

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

Reportable

CASE NO: 15426/2006

2/10/2009

In the matter between:

RENIER CHRISTIAAN VAN ZYL

PLAINTIFF

and

GOEDEHOOP LAERSKOOL

1st DEFENDANT

MEC DEPARTMENT OF EDUCATION,

2nd DEFENDANT

MPUMALANGA

JUDGMENT

SHONGWE DJP

1. This matter concerns the question of costs .The plaintiff sued the first and second defendants for damages as a result of injuries

sustained by the plaintiff. The parties have now agreed that absolution from the instance should be ordered in favour of the first defendant , however , the matter will proceed against the second defendant .The nub of what is before me is to determine who should pay the first defendant's costs. Is it the plaintiff or the second defendant or the plaintiff and the second defendant jointly and severally? the one paying and the other to be absolved.

2. When the action was commenced with in 2006, the plaintiff sued the first defendant only. The cause of action being that the plaintiff sustained injuries as a result of an activity which was not an educational activity as envisaged in section 60 (1) of the South African School's Act 84 of 1996 ("The Act") .At a later stage the plaintiff amended the particulars of claim wherein the second defendant was joined .The plaintiff pleaded in the alternative that in the event it is found that the incident which led to the plaintiff sustaining injuries did in deed take place as a result of an activity which was an educational activity , the second defendant is liable for the damages in terms of the provisions of section 60 (3) of the Act .

3. The second defendant denied liability on the basis that the activity that led to the plaintiff's injuries was not an educational activity as envisaged in section 60 (1) of the Act ; alternatively that if it is found that the activity was an educational activity as envisaged in section 60 (1) and that the second defendant was liable to the plaintiff, the second defendant pleaded that the plaintiff was already ten years old and therefore *culpa capax* , she contributed to her injuries by continuing to play on the movable steel pavilion which was being moved notwithstanding warnings by a certain Mr Bulford and others to desist from doing so .

4. After the pre-trial was held and questions and answers were exchanged between the parties, the second defendant conceded that the incident that led to the plaintiff's injury was indeed an educational activity as envisaged in section 60 (1) of the Act .It became clear that the first defendant should be absolved .To me this concession does not necessarily mean that the second defendant admits liability .The plaintiff still has to prove liability of the second defendant. All it says is that in law the defendant is the party to be cited and prosecuted.

5. Section 60 (1) provides that : " The state is liable for any damages 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 provision of this section "

There can be no doubt that the plaintiff sued the wrong party in the first summons .Notwithstanding the fact that the first defendant brought it to the attention of the plaintiff that section 60 (1) is against the plaintiff's move , the plaintiff persisted , in the amended particulars of claim , to allege that the first defendant is liable and also allege that the incident occurred as a result of a non educational activity and that consequently the second defendant is not liable .It is only in the alternative that the plaintiff points at the second defendant .That is if it is found that the first defendant is not liable then and only then is the second defendant liable .

6. In my view, up to the stage when the plaintiff accepted that the first defendant should be absolved, the plaintiff must be held liable for the costs of the first defendant even if the second defendant resisted liability for all along until at a later stage. The lis was between the

plaintiff and both defendants but there was no lis between the first and second defendant. At no stage did the second defendant make common cause with the plaintiff to pin liability on the first defendant, therefore the second defendant cannot be associated with the success or otherwise of the first defendant. It is significant to note that it was not the second defendant's case that it was not liable and that the first defendant was in fact liable **(See Rabinowitz and another NNO vs Ned-Equality Insurance 1980 (3) SA (WLD) (See Body Corporation of Dumberton Oakes vs Faiga 1999 (1) SA 975 (SCA) of 981 E – F; also Parity Insurance Co Ltd vs Van Den Bergh 1966 (4) SA 463 (A) at 483 B-E)**

7. Rule 10(4) reads as follows: "In any action in which any causes of action or parties have been joined in accordance with this rule, the court at the conclusion of the trial shall give such judgment in favour of such of the parties as shall be entitled to relief or grant absolution from the instance , and shall make such order as to costs as shall to it seem to be just , provided that without limiting the discretion of the court in any way –

- (a) *any court may order that any plaintiff who is unsuccessful shall be liable to any other party , whether plaintiff or defendant , for any costs occasioned by his joining in the action as plaintiff ;*
- (b) *if the judgment is given in favour of any defendant or if any defendant is absolved from the instance , the court may order :*
- (i) the plaintiff to pay such defendant's costs , or*
 - (ii) the unsuccessful defendants to pay the costs to the successful defendant jointly and severally , the one paying the other to be absolved , and that if one of the unsuccessful defendants pays more than his pro rata share of the costs of the successful defendant , he shall be entitled to recover from the other unsuccessful defendants pro rata share of such excess, and the court may further order that , if the successful defendant is unable to recover the whole or any part of his costs from the unsuccessful defendants , he shall be entitled to recover from the plaintiff such part of his costs as he cannot recover from the unsuccessful defendants " .*

Subrule (b) (i) above is clear and unambiguous that the court may order the plaintiff to pay the absolved defendant's costs or the

unsuccessful defendant to pay the costs of the successful defendant jointly and severally .The question arises immediately whether or not the second defendant could be referred to as the unsuccessful party . I do not think that at this stage, the second defendant can be referred to as the unsuccessful party . I believe that the proceedings should be allowed to come to finality , only then , depending on the outcome , can there be a successful and unsuccessful party .

8. It is trite that where a question of costs arises, the court has a discretion to exercise , which discretion has to be exercised judicially. I find that there is no lis between the first and second defendant, however ,there is a lis between the plaintiff and the second defendant and that there was a lis between the plaintiff and the first defendant which has been resolved by absolution. The first defendant is the successful party and therefore the plaintiff must be ordered to pay the costs of the first defendant . The circumstances of this case do not justify that it is reasonable for the second defendant to bear the costs of the first defendant .**(See Orphanides and Others vs Straton and Others 1953 (1) SA (SR) 152)**

9. In the result the following order is made
- (a) Second defendant conceded that the damages caused to the plaintiff was as a result of an act or mission in connection with an educational activity , wherefore plaintiff's claim lies against the second defendant .
 - (b) Absolution from the instance is ordered in favour of the first defendant;
 - (c) Costs of the first defendant will be paid by the plaintiff
 - (d) Costs of the plaintiff and second defendant be reserved
 - (e) The remainder of the trial is postponed *sine die*

J B SHONGWE
DEPUTY JUDGE PRESIDENT
NORTH GAUTENG HIGH COURT

DATE OF HEARING : 28 /08/2009
DATE OF JUDGMENT :
PLAINTIFF'S ATTORNEYS : STEYN STRYDOM & VILJOEN INC
C/O B C BEHRENS
PLAINTIFF'S ADVOCATE :
1ST DEFENDANT'S ATT : SAVAGE JOOSTE & ADAMS
1ST DEFENDANT'S ADV :
2ND DEFENDANT'S ATT : THE STATE ATTORNEY
2ND DEFENDANT'S ADV :