MEC for Education, Western Cape Province v Strauss (640/06) [2007] ZASCA 155; [2007] SCA 155 (RSA) (28 November 2007)

REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case number: 640/06

In the matter between:

**THE MEC FOR EDUCATION,
WESTERN CAPE PROVINCE**

and

EDITH STRAUSS Res

CORAM: **SCOTT, MTHIYANE, CLOETE, HEHER JJA and MALAN AJA**
HEARD: **12 NOVEMBER 2007**
DELIVERED: **28 NOVEMBER 2007**

Summary: South African Schools Act 84 of 1996 – s 60 - Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) – s 35 – educator doing part-time discus training injured – whether s 35(1) of COIDA applicable
Neutral citation: *MEC for Education v Strauss*[2007] SCA 155 (RSA)

JUDGMENT

MALAN AJA:

[1] This is an appeal with leave of the court a quo against the judgment of Van Zyl J sitting in the Cape High Court in which he dismissed with costs the defendant's special plea and ordered the defendant to pay the costs of a Rule 33(4) application and the costs of the postponement of the hearing on 30 May 2006.

[2] The appellant, the defendant in the court a quo, is the Member of the Executive Council for Education in the Western Cape. The respondent, the plaintiff in the court a quo, was an educator employed at the Paarl Girls' High School. The plaintiff instituted proceedings against the defendant, the governing body of the school and two medical doctors claiming damages arising from an incident that occurred on 12 February 2001 while she was engaged in training learners at the school to throw the discus. She was struck on the forehead just above the left eye by a discus thrown by a learner participating in the training session and sustained serious injuries as a result. Her claim against the governing body and the two medical doctors was subsequently withdrawn and she proceeded against the defendant only.

[3] The plaintiff was employed by the governing body of the school, a public school, pursuant to a written contract effective from 1 January 2001 in accordance with the provisions of s 20(4) of the Act (and not by the Head of Department in terms of the Employment of Educators Act 76 of 1998). In terms of her contract of employment the plaintiff accepted the professional authority of the principal. It is alleged that the plaintiff was obliged to 'carry out lawful requests and/or instructions of the school principal and/or the governing body relating, inter alia, to educational activities, including sports training or coaching at the school'. She was obliged to provide assistance in respect of extra curricular activities as instructed by the principal without any additional compensation. Clause 4.3 of her contract provides:
'Die werknemer sal bystand verleen ten opsigte van buite-kurrikulêre aktiwiteite soos deur die Hoof aan hom/haar opgedra sonder enige addisionele vergoeding.'

[4] The incident is alleged to have occurred while the plaintiff was an educator at the school and
'acting upon the lawful instructions of the school principal conveyed to the plaintiff by the sports' head, to train or coach learners in discus throwing, for which the plaintiff would be remunerated by the governing body as an independent trainer.' (Paragraph 9 of the particulars of claim).

In this paragraph a contract of employment other than the contract annexed to the particulars of claim is referred to.

[5] The plaintiff's claim against the defendant is founded on the latter's own alleged negligence and also, by virtue of s 60 of the Act, on the negligence of the principal of the school or its governing body. As to the defendant's own negligence, it was alleged, for example, that the defendant failed to provide safety nets around the discuss circle (paragraph 10.4) and also that he failed to ensure that nets were provided by the principal, the governing body or the school (paragraph 10.5). As to the plaintiff's reliance on s 60, it was alleged that the 'school principal, governing body and/or Head of Department' failed to ensure that educators and sports trainers or coaches were able to carry out their functions in an environment where the risk of injury was eliminated (paragraph 10.6) or that they failed to take reasonable steps such as the provision of safety nets to prevent injury to the plaintiff (paragraph 10.7).

[6] Section 60 of the Act provides:

‘(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 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.’

[7] The plaintiff pleaded that in terms of s 60(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 the said section and added that any action had to be instituted against the defendant.

[8] In the course of his judgment Van Zyl J said 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) … on which the plaintiff has in any event placed reliance’. I do not agree. Section 60, although wide in scope, has a limited purpose: it exempts the school or its governing body from liability for damage or loss caused ‘as a result of an act or omission in connection with any educational activity’ and transfers liability to the State. Public education is the responsibility of the State. Hence the legislature intended the State to be liable for damage or loss caused by an act or omission resulting from an educational activity for which the school would otherwise have been liable. The section, however, does not preclude claims a person may have against the State based on other grounds such as in this case where reliance is also placed on the defendant’s own negligence and he is cited as a wrongdoer. The section simply does not deal with such other claims. (I express no view on the merits or otherwise of this claim.)

[9] The activity the plaintiff was allegedly engaged in clearly falls within the description of ‘educational activity’ used in s 60(1). Van Zyl J correctly came to this conclusion: the plaintiff was acting as alleged on the lawful instructions of the school officials. The liability transferred must furthermore result from ‘an act or omission in connection with any educational activity’. The acts or omissions alleged by the plaintiff in paragraph 10 of her particulars of claim and attributed to the principal, the governing body or the principal are all acts or omissions ‘in connection with any educational activity’, liability for which would be transferred to the State had the school been liable. By pleading s 60 of the Act the plaintiff intended to hold the State liable not only as a wrongdoer but also by virtue of the liability thus transferred.

[10] The defendant filed a special plea contending that s 60 did not avail the plaintiff. Two grounds were relied on. The first was that the plaintiff was appointed in terms of s 20(4) of the Act which provides that a public school may, subject to the Act, the Labour Relations Act 66 of 1995 and any other applicable law, establish posts for educators and employ educators additional to the establishment determined by the Member of the Executive Council in terms of s 3(1) of the Employment of Educators Act 76 of 1998. In

terms of s 20(10) s 60 is not applicable where the act or omission complained of relates to the contractual responsibility of the school as an employer towards its staff. The plaintiff's claim lies in delict and the defendant correctly did not persist with this contention. The second ground relied upon is s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) which precludes an action by an employee for the recovery of damages against his or her employer, as a consequence of which the defendant is not liable for any damage for which the governing body would not have been liable. Although the special plea is somewhat inelegantly worded, s 35(1) was relied upon in argument both in this and the court a quo as an independent ground apart from the provisions of s 20 (4) of the Act.

[11] COIDA came into operation on 1 March 1994 providing for a system of no-fault compensation for employees who are injured in accidents that arise out of and in the course of their employment or who contract occupational diseases. A compensation fund is established to which employers are required to contribute and from which compensation and other benefits are paid to employees. Employees meeting the requirements of the Act are entitled to the benefits provided for and prescribed by COIDA. COIDA
'supplants the essentially individualistic common-law position, typically represented by civil claims of a plaintiff employee against a negligent defendant employer, by a system which is intended to and does enable employees to obtain limited compensation from a fund to which the employers are obliged to contribute.'

[12] At common law an employee has to show that his or her employer acted negligently thereby risking a finding that he or she was contributorily negligent. The employee claiming common-law damages from the employer would also bear the risk of the employer's insolvency or his inability to meet a judgment debt. While the employee ran the risk of an adverse cost order if he or she was unsuccessful, a common-law action might lead to his or her recovering substantially more by way of damages than under the compensation provided by COIDA. Section 35 abolished an employee's common-law right to claim damages. Section 35 COIDA is headed 'Substitution of compensation for other legal remedies' and provides as follows:
'(1) 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.'

[13] Prior to the date of the trial the defendant filed an application in terms of Rule 33(4) for an order that the special plea raised questions of law which might conveniently be decided before any evidence was led and separately from any other issue, and directing that all further proceedings be stayed until such questions had been resolved. Van Zyl J granted the application holding that the special plea should be decided separately and that no evidence was required for this purpose. I agree with this ruling. He, however, ordered the defendant to pay the costs of the application and of the postponement of the trial on 30 May 2006 and dismissed the special plea with costs. He

expressed the view that any liability of the defendant could only have arisen from the provisions of s 60(1) of the Act and said that 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.'

He said of s 60:
'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 the public school and 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.'

And added:
'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 … it would undoubtedly have said so.'

[14] The plaintiff alleged in her particulars of claim that she was obliged to carry out lawful instructions of the principal or governing body relating to educational activities, including sports training or coaching at the school. She alleged further, in paragraph 9 of her particulars of claim (quoted in paragraph 4 above) that the incident occurred when the plaintiff was engaged in the training or coaching of learners in throwing the discus for which she was to be remunerated as an independent trainer. It follows that the incident fell within the definition of an 'accident' as defined in COIDA. This is so whether the incident occurred within the course and scope of the plaintiff's employment in terms of her written contract of employment pursuant to s 20(4) of the Act or within the course and scope of her employment as an independent trainer as alleged in paragraph 9 of the particulars of claim. In both cases she was an 'employee' and the governing body, acting on behalf of the school, her 'employer'. In this regard Van Zyl J correctly observed that it mattered not whether the plaintiff's agreement to render services as an independent or outside trainer could be classified as an amendment to her contract of employment or as an additional agreement: in rendering coaching services she was on her own pleaded version acting on instructions of the principal conveyed to her by the head of sport at the school and thus acting within the course and scope of her employment.

[15] It is correct, as Van Zyl J observed, that s 60(1) has a particularly wide and far-reaching ambit. He, however, added that if it had been the intention of the legislature to exclude the provisions of s 35 COIDA from its scope the legislature would have expressly so provided. This observation was made in the context of the question whether the reference to 'any other applicable law' in s 20(4) of the Act includes a reference to COIDA. The argument, however, loses sight of the express words of s 60(1) which renders the State liable only in circumstances where the school would have been liable - 'and for which such public school would have been liable'. If a school as employer would not have been liable to an employee by virtue of the provisions of s 35 COIDA neither would the State be in terms of s 60. This conclusion can be reached without reference to s 20(4) of the Act and the question whether COIDA is included in the words 'any other applicable law'. COIDA provides for compensation for employees and s 35(1) expressly excludes liability on the part of the employer for damages in respect of any occupational injury or disease resulting in disablement or death. Since the school is not liable to the plaintiff liability cannot be attributed to the State in terms of s 60(1). It follows that the special plea to the plaintiff's particulars of claim should be upheld in so far as she relies on s 60 of the Act. Nothing in s 36 of COIDA militates against this conclusion. Indeed, s 36 allows both a claim for damages against a third party, ie a party other than the employer, as a wrongdoer and also a claim for compensation in terms of COIDA.

[16] In his judgment in the court a quo Van Zyl J awarded the costs of the Rule 33(4) application to the plaintiff remarking that the application was unnecessary 'in that the issue of evidence was irrelevant for purposes of considering the special plea'. He added: '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 do not agree. The parties were in agreement that the special plea should be dealt with separately but could not agree whether evidence was required in respect of the issues raised in it. Van Zyl J was satisfied that the special plea could be decided separately and that no evidence was required for that purpose. In other words, on this issue, he found in favour of the defendant but nevertheless gave an adverse costs order against him. It is not apparent from his judgment why he described the application as one that bordered on an abuse of procedure. The only basis advanced in this court is the statement by the plaintiff's attorney that she 'had omitted to include in the minute [of the pretrial conference of 12 May 2005] … that the parties agree to disagree on the issue of oral evidence and that the court be asked for a ruling at the commencement of the hearing on whether the special plea should be disposed of by way of argument or after the adduction of evidence.' Whether such an agreement was reached is in dispute but there is no suggestion that the approach to the court to determine the issue would have had to take any particular form. In the circumstances it was prudent of the defendant, given the on-going dispute whether evidence was required to adjudicate the special plea, to approach the court formally by way of notice of motion. The founding affidavit properly summarises the pleadings and respective contentions of the parties. It shows that the defendant requested the consent of the plaintiff for the disposal of the legal questions as early as 5 May 2006 failing which an application would be made. The plaintiff's attorney agreed to the separation in a letter of

10 May 2006 but voiced her disagreement whether the matter could be disposed of without evidence. As I have said, there is a dispute of fact on what was agreed upon at the pretrial conference. However, the plaintiff's case is not that it was agreed that an informal application without the need for a notice of motion and affidavit would be sufficient: the alleged omission in the minutes of the pretrial conference merely refers to the fact that the court would be 'asked' at the commencement of the hearing. How the court was to be 'asked' was, even on the version of the plaintiff's attorney, not agreed. The learned judge a quo was satisfied after 'reading the papers and hearing initial argument' that the matter could be disposed of without oral evidence. The defendant cannot be faulted for having elected to bring a formal application for a separation. The relief prayed for in the application was granted. Costs of the application should therefore have followed the result and as the court a quo misdirected itself this court is at large to substitute such an order on appeal.

[17] A replying affidavit was clearly necessary and there can be no argument that the comprehensive answering affidavit which was filed on the afternoon before the trial was late, and entitled the defendant to the costs of the postponement on 30 May 2006.

The following order is made:
(1)
The appeal is upheld with costs including the costs of two counsel;
(2)
Paragraphs 1 and 2 of the order of the court a quo are set aside and replaced with the following:
'(a) The special plea is upheld with costs including the costs of two counsel and the plaintiff's claim based on s 60 of the South African Schools Act 84 of 1996 is dismissed;
(b) The plaintiff is ordered to pay the costs of the Rule 33(4) application and of the postponement on 30 May 2006, including the costs of two counsel.'

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Malan AJA
Acting Judge of Appeal

Concur:

Scott JA
Mthiyane JA
Cloete JA
Heher JA