St Helena Primary School and Another v MEC: Department of Education, Free State Province and Another (891/2004) [2005] ZAFSHC 10; [2005] JOL 15846 (O) (15 September 2005)

IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 891/2004

In the matter between:

ST HELENA PRIMARY SCHOOL 1st Plaintiff

THE GOVERNING BODY OF 2nd Plaintiff

ST HELENA PRIMARY SCHOOL

and

THE MEC : DEPARTMENT OF EDUCATION, 1st Defendant

FREE STATE PROVINCE

THE PREMIER OF THE FREE STATE 2nd Defendant

PROVINCE

HEARD ON: 17 AUGUST 2005

JUDGMENT BY: H.M. MUSI J

DELIVERED ON: 15 SEPTEMBER 2005

[1] The first and the second plaintiffs are respectively a public school and its governing body. In terms of section 9(1) of the Free State Education Act 2 of 2000 (the Act) every public school is a juristic person "with legal capacity to perform its functions in terms of this Act". Although a public school has capacity to perform its functions as aforesaid, its governance is vested in its governing body in terms of section 37(1) of the Act. Now, the Act does not confer on the governing body the status of a juristic person, but states in section 37(2) that it stands in a position of trust towards the school. However, section 41(1)(b) empowers a governing

body to adopt a constitution. This means that a governing body can clothe itself with the status of a juristic person by its own constitution. So that the answer to the question of whether the second plaintiff has the legal capacity to sue or be sued in its own name, would have to be answered with reference to its constitution. There can be no doubt though that the Act contemplates that a governing body will clothe itself with such capacity, in order to be able to properly fulfil its statutory functions. In the hearing of this matter it was assumed that the second applicant is also a juristic person.

[2] The second defendant has been joined purely as the head of the Free State Provincial Government. The first respondent is the real defendant in that he is the member of the Provincial Government who is responsible for all educational matters in the province. In terms of section 10(1) of the Act, he must establish and maintain public schools in the province. He may reclassify existing categories or phases of public schools or register new categories (section 10(3)). He may, subject to certain conditions, restrict the right of public schools to occupy the State buildings that house them. He may close public schools or relocate them. He oversees the establishment of governing bodies and his head of department may replace those of their members

who are unable to perform their functions. In short, the second defendant, in tandem with his head of department, has ultimate responsibility for the running of public schools in the province, including control of the buildings that house them.

[3] I shall, for the sake of convenience, henceforth refer to the plaintiffs collectively as the school and to the defendants collectively as the department.

[4] On the first of the three days set aside for the hearing of this matter, the parties indicated that they would proceed in terms of rule 33 of the Rules of this Court. This meant that no *viva voce* evidence would be heard and the parties submitted a written statement of agreed facts (the stated case). The issues in dispute were thereby set out and the parties identified the legal issues that this Court was called upon to decide, having heard arguments advanced on behalf of the parties.

[5] In summary, the school occupies premises at Union Avenue, St Helena, Welkom. The buildings and the land on which they are situate, belong to the Free State Provincial Government (the department). The school

does not occupy the premises in terms of any lease and is therefore not a lessee. Nor does it pay any rent. It however, occupies the premises with the full permission of the owner, the department.

[6] On 14 February 2002 a fire broke out in the school premises and partly damaged the buildings thereof. The costs of repairing the damaged portion amounted to R122 342,52. The school had a valid short term insurance policy with Mutual and Federal Insurance Company Ltd (the insurer), covering *inter alia* damage to the buildings. A claim was duly lodged with the insurer and an amount of R82 010,22 was paid in settlement of the school's claim in respect of damage to the buildings. The school utilised funds from other sources to make up the short fall of R40 332,30 and had the damage repaired.

[7] In repairing the damage, the school did not take any money from its banking account. In other words, it did not take out money from its budget. The money came exclusively from outside the school's coffers. Nor did it demand any compensation from the owner of the buildings, the department. The demand for compensation comes from the school's insurer, so that the instant action has been instituted at the instance of

the insurer. The insurer relies on the doctrine of subrogation in terms of which it can institute action in the name of its insured to enforce a claim that the insured had against a third party for compensation for the full amount of the damages suffered by the insured and for which the third party could be held liable.

[8] *In casu*, the insurer avers that the department, as owner of the damaged buildings, was obliged to repair the damage; that in itself repairing the damage, the school was impoverished to the extent of the repair costs of R122 342,52 whereas the department was enriched by such amount, in the sense that it was saved that same amount which was needed to restore the buildings to the condition in which they were prior to the fire.

[9] This is a claim based on unjustified enrichment. It is a novel claim for which no precedent could be cited. The defendants dispute that an action for unjustified enrichment lies in the instant situation; that even if such cause of action is available to the plaintiffs, the requirements thereof have not been established. The plaintiffs also sought to impute, in the alternative, liability to the department on the basis that the school acted as a *negotiorum gestor*. This latter cause of action was, however,

abandoned and not pursued in argument. The sole question for decision is ultimately whether a claim based on unjustified enrichment can be sustained in the circumstances of this case. The parties put it like this in the stated case:

> "3. The Court is requested to adjudicate the following question of law:
>
> 3.1 Whether or not plaintiffs are entitled to judgment against defendants for the amount claimed in the particulars of claim and based on the cause of action pleaded therein."

[10] There was some debate at the hearing as to whether the doctrine of subrogation is applicable in respect of an enrichment claim. The gist of the doctrine was stated as follows by Farlam AJA (as he then was) in **COMMERCIAL UNION INSURANCE COMPANY OF SOUTH AFRICA LTD v LOTTER** 1999 (1) ALL SA 235 (A) at page 240 e – f:

> "It is trite law that an insurer under a contract of indemnity insurance who has satisfied the claim of the insured is entitled to be placed in the insured's position in respect of all rights and remedies against other parties which are vested in the insured in relation to the subject matter of

the insurance. This is by virtue of the doctrine of subrogation which is part of our common law."

The debate arises from the fact that though the school and its governing body are cited as plaintiffs, this action has in fact been instituted at the instance of the insurer on the basis of subrogation. It was contended on behalf of the department that subrogation is confined to claims arising *ex contractu* and *ex delicto* where an insured has suffered loss as a result of the fault of a third party (the wrongdoer). Mr. Claasen, for the defendants, cited a number of cases illustrating the operation of this doctrine and pointed out that in all the cases the target of the insurer's claim for compensation was a wrongdoer. He submitted that the doctrine cannot apply in a case like the present where no-one could be held liable for the fire and the resultant damage.

[11] Mr. Daffue, for the plaintiffs, argued, on the other hand, that the fact that there is no wrongdoer in the instant case cannot be a bar to the operation of subrogation and that the principle is that as long as the insured had a valid claim against the third party, the insurer should be able to recover compensation from such third party.

[12] In the view that I take of the matter, it is unnecessary to decide on this dispute. I shall assume, without deciding it, that the insurer could proceed on the basis of subrogation even in a claim based on undue enrichment. The crux of the matter is whether the school as the insured can succeed in its claim based on unjustified enrichment in the circumstances of this case.

[13] It is trite that our law does not recognise a general enrichment liability. Instead our law recognises specific instances in which an enrichment action would lie, so that a plaintiff wanting to sue for enrichment would have to identify a particular head under which his or her relief can be granted. The so-called *condictiones* of Roman law have been passed on to our legal system and comprise most of the recognised instances where action for unjustified enrichment lies. For a discussion of the various *condictiones,* see **LAWSA** Vol. 9 second issue at par. 209 – 221.

[14] There are, however, other instances where enrichment actions would lie apart from the *condictiones.* One such instance is the case of a *bona fide* possessor or occupier who has made necessary or useful

improvements to the property of another, in relation to which no agreement exists. Such possessor is entitled not only to retain possession of the improvements until compensated (*ius retentionis*), but can also sue for compensation. See **McCARTHY RETAIL LTD v SHORTDISTANCE CARRIERS CC** 2001(3) SA 482 (SCA) at 489 G – H.

[15] Although there is no general enrichment liability in our law, there are nonetheless basic requirements that must be met for relief to be granted under any of the recognised actions. These requirements are fully set out in **LAWSA** *op cit* at par. 209. See also **KUDU GRANITE OPERATIONS (PTY) LTD v CATERNA LTD** 2003 (5) SA 193 (SCA) at paragraph 17; **McCARTHY RETAIL LTD v SHORTDISTANCE CARRIERS CC** *supra* at 490D par. 15. They are the following:

1. the defendant must have been enriched;
2. the plaintiff must have been impoverished;
3. the enrichment of the defendant must be at the expense of the plaintiff;
4. the enrichment must be unjustified (*sine causa*).

[16] It will be noted in this regard that the plaintiffs *in casu* have not identified any specific heading under which they are suing. Nor did Mr. Daffue do so in his heads of argument or oral argument. Counsel simply listed the above requirements and went on to indicate on which basis would each have been fulfilled with reference to the agreed facts of this case. Counsel seems to conflate what could be regarded as the general principles of enrichment liability with the specific requirements set out above. No wonder Mr. Claasen criticised the manner in which the cause of action has been formulated. Indeed one gets the impression that the plaintiffs aver a general enrichment liability and Mr. Daffue referred to the *obiter dictum* of Schutz JA in **McCARTHY** *supra* where the learned Judge of Appeal argues for the recognition of such general enrichment liability, as if the *dictum* represents the current legal position.

[17] Turning to the facts of the instant case, it is common cause that the school buildings belong to the State as represented by the department. It is common cause that the school effected the improvements to the buildings in the form of repairs to the damage caused by the fire. There can be no doubt that the repairs were necessary in order to restore the buildings to their pre-fire condition. This is clearly a typical case of necessary improvements. It is a case of someone who has effected

necessary improvements to the property of another, which is one of the recognised instances where an enrichment claim lies.

[18] It is necessary, however, to determine the status of the school's presence on the property for whether it has a remedy or not will depend on whether it is a possessor or occupier and then whether it is a *bona fide* or *mala fide* possessor or *bona fide* or *mala fide* occupier. Then there is the position of a lawful occupier. These figures are defined in **LAWSA** *op cit* at par. 227 footnote 3, as set out hereunder.

[19 Now a *bona fide* possessor is one who controls the property of another *animo domini* under the honest but mistaken belief that he or she is the owner. A *bona fide* occupier,on the other hand, occupies property not *animo domini* but in the belief that he or she is entitled to occupy whereas he or she is not so entitled. Clearly the school cannot be either of the two. Certainly it is neither a *mala fide* possessor nor *mala fide* occupier since there is no dishonesty about its presence on the premises.

[20] In my view, the school answers to the definition of a lawful occupier. A lawful occupier does not have the *animus domini* but is entitled to

occupation in that he or she has the permission of the owner. A lawful occupier does have an enrichment action for the recovery of the necessary and useful improvements that he or she has effected to the property of another. See **LAWSA** *op cit* at par. 237. In the **McCARTHY** case *supra* the action of the appellant, a garage that had effected repairs to the respondent's motor vehicle, was decided on the basis that the garage was a lawful occupier as it had been placed in possession by the owner.

[21] It follows that the school does have an enrichment action against the department. The cardinal question though is whether the general requirements of an enrichment action as set out above have been established and I now proceed to deal with each requirement.

[22] Firstly, has the defendant been enriched? I do not think that there can be debate about this. The buildings were damaged and it is not disputed that the costs of repairing the damage amounted to R122 342,52. This was a necessary expenditure and the owner has been spared that much. Besides, it has been held that once it is proved that money has been expended or goods delivered a presumption arises that the

recipient has been enriched and the onus then shifts onto such recipient to prove that it has not been enriched. See **KUDU GRANITE** *supra* at page 203H paragraph 21. It has been shown in this case that the plaintiff expended money on repairs and the defendant has not rebutted the presumption of enrichment.

[23] Has the plaintiff been impoverished? There was much debate about this during the hearing and the applicability of the maxim "*res inter alios acta*" was raised in this regard. This arose from the fact that the school repaired the damage out of the proceeds of an insurance policy it had with its insurer and not from its own coffers. The import of this rule, also called the collateral source rule, was stated as follows by Trollip JA in **SANTAM VERSEKERINGSMAATSKAPPY BEPERK v BEYLEVELDT** 1973 (2) SA 146 (AD) at 168F:

> ‘‘The cross-appeal raises an interesting issue relating to the ‘collateral source rule’, i.e., the rule that generally any compensation for bodily injuries that the injured party receives from a collateral source, wholly independent of the wrongdoer or his insurer, does not operate to reduce the damages recoverable by him.”

[24] It was contended on behalf of the defendants that the maxim has no application in the instant case since in an enrichment action it must be shown that the plaintiffs' estate has been diminished to the extent of the amount expended on the improvements. Mr. Claasen argued that since the school did not take out money from its coffers, but instead used the proceeds of the insurance policy, it has not been impoverished. I am prepared to accept the counter argument by Mr. Daffue that once the insurance payout was made, it became the school's money and therefore an asset in its estate. In that context, the source of the funds with which it repaired the damage, is irrelevant. In other words, the collateral source rule applies.

[25] Was the defendants' enrichment at the expense of the plaintiffs? We are not here dealing with the so-called indirect enrichment or multiple parties as was the case in cases like **BROOKLYN HOUSE FURNISHERS (PTY) LTD v KNOETZE & SONS** 1970 (3) SA 264 (A); **BUZZARD ELECTRICAL (PTY) LTD v 158 JAN SMUTS AVENUE INVESTMENTS (PTY) LTD EN 'N ANDER** 1996 (4) SA 19 (A). Here there was a causal link between the enrichment and the impoverishment.

[26] There are, however, other considerations that impact on this requirement and the nature of the relationship between the school and the department is of paramount importance. It will be noted that the school buildings are public facilities that are held in ownership by the State (the department) strictly for the benefit of the public. The public school is one such member of the public for whose benefit the buildings are meant. Hence it pays no rent. The department derives no real benefit from its nominal ownership. The real beneficiary is the school and as long as it complies with the applicable law and regulations it can have exclusive occupation, control and enjoyment of such premises almost in perpetuity. This much is clear from the provisions of section 11(1) of the Act. Section 11(2) even protects the school's right of occupation against any successor in title of the department. It has a direct interest in the maintenance and preservation of the school premises and is the primary beneficiary of any improvements thereon. So that whereas it has been impoverished by the amount expended on the repairs, that is offset by the fact that the improvement is to its benefit, rather than to its disadvantage. In that context, the enrichment is not at its expense.

[27] The final and vexed question is whether the enrichment is unjustified or *sine causa*. The import of this requirement is that there must be a legal

cause or justification for the transfer of the value from the estate of the plaintiff to that of the defendant. This would normally entail a *quid quo pro* of some sort for the transfer of value or retention thereof. If there is none, then the enrichment is said to be unjustified. See **McCARTHY** *supra* at 496 paragraph 4; **PRETORIUS v COMMERCIAL UNION VERSEKERINGSMAATSKAPPY VAN SUID-AFRIKA BPK** 1995 (3) SA 778 (O) at 782 B – E.

[28] In the same breath it should be noted that enrichment actions are based on principles of equity and fairness, the ultimate question being whether in the particular circumstances of the case, it will be fair or not that the defendant should retain the value. Compare **VON WULDFLING-EYBERS AND ANOTHER v SOUNDPROPS 2587 INVESTMENTS CC** 1994 (4) SA 640 (CPD) at 644i; **KUDU GRANITE** *supra* at 201F; **BUZZARD ELECTRICAL (PTY) LTD v 158 JAN SMUTS AVENUE INVESTMENTS** *supra* at 28i – 29G.

[29] Take the example given in the latter case at page 29. An owner had always wanted to erect an additional bedroom in his house but had no funds to do that. A friend of his, B, offers to erect such bedroom as a

donation and the owner happily accepts that. Instead B engages a sub-contractor, A, to do the job for R100 000,00. However, B fails to pay A the agreed amount due to B's subsequent insolvency. The value of the owner's property has been increased by R100 000,00 due to A's efforts. It was concluded that it would not be fair to expect the owner to pay for such improvements.

[30] Turning to the facts of the instant case, it will be noted that the school was obliged in terms of the provisions of the Act to maintain the buildings and, as stated above, it had a direct interest in the maintenance and preservation thereof. In line thereof the school took out an insurance policy covering *inter alia* the sort of damage in question. The school had been given permission in terms of the Act to raise funds to augment the funds that it received from the department and it did levy school fees from which it paid the monthly premiums on the relevant policy. The department had access to the school's budget which it approved and from this it can be accepted that the department came to know that the premises were properly insured. Implicit in this must have been a common understanding between the parties that any resultant damage would be paid out of the proceeds of the insurance policy. And for that reason the department could not have itself taken out additional

insurance covering the same subject matter. It may be noted also that the insurance policy covered some R6 million.

[31] In my view, that constituted, as between the school and the department, sufficient cause for the enrichment. At any rate, by assuming responsibility for the maintenance and preservation of the buildings and properly insuring them with the full knowledge and approval of the department, a reasonable expectation was created that the department would not be held liable for the repair costs. That this is so, is confirmed by the fact that the school neither demanded that the department pays for the repairs nor that it be refunded the amount expended thereon. The school was not even aware that its insurer had instituted the instant action.

[32] Mr. Daffue also contended that the funds that the school had been permitted to raise to augment the funds provided by the department, were meant to be used exclusively for educational purposes and could not be applied to maintenance costs. He also sought to distinguish between maintenance and repairs to the buildings and contended that the school's responsibility was limited to the ordinary upkeep of the

premises as opposed to repairing damage. He cited **COMMERCIAL UNION ASSURANCE v GOLDEN ERA PRINTERS & STATIONERS** 1998 (2) SA 718 (BPD) especially the passages at 724.

[33] It should be noted that the question under discussion in the part of the judgment referred to above, was whether the lessee could in terms of a clause in the lease be obliged to repair and restore to its previous condition a portion of the building that had been destroyed by fire in circumstances where the lessor had insured the buildings and had been paid compensation for such destroyed portion. Waddington J stated the following at page 724 C:

> ‘‘It is not possible given the ordinary meaning of words to repair or maintain something which no longer exists. The agreement of lease nowhere casts a duty on the lessee to replace, at any stage, a building destroyed by fire whether caused accidentally or through negligence.” (My own underlining)

It is significant that the learned Judge uses the words “repair or maintain”. *In casu* we are dealing with repairs which had in fact been effected as part of the maintenance obligations of the school. Besides,

there is no agreement obliging the department to insure the premises in the instant case. And if the school had no obligation to repair the damage to the building, why would it have taken out the relevant insurance cover?

[34] I come to the conclusion that the enrichment was neither at the expense of the plaintiffs nor was it unjustified and the plaintiffs had no valid claim against the defendants. In the circumstances, subrogation could not take place.

[35] The action is dismissed with costs, which shall include the costs consequent upon the employment by defendants of two counsel.

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H.M. MUSI, J

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