Case No **A37/2000**

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

In the matter between:

DIE BESTUURSLIGGAAM VAN GENE LOUW LAERSKOOL Appellant

and

J D ROODTMAN Respondent

JUDGMENT: DELIVERED 29 SEPTEMBER 2000

VAN HEERDEN J:

The appellant is the governing body of a state-aided school, while the respondent is the divorced non-custodian parent of a pupil of this school. In the Magistrate's Court for the District of Bellville, the appellant sued the respondent for an amount of R3 060.00, being outstanding school fees due and payable to the appellant in respect of the said pupil. According to the particulars of claim, the respondent's

alleged liability to pay the outstanding school fees was based on the provisions of section 102A(1) of the Education Affairs Act (House of Assembly) 70 of 1988 ('the Act').

The matter was ultimately placed before the magistrate for adjudication in the form of a stated case. The factual basis of the stated case (partly set out in the written statement of agreed facts and partly common cause between the parties) was as follows:

1. The respondent is the natural parent of a minor child who has been admitted as a pupil to the state-aided school of which the appellant is the governing body.

2. The respondent is divorced from the mother of the minor child in question and, in terms of the deed of settlement incorporated in the divorce order made on 13 February 1990, the custody of ('*beheer en toesig oor*')[1] such minor child was granted to the mother.

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[1] For criticism of the term '*beheer en toesig*' instead of the word '*bewaring*' ('*custody*'), see *Stassen v Stassen* 1998 (2) SA 105 (W).

3. The amount of R3 060.00 is due and payable to the appellant in respect of outstanding school fees for the minor child and these school fees relate to a period governed by the provisions of the Act.

4. The mother of the minor child (the respondent's former wife) was the person who enrolled the child as a pupil at the state-aided school in question. There is, accordingly, no **contractual** relationship between the appellant and the respondent as regards the payment of school fees.

5. In terms of the deed of settlement incorporated in the divorce order, the respondent is obliged to pay maintenance for his two minor children in the total amount of R500,00 per month from 31 January 1990. In addition, the respondent is obliged to keep his minor children covered by his medical fund, his liability in this regard being limited to the amount for which the medical fund is liable. No provision is made in the deed of settlement for any further payments by the respondent in respect of his minor children; in particular, no express provision is made for the payment of school fees by the respondent.

It is not clear from the papers before this Court whether the above-mentioned fixed amount of maintenance payable by the respondent has been increased subsequent to the divorce, either by court order or by agreement between the respondent and his former wife. However, it would appear that the respondent has at no stage subsequent to the divorce been ordered by a competent court, to pay school fees in respect of the minor child to whom these proceedings relate.

In terms of the stated case, the question which had to be decided by the magistrate was formulated as follows:

> *'Of the 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.'*

The magistrate decided this question in the negative and, accordingly, dismissed the appellant's claim. The judgment and order of the magistrate in this regard form the subject of the present appeal.

With reference to various authorities, the magistrate sketched the common law position in terms of which the parent to whom the custody of a minor child has been awarded (most frequently upon the divorce of

the parents) is henceforth vested with that portion of the parental power[2] which pertains to the personal, day-to-day life of the child. One of the incidents of custody is the decision-making power in respect of the child's education, including the choice of school for the child. The magistrate continued as follows:

> *'Gevolglik kan die ander (nie-bewarende) ouer nie besluite neem oor wat by die bewarende ouer tuis- hoort nie. Die verweerder is gevolglik nie by magte om die kind in 'n spesifieke skool te plaas vir onderrig nie. … Die gevolglike aanspreeklikheid vir betaling van skoolfooie volg dus vir die rekening van die ouer wie die gesag het oor die kind en oor-eenkomste in belang van die kind by die skool aangegaan het, te wees. Die ouer wie nie meer ouerlike gesag oor die kind voer nie, ook nie met betrekking tot watter skool die kind moet bywoon nie, kan dus ook nie aanspreeklik wees vir betaling van skoolgelde nie. Die egskeidingsbevel gelas dit nie. Die vader van die kind, met ander woorde die verweerder, het homself ook nie kontraktueel verbind om die skoolgelde te*

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[2] The term '*parental power*' may be regarded as outmoded and unsatisfactory, the modern emphasis being on the rights and interests of children rather than on the '*power*' relationship between parent and child (see Van Heerden et al (eds) Boberg's *Law of Persons and the Family* (2ed, 1999) 313-316 and the authorities there cited). This term is, however, so entrenched in the South African case law and other sources that use of another term for purposes of this judgment would simply cause confusion (cf in this regard, *V v V* 1998 (4) SA 169 (C) at 176C-F).

betaal nie. Die moeder het haar egter sodanig verbind toe sy die kind ingeskryf het by daardie skool. Daar bestaan nie 'n ooreenkoms in dié verband tussen die eiser en die verweerder nie. Die eiser se eis word gevolglik bevind om nie te slaag nie...'

Mr Treurnicht, who appeared for the appellant, submitted that the magistrate had not actually decided the question posed in the stated case, namely whether the provisions of the Act render a non-custodian parent liable *vis-à-vis* the relevant school for the payment of school fees in respect of his or her minor child, irrespective of the non-custodian parent's lack of decision-making power concerning the choice of such school. **Mr Treurnicht** emphasised that the appellant's claim was based neither on the common law, nor on a contractual relationship between the appellant and the respondent, but exclusively upon the provisions of section 102A(1) of the Act.

There is some merit in this criticism of the magistrate's reasoning. However, this does not necessarily mean that the order ultimately made by the magistrate is incorrect. If this Court comes to the conclusion that, on a proper interpretation, the provisions of section 102A(1) of the Act

do not in fact support a claim for school fees by the appellant against the respondent, this appeal cannot succeed.

Section 102A(1) of the Act reads as follows:

> *'The parent of a pupil admitted to a state-aided school shall pay such school fees as the governing body of that school may levy.'*

In terms of section 1, the word 'parent', in relation to a child, means 'the parent of such child or the person in whose custody the child has been lawfully placed'.

Counsel for the Appellant argued that, in view of this definition of '*parent*' in the Act, the legislature must be taken to have envisaged an expansion of the concept of '*parent*' so as to include not only the natural parents (the father and the mother) of a child, but also other **persons** (not being parents) in whose custody the child has been lawfully placed. Upon this interpretation, the parties liable to pay school fees in respect of a minor child, in terms of section 102A(1) of the Act, would be either the father or the mother of the child, (irrespective of whether either or both such parents have custody of the child), as well as any third party who

has custody of the child in terms of the order of a competent court. The school would thus be able to rely on the provisions of the section to hold either the father or the mother liable for school fees - even if the parents are divorced, the custody of the child has been granted to the other parent and the latter as the custodian has enrolled the child in the school.

According to counsel for the appellant, this interpretation is supported by the common law duty of both parents to support their children in proportion to their respective means, which duty is not terminated by divorce or by the fact that the custody of the child has been granted to the other parent.

Mr la Grange, who appeared for the respondent, also relied on the common law in support of quite a different interpretation of the relevant provisions of the Act. Referring to the common law '*right*' of the custodian of a minor child to determine all questions relating to such child's education (whether or not the custodian is a parent of the child), counsel submitted that the definition of '*parent*' in 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 law or by the order of a competent court. Married parents (who, in the absence of a

court order to the contrary, 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 law. On the other hand, there are categories of parents and other persons who have custody of a minor child, not by operation of law, but rather by virtue of the order of a competent court. These categories include:

- the father of an extra-marital child to whom the custody of such child has been granted, either in terms of the common law or under the provisions of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997;

- the divorced parent who has upon divorce been granted custody of his or her child, to the exclusion of the other parent, or the divorced

parents who have upon divorce been awarded joint custody of their child, in terms of section 6(3) of the Divorce Act 70 of 1979;[3]

- the adoptive parent (or parents) of a child who has (or have) custody (and guardianship) of the child by virtue of the adoption order made by a children's court under Chapter 4 of the Child Care Act 74 of 1983;

- the foster parent (or parents) who has (or have) custody of a child by virtue of the order of a children's court, made in terms of section 15(1)(b), read together with section 53(1), of the Child Care Act 74 of 1983; and

- the person in whose custody a convicted child has been placed by the relevant criminal court, acting in terms of section 290(1)(b) of the Criminal Procedure Act 51 of 1977.

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[3] Custody orders may also be made by the High Court, in terms of s 5(1) of the Matrimonial Affairs Act 37 of 1953 (as substituted by s 16(a) of Act 70 of 1979), in cases where the parents are already divorced or are living apart from each other. Moreover, in the exercise of its inherent jurisdiction as the upper guardian of all minors within its area of jurisdiction, the High Court has a common law power to make **any** order (including a custody order) in respect of a child where the best interests of the child require such an order. In exceptional cases, **both** parents may be deprived of the custody of their child and this custody may be vested in a third party. See further in this regard *Boberg's Law of Persons and the Family* op cit 500 et seq.

Counsel for the respondent thus submitted that, on a proper interpretation, the non-custodian parent of a child would **not** fall within the definition of '*parent*', as it appears in section 1 of the Act. On the contrary, this definition should be taken to include only those parents who have custody of a child by operation of law, as also those parents and other persons in whose custody a child has been placed by the order of a competent court. According to counsel, this interpretation is also supported by the context of the Act as a whole and, in particular, by having regard to other sections of the Act in which the word '*parent*' is utilised.

The principle of statutory interpretation which requires a statute to be interpreted in conformity with the common law rather than against it has been described as '*the most fundamental of all the presumptions* [of statutory interpretation] *since many of the others are merely axiomatic extrapolations of it*'.[4]

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[4] See Devenish *Interpretation of Statutes* (1992) 159.

In the words of Wessels J in *Casserley v Stubbs* 1916 TPD 310 at 312:

> *'It is a well-known canon of construction that we cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention of the legislature to alter the common law, or the inference from the Ordinance must be such that we can come to no other conclusion than that the legislature did have such an intention.'*

The effect of this principle is neatly summed up by Professor Lourens du Plessis as follows:

> *'This implies that, as a starting-point, an enactment must be interpreted in view of the common law in that its provisions must as far as possible be reconciled with related precepts of the common law: the provisions that stand to be interpreted must be so construed that they are capable of co-existing with similar and/or related provisions of the common law.'*

(See Du Plessis *The Interpretation of Statutes* (1986) 69 and the authorities there cited; see also Steyn *Die Uitleg van Wette* (5 ed, 1981) 97-100.)

At common law a parent (or other person) who has the custody of a minor child is entrusted with the care of the child's person and the decision-making power in respect of the child's day-to-day life, upbringing and education. A useful description of the position of the custodian parent is given by Gubbay J in *Matthee v MacGregor Auld* 1981 (4) SA 637 (Z) at 640D-F:

> *'the custodian parent has, therefore, the right and duty to regulate the life of the child; to choose and establish his residence (**Landmann v Mienie** 1944 OPD 59 at 65); to resolve with whom he should be allowed to associate (**Wolfson v Wolfson** 1962 (1) SA 34 SR at 37C-H); to direct the lines on which his secular education should proceed (**Simleit v Cunliffe** 1940 TPD 67 at 76; **Scott v Scott** 1946 WLD 399 at 401), including the choice of the school (**Martin v Mason** 1949 (1) PH B9 (N)); to devise upon his religious instruction (**Ryan v Ryan** 1963 R & N 356 (SR) at 368A); to determine what medical advice, supervision or assistance should be sought in the event of his becoming ill or sustaining an injury (**Oosthuizen v Rix** 1948 (2) PH B65 (W); **Custner v Hughes** 1970 (3) SA 622 (W) at 625B). The … non-custodian has no right of interference in these matters.'*

This description applies equally to the position of a non-parent in whose custody the child has been lawfully placed.

Specifically as regards the secular education of the child, it is the custodian who is vested with the decision-making power concerning all questions relating to such education, such as selecting the school to which the child is to be sent, choosing the medium of instruction, and changing the child's school from time to time, as circumstances may require (see, for example, *Niemeyer v De Villiers* 1951 (4) SA 100 (T) at 103H-104A and the numerous other authorities cited in Joubert (ed) *LAWSA* Volume 16 *Marriage* (First Reissue, 1998) para 134 and in *Boberg's Law of Persons and the Family* op cit at 562-563 note 215 and 663 note 21).

The question of the custodian's position concerning the religious education of the child was left open in *Simleit v Cunliffe* 1940 TPD 67 at 76 (which case was concerned only with secular education). However, the custodian's '*duty to care for the religious upbringing of the child and the right,* ***prima facie,*** *to decide upon the form which that religious upbringing should take*' was affirmed by Ramsbottom J in *Dreyer v Lyte-Mason* 1948 (2) SA 245 (W) at 251, followed in *Ryan v Ryan* 1963 (2) PH B26 (SR). (See also in this regard the later cases cited in *LAWSA* Volume 16 *Marriage* loc cit and in *Boberg's Law of Persons and the Family* op cit 663 note 22; but cf Spiro *Law of Parent and Child* (4 ed,

1985) 298-299 and *Allsop v McCann* (CPD Case No 1518/2000, unreported judgment of Foxcroft J) at 7-14.)

As pointed out above, the parents of a dependent child are both under a common law duty to support such child in accordance with their respective means. This duty of parents to support their children is not terminated by the dissolution of their marriage by divorce. A court order for the maintenance of a dependent child (whether made by the High Court or by a maintenance court) simply regulates the incidence of the common-law duty of support as between the parents. A parent who has paid more than his or her *pro rata* share towards the child's support is entitled to recover the excess from the other parent, irrespective of whether the duty of support was apportioned between them by an order of court. This right of recourse appears to be based either on unjust enrichment or on *negotiorum gestio.*

The parental duty of support includes the obligation to provide the child with a suitable education (see now section 15(2) of the Maintenance Act 99 of 1998). In appropriate cases, this may even extend to the provision of a university education (see, for example, *Mentz v Simpson* 1990 (4) SA 455 (A) at 459B-D).

The scale upon which parents must provide support for their child is determined by the reasonable needs of the child, viewed against the background of the standard of living of the parents and their economic and social circumstances. (On the duty of parents to support their children, see *Boberg's Law of Persons and the Family* op cit 240-248, *LAWSA* Volume 16 *Marriage* op cit paras 156-168, Clark (ed) *Family Law Service* (1988, with looseleaf updates) paras C3-C13 and the numerous authorities cited by these writers.)

For the purposes of the present case, it is important to distinguish between the duty of parents *inter se* to support their children, on the one hand, and the liability of parents as against third parties for debts incurred by either parent in respect of the child's maintenance needs, on the other hand. Provided that the parent with whom the third party contracted had the requisite contractual capacity, the third party would of course have a contractual claim against such parent. Furthermore, during the subsistence of the parents' marriage, the provision of goods or services by the third party for the support of the child would, in many instances, fall within the concept of '*necessaries for the joint household*'. If so, the third party would, in appropriate circumstances, also have a contractual claim against the non-contracting parent. If, on the other

hand, the goods or services supplied by the third party cannot be brought within the concept of '*necessaries for the joint household*' (for example, if the spouses are separated and there **is** no such joint household), then the contractual claim of the third party would lie only against the contracting parent and any liability of the non-contracting parent *vis-à-vis* the third party would have to be based either on unjust enrichment or *negotiorum gestio*. (See further in this regard, Sinclair assisted by Heaton *The Law of Marriage* Volume 1 (1996) 445 et seq, as also Hutchison et al (eds) *Wille's Principles of South African Law* (8 ed, 1991) 134-138).

It must be noted that, to a certain extent, the common law rules governing the liability of spouses as against third parties for debts incurred by either of them in respect of household necessaries have been replaced by the provisions of the Matrimonial Property Act 88 of 1984. In the case of a marriage in community of property, section 17(5) of this Act provides that, where a debt has been incurred for necessaries for the joint household, the spouses are jointly and severally liable to the third party concerned. In terms of the same subsection, even if the debt does not fall within the ambit of necessaries for the joint household, the spouse who incurred the debt or both spouses jointly may be sued by the

third party creditor, provided that the debt in question is recoverable from the joint estate. In terms of section 23(5) of Act 88 of 1984, spouses married out of community of property are also jointly and severally liable to third parties for all debts incurred by either of them in respect of necessaries for the joint household.

Where the parents of a child are divorced, the third party who provides goods or services for the support of the child would appear to have a contractual claim only against the parent or other person with whom the third party has contracted. Although both parents **do** remain liable to support their child in accordance with their respective means, the third party who wishes to sue a non-contracting parent would, it would seem, have to base this claim on some other ground (such as unjust enrichment or *negotiorum gestio*) and would have to satisfy the requirements of such a claim (see *Boberg's Law of Persons and the Family* op cit 248, as also the first edition of the same work (1977) 266-267).

Responding to a question from the Court, counsel for the respondent submitted that, where the deed of settlement between the parents expressly provided for the payment by the non-custodian parent

of the cost of goods or services in respect of the child (eg medical expenses or school fees), the third party supplier might be able to found a claim against the non-custodian parent on the basis of a *stipulatio alteri*. This may well be so, but it is not necessary, for the purposes of this judgment, to express any firm views in this regard.

The above-mentioned presumption that a statutory provision does not alter the existing law more than is necessary applies not only to the common law, but also to the alteration of existing statute law (see Devenish *op cit* 71-72). The common law and statutory framework set out above must therefore form the background to the interpretation of section 102A(1) of the Act. Moreover, it should also be remembered that, where the legislature uses the same word in different sections of the same statute, it may reasonably be supposed that it would intend this word to be understood in the same sense throughout the statute, where no clear indication to the contrary is given (see *Minister of the Interior v Machadodorp Investments (Pty) Ltd and Another* 1957 (2) SA 395 (A) at 404D-E, *The Master v I L Back and Co Ltd* 1983 (1) 986 (A) at 1001C-D, as also Devenish op cit 217-218 and Joubert (ed) *LAWSA* Volume 23 *Statute Law and Interpretation* (1991) para 296). Apart from section 102A(1), there are various other sections of the Act which regulate the

position of a '*parent*' of a child as regards the education of that child. These sections bear closer examination.

- In terms of section 42 of the Act, the relevant Head of Education may, at the request of the '*parent of the child*', approve that the child be admitted to a school for specialised education (whether a state-aided school or otherwise), if the Head of Education is of the opinion that the child concerned is a handicapped child. (See also sections 43, 44, 45 and 47, which also confer certain rights and/or impose certain obligations on the '*parent of a handicapped child*'.)

- Section 55 of the Act provides that, in certain circumstances, the '*parent of a child*' may choose which official language shall be determined by the school principal as the mother tongue of the child.

- In cases in which the school principal or some other competent person has, in terms of section 55, determined the mother tongue of the child, section 56 gives to the '*parent of the child*' who is aggrieved by such determination a right to appeal against that determination, first to the Head of Education, and thereafter to the Minister of Education.

- Section 57(2) of the Act specifically empowers the '*parent of a child*', in certain circumstances, to choose which official language shall be the medium of instruction for the child concerned.

- As regards religious ceremonies and Bible instruction in schools governed by the Act, section 62(4) entitles the '*parent of a child*' to request the school principal in writing that the child be exempted from attending such ceremonies or Bible instruction, whereupon the principal is obliged to exempt the child accordingly.

As pointed out by counsel for the respondent, the rights, powers and duties conferred by all the above-mentioned sections of the Act upon the '*parent of a child*' relate to matters which, under the common law, fall within the exclusive competence of the parent or other person having custody of the child in question. The non-custodian parent has no common law right to interfere in these matters, although he or she may petition the court to do so if it appears that the custodian has exercised his or her discretion in a manner contrary to the interests of the child, or in conflict with an order of court. If, therefore, the word '*parent*' in these sections were to be interpreted to include a non-custodian parent, this would amount to a radical departure from the common law principles set

out above. It certainly cannot be said that either the language or the import of these provisions support the conclusion that the intention of the legislature **was** to alter the common law in this manner. This being so, the word '*parent*', as used in the above-mentioned articles, must be interpreted to mean the parent or other person who has custody of a child, whether by operation of law or by order of a competent court.

Mention may also be made of section 52 of the Act. In terms of this section, if a so-called '*feeder area*' has been determined for the purposes of the admission of children to a school, then '*no child whose parent resides within the feeder area shall, except with the approval of the school board concerned, attend a school outside that feeder area*' (section 52(1)(a)). As, in the vast majority of cases, the child would reside together with its custodian, it is logical to interpret the word '*parent*' in section 52 to have exactly the same meaning as the word '*parent*' in the other sections discussed above.

Interestingly enough, both counsel for the appellant, as also counsel for the respondent, relied on section 104 of the Act to support their different interpretations of the word '*parent*' in section 102A(1). Section 104(1) provides that, if the '*parent of a child*' who is subject to

compulsory school attendance fails to send the child to school regularly without sufficient cause, that parent is guilty of a criminal offence.

Counsel for the respondent argued that, as it is trite law that penal provisions must be construed strictly, the word '*parent*' in section 104(1) must be interpreted as referring only to the parent or other person who has custody of the child and who, therefore, under the common law has the exclusive decision-making power in respect of the child's education. On the other hand, counsel for the appellant submitted that such an interpretation would give rise to the absurd result that, in circumstances in which the child is staying with the non-custodian parent (for example, during one of the periods of access by the non-custodian parent), the non-custodian parent could fail to send the child to school regularly with impunity – and this could surely not have been the intention of the legislature.

The latter interpretation overlooks the provisions of section 104(2)(a)(ii) of the Act, in terms of which '*any person*' who, during normal school hours, without sufficient cause '*prevents or discourages*' a child (who is subject to compulsory school attendance) from attending school, is also guilty of an offence. The penalties applicable to both such

offences are exactly the same (see section 106(b) of the Act). Thus, even if the word '*parent*' in section 104(1) were interpreted to exclude the non-custodian parent, such parent would nevertheless in most cases be caught within the provisions of section 104(2)(a)(ii) if the child who is staying with him or her does not attend school on a regular basis.

As submitted by counsel for the appellant, there would appear to be no indication that the word '*parent*' as utilised in section 102A(1) of the Act should be interpreted to have a different meaning to the same word when used in the other sections of the Act discussed above. Indeed, if one were to interpret the word '*parent*' in section 102A(1) to include the divorced non-custodian parent, this would mean that the school would be able to hold such non-custodian parent liable for the payment of school fees, not only in the absence of a contractual relationship between the school and such parent, but also without having to satisfy the requirements of a claim based on some other ground such as unjust enrichment or *negotiorum gestio*. Such an interpretation would also amount to a fairly radical departure from the common law principles set out above.

The appellant's interpretation of the word '*parent*' in section 102A(1) of the Act would also give rise to inequitable and, in many cases, absurd or anomalous consequences. Thus, for example, where the amount of maintenance payable by the non-custodian parent in respect of his or her child has been computed with reference to all the different components of the duty of support, including the child's educational expenses (see, for example, *Du Toit v Du Toit* 1991 (2) SA 856 (O)), the school at which the custodian parent has enrolled the child would nevertheless be entitled to sue the non-custodian parent for all the outstanding school fees in respect of such child. This would be the case even if the non-custodian parent had complied with the maintenance order in all respects.

Another possibility which springs to mind is the situation where the child has been placed in the custody of a foster parent by a children's court and that foster parent has enrolled the child in a school. Quite apart from the possibility of a foster care grant payable to the foster parent, the natural parent may also have been ordered to make regular payments as a contribution towards the maintenance of the child (by means of a contribution order in terms of section 43 of the Child Care Act 74 of 1983). If one were to interpret the word '*parent*' in section

102A(1) of the Act in the manner contended for by the appellant, this would mean that the school would be able to sue the natural parent (who does not have the custody of his or her child) for all outstanding school fees in respect of such child, even if the natural parent had complied with the contribution order against him or her in every respect. This type of consequence would offend against the tenet of statutory interpretation to the effect that, as far as possible, statutes must be interpreted so as not to give rise to inequitable or absurd results (see, in this regard, Du Plessis op cit 83-97).

In the light of the above, I am of the view that the word '*parent*' in section 102A(1) of the Act, read together with the definition of '*parent*' in section 1, must be interpreted so as to encompass 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. If more than one person has custody of a particular pupil, then any of such persons can be held liable by the school, in terms of section 102A(1), for that pupil's school fees. Thus, married parents who, in the absence of a court order to the contrary, share the custody of their minor child, would both be liable *vis-à-vis* the school for the payment of school fees, irrespective of which parent had

enrolled the child in the school. Similarly, the school would be able to sue either parent (or both parents jointly) for school fees in a situation where the parents are divorced, but where joint custody of the child has been awarded to them (once again, quite irrespective of which custodian parent had enrolled the child at the school).

To a certain extent, therefore, this interpretation of section 102A(1) does alter the common law principles regulating the liability of parents *vis-à-vis* third parties who provide goods or services for the support of a child. In such situations, however, each of the parents having custody of the child has an equal voice in matters relating to the child's daily life, including educational matters, so that this '*extension*' of the common law would appear to be justified. Here too, of course, the parent who pays the school fees and, by so doing, contributes more than his or her *pro rata* share towards the child's support, will be entitled under the common law to recover the excess from the other parent.

It follows from what I have said above that, in my view, the provisions of section 102A(1) of the Act do not render the respondent, as the non-custodian parent, liable *vis-à-vis* the appellant for the payment of outstanding school fees in respect of his minor child. I would accordingly recommend that the appeal be dismissed with costs.

B J VAN HEERDEN

GRIESEL J: I agree. The appeal is dismissed with costs.

B M GRIESEL