NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

Case No. EL 240/2010
ECD 540/2010

In the matter between

THE MEC FOR THE EASTERN CAPE	
DEPARTMENT OF EDUCATION	**First Plaintiff**
DEBORAH ROBYN VAN	
COEVERDEN DE GROOT	**Second Plaintiff**
LISOLOMZI SIYABULELA KALIMASHE	**Third Plaintiff**

and

PLAYWAYS PRE-PRIMARY SCHOOL	**First Defendant**
CINZACO 107 (PTY) LIMITED	**Second Defendant**
THE REGISTRAR OF DEEDS,	
KING WILLIAM'S TOWN	**Third Defendant**

JUDGMENT

HARTLE J

[1] The plaintiffs[1] issued out an application against the defendants *inter alia* seeking an order setting aside the sale and subsequent transfer of certain immovable property ("the Property") which had been home to the Playways Pre-Primary School ("the school") and which had been sold to the second defendant on 1 December 2006 by the voluntary association styled "Playways Pre-Primary School" ("Playways"). Transfer was registered by the third defendant on 13 March 2007. A related order was sought that the third defendant ("The Registrar of Deeds") be ordered to effect transfer of the property back from the second defendant to the first defendant.

[2] The entity which the plaintiffs envisage as the first defendant is the juristic person which they say owned the property prior to its sale to the second defendant. At the outset Mr. Ford, who together with Ms. Beard appeared for the first and second defendants at the trial, placed on record that they do not claim to represent the entity cited in the way in which the first defendant is cited by the plaintiffs. The plaintiffs' premise for their peculiar citation of this defendant is that Playways was at all relevant times a public school and that it constituted the juristic person that every public school is pursuant to the provisions of section 15 of the South African Schools Act, No. 84 of 1996 ("the Schools Act).[2] The entity which counsel say they represent instead is Playways, the voluntary association governed by the terms of its own constitution, albeit the defendants plead that it no longer exists due to the fact that it was wound up after disposing of the school and all its property to the second defendant.

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[1] Although the matter commenced as an application, I will refer to the applicants in their respective order as the plaintiffs and the respondents in their respective order as the defendants.

[2] The plaintiffs plead that Playways "was at all relevant times a public pre-primary school as defined in Chapter 3" of the Schools Act. Chapter 3 deals with public schools under its own heading.

[3] The third defendant did not oppose the application but abides this court's decision. Inasmuch as I refer to "the defendants" herein, it excludes the latter defendant.

[4] The plaintiffs are respectively : the Member of the Executive Council for the Eastern Cape Department of Education ("the Department") who is alleged to be the representative authority responsible for all public schools within the Eastern Cape Province; a former principal of Playways who the plaintiffs say ought to have represented the head of the department in respect of the purported sale under the mantle of the public school governing body they contend for (or *ex officio* in terms of Playways' constitution); and a parent and vice-chairperson of the governing body of Playways at the time.

[5] After delivery of the second defendant's answering papers in the application, which pertinently raised an issue of prescription because more than three years since the sale and before service of the motion proceedings on them had passed, the plaintiffs gave notice of intention to amend their notice of motion to include among the items sold in the impugned sale the school in addition to the fixed property which had been transferred to the second defendant. The reason that was advanced for the amendment is that the plaintiffs were originally under the impression that all that was being sold by the first defendant was the fixed property of Playways and not Playways itself, lock, stock and barrel. They claim that they only became aware of the true situation upon reading the defendants' answering affidavits which clarified what had in fact been sold to the second defendant. This nascent awareness has a bearing on the issue of prescription raised by the defendants. I clarify that the first respondent indicated that, in consequence of the filing of the defendants' answering affidavits in the motion proceedings, the first

plaintiff became aware for the first time only then of his "cause of action" available to him in terms of section 58A (2) of the School's Act and that this claim had certainly not become prescribed.[3]

[6] The defendants objected to the plaintiffs' proposed amendment of the main prayer itself, resulting in the issue of a formal application to amend and for leave to supplement the founding affidavit. This application was in turn opposed but the upshot of the matter is that the proposed amendment was allowed. In delivering judgment the court, rather propitiously, remarked upon the fact that it was a matter which was most unlikely to be decided on the papers given the extent of the disputed facts and that it ought to have been referred to oral evidence to ventilate these disputes.

[7] It is relevant to mention that the supplementation of the original papers was delayed after the amendment was allowed, resulting in an application for condonation by the plaintiffs of the late filing of their so-called "supplementary papers", vehemently opposed by the defendants, which formed the vehicle by the latter to deal with a challenge to strike out, *inter alia*, the whole of the replying affidavit of one Mr. Riaan Van Rensburg which had been filed in support of the applicants' case to establish the status of Playways as a public school. This included the annexures to his affidavit which are as follows: Annexure "RVR1"- an Institution Registration Report extracted from the data base of the Eastern Cape Department of Education's Education Management Information System ("EMIS") on 14 May 2010 which reflects Playways as a public sector school with registration date 1 January 1983; Annexure "RVR2" - a staff establishment report of Playways

[3] See paragraph 14 of the replying affidavit of Mr S S Zibi, the Deputy Director-General of the Provincial Education Department, as well as paragraph 34 of the applicants' heads of argument filed in the motion proceedings.

as at 9 April 1999 which indicates that Playways qualified for one post of principal at the relevant time;[4] Annexure "RVR3" - another official staff establishment for 1 January 2003 which indicates the number of staff members for which Playways at the time qualified, viz three; and Annexure "RVR4" - selective Persal Snapshots in respect of Playways for the period 2005 – 2010, which indicates that over this period a principal at Playways was remunerated by the Department. All these documents in the plaintiffs' view cumulatively establish that Playways is (and was at the time of the impugned sale) a public school which is what was hoped to be achieved by the introduction of this deponent's affidavit and annexures, albeit only in their replying affidavits.

[8] The basis for the objection by the defendants to the introduction of Mr. Van Rensburg's evidence - which had been foreshadowed by an earlier notice to strike out dated in 2010 already, is that his testimony concerning the "facts" purported to be represented by these annexures amounted to hearsay evidence. In addition, it was submitted that he had failed to demonstrate that the data sought to be introduced as evidence was or is inadmissible in terms of the Electronic Communications and Transactions Act, No. 25 of 2002 ("the ECTA").

[4] In terms of the Employment of Educators' Act, No. 76 of 1998 ("EEA"), which has applied since 2 October 1998, a post has to be created on any educator establishment under the act, in the case of a provincial department of education, by the relevant Member of the Executive Council. In terms of section 5, subject to the norms prescribed for the provisioning of posts, educator establishments are to consist of the posts created by the Member of the Executive Council. The EEA applies only in respect of the employment of educators at public schools and departmental offices. These provisions must be read together with section 12 of the Schools Act which provides that the MEC must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature and that he must *inter alia* determine norms and standards for school funding and educator provisioning for public schools. It is apparent from those norms and standards and general education policy that the state aims to meet its Constitutional imperative to provide basic education to public schools from public revenue on a fair and equitable basis and that it does so practicably according to a distribution formula and certain policy targets. See also sections 34 and 35 of the Schools Act which articulates the responsibility of the state to fund public schools and how this is to be effected in accordance with norms and standards for school funding. The underlying significance of this annexure, and "RVR3" is that because of the post establishments it must follow that Playways is/was a public school.

[9] On 26 November 2013, when this aspect and others raised by the interlocutory applications and notices to strike out fell to be determined,[5] the court missed the opportunity to come to grips with the application by the plaintiffs to condone the introduction of several so-called supplementary affidavits, and the objections, resolving instead that it was necessary to refer the various disputes which has been raised in the application to trial to be properly ventilated. As a result, an order was issued in the following terms:

> "1. The Application is referred to trial;
> 2. the Notice of Motion shall stand as a simple summons;
> 3. the Notice of intention to oppose shall stand as a notice of intention to defend;
> 4. the Applicant (sic) shall deliver a declaration within 30 days of this order;
> 5. thereafter the rules relating to actions shall apply;
> 6. the cost to date shall be reserved for determination by the trial court."

[10] The relief sought by the plaintiffs' in their declaration, post compliance with the order aforesaid, accords with the prayers sought in the application as per the amended notice of motion and is premised on the complaint that the deed of sale concluded between Playways and the second defendant, and the subsequent transfer of the immovable property to it, was wrongful, void and unlawful on the following grounds, now in this reconstituted order of significance:

10.1 the first plaintiff did not give his written consent to the alienation and transfer of any of the property of Playways to the second defendant as

[5] The plaintiffs had also filed a notice to strike out which is irrelevant for present purposes.

is required pursuant to the provisions of the section 58A(2) of the Schools Act;

10.2 the sale of the school to the second defendant was precluded by the provisions of the school's constitution applicable at the time, alternatively was not consistent with such provisions, further alternatively, was not authorized in accordance with such provisions;

10.3 the sale was not authorized by a properly constituted, quorate meeting of the school governing body; and

10.4 the entire transaction was fraudulent as the chairperson of the governing body accepted a bribe from the second defendant to conclude the deed of sale.

[11] The last ground was ultimately not pursued upon trial or in argument. The plaintiffs also failed to adduce any evidence regarding the alleged unconstitutionality of the sale of the school at the trial. Instead the emphasis was placed firmly on the first ground indicated above, albeit the first plaintiff had been at pains in the application papers to establish a basis for a complaint even on the earlier mistaken assumption that what had been disposed of to the second defendant was only the fixed property and without a realization of his supposed cause of action premised on a contravention of section 58A (2) of the School's Act. In this respect, albeit only co-incidentally to deal with the point that he lacked *locus standi* in the matter, Mr. S S Zibi, a deputy director in the Department, justified the first plaintiff's interest in associating himself with the initial relief sought in his affidavit as follows:

> "It is denied that even if this Honourable Court accepts that the school was prior to its sale a private school, the First Applicant has no *locus standi* to interfere with its sale. As

> set out in the founding papers, the School Governing Body acted *ultra vires* the school's own constitution in the manner in which the school was sold. The First Applicant as the responsible official for the provision of education in the Eastern Cape, and as the employer of the principal of the school, therefore has the continuing *locus standi* to bring this application."

[12] After the referral to trial it appears to me that the first plaintiff was not as confident of his interest in the matter if it transpired that Playways was rather a private school. The allegations by the second plaintiff in her initial founding affidavit that she was acting in both her personal capacity and *ex officio* as the principal of the voluntary association pursuant to its constitution, as well as that of the third defendant that he was a parent (and for that reasons an ordinary member) and vice-chairperson of that voluntary association, also appeared to recede into the background in the action proceedings, the emphasis instead being on the supposed statutory contravention.

[13] In the action the defendants filed three special pleas and pleaded over. The plaintiffs replicated, and the defendants filed a re-joinder as well.

[14] In brief the special pleas are, firstly, that the plaintiffs' claims constitute debts as contemplated in the Prescription Act, No. 68 of 1969 ("the Prescription Act") which had become prescribed. They assert in this respect that these claims arose on 1 December 2006 when the school and fixed property were sold, whereas the proceedings were instituted by service of a notice of motion and founding affidavit only on 12 March 2010, a period in excess of three years from the date upon which the alleged debts became due and prescription commenced to run. Secondly, the defendants plead that the plaintiffs, for various reasons, lack *locus*

standi in iudicio to claim the relief sought in these proceedings[6] and, thirdly, that Playways was not and is not a public school as contemplated in the Schools Act but is in fact an independent school conducted by a voluntary association with its own constitution which was wound up and no longer exists in fact or in law. The last plea postulates by implication that even if this court were to find a cause to set aside the sale, that Playways is incapable of giving effect to the relief sought. They plead that such relief is accordingly not competent in law.[7]

[15] The plea over asserts that Playways is not and never was a public school. It was at all material times the name of an independent school conducted by a juristic person, being a voluntary association governed by the terms of its own constitution and that that entity has ceased to exist having been wound up in terms of its constitution. It further denies any basis whatsoever to impugn the sale.

[16] In respect of the plea of prescription, the plaintiffs deny the facts on which the plea is based. They plead further that the purported sale of the school to the second defendant is a legal nullity from which no legal consequences can flow. Accordingly, the provisions of the Prescription Act do not apply to their claims. In

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[6] The first plaintiff is alleged to have no interest in Playways because it is not a public school. The complaint against the second plaintiff is that she was not a member of the juristic person which then existed, and which conducted Playways. The premise in the application is that she was "under a cloud" so to speak because she had been convicted of theft of school funds, albeit she was officially, at the time of the sale at least, still the school's principal. The third plaintiff, although vice-chairperson of the governing body at the relevant time of the sale, is said to have no *locus standi* because Playways has been wound up. Whilst the argument against the first plaintiff's *locus standi*, if it transpires that the school was private and not public, is certainly defensible, those against the second and third plaintiff's *locus standi vis a vis* the voluntary association lack basis as far as I am concerned. (See footnote 7 below).

[7] Although this is not an aspect I need consider given the view I take herein, I can hardly conceive of a situation where aggrieved members of a voluntary association would be denied an audience to court on the basis that the association has been wound up and its core assets disposed of on the ground that one or more of its members has acted fraudulently or flouted the rules of the constitution in respect of the very disposition and winding up that "terminates it". Notionally there would be an entity still capable of giving effect to the relief once the illegality complained of is reversed by a court.

any event, so they plead, prescription only commenced running on or about the date of transfer of the fixed property from the first defendant to the second defendant, that is on 13 March 2007, and that service of the notice of motion, on 12 March 2010, occurred less than three years thereafter. In the further alternative they allege that they only became aware of the purported sale during or about August 2007, less than three years before the service of the notice of motion. In a further alternative they hold out that they only became aware of the true nature of the sale between the first and second defendants and the full nature of their cause of action on or about 22 April 2010 when the first and second defendants filed their answering affidavits in the application (in which it was for the first time apparent to the Department's officials that the school in addition to fixed property had been sold) which is the date they claim that prescription, if applicable, only commenced to run.

[17] In respect of the second special plea of lack of *locus standi* they aver that Playways was at all material times a public school; was indeed conducted by a juristic person with its own constitution; has not been wound up in terms thereof; and continues to exist. They claim that the Department and the other two plaintiffs vitally have *locus standi* because of their particular standing in relation to Playways as a public school and the official roles played by them at the time of the impugned sale.

[18] In respect of the third special plea, the plaintiffs claim that Playways was and remains a public school as contemplated in the Schools Act.

[19] It appears that the following are the issues which are properly required to be determined by this court namely:

19.1 what the status of the entity was which sold the school to the second defendant, i.e. whether a public or a private school;

19.2 whether the plaintiffs have *locus standi* in either scenario to challenge the sale;

19.3 assuming *locus standi*, whether the sale of the school and its property falls to be set aside on any basis following the court's determination of its status at the relevant time whether as a public or a private school;

19.4 whether the plaintiffs' claims have prescribed; and

19.5 what relief, if any, can be granted in the event I find cause to set aside the sale and its consequences and that the relevant claims have not prescribed.

[20] The question whether Playways is, or rather was, a public or an independent school impacts significantly on how the other issues are to be approached. I will accordingly commence with a determination of this aspect. It is not hard to imagine that if this facet is determined in favour of the plaintiffs that their claim (at least regarding the purported nullity of the sale) raises a rather nuanced matter of public interest and that their respective legal standing will then have to be seen through a different prism. Although the second and third plaintiffs (and indeed the first plaintiff for that matter) purported on the pleadings to challenge the sale even on the assumption that the school was the entity contended for by the defendants, their real interest resides in my view in a public-school context and the Provincial Department of Education is the real driver behind the claim with them being the necessary complainants.

[21] It is perhaps useful to begin with an examination of what the plaintiffs' primary claim is. Section 58A of the Schools Act provides as follows:

> "58A. Alienation of assets of public school. —
>
> (1) The Head of Department has the right to compile or inspect an inventory of all the assets of a public school.[8]
>
> (2) No person may alienate any assets owned by a public school to another person or body without the written approval of the Member of the Executive Council.
>
> (3) Despite subsection (2), the Member of the Executive Council may—
>
> (a) determine that certain categories of assets below a certain value may be alienated without his or her written approval; and
>
> (b) determine and publish the value contemplated in paragraph (a) by notice in the Provincial Gazette.[9]
>
> (4) …"

[22] The *raison d'etre* for this provision, inserted by section 6 of the Education Laws Amendment Act No. 24 of 2005, as appears from the Memorandum on the objects of the Bill which foreshadowed it, is as follows:

> "In terms of the SASA[10] a public school has a right of ownership of the assets of that public school. The assets of public schools are acquired through funds received from the

[8] Evidently the Head of Department had no inkling when push came to shove of the movable assets of Playways despite its regard of the school as a public one. If not an indictment of their record keeping, it is a probability in favour of the defendants that Playways was instead an independent school and the provisions of the section therefore not applicable to it.

[9] The MEC appears not to have done so to date. If one has regard to the huge resources thrown after this litigation to protect a handful of movable assets evidently of nominal value according to the deed of sale (leaving aside the issue whether Playways is or isn't a public-sector school), the imperative to do so without delay is brought into sharp focus.

[10] This is a reference to the Schools Act.

> state, from school fees or donations to the public school. These are public assets and must be used by all role payers of the school. The movable assets of the school consist of school desks, equipment and similar assets used in the professional delivery of education programmes in the classroom.
>
> In special schools such as agricultural schools, the livestock and agricultural equipment are an integral part of the educational activities offered by such schools. Currently there is no provision in the SASA to regulate the alienation of these school assets. It has been shown that some public schools alienate school property without the approval of the Member of the Executive Council, and in many cases such property is alienated without an actual value attached to it.
>
> The proposed new clause 6 seeks to ensure that assets that are needed for providing proper educational programmes in a public school are protected. However, since such an approval might create a huge administrative problem in the Provincial Education Department, the Bill seeks to allow the Member of the Executive Council to determine categories of assets below a certain value that may be alienated without written prior approval."

[23] It appears from the foregoing that the assets envisaged by section 58A (2) which fall to be protected against their unauthorized alienation are movable assets only, the value of which are worthy of vexing the MEC with the administrative burden of signing off in respect of. I am fortified in my view of this by the fact that the Schools Act deals differently and separately with immovable property in a public school context.[11]

[24] The prayers as stated in the declaration are somewhat confusing because the plaintiffs seek the court's intervention in respect of both movable and immovable property, also seeking an order of re-transfer in effect. Prayer (b) envisages that

[11] See sections 13, 14, 35(5) and 55 of the Schools Act. *However, in any event, the prohibition only applies to the sale of assets of a public school*.

the third defendant effect transfer of the property (which must be the land because otherwise the Registrar of Deeds would not be nominated to give effect to this component of the relief) back from the second defendant to the first defendant, which is complicated by the fact that the land was self-evidently never owned by the first defendant as envisaged in the way cited by the plaintiffs, but by Playways Pre-Primary School as appears from the prior deed of transfer which forms part of the agreed trial bundle.

[25] Somewhere else lurking in all of this is the second and third plaintiffs' suggested cause of action (which the first plaintiff was initially hard pressed to suggest he might also have an interest in associating himself with in the general interest of the public) as members of the voluntary association against it itself (it should have been against the errant members of the voluntary association although they were not joined in the proceedings), premised on those members purportedly acting in disregard of Playways' constitution and which conduct resulted in a transfer of its assets, a legal state of affairs which is required to be reversed in substance and form. The third claim is however not something I need apply my mind to any further however since, as indicated above, the private constitutional challenge, if I might call it that, appeared to have all but fizzled out by the time of the trial.

[26] For present purposes I will focus on the effective relief sought by the plaintiffs which is to restore the status *quo ante* on the assumption that, if Playways was a public school, the permission of the Member of the Executive Council ("MEC") for the sale (at least of the movable assets regardless of their nominal value) ought to have been sought, which self-evidently did not happen because the

first defendants did not believe that the voluntary association owed any fealty to the MEC to consult him regarding the sale.

[27] On the issue of onus, the plaintiffs, whilst seemingly accepting that they bore the onus to prove that the school was a public one and purported to do so by adducing evidence towards this end were yet of the view that the defendants had an obligation to prove that it was an independent as opposed to a public school at the time of the purported sale and transfer by Playways to the second defendant of its property. In this respect they assert an onus on the defendants to rebut the *presumption* that Playways is a public school on the premise of what their EMIS records say[12] and based on the doctrine of *praesumuntur rite esse acta* which assumes the validity of those records, aspects I will shortly deal with. The thought does not seem to have occurred to them however, inasmuch as *locus standi* was also placed in contention, that Playways' standing as a public school had to be established by the first plaintiff also in order to assert his interest in the action on this premise.[13]

[28] The plaintiffs also appear to have been under the misapprehension that the defendants bore the onus to prove that the sale of the school and fixed property was not in conformity with the constitution of Playways whereas in my view the onus is clearly on he who alleges such a fact to establish it according to the ordinary incidence of the onus.

[12] On the premise of a section 15(4) ECTA certificate.

[13] Mars Incorporated v Candy World (Pty) Ltd 1991 (1) SA 567 AD at 575H.

[29] The onus is of course properly on the defendants to prove when prescription commenced to run and that the plaintiffs' claims had become prescribed before service of the application papers on the plaintiffs on 12 March 2010.

[30] Before dealing with the evidence, I should perhaps make another preliminary observation concerning the probative value of the affidavits filed in the motion proceedings since the proceedings were converted into a trial.

[31] The proper approach to be adopted in this respect has been helpfully stated by the Supreme Court of Appeal in Lekup Prop Co. No. 4 (Pty) Ltd v Wright[14] as follows:

> "Before making the appropriate order, I wish to say something about the manner in which the trial was conducted. It will be recalled that the appellant initiated motion proceedings and that the matter was referred to trial after the respondent had filed his answering affidavit. At the trial, the respondent was allowed to read from that affidavit and did so, extensively. That was not the correct procedure. A witness who gives evidence in trial proceedings, must do so in the ordinary way. In our practice, lay witnesses are not usually permitted to read from pre-prepared statements even if those statements have been prepared by themselves. The learned judge a quo was under a misapprehension as to the status of the affidavits, as appears from what he said whilst Legh was being cross-examined, namely: 'I will accept that the affidavits in this application are proper evidence before this court'. *Affidavits filed may of course be used for cross-examination and also as proof of admissions therein contained, but (save to the extent that they contain admissions) they have no probative value; and in the absence of agreement, they do not stand as the witness's evidence-in-chief, or supplement it*. And if, by agreement, they are to be treated as such, it is unnecessary and a waste of time and costs for them to be read into the record. A referral to trial is different to a referral to evidence on limited issues. In the latter case, the affidavits stand as evidence save to the extent that they deal with

[14] 2012 (5) SA 246 (SCA) at par [32].

> dispute(s) of fact; and once the dispute(s) have been resolved by oral evidence, the matter is decided on the basis of that finding together with the affidavit evidence that is not in dispute." (Emphasis added)

[32] Although the parties were agreed as to the correct approach to be adopted in the circumstances, each had their own view of what the court might rely upon as established facts at the end of the day. Mr. Heunis submitted that because there was an absence of oral evidence by the defendants in respect of the issue of when the plaintiffs' claims arose; that Playways was properly wound up and no longer exists; which constitution was the valid one; and because it failed to refute, even on the defendants' say so as to which constitution was of application, that the sale could not have passed muster, that I could take the plaintiffs version as it were on these issues as set out in the affidavits as established facts, but this appears to me to be opportunistic and based on an incorrect approach concerning where the onus lies in respect of the last three aspects. I am inclined to agree with Mr. Ford that what *Lekup*[15] envisages as going through to the body of accepted evidence ultimately must be proper and unequivocal admissions and not assumed admissions based on the other party's apparent acceptance thereof or failure to renounce it vociferously, i.e. non-denials. It must be borne in mind that the plaintiffs' version on the crucial aspects in relation to the defendants' is as far as the East is from the West, which is why my colleague found it necessary to refer the matter to trial in the first instance. The status of various affidavits filed in the application is also unclear since condonation and interlocutory applications were not finalized despite it being contended that certain evidence was inadmissible either for want of compliance with the rules of the court or because it was hearsay or otherwise found wanting. Further, since much time had passed between the

[15] *Supra*

issue of the application and the commencement of the trial, and concessions had been made along the way, it appeared to me to be risky to make assumptions in the absence of the parties' firm agreement as to what should or should not have been carried forward from the voluminous papers as proper admissions.[16]

[33] To demonstrate but one example, it came as a surprise to me that at the trial the principal players in the whole fracas, the complainants who had sounded the warning to the Department that the terms of Playways' constitution had been so egregiously and flagrantly ignored, and who evidently pressed upon the first defendant to interpose himself in the sale transaction, did not give *viva voce* evidence. The very serious allegations of fraud and bribery were not given flesh in the evidence at all and this ground relied upon to void the sale simply fell by the by, yet I was only informed in reply when counsel argued before me that this aspect, which I perceived to be significant, had consciously been abandoned.

[34] There are of course aspects which are self-evidently not in contention and which one can deduce using common sense and logic.

[35] Further, the parties have helpfully listed at least the following common cause facts which appear from the pleadings:

35.1 the identities of the plaintiffs and the second defendant;

[16] I believe it was incumbent on the parties before the trial commenced, as part of the case management processes at least, to have prepared a list of admissions and not to have left it to the court to have had to traverse more than a thousand pages filed in the motion proceedings to gauge the essence of the matter or to determine what was in contention and what not.

35.2 that the second plaintiff was a principal of the school from approximately 1 January 2001 to the end of December 2006;[17]

35.3 that the third plaintiff was the vice-chairperson of the governing body for a limited period of time;[18]

35.4 that the school was conducted by a juristic person with its own constitution capable of suing and being sued in its own name;[19]

35.5 the deed of sale annexed as Annexure "A" to the plaintiffs' declaration;

35.6 that the third defendant registered transfer of the property to the second defendant in terms of Deed of Transfer T1236/2007 on 13 March 2007 and that a copy of the deed of transfer is annexed to the plaintiffs' declaration as annexure "B";

35.7 that the first plaintiff did not give written approval for the alienation of any of the school's property to the second defendant as contemplated in the Schools Act, it being the defendants' contention that such approval was not required; and

35.8 that the plaintiffs demanded that the first and second defendants cancel the deed of sale and that they have refused to restore the status *quo ante*.

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[17] In fact, it can be assumed from Annexure "RVR4", which covers the period from October 2005 to March 2010, that the second plaintiff continued to be paid as a principal of Playways well beyond the date on which the school and its property was sold, or conversely stated, that she remained a persal paid educator relative to the school for the entire period. This raises a concern in itself that the Department's EMIS records do not reflect the true reality.

[18] It is not clear why the defendants chose to limit their admission in this respect. It is common cause that at least as at the date of the sale of the property the third plaintiff was *de facto* the vice-chairperson of the voluntary association.

[19] Mr. Ford submitted during argument that the admission by the plaintiffs of this allegation that the school was conducted by a juristic person with its own constitution as opposed to a juristic person envisaged by section 15 of the Schools Act, is dispositive of the matter because one cannot have entities existing in different dimensions. It either was who the defendant says it is, or it was the section 15 juristic person. Although expressed awkwardly it appears to me to be plain from the general tenor of the plaintiffs' case, however, that the entity they had in mind when making this admission is the public school one.

[36] The trial commenced before me on 19 April 2016 but was postponed on the second day because of the late discovery by the second defendant of certain documentation and a last minute formal objection by it to the admission into evidence of the data printouts in respect of which Mr. Riaan Van Rensburg testifying on behalf of the plaintiff had commenced giving evidence. I granted the application and ruled that each party had to bear its own costs of the postponement.

[37] The reason for the costs award is that both parties were in a sense to blame for the state of affairs which had arisen. Whilst the plaintiffs were clearly prejudiced by the late discovery of voluminous documentation days before, they equivocated before the trial commenced about whether they would object or not and seek a postponement. The second defendant, on the other hand had not bothered to indicate beforehand, though the pre-trial processes, that it would raise a formal objection to the introduction of the computer printouts upon which the plaintiffs vitally relied to prove the school's status, well anticipating that Mr. van Rensburg would deal with these records in his oral testimony. Mr. Ford raised the objection for the first time when Mr. Van Rensburg commenced giving his testimony notwithstanding what had been recorded in the minute of the parties' case management conference regarding how documentation was to be dealt with. The parties' trial minute provides, *inter alia*, that the plaintiffs would prepare the trial bundle; that copies in it could be used without further proof; that each would serve as evidence of what they purported to be without being proof of the truth of the contents; that extracts could be used; and that each party would have the right

to call for the whole document or the original, or to challenge the authenticity of a document, on reasonable written notice.[20]

[38] It is common cause that no such notice of objection was raised by the plaintiffs.

[39] The Draft Case Management Directive ("DCMD") applicable to this court in respect of trial litigation imposes upon the parties the obligation to limit issues as best they can and to streamline the trial by alleviating technical objections.[21] It was held in Skom v Minister of Police & Others in re Singatha v Minister of Police & Another[22] that case management is not merely facilitative, but in fact a vital and necessary tool to ensure the enhancement of access to quality justice for all, not least of all though the effective, efficient and speedy finalization of matters. It certainly impedes access to justice and hampers the finalization of an action when a trial grinds to a halt mid testimony because the legal representatives have become embroiled in a side dispute about the status of documents which they should have reached agreement on through the case management processes.

[20] Ironically in my experience of case management the parties agree as of rote to such effect, but in this instance the defendants, by counsel's own admission, reasonably anticipated that a challenge would come against the authenticity of the documents concerning which Mr. van Rensburg would testify.

[21] The Directive behoves the parties in peremptory terms to address certain issues at the initial case management conference already, including how documentation is to be dealt with at the trial. They are also obliged to consider matters which may facilitate the just and speedy disposal of the case (Par 6 (4)). By the time of the final pre-trial conference, the parties should have considered and tried to reach agreement *inter alia* on the question of what exhibits are to be introduced into evidence during the trial, must identity these documents and objections in respect thereof are required to be stated. Indeed, issues and objections not specified in a final pre-trial order shall, according to the Directive, not be available to the parties at trial (Par 11). The Directive provides further that the final pre-trial order shall be amended "only to prevent manifest injustice" (Par 13). The Directive also provides sanctions for a litigant's failure to meaningfully engage in pre-trial efforts or to meet the case management objectives (Par 15).

[22] (285 & 284/2014) [2014] ZAECBHC 6 (27 May 2014)

[40] I take Mr. Ford's point that generally issues of inadmissible hearsay evidence cannot be anticipated or dealt with in a pre-trial forum because such challenges arise spontaneously during the trial and must be determined by the rulings of the court, but the circumstances here were very different. Ironically, he submitted that it should have been abundantly plain to the plaintiffs that the second defendant was vehemently opposed to the introduction of the records sought to be introduced through the testimony of Mr. Van Rensburg as their objection had been foreshadowed in at least two interlocutory applications and outlined in the notices to strike out filed during the course of the motion proceedings. He submitted that, since this aspect had not been dealt with by my colleague when issuing the order referring the matter to trial, it was an "issue" that obviously remained alive and fell to be determined upon trial. Whilst I do not agree that it simply followed that the script for the motion proceedings would prevail perfunctorily, it certainly behoved the parties to pertinently deal with what might still be in contention going forward insofar as it would impact upon the trial. In respect of the contentious evidence of Mr. Van Rensburg, which was reasonably anticipated by the defendants' counsel at least, they should in my view properly have pressed upon the plaintiffs' representative that there would be issues of admissibility if the deponent were to persist in introducing the contentious records by medium of his oral testimony, were they mindful of the objectives of case management.

[41] As it transpired the plaintiffs were not merely objecting to Mr. Van Rensburg's evidence on the basis that it was hearsay plain and simple. Mr. Ford's objection was that documents which he anticipated the deponent would seek to introduce through his testimony are extracts from electronically stored documents, i.e. "data messages" as envisaged in the ECTA and that because of this the plaintiffs were expected to follow the prescripts of the act, more particular section

15 (4), which requires a certificate to be produced concerning the nature of the data message and its production. The further objection that the documentation sought to be relied upon was by obvious implication of a hearsay nature, or at least not in its original form, and that reliance could not be placed thereon unless application was made for its admission pursuant to the provisions of the Law of Evidence Amendment Act, No. 45 of 1998 ("the Evidence Act") was merely co-incidental. His complaint was that the plaintiffs had made no attempt to bring the evidence sought to be admitted within the parameters of section 15 (4) of the ECTA. I expect that the provisions of section 15 (4) of the ECTA had not even occurred to the first plaintiffs' representatives as no certificate to this effect had been put up by the time of the trial. To the contrary they were blindsided by the fact that no objections to the admissibility of the documentation in the trial bundle had been noted pursuant to the pre-trial minute aforesaid.

[42] It became plain that the parties had thus reached an impasse. Mr. Ford insisted that the defendants' objection be argued and ruled upon (as an ordinary objection to hearsay evidence sought to be introduced), failing which Mr. Van Rensburg could not give the anticipated testimony. I stood the matter down until the following morning to enable the first plaintiff to consider his position and/or to prepare an argument in rebuttal.[23] By the next day the plaintiffs felt themselves pressed into a corner and having reached their "tipping point", as Mr. Heunis put it. Until then they had been prepared to countenance the defendant's late discovery but having regard to what they now perceived to be an obstructive attitude on the part of the defendants regarding the issue of the admissibility of the Department's

[23] Defendants' counsel had come ready and prepared with extensive heads of argument on the issue of the admissibility of the relevant documentation.

EMIS records, became disinclined to pursue the matter further without the safety net of a postponement.

[43] Since this issue of admissibility continued to take centre stage, I digress briefly to outline the relevant legislative provisions in this regard.

[44] Section 15 of the ECTA provides as follows:

> **"15. Admissibility and evidential weight of data messages**
>
> (1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence-
>
> (a) on the mere grounds that it is constituted by a data message; or
>
> (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
>
> (2) Information in the form of a data message must be given due evidential weight.
>
> (3) In assessing the evidential weight of a data message, regard must be had to-
>
> (a) the reliability of the manner in which the data message was generated, stored or communicated;
>
> (b) the reliability of the manner in which the integrity of the data message was maintained;
>
> (c) the manner in which its originator was identified; and
>
> (d) any other relevant factor.
>
> (4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or

> any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract."

[45] "Data" is defined in section 1 of the ECTA as "electronic representations of information in any form" and a "data message" as "data generated, sent, received or stored by electronic means and includes … a stored record;"

[46] It is common cause *in casu* that all four documents generated by Mr Van Rensburg and which were ultimately introduced *via* his testimony constitute "data messages".

[47] From a reading of the ECTA's purpose and objects its aim is not to disqualify electronic communications and transactions as evidence, but rather to facilitate the use thereof as such.

[48] In essence section 15 (4) of the ECTA (if applicable) creates a statutory exception to the hearsay rule in favour of data messages made during the ordinary course of business, and it further creates a rebuttable presumption that such records are correct.

[49] In Ndlovu v Minister of Correctional Services and Another,[24] the court carefully interpreted its provisions. Firstly, on a proper reading, section 15 (1) (a) does not proscribe the exclusion from evidence of a data message on the mere ground that it was generated by a computer and not by a natural person, and section 15 (1) (b) on the mere grounds that it is not in its original form. Secondly,

[24] [2006] 4 All SA 165 (W) at 172 – 173

section 15 (1) does not do away with the three requirements with which documentary evidence generally has to comply with in order to be rendered admissible in evidence. Statements contained therein still have to be relevant and otherwise admissible. The authenticity of the document must still be proved, and the original document must normally still be produced. This is of course unless section 15 (1) (b) applies.[25]

[50] Thirdly, a data message, once it has been admitted in evidence, has to be given due evidential weight pursuant to the provisions of section 15 (2), the assessment of which requires regard to be had to the factors set out in section 15 (3), as set out in paragraph [44] above.

[51] Fourthly, section 15 (4) provides an exception to the manner of proof and evidential weight ordinarily to be accorded to a data message. There are two situations in which a data message may on its mere production be admissible in evidence. The first is where it is made by a person in the ordinary course of business which, when juxtaposed with the words which follow, clearly refers to an original data message which is required to have been made "in the ordinary course of business". The second is where a copy or printout of or an extract from such data message is put up, which is certified to be correct by an officer in the service of such person, the latter being the one who made the data message in the ordinary course of business,.

[25] In *casu* the third requirement did not have to be complied with according to Mr. Heunis by reason of the agreement reached between the parties at the initial case management conference which envisaged that copies could be used subject to the proviso that the parties would have the right to call for the original document or challenge the authenticity thereof on reasonable written notice, which was not given. Evidently, he assumed wrong.

[52] Once either of these two situations is present, the data message is on its mere production admissible in evidence and rebuttable proof of the facts contained therein. Thus viewed, section 15 (4) of the ECTA, which appears to be a self-contained provision, creates a statutory exception to the hearsay rule in favour of data messages made during the ordinary course of business. In such event the "qualitative enquiry" envisaged by sections 15 (2) or (3) in regard to the weight to be attached does not arise. It further creates a rebuttable presumption that the facts contained therein are correct.

[53] At the resumed hearing the plaintiffs' counsel was by now ready to deal with the objection, but Mr. Ford surprisingly contended instead that an assessment of Mr. Van Rensburg's testimony and the probative value of the relevant annexures could be dealt with at the end of the hearing. The first plaintiff had also, in the meantime filed a section 15(4) certificate which provides that:

> "[I] confirm that the copies of extracts and/or printouts which appear on pages 73, 74, 75, 76,[26] 80, 81, 82, 83, 84,[27] 117[28] and 118[29] of the Trial Bundle were extracted from the Department of Education's data bases and I confirm and certify that they are correct.
> I further confirm that I have access to the Department's data bases in the ordinary course of the performance of my responsibilities; that I am responsible for updating and

[26] These comprise the original Annexure "RVR1" – "RVR 4" referred to in paragraph 7 above.

[27] The documents at pages 80 – 84 are a more comprehensive version of the registration report Mr. Van Rensburg referred to it in a covering letter as the "profile" of the school.

[28] The first plaintiff added a salary advice of the second plaintiff which self-evidently persal and not EMIS would have generated.

[29] This page number must be a mistake as it does not relate to Mr. Van Rensburg's collection of documents.

maintaining those data bases; and, that I made the aforementioned extracts and/or printouts during the ordinary course of the discharge of my responsibilities."[30]

[54] If the application had proceeded to its logical conclusion, I might have been inclined to provisionally admit the annexures by reason of the fact that it was revealed by Mr. Heunis during the course of replying to Mr. Ford's argument in the application for postponement after all of that that he was "not presenting the document(s) about which Mr. Van Rensburg (was testifying) … as proof of the contents thereof, but as a reflection of information that may not be correct of what is at the Department's disposal".

[55] Far from the first plaintiff maintaining this position regarding the status of the Department's EMIS records however, the filing of the section 15 (4) certificate appeared to provide the impetus for Mr. Heunis to argue, at the end of the trial, that since the first plaintiff had put up the relevant certificate in proper form in compliance with the sub-section, which had said all that needed to be said, a rebuttable presumption came to the fore that the records produced by Mr. Van Rensburg are therefore correct. It is on this basis that he argued that the second defendant bore the onus to rebut the presumption "that Playways is a public school", a duty which it failed to discharge. Alternatively, he submitted that the provisions of sections 15 (4) (a) and (b) of the ECTA applied and that that it was vitally in the interests of justice in terms of sections 5 (3) (1) (c) and (4) of the Evidence Act to admit the data messages introduced through his testimony. I will say more about this later when I evaluate the evidence.

[30] In my view the "certificate" put up by the witness does not strictly say what the subsection provides. One is not sure if he means that he was the maker of the data messages in the ordinary course of business, or that he was purporting to certify copies from the electronic database as correct in the sense that they were true copies. Instead he seems to be saying that the contents are correct.

THE PLAINTIFFS' EVIDENCE:

Mr Van Rensburg:

[56] Mr. Van Rensburg was the principal witness in support of the plaintiffs' case that Playways was and indeed still is, at least according to the Department's records, a public school. He is in the employ of the Department as a Chief Education Specialist in EMIS, in which capacity he is responsible for maintaining its information systems. This includes inputting and maintaining information regarding schools and learner and educator information. In 2000 he was seconded to EMIS from the East London Teachers Centre (where he was then engaged in instructing educators on computer practice and literacy) to resolve a problem experienced by the Department concerning the instability of the platform on which its management information system was hosted. The Department was attempting at the time to capture the results of annual and snap surveys, which both public and private schools are required to conduct, but the system in use at the time was not suited for such large quantities of data. It was also lagging two years behind.

[57] When he arrived at EMIS there was a list of all schools in the province, but it was not well managed. EMIS was required in the ordinary course to consolidate the list and to verify the information going into the master file. The master list is critical, so he explained, because there are many resource intensive activities that depend on the information generated by the system, so for example post establishments, allocation of funding etc. Practically how they consolidated was to take the most recent update of the master list which they had had at their disposal

at the time. They obtained downloads from persal and then went through a manual process of linking schools (identified by unique EMIS reference numbers allocated to each institution) to persal pay points and by verifying this information.

[58] He conceded that he had not seen any original documentation for Playways when he was asked in 2010 to report on the school's sector status despite requesting the archive headquarters for the former Cape Education Department in Cape Town to search their records for any information in this respect. He suggested that these vital records may have been lost pre-amalgamation. The master file however listed Playways as being a public school which settled the matter for him. He explained that he examined only two sources to determine whether or not this information was correct, namely the staff post establishments for public schools and the persal records, which is the government payroll system.

[59] Post establishment or provisioning is a critical source in his view. These allocations of resources to public schools is in turn based on an annual survey in which only public schools are expected to participate to determine the post establishment for each year.

[60] The questionnaires that inform the survey are completed by the school principal of each school. The information provided in these is captured on the EMIS and thus becomes electronic data. The hard copies of the surveys are kept but destroyed after five years.

[61] Persal has their own strict controls and source documentation for every transaction. So, for example, in the event of the appointment of an employee the

source document is the actual appointment letter.[31] These would be filed on each staff member's file kept by the registry of the Department.

[62] Independent schools do not feature on the payroll system according to him because their appointments are done independently by the relevant school governing body.

[63] Since 2000 EMIS has a document to support every transaction that happens on the master file. The auditor-general will have regard to these documents when auditing the EMIS itself. Even if a school is closed, EMIS must have written authorization from the relevant functionary to reflect that status before being able to commit such a transaction on their data base.

[64] The official staff establishment issued in 1999 which he produced for Playways, indicated in his view from the information reflected therein that Playways was a standalone public pre-primary school with twenty-eight Grade R learners at the time and that the school was allocated one principal post according to the relevant distribution formula applied, signed off by the acting permanent secretary at the time. This allocation would have been based on the annual survey completed in March the year before. Staff establishments for schools are declared by 30 September before the ensuing year. This staff establishment would have been used as one of the sources employed by EMIS in 2000 to verify the authenticity of their master file. Once the post establishments are declared, persal loads this information to its own system so that the educator is in due course paid.

[31] The source documentation in respect of the second defendant, which would have been useful to show the circumstances under which she came to be incorporated on the persal system, relative to Playways, was not produced. The only background concerning the payment of her salary by persal comes from a financial report of the school dated in 2001 which laments the fact that the school took strain having had to pay her salary out of its own coffers for seven months until her appointment by the Department, which only kicked in in August 2001.

[65] The institution registration report (Annexure "RVR1") is a document which he claims to have generated himself in 2010 when he became involved in the motion proceedings and which indicates the relevant information that is on the master file for Playways. It is merely a "graphical layer" that extracts information from the master file.

[66] In this case it showed Playways to be a standalone Early Childhood Development ("ECD") site. Such a site is one which after the amalgamation of the different school departments in 1994 were sites that only offered the pre-primary schooling phase but had teachers appointed at these that were government appointed. Presently Grade R forms part of ordinary public schools and its practitioners (which are not fully-fledged educators) are paid from persal. By a process of attrition, the Department is no longer filling posts at standalone sites once they become vacant.

[67] The document also reflects the name of the pre-school (even a name change must be accommodated by an official approval), that it is situated in the East London district in Circuit 3; its telephone and telefax details; the geographic information system detail of its location; its non-section 21 status (only applicable to primary and secondary schools), its operational status (as at 14 May 2010 when the registration report was printed) - namely still operational, that it is in the public sector, the persal pay point reference number, and the school manager's name (which name incidentally did not appear to be significant to any of the witness who testified). Each facet of the report would have come from different sources he explained. So, for example, the section 21 status information would have been

apprised to them from the finance section. The geographic information system coordinates would come from infrastructure, and so on.

[68] Most critically, the document also reflects the registration date of Playways as being 1 January 1983. This would indicate, so he explained, when the school started to operate or became an education institute. Asked where this detail would have been extracted from, he volunteered that it was sourced from the national school register of needs infrastructure survey conducted at the request of Treasury in 2000. The objective was that that census would inform budgeting and planning going forward for school infrastructure nationally.

[69] Annexure "RBR3" is similar to "RBR 2", but just a later adapted template of the staff establishment for educators in 2003. This establishment indicates that according to the Department's formula, Playways qualified for three posts for that year, but given the progression by then of Grade R classes being attached to primary schools they had already started the process of attrition and did not fill the second and third posts the school qualified for despite the targets reached. He again stressed that such an establishment would only have applied to a public school. The source of their information and result produced in this instance would again have been the annual survey conducted in March of that year.

[70] Annexure "RBR4", he explained, was a printout from the EMIS reflecting a snapshot of the school's pay point for the period 2004 – 2010 derived from persal text files imported into their data base. The persal component number correlated to

a post level of principal. The other details corresponded to those of the profile of the recipient of remuneration, who it is common cause is the second plaintiff.[32]

[71] Although persal has its own system of checks and balances (he assured the court of the integrity of the master file which is a read only file except for two people who have the right to update or change it), it transpires that the information which is captured and uploaded to it is only as good as the information given by those who are responsible for filling out the survey forms. He conceded that sometimes the information was incomplete or incorrect such as where, for example, schools think they are independent whereas as they not, or *vice versa*, or where a principal overstates a school's learner numbers to achieve a better post outcome. He emphasized that there are however quality assurance processes in place to ensure that the data accords with the reality and is consistent with the integrated information at their disposal.

[72] Referred to a document discovered by the second defendant which is a tenth day return dated 4 February 2002 by the Little Beacon's Pre-Primary school principal, Ms. Leonard, to indicate that that school, also a standalone ECD is independent, he asserted that she was mistaken in her assessment of the sector of Little Beacons. This was one of those examples in his view where the school was not 100% sure and under the impression that it was independent whereas it is in fact a public school. He motivated his answer on the basis that Ms. Leonard had indicated in the return that she was paid by the Department. This means in his

[32] Counsel did not interrogate the import of this information much. The question begs itself how the second plaintiff could have continued to be paid as a principal in association with Playways until 2010 whereas it was known by the Department, by at least March 2007, that she was not reporting at that school any longer. This appears from the evidence of Mr. Ngxele. The other puzzling question is whether staff establishments were completed routinely after this and if so based on what information, and by whom. I understood Mr. Van Rensburg's evidence to mean that the surveys were vital to justify staff establishments.

view that it is a public school because a private school does not have state paid employees on its payroll or, put differently, the persal system does not allow for educators employed at independent schools to be paid from the persal system. Ms. Leonard had purportedly made this mistake consistently in other forms put up by the second defendant in discovery.

[73] He conceded the possibility that independent schools do qualify for subsidies according to policy, which EMIS calculates, but he disavowed that the Department provides them with paid staff in lieu thereof.

[74] He described the Department's system of registration of schools as a positive one, meaning that a school must come forward to register. In the case of Playways he could find no trace of the school ever having been registered as an independent school.

[75] Under cross examination he acknowledged that on 5 March 2007 already he had generated a letter signed by him, addressed "to whom it may concern", which confirmed the status of Playways to be public insofar as the Department's EMIS goes. The letter gave cover to a profile of the school printed by him off the EMIS reflecting this information, in response to a request by the Department at the time.

[76] He gave a context to how the date of registration of the school reflected on EMIS must have been obtained. The census referred to above had entailed the National Department sending out field workers to all the schools to interview the school principals. The data captured from this exercise by the National Department was thereupon given to EMIS. He could not say what had been recorded at the time on the original documentation on which this information was

based. He agreed, in respect of the census, that he had no control over the data captured by the National Department arising from the exercise neither could he guarantee the correctness thereof. The detail canvassed by the census had however related to infrastructure needs on the part of schools generally.

[77] Whilst being generally knowledgeable of the Education Information Policy,[33] he had no knowledge of the legislation which preceded the Schools Act, and which would have been of application from time to time. He also had no independent knowledge that Playways was founded in 1940, the history of the school or that in 1976 the Cape Education Department purportedly took over the payment of teachers' salaries in lieu of a general subsidy until these were withdrawn in1994. He could not gainsay what Mr. Ford suggested the evidence would be in this respect neither did he have any comment to offer as to the import or significance of the defendants' anticipated evidence being in contradiction to his opinion that persal only pays educators at public schools. Indeed, as far as he is concerned the pre-dominant and only indicator in his view which distinguishes a private from a public school is that in respect of the latter, an educator is paid by persal. He could say this with conviction because people he interacted with from persal had "assured" him that this is so.

[33] Despite professing himself to be eminently qualified in the maintenance of the Department's EMIS it struck me as odd that he not once referred the court to the formal protocol or standards, published under the title "Master List of Institutions Providing Education Services" per GN 573 in GG 35526 dated 17 July 2012 (which would have been applicable at the dates of his testimony at least). The purpose of the standard is to specify the relevant data elements that must be managed and maintained to describe each educational institution in a standardised manner for the Department of Basic Education. Technical specifications for the data fields or elements follows a script. Among core data is "the official full name of the institution in accordance with the registration or establishment documents of the institution." The owner of the land and the buildings are separate core detail that is required to be denoted under separate fields. An institutions subsector to which it belongs must be captured in accordance with the requirements of "Code List Table 6.17 of SC009; Standard for Data Coding" which the court was never privy to. An ex education department field is also required to be maintained with institutions registered between 1996 and 2009 being allocated a unique PED or Code 16. Whist Mr Van Rensburg certainly did his best to apprise the court of what he knew best, there was no professional point of reference for some of the conclusions drawn by him.

[78] It transpires that he does not have authority to transact on the persal system neither does he have access to anything except authorized text files downloaded from their system to EMIS.

[79] He agreed that both the registration of an independent school and a change to a public school involved extensive processes which had to be undergone. He clarified that EMIS only became involved at the end of such developments.

[80] He clarified that when he had been asked to generate the profile report of Playways in March 2007 his brief had not been to check whether the status of the school was private or public, but rather to establish only if the school was registered on the EMIS, firstly, and, secondly, to see if the second plaintiff was indeed on the persal system. He claims that they did not have any information to verify at that point in time whether the school was independent or public. It was only on 14 March 2010 however that he generated the comprehensive registration report for Playways which indicated that the sector of the school was public.[34]

[81] At the time he generated the registration report in 2010, he had the school down as still being operational. As a matter of course, schools are never deleted from the system but would change to "pending close" or "closed" once they received authorization from the MEC to capture such a change. According to him Playways was also as at the date of his testimony on 19 September 2016 still registered on the master file as a public school.

[34] This narrative doesn't make sense. Nothing had happened in-between to allow him to say with conviction in 2010 that Playways was a public-sector school.

[82] After it was pointed out to him by Mr. Ford that the second plaintiff had by the date his registration report was generated already been excluded from the school and that changes had taken place which self-evidently were not in line with EMIS' records, he explained that sometimes it takes a while for the relevant and necessary documents authoring any changes to filter through to them for their purposes. The master file also runs independently of the annual surveys and data entries generated in that context. He agreed though that changes to email addresses effected since he generated the profile in 2007 would have been prompted by the school introducing such changes when completing the usual annual survey, which information would in the ordinary course have been captured on the master file.

[83] In 2010 the sector indicated on the master file would have come from a combination of persal downloads and the 1999 staff establishment. He agreed that these two base lines were effectively linked and did not really constitute separate sources of information.

[84] It became apparent when pressed concerning the information pertaining to the second defendant on the staff establishment that he deferred to persal as having the specialized knowledge, particularly regarding the common cause fact that from January 2007 she was no longer at Playways but continued to be employed and paid by the Department until April 2016.[35] He also deferred to the human resources department concerning the allegation put to him that the second plaintiff had been charged with a criminal offence relating to the theft of money from Playways and that she had been convicted and sentenced pursuant thereto.

[35] See footnote 32.

[85] He was not inclined to agree that teachers paid pursuant to the provisions of sections 5A and B of Ordinance No. 20 of 1956, inserted by section 55 of Ordinance No. 15 of 1979,[36] might also be on the persal system despite the school obviously being a private one, neither was he prepared to be drawn on the suggestion that his insistence that persal paid educators only occur in public school scenarios was not a reliable indicator.

[86] He was unable to engage with Mr. Ford regarding the suggestion that Ms. Leonard would testify that despite EMIS' indications to the contrary, Little Beacons was also a private pre-primary school and was dealt with by the Department as such.

[87] Asked to indicate the source for the contention in his affidavit filed in the motion proceedings that no departmentally employed educators were allocated to private schools and that it was in fact impossible for this to happen in terms of departmental policy, he clarified that he was deferring to the persal system in that regard "where they have assured me that no private school staff member can be employed on the persal system".

[88] He conceded, with reference to newspaper reports he was referred to which convey that the Department was having a problem with ghost employees based on false input from those responsible for completing the annual surveys (although qualifying that it is an issue dealt with by persal and not EMIS), that it was always possible that a data system could be found to be incorrect based on wrong or corrupt information captured. He assured the court however that EMIS regularly

[36] The legislative outline, and its import, is dealt with below.

undergoes general audits on a standard basis as required. What the standard basis was he never sought to explain.

[89] He was not prepared to comment on Mr. Ford's final submission put to him that there would be evidence, despite EMIS records to the contrary, that Playways and Little Beacons were independent schools and regarded as such by the Department thus rendering his sole reliance on the master file as misguided and wrong.

Mr. Nxele:

[90] The plaintiffs also adduced the testimony of Mr. Ntsele Thomas Nxele, now retired but previously in the employ of the Department as Chief Education Specialist. He was based in East London at the relevant time and dealt with issues of school governance. His testimony was focused on the issue of prescription, but he indirectly touched upon the aspect of the status of the Playways School. In 2006 the second plaintiff made a report to him that the school (the land) was being sold by the chairperson of the school governing body and that she was going to be out of work. In the course of trying to resolve the issue he stated that he had visited the school on a number of occasions and had also tried unsuccessfully to set up meetings with the relevant governing body trustees to discuss the matter. Ironically, despite the professed status of the school as a public one and his authority by virtue of his position at the time, it appears that he made the lackluster attempts which he did only really to "assist the principal", being aware of the difficulty she was going through. He thought he should attempt to meet and try and resolve the matter "so that (they) can have a kind of understanding where (they) stand on the issue".

[91] He had been informed in no uncertain terms when addressing a then trustee of Playways, Mr. Schultz, that he had no *locus standi* to insist that he meet with him because the Department was not a trustee, shareholder or the owner of the school or of the property on which it was situated.

[92] He added his own pennies' worth of why he thought the school was public, which appears to accord with Mr. Van Rensburg's peculiar reasoning:

> "Why do you say that? --- One thing was that you know, with the staff establishment schools are allocated posts by the Department of Education, so this was one school that was also allocated a post by the Department of Education and therefore I felt it was Public School and secondly they did receive learner support material from the Department, I think those two issues I felt were enough to convince me that it was a Public School."

[93] As it turns out, his resolve of the situation, given that the committee members of Playways were not prepared to entertain him or give the second plaintiff access to the school, was to have her report (officially) to his office to work there for a few months until she went on incapacity leave and was thereafter medically boarded[37].

[94] He claimed to be unaware by the time he was agitating to be of assistance to the second plaintiff of the fact that she had been prosecuted in relation to the theft of money from school funds and convicted on the basis of her guilty plea.

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[37] This official deployment was ironically never captured on the persal system. The persal snapshots which Mr Van Rensburg introduced show her to have been associated with Playways as its principal until 2010 at least, an untrue reflection of the reality.

[95] He appeared to concede that at the time of his purported intervention and based on what was happening that they did not have the "capacity" to deal with the problem (an alarming proposition if on their version they believed Playways to be a public school under the control of the first defendant), although he insisted that there was a lack of clarity on their part as to what the legal position was.[38]

[96] He could not dispute Mr. Ford's submission that the defendants' evidence would be that Playways had not been provided with learner support material. He conceded that he had been so informed by the second plaintiff and bore no personal knowledge of this fact.

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[38] I accept the Department's *bona fides* regarding the lack of clarity. It also prevailed in the minds of the trustees and members of Playways themselves, not that they equivocated regarding whether they could or could not sell Playways, but rather how they were defined. In the minutes of the Special General Meeting held at the school on 29 November 2006 in which the seminal decision was taken to sell the school, included in the trial bundle, they considered the options available to them in troubleshooting the problems which had brought them to the brink of selling and noted that:

> "*What were the options available to rectify these problems?*
>
> *a) Report the misadministration to the department of education and await their action.*
> *A parent who works in the department of education confirmed that if anything did happen it would take years!*
> *It was also understood that the department of education is not in support of individual Pre-Primary School's like Playways and it was quite a concern that they might hand it over to a school of their choice, if they were aware of problems at the school*
> *There is no disciplinary action Playways Pre-Primary can take against the offender as she is employed by the department of education and not Playways Pre-primary School.*
>
> *b) Thus option B is to sell Playways Pre-Primary School according to conditions set out in the constitution of the School."*

Elsewhere in the minute they also refer to themselves as being a "Government School", albeit the only benefit that this attracted was that the principal's salary was paid by the Department. Then comes the clanger:

> *"A lot of discussion followed and it was agreed that while the school is a government school, a principal employed by the department is in place who is responsible for the management of the school. The principal is in control of the daily running of the school and thus can manipulate matters, especially where the governing body is a group of unsuspecting individuals.*
> *Alternatively if the school were privately owned a business person would take a keen personal interest in the efficient management of the school. This person would also have the necessary management skills and teaching would be left in the hands of the capable teachers."*

Dr. Sipho Lombo:

[97] The plaintiffs adduced the evidence of Mr. Sipho Lombo, in the employ of the Department as director in a program entitled Quality Promotion and Standard in Education. He had previously been a director in the office of the Head of Department as a technical advisor but it transpired that he had only been so employed from 1 April 2008 to November 2009. He could obviously not assist the court at all, even in respect of the issue of prescription regarding what had happened between the time of the report to Mr. Nxele by the second and third plaintiffs and the decision taken to litigate ultimately.

Mr. Eric Jabulani Nbeje:

[98] Next the plaintiffs adduced the testimony of Mr. Eric Jabulani Nbeje, who was in service as a legal advisor to the Department on secondment from the office of the Premier from 3 August 2008. His evidence pertained to the issue of prescription, but he formed the legal opinion after the fact (although the plaintiffs did not qualify him as an expert) that based on his own investigations Playways was a public school. What tipped the balance for him is the post establishment (or the resource target list) declared in respect of Playways in accordance with the norms and standards relating to post provisioning, because, in his considered view, departmentally paid posts are only provided to public schools.

[99] Despite professing to have formed such opinion, he had no idea concerning the prior legislative provisions preceding the coming into operation of the Schools Act, or when Playways was established, neither was he aware that there was a

time, as it was put to him by Mr. Ford under cross examination, when the relevant education authorities indeed paid educators at private schools.

Ms. Maritha Alberts:

[100] The plaintiffs also led the evidence of Ms. Alberts, a retired former Director of Human Resources Administration for the Department of Education in Zwelitsha who claimed to have considerable experience in matters of personnel since she had been employed in education since 1980. According to her the persal system was started in 1993/4 by the Western Cape Department of Education whereafter, in 1996, the other departments followed suit. All employees that were paid by the Cape Education Department and who held an approved post on the staff establishment of an institution were transferred onto the Department's persal system.[39]

[101] According to her knowledge the Department does not provide departmentally paid educators to private schools. Rather she proclaimed that at a private school the school governing body is the employer and "never ever will a person employed by a school governing body be remunerated by the persal system".[40]

[102] Ms. Alberts too could not dispute that Playways started in 1940 or contradict a statement to the effect that the school has always been regarded, certainly by

[39] The fact that Mrs. Hollis held an approved post at Playways by the date of takeover, according to her version that teachers at the school were paid by the Cape Education Department in lieu of a general subsidy, would account for how she came to be on the Department's persal system post amalgamation.

[40] According to her, she knew of no such instance in her numerous years of experience with the Department.

those operating it, as a private school. Neither could she comment on the assertion put to her that the Department paid not only one, but two educators at other independent pre-primary schools. She readily conceded however, despite her statement to the effect that departmentally paid educators are not provided to private schools, that this was possible in terms of the earlier Cape Education Ordinance, 20 of 1956.

[103] I point out that under examination by the court it transpired that she no longer has access to persal, albeit she is a consultant, post retirement, to the Department in Port Elizabeth. She provided an archived salary record in respect of Ms. Leonard, the principal of Little Beacons while being led in chief but significantly could not bring the same introspection to the second plaintiff because she is not authorized to get information from persal any longer.[41]

[104] She clarified that she was a "Johnny-come-lately" to the saga of Playways. She was further self-evidently not qualified as an expert on persal matters, instead offering the views she did based on her own personal experience. One would have thought that that the plaintiffs would adduce the testimony of someone with authority in persal in order to bring home the conviction that it never happens that staff of independent schools are, or at least were, paid by persal, and to shed light on the important changes that were ushered in by the introduction of the national system of education. [42]

[41] The court's interests would have been better served by understanding the profiles of Mrs. Hollis and the second plaintiff and having access to the Department's paper trail in respect of them from their respective appointments to exit, and on what basis each of them came to be paid by the relevant education departments more specifically in relation to Playways.

[42] Indeed, the testimony of someone from the erstwhile Cape Education Department would have been helpful.

[105] As an aside it emerges from the facts set forth in M J Schentke v The Member of the Executive Council, Department of Education, Eastern Cape Province & Others[43] that current day stipends for Grade R practitioners are for convenience paid by persal directly to practitioners. Paragraph [11] of the judgment of Stretch J is instructive in this respect:

> "According to the Department's legal representative, the Department had initially paid the stipends which I have referred to into school bank accounts to be transferred to the individual practitioners. However, the money was not always paid over, which resulted in the Department registering the payments on its staff salaries system (PERSAL) to be paid directly to the practitioners. An unintended consequence of this step was that the PERSAL system generated a salary advice and automatically deducted a monthly contribution to the GPSSBC."[44]

THE DEFENDANTS' EVIDENCE:

Mrs. Judith Hollis:

[106] The defendant led the evidence of Mrs. Judith Hollis, principal of Playways for over a decade from 1989 to 2000. She regarded the school as private and clarified that she never received any documentation from the Department referring to the school as public. Indeed, had she received such, she would have queried it. According to her, the school was self-funded and received no subsidy from the Department of Education, which only paid the salaries of three teachers until 1993,

[43] Eastern Cape Local Division, Bhisho, Case No. 57/2015, dated 19 February 2016.

[44] It is noteworthy in my view that this was contended on behalf of the Education Department itself as being the predicament it faced, being hoist by its own petard as it were.

where after they reduced the payment to one teacher's salary. The school was started in a garage and was thus, from the outset, obviously a private and later an independent school.

[107] Regarding her appointment to Playways, she related that she had applied directly to the governing body and was interviewed by trustees at the time who hired her on probation at first for a period of six months. Until then she had worked various educator jobs and had obtained the then new requisite pre-primary qualification that would allow her to teach or to take a post in either sector. Her first appointment, post pre-primary school qualification, was as a teacher at Wonderland Pre-Primary, a private school in Gonubie, where she was paid by the Cape Education Department. When her appointment to Playways was approved, the governing body informed the Cape Education Department of their decision and once they were assured of her pre-primary qualifications, she was put down on that Department's payroll.

[108] In spelling out the past of Playways she confirmed that this had been sourced from a history recordal in a leather-bound book which the school had retained. Contributions were made in it by herself, previous principals, trustees and people who had been on the school's committee from time to time. The most notable and relevant milestones for present purposes are that the school started out as a nursery school in the garage of one Marge Taylor in 1940 until they moved to their last location in Berea and erected a proper building on municipal land; Playways was granted a provincial government subsidy in 1959; and that the Cape Education Department took over the payment of teachers' salaries along the way (probably

thirty years ago she suggested)[45] at a time when pre-primary teachers were expected to get the necessary pre-primary qualifications. When she commenced teaching at Playways there were two other departmentally paid staff apart from herself. In 1993 the Cape Education Department withdrew the salaries of two teachers.

[109] She referred to an information circular notice given to new parents of prospective children coming into school under her reign as principal, in which a brief history of Playways is stated amongst other aspects.[46] Two matters of significance arise from it. Firstly, the abbreviated history of the school is related as follows:

> "The school was founded by a group of parents in 1940 and later joined forces with a school run by Mrs M. Taylor and became Playways. It is still run by a committee of parents on a non-profit basis. Until 1957, the School subsisted entirely on fees from parents, but by then Playways had reached a sufficiently high standard for application to be made for a Provincial subsidy which was granted. In 1976 the Cape Education Department took over the paying of teachers' salaries, instead of a general subsidy. In 1994 the Department withdrew the payment of the salaries of two teachers and they are now employed by the Management Committee.

[110] Parents are also informed in the circular that the school is registered by the Cape Education Department, hence the name "Playways Pre-Primary". The circular goes on to note that:

[45] The history records it as being in 1976.

[46] This would have been around 1992.

> "Unless a school is registered with the Department it may NOT call itself a Pre-Primary. We are not a Creche nor a Day Care Centre nor an Educare Centre. Our aim is to help develop the child as a whole so that when he moves on to Primary School he is school ready. We aim to develop the concepts and skills he will need for formal learning and ALL staff members are qualified Pre-Primary teachers."

[111] She claims that there was little interaction with the relevant education departments in carrying on the school's existence. There was a Ms. Koekemoer in the employ of the Department who would visit the school once a year and who would occasionally organize a workshop for educators of private pre-primary schools on a Saturday.

[112] All the movable assets of the school were purchased by the governing body through funds raised at the school.

[113] Governance-wise the school was run by a governing body that consisted of a chairman, vice-chairman, a treasurer and a secretary, a representative from the mothers' group and herself. Meetings happened monthly. Annual General Meetings were held at the beginning of the second term, budgetary matters were determined towards the end of the year. The relevant education department played no role whatsoever in these matters and conversely no information regarding the school's affairs or finances were reported to them.

[114] There would have been a ten-day report (the so-called "Snap survey" on a pink form) which surfaced from the Department near the beginning of each school

year and another which was completed annually in which she is quite sure she would have recorded Playways as a private school.[47]

[115] Under cross examination she asserted that she had no knowledge of the registration date of Playways in the records of EMIS given as 1 January 1983. She explained that she would have queried this information if had she seen it along the way because it was self-evidently incorrect.

Mrs. Louise Joy Leonard:

[116] Mrs. Leonard gave evidence on behalf of the defendant to the effect that she consistently reflected Little Beacons, a school like Playways, as an independent school on documentation sent to the Department and that it was never queried.

[117] Under cross examination she was at pains to explain why when completing the annual survey for schools[48] on 16 May 2002[49] she checked the box for "public school" and then changed this to check the box for "independent school". She explained how this came about. Prior to completing the annual survey for schools, on 14 May 2002 she completed a form styled "Data Base For ECD Sites" which on the second page thereof required one of three options to be selected to indicate the status of the Grade R class. The three options are "Grade R class attached to public primary school", "class in community based centre" or "Class in

[47] Both these surveys would have been required to be completed by public and independent schools alike.

[48] These forms on the face of it were obviously only required to be completed by ECD sites in the public sector. Counsel appeared to be focused on information detailed in it, but did not interrogate why the principal of the Little Beacons was filling it in at all, given her professed status of the school as being independent. Perhaps this is where the confusion has come in from the Department's point of view that Little Beacons is in the public sector.

[49] This particular return was held up the plaintiffs to demonstrate her supposed uncertainty regarding Playways' sector status.

freestanding public ECD Centre". She checked the Grade R class in freestanding public ECD Centre as she believed that this was the correct designation for an independent school such as Little Beacons, as it was a freestanding ECD centre. There was according to her no option for an independent freestanding ECD centre.[50] The form then continued "Full Name of ECD Care Provider", after which she inserted her name, as that was the position in which she was employed. The form then required her to answer the following question: "Is the ECD provider on the persal system of the Department (only for public primary schools and freestanding ECD centres)?" She stated that she answered in the affirmative as she could not have answered "no" to this question.

[118] She made no pretence of the fact that she was employed by the Department and on its persal system. She also regarded Little Beacons as being a freestanding centre. As a result, to answer otherwise would have been incorrect.

[119] She was however resolute that Little Beacons was not in the public sector.

THE LEGISLATIVE PROVISIONS:

[120] During argument counsel referred me to the relevant legislative provisions which have applied in the South African education arena over the years since 1940 when the defendants say Playways was established. Two threads were explored in examining these. The one focus is on the so-called positive system of registration of independent or private schools which the plaintiffs contend for. They submit that, absent a registration certificate proving that Playways was a private school, that an inference falls to be drawn in this respect that it was instead a public-sector

[50] See footnote 48 above.

school as the Department's EMIS and persal records suggest. The second focus is on provisions in the legislation which lend support to the defendants' version that educators of private schools were in fact remunerated by government despite this status as a means of subsidizing these schools.

CAPE CONSOLIDATED EDUCATION ORDINANCE 5 OF 1921

[121] One must begin with the Cape Consolidated Education Ordinance 5 of 1921 ("the Consolidated Ordinance") on the basis that Playways commenced as a nursery school in 1940 because this is the legislation which pertained at the relevant time. Although Mr. Heunis flirted with the proposition that the evidence given by Mrs. Hollis concerning the recordal of the history of the school was in the nature of hearsay evidence, it was put before the court without objection. Moreover the history was recorded in circumstances long before it was ever imagined that Playways would be embroiled in litigation and self-evidently reveals the natural chronistic evolvement of the school since its establishment. The key events remembered which bear on the action, as well as other minutiae, are supported by certain of the other documents in the trial bundle, such as financial and chairperson's reports, Mrs. Hollis' own circular letter to prospective parents dated around 1992, the deed of sale entered into between it as an "education institution" and the municipality in 1987 when it purchased the fixed property, and a copy of a mortgage bond dated in 1992. I accordingly find no reason to reject the premise of the school's origin in 1940 rather than accepting the later date of inception contended for by the Department in its EMIS records which is unsubstantiated by any source documentation.

[122] Chapter 25 of the Consolidated Ordinance deals with private schools in general. Section 321 provides that:

> "321. It shall be the duty of the proprietor or principal teacher of every school which is not aided on the registers of which 5 or more pupils were enrolled:
>
> (i) to register such school at the office of the Superintendent General;
>
> (ii) to keep a register of enrolment and a register of daily attendances of pupils;
>
> (iii) to keep a register of teachers employed thereat showing the qualification and emoluments of such teachers.
>
> Any such register shall be in such form and kept in such manner, and such returns shall be furnished, as may be required by the Superintendent General."

[123] Section 323 provided for the inspection of private schools and read as follows:

> "323. It shall be lawful for the Superintendent-General or any inspector of schools, or any medical inspector of schools specially authorized thereto by the Superintendent-General, to visit and inspect any such school as is in this chapter described for the purpose of ascertaining the condition of such school, including the premises, furniture and equipment, the nature of the instruction given and the manner in which the school is conducted."[51]

[124] Section 322 provided that the proprietor or principal teacher of such schools could request an examination or inspection of the school.

[51] This oversight of private schools by the relevant education department, ostensibly to maintain control and to ensure quality, is a consistent feature of the education legislation which has pertained over the years.

[125] Evidently this Ordinance did not provide for pre-primary schools at all. Section 86(a) thereof, which dealt with the establishment and classification of schools provided for a host of different types of schools, including training colleges, training schools, secondary schools graded as high schools, secondary schools not graded as high schools, primary schools, farm schools and part-time schools.

[126] Chapter 2 of the Consolidated Ordinance further provided for the establishment of special schools and in terms of section 134 (a) thereof technical schools, commercial schools, art schools, and music schools for students of "European parentage or extraction" were classified as special schools. Section 2 defined a school as being "aided" by the Provincial Administration. These types of school listed above were thus, by definition, schools aided by the Provincial Administration.

[127] It follows that since the Consolidated Ordinance did not apply to nursery or pre-primary schools whether public or private, that they were thus not required, in terms of the Consolidated Ordinance, to be registered.

THE CAPE EDUCATION ORDINANCE 20 OF 1956

[128] Initially, the Cape Education Ordinance 20 of 1956 ("the Education Ordinance"), which repealed the Consolidated Ordinance and came into effect on 1 January 1957, did not deal with pre-primary schools, but referred to nursery schools. Prior to its amendment, section 239 thereof read as follows:

> "239. The Administrator may grant aid, in accordance with regulations made by him, to any nursery school for European or Coloured pupils who have attained the age of 2 years but have not attained the age of 6 years."

[129] This section was then amplified by Ordinance 14 of 1966 to provide that:

> "239. The Administrator may grant aid, in accordance with regulations made by him, to any nursery school for European pupils in respect of pupils who are enrolled at such schools and are of such age as may be prescribed in such regulations, provided that such aid shall not be granted in respect of a pupil during any period before he attains the age of 2 years or after the end of the year in which he attains the age of 6 years."

[130] The Education Ordinance was then amended by Ordinance 10 of 1971, which introduced definitions for 'pre-primary class' and 'pre-primary education'. As a consequence of this amendment, the Education Ordinance defined a 'pre-primary class' as "… a class which forms part of a primary school or of the primary section of either a high school or a secondary school and in which pre-primary education is provided". 'Pre-primary education' was defined to mean "instruction which is exclusively below the level of syllabuses for the primary school course of the department".

[131] Section 58 of the Education Ordinance 20 of 1956 was amended three times, first by section 3 of Ordinance 10 of 1971, then by section 4 of Ordinance 16 of 1973 and finally by section 35 of Ordinance 15 of 1979. The final result was that the section read:

"58. (1) The Department may establish and maintain schools for European pupils, classified as high schools, secondary schools, primary schools or pre-primary schools; provided that the board shall be consulted before any such school is established in an area; and provided further that with effect from the first day of January, 1974, no secondary school shall be established.

(2) In respect of any such school the Department shall decide whether boys or girls or both boys and girls are to be enrolled therein and shall –

(a) in the case of a pre-primary school or pre-primary class, determine the nature and extent of the pre-primary education to be provided therein, and

(b) …"

[132] Evidently this section governed schools classified as public schools.

[133] Following thereon and also dealing with public pre-primary schools is section 62A of the Education Ordinance 20 of 1956, inserted by section 7 of Ordinance 10 of 1971. This section deals with pre-primary schools in the most general of terms and reads as follows:

"62A. (1) Pre-primary schools shall be schools organized, staffed and equipped exclusively for pre-primary education.

(2) The Administrator may make regulations not inconsistent with this ordinance in regard to pre-primary schools, including-

(a) the minimum number of children required for the establishment of such a school;

(b) the minimum average enrolment to be maintained by such a school and the closing of such a school on failure to maintain such enrolment; and

(c) the minimum and maximum ages of children who may be enrolled at such a school.

(3) The power to make regulations for any purpose referred to in sub-section (2) shall include the power to restrict or prohibit any matter or thing in relation to that purpose either absolutely or conditionally.

(4) Any regulations made in terms of sub-section (2) may be made with retrospective effect to a date not earlier than date of commencement of the Education and School Board Service Amendment Ordinance, 1971."

[134] Section 240 (1), which dealt with "private schools", until its amendment by section 10 of Ordinance 23 of 1969, initially read as follows:

"240. (1) No person shall establish, control or maintain a private school, including a nursery school, for European children in which 5 or more pupils are enrolled, unless such school is registered with the Department.[52]

(2) The registration of a private school shall be in the discretion of the Department, and shall be subject to the management thereof-

(a) keeping or causing to be kept, in such form or in such manner as the Department may from time to time require, a register of enrolment and a register of daily attendances of the pupils and a register of teachers employed in such school showing their qualifications and emoluments;

(b) furnishing or causing to be furnished to the Department such returns which may from time to time require; and

(c) complying with such other conditions as the Administrator may generally or specifically prescribe.

(3) …[53]

[52] This ties in with Mrs. Hollis' circular that, *circa* 1959, the school had subsisted entirely on school fees, but had "reached a sufficiently high standard for application to be made for a provincial subsidy which was granted". This assumes registration as a premise before (or together with) an application for financial aid and compliance with the requisite requirements that would make it eligible for such aid. In other words, Playways must have registered and it probably happened under this dispensation which applied at the time.

(4) Whenever the management or principal of a private school makes a request in writing for an examination or inspection of such school, the Department may cause such examination or inspection to be made and a report thereon to be transmitted to such management or principal free of charge.

(5) Any private school may be visited and inspected by the Department for the purposes of ascertaining the condition of such school, including the premises, furniture and equipment, the nature of the instruction given and the manner in which the school is conducted.

(6) If the Superintendent-General is not satisfied in regard to the condition of a private school which is registered with the Department, the qualifications of the teacher, or the nature of the instruction given therein, or if it appears to the Department that the condition subject to which such private school was registered are not being complied with, the Department may cancel the registration of such school from a date determined by him, and from such date the school shall for the purposes of sub-section (1) be deemed not to be registered.

(7) Any person who contravenes the provisions of sub-section (1) of sub-section (3) shall be guilty of an offence.

(8) For the purposes of the foregoing provisions of this section 'private school' means an education institution not being a university, university college, college or school established, maintained, aided, registered or required to be registered under a provision of any other law or under any other provision of this ordinance."

[135] Section 18 of Ordinance 10 of 1971 amended section 240 (1) by substituting the words "nursery school" for the words "pre-primary school". Section 54 of Ordinance 15 of 1979 deleted section 239 of Ordinance 20 of 1956, I expect

[53] This section deals with the admission ages of children attending private nursery schools and is irrelevant for present purposes.

because private pre-primary schools had by then become accepted as being subsumed under private schools as a collective.

[136] Sections 240 (5A) and (5B), significant in their import and timing for present purposes, were then inserted by section 55 of Ordinance 15 of 1979. These sections read as follows:

> "5A. The Administrator may make regulations providing for the granting of aid to private schools by means of –
>
> (a) the payment of a subsidy in respect of pupils enrolled at any other school and who, in the case of a private pre-primary school, are of the age prescribed in such regulations, or
>
> (b) the appointment and remuneration by the Department of teachers at any private school for the instruction of pupils of such school.
>
> 5B Any teacher appointed at a private school in accordance with the regulations contemplated by sub-section (5A)(b) shall be deemed to have been appointed in terms of section 81 and the provisions of chapter 2 shall apply in respect of any such teacher."[54]

[137] A further amendment to section 240 followed by the insertion of subsection (6) in the following terms:

> "(6) If the director is not satisfied in regard to the condition of a private school which is registered with the Department, the qualifications of the teacher or teachers

[54] This change is significant from the defendants' point of view as it confirms Mrs. Hollis' and Mrs. Leonard's evidence that at a point in time and despite their schools being private, their teachers were paid by the erstwhile Cape Education Department. The best argument the plaintiffs can raise against this as a possibility is that the envisaged regulations, which the then Administrator was required to make, were never forthcoming. The date is also a bit off, as far as Mrs. Hollis' testimony went, but perhaps the history recorded in the linen history book was a tad off. This would not be a material mistake in my view.

> therein, the nature of the instruction given therein or that the conditions subject to which the school was registered are not being complied with, the Department may-
>
> (a) notwithstanding any provision to the contrary and any regulations made under sub-section (5A), reduce, cancel or terminate from a date determined by it any aid to such school in terms of such regulations, or
>
> (b) cancel the registration of such school from a date determined by it and from such date such school shall for the purposes of sub-section (1) be deemed not to be registered."

[138] As an obvious consequence of the insertion of section 240 (5A) (b), the Department could now grant aid to a private school in the form of the appointment and remuneration by the Department of teachers at a private school.

[139] From the above date it is evident that, prior to 9 August 1968, which is the promulgation date of Ordinance 23 of 1968 (the Ordinance that initially amended section 240 (1)), private nursery or pre-primary schools were not required to be registered.

[140] Of further significance, section 240 of the Ordinance does not provide for a registration certified to be issued, even assuming registration as a private school in terms of this section.[55]

[55] I expect however that the fact of its existence must have been recorded with the Cape Education Department because how else would it have been able to apply for a provincial subsidy and later for the payment of educators' remuneration.

THE PRIVATE SCHOOLS ACT (HOUSE OF ASSEMBLY) 104 OF 1986:

[141] The Private Schools Act (House of Assembly) 104 of 1986 (hereinafter referred to as the "Private Schools Act") was ostensibly, according to its preamble, enacted to provide for the registration of, the control over, and the making of financial grants to private schools and for matters connected therewith.

[142] Section 1 of the Private Schools Act sets out the following definitions of relevance for present purposes:

> "(iii) "Education Ordinance" means the Education Ordinance, 1956 (Ordinance no. 20 of 1956 of the Cape of Good Hope) …
>
> (iv) "Head of Department" means the Head of the Department; …
>
> (viii) "Private school" means any school other than a school maintained, managed and controlled by a Provincial Education Department, but-
>
> (a) does not include a church primary school, farm school or private special school or class mentioned in an education ordinance; and
>
> (b) for the purposes of section (2), (3), (4), (5) and (7), does not include a private school attended by less than 20 pupils;
>
> …"

[143] Section 2 of the Private Schools Act provides that no person shall maintain a private school unless that private school is registered in terms of the Private Schools Act, which became effective on 1 April 1986. Section 3 deals with applications for the registration of private schools and provides that they are to be made in writing to the Head of Education and that any applicant for the registration

of a private school must furnish such additional particulars in connection with the application as the Head of Education may require.

[144] Section 4 deals with the consideration of applications for the registration of private schools by the Head of Education and confers upon him a discretion in that it provides that:

> "(1) The Head of Education may at his discretion grant or refuse an application referred to in section 3, but he shall not grant any application if he is of the opinion that the private school does not comply with the prescribed requirements."

[145] Once an application for the registration of a private school has been granted by the Head of Education, in terms of section 5 he is obliged to register the private school and issue to the applicant a registration certificate in such form as he may determine. The registration of the private school is subject to the prescribed conditions in terms of section 5 (2). Section 7 makes it a criminal offence for any person to maintain, manage, or control a private school not registered in terms of the Private Schools Act.

[146] Turning to issues of finance, section 6 provides that a registered private school may apply to the Head of Education in writing for "the prescribed financial grant". The Head of Education may at his discretion grant or refuse such an application, but may not grant any application for the prescribed financial grant if he is of the opinion that the registered private school does not comply with the prescribed requirements for the financial grant.

[147] Section 11 is headed "Exclusions of Provisions of Education Ordinances" and reads as follows:

> "11. (1) Subject to the provisions of this section, any provision of an education ordinance shall cease to be of force insofar as it deals with any matter provided for in this Act.
>
> (2) Any private school registered in terms of any provision of an education ordinance which ceases to be of force by reason of sub-section (1) shall be deemed to be registered in terms of section 5(1) of this Act.
>
> (3) A reference in any education ordinance –
>
> (a) to a private school registered in terms of any provision which ceases to be of force by reasons of sub-section (1), shall, unless inconsistent with the context or otherwise clearly inappropriate, be construed as a reference to a private school situated in a relevant province and registered in terms of this Act;
>
> (b) to such private school receiving grants in aid or subsidized or aided under any provision of that education ordinance, shall, unless inconsistent with the context or otherwise clearly inappropriate, be construed as a reference to a private school situated in the relevant province and to which any financial grant is made under this Act."[56]

[148] It follows logically from this that any private school established in terms of, or registered at the office of the Superintendent General in accordance with section 240 of the Education Ordinance 20 of 1956, as amended, is thus deemed to be registered in terms of section 5 (1) of the Private Schools Act. As is set out above, registration in terms of section 5 (1) of the Private Schools Act requires the Head

[56] Following my comment in footnote 55 above that the school must have registered with the Cape Education Department to qualify for a subsidy and educator salaries in lieu of a general subsidy later on, its standing as such a school in receipt of financial aid would have been preserved to it by these provisions.

of Education to issue to the applicant a registration certificate in such form as he may determine.

[149] There is no such similar requirement in section 240 of the Education Ordinance, as amended. As a result, no such registration certificate would have existed for a private pre-primary school established in terms of section 240 of the Ordinance and such a registration certificate would most certainly not exist for a private pre-primary school established prior to 9 August 1968.

[150] Owing to the fact that section 3 (2) is a deeming provisioning, it does not appear that the Legislature intended that the Head of Education furnish a private school deemed to be registered in terms of the Private Schools Act with a certificate confirming the registration as a private school. This is because section 5 (1) specifically refers to a registration certificate being issued upon a successful (new) application for registration. It provides as follows:

> "*If the Head of Education grants an application referred to in section 3*, he shall register the private school in question and issue to the applicant a registration certificate in such form as he may determine." (Emphasis added)

[151] Thus, where the school is deemed to have been registered in terms of section 5 (1), there would have been no need for an application for its registration and consequently, no registration certificate would issue.

[152] The Private Schools Act was amended by the Private Schools Amendment Act (House of Assembly) 60 of 1990. The definition of "private school" was amended to mean:

> "any school other than-
>
> (a) (i) a public school;
>
> (ii) a state aided school;
>
> (iii) a private school for specialized education;
>
> (v) a private pre-primary school,
>
> as defined in section 1 of the Education Affairs Act (House of Assembly), 1988; and
>
> (b) a church pre-primary school or farm school as mentioned in section 40 of that Act."

[153] The result of this is that the Private Schools Act was no longer of application to private pre-primary schools with effect from 29 June 1990 by virtue of the amendment to the definition of private schools, this being the commencement date of the amending act.

THE EDUCATION AFFAIRS ACT (HOUSE OF ASSEMBLY) 70 OF 1988:

[154] The Education Affairs Act (House of Assembly) 70 of 1988 ("the Education Affairs Act")[57] defines a private pre-primary school in section 1 (xxii) as being "a private pre-primary school registered or deemed to be registered in terms of section 25". A private school is defined in section 1 (xxiii) as being a "private pre-primary or a private school for specialized education, and for the purposes of paragraph (b)

[57] The commencement date of this act is 1 April 1990.

of the definition of "school" and sections 38, 39, 40 and 99, also a private school registered or deemed to be registered in terms of the Private Schools Act (House of Assembly) 1986 (Act No. 104 of 1986)". Section 1 (xxix) defines a school as being "a public school, private pre-primary school, private school for specialized education or state-aided school, except-

(a) in sections 51 and 52, where it means a pre-primary school, primary school or secondary school; or

(b) in the definition of "compulsory school attendance" and sections 2, 11, 53, 54, 55, 57, 59, 60, 61 and 104, where it means a public school, private school or state-aided school."

[155] Accordingly, insofar as sections 8 and 9 of the Education Affairs Act are concerned, a school includes a private pre-primary school. These sections are relevant as they provide for the submission of information by these schools and the inspection of them. They read:

"8. **Submission of information by schools.**

For the purposes of this Act the Head of Education may direct a principal of a school in writing to submit to him, within the period mentioned in the direction, such information as he may require in connection with the affairs of the school and as the school has available.

9. **Inspection of schools and hostels.**

(1) The Head of Education may, either in general or in a specific case, authorize in writing a person employed by the Department to inspect a school or hostel.

(2) A person authorized under subsection (1), may-

(a) at any reasonable time and without prior notice enter upon the grounds of the school or hostel concerned;

(b) question under oath or otherwise any person who in his opinion may be able to furnish information on a matter to which this Act relates;

(c) require a person who has in his possession or custody or under his control a register, book or document on a matter to which this Act relates, to submit such a register, book or document to him;

(d) examine such a register, book or document or make an extract therefrom or a copy thereof, and require from any person or explanation under oath or otherwise of any entry therein; and

(e) attach such a register, book or document as in his opinion may provide proof of an offence or irregularity.

(3) A person authorized under subsection (1) shall not conduct an inspection under this section, unless he is, while he is conducting that inspection, in possession of his written authorization referred to in that subsection, which shall be produced by him at the request of any person affected by that inspection."

[156] The Education Affairs Act thus specifically makes provision for the submission of information by a private pre-primary school to the Head of Education, who is defined as being the Head of Department, and for the inspection of private pre-primary schools.

[157] Chapter 5 of the Education Affairs Act deals with private schools. Sections 21, 23, 24, 25, 26, and 27 thereof relate specifically to private pre-primary schools. The starting point is to be found in sections 23 to 25, which deal with the registration of private pre-primary schools. These sections, in so far as they are relevant, provide as follows:

"23. **Application for registration.**

(1) Any person who intends to register as a private pre-primary school or private school for specialized education, shall apply in writing to the Head of Education for such registration.

(2) An applicant for such registration shall furnish such additional information in connection with his application as the Head of Education may require.

24. **Consideration of applications for registration.**

(1) The Head of Education may at his discretion grant or refuse an application referred to in section 23, but he shall not grant an application if he is of the opinion that the applicant concerned does not comply with the prescribed requirements.

(2) If the Head of Education refuses an application referred to in section 23, he shall notify the applicant in writing of such refusal and the reasons therefor.

25. **Registration as private pre-primary schools and private schools for specialized education.**

(1) If the Head of Education grants an application referred to in section 23, he shall register the applicant as a private pre-primary school or private school for specialized education, as the case may be, and issue a certificate of registration to the applicant in such form as he may determine.

(2) The registration as a private pre-primary school or private school for specialized education shall be subject to the prescribed conditions.

(3) The registration as a private pre-primary school or a private school for specialized education in terms of this Act shall not exempt any person from any other obligation in respect of registration in terms of any other law.

(4) A private nursery school or private pre-primary school registered in terms of a law repealed by this Act and which existed immediately prior to the fixed date, shall from that date be deemed to be a private pre-primary school registered in terms of this Act.

(5) …"

[158] In summary, in order to register as a private pre-primary school, a written application is required to be submitted to the Head of Education, who will then consider the application and make a decision. If the application is approved, the private pre-primary school is then registered and a registration certificate is issued to the applicant in a form determined by the Head of Education. This registration is subject to the prescribed conditions.

[159] Section 25 (4) contains a deeming provision to the effect that if any private pre-primary school is registered (or, plainly, established or deemed to be registered), as such under a law repealed by the Education Affairs Act which existed immediately prior to the fixed date, it is deemed to have been registered in terms of the Education Affairs Act. There is no requirement that a certificate be issued under such circumstances.

[160] Section 21, whilst it does not relate to the registration process, provides that "[n]o person shall for reward keep in his custody or under his control 20 or more children of three years or older but not yet subject to compulsory school attendance, unless "he" (sic) has been registered as a private pre-primary school in terms of this Act." Section 103 renders a contravention of this section a criminal offence.[58]

[58] The mere fact that the education department was paying the salaries of staff at Playways over the entire period since 1976 is against the probability that it was ever an unregistered or unlawful private education institute.

[161] Section 27 provides for the withdrawal or lapsing of the registration of a private pre-primary school "in the prescribed circumstances", which circumstances are not set out in the Education Affairs Act.

[162] The Education Affairs Act further makes provision, in section 26 thereof, for the payment of subsidies under two categories to private pre-primary schools. This section reads as follows:

> "**26. Subsidies to private pre-primary schools.**
>
> (1) A private pre-primary school may apply in writing to the Head of Education to be classified for subsidy purposes as a departmentally controlled pre-primary school.[59]
>
> (2) A private pre-primary school which has not been classified as contemplated in subsection (1) may annually or prior to the prescribed date apply in writing to the Head of Education for a subsidy.[60]
>
> (3) The Head of Education may at his discretion grant or refuse an application referred to in subsection (1) or (2), but he shall not grant an application if he is of the opinion that the private pre-primary school does not comply with the prescribed conditions for subsidization or classification, as the case may be.
>
> (4) As from the date on which an application for classification as contemplated in subsection (1) is granted under subsection (3), the persons employed in teaching posts at such departmentally controlled pre-primary school shall be deemed to be employed in teaching posts at a departmental institution.

[59] The evidence did not canvass whether the school might have made such an application. Incidentally none of the plaintiffs' witnesses described what the import of this classification as a "departmentally controlled pre-primary school" entailed. Perhaps the only effect of it is as outlined in sub-section (4).

[60] Neither of the defendants' witnesses were drawn on the issue of how the payment of subsidies (or educator's salaries in lieu thereof) were renewed each year if this was the manner of subsidization the school elected to go with. The consistent theme in all the legislation appears to be though that application for aid or subsidies or financial assistance was made annually on or before a prescribed date.

(5) A provincially controlled nursery school or pre-primary school classified or maintained in terms of a law repealed by this Act and which existed immediately prior to the fixed date, shall from that date be deemed to be a departmentally controlled pre-primary school which has been classified in terms of this Act."

[163] This section thus makes allowance for the provision of financial assistance to private pre-primary schools on two bases: the first when the school makes application to be classified as a "departmentally controlled pre-primary school", and the second where the school remains private and makes application annually for the payment of a subsidy to it by the Head of Education. It appears that in the former instance, the school will lose its private character, as it becomes departmentally controlled and the teachers then employed at that school are deemed to be employed in teaching posts at a departmental institution. The deeming provision subjected those teachers to the provisions of Chapter 7 of the Education Affairs Act, which made provision (largely) for Ministerial control over their conditions of service, promotions, salaries and the like (see sections 67 – 69). Despite this, it does not appear that the classification as "departmentally controlled" in terms of this section would have rendered the school public, as this is not expressly provided for in the section as it is in section 38.

[164] Section 38 provides expressly for the declaration of private schools (which includes pre-primary schools as per the definition of private school) as public schools as follows:

"**38. Declaration of private schools and state-aided schools as public schools.**

(1) The Minister may enter into an agreement with the owner of a private school or the governing body of a state-aided school in terms of which such a school is declared to be a public school.

(2) No agreement shall be entered into under subsection (1), except with the concurrence of the Minister of the Budget.

(3) If an agreement has been entered into under subsection (1), the Minister may by notice in the Gazette declare the private school or state-aided school concerned, as the case may be, to be a public school with effect from a date mentioned in the notice."

[165] Such a declaration has certain consequences which are fully spelt out in section 39. The provisions of section 39 (1) delineate these as being:

"**39. Consequences of declaration as public school.**

(1) As from the date mentioned in the notice contemplated in section 38(3)-

(a) the school concerned shall be deemed to be a public school established under section 12;

(b) there shall no longer vest in the previous owner or governing body any rights, powers, duties or functions in respect of the school concerned;

(c) the rights obtained and obligations incurred by the owner or governing body concerned, for purposes of or in connection with the school concerned, shall vest in the State; and

(d) the ownership and control of movable and immovable property which immediately prior to that date vested in the owner or governing body concerned, and which relates to the school concerned, shall vest in the State, unless otherwise agreed upon in terms of section 38(1)."[61]

[61] None of these drastic implications were suggested to have taken effect in the case of Playways. It could certainly not have happened under the radar considering what would have had to precede the vesting in the State in terms of section 38. A written agreement would exist as well as proof of publication in the Government Gazette.

[166] The remaining subsection deals with giving effect to the provisions of section 39 (1)(d) by transfer/endorsement of the school's immovable property and regulates the position regarding lawful actions taken by the owner or governing body prior to the declaration.

[167] In terms of section 113 (1) read with Schedule 3 of the Education Affairs Act, the whole of the Cape Education Ordinance 20 of 1956 was repealed, except in so far as it related to the establishment and maintenance of training colleges for the training of European student teachers, excluding Part C (Chapters 11 to 16).

[168] Sections 3, 65 and Chapter 7 of the Education Affairs Act was then repealed by the South African Schools Act 84 of 1996 (hereinafter referred to as "the South African Schools Act").

EASTERN CAPE SCHOOLS EDUCATION ACT 1 OF 1999

[169] According to section 2 of the Eastern Cape Schools Education Act 1 of 1999 ("the Eastern Cape Act") the provisions of the Eastern Cape Act "… shall, subject to national policy and to the provisions of the Constitution or any other law or Act applying to education in general in the whole of the Republic of South Africa, apply in relation to education provided in schools in the Province." Section 3 thereof provides:

"**3. Control of school education in the Province**

> As from the fixed date, school education in the Province shall be controlled by the Department, acting in accordance with the policy determined by the MEC."

[170] The Eastern Cape Act defines a school as "a public school or an independent school which enrolls learners in one or more grades between grade zero and grade twelve". The Act makes no mention of a private school, but rather makes use of the nomenclature of the Schools Act and defines an independent school as a school other than a public school. A pre-primary school is defined as one "for children who are not younger than three and not older than seven years but who are not yet subject to compulsory school attendance".

[171] Section 7 of the Eastern Cape Act permits the Head of Department, through the district manager, to authorize in writing visits to schools for administrative purposes. 'School' in this section would, by virtue of the definition, include an independent school. Section 8 permits the MEC, if it is in the interests of education in the province, "to appoint any appropriate person to conduct an inquiry on a matter specified in written terms of reference" provided only that the provisions of any applicable law be taken into account. The section then specifies the powers of a person so appointed.

[172] Sections 27 – 30 of chapter 5 of the Eastern Cape Act deals with the establishment of independent schools. These sections, in so far as they are relevant, are couched in the following terms:

> **"27. Establishment, conduct or maintenance of independent schools prohibited unless registered.**—(1) A person, body or bodies may establish, at their own cost,

an independent school based on a common culture, language or religion, provided that there shall be no discrimination on the grounds of race.

(2) No person shall establish, conduct or maintain an independent school unless that independent school is registered in terms of this Act.

(3) No person shall for reward keep in his or her custody or under his or her control 20 or more children of 3 years or older unless he or she has been registered as an independent school in terms of this Act.

(4) No person shall accept at an independent school keep in his or her custody or under his or her control children to provide specialized education to them for reward unless he or she has been registered as an independent school in terms of this Act.

28. Application for registration.—(1) Any person intending to establish, conduct or maintain an independent school shall apply to the head of Department in writing for the registration of that independent school.

(2) An applicant for the registration of an independent school shall furnish such additional particulars in connection with his or her application as the head of Department may require.

29. Consideration of applications for registration of independent schools.—(1) The head of Department may grant an application referred to in section 28, if he or she is of the opinion that the provisions of section 46 of the 1996 Act and other prescribed requirements have been complied with.

(2) If the head of Department refuses an application referred to in section 28, he or she shall notify the applicant in writing of such refusal and the reasons therefor.

30. Registration of independent schools.—(1) If the head of Department grants an application referred to in section 28, he or she shall register the independent school in question and issue to the applicant a registration certificate in such form as he or she may determine. Such registration certificate must be prominently displayed and produced on request.

(2) The registration of an independent school shall be subject to the prescribed conditions.

(3) An independent school registered in terms of a law repealed by this Act and which existed immediately prior to the fixed date, shall from that date be deemed to be an independent school registered in terms of this Act.

(4) The owner of an independent school may manage such school himself or herself or he or she may appoint or authorise any person to manage the school on his or her behalf subject to the provisions of this Act.

(5) Any person who contravenes the provisions of subsections (1) and (2) of section 27 and any person who admits anyone to a school which is not registered or exempted from registration in terms of this Act shall be guilty of an offence.

(6) The above provisions shall not apply to—

(*a*) a correspondence college registered in terms of the Correspondence Colleges Act, 1965 (Act No. 59 of 1965), and providing tuition exclusively by means of correspondence;

(*b*) a school established, maintained or controlled by a church solely for the purposes of providing theological training to prospective ministers of religion or evangelists or any schools providing exclusively, religious tuition;

(*c*) any person providing, for reward, informal education which does not lead to the acquisition of any diploma, certificate or statement."

[173] Section 54 renders the contravention of any prohibition contained in section 27 a criminal offence.

[174] Section 32 provides that the registration of an independent school "shall lapse or may be withdrawn under the prescribed circumstances and subject to the prescribed legal requirements", but that "(n)o withdrawal or lapse of registration of an independent school shall be valid unless the owner of such an independent school has been furnished with written notification and reason for such lapse or withdrawal." Section 33 makes provision for an appeal against the refusal or withdrawal of registration as an independent school.

[175] Section 35 of the Eastern Cape Act makes provision for the declaration of an independent school as public. Before such a declaration can be made, the MEC must enter into "an agreement with the owner of an independent school or the governing body thereof in terms of which such a school may be declared to be a public school after consultation with the school community and other interested parties". Further:

> "(a) no agreement shall be entered into under this section, except with the concurrence of the financial head;
>
> (c) if an agreement has been entered into under this section, the MEC may by notice in the Provincial Gazette declare the independent school concerned to a public school with effect from a date mentioned in the notice."

[176] Section 36 sets out the consequences of such a declaration which are substantially similar to those contained in section 39 of the Education Affairs Act.

[177] Section 31 permits an independent school to apply annually in writing to the Head of Department for the payment of the prescribed subsidy.

[178] Section 74, read with Schedule 1, repeals Part C of the Cape Education Ordinance 20 of 1956; the whole of the Private Schools Act, with the exception of section 1A; and the whole of the Education Affairs Act, with the exception of sections 3 and 65.

[179] It would appear therefore that if a school was registered as a private school pursuant to one of these pieces of legislation, in terms of section 30 (3) it is

deemed to be an independent school registered in terms of the Eastern Cape Act and no registration certificate would have been provided.

LEGISLATIVE REQUIREMENTS REGARDING THE ESTABLISHMENT OF PUBLIC PRE-PRIMARY SCHOOLS:

Consolidated Education Ordinance 5 of 1921:

[180] As noted above, section 86 of the Consolidated Ordinance deals with the establishment and classification of schools and provides, in so far as this goes, merely that "schools may be established for the purpose of affording education to pupils of European parentage or extraction". There are thus no formal registration requirements for the establishment of public schools in terms of this Ordinance.

Education Ordinance 20 of 1956:

[181] Section 58 (1) of the Education Ordinary provides for the establishment and maintenance of undenominational schools for European pupils, which are to be classified as high schools, secondary schools, primary schools and farm schools. This section was then amended by Ordinance 10 of 1971 to include pre-primary schools. A consequential addition in the form of section 62A was also introduced by Ordinance 10 of 1971. This section provided, in sub-section (1) thereof, that pre-primary schools were to be "organized, staffed and equipped exclusively for pre-primary education". The remainder of the section dealt with the Administrator's power to make regulations.

[182] There was thus no requirement that public pre-primary schools be registered.

Education Affairs Act (House of Assembly) 70 of 1988:

[183] Section 12 (1) of the Education Affairs Act provides for the establishment of certain categories of public schools as follows:

> "12. Establishment and maintenance of public schools.
>
> (1) The ministry may, out of moneys appropriated for this purpose by the House of Assembly, establish and maintain the following public schools …"

[184] Included in the listed categories of schools is a pre-primary school.

[185] Section 12 (2) contains a deeming provision in the following terms:

> "2(a) A provincial nursery school and pre-primary school or class;
>
> …
>
> established, founded or classified in terms of a law repealed by this Act, or deemed to be established, founded or classified in terms of such law, and which was controlled and managed by the Department immediately prior to the fixed date, shall with effect from that date be deemed to be –
>
> (i) A pre-primary school;
>
> …
>
> respectively, established under this section."

[186] Once again, there is no requirement for registration of a public pre-primary school.

THE SOUTH AFRICAN SCHOOLS ACT 84 OF 1996:

[187] Under the current relevant provisions of the Schools Act, which came into operation on 1 January 1997, "school" means both a public school as well as an independent school which enrolls learners in one or more grades from Grade R (reception year) to Grade 12.[62] A distinction is made between a public school and an independent school in section 1. "Public school" means a school contemplated in Chapter 3, whereas an independent school means a school registered or deemed to be registered in terms of section 46.

[188] Chapter 5, which incorporates section 46, deals with independent schools. Section 45 provides that any person may at his or her own cost establish and maintain an independent school. Section 45A provides for the admission age to such a school. Section 46 deals with the registration of an independent school and provides that no person may establish or maintain an independent school *unless it is registered by the head of department*.

[189] The definition of an independent school in section 1 should draw the reader's attention to the provisions of section 53, a transitional provision, which provides that:

> "a private school which was registered or deemed to have been registered under the provisions of the law regulating school education in the Republic of South Africa and which existed immediately prior to the commencement of this act, is deemed to be an independent school".

[62] It appears that an ordinary playschool or crèche not offering Grade R would not constitute a school within the meaning of a school in the Schools Act. Such a "school" or facility would instead be governed by the terms of Chapter 6 of the Children's Act, 32 of 2005, well at least since the commencement date of that act, which is 1 April 2010.

[190] Thus the nomenclature of a "private" as opposed to an independent school no longer pertains.

[191] This section must be read together with section 52, also under Chapter 6 dealing with the transitional provisions. It provides that any school which was established or deemed to have been established in terms of any law governing school education in the Republic and which existed immediately prior to the commencement of the Schools Act, other than a private school referred to in section 53, is deemed to be a public school.

[192] Subsection 2 provides that the assets and liabilities which vested in such a school immediately prior to the commencement of the Schools Act vest in the public school in question and that funds and other movable assets used by, or held for on or its behalf and which in law are the property of the state, remain at the disposal of the school and devolve on the school on a date and subject to conditions determined by the Minister by notice in the Government Gazette after consultation with the Council of Education Ministers (subsection 3). Subsection 4 provides that any transaction entered into prior to the commencement of the Schools Act by a school contemplated in subsection 1, which had the effect of transferring funds or other assets of such school to another person or body without value, is invalid.

[193] The transitional provisions negate a requirement of registration post commencement of the current Schools Act of already existing private schools.

[194] The manner and process for registration or withdrawal of registration of an independent school by the head of department is provided for in sub-sections 2 to 4 of section 46. Section 47 provides in what circumstances a withdrawal of the registration by the head of department is valid. Vitally it is an open and transparent process and cannot happen without the involvement (and indeed knowledge) of the owner of the independent school.

[195] Section 48 provides that the minister may subsidize independent schools. It is apposite to repeat section 48 below:

> "48. Subsidies to registered independent schools.—
>
> (1) The Minister may, by notice in the Government Gazette, determine norms and minimum standards for the granting of subsidies to independent schools after consultation with the Council of Education Ministers and the Financial and Fiscal Commission and with the concurrence of the Minister of Finance.
>
> (2) The Member of the Executive Council may, out of funds appropriated by the provincial legislature for that purpose, grant a subsidy to an independent school.
>
> (3) If a condition subject to which a subsidy was granted has not been complied with, the Head of Department may terminate or reduce the subsidy from a date determined by him or her.
>
> (4) The Head of Department may not terminate or reduce a subsidy under subsection (3) unless—
>
> (a) the owner of such independent school has been furnished with a notice of intention to terminate or reduce the subsidy and the reasons therefor;

(b) such owner has been granted an opportunity to make written representations as to why the subsidy should not be terminated or reduced; and

(c) any such representations received have been duly considered.

(5) The owner of an independent school may appeal to the Member of the Executive Council against the termination or reduction of a subsidy to such independent school."[63]

[196] "Subsidy" or "subsidize" is not defined in the act but, having regard to the ordinary grammatical meaning of the word, it appears to endorse the financial support of such schools subject to the norms and minimum standards for the granting of same.[64]

[197] Subsection (4) provides that a subsidy to an independent school may not be withdrawn except subject to compliance with the *Audi alteram partem* rule.

[198] Section 50 provides the duties of the MEC to determine by notice in the Provincial Gazette requirements for independent schools, *inter alia*, regarding the determination of criteria of eligibility, conditions and manner of payment of any subsidy to an independent school.[65] Subsection 2 provides further that different

[63] The Schools Act brought a whole new and much more transparent, approach to the provisioning of both the funding of public schools as well as the payment of subsidies to independent schools, no doubt to achieve the desired equity and to redress the inequalities of the past under *Apartheid*.

[64] The National Norms and Standards for school funding (1998 and 2006) do not appear to contemplate the payment of salaries in lieu of a cash payment to a school where they are so eligible. To the contrary, subsidies are paid at certain intervals once a term.

[65]Independent ECD centres were not eligible for funding under the 1998 Norms and Standards. There appears to have been a shift change under the current Norms and Standards however which is dealt with in Chapter 9. Only "targeted" independent schools will however come in for the reckoning. Paragraph 253 provides that "(i)n accordance with the proposals of Education White Paper 5, the state will fund Grade R in non-public institutions where there is a need for the piloting of new approaches or there is a need to reduce the distance travelled by poor Grade R learners between home and the institution."

requirements may be made under subsection 1 in respect of different independent schools. Subsection 3 also provides that the MEC must allow the affected parties a reasonable period to comment on any requirement he or she intends to determine under subsection (1).

[199] Section 49 is again of some significance because it determines the only basis upon which an independent school can become a public school. This section provides as follows:

> "49. Declaration of independent school as public school.—
>
> (1) The Member of the Executive Council may, with the concurrence of the Member of the Executive Council responsible for finance, enter into an agreement with the owner of an independent school in terms whereof such independent school is declared to be a public school.
>
> (2) Notice of the change of status contemplated in subsection (1) must be published in the Provincial Gazette."

[200] It is evident from the foregoing that such a change could not happen stealthily.

[201] Section 54 deals with transitional provisions relating to governing bodies. From the context this section applies to public schools. Given the Schools Act's stated objects, *inter alia*, to ensure the organized and democratic governance of schools in partnership with the state, the Minister's reach in bringing those schools in line after the commencement date of the Schools Act by determining dates by which the election of members of governing bodies at all public schools in a province had to be be finalized and from when those governing bodies were

compelled to function in terms of the Schools Act would be another "in your face" manifestation as it were that a school is considered a public school.

[202] Section 55 is a transitional provision dealing with the immovable property of certain schools which were state-aided under section 29 (2A) of the Education Affairs Act, 1998.[66] It was never suggested by the plaintiffs that Playways was such a school. If indeed it was, the Department would certainly have a public record of how its property was dealt with pursuant to the extensive provisions of section 55 and the State's title would have been endorsed against the relevant deed of transfer. The provisions of section 55 are reproduced below:

> "55. Transitional provisions relating to immovable property of certain schools.—
>
> (1) The immovable property of a school which was declared to be a state-aided school under section 29 (2A) of the Education Affairs Act, 1988 (House of Assembly) (Act No. 70 of 1988), devolves upon the State on a date determined by the Minister by notice in the Government Gazette.
>
> (2) The Minister may determine different dates in respect of different schools under subsection (1).
>
> (3) Any notice determining a date or dates referred to in subsection (1) or (2) must grant all interested parties a period of not less than 30 days in which to make written submissions.
>
> (4) The Minister must consider all such submissions received, and thereafter may alter any notice referred to in subsection (1).
>
> (5) Any transfer duty, stamp duty, other fees or costs payable as a result of the transfer of the immovable property contemplated in subsection (1) must be paid in full or in part from funds appropriated by Parliament for that purpose.

[66] These would have been what were commonly known as "Model C" schools.

(6) The Minister may, with the concurrence of the Minister of Finance, direct that no transfer duty, stamp duty, other fees or costs contemplated in subsection (5) be paid in respect of a particular transfer under this section.

(7) The rights of third parties with claims against the school in respect of the immovable property affected by the transfer contemplated in this section are not extinguished by the transfer and—

(a) a third party acquires no right of execution against the immovable property as a result of such transfer alone;

(b) a third party is obliged to excuse the school in question if the school fails to meet its commitments to the third party; and

(c) the State indemnifies such a third party in its claims against the school which were secured by the immovable property, but the third party does not acquire a greater right against the State than that which it had against the school prior to the transfer.

(8) The fact that compensation for any land and real rights in or over land expropriated in terms of subsection (1) has not been finalised or paid, does not impede the transfer of such land and real rights in or over land to the State.

(9) Until the date contemplated in subsection (1), a public school referred to in that subsection may not let, sell or otherwise alienate its immovable property, or grant to any person any real right thereon or servitude thereon without the written consent of the Member of the Executive Council.

(10) Any claim for compensation arising from subsection (1) must be determined as contemplated in the Constitution.

(11) The officer in charge of the deeds office or other office where the immovable property of a school is registered, must, on submission of the title deed in question, make such endorsement on the title deed and such entry in the register as may be required to register the transfer of the immovable property.

(12) Any immovable property belonging to the State which was used by a school and not transferred or endorsed into the name of the school contemplated in subsection (1) remains the property of the State.

(13) Any immovable property which was transferred into the name of a school contemplated in subsection (1) must, if such school is subsequently closed in terms of this Act or any other applicable law, devolve upon the State."[67]

[203] Section 56 is also relevant to mention. It contains transitional provisions relating to public schools on private property and provides as follows:

"56. **Transitional provisions relating to public schools on private property**.—If an agreement contemplated in section 14 does not exist at the commencement of this Act in respect of a school, standing on private property and which is deemed to be a public school in terms of section 52 (1), the Member of the Executive Council must take reasonable measures to conclude such an agreement within six months of the commencement of this Act."

[204] Section 14 in turns deals with public schools on private property. It provides as follows:

"14. **Public schools on private property.—**

(1) Subject to the Constitution and an expropriation in terms of section 58 of land or a real right to use the property on which the public school is situated, a public school may be provided on private property only in terms of an agreement between the Member of the Executive Council and the owner of the private property.

(2) An agreement contemplated in subsection (1) must be consistent with this Act and in particular must provide for—

[67] If a situation under section 55 pertained, one would have expected the plaintiffs to have relied instead on the prohibition referred to in sub-section (9) as a basis to impugn the sale, at least in respect of the immovable property.

(a) the provision of education and the performance of the normal functions of a public school;

(b) governance of the school, including the relationship between the governing body of the school and the owner;

(c) access by all interested parties to the property on which the school stands;

(d) security of occupation and use of the property by the school;

(e) maintenance and improvement of the school buildings and the property on which the school stands and the supply of necessary services;

(f) (f) protection of the owner's rights in respect of the property occupied, affected or used by the school.

(3) The provisions of the Deeds Registries Act, 1937 (Act No. 47 of 1937), do not apply to a real right, excluding ownership, acquired by the State, a public school or another party in terms of an agreement contemplated in this section.

(4) The right contemplated in subsection (3) is enforceable against any successor in title to the owner of the immovable property in question.

(5) Despite subsection (3), a Registrar of deeds must endorse on the title deed of the affected property that the property is subject to an agreement contemplated in this section, if the Registrar of deeds receives—

(a) an application for such endorsement by the owner of the property, or the Member of the Executive Council or any other holder of a right contemplated in subsection (3), together with the title deed of the property; and

(b) affidavits by the owner of the property and the Member of the Executive Council stating that an agreement contemplated in this section has been concluded.

(6) The Minister must, after consultation with the Council of Education Ministers, make regulations regarding the minimum requirements of an agreement contemplated in this section.

(7) The Registrar of deeds may cancel any endorsement made in accordance with subsection (5) if the owner of the property submits an affidavit from the Member of the Executive Council of the province in which the public school is situated to the effect that such public school has been closed in terms of section 33.

(8) Any transfer duty, stamp duty, fees or costs payable in respect of the registration of a right in terms of subsection (3) may be paid in full or in part from funds appropriated by the provincial legislature for that purpose, but the public school contemplated in subsection (1) is not responsible for such duties, fees or costs."

[205] It is common cause that such an agreement was not entered into *in casu*.

[206] Section 58 deals with expropriation of land or real rights in or over land for any purpose relating to school education in a province. It provides that the MEC may, if it is in the public interest to do so, expropriate land or a real right in or over land for any purpose relating to school education in a province. This requires notice to be given in the prescribed format and a fair process to be adhered to. It is not relevant for present purposes except to highlight that Playways' fixed property could not have fallen into the state coffers on this basis, unbeknown to it.

[207] There are various other sections in the Schools Act generally which dictate to schools on issues of compliance or duties etc. which would obviously set a public school dramatically apart from an independent one. Some expectations are common to both schools since the act applies to school education in the Republic of South Africa as a whole, but it is in these nuances that the public nature of a

school stands out by comparison by the Department's dealing with then.[68] The Department would, for example, dictate to a public school regarding its admission criteria and policy[69] and the determination of norms and standards for basic infrastructure and capacity,[70] language policy,[71] managing non-discriminatory language practices,[72] requirements in respect of religious observances,[73] requiring the adoption of a code of conduct for learners by the school's governing body,[74] dealing with the suspension and expulsion from school of its learners,[75] the expectation of a representative council of learners at high schools,[76] the various unique aspects of control of public schools mentioned under Chapter 3 as well as the funding of public schools in terms of Chapter 4, calling to order under-performing schools,[77] the overall compliance by the governing bodies with the various norms and standards[78] and limiting the liability of the state in the specified instances provided for in respect of the activities of a public school.[79]

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[68] See section 2 of the Schools Act as well as its object and preamble. The Act uses the terms "*school*" to refer to both categories, versus "*public school*" to single out those aspects of its oversight and responsibility which pertain strictly to the latter category.

[69] See section 5.

[70] Section 5A.

[71] Section 6.

[72] Section 6B.

[73] Section 7

[74] Section 8

[75] Section 9

[76] Section 11

[77] Section 58B

[78] Section 58C

[79] Section 60.

[208] All these aspects or features of rights and obligations would roundly manifest whether a school is regarded by the department as a public or an independent school. Playways does not appear however to have been regulated by these demanding standards.

[209] What stands out about the legislative provisions outlined above, even before the coming into effect of the current Schools Act, is the consistency over the years concerning the distinction drawn between public and the erstwhile private schools and the differences in their interaction with the relevant education department. The Department's stand-offish yet interested interaction with an independent school is consistent with the Constitutional imperative on the State to provide a basic education as provided for in section 29 of the Constitution,[80] although making allowance for independent education institutions to be established and maintained at own expense subject to certain requirements and watchful oversight for compliance and quality control.

[210] Section 29 (3) dictates the elementary conditions for independent schools to professionally co-exist with public schools. These are that the schools must be racially non-discriminatory, be registered with the State, maintain standards that are not inferior to standards at public educational institutions and be maintained at own expense, provided that this does not preclude state subsidies for independent educational institutions.[81] These two features of controlled state oversight and financial aid/assistance, or the payment of subsidies to independent education institutions has been a consistent theme over the years even before the dawn of

[80] Constitution of the Republic of South Africa, 1996.

[81] See Chapter 5 of the Schools Act which also endorses these conditions.

Democracy. Despite subsidization the line between public and independent schools has always been a stark one.

The relevant norms and standards for School Funding:

[211] It is necessary briefly to have regard to the National Norms and Standards for School Funding[82] published in 1998 pursuant to the provisions of section 35 of the Schools Act and section 3 (4)(g) of the National Education Policy Act, No. 27 of 1996 ("NEPA")[83] which set the background to the changes that were rung in after the new national system for schools was introduced. This gives a context in my view to Mr. Van Rensburg's early involvement in the new features sought to be implemented by the Department and efforts to gear up the EMIS to meet education's post-apartheid aims of redress and equity in the provisioning of quality education.

[212] In its introduction the norms clarified the obvious that they comprised the national norms and minimum standards for school funding in terms of the School Act. In addition, the document purported to deal with the procedures to be adopted by provincial education departments ("PEDs") in determining resource allocation to their schools. It also intended to deal (as it did) not only with the funding of

[82] These were published in Government Gazette 19347 dated 12 October 1998 per Notice No. 2362 of 1998. They were later replaced by Government Notice 869 (GG 29179) of 31 August 2006, as corrected by GN 1282 (GG 29473 of 14 December 2006). A difference between the former and the later that is worth mentioning is that public funding for Grade R in independent schools is back in the offing but only for select schools. The objective is to target poorer schools though where the need to advance equity and redress in the provisioning of services is profoundly required.

[83] The commencement date of the NEPA is 24 April 1996.

public schools and the exemption of parents who are unable to pay school fees, but with the payment of subsidies to independent schools.

[213] It recognized the broad consultation that had happened to make it a reality including the input of organizations representing independent schools and public school governing bodies.

[214] The norms were to have become national policy on 1 April 1999 and would effectively have been implemented in the school year starting in January 2000, which was the year in which Mrs. Hollis retired as principal.

[215] Certain teething problems were envisaged by the national education department in the implementation of the norms and standards, and obligations placed on the heads of department in turn who:

> "(would) be expected to verify that the national norms are being complied with in allocating funds, or that acceptable alternatives are being implemented after consultation with the DoE. If the PED is unable to comply with the norms because of a lack of expertise or for any other reason, the DoE must be informed without undue delay, so that the problem can be examined, and remedies sought."[84]

[216] The norms warned that, since government was "grappling with the necessity to stabilise and reprioritize provincial education budgets," the reality was to be faced that provincial education budgets from which subsidies could be paid were

[84] Paragraph 16 of the Norms and Standards for School funding.

extremely constrained. It cautioned further that subsidy allocations had to show preference for independent schools that met very specific targets.[85]

[217] In order to establish policy targets for the number of educators and non-educator personnel at schools the document proposed the following:

> "The national Department of Education (DoE) will work with provincial education departments, using existing databases, to ensure that they can track the number and location of personnel engaged in teaching and nonteaching activities, in order to assist planning towards this target."[86]

[218] In implementing the new funding system, it noted the need to develop capacity for intensive data use and more specifically it recognized that systems had to be developed to guide planning and resource allocations which involved schools in timeously providing sufficient information by 30 September each year.

[219] It also described how "comprehensive data" had to be ascertained:

> "Comprehensive data on schools have been created through the national School Register of Needs survey, whose databases have been incorporated in provincial data systems, and the new, provincially-based national Education Management Information System (EMIS). The 1996 national Census reports will provide reliable and up-to-date demographic information. Provincial education departments may have access to other data sources, and the national Department will augment these wherever possible."[87]

[220] It related how accuracy was to be achieved:

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[85] Playways would not have met those targets or been eligible for subsidization because, for one, it was a standalone ECD centre that chose not to align itself with a primary school.

[86] Paragraph 30 refers.

[87] Paragraph 71 refers.

"The MTEF[88] provides a co-operative mechanism for improving the accuracy of budget-related data and undertaking relevant analytic studies. The DoE and PEDs are active participants in these processes."[89]

[221] It reflected how it would accomplish the task at hand with the necessary skills set:

"Skill requirements

73. To attempt to accomplish the new tasks without high-level skills is absolutely unrealistic, especially given the size of provincial education budgets. Each provincial education department must, therefore, acquire the services of:

(a) At least one, and preferably several, highly-skilled strategic financial analysts who understand the use of data-intensive planning and analysis techniques in public financial management. If not already deeply familiar with education issues and policies, they must be willing to make a careful study and acquire the necessary knowledge.

(b) Several high-level accounting experts who understand the national computerized public financial and management information systems. Both accounting expertise and strategic financial management expertise are necessary if PEDs are to apply the norms satisfactorily.

(c) Several highly-skilled information systems experts to improve the functioning of the education databases (including the MIS). This will include the decentralization or devolution of such functions and the training of regional and district officers.

(d) At least one senior statistician or applied numerical analyst.

(e) At least one person skilled in educational planning and forecasting techniques.

(f) Computer systems and databases."

[88] This is an acronym for Medium Term Expenditure Framework.
[89] Paragraph 72 refers.

[222] It proposed that provinces having challenges making the necessary appointments were to explore the secondment of persons skilled in this area with EMIS expertise to assist with the introduction of the new, high-level analysis.

[223] It acknowledged that it would probably be a slow process and that it would take time for PEDs to achieve the required capacity and to enable their specialists to become fully conversant with the new requirements. It made allowance for the national norms to be applied in a progressive manner while PEDs were developing their data systems, and their capacity to apply them. It suggested how the norms were to be implemented by reaching specific goals:

> **"Implementing the norms**
>
> 78. Certain tasks have priority and must be undertaken or continued even before the norms and minimum standards come into effect. These are:
>
> (a) creating a computerized method of tracking and documenting the targeted allocations and subsidies, according to the norms;
>
> (b) creating appropriate accounting and financial mechanisms to allocate and track funds in terms of the norms, and to inform schools of their allocations as required by section 34 of the Act;
>
> (c) helping SGBs to understand how to advise parents on whether to set fees, to calculate the level of fees, to determine exemption criteria and procedures, and to handle appeals (SASA, sections 38-40).
>
> 79. Analytical and budgetary preparation for January 2000 must start not later than the beginning of the school year 1999…."

[224] The document purported to set out the first uniform national norms and standards for independent school subsidies and conditions of eligibility as indicated below:

"143. The norms that follow are the first uniform national norms for independent school subsidies. They are intended to provide a stable and principled basis for MECs in all provinces, to decide the eligibility for subsidy and the level of subsidies for registered independent schools.

144. The national norms apply uniformly in all provinces. However, a provincial MEC may vary them, so long as their intent and spirit are maintained. The Head of Department must consult the national DoE on this matter.

145. The following norms embody conditions of eligibility for subsidy, and funding criteria for allocating subsidies.

Conditions of eligibility

146. An independent school may be considered for subsidy if it-

(a) is registered by the PED;

(b) has made an application to the PED in the prescribed manner;

(c) has been operational for one full school year;

(d) is not operated for profit;

(e) is managed successfully according to a management checklist determined by the PED, as described in paragraph 149;

(f) agrees to unannounced inspection visits by officials of the PED; and

(g) has not been established in direct competition with a nearby uncrowded public school of equivalent quality."

[225] Schools eligible on this basis were required to "toe the line" as follows:

"149. Each school requesting funding will be subject to a management checklist (which may be the same as, or based on, the checklist referred to in paragraph 107 above), which will be approved by the HQD after consultation with representatives of independent schools. This checklist will determine whether the school is able to manage public funding responsibly. It must include indicators of sound management, such as whether the school keeps proper admissions and attendance registers and maintains fee payment and other financial records. To be

> eligible for funding a school must subscribe to the checklist and must allow unannounced inspections by officials of the PED, to ensure that the practices in the checklist are up-to-date. Refusal to allow an unannounced visit will result in forfeiture of further funding."[90]

[226] It was significantly elucidated at that time that Grade R funding by way of subsidy was not within the contemplation of the National Education Department:

> "153. Subsidies may be paid only in respect of grades 1-12. No other grades are eligible for subsidy for the time being. …."

[227] It was further apparent that subsidy payments, calculated on a per learner basis according to verified enrolment in the school (such as were warranted), were to be paid at the beginning of each term by no later than 1 April in each school year for the first term, and subsequently thereafter by no later than six weeks after the beginning of each term. The monthly payment of an educator's remuneration in lieu of a subsidy (assuming eligibility) does not feature as an authorised manner of subsidization at all.

[228] The brief outline above certainly raises a question mark concerning how, if Playways was an independent school, the Department, certainly after January 2000, could have continued to pay the principals' remuneration in lieu of subsidizing it on the basis contended for by the defendants.

[229] The payment of Mrs. Hollis' remuneration was probably still acceptable (on the defendants' version that she had come onto the persal system as a means of subsidizing the school in the same way as teachers who had gone before her)

[90] These requirements were not strictly relevant for present purposes because Playways was self-evidently not a school that after 2000 qualified for subsidies at all as an independent standalone ECD centre.

coming in at the tail end of what had been a permissible practice by government up until then and the fact that the implementation of the new system was by then just imminent, but what is less clear is how the second defendant could have been remunerated by persal relative to Playways after the implementation date of the 1998 Norms and Standards. The answer could be that the Department made a mistake by creating or perpetuating a resource allocation for Playways, whereas it was not eligible for public funding any longer at all.

[230] It is unfortunate that there was an absence of documentation or evidence concerning the circumstances under which the second defendant came to be appointed as a persal paid educator in association with Playways at a crucial time when funding and other changes in the introduction of formal Grade R education were in the pipeline. The only fact that emerges from a financial report of the school in 2001 is that there was a seven-month delay in her going on to persal in that year which had caused a burden because her salary had to be funded from school fees. It would have been helpful to know why, what the Department was grappling with, and how they came to a decision to pay her remuneration on the basis that she was associated with Playways, a pre-primary school that had consciously elected not to align itself with a public primary school, which appeared to be the only basis upon which the Department could provision a post of principal. Whether public or independent in the Department's estimation, it called for an explanation.

EDUCATION WHITE PAPER 5 ON EARLY CHILDHOOD DEVELOPMENT:

[231] It is also relevant to mention the Education White Paper which saw the introduction of the National Department of Education's groundbreaking pilot project on the provision of the Reception Year (Grade R) in formal education. It was declared national policy in 2001 under section 3 (4) (*l*) of the NEPA, by notice published in the Gazette.[91] The main ECD policy proposed was the establishment of a national system of the provision of Grade R for children aged five turning six so that all children entering Grade 1 would have an opportunity to participate in an accredited reception year programme. The intention was to achieve this through a phased poverty-targeted approach that makes use of grants-in-aid to primary schools and subsidies to selected community-based ECD sites within conditional grants and provincial budgets.

[232] To improve the quality of the ECD programmes, it was required that all centres offering reception year programmes be registered with PEDs, that accredited reception year educators be registered with the SA Council of Educators and that educators who did not have a specialized qualification to teach Grade R would need to undergo approved training programmes. In identifying the types of ECD provision in the country which had gone before, the Paper acknowledged the great variety of ECD services which existed in the category of independent ECD institutions, included among them being Grade R at independent schools, and Grade R attached to public schools, but managed by the school governing body and operated by private individuals or the community. Significantly it recognized

[91] GN 1043 (GG 22756) of 17 October 2001, amended by GN1369 (GG 22938) of 13 December 2001

that these had been funded through parents' fees, community fundraising and/or donations of material, "with some or no financial support from government." In Education's analysis of these sites it picked up on the stark difference in quality between them *inter alia* based on inequitable funding and the resourcing of ECD services.

[233] The Paper revealed further that the Department of Education had in 1996 adopted the *Interim ECD Policy* which had provided for the implementation at the time of a National Reception Year Pilot Project which was funded by government at a cost of R125 million in which 2,730 ECD sites participated to make and test innovations in the ECD field related to the accreditation of practitioners, policy and subsidy systems, and to research the most effective means of delivering Grade R education. 1997 saw the launch of the Interim Policy on ECD. It appears that the Eastern Cape had amongst other PEDs experienced "serious problems in project implementation."

[234] One of the results of the research is that whilst it was indicated that independent pre-primary schools and reception year programmes that are attached to independent schools provide an important service and should continue to do so, a conscious decision was reached that these programmes would however not receive a government subsidy. Nonetheless they were required to adopt and carry out national policy and norms and standards on the provision of reception year programmes on the same basis as was applicable to public providers. The provision of the reception year in public primary schools was to take place via direct grants-in-aid from provincial departments of education to school governing bodies under the "coverage" of section 21 of the Schools Act. These grants would flow on a per-learner basis and would be "poverty-targeted."

[235] We learn from all of this that, in order for any kind of subsidization to have continued after 2000 in respect of the kind of school that the defendants say Playways was, that it was required to attach itself to a public primary school to qualify for grants-in-aid, and that such subsidization could certainly not by that stage have entailed the payment of an educator's remuneration. It is common cause that Playways turned down the invitation to associate itself with Hudson Primary.

[236] It is harder to process that the second defendant was paid in association with Playways for more than a decade afterwards even on the assumption that it was a standalone ECD site in the public sector in the Department's estimation. This only serves to heighten the probability that the payments made by persal on this basis were a mistake and self-evidently against policy.

EVALUATION AND DISCUSSION:

[237] It is evident from the legislative outline above that registration denotes an independent school's legal authority to operate and its certificate mere proof of the fact of its registration as such. I cannot conclude for the reasons stated below that the first defendant's inability in this litigation to provide a certificate of registration *per se* warrants a finding that it is accordingly, or therefore must have been, a public school. There is in any event as I have indicated above no onus on the defendants to establish that it was in fact an independent school, but on the plaintiffs instead to prove that it is (as its records even presently maintain), and was, a public school at the time of the impugned sale. The fact that the

Department's EMIS says it is a public school in its records is not an overwhelming probability in its favour as I indicate below.

[238] The unchallenged evidence is that the school has been in existence since 1940 when the authorities did not require such an institution to be registered. Indeed, the concept of a nursery or pre-primary school in an official school context only emerged much later so it could not have been a public institution from its inception as claimed by the plaintiffs[92]. Further the school's recorded history that in 1959 the Cape Education Department paid a provincial subsidy to it, and thereafter in 1976 took over the payment of educators' salaries (certainly possible and consistent with the relevant legislation which pertained at the time) cannot be gainsaid. Indeed, in the circular note to parents referred to above, Mrs. Hollis had it down that the school was "registered with the Cape Education Department," a representation most unlikely to have been published to prospective parents as the school's manifesto if it were untrue, especially since it appears to have conducted itself professionally over the years in every other respect. Moreover, since subsidies were paid to it under the old dispensation and later educators' salaries, the Cape Education Department's recognition of it as a lawful school must be assumed otherwise it would not have parted with the funding as even then private schools were operated subject to strict conditions and only for so long as the education department was satisfied that the school was compliant with the conditions imposed on it at all material times. The school must further have had some credibility as an independent facility for the municipality to have sold land to it in 1987 as an educational institute in the form of a voluntary association. It also

[92] In response to a request for trial particulars the plaintiffs clarified that the school had been public from its inception.

registered a bond in 1992 with Absa Bank as "Playways Pre-Primary School," which assumes that it existed as such a private juristic entity at the relevant time.

[239] It is against the probabilities that Playways was only registered as an educational institute on 1 January 1983. This information on EMIS does not accord with the unchallenged evidence that the school existed before and was indeed recognized by the Cape Education Department as an education institute by the payment of subsidies and educators' salaries to the school. If anyone should have had the duty to produce paperwork in substantiation of such establishment it is the Department that maintains that the school came into being on this date as its records suggest. The best that Mr. Heunis could assert on behalf of the plaintiffs in this respect is that since other details on the Department's EMIS ring true, that this random fact, being the purported date of its installation, must have emanated from the school itself. Inasmuch as Mr. van Rensburg suggested that this peculiar information would have come from the school itself on the occasion of the census conducted in 2000 (through the mouth of the principal I expect) Mrs. Hollis, who was at the helm at the time, has disavowed that she would have given such an indication.

[240] There were no significant developments related by Mrs. Hollis on the basis of which it can be concluded that the school changed its status from private, the terminology retained at the time, to public. Had it done so this would have attracted publicity and left a paper trail which would vouch for the change. Similarly, if Playways had sought to declare itself a state aided school before the coming into operation of the Schools Act that too would have been a very public about turn that would be manifest from the relevant paperwork and publication of

the relevant notice in the Government Gazette.[93] Even assuming that Playways had taken on the mantle of becoming a "departmentally controlled" institution by choosing that form of subsidy in terms of section 26 (1) under the Education Affairs Act, this would not have impacted its status as an independent school.

[241] What is significant however, and which is certainly consistent with the legislative frameworks which applied in both 1959 and 1976, is that it was permissible for educators at private schools to be remunerated by the Cape Education Department.

[242] In my view there is no merit in Mr. Heunis' submission that the possibility of the payment of educators' salaries in lieu of a general subsidy is to be discounted by the absence of any regulations promulgated pursuant to section 240 (5A) of the Education Ordinance, which was probably the dispensation under which the manner of subsidization by means of the appointment and remuneration by the Cape Education Department of teachers at Playways as a private school for the instruction of its pupils first commenced in the school's case. Mrs. Hollis' evidence that she and others before her were so paid in fact, over a lengthy period and despite the absence of regulations having been promulgated in this respect, cannot be gainsaid. This also accords with the history of the school. I mention that in any event, and since we are only concerned with the later years, section 26 of the Education Affairs Act did not require the promulgation of any regulations to give effect to the obligation of the then Head of Education to classify a school for subsidy purposes as a departmentally controlled pre-primary school, after which the persons employed in teaching posts at such schools would be deemed to be employed in teaching posts at a departmental institution. The point is that the legal

[93] Section 29 (2A) of the Education Affairs Act.

framework clearly allowed for subsidization of private schools in this manner and that it would have been the most natural thing for such educators to have come onto persal on this ticket.

[243] There is also the unchallenged evidence that the school operated in every sense of the word as a private school. The concession that Mrs. Koekemoer, an emissary of the Department, involved herself to the limited extent related by Mrs. Hollis and Mrs. Leonard is in conformity with Department's oversight responsibility in respect of independent schools. For the rest Playways used its own funds other than the limited support it got from the education department to subsist and acquire the assets which it did. Governance wise it never subscribed to the public school governing body model and it did not report its financial or internal affairs to the Department. The only regulation by the Department which it submitted itself to was that pertaining to the standard monitoring and cooperation of independent schools prescribed by the relevant legal dispensation from time to time relating to inspections and the submission of mandated information.

[244] I turn now to deal with the evidence of Mr. van Rensburg. At best his evidence that Playways is and was a public school derives from information stored on EMIS' databases.

[245] The premise is that the EMIS' records introduced through his testimony are correct since they constitute data messages within the meaning contemplated by section 15 (4) of the ECTA, but it is not clear from the "certificate" put up by the first plaintiff to bring himself within the parameters of the subsection whether he intended to assert that the first or second situation applies. The alternate data message that is admissible in evidence on its mere production in civil proceedings

and which purportedly constitutes rebuttable proof of the facts contained in such records, copies, printouts or extracts, is a copy or printout or extract from a data message *made* by another person in my view in the ordinary course of that person's business, which the person who is an officer in the service of such a person and who is doing the certifying has certified to "be correct".[94] Perhaps it was meant to suggest that Mr. van Rensburg himself made the data messages because the phrase: "in the course of his employment" is used, but he could certainly never claim to have had any input in making the data messages that emanate from persals' records.[95] The certificate is not in clear terms but I will assume for present purposes that the data message emanating from EMIS' records (the Institution Registration Report) was "made" by EMIS officers in the ordinary course of business (in the sense that EMIS and persal records are mandated to be established and maintained for every provincial education department) and that Mr. van Rensburg was an officer in service going about EMIS' business when he extracted the printout which he did from EMIS' electronic storage databases.

[246] Although Mr. van Rensburg is self-evidently not in persal and has limited access to files imported into EMIS from persal's data bases such as to cast doubt on his being able to certify those records as correct, it is unnecessary to evaluate the status of annexures RVR 2, 3 and 4 introduced through his testimony. They are not contentious in the sense that it is common cause that post establishments were declared in respect of Playways for 9 April 1999 and for 1 January 2003 respectively purportedly by the Department following the prescripts of the 1998

[94] To my mind such a situation arises where the maker of the original data message is himself unable to say that he made the message in the ordinary course of business, but someone else can produce a copy of it and is in the unique position of being an officer in the service of the maker who can by reason thereof vouch for the fact that it is correct in the sense that it is a true copy.

[95] He was quite clear that persal had its own system and that he could only download text files from persal with the necessary authorisation with a view to importing it into EMIS' records.

Norms and Standards for School Funding applicable at the time. It is also not in issue that when the Department conducted a persal snapshot relative to the school over the period 2005 – 2010 it revealed that a principal of post level 4 had been provisioned to it and that such principal, being the second defendant, was remunerated by persal throughout this time, this being represented by Annexure "RVR 4".

[247] I mention though that, except to repeat the Department's view that this by default means that Playways was a public-sector school because persal only pays educators employed in public sector schools, no evidence was presented to say how these resource allocations came to be made relative to Playways on the basis of either contention that it was a public or an independent school. The changes heralded by the 1998 Norms and Standards for the funding of schools was a recent development so the source documentation that led to the resource allocations should still all have been available to give a context to especially the 1999 Staff Establishment, which no doubt established the pattern going forward post amalgamation. No one from persal, at least no authorised person, came forward to testify in this respect. As an aside I mention that Mrs. Hollis in her testimony expressed surprise that in the staff establishment for 2003, after her retirement, the number of Grade R learner could be 70 because of the school's limited capacity. The likelihood therefore exists that the information given as the premise for this approved establishment was incorrect even on this basis.

[248] Another absolute distortion of the reality is that the second defendant was (I hope no longer is) shown on persal to be a paid educator in association with Playways for years after it was plainly known by the Department's authorities that she had not shown her face at the school since January 2007 after its sale to the

second defendant. It certainly begs the question how this could have happened if the procedure is for the school principal of a public school to annually update and or verify this information? What, and more importantly who, from 2007 to 2010 informed the Department that an educator was needed at Playways for the resource allocation to have been perpetuated long after the sale of the school? All of this confirms overwhelmingly to me that despite what persal's records indicate, they could not have provided a reliable basis upon or against which EMIS could have validated the information reflected in its master list concerning Playways, whether in respect of the sector of the school or its date of registration.

[249] That brings me to the Institution Registration Report (Annexure RVR 1). It would be admissible in evidence, all other requirements being in place, despite the fact that it was generated by a computer and not a natural person. But where the probative value of the information in the message (in this instance the facts in contention represented in the report being that the school was registered as a public school on 1January 1983 and that its status is that of a public school)[96] depends upon the credibility of a natural person other than the person giving the evidence, there is no reason to suppose that section 15 seeks to override the normal rules relating to hearsay evidence. This is clearly not a situation where the probative value depends upon the "credibility" of the computer because we are here dealing only with an electronic storage database.[97] The information in the printout probably passes the grade on a technical score except that its content, in respect of the first

[96] Although it appears to be one contentious fact the sources for each fact are distinct. One emerges from evidence collected in the needs infrastructure survey and the other on the premise of persal's records that given the payment of the principal's remuneration by the Department, and the provisioning of such an educator to the school in the first place, this gives rise to a presumption as it were that it must therefore be a public-sector school otherwise neither the provisioning or payment would have happened.

[97] See the approach adopted in *Ndlovu, Supra,* at 173d-f.

contentious issue highlighted above, is by Mr. van Rensburg's own admission based on hearsay evidence and other unreliable factors I will shortly relate.

[250] There appears to be no issue with the report's authenticity as computer reports go. Mr. van Rensburg was himself involved from the outset post amalgamation with the team responsible for setting the templates and capturing the information relative to the core data fields that EMIS' records represent. Indeed, he had himself perfected or adjusted its platform in use at the time so that it could accommodate what was necessary for the data base to store and communicate information. There also appeared to be no technical reason, once EMIS got over its original problems in setting up a workable data system, to suggest that there was anything lacking in the *manner* in which the integrity of its data was or is being maintained.

[251] But the concern is with the content that has gone into the core fields on the master list of institutions which represents Playways as a public school whereas all the other evidence points in the opposite direction. I consider the fact that in gearing up the EMIS system in 2000 there were no independent source documents to confirm the premise adopted about the school that it was a public school save for the fact that an established post had been provisioned to it and that it boasted a persal paid educator in the form of a principal. It is common cause that the Cape Education Department could not come to the party in providing crucial documentation and that the existing data basis were in effect consolidated and validated against persal's records. The disputed information concerning the school's purported registration as a public school on 1 January 1983 was obtained second hand from the results of a census concerning needs infrastructure that was conducted by an entirely different government department whose data was shared

with EMIS. No one can say who said this, or whether a document constituted the source of this information, which has also never been forthcoming.

[252] Even if Mr. van Rensburg had put up a word perfect section 15 (4) certificate this does not magically transform the recordal in EMIS' records, in essence based on hearsay evidence (which I find no basis to admit against the defendants' acceptable evidence that Playways was established in 1940 and has carried on its existence as a private or independent school since then) or conjecture, to an established or proven fact that it was a public school which was registered on 1 January 1983. It is a circular argument to suggest that EMIS's record are authenticated or validated by persal's records when all the indications are that the Department should not have provisioned a post a Playways at all after Mrs. Hollis' retirement. The fact that it is inherently improbable that a persal paid educator would be appointed to an independent standalone ECD centre cannot redound to the defendants' disadvantage in this bizarre situation. I am certainly not inclined to give the Institution Registration Report any validity other than that it constitutes a recordal in EMIS's records of what in its estimate and best guess constitutes a public school. Mr. Heunis was correct in noting that this information may or may not be correct. I find no basis to accept that it is correct for the various reasons indicated above.

[253] Mr. Heunis sought to persuade me that the presumption *omnia praesumuntur rite esse acta* somehow came to the plaintiffs' rescue to confirm the validity of EMIS' records but their reliance upon the maxim is to my mind misplaced. The presumption only operates when a mere formality or detail required by procedure is involved. It permits a party to dispense with proof of compliance with necessary formalities, if there is evidence of the act having been

legally and regularly done.[98] I agree with Mr. Ford that the presumption cannot operate to infuse with legal validity the recordal of a school as public on its EMIS master file database as the creation of a reliable database under these circumstances, post amalgamation, was by no means a mere formality or detail of required procedure routinely undertaken. It applies to an act having been legally and regularly done, not to the creation of a new database under these peculiar circumstances.

[254] In the premises the plaintiffs have failed to establish on a balance of probabilities that the entity that the sold the school and its fixed property to the second defendant was a public school. In consequence the first plaintiff had no legal standing to interpose himself in the sale. It is unnecessary to determine the rest of the issues vis-à-vis the first defendant. As for the second and plaintiffs' private constitutional challenge they failed to present any evidence to meet the burden of proof on them and their separate claim in this respect must also fail.

[255] In the result I issue the following order:

1. The action is dismissed, with costs, such costs to include the costs of second counsel, as well as the reserved costs of the application in March 2014 when the matter was referred to trial.

[98] Thornhill v S [1997] 4 All SA571 (C) at 557; Kellerman v Minister of the Interior 1945 WLD 179 at 193.

B HARTLE
JUDGE OF THE HIGH COURT

DATES OF HEARING: 19 April, 19, 20 & 21 September 2016 and 27 February 2017
DATE OF JUDGMENT: 29 May 2018

APPEARANCES:

For the first and second plaintiffs: Messrs. J C Heunis SC & B Boswell instructed by Bax Kaplan Russell Inc., East London (ref. Mr. S Clarke).
For the defendants: Mr. E A S Ford SC & Ms. M L Beard instructed by Wesley Pretorius & Associates, East London (ref. Mr. Smith).