

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 103/2012

In the application of

EQUAL EDUCATION: Applicant for admission as *amicus curiae*

**THE HEAD OF DEPARTMENT: DEPARTMENT
OF EDUCATION, FREE STATE PROVINCE** Applicant

and

WELKOM HIGH SCHOOL 1st Respondent

**GOVERNING BODY OF WELKOM
HIGH SCHOOL** 2nd Respondent

and

HARMONY HIGH SCHOOL 1st Respondent

**THE GOVERNING BODY OF HARMONY
HIGH SCHOOL** 2nd Respondent

**NOTICE OF APPLICATION FOR ADMISSION AS AMICUS CURIAE IN TERMS OF
RULE 10(4) OF THE RULES OF THE COURT**

PLEASE TAKE NOTICE that the Applicant intends to apply to this Court, on a date to be determined by the Registrar, for an order in the following terms-

1. That Equal Education is admitted to these proceedings as *amicus curiae*.

2. The *amicus curiae* is granted—

2.1 the right to lodge written argument in this matter; and

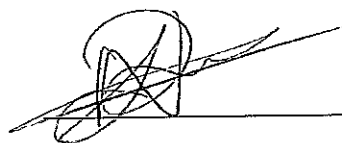
2.2 the right to present oral argument at the hearing of this matter.

3. Further and/or alternative relief.

TAKE FURTHER NOTICE that the affidavit of **BRAD BROCKMAN** will be used in support of this application.

AND TAKE NOTICE FURTHER that the Applicant has appointed the address set out below as the address at which they will accept service of all process in these proceedings.

SIGNED and **DATED** at **CAPE TOWN** on this 23 day of **JANUARY 2013**



EQUAL EDUCATION LAW CENTRE

Attorneys for amicus curiae

1st Floor

6 Spin Street

CAPE TOWN

Tel: 021 4611421

(Ref: Ms L. Draga)

C/O Norton Rose
15 Alice Lane
(Fredman Drive Entrance)
Sandton
2146
Tel: 011 685 8617
Fax: 011 301 3358
Ref: Nicki van't Riet

TO: THE REGISTRAR
CONSTITUTIONAL COURT OF SOUTH AFRICA
BRAAMFONTEIN

AND TO: STATE ATTORNEY
Attorney for Applicant
10th Floor, North State Building
95 Market Street
Cnr Kruis Street,
JOHANNESBURG
2001
Tel: 011 330 7600
Fax: 011 337 7180
email: bamaranyane@justice.gov.za
Ref: B MARANYANE/pk

AND TO: MESSRS HORN AND VAN RENSBURG
Attorneys for Respondents
93A Charles Street
BLOEMFONTEIN
9301
Tel: (051) 448 9985
Fax: (051) 448 9987
Ref: MJVR/HM5780
C/O MOODIE & ROBERTSON ATTORNEYS
7th Floor, 209 Smit Street
BRAAMFONTEIN
Tel: (011) 403 5171
Fax: (011) 403 1973
Ref: Ms S Jackson
E-mail: Geraldine@moodierobertson.co.za

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 103/2012

In the application of

EQUAL EDUCATION: Applicant for admission as *amicus curiae*

THE HEAD OF DEPARTMENT: DEPARTMENT OF EDUCATION, FREE STATE PROVINCE Applicant

and

WELKOM HIGH SCHOOL 1st Respondent

GOVERNING BODY OF WELKOM HIGH SCHOOL 2nd Respondent

and

HARMONY HIGH SCHOOL 1st Respondent

THE GOVERNING BODY OF HARMONY HIGH SCHOOL 2nd Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

BRAD BROCKMAN

do hereby make oath and state that;

BB C.S.C

1. I am the General Secretary of the Applicant, Equal Education (EE). I am duly authorised to bring this application for admission as *amicus curiae* on behalf of EE. I attach hereto, marked "BB1", a copy of the resolution taken by EE's National Secretariat authorising me to do so.
2. The facts contained herein are to the best of my knowledge both true and correct and, unless otherwise indicated by statement or context, fall within my personal knowledge.
3. In this affidavit I will address the following issues;
 - 3.1. The work of EE and the nature of its interest in these proceedings;
 - 3.2. The position to be adopted and the submissions, in brief, to be advanced by EE in these proceedings. It is submitted that these submissions will be useful to the Court and different from those advanced by the other parties to this application for leave to appeal;
 - 3.3. The parties' consent to the admission of EE as *amicus curiae* in these proceedings.

A EQUAL EDUCATION'S INTEREST IN THIS APPLICATION

4. EE is a movement of learners, parents, teachers and community members working for quality and equality in South African schools through policy analysis, advocacy and activism. EE is also a registered non-profit organisation.
5. To achieve its objectives, EE is involved in a number of activities that include:
 - 5.1. Developing the capacity of learners, parents, teachers and community members to drive improvement in their schools and educational institutions;
 - 5.2. Conducting and applying research on the state of the education system in South Africa;
 - 5.3. Campaigning for a curriculum and pedagogy that is academically rigorous, and that promotes dignity, creativity and social justice;
 - 5.4. Engaging constructively with the State on best practices in the management and governance of the education system including through meetings, letters, briefs and legislative and policy input;
 - 5.5. Providing information about education, human rights and Constitutional Court jurisprudence to the public; and

- 5.6. Where necessary, using the courts and legal processes to advance EE's values and to contribute to a strong civil society that holds private interests, government, individuals and itself accountable.
6. As a component of EE's work, EE often assists marginalised learners where there are on-going violations of their constitutional rights. As a result, EE often turns to and relies upon state actors such as Heads of Department (HOD's) or MEC's for assistance to resolve these matters and to ensure that learners' rights are protected.
7. As a result of its work, EE has intimate knowledge of the inner workings of the South African Schools Act and the practical implementation of this legislation. A judgment from the Constitutional Court on the powers of HOD's will have significant ramifications for EE's work as it goes directly to EE's ability to utilise the provincial education departments (MEC or HOD) to effectively and expeditiously remedy unlawful/unconstitutional SGB endorsed conduct where such conduct constitutes a flagrant violation of learners' rights.
8. Having regard to the objectives and work of EE in the administration of the South African Schools Act, EE has a vested interest in the outcome of this matter.

B. EE's SUBMISSIONS

9. If admitted, EE would make written and oral submissions on the following relevant issues:

RS L.S. L

- 9.1. The scope and extent of the statutory powers of the Head of Department to counteract decisions of SGBs and school Principals where such decisions violate learners' rights, as EE believes is the case here.
- 9.2. The efficacy of unlawful or unconstitutional decisions before they are declared as such or reviewed and set aside by a competent court, in particular whether another organ of state is obliged to either accept them or institute proceedings directly challenging them. The jurisprudence of the Supreme Court of Appeal (SCA) on this topic is not harmonious. Compare *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) paras 27-37 and the cases following it with *The Master of The High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 (SCA) paras 11-14 and the cases cited there.
- 9.3. EE considers this matter as providing a unique opportunity to advance a legal argument that would strengthen the protection of constitutional rights of learners and provide some guidance to SGBs on the impact of law and policy on their authority to govern schools. As a result of its work and special interest in the areas of education, EE is uniquely placed to be of assistance to the court by making legal submissions relevant to the constitutional and legal issues to be decided by the Honourable Court. For this reason and because of the point summarized in para 9.2 above, the proposed scope of

involvement of EE is different from the anticipated submissions of the other parties.

C THE PARTIES' CONSENT TO THE ADMISSION OF EE AS AMICUS CURIAE

10. To facilitate EE's involvement in this matter, and in compliance with Rule 10(2) of this Honourable Court, on 4 December 2012 our attorneys addressed a letter to the State Attorney and to the Respondents' attorney seeking their consent to EE being admitted as *amicus curiae*. This letter is attached, marked "BB2".
11. On 13 December, we received a written reply from the Respondents' attorney, indicating that they have no objection to EE's admission as *amicus curiae*. This letter is attached, marked "BB3".
12. On 10 December, the State Attorney composed a response indicating its approval of EE's application to be admitted as *amicus curiae*. However, despite receiving verbal confirmation last year, the written response only arrived on 8 January 2013. This letter is attached, marked "BB4".

CONCLUSION

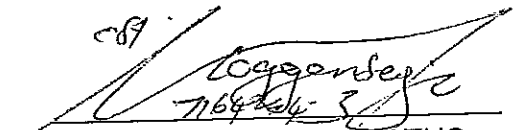
13. Having regard to all of the above, I respectfully request that the Court grant the relief sought in the notice of motion to which this affidavit is attached.

RS C.A.C



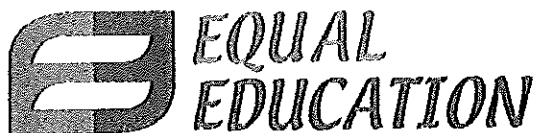
BRAD BROCKMAN

Thus signed and sworn to before me at Mowbray on this 22 day of January 2013 by the deponent who acknowledges that he knows and understands the contents of this affidavit and that he has no objection in taking the prescribed oath, which he regards as binding on his conscience.

089

COMMISSIONER OF OATHS

SUID-AFRIKAANSE POLISDIENERS
STATISTIEK EN REKENING
769246
22 JAN 2013
STATION KOMMISSONER
DORPSTRAAT 100
EDDITHOUWERSBURG

BR C.D. C



EE Secretariat: Yoliswa Dwane (Chairperson), Bayanda Mazwi, Ntuthuzo Ndzomo, Sean Feinberg, Brad Brockman, Doron Isaacs

RESOLUTION OF THE NATIONAL SECRETARIAT OF EQUAL EDUCATION

On the 13 November 2012, the National Secretariat of Equal Education (EE) met to discuss, amongst other matters, a proposed application to join as *amicus curiae* in an application for leave to appeal to the Constitutional Court filed by the Head of Department, Department of Education, Free State Province (under case number CCT103/12), following a judgment by the Supreme Court of Appeal which concluded that the HOD has no authority, outside of court processes, to compel a school principal to act in a manner contrary to an SGB endorsed school policy. EE's aim in becoming involved in the litigation is to assist the Court in providing clarity on the extent and scope of the HOD's powers under the South African Schools Act. After careful consideration, the EE National Secretariat adopted the following resolution:

1. In terms of its own constitutional mandate, in the interests of learners at public schools and in the public interest to apply to be joined in the abovementioned litigation as an *amicus curiae* pursuant to advice given by legal counsel; and
2. To empower Brad Brockman, the General Secretary of EE, to do all things necessary to this end including deposing to affidavits on EE's behalf.


Doron Isaacs

Deputy General Secretary

✉ Postal: PO Box 40114, Elonwabeni, 7791 🏢 Office: Washington Square, Capital Drive, Thembokwezi, Khayelitsha

✉ E-mail: info@equaleducation.org.za ~ 🌐 Website: www.equaleducation.org.za

☎ Telephone: 021 387 0022 ~ 📠 Fax: 0865169396

Registered S10(1)(cN) and S18A(1)(a) Public Benefit Organisation (PBO) (Exemption Number 930 027 221)
Registered Non-Profit Organisation (NPO) (Registration Number 068-288-NPO)



4 December 2012

TO: THE STATE ATTORNEY

Attorney for Applicants
10th Floor, North State Building
95 Market Street
Cnr Kruis Street,
JOHANNESBURG
Tel: (011) 330 7600
Fax: (011) 337 7180

Ref: B M Maranyane

AND TO: M J VAN RENSBURG

Attorney for the Respondents
Horn & Van Rensburg Attorneys
93a Charles Street
BLOEMFONTEIN
Tel: (051) 448 9985
Fax: (051) 448 9987
Ref: MJVR/HM5780
c/o: MOODIE & ROBERTSON ATTORNEYS
7th Floor, 209 Smit Street
BRAAMFONTEIN
Tel: (011) 403 5171

Fax: (011) 403 1973

Ref: Ms S Jackson

E-mail: Geraldine@moodierobertson.co.za

REQUEST TO BE ADMITTED AS AMICUS CURIAE IN: THE HEAD OF DEPARTMENT, DEPARTMENT OF EDUCATION, FREE STATE PROVINCE v WELKOM HIGH SCHOOL AND ANOTHER; THE HEAD OF DEPARTMENT, DEPARTMENT OF EDUCATION, FREE STATE PROVINCE v HARMONY HIGH SCHOOL AND ANOTHER CCT 103/12

1. We refer to the above matter to which we address you on in this letter. We represent Equal Education (EE), a Non-Profit organisation registered under the number 068-288-NPO. EE is a membership based, registered non-profit organisation whose objective is to work for and campaign to achieve quality and equality in education in South Africa.

The Equal Education Law Centre is managed
by the Equal Education Law Centre Trust.

Trustees:

Justice Arthur Chaskalson Dr Ursula Hoadley
Adv Zanele Msweli Prof Mary Metcalfe
Kerry Williams Yoliswa Dwane
Itumeleng Mahabane Doron Isaacs

6 Spin Street
Cape Town 8001

T +27 21 461 1421 / 3551
F +27 86 572 4675

info@eelawcentre.org.za
www.eelawcentre.org.za

Public Benefit Organisation (PBO)
(Exemption No. 930038683)
NPO No. 099-668-NPO
Trust Certificate No. IT2966/2011

The Equal Education Law Centre
Trust is a registered Trust.

C.J.L
BB

2. EE's members comprise learners, parents, teachers and members of various communities who share the same vision and approve of its objectives and functions. In order to achieve its objectives, EE conducts a broad range of activities which include but are not limited to the following:

- 2.1 developing the capacity of learners, parents, teachers and community members to drive improvement in their schools and educational institutions;
- 2.2 conducting and applying research on the state of the education system in South Africa;
- 2.3 campaigning, based on evidence, for a curriculum and pedagogy that promotes human dignity, creativity, social justice and the highest standards of content and rigor in teaching;
- 2.4 engaging constructively with the State on best practices in the management and governance of the education system including through meetings, letters or briefs and input into legislative and policy development processes;
- 2.5 providing information about education and human rights to the public; and
- 2.6 where necessary, using the courts and legal processes to advance the values and to contribute to a strong civil society that holds private interests, government, individuals, and itself accountable.

3. As a component of EE's work, EE often turns to and relies on Heads of Department or MEC's for state intervention and assistance to resolve matters where ongoing violation of learners' constitutional rights have been brought to EE's attention. As a result of its work, EE has intimate knowledge of the inner workings of the South African Schools Act and the practical implementation of this legislation. A judgment from the Constitutional Court on these issues will have significant ramifications for EE's work as it goes directly to EE's ability to utilise the provincial education department (MEC or HOD) to remedy unlawful/unconstitutional SGB endorsed conduct, outside of court processes, where such conduct constitutes a flagrant violation of learners' rights. EE therefore has a vested interest in the outcome of this matter.

4. Having regard to the objectives and work of EE in the administration of the South African Schools Act and the constitutional right to education, we write in terms of Rule 10(2) of the Rules of the Constitutional Court to request your written consent to be admitted as amicus curiae.

5. If admitted EE intends to make written and oral submissions on the following relevant issues:

5.1 The scope and extent of the statutory powers of the Head of Department to counteract decisions of SGBs and school Principals where such decisions violate learners' rights, as EE believes is the case here.

5.2 The efficacy of unlawful or unconstitutional decisions before they are declared as such or reviewed and set aside by a competent court, in particular whether another organ of state is obliged to either accept them or institute proceedings directly challenging them. The jurisprudence of the Supreme Court of Appeal (SCA) on this topic is not harmonious. Compare *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) paras 27-37

C.A. C
BB

and the cases following it with The Master of The High Court (North Gauteng High Court, Pretoria) v Motala NO and Others 2012 (3) SA 325 (SCA) paras 11-14 and the cases cited there.

6. EE wishes to advance a legal argument in favour of strengthening the protection of constitutional rights of learners and the extent to which an HOD may intervene to protect, respect, promote or fulfill these rights. As a result of its work and special interest in the areas of education, EE is uniquely placed to be of assistance to the court by making legal submissions relevant to the constitutional and legal issues to be decided by the Honourable Court. For this reason and because of the point summarised in para 5.2 above, the proposed scope of involvement of EE is different from the anticipated submissions of the parties.

7. EE thus requests your consent for its admission as an *amicus curiae* in these proceedings, in order to deliver written submissions one week after the respondents' written submissions and to present oral argument at the hearing of the matter.

Yours faithfully,

EELC

PER: 

LISA DRAGA

G.D.C.
RR

Established 1918

Our ref MR D ARTHUR/KM/H301876

Your ref

13 December 2012

7th Floor 209 Smit Street
Braamfontein Johannesburg
PO Box 4685 Johannesburg 2000
Docex 208 Johannesburg
Telephone (011) 403 5171 or
(011) 628 8600
Fax (011) 403 1946 / 403 1973
VAT No. 4090120116
Direct line: (011) 628 8894
Direct fax: 086 514 9539
darthur@moodierobertson.co.za

Attention: Ms L Draga
Equal Education Law Centre
E-mail: lisad@eelawcentre.org.za

Dear Madam

**THE HEAD OF DEPARTMENT : DEPARTMENT OF EDUCATION, FREE STATE PROVINCE vs
WELKOM HIGH SCHOOL AND GOVERNING BODY OF WELKOM HIGH SCHOOL AND
HARMONY HIGH SCHOOL AND GOVERNING BODY OF HARMONY HIGH SCHOOL (CASE
NUMBER 103/2012)**

We refer to your e-mail dated the 4th of December 2012.

We enclose Horn & Van Rensburg's letter dated the 12th of December 2012, the contents of which speak for itself.

Yours faithfully


D E ARTHUR
MOODIE & ROBERTSON

Partners RDA Johnson Dip.Juris (Wits) SK Dewberry BProc (UFS) DE Arthur BA LLB (Wits)
CS Beckenstrater BA LLB (Wits) A German BA LLB (Wits) MS Palterton LLB (UNISA)
Associates TL Leihetsa LLB (UNW) A Leibbrandt BA LLB (RAU) GJ Parr LLB (UP)
Assisted by D de Klerk BProc (UP) CJ Malan LLB (Wits) S Singh BCom LLB (Wits)
L Mokoena LLB (Wits) L Hildebrandt BCom LLB (UJ)
Practising Consultants HF Beckenstrater BA LLB (Wits) DCS Wimble BA LLB (Wits) AG Collins
Financial Manager RJ Coertzen BCom (Hons) Acc (UP)
Also at: No. 4 Tuscany Office Park, 6 Coombe Place, Rivonia; Tel (011) 807 6046

C.A.C
BB



HORN & VAN RENSBURG
advocates • prokureurs

Charlesstraat 93A, Bloemfontein, 9301
Postbus 453, Bloemfontein, 9300

DOCEX 111, Bloemfontein
☎ 051 448 9985
☎ 051 448 9987
✉ hvprrok@intekom.co.za

93A Charles Street, Bloemfontein, 9301
PO Box 453, Bloemfontein, 9300

BTW \ VAT: 4200 162 347

U VERW / YOUR REF **MR D ARTHUR/KM/H301876**
ONS VERW / OUR REF **MR M J VAN RENSBURG/maryke/HM5780**

12/12/2012

MOODIE & ROBERTSON
JOHANNESBURG

BY FAX: 086 514 9539
E-MAIL: darthur@moodierobertson.co.za

Dear Sirs

**DEPARTMENT OF EDUCATION, FREE STATE PROVINCE vs WELKOM
HIGH SCHOOL AND GOVERNING BODY OF WELKOM HIGH SCHOOL
AND HARMONY HIGH SCHOOL AND GOVERNING BODY OF HARMONY
HIGH SCHOOL**

We refer to the above matter and your letter dated the 11th December 2012.

We have perused the letter from the Equal Education Law Centre dated the 4th December 2012, and have no objection that the Centre be joined as *Amicus* in the proceedings in the Constitutional Court.

We therefore consent to the Equal Education Law Centre intervening as *Amicus Curiae* in the proceeding in the Constitutional Court, on the condition that the Centre fulfil all obligations in terms of the Rules of the Constitutional Court.

Please convey our aforesaid consent to the Centre.

We trust you find this in order.

Yours faithfully,


HORN & VAN RENSBURG
Direct e-mail: hvr@hvrprok.co.za
Direct fax : 0866012514

SB C-D.C

BBA



Lisa Andrews <lisaa@eelawcentre.org.za>

Re: Harmony High School and another / The Head of Department , Free State department of Education

Kanzi Phumlani <PKanzi@justice.gov.za>
To: "LisaA@eelawcentre.org.za" <LisaA@eelawcentre.org.za>


Tue, Jan 8, 2013 at 11:27 AM

Good Day

Attached hereto a letter as requested in our telephone conversation.

Regards

Phumlani Kanzi

 20130108110027869891_4.pdf
35K

BB C.D. C



tne doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE STATE ATTORNEY: BLOEMFONTEIN

Private Bag X 20630, BLOEMFONTEIN 9300 • 11th Floor, Fedsure Building, 49 Charlotte Maxeke Street, BLOEMFONTEIN
9301 • DOCEX 100
Tel (051) 4004 300, Fax (051) 4004 331; (051) 4004 336; (051) 447 3146,

My Ref : 682/201001309/P13H *(Always quote my reference number)*
Enq : B MARANYANE/pk
Tel : (051) 4004 314 (Direct Line)
E-mail : bamaranyane@justice.gov.za
Your Ref : Lisa Draga

10 December 2012

Equal Education Law Centre
6 Spin Street
CAPE TOWN
8001

BY FAX: (086) 672 4675

**RE: HARMONY HIGH SCHOOL AND ANOTHER// THE HEAD OF DEPARTMENT,
FREE STATE DEPARTMENT OF EDUCATION AND ANOTHER; WELKOM HIGH
SCHOOL AND ANOTHER // THE HEAD OF DEPARTMENT, FREE STATE
DEPARTMENT – APPEAL**

1. Reference is made to the above matter.
2. We confirm that we do not have any objection to your organization being admitted as "*amicus curiae*" in the proceedings.

Yours faithfully


Ms B M MARANYANE
for State Attorney, Bloemfontein