Technofin Leasing & Finance (Pty) Ltd v Framesby High School and another [2005] 4 All SA 87 (SE)

Division:	South Eastern Cape Local Division
Date:	31 March 2005
Case No:	1073/2001
Before:	JD Pickering J
Sourced by:	BJ Pienaar
Summarised by:	D Harris

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Education – Action for payment in respect of equipment hired by school – Whether school or State liable – South African Schools Act 84 of 1996 – Section 60 – Providing that liability is incurred by the State – Such liability not restricted so as to exclude damage or loss caused contractually.

Editor's Summary

The plaintiff was a company conducting the business of financing the sale and leasing of office and related equipment. It entered into an agreement of lease with first defendant, a public school, for the hire of a photocopier. Alleging that the plaintiff had made certain misrepresentations which induced the school to enter into the agreement, the school cancelled the agreement. The plaintiff in turn denied any breach, accepted the cancellation and claimed the return of the photocopier and contractual damages. The school defended the action.

In subsequent amendments to its plea, the school raised the special plea of non-joinder. In terms thereof, it argued that based on the interpretation of section 60 of the South African Schools Act 84 of 1996 ("the Schools Act"), the plaintiff had sued the wrong entity. According to the school, the plaintiff should have sued the second defendant (the provincial Member for the Executive Council for Education). This led to the plaintiff bringing an application to join the second defendant. The application was granted.

Although the second defendant disputed the merits, and put the plaintiff to the proof thereof, it did admit that in the event of the plaintiff proving its claim, it (and not the school) would be solely liable for any loss which the plaintiff may have suffered, based on the provisions of section 60 of the Schools Act.

Held – The only issue for determination was whether the first or second defendant was liable for any breach of contract proved by the plaintiff. This required a proper interpretation of section 60 of the Schools Act.

Section 21 of the Schools Act makes it clear that the school was authorised to lease the photocopier machines from plaintiff. The dispute between the parties related to the issue of whether or not, on a proper construction of section 60, the State was liable only for loss caused delictually or whether its liability extended to contractual as well as delictual loss. The Court stated that section 60 had to be read in the context of the whole Act. Examining the section, the Court found nothing in its wide framing which indicated that it was the legislature's intention to limit the liability referred to in the section to delictual liability only. The Court agreed that section 60 was enacted, *inter alia*, for the protection of any public school which would, but for the provisions of the section, have been liable to a plaintiff for contractual damage or loss. Section 60 passes on such liability to the second respondent. The conclusion was that that

there was no reason to limit the State's liability in terms of section 60 so as to exclude damage or loss caused contractually.

Notes

For Education see:

- *LAWSA* First Reissue (Vol 8(2), paras 1-230)

Cases referred to in judgment

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others 2004 (7) BCLR 687 (CC)	91
Ferdinand Postma Hoërskool v Stadsraad van Potchefstroom [1999] 3 All SA 623 (T)	91
Kangra Holdings (Pty) Ltd v Minister of Water Affairs [1998] 3 All SA 227 (1998 (4) SA 330) (SCA)	92

Judgment

PICKERING J

This matter came before me by way of a stated case. The stated case reads as follows:

"1. The plaintiff is Technofin Leasing & Finance (Pty) Ltd, a company duly incorporated in accordance with the Companies Act 61 of 1973, which company carries on the business of financing the sale and leasing of office and related equipment

2. The first defendant is Framesby High School, a public school which by virtue of the provisions of section 15 of the South African Schools Act 84 of 1996 (the Schools Act) is a juristic person with legal capacity to perform its functions in terms of the said Schools Act

3. The second defendant is the Member for the Executive Council for Education, Eastern Cape Province, who in terms of the Schools Act is the official responsible for education in the province

4. The background facts relevant to the stated case can be summarised as follows:

4.1 On 14 April 2000 the plaintiff and the first defendant entered into a written agreement of lease in terms 6f which the first defendant leased certain photocopier machines from the plaintiff;

4.2 On 16 March 2001 the first defendant cancelled the agreement, it being alleged that the plaintiff (or agents purportedly acting on its behalf) had made certain misrepresentations which had induced the first defendant to enter into the agreement

4.3 The plaintiff denied that it was in breach and, as it was entitled to do in terms of the agreement, regarded the lease as cancelled, claimed return of the goods and contractual damages;

4.4 On 14 May 2001 the plaintiff issued summons against the first defendant claiming;

4.4.1 Cancellation of the agreement;

4.4.2 Return of the goods;

4.4.3 Contractual damages;

4.5 The first defendant defended the action, denying that it was in breach of any of the terms of the agreement and pleaded further that the plaintiff had breached the terms thereof. It also instituted a counter-claim;

4.6 On 9 January 2003 the first defendant effected substantial amendments, not only to its plea on the merits, but it also introduced a special plea, namely a plea of non-joinder

4.7 The first defendant's special plea of non-joinder was to the effect that based on the interpretation of s 60 of the Schools Act, the plaintiff had sued the wrong entity;

4.8 The first defendant alleged that, based on the interpretation of section 60 of the Schools Act, the plaintiff should have pursued its action against the second defendant;

4.9 As a result of the special plea the plaintiff brought an application to join the second defendant as a party to the action. The application was granted;

4.10 The plaintiff amended its particulars of claim to reflect the second defendant as a party to the action, which it has sued in the alternative;

4.11 The second defendant pleaded to the plaintiff's claim as amended, disputing the merits and putting the plaintiff to the proof of its allegations;

4.12 The second defendant did, however admit that in the event of the plaintiff proving its claim and based on the provisions of section 60 of the Schools Act, it (and not the first defendant) would be solely liable for any loss which the plaintiff may have suffered;

5. It is the plaintiff's contention that section 60 cannot be interpreted so as to apply to the contract entered into between it and the first defendant and that in any dispute arising between it and the first defendant in respect of that contract, in the event of it being established that the first defendant was in breach thereof, the first defendant would be liable to the plaintiff in respect of such breach.

6. It is the first and second defendant's contention that section 60 should be interpreted in such a way that it applies to the contract entered into between the plaintiff and the first defendant and that in any dispute arising between the plaintiff and the first defendant in respect of that contract, in the event of it being established that the first defendant was in breach thereof, the second defendant would be liable to the plaintiff in respect of such breach.

7. The parties accordingly require this Honourable Court to:

7.1 Interpret section 60 and to decide whether the first defendant or the second defendant is liable to the plaintiff for breach of contract should the plaintiff prove this;

7.2 To determine whether the claim against the first or second defendants should be dismissed;

7.3 To make an appropriate order regarding costs, including the costs occasioned by the stated case."

Section 60 of the Schools Act reads as follows:

"(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.

(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

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business operated under the authority of a public school for purposes of supplementing the resources of the school as contemplated in section 26, including the offering of practical educational activities relating to that enterprise or business.

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

It is common cause between the parties, although this does not appear in the stated case, that the photocopier machines were acquired by first defendant, in connection with the "educational activities" conducted by first defendant. In the light of this concession by second defendant it is not necessary for any more to be said in this regard.

It is further common cause that first defendant is what may be referred to as being a section 21 public school. In order to appreciate the significance of this fact for purposes of the determination sought in the stated case it is necessary to have regard to certain sections of the Schools Act.

In terms of section 15 "every public school is a juristic person, with legal capacity to perform its functions in terms of this Act."

Section 16 vests the "governance" of every public school "in its governing body." Whilst the professional management of a public school is undertaken by the principal of that school under the authority of the Head of Department (section 16(3)), the governing body manages and controls the public school.

The functions of the governing body are primarily dealt with in section 20 and section 21. All governing bodies have those functions set out in section 20. The additional functions set out in section 21 may, however, only be exercised by a governing body if the Member of the Executive

Council for Education (the "MEC") of the relevant province has allocated such functions to that governing body. Section 21(6) provides as follows:

> "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."

In the present matter the governing body of the first defendant has been allocated certain section 21 functions by the second defendant in terms of Provincial Notice number 23 of 24 March 2000 published in *Provincial Gazette Extraordinary* number 498 of 24 March 2000. These functions, in terms of the annexure to such notice, are:

> "(a) To maintain and improve the school's property, and building and grounds occupied by the school, including school hostels, if applicable;
>
> (b) To determine the extramural curriculum of the school and the choice of subject options in terms of provincial curriculum policy;
>
> (c) To purchase text books, educational materials or equipment for the school;
>
> (d) To pay for services to the school."

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It is clear from the provisions of section 21 and of the Provincial Notice that first defendant therefore had the necessary power to lease the photocopier machines from plaintiff and that, conversely, had it not been for such provisions the leasing of the machines would have had to be undertaken by the State.

In essence, although this is not spelt out clearly in paragraphs [5] and [6] of the stated case, the dispute between the parties relates to the issue as to whether or not, on a proper construction of section 60, the State is liable only for "damage or loss" caused delictually or whether its liability extends to contractual as well as delictual "damage or loss", in which event second defendant would be liable to plaintiff in the event of it being established that first defendant was in breach of its contract with plaintiff.

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (7) BCLR 687 (CC) at 725B–726D it was reiterated that whilst it is a primary rule of statutory construction that words in a statute must be given their ordinary grammatical meaning it was also a rule of construction that such words should be construed in the light of their context, It was further stated at paragraph [90] 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."

Mr *Van der Linde*, who with Mr *Mullins* appeared for the plaintiff, submitted that it was necessary to have regard to the scheme of the Schools Act and in particular to the role accorded by the Legislature to the governing bodies of public schools. I do not intend to burden this judgment with a reference to the particular sections of the Act referred to by him in this regard. It can be accepted, having regard thereto, that the governing bodies of section 21 public schools in particular have been afforded a very considerable degree of autonomy in respect of their functions, such functions including, apart from those set out in the annexure to the Provincial Notice above, the establishment and administration of a school fund; the preparation of a budget; the keeping of financial records and the appointment of a registered accountant to audit those records. For an overview of the structure of the Schools Act see *Ferdinand Postma Hoërskool v Stadsraad van Potchefstroom* [1999] 3 All SA 623 (T) at 630*b*–633*d*. I bear the above factors in mind in considering the interpretation to be placed upon section 60.

Mr *Van der Linde* referred firstly to the provisions of section 5(3)(*c*) of the Schools Act which provides:

> "No learner may be refused admission to a public school on the grounds that his or her parent–
>
> (*c*) has refused to enter into a contract in terms of which the parent waives any claim for damages arising out of the education of the learner."

He submitted that the "claims for damages" referred to in the subsection were clearly delictual claims. He submitted that such a prohibition was, not surprisingly, not to be found in prior enactments dealing with education such as the Education Affairs Act (House of Assembly) 70 of 1988 and the Technical Colleges Act 104 of 1981, neither of which Acts contained the equivalent of section 60 of the present Act. Why, he asked, should the Legislature have introduced section 60 into the present Act? The reason for so doing, so he submitted, was that the Legislature, having interfered in section 5(3)(*c*) with the contractual freedom afforded a public school, wished to provide the school with an indemnification where delictual claims as envisaged in section 5(3)(*c*) arose.

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Section 60, so his argument ran, had its origin in this interference with the contractual capacity of a public school.

In my view these submissions cannot be upheld. I am by no means persuaded that the "damages" referred to in section 5(3)(*c*) are limited to delictual damages and it is not difficult to envisage that such damages might also be contractual in nature. In the view I take of the matter, however, it is not necessary to attempt to determine the scope of the "damages" referred to therein, because, as Mr. *Van der Linde* himself emphasised in the course of his submissions, section 60 must be read in the context of the entire Act. In my view, when the Act is read as a whole, section 60 cannot be so construed as to limit its purpose and import solely to section 5(3)(*c*). If such limitation was intended then it is, in my view, inexplicable as to why the provisions of section 60 should not have been included as a further subsection to section 5(3)(*c*) or why specific reference should not have been made in section 60 – section 5(3)(*c*) so as to make such limitation clear.

Turning to the wording of section 60 itself Mr *Van der Linde*, with reference to the well-known presumption that the Legislature does not intend to alter the common law or the statute law more than is necessary, submitted that in common law a public school, being a legal persona, would be liable for damage or loss arising from any cause of action. In section 60, however, so he submitted, the Legislature chose to use wording indicative of delictual liability. In this regard he referred to various Acts of Parliament making provision for State liability where the Legislature had specified such liability as being either delictual or contractual or both (see The Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002; Correctional Services Act 111 of 1998; Defence Act 42 of 2002; and South African Police Service Act 68 of 1995.) He submitted that had the Legislature intended section 60 to apply also to contractual damage or loss it would have been a simple matter for it to have done so as indeed it did in the various Acts referred to above. In my view, Mr *Van der Linde*'s submission in this regard bears the seeds of its own destruction. In each of the examples referred to by him liability is either expressly stated to be only in delict (see for examples 131 of the Correctional Service Act 111 of 1998) or the relevant section is couched in such language as to make it clear that only delictual liability is intended (see for example section 85(1) of the Defence Act 42 of 2002).

As submitted by Mr *Buchanan*, who with Mr *Schubart* and Mr *Booi* appeared for second defendant, (first defendant having abided the decision of this Court) section 60 is couched in the broadest of terms and the State's liability is expressed in the most general language. The section does not make any specific reference to delictual liability whereas, to use Mr *Van der Linde*'s own terminology, it would have been a simple matter for it to have done so had this been intended. Furthermore, the words "damage" and "loss" are not words with an exclusively delictual connotation. In *Kangra Holdings (Pty) Ltd v Minister of Water Affairs*[1]

Footnote ×

1 Also reported at [1998] 3 All SA 227 (A) – Ed.

1998 (4) SA 330 (SCA) the following was stated at 338F–G:

> "The words 'loss' and 'damage' are not defined in the Act and must therefore be given, subject to their context their ordinary meaning. There being no contextual support for the argument to be derived from the wording or setting of the provisions in question, the ordinary meaning prevails. 'Damage' is a word of wide and general import and ordinarily embraces physical damage and pecuniary loss (*Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1988 (3) SA 122 (A) at 130I–

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> 131B, a case involving provincial legislation conferring a Power akin to expropriation) and 'loss' is a synonym for 'damage' (at 131G–H)."

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

Mr *Van der Linde* submitted further that certain factors strongly militated against an extension of the liability in section 60 to include contractual liability. He pointed out, with reference to *LAWSA*: Volume 28 paragraphs 796–813, that express statutory provisions applied to the procurement by the State of supplies and services. He submitted that it could not have been the intention of the Legislature to hold the State liable in contract in circumstances where the provisions relating to State procurement were not applicable and where equipment had been leased or purchased by a section 21 public school without any such procurement procedures having been followed. In such circumstances, the State could be exposed to the risk of financial loss occasioned by profligate spending on the part of a particular governing body. In my view, however, his submissions overlook certain relevant factors. There is, firstly, the fact that the MEC may only make a determination in terms of section 21(6) if, *inter alia,* he or she is satisfied that the governing body concerned has the capacity to perform such function effectively. In so satisfying him- or herself the MEC will, to my mind, take into account, *inter alia,* the extent of the relevant experience and expertise of the members of the governing body and their track record having special regard to their handling of school funds in the past. There are, secondly, also certain safeguards relating, *inter alia,* to the keeping by the governing body of records of funds received and spent by the school; proper budgeting; and the appointment of a registered accountant to audit the financial records.

It is furthermore clear, in my view, that section 21(6) has been enacted for reasons of practicality so as to enable the governing bodies of those public schools possessed of the requisite capacity to get on with the day to day running of the school unencumbered by the strict requirements relating to State procurement.

It is understandable, however, that the State would nevertheless be concerned as to the possible serious consequences for such a public school should its governing body by mischance or otherwise enter into a contract which is eventually terminated with adverse financial consequences for the school. A situation, for instance, whereby school equipment such as desks, chairs or learners' books were attached in order to satisfy a judgment debt or where an application was brought for the liquidation of the school, would be intolerable and the Legislature, in my view, could never have intended that a public school be exposed to such risks regardless of the degree of autonomy afforded to its governing body. In my view Mr *Buchanan* is correct in his submission that section 60 has been enacted, *inter alia,* for the protection of any public school which would, but for the provisions of the section, have been liable to a plaintiff for contractual damage or loss.

Most importantly, however, sight must not be lost of the fact that the responsibility for and the funding of all public schools, including those to which the provisions of section 21 have been made applicable, ultimately vests, in terms of section 34, in the State. Section 60 must, in my view, be interpreted in the context of the acceptance by the State of its obligations in this regard.

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Mr *Van der Linde* then submitted that to interpret section 60 as including contractual liability would be to interfere with the contractual rights of parties privy to a particular contract, more especially as the State was not, in terms of section 60, substituted as the contracting party for the public school but was merely made liable for any damage or loss occasioned as set out therein. He submitted, if I understood him correctly, that the rights and obligations of plaintiff and first defendant respectively, appearing from their written agreement, could not in these circumstances bind the State.

It is correct that section 60 does not purport to substitute the State as a contracting party for the public school but I do not understand how this factor is of assistance to the plaintiff. In my view the interpretation contended for by *Van der Linde* ignores the phrase "and for which such public school would have been liable." The issue of second defendant not being bound by the terms of the agreement entered into between first defendant and plaintiff does not and cannot arise. The issue is and remains whether or not first defendant would have been liable to plaintiff but for the

provisions of section 60. Section 60 itself does not purport to amend or alter the terms of the agreement between the plaintiff and first defendant. All that it requires of plaintiff in the present case, where the requirement as to "educational activity" has been satisfied, is that plaintiff prove in the same way as it would if the action were against first defendant that first defendant was in breach of the written agreement between them and that plaintiff has suffered damage or loss as a result thereof. If plaintiff succeeds in so doing then the State will be liable for payment of such damages or loss.

Mr *Van der Linde* submitted, finally, that an interpretation that section 60 applied to contractual damage or loss would give rise to insuperable procedural difficulties and anomalies. He submitted that plaintiff could be compelled to litigate on the same cause of action against both the public school and the MEC depending on the nature of the remedy sought by it. If, for instance, a plaintiff claimed an order for a specific performance with an alternative claim for damages the MEC would have to be cited *ex abundante cautela* merely to cater for the possibility of the Court refusing to grant the order for specific performance. In the present case, where plaintiff was seeking an order for cancellation of the agreement, return of the goods and damages, the claim for return of the goods would lie only against the first defendant and not the State. Mr *Van der Linde* pointed further to the difficulties which could arise in the present case where first defendant has filed a counter-claim.

I accept that procedural difficulties of the sort mentioned by Mr *Van der Linde* may well arise in certain cases. I am not persuaded, however, that they are insuperable. Many plaintiffs are from time to time confronted with the difficult issue as to whom to join as defendants in a particular action. In the present matter an important consideration to my mind is the very close nexus between a public school and the MEC. By the nature of things whatever defence was available to the public school would be available to second defendant. Indeed, second defendant would have no defence to the action other than that which was available to first defendant. In the vast majority of cases the public school and the MEC would therefore no doubt utilise the services of the same legal representatives. A finding that section 60 is applicable to contractual matters may occasion some degree of inconvenience to a plaintiff but this factor does not impel one to the conclusion that the State's liability in terms of section 60 is limited to delictual damage or loss.

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For his part, Mr *Buchanan* submitted that the matter was put beyond doubt by the provisions of section 20(10). These read 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)" (my emphasis).

I agree with his submissions thereanent to the effect that should section 60 exclude the State's liability for contractual obligations it would have been unnecessary for the Legislature to have promulgated section 20(10) and in particular to have referred therein to section 60 in the terms it did.

In all the circumstances I am satisfied that there is no reason to limit the State's liability in terms of section 60 so as to exclude damage or loss caused contractually.

At the conclusion of argument I enquired from counsel as to whether an order in terms of paragraph [7.2] of the stated case would be appropriate. It then transpired that through an unfortunate concatenation of events Mr *Van der Linde* had been unaware of the introduction into the stated case, by way of an amendment, of paragraph [7.2]. Both parties were accordingly afforded an opportunity to file further heads of argument on the issue, which they have now done. I have given careful consideration to the submissions contained therein but I do not intend to burden this judgment with a detailed discussion thereof.

I am satisfied that in all the circumstances it would be inappropriate for me to make an order at this stage dismissing the plaintiff's claim against the first defendant. No prejudice which cannot be remedied in due course by an appropriate costs order will thereby be occasioned to first defendant. The following order is therefore made:

1. Second defendant is liable to plaintiff for any damage or loss occasioned to plaintiff in respect of the agreement concluded between plaintiff and first defendant in the event of it being established that first defendant was in breach thereof

2. Plaintiff is ordered to pay the costs occasioned by the stated case, such costs to include the costs of two counsel.

For the plaintiff:

HJ van der Linde SC *and NJ Mullins* instructed by *JR Bester & Associates*

For the second defendant:

RG Buchanan SC, *LA Schubart* and *M Booi* instructed by *State Attorney*