

**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

**CENTRE FOR CHILD LAW**

Fourth Respondent

**THE COMMUNITY OF GROOTKRAAL**

Fifth Respondent

**THE INDEPENDENTE CHURCH OUDTSHOORN**

Sixth Respondent

**TRUI KIEWIETS**

Seventh Respondent

**KATRINA MEI**

Eighth Respondent

**EQUAL EDUCATION**

*Amicus Curiae*

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## FIRST RESPONDENT'S FURTHER SUPPLEMENTARY PRINCIPAL SUBMISSIONS

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### INTRODUCTION

1. The applicants (“the Trust”) own Portion 40 of the Farm De Kombuys No. 28 and 1/9<sup>th</sup> interest in Portion 1 of the Farm Groenefontein No. 29 (“the property”).<sup>1</sup>
  
2. The third respondent (“the School”) is situated on a portion of the property.<sup>2</sup> The predecessors of the Trust and the Trust itself, let the portion on which the School is situated, to the first respondent (“the MEC / the Department”) in terms of a lease agreement contemplated in s 14 of the South African Schools Act 84 of 1996 (“the Act”).<sup>3</sup> It is common cause, that the lease expired on 31 May 2010<sup>4</sup>, and that the Trust and the Department were unable to reach agreement on the rental for a new lease agreement.<sup>5</sup>
  
3. In the light of the fact that the Department was unable to conclude a new lease agreement with the Trust, it investigated the possibility of acquiring land owned by the Trust situated opposite the School, as well as land on a neighbouring farm, close

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<sup>1</sup> Record: p8 para 4.1; p95 para 12; p140 para 42; p238 annexure RA1.

<sup>2</sup> Record: p94 para 8.

<sup>3</sup> Record: pp94-95 paras 9-11

<sup>4</sup> Record: p95 para 11; p96 para 14.

<sup>5</sup> Record: 100 para 26.

to the School. The Department found that the land offered by the Trust and the neighbouring farm were unsuitable, and the development costs prohibitive.<sup>6</sup>

4. In order to ensure the continued education of the learners, the Department signified its willingness to relocate the School to land owned by the State on which Voorbedag Primary School (“Voorbedag”) is situated.<sup>7</sup>
5. However, on 29 June 2011, the School and its School Governing Body (“the SGB”) launched an urgent application under case number 12999/2011 in which they contended that the Department intended to close the School, and sought, among other things, an interdict to preclude it from doing so. Despite the Department’s confirmation, amongst other things, that it had not taken a decision to close the School, the Court, on 15 July 2011, granted an order which, among other things, interdicted the Department from relocating or closing the School without consulting it and the SGB.<sup>8</sup>
6. On 2 December 2011, the Trust too, launched an urgent application in terms of which it sought an order to evict the MEC, the School and the SGB (“the main application”). The Department, acknowledging that it could not, in the absence of a lease agreement contemplated in s 14 of the Act, lawfully occupy the property, delivered a notice to abide by the Court’s decision.
7. Given the urgency with which the Trust brought the main application, the Department erected a number of mobile classrooms at Voorbedag equivalent to the

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<sup>6</sup> Record: p96 para 15; p100 para 27.

<sup>7</sup> Record: p101 para 28.

<sup>8</sup> Record: p59 annexure FA12.

number of classroom the learners had at the School to accommodate them, an office for the School's principal, and undertook to provide the necessary transport to ensure that the learners were able to attend school. In addition, the Department ensured that the learners had access to sufficient potable water, upgraded the electricity supply, and provided adequate ablution facilities.<sup>9</sup>

8. However, since the launch of the main application, Equal Education ("EE") has been admitted as an, *amicus curiae*, and a number of respondents have joined in the proceedings – the fourth respondent, Centre for Child Law ("CCL"), the fifth respondent, the Community of Grootkraal ("the Community"), the sixth respondent, the Independent Church Oudtshoorn ("the Church"), the seventh respondent, Trui Kiewiets ("Kiewiets") and the eighth respondent, Katrina Mei ("Mei") (collectively, "the respondents").
9. The School, the SGB, together with the respondents, oppose the main application. EE was appointed by the Court to safeguard the learners' interests and to provide the information concerning their circumstances and the effect of an eviction order on them.<sup>10</sup>
10. Notwithstanding the Department's decision to abide by the Court's order, it makes these submissions in the response to the allegations and contentions advanced by the respondents, EE and CCL.

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<sup>9</sup> Record: pp101-103 paras 29-35.

<sup>10</sup> Record: p248 para 6.

11. Before these allegations and contentions are addressed, it is perhaps prudent to begin with the relevant constitutional and statutory framework.

### **The relevant constitutional and statutory framework**

12. The relevant part of s 29(1) provides that everyone has the right to basic education. It is trite that the nature of the right is such that, unlike some of the other socio-economic rights, it is immediately realizable.<sup>11</sup>
13. The Act is the primary statute which gives effect to the right to basic education. It contains various provisions governing the relationships between the Minister of Education (“the Minister”), members of provincial executive councils responsible for education (“MECs”), Heads of Department (“HODs”), principals and the governing bodies of public schools. It makes clear that public schools are run by a partnership involving school governing bodies (which represent the interests of parents and learners), principals, the relevant HOD and MEC, and the Minister. And, its provisions are carefully crafted to strike a balance between the duties of the various partners in order to ensure an effective education system.<sup>12</sup>
14. In furtherance of the constitutional and statutory objectives, s 3(1) of the Act distinguishes between basic and further education by making school attendance compulsory for learners from age 7 to 15 or, until the child reaches the 9<sup>th</sup> grade, whichever occurs first.

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<sup>11</sup> Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as *Amici Curiae*) 2011 (8) BCLR 761 (CC) at paras 36-37; Minister of Basic Education and Others v Basic Education for All and Others 2016 (4) SA 63 SCA at paras 35-37.

<sup>12</sup> Head of Department, Department of Education, Free State Province v Welkom High School and Others 2014 (2) SA 228 CC at para 36.

15. In turn, s 3(3) obliges the MEC to ensure that there are enough school places so that every child who lives in his or her province attends school as required by s 3(1) of the Act.<sup>13</sup>
16. And s 12 of the Act enjoins the MEC to provide public schools out of funds appropriated for this purpose by the provincial legislature.
17. Section 14(1) on the other hand, provides that subject to the Constitution and an expropriation in terms of s 58 (of the Act) of land, or a real right to use the property on which the public school is situated, a public school may be provided on private property only in terms of an agreement between the MEC and the owner of the private property.
18. And in terms of s 58, the MEC may, if it is in the public interest to do so, expropriate land or a real right in or over land for any purpose relating to school education in a province.
19. It is accordingly submitted that given the above framework, the right to basic education is constitutionally entrenched, and statutorily enforced.<sup>14</sup>
20. The Constitutional Court has held that basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents, and mental and physical abilities to his or her fullest potential. It provides a foundation for a child's lifetime learning and work opportunities. To

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<sup>13</sup> Governing Body of the Juma Masjid Primary School (*supra*) at para 38.

<sup>14</sup> Minister of Basic Education and Others v Basic Education for All and Others (*supra*) at para 40.

this ends, access to school, an important component of the right to basic education guaranteed to everyone by s 29(1)(a) of the Constitution, is a necessary condition for the achievement of this right.<sup>15</sup>

21. It is accordingly, submitted that in furtherance of the MEC's constitutional mandate, i.e. of realizing the right to basic education for everyone, the primary responsibility is to ensure that there are enough school places so that every child who lives in the Western Cape Province can attend school.<sup>16</sup> In *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 CC, the Court observed that the Western Cape Education Department inherited an education system that was grossly unequal and had the daunting task of converting this system to an equitable system.<sup>17</sup>

22. It is submitted that statutory framework provides various mechanisms designed to achieve the constitutional mandate, and the daunting task referred to by the Constitutional Court.

22.1. The first is s 34(1), which places an obligation on the State to fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision. Allied to this provision, is s 35, which concerns the norms and standards for school funding. And allied to s 35, is s 36 which places an obligation on school governing bodies to take all reasonable measures to supplement the resources supplied by the State in

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<sup>15</sup> Governing Body of the Juma Masjid Primary School (*supra*) at para 43.

<sup>16</sup> Section 3(3) of the Act.

<sup>17</sup> At para 37.

order to improve the quality of education provided by the school to all learners at the school.

- 22.2. The second is s 12, which obliges the MEC to provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature.
- 22.3. The third is s 13, which provides for public schools on state owned land.
- 22.4. The fourth is s 14, which provides for schools on private property.
- 22.5. The fifth is s 56, which contemplates the non-existence of a lease agreement provided for in s 14 at the commencement of the Act, in which event the MEC must take reasonable measures to conclude such an agreement within 6 months of the commencement of the Act.
- 22.6. The sixth is s 58, which vests the relevant member of the executive council with the discretion to expropriate land or a real right in or over land for any purpose relating to school education in the province.
23. It is submitted that, faced with the possible eviction of the School from the property, it was incumbent upon the MEC and the Department to have taken adequate steps to make alternative arrangements for the learners.<sup>18</sup>

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Governing Body of the Juma Masjid Primary School (supra) at para 47 (own underlining).



24. It is further submitted that when faced with the duty to give effect to its constitutional and statutory permissible objectives, it is trite that the executive has a wide discretion in selecting the means to achieve these and courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected.<sup>19</sup>
25. It is accordingly, submitted that it is against this framework, having regard to the facts of this case, that the question whether the MEC has fulfilled the constitutional mandate, must be determined.

#### **Did the MEC fulfil the constitutional mandate?**

26. It is submitted that, far from adopting an indifferent approach<sup>20</sup>, the MEC did, given the measures taken at the time when it became apparent that a new lease agreement could not be concluded – measures which were directed at the immediate continuation of the education of the learners at the School.<sup>21</sup>
27. This matter has since then been pending for a number of years and in this time, the Department has faced significant economic challenges. The six mobile classrooms erected in 2011 had been standing vacant pending the outcome of the main application and when classrooms were required elsewhere in the Western Cape

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<sup>19</sup> Albutt v Centre for the Study of Violence and Reconciliation, and Others 2010 (3) SA 293 CC at para 51; Bel Porto School Governing Body and Others (*supra*) at para 41.

<sup>20</sup> *cf* Governing Body of the Juma Musjid Primary School (*supra*) at para 46.

<sup>21</sup> Record: pp101-103 paras 30-30; p703 paras 10 and 13; p705 paras 17 and 18.

Province, four of the six mobile classrooms were relocated to address that need.<sup>22</sup>

And given the time lapse, the costs associated with the replacement of mobile classrooms have escalated – so too the transport costs – which impact on the Department's current budget.<sup>23</sup>

28. Notwithstanding, the changed circumstances, the MEC and the Department accepts that they will have to provide the necessary infrastructure to accommodate the learners of the School on alternative premises in the event that the main application succeeds and requires time to do so. In this regard, it contends that a procurement process would require between 6 and 9 months to complete.<sup>24</sup>
29. The School and the SGB opposes the main application. They contend however, that the Department's offer to pay R10 000.00 in monthly rental under a new lease agreement, was a major, if not, the sole determining factor in the Trust's decision not to conclude a new lease agreement. They contend further that the Department's decision to pay only R10 000.00 has the effect, in the event of an eviction order being granted, of impairing the rights of the learners at the School to basic education, and as such incompatible with the obligations contained in s 29(1)(a) of the Constitution,<sup>25</sup> and that the amount of the rental offered is not supported by the facts.<sup>26</sup> It is submitted that these contentions are ill-founded for the following reasons.

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<sup>22</sup> Record: p705 para 19.

<sup>23</sup> Record: 706 para20.

<sup>24</sup> Record: p706 para 21.

<sup>25</sup> Record: p743 paras 6-9.

<sup>26</sup> Record: p743 para 10.

- 29.1. First, the adversarial position adopted by the School and the SGB against the Department in these proceedings is inconsistent with their letter dated 13 June 2011 in which they stated categorically that they do not require the Department to become embroiled in any dispute regarding the continued right of the School to occupy the portion of the property on which it is situated.<sup>27</sup>
- 29.2. Second, the Department provided all that was required, on State owned land, a short distance from where the School is situated, for the continuation of the learners' education, at the School.<sup>28</sup> The Department adopted this course, given the prohibitive costs of acquiring land and constructing a new school at the time. It also provided the least interference with the learners' academic year.
- 29.3. It is pure conjecture on the part of the School that it will close in the event of an eviction order.<sup>29</sup> It is submitted that an order of this Court cannot give rise to a circumvention of the procedure for a closure of the School, but may call for a relocation of the School to alternative premises.
- 29.4. The School and the SGB's contention, that the Department has not provided a factual basis for its determination of R10 000.00,<sup>30</sup> is without merit. The Department made it clear that it determined the monthly rental of R10 000.00 reasonable, measured against the rental paid by it in respect

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<sup>27</sup> Record: p197 annexure KD9 para 20.

<sup>28</sup> Record: p102 paras 31-33.

<sup>29</sup> Record: p101 para 29; p201 annexure KD10.

<sup>30</sup> Record: p743 para 10.

of a similar agreement concluded in respect of private property just outside Oudtshoorn.<sup>31</sup> This fact is not disputed.

30. Furthermore, it is submitted that the School and the SGB's reliance upon the order handed down in the urgent application brought by them against the School on 15 July 2011 ("the order")<sup>32</sup>, is similarly misplaced.

30.1. The order does not in absolute terms preclude the Department from relocating the School. It can in terms of the order do so pursuant to a "*further lawful decision or order*". The Department has not relocated the School and is not seeking to close it. Thus, the Department is not in breach of the order and this Court may order the relocation in the event that it grants the Trust an eviction order.

30.2. Moreover, it is submitted that the Act does not preclude a relocation of a school. On the contrary, it is submitted that, an MEC is obliged to ensure that there are enough school places so that every child can attend School. It is submitted that how and where a school is established is something best left to the Department's policy determinations taking into account that every learner shall be entitled to basic education at his or her nearest ordinary public school, insofar as it is reasonably practicable.<sup>33</sup>

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<sup>31</sup> Record: p100 para 26.

<sup>32</sup> Record: p745 paras 15-19.

<sup>33</sup> Section 3(1)(a) of the Western cape School Education Act 12 of 1997.

- 30.3. In any event, it is submitted that the claims made by the Community to a public servitude over the portion of the property on which the School and the Church is situated, must first be determined, and that pending that determination, any attempts the Department may make regarding the conclusion of a lease agreement or, engaging with any interested party regarding the relocation of the School, are presently frustrated.
31. The criticism directed at the MEC and the Department regarding the adequacy of the facilities at Voorbedag is, it is submitted, unwarranted and devoid of any merit inasmuch as it is inconsistent with the version contained in CCL's affidavit of, for example, overcrowded classrooms, insufficient space for learning and sporting facilities.<sup>34</sup> The Department contends that these deficiencies would have been overcome immediately, had the School been relocated to Voorbedag, or should it be.<sup>35</sup>
32. The School and the SGB's criticism of the transport arrangements or the perceived lack thereof are similarly without merit. Significant in this regard, is that the School and the SGB disregard the fact that there is an existing transport system in place to bring the learners to the School, which is already funded by, the Department.<sup>36</sup> The Department is unable to finalize the arrangements regarding the additional transport because of the claim lodged by the Community regarding a public servitude, over the portion of the property on which the School is situated, and the uncertainty, surrounding the outcome of this application. It is submitted that it is unreasonable,

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<sup>34</sup> Record: pp708-709 paras 31-34.

<sup>35</sup> Record: p709 para 33.

<sup>36</sup> Record: p707 para 27; p709 para 32.

and potentially wasteful, were the Department to go out on tender, to secure transport which might not be required.<sup>37</sup>

33. Furthermore, it cannot be contended that the conditions of the roads influence the learners' attendance at School. The learners are presently travelling the same roads to School. It is not the School or the SGB's case that there is a substantial absentee rate at the School which is linked to the condition of the roads. And, it is submitted that even if there is a connection, it will be the same whether the School is situated on the existing property or should it share the property with Voorbedag.<sup>38</sup> Moreover, CCL does not take issue with the present transport arrangement – which is paid for by the Department.<sup>39</sup>
34. On the contrary, it is submitted that CCL contends that there are a number of existing difficulties which bear upon the learners of the School. These include the loss of employment of the parents of the learners from time to time on account of them being migrant workers<sup>40</sup> and because the learners find employment on one of the farms.<sup>41</sup>
35. It is submitted that the primary difference between the learners' present situation attending the School in its current location and attending the School should it be relocated to state owned land approximately 17km from its current location, is the additional distance and travelling time. Neither the School, nor the SGB contend that these additional factors could not be compensated by the School starting a later so as to prevent or minimise any interference with the learners' daily routine.

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<sup>37</sup> Record: p706 para 22.

<sup>38</sup> Record: p710 para 35.2.

<sup>39</sup> Record: p256 para 28.

<sup>40</sup> Record: p708 paras 30 and 31.

<sup>41</sup> Record: p267 para 65.

36. EE's key contention is for the expropriation of the portion of the property on which the School is situated – as opposed to, the relocation of the School to state owned land, which it argues is not permitted in terms of the Act. It contends that, given the historical context, s 14 and s 58 served to ensure that public schools on private land are provided with security of tenure.<sup>42</sup> It is submitted that this contention ignores the full extent of the purpose of these sections.
- 36.1. It is submitted that the given the history of farm schools, the security of tenure contemplated by s 14 and s 58 is designed to ensure the continued learning of learners at farm schools.
- 36.2. Expropriation, it is submitted, is one of the mechanisms which the Act provides in order to fulfil the constitutional mandate of ensuring the right to basic education to everyone, and s 58 vests the MEC with the discretion as to whether expropriation in any of the forms provided for, should take place.
- 36.3. Section 58, it is further submitted, gives effect to the obligation placed upon the MEC to ensure that enough places are provided for learning to take place.
- 36.4. Thus, it is submitted that, the underlying purpose the choice to purchase land, or to lease land, or to expropriate land serves, is the achievement of the continued learning by learners.

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<sup>42</sup> Record: pp756-757 paras 6-9.

- 36.5. In this case, the MEC, given the circumstances at the time when Trust launched its urgent application, and that no lease agreement could be concluded, considered that the relocation of the School, a short distance from its current location, would ensure the continued education of the learners of the School.
- 36.6. EE's case, however, is that there is a better solution, i.e. expropriation. It is submitted that this is what the Constitutional Court has guarded against and expressly held that courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected.<sup>43</sup>
- 36.7. Moreover, it is submitted that EE's contention that the MEC ought to have considered "*every possible way in which the school could remain in its current location*"<sup>44</sup>, is misplaced. It is submitted that the MEC must ensure the continued education of learners and take adequate steps in order to achieve this objective.<sup>45</sup>
- 36.8. Moreover, there is no dispute that all the learners at the School are brought to the School at its present location by means of a transport system which is funded by the Department. It is submitted that this Court can accept (there being no evidence to contrary on the papers) that the learners of the School would arrive at School timeously. In doing so, they already contend with the adverse road and weather conditions. On the Schools

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<sup>43</sup> Albutt (*supra*) at para 51.

<sup>44</sup> Record: p758 para 13.

<sup>45</sup> Governing Body of the Juma Masjid Primary School (*supra*) at para 47.



own showing, some learners are transported from Oudthoorn,<sup>46</sup> the Le Roux<sup>47</sup> and the Matjiesrivier areas.<sup>48</sup> It is therefore, not “*an oversimplification of the issue*” for the MEC to contend that the additional travel time could be compensated by the School starting a few minutes later.<sup>49</sup>

36.9. As regards the EE’s contention that the Act does not permit the relocation of a school, it is submitted that inasmuch as s 3(3) of the Act imposes an obligation on the MEC to ensure enough school places for every child who lives in his or her province, the section contemplates the relocation of a school.

36.10. Moreover, it is submitted that, given the existing circumstances, and the additional travel, the community and the learners continue to be served by the School, albeit not in its present location. It is not the Department’s constitutional obligation to ensure that the School remains at its present location because it serves a community member’s personal needs, such as having access to a telephone or to collect his or her post.<sup>50</sup>

37. In support of its opposition to the relocation of the School, EE tendered the expert evidence of Dr Gordon.<sup>51</sup> It is trite that an expert provides the court with the benefit of his or her expertise and that the evidence adduced, must be independent, objective, unbiased, not go beyond the logic which dictates the scientific

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<sup>46</sup> Record: p170 para 150.

<sup>47</sup> Record: 170 para 150.1.

<sup>48</sup> Record: p170 para 150.2.

<sup>49</sup> Record: p763 para 28.

<sup>50</sup> Record: p266 para 64; p272 para 84; p788 para 10.

<sup>51</sup> Record: pp818-904.

knowledge which the expert claims to possess, and the expert must not assume, the role of an advocate.<sup>52</sup> It is submitted that the evidence adduced by Dr Gordon, falls short of these strictures.

37.1. As regards the history of farm schools, it is submitted that Dr Gordon evidence suggests no more than what Mr Isaacs' evidence in this regard suggests. It is not disputed that EE adduced substantially the same evidence through the affidavit deposed to by Mr Isaacs, without qualifying him as an expert.<sup>53</sup>

37.2. It is submitted that Dr Gordon's evidence regarding the history of farm schools also lacks objectivity in that it does not take account of the present day realities such as governance which is vested in the School and the SGB, the closure of schools is regulated by the Act – not a farm owner.<sup>54</sup> The evidence does not take account of existing conditions at the School, such as the fact that the rooms are utilized as classrooms and are not conducive for the number of learners present enrolled at the School, resulting in overcrowding.<sup>55</sup>

37.3. The concerns surrounding security of tenure as regards farm schools has been taken up in the Act inasmuch as it provides the leasing or expropriation of property. In this regard, it is not disputed that the Department has for many years been able to secure tenure in respect of

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<sup>52</sup> Schneider NO and Others v AA and Another 2010 (5) SA 203 WCC at 211E-212B.

<sup>53</sup> Record: pp821-824 paras 10-21; p907 paras 4-7.

<sup>54</sup> Record: p908 paras 8.1 and 8.2.

<sup>55</sup> Record: p908 para 8.3.

schools on private property at rentals determined in accordance with the Department's formula.<sup>56</sup>

37.4. Dr Gordon's contention that s 58 is underutilized, is without foundation given the fact that the Department has over long periods been able to secure the tenure of schools on private property. In those isolated cases where it has not been able to, the education of learners continue without interference from the property owner,<sup>57</sup>

37.5. It is submitted that Dr Gordon's qualifications do not qualify her to express an opinion on the difference between school closures and mergers.<sup>58</sup>

37.6. It is submitted that inasmuch as farm schools may generally share certain characteristics, these are irrelevant when not applied to the School and when ignoring relevant facts, e.g. the obvious benefits of eliminating overcrowding of classrooms, the School starting later and synchronising the commencement, interval and end times of the School with Voorbedag Primary School, and the absence of any complaint by the School that the Department is does not provide adequate resources.<sup>59</sup>

37.7. Finally, the inconclusive nature of Dr Gordon's evidence does not assist this Court, lack objectivity and ought to be disregarded.<sup>60</sup>

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<sup>56</sup> Record: pp909-910 paras 10-18.

<sup>57</sup> Record: pp911-912 paras 19-22.

<sup>58</sup> Record: p912 para 23.

<sup>59</sup> Record: pp913-914 paras 26-27.

<sup>60</sup> Record: pp914-915 paras 28-30.

38. CCL's case, it is submitted, is not dissimilar to that of EE. It too, contends that relocating the School would burden the learners and their parents and consider that it would be in the learners' best interest to remain in their present location. To this end, CCL also contends for the expropriation of the portion of the property on which the School is situated.

38.1. In *Governing Body of the Juma Masjid Primary School*, the Constitutional Court observed that the MEC and the property owner were unable to conclude a lease agreement as contemplated in s 14 of the Act. It also observed that the steps taken by the MEC to secure alternative placements for the learners were reasonable.<sup>61</sup>

38.2. The Constitutional Court also considered that the complaints about transport and siblings being split to attend different schools and travelling at different times and in different busses could not stand. It held in this regard that the MEC was not constitutionally obliged to provide transportation for the convenience of each parent and learner.<sup>62</sup>

38.3. It is submitted that the MEC in the present case the MEC accepts the responsibility of fulfilling the constitutional obligation of providing basic education to the learners of the School. It fulfils this obligation by accommodating the learners on state owned land at Voorbedag and by its offer to provide the necessary transport to ensure the learners can attend

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<sup>61</sup> At paras 75-78.

<sup>62</sup> At para 78.

school. It is submitted that, insofar as an alternative means may be available, it is irrelevant.

38.4. CCL's contention, that the MEC as custodian of the education of the learners, should be mindful of the fact that inasmuch as the parents of learners move around, the only stable place the learners may have, is the School,<sup>63</sup> ignores the fact that the Department is not closing the School or merging it with another school, but merely ensuring the continuation of the School, albeit not in its present location. Thus, the stability the School offers remains unaffected. In the event that the learner has to leave the School on account of the fact that his or her parents found work elsewhere, the stability the School offers, becomes irrelevant.

38.5. Furthermore, it is submitted that CCL's contention, that given the daily routine of the learners, their waking-up times and the conditions of the roads, relocating the School would burden the parents and learners and "*may result in higher rates of school-drop-out*"<sup>64</sup> is, speculative, and ill-founded, in that the only difference the relocation brings about, is the additional travelling distance.

38.6. The high water mark of CCL's case as regards the roads on which the learners travel is that their condition presents a "*challenge*" to the learners' access to education and the move would add to this.<sup>65</sup> The condition of

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<sup>63</sup> Record: 808 para 39.

<sup>64</sup> Record: pp808-809 paras 41-43.

<sup>65</sup> Record: p809 para 42.

the roads is not altered by the relocation and remains the same whether the learners attend the School in its present location or at Voorbedag.

38.7. Moreover, CCL does not seriously challenge the MEC's suggestion that the School could start a few minutes later to accommodate the additional travelling. And the MEC contends that should the main application succeed and the School be relocated to Voorbedag, both schools could commence and end at the same time and their intervals could coincide.<sup>66</sup>

38.8. Furthermore, CCL's contention that the MEC has no regard for safety issues and the effect different seasons has on the learners' school attendance is, it is submitted, similarly ill-founded.<sup>67</sup> The learners are presently collected by the school principal and they travel a particular route to school. In the event of the School being relocated to Voorbedag, the route along which the learners would be collected would not change. They would be collected at the same pick-up points as they would have, had the School not been relocated. The learners would be exposed to the same safety issues – no incident is evident on the papers which render these contentions speculative - and the same seasonal issues, until they are picked-up by the school principal at the various pick-up points. Accordingly, it is submitted that the relocation would have no bearing upon any existing safety and seasonal issues. Moreover, it is not CCL's case that road from the School's present location at Grootkraal to

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<sup>66</sup> Record: p715 para 54.

<sup>67</sup> Record: p809: para 45.

Voorbedag, is in any way more dangerous than the roads on which the learners travel to pick-up points.

### **The appropriate remedy**

39. It is submitted that, given the above, the steps taken by the MEC and the Department were adequate as contemplated by the Constitutional Court in the case of *Governing Body of the Juma Musjid Primary School*.
40. Inasmuch as the Community claims that it has acquired a public servitude over the portion of the property on which the School is situated, it is submitted that this application ought to be determined first. In this regard, it is to be noted that EE agrees with this proposition.<sup>68</sup>
41. In the event of this Court dismissing the Community's application and grants an order evicting the School, it is submitted that an appropriate order ought to afford the MEC the opportunity to acquire the additional classrooms at Voorbedag and to make the necessary transport arrangements.
42. Finally, as regards costs, the MEC and the Department has at all times maintained that they do not oppose the relief sought by the applicants and that they will abide by the decision of this Court. In any event, it is submitted that the Trust seeks a costs order only against those parties who oppose its application.

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<sup>68</sup> Record: p776 para 68.

**E A DE VILLIERS-JANSEN**

**First respondent's counsel**

**Chambers**

**Cape Town**

**17 March 2017**