THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1417/2018

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL,

DEPARTMENT OF EDUCATION,

EASTERN CAPE **APPELLANT**

and

KOMANI SCHOOL & OFFICE

SUPPLIERS CC, t/a KOMANI STATIONERS **RESPONDENT**

Neutral citation: *Member of the Executive Council, Department of Education, Eastern Cape v Komani School & Office Supplies CC, t/a Komani Stationers* (Case no 1417/2018) [2022] ZASCA 13 (26 January 2022)

Coram: PETSE AP and MOCUMIE, MBATHA and GORVEN JJA and WEINER AJA

Heard: 08 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h 45 on 26 January 2021.

Summary: Public school and school governing body – South African Schools Act 84 of 1996 as amended (the Schools Act) – interpretation of s 60(1) – liability of State for delictual or contractual damage or loss arising from act or omission in connection with school activity for which such a public school would have been liable but for the Schools Act.

ORDER

On appeal from: Eastern Cape Division of the High Court of South Africa, Grahamstown (Malusi J, sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the high court is set aside and in its place is substituted the following:

'The application is dismissed with costs, including the costs of two counsel where so employed.'

JUDGMENT

Petse AP (Gorven JA and Weiner AJA concurring):

[1] During January 2017 the respondent, Komani School & Office Suppliers CC trading as Komani Stationers (Komani Stationers), instituted motion proceedings in the Eastern Cape Division of the High Court, Grahamstown (the high court) against the appellant, the Member of the Executive Council for the Department of Education, Eastern Cape (the MEC), seeking payment of R151 954.81, representing the purchase price of goods sold and delivered to Mpendulo Public Primary School, (Mpendulo School) which is a public school under the political stewardship of the MEC. In addition, Komani Stationers also sought payment of the sum of R959.59 in respect of legal costs it had incurred

in the Queenstown Magistrates' Court (the magistrates' court) in its abortive attempt to recover the principal debt from Mpendulo School together with *mora* interest at the prescribed legal rate.

[2] The facts are uncomplicated and are briefly as follows. During January 2013, Komani Stationers supplied school stationery to the Mpendulo School at the instance of the School Governing Body (SGB) and the school's Principal. The purchase price of the goods was R151 954-81. The SGB and the Principal failed to pay the purchase price. As a result, Komani Stationers instituted an action against the SGB and the Principal in the magistrates' court. The action was not defended. Komani Stationers proceeded to obtain default judgment against the SGB and Mpendulo School as represented by its Principal in the amount claimed in its summons together with interest and costs of suit in the sum of R959-69. Subsequently, Komani Stationers issued a warrant of execution, and pursuant thereto various goods[1] were placed under judicial attachment in order to satisfy the judgment debt, interest and costs of suit.

[3] The attachment of the property prompted the District Director, Mr N H Godlo, to institute interpleader summons in the magistrates' court on behalf of the MEC. The interpleader summons sought an order releasing the goods concerned from attachment. The foundation for the interpleader summons was that such goods were owned by the Eastern Cape Department of Education (the Department) or alternatively John Noah High School, neither of whom were indebted to Komani Stationers nor were they the defendants in the magistrates' court proceedings. In any event, the MEC contended that assets of a public

[1] The goods attached belonged to the Department and John Noah High School both of which were not parties to the proceedings.

school are immune from judicial attachment in order to satisfy a judgment by virtue of the prohibition provided for in s 58A(4) of the South African Schools Act 84 of 1996 as amended (the Schools Act). The interpleader proceedings were not opposed.

[4] Once the goods were released from attachment, Komani Stationers turned its focus to the MEC. By letter dated 4 November 2016 and addressed to the MEC on behalf of Komani Stationers, the latter gave notice to the MEC in terms of s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.[2] In this letter, Komani Stationers advised the MEC that it would institute legal proceedings against the MEC seeking recovery of the amounts owed to it by Mpendulo School. In order to assist the MEC to assess the merits of the claim, the letter included a draft notice of motion accompanied by an

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[2] Section 3 which is headed 'Notice of intended legal proceedings to be given to organ of state' provides:
'(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless–
(*a*) the creditor has given the organ of state in question notice in writing of his or
(*b*) the organ of state in question has consented in writing to the institution of that her or its intention to institute the legal proceedings in question; or legal proceedings–
(*i*) without such notice; or
(*ii*) upon receipt of a notice which does not comply with all the requirements set out in subsection (2).
(2) A notice must–
(*a*) within six months from the date on which the debt became due, be served on
(*b*) briefly set out the organ of state in accordance with section 4(1); and
(*i*) the facts giving rise to the debt; and
(*ii*) such particulars of such debt as are within the knowledge of the creditor.
(3) For purposes of subsection (2)(*u*)–
(*a*) a debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and
(*b*) a debt referred to in section 2(2)(*a*), must be regarded as having become due on the fixed date.
(4) (*a*) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(*a*), the creditor may apply to a court having jurisdiction for condonation of such failure.
(*b*) The court may grant an application referred to in paragraph (*a*) if it is satisfied that–
(*i*) the debt has not been extinguished by prescription;
(*ii*) good cause exists for the failure by the creditor; and
(*iii*) the organ of state was not unreasonably prejudiced by the failure.
(*c*) If an application is granted in terms of paragraph (*b*), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate.'

unsigned 'founding affidavit' explaining the history of the matter. The letter did not elicit a response from the MEC.

[5] Undeterred by the MEC's indifference, Komani Stationers, as already indicated, instituted legal proceedings against the MEC. The MEC opposed the application.

[6] The opposing affidavit filed on behalf of the MEC was deposed to by Mr E W Scheun, the Director of Legal Services employed by the Department. After making reference to s 60 of the Schools Act, Mr Scheun stated the following:

'The provisions and liability of the [MEC] in terms of the provisions of section 60 (1) of the Act only applies to liability in relation to delictual claims and does not include any contractual claims against the [SGB] and [Mpendulo Public Primary School]. The Applicant's claim against the [SGB] and [Mpendulo Public Primary School] is a contractual claim and accordingly the [MEC] is not liable in terms of sections 60 (1) and 60 (3) of the Act. [Komani Stationers'] claim and the relief sought against the [MEC] is defective and should accordingly be dismissed, with costs, on this ground alone.'

[7] He then continued:

'[Komani Stationers] bases its claim against the [MEC] on the judgment which was granted on 10 September 2015, which judgment was granted against the [SGB] and [Mpendulo Public Primary School]. If [Komani Stationers] does have a claim against the [MEC], which is denied, such claim must be instituted against the [MEC]in terms of section 60 (3) of the Act.'

[8] Thereafter Mr Scheun went on to assert that it was not correct that the MEC became 'liable in terms of s 60(1) of the [Schools Act]' as a consequence

of a school's[3] inability to satisfy a judgment against it. He then concluded by contending that even if it were accepted that Komani Stationers had a claim against the MEC by virtue of s 60 of the Schools Act, such a claim had prescribed.

[9] To counter Mr Scheun's assertion that the claim had prescribed, the deponent to Komani Stationers' replying affidavit averred that:

'7.2. The claim, which essentially is a claim against a public school, is a claim for specific performance.

7.3. The claim against the [MEC] pursuant to the provisions of Section 60(1)(a) of the Act is only triggered once it is apparent that the school is not in a position to comply with its contractual obligations and in the present instance only once Judgment has been obtained against the school (through the medium of the governing body).

7.4. Accordingly, [Komani Stationers'] claim pursuant to Section 60(l)(a) only arose subsequent to the granting of the Judgment and when it became apparent that only subsequent to the granting of the Judgment.

7.5. It is only after Judgment has been obtained and it appears that the school is unable to pay the amount outstanding as specific performance, that [Komani Stationers] has suffered damages for which it can hold the State, through the Member of the Executive Council for the Department of Education Eastern Cape, liable in terms of Section 60(l)(a).'

[10] Accordingly, it was asserted that 'prescription did not arise until [Komani Stationers] had knowledge of the identity of the debtor and the facts from which the debt arose.' And that Komani Stationers became aware of these facts only when the MEC filed the interpleader summons seeking the release of the goods

[3] This was in reference to Mpendulo Public Primary School.

placed under attachment in satisfaction of the judgment obtained in the magistrates' court.

[11] On 14 December 2017 the matter came before Malusi J who, in his judgment, found in favour of Komani Stationers. In the result, the learned Judge ordered the MEC to pay the amounts claimed representing the judgment debt, costs of suit in the magistrates' court, *mora* interest calculated from 11 September 2015 to the date of payment and costs attendant upon the high court proceedings. The present appeal is directed against that order and is with the leave of the high court.

[12] This appeal concerns the question whether, on its proper construction, s 60(1) of the Schools Act, as it now reads after its amendment by s 14 of the Basic Education Laws Amendment Act 15 of 2011 (the Amendment Act), encompasses claims for specific performance in respect of payment of money owed to a creditor by a public school because of the prohibition contained in s 58A(4)[4] of the Schools Act. Section 58 A(4) precludes the attachment, in satisfaction of a judgment debt, of the assets of a public school. The high court answered that question in the affirmative. Whether the high court was correct in reaching that conclusion or not is the cardinal issue that confronts us in this appeal.

[13] If the conclusion reached by the high court prevails, then a subsidiary issue will arise, namely whether or not the claim asserted by Komani Stationers against the MEC has prescribed.

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[4] Section 58A(4) reads:
'The assets of a public school may not be attached as a result of any legal action taken against the school.'

[14] In arriving at its decision the high court, in essence, held that Mpendulo School was empowered in terms of ss 20 and 21[5] of the Schools Act to perform certain functions[6] such as entering into agreements of the kind that ultimately gave rise to the claim instituted against the school by Komani Stationers in the magistrates' court.[7] Furthermore, the high court held that the loss that Komani Stationers had suffered, and thus sought to recoup from the MEC, arose as a direct consequence of the school's failure 'to render specific performance' coupled with the fact that Komani Stationers was, in terms of s 58A(4) of the Schools Act, precluded from levying execution against the assets of the school in order to satisfy the judgment it had obtained by default against the school.[8]

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[5] Section 21 which is titled 'Allocated functions of governing bodies' reads:
'(1) Subject to this Act, a governing body may apply to the Head of Department in writing to be allocated any of the following functions:

(a) To maintain and improve the school's property, and buildings and grounds occupied by the school, including school hostels, if applicable;

(b) to determine the extra-mural curriculum of the school and the choice of subject options in terms of provincial curriculum policy;

(c) to purchase textbooks, educational materials or equipment for the school;

(d) to pay for services to the school;

(dA) to provide an adult basic education and training class or centre subject to any applicable law; or

(e) other functions consistent with this Act and any applicable provincial law.

(2) The Head of Department may refuse an application contemplated in subsection (1) only if the governing body concerned does not have the capacity to perform such function effectively.
(3) The Head of Department may approve such application unconditionally or subject to conditions.
(4) The decision of the Head of Department on such application must be conveyed in writing to the governing body concerned, giving reasons.
(5) Any person aggrieved by a decision of the Head of Department in terms of this section may appeal to the Member of the Executive Council.
(6) The Member of the Executive Council may, by notice in the Provincial Gazette, determine that some governing bodies may exercise one or more functions without making an application contemplated in subsection (1), if–

(a) he or she is satisfied that the governing bodies concerned have the capacity to perform such function effectively; and

(b) there is a reasonable and equitable basis for doing so.'

[6] Section 15 essentially provides that a public school is a juristic person endowed with legal capacity to perform its function in terms of the Schools Act.
[7] Para 17 of the high court judgment.
[8] Para 18 of the high court judgment.

[15] Insofar as prescription was concerned, the high court found that the claim had not prescribed because 'prescription [could] only begin to run on 8 June 2016 which is the date on which the district director deposed to an affidavit initiating the interpleader summons.'[9] Thus, the upshot of this statement is that prescription could not have commenced to run vis-à-vis the MEC before 8 June 2016 presumably because the MEC's identity as a debtor was unknown to Komani Stationers until the MEC entered the fray on 8 June 2016 in order to avert the attachment of the assets of the school.[10]

[16] It is timely at this stage to make reference to s 58A(4) of the Schools Act. The section provides:

'The assets of a public school may not be attached as a result of any legal action taken against the school.'

In this case, s 58A(4) does not present any controversy. Komani Stationers accepts without question that the school's assets were immune from attachment, hence it readily conceded the MEC's interpleader claim and, instead, invoked s 60(1) of the Schools Act to seek recompense against the MEC.

[17] Section 60 of the Schools Act which is headed 'Liability of State' reads:

'(1)(a) Subject to paragraph (b), the State is liable for any delictual or contractual damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school and for which such public school would have been liable but for the provisions of this section.

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[9] Para 24 of the high court judgment.

[10] Section 12(3) of the Prescription Act 68 of 1969 which is headed 'When prescription begins to run' provides: 'A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

(b) Where a public school has taken out insurance and the school activity is an eventuality covered by the insurance policy, the liability of the State is limited to the extent that the damage or loss has not been compensated in terms of the policy.

(2) The provisions of the State Liability Act, 1957 (Act 20 of 1957), apply to any claim under subsection (1).

(3) Any claim for damage or loss contemplated in subsection (1) must be instituted against the Member of the Executive Council concerned.

(4) Despite the provisions of subsection (1), the State is not liable for any damage or loss caused as a result of any act or omission in connection with any enterprise or business operated under the authority of a public school for purposes of supplementing the resources of the school as contemplated in section 36, including the offering of practical educational activities relating to that enterprise or business.

(5) Any legal proceedings against a public school for any damage or loss contemplated in subsection (4), or in respect of any act or omission relating to its contractual responsibility as employer as contemplated in section 20 (10), may only be instituted after written notice of the intention to institute proceedings against the school has been given to the Head of Department for his or her information.'

[18] In the present case it is not in dispute that the purchase of school stationery by a public school endowed with the powers under s 21[11] of the Schools Act is a 'school activity' as envisaged in s 60(1).[12] Insofar as s 60(4) is concerned, the State is absolved from liability for any damage or loss arising 'in connection with any enterprise or business operated under the authority of a public school for purposes of supplementing the resources of the school as contemplated in section 36, including the offering of practical educational activities relating to that enterprise or business.'[13]

[11] It is common cause that Mpendulo Public Primary School is such a school.

[12] See s 1(1) of the South African Schools Act 84 of 1996 which defines 'school activity' to mean any official, educational, cultural, recreational or social activity of the school within or outside the school premises.

[13] Section 36 which is headed 'Responsibility of governing body' reads:

[19] It is apposite at this juncture to make one pertinent observation, which is this: when Komani Stationers commenced litigation in the high court against the MEC in 2017, the default judgment it had earlier obtained against the school (as represented by its School Governing Body and Principal) was still extant. And we were informed, during the hearing, that this remained the position as at the date of the hearing of the appeal.

Interpretation of s 60(1) of the Schools Act

[20] The principles to be applied to the interpretation of statutory provisions are by now well settled. The prevailing position is to the effect that:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one

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'(1) A governing body of a public school must take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school.
(2) Despite subsection (1), a governing body may not enter into any loan or overdraft agreement so as to supplement the school fund, without the written approval of the Member of the Executive Council.
(3) If a person lends money or grants an overdraft to a public school without the written approval of the Member of the Executive Council, the State and the public school will not be bound by the contract of lending money or an overdraft agreement.
(4) (*a*) A governing body may, with the approval of the Member of the Executive Council-
(i) lease, burden, convert or alter immovable property of the school to provide for school activities or to supplement the school fund of that school; and
(ii) allow any person to conduct any business on school property to supplement the school fund.
(*b*) A governing body may not allow any activity on school property that is hazardous or disruptive to learners or prohibited by this Act.
(5) For the purposes of subsection (4), "school property" means immovable property owned by the State, including property contemplated in sections 13 and 55 and any immovable property bought by a school from the school funds or donations to the school.'

that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Footnotes omitted.)

So said Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[14]. This approach has not been departed from since. On the contrary, it has been reaffirmed on several occasions both by the Constitutional Court[15] and this Court.[16]

[21] In *Cool Ideas*[17] the Constitutional Court reiterated what it termed 'three important interrelated riders' to statutory interpretation. These are:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).' (Footnotes omitted.)

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[14] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA) para 18.

[15] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28 (*Cool Ideas*); *AfriForum and Another v University of the Free State* 2018 (2) SA 185 (CC) para 43; *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20 paras 47-48.

[16] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA); *G4s Cash Solutions v Zandspruit Cash And Carry (Pty) Ltd and Another* 2017 (2) SA 24 (SCA) para 12.

[17] Footnote 15 para 28.

[22] It is as well to keep at the forefront of one's mind the salutary remarks by Schreiner JA that:

'[T]he legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene.'[18]

[23] Nevertheless, as the Constitutional Court cautioned in *Kubyana v Standard Bank of South Africa Ltd* (*Kubyana*):[19]

'[L]egislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament.'

[24] Counsel on both sides were in agreement that the claim asserted by Komani Stationers is essentially one for specific performance. Counsel also accepted that on its terms s 60(1) does not absolve public schools from liability in respect of their contractual obligations. It is, therefore, hardly surprising that when Mpendulo School failed to pay for the stationary it had purchased from Komani Stationers the latter instituted legal action in the magistrates' court against the school itself.

[25] In *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*[20] this Court had occasion to consider the proper interpretation of s 60 as it then read. This was before its amendment by the Amendment Act. Section 60, at that stage, read thus:

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[18] *Jaga v Dönges, NO and Another; Bhana v Dönges, NO and Another* 1950 (4) SA 653 (A) at 662G-H and 664H quoted with approval by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 para 89.
[19] *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC) para 18 (Kubyana).
[20] *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* [2008] ZASCA 70; 2008 (5) SA 1 (SCA) (*Bastian*).

'(1) The State is liable for any damage or loss caused as a result of any act or omission in connection with any educational activity conducted by a public school and for which such public school would have been liable but for the provisions of this section.

(2) The provisions of the State Liability Act, 1957 (Act No. 20 of 1957), apply to any claim under subsection (1).

(3) Any claim for damage or loss contemplated in subsection (1) must be instituted against the Member of the Executive Council concerned.

(4) Despite the provisions of subsection (1), the State is not liable for any damage or loss caused as a result of any act or omission in connection with any enterprise or business operated under the authority of a public school for purposes of supplementing the resources of the school as contemplated in section 36, including the offering of practical educational activities relating to that enterprise or business.

(5) Any legal proceedings against a public school for any damage or loss contemplated in subsection (4), or in respect of any act or omission relating to its contractual responsibility as employer as contemplated in section 20(10), may only be instituted after written notice of the intention to institute proceedings against the school has been given to the Head of Department for his or her information.'

[26] Although s 60 was, at that stage, couched in slightly different language, it was, save for minor yet fundamental changes, in substance functionally equivalent to the current s 60. In *Bastian* this Court observed that although s 60(1) was couched in broad and general terms it could not 'be interpreted to render the State liable for *specific performance* of contractual obligations

lawfully undertaken by a public school through the medium of its governing body.'[21]

[27] The Court went on to hold that:

'The public school itself, and not the State, is therefore liable for the fulfilment of a public school's contractual obligations – the other party to the contract cannot, as it were, rely on some sort of 'warranty' by the State that the school will perform its obligations under contracts which have been lawfully concluded. This being so, it is difficult to understand why the Legislature would have intended s 60(1) of the Act to have the effect of imposing upon the State a 'warranty', vis à vis the other party to a contract with a public school, to pay contractual damages to such other contracting party should the school breach its contractual obligations.'[22]

[28] Hot on the heels of this Court's decision in *Bastian*, the Legislature amended s 60 to explicitly provide in s 60(1)(*a*) thereof that, subject to paragraph (*b*)[23], 'the State is liable for *delictual* or *contractual* damage or loss caused as a result of any act or omission in connection with any school activity, conducted by a public school. . .' The italicised words represent the changes in the text of s 60(1) introduced by the amendment brought about by s 14 of the Amendment Act.[24]

[29] As already mentioned above, the central issue in this appeal is whether the high court was correct in sustaining the claim for specific performance asserted by Komani Stationers against the MEC. Unsurprisingly, counsel for

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[21] *Bastian* para 21.
[22] *Bastian* para 22.
[23] Paragraph (b) reads:
'Where a public school has taken out insurance and the school activity is an eventuality covered by the insurance policy, the liability of the State is limited to the extent that the damage or loss has not been compensated in terms of the policy.'
[24] See para 12 above.

Komani Stationers valiantly supported the judgment of the high court. On the contrary, counsel for the MEC trenchantly criticised the underlying reasoning of the high court. In broad terms, counsel contended that the high court erred in two fundamental respects. First, it paid no regard to the purpose of the Amendment Act contained in the long title which states that the purpose of the amendment was 'to further regulate the liability of the State for certain damages.'

[30] Counsel submitted that the words 'liability of the State for certain damages' clearly evince an intention to limit the liability of the State to either delictual or contractual damages or loss only. And that a claim for specific performance seeks not the payment of damage or loss but rather performance of a specific act or payment of money pursuant to a contractual obligation.[25] The distinction between a claim for damages for breach of contract and a claim for payment under the contract, that is specific performance, was explained by Innes CJ in *Gibson Ltd v Woodhead Plant Ltd*[26] thus:

'The claim in this action is for £900 less royalties received on actually imported; there is no claim for loss otherwise sustained owing to non-importation, nor is there any averment of such loss. The sum demanded therefore, is what the respondents undertook to pay.'[27]

In *Gibson Ltd* the plaintiff had described its claim in its declaration as one for damages. However, this Court observed that in view of the fact that in truth the relief sought in the action represented a payment which the respondent had contracted to make it could not properly be described as a claim for damages.

[31] Secondly, counsel submitted that in failing to pay due regard to one of the fundamental tenets of statutory interpretation, namely to have regard to every

[25] See, for example, *Olivier v Stoop* 1978(1) SA 196 (T) at 202 A-C.
[26] *Gibson Ltd v Woodhead Plant Ltd* 1918 AD 308.
[27] Ibid at 314.

word in a statutory provision, the high court ignored the most crucial words, that is, 'delictual and contractual damage or loss' contained in the amended s 60(1) which are indicative of the fact that s 60(1) ascribes liability to the State only for delictual or contractual damage or loss to the exclusion of claims for specific performance.

[32] In counter, counsel for Komani Stationers submitted that the decision in *Corporate Finance Solutions (Pty) Ltd v Laerskool Hartswater*[28] was wrong in concluding that a claim for specific performance was not available against the State under s 60(1) of the Schools Act. It was argued that in coming to this conclusion, the high court there failed to have regard to the effect of s 58A(4) of the Schools Act which proscribed the attachment of the assets of a public school.

[33] It was further contended that the word 'loss' in s 60(1) ought to be given an extended meaning to encompass a loss occasioned by a school's inability to fulfil its contractual obligations, including a claim for specific performance. In addition, it was submitted in counsel's heads of argument that 'where it is apparent, . . ., that enforcement of performance against a debtor is impossible, [by reason of the prohibition in s 58A(4) in this case] the claim against the MEC is not dissimilar to a claim for damages as surrogate for performance.' For this proposition, counsel called into aid this Court's decision in *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd*.[29]

[28] Unreported judgment of the Gauteng Division of the High Court, Pretoria under case no 508/2012.
[29] *Mostert NO v Old Mutual Life Assurance CO (SA) Ltd* 2001 (4) SA 159 (SCA) (*Mostert NO*).

[34] It is therefore necessary to consider what s 60(1) means by providing that 'the State is liable for any delictual or contractual damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school and for which a public school would have been liable but for the provisions of this section.' This exercise will be undertaken in the light of the interpretive tenets outlined above, having due regard to the objects of the Schools Act and the manifest purpose of the Amendment Act to which reference has been made in paragraph 12 above. And, I do so cognisant of the constitutional injunction in s 39(2) of the Constitution, which decrees that when interpreting legislation every court must promote the spirit, purport and objects of the Bill of Rights.

[35] It bears mentioning, by way of prelude, that a delict generally entails a breach of a duty imposed by the law independently of the will of the party bound. On the other hand, contractual damage or loss flows from a breach of contract and thus consists of a breach of a duty voluntarily assumed. However, as E M Grosskopf AJA (writing for the majority) recognised in *Lillicrap, Wassenaar and Partners v Pilkington Brothers*[30] *(SA) (Pty) Ltd*, there may well be an overlap between a claim for delictual and contractual damage where the conduct complained of constitutes both a breach of contract and also satisfies the requirements of a delictual claim.[31]

[36] In contrast, specific performance entails the right of a plaintiff to insist, subject only to the court's discretion, that the other party to the contract performs

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[30] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 495I-496A-H.

[31] See also *Van Wyk v Lewis* 1924 AD 438 at 443; And compare *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 597 as to the differences between the remedy for breach of contract and for delict.

his or her undertaking in terms of the contract whenever he or she is in a position to do so.[32]

[37] The last ditch contention on behalf of Komani Stationers was that if it is not allowed to claim specific performance from the MEC this would mean that it has no other remedy because it cannot execute against the school as a result of the prohibition in s 58A(4). This contention cannot be sustained. Had the legislation meant that a creditor who cannot execute against a public school could enforce its rights, deriving from a contract with a public school, against the relevant MEC, it would have said so. However, this is not what s 60(1) says. All it says is that 'the State is liable for any delictual or contractual damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school and for which such a public school would have been liable but for the provisions of this section.'

[38] During argument the question was raised as to whether it were not, for example, open to Komani Stationers, once the school failed to pay the purchase price, to cancel the contract with Mpendulo School on account of the latter's breach of the contract and then sue the MEC for contractual damage in terms of s 60(1) and (3) of the Schools Act. However, it is not necessary to express a firm view on this proposition because the situation put to counsel did not arise in this case. Nevertheless, I venture to say that had that situation eventuated the position would have been as follows. It would, in that event, have been open to Komani Stationers to invoke s 60(1) of the Schools Act, and institute a claim

[32] See in this regard: *Farmers' Co-op Society (Reg) v Berry* 1912 AD 343 at 350.

'from the onset' for the 'damage or loss' suffered against the MEC as contemplated in s 60(3).

[39] However, what in fact happened here is that Komani Stationers elected to sue Mpendulo School (and the SBG) for specific performance. When it was confronted with s 58A(4) – which had been in operation since 26 January 2006[33] – it still, and specifically, chose to claim specific performance against the MEC. But, this is not what s 60 contemplates. Its wording, in light of its context and purpose, caters only for a claim for delictual or contractual damage or loss which is required to be instituted from the outset against the MEC concerned.[34]

[40] As already pointed out, in view of the conclusion as to the legal position reached in this judgment the proposition put to counsel is, happily, not an issue we are called upon to decide in this case. Thus, that question will have to wait for another day where it is pertinently raised and addressed. For as Howie JA pointedly observed:

'Finally it is desirable that any judgment of this Court be the product of thorough consideration of, *inter alia*, forensically tested argument from both sides on questions that *are necessary for the decision*.'[35] (Emphasis added.)

[41] To bring a claim within the purview of s 60(1) in order to hold the State liable the claimant would need to establish the following: (a) delictual or contractual damage or loss; (b) caused as a result of any act or omission; (c) in connection with a school activity; (d) conducted by a public school; (e) for

[33] See s 6 of the Education Laws Amendment Act 24 of 2005.
[34] See *Moodley v Kenmont School and Others* 2020 (1) SA 410 (CC) para 45 (*Moodley*).
[35] *Western Cape Education Department and Another v George* [1998] 2 All SA 623 (A); 1998 (3) SA 77 (SCA) at 84E.

which such public school would have been liable but for the provisions of this section.

[42] This then raises the question as to whether or not, in the context of the facts of this case, Komani Stationers satisfied these requirements. I do not think so. That Komani Stationers did not assert a delictual claim admits of no doubt. So too, on its own admission, it did not assert a claim for contractual damage or loss. Instead, it chose to pursue Mpendulo School for specific performance. As pointed out above, it was only after it had been confronted with s 58A(4) that it instituted another claim, still for specific performance, against the MEC.

[43] However, its approach is not what s 60(1) countenances. The provision is specifically designed to come to the rescue of someone who asserts a delictual or contractual claim for damage or loss. There is no good reason to extend the operation of s 60(1) beyond its natural ambit. To do so would be crossing the divide between statutory interpretation and legislating. The clear and unequivocal language employed in s 60(1) cannot be ignored for as Kentridge AJ aptly put it in *S v Zuma and Others*:[36]

'[I]f the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.'

[44] Although these remarks were made in a different context, the Constitutional Court subsequently stated in *Kubyana* that 'they apply even more forcefully in relation to statutory interpretation generally.'[37] Accordingly, the reliance by Komani Stationers on *Mostert NO* is misplaced as that case turned

[36] S v Zuma and Others [1995] ZACC 1; 1995 (2) SA 62 (CC) para 18.
[37] *Kubyana* para 18.

on its facts which are materially distinguishable from the facts of the present matter.

[45] It remains to mention that the constitutional issue that was foreshadowed in this Court's directive[38] of 21 February 2020, namely whether or not s 58A(4) of the Schools Act is constitutionally valid by virtue of its potentiality to infringe ss 9 and 34 of the Constitution, does no longer arise. This is so because in *Moodley*[39] the Constitutional Court, whilst recognising that s 58A(4) of the Schools Act limited the fundamental rights guaranteed in ss 9(1) and 10 of the Constitution, nevertheless held that the limitation was reasonable and justifiable under s 36(1) of the Constitution. The Court noted that (paras 25-26):

'. . . this matter concerns two crucial constitutional rights: the right that decrees that "[a] child's best interests are of paramount importance in every matter concerning the child"; and the right to basic education. Of particular significance in the present context is the right to basic education. The purpose of the limitation brought about by section 58A(4) is to avert any adverse effects that could be caused by the attachment of school assets.

There is no denying that a significant number of South African public schools operate under conditions of extreme deprivation. Largely, these are schools that service communities

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[38] The directive read, in material parts, as follows:

'1. This appeal has been removed from the roll in view of the likelihood of the following Constitutional issue arising if it succeeds on the basis that the respondents claim is not a claim for damage or loss in terms of s 60(1) (a) of the South African Schools Act 84 of 1986:
"Are the Respondent's constitutional rights to equality (s 9 of the Constitution) and access to courts (s 34 of the Constitution) infringed by its inability by virtue of s 58A(4) of the Schools Act to execute on a judgment for the price of goods sold and delivered to a public school and the absence of any remedy against the MEC: Education for the Eastern Cape or any other party to recover the amount due in terms of that judgment."

2. The appellant is directed to serve a copy of the appeal record, together with the heads of argument and this directive, on the Minister for Basic Education and the Minister of Justice.

3. The Ministers are required to five notice within 10 days of such service to the Registrar of this court and the parties' attorneys indicating if they intend to intervene in this appeal.

4. If either Minister intervenes in the appeal their heads of argument shall be delivered within 30 days of the date of the notice to intervene.

. . .'

[39] Above fn 34.

disadvantaged by South Africa's colonial and apartheid past. If what meagre resources they have were to be liable to be attached to satisfy judgment debts, untold misery would be visited upon the already disadvantaged school children. Imagine a school bereft of all materials necessary for education such as desks, chairs or benches, laboratory apparatus, books, computers, school buses and other vehicles, and the like. Imagine the spectre of school children who – because of the lack of desks and chairs or benches – have to sit on the floor and write on their laps. Imagine a school that has lost its meagre financial resources to an attachment and cannot buy the barest of necessities.' (Footnotes omitted.)

[46] The Court then went on to say (paras 30 and 31):

'. . . therefore, the proscription in section 58A(4) of the Schools Act of the attachment of the assets of public schools is meant to protect this very important right, the right to basic education. It averts the obvious harm that would surely eventuate if school assets could be attached.

Although in nature and extent the limitation is absolute, in the light of the right that it seeks to protect, that is the right to basic education, the limitation is understandable. Add to this the cognate right, the right that "[a] child's best interests are of paramount importance in every matter concerning the child". This is by no means making light of the importance of the rights to dignity and equality, both of which are – as I have said – of particular significance in the South African context. The reality is that the right that the limitation is seeking to advance cries out for protection. And that is a cry which we cannot but heed.' (Footnotes omitted.)

[47] In this case there can be no question of Komani Stationers having been denied access to courts in breach of its constitutional right in terms of s 34 of the Constitution. In truth, what happened here is that Komani Stationers misconceived the nature of its remedy under s 60 of the Schools Act. Thus, it was the author of its own misfortune.

[48] Advisedly, I refrain from saying anything about the fact that Komani Stationers itself had at no stage prior to this Court's directive questioned the constitutional validity of s 58A(4) of the Schools Act.

[49] For all the foregoing reasons therefore, the primary argument predicated upon s 60 of the Schools Act and advanced on behalf of the MEC must succeed. In sum, it is held that s 60 in its current incarnation is limited only to delictual or contractual damage or loss arising as a result of an act or omission in the circumstances stipulated in the section itself against a public school and does not avail a creditor who seeks to enforce a contractual claim for specific performance against the MEC concerned when a claim of that kind lies solely against a public school that is privy to the contract. And that in circumstances where s 60 avails a creditor, the creditor is required, in terms of s 60(3), to institute its claim at the outset against 'the Member of the Executive Council concerned' and not first against a public school and when no payment is forthcoming from the school, to then turn to the Member of the Executive Council concerned.[40]

[50] This is indeed what s 60(1) and (3) contemplates. As this Court rightly noted in *Bastian*, it is inconceivable that s 60(1) was intended to provide the other contracting party to a contract with a public school with some kind of 'warranty' against a public school that has failed to perform its contractual obligations. The change in the wording of s 60(1) brought about by the 2011 amendment does not affect this position. In the present case it is common cause

[40] *Moodley* para 45.

between the parties that Komani Stationers is in effect claiming specific performance from the MEC.[41]

[51] The conclusion to which I have arrived renders it unnecessary to consider the MEC's alternative contention with respect to prescription.

[52] Before making the order, it is necessary to mention that I have had the advantage of reading, with great care and interest, the dissenting judgment of Mocumie and Mbatha JJA. However, I do not propose to traverse their reasons in support of the conclusion to which they have come. Suffice it to state that most of the statements of fact which constitute the foundation on which the edifice of their reasoning rests are not borne out by the record.

[53] One of the enduring tenets of judicial adjudication is that courts are enjoined to decide only the issues placed before them by the litigants. And that it is not open to a court to change the factual issues presented by the parties or introduce new issues.

[54] This principle was aptly explained in *Fischer and Another v Ramahlele and Others*[42] in which the following was stated:

'Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic

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[41] *Bastian* paras 21-22.
[42] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) paras 13-14. See also *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) ; 2009 (1) SACR 361 (SCA) ; 2009 (4) BCLR 393 (SCA) ; [2009] 2 All SA 243 (SCA) paras 15-16.

human rights guaranteed by our Constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.' (Footnotes omitted.)

[55] Explaining the difference between a review and an appeal in *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council*[43] Innes CJ made the following pertinent remarks in relation to an appeal record:

'... there is this distinction between the two, [a review and an appeal] that an appellant comes into court upon a record of the case in the court below, and by that record, he is bound, he

[43] *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 1903 TS 111 at 115. See also in this regard *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 54 in which it was said: '[A]ppeals are decided on the record of the case and the findings made by the trial court.'

cannot take advantage of any circumstance which does not appear upon or cannot be deduced from the record.'

[56] In similar vein, the Constitutional Court, in dealing with the import of rule 19(1)*(c)*(i) of its rules, stated that:

'[R]ule 19 deals with the preparation of the appeal record, which according to the practice of our courts has always been understood to mean a record of the proceedings in the court against whose decision the appeal has been noted.'[44]

[57] In the circumstances, I have serious misgivings about the approach adopted in the dissenting judgment. It has, contrary to judicial precedent, adjudicated this case on the basis of facts not relied upon by the parties in their affidavits. In so doing, the dissenting judgment has, with respect, gone outside the four corners of the record, thereby overlooking the fundamental principle that, as an appellate court, this Court is as a general rule confined to the appeal record.

[58] The reason for this sound principle is not far to seek. Primarily, the task of the appellate court is to determine whether the court of first instance arrived at the correct decision on the issues, supported by facts, raised by the parties. And absent the admission of new evidence on appeal, the appellate court is bound by the record and may not stray beyond what is contained in the record.

[59] And, what is more, where the constitutionality of a statutory provision is not impugned, as in this case, courts are enjoined to interpret the implicated provisions 'in a manner best compatible with the Constitution'. This principle

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[44] *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (10) BCLR 1348 (CC) paras 17-19.

was affirmed by the Constitutional Court in *Grootboom v National Prosecuting Authority and Another*.[45]

[60] In the result the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and in its place is substituted the following:

> 'The application is dismissed with costs, including the costs of two counsel where so employed.'

X M PETSE
ACTING PRESIDENT
SUPREME COURT OF APPEAL

Mocumie JA and Mbatha JA (dissenting):

[61] We have had the benefit of reading the judgment by our colleague, Petse AP with whom other colleagues agree. He proposes to find in favour of the appellant, the MEC, in respect of all the issues on appeal. We respectfully hold a different view. Our approach is based on a reading of s 60(1) of the Schools

[45] *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC) para 37.

Act in line with the now settled principles of interpretation of statutes set out in para 20 of the majority judgment and in line with s 39(2) of the Constitution.

[62] There is a preliminary issue which needs to be addressed before we delve into the merits of the appeal. It is common cause that when the appeal was initially set down, the parties confined themselves strictly to the four corners of the record. The scope of the appeal, to include constitutional issues, was widened by the directive of this Court. This necessitated the postponement of the appeal and the filing of supplementary heads of argument by the parties. The essence of the directive was that it waived that the constitutional issues were not raised in the pleadings as it mero motu called upon the parties to address it on specific constitutional issues. In a letter addressed to the parties, this Court required the following in terms of a Directive issued which we quote:

'1. This appeal has been removed from the roll in view of the likelihood of the following constitutional issue arising if it succeeds on the basis that the respondent's claim is not a claim for damage or loss in terms of s 60(1)(a) of the South African Schools Act 84 of 1986:

"Are the Respondent's constitutional rights to equality (s 9 of the Constitution) and access to courts (s 34 of the Constitution) infringed by its inability by virtue of s 58A(4) of the Schools Act to execute on a judgment for the price of goods sold and delivered to a public school and the absence of any remedy against the MEC: Education for the Eastern Cape or any other party to recover the amount due in terms of that judgment."

2. The appellant is directed to serve a copy of the appeal record, together with the heads of argument and this directive, on the Minister for Basic Education and the Minister of Justice.

3. The Ministers are required to give notice within 10 days of such service to the Registrar of this court and the parties' attorneys indicating if they intend to intervene in this appeal.

4. If either Minister intervenes in the appeal their heads of argument shall be delivered within 30 days of the date of the notice to intervene.

5. The parties are given leave to deliver supplementary heads of argument dealing with the constitutional issue within 20 days of the delivery of the later of the Minister's heads of argument, or within 20 days of the elapse of the period of 10 days in paragraph 3 of this directive, whichever is the earlier.

6. The Registrar is directed to send a copy of this directive to the following non-governmental organisations: Equal Education; Legal Resources Centre, Grahamstown; the Federation of School Governing Bodies and the Governing Body Foundation.

7. Any such organisation wishing to intervene in this appeal shall apply to be admitted as an amicus curiae in terms of Rule 16A of the Uniform Rules of Court.

8. The appeal will be enrolled again once all parties and amici have complied with this directive.'

The parties thereafter conducted their case on this basis.

[63] There are two issues raised by this appeal: first, the interpretation of the provisions of s 60 of the Schools Act as amended by the Amendment Act; second, whether s 58A(4) read with s 60 of the Schools Act infringed the respondent's, Komani Stationers', right to equality under s 9 of the Constitution and its right of access to courts in terms of s 34 of the Constitution.

[64] The most contentious issue arising from the conclusion reached by the learned acting president is whether it can be said that s 60(1), as amended, only ascribes liability to the State for delictual and contractual damages and loss, with the exclusion of claims for specific performance. In the context of the

interpretation of the provisions of s 60(1), it is important to bear in mind that the claim by Komani Stationers against Mpendulo Primary School is one for specific performance. Komani Stationers' claim for contractual damages against the MEC is based on the same cause of action that served before the magistrate's court, save that the claim was again pursued against the MEC. When Komani Stationers could not execute against the school this required the interpretation of the provisions of s 60(1)(a), as amended, which provide as follows:

'Subject to paragraph (b) the State is liable for any delictual or contractual damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school and for which such public school would have been liable but for the provision of this section.'

[65] The Minister intervened in the proceedings on the basis that the matter raised constitutional issues and the absence of the remedy against the MEC for Komani Stationers to recover the amount due in terms of the judgment. The backdrop to this was the finding by the court a quo that s 60(1) was triggered by the failure of the school to render specific performance which therefore guaranteed the obligations of the State.

[66] The MEC contends that the liability of the State is only limited to delictual and contractual obligations or loss in line with the *Bastian*[46] judgment. It further contended that the court a quo misconstrued the approach to the principles set out in Bastian to the amended s 60.

[67] Furthermore, the MEC contended that there is a clear distinction between a liability in a contract for a purchase price as opposed to one for damages

[46] Footnote 20.

arising from a breach of contract. The MEC asserted that if such liability is ascribed to the State this would create a second liability accessory to the liability of a public school. The MEC furthermore suggested that Komani Stationers was not without a remedy. A remedy fashioned in *Moodley*,[47] namely a mandamus and contempt proceedings are available to it.

[68] As Petse AP notes in para 20 of the majority judgment, '[t]he principles to be applied to the interpretation of statutory provisions are by now well settled'. Additionally, s 39(2) of the Constitution[48] allows the courts to develop any private law remedies in line with the Bill of Rights.

[69] The process of interpreting the Constitution must recognise the situational context and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. The Constitution's history and purpose involves a transition from a society based on division, injustice and exclusion to a vested democratic society, respecting the dignity of all its citizens and including everyone in the process of governance. This spirit of transition and transformation characterises the constitutional enterprise as a whole.[49]

[70] This theme of democratic values, social justice and fundamental human rights in the Constitution finds resonance in the Schools Act. The preamble to the Schools Act sets out the objectives of that Act as follows:

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[47] Footnote 35.
[48] Section 39(2) provides that when interpreting any legislation, and when developing common law or customary law, every court, tribunal or forum must promote the spirit, purport and objective of the Bill of Rights.
[49] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (10) BCLR 1079 para 21.

'Whereas this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State; and

Whereas it is necessary to set uniform norms and standards for the education of learners at schools and the organisation, governance and funding of schools throughout the Republic of South Africa.'

[71] The Constitutional Court in Competition *Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and another*[50] para 9 stated as follows:

'The invocation of section 39(2) of the Constitution in interpreting legislation that implicates a right in the Bill of Rights, ought not to be viewed as an optional extra. It should rather be seen as a constitutional injunction. Whether any of the parties have specifically contended for the interpretation of legislation with express reference to or through the prism of section 39(2) should not really matter. It is, broadly speaking, a constitutional obligation that rests on the shoulders of any court interpreting legislation or developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights. That a court, whose judgment and order is appealed against, might not have heeded this constitutional call to duty should only point to its failure to do what it was obliged to do in the first place.' (Footnote omitted.)

[72] This means, as provided in s 34 of the Schools Act, that the State has a Constitutional obligation to 'fund public schools from public revenue on an

[50] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2021] ZACC 35.

equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress past inequalities in education provision'. This should be read with s 36 of the Schools Act which provides that the SGB must take all reasonable steps to supplement resources by the State in order to improve the quality of education provided by the school to all learners at the school.

[73] A narrow interpretation of s 60(1)(a) proposed by the MEC infringes Komani Stationers' right to equality under s 9 of the Constitution and its right to access to courts in terms of s 34 of the Constitution. We envisage an interpretation which is not only purposive, but also pragmatic and protects small business enterprises which have a legitimate right to participate in the economy of their country without any hindrances and or curtailment of their rights from organs of State. The failure to accord protection to such business enterprises will not only negatively affect them, but will also impact on the values enshrined in the preamble to the Schools Act, amongst which, the provision of 'an education of progressively high quality for all learners.'

[74] Moreover, the interpretation advanced by the MEC manifestly and unreasonably offends public policy. The school is a juristic entity with powers to contract with consequences which flow from such powers. The MEC is responsible for ensuring that such powers are properly exercised by the public school. The nature of Komani Stationers' claim is sui generis, because of the limitation imposed by s 58A(4). To curtail the rights of Komani Stationers by the narrow interpretation of s 60(1)(a) proposed in these circumstances would be an anomaly that cannot be countenanced in any democratic society.

[75] Any other interpretation of s 60(1) would set the unjust precedence of a party being denied the possibility of pursuing a remedy of specific performance against a school in circumstance beyond their control. Komani Stationers, in this case, made every effort to purge the indebtedness against the school. It cannot be said that it adopted a supine attitude and failed to pursue its remedies against the school. It is inconceivable, in the rural social context and setting in which the parties live, that Komani Stationers should have ascertained if the school had sufficient funding before supplying it with the necessary school materials, as the MEC contended.

[76] Mpendulo Primary School is a quintile three school, in an area where most parents are illiterate or working outside the province. The Minister in her intervening affidavit, sets out the norms and standards for public school funding. The public school in this matter, being a public school, is accorded 's 21 functions' namely, to maintain and improve the school's property and buildings and grounds occupied by the school; purchase textbooks, educational materials or equipment for the school; and to pay for services to the school. The SGB is responsible for managing aspects of expenditure. The decision to allocate these functions to the SGB by the Department of Education takes into account considerations relating to the capability to handle and account for public funds, to meet contractual obligations to suppliers of goods and services and the ability to make sound financial decisions.[51]

[77] The s 21 functions, which are bestowed on SGBs, require governors with, at least, a basic understanding of finance and budgeting. This is so because the

[51] See in this regard s 29 of the Schools Act.

SGB manages the intricate finances, procurement, and management of school assets, and requires that the SGB should be able to handle the financial administration of the school after receiving some form of financial management training. Although not pleaded, however, from the paucity of information on the part of the Minister and the MEC,[52] there is no indication that the SGB was capacitated in financial management to the level of concluding a contract of this magnitude. In her affidavit, the Minister has not disclosed the competency of the SGB in this sphere.

[78] Furthermore, the Minister has not stated whether the school and the SGB exceeded the allocated budget or whether there was an increase in the intake of pupils or if they received the allocated budget at all. She merely sets out the allocations to the school and the responsibilities of the SGB, without giving the actual facts relating to the school in question. It bears mention that no affidavit has been filed by the school principal nor by the Head of the Department (the HOD) as to what exactly led to the conclusion of the contract with Komani Stationers. Also, no reason for the school's non-fulfilment of its obligation to pay the purchase price under the contract is provided whatsoever.

[79] It is difficult to conclude otherwise than that the SGB in this matter like other SGBs, performed a public constitutional function on behalf of the State. Considering the paucity of information within the knowledge and purview of the Minister through the MEC, HOD and SGB, on the competence of the SGB to deal with its s 21 functions, the Minister cannot state without contradiction

[52] It must be noted that the Minister and the MEC are the custodians of all the information and are privy to whether the SGB was competent or not and ought to have disclosed this in their affidavit.

that the SGB was trained and competent to handle those functions. To say the opposite required the Minister to have stated that in her affidavit, which she did not do.

[80] In that regard it cannot be gainsaid that the SGB was carrying out the constitutional mandate of the Department of Education, even if it is accepted, as the Minister seems to suggest, that the SGB may have exceeded its quota. Contracting for textbooks and school materials was the only way that it could have supplemented the resources due by the State.

[81] In this case, the SGB had the necessary legal powers to conclude the agreement in terms of s 21 with Komani Stationers. In pursuing a claim against the MEC, it cannot be said that it was a resuscitation of an invalid agreement. Furthermore, there is no evidence to the contrary that suggests that the stationery was never supplied and delivered to the school.

[82] The provisions of s 22 of the Schools Act bear relevance here. The section provides for the withdrawal of the functions of the SGB by the HOD, where they cannot perform the s 21 functions. The claim in this case came to the attention of the HOD early enough for the Department to have been able to inform this Court, whether they have acted in terms of s 22 to protect the interests of other creditors of the school.

[83] We now turn to the issue of possible remedies available to Komani Stationers. The MEC submits that Komani Stationers is not without a remedy as a mandamus and contempt proceedings are available to Komani Stationers, as

was decided in *Moodley*.[53] This case is distinguishable from *Moodley* as in that case the SGB was in a position to raise funds for senior counsel in extensive and unnecessary litigation. It even refused to disclose the source of its funders, hence the court held that it was in a position to settle costs due to Mr Moodley. There is no evidence that suggests that in this case, the school had an SGB that would be able to settle Komani Stationers' debt. The Constitutional Court did not state that an appropriate remedy should always be in terms of a *mandamus* and contempt of court proceedings. Mr Gade's affidavit, filed on behalf of the MEC says it all, where he expressed himself as follows:

'[D]ue to the high level of poverty experienced in the Eastern Cape all learners who attend quintile one, two and three schools are subsidised at a quintile one level which is at a level at which no fees are charged. Such schools are fully subsidised by the Eastern Cape Department of Education.'

Therefore, the remedy fashioned in *Moodley* can never address the injustice to Komani Stationers. The MEC should not only prescribe what needs to be done by public schools, but should ensure that it is done.

[84] On that score, Komani Stationers is entitled to appropriate relief for a breach of the right to equality. A remedy embodying effectiveness, suitability and just relief as stated in *Fose v Minister of Safety and Security*[54] will be in line with the objectives of the Constitution. In *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd; President of the RSA and Others v Modderklip Boerdery (Pty) Ltd*[55] this Court emphasised that:

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[53] Footnote 35.
[54] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (7) BCLR 851 (CC).
[55] *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* [2004] ZASCA 47; [2004] 3 All SA 169 (SCA).

'[Courts] should "attempt to synchronise the real world with the ideal construct of a constitutional world" and they have a duty to mould an order that will provide effective relief to those affected by a constitutional breach.'[56]

A form of constitutional damages should suffice in this case, otherwise Komani Stationers will be left without a remedy. It would be unfair if Komani Stationers is forced to pursue other remedies including unjustified enrichment at its peril as it may be met with prescription and any other lawful defence which the MEC may raise. Komani Stationers' claim can never be satisfied by the impoverished community. Public policy dictates that the MEC settles the debt due to Komani Stationers.

[85] In conclusion, besides the public policy issue with which this judgment commenced, Komani Stationers advanced a very persuasive argument that s 60(1) should be read to include damages or loss flowing from the non-payment of a claim based on specific performance. We agree with the respondent that this will not lead to a floodgate of claims against the MEC, as not all claims of specific performance will give rise to claims against the MEC as each case will need to be treated on its own particular facts. In appropriate circumstances, a court faced with the same facts but pleaded and argued in the court of first instance, would have been bound to 'prefer interpretations . . . that fall[s] within the constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section'.[57]

[86] From what we have stated in the above paragraphs, it is clear that we are of the view that in interpreting the provisions of s 60(1)(a), the word 'loss' must

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[56] Ibid para 42.

[57] Footnote 4 at para 23. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) at para 21.

be ascribed a different interpretation to word 'damage'. The fact that the respondent did not sue the school for damages, does not necessarily mean that the school is not liable for 'loss' that the creditor has suffered due to non-payment of the purchase price. The majority judgment reasons that the respondent could have cancelled the contract and sued for damages. It is trite that if a debtor persists in failing to render specific performance after obtaining judgment, the creditor can cancel and claim damages.[58] That has not happened in this case because, cancelling and suing for damages would not yield a different monetary value or overcome the s 58A(4) prohibition on execution against the school property. In that regard, the creditor should not go through the formality of the cancellation before claiming damages or loss for which the school would in that event have been liable.

[87] At the end of it all, it is not as if the Minister, the MEC or the SGB including the beneficiaries of this business venture (the learners) have lost anything. To the contrary they have benefitted immensely at the expense of Komani Stationers. The advantages to them are obvious. It is therefore imperative for the Minister and the MEC in the province to go back to the drawing board to educate, train and empower the SGBs, the principals and the local businesses on this very unique situation to avoid similar actions.

[88] In sum, if an ordinary man in the Eastern Cape was asked 'is the Minister and the MEC's refusal to pay a small business enterprise for goods sold to advance "an education of progressively high quality for all learners [at

[58] See in this regard *Basson and Others v Hanna* [2016] ZASCA 198; [2017] 1 All SA 669 (SCA); *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343; *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *Woods v Walters* 1921 AD 303; *Shill v Milner* 1937 AD 101; *Haynes v King Williamstown Municipality* 1951 (2) SA 371 (A); *Rens v Coltman* [1995] ZASCA 118; 1996 (1) SA 452 (A).

Mpendulo Primary School and surrounding schools]"', at all justifiable in any society not to mention a democratic one? We are certain, the answer will be 'not at all'. This is so, because this small business enterprise, and others that are invited to do business with the school and other schools in the province (in particular to provide books), are to advance the values underpinning the Schools Act as read with the Constitution. However, if this is done without having ascertained whether the school has money or not would definitely result in these enterprises being bankrupted. This cannot be countenanced in any democratic society which upholds equality of all before the law. No one should be allowed to benefit at the expense of the other on the basis proposed by the MEC or any organ of State. After all, s 7(2) of the Bill of Rights makes this very clear, '[t]he State [through its organs] must respect, protect, promote and fulfil the rights in the Bill of Rights'.

[89] In the result, we would have dismissed the appeal with costs, including the costs of two counsel.

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B C MOCUMIE
JUDGE OF APPEAL

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Y T MBATHA
JUDGE OF APPEAL

APPEARANCES

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