

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

CASE NO: 24611/11

In the matter between:-

CENTRE FOR CHILD LAW

Applicant

and

JACOBUS DU PLESSIS BOTHA N.O.

First Respondent

ESTELLE BOTHA N.O.

Second Respondent

GERHARD BOTHA N.O.

Third Respondent

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

**MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION,
WESTERN CAPE**

Fourth Respondent

**THE GOVERNING BODY OF THE GROOTKRAAL UCC
PRIMARY SCHOOL (OUDTSHOORN)**

Fifth Respondent

GROOTKRAAL UCC PRIMARY SCHOOL (OUDTSHOORN)

Sixth Respondent

In re:

The matter between:-

JACOBUS DU PLESSIS BOTHA N.O.

First Applicant

ESTELLE BOTHA N.O.

Second Applicant

GERHARD BOTHA N.O.

Third Applicant

**In their capacities as trustees for the time being of the Kobot
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and

**MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION,
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First Respondent

**THE GOVERNING BODY OF THE GROOTKRAAL UCC
PRIMARY SCHOOL (OUDTSHOORN)**

Second Respondent

**GROOTKRAAL UCC PRIMARY SCHOOL (OUDTSHOORN)
EQUAL EDUCATION**

**Third Respondent
Amicus Curiae**

NOTICE OF MOTION

KINDLY TAKE NOTICE that the applicant intends to apply to this Court for an order in the following terms:

1. Granting leave to the Centre for Child Law, acting on behalf of the minor children attending school at Grootkraal UCC Primary School, to intervene as a party in the main application under case number 24611/2011;
2. Granting leave to the minor children's legal representative to file an affidavit in the main application within 30 days of the granting of this order and to make written and oral submissions in the main application on such terms and subject to such time periods as this Court deems meet;
3. Ordering the Respondents jointly and severally to pay the Applicant's costs, if and to the extent that they oppose this application; and
4. Further and/or alternative relief.

TAKE FURTHER NOTICE that the affidavit of **CARINA DU TOIT** will be used in support hereof.

TAKE FURTHER NOTICE that the applicants have appointed the offices of **NORMAN WINK AND STEPHENS** at the address indicated below as the address at which they will accept notice and service of all process, documents and notices in these proceedings.

TAKE FURTHER NOTICE if any of the respondents intend opposing this application, they are required:

1. To notify the applicant's attorney in writing, within **five (5) days** of the service of the notice of motion of such intention to oppose;
2. Within **fifteen (15) days** of notifying the applicant's attorney of their intention to oppose the application, to deliver their answering affidavit, if any, together with any relevant documents in answer to the allegations made by the applicant; and
3. To appoint in their notice of opposition an address, within eight (8) kilometers of the office of the Registrar at which they will accept notice and service of all documents in these proceedings.

DATED at PRETORIA on this 7TH day of MAY 2012.



CARINA DU TOIT
CENTRE FOR CHILD LAW
Attorneys for the Applicants
Room 4-31 Law Building
University of Pretoria
Pretoria
Tel: 012 420 4502
Fax: 012 420 4499
Ref: C 0251 / C du Toit

C/O: NORMAN WINK & STEPHENS
2nd Floor, The Chambers
50 Keerom Street
Cape Town
Ref: CE Smyth /sw/S92

**TO: THE REGISTRAR
WESTERN CAPE HIGH COURT
CAPE TOWN**

AND TO: LOUW DU PLESSIS INC
Attorneys for the First to Third Respondents
31 St James Street
Somerset-West

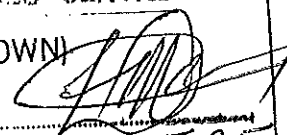
C/O WALKERS INC
15th Floor Plein Park
Plein Street
Cape Town

AND TO: THE STATE ATTORNEY
Attorneys for the Fourth Respondent
4th Floor
22 Long Street
Cape Town
Tel: 021 441 9270
Ref: Karjiker 1978/11/P18

AND TO: BOTHA PRETORIUS INC
Attorneys for the Fifth and Sixth Respondent
Unit 1-3, 4 Nina Street
Brackenfell

C/O HEYNS & PARTNERS
Ref: Jerald Andrews/ag/MAT362
Ground Floor, the Chambers
50 Keerom Street
Cape Town

AND TO: LEGAL RESOURCES CENTRE
Attorneys for the Amicus Curiae
Third Floor
54 Shortmarket Street
Greenmarket Square
Cape Town
Ref: W Kerfoot / S Magardie

LEGAL RESOURCES CENTRE	
(CAPE TOWN)	
Received copy hereof:	
Date: 08.05.12	Time: 15.25
Without Prejudice	

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FOUNDING AFFIDAVIT

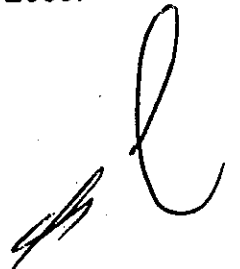


I, the undersigned

CARINA DU TOIT

state under oath:

1. I am an adult woman, employed as an attorney at the Centre for Child Law (hereafter 'CCL'), University of Pretoria.
2. The facts contained herein are to the best of my knowledge true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge.
3. I am duly authorised to bring this application on behalf of the CCL.
4. The CCL was established by the University of Pretoria in terms of a constitution and is registered as a Law Clinic with the Law Society of the Northern Provinces. The main objective of the CCL is to contribute within its means to establish and promote the best interests of children in the South African community, more particularly to use the law as an instrument to advance such interests.
5. The CCL acts in this application on behalf of all the children attending Grootkraal UCC Primary School who cannot litigate on their own behalf due to their status as minors. The CCL is empowered to act on behalf of the children and to bring this application on their behalf in terms of section 38(c) of the Constitution and sections 14 and 15(2)(c) of the Children's Act 38 of 2005.



6. The full particulars of the Applicants and Respondents, in the main matter, are set out fully in the Founding Affidavit under case number 24611/2011.

PURPOSE OF THE APPLICATION

7. The purpose of this application is two-fold:

- 7.1 Firstly, to join the CCL, acting on behalf of the group of children attending Grootkraal UCC Primary School, as an intervening party in the main matter; and

- 7.2 Secondly, to explain my role as the children's legal representative and to indicate how and when I will place the relevant information relating to the children before this court.

BACKGROUND TO THIS APPLICATION

8. On 2 December 2011 the first to third respondents, the Applicants in the main matter, launched an urgent application for the eviction of the Fifth and Sixth Respondents from the property known as Grootkraal. The Sixth Respondent is a school currently operating on Grootkraal.


9. On 30 March 2012 I received a call from Judge Baartman who presided over the hearing of the main matter. Judge Baartman indicated that she was concerned about the legal interests of the children and requested that I legally represent the children who are currently attending school at Grootkraal.

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10. I obtained the court pleadings in this matter on 5 April 2012. After perusal of the documents, discussions with the other parties and a two-day visit to Grootkraal, I formed a clearer view of my role as the children's legal representative.
11. There are 149 children currently attending school at Grootkraal, who are between the ages of 6 and 15 and therefore vary significantly in respect of their maturity and stage of development and concomitantly their ability to participate. Whilst some of the older children may have the capacity to understand the import of the proceedings, form clear views and wishes in respect thereof and may give instructions accordingly, the very young children do not have the same capacity and require a legal representative to safeguard their best interests rather than act on their views and wishes.

APPLICATION TO JOIN AS INTERVENING PARTY

12. The CCL, on behalf of the minor children, is seeking an order to join as intervening party in this matter for the following reasons:
- 12.1 The application for the eviction of the school is of extreme importance to the minor children and should the order for eviction be granted, it will have a significant impact on their lives. The eviction concerns them directly and I submit that substantial injustice would result if they are not separately joined as intervening parties.
- 12.2 Although the interest of the children and the Fifth and Sixth Respondents may appear to coincide, there remains a potential conflict



of interests. This conflict of interests relates to the fact that, whilst the Fifth and Sixth Respondent maintain that the school should not be evicted, there exists a possibility that a solution, other than the school remaining at Grootkraal, may be in the best interests of the children.

12.3 Furthermore, the facts relating specifically to the children, their circumstances and the effect that eviction of the school would have on their lives are not fully canvassed on the papers before this court nor has legal argument been advanced on their behalf. The intervention of the children as parties will allow them all rights of participation in the legal process, including service of documents, participation in mediation and settlement negotiations and the right to appeal the outcome of the main application.

12.4 The best interest of the children is the paramount consideration in all matters affecting the child. The children will be directly affected by the eviction application. The views of the children are an important factor in ascertaining their best interest and they have a right to participate in proceedings which will affect their lives.

12.5 I point out further that the children have a right to participate in matters which concern them in terms of both national and international law:

12.5.1 Section 10 of the Children's Act states that:

"Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

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12.5.2 Article 12 of the United Nations Convention on the Rights of the Child states this principle in similar terms.

12.5.3 Article IV(2) of the African Charter of the Rights and Welfare of the Child (which has been ratified by South Africa) provides that:

*"In all judicial or administrative proceedings affecting a child who is capable of communicating his or her views, an opportunity to be heard either directly or through an impartial representative **as a party to the proceedings**, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate laws" (my emphasis)*

13. I submit that the minor children plainly have a direct and substantial interest in the main application and should be joined as parties to the proceedings to allow them to effectively exercise their rights. However, in view of the large number of children and the difference in age, maturity and stage of development of the children, it would not be practicable to join each of the children in their own name.

14. The CCL has knowledge of and experience in litigating on the protection of children's right to basic education. In particular, the Centre successfully litigated as applicant in the Eastern Cape to eliminate mud structure schools and to provide proper infrastructure to these schools. The Centre was also involved as *amicus curiae* in other education cases, including a matter in the Constitutional Court relating to the eviction of a public school from private property.



15. More importantly, the CCL has in-depth knowledge and expertise in representing both individual and groups of children and as such is ideally suited to act on behalf of the group of children concerned in this matter.

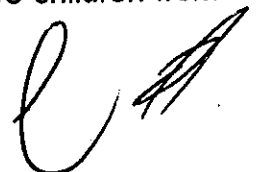
ROLE OF THE CHILDREN'S LEGAL REPRESENTATIVE

16. I submit that it is appropriate that the children's legal representative in this matter assumes a role similar to that of a *curator ad litem*, although this model of legal representation of children is more expansive than what is traditionally understood as the role of a common law *curator ad litem*. This will allow me to conduct a full investigation and compile an affidavit for the court which would include:

- 16.1 Details regarding the children's current circumstances;
- 16.2 The effect that the eviction would have on the lives of the children;
- 16.3 The views and wishes of the children in respect of the eviction;
- 16.4 Examining all the information necessary to determine what would be in the child's best interests;
- 16.5 Exploring different solutions to determine which option would be in the best interests of the children that would also resolve the disputes between the parties;
- 16.6 Recommendations as to what would be in the best interests of the children; and

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- 16.7 Legal arguments to support the recommendations relating to the best interests of the children.
17. The Constitutional Court employs this model of legal representation of children in matters before them that concern children. The Constitutional Court appoints a *curator ad litem* for children in terms of section 28(1)(h) and requests that such a curator provide the court with a detailed report in terms similar to those detailed above including factual information and legal argument.
18. This model has also been used in the Supreme Court of Appeal, North Gauteng and South Gauteng High Courts to protect the legal interests of groups of children caught in legal disputes between adults. Further, the Supreme Court of Appeal has stated that there is no difference between a *curator ad litem* and a legal representative.
19. This model of legal representation of children is particularly effective to safeguard and advance the interests of a group of children where it would be difficult to obtain specific instructions and what is required is a detailed investigation into the exact real-life position of the children, the effect that the eviction would have and the legal remedy that would safeguard their best interests.
20. I have explained my role as detailed above to the legal representatives of the other parties and have indicated that I will file a comprehensive affidavit once the investigation is completed.
21. I understand that this matter started as one of urgency and that there are time concerns relating to the school terms and the best time to move children from

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one school to another, should that prove to be the final decision. I am conscious of the fact that I must conclude my investigation as soon as possible whilst making sure that I have all the relevant information. I therefore submit that it is appropriate that I submit my affidavit within 30 days of the date of this order. I have already started on preliminary investigations and research into the legal aspects concerned and I am convinced that 30 days from the date of the order would ensure sufficient time to complete the investigation and affidavit.

22. I accordingly pray for an order in terms of the Notice of Motion to which this affidavit is attached.



DEPONENT

SIGNED and SWORN to before me at PRETORIA on the 7th day of May 2012, after the deponent stated that she is aware of the content of this statement and considers the oath to be binding on her conscience. I certify that the regulations provided for in the Government Gazette Notice R. 1258 of 21 July 1972 have been complied with.



COMMISSIONER OF OATHS

MARK A CHRISTIAN

COMMISSIONER OF OATHS
PRACTISING ATTORNEY, RSA
365 SPITFIRE AVENUE, EERSTERUST, 0022
TEL: 012 806 6780
CELL: 082 828 4086