

**IN THE HIGH COURT OF SOUTH AFRICA  
(LIMPOPO DIVISION, POLOKWANE)**

**CASE 1416/2015**

In the matter between:

**TEBEILA INSTITUTE OF LEADERSHIP  
EDUCATION, GOVERNANCE AND TRAINING**

First Amicus Applicant

**EQUAL EDUCATION**

Second Amicus Applicant

and

**MINISTER OF BASIC EDUCATION**

First Respondent

**MEMBER OF THE EXECUTIVE COUCIL,  
LIMPOPO DEPARTMENT OF EDUCATION**

Second Respondent

**PRINCIPAL OF MAHLODUMELA LOWER  
PRIMARY SCHOOL**

Third Respondent

**SCHOOL GOVERNING BODY, MAHLODUMELA  
LOWER PRIMARY SCHOOL**

Fourth Respondent

In re

**ROSINA MANKONE KOMAPE**

First Plaintiff

**MALOTI JAMES KOMAPE**

Second Plaintiff

**MOKIBELO LYDIA KOMAPE**

Third Plaintiff

**LUCAS KHOMOTSO KOMAPE**

Fourth Plaintiff

and

**MINISTER OF BASIC EDUCATION**

First Defendant

**MEMBER OF THE EXECUTIVE COUCIL,  
LIMPOPO DEPARTMENT OF EDUCATION**

Second Defendant

**PRINCIPAL OF MAHLODUMELA LOWER  
PRIMARY SCHOOL**

Third Defendant

**SCHOOL GOVERNING BODY, MAHLODUMELA  
LOWER PRIMARY SCHOOL**

Fourth Defendant

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**HEADS OF ARGUMENT OF THE SECOND APPLICANT IN THE APPLICATION  
FOR ADMISSION AS AN AMICUS CURIAE**

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## INTRODUCTION

1. On 20 January 2014, Michael Komape, aged 6 at the time, and a learner at Mohlodumela Lower Primary School (“Mahlodumela”), fell into a pit toilet on the premises of Mahlodumela and died.
2. The plaintiffs, being the parents and older siblings of the late Michael, acting in their own interests, and in the case of the first and second plaintiffs’ –
  - 2.1. in the interests of their minor children and other minor children who attend schools in Limpopo Province but are unable to institute these proceedings for themselves; and
  - 2.2. in the public interest,have sued the defendants for:
  - 2.3. a declarator that the defendants have breached their constitutional obligations in respect of the rights contained in sections 9, 10, 11, 24, 27, 28, and 29 of the Constitution;
  - 2.4. payment of the sum of R940,000.00 for emotional trauma and shock they experienced as a result of late Michael’s tragic death;

- 2.5. payment of the sum of R2,000,000.00 for grief they suffered based on the common law as developed in accordance with section 39(2) of the Constitution; and
- 2.6. payment of the sum of R208,454.80 for future medical expenses, funeral costs and loss of earnings.
3. The action is pursued, in part, on the basis of the existing common law of delict. The plaintiffs also acknowledge, however, that the existing common law may provide inadequate remedies for the loss they have suffered and so they seek a development of the common law, in terms of section 39(2) of the Constitution.<sup>1</sup>
4. On the 28<sup>th</sup> August 2015 the plaintiffs caused a notice to be published in terms of Uniform Rule 16A.
5. The second amicus applicant (“Equal Education”) applied to be admitted as an *amicus curiae*.<sup>2</sup> The respondents oppose the application.<sup>3</sup>
6. One of the key issues to be determined in the action is the extent of the defendants’ knowledge about the toilet into which late Michael

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<sup>1</sup> POC paras 24 and 25

<sup>2</sup> Notice of Motion pp 1-4 and founding affidavit pp 5-156 and replying affidavit pp 206-215

<sup>3</sup> Respondents’ answering affidavit pp 168-201

fell.<sup>4</sup> The foreseeability of harm is a critical determinant of wrongful conduct.<sup>5</sup> EE has evidence relevant to the determination of this issue because it has been actively involved for many years in agitating for the relevant organs of state to take steps to improve the inadequate and unsafe infrastructure at schools throughout the country.

7. Equal Education has therefore applied to be admitted as an *amicus curiae* in order to present evidence that shows the extent of the Minister's and MEC's knowledge of the generally parlous and unsafe state of school infrastructure, including toilets. This evidence will be relevant to the question of the foreseeability of the harm in question.
8. Equal Education also seeks admission to make submissions on the impact of this evidence for the liability of the defendants and the question whether the common law requires development.

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<sup>4</sup> POC para 19

<sup>5</sup> *OE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) para 21 where the court held that "Such foreseeability is often an important, even a decisive factor in deciding whether wrongfulness has been established, but it is not in itself enough . . ." *Premier, Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) para 42

## REQUIREMENTS OF ADMISSION AS AMICUS CURIAE

9. If a party wishing to be admitted as an *amicus curiae* is unable to obtain written consent of all the parties to the proceedings in terms of Rule 16A(2), then such party has to apply to court to be so admitted in terms of subrule (5). An applicant shall in its application:
  - 9.1. briefly describe its interest in the proceedings;
  - 9.2. clearly and succinctly set out submissions which it will advance;
  - 9.3. set out the relevance of its submissions to the proceedings;
  - 9.4. set out its reasons for believing that submissions will assist the court; and
  - 9.5. set out reasons for believing that its submissions are different from those of other parties.<sup>6</sup>
10. In what follows, we expand on each of these requirements and demonstrate how Equal Education has met them.

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<sup>6</sup> Rule 16A(6)(a) and (b)

***Interest in the proceedings***

10.1. Pursuant to its mandate, Equal Education is interested in ensuring that -

10.1.1. there is progressive improvement of infrastructure at South African schools and that adequate steps are taken to protect learners from physical harm which may be occasioned by lack of or poor facilities;<sup>7</sup>

10.1.2. government takes adequate steps progressively to improve infrastructure at South African schools;<sup>8</sup>

10.1.3. proper audits of existing infrastructure are carried out by government and steps taken to protect the health and safety of learners, and remedial steps to address urgent needs outside of the broad timeframes provided in the promulgated norms and standards;<sup>9</sup>  
and

10.1.4. there are adequate remedies available if government fails to meet its obligations.<sup>10</sup>

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<sup>7</sup> Founding affidavit para 9.3.1 p 9

<sup>8</sup> Founding affidavit para 9.3.2 p 9

<sup>9</sup> Founding affidavit para 9.3.3 p 9

<sup>10</sup> Founding affidavit para 9.3.4 p 9



***Submissions and their relevance***

10.2. The Constitutional Court has dealt with the requirement that an amicus's contribution to a case must be relevant in the following terms:

*“The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court.”<sup>11</sup>*

10.3. We have set out above the evidence and submissions that Equal Education seeks to contribute to the action. In summary, the evidence relates to the extent of the Minister's and MEC's knowledge of the generally inadequate and unsafe state of school infrastructure, including toilets. This evidence will be relevant to the question of the foreseeability of the harm in question.

10.4. Equal Education also seeks leave to make legal submissions on the question of the development of the

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<sup>11</sup> *In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) at para 5

common law and why the remedies under the existing law of delict may be inadequate to vindicate the rights that have been violated by the defendants.

### ***Assistance to the Court***

10.5. Whether the contribution of an *amicus curiae* will be of assistance to the court must be assessed in the following terms –

*“Thus, the role of an amicus envisioned in the Uniform Rules is very closely linked to the protection of our constitutional values and the rights enshrined in the Bill of Rights. Indeed, Rule 16A(2) describes an amicus as an “interested party in a constitutional issue raised in proceedings”. Therefore, although friends of the court played a variety of roles at common law, the new Rule was specifically intended to facilitate the role of amici in promoting and protecting the public interest. In these cases, amici play an important role first, by ensuring that courts consider a wide range of options and are well informed; and second, by increasing access to the courts by creating space for interested non-parties to provide input on important public interest matters, particularly those relating to constitutional issues.”<sup>12</sup>*

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<sup>12</sup> *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (2) SA 620 (CC) at para 26

- 10.6. The evidence that Equal Education proposes to lead on the state of the defendants' knowledge about the unsafe conditions of school infrastructure, will assist the court in determining whether the harm to late Michael was foreseeable.
- 10.7. Unless this evidence is presented, the court will be deprived of information relevant to the assessment of wrongfulness.
- 10.8. In so far as the submissions on the development of the common law are concerned, the court will be assisted in receiving submissions about the appropriateness of that development and why, if the existing common law remains undeveloped, plaintiffs' rights will not be adequately vindicated.

***Submissions different from those of the other parties***

- 10.9. Equal Education has submitted that it cannot identify clearly at this stage the extent to which its evidence and submissions will differ from those of the parties.<sup>13</sup>

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<sup>13</sup> Founding Affidavit para 13.1 p 24

10.10. Unlike in opposed applications where both evidence and the legal framework for those submissions are set out in affidavits, because this matter is an action, neither the evidence nor the submissions of the parties is yet before the court. Equal Education therefore could not identify in its amicus application the respects in which its evidence and submissions would differ from that of the parties. It nonetheless undertook to ensure against duplication.<sup>14</sup>

10.11. In any event, this Court has a broad discretion to determine the terms and conditions on which an amicus may be admitted<sup>15</sup> and has inherent jurisdiction to regulate its own proceedings.<sup>16</sup> The trial court will therefore be in a position to ensure against any duplication during the trial.

11. In the circumstances, we submit that a proper case has been made for admission of Equal Education as an *amicus curiae*.

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<sup>14</sup> Founding Affidavit para 13.1 p 24

<sup>15</sup> *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (2) SA 620 (CC) para 19

<sup>16</sup> Section 173 of the Constitution.

## GROUNDS OF OPPOSITION

12. The respondents oppose the applicants admission as *amici curiae* on the grounds that:
- 12.1. the matter does not raise a constitutional point;
- 12.2. the applicants do not pass the threshold for admission as *amicus curiae* because the submissions to be made are abstract, academic and irrelevant to the issues at hand.<sup>17</sup>
13. None of these grounds of opposition has merit.

### ***The matter does not raise a constitutional point***

14. The respondents' submissions under this heading are contradictory. First, the respondents claim that the matter does not raise a constitutional point<sup>18</sup>, but then they concede that the action does raise the question whether the common law should be developed in the light of section 39(2) of the Constitution.<sup>19</sup>

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<sup>17</sup> Answering affidavit para 2.6 p 172

<sup>18</sup> Answering affidavit para 2.6(i) p 172 and paras 37.1 and 37.2 p 194

<sup>19</sup> Answering affidavit para 2.6(i) p 172

15. To the extent that they acknowledge that the development of the common law is a constitutional matter, they can have no quibble with Equal Education being admitted as an amicus to address that issue.
16. In any event, however, the respondents are wrong to claim that the only constitutional issue raised in the case relates to the development of the common law. The plaintiffs' main claims rest on the defendants' breaches of numerous public law duties that give rise to private law claims for damages. This is itself a constitutional issue. The Constitutional Court has itself recently recognised this in the case of *Mashongwa v PARA* [2015] ZACC 36 paras 25 and 26. The question of what those public law duties were and whether they were breached in a manner that would give rise to a private law claim for damages is therefore a constitutional matter on which Equal Education proposes to lead relevant evidence and make legal submissions.
17. We accordingly submit that there is no merit to the respondents' assertion that the matter does not raise constitutional issues. Equal Education's application for admission as an *amicus curiae* therefore cannot be refused on this basis.

***The applicants do not pass the threshold***

18. The respondents appear to contend that Equal Education does not meet the requirements for admission as an *amicus curiae* because:
- 18.1. the evidence it proposes to lead deals with general issues of infrastructure at schools and dealings with the first respondent and this evidence is irrelevant to the action;<sup>20</sup>
- 18.2. the Constitutional Court has on many occasions refused to develop the common law in other matters;<sup>21</sup> and
- 18.3. Equal Education "does not know the extent of the evidence and submissions to be made".<sup>22</sup>
19. In what follows, we set out why none of these claims is sustainable.

Alleged irrelevance

20. Equal Education's proposed evidence and submissions relate to the state of knowledge of the first defendant - the Minister of Basic

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<sup>20</sup> See Answering affidavit paras 32.1 to 32.3 and 33.2 pp 189-190 and 192

<sup>21</sup> Answering affidavit para 32.5 p 190

<sup>22</sup> Answering affidavit para 34.2 p 193

Education and the second defendant - the MEC for Education in Limpopo,<sup>23</sup> and are therefore relevant to the proceedings.

21. The Minister's and MEC's state of knowledge is directly relevant to the foreseeability of harm to late Michael. Equal Education's evidence will show that, since at least 2010, it and other stakeholders had brought it to the attention of the Minister and the MEC that school infrastructure was in a deplorable state and that safety issues were likely to arise.
22. The fact that this evidence relates only to these two defendants' state of knowledge does not make it irrelevant in the action. It simply makes it relevant to the liability of two of the four defendants.
23. Also, the fact that the evidence relates to the state of school infrastructure generally does not make it irrelevant to the foreseeability of harm to late Michael. If the evidence shows that the Minister and MEC knew that school toilets were generally in a state of disrepair and unsafe, this is relevant to determining whether they foresaw, or ought to have foreseen, harm to a child at Mohlodumela.

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<sup>23</sup> Founding affidavit paras 10.1.35 and 10.1.36 p 18



24. We therefore submit that there is no merit to the respondents' assertion that the evidence Equal Education proposes to lead and the submissions it intends to make are irrelevant to the issues to be determined.

Constitutional Court's prior case law on developing the common law

25. The respondents contend that the Constitutional Court has declined to develop the common law in previous cases where the common law already provides the plaintiff with an adequate remedy.<sup>24</sup> On this basis, they contend that they will argue for the trial court not to develop the common law.
26. However, the very question whether the existing common law provides an adequate remedy to the plaintiffs will need to be determined by the trial court and it is on this aspect that Equal Education proposes to make submissions.
27. Equal Education's application to be admitted as an *amicus curiae* to make submissions on the development of the common law ought not to be refused because the respondents say they will argue to the trial court that the common law should not be developed.

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<sup>24</sup> Answering affidavit para 32.5 p 190

28. It is because the question whether the common law should be developed is a live issue between the parties that the submissions of Equal Education will be relevant to the case.

#### The extent of Equal Education's evidence and submissions

29. The respondents contend that Equal Education should not be admitted as an amicus in these proceedings because it "does not know the extent of the evidence and submissions to be made".
30. However, this submission is based on a misunderstanding of what Equal Education said in its founding affidavit. In paragraph 13.1 of the founding affidavit, Equal Education explained that because the trial was not yet underway, it did not know what evidence would be led and what submissions would be made by the parties, and therefore could not yet set out the respects in which its evidence and submissions would differ from that of the parties. The paragraph therefore deals with what Equal Education does not know about the evidence and submissions *of the other parties*. Equal Education did not say that it did not know what evidence and submissions it proposed to make. The founding affidavit clearly

sets out that proposed evidence and the scope of the submissions.<sup>25</sup>

31. There is accordingly no basis to this ground for refusing Equal Education's application.

## CONCLUSION

32. In the light of what is set out above, we submit that the respondents have failed to identify even one proper ground on which Equal Education's application should be refused.

## APPROPRIATE COSTS ORDER

33. In *Jeebhai*,<sup>26</sup> the Supreme Court of Appeal recognised that where there are no proper grounds for opposing an application for admission of an *amicus curiae*, the opposing party should be ordered to pay the costs of the application.

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<sup>25</sup> Founding affidavit paras 10.1.1 to 10.1.54 pp 10-23

<sup>26</sup> *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA) para 52

34. This decision was recently followed by the Gauteng High Court in the matter of *McBride v Minister of Police (Council for the Advancement of the South African Constitution and Helen Suzman Foundation as Amicus Curiae)* 2016 JDR 0028 (GP).<sup>27</sup>
35. For all the reasons set out above, we submit that the respondents' opposition to Equal Education's application for admission as *amicus curiae* is unfounded. It is factually and legally untenable and contradictory at points.
36. In summary, they oppose the application on the basis that:
- 36.1. there is no constitutional matter in the case – despite admitting that there is at least one and failing to see that the case is premised on the defendants' alleged breach of constitutional duties;
  - 36.2. the requirements for admission as an amicus have not been met – when they clearly have; and
  - 36.3. the applicant does not know what evidence and submissions it proposes to present – when, in fact, the founding affidavit sets these out in painstaking detail.

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<sup>27</sup> para 76

37. Against these facts, there were no proper grounds for opposing the application and therefore the respondents ought to bear the costs.

## **RELIEF**

38. For the reasons set out above, Equal Education seeks an order –
- 38.1. admitting it as an *amicus curiae* in the action;
- 38.2. directing that it be permitted to lead evidence at the trial to cover the issues highlighted in its founding affidavit;
- 38.3. granting Equal Education leave to make oral submissions at the hearing of the action; and
- 38.4. directing the respondents to pay the costs of the amicus application, jointly and severally, the one paying the other to be absolved.

**KATE HOFMEYR**

**NDUMISO LUTHULI**

**Counsel for the second amicus applicant**

**Chambers  
Sandton  
1 March 2016**