

**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
THE GOVERNING BODY OF THE GROOTKRAAL
UCC PRIMARY SCHOOL (OUDTSHOORN)
GROOTKRAAL UCC PRIMARY SCHOOL
(OUDTSHOORN)
CENTRE FOR CHILD LAW
THE COMMUNITY OF GROOTKRAAL
THE INDEPENDENTE CHURCH OUDTSHOORN
TRUI KIEWIETS
KATRINA MEI
EQUAL EDUCATION**

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

Eighth Respondent

Amicus Curiae

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**FIRST RESPONDENT'S SUPPLEMENTARY EXPLANATORY AFFIDAVIT
IN RESPONSE TO THE AFFIDAVIT OF DR A GORDON DATED 23
JANUARY 2017**

I, the undersigned,

JOHN HILTON LYNERS

do hereby make oath and state that:

1. I depose to all the affidavits filed on behalf of the first respondent ("the MEC") in these proceedings.
2. The contents of this affidavit are within my personal knowledge, unless otherwise stated.
3. I depose to this affidavit in response to the affidavit of Dr Adele Gordon filed by the *Amicus Curiae*, Equal Education, which I am advised is tendered as expert evidence. I shall deal with the allegations and contentions contained therein by following its structure and shall guard against repeating what I have already said in my previous affidavits. My failure to deal with any allegation or contention must not be construed as an admission thereof. On the contrary, I deny it. And,



any submissions regarding the law, I make on the basis of legal advice, which advice I believe to be correct.

History of farm schools

4. I am advised that the history of farm schools as explained by Dr Gordon is substantially contained in an affidavit deposed to by an employee of Equal Education, Mr Doron Moss Isaacs ("Isaacs"), on 27 January 2012 (record pp252-268). And as I explained in my affidavit dated 14 February 2012 (record pp334-344), the MEC and the Western Cape Education Department ("the Department") are well aware of the historical context to which farm schools were exposed.
5. Equal Education has to my knowledge not held Isaacs out as an expert witness, but adduced this evidence nonetheless. And I deposed to my affidavit referred to above, in response to Isaacs' affidavit, without suggesting that he could not adduce the evidence.
6. In light of the above, it seems hardly necessary for Equal Education to adduce substantially the same evidence through Dr Gordon and I am advised that it does not assist the Court any more than the same evidence adduced by Isaacs would.
7. In any event, I am advised that it is not the second respondent's ("the SGB") or the third respondent's ("the School") case in their answering affidavit (record pp132-184) that they are presently affected or have been affected by the historical context described in Dr Gordon's affidavit. On the contrary, the historical context

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invoked by the SGB and the School is limited to the evolution of the ownership of the land on which the School is situated.

8. Furthermore, Dr Gordon's explanation of the historical context, does not take account of the present day realities – and in particular at the School.

- 8.1. The School is governed by the SGB, including parents represented on the SGB, not the farm owner – in this case, the applicant (“the Trust”). The Trust does not have a say in whether children from neighbouring farms may attend the School or, in the selection of educators, and does not exercise any control over either or their funds. The present litigation is indicative of the kind of control vested in the School and the SGB.

- 8.2. The closure of schools is regulated by the South African Schools Act 84 of 1996 (“the Act”) - not the farmer or farm owner.

- 8.3. On the other hand, although Grootkraal has water, toilets electricity and a telephone, it does not have proper classrooms – the structure and its rooms are utilized as classrooms. They are not conducive for the number learners presently enrolled at the School resulting in overcrowding. By contrast, the Department erected proper classrooms, albeit mobile ones, at Voorbedag. There is as I have said in my earlier affidavit sufficient potable water, sanitation, electricity and the Department provides adequate learning material.



9. In light of the above, I am advised that this evidence of Dr Gordon is not only unhelpful, but it is also irrelevant.

The legislative backdrop

10. I do not dispute the fact that the National Government implemented processes to investigate the transformation of the education system. I also do not dispute that the Hunter report was produced and that certain recommendations were made to the National Minister of Education as regards the transformation of the education system. As Ms Gordon says, the Hunter Committee was *“tasked with suggesting policy changes that would result in an equitable system of educational provision”*.
11. The transformation initiatives were clearly directed at changing the education system from the Verwoerd led approach described by Dr Gordon – i.e. the advent of a new order. Underlying the need for change, which the national and provincial departments acknowledged, is the constitutional obligation to provide basic education to everyone.
12. In order to fulfil its constitutional obligation of providing basic education, the Department recognizes the need for security of tenure in respect of schools situated on private property. In order to secure a school’s tenure, the Department concluded leases – as permitted in terms of the Act - with several owners of private land on which schools are situated.
13. Presently, the Department has 259 public schools on private property - including property owned by farm owners and churches. It has concluded and/or renewed

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leases in respect of 254 schools. The remaining 5 include the property on which the School (Grootkraal) is situated. In respect of the remaining 4, leases have not as yet been concluded for various reasons, such as liquidations and uncertainty surrounding ownership of the property.

14. I pause to mention that the rental payable in respect of the majority of the aforementioned leases has been agreed to in accordance with the per-square-meter rate approved by the Department.
15. Property owners have, notwithstanding the rental amounts, over the years always been willing to co-operate with the Department and as such the Department has enjoyed good relationships with these property owners.
16. In light of the fact that the Department has been able to secure the tenure of schools on private property by concluding leases in the circumstances described above, it has not considered it necessary to expropriate any land – and it is submitted that where leases are obtainable, the MEC is not obliged to expropriate.
17. As for the management of public schools, I have already stated above that its management and control are no longer subject to the whims of a property owner. On the contrary, its management is in terms of the provisions of the Act, vested in the schools and its governing bodies.
18. Having regard to the above, it is clear that the Department's actions taken in terms of the provisions of the Act have been in keeping with the recommendations made by the Hunter Commission to the extent that these have been endorsed in the White Paper 2, and taken up in the Act.



The Act in practice

Leases and expropriations

19. In the light of what I said above concerning the security of tenure, I do not agree with the contention that s 58 of the Act has been underutilized. Its invocation, I am advised is discretionary, and the contention that it is underutilized must be assessed in the light of the fact that the Department has for many years been able to secure tenure in the form of a lease agreement. And, as already stated above, the Department has lease agreements in place in respect of the majority of schools on private property. Despite the fact that it does not have leases in place in respect of a small number of schools on private property, including the property on which the School is situated, the education of learners at these schools continues unabated.

20. I am advised that the contention advanced by Dr Gordon, that the Department's election to conclude short-term leases of three to five years – as opposed to expropriating property - is *“contrary to the recommendations informing, and the intention behind section 14 of SASA (that is, leases in perpetuity that would secure a school's tenure)”* is ill-founded in that the conclusion of leases of any duration is not precluded in terms of the Act. The Department concludes leases for five years, with an option to renew the lease for five years. Its tenure is accordingly secure for 10 years, should it elect to exercise its option. I annex a copy of the standard lease agreement concluded with property owners marked, “**JL1**” and incorporate its terms.

21. Moreover, the period of five years is conducive for the Department's financial planning which in turn includes its vision and plan of constructing schools.
22. I submit that the contention that the trend towards short-term leases – as opposed to leases in perpetuity – leads to insecurity of tenure – is in light of the provisions of annexure **JL1**, misplaced. Apart from the peculiar circumstances at the School, the Department has until now been able to secure tenure at the substantial majority of all its other schools on private property. Furthermore, to my knowledge, and as it appears from the affidavits filed on behalf of the School and the SGB, *“the participation of the school community in governance and management, as parents and other stakeholders”* has not weakened.

School closures and mergers

23. I am advised that the legal contentions and conclusions reached by Dr Gordon as regards closures, mergers and relocations of schools are, in the light of her qualifications, not matters within her expertise. On the contrary, it seems that Dr Gordon has assumed the role of an advocate. I am also advised that annexure **AG10** has already been annexed to and dealt with in Isaac's affidavit (record p302 annexure YD3).
24. It is however, important to bear in mind the context in which the Department decided to relocate the School. I explained what had occurred at the time in my affidavit dated 13 December 2011 (record p97 para 16-p101 para 23).



25. Notwithstanding the assurances given to the School and the SGB that the Department has not decided to close the school, but given the circumstances, had to relocate the School *“for the third and fourth school terms during which period consultations with the School and the SGB regarding the future of the School would take place”*, the School and the SGB launched an urgent application on 29 June 2011 to interdict the Department from relocating the School. On or about 5 December 2011 (the court stamp records 2009), the Trust launched its eviction application, which is pending.

The unique nature of farm schools

26. I am advised that the explanation afforded by Dr Gordon appears to be a representation of general factors, all or some of which might find application in some or all farm schools.
27. However, Dr Gordon does not relate any of the factors to the School or, its learners. I submit that the absence of such a connection renders the evidence unhelpful and irrelevant. Having regard to this evidence, I also submit that Dr Gordon has not considered material facts which would detract from her evidence. For example, it will be recalled that the Department put up mobile classrooms in very urgent and pressing circumstances. These were nonetheless proper classrooms compared to the overcrowded rooms of the house in which the learners are presently educated, contributing to an improved learning environment. Dr Gordon has also not explored the possibility of the School (and Voorbedag) starting later so as to minimize any interference in the learners



routine. Another factor not considered by Dr Gordon, is that the School has not complained that the Department does not provide adequate “*resources (funds and material resources)*”.

The WCED’s proposed relocation plan

28. It appears from the last paragraph of Dr Gordon’s affidavit that her findings are inconclusive. The reason for this inconclusive finding is the apparent lack of detail regarding the transport arrangements and the relocation itself which “may” impact the learners’ access to and/or standard of education. This led Dr Gordon to speculate that relocating the learners to Voorbedag “*runs the risk of possible violations*” to the rights of the learners (own underlining).
29. I respectfully point out that upon a combined reading of my affidavits of 13 December 2011 and 3 November 2016 (Dr Gordon says that she considered both), there can be no question about the reasonableness and the sincerity of the offers made by the Department as regards transport and classroom accommodation, both of which would have ensured the continued education of the learners in improved learning conditions.
30. Dr Gordon’s suggestion that the relocation proposed by the Department could cause conflict between management, parents and learners is simply speculative. So too, the suggestion of a duplication of infrastructure, management, governance structures and teaching personnel. Having two schools share the same property would be no different than had they occupied separate properties. And any



duplication, such as may result, could be resolved in a manner best suited to the needs of both schools.

31. Accordingly, inconclusive as Dr Gordon's finding may be, I submit that it lacks objectivity and should be disregarded.



JOHN HILTON LYNERS

I certify that:


The deponent signed this affidavit and swore and acknowledged that:

- (a) he knew and understood the contents of this affidavit;
- (b) he had no objection to taking the prescribed oath; and
- (c) he considered the oath to be binding on his conscience.

The deponent thereafter uttered the words "*I swear that the contents of this declaration are true, so help me God.*"

Dated at CAPE TOWN this 27th day of February 2017.





COMMISSIONER OF OATHS

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