

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A155/19

Water Tribunal Case number: WT03/17/MP

In the matter of:

LEGAL RESOURCES CENTRE

First Applicant *Amicus Curiae*

CENTRE FOR APPLIED LEGAL STUDIES

Second Applicant *Amicus Curiae*

SECTION27

Third Applicant *Amicus Curiae*

EQUAL EDUCATION LAW CENTRE

Fourth Applicant *Amicus Curiae*

NDIFUNA UKWAZI

Fifth Applicant *Amicus Curiae*

CENTRE FOR CHILD LAW

Sixth Applicant *Amicus Curiae*

In the application of:

ENDANGERED WILDLIFE TRUST

First Applicant

FEDERATION FOR A SUSTAINABLE ENVIRONMENT

Second Applicant

And

DIRECTOR-GENERAL (ACTING),

DEPARTMENT OF WATER AND SANITATION

First Respondent

ATHA-AFRICA VENTURES (PTY) LTD

Second Respondent

EQUAL EDUCATION LAW CENTRE'S SUPPORTING AFFIDAVIT

I, the undersigned,

TSHEGOFATSO PHALA

do hereby make oath and state that:

- 1 I am an adult female, employed as the Executive Director of Equal Education Law Centre (the "EELC"), a registered public interest law clinic with offices located at Isivivana Centre, 8 Mzala Street, Khayelitsha, Western Cape. I am duly authorised to depose to this affidavit.
- 2 The facts contained herein are, unless indicated by the context, within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

The Purpose of the Affidavit

- 1 EELC seeks to be admitted as the fourth *amicus curiae* in the main application. A copy of the resolution of the Board of Trustees of EELC to this effect is attached as "TP1".
- 2 Nershan Govender deposed to a founding affidavit (the main affidavit) on behalf of the Legal Resources Centre (LRC) motivating for EELC, and other public interest law centres' applications, to be admitted as *amici curiae* in this matter. I have read that main affidavit and I confirm that the contents thereof are true and correct in so far as they relate to EELC.
- 3 Throughout this affidavit, I demonstrate how the EELC uses multiple strategies including advocacy, research and litigation to achieve its objectives of transformative constitutionalism and access to justice in the field of education.
- 4 The constitutional right to basic education has been interpreted by the Courts as an unqualified right that is not subject to the availability of resources, and is therefore immediately realisable. However, despite the clear interpretation of the content of the right to basic education, the South African education system continues to be in a dire state and is characterised by regressive funding patterns, depilated infrastructure and acute inequality.
- 5 As a result of all these challenges, the EELC's entire existence is premised on creating systemic change in the education sector. EELC has over the

years secured significant victories that have changed the education landscape as outlined above. In order to continue doing so, EELC's activist lawyers must be able to continue using the law, particularly public interest litigation as a tool to advance the right to basic education. The public law centres in South Africa have helped to advance an active citizenry, the promotion and protection of the rights contained in the Constitution and the advancement of Constitutional Transformation.

- 6 The notion of transformative constitutionalism has its origins in the writings of Professor Karl Klare who, over 20 years ago, described the concept as: "A long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction."¹ (emphasis added).
- 7 The tools utilised by the public law centres further the particular ideals of constitutional transformation by continuously transforming society in ways that enhance the lives of people. An adverse finding regarding the manner in which the public law centres, such as the EELC, conduct their activities

¹ Klare "Legal Culture and Transformative Constitutionalism" 1998 SAJHR 146-188.

would fail to embrace the notion of transformative constitutionalism and would fail to promote, protect and fulfil the rights and freedoms enshrined in the Constitution.

The EELC's Work and Objectives

- 8 The EELC is a registered public interest law clinic established in 2012 working to further the struggle for education justice and redress in South Africa through legal activism, research and advocacy.
- 9 The EELC's formation was borne out of a recognition of the crucial link between legal advocacy and social mobilisation. The EELC aims to promote equitable, adequately-resourced and high-quality education in South Africa through the provision of specialised legal services and advice on matters concerning education, having particular regard to the needs of socially and economically disadvantaged persons.
- 10 At the heart of the EELC's work is the achievement of systemic change in the education sector and protection and promotion of children's best interests, and their right to basic education.

- 11 The EELC is characterised by the use of a unique combination of movement lawyering², community lawyering and advocacy as a tool to empower individuals, communities and movements; to advance accountability; and to contribute towards the development of a capable state.
- 12 In this affidavit I set out the work and impact of the EELC over the past 8 years. Between 2012 and 2019, the EELC has been involved in approximately 20 litigation matters. The following discernible impacts have materialised from the EELC's litigation cases:
- 12.1 EELC's litigation has had significant policy and law reform impact, including changes to the Norms and Standards for School Infrastructure, fee exemption processes and school feeder zone determinations.
- 12.2 The jurisprudence relating to children's rights in South Africa and the right to education in particular, has been developed through the EELC's cases, including the right to protest for children and religious discrimination against learners.

² Movement lawyering is the conscious supporting of grassroots progressive movements through legal advocacy, support and litigation, and making available the tactical power of the law in the greater struggle against inequality, oppression and discrimination.

- 14 Since 2012 to date, the EELC provided ongoing legal support to EE's long-term infrastructure campaign which culminated in securing the promulgation and implementation of a legally binding law setting out the state's obligation to provide safe and adequate school infrastructure to all schools – the *Regulations for Minimum Uniform Norms and Standards for School Infrastructure* (the “**Norms and Standards**”). The adoption of the Norms and Standards on 29 November 2013 followed years of campaigning by members of EE, and a court ordered settlement, in terms of which the Minister of Basic Education was obliged to promulgate the Norms and Standards.
- 15 Whilst this was a resounding and significant victory for EE members, the Norms and Standards contained loopholes and vague language which had the potential of allowing the government to delay, potentially indefinitely, the provision of adequate infrastructure to schools across the country, thereby rendering the Norms and Standards ineffective. The most concerning of the provisions in the Norms and Standards was Regulation 4(5)(a), which stipulated that the implementation of the Norms and Standards was subject to “*resources and cooperation of other government agencies and entities responsible for school infrastructure.*” The implication of this being that if the Department of Basic Education (“**DBE**”), wanted to provide a school with adequate sanitation, but another organ state was uncooperative, the state

12.3 There have been cases with identifiable material impact on an individual or more systemic level. A significant example of this is the scholar transport case which resulted in almost 3000 learners receiving scholar transport.

The Importance of Movement Lawyering as a Tool to Advance Access to Justice and the Realisation of Rights

13 Since its inception, the EELC has provided legal support to its movement partner organisation, Equal Education (“EE”). EE is a democratic social movement of parents, teachers, and learners (known as Equal-isers). As movement lawyers, the EELC’s attorneys and researchers provide legal and other support to the movement’s members and partners in order to advance campaigns for good governance, accountability, transparency and effective delivery of social services. The EELC has supported and worked alongside EE on campaigns related to scholar transport, school infrastructure, spatial and land justice, the right to protest, and private actor accountability in education. Years of dedicated campaigning and strategic impact litigation by EE members represented by the EELC, has resulted in significant progress being achieved in the fight for education justice. Two of those examples are EE’s school infrastructure and scholar transport campaigns.

EE’s school infrastructure campaign

could say it had no legal duty to follow through on the commitments in the Norms and Standards. Fearing that the government would use Regulation 4(5)(a) to evade fixing school infrastructure in an equitable and urgent manner, EE, represented by the EELC, raised these concerns with the Minister of Education on numerous occasions, requesting that these problems with the Norms and Standards be addressed.

- 16 Finally, after unsuccessful attempts at engaging the DBE, the EELC represented EE in the Bhisho High Court in the matter of *Equal Education & Others v Minister of Basic Education & Others*³, in March 2018, against the Minister of Basic Education, all nine MECs for Education and the Minister of Finance, seeking an order to compel the Minister of Basic Education to address the unconstitutional provisions in the Norms and Standards.
- 17 On 19 July 2018, the Bhisho High Court ruled in favour of EE and its members, declaring the escape clause unconstitutional and invalid, and addressing the other loopholes in the Norms and Standards. Critically, the Court also agreed with submissions made on behalf of EE that the Minister of Basic Education is obliged to make public the annual provincial

³Case number: 276/2016

implementation plans and reports on compliance with the Norms and Standards, to ensure accountability and transparency.

- 18 That court application highlighted the widespread results of the government's failure to provide adequate infrastructure standards for public schools in terms of section 5A of the South African Schools Act 84 of 1996, a problem that most harshly affects the poorest schools in the country by perpetuating systemic school infrastructural problems and gross educational inequalities. The application clearly demonstrated how many learners and teachers have been left in unsafe environments that are not conducive to learning, and which have undermined the ability of the learners to achieve in the classroom and fully realise their rights to an adequate education, equality and dignity.
- 19 Currently, approximately 3164 schools across the country are reliant on pit latrines as their only form of ablution facilities, while an additional 2607 schools still have pit latrines that have not been demolished or replaced. Approximately 5839 schools across South Africa have an unreliable water supply; and approximately 460 schools have no electricity.⁴ This is in

⁴ 2020 National Education Infrastructure Management Systems Report, Published by the Department of Basic Education.

contrast to 2013 where approximately 11 737 schools were either reliant on pit latrines or had no ablution facilities at all; approximately 4426 schools had either no water or an unreliable water source; and 2925 schools had no electricity.⁵ Whilst progress is certainly tangible there are still thousands of learners who are in dire need of adequate infrastructure and resource provisioning. As a result, EE's campaign, with the support of the EELC, is ongoing.

EE's Scholar transport campaign

20 Since 2014 Equal Education has been campaigning for the adequate provision of scholar transport at schools in Nquthu, KwaZulu-Natal ("KZN"), which campaign was initiated as a direct response to the KwaZulu-Natal Department of Education (the "KZNDOE") adopting a Scholar Transport policy during 2013.

⁵ 2013 National Education Infrastructure Management Systems Report, published by the Department of Basic Education.
<https://www.education.gov.za/Portals/0/Documents/Reports/NEIMS%20STANDARD%20REPORTS%20MARCH%202013.pdf?ver=2015-02-01-143849-880>

- 21 This campaign has been led by EE members, and particularly learners in KZN who were faced with the challenges of getting to and from school, and which challenges ultimately limited their access to education.
- 22 The advocacy and research which was undertaken since 2014 has revealed the dire situation of poor rural children who, in the absence of state subsidised transport, were compelled to walk dangerous terrain and long distances to and from school, compromising their safety, health, equality, and access to education.
- 23 Since 2014, EE and its members, with the support of the EELC, have undertaken a variety of advocacy strategies and actions in support of its campaign to secure adequate state subsidized scholar transport in KZN. This is not conflict of interest in any way.
- 24 In March 2017, and following EE's concerted advocacy efforts, litigation was launched by the EELC on behalf of EE. This litigation was instituted in furtherance of EE's scholar transport campaign, and sought to secure not only scholar transport for schools in Nquthu, but a detailed policy that complies with the National Scholar Transport Policy, and plans to ensure the provision of scholar transport to all qualifying learners in KZN.
- 25 In November 2017, the EELC secured a court ordered settlement agreement which ensured the provisioning of scholar transport to 12

TCP
H.E.

schools in Nquthu. This order secured transport for almost 3000 qualifying learners who attended these schools and who otherwise would have been forced to continue walking long distances along dangerous terrain to and from school every day. In addition to this, the order, by compelling the provision of scholar transport, ensured the protection of these learners' rights to equality, safety, health, and access to education. The court order furthermore created an obligation on the KZNDOE to report to EE on their plans for future provisioning of scholar transport, the KZNDOE's consideration of alternative modes of transport, the progress of the intergovernmental relations between the KZNDOE and the KwaZulu-Natal Department of Transport (the "KZNDOT"), provisioning of scholar transport to learners with disabilities, and importantly the drafting and publication of a scholar transport policy which complies with the National Transport Policy.

- 26 The EELC has represented EE as a client in approximately 13 cases, with EE being an applicant in 6 cases and an amicus curiae in 7 cases.

Community Lawyering as a Tool to Advance Access to Justice and the Realisation of Rights

- 27 In addition to our movement lawyering work, the EELC provides crucial legal support through free-legal services on a daily basis to learners, parents and communities across the country through its specialised legal advice clinic

TCP
H-E

which is open to any South African both remotely and physically. The issues dealt with generally range from unlawful school admission practices and exclusions, school fee exemptions, unlawful disciplinary proceedings, discrimination against learners in schools, including against girl learners who are pregnant and against foreign and undocumented learners, and school resourcing challenges.

- 28 Through the advice clinic, the EELC identifies systemic issues impacting on the rights of children and education equity, which informs strategic litigation interventions. For example, the case of *Michelle Saffer v Western Cape Department of Education and Others*, which was heard by the Supreme Court of Appeal, resulted in substantial reform of school fee exemption processes for single parents. This case highlighted the discrimination that single parents, particularly single mothers, face when applying for school fee exemptions. The SCA confirmed that, in circumstances where the non-custodial parent has refused, or failed, to provide details of their income, public schools must grant a conditional fee exemption to the custodial parent, having regard only to her or his income. This conditional fee exemption must be the total, or partial, fee exemption to which the applicant would have been entitled to if she or he were the only parent of the learner concerned. In addition, the granting of such a conditional exemption would not limit the public school from taking legal steps to enforce payment by the

TEP
H.C

other parent of the learner for the balance of the school fees, which ensures that non-custodial parents are held responsible where appropriate. Through this case, thousands of custodial single parents will have access to schooling for their children.

- 29 The EELC has had four walk-in cases develop into strategic litigation. From 2019 to date the EELC has afforded about 595 clients access to justice through the advice clinic.

Research and Advocacy as a Tool to Advance Access to Justice and the Realisation of Rights

- 30 In 2018, the EELC established a specialist internal education law and policy research unit which consistently monitors and makes submissions in relation to education law and policy reforms. The EELC works toward the strengthening of the legal framework on education and related rights to enhance transparency and accountability. The EELC's overriding goal is to ensure the realisation of every learner's right to an equitable, safe and adequate basic education by employing the law and focussing its efforts on improving accountability mechanisms throughout the public education system. A crucial aspect of this work is empowering and supporting EE's members, learners and parents to engage with Parliamentary processes and with the existing legal framework.

- 31 Since its establishment, the EELC has made approximately 27 submissions on proposed laws, policies or regulatory reforms at the international, national and provincial levels. A large number of these submissions have been made jointly with EE and the EELC has relied significantly on EE's capacity for broader advocacy in order to further the impact of submissions made.
- 32 Areas where submissions have demonstrated impact include submissions to the Constitutional Review Committee on proposed amendments to section 100 of the Constitution, submissions on feeder zone regulations in Gauteng, and submissions to the UN Committee on Economic, Cultural and Social Rights regarding South Africa's fulfilment of the right to basic education.
- 33 The EELC has also produced various self-standing reports on education issues, including a State of Education report and a report on Access to Education for Children in Conflict with the Law and developed various "Know Your Rights" pamphlets and materials for EE's learner members and the broader public.
- 34 Through its movement lawyering and research and advocacy work, the EELC has helped to achieve South Africa's Constitutional ideal of active citizenship. One of the unique features of South Africa's Constitution is the

TCP
H.E

role that it assigns to citizens in ensuring accountable governance. South Africa's Constitution envisages a 'participatory democracy' where active citizens play a role in ensuring that Parliament and the executive fulfil the Constitution's promise of social justice. Through their diverse ways of operating, which include the use of advocacy, research, protest, policy development and other campaigns, the EELC alongside the other PILG's play a crucial role in facilitating and supporting this engagement and involvement.

CONCLUSION

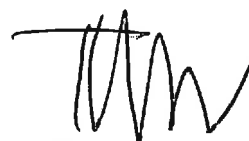
- 35 EELC's interest in this matter relates to the eventual detrimental impact a precedent of the nature sought by the second respondent will have on litigation in the public interest.. This is especially the case in the context where litigation could be brought against a public interest litigation organisation representing organisations that seek to assert theirs and others' human rights.
- 36 The threat of a punitive costs order against the attorneys representing the appellants as well as the threat of reporting them to the LPC for alleged unethical conduct has the chilling effect of discouraging public interest litigation organisations from representing organisations, communities and

TOP
HE

other marginalised actors who may be fighting for rights similar to that which the public interest litigation organisation strives to protect and promote. This has a stifling effect for access to justice for these marginalised actors.

37 EELC submits that its existence as a public interest litigation organisation specialising in children's rights and representing thousands of marginalised actors including social movements, communities, community networks and activists is placed at risk of being discredited by the arguments advanced by the Second Respondent

38 Therefore, EELC seeks to be admitted as the fourth *amicus curiae* in this matter in order to make submissions as set out in this affidavit. It also aligns itself with the submissions made in the main affidavit.



DEPONENT

Signed and sworn to before me at Rosebank on the 20 day of NOVEMBER 2020, the deponent having acknowledged that the

H.E

deponent knows and understands the contents of this affidavit, that the deponent has no objection to taking the prescribed oath and that the deponent considers the prescribed oath to be binding on the deponent's conscience.

[Handwritten signature] 7/10/19/03
567

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
2020 -11- 20
CSC
ROSEBANK
SUID-AFRIKAANSE POLISIEDIENS

COMMISSIONER OF OATHS

Name: *Heidi Ems Namgany*

Address: *15 STURKE AVENUE
ROSEBANK SAKS*

Designation: *SGT*

TCP
HE

"TPI"

EQUAL EDUCATION LAW CENTRE TRUST
ROUND ROBIN BOARD RESOLUTION
APPLICATION TO BE ADMITTED AS *AMICUS CURIAE*

BACKGROUND

1. The Endangered Wildlife Trust and the Federation For a Sustainable Environment (the appellants) are represented by the Centre for Environmental Rights (CER) in a matter against the Director-General of the Department of Water and Sanitation and Atha-Africa Ventures (Pty) Ltd (the second respondent) (hereinafter referred to as the Litigation).
2. The Litigation concerns the granting of a water use licence for a proposed new coal mine to be constructed by the second respondent in a Strategic Water Source Area. In the second respondent's heads of argument, they characterise the Litigation as *"the abuse of a special appeal process by the Appellants in order to advance their agenda against any form of coalmining"*. They go further, by accusing *"environmental lobbyists"* in general, and CER in particular as the attorneys of record for the appellants, of having *"a clear, direct and substantial interest in the proceedings both before the Water Tribunal and before the Court, as well as in the outcome thereof, and which situation constitutes not only a clear and unethical conflict of interest in the case of any other attorney, but which also negates any pretence of objectivity on their part"*. The second respondent then goes on to ask the court to award punitive costs *de bonis propriis* on the punitive attorney-client scale. against the appellants and CER. The appellants filed an affidavit responding to these accusations, and further pleadings followed.
3. On 12 October 2020, a Notice In terms of Rule 16A of the Uniform Rules of Court was filed by the appellants noting the constitutional issues raised specifically by the second respondent's allegations against the appellants and their attorneys.

NOW THEREFORE, after having considered this background, the Equal Education Law Centre Board of Trustees resolved via round robin that:

4. The Executive Director, is authorised to,

The Equal Education Law Centre is managed
By the Equal Education Law Centre Trust.

Trustees:

Adv Janice Bleazard
Adv Michelle Norton SC
Dr Ursula Hoadley
Ntshadi Motokeng
Michael Mhikwa

Tatum Howie
Adv Achmat Toefy
Zukiswa Kota
Justice Catherine O'Regan

Ishivana Centre
3rd Floor
8 Mzila Street
Khayelitsha, 7784

T +27 21 461 1421/3551
F +27 86 572 4675

info@eelawcentre.org.za
www.eelawcentre.org.za

Public Benefit Organisation
(Exemption No: 930038683)

NPO No: 099-658-NPO
Trust Certificate No. IT2966/2011

The Equal Education Law Centre
Trust is a registered Trust.

TCP
H.E



- (a) Represent the EELC in instituting and / or joining any / and all legal proceedings seeking the leave of the North Gauteng High Court to be admitted and intervene as *amicus curiae* in the Litigation in terms of Rule 16A of the Uniform Rules of Court;
- (b) instruct and appoint Cliff Decker Hofmeyr, in the aforesaid legal proceedings; and
- (c) in terms of its Trust Deed, to do all things necessary, including but not limited to deposing to affidavits, on the Equal Education Law Centre Trust's behalf, to give effect to the resolution in this paragraph 4

Hereby signed and approved

Justice Catherine O'Regan
Chairperson

Ursula Hoadley
Trustee

Adv Achmat Toefy
Trustee

Adv Janice Bleazard
Trustee

Tatum Howie
Trustee

RECUSED FROM MATTER

Michael Mbikiwa
Trustee

Ntshadi Mofokeng
Trustee

Adv Michelle Norton SC
Trustee

Zukiswa Kota
Trustee

The Equal Education Law Centre is managed
By the Equal Education Law Centre Trust.

Trustees:
Adv Janice Bleazard
Adv Michelle Norton SC
Dr Ursula Hoadley
Ntshadi Mofokeng
Michael Mbikiwa

Tatum Howie
Adv Achmat Toefy
Zukiswa Kota
Justice Catherine O'Regan

Isivivana Centre
3rd Floor
8 Mzala Street
Khayelitsha, 7784

T +27 21 461 1421/3551
F +27 85 572 4675

info@eelawcentre.org.za
www.eelawcentre.org.za

Public Benefit Organisation
(Exemption No: 930038683)

NPO No: 099-658-NPO
Trust Certificate No. IT2966/2011

The Equal Education Law Centre
Trust is a registered Trust.

top
HG