Strauss v MEC for Education Western Cape Province (9684/03) [2006] ZAWCHC 41 (8 September 2006)

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 9684/2003

In the matter between:

EDITH STRAUSS Plaintiff

and

THE MEC FOR EDUCATION, WESTERN CAPE PROVINCE Defendant

JUDGMENT: 08 SEPTEMBER 2006

VAN ZYL J:

INTRODUCTION

[1] This is an application by the defendant, in terms of rule 33 (4) of the rules of this court, that the questions of law raised in the defendant's special plea be decided separately from any questions of law or fact in the action pending between the parties. This court is obliged to grant such application and to order that all further proceedings be stayed until such questions have been disposed of, unless it appears that they "cannot conveniently be decided separately".

[2] The parties were in agreement that the special plea should be dealt with separately, although they could not agree whether evidence was required in respect of the issues raised therein. After reading the papers and hearing initial argument from both parties, I was satisfied that the special plea should indeed be decided separately from any other issues raised in the pleadings. I was likewise satisfied that evidence was not required for this purpose. What did cause me concern was why the defendant saw fit to bring this application at all, thereby incurring unnecessary costs. Whether or not evidence should be led in support of, or to counter, a special plea is irrelevant for purposes of making a decision in terms of rule 33(4). I shall return to this aspect later.

[3] Ms R Williams SC, assisted by Ms T Golden, appeared for the plaintiff, and Mr J C Heunis SC, assisted by Ms N Bawa, for the defendant. The court expresses its appreciation to them for their presentations on behalf of the respective parties.

BACKGROUND

[4] The plaintiff is an educator in the employ of the governing body of the Paarl Girls' High School ("the school") in terms of a written contract of employment signed by her on 20 March 2001 but effective from 1 January 2001. In terms of clause 4.3 of such contract she was required, without additional remuneration, to assist with extra-curricular activities allocated to her by the

principal of the school. This included educational activities in the form of sports coaching.
[5] On 12 February 2001, while the plaintiff was engaged in coaching high school learners in the athletics field event known as discus throw, she was struck on the forehead, just above the left eye, by a discus thrown by a learner participating in the said coaching session. She was seriously injured, suffering brain damage, concussion, a "whiplash" injury of the neck, a fracture of the left orbital socket and an eye injury. As a result she was rendered permanently disabled and suffered extensive damages amounting, in monetary terms, to R683 000,00, being the amount of her claim against the defendant.
[6] In her amended particulars of claim the plaintiff attributed her injury and resultant damages to the alleged negligence of the defendant in that the discus circle on the sports field was not, at the time of the incident, enclosed with safety nets. It would appear from the facts, however, that the failure to provide safety nets was in fact attributable to an omission by the school, which had a duty to ensure the safety of the persons involved in or present at the coaching session in question. The plaintiff was, at the time, in the employ of the school as a so-called "independent" or "outside" coach ("buite-afrigter"), for which the school remunerated her. As such she was not acting in terms of clause 4.3 of her employment contract with the school, but in terms of an agreement with the school to render services as an "independent" or "outside" athletics coach at an agreed remuneration.
[7] Whether this agreement constituted an amendment to her contract of employment, or whether it should be regarded as a supplementary or additional agreement, be it oral or tacit, between her and the school is, in my view, of no consequence for purposes of considering the special plea. It appears to be common cause that she was, in rendering coaching services as aforesaid, acting on the instructions of the principal of the school, as conveyed to her by the head of sport at the school. As such she might not have been acting in her capacity as an educator, but she was certainly engaged in an educational activity at the behest of the relevant school officials.
[8] It follows from the aforesaid that any liability ascribed to the defendant, in his official capacity as the member of the executive council who was responsible for education in the Western Cape, would not arise from any negligence on his part. It could arise only from the provisions of section 60(1) of the *South African Schools Act* 84 of 1996 ("the Act"), on which the plaintiff has in any event placed reliance. Under the heading "Liability of State", this section is expressed in the following terms:
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.

THE SPECIAL PLEA
[9] The special plea raised by the defendant is to the effect that section 60(1) of the Act is not applicable in that it is subject to the provisions of section 20(10) the Act, which reads as follows:
Despite section 60, the State is not liable for any act or omission by the *public school* relating to its contractual responsibility as the employer in respect of staff employed in terms of subsections (4) and (5).

[10] Section 20(4) of the Act deals with the right of a public school to establish posts for educators and to appoint educators to such posts in addition to those determined in terms of section 3(1) of the *Educator's Employment Act* 138 of 1994. Section 20(5) provides for a similar right regarding the establishment of posts for non-educational staff in addition to those

established in terms of the *Public Service Act* 103 of 1994. Of some significance, for present purposes, is that both these subsections are expressly made subject to the *Labour Relations Act* 66 of 1995 and "any other applicable law", in addition to the Act under discussion.
[11] Inasmuch as the school had employed the plaintiff in terms of section 20(4) of the Act, the defendant averred, the omission complained of related to her contractual responsibility as an employee. The defendant was hence not liable in terms of section 60(1) of the Act.
[12] The defendant relied also on section 35(1) of the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 ("COIDA") as an "applicable law" to which section 20(4) of the Act was subject and which precluded an action by the plaintiff against the school. It reads as follows:
No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.

The term "occupational injury" is defined in section 1 of COIDA as "a personal injury sustained as a result of an accident". The definition of "accident" in the same section is "an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee".

MAIN SUBMISSIONS ON BEHALF OF THE DEFENDANT

[13] The main argument put forward by Mr Heunis on behalf of the defendant was that the plaintiff had, at the relevant time, been in the employ of the school as an athletics coach in terms of the provisions of section 20(4) of the Act. Inasmuch as this subsection was subject to "any other applicable law", section 35(1) of COIDA should be applied as an "applicable law". As an employee the plaintiff was hence entitled to compensation from the Compensation Fund for her injuries and disablement, and was precluded, by the provisions of section 35(1) of COIDA, from claiming damages against the school. This means that the school was not liable for such damages, so that section 60(1) of the Act was not applicable. Consequently the State, and hence the defendant, did not attract liability.
[14] As for the first leg of the special plea, namely that relating to the applicability of section 20(10) of the Act, Mr Heunis indicated during the course of argument that he was no longer relying on its provisions.

MAIN SUBMISSIONS ON BEHALF OF THE PLAINTIFF

[15] In her argument on behalf of the plaintiff Ms Williams submitted at the outset that, inasmuch as the parties had agreed that the special plea should be decided prior to the consideration of the merits of the case, the application in terms of rule 33(4) was unnecessary. It certainly was not necessary for purposes of obtaining a ruling from this court whether or not evidence should be led in regard to the special plea. For this reason the defendant should be ordered to pay the costs of the application, including the costs occasioned by the postponement of this matter on 30 May 2006 and including the costs of two counsel. In addition Ms Williams submitted that the defendant's application to strike out certain portions of the answering affidavit, with which application the defendant did not proceed, should be dismissed with costs.
[16] Much of the further argument presented by Ms Williams dealt with the dispute between the parties as to the nature of the agreement between the plaintiff and the school in respect of her extra-curricular coaching duties. More particularly Ms Williams submitted that the parties were

not in agreement as to whether the plaintiff's appointment as an independent or outside coach was an appointment in terms of section 20(4) of the Act. The plaintiff insisted that the special plea could not be adjudicated upon without the presentation of evidence on this dispute.
[17] As for the leg of the special plea still relied on by the defendant, Ms Williams submitted that section 35(1) of COIDA was not applicable and did not exclude the defendant's liability in terms of section 60 (1) of the Act. If the legislature had intended to make the said section subject to COIDA it would have said so. She accordingly requested that the special plea be dismissed.

CONSIDERATION OF THE SPECIAL PLEA

[18] Interesting and innovative as the argument put forward by Mr Heunis may be, there is no merit in it. Although the Act may not be a model of well-structured and comprehensible legislation, its meaning, in the various sections referred to in the papers and in argument, is clear. The school in the present matter is a public school as defined in section 1. Section 15 determines the status of every public school as "a juristic person, with legal capacity to perform its functions in terms of this Act". Section 16(1), in turn, vests the governance of every public school in its governing body, which "may perform only such functions and obligations and exercise only such rights as prescribed by the Act". In terms of section 16(3) the professional management of a public school is in the hands of the principal, who is, in terms of section 23(1)(*b*) of the Act, *ex officio* a member of the governing body. He carries out his functions, however, under the authority of the head of the relevant education department ("the department").
[19] The functions of governing bodies are set out in section 20 of the Act. Section 20(1)(*i*) and (*j*) respectively empower a governing body to recommend, to the head of the department, the appointment of educators (teaching staff) and non-educators (administrative staff) at the school. The department then has the authority to make the required appointments from the ranks of those persons recommended by the governing body. Both categories of appointments are subject to the *Labour Relations Act* 66 of 1995. They are also, respectively, subject to the *Employment of Educators Act* 76 of 1998 and the *Public Service Act* 103 of 1994. The persons thus appointed are generally described as "departmental appointees" in that they are employed and remunerated by the relevant department of education.
[20] Sections 20(4) and (5) give governing bodies the power to establish posts for educators (teaching staff) and non-educators (administrative staff) in addition to those established by the department. The establishment of such posts, and the appointment of persons to fill them, are, as mentioned previously (par [10] above), subject to the Act, the *Labour Relations Act* 66 of 1995 and "any other applicable law". This appears not only from the provisions of sections 20(4) and (5), but also from section 20(6), which expressly stipulates that persons thus appointed must comply with the same legislative requirements as those with which departmental appointees must comply. The persons appointed to the additional posts created by a governing body may be described as "governing body appointees" in that they are in the employ of, and remunerated by, the governing body.
[21] Section 20(10), on which the defendant initially relied (see par [9] and [14] above), provides for a limitation on State liability in terms of section 60(1) of the Act. The limitation, however, has a narrow scope in that it excludes liability only in respect of an act or omission by the school arising from its contractual responsibility as employer in respect of governing body appointees employed in terms of sections 20(4) and (5) of the Act. It can hence not be applicable in the present matter in that the plaintiff's cause of action, as set forth in her particulars of claim, is not contract, but delict. Although both contractual and delictual liability are included in the

wide-ranging provisions of section 60(1) of the Act, section 20(10) expressly caters only for a school's contractual liability towards governing body appointees. This relates, for example, to the school's obligation to pay such persons their salaries or other forms of remuneration to which they may be entitled. See *Technofin Leasing & Finance (Pty) Ltd v Framesby High School and Another* 2005 (6) SA 78 (SE) at 92I-93C and 95D-E; *LUR vir Onderwys en Kultuur, Vrystaat v Louw en 'n Ander* 2006 (1) SA 192 (SCA) par [12]-[13] at 196E-197B. See also the discussion of the latter case by P J Visser in 2006 (69) THRHR 523-528.

[22] In view hereof it is not necessary to determine whether or not the agreement between the plaintiff and the school relating to her coaching duties falls under the provisions of section 20(4) of the Act. Inasmuch as the definition of an educator in section 1 of the Act excludes "a person who is appointed to exclusively perform extracurricular duties", it is certainly arguable that she was not acting in her capacity as a governing body appointee in terms of section 20(4). This section would, however, become relevant only if the liability of the State in terms of section 60(1) were limited by the application of section 20(10) of the Act. Since I have rejected such suggested limitation, the section 20(4) issue falls away.

[23] I turn now to the main argument raised by Mr Heunis. The Act relating to compensation for occupational injuries and diseases (COIDA) is certainly relevant in that the plaintiff was, at the relevant time, an employee who personally suffered an occupational injury, with resultant disablement, in an accident arising out of and in the course of her employment. She would hence, under normal circumstances and provided she complies with any requirements for a valid claim, qualify for compensation from the Compensation Fund in terms of such Act. This does not mean, however, that the liability of the State in terms of section 60(1) of the Act is excluded, or even restricted, by such claim.

[24] The major difficulty facing the defendant in this regard is the express wording of section 60(1) of the Act. The words used must, of course be given their ordinary grammatical meaning and must be construed in their proper context. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) par [89]-[90] at 526G-528D; *Technofin Leasing & Finance (Pty) Ltd v Framesby High School and Another* (cited in par [21] above) at 91C-D.

[25] When one applies these guidelines to the wording of section 60(1) its meaning becomes clear and unequivocal. It is abundantly clear that the section was intended to have a particularly wide and far-reaching ambit. The State unconditionally accepts liability for "any damage or loss" resulting from "any act or omission" relating to "any educational activity" conducted by a public school and in respect of which that school would be liable if it were not for the provisions of this section. This constitutes general liability, with the State stepping into the shoes of the school and taking over its responsibility towards any party who or which might have suffered loss or damage as a result of such act or omission.

[26] The only restrictions to this liability are contained in section 20(10), with which I have already dealt (par [21] above), and section 60(4) of the Act. The latter section excludes liability for damage or loss arising from "any enterprise or business operated under the authority of a public school for purposes of supplementing the resources of the school". For present purposes it is not relevant, although it would appear that the defendant did in fact initially rely on it before abandoning it in an amended plea.

[27] Significantly section 60(1) differs from other sections of the Act, such as sections 20(1)(*i*) and (*j*) and sections 20(4), (5) and (6) referred to above (par [19]-[20] above), in that it is not made subject to any other statute or law. Indeed, the only reference to another statute in section

60 occurs in section 60(2), which stipulates that the provisions of the *State Liability Act* 20 of 1957 apply to any claim against the State in terms of section 60(1). This leads to the almost irresistible inference that no reference to any other statute or law was intended. If the legislature had intended section 60(1) to be subject to the provisions of section 35(1) of COIDA, as averred by the defendant, or for that matter to any other legislative provisions, it would undoubtedly have said so.

[28] In this regard section 60(1) of the Act has been described as an "umbrella provision" directed at establishing State liability in the circumstances referred to in such section. See *Louw en 'n Ander v LUR vir Onderwys en Kultuur, Vrystaat, en 'n Ander* 2005 (6) SA 78 (O) par [13] at 85B-C (*per* Cilli J):

Artikel 60(1) is 'n sambreelbepaling wat daarop gerig is om aanspreeklikheid by die Staat te vestig in die omstandighede waarna in die artikel verwys word. Opvoeding in 'n openbare skool is in die eerste instansie 'n Staatsverantwoordelikheid. Daarom maak dit sin dat die Wetgewer die Staat verantwoordelikheid wil laat aanvaar vir skade of verlies wat veroorsaak word as gevolg van 'n daad of versuim wat voortspruit uit 'n opvoedkundige aktiwiteit by 'n openbare skool.

See also the *Technofin* case (par [21] above) at 92I-93C, where Pickering J observed that section 60 "is couched in the broadest of terms and the State's liability is expressed in the most general language". Indeed, in the "wide language" of the section there was nothing to indicate that it was restricted to delictual liability.

CONCLUSION

[29] It follows that Mr Heunis has not succeeded in persuading me that the defendant's special plea should be upheld. He has likewise not persuaded me that the parties should bear their own costs relating to the rule 33(4) application, the striking out application or the postponement of 30 May 2006. I have already remarked (par [2] above) that the rule 33(4) application was clearly unnecessary in that the issue of evidence was irrelevant for purposes of considering the special plea. In fact such application bordered on an abuse of the procedure of this court and might even have justified a punitive order as to costs had Ms Williams generously not insisted on such order. I am, however, satisfied that the defendant should pay the costs of the rule 33(4) application and the costs occasioned by the postponement on 30 May 2006, when the matter could not proceed because the rule 33(4) papers had to be amplified. In both cases the plaintiff is entitled to the costs of two counsel. The defendant must also pay the costs of the striking out application with which it did not proceed. In that case, however, the costs of two counsel are not justified.

[30] In the event I make the following order:

1.
The special plea is dismissed with costs, including the costs of two counsel.

2.
The defendant is order to pay the costs of the rule 33(4) application and of the postponement of 30 May 2006, once again including the costs of two counsel.

3.
The application to strike out is dismissed with costs.

D H VAN ZYL
Judge of the High Court