

A NOTE ON ASPECTS OF THE LEGAL PRINCIPLES GOVERNING SCHOOL FEES IN PUBLIC SCHOOLS

1 Introduction

There are currently more than 28 000 public schools in South Africa. It is thus obvious that the legal principles governing the funding of such schools, and in particular school fees contributed by millions of parents, are of considerable importance. Although the law in this regard has undergone some reform during the past year, certain problems and questions remain.

In previous contributions I referred to the general principles concerning school fees and discussed certain irregular or illegal practices regarding the imposition of school fees and other charges by public schools (see 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; and “Notes on the intended reform of the law relating to school fees” 2006 *Speculum Juris* 112). After an evaluation of the law, I recommended the following (2004 *De Jure* 362):

“Urgent attention should be given to the legislative reform of the provisions in regard to school fees. The current provisions are too vague and simplistic. Much more sophisticated and detailed provisions are required that are not open to so much manipulation. If necessary, such provisions may allow differentiated school fees in prescribed circumstances.”

Since then the South African Schools Act 84 of 1996 (referred to as “the Schools Act” or “the Act”) has been amended in respect of school fees by the Education Laws Amendment Act 24 of 2005. The amendments came into operation on 26 January 2006 (see *GG* 28426 dated 26 January 2006). This contribution analyses and evaluates certain aspects of school fees against the background of the reform (see for a note on the draft legislation, Visser 2006 *Speculum Juris* 112–117).

2 Relevant legal provisions

It is useful to refer first to the statutory provisions relevant to school fees and then to conduct a critical discussion. Section 1(1) of the Act (introduced in 2006) defines school fees as

“school fees contemplated in section 39 and includes any form of contribution of a monetary nature made or paid by a person in relation to the attendance or participation of a learner in any programme of a public school”.

Section 5(3)(a) of the Act states that no learner may be refused admission to a public school on the grounds that his or her parent is unable to pay or has not

paid school fees determined by the governing body in terms of section 39 (see for more detail Visser “Some principles regarding the rights, duties and functions of parents in terms of the provisions of the South African Schools Act 84 of 1996 applicable to public schools” 1997 TSAR 626 629). Section 20(1) lists the functions of the democratically elected governing body of a public school without referring to school fees. However, section 20(1)(l) provides that it must “discharge all other functions imposed on the governing body by or under this Act”. This obviously refers to its functions, powers and duties regarding school fees contained in other parts of the Act.

Chapter 4 of the Act contains provisions on the funding of public schools. The State has the basic responsibility to provide such funding (see s 34 of the Act; generally s 29 of the Constitution). Section 35 of the Act contains principles for determining “norms and standards for school funding” by the state. It is not necessary for the purposes of this note, however, to quote or analyse these provisions or their huge practical significance. Section 36 places a responsibility on school governing bodies to take reasonable measures to supplement the resources provided by the State in order to improve the quality of education at a particular school (it thus refers to endeavours other than the charging of school fees), while section 37 covers school funds and assets of public schools. Noteworthy is section 37(7)(c), which prohibits a governing body from collecting money from parents to circumvent the payment of compulsory school fees and to use such money to establish or fund a trust. The school fund, of which a part will obviously consist of all school fees collected, may generally only be used for educational purposes “at or in connection” with the relevant public school (s 37(6)(a)).

Section 39 of the Act provides as follows (ss (2)(c) and ss (5) to (12) have been introduced with effect from 2006):

- “(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) [the budget meeting].
- (2) A resolution contemplated in subsection (1) must provide for—
 - (a) the amount of school fees to be charged; and
 - (b) equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees;
 - (c) a school budget that reflects the estimated cumulative effect of—
 - (i) the established trends of non-payment of school fees;
 - (ii) the total, partial or conditional exemptions granted to parents in terms of the regulations contemplated in subsection (4).
- (3) The governing body must implement a resolution adopted at the meeting contemplated in subsection (1).
- (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).
- (5) No public school may charge any registration, administration or other fee, except school fees as defined in section 1.
- (6) A public school may not charge a parent of a learner at that school different school fees based on curriculum or extramural curriculum within the same grade.
- (7) Despite subsection (1), the Minister must by notice in the Government Gazette annually determine the national quintiles for public schools or part of such quintiles which must be used by the Member of the Executive Council to identify schools that may not charge school fees.

- (8) The Minister may make a determination in terms of subsection (7) only if sufficient funding, not less than the adequacy benchmark level of funding per learner, has been secured to fund learners at the schools affected by the determination.
- (9) The Member of the Executive Council must identify and draw a list of all the schools contemplated in subsection (7) within his or her province.
- (10) The Minister must—
 - (a) consider the list of schools identified in terms of subsection (9);
 - (b) compare the list with the determination contemplated in section 35(1); and
 - (c) publish the list per province, in the Government Gazette if it complies with the determination.
- (11) The schools contemplated in subsection (7) may, despite that subsection, charge school fees if they receive less than the adequacy benchmark level of funding per learner from the provincial education department.
- (12) The right of the school to charge school fees in terms of subsection (11) is limited to an amount equal to the sum obtained if the actual amount received from the State is deducted from the no fee threshold.”

Section 40 confirms a parent’s liability to pay school fees:

- “(1) 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.
- (2) A parent may appeal to the Head of Department against a decision of a governing body regarding the exemption of such parent from payment of school fees.
- (3) In deciding an appeal referred to in subsection (2), the Head of Department must follow due process which safeguards the interests of the parent and the governing body.

Section 41 covers the enforcement of payment of school fees (most of this has been introduced from January 2006):

- “(1) A public school may by process of law enforce the payment of school fees by parents who are liable to pay in terms of section 40.
- (2) The exemption from payment of school fees must be calculated according to the regulations contemplated in section 39(4).
- (3) The exemption from payment of school fees in terms of this Act is calculated retrospectively from the beginning of the year, if the parent qualifies for the exemption.
- (4) A public school may act in terms of subsection (1) only after it has ascertained that—
 - (a) the parent does not qualify for exemption from payment of school fees in terms of this Act;
 - (b) deductions have been made in terms of regulations contemplated in section 39(4), for a parent who qualifies for partial exemption; and
 - (c) the parent has completed and signed the form prescribed in the regulations contemplated in section 39(4).
- (5) Despite subsection (4), a public school may act in terms of subsection (1) if—
 - (a) that school can provide proof of a written notification to the parent delivered by hand or registered post that the parent has failed to apply for exemption contemplated in section 39; and
 - (b) despite the notice contemplated in paragraph (a), the parent fails to pay the school fees after a period of three months from the date of notification.
- (6) A public school may not attach the dwelling in which a parent resides.
- (7) A learner may not be deprived of his or her right to participate in all aspects of the programme of a public school despite the non-payment of school fees

by his or her parent and may not be victimised in any manner, including but not limited to the following conduct:

- (a) Suspension from classes;
- (b) verbal or non-verbal abuse;
- (c) denial of access to—
 - (i) cultural, sporting or social activities of the school; or
 - (ii) the nutrition programme of the school for those learners who qualify in terms of the applicable policy; or
- (d) denial of a school report or transfer certificate.”

3 Analysis, comment and evaluation

The provisions referred to above, as well as any implied powers and functions connected with school fees, may easily be the subject of an extensive monograph or a post-graduate dissertation. However, in view of practical considerations this note focuses only on certain core issues involving parents. The reform will not be discussed insofar as it relates only to schools which may *not* charge school fees, so-called “no fee schools” (see s 39(7)).

The determination and charging of school fees must meet all the requirements of the Schools Act and since this obviously constitutes administrative action as contemplated by the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), the requirements in the latter legislation are highly relevant. It must be noted in passing that a public school, together with its governing body, generally performs public functions in terms of the Act and is an organ of State as defined in section 239 of the Constitution (see *Western Cape Minister of Education v Governing Body of Mikro Primary School* case 140/2005 (SCA) para 20)). It must be assumed, without further discussion, that a school may enter into enforceable contractual agreements with parents regarding payments to the school – even the payment of school fees – to the extent that such agreements and their concomitant obligations are not in conflict with the Schools Act or any other legal provision. A contract may probably be used to govern practical matters not provided for in the Act (eg, many schools want parents to sign contracts to provide for high collection costs of outstanding school fees). However, the imposition of “school fees” at public schools needs obviously not be based on any (voluntary) contractual undertaking and a parent’s agreement to pay school fees is not required.

Although the raising and proper use of school fees is important in the promotion of quality education, the authority of a public school to determine, charge and collect school fees may only be exercised in terms of the empowering provisions of the Schools Act (see generally Hoexter *The new constitutional and administrative law* Vol II (2002) 77ff; see, by way of analogy, on levying municipal service charges, *Rates Action Group v City of Cape Town* 2004 5 SA 545 (C)). An obvious example of invalid school fees would be if a “no fee school” purports to charge such a fee since the power to do so has been removed (s 39(7)). Sections 39 and 40 make it clear that the main relevant actions regarding school fees at a school are to “determine” and to “charge” such fees, to “implement” a resolution regarding school fees and to “enforce” payment of school fees by parents. Reasonably strict compliance with the applicable legal provisions should be required in view of the financial burden placed on parents.

Many questions, which can obviously not be explored fully in this note, remain. For example, may school fees only be determined “once and for all” for a particular school year? A literal reading of section 39 suggests that school fees

for, say 2007, may only be decided upon in 2006 (s 38(2) read with s 39(1)). While school fees may probably be revised after they have been originally determined by following the same legislative procedures (during 2006 in the example), it is doubtful whether there is implied authority to do so during the next school year after school fees have become enforceable. There can be little doubt, however, that a resolution approving school fees may not authorise any official or even the school governing body to increase school fees or implement an alternative or “contingency” school fee. Such a practice would run counter to the approval scheme provided for in the Act and may also amount to an irregular delegation (see eg s 39(3) obliging the governing body to implement the resolution regarding school fees and s 39(2)(a) requiring the amount of school fees to be charged – and not hypothetical amounts which will not necessarily be charged). The inflexibility suggested by a literal reading of section 39 (see generally on the *contra fiscum* approach to interpretation in cases of doubt Visser 2006 *Speculum Juris* 116) may, of course, cause a variety of practical problems. Careful planning by a school, or further legislative reform, seem to be the only options at this stage.

Practical experience demonstrates that governing bodies and school administrators, in any event, often deviate from section 39. A common example is that no express provision on the equitable criteria for exemption of parents is provided for in the parent resolution (see s 39(2)(b)). In some instances there are misrepresentations regarding the necessity for or the exact use of the school fees on which parents are called upon to decide. With the new and more onerous requirements regarding the school budget in a parent resolution on school fees (see para 2 above for the text of s 39(2)(c)), more instances of deviation or non-compliance are possible. The question is whether a degree of non-compliance with formal requirements, or misrepresentation, will render the resolution on school fees by parents (who usually merely rubber-stamp recommendations by the governing body and the school principal) to be void, voidable, unenforceable or reviewable. Reference may be made to section 6(2)(b) of PAJA which lists as one of the grounds for the review of an administrative action the fact that a “mandatory and material procedure or condition prescribed by an empowering provision was not complied with”. The nature and extent of the deviation and its influence on the resolution, will, naturally, have to be considered. Where no budget meeting was properly called or held, or the resolution of parents was achieved through material misrepresentation, it may well be that the determination of school fees based on such a “resolution” of parents will not be enforceable.

A further question is what precisely the legislature intended to achieve through the introduction of the wide definition of “school fees” (see para 2 above). The definition first refers to school fees contemplated by section 39, in other words approved by parents and which parents are legally obliged to pay. It then continues by stating that it includes any contribution of a monetary nature “made or paid by a person or body” in relation to a learner’s attendance or participation in any school programme. It is beyond the scope of this note to undertake a full analysis of this definition and all its implications. The phrase “a person or body” is wider than parents having an obligation to pay school fees (see s 40). One plausible construction of the new definition is that it is aimed at expanding the concept of school fees to ensure financial transparency in that the money is properly taken into account for the purposes of the school budget, and that the fees must be paid into the school fund which is regulated by law – and not into a separate fund which may be used by the governing body without sufficient legal constraints.

A different possible interpretation of the wide definition of “school fees” is that a public school is not empowered to separate school fees contemplated by section 39 of the Act from other or additional payments, levies or charges in connection with a learner’s attendance or participation in any programme of the public school (see for a reference to this Visser 2004 *De Jure* 361 where it is also pointed out that parents only have a statutory say with regard to “school fees” and not to other charges). This could mean that a school may not administratively charge fees subsequently, after a new school year has commenced, in respect of particular activities as the financial need arises. All such payments are seen as part of the school fees and may thus only be imposed on parents in terms of the general provisions of the Schools Act. For example, many secondary schools offer a so-called “winter school” to their matriculants for which extra payments are required to be channelled to educators. In terms of the wide definition of school fees such payments will probably have to be approved and imposed as part of the school fees (s 39) – unless there is a (voluntary) contractual basis. In conjunction with the apparent requirement to decide on school fees in advance, this will necessitate careful planning by a school to ensure that it can fully finance every “programme”. Nevertheless, if the above interpretations are correct, the wide definition of school fees is to be welcomed since it may assist in preventing unfair, irregular or even corrupt practices by certain schools who sometimes act as though they have the inherent power to charge, levy or demand any amount deemed necessary by them.

A further important question relates to differentiated school fees where parents are required to pay on the basis of, for example, subject choice, participation in certain activities, number of children enrolled by a parent, etcetera. This may be linked to the question of whether a definite school fee must be the subject of a parent resolution or whether a formula and/or a scale of tariffs may be provided for. As pointed out before (2004 *De Jure* 361), it may be argued that only a single and definite school fee (and not a formula to calculate a school fee) may be the subject of a resolution in terms of section 39 the Act – at least in terms of the Act before the amendments’ coming into operation in 2006. This could be too simplistic or rigid in view of the needs of and practices at certain schools, but the Act did not, and still does not, expressly sanction any differentiation. The question which remains is whether there is implied power to differentiate (see generally Hoexter 25-25 for references to cases on implied powers).

The issue of differentiated school fees remains a vexed one and if it should be found that some form of differentiation is reasonably necessary and in accordance with the Act, it will naturally have to avoid a conflict with the right to equality in section 9 of the Constitution. For example, the practice at certain schools to charge parents a higher fee if they have only one child attending the school, does not appear to be based on any legitimate or rational consideration and is thus probably irregular.

Have the new additions to section 39 (eg s 39(6)), which contain an express prohibition on charging different school fees based on curriculum or extramural curriculum *within the same grade*, changed the position? This also raises the question of the possible retrospectivity of the Education Laws Amendment Act 24 of 2005. What did the legislature intend to change or achieve through the express prohibition on differentiation on certain grounds? Does it (now) permit differentiation on other grounds? Without going into all the detail, it is submitted that since differentiated school fees were in any event not (expressly) permitted in terms of section 39 before it was amended, the effect of the new section 36(6)

cannot be to legitimise differentiated school fees in general (eg based on the number of children enrolled by a parent), but merely to remove all possible doubt that differentiation on the basis of the factors listed cannot be legitimate. On the other hand, it may now be argued, on the basis of the restrictive phrase “within the same grade”, that a reasonable and rational differentiation in regard to different school grades on rational grounds may probably be legitimate (see on the *ex contrariis* principle of interpretation, Visser 2006 *Speculum Juris* 116). This would also suggest that the term “school fees”, which must be the subject of a resolution by parents, may indeed be construed as “an applicable school fee” in the sense that different fees may be determined with regard to different grades, provided that all other legal requirements are met (contrary to the assumption expressed *supra*).

Since section 39(6) came into operation in January 2006, the question is whether a school may still enforce the payment of school fees approved in 2005 but which are in conflict with section 39(6) in that, for example, there is differentiation on the basis of curriculum “within the same grade”. In view of, *inter alia*, the exception to the presumption against retrospectivity where a provision is in favour of someone (see generally eg *R v Mazibuko* 1958 4 SA 353 (A) – dealing with criminal punishment though), and the fact that section 39(6) is probably merely declaratory (see eg *Parity Insurance Co Ltd v Marescia* 1965 3 SA 430 (A) 434 on the retroactive operation of a purely declaratory legislative provision), it could be submitted that fees falling foul of section 39(6), may not now be “charged” or “enforced” by a public school, even though they were decided upon before the Act came into operation. However, the matter is obviously not fully settled. The same arguments may be advanced with regard to so-called registration, administration or other fees which are now expressly outlawed in terms of section 39(5). Such amounts could, in the absence of a valid contractual agreement to the contrary, not be imposed separately from school fees before the amendments came into operation in January 2006 and should thus still be unenforceable. Without analysing all possibilities or listing all considerations, it appears that since section 39(6) merely confirms the original intention behind section 39 as a whole, school fees based on unauthorised differentiation in 2005 may not be enforced during 2006. Since the introduction of section 39(6) all parent resolutions on school fees will obviously have to be consistent with this provision to avoid a finding that they are fully or partially void or unenforceable. Further, in regard to retrospectivity, it may be asked whether the identification of a school in 2006 as a “no fee school” means that school fees properly determined in 2005 may not be recovered from parents in 2006. The answer is probably in the affirmative in view of the principles regarding retrospectivity of laws in instances favourable to those affected.

As far as the *enforcement* of school fees are concerned, the new section 41(2)–(4) contains more onerous provisions than before. There is obvious and reasonable justification for the principle involved – including the measure that a parent’s dwelling may not be attached (s 41(6)). Section 41(7) is not completely new but the express prohibition on exclusion and victimisation (which refers to a type of discrimination) against learners whose parents default on the payment of valid school fees, must be welcomed in view of the strengthening of the important principle involved. Children should not be used as “security” in respect of payment. In view of the wide definition of school fees, schools will not easily avoid these provisions by arguing that payments or charges are in respect of particular or specialised activities and that the exclusion of learners in the case of

non-payment by their parents is thus justified. It is just a pity that the legislature did not deem it necessary to criminalise instances of unlawful discrimination against a learner. Such victimisation, sometimes in subtle forms, continues despite the law – just like unlawful corporal punishment in schools – and can probably only be eradicated by resorting to effective criminal prosecution.

Generally it should be noted that a debt in respect of school fees becomes prescribed after three years in terms of the Prescription Act 68 of 1969 (see s 11(d)). What is the position regarding the settlement of claims against parents or the writing-off of debts? There are no express rules in this regard in the Act. Although section 39(3) obliges a school governing body “to implement a resolution regarding school fees”, it must be implied in the Act that the governing body may write off debts which are deemed on reasonable grounds to be irrecoverable. The governing body should also have the implied power to enter into a settlement with a parent regarding school fees to provide for the manner of payment or the final settlement of actual or presumed indebtedness.

While the changes made by the Education Laws Amendment Act to the law relating to school fees are generally to be welcomed, the new consolidated national schools act, which is currently planned to replace the current Schools Act, should deal with the matters and uncertainties referred to above. The best legislative strategy would probably be to retain the basic structure of the current legislation applicable to school fees, but to empower the Minister of Education to make regulations “on any matter pertaining to school fees, including the composition, imposition, approval, payment, enforcement or writing-off of school fees”. This could be added as a new subsection to section 61 which currently prescribes the topics on which the Minister may make regulations. It is quite natural for important financial matters such as school fees to require detailed regulations and the best way to achieve this is the well-known methodology of having the basic principles in principal legislation and the further detailed rules in regulations. As is known, this will promote flexibility and enable the Minister to deal expeditiously with unforeseen problems and with new schemes aimed at exploiting parents or undermining the current provisions of the Act.

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