

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: 24611/11

In the matter between:

<b>JACOBUS DU PLESSIS N.O</b>	First Applicant
<b>ESTELLE BOTHA N.O</b>	Second Applicant
<b>GERHARD BOTHA N.O</b>	Third Applicant

(in their capacity as trustees for the time being  
of the Kobot Beisigheid Trust (IT969/2009))

and

<b>MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, WESTERN CAPE</b>	First Respondent
<b>THE GOVERNING BODY OF THE GROOTKRAAL UCC PRIMARY SCHOOL (OUDTSHORN)</b>	Second Respondent
<b>GROOTKRAAL UCC PRIMARY SCHOOL (OUDTSHOORN)</b>	Third Respondent

and

<b>EQUAL EDUCATION</b>	Amicus Curiae
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**FILING NOTICE**

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**DOCUMENT(S) FILED HEREWITH:**

First Respondent's affidavit deposed to by John Hilton Lyners in answer to the Amicus Curiae


DATED AT CAPE TOWN ON THIS 14<sup>TH</sup> DAY FEBRUARY 2012.

**STATE ATTORNEY**

Per:  
**ZAHEER KARJIKER**  
Attorney with a right of appearance  
in accordance with Section 4(2) of  
Act 62 of 1995  
Second Defendant's Attorney  
4<sup>th</sup> Floor  
22 Long Street  
**CAPE TOWN**  
(Ref: 1987/11/P18)

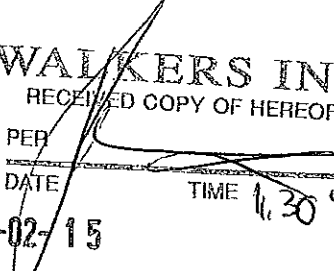
**TO:** THE REGISTRAR  
High court  
CAPE TOWN

**AND TO:** LEGAL RESOURCES CENTRE  
Amicus Curiae's attorney  
3<sup>rd</sup> Floor, Greenmarket Place  
54 Shortmarket Street  
CAPE TOWN

<b>LEGAL RESOURCES CENTRE</b>	
(CAPE TOWN)	
Received copy hereof. 	
Date: 15.02.12	Time: 12:00
Without Prejudice	

**AND TO:** LOUW DU PLESSIS  
Applicant's Attorney  
31a St James Street  
**SOMERSET WEST**  
REF: C Nimb

**C/O:** WALKERS INC.  
15<sup>th</sup> Floor, Plein Park  
CAPE TOWN

<b>WALKERS INC.</b>	
RECEIVED COPY OF HEREOF	
PER 	
DATE	TIME 1:30
2012 -02-15	

**AND TO:** BOTHA PRETORIUS AND ANDREWS INC.  
Second and Third Respondents' Attorney  
Unit 1, 4 Nina Street  
**BRACKENFELL**  
REF: JERALD/ag/MAT845

**C/O:** HEYNS & PARTNERS  
Ground Floor, The Chambers

50 Keerom Street  
**CAPE TOWN**

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO.: 24611/11

In the matter between:

<b>JACOBUS DU PLESSIS BOTHA N.O.</b>	First Applicant
<b>ESTELLE BOTHA N.O.</b>	Second Applicant
<b>GERHARD BOTHA N.O.</b>	Third Applicant

(In their capacities as trustees for the time being  
of the Kobot Besigheid Trust (IT 969/2009))

and

<b>MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, WESTERN CAPE</b>	First Respondent
<b>THE GOVERNING BODY OF THE GROOTKRAAL UCC PRIMARY SCHOOL (OUDTSHOORN)</b>	Second Respondent
<b>GROOTKRAAL UCC PRIMARY SCHOOL (OUDTSHOORN)</b>	Third Respondent
<b>EQUAL EDUCATION</b>	Amicus Curiae

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**FIRST RESPONDENT'S AFFIDAVIT DEPOSED TO BY JOHN HILTON  
LYNERS IN ANSWER TO THE AMICUS CURIAE**

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NWJ 

I, the undersigned,

**JOHN HILTON LYNERS**

do hereby make oath and state that:

1. I deposed to the first respondent's ("*the Minister / the Department*") explanatory affidavit and confirm that I am still so authorized.
2. The contents of this affidavit are within my personal knowledge, unless otherwise stated.
3. On 5 January 2012 this Honourable Court granted an order by agreement between the parties in which Equal Education had been admitted as amicus curiae ("*the order*"). The order provides for Equal Education to file an affidavit, alternatively, its principal submissions by 26 January 2012. On 27 January 2012 it served an affidavit deposed to by Doron Moss Isaacs on the Department's attorneys. I have read the affidavit. For convenience, I shall follow the same structure before dealing with the individual allegations paragraph by paragraph. Where I make submissions regarding the law, I do so having regard to the advice of the Department's legal advisers, which advice I believe to be correct.

**The historical context**

4. The Department is well aware of the historical context in which schools in rural areas were required to function. It is however, not the second respondent's ("*the Governing Body*") or the third respondent's ("*the School*") case that they are

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experiencing any of the problems referred to by Equal Education in paragraph 12 of its supplementary affidavit. On the contrary, Mr Dido the chairperson of the Governing Body, said the following of the School in an earlier application brought under case number 12999/11 (in which the Governing Body and the School sought to interdict the Department from taking any steps to close, merge or move the school): *“The Grootkraal School has expended a lot of energy to obtain funding from local and international benefactors. When the current headmaster of Grootkraal School, Mr. LJ Metembo, was appointed in 1994, the school had no water, no electricity, no telephone and four overloaded pit latrines toilets. Through hard work and dedication the school now has relatively good facilities.”* The school has also acquired its own buses.

5. Both the Governing Body and the School are regulated in terms of the South African Schools Act 84 of 1996 (*“the Act”*). Neither the Governing Body nor the School disputes this. On the contrary their case in the interdict application referred to above and in this case, as regards the Department, is premised upon the Department’s alleged non-compliance with the provisions of the Act. Moreover, neither the Governing Body nor the School disputes that their tenure on its current premises has since 1 February 2001 been regulated in terms of agreements provided for in section 14 of the Act which the Department concluded (and renewed from time to time) with the owners of the premises and accepted by Mr Dido on behalf of the Governing Body. Their occupation of the premises has thus at all times been temporary.

NwH 

6. In light of the above, I respectfully point out that the contentions advanced by Equal Education in paragraph 26 of its founding affidavit, namely the unreasonable refusal of land owners to conclude agreements contemplated in section 14 of the Act, and paragraph 18 of its supplementary affidavit, of the security of tenure being subject to the whims of private land owners, are without foundation.
  
7. Section 58 confers a discretion upon the Minister whether to expropriate land or a real right in or over land for any purpose relating to school education if it is in the public interest to do so. The Department would exercise this power as a last resort. That expropriation should be adopted as a last resort is confirmed in the guidelines - annex YD3 - upon which Equal Education rely. I pause to mention that these are guidelines, not policy. In terms of the report, the guidelines were formulated to assist with the rationalization of small or non-viable schools, which may be achieved through mergers and closures. The objective *inter alia* is to improve the quality of education, promote access to schools and to ensure the retention of learners and educators in rural and farm schools. Expropriation is envisaged as an aid in this process – and not as is suggested by Equal Education that where negotiations with a property owner to rent its property seems unlikely, the Minister automatically invokes section 58 of the Act before he considers a merger or a closure.
  
8. Annex YD2 also recognizes that expropriation is a difficult option. This report concludes with recommendations for the closure of farm schools and other

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public schools on private land, ultimately phasing out the category of public schools on private land.

9. I respectfully point out that security of tenure is one of the ways by which to ensure the right to basic education. The Department contends, however, that the right to basic education does not necessarily entail that the right can only be exercised in a preferred location. In this case, the Governing Body and the School insist on remaining in its current location. The Department has put in place the necessary facilities on the premises of Voorbedag Primary School and will ensure adequate facilities there for the learners of the School to ensure their right to basic education. As previously stated, the Department is prepared to either provide transport for the School's learners, alternatively, provide the funds so that the School can arrange the transport. The principal of the School is responsible to advise the Department of the route along which the learners will be transported. I repeat, the Department has not taken a decision to close or merge the School with any other.

**Obligation of the MEC to ensure security of tenure of schools**

10. I respectfully point out that Equal Education's contention that tenure of security - at the present location - is a precondition to ensuring the School's learners' right to basic education is similarly without foundation. The learners are relocated to alternative premises where they will have the same number of classrooms, one computer room, a principal's office, adequate water and ablution facilities, sufficient electricity to operate their computer room, transport

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OK



to school as well as their teachers. In the circumstances, I respectfully point out that the learners' right to basic education remains unaffected.

11. I pause however, to mention that in my earlier affidavit, I said that the Department would construct an additional four mobile classrooms by March 2012. It has, in light of this application and the costs associated therewith, not proceeded with the remaining four as yet. It undertakes to do so should this Honourable Court grant an eviction order. In that event the Department asks to vacate the property by the end of the second school term. This will afford the Department sufficient time within which to put up the additional classrooms.
12. I confirm that the Department did in fact consider expropriation, but in light of the alternative measures available to the Department, decided to relocate the School. The School will be situated on state owned land approximately 17kms from its present location. The Department is also of the view that the property at Voorbedag Primary School is more suitable than the existing premises.

**The appropriate remedy**

13. The Department will abide by the decision of this Honourable Court. As already stated, the Department understands that it can occupy private property only in terms of an agreement contemplated in section 14 of the Act. In the event of an order evicting the Department, it asks that it be ordered to vacate at the end of the second school term to afford it the opportunity of putting up the remaining four mobile units.

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14. In what follows I deal with the allegations contained in the supplementary affidavit paragraph by paragraph. My failure to deal with any specific allegation must not be construed as an admission thereof and is denied.

**Ad paragraphs 1 to 5 thereof**

15. I deny that all the allegations contained in the affidavit are true and correct. Save as stated herein, I admit these paragraphs.

**Ad paragraphs 6 to 9 thereof**

16. I admit these paragraphs.

**Ad paragraph 10 thereof**

17. I have followed the same structure above.

**Ad paragraphs 11 to 17 thereof**

18. Subject to what is stated above, I respectfully say that these paragraphs are irrelevant and ought to be disregarded.

NW4 OK

**Ad paragraphs 18 to 19 thereof**

19. I am advised that these paragraphs constitute legal argument and do not require an answer from me. I do not understand what Equal Education means with the last sentence of paragraph 19.

**Ad paragraph 20 thereof**

20. I admit that in some cases the Department's available financial resources are not sufficient to meet the rentals asked for by land owners. This is such a case.

**Ad paragraph 21 thereof**

21. I am advised that this paragraph constitutes legal argument and does not require an answer from me.

**Ad paragraph 22 thereof**

22. I am advised that this paragraph too constitutes legal argument and does not require an answer from me. As already stated however, the Department did consider expropriation, but decided to relocate the School to state owned land instead.

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**Ad paragraphs 23 to 28 thereof**

23. I admit these paragraphs only to the extent that they correctly reflect the reports. They are also denied to the extent that they are inconsistent with what I have stated above. I point out that annex YD1 is limited to a study carried out in the rural areas of the Free State, Limpopo and Mpumalanga Provinces. No reference is made to the prevailing circumstances in the Western Cape Province. As regards annexes YD2 and YD3, I have already pointed out that these are guidelines and not the Department's policy.

**Ad paragraph 29 thereof**

24. As already stated, the Department did consider expropriation. Save as stated herein, I deny this paragraph.

**Ad paragraph 31 thereof**

25. I deny this paragraph. The School will continue on alternative premises.

**Ad paragraph 32 thereof**

26. I admit that its relocation was considered when the property owner gave the Department notice that it would not renew the lease the Department had over the property. I deny the remaining allegations.

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**Ad paragraph 33 thereof**

27. I am advised that this paragraph constitutes legal argument and does not require an answer from me.

**Ad paragraph 34 thereof**

28. I admit that the section 58 of the Act confers a discretion upon the Member of the Executive Council of a province who is responsible for education in that province. The guide lines refer to the provisions of section 58 of the Act.

**Ad paragraph 35 thereof**

29. I admit the letter was addressed to the Minister. It was sent by facsimile to the Minister on 4 January 2012 at 16h22. The application for eviction would be heard the following morning, 5 January 2012. The issue of expropriation was raised for the first time in this letter. The Department's response is contained in this affidavit.

**Ad paragraph 36 thereof**

30. I am advised that this paragraph constitutes legal argument and does not require an answer from me.


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Ad paragraph 37 thereof

31. I deny this paragraph.

Ad paragraph 38 thereof

32. I have dealt with these allegations above. Save as stated above, I deny this paragraph.




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**JOHN HILTON LYNERS**

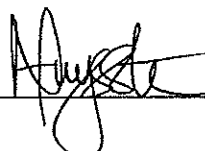
I certify that:

The deponent signed this affidavit and swore and acknowledged that:

- (a) he knew and understood the contents of this affidavit;
- (b) he had no objection to taking the prescribed oath; and
- (c) he considered the oath to be binding on his conscience.

The deponent thereafter uttered the words "*I swear that the contents of this declaration are true, so help me God.*"

Dated at CAPE TOWN this 14th day of February 2012.




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**COMMISSIONER OF OATHS**  
**NICOLE VAN HUYSTEEN**  
 PRACTISING ADVOCATE OF THE HIGH  
 COURT OF SOUTH AFRICA  
 6th FLOOR, KEEROM STREET CHAMBERS  
 021 424 0093