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THE EXEMPTION OF A PARENT FROM PAYING PUBLIC SCHOOL FEES WITH REFERENCE TO THE POSITION OF A DIVORCEE

1 Introduction and general

Various issues relating to school fees in public schools have been analysed or referred to in previous publications (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, “Notes on the intended reform of the law relating to school fees” 2006 *Speculum Juris* 112 and “A note on the legal principles governing school fees in public schools” 2007 *THRHR* 107).

However, the important matter of the exemption of parents who are unable to pay school fees should also be addressed in some detail. The provisions in this regard 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. This contribution examines exemptions from the perspective of some statutory rules relied upon for the implementation of the state’s policy.

It must be pointed out that the legislature has expressly severed any link between a learner’s right to attend a public school and to be admitted to the full programme of the school, and his or her parent’s payment of or ability to pay school fees (see ss 5(3)(a) and 41(7) of the South African Schools Act 84 of 1996 – “the Schools Act”). The right of a learner to attend a public school is thus not similar to the right to a contractual performance in return for monetary consideration.

2 Statutory provisions

Statutory provisions in national legislation constitute the legal framework for school fee exemption. Section 39(2)(b) of the Schools Act provides that a parent resolution on which the imposition of school fees is based at a public school “must provide for . . . equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees”. While the matter is not entirely clear, it may be argued that a resolution on school fees that does *not* also contain a decision on procedures and criteria on exemption or does not refer to the regulations in this regard (see below) is void or unenforceable. The legislature apparently intended the right to an exemption as a counterbalance to the statutory duty to pay school fees and it is thus an integral part of a valid resolution by the parents on school fees. The mere fact that there are official policies and regulations on exemption (see below), is thus not sufficient.

Section 39(4) of the Schools Act provides as follows:

“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).”

Acting in terms of the above provision, the minister published the “Exemption of Parents from the Payment of School Fees Regulations” (see GN 1293 in *GG* 19347 dated 1998-10-12, which have now been replaced by “Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools”, GN 1052 in *GG* 29311 dated 2006-10-18). The latter set of regulations came into operation on 1 January 2007. At the time of preparation of this contribution, the validity of the 2006 regulations was being challenged in court although the court has refused to suspend the implementation of the new regulations pending the challenge. It is self-evident that the validity of the regulations must be measured against, *inter alia*, the relevant provisions in the Schools Act – for example, the rationale for an exemption, namely the inability of a parent to pay school fees and the expressly stated object that the regulations should contain “equitable” criteria for determining inability to pay and provide for proper procedures for dealing with applications for exemptions.

Section 40(1) of the Schools Act obliges a parent to pay 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”. A valid exemption therefore totally or partially extinguishes the legal obligation to pay school fees.

Section 41 provides as follows with regard to exemptions:

- (a) The amount of an exemption must be calculated according to the regulations on school fee exemptions (s 41(2)). However, there is no express reference to the resolution by parents on the criteria for an exemption (as contemplated in s 39(2)(b)). In accordance with the presumption that the legislature does not create meaningless statutory provisions, an exemption should thus also be calculated in terms of the criteria in a parental resolution, but only to the extent that they are compatible with the ministerial regulations.
- (b) The exemption is calculated retrospectively from the date that the parent *qualifies* for the exemption (s 41(3)) – and thus probably not from the date when the exemption is actually *granted*. This also means that school fees must in principle already be due since there can hardly be an exemption from a duty which does not exist. In addition, it appears that the relevant date would be when a parent objectively meets all the requirements for an exemption, irrespective of whether an application was submitted on that date.
- (c) The following provisions govern the enforcement of school fees against a parent and are also relevant in regard to exemptions (s 41(4) and (5)):
 - “(4) A public school may act in terms of subsection (1) [use the relevant process of law to enforce the payment by parents who are liable to pay] only after it [the school] 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) [the current regulations contain two forms].
- (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.”
- (d) Section 41(6) generally prohibits the attachment of the dwelling in which a parent resides. By implication this refers to the recovery of school fees through a process in terms of which school fees are claimed. Whether it goes wider, need not be considered in this contribution.

There are some questions concerning the relationship between sections 41(4) and (5) quoted above. A public school must apparently ascertain – through a reasonable process – whether or not a parent who is to be sued qualifies for an exemption. It is not clear whether a parent must actually have applied for an exemption or not. Regulation 3(1)(c) of the exemption regulations refers to annexure A in the regulations as the form contemplated in section 41(4)(c) of the Schools Act. This form *inter alia* requires a parent to declare whether or not he or she intends applying for an exemption. Section 41(5) is intended to dispense with the requirements of section 41(4) through a notice. However, it could not have been the intention of the legislature to deprive a parent of the opportunity of applying for an exemption. It must therefore be assumed that a parent who receives the notice in question may still apply for an exemption within the period of three months referred to.

It falls outside the scope of this note to conduct a detailed analysis and evaluation of the provisions of the current regulations concerning exemptions referred to above (which have to be interpreted within the framework of the Schools Act and the ministerial norms and standards for school funding – see GN 869 in GG 29179 dated 2006-08-31). It should generally be noted that these regulations raise some questions of principle and many of detail. They contain provisions regarding the obligations of governing bodies and parents, the procedure according to which governing bodies must consider applications (most of the provisions in reg 6, however, do not deal with procedures but with criteria for qualifying for an exemption), appeals and assistance to parents and to schools. There are also two forms, namely a general form intended to advise parents as to their rights and an application form. Finally there are seven pages with illustrations of how exemptions may be calculated in different situations. Since there is a specific reference to the calculations in the regulations (reg 6(15)) they should probably be regarded as part of the regulations – at least where there appears to be some doubt regarding the interpretation of the main body of the regulations.

3 Further analysis and evaluation

It is obviously only a parent who is liable to pay school fees who is subject to the provisions regarding exemption. The definition of “parent” in section 1(1) of the Schools Act is as follows:

- “(a) the parent or guardian of a learner;
- (b) the person legally entitled to the custody of a learner;

- (c) the person who undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner's education at school."

There are some difficult questions regarding the interpretation and application of this provision in certain instances (see generally 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* 626 627–628 and "School fees: Governing Body, Gene Louw Primary School v Roodtman 2004 1 SA 45 (C)" 2004 *THRHR* 533–537; Mawdsley and Beckmann "Who is a parent for the purposes of making educational decisions on behalf of children? A comparison between the approaches taken by the United States and South Africa" 2006 *De Jure* 354–384).

Practical problems may arise, *inter alia*, in the case of divorced parents or where there are, for other reasons, different persons who qualify as parents but who are not or could not have been married to each other. What, for instance, is the position regarding school fees and exemption if Mr and Mrs X are divorced and sole custody of their child has been given to Mrs X who enrolls the child at public school Z? In *Gene Louw* it was held that under the now repealed Education Affairs Act 70 of 1988 only the parent having custody of a child may be sued for school fees. In view of the wide scope of the duty to pay school fees (see eg s 40(1) which provides that "a parent is liable to pay the school fees determined in terms of section 39 unless and to the extent that he or she has been exempted from payment in terms of this Act"), all parents are now in principle liable to pay school fees. Thus Mr and Mrs X are both liable and may probably be sued jointly or severally. Payment of school fees is based on a statutory provision and even if Mr X has not signed any agreement to enrol the child at school Z, he may still be liable. A contract which Mrs X has concluded with school Z may, of course, co-determine aspects of her obligations *vis-à-vis* Z to the extent that the contractual undertaking is consistent with the law.

In regard to an exemption, the matter could also be problematic. A sensible interpretation of the Schools Act suggests that Mrs X may apply for an exemption on her own and that this would affect only her obligations towards the school. Her application would obviously not influence Mr X's position. It is thus conceivable that Mrs X, who may have no or only a modest income, could be granted a full or partial exemption while Mr X would still remain fully liable. However, on the face of it the exemption regulations of 2006 do not appear to support such a logical and just interpretation. For instance, regulation 6(2) supplies a formula to be used in considering whether an application for exemption should be granted, which has as one of its elements a factor representing the "combined annual gross income of parents" – without taking into account the nature of the relationship between the parents (see also reg 3 in the previous (1998) regulations). If this is applied to the case of Mr and Mrs X, it may mean that Mrs X will never succeed in obtaining an exemption if Mr X has a large enough income – despite the fact that the said income has legally and factually nothing to do with her and does not improve her financial position and ability to pay.

In view of this unjust and anomalous result of interpreting regulation 6(2) literally, it 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. The regulations in question are, in any event, ambiguous in this respect. While the relevant item in regulation 6(2) uses the plural "parents", many other provisions in the same regulation

employ the singular form. For example, regulation 6(2)(a) refers to school fees as a proportion of the income of a parent (singular), regulation 6(2)(c) deals with the situation where “a parent” has more than one child at the same school and regulation 6(3) declares that a “parent qualifies for total exemption”. There is nothing in the Schools Act which suggests that only one exemption per child or learner is possible and that an exemption must affect everyone connected with the child who qualifies as a parent. When interpreting the concept “parent” it should also be kept in mind that whether the singular or plural is appropriate depends on the intention of the legislature as reflected in the legislative measure as a whole and the context in which it is used (see s 6 of the Interpretation Act 33 of 1957 and the customary introduction to the definitions in reg 1).

While Mr and Mrs X remain married, it is highly probable that they could and would jointly apply for an exemption – although this is apparently not legally necessary. However, after a divorce a joint application may be less likely. Thus, to consider Mrs X’s application on the basis of Mr X’s contribution to their notional and hypothetical “joint income”, is completely unrealistic. Such an approach will never withstand judicial scrutiny. In addition, paragraph 168 of the Amended National Norms and Standards for School Funding (see above), which has to be considered in interpreting the 2006 regulations (reg 2(1)), provides 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” who has only one child and the adding up of the income of the “couple”. Divorced parents are obviously not a “couple” and the illustration is thus irrelevant and perhaps demonstrates that where there is no couple, a different approach should be followed.

What is also interesting from the perspective of divorced parents, is that maintenance paid by one parent in respect of his children (to take the example of Mr X referred to above) may *not* be taken into account in calculating whether Mrs X qualifies for an exemption. This is so because of the definition of income as referring to “gross salary or wages”, “money received from investments” and “profit gained from any form of business undertaking” (see reg 1 of the exemption regulations). This position is also questionable since maintenance awards usually take account of educational expenses. If Mrs X receives money from Mr X for the purposes of spending it on education, it should realistically be regarded as part of her “income” for the purposes of considering an exemption. The omission of maintenance from the concept of “income” can hardly be seen as supporting the inappropriate notion that the income of divorced parents should be combined if one of them applies for an exemption.

4 Conclusion

The best legal approach in regard to school fees and exemptions is clearly to have basic principles in the Schools Act and matters of detail in regulations. It is unavoidable that the regulations dealing with exemptions will have to be reviewed annually to ensure that the legislative intent is achieved and that practical problems are addressed as they emerge. In order to bring greater clarity regarding the position of divorced parents as referred to above, the Minister of Education should reconsider aspects of regulation 6 of the 2006 regulations. It should not be necessary for parents first to proceed to court to have justice done because

of unclear provisions that may be abused by schools that are unwilling to grant exemptions. A high degree of clarity is required in regulations aimed at alleviating the plight of parents who cannot afford to pay school fees or full school fees.

Finally, criticism must be levelled at some of the assumptions apparently underlying the government's policy regarding exemptions (see eg para 154 of the norms and standards document). Exemptions have little or nothing to do with providing learners access to basic and even further school education – even though it is popular for government officials to defend the regulations on this basis for political reasons. As pointed out above (para 1), the legislature has correctly removed any legal link between the payment of school fees and access to quality education. No learner may thus be denied access to a public school even though his or her parent does not pay the school fees that are due. Exemptions are accordingly aimed at ensuring equity for *parents* who are reasonably unable to pay school fees – and not to (directly) benefit children who incur no liability whatsoever and who may not be prejudiced because of their parent's financial inability. Other ambitious schemes such as the new “no fee schools” (see eg s 39(7) of the Schools Act) have the same aim. However, in the final analysis the State should ensure that exemptions in public schools are properly financed from public funds. It makes little sense to alleviate financial burdens on parents but still fail to provide high quality education to their children. The financing of exemptions should naturally be carried by the State in terms of its general responsibilities in the sphere of public education (s 29 of the Constitution). Parents at schools not qualifying for an exemption should not be required directly to finance an exemption given to other parents – they are already contributing sufficiently to the financing of public schools through taxation and school fees aimed at benefiting their own children.

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