IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 6366/13

In the matter between:

JEANNÉ VAN ZYL Plaintiff

and

DIE VAN KERVEL SKOOL Defendant

JUDGMENT DELIVERED: 10 SEPTEMBER 2013

FOURIE, J

INTRODUCTION:

[1] Defendant is a public school as contemplated in the South African Schools Act 84 of 1996 ("the Act"). On Saturday 21 February 2004, defendant hosted an inter-provincial athletics meeting at its school premises in George. Learners of the defendant, as well as learners from a number of visiting schools, participated in the meeting.

[2] Plaintiff, the mother of the head learner of defendant, attended the athletics meeting and rendered assistance at defendant's tuck-shop, where refreshments were sold to those attending the meeting. While working in the tuck-shop, a service hatch collapsed and struck Plaintiff on the neck. She sustained injuries and in due course instituted action against defendant for damages allegedly suffered as a consequence of the injuries.

[3] Defendant opposes the action and has raised two special pleas, relying on:

(a) Section 60(1) of the Act, pleading that plaintiff incorrectly sued the school rather than the provincial Member of the Executive Council ("the MEC").

(b) Section 60(5) of the Act, read with Section 60(4), pleading that if the first special plea fails, plaintiff is non-suited for not giving notice of her claim to the head of the relevant provincial education department.

[4] It was ordered in terms of Rule 33(4), that the special pleas be heard first, with the remainder of the issues to stand over for later determination, if necessary. During argument, defendant disavowed reliance on the second special plea, with the result that only the first special plea, that plaintiff incorrectly sued defendant rather than the MEC, requires adjudication. Defendant accepted that it bears the onus to prove this defence.

[5] At the hearing defendant called Mr T ELLIS, the principal of defendant, as a witness, while plaintiff's son, Mr D T VAN ZYL, testified on her behalf. There is not much in dispute between the parties and, as will become clear in due course, the matter rather turns on the adjudication of crisp legal issues.

RELEVANT LEGISLATION

[6] At the time of the incident on 21 February 2004, Section 60(1) of the Act read as follows:

> *"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."*

[7] Section 60(3) of the Act read, and still reads, as follows:

> *"Any claim for damage or loss contemplated in sub-section (1) must be instituted against the Member of the Executive Council concerned."*

[8] In terms of Act 31 of 2007, section 60(1) was, with effect from 31 December 2007, amended to read as follows:

> *"60(1)(a) Subject to paragraph (b), the State is liable for any 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.*

60(1)(b) where a public school has taken out insurance and the school activity is an eventuality covered by the insurance policy, the liability of the State is limited to the extent that the damage or loss has not been compensated in terms of the policy."

[9] With effect from 19 September 2011, section 60(1)(a) was amended by Act 15 of 2011, to extend liability by including contractual claims against public schools.

[10] Section 60(1) of the Act, as it read prior to 31 December 2007, did not define the term *"any educational activity"*. As appears from the above, the term *"any educational activity"* was substituted, with effect from 31 December 2007, by the term *"any school activity"*. In Act 31 of 2007, *"school activity"* is defined as meaning any official educational, cultural, recreational or social activity of the school within or outside the school premises.

DISCUSSION

[11] From the above it follows that, with regard to the remaining special plea, defendant has the onus of proving that plaintiff's injuries were caused as a result of any act or omission in connection with any educational activity conducted by defendant. Defendant correctly points out that Section 60(1) does not require proof that plaintiff's injuries were caused as a result of any educational activity, but that proof that the

injuries were the result of any act or omission in connection with any educational activity conducted by defendant, would suffice. (my emphasis).

[12] In the further particulars for trial furnished by defendant, it is alleged that the educational activity on which defendant relies is the following:

"the defendant hosted an annual interprovincial athletics meeting of so-called 'special schools' in which the learners also participated as athletes, as assistants to the meeting officials and as spectators"

[13] It was accordingly submitted on behalf of defendant, that the running of the tuck-shop and the resultant opening and use of the service hatch in the process, constituted acts or omissions in connection with an educational activity, i.e. the athletics meeting. Counsel for defendant submitted that, in any event, the evidence also shows that the running of the tuck-shop, in itself, constituted an educational activity within the meaning of section 60(1) of the Act, and therefore the opening and use of the service hatch of the tuck-shop was an act or omission in connection with the use and running of the tuck-shop as an educational activity.

[14] I should add that there was some debate as to whether defendant is entitled to extend the reach of its special defence beyond the further particulars furnished by it, but I am satisfied that it is not precluded from doing so. It should be borne in mind that further particulars for trial are not pleadings. (See **Ruslyn Mining and Plant Hire (Pty) Ltd v Alexkor Ltd** (917/10) [2011] ZASCA 218). A party may therefore present

evidence which is not covered by the further particulars furnished by it, subject to the court granting relief for any prejudice caused to the other party.

[15] Broadly speaking, the submission on behalf of plaintiff is that, neither the running of the tuck-shop in itself, nor the athletics meeting, constituted an educational activity within the meaning of section 60(1) of the Act. It was submitted that the mere operation of a tuck-shop on a school's property, does not necessarily imply that it is operated for educational purposes. Whether it is or not, is a question of fact. Furthermore, it was submitted that an athletics meeting of this nature is inherently recreational and social, not educational.

[16] It is trite law that, in the construction of a statutory provision such as section 60(1) of the Act, the primary rule is to ascertain the intention of the legislature by, firstly, 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. 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, in order to give effect to the object or purpose of the legislation in question. This is referred to as a purposive construction. See **Bastian Financial Services (Pty) Ltd v General Hendrick Schoeman Primary School** 2008(5) SA 1 (SCA) at 8-9; **Manyasha v Minister of Law & Order** 1999(2) SA 179 (SCA) at 185 B-C; **Public Carriers Association & Others v Tollroad Concessionaries (Pty) Ltd & Others** 1990(1) SA 290 (A); **Standard Bank Investment Corporation Ltd v Competition Commission & Others; Liberty Life**

Association of Africa Ltd v Competition Commission & Others, 2000(2) SA 797 (SCA) at para 16.

[17] If regard is had to the dictionary meaning of the words *"educational activity,"* it appears that the ordinary grammatical meaning thereof conveys an activity which aims to impart knowledge or skill to another person. The Thesaurus of the English Language, defines *"educational acitivities"* as the activities of educating or instructing; activities that impart knowledge or skill. The Collins English Dictionary defines the noun *"education"* as the act or process of imparting knowledge especially at school, college or university. The Encyclopedia Brittania defines the noun as the discipline which is concerned with methods of teaching or learning in schools or school-like environments.

[18] The Oxford Concise Dictionary defines "*education*" as the process of educating or being educated; the theory and practice of teaching. The Shorter Oxford English Dictionary describes "*education*", inter alia, as the systematic instruction, schooling or training given to the young in preparation for the work of life and, hence, "*educational*" as due to or pertaining to or concerned with education.

[19] Turning to the object or purpose of section 60 of the Act, same has been considered by Malan AJA (as he then was) in writing for the majority in **MEC for Education, Western Cape Province v Strauss** 2008(2) SA 366 (SCA). The learned acting judge of appeal said the following at 369 D-E:

"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 any 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."

[20] With regard to the construction of this statutory provision, counsel for defendant has placed reliance on the minority judgment of Hurt AJA (as he then was) in the **Bastian Financial Services-** case, as well as the decision in **Marist Brothers v PE Municipality** 1948(4) SA 698 (A) at 702. In the first mentioned case, Hurt AJA stated that, *"in the light of these considerations, it seems to me that the purpose behind section 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."* It should, however, be borne in mind that, not only is this a dissenting minority judgment, but also that the statement was made in the context of a case in which the issue was whether or not section 60 of the Act applies in circumstances where a third party has suffered damages as a consequence of a public school's breach of contract. In my view, the statement is not of much assistance in determining the issues in the instant case.

[21] I am further of the view that the decision in Marist Brothers, also does not find direct application in the present case. In Marist Brothers the court considered the *"purpose"* of a school, namely to improve the scholars in mind and body. However, in the present matter the court is not called upon to determine what the purpose of the

school is, but to interpret the phrase *"any educational activity"*. As I have mentioned, the Supreme Court of Appeal has interpreted this phrase, with which interpretation I am in respectful agreement. I believe that, what is important with regard to the construction placed upon section 60 by the Supreme Court of Appeal in the Strauss-case, is that the section, although wide in scope, has a limited purpose. It is wide in scope, as it includes any act or omission giving rise to liability for damage or loss caused to a third party. However, the purpose of the section is limited in that it only exempts the public school in circumstances where the damage or loss is caused as a result of such act or omission in connection with <u>any educational activity</u> (my emphasis).

[22] In essence, the crisp question to be answered is whether the athletics meeting and/or the running of the tuck-shop, in itself, constituted an educational activity within the meaning of section 60(1) of the Act. The submission on behalf of defendant is that the athletics meeting, being an activity which improves the participating learners in mind and body, constitutes an educational activity. I do not agree. In my view, such a construction would be too wide and it fails to take proper account of the limited purpose of section 60(1), as held by the majority of the Supreme Court of Appeal in the Strauss-judgment. Although participation in an athletics meeting would probably improve the participants in mind and body, this does not mean that it constitutes an educational activity. The purpose of an athletics meeting of this nature would not appear to be the imparting of knowledge and skills to the participants.

[23] I rather agree with the submission on behalf of plaintiff, that an athletics meeting is inherently recreational and social, not educational. In this regard it is important to bear in mind that there is no evidence of any activity at the athletics meeting which aimed to impart knowledge or skill to the participants. On the contrary, it was an athletics meeting for the purpose of affording the learners the opportunity to compete against learners from other schools, thereby putting their skills to the test. The present is also not a case where, as in the Strauss-case, the plaintiff was injured while she was engaged in training learners at the school to throw the discus.

[24] I believe that my aforesaid view is underscored by the 2007 amendment to the Act. In that amendment, the legislature substituted *"educational activity"* with *"school activity"* and introduced the corresponding definition of *"school activity,"* as meaning *"any official educational, cultural, recreational or social activity of the school within or outside the school premises"*.

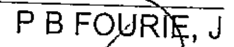
[25] I agree with the submission on behalf of plaintiff, that, in so expressly broadening the ambit of section 60(1), the legislature expressly incorporated the previous pre-2007 reference to *"educational activity"* as part of the new, broader post-2007 reference to *"school activity"*. The legislature also included cultural, recreational and social activity in the definition of *"school activity"*. In so doing, the reasonable conclusion to be drawn is that the legislature did not consider an educational activity to include recreational or social activities, and accordingly amended it in this manner in 2007 to include such activities.

[26] I now turn to deal with the submission on behalf of defendant, that the running of the tuck-shop, in itself, constituted an educational activity within the meaning of section 60(1) of the Act. Having regard to my findings above, as to the interpretation of section 60(1), I fail to see how the running of the tuck-shop, in itself, would constitute an educational activity as envisaged in the Act. There is no evidence to show that the tuck-shop was run with the aim to impart knowledge or skills to any person. Also, the evidence shows that the tuck-shop was opened on that day for the purpose of earning funds for the defendant's final year-learners' farewell dance.

[27] It was suggested on behalf of defendant that this farewell dance constituted an educational activity, but I fail to see how a social event of this nature, can be described as educational activity in terms of section 60(1) of the Act. It is clearly not an activity which, by means of instruction or teaching, aims to impart knowledge or skill to the learners. It is obviously a recreational social event. Also, the ledger account produced by defendant, which reflects the proceeds of the sales of the tuck-shop, shows that all payments made from this account were for recreational or social purposes.

[28] For these reasons, I find that the running of the tuck-shop and the opening and use of the service hatch in the process, did not constitute an act or omission in connection with any educational activity, nor did the running of the tuck-shop in itself, constitute an educational activity, as envisaged in section 60(1) of the Act. It follows that the remaining special plea has to fail.

[29] In the result the two special pleas raised by defendant are dismissed with costs.



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