

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA 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

HEADS OF ARGUMENT FOR THE *AMICUS CURIAE*

INTRODUCTION

1.

In this matter the Appellants appeal against paragraphs 2 and 4 of the orders of the Honourable Mr Justice Le Grange handed down in the Western Cape Division of the

High Court, Cape Town on 15 September 2016 under case number 18775/2013 and parts of the judgment supporting those paragraphs. Leave to appeal was granted by the Western Cape Division of the High Court on 20 October 2016.

2.

Paragraph 2 of the Order of the High Court is an Order declaring that the Applicant (MS) and her former husband are jointly and not jointly and severally liable for the school fees as contemplated in Section 40(1) of the South African School Act (SASA).

3.

Paragraph 4 of the Order of the High Court is an Order in terms of which the Appellants (Respondents in the High Court) were directed to pay the costs of the Respondent (Applicant in the High Court).

4.

The Respondent was also granted leave to cross-appeal against paragraph 3 of the Order of the Western Cape High Court in terms of which the remaining relief she sought in the amended Notice of Motion was dismissed.

BACKGROUND

5.

The Applicant in the High Court (MS) was initially married to MG. The Applicant then was divorced from MG. Upon divorce the Applicant and MG signed a consent paper which dealt with the proprietary rights including the maintenance and liability of both parents regarding school fees.

6.

In 2010 MS and MG further regulated their parental rights and obligations towards their child, ZG and consented to an addendum which was made an Order of Court. According to the 1999 consent paper, MG was liable to pay, *inter alia*, maintenance for ZG in the amount of R600.00 per month. MG was also liable to pay 50% of ZG's school fees, school uniforms, tuition costs, books, stationery, equipment and extra mural costs reasonably incurred.

7.

In 2010 the parties (MS and MG) made an addendum to their consent paper and recorded their co-parental responsibilities and rights in respect of their child ZG and how disputes would be resolved if they arose.

8.

They recorded, *inter alia*, the following:-

“The parties agree that it is in the best interest of ZG for both parents to remain involved in all aspects of ZG's life, including her schooling and extramural activities in and general welfare.”

9.

It is common cause that the exemption policy demands that the combined annual gross income of both parents of a child in a fee paying school be furnished. Failure to do so results in the application being regarded as incomplete and thus declined. The school further demands full payment of fees from the custodian parent. The School further places the obligation on the custodian parent to recover from the non-custodian parent a portion of the fees. The School regards this as an issue between parents and refuses to get involved.

10.

It appears that the school adopted the attitude that it could not consider the Respondent's application for exemption on the financial information of only one parent because such consideration would be outside the law. It is common cause that failure to pay school fees leads to legal action being taken which may lead to execution.

CONDONATION

11.

In terms of Rule 16(5) of the Supreme Court of Appeal Rules, an application to be admitted as an *amicus curiae* must be made within one month after the record has been lodged with the Registrar.

12.

In this matter the record was lodged with the Registrar on 6 March 2017. However, the *amicus curiae* became aware that the record had been lodged only on 2 May 2017 when it received the Appellant's practice note and other documents.

13.

The *amicus curiae* then requested the Respondent's attorney to provide it with the record and the record was furnished only on 11 May 2017. On the same date the *amicus curiae* sent letters to all the parties requesting their consent to be admitted as an *amicus curiae*.

14.

On 16 May 2017 the *amicus curiae* received responses from the Appellants' attorneys and also from the Respondent's attorneys. All the parties have consented to the Women's Legal Centre being admitted as *amicus curiae*. Neither the parties nor the Court will be prejudiced by the delay of the *amicus curiae* in filing its application. It is in the interest of justice that the delay be condoned.

15.

It is accordingly submitted that the failure by the *amicus curiae* to file its application on or before 5 April 2017 to be admitted as such should be condoned.

See : Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others 2014 (5) SA 138 (CC) @ paragraph 42

16.

The issues that are of interest to the Women's Legal Centre are the following:-

- 16.1 Whether or not divorced or separated biological parents are jointly rather than jointly and severally liable for the payment of school fees;
- 16.2 Whether or not Section 40(1) of the South African Schools Act is unconstitutional and invalid;
- 16.3 Whether or not Regulation 6(2) read with the definition of "combined annual gross income" in Regulation 1 of the Regulations relating to the exemption of parents from payment of school fees is unconstitutional and invalid.

THE LEGAL POSITION

17.

Section 40(1) of the South African Schools Act provides that 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.

18.

It is submitted that Section 40(1) of the South African Schools Act is unconstitutional because in the event of the non-custodian parent who is usually the father failing to co-operate and to pay his portion of the fees, the parent who has custody of the child

will be required to pay 100% of fees since this section seeks to hold her jointly and severally liable with the other parent.

19.

This has the effect of discriminating against the parent who has the custody of the child and this is usually the mother of the child. This discrimination flies in the face of Section 9(3) of the Constitution which outlaws discrimination on a number of grounds including gender. It also violates Article 2(f) of the Convention on the Elimination of All Forms of Discrimination Against Women which provides that State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

20.

In **F v F 2006 (3) SA 42 (SCA)** the Court made the following observations at paragraph 12:-

“It is also important that Courts be acutely sensitive to the possibility that the differential treatment of custodian parents and their non-custodian counterparts – who have no reciprocal legal obligation to maintain contact with the child and may relocate at will – may, and often does, indirectly constitute unfair gender discrimination. Despite the constitutional commitment to equality, the division of parenting roles in South Africa remains largely

gender-based. It is still predominantly women who care for children and that reality appears to be reflected in many custody arrangements upon divorce”.

21.

In **Harken v Lane N.O and Others 1997 (11) BCLR 1489 (CC)** the Constitutional Court laid down the stages of enquiry to determine whether a legislative provision violates the equality clause in the Constitution. At paragraph 50(a) the Court laid down the following test:-

“Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is violation of Section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination”.

22.

It is submitted that Section 40(1) of the South African Schools Act discriminates against women who are not living with the fathers of their children in that in the event of the custodian parent, who is usually a woman, not being able to find the financial information of the other spouse, then she will be held liable for 100% of the fees, since the section seeks to hold her jointly and severally liable with the non-custodian parent. The Section is also unconstitutional for the following reasons:-

22.1 It reinstates indirectly the “joint estate” of the divorced woman and her former husband which was dissolved by a decree of divorce;

- 22.2 It is unrealistic as it envisions a perfect family unit;
- 22.3 It disregards the interests and the rights of the child to education;
- 22.4 It infringes the paramountcy principle in that the child's enrolment and his right to continue schooling depends on the parents' ability to pay school fees;
- 22.5 It is onerous on women in that where the custodian parent has paid fees, the government places the obligation on the custodian parent to exercise a right of recourse against the non-custodian parent;

See: Record, page 504, paragraph 49, lines 15 to 20

- 22.6 Having referred to all the difficulties that Section 40(1) and the Regulations present, we submit that they are inflexible, unworkable and are thus unconstitutional and invalid. The impugned section and the regulation are intended to be the only considerations to the exclusion of all other considerations.

See: Record page 507, paragraph 56, lines 1 to 10

23.

Section 40(1) and the impugned regulation conflict with Section 15 of the Maintenance Act, 99 of 1998, in that the Maintenance Act when dealing with the duty

of support of parents makes provision for the apportionment of the obligations of parents to support their children according to their respective means.

Section 15 (2) and 15 (3) (a) (i) and (ii) of Act 99 of 1998

24.

Section 40 (1) as it stands is broad in that it extends the obligations of a custodian parent to payment of full fees and does not make the important distinction that the Maintenance Act makes in section 15 thereof. It is trite that if the law is overbroad, it is unconstitutional.

See: Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others 1996 (3) SA 617 (CC)

25.

In its implementation of Section 40(1), the State abdicates its obligation to recover fees from the non-custodian parent by unlawfully placing that obligation on the custodian parent who in many instances is the mother. That, we submit, perpetuates gender abuse and discrimination.

See : Bannatyne v Bannatyne (CGE as amicus curiae) 2003 (2) SA 363 CC @ page 377 para 29 E-F

26.

It is accordingly submitted that in considering the constitutionality of Section 40(1) of the South African Schools Act, the Court should take into account the interests of children who may be adversely affected by its provisions.

27.

Regulation 6 (2)

The Regulation including the formula deprives the child of the full benefit of the rights enshrined in Section 28(1) (b), 28(2) and 29(1)(a) of the Constitution in that :

- 27.1. in the assessment of whether or not to grant fee exemption, only a combined gross annual income is considered to the exclusion of the parents' net income, reasonable and necessary expenses, debts or other liabilities, medical expenses and all other necessary considerations that have to be taken into account in the running of a family home and maintenance of a child.
- 27.2 it places the obligation on women to pay school fees above all other rights, including the paramountcy principle applicable to the interests of children.
- 27.3 the concept of a combined gross annual income instils the stereotype that a child must have both parents in order for him/her and the single, divorced, separated or widowed mother to benefit from the exemption policy;
- 27.4 The absence of combined gross annual income is used to prevent the custodian parent from deriving the benefits of the exemption policy and by so doing the State acts irrationally and in a manner that offends the dignity of single, divorced or separated mothers and is thus unconstitutional.

Volks NO v Robinson and Others 2005 (5) BCLR 446 (CC) @ 226

27.5 The inclusion of combined annual gross income is discriminatory as it exposes the children coming from poor backgrounds, or homes that are headed by single, divorced or separated mothers to the risk of them being unable to obtain the necessary education due to their mothers' inability to pay full fees.

Volks NO Supra

27.6 The Regulation imposes indirectly an obligation that children must have both parents and thus disregarding any possibility of the non-existence of a combined annual gross income.

27.7 Regulation 1 defines "combined annual gross income of parents" as 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. However, the formula in Regulation 6 (2) makes no provision for a single parent.

See : Regulation 1

28.

Regulation 6(2)(c) provides that where a parent has more than one child at the same school and the school fees are not the same for all of them, the highest school fees must be used in the formula. No mention is made of the additional monetary contribution that a parent pays towards the second learner's attendance or

participation in any programme at the school. This suggests that a relevant consideration is left out in circumstances where such contribution should be taken into account. That, in our view, renders the regulation irrational.

29.

Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. This section was included in the Constitution pursuant to the provisions of Article 3 of the Convention on the Rights of Child which provides as follows:-

- 29.1 *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
- 29.2 *States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
- 29.3 *State Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."*

30.

It is submitted that if the exemption from paying fees of the custodial parent is going to be made difficult and almost impossible by the fact that she cannot obtain the

financial information of the other parent, this may result in the learner being unable to continue with his or her schooling and this will constitute a violation of Section 28(2) of the Constitution.

31.

In ***M v The State (Centre for Child Law as amicus curiae) [2007] ZACC 18*** the Constitutional Court held at paragraph 25 that the word “paramount” is emphatic and that it would cover virtually all the laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them.

32.

It is submitted that Regulation 6(2) of the Regulations relating to the exemption of parents from payment of fees in public schools is also unconstitutional because it requires the School Governing Body, in determining whether the custodian parent qualifies for exemption from payment of fees, to consider the combined annual gross income of parents.

33.

It may be very difficult and in some cases impossible for the custodian parent, who is usually the mother of the child, to obtain the information about the finances of the father of the child from whom she has been separated or divorced, or whom she never married at all.

34.

The Constitutional Court has held that where it is possible to separate the good from the bad in a Statute and the good is not dependent on the bad, then that part of Statute which is good must be given effect to, provided that what remains carries out the main object of the Statute.

See : *Minister of Health and Another v New Clicks South Africa (Pty) Ltd. and Others* 2006 (2) SA 311 (CC) at paragraph 15

35.

35.1 It is submitted that the approach adopted by the Constitutional Court in ***State v Zuma and 2 Others* 1995 (2) SA 642 (CC)** was imported from the Canadian case in ***R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 395 - 396** where the Court preferred an interpretation that was generous and purposive and aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection rather than a legalistic one.

35.2 In *casu* the interpretation afforded by the High Court to the provisions of Section 40(1) is, with respect, a legalistic one and this offends the principle that all legislation must be interpreted through the prism of the Bill of Rights.

See : *Investigative Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd and Others* 2001 (1) SA 545 (CC) @ 558 (E)

35.3 The fact that Section 40(1) is capable of several interpretations is indicative of the fact that it is ambiguous. The State that implements the provisions of Section 40(1) interprets the section in a manner that is oppressive, onerous

and discriminatory on women who are single, divorced or separated. This offends the principle that human dignity is a value that informs the interpretation of many if not all rights.

See : *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 @ para 35

36.

The State in its application of Section 40 (1) takes away existing rights that mothers have as parents in terms of the Maintenance Act 99 of 1998 or any divorce settlement agreements. This offends the principle that legislation is not to be interpreted to extinguish existing rights and obligations.

See: *Veldman v Director of Public Prosecutions, (Witwatersrand Local Division)* 2007 (3) SA 210 (CC) @ paragraphs 26 & 27

37.

It is submitted that even if the Court does not invalidate the whole of Regulation 6(2), it can still sever certain words from the Regulation. It is submitted that the words “*combined annual gross income of parents*” must be severed from the formula and be replaced by the words “annual net income of the applicant”.

THE PROPOSED REMEDY

38.

In ***Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA)** the Supreme Court of Appeal held that the word “parent” in Section 40(1) of the South African Schools Act

includes the non-custodian father of a child born out of wedlock and that such “parent” was liable for the child’s school fees.

39.

It is submitted that while the custodian parent is liable to pay her portion of school fees the exemption scheme must not prevent her from applying for and being granted a fee exemption on the basis that the non-custodian parent’s financial information has not been furnished. There is no legal basis to place the burden for the furnishing of the financial information of the non- custodial parent on the custodial one. Where no such legal obligation exists, to compel the custodial parent to do so is, with respect, irrational.

40.

It is for this reason that the Women’s Legal Centre supports a relief in terms of which Section 40(1) of the South African Schools Act as well as Regulation 6(2) of the Regulations relating to the exemption from paying school fees would be declared unconstitutional and invalid to the extent that they do not provide for a procedure in terms of which custodian parents would be able to apply for and to be granted exemption from payment of fees without having to furnish the financial information of the non-custodian parent. Section 40 (1) together with the exemption policy are capable of different interpretations and there is no uniformity in the manner in which they are applied by the various governing bodies.

See: The memorandum from the Director: Institutional Management and Governance Planning dated 24 May 2013 at page 467 of the record.

See also: The Preamble to SASA

41.

If the Honourable Court is not inclined to declare the said provisions unconstitutional and invalid, then it is submitted that the remedy would be to direct the Minister of Basic Education to amend Section 40 (1) and Regulation 6 (2) to achieve the desired outcome.

42.

It is further submitted that pending the aforesaid amendment, the Court should declare that the custodian parent is entitled to apply for exemption from paying her portion of the fees and to be granted such exemption on the basis of her income alone, without her having to furnish the school with the financial information of the non-custodian parent which she may be unable to obtain.

43.

It is submitted that the infringement of the rights of the custodial mothers that is caused by section 40 (1) and regulation 6 (2) is not justified in terms of section 36 (1) of the Constitution because they:

- 43.1 are contrary to the Maintenance Act that defines the obligations of parents towards maintenance of their children;
- 43.2 perpetuate the stereotype that children must come from a perfect family unit;

- 43.3 place an onerous and unfair burden on the custodial mother who must obtain information from an unco-operative ex – husband or ex- partner.
- 43.4 undermine the paramountcy principle;
- 43.5 differentiate between children who are from disadvantaged backgrounds or whose parents are single, divorced or separated on the one hand and those who live with both parents on the other and thus offend the right to equality;
- 43.6 violate the women’s right to dignity and self – worth;
- 43.7 are unreasonable and unjustifiable; and
- 43.8 do not serve a legitimate purpose.

44.

In addition to the aforesaid, the impugned provisions violate the following International Instruments:

- 44.1 Article 3 of the African Charter on the Rights of Women which guarantees that every woman shall have a right to dignity inherent in a human being and to the recognition and protection of her human and legal rights;
- 44.2 Article 4 of the aforesaid Charter which provides that every woman shall be entitled to respect for her life and the integrity of her person;

- 44.3 Article 2 of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa which mandates all State parties to combat all forms of discrimination against women through appropriate legislative, institutional and other means;
- 44.4 Article 8 of the aforesaid Protocol which guarantees that women are equal before the law and are entitled to equal benefit of the law;
- 44.5 The SADC Protocol on Gender and Development which requires member states to endeavour by 2015 to enshrine gender equality and equity in their Constitutions and ensure that these rights are not compromised by any provisions, laws or practices.

T V NORMAN SC

with

C M NQALA

Chambers

DURBAN

31 May 2017