

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 294/2018

SCA Case No: 1134/2017

GJ Case No: 38670/2016

In the application to be admitted as *amicus curiae* –

THE CENTRE FOR CHILD LAW

Applicant

In the matter between:

AB

First Applicant

(First Applicant in Court *a quo*)

CB

Second Applicant

(Second Applicant in Court *a quo*)

and

PRIDWIN PREPARATORY SCHOOL

First Respondent

(First Respondent in Court *a quo*)

SELWYN MARX

Second Respondent

(Second Respondent in Court *a quo*)

**THE BOARD OF PRIDWIN PREPARATORY
SCHOOL**

Third Respondent

(Third Respondent in Court *a quo*)

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR EDUCATION, GAUTENG**

Fourth Respondent

(Fourth Respondent in Court *a quo*)

**THE INDEPENDENT SCHOOLS ASSOCIATION
OF SOUTHERN AFRICA**

Fifth Respondent

APPLICATION FOR ADMISSION AS *AMICUS CURIAE*

I, the undersigned,

ALEXANDRA TATIANA KLONARIDES

do hereby make oath and state that:

1. I am an adult female currently employed at the Centre for Child Law (CCL).
2. I am duly authorised to depose to this affidavit on behalf of the CCL.
3. The facts contained herein are to the best of my knowledge both true and correct and, unless otherwise indicated by statement or context, are within my personal knowledge.
4. This is an application in terms of Rule 10 of the Rules of this Court seeking leave for the admission of the CCL as *amicus curiae* in these proceedings.
5. The purpose of this affidavit is to set out the basis of the application as per requirements listed in Rule 10 of the Rules of this Court.

THE APPLICANT

6. The CCL forms part of the Faculty of Law of the University of Pretoria. It is also a registered law clinic with the Legal Practice Council. It was established in October

1998 and works towards the realization of democratic and human rights values as enshrined in the Constitution of South Africa Act 108 of 1996 (“the Constitution”).

7. The main objective of the CCL is to contribute within its means to establish and promote the constitutional rights of children in the South African community, more particularly to use the law as an instrument to advance such rights.
8. The CCL is also dedicated towards the promotion and protection of children’s rights within the framework of the United Nations Convention on the Rights of the Child (“UNCRC”) and the African Charter on the Rights and Welfare of the Child (“ACRWC”).
9. The CCL has litigated and conducted extensive research and advocacy on the issue of children’s rights.

APPLICANT’S INTEREST IN THE MATTER

10. The CCL makes use of strategic impact litigation to promote and advance the rights of children in South Africa. The CCL has over the years been involved in cases that have been heard in numerous courts. These judgments especially those given by the superior courts have set precedents that have brought about positive changes in the law, government activities and the broader society.
11. The CCL’s focus has always been to contribute to the process of formulating children’s rights in a manner that liberates the child as an independent rights bearer and drives the development of child-centred laws, policies and process.
12. The CCL intends to make submissions that will contribute towards the correct interpretation of the duty to consider the best interests of a child paramount as provided for in section 28(2) of the Constitution. In particular, this matter provides the opportunity to illustrate that the assessment and determination of what is in the best interests of a child requires due process and procedural guarantees especially by independent organisations.

13. The CCL will also make submissions on the negative obligation imposed by section 29(1)(a) of the Constitution on parties to respect the right to education. The CCL will submit that this obligation applies horizontally to independent schools regardless of whether they are subsidised by the state or not.
14. Our submissions will focus on the interrelated nature of the constitutional issues raised in this matter and the substantive content of the rights in question, in particular section 28(2) read together with section 29(1)(a) and how these sections are applied.
15. The CCL notes that this is important not only for this case, but for other similar cases.
16. For the above reasons I aver that the CCL has an interest in the main application that is sufficient to qualify it as *amicus curiae*.

SUBMISSIONS TO BE ADVANCED AND THEIR RELEVANCE TO THE PROCEEDINGS

17. We have perused the judgement of the High Court and the Supreme Court of Appeal as well as the record filed in the Constitutional Court and we are of the view that the submissions we intend to advance will focus on pertinent issues that have not been fully canvassed by the parties.
18. We are mindful of the duty of *amicus curiae* not to repeat any submissions made by the parties. We are of the respectful view that we can make submissions of substance which would be helpful to this Court in dealing with this matter.
19. The CCL is of the opinion that both the High Court of South Africa, Johannesburg and the Supreme Court of Appeal erred in their interpretation of section 28(2) of the Constitution.
20. The CCL is of the view that, the issues raised by this case are of considerable significance and have far reaching implications on the best interest standard as well

as the right to education. This case will provide clarity on the interpretation and implementation of section 28(2) read together with section 29(1)(a) of the Constitution.

21. The submissions that the CCL wishes to make are as follows:

21.1. In accordance with the United Nations Convention of the Rights of the Child, **General Comment on the right of the child to have his or her best interests taken as a primary consideration 14 of 2013** (“UNCRC general comment”) –

21.1.1. The Committee on the Rights of the Children, recognises that the child’s best interests is a threefold concept in terms of which it is considered to be a right, a principle and a rule of procedure.

21.1.2. The CCL intends to make submissions on the these concepts in terms of which, assessing and determining the best interests of the child requires procedural guarantees and the justification of the decision must show that the right has been explicitly taken into account in order to give effect to the right.

DOMESTIC LAW

21.2. The interpretation of the duty to consider the best interests of a child paramount, provided for in section 28(2) of the Constitution, is of particular relevance. We will contend that the determination of what is in the best interests of a child cannot be conducted in a discretionary and abstract manner by either the state or independent institutions.

21.3. The best interest of the child is a constitutional right of every child in South Africa. Section 28(2) provides that-

“A child’s best interests are of paramount importance in every matter concerning the child.”

- 21.4. To this end, all proceedings, actions or decisions in matters concerning children must respect the child's right to dignity, treat the child fairly and equitably and protect the child from unfair discrimination on any ground.
- 21.5. Section 6 of the Children's Act 38 of 2005 ("Children's Act") provides that all proceedings, actions or decisions in matters concerning children must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights.
- 21.6. Section 8(2) of the Constitution holds that both natural and juristic persons are bound by the provisions of the Bill of Rights. In *Governing Body of the Juma Masjid Primary School & Others v Essay NO and Others*, the Constitutional Court stressed that although private parties do not have the same duties as the state to advance the rights guaranteed in the Bill of Rights, the Constitution does require private parties not to unreasonably interfere with or diminish the enjoyment of the right to a basic education.¹
- 21.7. In the premises, children who utilise the services of private institutions are holders of the same rights as children who utilise the services of public or government institutions. These rights include those that are set out in the Constitution as well as in other laws and regulations, which include the right to a basic education, the right to not be subjected to unfair discrimination and the right to due process. Thus, decisions taken by private institutions which impact the rights of children must be made in a child-centred manner and provide for procedural due process.
- 21.8. In light of the procedural element of the section 28(2), neither public nor private institutions can conduct an assessment and determination of a child's best interests in a discretionary and abstract manner as this precludes the right to due process and the safety mechanism of procedural guarantees in decision making.

¹ *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC).

21.9. When interpreting the application of section 28(2) of the Constitution, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom and must consider international law. This is supported by section 8 of the Children's Act in terms of which all organs of state in any sphere of government must respect, protect and promote the rights of children contained in the Children's Act. This is of particular importance as best interests of children is a dynamic concept that not only speaks to children's "best-interests" but also to the exercise of their rights and members of society.

INTERNATIONAL LAW

21.10. The principle of the best interests of the child is one of the four pillars of the UNCRC. Article 3(1) of the "UNCRC" provides-

"In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration."

21.11. The UNCRC general comment refers to "public and private social welfare institutions" which include institutions whose work and decisions impact on children and the realisation of their rights and these include educational institutions.

21.12. Article 3 of the UNCRC expresses one of the fundamental values of the Convention, in terms of which the concept of the child's best interests is aimed at ensuring the effective enjoyment of all the rights recognised in the UNCRC as well as the holistic development of a child. In light of this, in the UNCRC **General comment on the rights of the child to freedom from all forms of violence 13 of 2012**, it has been pointed out that, *"an adult's judgement of a child's best interests cannot override the obligation to respect all the child's rights under the UNCRC."*

21.13. In the premises, the UNCRC in its general comment states that a full application of the child's best interests embraces a three-fold approach in terms of which a child's best interests are viewed as a substantive right, a fundamental, interpretive legal principle and a rule of procedure. The Committee defines the requirements for due consideration of a child's best interests, especially in judicial and administrative decisions concerning the child.

21.14. The Committee provides that in assessing and determining the best interests of a child, the factual context of the case needs to be considered and a procedure that ensures legal guarantees and proper application of the right should be applied. Further, in the assessment and determination of a child's best interests the participation of the child is required. The Committee states the following:

“The ‘best-interests determination’ describes the formal process with strict procedural safeguards designed to determine the child’s best interests on the basis of the best interests assessment.”

22. The CCL is of the view that the first, second, third and fifth respondents; the High Court and the Supreme Court of Appeal's approach to the interpretation of the obligation under section 28(2) of the Constitution is incorrect.

23. The CCL will submit that section 28(2) read with section 29(1)(a) places a duty on the respondents to consider the individual circumstances of the children in a procedurally fair manner and giving due consideration to the importance of the intersecting rights.

APPLICATION TO BE ADMITTED AS AMICUS CURIAE IN TERMS OF RULE 10

24. On 25 March 2019, we wrote to the attorneys of the parties to request, as per Rule 10 of the Rules of this Court, consent to enter as *amicus curiae*. We attach hereto copies of the letters marked as annexure “**ATK1**” to “**ATK4**”.

25. The terms and conditions proposed by the CCL were:

- 25.1. The CCL be given consent to enter as *amicus curiae* in this matter;
- 25.2. That the *amicus curiae* be given consent to lodge written submissions in this matter in line with the directives of the Constitutional Court;
- 25.3. That the *amicus curiae* be given consent to present oral submissions at the hearing of this matter.
26. Further, in the aforementioned letter the CCL undertook to file its application with the court on Monday 1 April 2019, and file its submissions in line with the directives of the Constitutional Court.
27. On Monday 1 April 2019, the CCL received a letter from the applicants' attorney confirming that they had no objection to the CCL intervening as *amicus curiae* in this matter. We attach hereto the letter from the applicant's attorney marked as annexure "ATK5".
28. There has been no response from the first, second, third, fourth and fifth respondents.
29. The CCL therefore applies in terms Rule 10(4) for leave to be admitted as *amicus curiae* in this matter.
30. In terms of Rule 10 an application for admission as *amicus curiae* can be made by any interested party in any matter before the Court. The interested party may, with the written consent of all the parties in the matter before the Court and within five days of the respondents lodging their written submissions, be admitted therein as an *amicus curiae*.
31. In terms of Rule 10(4) if written consent is not has not been secured by the interested party, that party may apply to the Chief Justice to be admitted in the matter before the Court as *amicus curiae*, and the Chief Justice may grant such application upon such terms and conditions and with such rights and privileges as he or she may determine.

32. In light of what is set out in this affidavit I therefore ask for an order as sought in the Notice of Motion.

ALEXANDRA TATIANA KLONARIDES

I hereby certify that the deponent acknowledges that she knows and understands the contents of this affidavit, which affidavit was sworn to and signed before me at Pretoria on 8 April 2019 in accordance with the requirements of Regulation 1258 dated 21 July 1972 as amended by Regulation Number 1648 dated 19 August 1977 as further amended by Regulation 1428 dated 11 July 1980, as further amended by Regulation 774 of 23 April 1982.

COMMISSIONER OF OATHS