REPUBLIC OF SOUTH AFRICA

SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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

Media Statement

Today the Supreme Court of Appeal (SCA) upheld an appeal by the Fish Hoek Primary School against a finding of the Cape High Court that only a custodian parent was liable to it for payment of school fees. The matter commenced as a stated case in the Bellville Magistrates' Court. In it, the school sued the respondent for payment of the sum of R1 610, being outstanding school fees in respect of one of its minor learners, the respondent's natural child. The respondent, who took no part in the appeal but rather chose to abide the decision of SCA, denied indebtedness to the school. In amplification of that denial he asserted that whilst he was the biological father of the learner, he was not liable for payment of the school fees but that the custodian parent was.

For its entitlement to payment from the respondent, the school relied upon s 40(1) of the South African Schools Act 84 of 1996 ('the Act'), which provides: 'A *parent* is liable to pay the *school* fees determined in terms of section 39 ...' The only question for determination – a legal one – was thus whether the respondent is indeed a parent in terms s 40(1) of the Act. The trial court held that he was not and accordingly dismissed the claim. An appeal to the Cape High Court proved unsuccessful.

A parent is defined in s 1 of the Act as:
'(*a*) the *parent* or guardian of a *learner*;
(*b*) the person legally entitled to custody of a *learner*; or
(*c*) the person who undertakes to fulfil the obligations of a person referred to in paragraphs *(a)* and (*b*) towards the *learner's* education at *school*;'

The high court held that only a custodian parent is a parent as envisaged in s 1(*a*) and accordingly read in the words 'custodian by operation of law'. It thus concluded that 'parent' in s 40(1) means 'the [custodian by operation of law] parent or guardian'. In arriving at that conclusion the high court was guided by an earlier decision of the Cape High Court. The court there held that the word 'parent' in s 102A(1) of the Education Affairs Act (House of Assembly), one of the predecessors to the present Act, read together with the definition of parent in s 1, 'must be interpreted so as to encompass only a parent who has custody of the pupil in question …'. The SCA held that the word 'parent' has been given a more expansive meaning by the Legislature in the later statute as compared to its earlier counterpart. It follows that the reliance by the high court on the earlier Cape judgment was misplaced as the Legislature intended the word 'parent' in the present Act to bear a different meaning to the meaning ascribed to it in the Education Affairs Act.

The SCA reasoned that the legislature has chosen a meaning of considerable breadth. On the literal and ordinary meaning of s 1(*a*), a natural father such as the respondent is a parent as defined. On the plain meaning of the word, he self-evidently is the child's 'parent'. There was thus nothing in the definition to suggest that a non-custodian or non-guardian parent is excluded from the meaning of the word. Each of sub-definitions *(a)*, *(b)* and *(c)* in section 1 ought, according to the SCA, to bear different meanings. If not, one or more of them would be rendered superfluous. It follows that *(b)* and *(c)* as defined categories ought to add something to *(a)*. By reading in the words 'custodian by operation of law' the high court rendered the reference to parent in s 1(*a*) superfluous and redundant. That, the SCA held, the high court ought not to have done.

Furthermore, the SCA observed that historically it is almost always mothers who become custodial parents and have to care for children on the breakdown of their marriage or other significant relationships. That places an additional financial burden on them and the sad reality is that they then become overburdened in terms of responsibilities and under-resourced in terms of means. Despite our constitutional promise of equality, the division of parenting roles continues to remain largely gender-based. It is thus important to heed the caution that courts should be acutely sensitive to the possibility that the differential treatment of custodian parents and their non-custodian counterparts often can and does constitute unfair gender discrimination. After all, so the SCA stated, the achievement of gender equality is a founding value of our Constitution. To interpret the section in such a way as to exclude the non-custodian parent from its operation, as the high court has done, serves to further thwart the realisation of that goal.

Moreover, according to the SCA, an interpretation that burdens both parents with responsibility for school fees is consistent with the injunction in s 28(2) of the Constitution that 'a child's best interests are of paramount importance in every matter concerning the child'. It, unquestionably is in the best interests of a child that a non-custodian parent, who is unwilling, yet has the means to pay his child's school fees, should be made to do so, if necessary, by the injunction of an order of a competent court.

The SCA accordingly upheld the appeal. The order of the Bellville Magistrates' Court was set aside and in its stead was substituted an order granting judgment in favour of the school for the sum of R 1610 together with interest plus costs.

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