

**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 1416/2015**

In the matter between:

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

**1<sup>st</sup> Amicus Applicant**

**EQUAL EDUCATION**

**2<sup>nd</sup> Amicus Applicant**

And

**MINISTER OF BASIC EDUCATION**

**1<sup>st</sup> Respondent**

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

**2<sup>nd</sup> Respondent**

**PRINCIPAL OF MAHLODUMELA LOWER  
PRIMARY SCHOOL**

**3<sup>RD</sup> Respondent**

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

**4<sup>TH</sup> Respondent**

**In re:**

**ROSINA MANKONE KOMAPE**

**1<sup>st</sup> Plaintiff**

**MALOTI JAMES KOMAPE**

**2<sup>nd</sup> Plaintiff**

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**MIKIBELO LYDIA KOMAPE**

**3<sup>rd</sup> Plaintiff**

**LUCAS KHOMOTSO KOMAPE**

**4<sup>th</sup> Plaintiff**

and

**MINISTER OF BASIC EDUCATION**

**1<sup>st</sup> Defendant**

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

**2<sup>nd</sup> Defendant**

**PRINCIPAL OF MAHLODUMELA, LOWER  
PRIMARY SCHOOL**

**3<sup>rd</sup> Defendant**

**JUDGMENT**

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**MOKGOHLOA J**

1. Arising out of an incident that occurred on 20 January 2014, Michael Komape, a 6 year old boy, and a learner at Mahlodumela Lower Primary School, fell into a pit toilet on the premises of the school and died. The action is pursued in trilogy of interests. The first is his parents and older siblings, acting in their own interests. The second interest relates to other minor children who attend school in the Limpopo Province. And lastly is in the public interest. The applicants seek the following order against the respondents:
  - 1.1. A declaratory order that the respondent have breached their constitutional obligations in respect of the rights contained in section 9, 10, 11, 24, 27, 28 and 29 of the Constitution;
  - 1.2. Payment of the sum of R 940 000.00 for emotional trauma and shock they experienced as a result of Michael's tragic death;
  - 1.3. Payment of the sum of R 2 000 000.00 for grief they suffered based on the common law as developed in accordance with section 39 (2) of the Constitution;
  - 1.4. Payment of the sum of R 208 454.80 for future medical expenses, funeral costs and loss of earnings.
2. The action is pursued partly on the basis of the existing common law and delict. Having realised that the existing common law may provide inadequate remedies for the loss they have suffered, the plaintiffs sought a development of common law in terms of section 39(2) of the Constitution Act 108 of 1996.

3. The first applicant, Tebeila Institute of Leadership, Education, Governance and Training (TILEGT) and the second applicant, Equal Education (EE), brought an application to be admitted as amici curiae in the main action in terms of Rule 16A (5) of the Uniform Court Rules. This application was preceded by publication of a notice in terms of Rule 16 (A) (1) of the Uniform Rules by the plaintiffs. The first and second applicants requested written consent to be admitted as amici curiae. The plaintiffs consented to their admission as amici curiae but the defendants refused to grant such consent.
4. Consequently, the applicants then brought this application to be admitted as *amici curiae* in the main proceedings in terms of the provisions of Rule 16(A)(5). ~~Before I deal with the requirements of Rule 16 (A)(5), I find it necessary to describe the applicants and the submissions and evidence they intend leading in the main proceedings.~~
5. TILEGT is an educational institution based in the rural areas of the Limpopo Province. It is actively involved in organising educational trainings, campaigns, public lectures, and career exhibitions in the communities of the Limpopo Province and across the country in order to ensure that learners become aware of the opportunities that may be available for them post matric. It has interest in ensuring access to quality basic education and further education, in particular by children from poor communities throughout South Africa.
6. In order for TILEGT to achieve its objectives, it conducts a broad range of activities which include but not limited to engaging learners, teachers and principals on the security of learners, teachers, and other supporting staff in school and where necessary, using the courts and legal processes to advance the Constitutional values and to hold private institutions, government, and individuals accountable.

7. The second applicant, EE, is a registered non-profit organisation and a public benefit organisation and a membership based democratic movement of learners, teachers, parents and community members working for quality and equality in South African schools through policy analysis, advocacy and activism. To achieve its objectives, EE conducts a broad range of activities and include but not limited to developing the capacity of learners, parents, teachers and community members to drive improvement in their schools and educational institutions; conducting and applying research on the state of the education system in South Africa; engaging constructively with the state and the best practices in the management and governance of the education system including through meetings, letters or briefs and input to legislative and policy development processes; campaigning for a curriculum and pedagogy that is academically rigorous and that promotes dignity, creativity and social justices.

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8. The relevant provisions of Rule 16A provides:

(5) If the interested party contemplated in subrule (2) is unable to obtain the written consent as contemplated therein, he or she may, within five days of the expiry of the 20-day period prescribed in that subrule, apply to the court to be admitted as an amicus curiae in the proceedings.

(6) An application contemplated in subrule (5) shall –

(a) Briefly describe the interest of the amicus curiae in the proceedings;

(b) Clearly and succinctly set out the submissions which will be advanced by the amicus curiae, the relevance thereof to the proceedings and his or her reasons for believing that the submissions will assist the court and are different from those of the other parties; and

(c) Be served upon all parties to the proceedings’.

9. In *Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 713 (CC) at 715 F*, the Court explained that:

“ 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. . .to provide cogent and helpful submissions that assist the Court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court. Ordinarily it is inappropriate for an amicus to try to raise new contentions based on fresh evidence.”

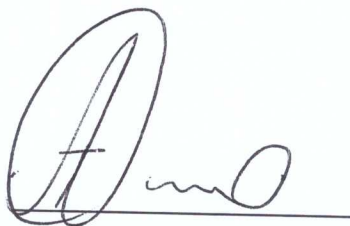
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10. The respondents oppose the application on the grounds that the matter does not raise a constitutional issue; the applicants do not pass a threshold for admission as amici curiae; and the submissions to be made by the applicants are abstract, academic and irrelevant to the issue at hand.
11. I find the respondents' argument without substance. The respondents concede that the plaintiffs' action raises the question whether common law should be developed in the light of section 39(2) of the Constitution. Furthermore, the plaintiffs' claims are based on the defendants' breach of certain public duties that give rise to private law claims for damages. The question of what those public duties were and whether they were breached to an extent that would give rise to a private law claim for damages is in my view, a constitutional issue.
12. Regarding the relevance of the evidence proposed to be lead, the first applicant submit that it intends making submissions on the scope and extent of the school officials to ensure proper supervision of learners within and near school campus, their responsibility as *in loco parentis*, and the consequences of their failure to supervise where a learner sustains injuries as a result of such failure.
13. EE on the other hand, submits that their proposed evidence and submissions relate to the state of knowledge of the first and second defendants. According to

EE, the defendants' knowledge is directly relevant to the foreseeability of harm to the deceased and is therefore relevant.

14. Having stated the above, I find that the applicants' participation in the main proceedings would provide cogent and helpful evidence and submissions that would assist the court.

### **Order**

1. The first and second applicants are admitted as *amici curiae* in the main action.
2. The second applicant is permitted to lead evidence in respect of issues highlighted in its founding affidavit.
3. The applicants are granted leave to file written submissions and present oral argument at the hearing of the main action.
4. The respondents are ordered to pay costs of the first and second applicants, jointly and severally, the one paying the other to be absolved.

A handwritten signature in black ink, appearing to be 'Mokgohloa J', written over a horizontal line.

MOKGOHLOA J

## REPRESENTATION

1. Counsel for the 1<sup>st</sup> Applicant  
Instructed by : Adv SS Tebeila  
: Chayya Attorneys
2. Counsel for the 2<sup>nd</sup> Applicant  
Instructed by : Adv Kate Hofmeyr  
: Equal Education Centre
3. Counsel for the Respondents  
Instructed by : Adv MS Phaswane  
: State Attorney

Date of Hearing: 8 March 2016

Date delivered: 13 June 2016