IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 508/2012

Heard on: 16/09/2015

Delivered on 03/11/2015

In the matter between

CORPORATE FINANCE SOLUTIONS (PTY) LTD **Plaintiff**

And

LAERSKOOL HARTSWATER **Defendant**

JUDGMENT

PAKATI J

[1] The plaintiff, Corporate Finance Solutions (Pty) Ltd (CFS Ltd), sues the defendant, Laerskool Hartswater, a public school as contemplated in s 15 of the South African Schools Act, 84 of 1996, for outstanding rental payments of R39 824-42 (Claim A) and R660 543-14 (Claim B) plus interest at the prime rate of 9% plus 5% per annum from the date of summons to date of

final payment in respect of each claim. The claims arise from a written Master Rental Agreement ("the agreement") concluded between the parties on 13 October 2005 (Claim A) and 17 November 2004 (Claim B). Initially CFS Ltd also sought an order for the return of the equipment. It has now become common cause that the equipment was returned on or about July 2010. No viva voce evidence was led by either party.

BACKGROUND FACTS

[2] Corporate Finance Solutions purchased from Gestetner, Kimberley, the equipment as requisitioned by Laerskool Hartswater and at its special request, and rented it to Laerskool Hartswater. Consequently on 17 November 2004 the parties entered into a written agreement number 739315 (Claim B). In terms of this agreement CFS Ltd rented the following equipment to Laerskool Hartswater:

2.1 One Gestetner 9002 Digital Copier with serial number J040900005;

2.2 One Gestetner DSM745 Digital Copier with serial number K9463501205;

2.3 One Gestetner 6123CP Copy Printer with serial number F3140970181; and

2.4 One Gestetner DSM415 MFP with serial number K2149304281.

The rental period was sixty months. Laerskool Hartswater had to pay an initial amount of R9 200-00 plus VAT and thereafter 59 monthly premiums of R9 200-00, subject to an annual escalation at the rate of 15%.

[3] On 13 October 2005 CFS Ltd entered into another agreement number 785580 (Claim A) in terms of which it leased to Laerskool Hartswater a Sony Projector VPLC – with serial number 5000720 and an Acer Extenza

5220 Laptop with serial number 9882 each for a period of 36 months at the premium rate of R1200-00 plus VAT per month, subject to an annual escalation at the rate of 15%.

[4] Laerskool Hartswater was accused to have breached the agreement in that it started with monthly payments as agreed upon by the parties from the effective dates of 28 October 2008 and 17 November 2008, but stopped payments during November 2009. Despite demand it has failed to make good the payments.

[5] CFS Ltd based its claim on Clause 17 of the agreement which states:

*“**17 BREACH OF AGREEMENT***

17.1 Should the user:

17.1.1 Fail to make any payment due in terms of its obligations in terms of this agreement on due date thereof; or

17.1.2 Commit any other breach of its obligations in terms of this agreement (which breach shall be deemed to be a material breach); or

17.2 Should the User in terms of 17.1 breach any of the provisions of this agreement, the owner shall be entitled forthwith without prejudice to any other rights which it might have against the User -

17.2.1 To demand payment of the total outstanding balance of the rentals plus VAT for the entire minimum period plus the notice periods as referred to in paragraph 4.3 and any other amount payable by the User in terms hereof, whether due for payment or not, upon payment of which amount the User shall be entitled to the use, possession and enjoyment of the equipment until the expiry of the notice period; provided, however, that if the User fails to make immediate payment as provided herein the rights of the Owner shall not be exhausted and the Owner shall notwithstanding the election to claim immediate payment in terms of the sub-clause, be entitled to claim and recover the relief in 17.2.2, 17.2.3 and 17.2.4; or

17.2.2 To cancel this agreement; and

17.2.3 To take possession of the equipment; and

17.2.4 To recover from the User –

17.2.4.1 The total of all amounts which but for such cancellation would have been payable from the date of cancellation of the agreement until the date upon which this agreement would otherwise have terminated by effluxion of time, that is, the last day of the notice period;

17.3 The provision of paragraph 17.2 above shall not be construed as precluding the Owner from enforcing performance by the User under the terms and conditions of this agreement."

CFS Ltd therefore claims specific performance and not damages arising from the cancellation of the agreement. Laerskool Hartswater opposed the application.

[6] Laerskool Hartswater filed a plea on 13 July 2012. On 02 June 2014 this plea was amended. There is no need to go into detail in respect of this amendment because it does not have any effect on the outcome of the case. What is of particular importance is the second amendment filed on 14 September 2015 on an urgent basis for the postponement of the matter to 23 – 25 November 2015 in order to further amend its plea. The issues proposed to be dealt with raised in this plea were:

6.1 That CFS Ltd has the necessary *locus standi*;

6.2 The terms and conditions agreed upon by the parties as far as the schedules are concerned;

6.3 That Annexure "A1" is operative in respect of the schedule; and

6.4 That the equipment was indeed delivered to Laerskool Hartswater.

[7] It is at this stage that Laerskool Hartswater raised the following defences:

7.1 That CFS Ltd breached s 60(1) of the South African Schools Act, 84 of 1996 (“the Schools Act);

7.2 That CFS Ltd failed to mitigate its damages;

7.3 That the terms and conditions in Clause 2.1 read with Clauses 5.5 and 8.1.3 are contradictory in that Clause [2.1] states that CFS Ltd shall grant Laerskool Hartswater the use and enjoyment of the goods whereas Clause 5.5 states that Laerskool Hartswater shall not be entitled to withhold any payments or deduct any amount from the rental payable in terms of the agreement for any reason whatsoever;

7.4 That Laerskool Hartswater relied on false, misleading or deceptive representations by Mr Binneman, acting on behalf of CFS Ltd, which Laerskool Hartswater *bona fide* relied on to their disadvantage; and

7.5 That Clause [17.2] of the agreement constitutes a penalty clause in terms of the Conventional Penalties Act, 15 of 1962, in that it entitles CFS Ltd to demand payment of the total outstanding balance of the rentals plus VAT which is *contra bonos mores* and unconscionable, unreasonable, unjust and unfair. Laerskool Hartswater filed this amended plea on Monday 14 September 2015, the two days before trial of this matter. The school partly conceded CFS Ltd’s case which left the issue of s 60(1) of the Schools Act only because it also abandoned its defence on the Conventional Penalties Act in the afternoon of 16 September 2015. Laerskool Hartswater did not tender the wasted costs occasioned by the postponement it sought.

[8] The following facts are undisputed: (a) that the cause of action is based on two rental agreements; and (b) that Laerskool Hartswater defaulted in respect of both claims.

[9] S (60)(1) of the Schools Act states:

"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."

[10] Prior to 31 December 2007 s 60(1) of the Schools Act imposed liability on the State for damage or loss caused as a result of any act or omission in connection with any educational activity conducted by a public school. Notably, s 60(1) of the Schools Act was amended by s 14 of the Basic Education Amendment Act[1]. The effect of the amendment in s 60(1) is that the words 'educational activity' have been replaced with the words 'school activity' and read as follows:

> "***60(1) Liability of State***:
>
> *(a) 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.*
> *(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."*

S 1 of the Act defines 'school activity' as meaning any official educational, cultural, recreational or social activity of the school within or outside the school premises. S 60(2) of the Schools Act provides that the provisions of the State Liability Act, 20 of 1957, apply to any claim under subsection (1).

[11] S 2 of the State Liability Act provides that the plaintiff or applicant, as the case may be, or his or her legal representative must, within seven days after a summons or notice instituting proceedings and in which the executive

[1] Act 15 of 2011.

authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that summons or notice on the State Attorney. Laerskool Hartswater pleaded therefore that CFS Ltd failed to give such notice to the executive authority of the Department of Education, Gauteng. Mr PJ Cronjé, on behalf of Laerskool Hartswater, argued that before the amendment of s 60(1) the section did not make mention of delictual or contractual liability but spoke of damages or loss. The State would therefore be liable if found to have been complicit. S 60(4) of the Schools Act provides:

"Despite the provisions of subsection (1), the State is not liable for any damage or loss caused as a result of any act or omission in connection with any enterprise or business operated under the authority of a public school for the purpose of supplementing the resources of the school as contemplated in section 36, including the offering of practical educational activities relating to that enterprise or business."

[12] In **BASTIAN FINANCIAL SERVICES (PTY) LTD v GENERAL HENDRIK SCHOEMAN PRIMARY SCHOOL**[2] Van Heerden JA had to interpret s 60(1) of the Schools Act as to whether it deals with delictual or contractual liability and held at para 19:

"[19] It has long been recognised in our case law that the aim of the statutory interpretation is to give effect to the object or purpose of the legislation in question. Thus in ***Standard Bank Investment Corporation Ltd v Competition Commission & Others; Liberty Life Association of Africa Ltd v Competition Commission & Others [2000 (2) SA 797 (SCA) para 16]****, Schutz JA, writing for the majority of this Court, stated that:-*

'Our Courts have, over many years, striven to give effect to the policy or object or purpose of legislation. This is reflected in a passage from the judgment of Innes CJ in ***Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 543.*** *But the passage also reflects that it is not the*

[2] 2008 (5) SA 1 (SCA).

function of a court to do violence to the language of a statute and impose its view of what the policy or object of a measure should be.'"

The learned Judge added at para 21 and 22 as follows:

"[21] Counsel for 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. Counsel also accepted that a claim for the return of goods at the instance of the supplier of such goods to a public school, in terms of a contract entered into with the school, would have to be instituted against the school itself and not against the MEC. In my view, both these propositions are correct. 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.

[22] The public school itself, and not the State, is therefore liable for the fulfilment of a public school's contractual obligations – the other party to the contract cannot, as it were, rely on some sort of 'warranty' by the State that the school will perform its obligations under contracts which have been lawfully concluded. This being so, it is difficult to understand why the Legislature would have intended s 60(1) of the act to have the effect of imposing upon the State a 'warranty' vis à vis the other party to a contract with a public school, to pay contractual damages to such other contracting party should the school breach its contractual obligations."

[13] A plaintiff has a right to claim from the other party a performance of his undertaking in terms of the contract. (See **FARMERS' CO-OP SOCIETY (REG) v BERRY.[3])** It is trite that specific performance will not be granted:

16.1 When the order would be impossible;

16.2 Where it will cause undue hardship;

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[3] 1912 AD 343 at 350.

16.3 In contracts for personal services; and

16.4 On grounds of imprecise obligations.

In the instant case the claim against Laerskool Hartswater is for specific performance as alluded to earlier and not for damages arising from the cancellation of the agreement. The State cannot therefore be held liable for claims for contractual obligations against it.

COSTS

[14] Adv S Aucamp, on behalf of the plaintiff, argued that the defendant conducted its case in a way that warrants a punitive cost order against it. Adv PR Cronjé, for the defendant, submitted that the defendant was not *mala fide* or employing delaying tactics in conducting its case. A court shall consider whether or not it is appropriate to make a special order as to costs against a party or his attorney, because he or his attorney failed, to a material degree, to promote the effective disposal of the litigation.[4]

[15] Summons was issued on 20 March 2012. The defendant amended its plea on two occasions as alluded to earlier. On the day the trial was supposed to run the defendant abandoned all other defences and only proceeded with the breach of s 60(1) of the Schools Act. This section was amended by the Education Law Amendment Act, 31 of 1997, and came into operation on 31 December 2007. The last amendment of the defendant's plea was served on the plaintiff's attorney on the day of the hearing. On the other hand these issues could have been avoided by the parties taking advantage of a proper pre-trial conference. In its plea filed on 14 September 2015 Laerskool Hartswater mentioned in para 13 of the Notice of Motion that their counsel discovered certain provisions in the South African Schools Act and the State Liability Act to be applicable, hence the amendment. No explanation

[4] Rule 37(9) (a) (ii) of the Uniform Rules of Court at B1-273

regarding the delay was made. Be that as it may, in the absence of prejudice to the other party, leave to amend may be granted at any stage, however careless the mistake or omission may have been and however late the application for amendment may be.[5] No prejudice was alleged by the plaintiff in this regard except that its witnesses had to be flown from Johannesburg. In any event, the matter was heard the very day it was set down for trial and witnesses had to attend the trial. This does not justify a punitive cost order. In my view, a cost order on the scale as between party and party scale is justified would be fair.

ORDER

CLAIM A

1. **The defendant, Laerskool Hartswater, is ordered to pay to the plaintiff, Corporate Finance Solutions, an amount of R39 824-42 (Thirty Nine Thousand Eight Hundred and Twenty Four Rand and Forty Two Cents) with interest on the said amount at the rate of 5% per annum from date of Summons to date of final payment (prime rate currently at 9%).**
2. **The defendant, Laerskool Hartswater, is ordered to pay costs of the action on party and party scale.**

CLAIM B

3. **The defendant, Laerskool Hartswater, is ordered to pay to the plaintiff, Corporate Finance Solutions, an amount of R660 543-14 (Six Hundred**

[5] Mabaso And Others v Minister of Police And Another [1980] (4) SA (WLD) at 323D.

and Sixty Thousand Five Hundred and Forty Three Rand and Fourteen Cents) with interest on the said amount at the rate of 5% per annum from date of Summons to date of final payment (prime rate currently at 9%).

4. **The defendant, Laerskool Hartswater, is ordered to pay costs of the action on party and party scale.**

BM PAKATI
JUDGE
NORTHERN CAPE DIVISION-KIMBERLEY

On behalf of the Plaintiff:	***ADV S AUCAMP***
Instructed by:	***DUNCAN & ROTHMAN INC.***
On behalf of the Defendant:	***ADV PR CRONJE***
Instructed by:	***ELLIOT MARIS WILMANS & HAY***