

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No.: 1209/2016

(Western Cape Division, Cape Town Case No. 18775/2013)

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

MICHELLE SAFFER

Respondent

APPELLANTS' HEADS OF ARGUMENT

1. The present matter is an appeal by the Appellants and a cross-appeal by the Respondent, with the leave of the Western Cape Division of the High Court, Cape Town ('the High Court'). It relates to the judgment and orders of the High Court

dated 16 September 2016 in an application by the Respondent (who was the Applicant in the High Court) against, amongst others, the Appellants (who were the First, Fourth and Fifth Respondents in the High Court and the only parties opposing the relief sought).

2. Respondent is the mother of a child, Zoë Saffer ('Zoë'), who was a Grade 10 learner at Fish Hoek High School when the High Court proceedings were launched in 2013.
3. As appears from the amended Notice of Motion,¹ in the High Court Respondent sought a wide range of relief, all of which, in one way or another, concerns the liability of parents of learners at fee-charging public schools in the Western Cape Province to pay to their children's annual school fees as determined by the schools' governing bodies in terms of section 39 of the South African Schools Act 84 of 1996 ('SASA').
4. The High Court granted two of the orders sought by Respondent, as well as her costs. As explained below, the first order granted by the High Court, namely the judicial review relief sought in paragraph 2 of the amended of Notice of Motion, was granted by consent. The second order granted by the High Court, namely the declaratory relief sought in paragraph 3.1 of the amended Notice of Motion, was opposed by Appellants. It is the object of the present appeal.
5. The High Court dismissed the remaining relief. Respondent has cross-appealed against the High Court's refusal to grant certain of such relief, namely the relief sought in paragraphs 3.3, 5 and 6 (but excluding sub-paragraphs 6.1, 6.3, 6.5, 6.8,

¹ Amended Notice of Motion 1: 1-11. The number before the colon is the volume. The number after the colon is/are the page(s). The number after the second colon, if any, is/are the paragraph/s

6.9 and 6.10) and paragraph 7 of her amended Notice of Motion; and, further, presumably in the alternative to the relief sought in paragraph 3.1 of her amended Notice of Motion, the relief sought in paragraphs 3.5 and 4 thereof.

6. The issues for decision arising from the above-mentioned paragraphs of Respondent's amended Notice of Motion are the following:

6.1 whether, in terms of section 40(1) of SASA, divorced or separated biological parents are jointly, rather than jointly and severally liable for the payment of the school fees of their children attending public schools;

6.2 if such parents are jointly and severally so liable, whether section 40(1) of SASA is inconsistent with the Constitution of the Republic of South Africa, 1996 ('the Constitution'), and invalid;

6.3 whether regulation 6(2) of the Regulations relating to the Exemption of Parents from the Payment of School Fees in Public Schools made in terms of section 39(4) of SASA and published in Government Notice R.1052 in Government Gazette 29311 of 18 October 2006 as amended by Government Notice R.1149 in Government Gazette 29392 of 17 November 2006 ('the Regulations'),² read together with the phrase '*combined annual gross income of parents*' in regulation 1 of the Regulations, is inconsistent with the Constitution and invalid;

6.4 whether Appellants have failed to comply with their constitutional and statutory obligations to ensure that fee-charging public schools in the Western Cape Province comply with the requirements of SASA and the

² For a copy of the Regulations, see the annexure to these heads of argument

Regulations in relation to fee exemptions, in the respects set out in paragraphs 6.2, 6.4, 6.6, 6.7 and 6.11 to 6.16 of the amended Notice of Motion.

7. In what follows, after dealing briefly with the review relief granted by consent by the High Court, we deal with each of the prayers in the amended Notice of Motion in respect of which Respondent persists in seeking relief.

JUDICIAL REVIEW BY CONSENT – PARAGRAPH 2 OF THE AMENDED NOTICE OF MOTION³

8. In the High Court Respondent applied for judicial review of a decision by First Appellant. The impugned decision is described in the amended Notice of Motion as a decision, in an appeal in terms of section 40(2) of SASA, made on or about 19 September 2013, dismissing Respondent’s appeal against a decision by the Governing Body of Fish Hoek High School (‘the Governing Body’) to refuse her a partial exemption from the payment of school fees.
9. In fact, the decision in question, conveyed in a letter of 19 September 2013,⁴ was that Respondent had forfeited her right to appeal in terms of section 40(2) of SASA⁵ against the Governing Body’s refusal of her 2013 fee exemption application, because she had failed to institute the appeal within the prescribed

³ Amended Notice of Motion 1: 2: 2

⁴ Annexure MS50 1: 196

⁵ Section 40(2) of SASA provides: ‘A parent may appeal to the Head of Department against a decision of a governing body regarding the exemption of such parent from payment of school fees’.

period of 30 days after receipt of the notification of the Governing Body's decision.⁶

10. As appears from First Appellant's letter of 19 September 2013, First Appellant based her decision on an assumption that Respondent had been notified of the Governing Body's rejection of her 2013 fee exemption application by way of a letter of 16 July 2013.⁷ As further appears from First Appellant's letter of 19 September 2013, at the time when First Appellant decided Respondent had forfeited her right of appeal the Western Cape Education Department ('WCED') was not in possession of a copy of the Governing Body's letter of 16 July 2013.
11. As things turned out, unbeknown to First Appellant when she took her decision, the Governing Body had sent its letter of 16 July 2013 to the incorrect address and later (on 18 September 2013) had acknowledged its error to Respondent.⁸
12. On 2 December 2013 First, Second and Second Appellants accordingly conceded the review relief⁹ because First Appellant's assumption that Respondent had been notified of the Governing Body's rejection of her 2013 fee exemption application by way of a letter of 16 July 2013 amounted to a material mistake of fact.¹⁰ The High Court accepted the concession and granted the review relief.¹¹
13. Whether Respondent has been subjected to repeated violations of her constitutional and statutory rights in the course of the processing of her 2013

⁶ Regulation 8(1) of the Regulations provides: 'A parent who is dissatisfied with the decision [of the governing body on an application for exemption] referred to in regulation 6(1) may, in writing and within 30 days after receipt of the notification of that decision, appeal to the Head of Department against the decision'.

⁷ Annexure MS47 1: 190-193

⁸ Annexure MS49 1: 195

⁹ Vijnnevold Answering Affidavit 3: 356-357: 6-7; annexure PV1 3:399

¹⁰ Pepcor Retirement Fund and Another v Financial Services Board and Another 2003 (6) SA 38 (SCA) para 47

¹¹ High Court Judgment 6: 804-805: 83-87

application for exemption, as claimed by the Respondent in paragraph 5 of the amended Notice of Motion, is considered in the section of these heads starting at paragraph 86 below.

14. The implications for costs of the Appellants concession of the review relief, is considered in the section of these heads starting at paragraph 178 below.

**DECLARATORS CONCERNING PARENTS’ LIABILITY FOR SCHOOL FEES
– PARAGRAPHS 3.1, 3.3, 3.5 AND 4 OF THE AMENDED NOTICE OF
MOTION¹²**

BACKGROUND

15. As explained in Third Appellant’s answering affidavit (deposed to by one Padayachee),¹³ section 36(1) of SASA stipulates that the School Governing Bodies (‘SGBs’) of all public schools must take all reasonable measures within their means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school. Subject to what follows, in the case of all public schools other than those that have been declared ‘*no fee schools*’ by the relevant Member of the Executive Council of a province responsible for education in that province (‘the MEC’) in terms of section 39(7) to (16) of SASA, this includes charging school fees to parents whose learners are enrolled at their schools.
16. Fish Hoek High School is, and always has been, a fee-paying school.

¹² Amended Notice of Motion 1: 2-3: 3-4

¹³ The submissions in this sub-section are based on Padayachee Answering Affidavit 3: 488-495: 3-21

17. At fee-paying schools, school fees are determined, in terms of section 39(1) of SASA, by the parents at an annual general meeting of parents held in terms of section 38(2) of SASA. The majority of the parents present and voting at the meeting must approve a resolution determining the school fees to be charged by the school.
18. Section 39(2) of SASA states the relevant resolution must provide for: the amount of school fees to be charged; equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees; and a school budget that reflects the estimated cumulative effect of the established trends of non-payment of school fees and the total, partial or conditional exemptions granted to parents in terms of the Regulations.
19. The Regulations provide for five categories or types of exemptions, namely automatic exemption, total exemption, partial exemption, conditional exemption and no exemption (the last strictly speaking not being a category of exemption). (In what follows, unless otherwise stated all references to regulations are references to the Regulations.)
20. Regulation 1 provides that the following persons qualify for an automatic exemption:
 - 20.1 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;

- 20.2 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;
- 20.3 a person who receives a social grant on behalf of a child; and
- 20.4 a child who heads a household.
21. Regulation 6(3), read with the formula in regulation 6(2), provides that a full exemption is to be granted if the learner's school fees plus any additional monetary contributions to be paid to the school are 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*'.
22. In terms of regulation 6(4) and 6(6) a partial exemption ranging between 7% and 97% is granted to the parents if the learner's school fees plus any additional monetary contributions to be paid to the school are 3.5% or more but less than 10% of the combined annual gross income of the learner's parents. Parents with more than one child at fee-paying schools are given different ranges of partial exemptions if the last-mentioned percentages are 3% or lower, depending on the number of such children.
23. Regulation 1 provides that a conditional exemption may be granted to a parent who qualifies for a partial exemption but, owing to personal circumstances beyond his or her control, cannot pay the reduced amount. It also applies to 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. We deal in more detail with the relevant types of conditional exemptions in the section starting at paragraph 32 below.

24. In terms of Regulations 6(5) and (6) no exemption is granted to the parents if the school fees plus any additional monetary contributions to be paid to the school are equal to or less than 2.0% of the combined annual gross income of the learner's parents (in the case of parents with fewer than five children at fee-paying schools).
25. Regulation 3(1)(a) and (b) requires that when a child is admitted to a fee-paying public school, the principal must notify the parent of the amount of the annual school fees to be paid and procedures for applying for exemption; as well as of the fact that the parent is liable for the payment of school fees unless he or she has been exempted from payment. Regulation 3(1)(c) provides the parent must complete and the principal and the parent must sign Form A to the Regulations indicating that the parent has been informed of those matters.
26. Regulation 3(1)(e) provides that the principal must notify the parent that if a parent is in arrears by one month or more, the governing body will investigate whether the parent qualifies for exemption before acting in terms of section 41(1) of SASA, i.e. by process of law enforcing the payment of school fees by the parent. (A school's right to take action under section 41(1) is qualified by section 41(4) to (6), the relevant parts of which are described later in these heads when

dealing with the relief relating to them sought by Respondent in paragraph 6 of the amended Notice of Motion.)

27. Regulation 4(1) provides that to obtain an exemption a parent must apply annually to the chairperson of the school's governing body by completing Form B to the Regulations. Paragraph 3.1 of the form requires that the parent state the learner's parents' combined annual gross income. Paragraph 4 of the form make provision for the parent to supply '*[a]ny other relevant information ... indicating inability to pay school fees owing to personal circumstances, that may lead to conditional exemption*'.
exemption'.
28. Regulation 4(2) adds that the applicant must furnish any relevant further particulars requested by the governing body.
29. Regulation 6(8) provides that if an applicant requests an opportunity to present his or her application in person or through a designated representative, he or she is entitled to do so.
30. Regulation 6(9) states that the governing body must, within seven days after determining the application, notify the applicant of its decision and the reason for it.
31. Regulation 8(1) provides that if a parent is not satisfied with the governing body's decision he or she may appeal in writing to the head of the relevant provincial education department within 30 days after receiving the decision. Regulation 8(2) provides the parent must furnish the head of department with the reasons for the appeal and all relevant information pertaining to the appeal. Regulation 8(3) provides that within 14 days after receiving the appeal the head of department

must notify the chairperson of the school governing body of the lodging of the appeal, furnish the chairperson with a copy of the reasons for the appeal and request the chairperson to furnish the head of department within 14 days with a copy of relevant minutes of the meeting of the school governing body, any comments on the appeal the governing body wishes to make and any other information relevant to the appeal. Regulation 8(4) provides the head of department must determine the appeal within 14 days after receiving the information from the school governing body and, within 7 days after deciding the appeal, notify the parent and the chairperson in writing of his or her decision.

32. Returning to conditional exemptions, we submit the definition of ‘*conditional exemption*’ in regulation 1, read with regulation 6(7) thereof, empowers the governing body of a public school, when granting a conditional exemption from the obligation to pay the school fees determined in terms of section 39(1) and (2) of SASA, to include, as conditions on which the exemption is granted, one or more suspensive conditions regarding the payment of the school fees.¹⁴

33. We further submit that the governing body of a public school may grant such a conditional exemption to a parent who:

33.1 in his or her application for exemption:

33.1.1 gives particulars of his or her total annual gross income; and

33.1.2 does not give particulars of the total annual gross income of the other parent of the learner concerned because such other parent

¹⁴ If an obligation is subject to a suspensive condition, it does not come into operation until the condition has been fulfilled: Southern Era Resources Ltd v Farndell NO [2010] 2 All SA 350 (SCA) para 11

has refused or failed to provide such particulars to the parent applying for the exemption; and

33.2 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.

34. We further submit that the amount of such a conditional exemption may 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.

35. We further submit that when granting such a conditional exemption the governing body may impose conditions to the effect that the applicant for the exemption:

35.1 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 or have reduced the partial exemption granted to him or her;

35.2 must, on demand from the governing body, pay 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; and

35.3 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.

36. We submit finally 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 SASA.

THE SEQUENCE OF THE RELIEF SOUGHT CONCERNING PARENTS' LIABILITY FOR SCHOOL FEES

37. By opposing Appellants' appeal, Respondent persists in asking for relief in terms of paragraph 3.1 of the amended Notice of Motion. In addition, in her application for leave to cross-appeal, she asks for relief in terms of paragraph 3.3 of the amended Notice of Motion, and, presumably, in the alternative to paragraph 3.1 thereof, the relief sought in paragraphs 3.5 and 4 thereof.

DECLARATORY ORDER – PARAGRAPH 3.1 OF THE AMENDED NOTICE OF MOTION

38. In paragraph 3.1 of the amended Notice of Motion Respondent asked for a declaratory order that she and her ex-husband Matthew Gray ('Gray'), and all other divorced or separated biological parents, are jointly, rather than jointly and severally, liable for the payment of their school fees attending state schools.
39. The High Court granted the relief sought by Respondent, albeit in a more limited form, namely it omitted any reference to all other divorced or separated biological

parents and consequently simply declared that Respondent and Gray are jointly and not jointly and severally liable for the payment of Zoë's school fees in terms of section 40(1) of SASA.¹⁵

40. The High Court reasoned there is a general principle in our law that joint and several liability must be plainly expressed or clearly inferred, there was no reference to joint and several liability in section 40(1), joint and several liability would impose an 'unnecessary heavy burden' on parents like Respondent and joint and several liability is irreconcilable with paramountcy that must be afforded the best interests of the child in all matters concerning children under our Constitution.¹⁶
41. We understand the reference to joint liability to mean Respondent and Gray are each liable to pay a portion of the fees determined with reference to their relative means. By contrast, where debtors are jointly and severally liable, the creditor may claim a part or the whole of the performance from any one of the debtors or both or all of them.¹⁷
42. We respectfully submit the High Court erred in granting this declaratory order, for the following reasons.
43. Section 40(1) of SASA provides as follows: '*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*' (our emphasis).¹⁸

¹⁵ High Court Judgment 6: 839: 2

¹⁶ High Court Judgment 6: 811-812: 104

¹⁷ Cf Christie The Law of Contract in South Africa 5th Edition (2006) 255

¹⁸ See Padayachee Answering Affidavit 3: 501: 41

44. Having regard to section 39(1) and (2)(a), the expression '*the school fees determined in terms of section 39*' in section 40(1) means amount of the school fees determined by a resolution adopted by a majority of the parents attending the general meeting of parents referred to in section 38(2) called for purposes of considering and approving the school's annual budget.
45. The word '*parent*', referred to in section 40(1), is defined in section 1(1) of SASA to mean, amongst others, '*the biological ... parent ... of a learner*'.¹⁹
46. It follows that each biological parent of a learner is liable to pay the whole of the amount of the school fees.
47. If Parliament had intended joint liability for divorced or separated biological parents, with the result that each such parent would be limited to a portion of the total amount of the fees apportioned, e.g. according to their respective financial resources, it would have said so and specified the basis of the apportionment.²⁰ Yet there is no indication in SASA of any apportionment of, or limitation of divorced or separated biological parents' liability.
48. The reason Parliament has not apportioned or limited divorced or separated biological parents' liability is it is impractical to expect fee-paying schools to determine such apportionments between all parents who are not persons married in community of property. Instead, section 40(1) of SASA imposes the full liability on each parent.²¹

¹⁹ Paragraph (a) of the definition of '*parent*' in section 1(1) of SASA

²⁰ Padayachee Answering Affidavit 3: 501: 41

²¹ Padayachee Answering Affidavit 3: 501: 41

49. The reference to ‘*a parent*’ in section 40(1) of SASA, read with the wide definition of ‘*parent*’ in section 1, ensures that public schools do not become embroiled in costly legal disputes with or between parents. It does so by providing that both parents are jointly and severally liable to the school for the payment of their child’s school fees.
50. If one parent pays or is compelled to pay the full amount of the fees, i.e. an amount in excess of his or her respective share (viewed from the perspective of the parents *inter se*²²), then such parent has a common-law right of recourse against the other parent.²³ (At common law the duty of support which parents owe their children include their basic education.²⁴ Section 15(2) of the Maintenance Act 99 of 1998 provides that there is a duty on both parents to maintain their children, which includes reasonable support in the provision of education.)
51. The interpretation of section 40(1) of SASA imposing the full liability for his or her child’s school fees on each parent, is consistent with the result and the reasoning of this Court in GW.²⁵ As to the result, this Court held that a non-custodian biological parent is liable to pay school fees in terms of section 40(1) of SASA – the school had sued the non-custodian parent for the whole of the school fees and this Court upheld the claim. As to the reasoning, this Court pointed out

²² In the case of the Respondent and her ex-husband Gray, paragraph 2.1(iii) of the Consent Paper (annexure MS3 1: 55-56) obliges Gray to pay half of the school fees. This order regulating the rights and duties of Respondent and Gray *inter se* does not detract from Fish Hoek High School’s right to recover the full amount of the fees from one of them, leaving it up to the one who pays to exercise a right of recourse against the other: see Padayachee Answering Affidavit 3: 505: 49

²³ Van Heerden, Cockrell and Keightley Boberg’s Law of Persons and The Family 2ed (1999) 243 and the authorities cited in n 52; Clark (ed) Family Law Service (LexisNexis) C4 and C7

²⁴ Voet 25.3.4, quoted Van Heerden, Cockrell and Keightley *op cit* 243

²⁵ Fish Hoek Primary School v GW 2010 2 SA 141 (SCA) (‘GW’). See especially paras 8, 11, 13 and 14.

that where in SASA ‘*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*’;²⁶ and this Court added that ‘*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”*’.²⁷ Therefore, it is necessarily implicit in this Court’s judgment in GW that each of the custodian and non-custodian parents can be held liable for the full amount of their child’s school fees.

DECLARATORY ORDER – PARAGRAPH 3.3 OF THE AMENDED NOTICE OF MOTION

52. Respondent asks for a declaration that Regulation 6(2) of the Regulations, read together with the definition of the phrase ‘*combined annual gross income of parents*’ in Regulation 1, is inconsistent with the Constitution and invalid because it infringes her rights to equal protection and benefit of the law and to dignity in, respectively, sections 9(1) and 10 of the Constitution. (Respondent’s attempt in her notice of application for leave to cross appeal to expand the basis of the attack to include unfair discrimination in breach of section 9(3) of the Constitution²⁸ is impermissible because the relevant allegations in her founding affidavit are confined to sections 9(2) and 10 of the Constitution.²⁹)

²⁶ GW para 11.

²⁷ GW para 14.

²⁸ Respondent’s application for leave to cross appeal 6: 848: 1.3

²⁹ Founding affidavit 1: 43: 81.3

THE FUNDAMENTAL PROBLEM WITH THE CONSTITUTIONAL ATTACK

53. The fundamental problem with Respondent's constitutional attack on Regulation 6(2) of the Regulations and the definition of the phrase '*combined annual gross income of parents*' in Regulation 1, is that they are derivatives of (i.e. give effect to) section 40(1) of SASA, which for the reasons given in paragraphs 38 to 51 above makes both custodial and non-custodial parents liable to pay their children's school fees and makes their liability joint and several. Subject to the outcome of the Respondent's challenge to the constitutionality of section 40(1) of SASA in paragraph 3.5 of her amended Notice of Motion, discussed below, the constitutionality of Regulation 6(2) of the Regulations and the definition of the phrase '*combined annual gross income of parents*' in Regulation 1 must be determined on the assumption that section 40(1) of SASA is not inconsistent with the Constitution and invalid.
54. The submissions below on the merits of Respondent's constitutional attacks on the impugned Regulations are therefore made in the alternative to the submission in the preceding paragraph.

SECTION 9(1) OF THE CONSTITUTION – EQUAL PROTECTION AND BENEFIT OF THE LAW

55. Starting with the alleged infringement of Respondent's right to equal protection and benefit of the law, it appears that Respondent alleges that Regulation 6(2) and the definition of the phrase '*combined annual gross income of parents*' in Regulation 1 differentiate between persons like her who are single or divorced parents and those who share a joint household, because Regulation 6(2) takes into

account the income of the learner's non-custodian parent in determining whether the custodian parent qualifies for an exemption from school fees. If our understanding of Respondent's allegation is right, her real complaint is not that Regulation 6(2) differentiates between persons like her who are single or divorced parents and those who share a joint household, because in fact it treats them in the same way, but that it should differentiate between them because they are not similarly situated.³⁰

56. We submit Respondent's equal protection case is inconsistent with the result and this Court's reasoning in GW, which, as explained, is that both parents are, and should be, liable to pay the school fees of their children in fee-paying public schools. This Court held they are so liable because that is the effect of section 40(1) of SASA. This Court further held they should be so liable because imposing such liability on both parents will promote the achievement of gender equality which is a founding value of our Constitution,³¹ is consistent with the injunction in section 28(2) of the Constitution that '*a child's best interests are of paramount importance in every matter concerning the child*'³² and affords the school and in turn the learner with the maximum possible protection.³³

57. We further submit that such differentiation as may be found, is rationally connected to legitimate government purposes³⁴ for any or all of the following reasons:

³⁰ Padayachee Answering Affidavit 3: 497: 26

³¹ GW para 13.

³² GW para 14.

³³ GW para 14.

³⁴ Padayachee Answering Affidavit 3: 497: 26; Prinsloo v Van der Linde and Another 1997 (3) SA 1012 (CC) paras 24-26; Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC) para 32

- 57.1 In terms of SASA the ‘*parent body of a fee-paying school determines the annual school fees payable by all parents of learners at the school. This determination is based on the budget required to operate the school effectively and the school’s income from the State and any other sources*’,³⁵
- 57.2 The ‘*combined annual gross income of parents*’ is included in the formula in Regulation 6(2) to ensure equitable and generic calculations for all types of parental structures – therefore, in accordance with SASA, the Regulations do not distinguish between the married or unmarried status of parents but concentrate on the parental responsibility and duty towards a child;³⁶
- 57.3 The formula in Regulation 6(2) has been framed in the way it has (i.e. including the income of both parents, including any non-custodian parent), so as to ensure that school fee exemptions are calculated on a basis which encourages both parents to comply with their legal duty to support their children; and, conversely, discourages non-custodian parents in particular from shifting the financial cost of their children’s education at fee-paying schools onto the parents of other children at such schools (or, where there are compensation schemes, the *fiscus*);³⁷

³⁵ Padayachee Answering Affidavit 3: 497: 27

³⁶ See Third Appellant’s Supplementary Answering Affidavit (deposed to by one Mveli) 5: 718-720: 13-15

³⁷ Padayachee Answering Affidavit 3: 498: 29

57.4 *‘The SASA and the Regulations together provide a mechanism which allows parents who cannot afford the fees a total or a partial exemption’;*³⁸ and

57.5 The Regulations allow schools to grant conditional exemptions of the sort described in paragraphs 32 to 36 above, which overcome the practical problems of obtaining information and other co-operation from non-custodial parents raised by Respondent.

58. Finally we point out that the acknowledgment by Third Appellant that the Regulations create practical difficulties for parents like Respondent who struggle to get the requisite financial information from the other parent, does not mean the Regulations are unconstitutional and invalid. The same applies to the preparation of legislative amendments to address these difficulties, for consideration by Third Appellant and the Council of Education Ministers established by the National Education Policy Act 27 of 1996.³⁹ For one thing, the practical difficulties may be overcome by the granting of conditional exemptions of the sort described in paragraphs 32 to 36 above. For another, the fact that there may be better ways of achieving the purposes set out in paragraph 57 above, does not mean the current legislation is not rationally related to those purposes. The requirement of rationality is not aimed at testing the reasonableness, fairness or appropriateness of a decision, nor whether an alternative or better means could have been employed to achieve the desired end.⁴⁰

³⁸ Padayachee Answering Affidavit 3: 497: 28

³⁹ Padayachee Answering Affidavit 3: 499: 32; Mweli Supplementary Answering Affidavit 5: 714-716: 4-6

⁴⁰ Minister of Education, Western Cape and Another v Beauvallon Secondary School and Others 2015 (2) SA 154 (SCA) para 38

SECTION 10 OF THE CONSTITUTION – DIGNITY

59. Turning to Respondent's dignity-based attack, Respondent alleges that being compelled to regard her ex-husband (Gray) as part of her family unit⁴¹ and to request financial information from him in order to complete the application forms for the school fee exemption⁴² (i.e. to request his annual gross income so as to be able to apply the formula for the '*combined annual gross income of parents*'), infringes her right to human dignity because doing so is degrading and humiliating.⁴³
60. We submit the claimed infringement of the constitutional right to dignity, is far-fetched and legally untenable. Respondent and Gray are the biological parents of Zoë. They both bear a common-law and statutory duty to support her. Conformably with that duty, section 40(1) of SASA imposes joint and several liability on them to pay the school fees determined in terms of section 39. Section 40(1) of SASA however also allows any one of them to be exempted in terms of SASA. Section 41(2) of SASA adds that the exemption from payment of school fees must be calculated according to the regulations contemplated in section 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 section 39(2)(b). One of those requirements, imposed by the Regulations, is that an application for exemption must be made by completing a form, one of the parts of which is a statement of the combined annual gross

⁴¹ The Governing Body's and Fish Hoek High School's use in correspondence of the expression '*family unit*', is discussed in paragraph 78 below

⁴² Founding affidavit 1: 26-27: 34

⁴³ Founding affidavit 1: 43: 81.3

income of both parents (regulation 4(1), read with Annexure B). Another of those requirements is when considering and determining the application the governing body of the school must apply a formula, one of the elements of which is the combined annual gross income of both parents (regulation 6(2)(a)). Respondent has not contended the regulations just mentioned are not authorized by the provisions of SASA. It follows that any custodial parent applying for exemption from school fees is obliged to obtain from the other parent particulars of his or her gross income, in order that the governing body may apply the prescribed formula to his/her application for exemption. While obtaining the prescribed information may be difficult – practically and emotionally – in cases where the parents are estranged from one another, the primary cause of that is the poor state of their relationship not the obligation to co-operate with one another in relation to matters of common interest concerning their child.⁴⁴

SECTION 36(1) OF THE CONSTITUTION – LIMITATION

61. Alternatively, and in the event it is found that either or both of the rights on which Respondent relies are infringed, then we submit that the infringement is justified in terms of section 36(1) of the Constitution.⁴⁵
62. In Manamela⁴⁶ the Constitutional Court stated that *‘the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and*

⁴⁴ In the case of the Respondent and her ex-husband Gray, paragraph 1.5 of the Addendum to the Consent Paper read with paragraphs 1.2, 1.3 and 1.4.1 thereof (annexure MS3 1: 60-66) create a mechanism for the resolution of disputes about Zoë including her enrolment in a given school

⁴⁵ Padayachee Answering Affidavit 3: 498: 30

⁴⁶ S v Manamela & Another 2000 (3) SA 1 (CC) para 32

democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.’

63. For the reasons given above, we submit any infringement of the right to equal protection and benefit of the law or the right to dignity that may be found is slight, and further that it serves a legitimate government purpose. It would not be rational or reasonable and justifiable to exclude from the formula in Regulation 6(2) the income of one parent of a learner, just because he or she is a non-custodian parent and is divorced or separated from the custodian parent.⁴⁷

**ATTACK ON THE CONSTITUTIONALITY OF SECTION 40(1) OF SASA –
PARAGRAPHS 3.5 AND 4 OF THE NOTICE OF MOTION**

64. Respondent seeks an order declaring s 40(1) of SASA unconstitutional and invalid if it is found the provision imposes joint and several liability on divorced or separated parents; and a further order referring the declaration of unconstitutionality to the Constitutional Court for confirmation. As the grounds for this attack are the same as those for Respondent’s attack on regulation 6(2) of the Regulations – alleged violations of the affected parents’ rights to dignity and

⁴⁷ Padayachee Answering Affidavit 3: 499: 31. Cf Amended Notice of Motion 1: 2: 3.1

equal protection of the law – we repeat our submissions above in response to those attacks on regulation 6(2).

REPEATED VIOLATIONS OF RIGHTS IN THE PROCESSING OF RESPONDENT'S 2011, 2012 AND 2013 SCHOOL FEES EXEMPTION APPLICATIONS – PARAGRAPH 5 OF THE AMENDED NOTICE OF MOTION⁴⁸

65. Respondent asks for a declaratory order in paragraph 5 of her amended Notice of Motion that she was 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.
66. Before dealing with the each of the three years' in turn, we point out that insofar as the relief sought is based on Respondent's alleged entitlement to an unconditional partial exemption from the payment of school fees, it is bad for the reasons given above in relation to the declaratory orders sought in paragraphs 3.1 and 3.3 of Respondent's amended Notice of Motion.
67. We also point out that Respondent's allegations under this heading are mainly directed against the Governing Body and Fish Hoek High School, not Appellants. We note that some of the allegations concerning the Governing Body and Fish Hoek High School, insofar as they may be applicable to Appellants, relate to declarators in paragraph 6 of the amended Notice of Motion which Respondent is not persisting with.⁴⁹
68. We also submit the proper forum for the raising and adjudication of Respondent's points relating to section 41(4) of SASA and Regulation 6(14)(b), is the court in

⁴⁸ Amended Notice of Motion 1: 3: 5

⁴⁹ See the omission from Respondent's Notice of Application for Leave to Cross-Appeal 6: 851: 5.3 of references to paragraphs 6.1, 6.3, 6.5 and 6.8 to 6.10 of the amended Notice of Motion

which the Governing Body and Fish Hoek High School may proceed against Respondent for the recovery of unpaid school fees.⁵⁰

69. In what follows we shall set out in turn, in relation to each of 2011, 2012 and 2013, each of Respondent's allegations in her founding papers and Appellants' answer to the allegation. (We shall not respond to allegations made for the first time in Respondent's replying papers.)

2011

70. Respondent alleges that Fish Hoek High School refused to accept Zoë's application for 2011 because she did not sign the undertaking to pay the full school fees.⁵¹ First Appellant states that the WCED has no record of the Respondent reporting this issue.⁵²
71. The Governing Body and Fish Hoek High School agree that Respondent did not sign Annexure A to the prescribed form. However, Respondent did sign the payment forms sent to all parents, which include the terminology from Annexure A. For example both forms declare the amount of school fees for the year, that parents are liable for school fees, that parents may apply for assistance in regard to school fees and indicate where the fee exemption application forms are obtained. Importantly both forms request a signature from the parent declaring that they understand the content of the correspondence. Respondent completed and signed the school payment forms for the years 2011 to 2015.⁵³

⁵⁰ Vijnnevold Answering Affidavit 3: 369: 47

⁵¹ Founding affidavit 1: 21: 19

⁵² Vijnnevold Answering Affidavit 3: 382: 94

⁵³ Hawksley Confirmatory Affidavit 5: 708: 11

72. First Appellant notes Respondent's further allegation that Fish Hoek High School's fee exemption form⁵⁴ discourages parents from applying for an exemption, but highlights the fact that Respondent failed to report this issue to the WCED.⁵⁵
73. Respondent alleges that Fish Hoek High School's exemption application form⁵⁶ was not applicable to her because the last page contained a section which both parents had to fill in. Respondent regards this as unreasonable because it was conditional on Respondent securing the co-operation of her ex-spouse (i.e. Gray).⁵⁷ Third Appellant notes that the form in question appears to be an incomplete version of the form prescribed in Annexure B to the Regulations, because pages 17 and 19 of the Government Gazette were missing plus the page with the declarations from both parents.⁵⁸ Be that as it may, in conformity with the Regulations the form required financial information from both parents.⁵⁹ This is not unreasonable⁶⁰ because, as explained earlier, the law requires that both parents support their children, irrespective of whether they are married or divorced or have never been married. This includes paying the school fees of their children.⁶¹
74. At the time, Respondent submitted to Fish Hoek High School that *'[in] terms of a court order relating to my divorce, I get a monthly payment out of which all my*

⁵⁴ Annexure MS5 1: 73

⁵⁵ Vijnnevold Answering Affidavit 3: 382: 95

⁵⁶ Annexure MS5A 1: 74-80

⁵⁷ Founding affidavit 1: 22: 21

⁵⁸ Padayachee Answering Affidavit 3: 505: 51

⁵⁹ Padayachee Answering Affidavit 3: 505: 51

⁶⁰ Padayachee Answering Affidavit 3: 497-498: 28-29

⁶¹ Padayachee Answering Affidavit 3: 497: 28

daughter's expenses are to be paid. My finances should therefore be considered entirely separately from those of her ex-husband'.⁶² However, as Third Appellant has pointed out,⁶³ Respondent was incorrect in stating that all Zoë's expenses were paid from the monthly maintenance, i.e. it appears from the consent paper that her school fees were a separate expense for which both parents were liable.⁶⁴ In any event, the meaning and effect of the maintenance arrangements and orders are matters between Respondent and Gray and do not affect the liability of each of them towards the school to pay Zoë's school fees.⁶⁵ Respondent was (and is) incorrect in stating that her financial position should be considered separately from that of Gray, because in the case of learner like Zoë whose parents are both alive the fee exemption application must be considered and determined with reference to the aggregate annual gross income of both parents.⁶⁶

75. Respondent confirms that Fish Hoek High School took additional steps by sending a fee exemption form to Gray, who failed to respond.⁶⁷ We submit Gray's recalcitrance cannot be blamed on the Appellants, none of whom is able to provide or obtain Gray's missing financial information.

76. On 30 May 2011 Respondent drew Fish Hoek High School's attention to Regulation 9(3), which states that no application may be disqualified on the ground that it is incomplete or incorrectly completed.⁶⁸ We however submit

⁶² Annexure MS7 1: 82-85

⁶³ Padayachee Answering Affidavit 3: 505: 52

⁶⁴ Padayachee Answering Affidavit 3: 504-505: 49-50

⁶⁵ Padayachee Answering Affidavit 3: 507: 57

⁶⁶ Padayachee Answering Affidavit 3: 505-506: 53

⁶⁷ Founding affidavit 1: 23-24: 25

⁶⁸ Founding affidavit 1: 24: 26

Regulation 9(3) must be read with Regulation 9(4), and when that is done the position is that if an application form is either incomplete or incorrectly completed, the principal or an educator who is a member of the SGB concerned must help the parents complete the form properly. In present matter, Fish Hoek High School had sent the form to Gray to obtain the missing financial information. As this information was not provided by Respondent or forthcoming from Gray, it was not possible to do the exemption calculation and hence to determine the exemption application with a view to granting the Respondent an unconditional full or partial exemption.⁶⁹ By requiring Respondent to provide Gray's gross annual income for any such calculation and exemption, the SGB was acting in conformity with the Regulations.⁷⁰

77. As regards Respondent's claim to a conditional exemption,⁷¹ for the reasons given in paragraphs 32 to 36 above we respectfully agree that it was open to the SGB to grant the Respondent such an exemption. Another option open to the Governing Body in such circumstances is to notify a recalcitrant non-custodial parent like Gray, in terms of section 41(5) of SASA, 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 section 41(1) of SASA. 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.⁷²

⁶⁹ Padayachee Answering Affidavit 3: 506: 54

⁷⁰ Padayachee Answering Affidavit 3: 508: 58

⁷¹ Founding affidavit 1: 24: 27

⁷² Padayachee Answering Affidavit 3: 508: 59

78. In response to Respondent's objection to the Governing Body's use of the word '*family unit*' in its 11 November 2011 correspondence with her,⁷³ as by that stage the Governing Body and Fish Hoek High School were undoubtedly aware that Respondent and Gray were divorced, Third Appellant said the reference to '*your income as a family unit*'⁷⁴ meant the combined annual gross income of Respondent and Gray required by the Regulations.⁷⁵ We note that Respondent's only reply was that Appellants' deponent making this point could have had no knowledge that the Governing Body's and Fish Hoek High School's reference to '*your income as a family unit*'⁷⁶ meant the combined annual gross income of Respondent and Gray required by the Regulations.⁷⁷ The answers to this are that the interpretation of the correspondence is a matter of law not a matter of fact and, accordingly, a matter for the court and not for the evidence of witnesses;⁷⁸ and, because in motion proceedings the affidavits constitute both the pleadings and the evidence,⁷⁹ Appellants had to plead their interpretation of the correspondence. (We note that the Governing Body and Fish Hoek High School have now acknowledged that the expression '*your income as a family unit*' was a poor choice of words – the relevant sentence should have read '*from information gleaned to date it does not appear that the **combined annual gross income** of the parents entitles you to such an exemption.*'⁸⁰)

⁷³ Founding affidavit 1: 26-27: 33-34, referring to annexure MS15 1: 97

⁷⁴ Annexure MS15 1: 97

⁷⁵ Padayachee Answering Affidavit 3: 508: 60

⁷⁶ Annexure MS15 1: 97

⁷⁷ Replying Affidavit 4: 573: 175

⁷⁸ KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) para 39

⁷⁹ Transnet Ltd v Rubenstein 2006 (1) SA 591 (SCA) para 28

⁸⁰ Hawksley Confirmatory Affidavit 5: 707-708: 9

79. As to the legal proceedings instituted against Respondent for the recovery of the 2011 school fees,⁸¹ we note Respondent has filed a plea on the merits⁸² but has not received a notice of set down from Fish Hoek High School's attorneys.⁸³ We further note that Respondent's plea on the merits raises a similar issue to one raised in the present matter, namely Respondent's allegation that she is entitled to a fee exemption. The fact that Respondent has raised this collateral challenge⁸⁴ to the Governing Body's decision not to give Respondent an exemption for the 2011 school year, shows that if her point is a good one she is not remediless (i.e. not bound to pay the full amount of the school fees claimed from her).⁸⁵

2012

80. Respondent submitted a fee exemption application on 16 February 2012.⁸⁶ On 1 March 2012 Fish Hoek High School informed Respondent that she could send a financial assistance application form, and a separate form would be sent to her ex-husband, Gray.⁸⁷

81. On 15 March 2012 Respondent appealed the 2011 and 2012 fee exemption applications to First Appellant on the basis that an earlier letter from Fish Hoek High School, dated 23 February 2012, amounted to a refusal to grant both exemptions for 2011 and 2012.⁸⁸ In this letter Fish Hoek High School referred to

⁸¹ Founding affidavit 1: 28-29: 39-40

⁸² Annexure MS21 1: 108

⁸³ Replying Affidavit 4: 573: 176

⁸⁴ Merafong City v AngloGold Ashanti 2016 (2) SA 176 (SCA) para 17

⁸⁵ Padayachee Answering Affidavit 3: 508-509: 61

⁸⁶ Founding affidavit 1: 29: 41

⁸⁷ Founding affidavit 1: 29-30: 43

⁸⁸ Founding affidavit 1: 30: 44-45

the dispute between Respondent and Gray about who was responsible to pay for Zoë's education and said that based on the impasse in relation to Respondent's 2011 exemption application it was not possible for the Governing Body to grant an exemption for 2012.⁸⁹

82. First Appellant refused the 2011 appeal on the basis that it was received outside of the 30 day time period. In respect of the 2012 appeal, First Appellant granted Respondent an 83% exemption from school fees.⁹⁰

83. In her answering affidavit First Appellant states that she now believes that her decision in relation to the 2012 fee exemption application was incorrect. She should not have granted Respondent a partial exemption because, like the Governing Body, she too did not have the financial information (i.e. Gray's gross annual income) needed for the calculation in terms of Regulation 6(2) to (6). Instead, First Appellant said, she should have granted Respondent a conditional exemption of that part of the school fees.⁹¹

84. First Appellant has however added that because 2012 had long come and gone by the time she made her answering affidavit, she does not intend to take any steps aimed at the reversal of her decision. First Appellant also noted that Fish Hoek High School did not apply for fee exemption compensation⁹² in respect of the 2012 exemption that she had granted.⁹³ Third Appellant's deponent also said that despite his misgivings about the correctness of First Appellant's determination of

⁸⁹ Annexure MS23 1: 118

⁹⁰ Annexure MS30 1: 149

⁹¹ Vijnnevold Answering Affidavit 3: 383-384: 104

⁹² The compensation paid by the WCED to schools which grant fee exemptions is discussed in paragraph 109 below.

⁹³ Vijnnevold Answering Affidavit 3: 384: 104

Respondent's appeal in respect of the 2012 exemption for school fees, unless and until it is set aside in proceedings for judicial review it stands and must be given effect to by the Governing Body and Fish Hoek High School. Therefore, insofar as Fish Hoek High School's letter of demand⁹⁴ includes a claim for more than 17% of the 2012 school fees, it is incorrect.

85. By dealing with and determining Respondent's appeal in respect of the 2012 exemption for school fees, First Appellant discharged her legal responsibility to Respondent. If, despite First Appellant's determination of the appeal, Fish Hoek High School sues Respondent for the exempted portion, Respondent may raise the determination as a defence in those proceedings.

2013

86. In respect of the 2013 fee exemption application, we refer to paragraphs 9 to 12 above dealing with the discovery and rectification of the administrative error made by the Governing Body in communicating to Respondent its decision regarding her 2013 fee exemption application.
87. We submit that in view of the review relief the High Court granted in relation to First Appellant's decision on Respondent's 2013 fee exemption appeal, this Court should not grant the additional relief sought in paragraph 5 of the amended Notice of Motion in relation to Respondent's 2013 fee exemption application.
88. We further submit in any event that Respondent's criticism of the Governing Body's and Fish Hoek High School's conduct in relation to her 2013 fee exemption application, is unwarranted. What occurred prior to the Governing

⁹⁴ Annexure MS31 1: 150

Body's decision to decline the application because it did not contain particulars of Gray's annual gross salary (set out in MS47, i.e. the letter of 16 July 2013 that was sent to the incorrect address), was the following:⁹⁵

88.1 Respondent's 2013 fee exemption application was received on 21 March 2013.

88.2 On 27 March 2013 the Governing Body advised Respondent by letter that particulars of the income of both parents must be declared in the application and until such particulars are received, the application would remain pending.

88.3 On 6 April 2013 the Governing Body sent a letter and an application form by registered mail to Gray at two different addresses. Gray was requested to complete and return the application form. Respondent was informed of the letter sent to Gray. Gray failed to respond.

88.4 On 26 April 2013 Fish Hoek High School's attorney informed the school that he personally had handed the form to Gray. Gray again failed to respond.

89. We consequently submit the Governing Body and Fish Hoek High School took reasonable steps to assist Respondent with the completion of the application (as they were required to do by regulations 9(3) and 9(4) of the Regulations), i.e. to include the annual gross income of both parents on the application form so that it reflected the '*combined annual gross income of parents*' for purposes of the application of the formula.

⁹⁵ Annexure PV3 3: 401-404

Conclusion regarding the relief sought in paragraph 5 of the amended Notice of Motion

90. In summary, and for the reasons set out above and those which follow below in relation to the relief sought in paragraph 6 of the amended Notice of Motion, Appellants submit that Respondent was not 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.

DECLARATORY ORDERS CONCERNING APPELLANTS' FAILURE TO COMPLY WITH CONSTITUTIONAL AND STATUTORY OBLIGATIONS – PARAGRAPH 6 OF THE AMENDED NOTICE OF MOTION⁹⁶

91. Respondent seeks a general declaratory order that Appellants failed to comply with their constitutional and statutory obligations in ensuring that fee charging schools comply with SASA and the Regulations in relation to fee-exemptions. The general declaratory order is then followed by a host of subsidiary declaratory orders, each in relation to a specific alleged omission.

92. In many instances the alleged omissions are not supported by any specific allegations in Respondent's papers.⁹⁷ We submit it is not permissible for an applicant in motion proceedings to make general (i.e. non case-specific) allegations in support of specific declaratory or interdictory relief. The applicant should adduce evidence, not merely make general allegations or state general conclusions.

⁹⁶ Amended Notice of Motion 1: 3-7: 6 - 6.16

⁹⁷ Vijnnevold Answering Affidavit 3: 359: 15

93. What is more, many of the alleged instances of non-compliance with SASA or the Regulations, have nothing to do with Respondent's experience with Fish Hoek High School. The impression created is Respondent has looked for any and every possible point of criticism against the WCED, and sought to raise it for decision in this matter.
94. Respondent's *modus operandi* has made it difficult for Appellants to respond to the relief sought in paragraph 6 and its sub-paragraphs. The response in Appellants' papers and our heads of argument has, therefore, taken the form of a general exposition of First and Second Appellants' systems for monitoring public schools in the Western Cape Province and compliance by such schools, followed by a specific response to each of the declaratory orders sought by Respondent. We shall follow the similar approach here. In addition, we shall include a response to a report by the Equal Education Law Centre ('EELC') on which Respondent relies.

THE REGULATIONS AND CHALLENGES ARISING FROM THEIR IMPLEMENTATION

95. The Regulations placed added responsibilities and duties on fee-paying schools and their SGBs to ensure that parents are afforded the opportunity to qualify for exemptions if their financial circumstances so demand.⁹⁸ Accordingly, on 9 November 2006 the WCED issued circular 0058/2006 to the eight districts of the Western Cape informing all concerned of the new Regulations.⁹⁹
96. When the WCED received complaints from parents that SGBs were not complying with them, for example refusals by schools to provide parents with

⁹⁸ Vijnnevold Answering Affidavit 3: 375: 69

⁹⁹ Vijnnevold Answering Affidavit 3: 376: 70; Annexure PV9 3: 444-445

application forms, refusals by SGBs to consider incomplete applications, failures to notify parents of decisions and failures to adhere to the prescribed procedure before enforcing payment of school fees by the process of law, First Appellant issued circular 0010/2011 dated 4 April 2011, which emphasised important stipulations in the Regulations that schools and the SGBs must apply.¹⁰⁰

97. It is clear that parents have nevertheless experienced a variety of problems in relation to liability and payment for school fees and exemptions from school fees. Some of these concern the SGBs' or schools' non-compliance with the Regulations.
98. Generally, the WCED only becomes aware of such non-compliance when parents lodge appeals against the SGBs' decisions and/or lodge complaints in respect of the SGBs' or schools' application or non-application of the Regulations. In many instances complaints are generally received telephonically and in some instances parents prefer to remain anonymous for the fear of victimisation.¹⁰¹
99. Complaints that arise in the appeal process are followed up with the relevant school to verify whether the correct procedure has been followed. The assessment and decision in respect of the complaint is based on the information received from the SGBs or schools.¹⁰²
100. According to First Appellant, if a consistent pattern of conduct emerges from the appeal processes or from the complaints raised, then the WCED sends out further circulars to the SGBs and schools requesting them to comply with SASA and the

¹⁰⁰ Vijnnevold Answering Affidavit 3: 376: 71; Annexure PV10 3: 446-447

¹⁰¹ Vijnnevold Answering Affidavit 3: 376: 72

¹⁰² Vijnnevold Answering Affidavit 3: 377: 73; Annexure PV11 3: 448

Regulations.¹⁰³ The district official who is assigned to monitor and support the schools also raises the stipulations in the circulars with the schools' principals during regular meetings held in their school circuits.¹⁰⁴

101. With specific reference to the receipt by the WCED of complaints (not being appeals in terms of section 5(9) of SASA) regarding e.g. public schools' admission procedures or matters connected with school fees, if the WCED receives such complaints it sends circulars to, amongst others, all principals and SGBs of public schools highlighting the problems and what must be done to avoid them re-occurring. For example on 5 August 2013 First Appellant sent Circular 0036/2013.¹⁰⁵

WCED: STRUCTURE, COMMUNICATIONS, MONITORING AND COMPLIANCE

102. The WCED comprises the provincial ministry of education, headed by the Minister of Education in the Western Cape (i.e. Second Appellant); the provincial head office; district offices; and education institutions, including ordinary and special public schools and Early Childhood Development sites. The Head Office and the eight district offices of the WCED are structured and designed to provide a rapid response service. The eight education district offices are made up of 49 circuits which provide direct support to schools. The circuit teams are multifunctional, with curriculum advisers, special education services professionals (psychologists, social workers, learning support advisers) and institutional

¹⁰³ Annexure PV5 3: 405-407

¹⁰⁴ Vijnnevold Answering Affidavit 3: 377: 74

¹⁰⁵ Vijnnevold Answering Affidavit 3: 362: 24; Annexure PV5 3: 405

management and governance managers. Circuit team managers lead these support teams.¹⁰⁶

103. In order to facilitate the flow of information and communications between the WCED and the eight districts, schools, SGBs, parents and the general community, the WCED uses the media (print, radio, television and online), campaigns, the WCED website, its Client Services Call Centre, its Walk In Centre and surveys.¹⁰⁷

104. The WCED also uses information systems to create strategic plans, track targets, report issues, escalate issues and monitor all feedback. The following systems have been implemented to ensure greater transparency, control and reporting.¹⁰⁸

104.1 Every year all schools complete online School Improvement Plans ('SIPs'), with targets for 3 years, for academic performance, management efficiencies (teacher and learner absenteeism and academic planning), resourcing and maintenance. The indicators correspond with some of the national targets set under the Action Plan for the year ahead.¹⁰⁹ The value of an online improvement plan like the SIP is that all schools focus on driving key improvement interventions. The SIP also forms part of the accountability system, since the signatories to the plan include the principal, the SGB and the WCED. In 2013, schools also uploaded Action Plans to specify steps they would take to meet the targets set in their SIPs.¹¹⁰

¹⁰⁶ Vijnevold Answering Affidavit 3: 372: 59

¹⁰⁷ Vijnevold Answering Affidavit 3: 372: 60

¹⁰⁸ Vijnevold Answering Affidavit 3: 373: 61

¹⁰⁹ Vijnevold Answering Affidavit 3: 373: 62; Annexure PV6 3: 408, read with 3: 405-407

¹¹⁰ Vijnevold Answering Affidavit 3: 373: 63

104.2 In 2012 the WCED introduced quarterly School Improvement Monitoring ('SIM'), which linked the SIPs to the WCED. The SIM tracks the use of textbooks and workbooks, key aspects of resourcing and school functionality e.g. SGB elections, preparedness for the forthcoming year. Because the reports are captured online, the data is easily drawn and available for rapid support.¹¹¹

104.3 Also relevant is the WCED's District Management Information System ('DMIS'), an online, centralised and organised record of information designed to improve the overall efficiency of school visits by district officials which is fully operational across all 8 district offices. District officials use the system to plan, capture and view reports for school interventions. DMIS has been upgraded to ensure that issues raised in school visits are accurately captured, reported on and escalated to other relevant districts or head office officials. For example, if issues such as school fee exemption queries are identified as a challenge, the issue will be captured and a unique number allocated. The issue will then be escalated to the relevant officials.¹¹²

104.4 The Central Education Management System ('CEMIS') was a management tool created and developed to support many automated business processes under one system. In the past, CEMIS directly supported examination, assessment administration and registration processes, supplied data for staff establishment calculations and created

¹¹¹ Vijnevold Answering Affidavit 3: 373-374: 64

¹¹² Vijnevold Answering Affidavit 3: 374: 65; Annexure PV7 3: 423

monitoring tools for tracking learner registration and conducting online surveys in ordinary and special schools.¹¹³ In 2012 CEMIS was utilised for automated applications for re-imburement of fee exemptions to schools and for the online notification of Norms and Standards. This improved communications between the WCED and schools and helped them with their planning.¹¹⁴ CEMIS has also played an important role in supporting, guiding and strengthening strategic decision-making at district level. For example, CEMIS automated and allowed the WCED to implement SIM, which as explained is the quarterly school monitoring tool used by district officials to track progress on specific areas of concern. CEMIS further provided schools with the facility to upload their improvement plans.¹¹⁵

105. The WCED has recognised that the school circuit system is generally in need of improvement. Therefore it is integrating the district officials' school visits/meetings, reporting and checklist system with DMIS to ensure that, when necessary, issues are escalated to other relevant districts or head office officials and that data is collated to provide historical analysis of the reporting of problems and resolution rates of these problems. For example, since 2009, the WCED has been collating a database of all appeals raised in respect of fee-exemptions. The WCED envisages that the monitoring and reporting system will track trends and problem areas and allow for better control and problem solving.¹¹⁶

¹¹³ Vijnevold Answering Affidavit 3: 374-375: 66

¹¹⁴ Vijnevold Answering Affidavit 3: 375: 67

¹¹⁵ Vijnevold Answering Affidavit 3: 375: 68

¹¹⁶ Vijnevold Answering Affidavit 3: 377-378: 75

106. With specific reference to the (fee exemption) Regulations, the WCED has recognised that they contain grey areas which, amongst other things, allow for their varied interpretation and application by SGBs and schools. In response, the WCED made a submission to the national Department of Basic Education to review the current Regulations regarding exemption of school fees.¹¹⁷

107. First Appellant disputes Respondent's allegation that the WCED's monitoring and compliance system '*as it relates to fee exemption queries*' is not reasonable and rational,¹¹⁸ saying the WCED's monitoring and compliance information system was designed to ensure '*greater transparency, control and reporting*'.¹¹⁹ In this regard, First Appellant points out the following:

107.1 The SIPs, SIM, DMIS and CEMIS components of the monitoring and compliance system are constantly assessed, revised and updated to create a viable management system between the WCED and the schools in the eight education districts. The WCED's monitoring and compliance system oversees 572 fee-paying schools and 884 non fee-paying schools and monitors multiple learner, educational and school management areas in all of the schools, e.g. admissions, subject curricula, fee exemptions etc.¹²⁰

107.2 It is inevitable in this complex and dynamic environment that the management system will be evolving constantly as new areas for monitoring arise. For example, since First Appellant's answering

¹¹⁷ Vijnevold Answering Affidavit 3: 378: 76; Annexure PV12 3: 465

¹¹⁸ Replying Affidavit 4: 533: 47

¹¹⁹ Vijnevold Supplementary Affidavit 5: 636: 11

¹²⁰ Vijnevold Supplementary Affidavit 5: 637: 12

affidavit was made in 2014, the WCED has changed the 49 circuits in the eight education districts to 64 circuits for better monitoring and control.¹²¹

107.3 In addition, the SIPs for 2016 was updated to allow for more reporting on the fee exemption procedures. As a result, the SIP contains four data areas that schools must complete in respect of fee exemptions, namely, the number of fee exemption learners, whether the school informed parents of the right to apply for fee exemption, whether a copy of the fee exemptions has been displayed and whether fee exemption timelines have been adhered to. These result areas are subsequently followed up by the circuit manager when he or she visits the school premises.¹²²

107.4 When schools submit the data on SIP online, the WCED can generate a governance data report in respect of the information supplied by a particular school. The report displays the information submitted by e.g. Fish Hoek High School and shows compliance with displaying of the fee regulations, adherence to fee exemption timelines, parents being informed of the right to apply for fee exemptions and whether the SGB complied with fee exemption criteria. The governance report is an effective tool to monitor school compliance and a further demonstrates that the WCED is taking an active role in monitoring and ensuring compliance with fee exemption regulations, *inter alia*.¹²³

¹²¹ Vijnevold Supplementary Affidavit 5: 637: 13; Annexure PV18 5: 650

¹²² Vijnevold Supplementary Affidavit 5: 637: 14; Annexure PV19 5: 651-656

¹²³ Vijnevold Supplementary Affidavit 5: 638: 15; Annexure PV20 5: 657

108. In summary, the WCED's system is a sophisticated one. It works adequately. This was impliedly conceded by Respondent when, in the High Court, she abandoned her prayer for a structural interdict in terms of paragraph 8 of the amended Notice of Motion.

WESTERN CAPE PROVINCIAL GOVERNMENT BUDGETARY ALLOWANCES

109. Due to the fact that fee exemptions result in the exempted portions of the fees being paid by the other parents and that in some instances fee exemptions may even detrimentally affect the financial viability of fee-paying schools, the Provincial Government of the Western Cape ('PGWC') has allocated substantial sums for fee exemption compensation from its budget.¹²⁴ In this regard:

109.1 On 22 June 2011 the WCED issued circular 017/2011 setting out the procedure to be followed by fee paying schools in obtaining compensation for fee exemptions.¹²⁵

109.2 On 14 November 2013 Second Appellant issued a statement to the media outlining that in 2011 R20 million had been allocated as fee exemption compensation for fee paying schools which had granted exemptions during 2010; in 2012 R30 million had been allocated as fee exemption compensation for exemptions granted during 2011; and in 2013 R42 million had been allocated as fee exemption compensation for exemptions granted during 2012.¹²⁶

¹²⁴ Vijnevold Answering Affidavit 3: 378: 77

¹²⁵ Vijnevold Answering Affidavit 3: 378: 78; Annexure PV13 3: 474-476

¹²⁶ Vijnevold Answering Affidavit 3: 379: 79; Annexure PV14 3: 477-478

109.3 In 2012 the WCED upgraded CEMIS to automate the process whereby schools can make online applications for fee exemption compensation.¹²⁷

109.4 In her main answering affidavit, which as stated was made in 2014, First Appellant further stated that in about November of that year a determination would be made whether an amount would be allocated as fee exemption compensation for exemptions granted during 2013.¹²⁸

110. In her replying affidavit Respondent contended that Appellants were seeking to create the incorrect impression that the budget for compensation for fee exemption to fee paying schools was discretionary rather than an obligation imposed by Regulation 170A of the National Norms and Standards for School Funding (which was inserted with effect from 1 April 2011).¹²⁹ We submit Respondent has misunderstood Regulation 170A. As First Appellant has explained, the Provincial Education Departments ('PEDs') allocate the compensation for fee exemptions from their budgets before applications/claims for compensation are received from the schools in their provinces. The compensation amount allocated is at the discretion of and constrained by the PEDs' budgets.¹³⁰ Therefore, while Regulation 170A(a) states that a PED will determine an allocation, the PED is not obliged to provide 100% compensation if the budget does not allow for this provision. This is demonstrated in the example provided in the Government

¹²⁷ Vijnévolld Answering Affidavit 3: 379: 81

¹²⁸ Vijnévolld Answering Affidavit 3: 379: 80

¹²⁹ Replying Affidavit 4: 536: 56. The Amended National Norms and Standards for School Funding were published in Government Notice No. 890 in Government Gazette No. 29179 of 31 August 2006. Regulations 168 to 170A thereof are reproduced in the annexure to these heads

¹³⁰ Vijnévolld Supplementary Affidavit 5: 639: 19

Notice introducing Regulation 170A.¹³¹ In terms of the applicable formula the total payable to a school is subjected to a provincial weighting ('W'), where W is determined by dividing the budget allocated for compensation by the preliminary total of claims for compensation by all schools in the province. Accordingly, if a lesser amount is budgeted for compensation relative to the total amount of the claims subsequently received, then schools claiming compensation will receive less than the amount claimed.¹³²

111. Returning to the amounts allocated by the WCED for compensation for fee exemptions:

111.1 The WCED allocated the highest compensation in the country for 2010 and 2011.¹³³

111.2 In 2015 the WCED approved the budget of R39 322 000 for compensation for the 2014 school year. As the total claims amounted to R43 650 026.00, an additional balance of R4 328 028.00 was requested to address the shortfall, which was approved. In 2016, the WCED approved a budget of R46 356 000 for the 2015 school year.¹³⁴

111.3 The above figures demonstrate the WCED's commitment to providing 100% compensation for school claims.¹³⁵

¹³¹ See the annexure to these heads

¹³² Vijnevold Supplementary Affidavit 5: 639: 20

¹³³ Vijnevold Supplementary Affidavit 5: 639-640: 21, referring to Annexure PV14 3: 477-478

¹³⁴ Confirmatory Affidavit of John Lyners 5: 743: 4; Annexure JL1 5: 745

¹³⁵ Vijnevold Supplementary Affidavit 5: 639-640: 21

EELC REPORT

112. Precillar Moyo ('Moyo') states that an EELC report entitled *Report on the Western Cape School Admission Policies and Practices* was submitted to the WCED.¹³⁶ In her answering affidavit, First Appellant stated that she had no opportunity to peruse this report or offer a response before the present proceedings were instituted. First Appellant pointed out that although Moyo states there was an informal confirmation from an unnamed WCED official of its having received the report, no details were provided and consequently First Appellant could not indicate whether or not the WCED did in fact receive the report and, if so, why it was not brought to her attention at the time. First Appellant added she was certain that none of the issues raised in the report were reported to her.¹³⁷

113. In reply Moyo responded that Lance Abrahams of the WCED acknowledged receipt of the report and that he had informed Moyo that he had forwarded the report to First Appellant.¹³⁸

114. First and Second Appellants thereupon obtained an affidavit from Abrahams, in which he says he did indeed telephonically confirm to Moyo that he had received a copy of the report. Abrahams adds the report was generic and served to inform the WCED's general processes on dealing with school admissions. Only part of the report dealt with fee exemptions.¹³⁹ Abrahams says his interactions with the EELC relate mostly to school admissions. Furthermore, he points out that of the

¹³⁶ Moyo's Supporting Affidavit 2: 209-213: 11-15, referring to Annexure PTM2 2: 229-247

¹³⁷ Vijnnevold Answering Affidavit 3: 391: 136

¹³⁸ Moyo's Confirmatory Affidavit 4: 627: 6

¹³⁹ Abrahams Confirmatory Affidavit 5: 747-748: 4

recommendations in the report only one relates to fee exemptions. It reads as follows:

*'Fee Exemptions: Ensure that all schools make Respondents aware of the provisions of the fee exemption policy and that schools desist from using terms that have the effect of shaming poor parents from applying for admission into fee charging schools.'*¹⁴⁰

115. According to Abrahams, as he did not handle fee exemptions, this aspect of the report would have had to be given to a different directorate to handle.¹⁴¹ He however cannot recall to whom he forwarded the report or even if he forwarded the report to anyone at all. He adds he would not have been able to forward the report directly to First Appellant as there are processes to be followed, which include forwarding the report to the of the appropriate directorates first.¹⁴²

116. What Abrahams does recall is that he asked Moyo if she had sent the report to First Appellant and if she had received a response, to which she replied that she had not received a response.¹⁴³

117. Finally, according to Abrahams he had no further interaction with the EELC about the report.¹⁴⁴

STATISTICALLY INDEFENSIBLE SAMPLE

118. First Appellant submits that although Moyo states that the EELC is handling many cases of abuse of the fee-exemption and fee-recovery processes, the seven

¹⁴⁰ Abrahams Confirmatory Affidavit 5: 748: 5, referring to PTM2 2: 242

¹⁴¹ Abrahams Confirmatory Affidavit 5: 748: 6

¹⁴² Abrahams Confirmatory Affidavit 5: 748: 7

¹⁴³ Abrahams Confirmatory Affidavit 5: 748: 8

¹⁴⁴ Abrahams Confirmatory Affidavit 5: 749: 9

cases referred to in her affidavit do not constitute a statistically defensible sample that shows that there is indeed the widespread pattern of abuse that Moyo claims. Moyo draws unjustifiable inferences from the limited number of cases referred to by the EELC.¹⁴⁵ (See in particular the general allegations in Moyo's affidavit.¹⁴⁶)

119. To illustrate the problem with Moyo's approach, while she relies on seven cases, there are, as stated, more than 570 fee-paying schools in the Western Cape Province.¹⁴⁷

120. In order to further clarify the position, First Appellant has provided an updated view of the fee exemptions awarded. The number of complaints and appeals relating to fee exemptions is minimal compared to the fact that there are 572 fee paying schools with varying numbers of learners per school.¹⁴⁸ As an example, First Appellant attached a copy of the list of the 2015 appeals for fee exemptions, which shows that only 32 appeals relating to fee exemptions were initiated in 2015 and only 9 of these were by single parents.¹⁴⁹

121. Furthermore, First Appellant has requested and received an update from the seven schools referred to by Moyo in her affidavit.¹⁵⁰ What emerges is the following:

121.1 **Table View Primary School** advised First Appellant that in 2013 it received 199 fee exemption applications, of which 183 were granted partial exemption, 15 were granted full exemption and 1 was rejected. In

¹⁴⁵ Vijnenvold Answering Affidavit 3: 392: 138

¹⁴⁶ Moyo's Affidavit 2: 214-215: 18-21

¹⁴⁷ Vijnenvold Answering Affidavit 3: 392: 138

¹⁴⁸ Vijnenvold Supplementary Affidavit 5: 640: 24; annexure PV23 5: 660-664a

¹⁴⁹ Annexure PV23 5: 660-664a

¹⁵⁰ Vijnenvold Supplementary Affidavit 5: 641: 25

2014 the school received 247 fee exemption applications, of which 230 were granted partial exemption, 9 were granted full exemption and 8 were rejected/disqualified. In 2015 the school received 407 fee exemption applications, of which 385 were granted partial exemption, 21 were granted full exemption and 1 was rejected/disqualified.¹⁵¹

121.2 **De Hoop Primary School** confirmed that the school has a system for dealing responsibly with every fee exemption application. The school's SGB amended a clause in the school financial form to comply with current policy and as a result no parent has been negatively affected by the clause. The principal supplied a list of the 2014 and 2015 fee exemption applications as proof of their compliance with the Regulations.¹⁵²

121.3 **Wynberg Girls High School** advised that in 2013, 65 fee exemption forms were issued, in relation to which 43 were granted partial exemption, 6 were granted full exemption and 16 forms were not returned or lost. In 2014, 58 fee exemption forms were issued, in relation to which 41 were granted partial exemption, 8 were granted full exemption and 9 forms were not returned or lost. In 2015, 51 fee exemption forms were issued, in relation to which 36 were granted partial exemption, 7 were granted full exemption and 8 forms were not returned or lost.¹⁵³

¹⁵¹ Vijnevold Supplementary Affidavit 5: 641-642: 25.3; Annexure PV25 5: 669-672

¹⁵² Vijnevold Supplementary Affidavit 5: 642: 25.4; Annexure PV26 5: 673-679

¹⁵³ Vijnevold Supplementary Affidavit 5: 642-643: 25.6; Annexure PV27 5: 680-682

- 121.4 **Rondebosch Boys High School** advised that in 2013, 25 applications for fee exemptions were made by parents, 24 full and partial exemptions were granted and 1 was rejected. In 2014, 29 applications for fee exemptions were made by parents and full and partial exemptions were granted in all cases. In 2015, 38 applications for fee exemptions were made by parents and once again full and partial exemptions were granted in all cases.¹⁵⁴
- 121.5 **Fish Hoek High School** advised that in 2013, 209 application forms for fee exemptions were issued to parents, resulting in 156 full and partial exemptions being granted and 3 being rejected. In 2014, 194 application forms for fee exemptions were issued to parents, resulting in 151 full and partial exemptions being granted and 8 being rejected. In 2015, 201 application forms for fee exemptions were issued to parents, resulting in 170 full and partial exemptions being granted and 3 being rejected.¹⁵⁵
- 121.6 **Edgemead High School** advised that it registers each fee exemption application form by numbering and dating it and by requesting a signature. In 2013, 113 fee exemption forms were issued, resulting in 64 being granted full exemption, 49 being granted partial exemption and none being rejected. In 2014, 111 fee exemption forms were issued, resulting in 60 being granted full exemption, 50 being granted partial exemption and one being rejected on the basis of being over the threshold. In 2015, 108 fee exemption forms were issued, resulting in 55

¹⁵⁴ Vijnevold Supplementary Affidavit 5: 643: 25.7; Annexure PV28 683-684

¹⁵⁵ Vijnevold Supplementary Affidavit 5: 643: 25.8; Annexure PV29 5: 685-686

being granted full exemption, 53 being granted partial exemption and none being rejected.¹⁵⁶

122. It is submitted that the seven cases referred to by Moyo pale into relative insignificance when considered in the light of the totality of the facts put up by Appellants, which demonstrate that schools in the Western Cape Province grant hundreds of fee exemption applications every year without significant problems being experienced.

123. We now turn to the specific declaratory orders sought in the sub-paragraphs of paragraph 6 of Respondent's amended Notice of Motion with which Respondent is persisting. We submit none should be granted.

124. Before dealing with the specifics, we respectfully submit it is not the task of this Court to become engaged in what amounts to the micro-management of the relationship between First and Second Appellants, on the one hand, and all principals of fee-paying public schools in the Western Cape Province, on the other hand. The granting of the declaratory orders sought by Respondent in this regard will infringe the constitutional separation of powers between the Judiciary and the Executive (including the Public Administration headed by the Executive).¹⁵⁷

DECLARATORY ORDER – Paragraph 6.2 of the Notice of Motion

125. In paragraph 6.2 of her amended Notice of Motion Respondent alleges that Appellants have failed to take sufficient and adequate measures to ensure fee-

¹⁵⁶ Vjinevold Supplementary Affidavit 5: 643-644: 25.9; Annexure PV30 5: 687-690

¹⁵⁷ For a recent general discussion of the principle of the separation of powers in the Constitution, see Tlouamma and Others v Mbete, Speaker of the National Assembly of the Parliament of the Republic of South Africa and Another 2016 (1) SA 534 (WCC) paras 59-66

paying schools do not discourage parents from applying for fee-exemptions, or stigmatise parents who have applied for fee-exemptions.

126. The declaratory relief sought in this paragraph appears to relate to Regulations 3(1) and 9 of the Regulations, which make provision for the principal, educators and the SGB of a fee-paying public school to assist parents who require assistance in applying for fee-exemptions. It also appears to relate to Regulation 3(4), which places a duty on the SGB to regard as confidential all information that a parent submits in support of his or her application and not to divulge such information to a third party without the consent of the parent. It is implicit in these provisions that such schools must not discourage parents from applying for fee-exemptions or stigmatise parents who have done so.¹⁵⁸

127. Appellants submit that there is insufficient evidence to support the sweeping allegation underlying the relief sought in this paragraph. In this regard we also point to the following facts concerning Respondent and Lisa Whyte (who made an affidavit that included complaints about Fish Hoek High School¹⁵⁹) specifically:

127.1 In 2011 Fish Hoek High School took additional steps in assisting Respondent by sending a fee exemption form to Respondent's ex-husband, Gray.¹⁶⁰

127.2 In 2012 Third Responded informed Respondent that she could send a financial assistance application form, and a separate form would be sent to Gray.¹⁶¹

¹⁵⁸ Vijnnevold Answering Affidavit 3: 360-361: 19

¹⁵⁹ Whyte Affidavit 4: 579-592

¹⁶⁰ Founding affidavit 1: 23-24: 25

127.3 In 2013 the Governing Body sent a letter and an application form by registered mail to Gray at two different addresses. Gray was requested to complete and return the application form. The school went an extra step by having its attorney personally hand the form to Gray.¹⁶²

127.4 In response to Whyte's affidavit, the Governing Body and Fish Hoek High School state that, in the case of divorced parents, they request both parties fill in separate forms in order to ensure confidentiality of their financial affairs.¹⁶³

128. We submit that Fish Hoek High School took reasonable steps to assist Respondent and Whyte to complete their applications, i.e. to include the annual gross income of both parents in the application form so as to reflect the '*combined annual gross income of parents*' for purposes of calculation and to protect the confidentiality of the information from each of the divorced parents.

DECLARATORY ORDER – Paragraph 6.4 of the Notice of Motion

129. In paragraph 6.4 of her amended Notice of Motion Respondent alleges that Appellants have failed to take sufficient and adequate measures to ensure that schools do not adopt unlawful policies which limit fee-exemptions by excluding parents who are refugees, immigrants or residing outside the feeder area.

130. SASA and the Regulations define parents without reference to whether or not they are refugees or immigrants or live outside a school's feeder zone. The admission of learners who are non-citizens or who reside outside the school feeder zones

¹⁶¹ Founding affidavit 1: 29-30: 43

¹⁶² Annexure PV3 3: 401-404

¹⁶³ Hawksley Confirmatory Affidavit 5: 709: 13

determined by the provincial Heads of Department is however dealt with in paragraphs 19 to 21 and 33 to 35 of the Admission Policy for Ordinary Public Schools ('the Admission Policy') (General Notice 2432 in Government Gazette 19377 of 19 October 1998) promulgated in terms of section 3(4)(i) of the National Education Policy Act 27 of 1996. Paragraph 3 of the Admission Policy provides that the admission policy of every public school, which its SGB must determine in terms of section 5(5) of SASA, must be consistent with the Admission Policy. Section 5(9) of SASA provides that any learner or parent of a learner who has been refused admission to a public school may appeal against the decision to the relevant MEC.¹⁶⁴

131. In this regard, in her affidavit, Moyo raised the case of Mumbake Chirwa ('Chirwa'), a Zambian national, who she said had been denied fee exemptions by Table View Primary School for the period 2008 to 2014 on the basis that he was a refugee.¹⁶⁵

132. First Appellant attached to her answering affidavit a response from Table View Primary School that is incompatible with Moyo's allegation that Chirwa has been the victim of a sustained abuse of the laws relating to fee exemptions. It appears that Chirwa did not apply for exemption between 2009 and 2014, although in 2011 the SGB of its own initiative granted him a partial exemption.¹⁶⁶ First Appellant added that it is not clear why Chirwa's complaints were not brought to the attention of the WCED by the EELC before the institution of the current legal proceedings. First Appellant stated that the complaints and the school's response

¹⁶⁴ Vijnenvold Answering Affidavit 3: 361-362: 23

¹⁶⁵ Moyo's Supporting Affidavit 2: 216-218: 24-32

¹⁶⁶ Vijnenvold Answering Affidavit 3: 393: 142-143

were being considered by the WCED, which in due course would engage with the school and Chirwa about them.¹⁶⁷

133. In response, in her reply, Respondent went so far as to call into question First Appellant's fitness to hold office; and further claimed that Table View Primary School's conduct was indefensible.¹⁶⁸

134. In her supplementary answering affidavit First Appellant has stated that the matter between Table View Primary School's SGB and Chirwa was settled in the Cape Town Magistrates Court in December 2015. In terms of the settlement agreement, the school withdrew all summonses issued and processes lodged and undertook not to pursue legal action for monies owed for the 2013 academic year or any previous year. The school agreed to process any fee exemption application that Chirwa may make for the duration of his children's attendance at the school.¹⁶⁹

135. First Appellant further said in that affidavit that Table View Primary School has advised that although their bursar has changed since the 2014 period, the school was unaware of any fee exemption application that was refused on the basis of nationality or status of a parent in 2014. In 2015, 38 applications were received from foreign nationals and all were granted partial exemptions.¹⁷⁰

DECLARATORY ORDER – Paragraph 6.6 of the Notice of Motion

136. In paragraph 6.6 of her amended Notice of Motion Respondent alleges that Appellants have failed to take sufficient and adequate measures to ensure

¹⁶⁷ Vijnervold Answering Affidavit 3: 393: 144

¹⁶⁸ Replying Affidavit 4: 560: 129

¹⁶⁹ Vijnervold Supplementary Affidavit 5: 641: 25.1; Annexure PV24 5: 665-668

¹⁷⁰ Vijnervold Supplementary Affidavit 5: 641: 25.2

governing bodies do not require divorced or single parents to provide financial information in respect of non-custodian biological parents.

137. We submit the declaratory relief sought in this paragraph cannot be granted because Regulations 6(3) to 6(6), read with the formula in regulation 6(2), which govern the granting of exemption by SGBs, are based on the learner's parents '*combined annual gross income*', a term defined in Regulation 1 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*'.¹⁷¹

138. As already explained, all non-custodial biological parents are parents as contemplated in paragraph (a) of the definition of '*parent*' in section 1(1) of SASA and in the definition of '*parent*' in section 1 of the Regulations. As SASA and the Regulations currently read, therefore, Regulation 4(1) obliges SGB's to require all parents who apply for fee exemptions to complete the form in Annexure B to the Regulations properly, including by providing the combined gross annual income of both parents.¹⁷²

DECLARATORY ORDER – Paragraph 6.7 of the Notice of Motion

139. In paragraph 6.7 of her amended Notice of Motion Respondent alleges that Appellants have failed to take sufficient and adequate measures to ensure governing bodies and schools do not disqualify fee-exemption Respondents because application forms are incomplete or incorrect.

140. The declaratory relief sought in this paragraph relates to Regulation 9(3), which provides that no Respondent for a fee exemption may be disqualified on the

¹⁷¹ Vijnervold Answering Affidavit 3: 363-364: 28

¹⁷² Vijnervold Answering Affidavit 3: 364: 28

ground that his or her application form is either incomplete or incorrectly completed. As explained earlier, however, Regulation 9(3) must be read with Regulation 9(4). If an application form is either incomplete or incorrectly completed, the principal or an educator who is a member of the SGB concerned must help the parents complete the form properly. Regulation 9(3) must also be read with the definition of the term ‘*combined annual gross income of parents*’ in Regulation 1 and the formula and the exemption provisions in Regulations 6(2) to (6). As stated above, the Regulations require that the gross annual income of both parents be supplied in order for the exemption calculation to be done, i.e. for an unconditional exemption to be granted.¹⁷³

141. As also stated above, if this information is not forthcoming despite the attempts made by the school authorities to assist an applicant, as happened in Respondent’s case, it will not be possible to do the exemption calculation and hence to determine the exemption application with a view to granting the applicant an unconditional full or partial exemption. The best that can be done in such circumstances is to grant the applicant a conditional exemption.¹⁷⁴

DECLARATORY ORDER – Paragraph 6.11 of the Notice of Motion

142. In paragraph 6.11 of her amended Notice of Motion Respondent alleges that Appellants have failed to take sufficient and adequate measures to ensure that governing bodies notify an unsuccessful applicant, in writing, of the right to appeal to the Head of Department in terms of section 40(2) of the Act, within 7 days of the decision being taken.

¹⁷³ Vijnévolld Answering Affidavit 3: 364: 29

¹⁷⁴ Vijnévolld Answering Affidavit 3: 364-365: 29

143. Regulation 6(13) states, in effect, that if an application for a fee exemption is declined or a parent does not qualify for an automatic exemption, the notices contemplated in Regulations 6(9) and (10) must refer to the applicant's right of appeal to the Head of Department in terms of section 40(2) of SASA.¹⁷⁵
144. There is no evidence of any systematic infringement of this Regulation.

DECLARATORY ORDER – Paragraphs 6.12 and 6.12.1 of the Notice of Motion

145. In paragraphs 6.12 and 6.12.1 of her amended Notice of Motion Respondent alleges that Appellants have failed to take sufficient and adequate measures to ensure, where applicants do not qualify for partial or total exemption, that SGBs consider whether the parent qualifies for conditional exemption based on the inability to pay school fees owing to circumstances beyond the parents' control.
146. As explained earlier, Regulation 1 provides that a conditional exemption may be granted to a parent who qualifies for a partial exemption, but owing to personal circumstances beyond his or her control cannot pay the reduced amount. It also applies to 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.¹⁷⁶
147. Third Appellant agrees that paragraphs 168 to 170 of the Amended National Norms and Standards for School Funding require amendments to bring them into line with the contents of the Regulations, which take precedence over them. In particular, paragraphs 168 and 169 will be amended to make it clear that in the case of a learner with two living parents the relevant income is the combined

¹⁷⁵ Vijnervold Answering Affidavit 3: 366: 36

¹⁷⁶ Vijnervold Answering Affidavit 3: 366-367: 38

gross annual income of both parents; and paragraph 170 will be amended to make say that a SGB's powers to grant exemptions must be exercised in accordance with, and subject to, the Regulations, i.e. SGBs cannot grant exemptions other than those permitted by the Regulations.¹⁷⁷

148. Once again, there is no evidence of any systematic infringement of this Regulation.

149. As regards the Respondent's claim to a conditional exemption, Third Appellant agrees it was open to the SGB to grant the Respondent such an exemption.¹⁷⁸ Subject to the possibility of a conditional exemption, Third Appellant disagrees that the Respondent may validly be granted an exemption even if she does not comply with the requirements therefor stipulated in the Regulations.

DECLARATORY ORDER – Paragraphs 6.12 and 6.12.2 of the Notice of Motion

150. In paragraphs 6.12 and 6.12.2 of her amended Notice of Motion Respondent alleges that Appellants have failed to take sufficient and adequate measures to ensure, where applicants do not qualify for partial or total exemption, that SGBs consider whether the parent qualifies for exemption based on transparent and equitable criteria other than those set out in the Regulations.

151. We submit the declaratory relief sought in this paragraph cannot be granted because the Regulations circumscribe the circumstances in which exemptions may be granted and sections 39(1)(c)(ii) and (4) of SASA, read together, provide that

¹⁷⁷ Padayachee Answering Affidavit 3: 513-514: 77

¹⁷⁸ Padayachee Answering Affidavit 3: 506: 56

the only exemptions which may be granted are those permitted by the Regulations.¹⁷⁹

DECLARATORY ORDER – Paragraph 6.13 of the Notice of Motion

152. In paragraph 6.13 of her amended Notice of Motion Respondent alleges that Appellants have failed to take sufficient and adequate measures to ensure that the WCED has taken adequate measures to assist fee-paying schools in applying the formula for fee-exemptions in Regulation 6.

153. Regulation 10(1) provides that every PED must develop measures for assisting schools in applying the formula contemplated in Regulation 6. Regulation 10(2) allows a public school to approach their PED for assistance in applying the formula.¹⁸⁰

154. First Appellant says that the WCED has not developed any such measures, mainly because it has not been approached by any public school for assistance in applying the formula and, it has consequently concluded, the illustrations with regard to the application of the formula in Annexure C to the Relations (referred to in Regulation 6(15)) are sufficient for the time being. Differently put, the WCED has concluded that the formula for the calculation of school fee exemption as indicated in the Regulations is so uncomplicated that it does not warrant any special measures to assist schools in applying it. All WCED district offices have available expertise to assist public schools with the correct interpretation of the formula.¹⁸¹

¹⁷⁹ Vijnevold Answering Affidavit 3: 367: 40

¹⁸⁰ Vijnevold Answering Affidavit 3: 367-368: 41

¹⁸¹ Vijnevold Answering Affidavit 3: 368: 42

155. Furthermore, the present case does not concern problems with the application of the formula. It arises from the problems experienced by Respondent in obtaining from Gray the financial information required by the formula. For this further reason too, there is no warrant for this Court to enter into the issues raised by the declaratory relief sought in this paragraph.¹⁸²

DECLARATORY ORDER – Paragraph 6.14 of the Notice of Motion

156. In paragraph 6.14 of her amended Notice of Motion Respondent alleges that Appellants have failed to take sufficient and adequate measures to ensure that when parents are in arrears in respect of school fees by one month or more, schools investigate whether the parent qualifies for a fee-exemption before instituting legal proceedings.

157. The declaratory relief sought in this paragraph appears to relate to Regulation 3(1)(e), which provides that the principal must notify a parent that if a parent is in arrears by one month or more, the SGB will investigate whether the parent qualifies for an exemption before taking legal action to recover school fees in terms of section 41(1) of SASA.¹⁸³

158. We submit the provisions of the Regulations and SASA relied on in this paragraph present an obstacle to proceedings by public schools aimed at enforcing the payment of school fees. The appropriate remedy for non-compliance with such provisions is therefore the deferral or perhaps the failure of the enforcement proceedings. The remedy can be sought in those proceedings.¹⁸⁴

¹⁸² Vijnevold Answering Affidavit 3: 368: 43

¹⁸³ Vijnevold Answering Affidavit 3: 369: 45

¹⁸⁴ Vijnevold Answering Affidavit 3: 369: 47

159. The submission in the preceding paragraph is repeated in relation to all the declaratory orders, discussed below, concerning enforcement proceedings.

160. Once again, there is also no evidence of any systematic infringement of this Regulation.

DECLARATORY ORDER – Paragraph 6.15.1 of the Notice of Motion

161. In paragraph 6.15.1 of her amended Notice of Motion Respondent alleges that Appellants have failed take sufficient and adequate measures to ensure schools institute legal proceedings for recovery of fees only after ascertaining that a parent does not qualify for a fee-exemption.

162. Section 41(4)(a) of SASA stipulates that a public school may by process of law enforce the payment of school fees only after it has ascertained that the parent does not qualify for exemption from payment of school fees in terms of SASA.¹⁸⁵

163. Once again, there is no evidence of any systematic infringement of this Regulation.

DECLARATORY ORDER – Paragraph 6.15.2 of the Notice of Motion

164. In paragraph 6.15.2 of her amended Notice of Motion Respondent alleges that Appellants have failed to take sufficient and adequate measures to ensure schools institute legal proceedings for the recovery of fees only after ascertaining that deductions have been made for parents who qualify for partial exemptions.

165. Section 41(4)(b) of SASA stipulates that a public school may by process of law enforce the payment of school fees only after it has ascertained that deductions

¹⁸⁵ Vijnnevold Answering Affidavit 3: 369: 48

have been made for a parent who qualifies for partial exemption in terms of the Regulations.¹⁸⁶

166. Once again, there is no evidence of any systematic infringement of this Regulation.

DECLARATORY ORDER – Paragraph 6.15.3 of the Notice of Motion

167. In paragraph 6.15.3 of her amended Notice of Motion Respondent alleges that Appellants have failed to take sufficient and adequate measures to ensure schools institute legal proceedings for recovery of fees only after ascertaining that the parent has completed and signed the prescribed form, annexure A to the Regulations.

168. Section 41(4)(c) of SASA stipulates that a public school may by process of law enforce the payment of school fees only after it has ascertained that the parent has completed and signed the fee-exemption application form prescribed in the Regulations.¹⁸⁷

169. With regard to Respondent, we refer to the description of the state of the school's legal proceedings against her as well as to paragraph 70 above.

170. Once again, there is no evidence of any systematic infringement of this Regulation.

DECLARATORY ORDER – Paragraphs 6.15.4 and 6.15.5 of the Notice of Motion

171. In paragraphs 6.15.4 and 6.15.5 of her amended Notice of Motion Respondent alleges that Appellants have failed to take sufficient and adequate measures to

¹⁸⁶ Vijnevold Answering Affidavit 3: 370: 50

¹⁸⁷ Vijnevold Answering Affidavit 3: 370: 52

ensure schools institute legal proceedings for recovery of fees only after ascertaining that the school can provide proof of written notification, by hand or registered post, that the parent has failed to apply for a fee-exemption; and despite receiving notice in terms of section 41(5)(a) of the Act, the parent has failed to pay after a period of three months after notification.

172. Section 41(5)(a) and (b) of SASA stipulates that, despite section 41(4), a public school may by process of law enforce the payment of school fees if that 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 exemption contemplated in section 39 (and hence the Regulations), and that despite the notice the parent has failed to pay the school fees for a period of three months after the date of the notice.¹⁸⁸

173. Once again, there is no evidence of any systematic infringement of this Regulation.

DECLARATORY ORDER – Paragraph 6.16 of the Notice of Motion

174. In paragraph 6.16 of her amended Notice of Motion Respondent alleges that Appellants have failed to take sufficient and adequate measures to ensure that all governing bodies institute legal proceedings for recovery of school fees only after considering reasonable forms of payment other than cash.

¹⁸⁸ Vijnnevold Answering Affidavit 3: 370-371: 54

175. Regulation 6(14)(b) provides that a SGB may take legal action to recover school fees in terms of section 41 of SASA from a parent who does not qualify for exemption, only after considering reasonable forms of payment other than cash.¹⁸⁹

176. Once again, there is no evidence of any systematic infringement of this Regulation.

MANDATORY ORDER DIRECTING APPELLANTS TO COMPLY WITH THEIR CONSTITUTIONAL AND STATUTORY OBLIGATIONS – PARAGRAPH 7 THE AMENDED NOTICE OF MOTION¹⁹⁰

177. For the reasons given in relation to the relief sought in paragraph 6 and its subparagraphs of the amended Notice of Motion, we submit the relief sought in paragraph 7 thereof should not be granted.

COSTS¹⁹¹

178. In the High Court Appellants accepted that Respondent is entitled to the costs of the preparation of the part of her founding papers relating to the application for judicial review of First Appellant's September 2013 decision concerning her application for a partial fee exemption for 2013.

179. Appellants submit that if their appeal against paragraph 2 of the High Court's order succeeds, then their appeal against the costs order in paragraph 4 thereof should succeed on the following basis and to the following extent:

179.1 In view of the fact that in the Appellants' answering papers they conceded the Respondent's application for judicial review of First

¹⁸⁹Vijnevold Answering Affidavit 3: 371: 57

¹⁹⁰ Amended Notice of Motion 1: 7: 7

¹⁹¹ Amended Notice of Motion 1: 8: 9

Appellant's September 2013 decision concerning her application for a partial fee exemption for 2013 (which resulted in paragraph 1 of the High Court's order), the Respondent's entitlement to costs in respect of such relief should be limited to costs on an unopposed basis.

179.2 Consequently, paragraph 4 of the High Court's order should be set aside and replaced with an order in the following terms: *'The First and Fourth Respondents are to pay the Applicant's costs of preparing the part of her founding papers relating to the application for judicial review of the decision referred to in paragraph 1 of this Order.'*

180. Appellants accept that if they succeed with their appeal against the granting of paragraph 2 of the High Court's order and Respondent fails with her cross-appeal, the appropriate order as to costs would be that all parties should bear their own costs in the appeal and cross-appeal.¹⁹²

PRAYER

181. Appellants accordingly seek orders in the following terms:

181.1 The appeal is upheld.

181.2 The cross-appeal is dismissed.

181.3 Paragraph 2 of the Order of the Court *a quo* is set aside.

181.4 Paragraph 4 of the Order of the Court *a quo* is set aside and replaced with an order in the following terms: *'The First and Fourth Respondents are to pay the Applicant's costs of preparing the part of her founding papers*

¹⁹² Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC) paras 21-23

relating to the application for judicial review of the decision referred to in paragraph 1 of this Order’.

181.5 Appellants and Respondent shall bear their own costs in the appeal and the cross-appeal.

A M BREITENBACH SC

M L DAVIS

Appellants’ Counsel

Chambers
CAPE TOWN
2 May 2017

APPELLANTS' AUTHORITIES

Pepcor Retirement Fund and Another v Financial Services Board and Another 2003 (6) SA 38 (SCA) para 47

Southern Era Resources Ltd v Farndell NO [2010] 2 All SA 350 (SCA) para 11

Christie The Law of Contract in South Africa 5th Edition (2006) 255

Van Heerden, Cockrell and Keightley Boberg's Law of Persons and The Family 2ed (1999) 243 and the authorities cited in n 52

Clark (ed) Family Law Service (LexisNexis) C4 and C7

*Fish Hoek Primary School v GW 2010 2 SA 141 (SCA)

Prinsloo v Van der Linde and Another 1997 (3) SA 1012 (CC) paras 24-26

Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC) para 32

Minister of Education, Western Cape and Another v Beauvallon Secondary School and Others 2015 (2) SA 154 (SCA) para 38

S v Manamela & Another 2000 (3) SA 1 (CC) para 32

KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) para 39

Transnet Ltd v Rubenstein 2006 (1) SA 591 (SCA) para 28

Merafong City v AngloGold Ashanti 2016 (2) SA 176 (SCA) para 17

Tlouamma and Others v Mbete, Speaker of the National Assembly of the Parliament of the Republic of South Africa and Another 2016 (1) SA 534 (WCC) paras 59-66

Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC) paras 21-23