THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

CASE NO: 207/07
Reportable

In the matter between:

BASTIAN FINANCIAL SERVICES (PTY) LTD Appellant

and

GENERAL HENDRIK SCHOEMAN PRIMARY SCHOOL Respondent

Coram**:** Harms ADP, Streicher, Heher & Van Heerden JJA et Hurt AJA

Heard: 9 May 2008

Delivered: 30 May 2008

Summary: ***Contract – public school – liability of school for contractual damages – whether s 60(1) of Schools Act 84 of 1996 renders the State liable for claims for contractual damages against a public school***

Neutral citation: ***Bastian Financial Services v General Hendrik Schoeman Primary School*** **(207/2007) [2008] ZSCA 70 (30 May 2008)**

VAN HEERDEN JA:

Introduction

[1] A public school leased photocopier equipment from a supplier for a specified period. The school then failed to pay the instalments due under the written lease agreement. The supplier cancelled the agreement and sued the school in the magistrate's court, claiming (inter alia) payment of the total rentals which would have been payable had the agreement run its prescribed course. Provided that the supplier can prove its case satisfactorily, is the public school liable to the supplier in this regard? In the ordinary course, one would have thought so. The school, however, thought otherwise, and the relevant magistrate's court, as well as the Pretoria High Court, agreed with it. The issue which must be decided in the present appeal is whether the magistrate's court and the court below were correct in that conclusion.

[2] During 2002, the appellant, Bastian Financial Services (Pty) Ltd (BFS), instituted action in the Brits Magistrate's Court against the respondent, the General Hendrik Schoeman Primary School (the School), claiming relief arising from the cancellation of a lease agreement. The School opposed the action, denying that it was in breach of any of the terms of the agreement and pleading repudiation of the agreement by BFS. The School also raised certain special pleas to the claim. The special plea relevant to this appeal is based on the provisions of s 60(1) of the Schools Act 84 of 1996 (the Act), which section imposes liability on the State for damage or loss caused 'as a result of any act or omission in connection with any educational activity conducted by a public school', for which the school would otherwise have been liable. The School pleaded that BFS had sued the wrong party. It claimed that the School was indemnified against

the contractual claim, which it contended had to be instituted against the Member of the Executive Council for Education of the North West Province (the MEC) as the provincial representative of the State. This special plea was upheld by the magistrate, whose decision was confirmed on appeal by the court a quo (per Preller J, Engelbrecht AJ concurring). The present appeal comes before us with leave granted by that court.

Factual background

[3] The written agreement, in terms of which BFS leased certain photocopier equipment to the School for a period of five years, was concluded during September 1999. It is common cause that the equipment was rented by the School in connection with 'educational activities' conducted by it. As indicated above, BFS cancelled the agreement and, relying on the express provisions thereof, claimed the following relief:

- confirmation of its cancellation of the agreement;
- return of the equipment to BFS;
- payment of the sum of R461 318,33 plus VAT, being the aggregate value of the rentals which would have been payable had that agreement continued until the expiry of the rental period;
- interest on the latter amount at the agreed rate;
- costs on the attorney and client scale.

[4] Before the magistrate, only the special pleas were argued, with no viva voce evidence being presented by either side.

Statutory framework

[5] With regard to the School's special plea based on s 60(1), BFS presented a twofold argument: first, it contended that its claim was not one for 'damage or loss', as contemplated by s 60(1); rather, it was one for specific performance in terms of the contract. Second, BFS contended that in any event, on a proper interpretation of s 60(1), it applies only to claims arising in delict and not to claims for contractual damages.

[6] I shall first consider the argument based on the interpretation of s 60(1). In this regard, the court a quo concluded that the ordinary grammatical meaning of the words 'damage or loss caused as a result of any act or omission in connection with any educational activity' includes claims for damages arising from both contract and delict.

[7] The issues presently under discussion arose in *Technofin Leasing & Finance (Pty) Limited v Framesby High School & Another*.[1] It appears that neither counsel nor the High Court was aware of that decision prior to the date of judgment – the only reference to the decision that appears in the record is in the High Court's judgment granting leave to appeal to this court. In the *Framesby* matter – incidentally also involving the lease of photocopier machines to a public school – the parties, by way of a stated case, required the court to interpret s 60 of the Act so as to determine which of the school or the relevant MEC was liable to the plaintiff for breach of contract, if such breach could be proved. In his judgment, Pickering J considered similar arguments to the ones advanced before us and

[1] 2005 (6) SA 87 (SE).

concluded 'that there is no reason to limit the State's liability in terms of s 60 so as to exclude damage or loss caused contractually'.[2]

[8] Before the most recent amendment to s 60 (in terms of the Education Laws Amendment Act 31 of 1997, which came into operation on 31 December 2007 and thus does not apply to the present matter),[3] the section provided:

'(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

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[2] At 95E. Cf also *Strauss v MEC for Education, Western Cape Province* 2007 (4) SA 127 (C) paras 25-28.

[3] The effect of the amendment is that the words 'educational activity' in s 60(1) have been replaced with the words 'school activity', this latter expression being defined in the Act to mean 'any official educational, cultural, recreational or social activity of the school within or outside the school premises'(see s 60(1)(a) of the Act, as amended, read with the definition of 'school activity' inserted in s 1 of the Act by s 4(c) of Act 31 of 2007). A new para (b) has been inserted into s 60(1), providing that, if the school activity in question is covered by an insurance policy taken out by the school, the liability of the State is limited to the damage or loss not covered by the policy.

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.'

[9] Other provisions of the Act which are relevant to this appeal are s 15, certain subsections of ss 16, 20, 21 and 34, s 36 (prior to amendment of this section in 2001)[4] and s 58A(4):

- **Section** 15, under the heading 'Status of public schools', provides that every public school is a juristic person, with legal capacity to perform its functions in terms of the Act.

- **Section 16** deals with 'Governance and professional management of public schools' and provides that the governance of every public school is vested in its governing body, which 'may perform only such functions and obligations and exercise only such rights as prescribed by the Act' (subsec (1)). A governing body stands in a position of trust towards the school (subsec (2)), while the 'professional management' of a public school must be undertaken by the principal under the authority of the Head of Department (subsec (3)).

- **Section 20** deals with 'Functions of all governing bodies' and provides, in sub-sec (4), that, subject to the Act and certain other provisions, 'a public school may establish posts for educators and employ educators additional to the establishment determined by the Member of the Executive Council in terms of section 3(1) of the Educators' Employment Act, 1994.'

- Subsection (5) permits a public school to 'establish posts for non-educators and employ non-educators additional to the establishment determined in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994).'

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[4] Section 36 was amended by s 5 of the Education Laws Amendment Act 57 of 2001, in terms of which two new subsections (subsecs (2) and (3)) were added to s 36. The amending Act came into operation on 5 December 2001, ie after the lease agreement was entered into by BFS and the School.

- Subsection (10) provides that, '(d)espite section 60, the State is not liable for any act or omission by the public school relating to its contractual liability as the employer in respect of staff employed in terms of subsections (4) and (5).'

- **Section 21**, dealing with 'Allocated functions of governing bodies', provides (in subsec (1)) that a governing body may apply to the Head of Department in writing to be allocated certain functions, including the purchasing of textbooks, educational materials and equipment for the school and the payment for services to the school (paragraphs (c) and (d) of subsec (1)).

- The Head of Department may refuse an application made by the governing body in terms of subsec (1) only if the governing body concerned does not have the capacity to perform such function effectively (subsec (2)); or may approve such application unconditionally or subject to conditions (subsec (3)). The decision of the Head of Department must be conveyed in writing to the governing body concerned, giving reasons (subsec (4)), whereupon any person aggrieved by this decision may appeal to the Member of the Executive Council (subsec (5)).

- In terms of s 21(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.'[5]

- **Section 34** places an obligation on the State to **'**fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision.'

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[5] In the *Framesby* case, the MEC concerned had allocated certain functions to school's governing body in terms of a notice published in the Provincial Gazette. The functions thus allocated to the governing body included those listed in paras (c) and (d) of s 21(1), as set out above.

- In terms of **s 36**, the governing body of a public school 'must take all reasonable steps 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'.

- Finally, **s 58A** regulates **'**Alienation of assets of public school' and provides, in subsec (4) thereof, that '(t)he assets of a public school may not be attached as a result of any legal action taken against the school.'[6]

[10] For the sake of completeness, mention should also be made of the Preamble to the Act, the relevant portion of which provides that –

'WHEREAS this country requires a new national system for schools which will . . . promote their[7] acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State . . . .'.

Interpretation of section 60(1) of the Act

[11] BFS contended, inter alia, that the inclusion of the words 'any act or omission in connection with' in s 60(1) indicated an intention on the part of the legislature to limit the circumstances under which the State would be held liable for damage or loss, to delictual claims against a public school. Moreover, so counsel for BFS submitted, the wording of s 60(1) (in particular, the reference to 'act or omission') has a particular 'delictual flavour' in that, although this term is not used *exclusively* in the delictual sphere, this is the area of law where it is most often to be found.

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[6] Section 58A was inserted into the Act by s 6 of the Education Laws Amendment Act 24 of 2005, which came into operation on 26 January 2006, ie also after the date of conclusion of the lease agreement. Because s 58A(4) relates to execution proceedings against the school, however, it would apply to any such proceedings instituted after the commencement of the amending Act on 26 January 2006.

[7] This would seem to refer to 'all learners, parents and educators', a phrase which, with the insertion of the word 'and', occurs immediately before the quoted sentence in the Preamble commencing with the word 'promote'.

[12] A further argument advanced by counsel for BFS was to the effect that, in terms of the Act, public schools have been given a high degree of autonomy in conducting their own affairs, through the medium of their respective governing bodies in which the governance of public schools is vested. The corollary of the freedom to enter into contracts conferred on the governing bodies of public schools by the Act (in particular ss 20 and 21 thereof), so it was contended, is that such schools must be held accountable under contracts entered into on their behalf by their governing bodies. This accountability would include liability to the other party to such a contract for both specific performance and damages for breach thereof.

[13] Counsel for the school countered these submissions by pointing to the broad wording of s 60(1) and the fact that the section does not make any express reference to delictual liability, the State's liability being expressed in the most general language. So too, the term 'act or omission' contained in s 60(1) is not defined or expressly limited in any way. Thus, argued counsel, when given their ordinary grammatical meaning, these words include any step of any nature or any obligation required to be fulfilled. Interpreted in this way, the words must include within their ambit any breach of any term of a contract requiring the school to take certain steps or to fulfil certain obligations and, likewise, any failure on the part of the school to take such a step or to fulfil such an obligation in terms of the contract.

[14] In advancing these arguments, counsel for the school relied on the following dictum of Van Zyl J in *Strauss v MEC for Education*:[8]

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[8] Supra n 2 para 28.

'In this regard, s 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) ([2006] 4 All SA 282) in para [13] at 85B-C (SA) (*per* Cillié 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 [supra n 1] at 92I-93C (SA), where Pickering J observed that s 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.'[9]

[15] The court below concluded that the ordinary grammatical meaning of the words 'damage or loss caused as a result of any act or omission' in s 60(1) includes claims for damages arising from both contract and delict. As I have already stated,[10] this was also the conclusion reached by Pickering J in *Framesby*:[11]

'There is, therefore, in my view, nothing in the wide language of s 60 itself which indicates that it was the intention of the Legislature to limit the liability referred to therein to delictual liability only.'

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[9] See also *Strauss* paras 24-25.
[10] See para 7 above.
[11] Supra n 1 at 93C.

[16] In *Manyasha v Minister of Law and Order*,[12] this Court reiterated the so-called 'golden rule' of statutory interpretation[13] in the following terms:

'It is trite that the primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature . . . One seeks to achieve this, in the first instance, by giving the words of the provision under consideration the ordinary grammatical meaning which their context dictates, unless to do so would lead to an absurdity so glaring that the [Legislature] could not have contemplated it'.

[17] It is, however, also a well-established rule of construction that words used in a statute must be interpreted in the light of their context, and that, in this regard, the 'context' –

'[I]s not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background . . . the legitimate field of interpretation should not be restricted as a result of an excessive peering at the language to be interpreted without sufficient attention to the contextual scene.'[14]

[18] This dictum from *Jaga's* case has been quoted with approval by the Constitutional Court in, inter alia, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others*,[15] that court remarking further – with reference to *Thoroughbred Breeders' Association v Price Waterhouse*[16] –

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[12] 1999 (2) SA 179 (SCA) at 185B-C.
[13] See, eg, LM du Plessis 'Statute Law and Interpretation' in 25(1) *Lawsa* (reissue, 2001) para 302 p 282-283, para 309 p 290-291 and the other authorities there cited.
[14] See *Jaga v Dönges NO & Another; Bhana v Dönges NO & Another* 1950 (4) SA 653 (A) at 662G-H and 664H (from the dissenting judgment of Schreiner JA, described by Du Plessis op cit para 310 p 297-298 as 'the judge's seminal exposition of an interpretive *modus operandi* honouring the exigencies of both language and context', and as 'probably one of the most frequently relied on minority judgments in the history of South African case law').
[15] 2004 (4) SA 490 (CC) para 89.
[16] 2001 (4) SA 551 (SCA) para 12 of the concurring judgment by Marais JA, Farlam AJA and Brand AJA (at 600 E-H).

that 'the emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous.'[17] The relevant passage from the *Thoroughbred Breeders' Association* case reads:

'The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed on the face of it to have a readily discernable meaning. As was said in *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) at 941D-E:

> "I am of the opinion that the words of s 3(2)(d) of the Act [the Admission of Advocates Act 74 of 1964], clear and unambiguous as they may appear on the face thereof, should be read in the light of the subject-matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature." '

[19] It has also long been recognised in our case law that the aim of statutory interpretation is to give effect to the object or purpose of the legislation in question. Thus, in *Standard Bank Investment Corporation Ltd v Competition Commission & Others; Liberty Life Association of Africa Ltd v Competition Commission & Others*,[18] Schutz JA, writing for the majority of this Court, stated that:–

'Our Courts have, over many years, striven to give effect to the policy or object or purpose of legislation. This is reflected in a passage from the judgment of Innes CJ in *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 543. But the passage also reflects that it is not the function of a court to do violence to the language of a statute and impose its view of what the policy or object of a measure should be.'

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[17] *Bato Star Fishing* para 90. See further Du Plessis op cit para 310 p 298.
[18] 2000 (2) SA 797 (SCA) para 16.

The learned judge referred[19] to *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others*[20] as illustrative of the proposition that 'our law is an enthusiastic supporter of "purposive construction" in the sense stated by Smalberger JA' in that case as follows:[21]

'The primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. It is now well-established that one seeks to achieve this, in the first instance, by giving the words of the enactment under consideration their ordinary grammatical meaning, unless to do so would lead to an absurdity so glaring that the Legislature could not have contemplated it . . . Subject to this proviso, no problem would normally arise where the words in question are only susceptible to one meaning: effect must be given to such meaning. In the present instance the words [which fell to be interpreted by the court] are not linguistically limited to a single ordinary grammatical meaning. They are, in their context, on a literal interpretation, capable of bearing the different meanings ascribed to them by the applicants, on the one hand, and the respondents, on the other. Both interpretations being linguistically feasible, the question is how to resolve the resultant ambiguity. As there would not seem to be any presumptions or other recognised aids to interpretation which can assist to resolve the ambiguity, it is in my view appropriate to have regard to the purpose of [the statutory provision in question] in order to determine the Legislature's intention.

. . . .

. . . Mindful of the fact that the primary aim of statutory interpretation is to arrive at the intention of the Legislature, the purpose of a statutory provision can provide a reliable pointer to such intention where there is ambiguity . . . .

Be that as it may, it must be accepted that the literal interpretation principle is firmly entrenched in our law and I do not seek to challenge it. But where its application results in ambiguity and one seeks to determine which of more than one meaning was intended

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[19] At para 21. See also paras 19, 20 and 22.
[20] 1990 (1) SA 925 (A).
[21] At 942I-944A.

by the Legislature, one may in my view properly have regard to the purpose of the provision under consideration to achieve such objective.'[22]

[20] At first glance, the wording of s 60(1) is indeed sufficiently broad and general to include within its ambit liability for both delictual and contractual damages, as argued by the School. On the other hand, it is equally capable of being interpreted so as to apply only to claims in delict against a public school, rendering the State liable for only such claims to the exclusion of the public school in question, as argued by BFS. Thus, in the words of Smalberger JA in *Public Carriers Association*,[23] 'the words . . . are not linguistically limited to a single ordinary grammatical meaning.' One therefore has to have regard to the context[24] in which these words are used in the Act, seen against the background of the purpose of this legislation.

[21] Counsel for both parties accepted that s 60(1) does not exempt a public school from liability to render specific performance of contractual obligations lawfully[25] undertaken by the school's governing body on its behalf. Any claim for specific performance by the other party to the contact would thus have to be instituted against the public school concerned, and not against the MEC. Counsel also accepted that a claim for the return of goods at the instance of the supplier of such goods to a public school, in terms of a contract entered into with the school, would have to be instituted

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[22] See further on the purposive approach to statutory interpretation ('purposivism'), Du Plessis op cit para 304 p 285, para 311 p 300-301, para 349 p 388-389, para 353 p 393-395 and the other authorities there cited.
[23] Supra n 20 at 943B, as quoted in the preceding paragraph.
[24] The 'context' bearing the broad meaning ascribed to it by Schreiner JA in *Jaga's* case, supra n 14 at 662 G-H, as quoted in para 17 above.
[25] Viz, with the written permission of the Head of Department given in terms of s 21 of the Act, in circumstances in which such written permission is required: see para 9 above.

against the school itself and not against the MEC. In my view, both these propositions are correct.[26] Even the broad and general wording of s 60(1) cannot legitimately 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.

[22] 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.

[23] As pointed out by counsel for BFS, the Act envisages the creation of a 'partnership' between the State, on the one hand, and the 'learners, parents and educators' of a public school, on the other, all the 'partners' taking responsibility for the organisation, governance and funding of the school.[27] The scheme of the Act is such that the 'learners, parents and educators' of a public school are represented by its governing body, the elected membership of which includes representatives of all such categories.[28] In giving effect to the idea of a 'partnership', the Act confers on public schools, through their governing bodies, a considerable degree of

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[26] See, in this regard, the *Framesby* case, supra n 1 at 94H-95C.
[27] See the Preamble to the Act, quoted in para 10 above.
[28] See s 23 of the Act, in particular s 23(2).

autonomy in the governance of the school's affairs.[29] Section 60(1) of the Act exempts the school from delictual liability arising from 'any educational activity conducted by it',[30] and so protects both the school and the victims of any such delict from the potentially dire consequences of a delictual claim. To my mind, *this* is the intended reach of s 60(1): it would be contrary to the purpose and scheme of the Act as a whole to interpret the section in a manner so as to shift to the State liability for contracts lawfully entered into by the school simply because the school breaches its contract and the other party seeks, not specific performance of the contract, but rather damages for such breach. It is perhaps important to note that, with effect from 26 January 2006, the risk of essential school equipment such as textbooks, classroom furniture, teaching materials, sporting equipment and the like being attached and sold in execution of the school's judgment debts no longer exists.[31]

[24] One last aspect must be mentioned. Section 20(10)[32] of the Act exempts a public school from liability for 'any act or omission by the public school relating to its contractual liability as the employer in respect of' additional educators or non-educators employed by the school governing body itself in terms of ss 20(4) and (5) of the Act. In *LUR vir*

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[29] The structure and reach of the Act in this regard is explained in some detail by Bertelsman AJ in *Die Ferdinand Postma Hoërskool v Die Stadsraad van Potchefstroom and Others* [1999] 3 All SA 623 (T) at 629j-633d.

[30] With the exception of liability for loss or damage flowing from an enterprise or business operated under the autonomy of the school for purposes of supplementing the resources of the school as contemplated in s 36: see s 60(4). In terms of s 36, the governing body of a public school is in fact *obliged* to take all reasonable steps to supplement the school's resources in order to improve the quality of education provided by the school to its learners.

[31] See s 58A of the Act, inserted by s 6 of the Education Laws Amendment Act 24 of 2005 (date of operation 26 January 2006). The wording of s 58A is quoted in para 9 above. Cf the *Framesby* case, supra n 1 at 93I-J.

[32] The wording of which appears in para 9 above.

Onderwys en Kultuur, Vrystaat v Louw en 'n Ander,[33] this court held that s 20(10) does not exclude the liability of the State for delictual damage or loss caused by the negligent act or omission of an educator or non-educator employed by the governing body of a public school under ss 20(4) or (5). In this regard, Streicher JA stated that:

'Die aanspreeklikheid van die Staat word uitgesluit ten opsigte van 'n handeling of 'n late wat voortspruit uit die openbare skool se "kontraktuele verantwoordelikheid as werkgewer teenoor die personeel aangestel ingevolge subarts (4) en (5)". In hierdie geval het die personeellid se handeling of late moontlik voortgespruit uit haar kontraktuele verantwoordelikheid teenoor die skool maar het duidelik nie voortgespruit uit die kontraktuele verantwoordelikheid van die skool teenoor haar soos vereis deur die artikel nie.'[34]

[25] In the *Framesby* case,[35] Pickering J accepted the submission by counsel for the plaintiff to the effect that, should s 60(1) exclude the State's liability for contractual obligations of a public school, 'it would have been unnecessary for the Legislature to have promulgated s 20(10) and, in particular, to have referred therein to s 60 in the terms it did.'[36] Needless to say, counsel for the School in the present appeal relied on this dictum.

[26] It is indeed so that, if s 60(1) of the Act is interpreted – as in my view it must be – to apply only to delictual claims, s 20(10) is, at least to a large extent, rendered superfluous. And this would, of course, go against the common law 'presumption' that a statute does not contain superfluous

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[33] 2006 (1) SA 193 (SCA).
[34] Para 13.
[35] Supra n 1 at 95D-E.
[36] See also the *Strauss* case, supra n 2 para 21 and the discussion of the *Louw* case by P J Visser in 2006 (69) *THRHR* 523.

provisions and that a meaning must be given to every word thereof.[37] As pointed out by this court, however:[38]

'[T]he rule is not an absolute one. Tautology is not uncommon in legislation . . . And the rule must not be applied to create differences of meaning where such differences were not intended by the lawgiver.'

[27] It could well be that s 20(10) was enacted to make it quite clear that the State is not liable for any labour-related claim, contractual or otherwise, brought against a public school by an educator or non-educator employed by its governing body in terms of ss 20(4) and (5). This was in fact one of the submissions made by counsel for BFS and appears to be a sound one. In any event, in the context of the Act as a whole, 'its apparent scope and purpose',[39] I do not think that the inclusion of s 20(10) in the Act detracts in any way from my conclusion that s 60(1) covers only claims in delict against a public school and does not include within its ambit contractual claims against the school. In the light of this conclusion, it is not necessary to engage with the submission by BFS that its claim was for specific performance of the lease agreement, rather than for 'damage or loss', as contemplated in s 60(1).

[28] It follows that the special plea raised by the School in this regard should have been dismissed and that, accordingly, this appeal must succeed.

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[37] See, for example, *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A) at 116 F-117A. See further, Du Plessis op cit para 330 and G E Devenish *Interpretation of Statutes* (1992) p211 and the other authorities cited by these authors.

[38] In *Commissioner for Inland Revenue v Shell Southern Africa Pension Fund* 1984 (1) SA 672 (A) at 678D-F.

[39] See *Jaga's* case, supra n 14 at 662G-H.

Order

[29] In the result, the following order is made:

1. The appeal is upheld with costs.

2. The order of the court below is set aside and replaced with the following:

‘2.1 The appeal is upheld with costs.

2.2 The order of the magistrate’s court dated 18 April 2005 is set aside and replaced with the following:

“The defendant’s special pleas are dismissed with costs.” ’

B J VAN HEERDEN
Judge of Appeal

Concur:

HARMS JA

STREICHER JA

HEHER JA

HURT AJA:

[30] I have read the judgment of Van Heerden JA, but find myself in respectful disagreement with her interpretation of s 60(1) of the South African Schools Act 84 of 1996 ('the Act').

[31] There are two crisp questions which require to be considered in order to decide this appeal. The first is whether the appellant's claim against the School is a claim for ‘damage or loss’ within the meaning of that expression in s 60(1). The appellant's contention is that, since the claim is based directly on a contractual term, it is, effectively, a claim for specific performance of that term (which takes effect on the fulfilment of a condition referred to in the contract) and not a claim for 'damage or loss'. The second is whether s 60(1) is intended to cover claims for damage or loss arising from contract or whether it is restricted to claims in delict.

[32] Van Heerden JA has summarized the contents of the *lex commissoria* (clause 9) of the contract in her judgment.[40] I think it would be of assistance if I were to quote the pertinent portions of the clause. They read as follows:

‘9. If [the] User defaults in the punctual payment of any monies as it (*sic*) falls due in terms of this Agreement; or fails to comply with any of the terms and conditions of or its obligations under this Agreement; . . . or abandons the equipment; . . . or breaches any warranty given in terms of this Agreement; or does or allows to be done, anything that might prejudice BFS's rights under this Agreement; or the breach of any one of the agreements[41] as constituted shall be deemed, at BFS's election, to be a breach of any or all agreements effected in terms of this Agreement, then and upon the occurrence of any of these events BFS may elect without prejudice to any of its rights to:

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[40] Para 3.

9.1 claim immediate payment of all amounts which would have been payable in terms of this Agreement until expiry of the rental period stated in the Equipment Schedule, whether such amounts are then due for payment or not, or

9.2 immediately terminate this Agreement without prior notice, take possession of the equipment, retain all amounts paid by the User and claim all outstanding Rentals, all legal costs on the attorney and own client scale and, as *agreed, pre-estimated liquidated damages*,[42] the aggregate value of the Rentals which would have been payable had this Agreement continued until expiry of the Rental period stated in the Equipment Schedule.

9.3 In addition BFS shall be entitled to claim from the User the amount of any Value Added Tax ("VAT") payable in respect of *such damages*.

9.4 If the goods are returned to or repossessed by BFS, BFS shall be entitled to dispose of same in such manner and on such terms and conditions as it may in its sole discretion determine.'

[33] There is a provision (clause 9.5) relating to interest in the contract annexed to the particulars of claim which is not clear, but the reference to it in the particulars[43] reads as follows:

'The Defendant would pay the Plaintiff arrear interest on any amount, including liquidated damages, due by the Defendant to the Plaintiff and such arrear interest would be calculated from due date of payment or, in the case of damages from the date of accrual of Plaintiff's right to claim, to date of receipt of payment by the [plaintiff].'

[34] The contract period was five years commencing 1 September 1999 and the School defaulted after the first month. The claim is therefore for repossession of the rented equipment and 59 months' rental plus VAT.

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[41] There were six items leased to the school, with one 'master agreement' covering all of them.
[42] I have italicized all of the references to 'damages' in this clause for reasons which should become apparent shortly.
[43] Para 4.9.

There is no averment in the particulars of claim as to a formal notice of cancellation of the agreement to the School. It appears, though, that the plaintiff relied on its right to terminate the agreement immediately and without notice in clause 9.2. This seems to follow from the fact that there is no separate claim for arrear instalments of rental up to the date of cancellation and the prayer for interest is on the full amount of R461 318.33 from the date of the first default, 1 October 2000, calculated at the rate of ‘prime plus 4%’ to the date of payment.

[35] There can be no doubt that these contractual stipulations are 'penalty stipulations' within the meaning of the Conventional Penalties Act, 15 of 1962. Accordingly, a court asked to adjudicate the appellant's claims in this case (other, of course, than the claims for return of the leased equipment), would be justified in requiring evidence to satisfy itself that the penalty was not out of proportion to the prejudice suffered by the appellant as a result of the School's default.[44] Such a procedure would not be possible in a simple claim for specific performance of a contract. In these circumstances, I consider that the contention that the claim is purely for specific performance is a semantic attempt to avoid an obvious conclusion. I may say that, if the claim had been framed on the basis that there was a cancellation on a specified date and that, at that date, a specified amount was owed by the School in the form of arrear instalments, that portion of the claim may well have been properly described as a claim for performance of a contractual obligation, but the issue does not arise here and no more need be said in that connection. As it stands, the whole

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[44] *Smit v Bester* 1977 (4) SA 937(A) at 942-943.

claim is one for 'damage or loss' arising out of the School's omission to pay the instalments when due.

[36] Does s 60(1) of the Act include, within its scope, claims for contractual damages? The relevant portion of the preamble to the Act states that:

'WHEREAS this country requires a new national system for schools which will . . . promote . . . acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State . . . .'

[37] Pursuant to this stated intention, in s 16(1) of the Act the Department of Education delegated the governance and management of public schools to their governing bodies. Section 36(1) imposed a duty on the governing body of each school to:

' . . . 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.'

[38] Subsections 37(1) to (3) provide for the establishment of a school fund into which the governing body is required to deposit all money received in the form, inter alia, of school fees, voluntary contributions and donations. Subsection (6) provides that:

'The school fund, all proceeds thereof and any other assets of the public school must be used only for –

(a) educational purposes, at or in connection with such school;

(b) educational purposes, at or in connection with another public school, by agreement with such other public school and with the consent of the Head of Department;

(c) the performance of the functions of the governing body; or

(d) another educational purpose agreed between the governing body and the Head of Department.'

[39] The governing body is required to prepare a budget ahead of the commencement of each school year and present it to the parent body for approval.[45] This budget is used as the basis for setting the fees for the coming year and the parent body is required, specifically and separately, to approve the proposed fees.[46] It is against this procedural background that the governing body, in consultation with the general parent body, computes the expenditure for the coming year and fixes the fees which will have to be levied to meet it.

[40] Looked at from this perspective, the purpose behind s 60(1) becomes plain. It is highly unlikely (if it is conceivable at all) that a school budget would contain a contingency provision for loss or damage arising out of an act or omission which had not, at the time of framing the budget, been foreseen. It can be predicted, therefore, that a claim of this type, if successful, would give rise to a shortfall in the budgeted funds. Nor could such a claim be satisfied by payment out of a school fund, since it could hardly be described as a payment 'for educational purposes' as prescribed in s 37(6)(a) of the Act. In the light of these considerations, it seems to me that the purpose behind s 60(1) is that the MEC will step into the shoes of a school in order to accept liability for claims for loss or damage arising from acts or omissions not budgeted for. Is there any reason why the legislator would have intended this to happen only in cases where the 'act or omission' is negligent, giving rise to delictual liability, as opposed to a breach attracting liability under a contract? There is none that I can think

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[45] Section 38.

of. Nor, in my view, does a consideration of the Act as a whole give any indication of such an intention.

[41] The argument presented on behalf of the appellant placed heavy emphasis on what was referred to as the 'delictual flavour' of the expression 'act or omission'. Although the expression is, understandably, regularly encountered in relation to claims in delict, it is by no means uncommon in the contractual context. The legislator has used it in this context in a number of statutes, such as ss 1 and 2 of the Conventional Penalties Act, s 4(4) of the National Credit Act 34 of 2005, s 12(5) of the Alienation of Land Act 68 of 1981 and s 5(2) of the Property Time-Sharing Control Act 75 of 1983. The expression is used in s 20(10) of the Act itself. In these circumstances it seems to me that little weight can be attributed, in construing s 60(1), to the fact that the legislature has used an expression which is regularly encountered in the delictual context, since that expression is by no means exclusive to that context.

[42] The crucial provision which indicates that both delictual and contractual liability are contemplated in s 60(1) is to be found in s 20(10), which reads:

‘Despite section 60, the State is not liable for any act or omission by the public school relating to its contractual liability as the employer in respect of staff employed in terms of subsections (4) and (5).’[47]

[43] I cannot accept that this is a simple case of legislative tautology. The words ‘despite section 60’ cannot be ignored and, in my view, the only

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[46] Section 39.
[47] Staff employed by the governing body in addition to the staff allocated by the Department of Education.

sensible import which can be given to them is that the particular form of contractual liability arising from a school's capacity as an employer cannot be enforced against the State. The inevitable corollary must be that the State is otherwise liable in terms of s 60(1), in appropriate circumstances, for loss or damage arising from an act or omission relating to contractual obligations other than those provided for in s 20(10).[48]

[44] It follows that I take the view that the appellant's claim should have been brought against the MEC and not the School and that the magistrate in the court of first instance was correct in upholding the special plea on this basis.

N V HURT
Acting Judge of Appeal

[48] This was the specific finding of Pickering J in the case of *Technofin Leasing & Finance (Pty) Ltd v Framesby High School* 2005 (6) SA 87 (SE). I agree with the reasoning reflected in that judgment.