



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM : The Registrar, Supreme Court of Appeal

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Please note that the media summary is for the benefit of the media and does not form part of the judgment.

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

MEDIA STATEMENT

The Supreme Court of Appeal today upheld an appeal, and to a limited extent a cross appeal, against an order of the Western Cape Division of the High Court, Cape Town.

The principal issue was whether liability of biological parents for school fees at public fee paying schools, as provided for in s 40(1) of the South African Schools Act 84 of 1996 (the Act), is joint liability, or whether it is joint and several liability, and if the latter, whether the consequences are such as to impact disparately, negatively and ultimately unlawfully on single parents who are separated from their partners or divorced from their spouses.

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

held that liability was joint but not joint and several. It nonetheless held that the mother in the present case had to provide the financial information of both parents. Further, the court below declined to grant a host of other declaratory orders sought by the appellant.

In coming to its conclusion, contrary to that of the court below, that liability was joint and several, the SCA concluded that on a proper interpretation of s 40(1) and the regulations thereunder the default position was that parents are jointly and severally liable but that the subsection does provide a safety valve in that the liability for parents such as the mother in the present case is eased by the following proviso: 'unless or to the extent that he or she has been exempted from payment in terms of this Act.'

The SCA, in interpreting s 40(1) of the Act had regard to the decision of the Constitutional Court in *Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & another* 2010 (2) SA 415 (CC), which considered the terrible legacy of apartheid and its impact on public and private resources and where the following was stated at paras 45 and 47:

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

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

The SCA stated the following in relation to the order it envisaged making:

'The result is one that will ensure that parents in the position of Ms S, especially women, are not treated prejudicially and are able in their own right to claim exemptions based on their own financial circumstances. Moreover, they are not burdened with the responsibility of obtaining financial information from the other parent. It also ensures that recalcitrant parents do not escape their parental obligations.

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

The SCA, although upholding the government's appeal against the order of joint rather than joint and several liability, gave the mother real relief by way of the order set out below, which it must be stated was arrived at with the cooperation of and useful contribution by the appellants:

1. ' The decision of the First Respondent, in the appeal in terms of s 40(2) of the South African Schools Act 84 of 1996 (the Act) made on the 19 September 2013 dismissing the Applicant's appeal against the Second Respondent's decision to refuse the Applicant a partial exemption from the payment of the school fees as a result of her failure to institute the appeal within the prescribed period of 30 days after receipt of the notification of the Second Respondent's decision, is reviewed and set aside.
2. ...
3. It is declared that in terms of s 40(1) of the Act the Applicant and her former husband are jointly and severally liable for their child's school fees.
4. It is declared that the Applicant was entitled to have her applications for a fee-exemption and the related appeals dealt with in the manner set out hereafter with reference to the Regulations relating to the Exemption of Parents from Payment of School Fees in Public Schools (Government Notice R.1052 in Government Gazette 29311 of 18 October 2006) as amended ('the Regulations). All public schools, governing bodies and education Departments must comply therewith in relation to the Applicant and all other parents who are in the same or similar situation as the Applicant:
 - (a) The governing body of a public school shall grant a conditional exemption from payment of school fees, referred to in Regulation 1 of the Regulations, to a parent who:
 - (i) in his or her application for exemption:
 - (aa) gives particulars for his or her total annual gross income; and

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

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

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

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

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

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

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

5. It is declared that the granting of such a conditional exemption shall not preclude the public school from taking legal steps to enforce payment, by the other parent of the learner concerned, of the school fees or the balance of the school fees, as the case may be, in terms of section 41(1) of the Act.
6. The Respondents are liable jointly and severally to pay the Applicant's costs, including the costs occasioned by the employment of two counsel'

The SCA, in upholding the mother's cross appeal to the limited extent set out in the order that appears below said the following:

'The next question that calls for determination is whether Ms S is entitled to an order declaring that she was subjected to repeated violations of her constitutional and statutory rights during the processing of her applications for a fee exemption during the years 2011, 2012 and 2013. It will be recalled that she complained about how she had been repeatedly required by the school to obtain information concerning Mr G's finances and how there were repeated references to herself and Mr G being part of a family unit despite her objections thereto. She communicated how degrading and humiliating that experience was. If it had ended there one could perhaps have argued that the attitude of the school and the governing body was driven by a mistaken view of the Act and the Regulations. However she was pressurised to meet with the school's attorneys during which meeting she was accused of conspiring with Mr G in an effort to avoid their joint obligation to pay school fees. Furthermore, when the HOD and the Department appeared to be sympathetic, ostensibly after taking legal advice, the school's attitude hardened and they stated that they would forcefully adopt the contrary position. They did not seek to enter into a dialogue concerning the legality of their position. I appreciate the difficulties faced by schools and their governing bodies who face the tremendously difficult task, especially in trying economic times of maintaining their financial health and ensuring that school programmes are adequately funded in the best interests of their learners. However, we are compelled by constitutional imperatives to employ our best efforts towards the attainment of a just and egalitarian society where every individual has worth and opportunity and the right to be treated with dignity. The conduct of the school and the governing body over the years of their interaction with Ms S was such they showed scant respect for her position as a custodian mother. Ms S is articulate and assertive. Yet, she struggled to engage the school and the governing body constructively. What, one might rightly ask, were the chances of a less assertive, more vulnerable single mother being able to vindicate her constitutional and statutory rights. To drive this point home the declaratory order sought should be granted in relation to the school and the governing body.'

The SCA entered as paragraph 2 of the substituted order the following:

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