

**SABWIL HUMAN RIGHTS COURT THULAMELA CHAMBERS,  
SANDTON**

**Case no: 1212/2018**

**In the matter between:**

PROVIDENCE HOPE HIGH

**Applicant**

**and**

MEC FOR EDUCATION, NORTH WEST

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

MINISTER FOR BASIC EDUCATION

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

ABANTWANA COMMUNITY CENTRE

**Amicus curiae**

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**AMICUS CURIAE SUPPLEMENT HEADS OF ARGUMENT**

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Upon having the benefit to peruse the submissions made by the parties to this case, the Amicus curiae has identified that there are further submissions which the Amicus curiae believes can be of assistance to the Honourable Court, which factors are relevant but not covered by the parties.

The Amicus curiae identifies the following submissions as relevant:

**1. Nature of the right to basic education**

**1.1.** A right in the bill of rights can be expressed:

**1.1.1.** Plainly as a right (i.e. unqualified) e.g. “everyone has a right to basic education”<sup>1</sup>

**1.1.2.** With a qualification, e.g. “everyone has a right to further education”, which the state, through reasonable measures, must make progressively available and accessible’,<sup>2</sup>

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<sup>1</sup> section 29(1)(a) Constitution of Republic of South Africa 1996.

<sup>2</sup> section 29(1)(b) Constitution of Republic of South Africa 1996.

- 1.1.3. Implied through expression of a negative duty, e.g. no one may be deprived of property.<sup>3</sup> Implies that everyone has a right to property.
- 1.2. If a right is qualified, its realisation can be limited by the qualification it bears, e.g. with the further education, it is subject to the state taking reasonable incremental steps to progressively realise the right.<sup>4</sup>
- 1.3. However, if a right is unqualified, such as the right to basic education, it is immediately realisable.<sup>5</sup>
- 1.4. Therefore, "basic education unlike some of the other socio-economic rights, is immediately realisable. There is no internal limitation requiring that the right be progressively realised", within "available resources" subject to "reasonable legislative measures".<sup>6</sup>

## 2. Constitutionality of the Limitation

- 2.1. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is, "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".<sup>7</sup>
- 2.2. There is no law which has been raised which permits the limitation of the right to education, equality and/or human dignity by enabling the exclusion of subsidy allocation for sanitary pad initiative.
- 2.3. To that extent the exclusion of the sanitary pad initiative from the subsidy allocation policy, in light of the facts of this case is unconstitutional, due to bearing no justifiable limitation.
- 2.4. The State's obligation to provide for basic education is guaranteed by the Constitution and is not confined to making places available at schools<sup>8</sup>

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<sup>3</sup> section 25 Constitution of Republic of South Africa 1996.

<sup>4</sup> section 29(1)(b) Constitution of Republic of South Africa 1996.

<sup>5</sup> section 29(1)(a) Constitution of Republic of South Africa 1996.

<sup>6</sup> *Governing Body of The Juma Masjid Primary School v Kyubwa* 2011 JDR 0343 p20

<sup>7</sup> Section 36(1) Constitution of Republic of South Africa 1996; *Governing Body of The Juma Masjid Primary School v Kyubwa* 2011 JDR 0343 20

<sup>8</sup>

- 2.5. For every right there are corresponding duty.
- 2.6. A duty can be positive or negative.
- 2.7. Although the right to basic education doesn't prescribe a positive duty on the Respondents, it does imply a corresponding negative duty on the Respondents to not deprive persons from basic education.

### **3. Respondent's duty**

- 3.1. The decision by the First Respondent, to not make a subsidy allocation to the sanitary pad initiative is in breach of this positive duty in that it indirectly perpetuates absenteeism which the School Act frowns upon because attendance is compulsory.<sup>9</sup>
- 3.2. This absenteeism in turn is skewed towards female learners thus unfairly discriminating against the female learners on the basis of sex and social origin.
- 3.3. Consequently, the dignity of the female learners is handicapped in that, they perform at a lower rate than their male counterparts and are prejudiced from scholarship opportunities.<sup>10</sup>
- 3.4. The extent of contraventions being made on by the Respondent on various fundamental rights of the female learners handicaps the paramountcy of best interest of the child.<sup>11</sup> This, in addition to the unqualified nature of the right to education, should prompt the Respondent to be compelled to immediately realise the right to education, by allocating a subsidy to the sanitary pad initiative in order to assist the school in addressing the problem of absenteeism and also protect rights which were consequently infringed as a result.

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<sup>9</sup> Section 3(1) South African Schools Act 84 of 1996.

<sup>10</sup> section 10 Constitution of Republic of South Africa 1996.

<sup>11</sup> section 28(2) Constitution of Republic of South Africa 1996.