



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

Case No: 1209/2016

**Reportable**

In the matter between:

**HEAD OF DEPARTMENT WESTERN**

**CAPE EDUCATION DEPARTMENT**

**FIRST APPELLANT**

**MEMBER OF THE EXECUTIVE COUNCIL FOR  
EDUCATION IN THE WESTERN CAPE PROVINCIAL**

**GOVERNMENT**

**SECOND APPELLANT**

**MINISTER OF BASIC EDUCATION**

**THIRD APPELLANT**

and

**Ms S**

**RESPONDENT**

**WOMEN'S LEGAL CENTRE**

**AMICUS CURIAE**

**Neutral Citation:** *Head of Department: Western Cape Education Department & another v S (Women's Legal Centre as Amicus Curiae)* (1209/2016) [2017] ZASCA 187 (13 December 2017)

**Coram:** Navsa ADP and Tshiqi, Seriti and Saldulker JJA and Makgoka AJA

**Heard:** 23 November 2017

**Delivered:** 13 December 2017

**Summary:** Interpretation and application of s 40(1) of the South African Schools Act 84 of 1996 – subsection provides for joint and several liability – fee-exemption applications can, however, be processed in terms of the Act and the Regulations to enable single parents separated from their partners or divorced from a spouse to have their applications assessed in relation to their own personal circumstances and not on combined income.

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## ORDER

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**On appeal from:** Western Cape Division of the High Court, Cape Town (Le Grange J sitting as court of first instance):

1 The appeal and the cross-appeal succeed to the extent reflected in the substituted orders that appear hereafter. The appellants are ordered jointly and severally to pay the respondent's costs in relation to both the appeal and the cross-appeal, such costs to include the costs of two counsel.

2 The order of the court below is set aside and replaced as follows:

'1 The decision of the First Respondent, in the appeal in terms of s 40(2) of the South African Schools Act 84 of 1996 (the Act) made on the 19 September 2013 dismissing the Applicant's appeal against the Second Respondent's decision to refuse the Applicant a partial exemption from the payment of the school fees as a result of her failure to institute the appeal within the prescribed period of 30 days after receipt of the notification of the Second Respondent's decision, is reviewed and set aside.

2 It is declared that in processing and dealing with the applicant's applications for a fee exemption in 2011, 2012 and 2013, the school and its governing body subjected her to repeated violations of her constitutional and statutory rights.

3 It is declared that in terms of s 40(1) of the Act the Applicant and her former husband are jointly and severally liable for their child's school fees.

4 It is declared that the Applicant was entitled to have her applications for a fee-exemption and the related appeals dealt with in the manner set out hereafter with reference to the Regulations relating to the Exemption of Parents from Payment of School Fees in Public Schools (Government Notice R.1052 in Government Gazette 29311 of 18 October 2006) as amended ('the Regulations). All public schools, governing bodies and education Departments must comply therewith in relation to the Applicant and all other parents who are in the same or similar situation as the Applicant:

(a) The governing body of a public school shall grant a conditional exemption from payment of school fees, referred to in Regulation 1 of the Regulations, to a parent who:

(i) in his or her application for exemption:

(aa) gives particulars for his or her total annual gross income; and

(bb) does not give particulars of the total annual gross income of the other parent of the learner concerned because the other parent has refused or failed to provide such particulars to the parent applying for the exemption; and

(ii) having regard solely to his or her total annual gross income, would qualify for a total or partial exemption in terms of the Regulations if he or she were the only parent of the learner concerned.

(b) A conditional exemption shall be the total exemption or the partial exemption to which the applicant would have been entitled if he or she were the only parent of the learner concerned.

(c) When granting such a conditional exemption the governing body shall impose conditions to the effect that the applicant for the exemption:

(i) must report to the school forthwith any increase in his or her gross annual income during the school year in question which, had it been his or her income at the time of making the application for exemption, would have disentitled him or her from receiving the total exemption granted to him or her or from receiving any partial exemption granted to him or her;

(ii) must, on demand from the governing body, pay on reasonable terms to be determined by the governing body after giving him or her the opportunity to make representations, the school fees or the portion of the school fees for which he or she would have been liable in terms of the Regulations based on his or her increased gross annual income;

(iii) shall not be liable to make any such payment unless, during the school year in question, his or her gross annual income increases to such an extent that, had it been his or her income at the time of making the application for exemption, he or she would have been disentitled from receiving the total exemption granted to him or her or from receiving any partial exemption or he or she would have been entitled only to a lesser partial exemption than the one granted to him or her.

5. It is declared that the granting of such a conditional exemption shall not preclude the public school from taking legal steps to enforce payment, by the other parent of the learner concerned, of the school fees or the balance of the school fees, as the case may be, in terms of section 41(1) of the Act.

6. The Respondents are liable jointly and severally to pay the Applicant's costs, including the costs occasioned by the employment of two counsel.'

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## JUDGMENT

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NAVSA ADP (Tshiqi, Seriti and Saldulker JJA and Makgoka AJA concurring):

[1] The principal dispute encompassed in an appeal and cross-appeal, before us with the leave of the court below, is whether liability of biological parents for school fees at public fee paying schools, as provided for in s 40(1) of the South African Schools Act 84 of 1996 (the Act), is joint liability, or joint and several liability, and if the latter, whether the consequences are such as to impact disparately, negatively and ultimately unlawfully on single parents who are separated from their partners or divorced from their spouses. I shall for convenience refer to the parties as they are in the appeal.

[2] Mothers like the respondent, Ms S, who are separated or divorced from their partners or spouses, are more often than not custodian parents who are left, at the coalface, so to speak, to deal with schools who seek payment from them. As noted by this court in *Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA) (para 13): 'Historically, mothers have been the primary care-givers of children in this country. That continues to be so. It is almost always mothers who become custodial parents and have to care for children on the breakdown of their marriage or other significant relationships. That places an additional financial burden on them and the sad reality is that they then become overburdened in terms of responsibilities and under-resourced in terms of means.'

[3] When the mother of a child whose former partner or spouse refuses to co-operate, she is more often than not, as in the case of the respondent, called upon to account to the school for issues or problems related to the non-payment of school fees. In the normal course, in the event of joint and several liability being imposed, she would be liable for the full amount of the fees with a right of recovery against the other parent for its share. The responsibility for recovery is placed on the custodian parent and not on the school. This, so it was submitted in the court below on behalf of the respondent and by the amicus curiae, the Women's Legal Centre (the WLC), results in discrimination against the custodian parent, often the mother, by treating her exemption application in the same way as exemption applications by parents

living in joint households. It was contended that this practice also operated in favour of non-custodian parents, often the father.

[4] In the court below, it was submitted on behalf of Ms S, that s 40(1) of the Act should be interpreted so as to impose liability on parents on a joint, rather than joint and several basis and she sought an order to that effect. This, so it was argued, would entitle mothers such as Ms S to apply for an exemption from paying school fees and that an assessment in that regard would be based on their own means and ability to pay rather than on the joint income of both parents. In the alternative, Ms S sought an order declaring s 40(1) unconstitutional and a further order declaring that Ms S qualified for a fee exemption.

[5] To facilitate a better understanding of what is set out in the preceding paragraph and of what follows, it is necessary at this early juncture to set out the provisions of s 40(1) of the Act:

‘ A parent is liable to pay the school fees determined in terms of section 39 unless or to the extent that he or she has been exempted from payment in terms of this Act’.

In the present case the scheme of the Act and the regulations promulgated thereunder, in relation to the question of exemption from payment of fees, is critical in addressing the vulnerable position that parents such as the respondent find themselves in.

[6] Before dealing with the background leading up to the hearing before us it is necessary to point out that the enforceable order at the end of this judgment, bearing on the principal dispute between the parties, is largely due to a productive debate between the court and counsel on behalf of the parties that led to an accommodation being reached by them on its material terms, and endorsed by us on a proper interpretation of the legislation in issue. The reasoning in relation to the interpretation of s 40(1) of the Act and the regulations thereunder is set out later. This judgment, especially in relation to the principal issues, is of importance to a vast number of parents across the country who find themselves in the same or similar position as Ms S. The parts of the order not agreed upon that were left to the court to decide are mostly accessory to the principal orders. It needs to be said that the parties’ legal representatives, in reaching the accommodation, displayed an admirable maturity. It

also demonstrates how sound and keen minds can be usefully employed in the national interest to advance and protect constitutional values.

[7] The appeal and cross-appeal we were called upon to adjudicate are before us on the following basis. The Head of the Western Cape Education Department (the HOD), the Member of the Executive Council for Education in the Western Cape Provincial Government (the MEC) and the Minister of Basic Education, the first, second and third appellants respectively, appeal against an order of the Western Cape Division of the High Court, Cape Town (Le Grange J), in terms of which it was declared that Ms S, and her former husband (Mr G), from whom she is divorced, are 'jointly' and not 'jointly and severally' liable for the school fees of their daughter (the child) at Fish Hoek High School (the school). Ms S cross-appeals against the dismissal of the further orders she had sought in the court below. The appeal and cross-appeal are before us with the leave of the court below. At the time that the dispute between the parties arose, the child was a grade 10 learner at the school. Happily, she has since then matriculated and is presently pursuing a degree at University. I shall, in due course, set out the very lengthy list of orders sought by Ms S. The background culminating in the litigation in the high court is set out hereafter.

[8] Ms S is a newspaper reporter. In March 1999, following the breakdown of her marriage, a settlement agreement was concluded with Mr G, which was made an order of court. It provided, inter alia, for maintenance for their child. The order was subsequently varied by a maintenance court in terms of which Mr G was required to pay an amount of R2 500 per month. This was later increased to R3 300 per month.

[9] The child was admitted to the school in January 2011 where she commenced grade 8. Ms S's assertion that she made it clear at the outset that she would be applying for a fee exemption is unchallenged. The school fee for that academic year was R13 250. At that time Ms S's annual salary was R160 284, in addition to which she received maintenance from Mr G in an amount of R33 540 per year.

[10] The practice at schools under the aegis of the HOD and the MEC is that official forms are handed to children for the attention of their parents. The form informs parents about their responsibilities in relation to school fees and provides

payment options. Ms S was referred to the bursar's office where she received a form in terms of which she could apply for an exemption. The form required, inter alia, the combined annual gross income of a child's parents to be provided. In addition to the breakdown in the relationship with Mr G and the difficulty in obtaining the required information she also considered it an infringement of her right, relative to her circumstances, to apply as an individual for a fee exemption. Simply put, the form did not provide for parents in Ms S's position, namely that of a divorced custodian parent entitled to be considered for an exemption relative to her personal circumstance, distinct from her former spouse.

[11] The following part of her founding affidavit bears repeating:

'On 1 March 2011 I submitted my fee exemption application. In support of the application I attached an affidavit completed in terms of Annexure "B" of the Regulations,<sup>1</sup> as it did not contain a declaration that needed to be signed by both parents (as requested by the school). I also explained that I get a monthly payment out of which all my daughter's expenses were to be paid and stated that my financial position should be considered separately from that of my ex-husband. A copy of this letter together with the affidavit and other supporting documents is annexed . . . .'

[12] The school responded, in a letter dated 11 March 2011, by stating that in order for it to consider the application for exemption, it required the gross combined income of both biological parents. The school was adamant that it would only consider the application upon receipt of the particulars of Mr G's income.

[13] On 9 May 2011 the school wrote a further letter to Ms S in which it re-iterated that position. The school informed her that it had written to Mr G and had sent him the exemption application form, in terms of which financial assistance was sought and that it had received no reply. The letter concluded by stating that the school governing body would not be in a position to consider the application without the required information from both parents.

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<sup>1</sup> The Regulations referred to by Ms S are those promulgated under the Act. Regulations relating to the Exemption of Parents from Payment of School Fees in Public Schools, GN R1052, GG 29311, 18 October 2006.

[14] On 31 May 2011 Ms S responded, asserting that she had supplied all the information at her disposal, justifying her application for financial assistance, and drew the governing body's attention to Regulation 9(3) , which provides:

'No applicant may be disqualified on the grounds that his or her application form is either incomplete or incorrectly completed.'

[15] She went on to state that she was unable to supply Mr G's financial particulars and that it was unreasonable for the school to expect her to obtain and provide them. She called on the school, in the interim, to provide her with a conditional exemption, until it had obtained the information from him. Ms S stated that according to her calculations, based on the formula provided for in the Regulations, she was entitled to a discount of R9 673 and was only personally liable for the difference between that amount and the amount of the school fees set out above, namely R13 250. She was adamant that her contribution to the school fees and that of Mr G needed to be calculated separately.

[16] To this, the school responded by way of a letter dated 28 June 2011 in which it was adamant that both parents were equally responsible for the payment of school fees and that it did not wish to get involved in a dispute between parents which it described as 'personal matters'. She was requested to direct all further communication to the school's attorney.

[17] On 8 July 2011 Ms S advised the school in a letter that there was no dispute between her and Mr G and required clarity on whether her application for an exemption had been processed and the outcome thereof. Predictably, the school responded, during July 2011, by stating that since it had not received the full co-operation of both parents it had been unable to finalise her application for an exemption. The school informed her that Mr G had conveyed to them that school fees were included in the maintenance payments he was making to her monthly.

[18] Equally adamant, Ms S wrote a letter on 3 August 2011 in which she stated that she had given her 'full co-operation' and provided all the information at her disposal and that Mr G's co-operation was a matter beyond her control. She



enquired why, under the prevailing circumstances, she had to bear the burden of obtaining the outstanding information. She requested a ruling on her application for an exemption.

[19] In a letter addressed to both parents, dated 11 November 2011, the governing body informed Ms S that it was not in a position to provide her with a fee exemption as it was unable to determine the income of both parents. It is necessary to repeat the following parts of the letter:

‘From the information we have gleaned to date it does not appear that your income as a family unit would entitle you to such an exemption.

. . .

Your failure to act and to resolve your differences leaves us with no alternative but to hand this matter over to our attorney for him to act in terms of the law to recover the school fees. The courts can then apportion payments and you can cover the cost of that intervention. We will hand this matter to Attorney Leon van Rensburg on 30 November 2011 unless you both submit completed exemption forms or pay the outstanding fees.’

[20] Ms S objected to what she considered to be the bullying tone of the letter and responded by requesting a ruling on her application for exemption. She took umbrage at being described as a family unit with Mr G. She was offended and felt humiliated. Further exchanges included a threat by the school of legal action upon a failure to arrange for payment of the school fees. Ms S met with the school’s attorneys in an effort to resolve the impasse but walked out of the consultation when it was suggested that she was collaborating with Mr G to the detriment of the school. Thereafter the school’s attorneys sent her a letter of demand claiming payment of school fees for the 2011 academic year in an amount of R7 250, described as ‘arrear school and related fees’. This was followed by a summons being issued out of the Simons Town Magistrate’s Court, served on Ms S in May 2012, with the school claiming payment of that amount. Ms S filed a plea. At present, that *lis* is pending.

[21] In 2012 the same problem arose. On 16 February 2012 Ms S applied for a fee exemption in the same manner as the previous year. She stated that her income for that year was an amount of R186 325, which comprised her salary and maintenance payments. Initially the school reassumed its prior position. However, on 1 March

2012, the school changed tack. It sent Ms S a letter directing her to submit an application for financial assistance. It stated that a separate application form would be dispatched to Mr G. This time, wary of what might ensue, Ms S approached attorneys for assistance who entered into communication with the school. The attorneys wrote the school on 12 March 2012, indicating that it interpreted the letter of demand – this occurred before summons was issued – as a refusal to grant an exemption for both the 2011 and 2012 academic year. The letter signalled Ms S's intention to appeal both decisions to the HOD.

[22] Consequently, on 15 March 2012, appeals were noted against the refusal of both exemption applications. On 24 March 2012, following upon a request from the school concerning her fee exemption application for that year, Ms S supplied such information as was at her disposal.

[23] On 11 April 2012, the HOD requested the school to furnish particulars in respect of Ms S's 2012 exemption application. The school responded in writing, reiterating its initial position that it could not consider the application for exemption until it was in possession of all the prescribed documentation and proof of income of both biological parents.

[24] On 30 May 2012, the HOD informed Ms S in writing that her appeal in respect of the 2011 year could not be considered as it had been received outside of the prescribed 30 day period. In respect of her appeal in relation to the 2012 academic year, her appeal was upheld and she was granted an exemption of 83 per cent. The relevant part of the letter from the HOD reads as follows:

'However, after careful consideration of your appeal against the decision of the governing body of Fish Hoek High School not to grant you exemption from the payment of school fees for 2012, I have decided, in terms of regulation 8(4) of the Regulations for the Exemption of Parents from the Payment of School Fees, 2006, that your appeal be upheld. The current school fees per learner at Fish Hoek High School constitutes 7,71 % of your annual gross income. In terms of regulation 6(4) of the aforementioned regulations and the table, you qualify for 83 % exemption from the payment of school fees in respect of your daughter, . . . ,

for the 2012 school year.<sup>12</sup>

[25] For the remainder of the 2012 academic year, Ms S paid school fees in accordance with that exemption. During August of that year, she received a letter of demand informing her that she owed an amount of R10 910. The letter claimed that she had failed to apply for or qualify for any exemption from school fees and should it not be paid within 90 days, legal action for recovery of the money would be launched. The letter of demand recorded the outstanding amount of R7 250 for the prior year being brought forward. On 4 September 2012, she returned the letter of demand to the school informing them that her appeal had been successful.

[26] In relation to the 2013 academic year, Ms S, once again, submitted a fee exemption application. She supplied personal financial information and applied the formula provided for in the Regulations, indicating that she would again be entitled to an 83 per cent exemption from school fees. She received no response to that application. In May 2013 she received a letter of demand from the school stating that she owed R12 800 in respect of school fees for the 2013 academic year. Legal action upon default was threatened.

[27] On 28 May 2013 Ms S's attorneys appealed on her behalf to the HOD against the school's refusal to grant her a fee exemption. The HOD informed her that the school had been requested to consider and determine her fee exemption application and to inform her of the outcome. She subsequently received a further letter of

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<sup>2</sup> The calculation was based on the formula contained in Regulation 6(2)(a):

'The governing body must apply the following formula when considering the application for exemption:

$$E = 100 \left( \frac{F + A}{C} \right)$$

Where –

E = school fees as a proportion of the income of a parent.

F = annual school fees, for one child, that a school charges in terms of section 39 of the Act.

A = additional monetary contributions paid by a parent in relation to a learner's attendance of, or participation in any programme of, a public school.

C = combined annual gross income of parents.

100 = the number by which the answer arrived at in the brackets is multiplied so as to convert it into a percentage.'

In terms of Regulation 6(3), if E is equal to or greater than 10 per cent the parent qualifies for total exemption. Ms S falls in a category where she qualifies for partial exemption as provided for in Regulation 6, which includes a table of the levels of exemptions to be applied.

demand from the school threatening legal action. In consequence Ms S's attorneys wrote to the HOD asking her to decide the appeal. The school governing body engaged the Department, stating that an attempt by the HOD to grant an exemption based on the financial information of only one parent might be outside the law and the governing body would, in that event, 'take a very strong position'. Ms S's attorneys wrote to the Department stating that the governing body's insistence upon the application for exemption being conditional upon Mr G disclosing financial information was unreasonable. The HOD adopted the position that she could only exercise appeal powers after the governing body had considered and made a decision on the application for exemption. Ms S's attorneys sent a letter of demand to the governing body insisting that a decision be made on the exemption application.

[28] On 12 September 2013 Ms S was informed by the governing body that her application for exemption had been declined. Subsequently, the HOD was requested to decide Ms S's appeal. Later that month the HOD wrote to Ms S's attorneys advising her that the appeal was lodged out of time, beyond the prescribed period of 30 days from the date of notification from the school governing body, and could therefore not be entertained.

[29] Ms S's attorneys, in response, pointed out that an earlier notification letter from the governing body had been wrongly addressed and had thus not been received and that the appeal was therefore not lodged out of time. There was no reply by the HOD.

[30] During October 2013 Mr G informed Ms S that he had been served with a summons in which fees for the 2013 academic year, in an amount of R7 383, was claimed from the two of them jointly and severally.

[31] The series of events set out above led to Ms S applying in the Western Cape Division of the High Court for extensive relief, inter alia, in the following terms:

'2. Reviewing and setting aside the decision of the First Respondent, in an appeal in terms of section 40(2) of the South African Schools Act 84 of 1996 . . . , made on or about

19 September 2013, dismissing the Applicant's appeal against the Second Respondent's decision to refuse her a partial exemption from the payment of 2013 school fees.

3. Declaring that:

3.1 the Applicant and the Sixth Respondent, and all other divorced or separated biological parents, are jointly, rather than jointly and severally liable for the payment of the school fees of their children attending state schools;

3.2 [Mr G] is not [the child's] "*parent*" for purposes of determining the "*combined annual gross income of parents*" in Regulation 6(2), read with the definition of this phrase in Regulation 1, of the Regulations relating to the exemption of parents from payment of school fees in public schools, promulgated in GN 1052 of 18 October 2006 ("the Regulations");

3.3 *in the alternative to paragraph 3.2*: Regulation 6(2), read together with the definition of the phrase "*combined annual gross income of parents*" in Regulation 1,<sup>3</sup> is inconsistent with the Constitution and invalid; and

3.4 the Applicant qualifies for a fee-exemption for the 2013 academic year, together with a determination of the amount of the exemption for which she qualifies.

3.5 Section 40(1) of the South African Schools Act 84 of 1996 is inconsistent with the Constitution and invalid.

...

5. Declaring that the Applicant has been subjected to repeated violations of her constitutional and statutory rights in the course of the processing of her 2011, 2012 and 2013 applications for exemptions from the payment of school-fees.

6. Declaring that the First, Fourth and Fifth Respondents have failed to comply with their constitutional and statutory obligations to ensure that fee-charging public schools in the Western Cape comply with the requirements of the Act and Regulations in relation to fee-exemptions, more particularly, in that they have failed:

6.1 to take sufficient and adequate measures to ensure that fee-charging public schools inform all parents of learners attending such schools of their right to apply for fee-exemptions;

6.2 to take sufficient and adequate measures to ensure that fee-charging public schools in no way discourage parents from applying for fee-exemptions or stigmatise parents who have applied for such exemptions;

6.3 to take sufficient and adequate measures to ensure that governing bodies cause a copy of the Regulations to be displayed in a conspicuous place at their schools;

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<sup>3</sup> In Regulation 1 'combined annual gross income of parents' means 'the annual gross income of the parents, calculated together, or, if a learner only has one parent, the total annual gross income of such parent'.

6.4 to take sufficient and adequate measures to ensure that schools do not adopt policies which unlawfully limit fee-exemptions by excluding parents such as those who are refugees, immigrants or living outside the feeder area for the school;

6.5 to take sufficient and adequate measures to ensure that no learner is disqualified from attending a fee-charging public school as a result of his or her parents being unable to afford school-fees;

6.6 to take sufficient and adequate measures to ensure that governing bodies do not require divorced or single parents to provide financial information in respect of non-custodian biological parents;

6.7 to take sufficient and adequate measures to ensure that governing bodies and schools do not disqualify and applicants for fee-exemptions on the grounds that their application forms are either incomplete or incorrectly completed;

6.8 to take sufficient and adequate measures to ensure that governing bodies comply with the criteria and safeguards stipulated in the Act and Regulations in determining fee-exemption applications;

6.9 to take sufficient and adequate measure to ensure that governing bodies consider applications for fee-exemptions and make a decision on those applications within 30 days of receiving them;

6.10 to take sufficient and adequate measures to ensure that governing bodies in writing notify every applicant for a fee exemption of the outcome of his or her application, together with reasons for the decision, within seven days of the decision being taken;

6.11 to take sufficient and adequate measures to ensure that if an application for a fee-exemption is rejected by a governing body, that the unsuccessful applicant is informed in writing, within seven days of the decision being taken, of his or her right to appeal against that decision to the First Respondent in terms of section 40(2) of the Act;

6.12 to take sufficient and adequate measures to ensure that in cases where applicants for fee-exemptions do not qualify for total or partial exemptions that governing bodies consider whether:

6.12.1 the parent concerned qualifies for a conditional exemption on account of his or her inability to pay school fees owing to personal circumstances beyond his or her control; and

6.12.2 the parent concerned qualifies for an exemption based on transparent and equitable criteria other than those set out in the Regulations;

6.13 to ensure that the Western Cape Education Department has taken adequate measures to assist schools in applying the formula for fee-exemptions in Regulation 6 of the Regulations;

6.14 to take sufficient and adequate measures to ensure that when the parents are in arrears with the payment of school fees by one month or more, governing bodies investigate

whether the parent concerned qualifies for a fee-exemption before instituting legal proceedings for the recovery of school fees;

6.15 to take sufficient and adequate measures to ensure that public schools institute legal proceedings for the recovery of school fees only after having ascertained that:

6.15.1 the parent concerned does not qualify for exemption from the payment of school fees in terms of the Act;

6.15.2 deductions have been made in terms of the Regulations for parents who qualify for partial exemptions;

6.15.3 the parent concerned has completed and signed the prescribed form, annexure "A" to the Regulations;

6.15.4 the school can provide proof of a written notification to the parent, delivered by hand or registered post, that the parent has failed to apply for a fee exemption; and

6.15.5 despite the receipt of a notice contemplated in subsection 41(5)(a) of the Act, the parent has failed to pay school fees after a period of three months from the date of notification;

6.16 to take sufficient and adequate measures to ensure that all governing bodies institute legal proceedings for the recovery of school fees only after considering reasonable forms of payment other than cash.

7. Directing the First, Fourth and Fifth Respondents to comply with their constitutional and statutory obligations as declared by this Court.'

In addition, Ms S sought a structural interdict in extensive terms which she did not persist with in the court below.

[32] At the end of her founding affidavit Ms S, pointed out that her application to court had far reaching implications for a large number of parents at fee-paying schools throughout the Western Cape. She went on to state the following:

'The failure of the education authorities to comply with their obligations to ensure that school fees are not an obstacle to access to education, is a matter of considerable public interest, which needs to be remedied without delay.'

[33] Ms S complained that the school, the governing body and the HOD repeatedly violated her constitutional and statutory rights. As is apparent from what is set out above, the principal orders sought by her based on her interpretation of the Act was the following. First, a declaration that she and Mr G were jointly rather than jointly and severally liable for the child's school fees and, second, that for the purposes of

claiming an exemption, a declaration that Regulation 6(2) be read so as to exclude Mr G as the child's parent when determining 'the combined annual gross income' of parents and, finally, as a consequence of the above, a declaration that Ms S qualified for a fee exemption for the 2013 academic year together with the determination of the amount of exemption for which she qualified. The declarations of invalidity of legislation on the basis of unconstitutionality were sought in the alternative.

[34] The HOD, the MEC and the Minister opposed the relief sought, save that the HOD and the MEC conceded para 2 of the notice of motion, which translates into an acceptance that the appeal in relation to the 2013 academic year was not out of time and ought to be considered and decided. The school and the governing body chose not to enter the fray, giving notice that they would abide the court's decision.

[35] The three appellants, in resisting the application by Ms S, all denied that any of Ms S's constitutional or statutory rights had been infringed. The Minister was rightly concerned about the effect that the non-payment of fees by a parent had on the remainder of the parent body and other learners. The Minister adopted the position that the legislative scheme was such that exemptions had to be determined on the income of both parents and that the requirement was rational and served a legitimate governmental purpose. Notwithstanding that position, the deponent on behalf of the Minister stated the following at para 32 of the answering affidavit:

'Having said that, I accept that the Regulations create practical difficulties for parents like the Applicant who struggle to get the requisite financial information from the other parent. Although I do not believe these difficulties give rise to the unconstitutionality alleged by the Applicant, legislative amendments to address this difficulty are being prepared for consideration by the National Minister and the Council of Education Ministers established by the National Education Policy Act 27 of 1996. If any relevant amendments are approved and published for public comment, the National Minister will seek leave to supplement her answering affidavit so as to place them before this Court and, to the extent necessary, to explain their rationale and intended working.'



[36] To sum up, the Minister adopted the position that the legislative scheme was such that in order for a school to process an application for exemption the income of both parents was required.

[37] The HOD and the MEC made common cause with the position adopted by the Minister and in response to the declaratory orders sought, in the main, contended that they were too generalised and vague or not justified.

[38] In adjudicating the dispute, the court below (Le Grange J) commenced with the right to education as a fundamental right entrenched in terms of s 29 of the Constitution and that the right was immediately realisable and could only be limited by a law of general application, in terms of s 36(1) of the Constitution.<sup>4</sup> The court had regard to the funding of public schools premised on s 34(1) of the Act. The Act, so the court noted, dictated that funding has to be sourced equitably to ensure that learners are able to exercise their rights and to redress past inequalities. Le Grange J had regard to the distinction between no-fee schools and fee-paying schools. Fish Hoek High School is and has always been a fee-paying school. Section 39(1) of the Act provides that school fees may be determined and charged at public schools only if a resolution to do so has been adopted by a majority of parents attending the meeting referred to in s 38(2).<sup>5</sup> The court took into account the provisions of s 39(2) of the Act which read as follows:

‘(2) A resolution contemplated in subsection (1) must provide for –

(a) the amount of school fees to be charged;

(b) equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees; and

(c) a school budget that reflects the estimated cumulative effect of –

(i) the established trends of non-payment of school fees;

and

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<sup>4</sup> In this regard, reliance was placed on the decision of the Constitutional Court in *Governing Body of the Juma Musjid Primary School & others v Essay NO & others* 2011 (8) BCLR 761 (CC). For completeness it is necessary to record that the law of general application which purports to limit the right has to be ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. It is also necessary to mention that in *Juma Musjid* the Constitutional Court distinguished between the right to a basic education and the right to further education.

<sup>5</sup> Section 38(2) provides:

‘Before a budget referred to in subsection (1) is approved by the governing body, it must be presented to a general meeting of parents convened on at least 30 days’ notice, for consideration and approval by a majority of parents present and voting.

(ii) the total, partial or conditional exemptions granted to parents in terms of the regulations contemplated in subsection (4).'

The court below went on to consider the procedure in the Regulations for applying for an exemption and had regard to the appeal process provided for therein.

[39] It was against the background set out in the preceding paragraph that Le Grange J went on to determine whether, in terms of s 40(1) of the Act, the liability of divorced or separated biological parents was joint or joint and several. He examined the conflicting contentions. First, on behalf of Ms S that if s 40(1) of the Act were to be interpreted as imposing joint and several liability on divorced or separated parents, it would in effect be treating them as a 'household unit', thereby violating the individual parent's rights to dignity and equal protection of the law. It was contended that an interpretation favouring constitutional compliance should be preferred and that the logical consequence was that s 40(1) should be interpreted as imposing joint rather than joint and several liability. Second, on behalf of the appellants, it was submitted that a proper reading of ss 39 and 40 of the Act compelled the conclusion that the parents were jointly and severally liable and that if the legislature had intended otherwise it would have said so and would have provided the basis for an apportionment. It was contended that schools could not be expected to determine such apportionments. Paragraphs 93 and 94 of the judgment in the court below relating to contentions on behalf of the appellants bear repeating:

'Accordingly, it was contended that if one parent pays or is compelled to pay the full amount of the said fees then such parent has a common-law right of recourse against the other parent. Furthermore, s 15(2) of the Maintenance Act 99 of 1998 stipulates that there is a duty on both parents to maintain their children, which includes reasonable support in the provision of education.

It was also argued that [Mr G's] undertaking, in the divorce Consent Paper to pay half of the school fees incurred at Government Schools in respect of [the child] means he is responsible, as between him and [Ms S], for half of the school fees at the school. And the arrangement between [Ms S] and [Mr G] does not alter the school's right to recover the full amount of the fees from either one of them, leaving it up to the one who pays to exercise a right of recourse against the other.'

[40] The court below also recorded the submissions on behalf of the WLC. Some of their submissions appear at paras 95 and 96 of the judgment which read as follows:

‘[I]t was argued that the fee exemption scheme should be viewed in the context of a society where, inter alia, women experience multiple and intersecting forms of discriminations resulting in them being socially and economically disadvantaged; that mothers ordinarily bear more responsibilities for child-rearing than fathers; that the failure by fathers to shoulder their fair share of the financial and social burden of child-rearing results in mothers bearing the financial responsibility for childcare disproportionately; the insufficiencies in the maintenance system; the high levels of domestic violence affecting the mothers’ ability to communicate with and enforce fathers’ obligations to their children.

Furthermore, the fee exemption scheme indirectly discriminates against women on grounds of their sex and or gender, and violates their right to dignity by effectively excluding them from obtaining fee exemptions in the absence of the non-custodian parent’s financial information.’

[41] It was also submitted on behalf of the WLC that the fee exemption scheme presently employed was inconsistent with South Africa’s international obligations in terms of Article 2(f) of the Convention on the Elimination of All Forms of Discrimination Against Women, particularly when it places the onus on them to obtain information from the non-custodian parent in order to have an exemption application finalised.

[42] The court below was astute not to minimize the difficulties faced by women who become custodial parents. Le Grange J had regard to the decision of this court in *Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA) which recognised the duty of parents to support their child in accordance with their respective means and that the duty undoubtedly embraced the educational needs of the child. The court below was acutely aware of the problems that arise from the differential treatment of custodian parents and their non-custodian counterparts, resulting in gender discrimination and concluded that to hold that s 40(1) imposes joint and several liability would impose an unnecessarily heavy burden on single parents like Ms S and is irreconcilable with the paramountcy that must be afforded to the best interest of the child. He went on to find that in terms of s 40(1) parents were jointly and not jointly and severally liable to pay school fees. As a result of that conclusion, Le

Grange J did not find it necessary to determine the constitutionality challenge to the provisions of s 40(1).

[43] In respect of the attack on the constitutionality of Regulation 6(2), the court below noted the Minister's concession concerning the practical difficulties for parents like Ms S and took into account the legislative amendments that were in process. It had regard to the proposed amendments to s 41 filed by the Minister. They read as follows:

'22. Section 41 of the South African Schools Act, 1996, is hereby amended –

(a) By the substitution for subsection (2) with the following subsection:

"(2) The exemption from payment of school fees must be calculated according to the regulations contemplated in section 39(4) and the governing body may only consider the following documentation when deciding on the application:

- (a) A salary advice of both parents, where applicable;
- (b) profits received from investments or other forms of business;
- (c) a divorce agreement or court order, where applicable;
- (d) an affidavit where the parent is unemployed; and
- (e) proof of all children registered at a public school; and"

(b) By the insertion after subsection (2) of the following subsection:

"(2A) Notwithstanding subsection (2), a parent may submit to the governing body documentary evidence in the form of an affidavit supported by a confirmatory affidavit from a social worker or another competent authority, or a court order, which constitutes sufficient proof that the other parent of the learner –

- (a) is untraceable;
- (b) is unwilling to provide the first-mentioned parent with particulars of his or her total annual gross income;
- (c) has failed to provide the first-mentioned parent with particulars of his or her total annual gross income despite the lapse of a reasonable time after a request by or on behalf of the first-mentioned parent that he or she do so; or
- (d) has provided the first-mentioned parent with incomplete or inaccurate particulars about his or her total annual gross income and has refused to rectify the deficiency or has failed to do so despite the lapse of a reasonable time after a request by or on behalf of the first-mentioned parent that he or she do so."

[44] In the court below counsel on behalf of Ms S submitted that the proposed amendments failed to provide for divorced or separated parents. The court

considered contentions on behalf of the appellants that the legislative scheme including the Regulations was structured so as to ensure that school fee exemptions are calculated on a basis that encourages both biological parents to comply with the duty to support their child. The court held as follows:

‘On a proper consideration, the differentiation complaint by MS, cannot be construed as irrational. The “combined annual gross income of parents” must unquestionably be in the best interest of the child. It is also to encourage both parents to comply with their legal duty to support their children. The differentiation is therefore rationally connected to a legitimate government purpose.’

[45] In relation to Ms S’s complaint concerning her treatment at the hands of the school, namely, that she was expected to regard Mr G as part of her family unit and to obtain financial information from him which, she contended, infringed her right to human dignity in that she was degraded and humiliated, the court below took the view that the infractions were not such as to justify the declaratory orders sought. It came to that conclusion partly on the basis that the child’s parents had both undertaken to remain involved in the child’s life and that Ms S’s reaction to being linked with Mr G as a family unit was not justified. In respect of the further declaratory order sought by Ms S, namely, that she qualified for a fee exemption in relation to the 2013 academic year, together with a determination of the amount for which she qualified, Le Grange J held that the HOD or the MEC could still grant the exemption. In this regard reliance was placed on the decision in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* 2015 (5) SA 245 (CC) where the court said the following:

‘In the administrative review context substitution remains an extraordinary remedy. Remittal is still almost always the prudent course.’

[46] In relation to the declaratory orders sought against the school and the governing body in respect of the processing of Ms S’s fee-exemption applications for 2011, 2012 and 2013, the court below noted that the main complaint concerns the manner in which they dealt with her. The court found that her complaints that she had been subjected to continuous violations of her constitutional and statutory rights were unfounded.

[47] The court below considered Ms S's complaints about the appellants' failure to ensure that all fee-charging public schools in the Western Cape complied with the Act and the Regulations in relation to fee exemptions and the relief sought in relation thereto. In this regard the court noted that Ms S placed reliance on a report by the Equal Education Law Centre which was to the effect that, far from complying with their duty to ensure equitable and just treatment, the respondents were actively discouraging applications for exemptions. The HOD, in turn, denied that the Department's monitoring and compliance systems were unreasonable and irrational. The HOD and the MEC suggested that the problems that arose were attributable to differing interpretations and applications of the fee exemption regulations. The HOD made the claim that between 2010 and 2011, the Department allocated the highest fee exemptions in the country. The court concluded that it was evident from the facts put up by the appellants, that schools in the Western Cape Province granted hundreds of fee exemption applications every year without significant problems being experienced. In respect of the remaining declaratory order sought by Ms S the court was in agreement with the view propounded by the appellant that, if the order was granted, this would amount to micro-management of the relationship between the HOD and the MEC and the schools under their jurisdiction. The court also took the view that by granting the relief it would be infringing the doctrine of the separation of powers. The following order was made by the court below:

- '1. The decision of the First Respondent, in the appeal in terms of s 40(2) of SASA made on the 19 September 2013 dismissing the Applicant's appeal against the Second Respondent's decision to refuse the Applicant a partial exemption from the payment of the school fees as a result of her failure to institute the appeal within the prescribed period of 30 days after receipt of the notification of the Second Respondent's decision, is reviewed and set aside.
2. Declaring that the Applicant (MS) and Sixth Respondent (MG) are jointly and not jointly and severally liable for the school fees as contemplated in s 40(1) of SASA.
3. The remaining relief sought in the Amended Notice of Motion is dismissed.
4. The Respondents to pay the Applicant's costs, including the costs occasioned by the employment of two counsel.
5. In respect of the WLC no order is made as to costs.'

[48] Before us the following four issues were initially presented for adjudication:

- (i) whether s 40(1) of the Act imposes joint or joint and several liability for the payment of school fees on each of the two living biological parents of a learner at a fee-paying public school;
- (ii) whether s 40(1) of the Act and the Fee Exemption Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools<sup>6</sup> unconstitutionally infringe the right of single or divorced parents to equal protection and benefits of the law in s 9(1) of the Constitution and the right to dignity in s 10 of the Constitution because the formula in the Regulations require every parent applying for an exemption from the obligation to pay school fees to give the combined annual gross income of both parents;
- (iii) Ms S's claim for a declaratory order that she was subjected to repeated violations of her rights in the course of the processing of her 2011, 2012 and 2013 fee-exemption application; and
- (iv) Ms S's claim for a declaratory order that the Appellants failed to comply with their constitutional and statutory obligations to ensure that fee-charging school in the Western Cape comply with the requirements of the Act and the Regulations in the respects set out in paragraphs 6.2, 6.4, 6.6, 6.7 and 6.11 to 6.16 of her Amended Notice of Motion.

[49] As stated above, the parties after debate with the court reached an accord in relation to the first two issues and were generally in agreement with the line of reasoning in relation thereto, set out below.

[50] In addressing the first issue, before turning directly to s 40(1) of the Act, which is the provision at the centre of the dispute between the parties, I consider it necessary to start with the preamble to the Act, which sets out the basis for its enactment. It reads as follows:

'WHEREAS the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation; and

WHEREAS this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism

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<sup>6</sup> See fn 1.

and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State, and

WHEREAS it is necessary to set uniform norms and standards for the education of learners at schools and the organisation, governance and funding of schools throughout the Republic of South Africa.'

[51] In *Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & another* 2010 (2) SA 415 (CC), the Constitutional Court had regard to the terrible legacy of apartheid and its impact on public and private resources and said the following at paras 45 and 47:

'45. Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequity are still with us.

...

47. In an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular. This the Constitution does in a cluster of warranties. I cite only a handful. Section 1(a) entrenches respect for human dignity, achievement of equality and freedom. Section 6(1) read with s 6(2) warrants and widens the span of our official languages from a partisan pair to include nine indigenous languages which for long have jostled for space and equal worth. Sections 9(1) and (2) entitle everyone to formal and substantive equality. Section 9(3) precludes and inhibits unfair discrimination on the grounds of, amongst others, race and language or social origin. Section 31(1) promises a collective right to enjoy and use one's language and culture. And even more importantly, s 29(1) entrenches the right to basic education and a right to further education which, through reasonable measures, the State must make progressively accessible and available to everyone.'



[52] What is set out above is part of the context against which s 40(1) has to be interpreted and applied. Section 34 of the Act provides another part of the contextual base. It reads as follows:

‘(1) The State must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of the past inequalities in education provision.

(2) The State must, on an annual basis, provide sufficient information to public schools regarding the funding referred to in subsection (1) to enable public schools to prepare their budgets for the next financial year.’

[53] Section 35 is also of significance. It provides:

‘(1) Subject to the Constitution and this Act, the Minister must determine national quintiles for public schools and national norms and standards for school funding after consultation with the Council of Education Ministers and the Minister of Finance.

(2) The norms and standards for school funding contemplated in subsection (1) must –

(a) set out criteria for the distribution of state funding to all public schools in a fair and equitable manner;

(b) provide for a system in terms of which learners at all public schools can be placed into quintiles, referred to as national quintiles for learners, according to financial means;

(c) provide for a system in terms of which all public schools in the Republic can be placed into quintiles referred to as national quintiles for public schools, according to the distribution of learners in the national quintiles for learners; and

(d) determine the procedure in terms of which the Member of the Executive Council must apply the criteria contemplated in paragraph (a).’

[54] Equally significant as part of the contextual setting, and flowing from s35 of the Act, is the following part of the introduction to the Amended National Norms and Standards for School Funding:<sup>7</sup>

‘152. School fees provide two benefits for the schooling system. Firstly, they provide a mechanism for raising revenue amongst parents who can afford to make this contribution, which in turn provides fiscal space for the state to implement preferential funding for poor schools. Secondly, school fees, even if they are set at a low and nominal level, encourage parent participation in school governance, and promote accountability of schools to the communities they serve.

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<sup>7</sup> Amended National Norms and Standards for School Funding, GN 869, GG 29179, 31 August 2006 (with effect from 1 January 2007).

153. School fees must not be allowed to become an obstacle in the schooling process, or a barrier preventing access to schools, especially as far as the most marginalised are concerned. Government believes that in the schools serving the poorest communities, there should be no school fees. Moreover, where schools do charge school fees, proper parent participation in the fee-setting process is critical. Effective criteria determining which schools should not charge school fees, as well as an effective exemptions policy to protect those who are less advantaged economically within fee-charging schools, are of utmost importance.'

What can be seen from the above is that there is commendable government sensitivity to ensuring that access to schools is not impeded, that fee-exemptions are provided on criteria that will ensure that those who are the most disadvantaged economically within fee-charging schools are protected and that there is ultimately an equitable distribution of financial burdens relative to means.

[55] A further material part of the background to the interpretation exercise is the decision of this court in *GW*, which dealt with some of the concerns set out in the preceding paragraphs. In that matter Ponnann JA said the following at para 14:

'At common law both parents of a dependent child are under a duty to support such child in accordance with their respective means. That duty must undoubtedly embrace the educational need of the child as well, particularly as the Act creates a system of compulsory schooling. The narrow construction placed on the word "parent" by the High Court offends against the principle of statutory interpretation which requires a statute to be interpreted in conformity with the common law rather than against it. Moreover, an interpretation that burdens both parents with responsibility for school fees is consistent with the injunction in s 28(2) of the Constitution that "a child's best interests are of paramount importance in every matter concerning the child". It unquestionably is in the best interests of a child that a non-custodian parent, who is unwilling, yet has the means, to pay his child's school fees, should be made to do so, if necessary by the injunction of an order of a competent court. Were that not to be so, the custodian parent would solely be saddled with that responsibility. And whilst a custodian parent, if she has paid more than her pro rata share towards the child's support, may in law be entitled to recover the excess from the non-custodian parent, the reality is that her right to recover may for all practical purposes prove to be illusory. Further, the sad truth is that many custodian parents are simply unable to pay or have been exempt from paying due to poverty. *Were the school not to have the right to recover school fees from the non-custodian parent in those circumstances, it will either have to shoulder that loss or mulct other parents with additional charges. In either event it would be acting to the detriment of*

*other learners. By including a further category of persons to those ordinarily contemplated by the word “parent”, it is plain that the legislature cast the net as widely as it could to afford the school and in turn the learner the maximum possible protection. To interpret the word restrictively as the High Court did can hardly be reconciled with the paramountcy that must be afforded to the best interests of the child principle.’ (My emphasis.)*

[56] In *GW* this court rejected the submission by a biological father that the word ‘parent’ in s 40 (1) did not render him liable for school fees but that the mother of the child, the custodian parent was liable for payment. Notably, *GW* recognised that at common law both parents are under a duty to support a child in accordance with their respective means, including seeing to the child’s educational needs. In rejecting the claim that only the custodian parent was liable for payment of school fees, this court was adamant that an interpretation that burdens both parents with responsibility to pay school fees was consistent with the injunction of s 28(2) of the Constitution that ‘a child’s best interests are of paramount importance in every matter concerning the child’. The highlighted part of the judgment outlined above is particularly apposite.

[57] I turn now to consider s 40(1), which appears near the beginning of this judgment, but is repeated here for ease of reference :

*‘ A parent is liable to pay the school fees determined in terms of section 39 unless or to the extent that he or she has been exempted from payment in terms of this Act.’*

(My emphasis.)

I pause to point out that the high court in interpreting the subsection had regard to authorities that make it clear that there is a general presumption that liability is joint rather than joint and several. However, as pointed out on behalf of the appellants, that presumption can be displaced by statute, (see R H Christie and G B Bradfield *Christie’s Law of Contract in South Africa*, 7 ed (2016) at 296).

[58] In considering s 40(1) one has to bear in mind s 38(2), which provides that each year the budget of a school for the following year prepared by the school governing body must be presented at a general meeting of parents and approved by a majority of the parents present and voting. Section 39(1) also has relevance:

‘ Subject to this Act, school fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending the meeting referred to in section 38(2)’.

Section 39(2)(a) states that ‘a resolution contemplated in subsection(1) must provide for the amount of school fees to be charged’

[59] The term ‘parent’ is defined in s 1 of the Act to mean, amongst others, ‘the biological . . . parent . . . of a learner’. As stated earlier, at common law a parent who pays the full amount of the fees has a right of recourse against the other parent for his or her respective share, viewed from the perspective of the parents inter se (see *Christie* at 298, *Boberg’s Law of Persons and The Family* C4 and C7).

[60] Viewed against legislative concerns as expressed in the architecture of the Act and in the norms and standards referred to above, that there should be an equitable burden between parents within a school, and inter se, and that non-custodian parents should not escape their legitimate responsibility for paying school fees as determined by this court in *GW*, a contextual, purposive and literal reading of s 40(1) of the Act compels the conclusion that parents are jointly and severally liable for school fees. What then of persons in Ms S’s situation? The discussion that follows demonstrates how the legislative scheme properly interpreted and applied serves to alleviate the default position set out above.

[61] The second issue that now calls for attention is whether s 40(1) and the fee exemption regulations are unconstitutional and infringe the rights of single, separated or divorced parents to equal protection of the law, or impinges on their dignity, because the formula referred to above provides for exemptions based on income and the regulations require every person applying for an exemption to supply the combined annual gross income of both parents.

[62] It must be kept in mind that a child may not be refused admission to a school based on non-payment by a parent. Section 5(3)(a) of the Act is to that effect. Section 5(1) provides that a public school must admit learners and serve their educational requirements without unfairly discriminating in any way. Furthermore, s 41(7) provides that a learner may not be deprived of his or her right to participate in

all aspects of the programme of a public school because of the non-payment of school fees by his or her parent and may not be victimised in any manner, including but not limited to the following conduct:

‘[S]uspension from classes; verbal or non-verbal abuse; denial of access to cultural, sporting or social activities of the school; denial of access to the nutrition programme of the school for those learners who qualify in terms of the applicable policy; and denial of a school report or transfer certificate.’

[63] Seen in proper perspective this case is about the impact that s 40(1) and the fee exemption scheme provided for by the Regulations have on people in Ms S’s position and not about a child’s exclusion from a school or any of its programmes. Section 40(1) sets out the default position that parents are jointly and severally liable but does provide a safety valve in that the liability is eased by the following proviso: ‘unless or to the extent that he or she has been exempted from payment *in terms of this Act*.’ (My emphasis.)

[64] In s 1(1) of the Act, ‘this Act’ is defined as including the Act and all the Regulations promulgated thereunder. Section 41(2) of the Act provides that the exemption from payment of school fees must be calculated according to the Regulations contemplated in s 39(4), i.e. the Regulations regarding the equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees referred to in s 39(2)(b).

[65] The framework for the exemptions is therefore to be found in the Fee Exemption Regulations, which were made in terms of ss 39(4) and 61<sup>8</sup> of the Act. The Regulations provide for four categories of exemptions, namely automatic exemptions, total exemptions, partial exemptions and conditional exemptions.

[66] Regulation 1 states that the following persons qualify for an automatic exemption:

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<sup>8</sup> Section 61(b) of the Act provides, inter alia, that the Minister may make regulations on any matter which must or may be prescribed by regulation under this Act. Section 61(i) empowers the Minister to make regulations on any matter which may be necessary or expedient to prescribe in order to achieve the objects of this Act.

- (i) a person who has the responsibility of a parent in respect of a child placed in a foster home, a youth care centre, a place of safety or an orphanage;
- (ii) a person who is a kinship caregiver of an orphan or of a child who has been abandoned by his or her parents and is without any visible means of support;
- (iii) a person who receives a social grant on behalf of a child; and
- (iv) a child who heads a household.

[67] Regulation 6(3), read with the formula in Regulation 6(2), provides that a total exemption is to be granted if the learner's school fees plus any additional monetary contributions to be paid to the school are equal to or more than 10 % of the learner's parents' combined annual gross income. Regulation 1 defines the term 'combined annual gross income' as meaning 'the annual gross income of the parents, calculated together, or, if a learner has only one parent, the total annual gross income of such parent'.

[68] In terms of Regulations 6(4) and 6(6), where parents have a single child at a fee-paying public school, a partial exemption ranging between 7 % and 97 % is granted to the parents if the learner's school fees plus any additional monetary contribution to be paid to the school are 3,5 % or more but less than 10 % of the learner's parents' combined annual gross income. Parents with more than one child at a fee-paying public school qualify for partial exemptions where those percentages are between 2 % and 3,5 %.

[69] It follows from what is set out above and the formula provided for in the Regulations, that where the combined gross income of both the parents is the denominator, a parent cannot be granted a total or partial exemption where he or she is unable to or does not provide the gross annual income of the other parent. However, that should not be the end of the road as far as parents in the position of Ms S are concerned.

[70] Regulation 1 provides that a conditional exemption may be granted to, amongst others, a parent who does not qualify for any exemption, but supplies information indicating his or her inability to pay school fees owing to personal circumstances beyond his or her control. A conditional exemption is granted with the

proviso that the parent agrees to conditions for the payment of the school fees. Regulation 6(7) adds that when attaching any condition the governing body is limited to conditions it considers reasonable.

[71] Regulation 6(7) empowers the governing body of a public school, when granting a conditional exemption, to include suspensive conditions regarding the payment of school fees. The obligation therefor does not come into operation until the condition has been fulfilled.<sup>9</sup>

[72] The governing body of a public school may grant such a conditional exemption to a parent who:

(i) in his or her application for exemption:

(a) gives particulars for his or her total annual gross income; and

(b) does not give particulars of the total annual gross income of the other parent of the learner concerned because the other parent has refused or failed to provide such particulars to the parent applying for the exemption; and

(ii) having regard solely to his or her total annual gross income, would qualify for a total or partial exemption in terms of the Regulations if he or she were the only parent of the learner concerned.

[73] A conditional exemption shall be the total exemption or the partial exemption to which an applicant would have been entitled if he or she were the only parent of the learner concerned. When granting such a conditional exemption the governing body shall impose conditions to the effect that the applicant for the exemption:

(i) must report to the school forthwith any increase in his or her gross annual income during the school year in question which, had it been his or her income at the time of making the application for exemption, would have disentitled him or her from receiving the total exemption granted to him or her or from receiving any partial exemption granted to him or her.

(ii) must, on demand from the governing body, pay on reasonable terms to be determined by the governing body, after giving parents the opportunity to make

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<sup>9</sup> See *Southern Era Resources Ltd v Farndell NO* [2010] 2 All SA 350 (SCA) para 11.

representations, the school fees or the portion of the school fees for which he or she would have been liable in terms of the Regulations based on his or her increased gross annual income.

(iii) shall not be liable to make any such payment unless, during the school year in question, his or her gross annual income increases to such an extent that, had it been his or her income at the time of making the application for exemption, he or she would have been disentitled to receive the total exemption granted to him or her or to receive any partial exemption or he or she would have been entitled only to a lesser partial exemption than the one granted to him or her.

[74] The granting of such a conditional exemption shall not preclude the public school from taking legal steps to enforce payment by the other parent of the learner concerned, of the school fees or the balance of the school fees, as the case may be, in terms of s 41(1) of the Act. Conditional exemptions of this sort will overcome the practical problems of obtaining information and other co-operation from non-custodial parents.

[75] An option open to the governing body in such circumstances is to notify a recalcitrant non-custodian parent like Mr G, in terms of s 41(5) of the Act, that should he fail to apply for an exemption within a period of three months the school will enforce the payment by him of his child's school fees in terms of s 41(1) of the Act. Such a notification may result in the recalcitrant parent providing the information necessary for the determination of the exemption application made by the other parent.

[76] That leads us to the attack by Ms S on the constitutionality of the Regulations. In light of what is set out above about how the Act and the Regulations, properly construed, are to be applied, the complaint of unequal treatment falls away. The result is one that will ensure that parents in the position of Ms S, especially women, are not treated prejudicially and are able in their own right to claim exemptions based on their own financial circumstances. Moreover, they are not burdened with the responsibility of obtaining financial information from the other parent. It also ensures that recalcitrant parents do not escape their parental obligations. The balance that is struck is that the funding structure for public fee-paying schools is preserved on the



basis that parents pay relative to their means and that exemptions are granted on a fair, equitable and predictable basis. The construction of the Act and the Regulations advanced above will promote the achievement of gender equality which is a founding constitutional value. I agree with the submissions on behalf of the appellants that the objective of the Act and constitutional values dictate that both parents should be encouraged to support their children and that non-custodian parents should be discouraged from shifting the financial cost of their children's education at fee-paying schools onto the other parent or the parents of other learners or, in some instances, to public funding in general. In construing a statute a court ought first to determine whether, through the application of all legitimate interpretive aids, the impugned legislation is capable of being read in a manner that is constitutionally compliant.<sup>10</sup> That is the exercise embarked on resulting in the conclusions set out above. The interpretation and application of the Act and the Regulations set out above are consonant with the proposed legislative amendments referred to in para 43 above.

[77] The court below, in holding that parents in terms of s 40(1) were jointly and not jointly and severally liable, considered that it was being gender sensitive and coming to the aid of persons in the position of Ms S. However, she was provided no practical relief and the question of precisely how the fee-exemption regulations were to be applied was left unanswered. It will be recalled that the court below took the view that the combined financial income still had to be provided.

[78] The next question that calls for determination is whether Ms S is entitled to an order declaring that she was subjected to repeated violations of her constitutional and statutory rights during the processing of her applications for a fee exemption during the years 2011, 2012 and 2013. It will be recalled that she complained about how she had been repeatedly required by the school to obtain information concerning Mr G's finances and how there were repeated references to herself and Mr G being part of a family unit despite her objections thereto. She communicated how degrading and humiliating that experience was. If it had ended there one could perhaps have argued that the attitude of the school and the governing body was driven by a mistaken view of the Act and the Regulations. However she was

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<sup>10</sup> See *Bertie van Zyl (Pty) Ltd & another v Minister for Safety and Security & others* [2009] ZACC 11; 2010 (2) SA 181 (CC).

pressurised to meet with the school's attorneys during which meeting she was accused of conspiring with Mr G in an effort to avoid their joint obligation to pay school fees. Furthermore, when the HOD and the Department appeared to be sympathetic, ostensibly after taking legal advice, the school's attitude hardened and they stated that they would forcefully adopt the contrary position. They did not seek to enter into a dialogue concerning the legality of their position. I appreciate the difficulties faced by schools and their governing bodies who face the tremendously difficult task, especially in trying economic times of maintaining their financial health and ensuring that school programmes are adequately funded in the best interests of their learners. However, we are compelled by constitutional imperatives to employ our best efforts towards the attainment of a just and egalitarian society where every individual has worth and opportunity and the right to be treated with dignity. The conduct of the school and the governing body over the years of their interaction with Ms S was such they showed scant respect for her position as a custodian mother. Ms S is articulate and assertive. Yet, she struggled to engage the school and the governing body constructively. What, one might rightly ask, were the chances of a less assertive, more vulnerable single mother being able to vindicate her constitutional and statutory rights. To drive this point home the declaratory order sought should be granted in relation to the school and the governing body.

[79] The HOD and the Department took a stand, against Ms S, following on their view of the interpretation and application of the Act and the Regulations. At times it could perhaps have been characterised as stereotypically bureaucratic. However, at some stage their attitude softened only to be met with an obdurate governing body. In my view they did not display the degree of insensitivity as did the school.

[80] That leads us to the long list of orders sought by Ms S against the appellants, based on her allegations concerning systemic obstructionism in relation to fee exemption applications by schools in the Western Cape and the Department which has oversight responsibility. The charge by Ms S of deliberate obstructionism was denied and the sample provided in relation to instances of obstructionism on the part of the Department was denied by them and they contended that the sample provided as evidence of obstructionism was too small. Furthermore, statistics were supplied by the Department showing the high level of exemptions granted by it. The orders

sought are in any event mostly vague and would amount to the court engaging in micromanagement and coming close to crossing the line between the three arms of government. In her heads of argument Ms S noted that the Department, in what she describes as a belated response to her application, amended its School Improvement Plans by requiring schools to report on:

- (i) the number of fee-exemption learners;
- (ii) whether parents have been informed of the right to apply for fee-exemptions;
- (iii) whether a copy of the regulations have been displayed; and
- (iv) whether there has been adherence to fee-exemption time-lines.

It was stated on her behalf that since this reflected an attempt to address some of the issues raised by her, she had decided not to request declaratory orders in relation to these matters and therefore did not proceed with her application for a structural interdict. That notwithstanding, it was contended on her behalf that she had made out a proper case for not only the general declaratory order sought in para 6 of her amended notice of motion but also in respect of the other extensive orders sought. In light of what is set out above, there is no warrant in granting the extensive further orders sought.

[81] In relation to costs, the following has to be considered. Although the appellants would have succeeded in relation to the question of liability of parents in terms of s 40(1), that success has to be measured against the fact that Ms S has attained the real relief of having her applications for exemption assessed relative to her ability based on her personal circumstances. That is, in effect, substantive success that should ensure costs in her favour. Even though there is some reference in the answering affidavits of the appellants concerning partial and conditional exemptions, it took this appeal to finally refine that position to the one resulting in the order set out below. The form of the order in substitution of the order of the court below poses some challenges. Nevertheless, the order that appears hereunder is one that is enforceable and must be followed by schools and the Department. In light of the conclusions set out above, it would make little sense for the school to proceed in the action instituted in the Simons Town Magistrates Court. Hopefully common sense will prevail. In respect of the pending appeal, the principles set out above should also apply.

[82] Finally, it remains to commend counsel on behalf of the appellants for adroitly providing the basis for the substituted order.

[83] The following order is made:

1 The appeal and the cross-appeal succeed to the extent reflected in the substituted orders that appear hereafter. The appellants are ordered jointly and severally to pay the respondent's costs in relation to both the appeal and the cross-appeal, such costs to include the costs of two counsel.

2 The order of the court below is set aside and replaced as follows:

'1 The decision of the First Respondent, in the appeal in terms of s 40(2) of the South African Schools Act 84 of 1996 (the Act) made on the 19 September 2013 dismissing the Applicant's appeal against the Second Respondent's decision to refuse the Applicant a partial exemption from the payment of the school fees as a result of her failure to institute the appeal within the prescribed period of 30 days after receipt of the notification of the Second Respondent's decision, is reviewed and set aside.

2 It is declared that in processing and dealing with the applicant's applications for a fee exemption in 2011, 2012 and 2013, the school and its governing body subjected her to repeated violations of her constitutional and statutory rights.

3 It is declared that in terms of s 40(1) of the Act the Applicant and her former husband are jointly and severally liable for their child's school fees.

4 It is declared that the Applicant was entitled to have her applications for a fee-exemption and the related appeals dealt with in the manner set out hereafter with reference to the Regulations relating to the Exemption of Parents from Payment of School Fees in Public Schools (Government Notice R.1052 in Government Gazette 29311 of 18 October 2006) as amended ('the Regulations'). All public schools, governing bodies and education Departments must comply therewith in relation to the Applicant and all other parents who are in the same or similar situation as the Applicant:

(a) The governing body of a public school shall grant a conditional exemption from payment of school fees, referred to in Regulation 1 of the Regulations, to a parent who:

(i) in his or her application for exemption:

(aa) gives particulars for his or her total annual gross income; and

(bb) does not give particulars of the total annual gross income of the other parent of the learner concerned because the other parent has refused or failed to provide such particulars to the parent applying for the exemption; and

(ii) having regard solely to his or her total annual gross income, would qualify for a total or partial exemption in terms of the Regulations if he or she were the only parent of the learner concerned.

(b) A conditional exemption shall be the total exemption or the partial exemption to which the applicant would have been entitled if he or she were the only parent of the learner concerned.

(c) When granting such a conditional exemption the governing body shall impose conditions to the effect that the applicant for the exemption:

(i) must report to the school forthwith any increase in his or her gross annual income during the school year in question which, had it been his or her income at the time of making the application for exemption, would have disentitled him or her from receiving the total exemption granted to him or her or from receiving any partial exemption granted to him or her;

(ii) must, on demand from the governing body, pay on reasonable terms to be determined by the governing body after giving him or her the opportunity to make representations, the school fees or the portion of the school fees for which he or she would have been liable in terms of the Regulations based on his or her increased gross annual income;

(iii) shall not be liable to make any such payment unless, during the school year in question, his or her gross annual income increases to such an extent that, had it been his or her income at the time of making the application for exemption, he or she would have been disentitled from receiving the total exemption granted to him or her or from receiving any partial exemption or he or she would have been entitled only to a lesser partial exemption than the one granted to him or her.

5. It is declared that the granting of such a conditional exemption shall not preclude the public school from taking legal steps to enforce payment, by the other parent of the learner concerned, of the school fees or the balance of the school fees, as the case may be, in terms of section 41(1) of the Act.

6. The Respondents are liable jointly and severally to pay the Applicant's costs, including the costs occasioned by the employment of two counsel.'

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M S Navsa  
Acting Deputy President

Appearances:

For the Appellant: A M Breitenbach SC (with him M L Davis)

Instructed by:

State Attorney, Cape Town

State Attorney, Bloemfontein

For the Respondent: P Hathorn SC (with him N Mayosi)

Instructed by:

Equal Education Law Centre, Khayelitsha

Webbers, Bloemfontein

For the Amicus: T V Norman SC (with him C M Nqala)

Instructed by:

Women's Legal Centre, Cape Town

Maduba Attorneys, Bloemfontein