REPORTABLE

IN THE SUPREME COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO.: A 154/08

In the matter between -

FISH HOEK PRIMARY SCHOOL **Appellant**

and

GREGORY WELCOME **Respondent**

JUDGMENT DELIVERED THIS 17th DAY OF SEPTEMBER, 2008

THRING, J.:-

On the 31st March, 2006 the appellant issued summons against the respondent in a magistrate's Court claiming the sum of R1,610.00 "being in respect of arrear school and related fees, for the period July, 2003 to date", with interest and costs. The respondent entered appearance to defend the action and in due course delivered a plea, the contents of which need not be set out here. The matter went to trial on a set

of agreed facts, which were said by the magistrate in his judgment to be as follows:

> "The material facts relevant to this case which is (sic) common cause are the following:
> (1) (sic) Defendant is the natural father and parent of the minor child to whom the school fees which underline (sic: underlie?) the action relate. The minor child was born out of wedlock. The defendant is not the custodian parent or the guardian of the minor child. The defendant did not enter into any agreement with the plaintiff for the payment of school fees in respect of the minor child. The quantum of the school fees in issue (is) an amount of R1610.00."

The single issue before the Court was formulated by the magistrate in the following terms:

> "The only legal question is whether the defendant is liable to the plaintiff for the payment of school fees in respect of the minor child."

No evidence was led. After hearing argument from the attorneys acting for the applicant and the respondent, respectively, the magistrate gave judgment. He dismissed the appellant's action, with costs. That was on the 14th June, 2007. The appellant appeals to this Court against the magistrate's decision.

It appears to be common cause that the appellant is a so-called “public school” as defined in section 1 of the South African Schools Act, No. 84 of 1996 (to which I shall refer herein as “the Schools Act”). I say this because, in its summons, the appellant describes itself as -

> “..... a school and a juristic person in terms of Section 15 of the South African Schools Act, 84 of 1996 .....”

Section 15 of the Schools Act reads:

> “Every public school is a juristic person, with legal capacity to perform its functions in terms of this Act.”

In his plea the respondent “admits the citation of the parties”. In section 1 of the Schools Act “public school” is defined as “a school contemplated in Chapter 3”. Chapter 3 of the Schools Act provides, in turn, in section 12(1) that:

> “The Member of the Executive Council must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature.”

“Member of the Executive Council” means, in terms of section 1 of the Schools Act:

> “.....(T)he Member of the Executive Council of a province who is responsible for education in that province.”

As is apparent from the agreed facts, the appellant did not base its claim on any contractual nexus between itself and the respondent. It relied on the provisions of section 40(1) of the Schools Act, which reads:

> "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."

Section 39 of the Schools Act stipulates that "school fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents" attending a general meeting of parents in terms of section 38(2). This aspect is not in issue in this case. Section 41(1) goes on to provide that "a public school may by process of law enforce the payment of school fees by parents who are liable to pay in terms of section 40".

It is the interpretation to be attached to the word "parent", for the purposes of section 40(1) of the Schools Act, which lies at the heart of this matter. The term is defined in section 1 of the Act as follows:

> "'parent' means -
>
> (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."

Dr. van Rensburg, who appeared for the appellant both at the trial and before us on appeal, argued, if I understood him correctly, first, that the appellant's claim against the respondent is governed by the Schools Act; secondly, that part (a) of the definition of "parent" in the Schools Act must be construed so as to include a non-custodian parent such as the respondent; and, thirdly, if it is so construed, that the respondent is legally liable to pay his illegitimate child's school fees to the appellant. This was also the argument which he unsuccessfully advanced before the magistrate at the trial.

He also has another argument, which he propounded for the first time before us on appeal. It is based on section 21 of the Children's Act, No. 38 of 2005, to which I shall refer herein "the Children's Act". Section 21(1) of this Act reads:

"The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of

> section 20, acquires full parental responsibilities and rights in respect of the child –
>
> (a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or
>
> (b) if he, regardless of whether he has lived or is living with the mother –
>
> (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;
>
> (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and
>
> (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period."

(Section 20 governs the responsibilities and rights of a father who is or was married to the mother of the child concerned, and it is not applicable here). Section 21(4) goes on to provide that:

> "This section applies regardless of whether the child was born before or after the commencement of this Act."

In terms of section 315 of the Children's Act, it takes effect on a date fixed by the President by proclamation in the Gazette. Section 21 of the Act came into operation in this way only on the 1st July, 2007, some two weeks after the magistrate had given judgment. Dr. van Rensburg nevertheless

contends that the Children's Act applies to the present matter, alternatively, that it has some bearing on it, inasmuch as the issues between the parties are still "alive" today, and, he argues, section 21(1) of the Children's Act has brought about certain fundamental changes to the common law and to the Schools Act as regards non-custodian, unmarried fathers of minor children, including their liability to schools for school fees.

There was no appearance before us for the respondent, so that we have had the benefit of hearing only the submissions made on behalf of the appellant. I shall deal with them more or less in the sequence in which I have attempted to summarise them above.

I shall assume in the appellant's favour, without deciding, that Dr. van Rensburg is correct in contending that the appellant's claim against the respondent is governed by the provisions of the Schools Act, although this is not altogether clear from the pleadings or from the agreed facts. This is the first leg of his argument based on the Schools Act.

The next step in his argument is that part (a) of the definition of "parent" in section 1 of the Schools Act must be interpreted so as to include

a non-custodian parent such as the respondent, and that the magistrate erred in construing the definition as excluding a non-custodian parent. At first blush this contention might appear to have some merit: but in my judgment the Schools Act must be viewed against the background of other, earlier legislation and the manner in which that legislation has been interpreted by this Court.

On the 1st April, 1990 the Education Affairs Act (House of Assembly), No. 70 of 1988 came into operation. I shall refer to it herein as the Education Affairs Act. Large portions of this Act are still in force today. In September, 2000 a matter not dissimilar to the present case came before this Court on appeal from a magistrate's Court. The governing body of a school had sued the divorced non-custodian parent of one of its pupils for school fees. The school was a so-called "state-aided" school. It based its claim on the provisions of section 102 A(1) of the Education Affairs Act, which reads:

> "The parent of a pupil admitted to a state-aided school shall pay such school fees as the governing body of that school may levy."

Had the school been a so-called "public school" as defined in section 1 of that Act, it could, mutatis mutandis, have relied on section 102(1) of the Act, which reads:

> "The parent of a pupil admitted to a public school or centre, shall pay such tuition fees as the Minister, with the concurrence of the Minister of the Budget, may determine."

Dr. van Rensburg conceded that, in the circumstances, the liability of the parent there concerned would have been the same, had the school been a public school and not a state-aided school.

The definition of "parent" in section 1 of the Education Affairs Act is:

> "'parent' in relation to a child, means the parent of such child or the person in whose custody the child has been lawfully placed."

The decision in that case turned on the construction to be placed on this definition. On behalf of the school it was contended, as it is in the case before us, that the term "parent" should be construed as including a non-custodian parent. As in the present case, the magistrate found against the school and dismissed its action. The school appealed. The appeal is

reported as Governing Body, Gene Louw Primary School v. Roodtman, 2004(1) SA 45 (C). It also went against the school. Van Heerden, J, as she then was, with Griesel, J. concurring, held at 57 B-C that:

> "I am of the view that the word 'parent' in s 102A(1) of the 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 by operation of law, as also the parent or other person in whose custody the pupil has been placed by order of a competent court."

The magistrate in the present case was guided by the decision in the Roodtman case, supra.

The Roodtman decision has not, to my knowledge, been overruled or departed from by any Court. If I understood him correctly, Dr. van Rensburg did not mount a serious attack on the correctness of the decision: he confined himself rather to submitting, first, that the term "parent" in the Schools Act must be given a different meaning from that ascribed to it by the Court in the Education Affairs Act and, secondly, that the Roodtman case would have to be decided differently today because of the changes brought about to the law by the Children's Act of 2005.

In the Roodtman case, supra, van Heerden, J. embarked on an exhaustive examination of the relevant provisions of the common law and of numerous sections of the Education Affairs Act, as well as of other relevant reported decisions and authorities. At 51 E she said:

> "The principle of statutory interpretation which requires a statute to be interpreted in conformity with the common law rather than against it has been described as 'the most fundamental of all the presumptions [of statutory interpretation] since many of the others are merely axiomatic extrapolations of it'."

At 54 D-F the learned Judge continued:

> "The above-mentioned presumption that a statutory provision does not alter the existing law more than is necessary applies not only to the common law, but also to the alteration of existing statute law (see Devenish (op cit at 71-2)). The common law and statutory framework set out above must therefore form the background to the interpretation of s. 102A(1) of the Act. Moreover, it should also be remembered that, where the Legislature uses the same word in different sections of the same statute, it may reasonably be supposed that it would intend this word to be understood in the same sense throughout the statute, where no clear indication to the contrary is given."

At 55 E-F she said:

> "If, therefore, the word 'parent' in these sections were to be interpreted to include a non-custodian parent, this would amount to a radical departure from the common-law principles set out above. It certainly cannot be said that either the language or the import of these provisions support the conclusion that the intention of the Legislature was to alter the common law in this manner. This being so, the word 'parent', as used in the above-mentioned articles, must be interpreted to mean the parent or other person who has custody of a child, whether by operation of law or by order of a competent court."

At 56 D-F she said:

> "As submitted by counsel for the appellant, there would appear to be no indication that the word 'parent' as utilised in s 102A(1) of the Act should be interpreted to have a different meaning to the same word when used in the other sections of the Act discussed above. Indeed, if one were to interpret the word 'parent' in s 102A(1) to include the divorced non-custodian parent, this would mean that the school would be able to hold such non-custodian parent liable for the payment of school fees, not only in the absence of a contractual relationship between the school and such parent, but also without having to satisfy the requirements of a claim based on some other ground such as unjust enrichment or negotiorum gestio. Such an interpretation would also amount to a fairly radical departure from the common-law principles set out above."

With all of these dicta I find myself in respectful agreement, for the reasons expounded by the learned Judge in her judgment.

Is the word “parent” to be given a different meaning where it is used in the Schools Act from that which it bears in the Education Affairs Act, as contended by the appellant?

In the first place, such an interpretation would lead, it seems to me, to an anomalous result, for the liability or otherwise of the respondent to the appellant on the agreed facts of this case would depend solely on whether the appellant had sued him on the applicable provisions of the Education Affairs Act, on the one hand, or on those of the Schools Act, on the other: under the former legislation, as interpreted in the Roodtman case, supra, the respondent would not be liable; whilst, under the Schools Act, construed as the appellant would have us construe it, he would. Dr. van Rensburg conceded, unless I misunderstood him, that the appellant could have founded its action against the respondent upon either one of these two pieces of legislation: for the Education Affairs Act also applies to a “public school”, meaning, in terms of the definition in section 1 thereof, inter alia, a “primary school .... established ... under section 12”; the only real difference,

on the face of the legislation, between public schools for the purposes of the Schools Act, on the one hand, and of the Education Affairs Act, on the other, being the identity of the person or body responsible for establishing them, in the former case being, in effect, the province and, in the latter, the Minister as defined in that Act. That the legislature could have intended to bring about so anomalous a result, viz. that precisely the same set of facts could give rise to liability under one statutory provision, and non-liability under the other, appears to me to be highly unlikely.

Dr. van Rensburg argued at one point that the effect of the Schools Act was in some way to bring about an amendment of the concept of "parent" as it is used in the Education Affairs Act. There is no express provision in the Schools Act to that effect. Moreover, when this Court handed down its judgment in the Roodtman case, supra, on the 29th September, 2000 the Schools Act had already been in force for nearly four years: yet the Court did not find that the Schools Act impinged in any way upon the issue before it, viz. the interpretation to be placed on the word "parent" for the purposes of the Education Affairs Act. Had the Schools Act had anything like the effect which is now suggested on behalf of the appellant, one would have expected the eminent senior counsel who

appeared for the appellant in that case to have made the point, and the Court to have dealt with it. But no mention is made of the Schools Act in the Roodtman case. The implication is that it was not considered in that case that the Schools Act had any bearing on the construction to be placed on the relevant provisions of the Education Affairs Act.

Secondly, it must be borne in mind in interpreting the relevant provisions of the Schools Act for the purposes of the present case that none of the sections of the Education Affairs Act which influenced this Court in construing the latter in 2000 have since been repealed or amended: they remain unchanged on the statute book today. They are sections 1 (the definition of "parent"), 42, 43, 44, 45, 47, 52, 55, 56, 57(2), 62(4), 102A, 104 and 106. It is an established principle of construction that, in interpreting a later statutory provision which is in pari materia it must be presumed, unless the contrary appears clearly, that the legislature did not intend to repeal or amend prior legislation. As Steyn, "Uitleg van Wette", 5th Ed., says at 99-100:

> "Soos blyk uit Kent N.O. v. S.A. Railways and Harbours, 1946 AD 405 moet ons ook wat ons wettereg betref by die uitleg van 'n latere wet begin met die veronderstelling dat dit nie die wetgewer se bedoeling is om die vroeëre wette te herroep of te wysig nie. Daarby moet in gedagte gehou word dat by

> ontstentenis aan ‘n uitdruklike bepaling, ‘n vorige wet alleen by noodsaaklike implikasie gewysig kan word. ‘n Moontlike implikasie is nie voldoende nie.”

So, in Kent, N.O. v. S.A. Railways and Another, 1946 AD 398 Watermeyer, C.J. said at 405:

> “In considering that question, it is necessary to bear in mind a well-known principle of statutory construction, viz., that Statutes must be read together and the later one must not be so construed as to repeal the provisions of an earlier one, or to take away rights conferred by an earlier one unless the later Statute expressly alters the provisions of the earlier one in that respect or such alteration is a necessary inference from the terms of the later Statute. The inference must be a necessary one and not merely a possible one. In Maxwell’s Interpretation of Statutes, the principle is stated as follows (4th ed., p. 233):-
>
> > ‘The language of every enactment must be so construed as far as possible as to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a Statute by construction when the words may have their proper operation without it. But it is impossible to will contradictions; and if the provisions of a later Act are so inconsistent with, or repugnant to those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later.”

Also apposite, in my respectful view, is the following statement made by Maxwell on the Interpretation of Statutes, 7th Ed. at 265, which is quoted with apparent approval by Steyn, op. cit., at 132:

> "It may be taken for granted that the Legislature is acquainted with the actual state of the law. Therefore, when the words of an old statute are either incorporated in, or by reference made part of, a new statute, this is understood to be done with the object of adopting any legal interpretation which has been put on them by the courts. So, the same words appearing in a subsequent Act in pari materia, the presumption arises that they are used in the meaning which has been judicially put on them that, unless there is something to rebut that presumption, the new statute is to be construed as the old one was."

So, also, is the following passage from an English case which was quoted with approval by Tindall, J.A. in Ex parte Minister of Justice: in re Rex v. Bolon, 1941 AD 345 at 359:

> "(W)hen a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in framing a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them."

It is, of course, true that when the legislature enacted the Schools Act in 1996 the Education Affairs Act had not yet been interpreted in the Roodtman case, supra. But these two pieces of legislation are undeniably in pari materia: they both deal with, inter alia, the provision and management of so-called public schools for the education of children. Thus, the preamble to the Education Affairs Act reads:

> "To provide for the provision and control of education in schools, and matters connected therewith",

whilst that of the Schools Act reads:

> "To provide for a uniform system for the organisation, governance and funding of schools; to amend and repeal certain laws relating to schools; and to provide for matters connected therewith."

And it is trite, I think, that, generally speaking, when a Court construes a legislative provision it does so ex tunc, and not ex nunc: it finds and pronounces upon what the intention of the legislature was at the time when it enacted the relevant legislation, and not at some other time. For the purposes of the present matter it must be assumed that the legislature become aware of the decision in the Roodtman case, supra, as soon as it

was handed down on the 29th September, 2000. Parliament was, in effect, told by this Court on that date what its intention had been when it enacted the Education Affairs Act on the 21st June, 1988. If the effect of the judgment had been to cast an unwelcome shadow, from the legislature's point of view, on the interpretation which was thereafter to be placed on the definition of "parent" in the Schools Act, in the sense that it would necessarily lead to a construction of that definition which would be in conflict with Parliament's intention (as Dr. van Rensburg would apparently have us find), it was a shadow under which Parliament was apparently content to live: for it did nothing to remove the anomaly, if it was an anomaly, for at least some six years, until, at best on Dr. van Rensburg's argument, it enacted the Children's Act on the 8th June, 2006. To me it seems to be far more likely that the legislature did not find it necessary to do anything to remove the "shadow" because it accepted that the interpretation henceforth to be placed on the definition of "parent" in the Schools Act was in accordance with the interpretation which had been placed on the corresponding definition in the Education Affairs Act in the Roodtman case, supra, and that these interpretations were both consonant with the legislature's true intention. Had Parliament at any time between the 29th September, 2000 and the 8th June, 2006 wished to alter the situation as regards the Schools Act, it could easily

have done so by enacting an appropriate provision. However, it did not do so.

In the Roodtman case, supra, at 55 F and 57 C this Court construed the definition of "parent" in the Education Affairs Act by reading it, in effect, as if it contained the words which appear below in square brackets:

> "'parent' in relation to a child, means the [custodian by operation of law] parent of such child or the person [either a parent or a person other than a parent] in whose custody the child has been lawfully placed [by order of a competent Court]."

As I have said, I find myself in respectful agreement with everything which was said by the Court in that case. Dr. van Rensburg's contentions to the contrary notwithstanding, I can see no good reason why words of similar import should not likewise be read into the definition of "parent" in the Schools Act, so that it would, in effect, read:

> "'parent' means –
>
> (a) the [custodian by operation of law] parent or guardian of a learner; [or]
> (b) the person [either a parent or a person other than a parent] legally entitled to custody of a learner [by reason of an order of a competent Court] ...."

Such a construction would render the definition in the Schools Act entirely in harmony with the corresponding definition in the Education Affairs Act, as interpreted in the Roodtman case, supra. On the other hand, to construe the definition in the Schools Act in the radically different way contended for on behalf of the appellant would, in my view, be to do violence to the principles of construction to which I have referred above.

For these reasons I am of the view that the appellant cannot succeed with its first argument, and that no fault can be found with the decision of the magistrate on that ground.

I turn now to consider the second principal contention advanced on behalf of the appellant, that based on section 21 of the Children's Act. Dr. van Rensburg argued that, notwithstanding the fact that, as I have said, this section came into force only after this matter had been argued and decided in the magistrate's Court, it had some application or bearing on the matter, inasmuch as it brought about, he contends, certain fundamental changes to the law, and the issues between the parties are, as

he puts it, still “alive”, inasmuch as this appeal is pending. In my view there is no merit in these submissions.

Dr. van Rensburg did not attempt with any great degree of conviction to persuade us that section 21 of the Children’s Act was enacted with retrospective effect. Nor could he have succeeded in doing so. The relevant principle is to be found stated as follows in Steyn, op. cit., where the learned author says, at 82:

> “Hierdie vermoede (i.e. the presumption against retrospectivity) word deur ons skrywers geformuleer met herhaalde verwysing na die bepaling in C 1.14.7 dat dit vasstaan dat wette en verordeninge vorm verleen aan toekomstige sake, en nie toegepas moet word op wat in die verlede gedoen is nie, tensy uitdruklik vir sake van die verlede sowel as vir nog hangende sake voorsiening gemaak is.”

There is no provision in the Children’s Act, express or implied, to the effect that any part of it is to have retrospective effect. On the contrary, as I have said, section 315 of the Act provides that it “takes effect on a date fixed by the President by proclamation in the Gazette”. In the case of section 21, that date was duly fixed at the 1st July, 2007, about a year after the Act had been passed on the 8th June, 2006. The provision in section 21(4) that section 21

applies "regardless of (sic) whether the child was born before or after the commencement of this Act" is not a declaration of retrospectivity: it is merely an identification of some of the persons to whom the Act is to apply, and nothing more. For this reason I am unable to agree with Prof. Heaton when she says, in Davel and Skelton's "Commentary on the Children's Act" at 3-10 that -

> "..... the new rules apply retroactively to children who were born before the coming into operation of the Act"

if thereby she seeks to convey that the Children's Act applies retrospectively from some unspecified date in the past, i.e. before the 1st July, 2007. To my mind the position could not be more plain: as far as section 21 is concerned, it came into operation only on the 1st July, 2007, and it had no application before that date. It governs situations and conduct only after that date.

According to the appellant's summons, its cause of action against the respondent arose at some time between July, 2003 and the date on which the summons was issued (the 31st March, 2006). It is trite that the substantive law governing the appellant's claim against the respondent is that which was in force when the cause of action arose: at the very worst,

from the respondent's point of view, it might possibly be argued that it was the law which was in force when the magistrate handed down his judgment; but by no stretch of legal imagination, it seems to me, can it be said that the appellant's claim can be founded on the provisions of a statute which came into operation, as in this instance, only after the trial Court had heard and disposed of the matter. The fact that the parties may still be in dispute with each other, inasmuch as the disappointed appellant has launched this appeal against the magistrate's order, does not assist the appellant, in my view. The function of this Court on appeal is to consider whether or not the decision of the magistrate was correct. Dr. van Rensburg did not attempt to persuade us that the magistrate had erred in not applying the then inoperative provisions of the Children's Act to this matter: clearly he could not have been expected to do so - indeed, it would have been manifestly wrong for him to have done so.

I conclude that the appellant's contentions based on the provisions of section 21 of the Children's Act are without foundation because that Act does not apply to the facts of this matter. It may or may not be that that section brought about certain changes to the law as from the 1st July, 2007 which, had they applied to the present matter, might have led to a

different result. However, it is not necessary to consider that question, which is hypothetical and academic, and I express no view on it.

In the result, the appeal is dismissed.

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THRING, J.

I agree.

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McDOUGALL, A.J.