

505/11/18

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO. A431/15

In the matter between:

**EQUAL EDUCATION**

Applicant for admission as  
*Amicus Curiae*

In the matter between:

**PHUMEZE MHLUNGWANA**

First Appellant

**XOLISWA MBADISA**

Second Appellant

**LUVO MANKQO**

Third Appellant

**NOMHLE MACI**

Fourth Appellant

**ZINGISA MRWEBI**

Fifth Appellant

**MLONDOLOZI SINUKU**

Sixth Appellant

**VUYOLWETHU SINUKU**

Seventh Appellant

**EZETHU SEBEZO**

Eighth Appellant

**NOLULAMA JARA**

Ninth Appellant

**ABDURRAZACK ACHMAT**

Tenth Appellant

and

**THE STATE**

First Respondent

**THE MINISTER OF POLICE**

Second Respondent

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**NOTICE OF APPLICATION FOR ADMISSION AS *AMICUS CURIAE* IN  
TERMS OF RULE 16A OF THE RULES OF COURT**

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**BE PLEASED TO TAKE NOTICE** that the Applicant intends to apply to the above Honourable Court, on a date to be determined by the Registrar, for an order in the following terms:-

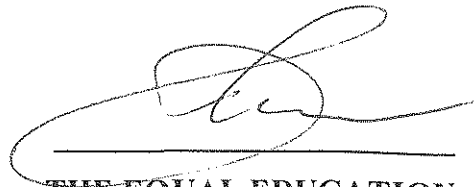
1. Admitting Equal Education (“EE”) as *amicus curiae* in these proceedings.
2. Directing that the *amicus curiae* is permitted to present written submissions in the above matter and to present oral argument at the hearing of this matter.
3. Further and/or alternative and/or related relief as the Court may deem necessary.

**TAKE NOTICE FURTHER** that the accompanying affidavit of **TSHEPO MOTSEPE** will be used in support of this application.

**TAKE NOTICE FURTHER** that the Applicants have appointed the offices of the Equal Education Law Centre, c/o Ndifuna Ukwazi Law Centre, Office 302, 47 on Strand, Strand Street, Cape Town, as the address at which they will accept notice and service of all documents and process in these proceedings.

**TAKE NOTICE FURTHER** that if you intend opposing this application, you are required to file an answering affidavit, setting out the grounds for opposition, within 5 days of receipt hereof.

DATED at *Cape Town* on this the *31<sup>st</sup>* day of AUGUST 2016.



**THE EQUAL EDUCATION  
LAW CENTRE**

Attorneys for the Applicant

Chandre Stuurman

Per email: Chandre@eelawcentre.org.za

**C/O NDIFUNA UKWAZI LAW CENTRE**

Office 302, 47 on Strand

Strand Street

Cape Town

**TO: REGISTRAR OF THE ABOVE HONOURABLE**

High Court

Cape Town

**AND TO: LEGAL RESOURCES CENTRE**

Attorneys for the Appellants

3<sup>rd</sup> Floor, Greenmarket Place

54 Shortmarket Street

Cape Town

Tel: 021 481 3000

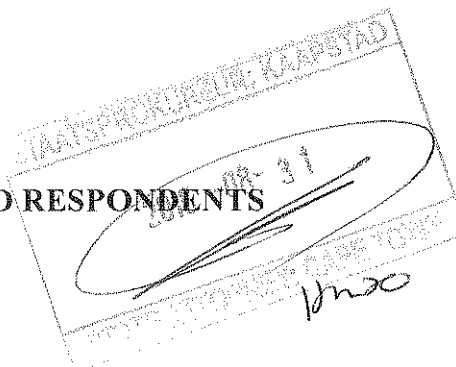
Email: [steve@lrc.org.za](mailto:steve@lrc.org.za)

**AND TO: THE FIRST AND SECOND RESPONDENTS**

c/o The State Attorney

22 Long Street

Cape Town



**AND TO: THE SECOND RESPONDENT**

The Minister of Police

120 Plein Street

Cape Town

**AND TO: NATIONAL PROSECUTING AUTHORITY**

115 Buitengracht Street

Cape Town

(Ref: Adv. Tarantaal 9/255/1-252/15)

IN THE HIGH COURT OF SOUTH AFRICA  
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**VUYOLWETHU SINUKU**  
Appellant

Seventh

**EZETHU SEBEZO**

Eighth Appellant

**NOLULAMA JARA**

Ninth Appellant

**ABDURRAZACK ACHMAT**

Tenth Appellant

and

**THE STATE**

First Respondent

**THE MINISTER OF POLICE**

Second Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**TSHEPO MOTSEPE**

do hereby make oath and state:

1. I am an adult male, serving as the General Secretary of Equal Education (“EE”), the applicant in this matter.
2. The facts contained in this affidavit are both true and correct. Unless the context indicates otherwise, they fall within my personal knowledge.
3. The submissions of law I make in this affidavit are made on the advice of Equal Education’s legal representatives, the Equal Education Law Centre (“EELC”).
4. This is an application for EE to be admitted as *amicus curiae* and to make written and oral submissions at the hearing of this matter. The parties have consented to the admission of EE as an *amicus* in this matter, and have consented to EE filing written heads of argument within 10 days from the date allocated for the matter to be heard.
5. EE is a movement of learners, parents, teachers and community members working for quality and equality in South African education, through analysis and activism. It is established in terms of a written constitution which authorises it to sue and be sued in its’ own name. The relevant sections of the constitution

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are annexed hereto marked "TM1". EE therefore has standing to bring this application in its' own name.

6. EE have duly resolved to institute these proceedings in furtherance of the objectives of their constitution and in the belief that it is able to assist this Honourable Court. I am duly authorised by the National Council of EE to depose to this affidavit and to bring this application on EE's behalf. A copy of the resolution is annexed hereto marked "TM2".
7. EE brings this application out of an abundance of caution, having regard to the Court's discretion to admit or refuse an *amicus curiae*.<sup>1</sup>
8. This affidavit is structured as follows:
  - 8.1. In Part A, I outline the purpose of the application;
  - 8.2. In Part B, I outline a brief background of EE and its work;
  - 8.3. In Part C, I outline the nature of EE's interest in these proceedings;
  - 8.4. In Part D, I outline EE's compliance with section 16A;
  - 8.5. In Part E, I outline the submissions that will be advanced by EE; and

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<sup>1</sup> Institute for Security Studies In Re S v Basson 2006 (6) SA 195 (CC) para 8; Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others 2013 (2) SA 620 (CC) para 20.

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8.6. In Part F, I outline the relevance of these submissions to the proceedings, their difference from the submissions of other parties and their assistance to the court.

#### PART A: THE PURPOSE OF THIS APPLICATION

9. This is an application in terms of Rule 16A of the Uniform Rules of Court on behalf of EE, seeking leave to intervene as *amicus curiae*, in the above appeal proceedings instituted in this Honourable Court.

10. On 11 February 2015, the Appellants were convicted on contravening section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 (“RGA”). The judgement is annexed hereto marked “TM3”.

11. On 9 July 2015, the Appellants’ Attorneys, on behalf of the Appellants, filed an Application for Leave to Appeal on the grounds that section 12(1)(a) of the RGA unreasonably and unjustifiably limits the right to freedom of assembly established in section 17 of the Constitution. The Application for Leave to Appeal is annexed as “TM4”.

12. In the Application for Leave to Appeal, the Appellants raise the following issues:

12.1. That section 12(1)(a) of the RGA violates the right to freedom of assembly in section 17 of the Constitution, and is therefore unconstitutional and

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invalid, to the extent that it criminalises the convening of a gathering solely on the basis that, (i) the gathering consists of 15 or more people; and (ii) no prior notice was given.

12.2. That the criminalisation of the gathering of more than 15 people merely because not notice was given violates section 17 of the Constitution because: (i) it makes it a crime to convene a peaceful, unarmed, gathering merely because the gathering is attended by 15 or more people and prior notice was not given; and (ii) it deters people from exercising their fundamental constitutional right to assemble peacefully and unarmed.

12.3. That the right to freedom of assembly further cannot be justified in terms of section 36(1) of the Constitution because: (i) the limitation of the right to assembly is severe; (ii) the application to gatherings of only 15 people or more is arbitrary and unrelated to the purpose of the provision; (iii) although the goal of regulating protests is legitimate, there are less restrictive means to achieve that goal, including, non-criminal sanctions, expanding the number of people that may be convened without notice, and relying on other existing criminal sanctions that permit police to deal with protests that pose some risk to public order or safety.

13. On 15 March 2016, the Appellants filed a Notice in terms of Rule 16A of the Uniform Rules of Court and called on interested parties to obtain written consent

of all parties to the proceedings within 20 days from the posting of the notice. A copy of the Notice is annexed hereto marked "TM5".

14. EE's National Council elected to intervene in the appeal proceedings as *amicus curiae*, to make submissions to assist the court in determining the constitutional challenge to section 12(1)(a) of the RGA. Due to the nature of EE's work, EE is uniquely positioned to make submissions as to how the section 12(1)(a) and the criminalisation of protect action, fails to take into account the best interest of the child. A brief background of EE and its work is set out in Part B of my affidavit.
15. EE wishes to make submissions, as an organisation whose core objective is to campaign for equal and quality education for all, who has over the years, made use of peaceful protest action to enhance the right to basic education for many school children across South Africa. As a movement we have, over time, seen the crucial role that protest action has to play in the realisation of the Constitutional vision, and are deeply concerned about how the right to assemble is continuously and unlawfully being stifled by the state.

#### PART B: BRIEF BACKGROUND OF EE AND ITS WORK

16. EE is a membership based democratic movement of learners, teachers, parents and community members. It is a non-profit organisation registered under number 068-288-NPO.

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17. EE has its headquarters in Khayelitsha, Western Cape, and also offices in the Eastern Cape and Gauteng.
18. EE is committed to ensure equal and quality education for all in South Africa.
19. Our core membership base is made up of high school learners, termed 'Equalisers', who actively advocate for quality education for all. EE has approximately 3220 Equalisers across KwaZulu-Natal, Eastern Cape, Western Cape, Limpopo and Gauteng who participate on a weekly basis in the work of EE. EE also has a parent following, with six EE parent branches located in the Western Cape. EE has many other active supporters.
20. EE has conducted awareness programmes and campaigns for the improvement of education in the Western Cape, Eastern Cape, Gauteng, KwaZulu-Natal and Limpopo.
21. Since inception in 2008, EE has been concerned with learning conditions in poor and working class schools and communities. During the last five years we have actively focused on ensuring that all public schools in South Africa have adequate infrastructure including access to basic amenities like water, electricity and adequate sanitation, as well as infrastructure items like libraries and laboratories.
22. To this end, EE has engaged provincial and national departments through, amongst others, meetings, letters, petitions, pickets and marches. Our marches

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have taken place in Cape Town, Johannesburg, Tshwane, Polokwane North and Bhisho.

23. Where necessary we have resorted to the courts in furtherance of our objectives and campaigns. Our approach has been to resort to legal action only when other avenues of democratic engagement have been exhausted.

#### PART C: EE'S INTEREST IN THE COURT PROCEEDINGS

24. EE's core objective is to campaign to achieve equal and quality education for all. In terms of clause 5 of its Constitution, a copy of which is annexed hereto marked "TM6", EE may conduct a broad range of activities to achieve this objective, including, but not limited to:

- 24.1. contributing to a strong civil society that holds private interests, government, individuals, and itself accountable to the values in its Constitution;

- 24.2. promoting and defending basic democratic principles and rights, such as the right to assemble, freedom of expression and association, access to information, privacy, good governance, participation in democratic elections, and freedom and security of the person, including freedom from sexual harassment and gender-based violence;

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- 24.3. sharing information and ideas, and supporting campaigns of other organisations and movements locally and globally that advance freedom, equality and human rights; and
- 24.4. where necessary, using courts and legal processes to advance the values and objectives listed in its Constitution.
25. EE's core membership base, the equalisers, actively advocate for quality education for all. These learners spearhead the EE movement. The ability of learners to picket, demonstrate and engage in a wide variety of protest action is crucial to the work of EE and maintaining a robust space for civil society engagement with the state.
26. EE is therefore interested in protecting children's right to protest as a necessary component for the fulfilment of their right to education. As a movement who is constitutionally mandated to promote and defend democratic rights such as the right to assemble, and who has, over time, seen the crucial role that protest action has to play in the realisation of the Constitutional vision, we have a vested interest in ensuring that the space for democratic engagement is opened up, especially, for our core membership base, which is high school learners (inclusive of minor children), who is still being silenced and kept from exercising

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their constitutionally guaranteed rights to assemble and to freely express themselves.

27. EE therefore brings this application:

27.1. In its own interest, as an organisation who is constitutionally mandated to promote and defend democratic rights and principals such as the right to assemble and freedom of expression and association, and have become increasingly aware of these rights being continuously violated and this important space shrinking;

27.2. On behalf of the learners, teachers and community members affected by the aforesaid violation, and who for lack of resources, lack of knowledge of their rights, lack of access to legal services, and because of their number, cannot individually bring these proceedings (section 38(b) of the Constitution); and

27.3. On behalf of the parents of such children who for similar reasons cannot individually bring these proceedings (section 38(b) of the Constitution).

27.4. In the public interest (section 38(d) of the Constitution).

#### PART D: EE'S COMPLIANCE WITH SECTION 16A

28. On 15 March 2016, the Appellants filed a Notice in Terms of Rule 16A.

29. To facilitate EE's involvement in this matter, and in compliance with Rule 16A of this Honourable Court, on 14 April 2016, a letter was sent by the Centre for Applied Legal Studies on behalf of a group of civil society organisations, including Equal Education, who works to uphold, promote and respect the Constitution, and the Rule of Law, and who has a keen interest in protecting the right to assemble, demonstrate, and petition as well as the ancillary rights in the Constitution. In this letter we informed the parties to the proceedings that we may have similar or unique submissions to make in the matter, and to that end are considering intervening in the matter, either individually as separate organisations of Amici or as some combination of the two. However, at the time of the letter the parties was yet to make submissions, and as such, our ability to assess whether an intervention will be useful to this Honourable Court, and what submissions to make, was not yet possible. We were thus unable to seek consent to be admitted as Amici, as at 14 April 2016. A copy of the letter is annexed hereto marked "TM7".

30. On 29 June 2016, our attorneys addressed a letter to the parties to the proceedings, being the appellants and the first and second respondents, for written consent to intervene as *amicus curiae*, and to make written submissions within a reasonable and agreed upon time after the parties have filed heads of argument. A copy of the letter is annexed hereto marked "TM8"

31. On 6 July 2016, we received a written reply from the appellants' attorneys, indicating that they have no objection to EE's admission as *amicus curiae*. A copy of the email is annexed hereto marked "TM9".
32. On 15 July 2016, we received a written reply from the National Prosecuting Authority, indicating that they have no objection to EE's admission as *amicus curiae*. The letter is annexed hereto marked "TM10".
33. No response was received from the Minister of Police, the Second Respondent in the above appeal proceedings.
34. On 4 August 2016, our attorneys received a written request from the appellants' attorneys to indicate whether we will be filing an affidavit and heads of argument or if we will only be filing heads of argument. After consultation, we decided on the latter and informed the appellants' attorneys of our decision. Copies of the email exchange are annexed hereto marked "TM11".
35. On 22 August 2016, our attorneys wrote to the state attorney representing the Minister of Police, the Second Respondent in the matter, informing that we have yet to receive a response to our request for written consent to intervene amicus. Our attorneys further informed that we have obtained the written consent of the Appellants as well as that of the National Prosecuting Authority, but are still awaiting the state attorney's response. A copy of our letter dated 29 June 2016,



was enclosed for their attention. A copy of the email is annexed hereto marked “TM12”.

36. On 23 August 2016, we received a response from the state attorney stating they were not in receipt of our letter of 29 June 2016, but have nevertheless been instructed by their client to consent to EE intervening as *amicus curiae*. That being on the conditions that EE file heads of argument in terms of timelines agreed to by the parties, within 10 days prior to the hearing and that EE would submit no new evidence to the court. The letter is annexed hereto marked “TM13”.

37. EE has therefore secured all parties’ permission to intervene in the matter as an *amicus curiae*, as contemplated in rules 16A(2) and (3) of the Uniform Rules of Court. In addition, all parties agreed to a timeline requiring EE to file heads of argument within 10 days before the date to be set for the hearing of the appeal.

PART E: SUBMISSIONS THAT WILL BE ADVANCED BY EE

38. In the submissions, EE wishes to address the following issues:

38.1. The effect of sections 12(1)(a) of the RGA on the rights of learners, in particular,

38.1.1. the unconstitutional impact on rights of learners including adult learners to a basic education provided for in section 29(1)(a);  
and

38.1.2. the disparate and adverse impact of the operation of section 12(1)(a) on rights of children to assembly freely as provided for in section 17 of the Constitution.

38.2. The problems of criminalising conduct when the requirements for a lawful gathering are arbitrary and often implemented in an arbitrary manner.

38.3. The impact of arrest on children and learners (stigma and trauma) and the implications in light of the section 28 of the Constitution best interest of the child principle and international law.

PART F: THE RELEVANCE OF THESE SUBMISSIONS TO THE PROCEEDINGS, THEIR DIFFERENCE FROM THE SUBMISSIONS OF OTHER PARTIES AND THEIR ASSISTANCE TO THE COURT

39. The submission EE wishes to advance to the court is relevant to determining the constitutional challenge to section 12(1)(a) of the RGA.

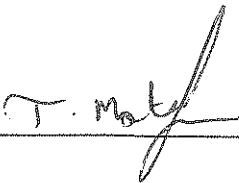
40. EE's submissions deal with the impact of section 12(1)(a) on the constitutional rights of learners, inclusive of children, to assemble, demonstrate and picket.

41. EE's submissions will assist the court in coming to a determination on the constitutional validity of section 12(1)(a), by highlighting the adverse effect of this section on one of the most vulnerable groups within society.

42. EE's submissions differs from those of other parties to the proceedings, as EE is the only party who will be highlighting the impact of section 12(1)(a) on learners.

CONCLUSION

Having regard to all of the above, I respectfully request that the Court grant the relief sought in the notice of motion to which this affidavit is attached.



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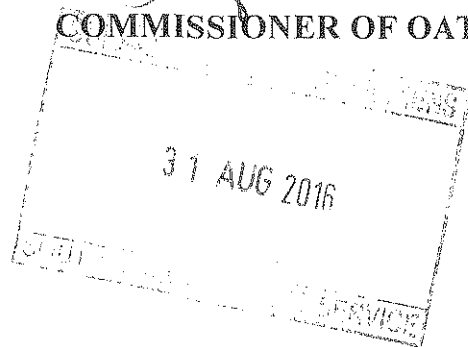
**TSHEPO MOTSEPE**

I certify that the Deponent acknowledged to me that he knows and understands the contents of this declaration, has no objection to taking the prescribed oath and considers the prescribed 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'*. The Deponent signed this declaration in my presence at CAPE TOWN on this the 31 day of August 2016.



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**COMMISSIONER OF OATHS**



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**CONSTITUTION OF**  
**E EDUCATION**

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## **CHAPTER 1: NAME OF THE MOVEMENT**

- 1.1. The name of the Movement is Equal Education. (In this Constitution it is referred to as 'EE' or 'the Movement'.)

## **CHAPTER 2: LEGAL NATURE AND PERSONALITY**

- 2.1. The Movement is a legal entity separate from its individual members. It will continue to exist even if the members change. The Movement may own property, enter into contracts, and sue or be sued in its own name.
- 2.2. EE is a registered Non-Profit Organisation (NPO) with registration number 068-288-NPO.
- 2.3. EE is a registered S10(1)(cN) and S18A(1)(a) Public Benefit Organisation (PBO) with Exemption Number 930 027 221.

## **CHAPTER 3: DEFINITIONS**

Some terms, like 'National Council' and 'Secretariat', are defined at the start of the relevant sections of this Constitution. This section defines additional terms which are not defined elsewhere in this Constitution.

*Equaliser:* A member of Equal Education who is attending a Primary or Secondary School. (For who is a member see 7.3.)

*Persons:* Unless otherwise indicated shall be construed as a reference to a natural person.

*Management:* A body comprised of the most senior staff members which manages the day to day affairs of EE and implements the program set out by Congress, the National Council (NC), and the Secretariat.



**National Council:** Yoliswa Dwane (Chair), Tracey Malawana, Doron Isaacs, Tshepo Motsepe, Ntuthuzo Ndzomo, Daphne Erosi, Dumile Runwana, Zintle Tomose, Niek Marutha, Fanelesibonge Shezi, Thato Mashego, Thoko Qalanto, Thabang Mabuza, Anda January, Samukelisiwe Kunene, Michelle Adler, Brad Brockman, Yana Van Leeve

## RESOLUTION OF THE NATIONAL COUNCIL OF EQUAL EDUCATION

### RE: PHUMEZA MHLUNGWANA AND 9 OTHERS vs THE STATE AND THE MINISTER OF POLICE – CASE NO.:A431/15

#### BACKGROUND

1. On 11 September 2013, Social Justice Coalition (SJC) members and supporters undertook a peaceful and organised protest outside the office of Mayor Patricia de Lille. SJC members and supporters chained themselves to the railings at the Cape Town Civic Centre and refused to leave until the Mayor addressed them and upheld her commitments on the Janitorial Service Sanitation Programme in Cape Town's Informal Settlements. The protest was met with Metro Police Officers, SAPS officers, and other City Law Enforcement Officials. The continuous refusal of protesters to leave, and staying chained together to the railings, eventually resulted in SAPS officers, from the Public Order Policing unit, cutting the chains and arresting 21 SJC Members and Supporters.
2. The 21 arrested were charged with convening and attending an illegal gathering in terms of the Regulation of Gatherings Act 205 of 1993 ("the Act"). The detainees, represented by the Legal Resources Centre (LRC), were tried in the Cape Town Magistrates' Court, Case no: 14/985/2013, by Magistrate Fredericks. During the trial, the facts were admitted and a plea of guilty was entered. 10 members of the SJC identified themselves as the organisers of the protest ("the SJC 10"), and the LRC placed certain constitutional arguments before the court, which would only be properly heard on appeal to a higher court.
3. On 11 February 2015, the SJC 10 were convicted on the main charge of contravention of section 12(1)(a) of the Act. The remaining 11 accused were acquitted of all charges. LRC, on behalf of the SJC 10, sought leave to appeal.
4. The SJC 10 sought leave to appeal on the following grounds, as set out in the Notice of Appeal to the Western Cape High Court:
  - 4.1. By criminalising the convening of a gathering merely because no notice was given, section 21(1)(a) of the Act limits the right to freedom of assembly in section 17 of the Constitution;
  - 4.2. That limitation is not reasonable and justifiable in terms of section 36(1) of the Constitution;
  - 4.3. Accordingly, the section must be declared unconstitutional and invalid; and

Postal: PO Box 40114, Elonwabeni, 7791 | Head Office: Washington Sqr, Capital Drive, Thembokwezi, Khayelitsha  
E-mail: [info@equaleducation.org.za](mailto:info@equaleducation.org.za) ~ Website: [www.equaleducation.org.za](http://www.equaleducation.org.za)

Facebook: Equal Education fan page ~ Twitter: [twitter.com/equal\\_education](https://twitter.com/equal_education)

Telephone: 021 387 0036 ~ Fax: 0865169396

Registered S10(1)(cN) and S18A(1)(a) Public Benefit Organisation (PBO) (Exemption Number 930 027 221)

Registered Non-Profit Organisation (NPO) (Registration Number 068-288-NPO)



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- 4.4. If the section is declared invalid, the basis for the conviction falls away.
5. On 9 July 2015, Magistrate Fredericks granted leave to appeal.

#### AMICUS INTERVENTIONS IN THE APPEAL OF THE SJC 10

6. On 14 March 2016, a Rule 16A notice was issued, informing all interested parties that they may with the written consent of all parties to the appeal proceedings, after having given notice no later than twenty (20) days from the date of the posting of the notice, be admitted as *amicus curiae* on such terms as agreed upon in writing between the parties.
7. EE comrades have experienced numerous instances in which the Act has been used in a manner which is overly prohibitive and unlawfully infringes on constitutionally enshrined rights. As a result, EE will seek legal advice once the main parties' Heads of Argument have been made available to it, and may wish to be admitted as *amicus curiae* ('friend of the court'), in the above-mentioned appeal case, case no: A431/15. As such, the National Council seeks to consider EE's role in the case on an urgent basis.
8. In response to the Rule 16A Notice, a group of civil society organisations met on 11 April 2016, and discussed the possibility of bringing a joint *amici* application, which would be led by one set of legal representatives, as agreed upon between the parties.
9. The Equal Education Law Centre represented EE in the aforementioned meeting, and informed the group that EE may, following consideration of the parties' arguments, decide:
  - 9.1. to take part in the joint *amici* application;
  - 9.2. to apply to be admitted as an *amicus* in its own name to make unique submissions relating amongst other things to the implication of the criminalisation of protests on the Constitutional requirement to act in the best interests of children; or
  - 9.3. not to apply to be admitted as an *amicus* in the matter.

#### THEREFORE

10. The National Council wishes to authorise the General Secretary and/or Deputy General Secretary to decide, after having sought legal advice based on the submissions of the parties to the appeal, which of the three potential routes set out in paragraph 8 EE will take.
11. The National Council also wishes to authorise any member of the Secretariat to depose to affidavits on behalf of EE in the appeal case, and in any proceedings relating to such appeal case.
12. On 13 April 2016, members of the National Council considered the above matters via telephonic or electronic means as contemplated in section 15.1.3 of the Constitution of EE, and the National Council hereby resolves:
  - 12.1 that EE may make application to be admitted as an *amicus curiae* in the SJC 10 appeal case, case no.: A431/15, either as part of a joint application of several civil society organisations and legal NGOs, or separately in its own name;



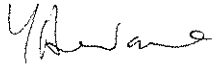
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12.2 that the General Secretary and/or the Deputy General Secretary of EE be and are hereby authorised to,

12.2.1. decide whether EE will be a party to the joint application or whether EE will bring an application on its own, if at all; and

12.2.2. appoint and instruct EE's attorneys in any of these matters.

12.3 in terms of its own constitutional mandate, in the interest of all youth in rural communities and townships, to empower any member of the Secretariat, to do all things necessary, including but not limited to deposing to affidavits, on EE's behalf, to give effect to the resolution in paragraph 12.1 above.



**CHAIRPERSON: YOLISWA DWANE**

18 APRIL 2016





COURT RESUMES ON 11 FEBRUARY 2015 (at 11:21)

PROSECUTOR: Case number 14/985/2013, state v Phumeza Mlungwana and 20 other. The presiding officer magistrate Fredericks; state N Rajab(?); all the accused being  
5 represented by advocate Bishop; the interpreter Ms Balati. The matter is on the roll today for the purpose of judgment.

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J U D G M E N T

Right then, case number 14/985/2013, state v Phumeza  
10 Mlungwana and 20 others. All accused before are adult persons represented by advocate Bishop. The accused are charged with one main count in that on about 11 September 2013 at or near the Civic Centre in Cape Town in the district of the Cape the accused unlawfully and intentionally convened a  
15 gathering in protest against sanitation services without giving the relevant municipal authority any notice that such gathering would take place. The alternative count is that on the same date and place the accused also mention previously unlawfully and intentionally attended a gathering in protest against poor  
20 sanitation services without notice and the required permission from the relevant authority.

Now all 21 accused pleaded not guilty. Admissions were made in terms of section 220 of Act 51 of 1977 and admitted in terms of the exhibit that was handed in, Exhibit A. The state  
25 called two witnesses, Noel da Silva and Jacob Petersen. Noel  
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da Silva, he told the court that he is a representative at the City of Cape Town and issues permits for gatherings. He also told court that on the said date of 9 September 2013 he did not receive an application for the gathering. He initially spoke of  
5 an application procedure, but later during cross-examination told the court that a notice is what ought to have been given. He also told the court that if notice was given and the parties received no response, that that would mean the action could go ahead. He, himself, did not observe the event of the day.

10 Jacob Petersen, he testified that he is a warrant officer for Public Order Policing stationed at Corrie(?). He arrived with a captain Prins on 11 September 2013 at the Civic Centre. He told the court that he saw protestors who were chained. According to him 20 protestors were chained while 20 other  
15 protestors were in the immediate vicinity. He was told by captain Prins to arrest the protestors. According this witness 20 of the protestors ran away. The rest of the protestors who were arrested, according to him, were on the chain and consequently were at court or were the accused at court.  
20 During cross-examination questions as to whether it was possible to access the Civic Centre despite the protest, was possible, he indicated that no one would be able to pass these protestors even if they lifted their chained arms to allow them to pass.

25 It is clear from the evidence of accused 1, who then later

came to testify for the defence and court is going to deal with that aspect later and the exhibits that were tendered, for example the photographs that were handed in, that there were no ...(indistinct) of any people in the vicinity of the chained  
5 accused bringing the total of those protesting in the region of 40 as the last-mentioned had testified. According to his evidence the passageway to enter the Civic Centre was blocked and that people were being prevented from entering or exiting that side of the Civic. From the exhibits one can  
10 clearly see another stairwell not too far from where the chained protestors were and the photograph actually depicts people utilising that side to the Civic. The state closed its case after this witness was cross-examined.

Defence then brought in application for discharge in  
15 terms of section 174 of Act 51 of 1977. The state opposed it and the application was denied by the court. The defence called accused 1, Phumeza Mlungwana. She tells the court that she belongs to an organisation called The Social Justice Coalition and that she is general secretary of the said  
20 organisation. In addition to her evidence an affidavit was handed into court setting out the history of their grievances as well as the communication agreements and frustrations as an organisation together with the community they experienced with the council and mayor in particular in trying to alleviate  
25 the plight of the communities.

Protest action was decided upon by accused 1, 3, 5, 12, 15, 16, 17, 18, 19 and 21 after various agreements failed to address the plight of the poor sanitation in the area. It was decided that they would not give notice of their proposed  
5 action as they would be no more than 15 people protesting. 15 initially, that is accused 1, 2, 3, 4, 5, 6, 8, 10, 12, 13, 15, 17, 18, 19 and 21 then chained themselves across the steps at Cape Town Civic Centre entrance. A letter was drafted to the mayor setting out their grievances and informing her and her  
10 office that 15 protestors would be protesting outside her office at the Civic Centre on 11 September that day. This letter was dated 11 September 2013 as the court already stated and was e-mailed to the mayors office on the said date and was also handed into court as an exhibit.

15 During the course of that morning they called up other members who eventually totalled six to either bring food, water, files, buy padlocks, chains and rendered tasks like show media to the person in the chain whom they can interview and to send off e-mails. These other members were never  
20 intended to engage in the protest action, but was there, according to accused 1, only to render support where needed. She tells the court that emotions ran high and at times these six would come within the vicinity of where the 15 were chained were, sang songs and chanted with them. At times  
25 some of them would move in and out of the chain and then go

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on with what they were tasked to do for the day. At no stage were these people asked by the accused, who decided upon this action, to remain neutral and not to join the protest.

When the police arrived a captain Prins spoke to the  
5 group chain and enquired about their reasons for being there. Accused 1 told him they wanted to see the mayor or one of her representatives in order to hand over a letter with their grievances. According to accused 1 captain Prins left, came back and advised that no one from the office of the mayor  
10 would be coming and that their demonstration was illegal. They were told to disperse. Accused 1 pointed out that they were within their rights as they were only 15 people protesting and need not have given notice to do so. A quick count, however, by the officer proved more people were now either  
15 attached or holding on to the chain, making the amount of people protesting in excess of 15. Accused 1 spoke to the group and told them that they only wanted to be 15 people as this would still keep them within the law and that if there was any one who no longer wanted to be part of the protest, they  
20 were free to leave. Accused 16, accused 4 and accused 5, the last of whom I just mentioned are two of the accused who were meant to be part of the chain, according to accused 1. The three of them then left the chain. The rest then decided not to leave until the mayor or someone from her office came to  
25 receive the letter.

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The instruction was given to arrest all those present on the chain, including those in the nearby vicinity. According to accused 1 those who left the chain, including the members who were there merely to render support as previously mentioned, were then also arrested with those still attached to the chain. The total number of persons on the chain at the time of the arrest then were 13, but in total 21 people were arrested. The 21 people who were arrested are currently the accused in court today.

10 In addition to her evidence various photographs were handed in depicting those on the human chain at various stages of the protest and where at the Civic Centre they were positioned. There are no other protestors totalling an amount of 20 people in addition to the accused immediately in front or 15 behind them. It is clear from the photographs that where the group had chained themselves that entry to the Civic Centre was not blocked off. From the photographs there are no more than 16, then 17 and then 18 people on or in the vicinity of the chain at any given time in question, this being very different 20 from the officer's evidence that there were about 40 protestors of whom 20 had run away and the rest on the chain then being arrested.

On one of their photographs one can clearly see another stairwell and people, in fact, making use of it, thus gaining 25 access to the Civic Centre from another point. It is clear that,

as testified by the accused, and in contrast to what the police officer testified, that at no stage was entry then to the Civic Centre prohibited by this group of protestors. The officer also told the court that no one would be able to pass under their  
5 arms if they were to lift it, but he, himself, did not witness any such refusal by those on the chain to allow anyone to the building by not lifting their chained arms. Despite this he tells the court the protestors were peaceful. From the photographs there is nothing to suggest that they were not. In fact,  
10 throughout accused 1 evidence, this is what she says.

Accused 1 also tells the court that they wanted to be 15 people at all times and that they never intended exceeding that number as they wanted to remain within the realms of the law, but only asked the extra persons to leave once captain Prins  
15 had pointed out to her that they were in excess of their number. The court notes that when she asked for those chained to kept at 15, there was no resistance, but complete cooperation. Clearly this could have been done earlier too before the police arrived.

20 The question then arises, did the accused contravene sections 12 (1) (a), that being the first and main count by not giving the required notice of the proposed action and was this, in fact, a gathering as defined in the act? Can it also be said that all 21 accused, in fact, were conveners of a gathering if  
25 the court finds that indeed the gathering was convened. The

answers to these question lie in the definitions of the words convene and gathering as defined by the act. The act defines convener as:

- 5 (a) Any person who of his own accord convenes a gathering and;
- (b) In relation to any organisation or branch of any organisation any person appointed by such organisation or branch in terms of sections (2) (1).

10 Gathering means any assembly concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act 29 of 1989 on any other public place or premises wholly or party open to the air.

Now those who took the resolution to protest were  
15 accused 1, 3, 5, 12, 15, 16, 17, 18, 19 and 21. These are, according to the admissions made by the accused as well as the testimony of accused 1, the conveners. Section 12 (1) (a) only has application on those who convened a gathering. Initially there were only going to be 15 protestors, but when  
20 others joined in song and dance they did not stop them. in fact, accused 16 was one of those who decided to embark on this action with the accused termed by the defence as the convening accused and was thus aware of the fact that only 15 people would be used to protest on this day and knew the  
25 reason why they wanted to remain 15.



What is not clear for this court is whether the other accused, that is accused 7, 9, 11, 14 and 20, who did not form part of the accused planned reaction and who were asked to assist on the day in question, whether they, in fact, were aware that not notice was given and the intention of the protesters to remain only 15. Besides this fact, they, together with accused 2, 4, 6, 8, 10 and 13, were not part of those who took the resolution to hold the action and thus sections 12 (1) (a) is not applicable to them. THE COURT FINDS THAT THESE ACCUSED ARE NOT GUILTY IN RESPECT OF COUNT 1, THE MAIN COUNT, AS THEY WERE NOT THE CONVENERS. The court finds that the following are then guilty and their questions that were previously asked are answered in the affirmative, ACCUSED 1, 3, 5, 12, 15, 16, 17, 18, 19 AND 21 ARE GUILTY THEN IN RESPECT OF THE MAIN COUNT.

The alternative charge, being that of sections 12 (1) (e) of Act 205 of 1993 simply set out that this section is not applicable to the remaining accused as they were never the conveners to begin with and the prohibition with regards to the place where a gathering may be held is also not applicable to them. THE COURT ACQUITS THE REMAINING ACCUSED ON THE ALTERNATIVE CHARGES AS WELL, THAT BEING ACCUSED 2, 4, 6, 8, 10, 13, 7, 9, 11, 14 AND 20.

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IN THE MAGISTRATES' COURT FOR THE DISTRICT OF CAPE TOWN  
(HELD AT CAPE TOWN)

Case No: 14/985/2013

In the matter between:

PHUMEZA MHLUNGWANA	First Applicant
XOLISWA MBADISA	Second Applicant
LUVO MANKQA	Third Applicant
NOMHLE MACI	Fourth Applicant
ZINGISA MRWEBI	Fifth Applicant
MLONDOLOZI SINUKU	Sixth Applicant
VUYOLWETHU SINUKU	Seventh Applicant
EZETHU SEBEZO	Eighth Applicant
NOLULAMA JARA	Ninth Applicant
ABDURRAZACK ACHMAT	Tenth Applicant

and

THE STATE	Respondent
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APPLICANTS' SUBMISSIONS  
(APPLICATION FOR LEAVE TO APPEAL)

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## INTRODUCTION

1. The first to tenth applicants (accused No's 1, 3, 5, 12, 15, 16, 17, 18, 19 and 21 at the trial) were convicted on 11 February 2015 on the main charge of contravention of section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 ("the RGA"). The sentence imposed by the learned Magistrate at the conclusion of the trial was a caution and discharge.
2. This is an application for leave to appeal in terms of section 309B of the Criminal Procedure Act 51 of 1977 ("the CPA") against the conviction of the accused on the main count of contravention of section 12(1)(a) of the RGA.
3. The accused seek leave to appeal on the following grounds of law set out in their amended Notice of Appeal<sup>1</sup>:
  - 3.1 By criminalising the convening of a gathering merely because no notice was given, section 12(1)(a) of the RGA limits the right to freedom of assembly in section 17 of the Constitution;
  - 3.2 That limitation is not reasonable and justifiable in terms of section 36(1) of the Constitution;
  - 3.3 Accordingly, the section must be declared unconstitutional and invalid;
  - 3.4 If the section is declared invalid, the basis for the conviction falls away.

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<sup>1</sup> Record, p 25 -26

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### THE APPLICABLE TEST

4. In deciding whether leave to appeal should be granted, a court is required to consider whether there are reasonable prospects of success. The Supreme Court of Appeal in *S v Smith*<sup>2</sup> described the test to be applied as follows:

*“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”*

### THE FACTUAL BASIS FOR THE CONVICTIONS

5. It was common cause at the trial that the accused had convened a “gathering” as defined in the RGA at the offices of Mayor Patricia De Lille on 11 September 2013, and that no notice of the gathering had been given in terms of section 3 of the RGA.<sup>3</sup>
6. The purpose of the gathering was to protest against the failure of the City of Cape Town (“the City”) to provide proper sanitation services to residents of informal settlements and the City’s lack of consultation with communities regarding the implementation of a janitorial service. Accused No. 1 (Ms Phumeza Mlungwana) testified on behalf of the accused and provided a detailed factual background to the work of the Social Justice Coalition (“SJC”) and their unsuccessful engagements with the City concerning for the three years which preceded the protest action on 11 September 2013.

<sup>2</sup> *S v Smith* 2012 (1) SACR 567 (SCA) at para 7. See also *S v Kruger* 2014 (1) SACR 647 (SCA) at para 2

<sup>3</sup> See Admissions by the Accused in terms of section 220 of the CPA

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7. A detailed affidavit was handed into court setting out the history of the applicants' grievances as well as the frustrations which the SJC and the communities experienced with the council and mayor in alleviating the plight of the communities. The protest action embarked upon by the applicants was decided upon after various agreements failed to address the plight of poor sanitation in the area.<sup>4</sup>
8. The applicants had decided not to give notice of their proposed action as there would be no more than 15 people protesting. This was confirmed in the letter to the mayor dated 11 September 2013 setting out the grievances of the SJC which informed her that 15 people would be protesting outside the Civic Centre on 11 September 2013.<sup>5</sup>
9. The protest action took the form of the applicants chaining themselves across the steps at the Cape Town Civic Centre entrance. Other protestors and members of the SJC were present, but according to Ms Mlungwana, these members were never intended to engage in the protest action but were only there to render support where needed.<sup>6</sup>
10. The court found that at no stage were these individuals "*asked to remain neutral and not to join the protest*".<sup>7</sup> However, according to Ms Mlungwana, when the police arrived she had pointed at that they were in their rights as there were only 15 people protesting and need not have given notice to do so. In addition, she testified that she had spoken to the group and told them that they only wanted 15 people "*as this would keep them within the*

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<sup>4</sup> Judgement, p 161, line 20 - 25

<sup>5</sup> Judgement, p 162, line 5 - 10

<sup>6</sup> Judgement, p 162, line 20

<sup>7</sup> Judgement, p 163, line 3

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law and that if there was anyone who no longer wanted to be part of the protest, they were free to leave.”<sup>8</sup>

11. A significant feature of this matter is the absence of any evidence during the trial indicating that the protest action by the applicants on 11 September 2013 was anything other a dignified, peaceful and non-violent protest on a human rights issue of significant public importance.
12. A number of photographs were handed into court as exhibits. The court found that “*it is clear from the photographs that where the group had chained themselves that entry to the Civic Centre was not blocked off*”.<sup>9</sup> The court discounted the evidence of state witnesses Prins and Peterson “*that there about 40 protestors of whom 20 had run away and the rest on the chain being arrested*”. The court found in contrast that the photographs depicted “*no more than 16, then 17 and then 18 people on or in the vicinity of the chain at any given time in question*”.<sup>10</sup>
13. State witness Peterson testified that the entrance to the Civic Centre had been prohibited by the protestors and that “*no one would be able to pass under their arms*.” He conceded however that he did not see any such refusal by those on the chain to allow anyone into the building and told the court that “*the protestors were peaceful*”<sup>11</sup>. The court found that “*from the photographs, there is nothing to suggest that they were not*.”<sup>12</sup>

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<sup>8</sup> Judgement, p 163, line 20

<sup>9</sup> Judgement, p 164, line 15

<sup>10</sup> Judgement, o 164, line 15 - 22

<sup>11</sup> Judgement, p 165, line 1 - 5

<sup>12</sup> Judgement, p 165, line 9. See also p 164, line 19 where the court found that in contrast to the evidence of the state witness “*on one of the photographs one can clearly see another stairwell and people, in fact, making use of it, thus gaining access to the Civic Centre from another point*”.

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14. Ms Mlungwana was emphatic in her evidence that the number of protestors were intended to be 15 people at all times and that "*they never intended exceeding that number as they wanted to remain within the realms of the law.*"<sup>13</sup> The court noted that "*when she asked for those chained to be kept as 15, there was no resistance, but complete co-operation.*" The court however found that "*clearly this could have been done earlier too before the police arrived.*"<sup>14</sup> The court in this regard also found that the accused "*did not stop*" the additional protestors who joined them.<sup>15</sup>
15. In the light of the admissions by the accused that they were the "*convenors*" as defined in the RGA, that no notice had been given in terms of section 3 and having found that the number of protestors exceeded 15 and thereby constituted a "*gathering*" as defined in the RGA, the court convicted the accused on the main count of contravening section 12(1)(a) of the RGA.

#### THE CONSTITUTIONAL DEFENCE

16. The applicants at the outset of the trial tendered a plea explanation in terms of section 115 of the CPA.
17. The second leg<sup>16</sup> of the plea explanation made the submission that the criminalisation of merely convening or attending a gathering without giving notice is unconstitutional and invalid. To that extent, section 12(1)(a) and 12(1)(e) of the RGA are inconsistent with the Constitution and invalid.

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<sup>13</sup> Judgement, p 165, line 11

<sup>14</sup> Judgement, p 165, line 15

<sup>15</sup> Judgement, p 166, line 23

<sup>16</sup> The court acquitted accused 2, 4, 6, 8, 10, 13, 7, 9, 11, 14 and 20 on the second leg advanced in the plea explanation being that section 12 (1)(e) of the RGA was not applicable on the facts (Judgement, p 167, line 20)

18. The plea explanation stated that the grounds on which the constitutionality of these provisions would be challenged would be set out more fully on appeal if necessary.<sup>17</sup> An affidavit was filed during the trial setting out more fully the basis for the plea and the anticipated constitutional challenge to the provisions of sections 12(1)(a) and 12(1)(e) of the RGA.
19. The Magistrates Court is a creature of statute and was precluded by law from determining the accused's defence set out in the section 115 plea explanation. Only the High Court has the jurisdiction to do so. In terms of section 170 of the Constitution, a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.
20. The court was required to decide the matter on the basis that section 12(1)(a) of the RGA was consistent with the Constitution and valid. This is so by virtue of the provisions of section 110 of the Magistrates' Courts Act 32 of 1944 which provides as follows:

*"110. Pronouncements on validity of law or conduct of President.*

*(1) A court shall not be competent to pronounce on the validity of any law or conduct of the President.*

*(2) If in any proceedings before a court it is alleged that—*

*(a) any law or any conduct of the President is invalid on the grounds of its inconsistency with a provision of the Constitution; or*

*(b) any law is invalid on any ground other than its constitutionality,*

*the court shall decide the matter on the assumption that such law or conduct is valid: Provided that the party which alleges that a law or conduct of the President is invalid, may adduce evidence regarding the invalidity of the law or conduct in question."*

<sup>17</sup> Admissions in terms of section 220, para 10.2

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## PROSPECTS OF SUCCESS

21. It is submitted that a court of appeal could reasonably arrive at a conclusion that by criminalising the convening of a gathering merely because no notice was given, section 12(1)(a) of the RGA unreasonably and unjustifiably limits the right to freedom of assembly in section 17 of the Constitution and is accordingly unconstitutional and invalid.
22. Section 17 of the Constitution provides that everyone has the rights, peacefully and unarmed, to assemble, demonstrate, to picket and to present petitions. The related rights to freedom of expression and freedom of association are entrenched in section 16 and section 18. Read together, these rights are the foundations of the Constitution's vision of a society in which human rights are respected and democratic values of equality, human dignity and freedom are protected and promoted.
23. According to *Currie and De Waal*<sup>18</sup> the RGA itself contains no explanation for the distinction between demonstration and gatherings and the 15 person threshold "*must be viewed as arbitrary*". The authors go on to state that:

*"Even if we accept the proposition that the State may legitimately restrict demonstrations as of right, the definitions of demonstration and gathering under the RGA not only inhibit the exercise of assembly but criminalise gatherings that pose absolutely no threat at all to order, property or other public goods"*

<sup>18</sup> Currie and De Waal, "*The Bill of Rights Handbook*", Juta, Sixth Edition at p 387

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24. The distinction which the RGA draws between a “gathering” and a “demonstration” and its imposition of criminal liability in section 12(1)(a) for convening a “gathering” in respect of which no notice in terms of section 3 has been given, may well be found void for vagueness and over breadth. The rule of law requires that rules be stated in a clear and accessible manner.<sup>19</sup>

## CONCLUSION

25. In the context of de-segregation and civil rights protests in the state of Alabama in the United States over fifty years ago, Judge Frank Johnson stated the following in *Williams v Wallace*<sup>20</sup>

*“...it seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case, the wrongs are enormous. (own emphasis) The extent of the right to demonstrate against these wrongs should be determined accordingly.”*

26. The applicants in this case find themselves with criminal records after engaging in a peaceful act of protest aimed at bringing attention to an ongoing violation of the fundamental rights of residents of informal settlement to human dignity: their ability to have access to toilets and sanitation without fear of being murdered or sexually assaulted.
27. There are reasonable prospects of a court of appeal finding the provisions of section 12(1)(a) of the RGA to be unconstitutional and invalid and that the convictions of the applicants on the basis of this provision cannot stand.

<sup>19</sup> *Davood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 47

<sup>20</sup> *Williams v. Wallace*, 240 F. Supp. 100, Middle District of Alabama, Northern Division, March 17, 1965

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28. It is accordingly submitted that the application for leave to appeal against the applicants' convictions on the main count of contravention of section 12(1)(a) of the RGA ought to be granted.

SHELDON MAGARDIE

*Counsel for the Applicants*

Chambers, Cape Town

9 July 2015

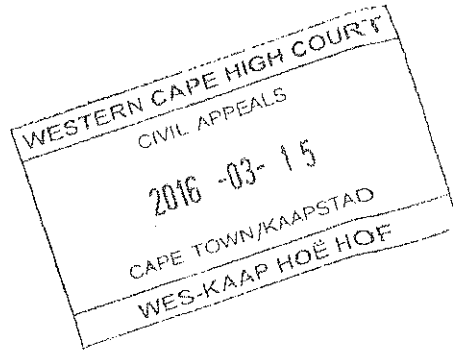
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IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE DIVISION, CAPE TOWN

Appeal Case No: A431/15

In the matter between:

PHUMEZA MHLUNGWANA  
XOLISWA MBADISA  
LUVU MANKQA  
NOMHLE MACI  
ZINGISA MRWEBI  
MLONDOLOZI SINUKU  
VUYOLWETHU SINUKU  
EZETHU SEBEZO  
NOLULAMA JARA  
ABDURRAZACK ACHMAT



First Appellant  
Second Appellant  
Third Appellant  
Fourth Appellant  
Fifth Appellant  
Sixth Appellant  
Seventh Appellant  
Eighth Appellant  
Ninth Appellant  
Tenth Appellant

and

THE STATE  
THE MINISTER OF POLICE

First Respondent  
Second Respondent

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NOTICE IN TERMS OF RULE 16A

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**KINDLY TAKE NOTICE** that in this appeal the Appellants raise the following constitutional issues:

1. The Appellants contend that section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 violates the right to freedom of assembly in s 17 of the Constitution, and is therefore unconstitutional and invalid, to the extent that it criminalises the convening of a gathering solely on the basis that:
  - 1.1. The gathering consists of 15 or more people; and
  - 1.2. No prior notice was given.
  
2. The Appellants contend that the criminalisation of a gathering of more than 15 people merely because no notice was given violates s 17 because:
  - 2.1. It makes it a crime to convene a peaceful, unarmed, gathering merely because the gathering is attended by 15 or more people and prior notice was not given; and
  - 2.2. It deters people from exercising their fundamental constitutional right to assemble peacefully and unarmed.
  
3. The limitation of the right to freedom of assembly further cannot be justified in terms of s 36(1) of the Constitution because:
  - 3.1. The limitation of the right to assembly is severe;
  - 3.2. The application to gatherings of only 15 people or more is arbitrary and unrelated to the purpose of the provision;
  - 3.3. Although the goal of regulating protests is legitimate, there are less restrictive means to achieve that goal, including:
    - 3.3.1. Non-criminal sanctions;

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- 3.3.2. Expanding the number of people that may be convened without notice; and
- 3.3.3. Relying on other existing criminal sanctions that permit police to deal with protests that pose some risk to public order or safety.

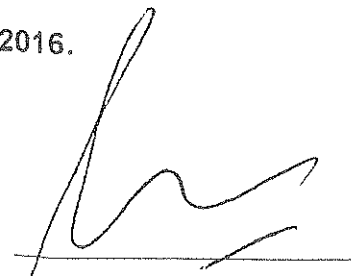
4. The Appellants will seek the following remedy:

- 4.1. Upholding their appeal and setting aside their conviction;
- 4.2. Declaring that ss 12(1)(a), read with s 1, of the RGA is unconstitutional and invalid to the extent that it criminalises convening a gathering of more than 15 people merely because no notice was given.

**TAKE NOTICE FURTHER** that any interested party may with the written consent of all parties to these proceedings, after having given notice no later than twenty (20) days from the date of the posting of this notice, be admitted as *amicus curiae* on such terms as agreed upon in writing between the parties.

**KINDLY** place this notice on the notice board of this Honourable Court that is designated for this purpose and ensure that it remains on the board for a period of twenty (20) days, and on the expiry of that period, place the notice in the Court file.

DATED AT CAPE TOWN THIS THE <sup>14<sup>th</sup></sup> DAY OF MARCH 2016.



**LEGAL RESOURCES CENTRE**

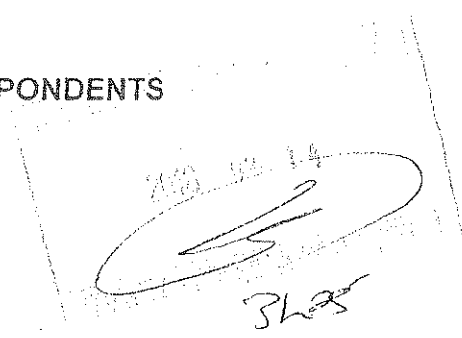
Attorneys for the Appellants



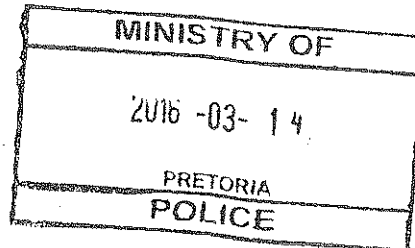
3<sup>rd</sup> Floor, Greenmarket Place  
54 Shortmarket Street  
Cape Town  
Tel: 021 481 3000  
Email: steve@lrc.org.za

**TO: THE REGISTRAR OF THE COURT**  
High Court of South Africa, Western Cape Division  
Cape Town

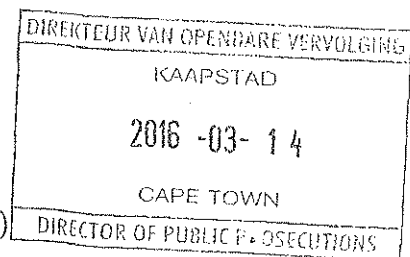
**AND TO: THE FIRST AND SECOND RESPONDENTS**  
c/o The State Attorney  
22 Long St  
Cape Town  
*M. Siselane.*



**AND TO: THE SECOND RESPONDENT**  
The Minister of Police  
120 Plein Street  
Cape Town



**AND TO: NATIONAL PROSECUTING AUTHORITY**  
115 Buitengracht Street  
Cape Town  
(Ref: Advocate Tarantaal 9/255/1 – 252/15)



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CONSTITUTION OF  
**E** EDUCATION



*Branch:* Any group of EE members, which has been given branch status by the NC in accordance with 14.19.

#### CHAPTER 4: VISION AND MISSION

4.1. Equal Education is a movement of learners, parents, teachers and community members working for quality and equality in South African education, through analysis and activism. The Movement is part of a broader democratic struggle for a free and equal society.

#### CHAPTER 5: AIMS OBJECTIVES AND ACTIVITIES

5.1. EE aims to be a research-informed, community-based, membership-based, youth oriented people's movement advocating for educational quality and equality in South African education, and for the defence and advancement of education as a public good.

5.2. The Movement will campaign to achieve equal and quality education for every person. The Movement may conduct a broad range of activities to achieve these aims and objectives. These activities may include, but are not limited to, the following:

5.2.1. Build a generation of young people and leaders who are socially and politically aware, committed to human rights and global environmental sustainability, personally responsible, active in struggles for freedom and equality, and who live by EE's values.

5.2.2. Develop the capacity of learners, parents, teachers, students, post-school youth and community members to drive improvement in schools and educational institutions. In this regard EE aims to be a base of community organising, a trusted source of information, a vehicle for training, and a

T.M.  
2011

strategic centre for struggles for quality education in South African schools.

- 5.2.3. Conduct and apply research on the state of the education system in South Africa.
- 5.2.4. Campaign, based on evidence, for a curriculum and pedagogy that promotes human dignity, creativity, social justice and the highest standards of content and rigour in teaching.
- 5.2.5. Engage constructively with the State on best practices in the management and governance of the education system including through meetings, letters or briefs and input into legislative and policy development processes.
- 5.2.6. Organise meetings, camps, seminars, lectures, conferences, summits and other activities involving learners, parents, teachers, activists and community members to advance the values and objectives listed in this Constitution.
- 5.2.7. Provide information about education and human rights to the public.
- 5.2.8. Write, speak, petition, campaign, picket, gather, march, and engage in any other form of peaceful action to advance the values and objectives listed in this Constitution.
- 5.2.9. Use all forms of media to advance the values and objectives listed in this Constitution.
- 5.2.10. Where necessary, use courts and legal processes to advance the values and objectives listed in this Constitution.

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- 5.2.11. Contribute to a strong civil society that holds private interests, government, individuals, and itself accountable to the values in this Constitution.
  - 5.2.12. Promote and, where necessary, defend basic democratic principles and rights, such as freedom of expression and association, access to information, privacy, good governance, participation in democratic elections, and freedom and security of the person, including freedom from sexual harassment and gender-based violence.
  - 5.2.13. Share information and ideas, and support campaigns of other organisations and movements locally and globally that advance freedom, equality and human rights.
- 5.3. Secondary activities to achieve the aims and objectives are:
- 5.3.1. Where resources allow, supporting individual members in accessing study opportunities, work opportunities and social services, with the principal aim being that such members invest their time and skills in building EE and advancing its values and objectives.
  - 5.3.2. Where resources allow, facilitating academic support for members in the form of tutoring, mentorship, extra lessons and study materials.
  - 5.3.3. Test an educational project or intervention in a particular area, and provide the resources needed.
- 5.4. In carrying out its activities, developing its materials and in its discussions the Movement shall encourage open discussion, and diversity and accessibility in respect of language and format.

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- 5.5. In carrying out its activities the Movement must consult reputable sources of information and evidence.

## CHAPTER 6: VALUES

- 6.1. Members of EE strive to:

- 6.1.1. Act with honesty and integrity in everything we do.
- 6.1.2. Be people of action and commitment who lead by example.
- 6.1.3. Engage in lifelong learning.
- 6.1.4. Respect and develop schools and educational institutions.
- 6.1.5. Struggle for social equality locally and globally, particularly in education.
- 6.1.6. Defend human rights, and work to eliminate direct and indirect discrimination and inequality based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, health or any other status.
- 6.1.7. Trust and support each other, and work cooperatively.
- 6.1.8. Hold our leaders and ourselves accountable.
- 6.1.9. Use the resources of the Movement with care.
- 6.1.10. Lead social transformation, especially in education, through analysis, evidence and peaceful activism.

T.M.  
24



Centre for Applied  
Legal Studies

DJ Du Plessis Building West Campus Wits Braamfontein  
Private Bag 3 Wits University 2050 South Africa  
Tel + 27 11 71 7-8600 Fax + 27 11 717 1702  
www.law.wits.ac.za/cals

**THE APPELLANTS**

c/o Legal Resources Centre Attorneys

3<sup>RD</sup> Floor Greenmarket Place

54 Shortmarket Street

Cape Town

Per email: steve@lrc.gov.za

**THE FIRST AND SECOND RESPONDENTS**

c/o The State Attorney

22 Long Street

Cape Town

Per email: ecapes@justice.gov.za

**THE MINISTER OF POLICE**

120 Plein Street

Cape Town

Per email: tuntulwanam@saps.gov.za

**NATIONAL PROSECUTING AUTHORITY**

115 Buitengracht Street

Cape Town

Per email: cclerk@npa.gov.za

14 April 2016

Dear all,

**RE: MLUNGWANA AND OTHERS V THE STATE AND OTHERS APPEAL CASE NO.  
A431/15**

*Tim  
Juy*



Centre for Applied  
Legal Studies

DJ Du Plessis Building West Campus Wits Braamfontein  
Private Bag 3 Wits University 2050 South Africa  
Tel + 27 11 717-8600 Fax + 27 11 717 1702  
[www.law.wits.ac.za/calis](http://www.law.wits.ac.za/calis)

1. We write to you as the group of Civil Society Organisations listed below. Our various entities work on human rights issues across the country, respectively as human rights organisations, research and advocacy organisations, social movements and law clinics.
2. We have become aware of the matter of *Mlungwana and others v the State and others* which is currently pending on appeal before the Western Cape High Court. We are in receipt of the Rule 16A notice filed by the appellants, in terms of which any persons seeking leave to intervene as amici curiae are required to seek consent from the parties on or by Thursday, 14 April 2016.
3. As organisations working to uphold, promote and respect the Constitution, and the Rule of Law, we have a keen interest in protecting the right to assembly, demonstration, picket and petition, as well as ancillary rights in the Constitution. The organisations listed below are all involved through their own work, and/or assisting clients, in monitoring and protecting the civil space for gatherings. The organisations are also involved in organising gatherings and/or representing clients through notification processes for gatherings, and defending the right to protest. As such, we are of the view that your matter will have implications for our clients and our organisations.
4. We wish to express that we may have similar or unique submissions to make in this matter, and to that end are considering intervening in this matter, either individually as separate organisations as a collective of Amici Curiae, or as some combination of the two.
5. Our ability to assess whether an intervention will be useful to the court, and what submissions can be made, depends on the arguments that will be raised by the various parties in the matter. As the parties are yet to make submissions, we are not in a position to seek consent to be admitted as Amici today, the 14<sup>th</sup> of April 2016.

A handwritten signature in black ink, appearing to read 'T. du Plessis', is located in the bottom right corner of the page.



Centre for Applied  
Legal Studies

DJ Du Plessis Building West Campus Wits Braamfontein  
Private Bag 3 Wits University 2050 South Africa  
Tel + 27 11 717-8600 Fax + 27 11 717 1702  
www.law.wits.ac.za/calis

6. Once we have seen your respective submissions and are of the opinion that our intervention will be of value to the Court, we will send formal letters requesting consent to intervene with details of our intervention, and intend to do so without delay or causing prejudice to any of the parties.
7. In order for us to determine whether our intervention would be of any assistance to the Court in this matter, we request that you share your various submissions with us as soon as they are available.

Regards,

Centre for Applied Legal Studies

Lawyers for Human Rights

Freedom of Expression Institute

Right to Know Campaign

Equal Education



29 June 2016

The Appellants

c/o Legal Resources Centre  
3<sup>rd</sup> Floor, Greenmarket Place  
54 Shortmarket Street  
Cape Town

Per E-mail: [steve@lrc.gov.za](mailto:steve@lrc.gov.za)

The First and Second Respondents

c/o The State Attorney  
22 Long Street  
Cape Town

Per E-mail: [ecapes@justice.gov.za](mailto:ecapes@justice.gov.za)

The Second Respondent

The Minister of Police  
120 Plein Street  
Cape Town

Per E-mail: [tuntulwanam@saps.gov.za](mailto:tuntulwanam@saps.gov.za)

National Prosecuting Authority

115 Buitengracht Street

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

(PBO)

Trustees:

Adv Janice Bleazard  
Itumeleng Mahabane  
IT2966/2011

Dr Ursula Hoadley  
Adv Kameshni Pillay  
Centre

Yoliswè Dwyane  
Doron Isaacs

Prof Halton Cheadle  
Justice Catherine O'Regan

6 Spln Street  
Cape Town 8001

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

[info@eelawcentre.org.za](mailto:info@eelawcentre.org.za)

[www.eelawcentre.org.za](http://www.eelawcentre.org.za)

Public Benefit Organisation

{Exemption No: 930038683}

NPO No: 099-658-NPO  
Trust Certificate No.

The Equal Education Law

Trust is a registered Trust.

T.M.  
2016



Cape Town

Per E-mail: [cclerk@npa.gov.za](mailto:cclerk@npa.gov.za)

Dear Sirs / Madams

**RE: MHLUNGWANA AND 9 OTHERS VS THE STATE AND OTHERS – CASE NO.:  
A431/15**

1. We refer to the above matter and the appeal lodged in the Western Cape High Court under case no.: A431/15 in the matter of *Phumeza Mhlungwana and 9 Others vs The State and Others*, specifically your notice in terms of Rule 16A of the Uniform Rules of Court to all interested parties to apply to the above Honourable Court to be admitted as *amicus curiae*, upon obtaining the written consent of all parties to the proceedings.
2. We act on behalf of Equal Education (EE), a social movement whose members are learners, teachers, parents and community members working for quality and equality in South African education, through analysis and activism.
3. In order to achieve its objectives, EE conducts a broad range of activities that include but are not limited to the following:
  - 3.1. developing the capacity of its members and supporters to drive improvement in their schools and educational institutions;
  - 3.2. conducting and applying research on the state of the education system in South Africa;
  - 3.3. engaging constructively with the State on best practices in the management and governance of the education system including through meetings, letters or briefs and input into legislative and policy development processes;
  - 3.4. where necessary, using the courts and legal processes to advance the values of, and to contribute to, a strong civil society that holds private interests, government, individuals, and itself accountable.

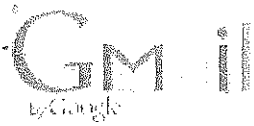
4. Since its inception in 2008, EE members, and supporters, many of whom are children, have participated in numerous peaceful protests. Many but not all of these have been undertaken with notice under the Regulation of Gatherings Act, and in some cases notice has been given but the relevant authorities have refused to "permit" the gathering to proceed.
5. Having regard to its objectives in the promotion of the realisation of the constitutional rights to education, equality, and the rights of children in South Africa, EE wishes to be admitted as *amicus curiae* in the above-mentioned appeal proceedings.
6. If admitted, EE intends to make written and oral submissions on the way in which the criminalisation for gatherings without notice fails to take into account the constitutional imperative that in any matter concerning a child, best interests of the child is of paramount importance.
7. As a result of the nature of its work, EE is uniquely placed to be of assistance to the Court by making submissions relevant to the legal issues to be determined in this matter.
8. We hereby request your consent for the admission of EE as *amicus curiae* in the above mentioned proceedings.
9. EE will, upon its admission, deliver written submissions within a reasonable and agreeable time after the parties have filed their heads of argument.
10. We ask that your client provides us with written consent as soon as reasonably possible, and by 3 July 2016.

Yours faithfully,



EQUAL EDUCATION LAW CENTRE

PER: Ms. CN Stuurman



Chandre Stuurman <chandre@eelawcentre.org.za>

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## Mhlungwana and Others vs The State and Others - Case No.: A431/15

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Steve Kahanovitz <steve@lrc.org.za>

6 July 2016 at 11:53

To: Chandre Stuurman <chandre@eelawcentre.org.za>, ecapes@justice.gov.za, tuntulwanam@saps.gov.za, cclerk@npa.gov.za

Cc: Daniel Linde <daniel@eelawcentre.org.za>, Nurina Ally <nurina@eelawcentre.org.za>, Ntuthuzo Ndzomo <ntuthuzo@equaleducation.org.za>, Kyle Bailey <kyle@equaleducation.org.za>, MSisilana@justice.gov.za

Dear Ms Stuurman

Our clients, the appellants have no objection to your client being admitted as an amicus herein

Kind regards

Steve Kahanovitz

Legal Resources Centre

Cape Town , South Africa

steve@lrc.org.za

tel 27-21-4813000

fax27-21-4230935

cell 0832350962

www.lrc.org.za

---

**From:** Steve Kahanovitz [mailto:steve@lrc.org.za]

**Sent:** 30 June 2016 11:42 AM

**To:** 'Chandre Stuurman'; 'ecapes@justice.gov.za'; 'tuntulwanam@saps.gov.za'; 'cclerk@npa.gov.za'

**Cc:** 'Daniel Linde'; 'Nurina Ally'; 'Ntuthuzo Ndzomo'; 'Kyle Bailey'

**Subject:** RE: Mhlungwana and Others vs The State and Others - Case No.: A431/15

Dear Ms Stuurman

We acknowledge receipt of your letter and will revert to you shortly

Kind regards

T.M.  
2016

Office of the Director of Public Prosecutions



The National Prosecuting Authority of South Africa  
Igunya Jikelele Labeshutshisi boMzantsi Afrika  
Die Nasionale Vervolgingsgesag van Suid-Afrika

Ref: 9/2/5/1-252/15  
Enq: Ms R Claassen

2016 -07- 15

**REGISTERED**

**CAPE TOWN**

Tel: +27 21 487-7000  
21 487-7167

115 Buitengracht  
Cape Town  
8000

Private Bag 9003  
Cape Town  
8000  
South Africa

www.npa.gov.za

The Head  
Equal Law Education Centre  
6 Spin Street  
1<sup>st</sup> Floor  
**CAPE TOWN**  
8001

Email: [info@eelawcentre.org.za](mailto:info@eelawcentre.org.za).

Madam

**APPEAL: PHUMEZA MLUNGWANA AND NINE OTHERS**  
**APPEAL NUMBER: A (D) 04/15**

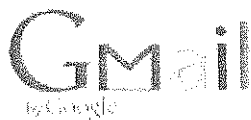
I have noted the contents of your letter dated 29.06.2016.

I have no objection to your being added as an amicus curiae in the matter.

Yours faithfully

**RJ DE KOCK**  
**DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE**





Melanie Boltman &lt;melanie@eelawcentre.org.za&gt;

**Fwd: SV MHLUNGWANA & OTHERS (SJC and Regulations of Gatherings Act**

1 message

Nurina Ally <nurina@eelawcentre.org.za>  
To: Melanie Boltman <melanie@eelawcentre.org.za>

Tue, Aug 30, 2016 at 10:24 AM

----- Forwarded message -----

From: **Daniel Linde** <daniel@eelawcentre.org.za>  
Date: 5 August 2016 at 14:33  
Subject: Re: SV MHLUNGWANA & OTHERS (SJC and Regulations of Gatherings Act  
To: steve@lrc.org.za  
Cc: dario.milo@webberwentzel.com, Chandre Stuurman <chandre@eelawcentre.org.za>, Keamogetswe Thobakgale <kea@seri-sa.org>, sandra.coliver@opensocietyfoundations.org

Dear Steve

Thanks for this update.

Equal Education will only file heads of argument. Once your timelines are clarified, please let us know when we should have that in.

Kind regards  
Daniel Linde

----- Forwarded message -----

From: "Steve Kahanovitz" <steve@lrc.org.za>  
Date: 04 Aug 2016 4:55 PM  
Subject: SV MHLUNGWANA & OTHERS (SJC and Regulations of Gatherings Act  
To: "Dario Milo" <dario.milo@webberwentzel.com>, "Chandre Stuurman" <chandre@eelawcentre.org.za>, "Keamogetswe Thobakgale" <kea@seri-sa.org>  
Cc: "Sandra Coliver" <sandra.coliver@opensocietyfoundations.org>

Dear colleagues

We have had further discussions this morning with Adv Stephen SC of the NPA regarding this appeal. . As you are aware the Minister of Police has filed an affidavit opposing this application – copy attached in case you haven't seen it .

We are trying to finalize dates with the NPA who will (probably ) not be filing an affidavit . The dates in part will depend on whether the amici wish to file affidavits or only heads of argument . If only heads of argument then acting for the appellants we will propose to the

NPA that we reply to the Minister's submissions this month – otherwise we will have to await amici submissions and then reply probably late September .

I would appreciate it if you could indicate to us if your clients will be filing heads or will want to in addition file an (earlier) affidavit - this will then inform my discussion with the NPA regarding dates

Kind regards

Steve Kahanovitz

Legal Resources Centre

Cape Town , South Africa

steve@lrc.org.za

tel 27-21-4813000

fax27-21-4230935

cell 0832350962

www.lrc.org.za

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**Daniel Linde**  
Deputy Director



**Tel:** +2721 461 1421/3551

**Mobile:** +2783 601 0091

**Fax:** +2786 572 4675

**Website:** [www.eelawcentre.org.za](http://www.eelawcentre.org.za)

**Twitter:** @Daniel\_Linde or @EELawcentre

**Address:** 3rd Floor Isivivana, 8 Mzala Street, Khayelitsha, 7784

--

**Daniel Linde**  
Deputy Director



**Tel:** +2721 461 1421/3551

**Mobile:** +2783 601 0091

**Fax:** +2786 572 4675

**Website:** [www.eelawcentre.org.za](http://www.eelawcentre.org.za)

**Twitter:** @Daniel\_Linde or @EElawcentre

**Address:** 3rd Floor Isivivana, 8 Mzala Street, Khayelitsha, 7784



Melanie Boltman <[melanie@eelawcentre.org.za](mailto:melanie@eelawcentre.org.za)>

**Fwd: Mhlungwana and Others // The State and Another ( Regulation of Gatherings Act ): Request for Consent**

1 message

Nurina Ally <[nurina@eelawcentre.org.za](mailto:nurina@eelawcentre.org.za)>  
To: Melanie Boltman <[melanie@eelawcentre.org.za](mailto:melanie@eelawcentre.org.za)>

Tue, Aug 30, 2016 at 10:32 AM

----- Forwarded message -----

From: "Chandre Stuurman" <[chandre@eelawcentre.org.za](mailto:chandre@eelawcentre.org.za)>  
Date: 22 Aug 2016 9:45 AM  
Subject: Mhlungwana and Others // The State and Another ( Regulation of Gatherings Act ): Request for Consent  
To: <[mssilana@justice.gov.za](mailto:mssilana@justice.gov.za)>  
Cc:

Dear Mr Sisilana,

We refer to the above matter and our letter of 29 June 2016, in terms of which we wrote on behalf of Equal Education, requesting the written consent of the Minister of Police to intervene as amicus curiae. We have now obtained the written consent of the Appellants as well as that of the National Prosecuting Authority, however, we still await a response from the Minister of Police. A copy of our letter of 29th June is attached, for your attention. Kindly let us have your response by Wednesday, 24 August 2016.

We look forward to hearing from you.

Yours sincerely,  
Chandre Stuurman  
Attorney / Prokureur  
**Equal Education Law Centre (EELC)**  
Tel : +2721 461 1421 / +2721 461 3551  
Fax: +2786 5724 675  
Cell: +2776 880 6133  
[www.eelawcentre.org.za](http://www.eelawcentre.org.za)  
3rd Floor  
Isivivana Centre  
8 Mzala Street  
Khayelitsha  
7784



**EQUAL  
EDUCATION  
LAW CENTRE**

29. 06. 2016 - Mhlungwana and Others vs The State and Others.pdf



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8/30/2016 10:34 A  
*DM*

TML

The State Attorney  
Die Staatsprokureur  
iGqweta IikaRhulumente  
4<sup>th</sup> FLOOR  
22 Long Street  
CAPE TOWN  
8001

Postal address  
Private Bag X 9001  
CAPE TOWN  
8000  
Tel: 021 441-9200  
021 441 9289  
Fax: 021 421-9364  
[MSisilana@justice.gov.za](mailto:MSisilana@justice.gov.za)  
Docex 156

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My Ref: 505/16/P18

Your Ref:

---

Tuesday, 23 August 2016

EQUAL EDUCATION LAW CENTRE  
6 Spin Street  
CAPE TOWN  
8001

Attention: Ms CN Stuurman  
By E-mail: [chandre@eelawcentre.org.za](mailto:chandre@eelawcentre.org.za)

Dear Madam,

**RE: MHLUNGWANA AND 9 OTHERS / THE STATE AND OTHERS – CASE NO. A431/15**

1. We refer to your letter dated 29 June 2016, which never reached our office.
2. Our office only received your letter on the 22<sup>nd</sup> August 2016 when it was enclosed in your email dated 22 August 2016.
3. Be that as it may, our instructions are to consent to your late request for the admission as *amicus curiae* on the basis that you are afforded an opportunity to make written and oral submissions in respect of the Constitutional challenge.
4. Our client does not however, agree to your client's placing any further evidence before the court, to the extent that it may seek to do so.

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Always quote my reference number / Haal altyd my verwysingsnommer aan / Maxa onke yixele inombolo yesalathiso sam

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5. Client is however, concerned about your client's meeting the deadline proposed by the applicants in filing papers, unless your client intends to follow same approach adopted by other *amicus curiae* of not filing any affidavit, instead they will file Heads of Argument no less than 10 days before the date on which the appeal is set down.
6. Also your client being able to present oral argument at the appeal hearing.
7. Lastly it is prudent that your client familiarise with the time table proposed by the applicants and accepted by the Respondents.
8. We trust the above is in order.

Yours faithfully,

STATE ATTORNEY

Per M SISILANA

T.M.  
2017