

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : A3/07

In the appeal between:-

ST HELENA PRIMARY SCHOOL
AND ANOTHER

Appellants

and

THE MEC: DEPARTMENT OF EDUCATION
FREE STATE PROVINCE AND ANOTHER

Respondents

CORAM: CILLIé, J *et* WRIGHT, J *et* EBRAHIM, J

HEARD ON: 4 AUGUST 2008

JUDGMENT BY: CILLIé, J

DELIVERED ON: 16 OCTOBER 2008

- [1] This is an appeal against the judgment of H.M. Musi J, as he then was, in the matter reported as **ST HELENA PRIMARY SCHOOL AND ANOTHER v MEC DEPARTMENT OF EDUCATION FREE STATE PROVINCE AND ANOTHER** 2007 (4) SA 16 (O). The judgment attracted some comment in legal publications. See:

Sonnekus and Schlemmer, **“Brandskade aan skoolgeboue: Op wie rus die verpligting om te herstel?”**

2007 TSAR 756;

Sonnekus and Schlemmer, **“Verrykingsvordering na herstel van brandskade aan vreemde eiendom en versekerbare belang”** 2007 TSAR 823;

Van Niekerk (2006) 9 **Juta’s Insurance Law Bulletin**, p. 120;

Sonnekus and Schlemmer, **De Rebus**, July 2008 p. 22;

Sonnekus: **Unjust Enrichment in South African Law**, p. 39.

The court is also indebted to Helen Scott, **Fellow and Tutor in Law, St Catharine’s College, Oxford**, who made available to the court the print of p. 222 and 223 of the *Restitution Law Review* to be published later in 2008.

Some, if not all of the comments on the judgment are based on a misconception of the facts before the trial Judge. It is therefore necessary to burden this judgment with more detail than the trial Judge did of the facts of this particular case.

- [2] First appellant is the St. Helena Primary School, a public school in terms of both Chapter 3 of the South African Schools Act, No. 84 of 1996 (“the Schools Act”) and the Free State School Education Act, 2 of 2000 (“the Free State Act”). During the proceedings thusfar the appellants were throughout referred to as “the school”. I will do likewise in this judgment. The school is in terms of both the aforesaid Acts a juristic person.
- [3] The second appellant is the governing body of the school and in terms of both the aforesaid Acts, the school’s government rests with the second appellant.
- [4] The first respondent is a member of the Executive Council: Department of Education, Free State Province. The Premier of the Free State Province is also cited as second respondent in her official capacity as the executive authority of the Province. It is clear, however, that the first respondent has the duty to establish and maintain schools in terms of both section 12(1) of the Schools Act and section 10(1) of the Free State Act. The second respondent has no separate role in these proceedings. Reference will be made to the

respondents as “the Department” as was done thusfar in the proceedings.

- [5] The Department is the owner of the immovable property consisting of the land and the buildings situated at St. Helena Primary School, Welkom, Free State.
- [6] The school has at all relevant times and specifically during the year 2002 occupied the school buildings in terms of the Free State Act.
- [7] As mentioned the Department is obliged to maintain the school buildings in terms of section 10 of the Free State Act. The school was at all relevant times in accordance with section 41(g) of that Act obliged to administer and control the property of the Department and the buildings occupied by it.
- [8] A fire broke out at the school on 14 February 2002 causing damage to the building in which the library was housed at the time.

[9] The necessary costs to restore that part of the building to its pre-fire condition was R122 342,52 which the school paid by utilising R82 010,22 received as indemnification in respect of the damage from its insurance, and R40 332,30 from its own funds.

[10] The school, as plaintiff, instituted action against the Department for the recovery of this amount. In the school's summons it is alleged that the school was under no legal obligation to repair the damage to the library building and that the Department was therefore unjustly enriched.

[11] In the Department's plea, the following is *inter alia* alleged:

“5.3.2 Chapter 8 of the aforesaid Act prescribes that the governance of such a Public School is vested in its Governing Body and Section 41(1)(g) obliged the Governing Body of such a Public School to administer and control the school's property, and buildings and grounds occupied by the school, including school hostels if applicable.

- 5.3.3 Section 41(2) allows the Governing Body to raise funds, including the charging of fees or tariffs, which accrues to such school.
- 5.3.4 Section 41(9) of the aforesaid Act obliges such Governing Body to present an annual budget contemplated in Section 56 of the aforesaid Act of the estimated costs relating to such Governing Body's functions.
- 5.3.5 Section 42(2) of the aforesaid Act, further obliges a Governing Body to apply to the Head of Education to be allocated any of, *inter alia*, the following functions:
- (a) to maintain and improve the school's property and buildings and grounds occupied by the school, including the school hostels, if applicable. Such function was allocated and/or taken over by plaintiffs.
- 5.3.6 In terms of Section 54(1), the Head of Education must finance Public Schools from funds appropriated for this purpose by the Provincial Legislature.
- 5.3.7 At all relevant times hereto, funds were raised, by the Governing Body, and funds were appropriated and allocated by the first defendant to the first or second plaintiff to maintain the school buildings, *inter alia*, to pay for the necessary short term insurance, for insuring the aforesaid buildings in an appropriate way.

AD PARAGRAPH 11 THEREOF:

In the premises aforesaid, the contents hereof are denied and plaintiffs are put to the proof thereof. First and second plaintiffs were at all relevant times obliged to administer, maintain and control the school's property and buildings, including the proper insurance thereof with money raised or allocated to them and did indeed purchase insurance with such money raised or allocated to them for the purpose of administering maintaining and controlling the school's property and buildings."

[12] When the matter was called in the Court *a quo*, the trial Judge was informed that the parties agreed to make use of the procedure provided for by Rule of Court 33(1). A stated case was duly drawn and presented to the trial Judge. That stated case sets out the following as the agreed facts on which the Department's alleged liability had to be considered:

"1.1 Both plaintiffs' status.

1.2 Neither the first plaintiff, nor the second plaintiff authorised the present action or instructed Honey & Partners to institute action.

1.3 Mutual & Federal Insurance Company Limited authorised and instructed Honey & Partners to institute action in

accordance with its contractual rights **vis-a-vis** plaintiffs and in accordance with the principle of subrogation.

- 1.4 None of the parties caused or was in any way responsible for the fire mentioned in plaintiffs' particulars of claim.
- 1.5 The Free State Province is the lawful owner of the immovable property consisting of the land and the St Helena Primary School buildings situated at Unicorn Avenue, St Helena, Welkom.
- 1.6 First plaintiff occupied the aforesaid school buildings at all relevant times and particularly during 2002 (and still occupies the buildings) in accordance with the provisions of Section 11 read with Sections 14 and 15 of the Free State Schools Education Act 2, 2 of 2000 ("**the Act**").
- 1.7 The first defendant provided funds to plaintiffs from time to time to enable plaintiffs, **inter alia** to maintain and control the immovable property and buildings as specified in the bundle of documents to be handed in and more specifically set out in paragraph 1.8 **infra** pertaining to the 2002 school year.
- 1.8 In accordance with the provisions of the Act:
 - 1.8.1 plaintiffs prepared a draft budget, a copy of the 2002 draft not being available, the 2003 draft stipulating the 2002 figures, is attached hereto as annexure "**A**";

1.8.2 defendants allocated funds to plaintiffs to contribute to their expenses, the total amount being **R53 714.74**, i.e. **R40 900.44** in respect of learning support material: textbooks, stationery and subject material and **R12 814.30** in respect of recurrent costs: municipal services, maintenance cost, etc. A copy of the letter of the Acting Head of Education dated **19 September 2001** is attached hereto as annexure "**B**". An additional budget allocation was made only in respect of expenditure pertaining to learning support material: textbooks, stationery and subject material, as is apparent from the letter of the Head of Education, dated **20 May 2002**, annexed hereto as annexure "**C**";

1.8.3 a final budget was prepared by plaintiffs for the 2002 financial school year after receipt of defendants' allocation as set out in annexure "**B**", which budget was presented to a general meeting of parents held on **11 October 2001** and approved by a majority of parents are voting, where after it was submitted to the Head of Department as required. A copy of this document is annexed hereto as annexure "**D**".

1.8.4 Plaintiffs were empowered in terms of the Act to supplement the resources supplied by defendants

and did in fact supplement resources in order to improve the quality of education provided by plaintiffs to all learners attending the 1st plaintiff.

1.8.5 Plaintiffs accept that the payment of insurance premiums can be regarded as a recurrent cost, but it is recorded that defendants never instructed or requested plaintiffs to utilise the allocated funds for the payment of insurance premiums, although the payment of insurance premiums was reflected in the budget approved by parents and presented to defendants.

1.9 The same practice and procedure took place for the school years prior to 2002 as well as thereafter. The relevant documents can be found in the bundle to be handed in by the parties.

1.10 Mutual & Federal Insurance Company Limited was the insurer in terms of a short term insurance policy taken out by the plaintiffs to insure, *inter alia* the immovable property and buildings against risks such as fire.

1.11 The terms and directions of the Act are, where relevant, applicable to this dispute.

1.12 The premiums paid by plaintiffs to Mutual & Federal Insurance Company Limited for the short term insurance were far less than the insurance cover that plaintiffs enjoyed and the damage caused by the fire and/or the

restoration of such damage. It is placed on record by plaintiffs that this fact and the fact that plaintiffs were insured are relevant for purposes of the adjudication of this dispute. Defendants do not agree with this contention.

- 1.13 Second plaintiff is or was at all relevant times in accordance with Section 41 of the Act obliged to administer and control the property of first plaintiff and the buildings occupied by it.
- 1.14 A fire broke out on **14 February 2002** which fire caused damage to the school buildings in the amount of **R122 342.52**, which amount was needed to restore the school buildings to its former condition.
- 1.15 Plaintiffs filed a claim with their insurer in respect of the damages sustained in the fire which company reimbursed plaintiffs in accordance with the provisions of the insurance policy. Average was applied and the insurer paid plaintiffs **R82 010,22**. Plaintiffs restored the school buildings to its former condition by utilising this amount together with a portion of the insurance money received in respect of the claim relating to the movables (their property) in the amount of **R788 021.63**.
- 1.16 Plaintiffs were in possession of the school buildings with the powers, functions and obligations as set out in the Act at all relevant times hereto.

- 1.17 Second plaintiff applied to be allocated with the functions set out in Section 42 of the Act. Defendants did not respond as is provided for in sub-sections 42(3) and (4). However plaintiffs accepted the responsibility to maintain the school property, buildings and land occupied by them.
- 1.18 A bundle of documents will be handed in to the Honourable Court. The parties agree that the contents of such documents in so far as they relate to the dispute are true and correct.

2.

- 2.1 It is contended on behalf of plaintiffs on the above factual allegations that
- 2.1.1 the Free State Province has been enriched as a result of the restoration of the school buildings to its former state;
- 2.1.2 first plaintiff, alternatively second plaintiff, alternatively both plaintiffs had been impoverished;
- 2.1.3 the Free State Province's enrichment occurred at the expense of first plaintiff, alternatively second plaintiff, alternatively first and second plaintiffs;
- 2.1.4 the enrichment took place *sine causa*, alternatively plaintiffs acted *quasi negotiorum gestio* when they incurred the expenses on behalf of the Free State Province in order to restore the school buildings to their former state.

2.2 Plaintiffs therefore ask for judgment as set out in the particulars of claim.

2.3 Defendants deny this contention and plaintiffs' claim.

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."

[13] Attached to the stated case are four annexures marked annexures "A" to "D". It contains, *inter alia*, the school's budget and two letters written by the Department setting out amounts allocated to the school for the year 2002. Annexure "D" is a document drawn by the school. It sets out the school's expense budget. It appears from all these documents that provision is made for insurance costs in an amount of R20 400,00 for the year in question.

[15] The final budget prepared by the school for the 2002 financial year was approved by the parents and thereafter submitted to the Head of the Department. In terms of this final budget provision was made for insurance as stated

above. Mr. Mullins, who on appeal appeared for the school, correctly conceded that it must be accepted that this budget was approved by the Department. This was also the case with the budgets for the financial years preceding the particular budget and subsequent to the 2002 budget, which all made provision for insurance as set out above.

[16] It is also to be noted that the school applied to be allocated the functions set out in section 42 of the Free State Act. Of specific importance is section 42(6) of that Act which reads as follows:

- “(6) The responsible Member may, by notice in the *Provincial Gazette*, determine that some governing bodies may exercise one or more functions without making an application contemplated in subsection (1), if-
 - (a) he or she is satisfied that the governing bodies concerned have the capacity to perform such function effectively; and
 - (b) there is a reasonable and equitable basis for doing so.”

The functions referred to in section 42(1) include the following:

- “(a) To maintain and improve the school’s property, and buildings and grounds occupied by the school, including school hostels, if applicable;
- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) other functions consistent with this Act and any applicable law.”

[17] Although there was no specific response to the request, as envisaged in section 42(4) of the Free State Act, it is clear that these functions referred to as section 21 functions (this reference is to the Schools Act), were in fact allocated to the school. This was done by Provincial Notice No. 9 of 2000. This Notice lists schools allocated these functions and specifically includes the school. Although Mr. Mullins, on behalf of the school, initially took the view that this cannot be considered on appeal as it was not incorporated in the stated case, he subsequently conceded that the court has to take

notice of this. It must be mentioned that this upgrading of the school's functions by means of this Provincial Notice was not known to those involved at the time of the trial. It resulted into this not being brought to the Court *a quo*'s attention. The Court *a quo* therefore did not consider the impact of this Provincial Notice on the matter.

[18] Mr. Mullins' abovementioned concession is correct. If parties overlook a question of law arising from the facts agreed upon in a stated case, and such question is fundamental to the issues concerned, the court is not confined to the issues of law explicitly set out in the stated case. See Erasmus, **Superior Court Practice**, B1-234 and **PADDOCK MOTORS (PTY) LTD v IGESUND** 1976 (3) SA 16 (A) at 24C. The reason for this is obvious. Whatever parties agree to be part of their stated case, the effect of existing legislation on the outcome of the dispute, they cannot exclude wilfully or by oversight from what the court has to consider.

[19] On these facts and against this background the trial Judge concluded:

“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 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.”

(My underlining.)

[20] On behalf of the school Mr. Mullins relied to a large extent on criticism in the publications set out in paragraph [1], *supra*, of this conclusion of the Court *a quo*.

[21] With regard to the “at the expense of” requirement reference was made by Mr. Mullins to the following statement by Sonnekus, **Unjustified Enrichment in South African Law**, p. 70 where the following is said:

“There is compliance with the causational function of the test when a direct connection can be shown to exist between the defendant’s patrimonial increase and the plaintiff’s patrimonial decrease.”

- [22] With regard to the more important (for purposes of this matter) requirement that the enrichment must be unjustified Mr. Mullins referred to De Vos, **Verrykings-aanspreeklikheid in die Suid-Afrikaanse Reg**, 3rd Edition on p. 353 where the following is said:

“Verryking is ongeregverdig wanneer daar geen afdoende regsgrond vir die verskuiwing of vir die voortdoring van die verskuiwing van waarde van die een boedel na die ander een is nie. Mens moet dus in elke geval waar daar ‘n verryking van een persoon ten koste van ‘n ander plaasgevind het, vasstel of daar ‘n regsgrond vir die verryking aan te toon is.”

- [23] In this respect Mr. Mullins referred to the duties of the Department as set out in the relevant Acts and submitted that the statutory scheme makes plain the duty of the Department to take reasonable steps to ensure that learners are provided with public schools and thus with the buildings,

including libraries, necessary for such public schools, and that this duty includes the concomitant duty to repair fire damage to those buildings, i.e. reinstate the buildings so that education can continue.

[24] With regard to the Court *a quo*'s finding that the school were themselves obliged to repair the fire damage, Mr. Mullins argued that a distinction must be drawn between a school's power to carry out ordinary maintenance and a purported obligation to carry out extensive repairs to damaged property.

[25] Mr. Claasen, on behalf of the Department, referred to the generally accepted view that both enrichment and subrogation are considered to be based on equity. He relied on the following passage in **TRAHAIR v WEBB AND COMPANY** 1924 WLD 227 at 235:

“Where the plaintiff basis his claim for relief on an equitable doctrine the court must be careful that, in a desire to do justice to the plaintiff, an injustice is not done to the defendant.”

[26] Mr. Claasen further argued that the Department had, by notice in the Provincial Gazette, determined that the school may exercise the functions set out in section 21(1) of the Schools Act, namely to maintain and improve schools, property and buildings. The Department provided funds for this purpose and a budget was prepared for each year and approved by the Department. The payment of insurance premiums as a current cost was therefore budgeted by the school and funded and consented to by the Department. This, he says, is confirmed by the following extract of the letter by the Head of Education of the Department to the school attached to the stated case which reads as follows:

“Schools that were allocated section 21 functions will receive their additional allocation over the remaining number of payments still owed to the school for the current academic year.

These payments are still subject to the following:

- (a) Submission of a quarterly statement of actual income and expenditure for the previous quarter.
- (b) Submission of a certificate of compliance at the beginning of each quarter as required by the Public Finance Management Act.

- (c) Submission of an audited financial statement within six months after the end of each financial year for the previous financial year.”

[27] Mr. Claasen concluded that there was an obligation on the school to maintain the said buildings. That was brought about, so the argument went, by

- (a) budgeting for insurance premiums to cover incidents of this nature; and
- (b) to apply for and receive the approval of the Department for payment of the insurance premiums from funds received from the Department or from funds which they are allowed to raise by approval of the said Department. The school, therefore, had a duty or responsibility to maintain and therefore the *sine causa* condition of enrichment is not satisfied.

[28] Mr. Mullins replied that section 21 of the Schools Act provided only powers and not obligations. He submitted that “maintenance” as used in section 21 of the Schools Act and section 42 of the Free State Act is to be understood as minor maintenance “such as fuel for the lawnmower”. Relying on

COMMERCIAL UNION ASSURANCE CO OF SOUTH AFRICA LTD v GOLDEN ERA PRINTERS AND STATIONERS (BOPHUTHATSWANA) (PTY) LTD 1998 (2)

SA 718 (B) on 724C he submitted that restoring damage caused by fire ought not to be regarded as maintenance.

[29] It is probably more correct I think to say that a partnership between the State and those taking responsibility for the government of the school was envisaged in the relevant legislation. This is confirmed by Van Heerden JA in the following passage in the majority judgment of the as yet unreported case of **BASTIAN FINANCIAL SERVICES (PTY) LTD v GENERAL HENDRIK SCHOEMAN PRIMARY SCHOOL** Case No. 207/07 (SCA):

“[23] As pointed out by counsel for BFS, the Act envisages the creation of a ‘partnership’ between the State, on the one hand, and the ‘learners, parents and educators’ of a public school, on the other, all the ‘partners’ taking responsibility for the organisation, governance and funding of the school. The scheme of the Act is such that the “learners, parents and educators’ of a public school are represented by its governing body, the elected

membership of which includes representatives of all such categories. In giving effect to the idea of a 'partnership', the Act confers on public schools, through their governing bodies, a considerable degree of autonomy in the governance of the school's affairs."

- [30] It is necessary to understand that this matter does not concern maintenance of school buildings in general by provincial education departments. It concerns the repair of damages caused by an isolated incident to that part of the school buildings of the St. Helena Primary School that houses the library. The question is not if and to what extent provincial education departments in general can saddle schools with the responsibility to maintain the school buildings. The question in this appeal is whether on the facts of this particular case this school should be allowed a claim based on unjust enrichment against this Department. I resist to be tempted to elucidate on issues that may very well have far reaching effects on the administration of school education services in general. I do so because I am mindful of what Lord Simon of Glaisdale (quoted with approval by Brand J, as he then was, in VAN BILJON AND OTHERS v MINISTER OF CORRECTIONAL SERVICES AND OTHERS

1997 (4) SA 441 (C) on 450G) said in **MILIANGOS v GEORGE FRANK (TEXTILES) LTD** [1976] AC 443 at 481, 1975 (3) ALL ER 801 (HL) at 824:

“(T)he training and qualification of a Judge is to elucidate the problem immediately before him, so that its features stand out in stereoscopic clarity. But the beam of light which so illuminates the immediate scene seems to throw surrounding areas into greater obscurity; the whole landscape is distorted to the view. A penumbra can be apprehended, but not much beyond; so that when the searchlight shifts a quite unexpected scene may be disclosed. The very qualifications for the judicial process thus impose limitations on its use. This is why judicial advance should be gradual. “I am not trained to see the distant scene: one step is enough for me” should be the motto on the wall opposite the Judge's desk. It is, I concede, a less spectacular method of progression than somersaults and cartwheels; but it is the one best suited to the capacity and resources of a Judge. We are likely to perform better the duties society imposes on us if we recognise our limitations. Within the proper limits there is more than enough to be done which is of value to society.”

[31] To decide if any enrichment took place, or at least if such an enrichment was not justifiable, one must consider all the

facts with regard to this particular incident. Now what are the facts applicable to this specific incident? A short synopsis of what has been mentioned in this regard thus far in this judgment is as follows:

On the strength of the budget which the school presented to the Department and which included the costs of insurance, the Department provided an amount to the school to cover those expenses. That amount then became part of the pool of the school's funds. Whether the insurance premium was paid out of the amount provided by the Department or the funds raised by the school itself, becomes indeterminable and in any event irrelevant. The clear understanding between the Department and the school is obvious: The school will repair out of the proceeds of the insurance policy damages such as occurred in the present case.

- [32] The question is not, as suggested by Mr. Mullins, whether the Department could have insisted that the school take out insurance. The question is whether in these particular circumstances the school could use the insurance money received for any other purpose than to repair the damages. The matter can be viewed from another angle: Would the

school be entitled in these circumstances to retain the proceeds of the policy, utilise it for whatever other purpose the school thinks fit and then expect the Department to repair the damages? The answer must be in the negative. Such a claim by the school would be answerable on the basis that the school claims that which it undertook to bear itself.

- [33] I do not understand the Schools Act or the Free State Act to preclude an arrangement between the Department and the school to the effect that the school will take out insurance, pay the premium for that out of the school funds (to which the Department contributed) and that in the event of the risk realising the proceeds of the policy is to be used to repair that damage. To hold under such circumstances that the Department is liable to the school on the basis of unjust enrichment would fly in the face of all logic. Although it may, strictly speaking, be correct to say that the Department's property was repaired with school funds and that the Department gained thereby, there can under these circumstances be no question of unjust enrichment, simply because the enrichment was not *sine causa*.

[34] The comments of Sonnekus and Schlemmer in the article in 2007 TSAR 823 on 832 which reads as follows can therefore not apply:

“Die geldigheid van die argument ontgaan ons. Die antwoord op die vraag of die staat verplig is om sy geboue vir die onderwys dienstig in stand te hou, kan nooit afhanklik wees van die feit dat ‘n derde onverskuldig skadeversekering uitgeneem het nie – daar gelaat dat dit onduidelik is waaruit die hof die afleiding van enige gemeenskaplike wilsooreenstemming tussen die partye in dié verband maak. Die uitspraak laat nie blyk dat sodanige getuienis gelei is nie.”

The present case is more akin to the situation which the learned authors deal with on p. 827 of the article and which reads as follows:

“Indien die owerheid reeds vooruit vir al sy moontlike onderhoudsverpligtinge met betrekking tot ‘n bepaalde artikel 21 skool in die volgende jaar begroot en die tersake bedrag as deel van die skool se normale toegekende fondse aan die skool sou oorgedra het, sou daar ruimte wees om te sê dat die owerheid nie met enige bespaarde uitgawes verryk kan wees indien die skool later wel herstelkoste sou aangaan en uit daardie

toekenning daarvoor betaal nie. Juis vir die doel is dan immers vooruit 'n bedrag aan die skool oorgedra.”

In principle it is irrelevant whether the amount so advanced to the school is an estimate of the possible costs to repair damages of this nature that might occur in future or on the other hand to obtain insurance cover against such an occurrence.

[35] The case was brought by means of subrogation and the possibility of the school claiming for the shortfall not paid out by the insurance company was not argued or set out in the stated case. It is therefore not necessary to deal with that.

[36] The question whether a claim for unjust enrichment is available to a subrogator was cursorily debated in argument. It was also dealt with by the Court *a quo* in its judgment. The conclusion which I reached as set out above makes it unnecessary to deal with that.

[37] Mr. Mullins, on behalf of the school, conceded that the employment of two counsel by the Department was justified in the circumstances of this case.

The appeal is therefore dismissed with costs, such costs to include the costs of two counsel.

C.B. CILLIÉ, J

I agree.

G.F. WRIGHT, J

I agree.

S. EBRAHIM, J

On behalf of appellants:

Adv. J.F. Mullins, SC
Instructed by:
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BLOEMFONTEIN

On behalf of respondents:

Adv. J.Y. Claasen

With him:

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