IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 11/08340

In the matter between:

THE GOVERNING BODY OF RIVONIA PRIMARY SCHOOL	**First Applicant**
THE RIVONIA PRIMARY SCHOOL	**Second Applicant**
and	
GAUTENG PROVINCE MEC OF EDUCATION	**First Respondent**
HEAD OF DEPARTMENT: GAUTENG DEPARTMENT OF EDUCATION:	**Second Respondent**
DISTRICT DIRECTOR JOHANNESBURG EAST D9: GAUTENG DEPARTMENT OF EDUCATION	**Third Respondent**
SC	**Fourth Respondent**
MACKENZIE: AUBREY	**Fifth Respondent**
DRYSDALE: CAROL	**Sixth Respondent**
and	
CENTRE FOR CHILD LAW	**First Amicus Curiae**
EQUAL EDUCATION	**Second Amicus Curiae**

HEADS OF ARGUMENT OF THE CENTRE FOR CHILD LAW

INTRODUCTION

1 In May 2011, the Centre for Child Law ("the Centre") was admitted as an amicus curiae by the consent of all the parties to this matter, in terms of Rules 16A(2) and (3) of the Uniform Rules of Court.

2 The Centre forms part of the University of Pretoria and is a Law Clinic registered with the Law Society of the Northern Provinces. Its main objective is to establish and promote child law and uphold the rights of children in South Africa, within an international and regional context, and in particular to use the law and litigation as an instrument to advance such interests.

3 These heads of argument have been prepared mindful of the duty of an amicus curiae not to repeat the submissions made by any party. Moreover, the Centre for Child Law has no wish to be drawn into the factual disputes that pervade the present case. It sees the significance of this case as being about general principles and it is accordingly those questions of general principle that it wishes to focus on

4 With that in mind, these heads of argument deal with four issues.

4.1 The duty of this Court in terms of section 39(2) of the Constitution;

4.2 The nature and effect of the right to education;

4.3 The powers and duties of the State regarding school capacity;

4.4 The public identification of the child involved in this matter.

THE EFFECT OF SECTION 39(2) OF THE CONSTITUTION

5 Section 39(2) of the Constitution requires that, when interpreting any legislation, this Court must "*promote the spirit, purport and objects of the Bill of Rights*".

6 While the approach required by section 39(2) of the Constitution is well established, it is necessary to set them out. This is because the arguments of the applicants appear to take little or no account of it.

7 The section 39(2) duty is one in respect of which "*no court has a discretion*" and must "*always be borne in mind*" by the courts. Indeed, this is so even if a litigant has failed to rely on section 39(2).

> ***Phumelela Gaming and Leisure Limited v Grundlingh and Others* 2007 (6) 350 (CC) at paras 26 – 27**

8 The Constitutional Court has repeatedly pronounced on the obligations arising from section 39(2) for the interpretation of legislation. There are two independent obligations that emerge from the Constitutional Court's jurisprudence in this regard.

9 The first obligation might conveniently be referred to as the "***Hyundai*** *obligation*".

9.1 This is that if a provision is reasonably capable of two interpretations and one interpretation would render it unconstitutional and the other not, the courts are required to adopt the interpretation that would render the provision compatible with the Constitution.

9.2 Thus, in ***Hyundai*** this Court held that:

> *"The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.*
>
> *… judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."*
>
> ***Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit*** **NO 2001 (1) SA 545 (CC) at paras 22-23**

10 The second obligation might conveniently be referred to as the "***Wary*** *obligation*".

10.1 This is that if a provision is reasonably capable of two interpretations, section 39(2) requires the adoption of the interpretation that "*better*" promotes the spirit, purport and objects of

the Bill of Rights. This is so even if neither interpretation would render the provision unconstitutional.

> ***Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another*** **2009 (1) SA 337 (CC) at paras 46, 84 and 107**

10.2 Thus, as the Constitutional Court explained in ***Fraser v Absa Bank***:

> *"Section 39(2) requires more from a Court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights."*
>
> ***Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)*** **2007 (3) SA 484 (CC) at para 47**

11 Thus, the effect of section 39(2) is that this Court must always seek to interpret legislation in a manner that is consistent with the Constitution and that best promotes constitutional values.

12 This is subject only to the proviso that the relevant provision of the Bill must be "*reasonably capable*" of the interpretation concerned – that is the interpretation must not be "*unduly strained*".

> ***Hyundai*** **(supra) at para 24**
> ***Wary*** **(supra) at paras 59-60 and 106-108**

13 The primary right involved in the present matter is the right to a basic education, guaranteed by section 29(1)(a) of the Constitution. It is this

right that must be promoted when this Court interprets the various statutory instruments at stake.

THE NATURE AND EFFECT OF THE RIGHT TO EDUCATION

14 Section 29(1) of the Constitution provides as follows:

> *" Everyone has the right-*
>
> *(a) to a basic education, including adult basic education; and*
>
> *(b) to further education, which the state, through reasonable measures, must make progressively available and accessible."*

15 The Constitutional Court has recently dealt extensively with the ambit this right in the ***Juma Musjid*** decision. None of the parties to this matter have yet made reference to that decision.

16 The ***Juma Musjid*** decision made clear that, unlikely other socio-economic rights, the right to a basic education it is "*immediately realisable*".

> *"It is important, for the purpose of this judgment, to understand the nature of the right to "a basic education" under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". This right is therefore distinct from the right to "further education" provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education "progressively available and accessible."*

Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others **2011 (8) BCLR 761 (CC) at para 37**

17 In doing so, it also emphasised the significance of the right to basic education in the overall constitutional scheme and focussed particularly on the question of access to school:

> *"The significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.*
>
> *Indeed, 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. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right."*
>
> ***Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others*** **2011 (8) BCLR 761 (CC) at paras 42 – 43**

18 The same approach was taken by the UN Committee on Economic, Social and Cultural Rights (CESCR), which explained the position as follows:

> *"Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities."*

United Nations Committee on Economic, Social and Cultural Rights General Comment No 13

19 In General Comment 13 of the CESCR, the following "*interrelated and essential features*" of the education to be provided to all children were identified:

> *"(a) Availability - functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party…..;*
>
> *(b) Accessibility - educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:*
>
> *Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds...;*
>
> *Physical accessibility - education has to be within safe physical reach …;*
>
> *Economic accessibility - education has to be affordable to all...*
>
> *(c) Acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) …*
>
> *(d) Adaptability - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.*

20 The present case concerns the questions of "*availability*", "*accessibility*" and "*acceptability*".

THE POWERS AND DUTIES OF THE STATE REGARDING SCHOOL CAPACITY

The core issue

21 It appears that a core part of the applicant's case is the following proposition:

> *"There is no statutory or other legal power given to the MEC or HOD to determine the capacity of a public school. Determining the capacity of a school is an inherent and necessary aspect of any admissions policy. This is also expressly recognised by section 5A of SASA and sections 3 and 4 of NEPA."*
>
> **Applicants' heads of argument, p 107, para 47**

22 The Centre is of the view that this approach is unsustainable.

23 It would be extraordinary if the question of school capacity were to fall outside the powers of the provincial education department when that department is statutorily bound, by section 3(3) of the Schools Act, to ensure that that there every child in the province can attend school.

24 Such an interpretation does not promote the right to a basic education as outlined above. Indeed it would fatally undermine it by making it extraordinarily difficult for the provincial education departments to fulfil their constitutional and statutory duties.

25 This is particularly the case given that, according to the Minister of Basic Education, one quarter of South African schools are overcrowded. This denotes an acute shortage of classrooms countrywide, particularly in former black schools.

> **See: <u>National Policy for an Equitable Provision of an Enabling School Physical and Teaching and Learning Environment</u>, Government Gazette No 33283 (11 June 2010), para 1.5.**

26 The applicants' proposition therefore cannot be accepted unless required by the clearest statutory language imaginable. There is no such language in the legislative provisions concerned – whether in the sections cited by the applicants or otherwise.

27 Indeed, the various legislative provisions cited point in the other direction – that government does have a critical role to play on questions of school capacity.

28 In the circumstances, it cannot be the case that a governing body is entitled to deal with admissions itself and potentially not make use of its full capacity when that capacity is desperately needed to accommodate other children in the province. As one academic put its:

> *"…a public school must, on the one hand, govern itself in the interests of the school and its learners, but, on the other, reconcile its internal interests with the external interests of the wider political and bureaucratic education hierarchy."*
>
> **Bray E "Education law" in Boezaart T (ed*) Child Law in South Africa*, 462.**

29 On this basis alone, the relief sought by the applicants is, in the Centre's submission, not sustainable. Granting that relief would substantially tie the hands of the Department as it sought to deal with the question of school capacity.

The limits of government's powers

30 However, the submissions set out above are subject to two important caveats.

31 First, in view of the clearly insufficient school capacity in Gauteng (and beyond), it is not sufficient for government only to ensure efficient use of existing capacity. On the contrary, the national and provincial government are bound by their constitutional and statutory obligations to take all measures necessary to deal with problems of school capacity.

31.1 The papers in this matter tell a story of a series of generally impressive government conduct and interventions to deal with the problem of school capacity in the province..

31.2 However, there is one issue that cannot pass unmentioned. This is that the respondents' papers suggest that it will take twenty years for the backlogs regarding classroom accommodation to be eradicated.

Respondents' answering affidavit, p 309, para 15.2

31.3 What is not clear from the papers is:

31.3.1 how the 20 year period is calculated;

31.3.2 what previous estimates government has given regarding the elimination of the backlogs and how these relate to the present estimate; and

31.3.3 the extent to which temporary interventions will prevent the backlog impacting on the ability of learners to obtain a proper basis education at present.

31.4 These issues are very significant in light of the ***Juma Musjid*** decision cited earlier. That decision, it will be recalled, made clear that, unlikely other socio-economic rights which are subject to the requirement of progressive realisation within available resources, the right to a basic education is "*immediately realisable*".

> *"It is important, for the purpose of this judgment, to understand the nature of the right to "a basic education" under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". This right is therefore distinct from the right to "further education" provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education "progressively available and accessible."*
>
> ***Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at para 37**

32 Second, it is a matter of great regret that neither the MEC nor the Minister have made use of their powers to enact policies, norms and standards or regulations dealing specifically with the question of school capacity.

32.1 In particular, the Minister is expressly permitted by section 5(1) of the Schools Act to

> *"by regulation prescribe minimum uniform norms and standards for-*
> *(a) school infrastructure;*
> *(b) capacity of a school in respect of the number of learners a school can admit; and*
> *(c) the provision of learning and teaching support material."*

32.2 Yet no such norms and standards have been made.

32.3 This is a pity because the difficulties and uncertainty experienced in the present case may well have been avoided or resolved at a far earlier stage if the relevant policies, norms and standards or regulations had been in place.

32.4 In particular, if there were clear policies, norms and standards or regulations in place, this could have avoided the accusations of queue-jumping and political interference that have pervaded this matter.

THE PUBLIC NAMING OF THE CHILD INVOLVED

33 There is one final issue that should be dealt with. From the point of view of the Centre, a highly disturbing feature of this case has been that the child

involved has been openly and freely named, not only in the present court papers, but also in the media debates that have taken place around this case.

34 This much appears to be common cause. Thus, the fourth respondent's affidavit states:

> "*[A]fter the meeting on [9 March 2011] this matter was discussed on 702 Radio and reported in the Star News Paper. In these reports the identity of the parents was mentioned as well as the grade of the learner. This conduct is prejudicial to [A] and has a potential to isolate her*."
>
> **Fourth respondent's answering affidavit, p 232 para 4.37.4**

35 This is not denied or dealt with in the applicant's replying affidavit.

> **Replying affidavit, pp 542a-c, para 123**

36 The Constitutional Court has referred to the fact that it has adopted a practice of not disclosing the identities of children involved in appropriate cases before it – whether by referring to the children or their parents.

> ***Johncom Media Inv Ltd v M and Others*** **2009 (4) SA 7 (CC) at para 42**
>
> **See also, for example:**
>
> ***C and Others v Department of Health and Social Development Gauteng and Others*** **CCT 55/11, judgment reserved**
>
> ***F v Minister of Safety and Security and Another*** **CCT 30/11, judgment reserved**
>
> ***S v S*** **2011 (2) SACR 88 (CC); 2011 (7) BCLR 740 (CC)**

***AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party)* 2008 (3) SA 183 (CC)**

***S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC)**

***J and Another v Director-General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC)**

37 Regrettably, however, by the time that this occurs, it is often too late for the damage of the disclosure already made to be undone.

38 The present case demonstrates the point. Whatever steps this Court takes now to seek to protect the identity of A, the fact of the matter is that it is widely and publicly known that A was the subject of the dispute between the School, the Department and her mother. This is particularly concerning given the allegations and counter-allegations about what took place in this case.

39 It is not clear from the papers which party or parties bear the blame for this disclosure. However, what is clear is that:

39.1 The applicant ought not to have named A in the present application at all when launching it;

39.2 All parties – the applicant, the department and A's mother – ought to have prevailed upon the media to ensure that they did not reveal A's identity; and

39.3 The media were in any event under an independent constitutional duty not to reveal A's identity.

40 These duties flow from A's rights under the Constitution, including:

40.1 the right to have her best interests be paramount in all matters concerning her, in terms of section 28(2) of the Constitution;

40.2 the right to be protected from maltreatment, abuse or degradation, in terms of section 28(1)(d) of the Constitution;

40.3 the right to human dignity, in terms of section 10 of the Constitution; and

40.4 the right to privacy, in terms of section 14 of the Constitution.

41 In this regard, A's rights are independent of her parents' rights, as the Constitutional Court has explained:

> *"Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them."*
>
> ***S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) at para 18**

42 There can be no doubt that the applicant, the Department, A's parents and the media all bore constitutional duties in relation to A's rights as set out above.

42.1 The duties of the public bodies involved in this regard flow from sections 7(2) and 8(1) of the Constitution.

42.2 The duties of the private persons and institutions in this regard flow from sections 8(2) and 8(3) of the Constitution.

See: *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at paras 54 – 60

***Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para 33**

***Standard Bank of South Africa v Saunderson* 2006 (2) SA 264 (SCA) at para 12**

43 In the circumstances, the Centre requests this Court:

43.1 First, to order at the outset of this hearing that the identity of A and her parents may not be revealed; and

43.2 Second, to make clear in its judgment that what occurred in this case was unacceptable and that all the parties involved should be more sensitive to this issue in future cases, should they arise.

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23 September 2011