

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION-GRAHAMSTOWN)**

**Case No: 235/2017**

In the matter between:

**KOMANI SCHOOL & OFFICE SUPPLIERS CC**

**t/a KOMANI STATIONERS**

**Applicant**

and

**THE MEMBER OF THE EXECUTIVE COUNCIL,**

**DEPARTMENT OF EDUCATION, E-C**

**First Respondent**

**THE SCHOOL GOVERNING BODY, MPENDULO**

**PRIMARY SCHOOL**

**Second Respondent**

**THE PRINCIPAL, JOHN NOAH SENIOR SECONDARY**

**SCHOOL**

**Third Respondent**

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## JUDGMENT

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### MALUSI J:

[1] The application is only against the first respondent for payment of a judgment debt in the amount of R152 914.50 incurred by the second and third respondents who are cited for convenience. The application is opposed by the first respondent.

[2] During September 2015 the applicant instituted action in the Queenstown magistrates court against Mpendulo Primary School, for stationery sold and delivered to the second and third respondents at their special instance and request in the amount of R151 954.81. On 11 September 2015 judgment was granted by default in favour of the applicant against the second and third respondents who represented the school, an aspect I will address later in this judgment, for the

amount claimed, together with costs in the sum of R959.69 and interest thereon at 9%.

[3] The applicant caused a warrant of execution to be issued and executed against the assets of the second respondent. The sheriff attached photocopiers, a fax machine, a risograph machine, a television set, a piano keyboard, educators' office chairs and tables, learners' desks and chairs belonging to the school. The director of the Queenstown district in the department of education initiated interpleader proceedings wherein he contended that an attachment was expressly prohibited by the provisions of section 58(A)(4) of the South African Schools Act 84 of 1996 as amended (*Schools Act*). Thereafter the attached goods were released. The applicant later initiated an unsuccessful application for joinder of the first respondent in the aforesaid Magistrates' court action.

[4] On 26 January 2017 the applicant launched the present application. The applicant avers that the first respondent is liable for the payment of the judgment debt as it is a loss that was incurred as

a result of an act in connection with an educational activity as provided in section 60(1) of the Schools Act.

[5] Mr Beyleveld, who appeared on behalf of the applicant, submitted that the action brought by the applicant in the Magistrates court was for specific performance against the school as represented by the second and third respondents. The loss as envisaged in section 60 of the Schools Act arose after the applicant could not execute on its judgment. It was argued that only at that stage did the first respondent become liable for the loss of the applicant. In the alternative it was argued that the applicant only obtained knowledge of the identity of the debtor and the facts from which the debt arose after the district director filed the affidavit initiating inter-pleader proceedings in the magistrates court.

[6] Ms Watt, who appeared on behalf of the first respondent, submitted that section 60(1) of the Schools Act was not applicable as the judgment was not against the school but only against the School Governing Body and the Principal (*second and third respondents respectively*). She further argued that the claim against the first

respondent had prescribed prior to the service of the application as the debt arose on 11 January 2013. She argued that it was peremptory for the action in the Magistrates court to have been instituted against the MEC. The loss arose when the school should have paid but did not do so, so it was argued. Finally she submitted that the identity of the debtor being the first respondent was known from the onset as the provision for such is in the Schools Act.

[7] The issue for decision is whether or not the first respondent is liable for the loss when the judgment is against the second and third respondents. The second issue to be determined is whether or not the claim against the first respondent has prescribed.

[8] The issue that arises in this matter is a procedural difficulty and an anomaly that was foreseen in *Framesby* more than a decade ago. The school was faced with the intolerable situation where its basic necessities were attached. ***Technofin Leasing & Finance v Framesby High School*** [2005] 4 All SA 87 (SE) 94F-G.

[9] The legal framework for the organisation, governance and funding of schools is provided in the Schools Act. It is common cause that the school involved in this matter is an ordinary public school as defined by section 1(1) read with section 12(3)(a)(i) of the Schools Act.

[10] Section 15 of the Schools Act provides that *'every public school is a juristic person with legal capacity to perform functions in terms of the Schools Act.'*

[11] Section 16 provides that *'the governance of a school is vested in its governing body and it may perform functions and obligations as prescribed by the act.'*

[12] The functions of a governing body are set out in section 20. The additional functions set out in section 21 may be exercised by a governing body only if they had been allocated by the Member of Executive Council for education of the relevant province.

[13] It is provided in section 36 that the governing body *'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.'*

[14] Section 58(A)(4) of the Schools Act expressly prohibits the attachment of the assets of a public school as a result of legal action taken against a public school.

[15] Section 60(1)(a) of the Schools Act provides that *'subject to paragraph (b), the state is liable for any delictual or contractual damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school and for which such public school would have been liable but for the provisions of this section.'* In terms of section 60(3) of the Schools Act *'any claim for damage or loss contemplated in sub-section 1 must be instituted against the Member of the Executive Council concerned.'*

[16] The applicant contends that, properly understood, its claim in the magistrates court was for specific performance in terms of the contract concluded between the applicant on the one hand and the second and third respondents on the other hand. Mr Beyleveld emphasized the point that the claim at that stage was not for *'damage or loss'* as envisaged in section 60 of the Schools Act.

[17] On the papers it is not in dispute that the applicant's claim in the magistrate's court was a claim for specific performance. As such it is not open to this court to determine this matter on a different basis as the court is bound by the formulation of the issues. Also it was not an issue that the school governing body was allocated a function to purchase stationery and equipment as envisaged by section 20 and 21 of the Schools Act. ***Sterklewies Pty Ltd t/a Harrysmith Feed Lot v Msimang & Others 2012 (5) SA 392 (SCA) at para 26.***

[18] I agree with the submission that the loss as envisaged in section 61 of the Schools Act arises on failure of the school to render specific performance and the inability of the applicant to execute on the magistrates court's judgment due to the prohibition contained in

s58(A)(4) of the Schools Act. I agree also with the submission that the first respondent's obligation imposed by section 60 of the Schools Act is a guarantee obligation as the first respondent stands in for the liability of the school.

[19] Our law has long recognised a distinction between a claim for specific performance and a claim for a loss. The majority judgment in *Bastian Financial Services* expressed it in the following terms:

*“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.”* (Footnotes omitted). ***Bastian Financial Services v Genl Hendrick Schoeman School 2008 (5) SA 1 at para 21.***

[20] The first respondent contends that the judgment that was granted in the magistrate's court was not against the school but only against the school governing body and the principal. The submission is further that the school was not cited as a party in the magistrate's court. The argument was concluded by making the point that reliance

on section 60(1)(a) of the Schools Act is accordingly misplaced as the school was never involved in any transaction with the applicant.

[21] I do not agree. It has long been recognised that a school acts through the agency of the governing body. In *Bastian Financial Services* it was stated that ‘ . . . both parties accepted that s 60(1) does not exempt a public school from liability to render specific performance of contractual obligations lawfully undertaken by the school’s governing body on its behalf. Any claim for specific performance by the other party to the contract would thus have to be instituted against the public school concerned, and not against the MEC. [It is] also accepted that a claim . . . , would have to be instituted against the school itself and not against the MEC. In my view, both these propositions are correct. ***Bastian Financial Services, ibid, at para 21.***

[22] The Constitutional Court expressed itself in *Ermelo*. It was stated that 23% of the educators were appointed and paid by the school as it is entitled to do under the applicable statute (*paragraph 7*). The Constitutional Court was alluding to s20 of the Schools Act where the governing body is empowered to establish posts and

employ educators. The Schools Act does not mention a school but only the governing body. The Court went on to say the primary function of a governing body is to look after the interest of the school and its learners. The Constitutional Court stated that the effective power to run schools is placed in the hands of the parents and guidance of learners through the school governing body (paragraph 79). The court accepted that the Schools Act places the governing body in a fiduciary relation to the school (paragraph 80). ***Head of Department, Mpumalanga Department of Education and Another v Hoerskool Ermelo & Another 2010 (2) SA 415 (CC).***

[23] The period of prescription is governed by the Prescription Act 68 of 1969. Section 11 of the Prescription Act provides that *‘the period of prescription in respect of a judgment debt is thirty years and in respect of any other debt it is three years.’* Section 12(1) of the Prescription Act states that prescription commences to run as soon as the debt is due. Section 12(3) of the Prescription Act states that *‘a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises; Provided that a creditor shall be deemed to have such*

*knowledge if he could have acquired it by exercising reasonable care.'*

[24] In the circumstances of this matter prescription can only begin to run on 8 June 2016 which is the date on which the district director deposed to an affidavit initiating the interpleader summons. It is on that date that it became clear the school was not in a position to satisfy its contractual obligations to the applicant. Even if I were wrong on the specific date, my view is that the earliest date on which prescription would run would have been 11 September 2015 when default judgment was granted against the second and third respondents respectively.

[25] In the result and for the above reasons the following order will issue:

**25.1 The first respondent is ordered to pay the applicant the sum of R151 954.81 plus costs in the magistrate's court of R959.69 together with *mora* interest on the aforesaid amount as from 11 September 2015 to date of payment.**

**25.2 The first respondent is ordered to pay the costs of the application.**

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**T MALUSI**

**JUDGE OF THE HIGH COURT**

**Appearances:**

For the Applicant:

*Adv Beyleveld instructed by*  
Zepe & Company  
c/o Yokwana Attorneys  
87 High Street  
**GRAHAMSTOWN**

For the 1<sup>st</sup> Respondent:

*Adv Watt instructed by*  
The State Attorneys  
c/o Dullabh & Co  
5 Bertram Street  
**GRAHAMSTOWN**

Heard on:

14 December 2017

Judgment delivered:

31 July 2018