

Some Aspects of the Regulations Relating to the Exemption of Parents from the Payment of School Fees in Public Schools

1 Introduction

The purpose of this note is to consider aspects of the recently published regulations governing exemptions from school fees which may be imposed in public schools (see “Regulations relating to the exemption of parents from payment of school fees in public schools” published in GG 29311 dated 2006-10-18 – “the exemption regulations” or “the regulations”). The validity of the 2006 regulations is being challenged in court although the court has refused to suspend their implementation pending the challenge.

The relevant provisions serve as an example of the state’s socio-economic policies in the field of the provision of education as contemplated in section 29 of the Constitution. Statutory provisions in national legislation constitute the legal framework for school fee exemption (see generally on school fees Visser “Aspects of school fees at public schools” 2004 *De Jure* 358–362, the discussion of *Governing Body, Gene Louw Primary School v Roodtman* 2004 1 SA 45 (C) in 2004 *THRHR* 533–537, “Equal educational opportunities defined and evaluated – some practical observations” 2004 22(3) *Perspectives in Education* 149–151, “Notes on the intended reform of the law relating to school fees” 2006 *Speculum Juris* 112).

2 Statutory Basis

Section 39 of the South African Schools Act 84 of 1996 (“the Schools Act”) provides the basis for the regulations made by the Minister of Education on exemptions from school fees (see also the general power in s 61(b)). The relevant part of the section reads as follows:

- “(1) Subject to this Act, 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 the meeting referred to in section 38(2).
- (2) A resolution contemplated in subsection (1) must provide for –
 - (a) the amount of fees to be charged;
 - (b) equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees . . .
- (4) The Minister must, after consultation with the Council of Education Ministers and the Minister of Finance, make regulations regarding the equitable criteria and procedures referred to in subsection (2)(b).”

In addition to the general requirements for the validity of subordinate legislation (or delegated legislation – see, eg, Hoexter *The New Constitutional and Administrative Law: Administrative Law* (2003) 28 *et seq* and 172 *et seq*), it is clear that regulations made by the Minister should serve the purpose indicated in section 39(4). In other words, the regulations should deal with the exemption of parents on the basis of their inability to pay school fees and provide principles on equitable criteria (standards) to be used to establish such inability as well as equitable procedures concerning,

inter alia, the submission and consideration of applications for exemptions. Without going into detail, it is questionable whether all the provisions in the exemption regulations deal with “criteria” and “procedures” as envisaged in the empowering provision.

The precise relationship between the parental resolution on exemption and the making of regulations by the Minister is somewhat problematic. The power to make regulations is expressly linked by section 39(4) to the content of the parental resolution contemplated in section 39(2)(b). In other words, the regulations are not like a policy which has to be considered, but not necessarily adopted, by parents in coming to their own decision (see, eg, in this regard the provisions on norms and standards regarding language policy in public schools in s 6 of the Schools Act and *Western Cape Minister of Education v Governing Body of Mikro Primary School* 2005 3 SA 436 (SCA)). It may be asked why parents have to adopt a resolution on something already prescribed in regulations. One is compelled to conclude that the legislature probably foresaw that the parental resolution may make provision for local circumstances and deal with issues not laid down in the regulations. However, the principles in the parental resolution may not be in conflict with ministerial regulations. In addition, it could be that the legislature wants the ministerial principles contained or referred to in the parental resolution for purposes of information.

3 Survey of Aspects of the Exemption Regulations

The exemption regulations, which came into operation on 1 January 2007, are made up of 13 provisions and three annexures. Two annexures contain forms (on the provision of information to parents and for applications for exemptions) while a third furnishes seven illustrations on how to calculate exemptions in typical situations. In this contribution only certain aspects of the regulations are considered.

Regulation 1 contains definitions. It includes the customary statement that the definitions only apply unless the context indicates otherwise and confirms that terms carry the same meaning as in the Schools Act (reg 1 nevertheless has a superfluous reference to the definition of parent in the Schools Act). The definitions clause provides for four types of exemption, namely an automatic total exemption, a total exemption, a partial exemption and a conditional exemption (the Schools Act does not refer to “automatic” exemptions). Of crucial importance is the definition of “income” which is used as the basis for the calculation of entitlement to an exemption and the amount thereof. This will be referred to below.

The exemption regulations apply to all public schools except schools declared as “no fee schools” in terms of section 39(7) of the Schools Act (reg 2(2)). The regulations must be interpreted within the “framework” of the Schools Act (also an unnecessary provision), as well as the framework of the “National Norms and Standards of School Funding” (see *GG* 29179 dated 2006-08-31; reg 2(1)).

There are provisions imposing a number of obligations on governing bodies and principals when a learner is admitted to a public school. An example is the provision of information to parents (reg 3). In view of the

irregular, dubious or illegal practices at certain public schools regarding school fees (see, eg, Visser 2004 *De Jure* 358), the express inclusion of these duties should be welcomed. However, it is not clear what the practical effect of non-compliance will be. Proper enforcement mechanisms are naturally required for efficacy and should be provided for.

Regulation 4 places certain obligations on parents. It stipulates that the form in annexure B of the regulations must be used for an exemption application – and thus not the detailed and invasive forms, clearly calculated to harass parents, in use at some public schools. Of crucial importance is that the governing body may only require a parent to furnish further “relevant” particulars to the application. This means particulars relating to the information reasonably required to properly consider the merits of an application and verify the accuracy of the basic information provided by the applicant parent. The power to request and receive information is obviously not intended to intimidate applicants or invade their right to privacy.

Regulation 6 is headed “procedure according to which governing body must consider application”. However, most of the regulation actually covers the criteria for an exemption since it provides the formula and its operation for calculating an entitlement to an exemption. It further has a table with percentage values which is to be used in conjunction with the formula. The formula enables the calculation of school fees as a percentage of the income of a parent by taking into account the annual school fees and “additional money contributed by a parent in relation to a learner’s attendance of, or participation in any programme of, a public school”. The “additional money” part is probably not clear enough (it appears to be based on the extended definition of “school fees” in section 1(1) of the Schools Act). It is something different to “school fees” – given that only the payment of school fees may be enforced in terms of the Schools Act. It probably refers to contractually agreed payments to the school and voluntary payments. Does it include expenditure by parents on necessary items such as school books, stationary, school dress and transport costs to and from school? There is a need to clarify this.

A parent’s income, which is basic to calculate an exemption, is defined in regulation 1 and only consists of the following: “gross salary or wages”, “money received from investments” and “profit gained from any form of business undertaking”. As is known, for example, from income tax law, there are many principles and questions concerning the exact scope and meaning of these simple sounding words. For example, are dividends from shares to be seen as “money received from investments”? And how precisely is “profit” to be calculated? What appears clear, however, is that the following are apparently *not* to be regarded as income: donations, an inheritance, maintenance payments, damages payments and profit from the sale of property outside the scope of a business. This may result in a situation that a parent may be wealthy from a capital perspective and still qualifies for an exemption – since there appears to be no equitable discretion in applying the results of the formula in conjunction with the exemption table. Such a result would be contrary to the provision in the Schools Act basing an exemption on a parent’s inability to pay school fees (s 39(2)(b)). Maintenance must in some instances be provided from capital

and a similar consideration should be built into the exemption regulations. To the extent that the regulations allow exemptions in cases not covered by the Schools Act, they may be regarded as invalid. However, certain problems could probably be cured through a sensible interpretation and application of the regulations.

A further thorny issue is the requirement in the formula that the “combined annual gross income of parents” is to be used. What, for instance, is the position regarding school fees and exemptions if Mr and Mrs Z are divorced and sole custody of their child has been given to Mrs Z who enrolls the child at public school X? (see generally *Governing Body, Gene Louw Primary School v Roodtman* (2004 1 SA 45 (C)) where it was held that in terms of the repealed Education Affairs Act 70 of 1988 only the parent having custody of a child may be sued for school fees).

It falls outside the scope of this contribution to analyse this problem in depth. A proper interpretation of the Schools Act suggests that Mrs Z can apply for an exemption on her own and that this would affect only her obligations towards school X. It is thus conceivable that Mrs Z, who may have no or only a modest income, could be granted a full or partial exemption while Mr Z would still remain fully liable. However, the formula under discussion does not appear to take into account the nature of the relationship between the parents. If the formula is literally applied to the case of Mr and Mrs Z, it may mean that Mrs Z can never succeed in obtaining an exemption if Mr Z has a large enough income – despite the fact that the said income has legally and factually nothing to do with her and does not influence her ability to pay.

In view of the above, such a result cannot be regarded as in accordance with the fundamental provision in section 39(2)(b) of the Schools Act basing exemptions on the two central criteria of “equitable grounds” and a parent’s ability to pay. While item “C” in regulation 6(2) uses the plural “parents”, many other provisions in the same regulation use the singular where the plural could also be expected (eg, reg 6(2)(a) refers to school fees as a proportion of the income of a parent (singular) and reg 6(3) provides that a “parent qualifies for total exemption”). There is nothing in the Schools Act which suggests that only one exemption per learner is possible and that an exemption must affect or equally affect everyone connected with the child and who qualifies as a parent. Properly interpreting the concept “parent” and deciding whether singular or plural is appropriate, depends on the intention of the legislature as it emerges from the legislative measure as a whole and the context in which it is used (see generally s 6 of the Interpretation Act 33 of 1957 and the customary introduction to the definitions in reg 1; see further par 168 of the Amended National Norms and Standards for School Funding, which have to be considered in interpreting the regulations which declare that it “is principally the income of individual parents and households, relative to school fees and other educational expenses that is used to determine eligibility to such total or partial exemptions”). Where parents are married, it usually makes sense to look at the financial position of a “household” – see, for example, illustration 1.3 in the exemption regulations which refers to a “couple” which has only one child and the adding up of the income of the

“couple”. However, where there is no “couple” but two or even more separate parents, a different approach is required.

If school fees as a proportion of a parent’s income are 10% or more, the parent qualifies for a total exemption. For a figure below 10% but more than 2.5%, a partial exemption is allowed. Other qualifications need not be considered here.

Regulation 6 further contains principles on, *inter alia*, the requirements for a total or partial exemption on the basis of the result achieved by using the prescribed formula, the right of a parent to present his or her application in person, time limits in making decisions and informing parents, a cross reference to illustrations of how the formula is to be applied (which could probably be an interpretive aid in the case of doubt) and a provision (reg 6(14)(b)) that payment of school fees in reasonable forms of payment other than cash must be considered.

Regulation 7 covers the alteration of a decision on an exemption when circumstances change (including procedural safeguards for parents) while regulation 8 prescribes procedures and timeframes concerning an appeal by a parent to the provincial head of education. There are also regulations on assistance to schools (reg 10) and voluntary contributions to a school despite an exemption (reg 11).

4 Evaluation

It should come as no surprise that the exemption regulations have been the subject of a legal challenge. It is clearly not merely the financial implications of the regulations which have spawned legal action but also the curtailment of the wide discretion which school governing bodies have enjoyed up to now. The dispute has not been dealt with finally as only the urgent application to suspend the regulations was the subject of litigation.

Despite the fact that there are quite a number of problems with interpreting certain provisions in the exemption regulations (including the fact that some of them may probably be regarded as *ultra vires* the Schools Act), and the negative influence that their implementation could have unless the state fully finances the granting of exemptions from the treasury, the regulations should still be generally welcomed. They represent a bold step to ensure more uniformity and equity in this important sphere of life. Too many schools misuse their functions in regard to the imposition of school fees, the granting of exemptions and the spending of school fees and more rigid legal standards are clearly necessary – even if the legal instrument introducing them is not yet perfect. The protection of the interests of parents through procedurally fair measures and timeframes are, for the same reason, now an important feature of the law relating to school fees and related matters. It is hoped that the necessary corrections could be made to improve the quality of the regulations and that the state will not allow any school – and thus its learners and their best interests – to suffer unreasonably as a result of their implementation.

PJ VISSER
University of Pretoria