

Fish Hoek Primary School v GW
2010 2 SA 141 (SCA)

The meaning of the word “parent” for the purpose of determining liability to pay school fees

1 Introduction

Fish Hoek Primary School sued a parent of a learner for the payment of R1,610.00 as outstanding school fees. Fish Hoek Primary School relied on section 40(1) of the South African Schools Act 84 of 1996 (SASA) which provides:

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.

The parent involved in this case, the natural father of a child born out of wedlock, denied liability. Liability was denied on the ground that he was a biological father and not a custodian parent who was liable for the payment of such school fees.

The main issue for determination in this case was the meaning to be given to the word “parent” as used in the SASA for the purposes of determining liability for the payment of school fees. The court *a quo* (*Fish*

Hoek Primary School v Welcome 2009 3 SA 36 (C)) held that this word should be understood to mean the custodian (by operation of the law) parent or guardian of a learner (38G-H, 44J-45A, 45C). Thus, according to this decision, only the custodian parent is liable for the payment of school fees. An appeal was lodged against this decision to the Supreme Court of Appeal (*Fish Hoek Primary School v GW* 2010 2 SA 141 (SCA)). The decision of the Supreme Court of Appeal and the High Court as well as the meaning ascribed to the word “parent” in *Governing Body, Gene Louw Primary School v Roodtman* 2004 1 SA 45 (C) relating to who is liable for the payment of school fees are hereafter discussed. The court held in the latter case that the word “parent” should be understood to refer to a custodian parent or guardian for the purposes of determining liability for the payment of school fees in terms of section 102A(1) of the Education Affairs Act (House of Assembly) 70 of 1988 (EAA). This definition was applied in *Fish Hoek Primary School v Welcome* (*supra*) but later rejected in *Fish Hoek Primary School v GW* (*supra*) in the interpretation of section 40(1) read with section 1 of the SASA.

2 *Gene Louw Primary School*

Before the decision in *Fish Hoek Primary School v GW* (*supra*) the word “parent” was given a restrictive meaning. It was interpreted as meaning “...the parent or other person who has custody of a child whether by operation of the law or by order of a competent court” (*Gene Louw Primary School* (*supra*) 55F).

This is the meaning that was given to the word “parent” by the court in determining who was responsible or liable for the payment of school fees in state-aided schools established in terms of the EAA. It is advisable to look at the facts in *Gene Louw Primary School* (*supra*) so as to be able to distinguish it from the case under consideration.

The respondent in *Gene Louw Primary School* was the natural father of a child enrolled at the appellant school. He (the respondent) was divorced from the mother of this minor child and the deed of settlement incorporated in the divorce order granted the custody of the child to the mother. Furthermore, in terms of the said deed of settlement, the respondent was to pay maintenance for his two minor children in the total amount of R500.00 per month. The respondent was also obliged to keep his minor children covered by his medical fund and no provision was made for any other payment, such as school fees (47-48). Moreover, there was no contractual relationship between the respondent and the appellant school for the payment of school fees.

This case commenced, just like the case under consideration (*Fish Hoek Primary School* (*supra*)), in the magistrate’s court. The magistrate decided that the respondent was not liable for the payment of school fees for his minor child as he was not a person in whose custody the child was lawfully placed. In a stated case, the question to be decided was formulated as follows: “*Of die bepalings van Wet 70 van 1988 die verweerder [the respondent] as nie toesighoudende ouer aanspreeklik stel vir die betaling van onderriggelde vir sy minderjarige kind*” (48G).

As already indicated above *Gene Louw Primary School (supra)* dealt with the interpretation of the term “parent” for the purpose of determining who was liable for the payment of school fees in terms of the EAA. The EAA defined “parent” as “the parent of such child or the person in whose custody the child has been lawfully placed” (s 1 EAA).

It was argued on behalf of the appellant that the legislature must have intended the word “parent” to have a broad or expanded meaning to include not only natural or biological parents (the father and mother) but also other persons (not being parents) in whose custody the child was lawfully placed (49H). According to this contention, the person liable for the payment of school fees in terms of section 102A (1) of the EAA would be (49H-50B):

[e]ither the father or mother (irrespective of whether either or both have custody); and

any third party who has custody of a child in terms of a court order.

The respondent, on the other hand, argued for a more restrictive interpretation of the word “parent” as used in the EAA. The contention was to the effect that (50D-F):

...[section] 1 of the Act was intended by the legislature to encompass only those parents or other persons who have custody of a child, either by operation of the law or by order of a competent court. Married parents (who in the absence of a court order, share the custody of their minor child), the surviving parent of a legitimate child whose other parent has died, and the mother of an extra-marital child all have custody by operation of the law”.

According to this contention, the following persons may be sued for the payment of school fees as they have custody of a minor child by virtue of a competent court order or operation of the law (50F-H, 57 A-B):

- (a) the natural father of an extra-marital child who has been granted custody of such child;
- (b) the divorced parent who had upon divorce been granted custody of his or her minor child;
- (c) the adoptive parent (or parents) who has custody of a minor child;
- (d) the foster parent (or parents) who has custody of a minor child; and
- (e) the person in whose custody a neglected child has been placed by order of criminal court.

After considering the rules of interpretation of statutes, the court in *Gene Louw Primary School* decided to restrict the meaning of “parent” to “only a parent who has custody of the pupil in question by operation of law, as also the parent or other person in whose custody the pupil has been placed by order of a competent court” (57 B-C). The court therefore held that a non-custodian parent could not be held liable for the payment of school fees for his or her minor child.

3 The High Court Judgment in *Fish Hoek Primary School*

The dispute in the *Fish Hoek Primary School* case also commenced in the magistrate’s court and an appeal was lodged in the Western Cape High

Court (2009 3 SA 36 (C)). The issue for determination was whether a non-custodian parent was liable for the payment of school fees for the education of his or her minor child. The respondent was the biological father of the learner who was admitted to the appellant school. He (the respondent) denied that he was responsible for the payment of school fees as he was not a custodian parent. The respondent was therefore relying on the meaning given to the term “parent” in the case of *Gene Louw Primary School (supra)* to the effect that the meaning of this word is to be limited to custodian parents. This was in the interpretation of section 102A(1) of the EAA.

Unlike in *Gene Louw Primary School (supra)* the question for determination in this case (*Fish Hoek Primary School*) revolved around the meaning to be attached to the term “parent” as envisaged in the SASA. This act saddles a parent with the responsibility of paying school fees unless he or she has been exempted (s 40(1) SASA). A “parent” is defined in section 1 of the SASA as:

- (a) the parent or guardian of a learner;
- (b) the person legally entitled to custody of a learner; or
- (c) the person who undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner’s education at school.

It was argued on behalf of the appellant school that the word “parent” has to be given a wide meaning to include a non-custodian parent in the position of the respondent in determining who was liable for the payment of school fees in terms of the provisions of section 40(1) of the SASA (38GH). What was in fact argued was that the court must, in interpreting the SASA, deviate from the meaning ascribed to the term “parent” in *Gene Louw Primary School (supra)* in the interpretation of the EAA.

The appellant also relied on the provisions of section 21 of the Children’s Act 38 of 2005 (CA) which came into operation on 1 July 2007. This section lays down circumstances under which the biological or natural father of a child may acquire parental responsibilities and rights in respect of his child. Such parental responsibilities and rights may be acquired under the following circumstances (s 21(1)(a), (b) CA):

- (a) If at the time of the child’s birth he is living with the mother in a permanent life-partnership; or
- (b) If he regardless of whether he has lived or is living with the mother -
 - (i) consents to be identified or successfully applies in terms of s 26 to be identified as the child’s father or pays damages in terms of customary law;
 - (ii) contributes or has attempted in good faith to contribute to the child’s upbringing for a reasonable period; and
 - (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of a child for a reasonable period.

Although the CA came into operation on 1 July 2007, “some two weeks after the magistrate had given judgement” (39D-E), the main aim of the appellant’s argument was to persuade the court that the correct meaning of the word “parent” as intended in the SASA includes also a non-custodian parent in the same position as the respondent.

As this matter was to be dealt with in terms of the SASA, the court proceeded to determine the meaning of the term “parent” as envisaged by this act. Despite this, it was held that “the Schools Act must be viewed against the background of other earlier legislation and the manner in which that legislation has been interpreted by this court” (39H-I). The court therefore relied primarily on the meaning ascribed to the word “parent” in *Gene Louw Primary School (supra)* and concluded that the same meaning must be attached to this word in terms of the SASA. The court held (41J-42A) that to depart from this meaning would:

In the first place, ... lead, it seems to me, to an anomalous result, for the liability or otherwise of the respondent to the appellant on the agreed facts of this case would depend solely on whether the appellant had sued him on the applicable provisions of the Education Affairs Act, on the one hand, or on those of the Schools Act, on the other: Under the former legislation, as interpreted in the *Roodtman* case, *supra*, the respondent would not be liable; whilst, under the Schools Act construed as the appellant would have us construe it, he would.

The court then interpreted the word “parent” in terms of the SASA in the same manner as it was done in *Gene Louw Primary School (supra)* by restricting its meaning to a custodian parent. The respondent, the biological father of the minor child, was therefore not held liable for the payment of the school fees

Appellant lodged another appeal to the Supreme Court of Appeal against the decision of the High Court. The Supreme Court of Appeal had to consider the same issue, namely, the meaning to be given to the word “parent” as intended by the SASA.

4 The SCA Judgment in *Fish Hoek Primary School*

The question to be decided in *Fish Hoek Primary School* (2010 2 SA 141 (SCA)) was phrased by the Supreme Court of Appeal (as follows (par 1):

[1] The Concise Oxford Dictionary defines the word “parent”, *inter alia*, as ‘a person who has begotten or borne offspring’; ‘a father or mother’; or ‘a person who has adopted a child’. That ordinarily at any rate is the plain meaning of the word. What we are called upon to decide in this case is whether when the legislature chose to employ the word in s 40(1) of the South African Schools Act 84 of 1996 ... it intended it in a sense conforming to its literal meaning or in some other narrow sense”.

It is quite clear from the above quotation that in the interpretation of any statutory enactment, the basic principle or rule should be that words used have to be given their ordinary everyday meaning unless the context otherwise appears in the enactment itself. The SASA uses the word “parent” in a number of provisions and at the same time defines what should be understood by the said word in its definition section (s 1

SASA). For the purpose of this discussion section 39, 40 and 41 (dealing with the determination of school fees, liability for the payment of school fees and enforcement of payment of school fees) as well as section 1 (definition of “parent”) of the SASA are of importance.

Section 39 provides as follows with regard to the determination of school fees:

- (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; and
 - (b) equitable criteria and procedures for total, partial or conditional exemption of parents who are unable to pay school fees.

Section 40 of the SASA, on the other hand, deals with liability for the payment of school fees as follows:

- (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 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 a parent from the payment of school fees.

Section 41 of the SASA deals with the manner in which the payment of school fees may be enforced against parents who are liable to pay such fees. The definition of what should be understood by the word “parent” for the purposes of these provisions is contained in section 1 of the SASA.

It can be safely assumed that in all the provisions mentioned above, which generally deal with school fees, the intention was to ascribe a particular meaning to the word “parent”. There is nothing in these provisions to suggest that this word has to be given a meaning other than that intended in the definition section (s 1 SASA). Consequently, the term “parent” as used under these circumstances has to be understood to mean:

- (a) the parent or guardian of a learner;
- (b) the person legally entitled to custody of a learner; or
- (c) the person who undertakes to fulfil the obligation of a person referred to in paragraphs (a) and (b) towards the learner’s education at school.

In determining the meaning to be given to the word “parent” as used in the SASA, resort has to be had first to the definition of this term as provided for by this act (par 1). It is only when such construction leads to some absurdity, inconsistency, hardship or anomaly as viewed from a consideration of the enactment as a whole that the meaning ascribed to this term in the definition section may be departed from (*Bhyat v Commissioner for Immigration* 1932 AD 125). This may, for example, be the position in respect of section 3 of the SASA which requires every “parent” to cause a learner for whom he or she is responsible to attend

school from the first day of the school year in which such learner reaches the age of seven until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first. 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* 626 626-627) commented as follows concerning the possible meaning of this provision and other provisions of a similar nature to the SASA:

There is nothing expressly requiring a parent to have custody over a learner (or to live within the area the school is situated), but in view of some of the practical implications of the Schools Act it may be assumed that the Act generally applies to custodian parents or guardians.

For the purposes of the provisions of the SASA which deals with school fees, however, the word “parent” has to be interpreted in the wide sense as provided for by the definition section (see Visser “Who is liable to pay school fees? *Governing Body, Gene Louw Primary School v Roodtman* 2004 1 SA 45 (C)” 2004 *THRHR* 534). Any of the persons mentioned in section 1(a), (b) or (c) of the SASA may therefore be held liable for the payment of school fees and not only the person who has custody of the learner.

Without determining the correctness or otherwise of the judgment *in Gene Louw Primary School* (*supra*) which was deemed unnecessary for the purpose of determining the meaning to be given to the term “parent” as envisaged by the SASA, the court decided to ascribe a broad meaning to this word to include a parent who does not have custody of a child (par 5). The respondent was therefore held to be a “parent” who was liable for the payment of school fees in terms of the SASA.

A closer look at the definition of the word “parent” in the SASA reveals that it has to be interpreted differently from the meaning ascribed to it in *Gene Louw Primary School* (*supra*) in the interpretation of the EAA for the purposes of determining liability for the payment of school fees. As indicated, this word is defined in the SASA to refer to a parent or guardian of a learner (whether or not he or she has custody), the person legally entitled to the custody of a learner or the person who undertakes to fulfil the obligations of the parent or guardian of a learner or a person legally entitled to the custody of a learner (s 1 SASA). On the other hand, the EAA defines “parent” as the parent of a child or the person in whose custody the child has lawfully been placed (s 1 EAA). There is therefore no doubt that the intention in the latter statute was to restrict the meaning of the word “parent” to a person who has custody of the child for the purposes of determining liability for the payment of school fees.

The court therefore found that the legislature had intended to give the word “parent” a wide meaning in terms of the SASA in contrast to the earlier EAA. It was therefore held that the reliance by the high court on the decision in *Gene Louw Primary School* (*supra*) was misplaced as the legislature had intended that the word “parent” should bear a different meaning from that used in the EAA for the purpose of determining who

is liable for the payment of school fees under the SASA. The court commented (par 8) as follows in this regard:

The legislature has chosen a meaning of considerable breadth. On the literal and ordinary meaning of s 1(a), a natural father such as the respondent is a parent as defined. It matters not that he is married to the child's mother. On the plain meaning of the word, he self-evidently is the child's parent. In my view there is nothing in the definition to suggest that a non-custodian or non-guardian parent is excluded from the meaning of the word. Far from narrowing the definition of a parent in that way, the legislature has chosen a more expansive definition of the word "parent" to include persons not ordinarily comprehended by its plain meaning. Thus in s 1(c) the legislature simply adds a further category of persons not ordinarily comprehended by the word "parent" to whom the school may look for payment. But it does so without releasing those envisaged in categories (a) and (b) from the obligation to pay.

What was in fact emphasised was that in interpreting a statute, the starting point has to be to give effect to the ordinary or literal meaning of the words used. It is only when this is unable to reveal the purpose of the legislation in question that this rule may be departed from. This would be the case where the plain meaning leads to an absurdity or inconsistency (*Poswa v The MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 3 SA 582 (SCA)). The court therefore held that "... reading in the words 'custodian by operation of the law' the high court rendered the reference to parent in s (1)(a) superfluous and redundant. That, as we well know, a court should be slow to do" (par 9). Further, "... if the legislature wanted to restrict liability for school fees to the custodian parent, it could simply have done so by stating that in clear and unambiguous language" (par 12).

It is further worth noting that the interpretation of the word "parent" by the court *a quo* was found by the Supreme Court of Appeal to be inconsistent with the provisions of the Constitution of the Republic of South Africa, 1996 to the effect that in interpreting any legislation, the "spirit, purport and objects of the Bill of Rights" have to be promoted (s 39(2)). The fact that mothers are regarded as primary care-givers and as such custodian parents on the breakdown of the marriage and other significant relationships places an additional burden on them (*Bannatyne v Bannatyne (Commission for Gender Equality, As Amicus Curiae)* 2003 2 SA 363 (CC)). As women are normally regarded as custodian parents, this may therefore constitute unfair gender discrimination on the ground of differential treatment of custodian parents and their non-custodian counterparts (*F v F* [2008] 1 ALL SA 571 (SCA)). The court concluded (par 13) in this regard that:

To interpret the section (section 40(1) read with section 1(1)) in such a way as to exclude the non-custodian parent from its operation, as the high court has done, serves ineluctably to further thwart the realisation of that goal.

The Supreme Court of Appeal further found that to interpret the word "parent" as the high court did had the effect of offending against the rule that a statute has to be interpreted in conformity with the common law

and the “best interests” of the child as intended by the Constitution (s 28(2)). The common law obliges both parents to support their children, including the provision of their educational needs, in accordance with their respective means and “... to interpret the word (parent) restrictively as the high court did can hardly be reconciled with the paramountcy that must be afforded to the best interests of the child principle” (par 14).

6 Conclusion

The SASA contains a number of provisions which deal with the rights, duties and functions of parents of learners admitted to public schools. The word “parent” is defined in the SASA to include certain categories of persons who may not be parents in the biological or natural sense of the word. There are three categories of parents in terms of this Act, namely, parents in the biological or ordinary sense of the word and guardians, persons who are legally entitled to the custody of learners (whether they have custody or not) and persons who have undertaken to fulfil the obligations of persons referred to in paragraph (a) and (b) of section 1 of the SASA. All the persons mentioned above are regarded as parents for the purposes of determining liability for the payment of school fees (s 40(1) SASA).

The decision of the Supreme Court of Appeal in *Fish Hoek Primary School (supra)* has to be welcomed as before it only parents who had custody of children by operation of the law or persons in whose custody children were lawfully placed by a competent court were regarded as “parents” who were liable for the payment of school fees (*Gene Louw Primary School (supra)*). It cannot be disputed that the majority of persons or parents who have custody of children are women. Consequently, most women, single or divorced, in whose custody children have been placed by order of a competent court, were saddled with the legal responsibility of paying school fees. This was in effect contrary to the Constitution which does not allow unfair discrimination based on sex, gender or marital status (s 9 Constitution). A natural father of a child born out of wedlock and a divorced father whose children have been placed in the custody of their mother by a court order may therefore be held liable for the payment of school fees for their minor children.

The reliance by the court *a quo* in *Fish Hoek Primary School (supra)* on the decision reached in *Gene Louw Primary School (supra)* was found to be without any foundation. Although the courts in both cases had to deal with the meaning to be attached to the term “parent”, the definitions were contained in two different statutes. The definitions, it is submitted, were also different in the sense that the definition dealt with in the latter case was narrower than the one dealt with in the former case. The legislation used in *Gene Louw Primary School (supra)* was the EAA which was promulgated before the achievement of the current constitutional dispensation in South Africa. *Fish Hoek Primary School (supra)* on the other hand involved the interpretation of the term “parent” as envisaged by the SASA, a statute that was promulgated after the achievement of the

current constitutional dispensation. In its interpretation, “the spirit, purport and objects of the Bill of Rights” have to be promoted (s 39(2) Constitution).

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