CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 22/09
[2009] ZACC 12

LAERSKOOL GENERAAL HENDRIK SCHOEMAN — Applicant

versus

BASTIAN FINANCIAL SERVICES (PTY) LTD — Respondent

Decided on : 7 May 2009

JUDGMENT

THE COURT:

[1] Laerskool Generaal Hendrik Schoeman (the school) is a public school in Schoemansville, Hartebeespoort, North West Province. It applies for leave to appeal against a decision of the Supreme Court of Appeal (SCA), holding it liable to the respondent company for money outstanding under a lease agreement for a photocopier. The SCA (per Van Heerden JA, with whom Harms ADP, Streicher JA and Heher JA concurred) held that section 60(1) of the South African Schools Act 84 of 1996 (the Act)[1] did not shift to the state liability for contracts properly entered into

[1] At the time material to these proceedings, and before amendment by the Education Laws Amendment Act 31 of 2007, which came into effect on 31 December 2007, section 60(1) of the Act provided:

> "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."

by a public school.[2] This judgment, dismissing the school's special plea, reversed the decision of the magistrate's court in Brits and the North Gauteng High Court (which had exonerated the school from contractual liability) and overruled a previous decision, to the same effect, by the Eastern Cape High Court in Port Elizabeth in 2005.[3]

[2] Since, in addition to the High Court decisions that were disapproved, one of the judges in the SCA (Hurt AJA) dissented from the conclusion the school seeks to challenge, the question of law the school seeks to pursue is clearly arguable.

[3] The parties' dispute furthermore raises a constitutional issue, namely, the contractual liability under the Act of governing bodies at public schools which are part of the state apparatus designed to secure the provision of the right to education under the Bill of Rights.[4]

[4] Before we grant leave to appeal, however, we must be satisfied that the school has brought its application properly and timeously. This it has not done. The application must be refused because the school has failed to satisfactorily explain its delay in bringing it. The chronology of the steps the school took to bring the matter

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[2] *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* [2008] ZASCA 70; 2008 (5) SA 1 (SCA) at para 22.

[3] *Technofin Leasing & Finance (Pty) Ltd v Framesby High School* 2005 (6) SA 87 (SECLD).

[4] Section 29(1) of the Constitution provides:

> "Everyone has the right—
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> (a) to a basic education, including adult basic education; and
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

before this Court reveals many unexplained delays which disentitle the school from pursuing its appeal.

[5] The SCA delivered its judgment on Friday 30 May 2008. The 15-day period specified in Rule 19(2) of the Rules of this Court, within which the school should have lodged its application, elapsed on Monday 23 June 2008. The school says its attorney wrote to it only on 4 July to inform it of the SCA outcome. It ascribes this delay to an oversight in the corresponding attorneys' offices in Bloemfontein, though it fails to attach any affidavit from those attorneys. In any event, the school's attorney on 9 July 2008 directed a follow-up inquiry to the school. The school says these two letters came to its attention only on 14 July 2008 because of the mid-year school vacation.

[6] The school does not claim that its attorney was unaware or failed to inform it of the time limits applicable to bringing an appeal before this Court. That is hardly conceivable. The suggestive inference is that despite knowing from the outset of those time limits the school's response to the SCA judgment suffered signally from inaction and indecision.

[7] Indeed, another eight days passed before the school consulted its attorney and counsel about the SCA judgment. Ten days later, the school says, on 1 August 2008, a conference of school governing bodies took place, where the effect of the SCA judgment was discussed. After the conference, the school's attorney tried on 5 August

2008 to schedule a consultation with the chief executive of FEDSAS, a national organisation of school governing bodies. Yet it was only four weeks later – on 2 September 2008 – that the school obtained a legal opinion on the merits of a possible appeal to this Court.

[8] A further week later, on 9 September, the school's attorney made enquiries to determine whether the governing body had taken any decision regarding an appeal. The position was, the school says, that the governing body was still considering the matter, but that one Mr Johan Van Wyk (whose position and authority appear nowhere from the application) indicated to the attorney in theory ("in konsep") that it was "strongly considering" an appeal.

[9] On 16 September 2008 the school's governing body was scheduled to meet. The school says that the governing body recommended that a "final decision" should be taken at this meeting. However, the school's account fails to state whether any decision was taken at the meeting, or indeed whether the matter was discussed at all. Its account jumps to 5 October 2008, 21 days later, when it says a "follow-up meeting" of the governing body took place. Only then did the school decide to apply for leave to appeal to this Court.

[10] In the meanwhile, the respondent had, quite understandably, taken a default judgment against the school, which the school managed to have rescinded only on 27 February 2009.

[11] The school must obtain condonation for the nine-month delay between 23 June 2008, when its application was due, and 23 March 2009, when it was lodged. It is plain that it must establish that the extent of its default is pardonable in the light of its prospects of success on the merits of the appeal, combined with the strength of its explanation for its default in order for condonation to be granted.

[12] In considering whether the school has established good grounds for condonation, we overlook the delay between 30 May 2008, when the SCA handed down judgment, and 14 July 2008, when the school says it learnt of that decision. We also leave out of account the delay between the meeting on 5 October 2008, when the school decided to appeal, and 27 February 2009, when the default judgment was eventually rescinded.

[13] We focus instead on the school's failure to take significant action of any nature between 14 July and 5 October 2008, and the time that elapsed after the default judgment was rescinded. That is a period of more than fourteen weeks, or over three months. The school advances no acceptable explanation at all for these delays. All we know is that the mid-year school vacation was in July, and that the FEDSAS conference in August discussed the matter.

[14] We do not consider that either of these factors explains or mitigates the delay. In our view, the lack of action invites the inference that the school may have been

ambivalent about appealing, and even that its appeal may have become perempted. But it is not necessary for us to decide the matter on the basis of peremption, since in our view condonation cannot be granted because of the failure to explain the fourteen weeks of seeming indecision and inaction.

[15] As this Court pointed out in *Van Wyk v Unitas Hospital*,[5] "[a]n applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable."[6] As in *Van Wyk* (though the delay we focus on here is shorter), we think that the attempt to explain the default "falls far short of these requirements."[7]

[16] The question underlying the condonation applications in both cases is whether an applicant with an arguable case may regard a further appeal to this Court as being there for the asking. The answer must of course be no. The manifest injustice to the opposing litigant cries out against any such conclusion. As was pointed out in *Van Wyk*: "There is an important principle involved here. An inordinate delay induces a reasonable belief that the order had become unassailable."[8]

[17] As in *Van Wyk*, the correspondence shows that the respondent entertained this belief, and in our view, as in *Van Wyk*, "it was reasonable for it to do so."[9] Even

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[5] *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC).

[6] Id at para 22.

[7] Id.

[8] Id at para 31.

[9] Id.

though the period of inaction and indecision is shorter than in *Van Wyk*, we think the opposing party here was entitled to conclude that the SCA order had become unassailable. That indeed explains why in September the opposing party moved for default judgment and obtained it (though the school later secured its rescission).

[18] In these circumstances we think the injustice to the respondent of permitting further appellate proceedings will be palpable.

[19] We appreciate that school governing bodies consist mainly of unremunerated members and that they may have heavy community and family responsibilities elsewhere. But we do not consider that in the absence of compelling explanation the inevitable difficulties of corporate decision-making in a lay body bearing public trust, with which we are inclined to sympathise, license the absence of decisive action over so long a period on so important a matter.

[20] As we indicated earlier, it is hardly conceivable that the importance of the SCA's adverse judgment and the consequences of inaction were not communicated to the governing body. The follow-up actions by the school's attorney on 9 July and 9 September 2008 compel the inference that they were.

[21] We think the governing body was duty-bound to decide promptly whether it wished to appeal. Yet even after obtaining legal advice on 2 September 2008, it failed to do so for another five weeks. And even after the default judgment was rescinded

on 27 February 2009, it lodged its application only on 23 March 2009. Indeed, it is not clear why the school chose to launch its application only after obtaining rescission. But the time lapse after that date alone falls outside the 15-day period within which the application should have been filed. And again it is entirely unexplained. It underscores the manifest unacceptability of the overall delay, the absence of explanation for it, and the injustice to the respondent if the school were now allowed to re-open proceedings.

[22] We point out in this regard that the parties have already been through an appellate process in the SCA. The SCA is the final court of appeal in non-constitutional matters. Parties who wish to undertake a further appeal to this Court on a constitutional issue must be mindful that it is undesirable to leave matters in abeyance, since after the period specified by the Rules of this Court has elapsed, the successful litigant in the SCA may reasonably infer that the SCA judgment has become final. To promote certainty and finality, litigants should therefore be astute to observe the 15-day period specified in Rule 19 for the launch of applications for leave to appeal to this Court. Parties who disregard that period without substantial reason, like the applicant, cannot expect the injustice of re-opened proceedings to be imposed on the opposing litigant.

[23] The school has thus not established that it would be justified or fair to grant it condonation. Our conclusion is based solely on its absence of explanation for its

default, and we leave aside entirely the merits of the interpretation of section 60(1) of the Act.

[24] Condonation is therefore refused and the application is dismissed.

Langa CJ, Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J.