THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 642 / 2008

FISH HOEK PRIMARY SCHOOL **Appellant**

and

G W **Respondent**

Neutral citation: **Fish Hoek Primary School v G W (642/2008) [2009] ZASCA 144 (26 November 2009)**

CORAM: **STREICHER, BRAND, HEHER, PONNAN JJA and LEACH AJA**

HEARD: **11 NOVEMBER 2009**

DELIVERED: **26 NOVEMBER 2009**

SUMMARY: **South African Schools Act 84 of 1996 – s 40(1) read with s 1 – liability of non-custodian parent for child's school fees.** .

ORDER

On appeal from: The Cape High Court (Thring J, McDougall AJ concurring, sitting as a Full Bench).

(a) The appeal succeeds.

(b) The order of the court below is set aside and replaced with the following:

‘(i) The appeal succeeds.

(ii) The order of the Magistrates' Court Bellville is set aside and replaced with the following order:

“Judgment is entered for the plaintiff against the defendant in the sum of R1610, together with interest at the rate of 14.5% per annum *a tempore morae* plus costs.”'

JUDGMENT

PONNAN JA (STREICHER, BRAND, HEHER JJA and LEACH AJA concurring):

[1] The *Concise Oxford Dictionary* defines the word 'parent', inter alia, as 'a person who has begotten or borne offspring'; 'a father or mother'; or 'a person who has adopted a child'. That, ordinarily at any rate, is the plain meaning of the word. What we are called upon to decide in this case is whether when the legislature chose to employ that word in s 40(1) of the South African Schools Act 84 of 1996 ('the Act'), it intended to use it in a sense conforming to its literal meaning or in some other narrower sense.

[2] That issue – the sole one for decision - arises against the backdrop of a stated case from the Bellville Magistrates' Court. In it, the appellant school sued the respondent for payment of the sum of R1 610, being outstanding school fees in

respect of one of its minor learners. For its entitlement to payment from the respondent, the school relied upon s 40(1) of the Act, which provides:

'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.'

The respondent has not been exempted. The exception accordingly finds no application.

[3] The respondent, who takes no part in this appeal but rather abides the decision of this court, denied indebtedness to the school. In amplification of that denial he asserted that whilst he was the biological father of the learner, he was not liable for payment of the school fees but that the custodian parent was. The only question for determination – a legal one – was thus whether the respondent is indeed a parent in terms s 40(1) of the Act. The trial court held that he was not and accordingly dismissed the claim. An appeal to the Cape High Court (Thring J, McDougall AJ concurring) proved unsuccessful.[1] The high court held that only a custodian parent is a parent as envisaged in s 1(*a*) and accordingly read in the words 'custodian by operation of law'. It thus concluded that 'parent' in s 40(1) means 'the [custodian by operation of law] parent or guardian'.

[4] In arriving at that conclusion the high court was guided by the decision in *Governing Body, Gene Louw Primary School v Roodtman.*[2] In *Roodtman,* the court held that the word 'parent' in s 102A(1) of the Education Affairs Act (House of Assembly),[3] one of the predecessors to the present Act, read together with the definition of parent in s 1, 'must be interpreted so as to encompass only a parent who has custody of the pupil in question by operation of law, as also the parent or other person in whose custody the pupil has been placed by order of a competent court'.[4] Section 102A(1) of the that Act provided: 'The parent of a pupil admitted to a state-aided school shall pay such school fees as the governing body of that school may levy.' A parent in s 1 of that Act was defined as follows: ' "parent" in relation to a child, means the parent of such child or the person in whose custody the child has been lawfully placed.' The high court reasoned that if the word 'parent' were to be

[1] The judgment is reported *sub nom Fish Hoek Primary School v Welcome* 2009 (3) SA 36 (C).
[2] 2004 (1) SA 45 (CPD).
[3] Act 70 of 1988.
[4] At 57B-C.

given a different meaning in the present Act, to that which it bore in one of its predecessors, it would lead to anomalous results.

[5] A parent is defined in s 1 of the present Act as:

'(*a*) the *parent* or guardian of a *learner*;

(*b*) the person legally entitled to custody of a *learner*; or

(*c*) the person who undertakes to fulfil the obligations of a person referred to in paragraphs *(a)* and (*b*) towards the *learner's* education at *school*;'

As should be immediately apparent, the word 'parent' has been given a more expansive meaning by the Legislature in the later statute as compared to its earlier counterpart. It follows that the reliance by the high court on *Roodtman* was misplaced as the Legislature intended the word 'parent' in the present Act to bear a different meaning to the meaning ascribed to it in the Education Affairs Act. I do not agree that to ascribe a different meaning to the word 'parent' to that put on it by *Roodtman* would lead to anamolous results. The Legislature obviously did not do so either. It is thus unnecessary to consider whether *Roodtman* was correctly decided.

[6] The 'cardinal rule of construction of a statute' as Stratford JA put it in *Bhyat v Commissioner for Immigration*[5]

'. . . is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment ... in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended.'

[7] The effect of that formulation, according to Schutz JA[6] '. . . is that the court does not impose its notion of what is absurd on the legislature's judgment as to what is fitting, but uses absurdity as a means of divining what the legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend.'

[8] The legislature has chosen a meaning of considerable breadth. On the literal and ordinary meaning of s 1(*a*), a natural father such as the respondent is a parent as defined. It matters not that he is not married to the child's mother. On the plain

[5] 1932 AD 125 at 129.

[6] *Poswa v The MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) para 11.

meaning of the word, he self-evidently is the child's 'parent'. In my view there is nothing in the definition to suggest that a non-custodian or non-guardian parent is excluded from the meaning of the word. Far from narrowing the definition of parent in that way, the legislature has chosen a more expansive definition of the word 'parent' to include persons not ordinarily comprehended by its plain meaning. Thus in s 1(*c)* the legislature simply adds a further category of persons not ordinarily contemplated by the word 'parent' to whom the school may look for payment. But, it does so without releasing those envisaged in categories *(a)* or *(b)* from their obligation to pay.

[9] Each of sub-definitions *(a)*, *(b)* and *(c)* ought to bear different meanings. If not, one or more of them would be rendered superfluous. It follows that *(b)* and *(c)* as defined categories ought to add something to *(a).* By reading in the words 'custodian by operation of law' the high court rendered the reference to parent in s 1(*a*) superfluous and redundant. That, as we well know, a court should be slow to do. For, as it was put by Trollip JA:[7]

'I think that the starting point ... is to emphasize the general well-known principle that, if possible, a statutory provision must be construed in such a way that effect is given to every word or phrase in it: or putting the same principle negatively, which is more appropriate here:

"... a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant ...." . . . .

That supposition is *a fortiori* justifiable where, as here, the statutory provision in question is in a definition section governing the meaning of the words used in the body of the Act.'

[10] The rationale for such a rule is fairly well-established, namely, that the lawgiver, it must be supposed, will choose its words carefully in order to express its intention carefully. Nonetheless, instances of obvious superfluity are not uncommon in statutory provisions.[8] That, however, is not the case here.

[11] By interpreting the word 'parent' restrictively, as the high court did, actual biological parentage was deemed irrelevant. Instead the defining characteristic became who has custody of the child. But that could hardly be so. Section 3 for example provides that every parent must cause every learner for whom he or she is responsible to attend school. There the duty is not placed on every parent, but only

[7] *S v Weinberg* 1979 (3) SA 89 (A) at 98 D-G.
[8] *NST Ferrochrome (Pty) Ltd v The Commissioner for Inland Revenue* 2000 (3) SA 1040 (SCA).

on the parent who has responsibility for the child - in other words the custodian parent. Thus where the Legislature wished to shoulder a particular parent with responsibility, it clearly defined that parent. By contrast s 40(1) which imposes an obligation to pay school fees does not draw that distinction. The Act thus explicitly distinguishes between parents in general and custodian parents when the need arises. The unqualified use of the word parent in s 40(1) would seem to be a clear indicator that non-custodian parents were intended to be included within its reach.

[12] When the legislature chose to use the word 'parent' in s 1(*a*), in my view, it intended to use it in a sense conforming at least with its literal meaning as opposed to some other unspecified narrower sense. For, as it was put by Schutz JA,[9] '[T]he literal meaning of an Act (in the sense of strict literalism) is not always the true one, but escaping its operation is usually not easy, most often impossible . . . .' That, to again borrow from Schutz JA, makes it ' ... all the more difficult to push out a plain word in favour of its ill-bordered shade'.[10] After all, if the Legislature wanted to restrict liability for school fees solely to a custodian parent, it could simply have done so by stating that in clear and unambiguous language.

[13] The interpretation that I postulate is consistent with the command in s 39(2) of the Constitution that a court 'must promote the spirit, purport and objects of the Bill of Rights when interpreting legislation.[11] Historically mothers have been the primary care-givers of children in this country.[12] 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.[13] 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.[14] Despite our constitutional promise of equality, the division of parenting roles continues to remain largely gender-based. It is thus important to heed the caution

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[9] *Poswa* para 10.
[10] Poswa para 9.
[11] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 72.
[12] *President of the Republic of SA v Hugo* 1997 (4) SA 1 (CC) para 37.
[13] *Bannatyne v Bannatyne (Commission for Gender Equality, As Amicus Curiae)* 2003 (2) SA 363 (CC) para 29.
[14] *Bannatyne* para 29.

sounded by this court in *F v F*[15] that courts should be acutely sensitive to the possibility that the differential treatment of custodian parents and their non-custodian counterparts often can and does constitute unfair gender discrimination. After all, the achievement of gender equality is a founding value of our Constitution. To interpret the section in such a way as to exclude the non-custodian parent from its operation, as the high court has done, serves ineluctably to further thwart the realisation of that goal.

[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 needs of the child as well, particularly as the Act[16] 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.[17] 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 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

[15] [2006] 1 All SA 571 (SCA) para 12.
[16] Section 3.
[17] *Roodtman* p 51A-H.

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.

[15] It follows that the appeal must succeed. As to costs, Mr Budlender, who appeared on behalf of the school *pro bono* sought no order for costs against the respondent either in this court or in the high court.

[16] In the result:

(a) The appeal succeeds.

(b) The order of the court below is set aside and replaced with the following:

‘(i) The appeal succeeds.

(ii) The order of the Magistrates' Court Bellville is set aside and replaced with the following order:

“Judgment is entered for the plaintiff against the defendant in the sum of R1610, together with interest at the rate of 14.5% per annum *a tempore morae* plus costs.”'

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	G Budlender SC
	Instructed by: Van Rensburg & Co Bergvliet Symington & De Kok Bloemfontein
For Respondent:	No Appearances