THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 93/2018

In the matter between:

PARKTOWN HIGH SCHOOL FOR GIRLS **APPELLANT**

and

EMERAN HISHAAM **FIRST RESPONDENT**

OBO EMERAN NAQEEB **SECOND RESPONDENT**

Neutral citation: *Parktown High School for Girls v Hishaam & another* (93/2018) [2019] ZASCA 10 (14 March 2019)

Coram: Cachalia, Leach and Tshiqi JJA and Mokgohloa and Rogers AJJA
Heard: 25 February 2019
Delivered: 14 March 2019

Summary: Liability of the State under s 60 of the South African Schools Act 84 of 1996 (the Act) – whether an injured party is obliged to sue the State and the school – whether a fashion show, organised by the Representative Council of Learners as a fundraising event was a 'business or enterprise' as envisaged in s 60(4) of the Act.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Matojane J sitting as court of first instance):

The appeal is upheld with costs including the costs of two counsel. The order of the court a quo is set aside and replaced with the following order:
'(i) The defendant's special plea is upheld.
(ii) The plaintiffs' claim is dismissed with costs.'

JUDGMENT

Cachalia JA (Leach and Tshiqi JJA and Mokgohloa and Rogers AJJA concurring)

[1] This appeal arises from an incident at a public school where a young member of the public was injured on the school's premises while attending a fashion show. The boy's father seeks to hold the school liable for his son's injuries. He says that the school negligently breached its legal duty to ensure the safety of members of the public at the school. The school denies liability and filed a special plea alleging that the action should have been instituted against the provincial government and not the school. The parties agreed that the special plea would be heard separately. The Gauteng Division of the High Court, Johannesburg (Matojane J) accordingly ordered the separation under Uniform rule 33(4).

[2] The court a quo dismissed the special plea, but granted the school leave to appeal to this court. The appellant is the Parktown High School for Girls (the School) against whom the action was instituted. The respondents are Mr Hishaam Emeran

and his son Mr Naqeeb Emeran, who was injured in the incident. They were the plaintiffs in the court a quo and oppose the appeal.

[3] The facts are uncomplicated. There were two fashion shows held in a hall on the school premises on the day of the incident; one in the afternoon and the other in the evening. Both were organised by the Representative Council of Learners (the RCL) established at the School under s 11 of the South African Schools Act 84 of 1996 (the Act). The entrance fee was R40, for the afternoon show and R70, for the late show. Naqeeb paid to attend the evening show and entered the School property.

[4] There were concrete tables with circular tops, which were permanent features, for use of members by the public and learners on the School grounds. The respondents alleged that the circular tops of the tables were not fixed to their stands. Naqeeb leaned on one of these table tops resting loosely on its stand. This downward pressure caused it to flip over and fall to the ground, crushing his right hand. In a nutshell the respondents' case is that the School was negligent in not taking reasonable steps to avoid a foreseeable occurrence of this nature and that it is accordingly liable for damages suffered by the father in his personal capacity for medical expenses and by Naqeeb for his future loss of earnings and general damages.

[5] The Act governs the liability of public schools such as the appellant in these circumstances. In terms of s 60(2) of the Act, the State Liability Act 20 of 1957[1] applies to a claim under s 60(1), which the parties accept also applies to this claim. This means that the general principles of vicarious liability, which apply to the liability of the State for the delicts of its employees, also apply to public schools. In the words of s 60(1)*(a)*:
'Subject to paragraph *(b)*, the State is liable for any delictual . . . 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.'

[1] Section 1 of the State Liability Act reads:
'Any claim against the State which would, if that claim has arisen against any person, be the ground of an action in any competent court, shall be cognizable by such court, where the claim arises out of any . . . wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.'

It is common cause that the fashion show was a 'school activity' as contemplated by this provision.[2]

[6] Section 60(1)*(b)* also bears some relevance. It reads as follows:

'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.'

It is common ground too, that the school obtained public liability insurance to cover it for claims in respect of its 'operations and activities'. In this regard and in response to the respondents' summons, the School issued a third party notice in which it claimed an indemnity from the third party, its insurance broker, in the event of the court finding it liable for Naqeeb's injury. This was because the broker allegedly had failed timeously to notify a claim to the insurer, which resulted in the latter repudiating the claim. That issue is not before us, but I shall return to it later in this judgment.

[7] Once it is established that the claim falls within the ambit of s 60(1) of the Act, which I have said this claim does, s 60(3) says that the claim must be instituted against the Member of the Executive Council (MEC) concerned, as representing the State. It is the School's case, as formulated in the special plea, that the fashion show, being a 'school activity' within the meaning of this section, fell within the ambit of s 60(1) and that the respondents ought, therefore, to have sued the State, instead of the School.

[8] Section 60(4), however, exempts the State from liability where the negligent conduct occurs '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* . . .'. (Emphasis added.) Section 36(1) deals with activities conducted under the auspices of the 'school governing body' to supplement resources supplied by the State for the purpose of improving the quality of the education of its learners. The question is whether the State was exempt from liability in accordance with s 60(4).

[2] In terms of s 1(1) of the South African Schools Act 84 of 1996 'school activity' means any official educational, cultural, recreational or social activity of the school within or outside the school premises.

[9] In their particulars of claim the respondents alleged that their claim was instituted pursuant to the provisions of s 60(4) of the Act, which, they say, supports their contention that the School, and not the MEC, was the correct defendant. Their case is that the fashion show was an 'enterprise' operated under the School's authority for the purposes of supplementing its resources as contemplated in s 36 of the Act. And, therefore, that the State is excused from liability. The respondents thus contend that they have correctly sought to hold the School alone liable for the delict. Their submission found favour in the court a quo. This was the only issue separated under rule 33(4). The remaining issues relating to the merits and quantum were to stand over until the special plea was disposed of. The separated issue is therefore the only issue on appeal before this court.

[10] For a claim to fall within the ambit of s 60(4) and thereby exclude the State's liability, the following five requirements must be met: (i) the act or omission giving rise to the claim must be in connection with (ii) a business or enterprise (iii) operated under the authority of the school (iv) for the purpose of supplementing the resources of the school (v) under the auspices of the school governing body.

[11] The central issue in dispute is whether the fashion show was an 'enterprise or business', neither of which is defined in the Act. It is common cause that it was not a business. Both parties rely on a dictionary meaning of an 'enterprise', which is a noun meaning 'a project or undertaking, especially one that requires boldness and effort'[3] to support their preferred meaning. The word also refers to an initiative in business, a business unit, a company or firm.[4] The School submits that in usual parlance a school activity, as defined in the Act – whether it has a fundraising component or not – simply does not fall within this meaning. The respondents, on the other hand, focus on the boldness and effort that went into the organisation of the fashion show to support their contention.

[12] I accept that a fashion show organised by a student body may well be an 'enterprising' initiative in the sense of its boldness, innovation and effort. But the word

[3] South African Concise Oxford Dictionary 10 ed (2002) at 385.
[4] Collins Dictionary 9 ed 2007.

is used as an adjective in this sense and not a noun. When used as a noun to describe a project or an undertaking, as it is in s 60(4), an 'enterprise' usually refers to business initiative undertaken by a commercial entity. The RCL is quite clearly not a business or enterprise within any meaning of the section. And the fact that it organised a fashion show to raise funds does not make it an enterprise.

[13] The requirement for the business or enterprise to be operated under the authority of the school also undermines the respondents' interpretation. The authorisation must relate to the purpose of the enterprise or business, which is to supplement the resources of the school as contemplated in s 36 of the Act. As mentioned earlier, s 36 deals with the responsibility of the governing body of a public school to supplement its resources in order to improve the quality of education the school provides to its learners.[5] In this regard s 36(4)*(a)*(ii) of the Act permits a governing body, with the approval of the MEC, to conduct any business on school property to supplement the school fund. No mention is made of an enterprise in this context, but I do not think anything turns on this.

[14] What is clear, however, is that the activities with which s 36 of the Act are concerned relate only to supplementing the school's resources by a business under the authority of the governing body and not to all fundraising activities of the school. Activities organised by the learner body such as a cake sale, matric dance party, a sale of raffle tickets, or an amateur fashion show with which we are concerned, would neither need the authority of the governing body, nor fall within the range of fundraising activity which s 36 contemplates. There was no evidence in this case that the governing body had anything to do with the fashion show. Indeed the School's evidence was to the contrary. In addition the School's uncontested evidence was that the funds collected from the fashion show represented a liability in its books, which the School owed the RCL and which the RCL could use as it deemed appropriate, for example to support an HIV-Aids charity, if it so decided.

[15] In summary the fashion show was therefore not a business or enterprise within the meaning of s 60(4), neither was it organised for the purpose of supplementing the

[5] Section 36(1).

School's resources; And even if some or all of the proceeds were ultimately used to supplement the School's resources this was not done as contemplated in s 36.

[16] So, properly understood, it is apparent that 60(4) read with s 36 exempts the State from liability only where the activity in question giving rise to the delict was conducted by a 'business or enterprise' under the authority of the School's governing body. By enacting this provision the lawmaker was seeking to limit the liability of the State for civil wrongs perpetrated by independent contractors for example – businesses or enterprises – contracted by the governing body for the purpose of supplementing a school's resources. This too accords with the general rule of our law that a principal is not liable for the delicts of independent contractors unless the principal is also at fault. Of course, it may be that if the MEC grants authority for the school governing body to contract an entity for this purpose, this may not absolve the State from liability, but that is not a matter I need consider. There may also be other instances where a school itself embarks on some business or enterprise to supplement its resources within the meaning of s 60(4), but the fashion show organised by the RCL quite clearly did not.

[17] It follows that by accepting the interpretation of s 60(4) that the respondents sought to give to it, the court a quo erred in dismissing the special plea. Once it is accepted that the special plea ought to have been upheld the appeal must succeed. The next issue is whether the claim should be dismissed in its entirety. This would be the result if we conclude that the School is correct in its contention that it was incorrectly cited as a party in these proceedings.

[18] I have already pointed out that s 60(1) read with s 60(3) of the Act makes the State liable in respect of any claim arising from a school activity. The fashion show was a school activity. And, on the assumption that the School's negligent omission in failing to fix the table tops was connected with the fashion show, the respondents were obliged to institute these proceedings against the MEC. This much is clear from these provisions. It seems clear too that if a party is obliged to sue the MEC it must follow that only the State can be held liable in these circumstances.

[19] What then are we to make of s 60(1)*(b)*, which says where a school has obtained public liability insurance the liability of the State is limited to the extent that the damage or loss has not been compensated in terms of the policy? Does it suggest that the school is also liable? I think not. The provision goes no further than providing that the MEC is liable only to the extent that the injured party has not been compensated by the school's insurer. There is no suggestion that the school may also be held liable where the MEC is liable.

[20] In any event in the instant case the insurer repudiated the School's insurance claim as a result of which no compensation was paid to the injured party. The School has joined the broker as a third party with a view to claiming damages if it is held liable, but this contingent claim does not engage s 60(1)*(b)*. This means that on the facts of this case the MEC alone is liable for any damage or loss that the respondents may prove arising from the incident.

[21] There may be instances where a claim is cognisable against a public school and not the MEC. But that would only be where the claim does not fall within the ambit of s 60. The consequence of finding that the MEC alone should have been cited, I regret to say, is that the respondents have indeed instituted these proceedings against the wrong party. It follows that the respondents' claim against the School must be dismissed.

[22] The following order is made:

The appeal is upheld with costs including the costs of two counsel. The order of the court a quo is set aside and replaced with the following order:

'(i) The defendant's special plea is upheld.

(ii) The plaintiffs' claim is dismissed with costs.'

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A Cachalia

Judge of Appeal

Appearances

For the Appellant:	D T v R Du Plessis SC (with him J Dorning)
Instructed by:	M C Turnbull Attorneys, Kensington
	Honey & Partners Incorporated, Bloemfontein
For the Respondent:	M Chaitowitz SC (with him Z G Ncantsa)
Instructed by:	Joseph's Incorporated, Johannesburg
	McIntyre & Van der Post Attorneys, Bloemfontein