

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

CASE NO.: 24611/11

In 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 Besigheid Trust (IT 969/2009)

and

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

FIRST RESPONDENT'S SUBMISSIONS IN RESPECT OF THE *AMICUS
CURIAE*

1. This is an application for the eviction of the first respondent (*“the MEC”*) and the second and third respondents (*“the Governing Body”* and *“the School”*) from property owned by the applicants (*“the Trust”*).

2. It is a sequel to an application brought by the Governing Body and the School to interdict the MEC from taking any steps to close, merge or move the School after the Trust had given the MEC notice that it would not extend or renew the lease agreement in terms of which the Department of Education (*“the Department”*) occupied the Trust’s property. The Department sought to relocate the School to premises at Voorbedag Primary School (*“Voorbedag”*). Voorbedag is situated on state owned land. The Governing Body and the School contended that the Department was in effect closing or merging the School with Voorbedag. In this event, the Department was obliged to follow the procedure to close or merge schools as set out in the South African Schools Act 84 of 1996 (*“the Act”*).

3. On 15 July 2011 this Court granted an order: (i) directing the Department to attempt to re-negotiate a lease agreement with the Trust; (ii) if a decision is made to close, or relocate the School that it be done after meaningful engagement with all affected parties; (iii) any relocation should not take place during the remainder of the 2011 school year, be made to suitable accommodation, catering for the health and educational needs of the learners and the staff similar to that which they had at the School; and (iv) proper and adequate means of transport being in place.

4. It is to be noted that the aforementioned order does not preclude relocating of the School.
5. Negotiations in respect of a new lease failed. The Trust now seeks to evict the Department. The School's learners were not relocated during the 2011 school year. In light of the termination of the lease agreement and in anticipation an eviction, the Department has constructed and will construct suitable accommodation catering for the learners' health and educational needs. These will be in place in the event of this Court ordering the Department, the Governing Body and School to vacate the Trust's property. The same staff will teach the learners. The school principal is responsible to advise the Department of the route along which learners will be collected and dropped-off so that the Department can put in place the necessary transport arrangements.
6. Equal Education ("*EE*") contends that the MEC is obliged constitutionally to respect, protect, promote and fulfil the School's learners' right to basic education. It contends that the MEC will achieve this obligation by ensuring the School's tenure at its present location.
7. It relies in this regard firstly on General Comment 13, the International Committee for Economic, Social and Cultural Rights ("*the Committee*"). It relies particularly on one component of the standard adopted by the Committee by which to measure compliance by a state with its obligation to provide basic education. In this regard, it contends that the component "*availability*"

contemplates that a school has security of tenure on the land on which it is located.

8. It is submitted that the definition of “*availability*” does not in any manner suggest or contemplate security of tenure in principle, nor security of tenure *on the land on which the school is situated*. It provides that functioning educational institutions and programmes have to be available *in sufficient quantity* within the jurisdiction of the State party. It is submitted that this component seeks to ensure that a State provides enough school places so that every child can attend a school. This obligation rests on the MEC in terms of section 3(3) of the Act. Section 12(1) obliges the MEC to provide public schools out of funds appropriated for that purpose by the provincial legislature. It is however not the Governing Body’s or the School’s case that these obligations are not met.
9. The only reference to buildings in the “*availability*” component is in the context of protection from the elements and sanitation facilities for both sexes. It also provides that educational institutions, in order to function, will require safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials and in some cases, facilities such as a library, computer facilities and information technology. There can be no dispute that the School, should it be evicted, will continue to operate in the same manner as it has been until now, at Voorbedag.
10. It is further submitted that even if “*availability*” contemplates security of tenure, the School’s tenure can be no more secure anywhere else than on state owned

land. EE seeks to infer from the Department's expressed intention that to consult with the School and the Governing Body regarding the School's future, that its tenure at Voorbedag is not secure. On the contrary, it could very well continue to exist on the premises at Voorbedag indefinitely.

11. In light of the MEC's constitutional obligation, EE contends further that *"Without security of tenure, the rights of learners at public schools on private land will always remain under threat of potential invasion by non-state parties."* It therefore contends that, as a component of the right to basic education, the MEC must consider expropriation to ensure security of tenure to fulfil his constitutional obligation.

12. It is submitted that the contention is premised upon the right to basic education being given effect to only on the property on which it is presently situated. This approach ignores the MEC's ability to give effect to his constitutional obligation on property other than on which the School is presently situated. The Governing Body and the School contend that this Court cannot grant an eviction order until the MEC informs this Court of the measures in place to give effect to the learners' right to basic education. It is submitted that the MEC has. The School will continue on the premises of Voorbedag. The learners 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 and transport to school. The same teachers and principal will continue to teach the learners.

13. The Department did consider expropriation. It is however, submitted that inasmuch as the MEC is able to give effect to his constitutional obligation, there is no need to expropriate the property.

E A DE VILLIERS-JANSEN

First Respondent's counsel

Chambers

Cape Town

8 March 2012