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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

WOMEN'S LEGAL CENTRE TRUST

Amicus Curiae

FILING NOTICE

TAKE NOTICE THAT the Appellants hereby files:

1. Appellants' Supplementary Heads of argument.

SIGNED AT CAPE TOWN ON THIS 27th DAY OF JUNE 2017.

STATE ATTORNEY



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To: **THE REGISTRAR**
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And to: **EQUAL EDUCATION LAW CENTRE**
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APPELLANTS' SUPPLEMENTARY HEADS OF ARGUMENT

1. These supplementary heads deal with aspects of the heads of argument for the *amicus curiae* which call for a response. In what follows we use the abbreviations as in our main heads of argument.

2. The *amicus curiae* appears to argue that, pursuant to s 40(1) of SASA and regulation 6(2) of the Regulations read with the definition of the phrase '*combined annual gross income of parents*' in regulation 1 ('the impugned provisions'), a woman who is the custodian parent of a learner at a fee-paying public school is invariably liable for the full amount of the learner's school fees if she cannot obtain particulars of the non-custodian parent's total annual gross income (see paragraphs 18, 22, 27.4, 30, 33, 39 and 40).
3. With respect, the *amicus curiae* has overlooked that:
 - 3.1 the obligation imposed by s 40(1) on every parent to pay their child's school fees is qualified by the words '*unless or to the extent that he or she has been exempted from payment in terms of this Act*';
 - 3.2 the term '*this Act*' is defined in s 1(1) of SASA in a manner which includes all regulations made in terms of SASA and the Regulations; and
 - 3.3 for the reasons given in paragraphs 23 and 32-35 of our main heads of argument, the definition of '*conditional exemption*' in regulation 1, read with regulation 6(7), empowers the governing bodies of public schools to grant a conditional partial or total exemption from payment to any parent who in his or her application for exemption gives particulars of his or her annual gross income and does not do so in relation to the other parent because the latter has refused or failed to provide such particulars to the former.

4. The *amicus curiae* appears to argue that the obligation imposed by the impugned provisions on a woman who is the custodian parent of a learner at a fee-paying public school to pay the full amount of the learner's school fees:
 - 4.1 disregards the right of learners, who are children, to a basic education in section 29(1)(a) of the Constitution and the principle that a child's best interests are of paramount importance in every matter concerning the child '*in that the child's enrolment and his right to continue schooling depends on the parents' ability to pay school fees*'; and
 - 4.2 discriminates against children coming from poor backgrounds headed by single, divorced or separated mothers in that they are at risk of '*being unable to obtain the necessary education due to their mothers' inability to pay full fees*' (see in particular paragraphs 22.3, 22.4, 27, 27.2, 27.5 and 30).
5. Apart from the problem with the premise of this argument, addressed in paragraph 3 above, with respect the *amicus curiae* has overlooked section 5(1) of SASA which provides a public school must admit learners and serve their educational requirements without unfairly discriminating in any way and section 5(3)(a) of SASA which provides no learner may be refused admission to a public school on the ground that his or her parent is unable to pay or has not paid the school fees determined by the governing body under section 39. It is implicit in these provisions that fee-paying public schools may not exclude, withhold schooling from or discriminate against learners who are enrolled on the grounds that their parents have not paid their school fees.

6. The *amicus curiae* argues that the impugned provisions are in conflict with section 15 of the Maintenance Act 99 of 1998 and take away and existing rights that mothers have as parents in terms of section 15 of the Maintenance Act or any divorce settlement agreements (paragraphs 23, 24 and 36).
7. With respect, there is no such conflict. The impugned provisions regulate the liability of parents to pay school fees to the fee-paying public schools at which their children are enrolled. The impugned provisions determine that such parents are each liable to the school for the full amount of the fees or, if the school has granted them a partial exemption, for the whole of the non-exempted portion of the fees. As explained in paragraph 50 of our main heads, if, in the case of a learner whose parents are both alive, one of them pays or is compelled to pay an amount in excess of his or her respective share (viewed from the perspective of the parents *inter se* and determined by their respective common-law duties of support, or by a maintenance order made by the maintenance court, or by a divorce order or by a consent paper incorporated into a divorce order), then such parent has a common-law right of recourse against the other parent.
8. The *amicus curiae* argues that the formula in regulation 6(2)(a) of the Regulations ('the formula') makes no provisions for single parents (paragraph 27).
9. With respect, the *amicus curiae* has overlooked the significance of the part of the definition of the expression '*combined annual gross income of parents*' in regulation 1, read with factor C in the formula, which provides that, if a learner has only one parent the expression means the total annual gross income of such parent.

10. The *amicus curiae* argues, in effect, that the formula irrationally leaves out of account any additional monetary contributions the parent pays towards the learners attendance at the school or participation in any of its programmes (paragraph 28).
11. With respect, the *amicus curiae* has overlooked variable 'A' in the formula in regulation 6(2)(a) of the Regulations. The formula expresses as a proportion of the parents combined annual gross income, the aggregate of the annual school fees and any such voluntary contributions.
12. The *amicus curiae* argues, in effect, that instead of using the combined annual gross income of parents as the denominator in the formula, it should use their nett income (paragraph 27.1).
13. With respect, this argument falters because the *amicus curiae* does not allege and has not attempted to show that the exemption percentages in the table in regulation 6(6)(a) are not rationally related to the corresponding aggregates of the school fees and additional monetary contributions expressed as percentages of the combined annual gross income of parents.

A M BREITENBACH SC

M L DAVIS

Appellants' Counsel

Chambers
CAPE TOWN
27 June 2017