

**CHAPTER 7**

# **SCHOOL FEES**

Sherylle Dass and Amanda Rinquist



## INTRODUCTION

Many of the problems that beset the South African education system today are a direct consequence of apartheid and its use of education as a tool of oppression. The education system was segregated along racial lines, with the distribution of funding disproportionately weighted in favour of white learners, while black learners received the least funding of all race groups. This uneven distribution of school funding along racial lines meant that schools for black, coloured, and Indian learners had less money than those for white learners. The quality of education was significantly poorer in black schools.

Although apartheid policies have long been abolished, South Africa's public education system is still unequal. Not enough has been done to get black children into previously whites-only schools. The majority of black learners still attend overcrowded, under-resourced schools with poor infrastructure and inexperienced teachers.

The South African Constitution is based on the idea that every person is equally protected by the law; it

aims to improve the quality of life of all citizens, and free their potential. Education can be a tool to achieve this ideal. The right to a basic education (Section 29(1)(b) of the Constitution), the right to equality (Section 9) and the right to dignity (Section 10) must therefore work to equalise the effects of apartheid and advance the quality of everyone's life. This will enable all people to become active citizens, capable of participating meaningfully in building a democratic and open society.

## THE CONSTITUTION

The Constitution says that EVERYONE has the right to basic education, including adult basic education.

'Everyone' means that the right to basic education is not just available to South Africans, but also to refugees and asylum seekers.

Section 153 of the National Norms and Standards for School Funding states that 'school fees must not be allowed to become an obstacle in the schooling process, or a barrier preventing access to schooling.'

Section 9 and 10 of the Constitution state:

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

10. Everyone has inherent dignity and the right to have their dignity respected and protected.

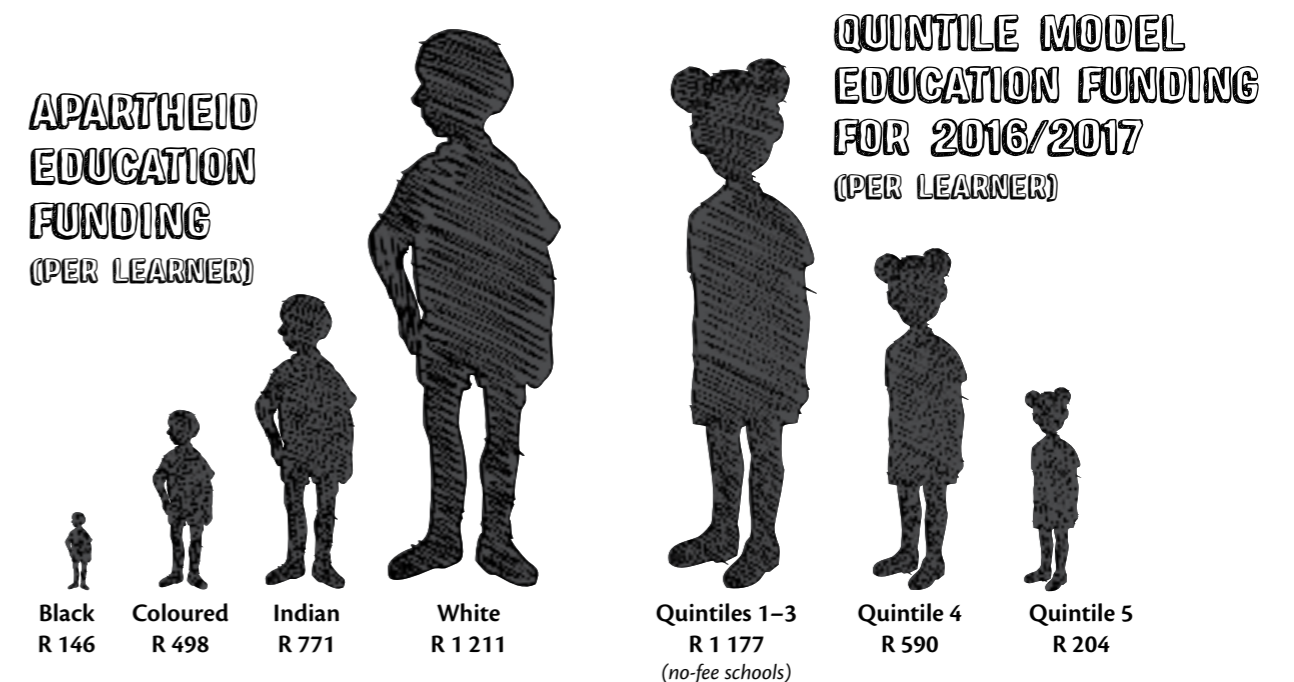


Figure 7.1: A comparison of the state's approach to school funding during and after Apartheid.

In order to achieve these ideals, in 1996 the government created the South African Schools Act. The main objective of the Schools Act was to provide for a uniform system for the organisation, governance and funding of schools.

Public education is funded by government through a pro-poor funding model. This means previously black schools receive more funding from the government than former white schools. The funding model creates five categories of schools, called quintiles.

These quintiles determine how much government funding each school gets. The schools in the lower quintiles (1 to 3) are declared no-fee schools, and do not charge school fees. These schools get the majority of the government's funding.

Schools in quintiles 4 and 5 receive a small amount of funding from the government and are therefore allowed to charge school fees. Each school's fees are determined by the parents of the school. Parents who are unable to afford the school fees are given the right

to apply for a school-fee exemption. This ensures that learners are not discriminated against because their parents are unable to pay the full fees.

This chapter will speak about the right of parents to apply for fee exemptions, and will discuss the experiences and challenges that parents face when applying for a school-fee exemption. It will also discuss some of the challenges for parents who are asked for 'compulsory donations' at no-fee schools.

## THE LIMITATION OF RIGHTS

While the Constitutional Court has ruled that the right to education is immediately realisable, it is important to note that all rights in the Bill of Rights may be limited by a general limitation. Section 36 of the Constitution directs this limitation. It states that any law that limits a person's access to education (or other right in the Bill of Rights) must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This is a high standard, which any potential limitation must meet. Other factors that are taken into account when there is a limitation of a right include the importance of the limitation, the nature and extent of the limitation, and whether there is a less restrictive way to achieve the government's purpose.

## INTERNATIONAL LAW

International law also recognises the need for governments to immediately realise the right to free education. South Africa has signed the International Convention on Social, Economic and Cultural Rights (ICESCR). The Convention calls for the removal of fees, especially for the poorest and most vulnerable.

International law calls for government to meet its obligation to provide the right to education, including access to public schooling, which must be economically accessible.

## LAW AND POLICY

The charging of and exemption from school fees is guided by a number of constitutional and legislative directives, as well as international law.

### ACCESS TO EDUCATION AND THE CONSTITUTION

Everyone has the right to a basic education.

- This right means that basic education is an immediately realisable right and is not dependent on the availability of government resources
- Government must provide access to basic education to everyone living in South Africa, immediately
- Education must be accessible, and this means public schooling must be free, or at least affordable.

Ideally, this right was intended to mean

that all learners would have access to free education, and that government would have a duty to ensure that this would happen. In reality, the government had to recognise that in order to benefit the majority of school-going learners from previously disadvantaged groups, they would have to develop a funding model that would provide for cross-subsidisation of school fees, from parents of learners who were in a position to pay school fees. Cross-subsidisation means that government pays less money to a school that can raise money itself through school fees or other fundraising mechanisms.

## THE FUNDING OF SCHOOLS THROUGH COLLECTION OF SCHOOL FEES

The South African Schools Act provides that schools must be funded through public funds. In order to address the past inequities in school funding, the Schools Act allows for certain schools in more affluent areas to raise their own funds, while government fully subsidises learners in poorer areas. The Act also allows for learners who attend partially subsidised schools, but who aren't able to pay school fees, to apply for full, partial or conditional exemptions from the payment of school fees.

## THE SCHOOLS ACT

According to Section 39(7) of the South African Schools Act, by notice in the Government Gazette the Minister must annually determine the national quintiles for public schools, or part of such quintiles, which must be used by the Provincial Member of the Executive Council for Education to identify schools that may not charge school fees.

Section 34 of the South African Schools Act states that the State must 'fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision.'

# SCHOOL FUNDING THROUGH THE QUINTILE SYSTEM

The Schools Act requires that the Minister of Basic Education determine the national quintiles for public schools annually. This is how the system works:

- The Minister classifies schools according to the level of poverty in surrounding areas
- The factors that they consider include the surrounding infrastructure and how many homes in the area are made from brick, wood, iron sheeting, and so on
- Schools are then ranked between quintiles 1 and 5, with quintile 1 being schools in a very poor area and quintile 5 being schools in a wealthier area
- Schools in quintiles 1 to 3 are no-fee schools, and schools in quintiles 4 and 5 are fee-charging schools
- Government wholly subsidises schools in quintiles 1 to 3, and partially subsidises schools in quintiles 4 and 5
- For each province, the Minister must publish a list of no-fee-paying schools where learners are entitled to enrol without paying any school fees.

There are circumstances in which schools are incorrectly classified as quintile 4 and 5 schools. Despite the

Norms and Standards allowing for a school to be reassigned to another quintile, in general schools find it difficult to change their classification.

However, Section 103(c) of the Norms and Standards for School Funding does say that special circumstances could exist that would warrant a school being reassigned to another quintile. Governing bodies may also apply for such a reassignment. The Norms and Standards require provincial education departments to establish a fair and objective administrative mechanism for considering such requests from school governing bodies and deciding upon them.

The consequences of a school being incorrectly classified could mean that poor children who attend schools in areas that are not rated among the poorest will be forced to attend schools that charge fees. The ability of a parent to apply for a fee-exemption is therefore critical, to ensure that a parent is not disadvantaged by the incorrect classification of a school.

This problem of misclassification is particularly serious in the context of special schools; where, because of the hostel-based system, even when schools are located in wealthy urban areas, learners come to the schools from poor areas around the country. It is often impossible for their parents to pay fees. A 2015 Human Rights Watch Report revealed that no special schools currently appear in any 'no-fee' schools list produced by the government.

What this means is that children with disabilities, whose education is already sorely disadvantaged by various other shortcomings in the education system, could be further denied access to schooling because of this failure to declare special schools to be 'no-fee' schools.

In a 2015 report, the Department of Basic Education recommended that, to remedy this situation, special schools should be permitted – through a process of 'voluntary classification' – to be reclassified as no-fee schools.

# NO-FEE SCHOOLS

No-fee schools are prohibited from charging fees, but are allowed to raise extra funds for the benefit of the school through donations and 'voluntary contributions'. According to the Department of Basic Education, 'any parent, including those granted any type of exemption, can make voluntary contributions to the school fund'. School governing bodies are therefore permitted to encourage parents, learners, educators and other staff at the school to render voluntary services to the school.

Given the difficulty that no-fee-paying schools face in trying to access resources that fall outside of the funding they receive from the state, there are often instances in which schools try to force parents to pay a voluntary donation. This is sometimes referred to as a 'compulsory donation'. This practice is prohibited, and learners should not suffer any discrimination or victimisation if their parents are unable to pay a voluntary contribution. Here are some examples.

## EXAMPLE OF REGISTRATION FEES

A mother has three children at a no-fee school. Every year she is asked to pay a registration fee of R300 per child. This means she must pay R900 every year, even though her children are already at the school. Registration fees are unlawful, whether

a child is starting at a new school or already enrolled at the school.

## EXAMPLES OF FEES FOR SPECIFIC SCHOOL ACTIVITIES

A school governing body (SGB) of a no-fee secondary school in the Mopani District in Limpopo met with parents early in 2015. Parents with learners in Grades 11 and 12 were informed that they were required to pay R60 per month so that the children could attend the 'Saturday school' and 'Winter school'. One parent said he felt obliged to pay, even if he could not afford this monthly contribution. He said: 'I don't want to put my daughter into trouble.'

Victimisation and discrimination for the non-payment of 'compulsory fees' is also prohibited. Victimisation or discrimination means there is some form of coercion to force a monetary contribution. The Schools Act and the

## CONTRIBUTIONS

Contributions can be in the form of money, in kind, or in the form of any service a parent may render to a school!

## DIFFERENCES AT PROVINCIAL LEVEL

Some provinces, such as the Western Cape, have adopted practices that designate some schools that charge school fees of less than R400 a month as no-fee schools.

## GOVERNING BODY RESPONSIBILITIES

The Schools Act, in Section 36(1), determines that a governing body of a public school must take all reasonable measures within its means to supplement the resources supplied by the state in order to improve the quality of education provided by the school to all learners at the school.

Admission Policy both state that a learner may not be deprived of his or her right to participate in any of the school programmes for not paying school fees.

These laws also ban schools from victimising learners for not paying school fees. Examples of such victimisation include schools withholding report cards, matriculation certificates or transfer cards; suspension from classes; verbal or non-verbal abuse; and denial of access to the school feeding schemes, or to school cultural, sporting or social activities.

## FEE-PAYING SCHOOLS

Section 39 of the Schools Act empowers the parent body to determine the school fees to be charged at a public school. There is no cap on how much each school may charge for school fees. This amount is agreed by the parent body of the school.

The parent body must also agree on the criteria and procedure for determining the total, partial or conditional exemption of parents who are unable to pay school fees (the school governing body is required to implement such a decision of the parent body).

The Minister of Basic Education

### EXAMPLE OF DISCRIMINATION OR VICTIMISATION

At a primary school in Mopani District, every Friday is 'Civvies Day'. This means that learners may come to school dressed in ordinary clothes instead of their uniforms, if they pay R2. This would be lawful if it was voluntary; the problem is that when learners come to school in their uniforms on a Friday, they are forced to go home, and are not allowed to return unless they pay the R2. This means that learners are prevented from attending school unless they pay R2.

provides regulations stating what the criteria and procedures for determining fee exemptions should be. In order to prevent financial discrimination in school admissions, the Schools Act states that no public school, in any quintile, may charge any registration, administration or other fee, except school fees.

## SCHOOL-FEE EXEMPTIONS

Parents who cannot afford to pay school fees at fee-charging school (schools in quintiles 4 and 5) may approach the school to request a fee exemption. The Schools Act and the Regulations Relating to the Exemption of Parents from the Payment of School Fees (the Regulations) provide for this.

Depending on the income of the parent, or whether the parent, guardian or a learner receives a social grant, a parent or guardian may be given an automatic exemption, a total exemption, a partial exemption, a conditional exemption, or no exemption.

Section 3 of the Regulations requires that the school principal tell all parents about school-fee exemptions and assist parents who want to apply for exemption. Parents must also sign a form that confirms that they were informed about the school fees and school-fee exemptions. The SGB must display the exemption regulations in a prominent place in the school (parents must be given copies of the regulations upon request).

Automatic exemptions are given to a person with the parental responsibility of a child who is in

foster care, an orphanage, a youth care centre or a place of safety. Automatic exemptions are also given to a child who heads a household, a person who receives a social grant on behalf of a child, a caregiver of an orphan, or a child abandoned by parents. These categories of people must complete the fee-exemption form from the school, and provide a court order, or a sworn statement or affidavit – confirmed by the South African Police Service, a social worker, or any other competent authority – confirming their status.

A parent who qualifies for a partial exemption is one who gets a discount on school fees; the amount would depend on the income of the parents in relation to the school fees. The regulations in the Schools Act provide a formula for calculating the amount a parent will be required to pay if they qualify for a partial exemption.

### EXAMPLE OF AUTOMATIC EXEMPTION

An example of an automatic exemption would be a grandmother who looks after her grandchildren and receives a child-support grant for them, or is their foster parent and receives a foster-care grant. The grandmother would need to submit proof to the governing body that she is receiving a social grant and would qualify for an automatic exemption. She could do this by giving documentary evidence in the form of:

- an affidavit explaining that she receives a child support grant for the child;
- a confirmation affidavit from a social worker or from any other competent authority; or
- a court order which has this information in it.

### EXAMPLE OF CONDITIONAL EXEMPTION

An example of a conditional exemption would be where a parent, at the time of applying for a fee-exemption, didn't qualify because they earned too much; but during the course of the year, became unemployed. The school in this instance could even accept non-financial contributions towards school fees, such as assisting with building renovations.

This formula takes into account:

- The annual school fees for one child that a school charges
- Additional monetary contributions such as piano lessons, art classes, school outings and so on
- The combined annual gross income of both parents.

'If the school fees as a proportion of the income of a parent are greater than 10%, the parent qualifies for a full exemption from the payment of school fees. If the school fees are less than 10% of the income, they will qualify for a partial exemption on a graded scale.'

Section 4 of the Regulations requires a parent to furnish any relevant documents a school governing body may request when deciding on a fee-exemption. The application also requires parents to submit a salary slip or letter explaining how much the parent earns. If the parent is unemployed, or self-employed, an affidavit stating how much they earn and how they support the child is required.

A conditional exemption can be granted to a parent who qualifies for a partial exemption, but because of some personal circumstance cannot pay the reduced amount. A conditional exemption may also be granted to a parent who does not qualify for a fee exemption, but provides information that he or she is unable to pay the school fees.

Section 7 of the Regulations allows for the governing body to reconsider the decision to grant exemption and amend the amount that the parent must pay if they later obtain information that the parent's financial position has changed substantially. They must reconsider the decision to grant exemption, and amend the amount that the parent must pay from the date on which the change took place.

The following formula is applied

$$E = 100 \left[ \frac{F + A}{C} \right]$$

E = school fees as a proportion of the income of the parent

F = the annual school fees for one child that a school charges in terms of Section 39 of the Act

A = additional monetary contributions paid by a parent in relation to a learner's attendance of, or participation in any programme of, a public school

C = combined annual gross income of parents

100 = the number by which the answer arrived at in brackets is multiplied so as to convert it to a percentage

The value E is then applied to a table designated in the Regulations that determines the percentage of exemption for which a parent would qualify.

**Example** If the income of a mother and father is R2000 per month, their total income for the year is R24 000. The school fee at their son's school is R1000 for the year. The school also has a school trip every year costing R400. The formula will be worked out as follows:

$$E = 100 \left[ \frac{1000 + 400}{2400} \right]$$

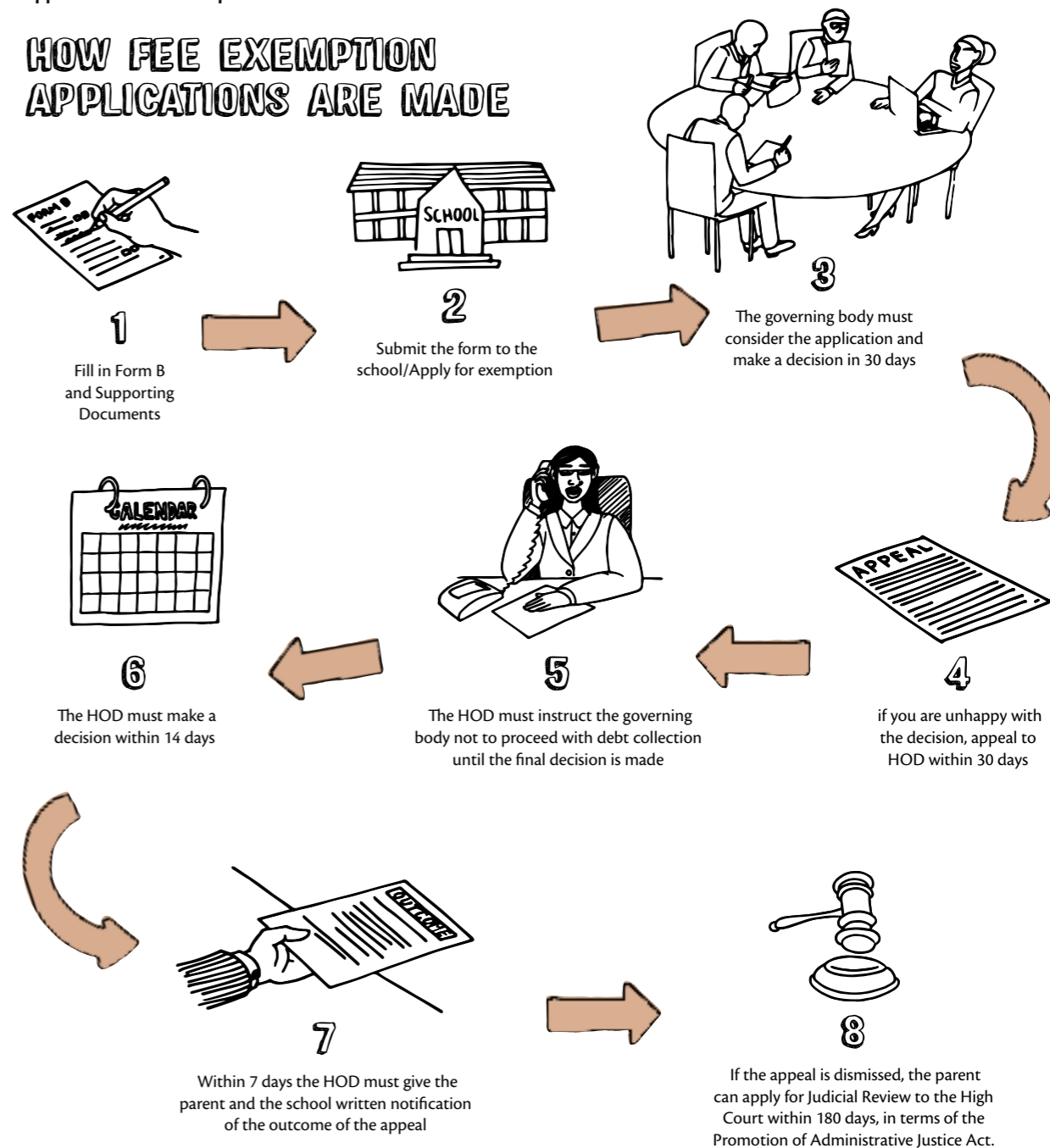
$$E = 5,83\% \text{ (rounded off to 6\%)}$$

In terms of the table from the Exemption regulations, these parents qualify for a 67% discount in their school fees. This means they would pay R1000 – R670 = R239

Section 8 provides that if a parent has been denied a fee exemption and they believe that the formula was not applied correctly or was applied unfairly, he or she can appeal to the head of the provincial education department to have their exemption application reconsidered by the provincial department. An appeal must be lodged with the head of department within 30 days of being notified of the rejection.

Figure 7.2: Explanation of the steps involved in an application for an exemption of fees.

## HOW FEE EXEMPTION APPLICATIONS ARE MADE



## COMPENSATION TO SCHOOLS GRANTING FEE EXEMPTIONS

To alleviate the limited funding that fee-charging schools get from the government, schools that grant fee exemptions are sometimes compensated by the government. This compensation is very limited, and fee-charging schools often don't receive compensation from provincial government, even though the department must budget for refunds to schools who grant fee exemptions. Provinces that do reimburse a school only refund a small portion of what a school would receive in funding if a parent paid the full fee.

This disparity between the compensation a school gets and the fees generated from full-fee-paying parents often leads to schools discouraging parents from applying for school-fee exemptions, or refusing admission to learners who they believe will be unable to pay school fees. Additionally, through their admissions policy, schools may create school feeder zones or catchment areas that include more affluent areas, and exclude bordering poorer townships.

When exemptions are granted, the

Department of Basic Education has acknowledged that compensation is even more important in special and full-service schools, given the high costs of providing education for children with disabilities. As a 2015 report on education for visually impaired learners in special schools reveals: 'Often, even special schools located in wealthier communities accommodate many learners from areas far outside of these communities, where the average household is poor and relies on low-paying jobs and/or social grants.'

### COMPENSATION PAYMENTS BY THE WESTERN CAPE EDUCATION DEPARTMENT (WCED)

In 2012, 90 506 parents were granted fee exemptions at public schools in the Western Cape. The WCED paid out a total of R42 million in compensation to schools granting fee exemptions.

## CURRENT CHALLENGES IN THE IMPLEMENTING OF SCHOOL-FEE-EXEMPTION REGULATIONS

The integration of former white schools into the new, unified and non-segregated public schooling system gave rise to what was commonly referred to as 'Model C' schools. These schools were schools situated predominately in former white areas and are seen as schools situated in more affluent and better resourced areas. The Model C system has been done away with, and most of these schools are now quintile 5 schools and are able to charge school fees.

The government does not limit the amount of school fees a school can charge. School fees are determined solely by the parent body of the school. This system gives rise to many challenges faced by parents who are unable to pay exorbitant fees. These parents are usually the minority group among the parent body, and are usually out-voted at parent body meetings.

Schools also adopt exclusionary practices to prevent the acceptance of learners who they believe may be unable to afford the school fees. These are some of the experiences parents have had when attempting to enrol their children and apply for fee exemptions at fee-paying schools:

'I applied for my daughter to be admitted into FHHHS in 2010. From the outset I made it clear that I would be applying for a fee exemption. Initially, the school refused to accept my application when I made it clear that I could not afford the full school fees, and therefore I could not sign the undertaking to pay the full school fees.' – Parent applying at Fish Hoek High School in the Western Cape.

'Immigrants and refugees are not allowed to apply for Financial Assistance. Your school fees have to be paid in advance at the beginning of each year and all Study Permits, Passports and Visas have to be up to date.' – Letter received by a refugee from Tableview Primary School when he applied for a fee exemption.

A parent from Khayelitsha in the Western Cape tried to apply for the admission of her daughter at De Hoop Primary School in Somerset West. The school rejected her application. The school's admission application incorrectly states that: 'parents who reside in the feeder area of the school may apply for a full exemption or partial remission in respect of school fees...' The school's argument was that since the learner did not reside in the feeder area, her parents could not apply for school-fee exemption. The Schools Act does not prescribe that a parent must reside in the feeder area of a school in order to apply for a school-fee exemption. The school's admission policy in respect of exemptions

from school fees was thus unlawful. Parents are also sometimes dissuaded from applying for fee-exemptions.

'I was told to find another school to take my daughter to if I couldn't afford the school fees.' – Single mother trying to apply for a fee exemption at Sun Valley Primary School.

Some schools use language in their fee-exemption forms that discourage or shame parents into not applying for a fee exemption:

'Please note, however, that the loss of income due to the fee exemptions is borne by the fee-paying parents.' – Fish Hoek High School

'Parents must be aware that requests for exemption may place an additional financial burden on those parents who do pay their fees.' – Wynberg Boys' High School.

Finally, schools don't comply with the Schools Act when recovering outstanding school fees. They hand parents over to debt collectors or debt collection attorneys, who most often win a judgment against

## SECTION 41 OF THE SCHOOLS ACT

A public school may only enforce the payment of school fees after it has ascertained that a parent does not qualify for a fee exemption.

the parent without ensuring that the school has determined whether or not a parent qualifies for a fee exemption.

Some parents also complain that they are never informed about the possibility of fee exemptions, or that the fee-exemption process is too complicated. The documents required

are complex and often difficult for parents to obtain – especially if they are foreign nationals. Parents whose children are in special or full-service schools, which are often far away from their homes, also struggle to afford the travel involved in completing the exemption process.

## LIABILITY FOR SCHOOL FEES

Both biological parents are liable for the payment of school fees. However, the Schools Act creates liability for other categories of ‘parents’, such as adoptive parents, legal guardians, custodians, and other persons who have undertaken parental responsibility over a child. This means, for example, that a grandparent who assumes the responsibility of a biological parent may be liable for school fees, and in turn may apply for a school-fee exemption. In recent years the courts have expanded the liability to pay school fees.

In *B, M (Born D P) v B, NG* the court said that not only biological parents could be held responsible for school fees. In

this case, a stepfather who assumed the role of a biological father was held liable for the payment of school fees.

## COLLECTION OF FEES

Debt-collection cases for school fees appear before magistrates’ courts on a daily basis. Parents who are unable to pay fees are also unable to defend a summons for the attachment of their assets for their children’s school fees. Often parents in this sort of situation are unaware that they may apply for fee exemptions. The Schools Act sets out strict obligations for schools in collecting school fees that are in arrears.

Section 41 of the Schools Act allows a public school to hand over a school-fee account that is in arrears to an attorney to issue a summons in two circumstances:

### 1. STEPS HAVE BEEN TAKEN TO ENSURE THAT A PARENT DOES NOT QUALIFY FOR A SCHOOL-FEE EXEMPTION.

Before a parent is handed over to an attorney for a fee account that is in arrears, the school must ensure that:

- they have ascertained whether or not a parent qualifies for a school-fee exemption
- if a parent did qualify for a fee exemption, then those deductions have been made to the total school fees payable
- the parent has completed and signed a form confirming that they were advised about the amount of school fees payable, that they are

liable for the full payment of the fees, and that they are aware of their right to apply for a fee exemption.

A school must comply with these obligations before they can hand a parent over to a debt-collection attorney to enforce the payment of school fees.

### 2. WRITTEN NOTIFICATION HAS BEEN ISSUED.

The Schools Act also allows a school to hand over the arrear account if:

- The school has proof that written notification was sent to a parent by hand or registered post informing that parent that they have not applied for a school-fee exemption
- The parent has still not paid the school fees after three months from the date this written notice was sent.

Section 41 specifically provides that a

residential property cannot be attached for the non-payment of school fees. A learner cannot be excluded from participating in all aspects of a public school despite non-payment of school fees. A learner’s report card or transfer certificate cannot be withheld due to non-payment of school fees.

Despite these provisions, many schools adopt unsavoury debt-collection practices, flaunt the strict regulations regarding the collection of school fees, and often withhold report cards and victimise and exclude learners from school activities.

In *Centre for Applied Legal Studies and Others v Hunt Road Secondary School and Others*, the school was interdicted from proceeding with any further action for the recovery of outstanding school fees unless and until it had delivered to the applicant’s attorneys proof that it had complied with its obligations in terms of Section 41 of the Schools Act.



# CUSTODIAN PARENTS, AND JOINT AND SEVERAL LIABILITY

There has been much debate about the responsibility of both non-custodian and custodian parents to pay school fees.

A custodian parent is a parent with whom the child lives for most of the time, and who is responsible for the child's daily well-being. The collection of maintenance from a recalcitrant parent has presented many challenges to divorced and single parents. In most instances, a custodian parent is the mother.

South African common law places a 'joint liability' on both parents to maintain their children. This means that both parents are equally responsible for maintaining their children. A parent who has custody over their child, however, most often bears more of the financial burden in raising the child. But by law, a non-custodian parent is liable for 50% of the costs of maintaining their child. This includes costs towards a child's education. The law does not cater for the actual amount needed to educate a child, in terms of school fees. A divorce order might stipulate that a non-custodian parent is liable for half of the school fees, but a maintenance order will look at how much a non-custodian parent can afford to pay. A custodian parent therefore would not necessarily be able to recover half of the school fees from an ex-spouse, if the other parent is unable to afford that amount.

The Schools Act further treats ex-spouses or ex-partners as a family unit in calculating the amount of a fee exemption.

Both the Schools Act and the Regulations require the combined annual income of both parents to determine whether a parent is entitled to a fee exemption. This is problematic for single and divorced parents, who are unable to provide the financial information of a non-custodian parent. All that they can provide is the amount of maintenance they receive from an ex-spouse or ex-partner. These provisions therefore discriminate against parents who do not fall within the traditional definition of a 'family'.

Several cases have attempted to address the discriminatory effect of the current fee-exemption regulations.

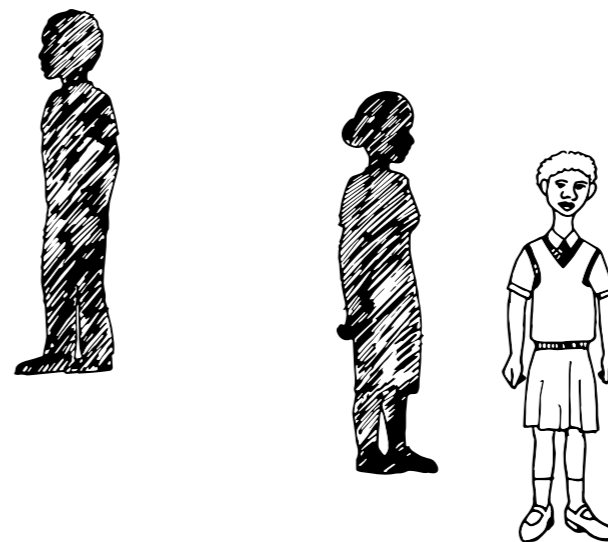
In *Bestuursraad van Laerskool Sentraal, Kakamas v Sersant van Kradenburg and Another* the court held that in respect of the collecting of school fees, the definition of 'parent' in the South African Schools Act does not include a parent who does not carry any parental responsibility, and therefore Sections 40 and 41 do not apply. However, the decision in this matter was overturned by another judgment: in *Fish Hoek Primary School v G W*, the Court held that a non-custodian parent does have liability for a child's school fees, and that such parents are not excluded from the meaning of the word 'parent'. The Court held that it is in the best interests of a child that a non-custodian parent should

be held liable for payment of school fees.

The courts have also been asked to determine whether a non-custodian parent who agrees to pay 100% of a child's school fees in terms of a divorce order absolves the custodian parent from the payment of school fees.

In terms of our common law, both parents are jointly and severally liable for the payment of maintenance, which includes school fees. This means that a creditor (in this case, the school) can choose which parent they want to sue for the collection of the full school fees outstanding. The custodian parent then has a right to claim back what they paid from their ex-spouse.

This presents various challenges to a custodian parent. If a custodian parent cannot pay the full amount of school fees, it is highly unlikely that they would be able to recover what they paid from their ex-spouse by using expensive court processes. The amount of maintenance that the custodian parent gets may be limited, and/or capped at a certain amount; and this amount may not necessarily cover the full amount of school fees levelled by the school. It is also very common for a non-custodian parent to disregard their obligations to pay maintenance, as they often do not take an active role in the upbringing of their child.



...treating a separated family as a joint unit also infringes on a custodian parent's rights to dignity and equality, by expecting them to provide financial information about an ex-spouse or partner.

In *Meeding v Hoër Tegniese Skool Sasolburg*, which also dealt with the liability of custodian and non-custodian parents for paying school fees, the ex-husband had agreed in the divorce settlement to pay the full school fees. The mother of the child asked the school to recover the school fees from her ex-husband because of this divorce order. However, the court said that the divorce order applied only between Ms Meeding and her ex-husband; it did not apply to the school. The school could therefore choose to recover the school fees from either Ms Meeding or her ex-husband; if from Ms Meeding, she would then have to sue her ex-husband for the money she paid for school fees. This is what joint and several liability means. The court said that both Ms Meeding and her ex-husband were jointly and severally liable for school fees, and not jointly liable.

The Meeding case failed to address the practical challenges faced by single and divorced parents; and that the law, as it stands, gives rise to unfair discrimination. The courts should have considered that both parents are jointly liable for school fees. This would mean that each parent

would be liable for half the school fees, and the school can therefore only sue a parent for half of the school fees. This would negate the discriminatory effect on single and divorced parents.

The insistence on treating a separated family as a joint unit also infringes on a custodian parent's rights to dignity and equality, by expecting them to provide financial information about an ex-spouse or partner.

The other notable challenge to the implementation of the fee-exemption regulations is that schools are refusing to decide on a fee-exemption application without the financial information of a non-custodian parent. In essence, they are declining applications for fee exemptions that do not include the financial information of a non-custodian parent. Therefore, a custodian parent who declares her full income, including the maintenance she receives from a non-custodian parent, may find her application declined – even though on her income alone, she would qualify for a fee exemption.

This practice of declining an

application for a fee exemption on the basis that the application is incomplete is an incorrect interpretation and application of the regulations. Regulation 9 states clearly that a parent who applies for an exemption cannot be disqualified from such an application on the basis that their application is incomplete. Regulation 9 places an obligation on the principal to assist a parent in completing their application, which should include taking steps to obtain the financial information from a non-custodian parent.

It is clear that the Department of Education needs to re-visit the Schools Act and the Regulations, and consider amending these regulations so that they do not infringe on the rights of single and divorced parents. Currently there is a case before the Supreme Court of Appeal which seeks to highlight these challenges, and which asks for the courts to declare certain parts of the Schools Act and the Regulations unconstitutional. This case (*Michelle Saffer v HOD Western Cape Education Department & Other*) might provide more clarity on the rights of single and divorced parents.



'In my travels all over the world, I have come to realise that what distinguishes one child from another is not ability, but access. Access to education, access to opportunity, access to love.' - Lauryn Hill

## CONCLUSION

'No-fee' schools, and fee exemptions in fee-charging schools, are there to ensure that there are no barriers to access to education, and that parents and their children are not discriminated against based on their inability to pay fees. Despite the challenges in the implementation of the Schools Act and the Regulations, these mechanisms nevertheless assist parents who have financial constraints to access schooling for their children.

**Sherylle Dass** is a former senior attorney at the Equal Education Law Centre.

**Amanda Rinquest** is a candidate attorney at the Equal Education Law Centre.

### CASES

*Fish Hoek Primary School v G W* 2010 (2) SA 141 (SCA); 2009 ZASCA 144.

*Meeding v Hoër Tegniese Skool Sasolburg* 2012 ZAFSHC 137.

*MB v NB* 2010 (3) SA 220 (GSJ); 2009 ZAGPJHC 76.

*Bestuursraad van Laerskool Sentraal, Kakamas v Sersant van Kradenburg and Another* 2008 ZANHC 18.

*Centre for Applied Legal Studies and Others v Hunt Road Secondary School and Others* 2007 ZAKZHC 6.

*Michelle Saffer v HOD Western Cape Education Department and Other* 18775/13

### CONSTITUTION AND LEGISLATION

Constitution of the Republic of South Africa, 1996.

South African Schools Act 84 of 1996.

National Education Policy Act 27 of 1998.

### INTERNATIONAL AND REGIONAL INSTRUMENTS

The International Convention on Economic, Social and Cultural Rights (ICESCR), 1966.

### SOURCE MATERIAL AND FURTHER READING

Human Rights Watch 'Complicit in Exclusion: South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities', 2015.

Special Rapporteur on the Right to Education 'Preliminary report of the Special Rapporteur on the right to education', 1999.

Equal Education Law Centre 'Western Cape High Court hears argument on discrimination against divorced mothers when applying for school fee exemptions', 2016.