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Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

[Reportable]

Case No: 18775/2013

In the matter between:

M S

Applicant

And

**HEAD OF DEPARTMENT, WESTERN CAPE
EDUCATION DEPARTMENT**

First Respondent

**THE SCHOOL GOVERNING BODY, FISH HOEK
HIGH SCHOOL**

Second Respondent

FISH HOEK HIGH SCHOOL

Third Respondent

**MEMBER OF THE EXECUTIVE COUNCIL
FOR EDUCATION IN THE WESTERN CAPE
PROVINCIAL GOVERNMENT**

Fourth Respondent

MINISTER OF BASIC EDUCATION

Fifth Respondent

MATTHEW GRAY

Sixth Respondent

JUDGMENT DELIVERED: 15 SEPTEMBER 2016

LE GRANGE, J:

Introduction:

[1] The Applicant ("MS") is the biological mother and custodian parent of ZG. In 2013 and at the time of launching these proceedings, ZG was a grade 10 learner at Fish Hoek High School ("the school"). MS is seeking a variety of relief against the Respondents. Most of the relief sought concerns the liability of parents to pay to their children's annual school fees as determined by the schools' governing bodies (SGB's), at fee-charging public schools in the Western Cape, in terms of section 39 of the South African Schools Act 84 of 1996 ('SASA'). By all accounts, despite the issues raised in this matter by MS, the learner ZG successfully matriculated and is presently pursuing her tertiary education at the University of Cape Town.

[2] The First, Fourth and Fifth Respondents ("the Respondents") are the only parties opposing the relief sought by the Applicant.

The relief:

[3] The orders sought by MS are both in her own and representative capacities. The relief sought by MS can be categorized as follows:

[4] **First**, the review and setting aside the decision of the First Respondent, dismissing the Applicant's appeal against the Second Respondent's decision to refuse her a partial exemption from the payment of

the 2013 school fees during September 2013 in terms of section 40(2) of SASA.

[5] **Second**, declaring that, MS and the Sixth Respondent ("MG"), and all other divorced or separated biological parents, are jointly, rather than jointly and severally liable for the payment of the school fees of their children attending state schools.

[6] **Third**, declaring that Regulation 6(2), read together with the definition of the phrase "combined annual gross income of parents" in Regulation 1, of the regulations relating to the exemption of parents from the payment of schools in public school, promulgated in GN 1052 of Government Gazette 29311 of 18 October 2006 ("the regulations"), is inconsistent with the Constitution and invalid;

[7] **Fourth**, declaring, in so far as is necessary, s 40(1) of SASA inconsistent with the constitution and invalid;

[8] **Fifth**, declaring that MS qualifies for a fee-exemption for the 2013 academic year, together with a determination of the amount of the exemption for which she qualifies;

[9] **Sixth**, declaring that MS had been subjected to repeated violations of her constitutional and statutory rights in the course of the processing of her 2011, 2012 and 2013 applications for exemptions from the payment of school fees;

[10] **Seven**, declaring that the Respondents have failed to comply with their constitutional and statutory obligations to ensure that fee charging public schools in the Western Cape comply with the requirements of SASA and the Regulations in relation to fee exemptions. In this regard, MS has enumerated a number of instances in paragraph 6 of her Amended Notice of Motion where the Respondents, according to her, failed in their constitutional and statutory obligations.

[11] The Applicant did not persist with the structural interdict it sought in its Amended Notice of Motion.

Counsel:

[12] Mr. P Hathorn, SC assisted by Ms N Mayosi appeared for MS. Mr. A Breitenbach, SC assisted by D Pillay and M Davis appeared for the Respondents. Ms. J Williams instructed by the Women's Legal Resources Centre appeared on behalf of the Amicus Curiae. I wish to express my gratitude to counsel for their comprehensive heads of argument. It greatly assisted in preparing my judgment.

The Factual Background:

[13] The background facts underpinning the application are largely not in dispute. Briefly stated the facts are the following:

[14] MS, is a reporter and at all relevant times worked at a local community newspaper in Fish Hoek. According to MS, she became aware of obtaining an exemption from the payment of school fees when the said newspaper ran a series of articles about school budgets, fees and how to apply for fee exemptions. The article was apparently in the paper a year and a half before she applied for ZG to be admitted to the school.

[15] At the time, according to MS, she earned an annual salary of R160 284 per year. She also received maintenance payments from MG which amounted to R33 540 per year. MS expressed the view that the school fees for the 2011 year in the amount of R 13 250, were substantial.

[16] MS also attached her divorce consent paper of 1999 which dealt with the proprietary rights including maintenance and the liability of both parents regarding school fees including an Addendum of 2010 to the Founding Affidavit. In 2010, MS and MG, further regulated their parental rights and obligations towards ZG and consented to an addendum to the original consent paper 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 R 600 pm. MG was also liable to pay 50% of ZG's school fees,

school uniforms, tuition costs, books, stationery, equipment and extramural costs reasonably incurred. In the 2010 addendum to the consent paper, the parties deleted and substituted paragraph 1 of the original consent paper with an extensive recordal of their co-parental responsibilities and rights in respect of ZG. To this end, paragraph 1.3 records 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"*. It was also agreed by MS in paragraph 3.1.2 that she will *'furnish MG with copies of ZG's school reports and any corresponding documentation received by her which relates to ZG's progress at school or any problems that she may be experiencing '*. It was also agreed by both parties that in the event of a dispute arising from them exercising their parental responsibilities and rights a facilitator will be appointed with immediate effect. It appears, according to the papers filed of record, the full extent of the consent paper and Addendum thereto only became known during court proceedings.

[17] According MS, the school annually provides children with forms for their parents to inform the school how they will be paying for the fees. The parents applying for fee exemptions receive a numbered form for which they are required to sign for at the school. MS expressed the view that the relevant form rather discourages parents from applying for exemption as it stresses that exemptions are financed by other parents.

[18] MS expressed the view that the exemption form did not apply to her circumstances as the last page contained a section that both parents were required to fill in. MS holds the view that as the custodian parent receiving maintenance from MG, and the difficult history with him, she regarded it as unreasonable of the school to expect her exemption application to be confidential upon securing the co-operation of MG.

[19] In February 2011, MS wrote a letter to the school. In the letter it was recorded that she would apply for a fee exemption and that she experienced some difficulty in getting the information required. MS then decided as an interim measure to enclose a cheque for an amount of R1 200.

[20] MS, in March 2011, submitted her exemption application. In support of the application she decided to attach an affidavit with the necessary Regulations, to inform the school that both parents need not sign the relevant form as requested by them. MS also inform the school that she receives a monthly maintenance payment, out of which all ZG's expenses needs to be paid. Furthermore, that her financial position should be considered separately from that of MG.

[21] In March 2011, the school responded to MS's application and stated that the gross combined income of both biological parents will be taken into account when applying for financial assistance. The school further informed MS that in order to process the application, the SGB required MG to furnish

the school with his income. It further informed MS that upon receipt of the necessary information from MG, the SGB would consider the application and in due course advise her accordingly.

[22] The school, in May 2011, send a further letter to MS reiterating its position and recorded therein that a financial assistance application form had been sent to MG, but that no response had been received from him. It was also recorded that the SGB would not be in a position to consider the application without the required information from both parents.

[23] MS responded to the school's letter. According to her, she furnished all the relevant information relating to the request for financial assistance and also drew the school's attention to Regulation 9(3) which provided that:

"No applicant may be disqualified on the grounds that his or her application form is either incomplete or incorrectly completed."

[24] It was also recorded in the letter that she was not in a position to provide the financial particulars of MG as required by the school and that it was unreasonable of the school to expect her to obtain this information. According to MS, the failure of the school to provide her with at least a confidential exemption, until it had obtained the information from MG, is a callous disregard for her financial position as the sole breadwinner in her

family. She also noted that according to her calculations, she would qualify for a discount of R 9 673 on the school fees.

[25] In June 2011, the school responded in a letter stating that both parents are equally responsible for the payment of school fees, that the SGB does not deem it appropriate to get involved in a dispute between the parents and requested MS to direct all further communication relating to the matter to the school's attorney.

[26] MS responded advising the school, that there was no dispute between her and MG, and that she received maintenance on a monthly basis which she disclosed in her application to the school. She also requested the school clarify where it was in the application process and state whether her application had been approved, declined or conditionally approved.

[27] The school, in July 2011, send a further letter to MS wherein it recorded that as the school did not receive the full co-operation of both biological parents, it had been unable to finalize MS's application. It also recorded that MG informed the school, that his payments made to MS include the school fees.

[28] In August 2011, MS in a letter to the school, recorded that she had given her full co-operation and provided all the information available to her. Furthermore, the co-operation of MG was a matter beyond her control. MS

also recorded that as far as she is concerned the approach adopted by the school made the exemption process almost unworkable. She moreover, recorded that no part of the maintenance payments that she received from MG were ring-fenced and specifically set aside for school fees and that the school should make a ruling on her exemption application.

[29] In November 2011, the school addressed a letter to MS and MG, informing both parents that the SGB was not in a position to provide MS with a fee exemption, as the school was unable to determine the income of both parents. It also stated that, from the information it had, it did not appear that their income as a family unit entitled MS to an exemption. The letter concluded that the school would hand the matter over to their attorney to recover the outstanding school fees unless both parents complete the exemption form or settle the outstanding fees.

[30] MS took exception to the school's letter and objected to what she regarded as 'the bullying tone of its letter'. MS further informed the school that it failed to comply with its obligation to process her original application within 30 days, and stated that:

"I am in no way a family unit with my daughter's biological father. I divorced him soon after she was born. Divorced is another way of saying: we are separated. I know very little about his life. I do not

have the kind of relationship which would enable me to do financial calculations as a 'family unit'."

[31] MS further put on record that she and MG lead separate lives and that it was preposterous for the school to demand that they complete a joint exemption application. MS also requested that the school make a ruling on the application. According to MS, she regarded the school's insistence that she and MG be treated as a "family unit", and that the outcome of her fee exemption application was dependent on his co-operation, as deeply offensive and humiliating.

[32] The school advised MS and MG that should they not consult the school's attorney or make a payment plan with regard to school fees, it would have no alternative but to follow the advice of its attorney on the appropriate way forward.

[33] MS, in a letter to the school, expressed her disappointment at being expected to pay all outstanding fees within two days or to present the school with a payment plan, despite having spent the whole year trying to apply for a subsidy. After writing the letter, MS attended the meeting with the school's attorney. According to MS, the meeting with the attorney was not constructive. The attorney apparently suggested MS and MG were working in cahoots not to pay the full outstanding amount of the school fees.

[34] MS, in March 2012 received a letter of demand from the school's attorneys to the sum of R7 250 in respect of arrear school, and related, fees for 2011. In May 2012, MS received a summons, issued out of the Simon's Town Magistrate's Court claiming R7 250 for the outstanding 2011 school fees from MS and MG, jointly and severally.

[35] MS's attorney in June 2012, filed a Special Plea, together with a Plea on the merits, to the summons.

[36] MS, in February 2012, again applied for a fee exemption. In support of the application MS recorded her annual salary as R151 369 and the maintenance payments as R34 956 per annum. Her total income per annum was recorded as R186 325. MS further recorded that the school fees were R14 510.

[37] In February 2012, the school informed MS that as a result of the dispute between her and MG, and given the '*impasse*' relating to her 2011 exemption application, the school could not under the circumstances grant a fee exemption for 2012.

[38] In March 2012 the school sent MS a further letter, requesting her to submit a financial assistance application form for the 2012 school fees. The school also stated that a separate application form would be sent to MG.

[39] According to MS, she feared the school would again continuously request information that she was unable to provide and therefore approached the Equal Education Law Centre ("EELC") for assistance.

[40] In March 2012, the Law Centre apparently wrote to the school, requesting it to confirm that its letter of February 2012 and its subsequent letter of demand for the 2011 school fees should be deemed as a refusal to grant an exemption for both 2011 and 2012. The letter also noted MS's intention to appeal to the Head of Department in respect of both decisions.

[41] According to MS, in March 2012, her attorneys noted an appeal to the Head of Department in terms of section 40(2) of SASA, against the refusal of her exemption applications for the years 2011 and 2012.

[42] In April 2012, the Head of Department sent a letter to the school requesting it to furnish certain particulars in respect of MS's exemption application for the 2012 school year. The school replied to the request for information from the Head of Department and reiterated its position that it could not consider the exemption application until it was in possession of all the prescribed documentation and proof of income in respect of both biological parents.

[43] In May 2012 the Head of Department sent MS a letter in which it was recorded that MS's appeal in respect of the 2011 school year could not be

considered as it was received outside of the prescribed 30 day time period, and the appeal in respect of the 2012 school fees was upheld. According to MS, the fees constituted 7.71% of her annual gross income and qualified her for an 83% exemption from school fees for the 2012 school year.

[44] MS expressed the view that the Head of Department must have determined the matter on the basis that the school fees amounted to R14 510,00, which is 7.7% of her 2012 salary (R151 369,00) plus the maintenance payments she received (R34 956,00). According to MS, in terms of the table in Regulation 6, she was accordingly entitled to an exemption of 83% of the school fees.

[45] According to MS, she never received any further communication from the school concerning her successful appeal and for the remainder of the year paid school fees in accordance with the exemption that had been awarded to her.

[46] However, in August of 2012, MS received a letter of demand from the school stating that she owed the school an amount of R10 910. The letter of demand claimed that MS failed to apply or qualify for an exemption or partial exemption from school fees and that, should the fees demanded not be paid within 90 days, the school would be entitled to institute legal action for recovery of the outstanding amount. The letter of demand recorded an outstanding amount of R7 250.

[47] In September 2012, MS advised the school that it may have sent the demand in error, and that her appeal had been successful. Moreover, that she was up to date with the payment of the school fees.

[48] MS, in March 2013, submitted her 2013 fee exemption application to the school. According to MS her annual salary was R185 640 and her maintenance payments from MG was R36 000 per annum, giving her a total income of approximately R221 640 per annum.

[49] According to MS, the 2013 school fees amounted to R15 800 which amounted to 7.1% of her annual income. MS expressed the view that in terms of the table in Regulation 6, she would again be entitled to an 83% exemption from school fees on the basis of the method used in 2012 by the Head of Department to determine her exemption.

[50] MS stated that, despite Regulation 6(1) stipulating that the SGB must make a decision on an application within 30 days of receipt thereof, she never received any response to her 2013 exemption application but was hopeful that the school would take into consideration that she had received an exemption in 2012.

[51] In May 2013, however, she received a letter of demand from the school, stating that she owed R12 800 in respect of the 2013 school fees.

Moreover, according to the school she failed to apply, or qualify, for an exemption and that should the fees not be paid within 90 days, the school would be entitled to institute legal action for their recovery.

[52] The attorneys of MS appealed to the Head of Department against the school's failure to grant her a fee exemption for the 2013 school year.

[53] The Head of Department acknowledged receipt of MS's appeal and the school was requested to consider her fee exemption application and to advise accordingly of its decision.

[54] It is evident from the further correspondence between the relevant parties, that the school adopted the stance that it cannot consider MS's application for exemption on the financial information of only one parent and that such consideration, according to the school, may be outside the law.

[55] The attorneys of MS regarded the school's stance as unreasonable. It suggested the exemption application by MS be processed with the information provided by her and that any outstanding balance be enforced against MG.

[56] The Head of Department expressed the view in August 2013 that absent of a decision by the school it could not exercise its powers as an appeal body.

[57] In September 2013, MS's attorneys demanded the SGB make a decision on her exemption application within 14 days.

[58] In the same month, MS received a letter of demand from the school's attorney for R11 653,80 in respect of what was stated to be arrear school and related fees for 2013. Further correspondence took place between the various parties and in the same month the Chairperson of the SGB advised MS that her application for an exemption had been declined.

[59] The letter also referred to a registered letter that had been sent in July 2013 wherein it was noted that her application had been declined. The letter further recorded that her account had been handed over for collection.

[60] On 13 September 2013, following receipt of the SGB's email, MS attorneys addressed a letter to the Head of Department in respect of her appeal. The Head of Department was accordingly requested to decide MS's appeal. The letter also advised the Head of Department that the SGB had claimed to have made a decision on her exemption application in July, but that this decision had not been communicated to her.

[61] It is now common cause that the letter of 16 July 2013 had been sent to an incorrect address. The Chairperson of the SGB acknowledged the school's administrative error. Furthermore, in September 2013, the Head of Department advised MS attorneys that her right to appeal in terms of the Act

had been forfeited, as she failed to institute the appeal within the prescribed period of 30 days after receipt of the Governing Body's notice of its decision dated 16 July 2013. The Head of Department also stated that since the governing body had instituted legal proceedings against her, the Department cannot intervene in the matter.

[62] It is also common cause that the school had issued a summons against both parents for payment of school fees in the amount of R7 383,30 , jointly and severally, in respect of the 2013 school fees.

[63] The Respondents in their answering affidavits have addressed the issues raised by MS and will I deal with it later.

The Legal Framework:

[64] The right to education is a fundamental right that is entrenched in s29(1) of our Constitution. Moreover, unlike most of the other socio-economic rights, the right to basic education is immediately realisable and can only be limited by a law of general application in terms of s 36(1) of the Constitution. In this regard see: Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others 2011(8) BCLR 761 (CC) at 774 para [37].

The Funding of Public Schools:

[65] The ultimate obligation to fund public schools falls squarely on the State. In terms of s34 (1) of SASA, public schools must be funded from public revenue. SASA also requires that such funding needs to be done on an equitable basis to ensure that learners are able to exercise their right to education and to redress past inequalities.

[66] The Fifth Respondent ('the National Minister') annually determines the national quintiles for public schools which may not charge school fees. These quintiles must be used by the relevant Member of the Executive Council of a province who is responsible for education in that province ('the MEC'), in terms of s39 (7) - (16) of SASA to identify schools in their provinces that may not charge school fees.

[67] The criteria to identify no fee schools are generally based on the economic level of the community around a school. It is accepted that at all times material to this matter, the National Minister has determined in terms of s39 (7) of SASA that all schools ranked in quintiles 1, 2 and 3 must be identified as no-fee schools. The no-fee schools in each province are then published in the Government Gazette. The no-fee schools are entitled to receive sufficient funding from their provincial education departments so as to enable them to function effectively without charging school fees ('the no-fee threshold') and if they receive less funding than the no-fee threshold they may charge school fees to make up the difference.

[68] In addition, the provincial MECs may, after consultation with the relevant SGB's, annually by notice in the Provincial Gazette identify additional public schools within their provinces not included in the list of schools published in the Government Gazette, but which are the poorest schools in that province falling outside the list and which consequently also may not charge school fees. In that event, those schools are entitled to receive additional funding and may only charge school fees if they receive less than the funding to which they are entitled.

[69] The school in question is, and has always been, a fee-paying school.

[70] At fee-paying schools at all times material to this matter, quintile 4 and 5 schools, the school fees are determined in terms of section 39(1) of SASA. The school fees are determined by the parents at an annual general meeting of parents that must be held in terms of section 38(2) of SASA. The majority of the parents present and voting at the meeting must approve a resolution determining the school fees to be charged by the school.

[71] Section 39(2) of SASA provides that the relevant resolution must provide for the following: the amount of school fees to be charged; equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees; and a school budget that reflects the estimated cumulative effect of the established trends of non-payment of school fees and the total, partial or conditional exemptions granted to parents in terms of the Regulations relating to the Exemption of Parents from the

Payment of School Fees in Public Schools made in terms of section 39(4) of SASA and published in Government Notice 1052 in Government Gazette 29311 of 18 October 2006 as amended by Government Notice 1149 in Government Gazette 29392 of 17 November 2006 ("the Regulations").

[72] The Regulations provide for five categories or types of exemptions, namely automatic exemption, total exemption, partial exemption, conditional exemption and no exemption.

[73] According to s 40(1) of SASA: "*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*". At issue is whether MS was entitled to a partial and or a conditional exemption.

[74] In terms of Regulation 6(4) and 6(6) a partial exemption ranging between 7% and 97% is granted to the parents if the learner's school fees plus any additional monetary contributions to be paid to the school are 3.5% or more, but less than 10% of the combined annual gross income of the learner's parents. Parents with more than one child at fee-paying schools are given a different range of partial exemptions if the last-mentioned percentages are 3% or lower, depending on the number of such children. Regulation 1 defines the term '*combined annual gross income of parents*' as meaning '*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*'.

[75] Regulation 1 provides that a conditional exemption may be granted to a parent who qualifies for a partial exemption but, owing to personal circumstances beyond his or her control, cannot pay the reduced amount. It also applies to a parent who does not qualify for any exemption, but supplies information indicating his or her inability to pay school fees owing to personal circumstances beyond his or her control. A conditional exemption is granted with the proviso that the parent agrees to conditions for the payment of the school fees. Regulation 6(7) adds that when attaching any condition the governing body is limited to conditions it considers reasonable.

[76] In terms of Regulations 6(5) and (6) no exemption is granted to the parents if the school fees plus any additional monetary contributions to be paid to the school are less than 2.0% of the combined annual gross income of the learner's parents (in the case of parents with fewer than five children at fee-paying schools).

[77] Regulation 3(1) requires that when a child is admitted to a fee-paying public school, the principal must notify the parent of the amount of the annual school fees to be paid and procedures for applying for exemption; as well as to the fact that the parent is liable for the payment of school fees unless he or she has been exempted from payment. The parent must complete the form contained in Annexure A of the Regulations, and both the principal and the parent must sign it indicating that the parent has been informed of those matters.

[78] If a parent is in arrears by one month, or more, the principal must notify that parent that the governing body will investigate whether the parent qualifies for exemption before acting in terms of section 41(1) of SASA, i.e. by process of law enforcing the payment of school fees by the parent.

[79] Regulation 4(1) provides that to obtain an exemption a parent must apply annually to the chairperson of the SGB by completing the form contained in Annexure B of the Regulations. The form requires that the parent state the learner's parents' combined annual gross income. Regulation 4(2) adds that the applicant must furnish any relevant further particulars requested by the governing body. Provision is also made that if an applicant requests an opportunity to present his or her application in person or through a designated representative, he or she is entitled to do so. Regulation 6(9) states that the governing body must, within seven days after determining the application, notify the applicant of its decision and the reason for it.

[80] Regulation 8 lays down the following procedure for an appeal. If a parent is not satisfied with the governing body's decision he or she may appeal in writing to the head of the relevant provincial education department within 30 days after receiving the decision. The parent must furnish the Head of Department with the reasons for the appeal and all relevant information pertaining to the appeal. Within 14 days after receiving the appeal, the Head of Department must notify the chairperson of the SGB of the lodging of the appeal; furnish the chairperson with a copy of the reasons for the appeal; and request the chairperson to furnish the Head of Department, within 14 days,

with a copy of the relevant minutes of the meeting of the school governing body, any comments on the appeal the governing body wishes to make and any other information relevant to the appeal. The Head of Department must determine the appeal within 14 days after receiving the information from the school governing body and, within 7 days after deciding the appeal, notify the parent and the chairperson in writing of his or her decision.

[81] MS also relied on a report by the EELC that was submitted to the First Respondent in 2013.

[82] Against this background, I now turn to deal with the various relief sought by MS.

The Review:

[83] The review is against a decision made by the First Respondent to dismiss MS's appeal in terms of section 40(2) of SASA, against the decision made by the SGB of the school on 18 September 2013, whereby it refused to grant MS a partial exemption from the payment of school fees.

[84] It is not in dispute that MS was informed in a letter dated 19 September 2013 that her right to appeal in terms of section 40(2) of SASA against the Second Respondent's refusal of her 2013 fee exemption application, had been forfeited as a result of her failure to institute the appeal within the prescribed period.

[85] According to the Respondents, a material mistake had been made as it was assumed by the First Respondent that MS had been notified of the Second Respondent's decision to reject her 2013 fee exemption application by way of a letter dated 16 July 2013. The said letter, however, was forwarded to an incorrect address. The Second Respondent in a letter dated 18 September 2013 acknowledged its error to MS.

[86] The Respondents, on 2 December 2013, conceded the relief sought in the review application.

[87] On these stated facts, the concession by the Respondents was correctly made. It follows that the decision of the First Respondent during September 2013, dismissing MS's appeal against the Second Respondent's decision to refuse her a partial exemption from the payment of 2013 school fees in terms of section 40(2) of the Act, needs to be reviewed and set aside.

The liability (jointly or jointly and severally) of all divorced or separated biological parents:

[88] The issue for determination is whether the provisions of s 40(1) in respect of all divorced or separated biological parents should be interpreted as imposing joint, rather than jointly and severally liability for the payment of the school fees, where their children attend state schools. Joint liability in this context means that each parent would only be liable for their proportionate share of the fees; joint and several liability means that each parent is liable to

the school for the full amount of the fees and if one parent pays the full amount, she or he will have a right of recovery against the other parent.

[89] The argument advanced by counsel for MS is that in our law there is a strong presumption for an interpretation in favour of joint, rather than joint and several, liability. For this proposition, reliance was placed on "*The Law of Contract in South Africa*" by RH Christie at 290 and the cases referred therein. Namely, that in our law of contracts there is a strong presumption that the liability of co-obligators and the rights of co-obligees, unless otherwise agreed upon, is joint and not joint and severally. Accordingly, it was contended that given the presumption against joint and several liability in our law, and in the absence of the Legislature expressly stating so in SASA, an interpretation of joint liability should be preferred.

[90] It was further argued by MS's counsel that the words "*A parent*" in s 40(1), is a strong indicator to an intention by the Legislator to impose joint, rather than joint and several, liability on parents. It was further contended that such conclusion is also supported by paragraph 168 of the Amended National Norms and Standards for school funding, which provides the following:

"Parents may be fully or partially exempted from the payment of school fees ... it is principally the income of individual parents and households, relative to school fees and other education expenses that is used to determine eligibility to such total or partial exemptions."

[91] According to counsel for MS, if s 40(1) were to be interpreted as imposing joint and several liability on divorced or separated parents, it continues to treat them as a "household unit", thereby violating the parents' rights to dignity and equal protection of the law. It was further argued that an interpretation of legislation which renders it constitutionally compliant should be preferred and that s 40(1) should be interpreted as imposing joint liability on biological parents who are divorced or separated, and not living in the same household.

[92] Counsel for the Respondents argued that on a proper reading of ss 39 and 40 of SASA, each biological parent of a learner is liable to pay school fees. Accordingly, it was argued that if the Legislature had intended joint liability, with the result that each parent would be limited to a portion of the total amount of the fees apportioned, it would have said so and specified the basis of the apportionment. It was further contended that the reason the Legislature had not done so is as a result of its impracticality to expect fee-paying schools to determine such apportionments between all parents who are not persons married in community of property, and as a result s 40(1) of SASA imposes the full liability on each parent.

[93] Accordingly, it was contended that if one parent pays or is compelled to pay the full amount of the said fees then such parent has a common-law right of recourse against the other parent. Furthermore, s 15(2) of the Maintenance Act 99 of 1998 stipulates that there is a duty on both parents to

maintain their children, which includes reasonable support in the provision of education.

[94] It was also argued that MG's undertaking in the divorce Consent Paper to pay half of the school fees incurred at Government Schools in respect of ZG means he is responsible, as between him and MS, for half of the school fees at the school. And the arrangement between MS and MG does not alter the school's right to recover the full amount of the fees from either one of them, leaving it up to the one who pays to exercise a right of recourse against the other.

[95] Submissions by counsel for the Amicus, concentrated mainly on the adverse impact the current fee exemption scheme have on women. Accordingly, it was argued that the fee exemption scheme should be viewed in the context of a society where, inter alia, women experience multiple and intersecting forms of discrimination resulting in them being socially and economically disadvantaged; that mothers ordinarily bear more responsibilities for child-rearing than fathers; that the failure by fathers to shoulder their fair share of the financial and social burden of child-rearing results in mothers bearing the financial responsibility for childcare disproportionately; the insufficiencies in the maintenance system; the high levels of domestic violence affecting the mothers' ability to communicate with and enforce fathers' obligations to their children.

[96] Furthermore, the fee exemption scheme indirectly discriminates against women on grounds of their sex and or gender, and violates their right to dignity by effectively excluding them from obtaining fee exemptions in the absence of the non-custodian parent's financial information.

[97] It was contended that the fee exemption scheme is inconsistent with South Africa's international obligations in relation to the equality and dignity of women, and that the fee exemption scheme violates women's rights to be free from domestic violence insofar as the onus is on them to obtain the signature and or financial information from the non-custodian parent in order to apply for an exemption from school fees. Moreover, the fee exemption scheme should be declared to be unconstitutional and the Minister (Fifth Respondent) should be ordered to amend the regulations and or SASA to provide for exceptions in the case of custodial parents who are not in a position to obtain the financial information of non-custodian parents; and to place an obligation on the school to enforce compliance of the uncooperative non-custodian parent.

[98] In conclusion, it was suggested that pending the amendment of the fee exemption scheme, the custodian parent should be entitled to an exemption based on her income alone, which absolves her of any joint and several liability for the fees. And that the school may then recover the balance of the fees from the uncooperative non-custodian parent unless that parent applies for an exemption and provides the relevant financial information.

Discussion:

[99] It is now accepted in our law that the words '*A parent*' as contemplated in s 40(1) of SASA burdens both parents with the responsibility to pay school fees, and that such an interpretation is consistent with s 28(2) of the Constitution which provides that '*a child's best interests are of paramount importance in every matter concerning the child*'. Moreover, with regard to the interest of the child '*[i]t 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.*' In this regard see Fish Hoek Primary School v GW 2010 (2) SA 141 (SCA) at para [14]. (For ease of reference this matter will be referred to as "GW".)

[100] There can be no debate that mothers, historically and presently, ordinarily become custodial parents and have to care for children on divorce or breakdown of other significant relationships. These circumstances as a result, '*places an additional financial burden on them and ... [d]ivorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means*. See Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae) 2003 (2) SA 363 (CC) at para [29].

[101] In GW supra at para [14] it was stated that '*[a]t common law both parents of a dependent child are under a duty to support such child in*

accordance with their respective means. That duty must undoubtedly embrace the educational needs of the child as well, particularly as the Act [section 3] creates a system of compulsory schooling.’ The SCA in GW further made the point at para [13], and correctly so, that: *‘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 sounded by this court in F v F [2006 (3) SA 42 (SCA) at para 12] 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.’*

[102] The cardinal rule of construction of the statute as Stratford JA put it in *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129 *‘is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment ... in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended.’*

[103] The effect of that formulation, *‘is that the court does not impose its notion of what is absurd on the legislature’s judgement as to what is fitting, but uses absurdity as a means of divining what the legislator could not have intended and therefore did not intend, thus arriving at what it did actually intend.’* In this regard see Poswa v Member of the Executive Council for

Economic Affairs, Environment and Tourism, Eastern Cape 2001 (3) SA 582 (SCA) at para [11].

[104] In this instance the joint and several liability is not stipulated in s 40(1). There are also no indicators in the said provisions to infer that the liability to pay by parents as co-debtors are jointly and severally. To presume otherwise would definitely impose an unnecessary heavy burden on parents like MS and is irreconcilable with the paramountcy that must be afforded to the best interest of the child as a principle in our Constitution. In my view, on a proper construction of the provisions of s 40(1) the liability of a parent (as in this instance) to pay school fees must be regarded as jointly and not jointly and severally. I am referring here to the liability of the parent to the school in terms of s 40(1), not the liability for school fees *inter se* (between parents), which may be effective by private arrangements. Such an interpretation is in accordance with the general principle in our law that co-obligators are liable only jointly unless an intention to impose joint and several liability is plainly expressed or can be clearly inferred. (See "*The Law of Contract in South Africa*" by RH Christie at page 290).

[105] As a result of the above mentioned, the constitutionality challenge by MS on s 40 (1) of SASA is unwarranted.

Constitutionality of Regulation 6(2):

[106] In this regard MS seeks a declaration that regulation 6 (2), read together with the definition of the phrase “*combined annual gross income of parents*” in Regulation 1, is inconsistent with the Constitution and invalid on the grounds that it infringes, amongst other things, her right to equal protection and benefit of the law and dignity in terms of ss 9 and 10 of the Constitution. To this end, MS relies heavily on her own experience with MG to demonstrate how degrading and humiliating it has been for her fee exemption application to be dependent on her ex-husband providing particulars concerning his income. Furthermore, that the respondents treated her ex-husband and her as a “family unit” for the purposes of the application.

[107] The Minister concedes that the regulation creates practical difficulties for parents like MS who struggle to get the requisite financial information from the other parent, and records that legislative amendments to address this difficulty are being prepared for consideration by the Minister and the Council of Education Ministers as established by the National Education Policy Act 27 of 1996. To this end, it was recorded by the Minister that these difficulties do not give rise to the unconstitutionality as alleged by MS. Furthermore, the proposed amendments to section 41 of SASA were filed as part of the record and the following was proposed:

[108] “***Amendment of section 41 of Act 84 of 1996, as amended by section 5 of Act 24 of 2005***”

22. *Section 41 of the South African Schools Act, 1996, is hereby amended–*

(a) By the substitution for subsection (2) with the following subsection:

"(2) The exemption from payment of school fees must be calculated according to the regulations contemplated in section 39(4) and the governing body may only consider the following documentation when deciding on the application:

(a) A salary advice of both parents, where applicable;

(b) profits received from investments or other forms of business;

(c) a divorce agreement or court order, where applicable;

(d) an affidavit where the parent is unemployed; and

(e) proof of all children registered at a public school; and

(b) By the insertion after subsection (2) of the following subsection:

"(2A) Notwithstanding subsection (2), a parent may submit to the governing body documentary evidence in the form of an affidavit supported by a confirmatory affidavit from a social worker or another competent authority, or a court order, which constitutes sufficient proof that the other parent of the learner –

(a) is untraceable;

(b) is unwilling to provide the first-mentioned parent with particulars of his or her total annual gross income;

- (c) *has failed to provide the first-mentioned parent with particulars of his or her total annual gross income despite the lapse of a reasonable time after a request by or on behalf of the first-mentioned parent that he or she do so; or*
- (d) *has provided the first-mentioned parent with incomplete or inaccurate particulars about his or her total annual gross income and has refused to rectify the deficiency or has failed to do so despite the lapse of a reasonable time after a request by or on behalf of the first-mentioned parent that he or she do so."*

[109] According to MS, the proposed amendments to section 40 (1) will be insufficient to eliminate practical difficulties faced by single-parent households and, more importantly, do not address the unconstitutionality of the definition of regulation 6 (2) read together with the definition of "*combined annual gross income of parents*" which require the income of both biological parents for the purposes of determining fee exemption. MS is adamant that the proposed amendments fails to provide for divorced or separated parents to be treated differently to parents still living together in the same household.

[110] MS's constitutional attack on Regulation 6 (2), read together with the definition of the phrase "*combined annual gross income of parents*" in Regulation 1, is tenuous. It appears that MS alleged the said regulations

differentiate between persons like her who are single or divorced parents, and those who share a joint household because regulation 6 (2) takes into account the income of the learner's non-custodian parent in determining whether the custodian parent qualifies for an exemption from school fees. It is now accepted in our law that both parents of a dependent child are under a duty to support such child in accordance with their respective means.

[111] In GW supra at para [14] the SCA held that the duty to support such a child must undoubtedly embrace the educational needs of the child as SASA creates a system of compulsory schooling. Both parents are therefore liable to pay the school fees for their children at fee-paying public schools. It was also stated in GW that parents are so liable because imposing such a liability on both will promote the achievement of gender equality. This is also consistent with the best interest of the child principle as enunciated in our Constitution.

[112] SASA does provide that the parent body of a fee-paying school determines the annual school fees payable by all parents of learners at the school. This determination is based on the budget required to operate the school effectively and the school's income from the State and any other sources.

[113] According to the Respondents the '*combined annual gross income of parents*' is included in the formula in Regulation 6(2) to ensure equitable and generic calculations for all types of parental structures. It follows that in accordance with SASA, the Regulations do not distinguish between the

married or unmarried status of parents but concentrate on the parental responsibility and duty towards a child.

[114] Furthermore, according to the Respondents the formula in Regulation 6(2) has been framed in the way it has (i.e. including the income of both parents, including any non-custodian parent), so as to ensure that school fee exemptions are calculated on a basis which encourages both parents to comply with their legal duty to support their children; and, conversely, discourages non-custodian parents in particular from shifting the financial cost of their children's education at fee-paying schools onto the parents of other children at such schools (or, where there are compensation schemes, the *fiscus*).

[115] On a proper consideration, the differentiation complaint by MS, cannot be construed as irrational. The 'combined annual gross income of parents' must unquestionably be in the best interest of the child. It is also to encourage both parents to comply with their legal duty to support their children. The differentiation is therefore rationally connected to a legitimate government purpose. See Prinsloo v Van der Linde and Another 1997 (3) SA 1012 (CC) paras [24]-[26]; Law Society of South Africa and Others v Minister for Transport and Another 2011 (1) SA 400 (CC) para [32].

[116] Turning to the dignity-based attack. MS, alleges that being compelled to regard her ex-husband, MG, as part of her family unit and to request

financial information from him in order to complete the application forms for the school fee exemption (i.e. to request his annual gross income so as to be able to apply the formula for the '*combined annual gross income of parents*'), infringes her right to human dignity because doing so is degrading and humiliating.

[117] According to the Respondents, the words '*family unit*' in its 11 November 2011 correspondence to MS, were in reference to '*your income as a family unit*', thereby, meaning the combined annual gross income of both parents as the Respondents knew at the time the parties were divorced. The Second and Third Respondents have further acknowledged that the expression '*your income as a family unit*' was a poor choice of words and that the relevant sentence should have read '*from information gleaned to date it does not appear that the 'combined annual gross income' of the parents entitles you to such an exemption.*'

[118] In this instance, the infraction claimed does not justify the relief sought. MS and MG are the biological parents of ZG. Both bear a common-law and statutory duty to support her. In fact, in 2010, MS consented that paragraph 1 of the original consent paper be substituted with an extensive recordal of the co-parental responsibilities and rights of both parents in respect of ZG. This addendum to the consent paper was made an order of court. In the addendum, both parents undertook to remain involved in all aspects of ZG's life, including her schooling, extramural activities and general

welfare. It was also agreed by MS that she will '*furnish MG with copies of ZG's school reports and any correspondence or documentation received by her which relates to the ZG's progress at school or any problems that she may be experiencing*'. In the event of a dispute, the role of a facilitator was contemplated and provided for.

[119] In terms of s41(2) the exemption from payment of school fees must be calculated according to the Regulations contemplated in section 39(4), i.e. the regulations regarding the equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees referred to in section 39(2)(b). One of the requirements, imposed by the Regulations, is that an application for exemption must be made by completing a form, one of the parts of which is a statement of the combined annual gross income of both parents (regulation 4(1), read with Annexure B). Another of those requirements is when considering and determining the application, the SGB of the school must apply a formula, one of the elements of which is the combined annual gross income of both parents (regulation 6(2)(a)).

[120] It follows that any custodial parent applying for exemption from school fees is obliged to obtain from the other parent particulars of his or her gross income, in order that the SGB may apply the prescribed formula to his or her application for exemption. I will accept that there may be circumstances where obtaining the prescribed information may be extremely difficult in cases where the parents are estranged from one another. But in the present

instance, given the fact that both parents undertook in 2010 to remain involved in all aspects of ZG's life, including her schooling and general welfare, the suggestion by MS that she was deeply offended with the Respondents to regard MG as part of her family unit and to insist that she request financial information from him in order to complete the application forms for the school fee exemption, is rather surprising. In fact MS accepted and agreed that she is under a legal obligation to forward school correspondence relating to ZG to MG when the addendum to the consent paper was made an order of court. Moreover, she and MG accepted to remain co-holders of parental responsibilities and rights in terms of the Children's Act, 38 of 2005. The relief sought by MS in this regard is therefore unsustainable and legally untenable.

Declaring that MS qualifies for a fee-exemption for the 2013 academic year, together with a determination of the amount of the exemption for which she qualifies:

[121] The First and Second Respondents have conceded the review relief in relation to First Respondent's decision on the appeal by MS against the Second Respondent's rejection of her 2013 fee exemption application.

[122] According to the First Respondent, it instructed the Second and Third Respondent's to reconsider the application or invite MS to lodge a new application in respect of 2013. On the papers filed of record, the Second

Respondent thereafter reconsidered the application and concluded it could not make a determination, as the information for both parents had not been provided. According to the Second Respondent, it offered to provide fee exemption application forms to both parents and to reassess any new applications for 2013. The First Respondent has also given an undertaking that if MS appeals against the Second Respondent's decision, it will consider and determine the appeal and communicate its decision to MS within 7 days of the appeal decision being made.

[123] MS however declined to make a new application or to appeal on several grounds. One of grounds upon which MS relies is that the First and Second Respondents are *functus officio*. The Second and Third Respondent was also severely criticised for their conduct in relation to MS's 2013 fee exemption application.

[124] On the papers filed of record, prior to the Second Respondent's decision to decline the application because it did not contain particulars of MG's annual gross salary, the steps taken by the Second and Third Respondents to assist MS with the completion of the application can hardly be regarded as unreasonable or degrading.

[125] In 2013, the exemption application by MS was received on 21 March 2013. A few days later on 27 March 2013 the Second Respondent advised MS by letter that the income of both parents must be declared in the application

and until same is received, the application would remain pending. On 6 April 2013, the Second Respondent sent a letter and an application form by registered mail to MG at two different addresses. MG was requested to complete and return the application form. MS was informed of the correspondence to MG and that he failed to respond. On 26 April 2013, the Third Respondent's attorney informed the school that he personally handed the form to MG and again he failed to respond. Moreover, in terms of regulations 9(3) and 9(4) of the Regulations, the annual gross income of both parents needs to be reflected on the application form as the combined annual gross income of parents is required for purposes of the application of the formula.

[126] On these stated facts, it is evident that MG was showing an obstinate attitude towards his co-parent responsibility in respect of his obligation towards ZG's school fees. According to the divorce settlement agreement he is liable for 50% of the school fees of ZG. It is surprising that MS did not rely on the provisions of the 2010 addendum to ensure that MG indeed comply with his co-parental responsibilities, which both of them legally undertook to do. In the present circumstances, the best interest of the child demanded that both parents adhere to the addendum to the divorce consent paper and to do all things necessary to provide the required information that was lacking. It is equally surprising that MS did not persist with invoking the right to appoint a facilitator to ensure that MG comply with his responsibility of paying 50% of the school fees or to provide the information required by the school. A failure

by MG to comply with the provisions in the addendum to the consent paper may at least have resulted in contempt of court proceedings.

[127] With regard to the *functus officio* argument advanced by MS, I am not convinced that in the circumstances of this case, the First and Second Respondent are *functus officio*. In the present circumstances, no real decision has been made by the relevant authorities, due to lack of pertinent information provided by MS to them. Moreover, I agree with counsel for the Respondents' that, the *functus officio* principle does not operate in instances where the decision-maker and the person adversely affected by it, agree that the initial decision may be disregarded. (See: Baxter Administrative Law (1984) at 373 s.v. '*Unfavourable Decisions*'; Cf. Hoexter Administrative Law in South Africa 2ed (2012) at 280-281). MS has, therefore, an effective internal remedy.

[128] Furthermore, the Second Respondent or First Respondent (may still on appeal) grant the Applicant a conditional exemption as MS's 2013 application for exemption did not contain all the information needed to perform the exemption calculation.

[129] Recently our higher courts have repeatedly stated that a case implicating an order of substitution requires courts to be mindful of the need for judicial deference and the obligations under the Constitution. In this regard see Trencon Construction (Pty) Ltd v Industrial Development

Corporation of South Africa Ltd and Another 2015 (5) SA 245 (CC) at paras [42- 47]. In the administrative review context substitution remains an extraordinary remedy. Remittal is still almost always the prudent and proper course. It is only in exceptional circumstances that the court will grant an order of substitution. In the present instance, taking into account all the relevant factors, it will not be just and equitable to grant an order of substitution in respect of the 2013 application for exemption. In these circumstances, MS should submit a fresh application for fee exemption for the 2013 year.

Declaring that MS had been subjected to repeated violations of her constitutional and statutory rights in the course of the processing of her 2011, 2012 and 2013 school fees exemption applications:

[130] The bulk of the allegations under this heading are mainly directed against the Second and Third Respondents. The complaints by MS are largely against the manner in which the Respondents dealt with her exemption applications. In addition, MS claims that the school infringed her right to dignity by, inter alia, characterising her inability to provide the financial information of her ex-husband as a dispute between parents; applying the fee exemption procedure in a manner that rendered it unworkable; referring to her and MG as a family unit; attempting to compel her to reopen problematic interactions she had experienced with MG, and suggesting, through its attorney, that she was working in cahoots with MG to defraud the school.

[131] The complaint by MS that she has been subjected to repeated violations of her constitutional and statutory rights in the course of the processing of her 2011, 2012 and 2013 applications for exemptions from the payment of school fees, does not endure scrutiny. At the heart of this matter is what is in the best interest of the child. In fact, in 2010, both parents committed themselves legally to remain co-holders of parental responsibilities and rights in respect of ZG. Moreover, both undertook to act as co-guardians as contemplated for in s 18 (2)(c), 18 (3) and 18(5) of the Children's Act, 38 of 2005.

[132] In respect of 2011, MS alleges that the Third Respondent refused to accept MS's application as result of her not signing the undertaking to pay the full school fees. According to the First Respondent, the Department has no record of MS reporting this issue to them. The Second and Third Respondents' agree that MS did not sign Annexure A to the prescribed form. However, the Second and Third Respondents' acknowledge that the Applicant did sign the payment forms sent to all parents, which include the terminology from Annexure A. According to the Second and Third Respondent both forms declare the amount of school fees for the year, that parents are liable for school fees, that parents may apply for assistance in regard to school fees and indicate where the fee exemption application forms are obtained. Both forms apparently request a signature from the parent declaring that they understand the content of the correspondence. According to the Second and

Third Respondent, MS completed and signed the school payment forms for the years 2011 to 2015.

[133] The First Respondent records it noted that MS further alleged that Third Respondent's fee exemption form discourages parents from applying for an exemption, but states that MS failed to report this issue to the Department.

[134] MS further alleges that the Third Respondent's exemption application form was not applicable to her because the last page contained a section which both parents had to fill in. MS regards this as unreasonable because it was conditional on her securing the co-operation of MG.

[135] According to the Fifth Respondent, the form in question is in conformity with the Regulations which require the financial information from both parents. The Fifth Respondent further states that the information required is not unreasonable as there is a legal duty on both parents to support their children, irrespective of whether they are married or divorced which includes the paying of school fees.

[136] The Fifth Respondent also took issue with MS where she recorded that *'[in] terms of a court order relating to my divorce, I get a monthly payment out of which all my daughter's expenses are to be paid. My finances should therefore be considered entirely separately from those of her ex-husband.'*

According to the Fifth Respondent, MS was incorrect in stating that all ZG's expenses were paid from the monthly maintenance, as it appears from the consent paper that her school fees were a separate expense for which both parents were liable. Accordingly, MS's view that her financial position should be considered separately from that of MG was held by the Fifth Respondent as misguided, as the fee exemption application must be considered and determined with reference to the aggregate annual gross income of both parents.

[137] MS also drew the Third Respondent's attention to Regulation 9(3) which states that no application may be disqualified on the ground that it is incomplete or incorrectly completed.

[138] According to the Fifth Respondent, Regulation 9(3) must be read with Regulation 9(4), and as a result, if an application form is either incomplete or incorrectly completed, the principal or an educator who is a member of the SGB concerned must help the parents complete the form properly. In the present instance, the Third Respondent did send the form to MG to obtain the missing financial information. According to the Fifth Respondent, as the legally required information was not provided by the parents it was not possible to do the exemption calculation.

[139] As to the legal proceedings instituted against MS for the recovery of the 2011 school fees, MS is not remediless.

[140] In respect of the 2012 exemption application, the Third Respondent informed MS that she could send a financial assistance application form, and a separate form would be sent to MG

[141] In March 2012, MS appealed the 2011 and 2012 fee exemption applications to First Respondent on the basis that an earlier letter from the Third Respondent, dated 23 February 2012, amounted to a refusal to grant both exemptions for 2011 and 2012. In the said letter, the Third Respondent referred to the dispute between the parents as to who was responsible to pay for ZG's education and indicated, based on the impasse between the parents in 2011, it was not possible for the Second Respondent to grant an exemption for 2012.

[142] The First Respondent refused the 2011 appeal on the basis that it was received outside of the 30 day time period. In respect of the 2012 appeal, the First Respondent granted MS an 83% exemption from school fees.

[143] In her answering affidavit, the First Respondent states that she now believes that her decision in relation to the 2012 fee exemption application was incorrect. She should not have granted the Applicant a partial exemption because, like the Second Respondent, she too did not have the financial information of MG needed for the calculation in terms of Regulation 6(2) to 6(6). Instead, the First Respondent said, she should have granted MS a

conditional exemption of that part of the school fees, with the proviso that MS agrees to pay the balance by a specified date far enough in the future.

[144] The First Respondent has, however, added that because 2012 is now history by the time she made her answering affidavit, she does not intend to take any steps aimed at the reversal of her decision. The First Respondent also noted that the Third Respondent did not apply for fee exemption compensation in respect of the 2012 exemption that she had granted. The Fifth Respondent's deponent also said that despite his misgivings about the correctness of the First Respondent's determination of MS's appeal in respect of the 2012 exemption for school fees, that unless and until it is set aside in proceedings for judicial review it stands and must be given effect to by the Second and Third Respondents.

[145] The 2013 fee exemption was already discussed in para [48]-[62]

[146] In considering what is in the best interests of the child, there can be no debate that a co-guardian and co-holder of parental responsibilities and rights, as in this instance, who is unwilling yet has the means to pay his child's school fees, should be made to do so, and if necessary, by the order of a competent court. As stated in GW *supra* at para [14], were the schools are not to have the right to recover school fees from such a parent, it will either have to shoulder that loss or mulct other parents with additional charges, which in either event would be detrimental to other learners.

[147] The attitude adopted by MS that the Respondents should only look at her financial circumstances as a divorced individual, and who only receives monthly maintenance payments from MG, is not only inconsistent with what is in the best interest of the child but it also undermines the very parental rights and responsibilities she and MG legally undertook in 2010. It is also at variance with the divorce order of 1999 which stipulates that MG is liable to pay 50% of ZG's school fees.

[148] The complaint by MS that she has been subjected to repeated violations of her constitutional and statutory rights in the course of the processing of her 2011, 2012 and 2013 applications for exemptions from the payment of school fees, is therefore unfounded.

The Respondents alleged failure to comply with their constitutional and statutory obligations to ensure that fee charging public schools in the Western Cape comply with the requirements of the Act and Regulations in relation to fee exemptions:

[149] In this regard, MS has enumerated a number of instances in paragraph 6 of her Amended Notice of Motion where the Respondents, according to her, failed in their constitutional and statutory obligations. As a result, MS seeks a general declaratory order that First, Fourth and Fifth Respondents failed to comply with their constitutional and statutory obligations in ensuring that fee

charging schools comply with SASA and the Regulations in relation to fee-exemptions.

[150] MS also placed heavy reliance on a report regarding fee exemption by the Equal Education Law Centre. In summary, the report records that schools seldom inform parents of the exemption policies, and if they do so, it done in such a way that it has the effect of discouraging their use or shaming parents into not applying for exemptions. Schools frequently sift poor learners during the application process to ensure that only parents who can guarantee full payment of fees are admitted. Furthermore, in some application forms it states that only parents who reside in the feeder area of the school may apply for exemptions from school fees, and that at certain schools parents are advised that they may apply for fee exemptions, but do so in such a way that emphasises the additional financial burden that this will place on other parents.

[151] According to the First and Fourth Respondent the Fee Exemption Regulations has placed added responsibilities and duties on fee-paying schools and their SGBs to ensure that parents are afforded the opportunity to qualify for exemptions if their financial circumstances so demand. Accordingly, on 9 November 2006 the WCED issued circular 0058/2006 to the eight districts of the Western Cape informing all concerned of the new Regulations. The imperfection and the various difficulties that arise out of the

interpretation and implementation of the fee exemption regulations by certain schools are not denied by the Respondents.

[152] The First Respondent however disputes MS's allegation that the Department's monitoring and compliance system with regard to fee exemption queries is not reasonable and rational. According to the First Respondent, the Department's monitoring and compliance information system creates and ensures greater transparency, control and reporting.

[153] The First Respondent also recorded that due to the fact that fee exemptions result in the exempted portions of the fees being paid by the other parents and that in some instances may even detrimentally affect the financial viability of fee paying schools, the Provincial Government of the Western Cape has allocated substantial sums for fee exemption compensation from its budget. In this regard:

- 1.1 On 22 June 2011, the WCED issued circular 017/2011 setting out the procedure to be followed by fee paying schools in obtaining compensation for fee exemptions.
- 1.2 On 14 November 2013, the Fourth Respondent issued a statement to the media outlining that in 2011 R20 million had been allocated as fee exemption compensation for fee paying schools which had granted exemptions during 2010; in 2012

R30 million had been allocated as fee exemption compensation for exemptions granted during 2011; and in 2013 R42 million had been allocated as fee exemption compensation for exemptions granted during 2012.

1.3 In 2012, the Department upgraded and automated the process whereby schools can make online applications for fee exemption compensation.

1.4 In her main answering affidavit, which was made in 2014, the First Respondent further stated that in about November of that year a determination would be made whether an amount would be allocated as fee exemption compensation for exemptions granted during 2013.

[154] According to the First Respondent, the Department has between 2010 and 2011 allocated the highest compensation in the country for fee exemption, and in 2015 approved the budget of R39 322 000 for compensation for the 2014 school year. The total claims amounted to R43 650 026.00, and an additional balance of R4 328 028.00 was requested to address the shortfall, which was approved. According to the First Respondent the Department in 2016, approved a budget of R 46 356 000 for the 2015 school year.

[155] According to the First and Fourth Respondent's, the figures demonstrate the Department's commitment to providing full compensation for school claims.

[156] In terms of the EELC report, the First Respondent records that although it is stated that the EELC is handling many cases of abuse of the fee-exemption and fee-recovery processes, the seven cases referred to do not constitute a statistically defensible sample that shows that there is indeed a widespread pattern of abuse. According to the First Respondent, the inferences drawn from the limited number of cases referred to by the EELC is unjustifiable.

[157] According to the First and Fourth Respondents, at the time of filing the affidavit there was more than 570 fee-paying schools in the Western Cape Province, and that only 32 appeals relating to fee exemptions were initiated in 2015.

2. Furthermore, the First Respondent has requested and received an update from the seven schools referred to in the EELC report and what emerged is the following:

2.1 **Table View Primary School** advised the First Respondent that in 2013 it received 199 fee exemption applications, of which 183 were granted partial exemption, 15 were granted full exemption

and 1 was rejected. In 2014, the school received 247 fee exemption applications, of which 230 were granted partial exemption, 9 were granted full exemption and 8 were rejected/disqualified. In 2015, the school received 407 fee exemption applications, of which 385 were granted partial exemption, 21 were granted full exemption and 1 was rejected/disqualified.

2.2 **De Hoop Primary School** confirmed that the school has a system for dealing responsibly with every fee exemption application. The SGB amended a clause in the school's financial form to comply with current policy and as a result no parent has been negatively affected by the clause. The principal supplied a list of the 2014 and 2015 fee exemption applications as proof of their compliance with the Regulations.

2.3 **Wynberg Girls High School** advised that in 2013, 65 fee exemption forms were issued, in relation to which, 43 were granted partial exemption, 6 were granted full exemption and 16 forms were not returned or lost. In 2014, 58 fee exemption forms were issued, in relation to which, 41 were granted partial exemption, 8 were granted full exemption and 9 forms were not returned or lost. In 2015, 51 fee exemption forms were issued,

in relation to which, 36 were granted partial exemption, 7 were granted full exemption and 8 forms were not returned or lost.

2.4 **Rondebosch Boys High School** advised that in 2013, 25 applications for fee exemptions were made by parents, 24 full and partial exemptions were granted and 1 was rejected. In 2014, 29 applications for fee exemptions were made by parents and full and partial exemptions were granted in all cases. In 2015, 38 applications for fee exemptions were made by parents and once again full and partial exemptions were granted in all cases.

2.5 **Fish Hoek High School** advised that in 2013, 209 application forms for fee exemptions were issued to parents, resulting in 156 full and partial exemptions being granted and 3 being rejected. In 2014, 194 application forms for fee exemptions were issued to parents, resulting in 151 full and partial exemptions being granted and 8 being rejected. In 2015, 201 application forms for fee exemptions were issued to parents, resulting in 170 full and partial exemptions being granted and 3 being rejected.

2.6 **Edgemean High School** advised that it registers each fee exemption application form by numbering and dating it and by

requesting a signature. In 2013, 113 fee exemption forms were issued, resulting in 64 being granted full exemption, 49 being granted partial exemption and none being rejected. In 2014, 111 fee exemption forms were issued, resulting in 60 being granted full exemption, 50 being granted partial exemption and one being rejected on the basis of being over the threshold. In 2015, 108 fee exemption forms were issued, resulting in 55 being granted full exemption, 53 being granted partial exemption and none being rejected.

[158] It is evident from the facts put up by the Respondents, that schools in the Western Cape Province grants hundreds of fee exemption applications every year without significant problems being experienced.

[159] With regard to the specific declaratory orders sought in the subparagraphs of paragraph 6 of Applicant's amended Notice of Motion, with which MS is persisting, I am in agreement with counsel for the Respondents that it is not the task of this Court to become engaged in what amounts to the micro-management of the relationship between the First and Fourth Respondents, on the one hand, and all principals of fee-paying public schools in the Western Cape Province, on the other hand.

[160] In my view the granting of the declaratory orders sought by the Applicant in this regard will infringe the constitutional separation of powers

between the Judiciary and the Executive. Moreover on a proper consideration of all the complaints no evidence is advanced of systematic infringement of the said Regulations.

[161] For these reasons, the relief sought in paragraph 6 and its subparagraphs of the Amended Notice of Motion, and the relief sought in paragraph 7, thereof cannot be granted.

Costs:

[162] The Respondents accept that MS is entitled to the costs of the preparation of the part of her founding papers relating to the application for judicial review of the First Respondent's September 2013 decision concerning her application for a partial fee exemption for 2013. The Respondents further accept that MS succeeds with a material portion of the other substantive relief she is seeking, and she is entitled to her costs, including the costs of two counsel. It is noted that the WLC is not asking for costs. The Applicant was to some extent successful. Therefore, it will only be just and equitable that costs should be awarded in her favour.

[163] In the result, the following order is made:

1. The decision of the First Respondent, in the appeal in terms of s 40 (2) of SASA 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's Respondents decision, is reviewed and set aside.

2. Declaring that the Applicant (MS) and Sixth Respondent (MG) are jointly and not jointly and severally liable for the school fees as contemplated in s 40(1) of SASA.
3. The remaining relief sought in the Amended Notice of Motion is dismissed.
4. The Respondents to pay the Applicant's costs, including the costs occasioned by the employment of two counsel.
5. In respect of the WLC no order is made as to costs.

LE GRANGE, J