

IN THE HIGH COURT OF SOUTH AFRICA  
NORTH GAUTENG HIGH COURT (PRETORIA)

Case No: 55896/2007

Case No: 10235/2008

In the application for admission as an amicus curiae of

CENTRE FOR APPLIED LEGAL STUDIES

Applicant

In the matter between  
AGRI SOUTH AFRICA

Plaintiff

and

MINISTER OF MINERALS AND ENERGY

Defendant

And

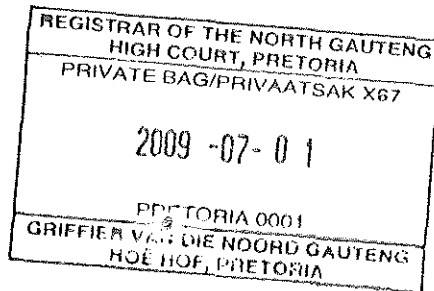
In the matter between  
ANNIS MOHR VAN ROOYEN

Plaintiff

and

MINISTER OF MINERALS AND ENERGY

Defendant



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NOTICE OF MOTION:

APPLICATION TO BE ADMITTED AS *AMICUS CURIAE*

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PLEASE TAKE NOTICE that the Centre for Applied Legal Studies hereby makes application to the above Honourable Court for an order in the following terms:

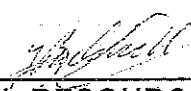
1. To the extent necessary, the late filing of the applicant's application for admission as *amicus curiae* is condoned;
2. The applicant is admitted as *amicus curiae* in the above proceedings in terms of Rule 16A of the Uniform Rules of Court;
3. The applicant is granted:
  - 3.1. the opportunity to submit written argument in the above matter;
  - 3.2. the opportunity to submit oral argument at the hearing of the above matter;
  - 3.3. the opportunity to adduce the evidence described in the founding affidavit attached hereto.
4. Further or alternative relief.

TAKE NOTICE FURTHER that the affidavit of JACQUELINE CLAIRE ANNETTE DUGARD and the annexures thereto will be used in support of this application.

TAKE NOTICE FURTHER that the applicant has appointed the offices of its attorneys set out below as the address at which it will accept notice and service of all documents in these proceedings.

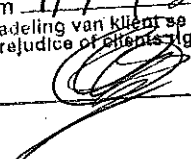
TAKE NOTICE FURTHER that should you intend to oppose this application, you are required to file an answering affidavit within five days of the date of service of this application setting out clearly and succinctly the grounds of such opposition.

DATED AT JOHANNESBURG THIS 30<sup>th</sup> DAY OF JUNE 2009.

  
**LEGAL RESOURCES CENTRE**  
Applicant's attorneys  
9<sup>th</sup> Floor, Bram Fischer House  
25 Rissik Street  
Johannesburg  
Ref: J Brickhill  
c/o LOUISE DU PLESSIS ATTORNEYS  
116 Infotech Building  
1090 Arcadia Street  
Hatfield  
Tel: 012 342 3005  
Fax: 012 342 3005  
Ref: L du Plessis

TO: THE REGISTRAR  
PRETORIA

AND TO: MACROBERT INC  
Plaintiff's Attorneys (Agri South Africa matter)  
Cnr Charles and Duncan Streets  
Brooklyn  
PRETORIA  
Ref: SM Jacobs/684526

MacRobert Inc  
Attorneys  
Date/Datum 1/7/2009  
Sonder benadeling van klient se regte  
Without prejudice of clients rights  
Get./Sign  10/45

AND TO: GEO KILLIAN ATTORNEYS  
Plaintiff's Attorneys (Van Rooyen matter)  
1<sup>st</sup> Floor, Harrogate Park  
1237 Pretorius Street  
Hatfield  
Ref: Mr Geo Killian

Hack, Stupel and Ross  
Standard Bank Chambers  
Church Square  
Tel: (012) 325 4185  
Ref: Foxcroft 1ck / RF 1817

1/7/2009 12:36  
ACCEPTED WITHOUT PREJUDICE  
HACK STUPEL & ROSS  
2<sup>ND</sup> FLOOR  
STANDARD BANK CHAMBERS  
CHURCH SQUARE PRETORIA

AND TO: STATE ATTORNEY  
Defendant's Attorneys  
Bothongo Heights  
8<sup>th</sup> Floor  
167 Andries Street  
PRETORIA  
Ref: Mr SP Mathebula/6658/2007/ Z51 SMCG

STAATSPROKUREUR
PRIVAATSAK/PRIVATE BAG X91
2009 -07- 01
PRETORIA 0001
STATE ATTORNEY

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ACCEPTED WITHOUT PREJUDICE

IN THE HIGH COURT OF SOUTH AFRICA  
NORTH GAUTENG HIGH COURT (PRETORIA)

Case No: 55896/2007

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In the application for admission as *amicus curiae* by

**CENTRE FOR APPLIED LEGAL STUDIES**

Applicant

In the matter between

**AGRI SOUTH AFRICA**

Plaintiff

and

**MINISTER OF MINERALS AND ENERGY**

Defendant

And

In the matter between

**ANNIS MOHR VAN ROOYEN**

Plaintiff

and

**MINISTER OF MINERALS AND ENERGY**

Defendant

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FOUNDING AFFIDAVIT:  
APPLICATION TO BE ADMITTED AS AMICUS CURIAE

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*Handwritten initials*

I, the undersigned

**JACQUELINE CLAIRE ANNETTE DUGARD**

make oath and state:

- 1 I am a senior researcher employed at the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand, 1 Jan Smuts Avenue, Johannesburg. I am duly authorised to depose to this affidavit on behalf of CALS.
- 2 The facts contained herein are to the best of my knowledge true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge.
- 3 In this application, CALS seeks admission as *amicus curiae* in the present proceedings. The purpose of this affidavit is to set out the basis of the application in accordance with the requirements of Rule 16A of the Uniform Rules of Court.

## **I INTRODUCTION**

4 In this affidavit, I address the following issues:

- 4.1 the juristic nature and relevant details of CALS;

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- 4.2 the conduct of CALS in complying with Rule 16A of the Uniform Rules of Court and condonation for any non-compliance with the Rule;
- 4.3 the legal submissions that CALS seeks to advance; and
- 4.4 the evidence that CALS seeks to adduce.

## **II THE CENTRE FOR APPLIED LEGAL STUDIES**

- 5 The applicant is the University of the Witwatersrand, acting through CALS, situated at 1 Jan Smuts Ave, Braamfontein.
- 6 CALS is a centre that exists within the University. The University is a juristic person and a tertiary education institution registered in terms of the Higher Education Act No 101 of 1997.
- 7 CALS has been established for the purposes of promoting, protecting and advancing human rights through the utilisation of the law. It seeks to strengthen constitutional democracy and promote social justice and equality in South Africa. In carrying out its functions, CALS undertakes litigation as well as research, advocacy, legal training and teaching. The aforementioned functions have been approved by the Vice-Chancellor of the University in terms of its rules, policies and procedures including the Delegation of Authority Document. A confirmatory



affidavit of the Vice-Chancellor of the University of the Witwatersrand confirming these details will be delivered with this affidavit.

8 CALS has a particular interest in issues concerning socio-economic rights. This interest is long-standing and dates back to before the present constitutional era. Among the current areas of focus of CALS are basic services, sanitation, housing and environmental rights. CALS has substantial expertise in these areas of academic research and public interest litigation.

9 In the past two years, CALS has been involved as attorneys of record for a principal party, attorneys for an *amicus curiae* or as as the *amicus* itself in a number of high profile public interest cases. CALS has most recently been involved in the following cases that have been heard, or will be heard, by the Constitutional Court:

9.1 *Occupiers of 51 Oljvia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (CCT 24/07);

9.2 *Residents of Joe Slovo Community Western Cape v Thubelisha Homes and Others* (CCT 22/08);

9.3 *Trustees for the time being of the Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08);

9.4 *Joseph and Others v City of Johannesburg and Others* (CCT 43/09); and



9.5 *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09).

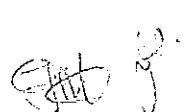
10 Accordingly, I respectfully submit that CALS is well placed to make legal submissions and adduce evidence in this matter, and to be of assistance to this Court in the decision of the important public interest issues that are at stake.

11 As I shall demonstrate more fully below, CALS seeks to intervene in this matter in the public interest and in pursuit of its objective of promoting human rights and, in particular, in order to make submissions regarding the permissive space that the state enjoys under the Constitution and international law to adopt regulatory measures aimed at promoting substantive equality and social justice, and to lead appropriate evidence.

### III COMPLIANCE WITH RULE 16A AND CONDONATION

12 On or about 20 May 2009, the Defendant published a notice in terms of Rule 16A, setting out the constitutional issue(s) arising in this matter and the procedure in terms of which any prospective *amicus curiae* should seek admission. The notice advised prospective *amici curiae* that, in order to be admitted as such, they could either:

12.1 obtain the consent of the parties to their admission within twenty (20) court days of the date of the publication of the Defendant's notice in terms of Rule 16A; or



12.2 in the absence of the consent of the parties, make application to the above Honourable Court to be admitted as *amici curiae* within five (5) days of the expiry of the period referred to in paragraph 12.1 above.

13 As I set out in more detail below, CALS timeously addressed requests to the parties for their consent to its admission within the period of twenty days contemplated in the Defendant's Rule 16A notice, but was not granted the consent of all the parties, thus necessitating this application. handwritten to the date

14 On Monday, 15 June 2009, the Legal Resources Centre (LRC), as the attorneys for CALS, wrote to the legal representatives of the parties requesting their consent to the admission of CALS as *amicus curiae*. A copy of the LRC's letter is attached, marked "JD1". In that letter, CALS requested the consent of the Plaintiffs and Defendant to be permitted to intervene as *amicus curiae* and indicated that, if admitted, CALS intends to:

14.1 Make written and oral legal submissions; and

14.2 Introduce limited evidence.

15 On Thursday, 18 June 2009, the State Attorney responded to the LRC's request, advising that the Defendant consents to the admission of CALS as *amicus curiae* for the purposes of making legal submissions, but that the Defendant would have to consider whether to consent to CALS's admission for the purposes of leading

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evidence when it becomes clear what evidence CALS seeks to adduce. A copy of the State Attorney's letter is attached, marked "JD2".

16 On Monday, 22 June 2009, the attorneys for the Plaintiff in the *Van Rooyen* matter responded to the request of CALS, stating that their client does not consent to the admission of CALS. A copy of the letter is attached, marked "JD3".

17 On 17 June 2009, MacRobert Inc., the attorneys for the Plaintiff in the *Agri South Africa* matter, delivered a letter to the LRC, a copy of which is attached marked "JD4", stating that they required more time to take instructions before responding to CALS' request. On Friday, 19 June 2009, MacRobert delivered a further letter, enquiring as to the "mechanism" by which the LRC seeks the admission of CALS as *amicus curiae* "in view of the fact that we are dealing with an action". A copy of MacRobert Inc.'s letter is attached, marked "JD5". The LRC's response of the same date, a copy of which is attached as annexure "JD6", advised that CALS seeks admission in terms of Rule 16A, which is applicable both to application and action proceedings, and pursuant to the Defendant's notice in terms of Rule 16A.

18 On 24 June 2009, MacRobert Inc. wrote to the LRC seeking details as to the practical manner in which CALS proposes to intervene. A copy of that letter is attached marked "JD7". The LRC responded the following day, providing such details in terms materially similar to the contents of paragraphs 51 to 52 below, and requesting a response to CALS's request for consent to be admitted on or before close of business on Friday, 26 June 2009. A copy of this letter of the LRC is also attached marked "JD8".

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- 19 On 29 June 2009, MacRobert Inc. responded to the LRC, among other things inviting CALS to furnish their client with its affidavit or pleading in terms of Rule 16A, after which the terms and conditions upon which CALS will be admitted as an *amicus curiae* could be agreed in writing between the parties. A copy of the letter is attached, marked "JD9".
- 20 Because CALS has failed to obtain the consent of all the parties to its admission, it has become necessary for CALS to bring this application to be admitted as *amicus curiae* in terms of Rule 16A.

#### Condonation

- 21 In terms of Rule 16A(5), if an interested party is unable to obtain the consent of the parties to its admission as *amicus curiae* within twenty days of the publication of the requisite notice in terms of Rule 16A(1), such interested party may make application to the court to be admitted as an *amicus curiae* within five days.
- 22 The twenty-day period (from 20 May 2009, when the Defendant published its notice in terms of Rule 16A(1)) expired on 18 June 2009. Accordingly, this application ought to have been lodged on or before 25 June 2009.
- 23 CALS addressed requests to the legal representatives of the parties seeking their consent to its admission within the twenty-day period contemplated by Rule 16A(1). However, the final response to its request was only received on 29 June 2009.

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- 24 Until the attitudes of the parties to the admission of CALS had been ascertained, it would have been premature to institute this application. However, in anticipation of the possibility that the parties would not consent to the admission of CALS, the legal representatives of CALS commenced the preparation of this application at the same time as sending the letter to the parties seeking their consent.
- 25 This application was prepared with all deliberate speed during the weeks of 15 and 22 June 2009. The application involves complex issues, including the legal issues in respect of which CALS seeks to make submissions, as well as the factual matters in relation to which CALS intends to adduce evidence. It was necessary to conduct legal research regarding the applicable international law principles and the law in foreign jurisdictions. In addition, it was necessary to hold consultations with CALS's counsel in this matter, and extensive telephonic consultations were held with counsel on 15 and 22 June 2009.
- 26 In addition, in light of CALS's juristic nature and institutional relationship to the University of the Witwatersrand, it was necessary to secure the approval of the University for this intervention by CALS and to obtain the confirmatory affidavit of the Vice-Chancellor referred to above.
- 27 This application was prepared as expeditiously as possible.
- 28 In the circumstances, this affidavit will be filed some four court days late. I respectfully submit that this delay has not resulted in any prejudice to the parties. CALS did not intend any disrespect to this Court in failing to submit this application

timeously, and I apologise for its late delivery. CALS furthermore respectfully submits that this Court ought to condone the lateness in filing in order that it may be assisted in its determination of the complex and important public interest issues that are raised in this matter.

- 29 In the circumstances, to the extent necessary, CALS prays that the late filing of this application be condoned.

#### **IV THE LEGAL SUBMISSIONS THAT CALS INTENDS TO ADVANCE**

- 30 The legal submissions that CALS intends to advance will address the proper interpretation of the relevant provisions of the Minerals and Petroleum Resources Development Act 28 of 2002 ("MPRDA") and section 25 of the Constitution, in the light of relevant:

30.1 provisions of the Constitution;

30.2 international law; and

30.3 foreign law

in terms of sections 39(1) and (2) of the Constitution.

- 31 Section 39(1) of the Constitution governs the interpretation of the provisions of the Bill of Rights. It provides that a court interpreting a provision of the Bill must

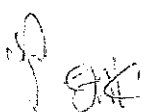
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consider (both binding and non-binding) international law, and may consider foreign law. Accordingly, when this Court approaches the interpretation of section 25 of the Constitution, which together with sections 9 and 24 of the Constitution is relevant to the disposition of the matter, it is appropriate to consider relevant foreign law and necessary to consider relevant international law.

32 I shall now outline briefly the legal submissions that CALS intends to make, if admitted, in respect of relevant constitutional provisions, international law and foreign law, and their interrelationship. I respectfully submit that these legal submissions are relevant, will be of assistance to the Court, and would otherwise not be before the Court because the submissions have not or would not be advanced by the other parties to the matter.

Constitutional provisions relevant to the interpretation of section 25 of the Constitution and to the interpretation of the MPRDA

33 Transformation and the achievement of substantive equality are fundamental constitutional objectives underpinned by a number of constitutional provisions. As its preamble makes clear, the MPRDA is animated by these constitutional objectives and the legislature's recognition of the need to make reforms to bring about equitable access to South Africa's mineral and petroleum resources and to take legislative and other measures to redress the results of past racial discrimination. I refer particularly to paras 4, 5, 6 and 7 of the preamble.



- 34 The Preamble to the Constitution states that the Constitution was adopted "recognis[ing] the injustices of our past", and that one of its purposes is to "improve the quality of life of all citizens and free the potential of each person". The very first founding provision of the Constitution, section 1(a), provides that the founding values of the Republic of South Africa include "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms".
- 35 The constitutional recognition of the critical need for state policies aimed at transformation was identified in the judgments of O'Regan J and Ngcobo J in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC)**, in the context of review of administrative action with restitutionary objectives in relation to the fishing industry.
- 36 As was pointed out by the Constitutional Court in **Bel Porto School Governing Body and Others v Premier, Western Cape 2002 (3) SA 265 (CC)**, at para 7:
- "The difficulties confronting us as a nation in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others."
- 37 Section 9(2) of the Constitution authorises the state, in order to promote the achievement of equality, which includes the full and equal enjoyment of all rights and freedoms in the Bill of Rights, to take legislative and other measures designed

*J. G. J.*



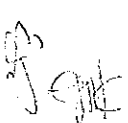
to protect or advance persons or categories of persons disadvantaged by unfair discrimination.

38 In **Minister of Finance and others v Van Heerden 2004 (6) SA 121 (CC)**, Moseneke J (as he then was) for the majority of the Constitutional Court observed that South African equality jurisprudence recognises a conception of equality that goes beyond mere formal equality. At paragraph 27, he noted that:

“This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist... It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but ‘situation-sensitive’ approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.”

39 The Court in **Van Heerden** recognised that remedial measures are not derogations from, but substantive and composite parts of, the right to equality envisaged in the Constitution.

40 If admitted, CALS will argue that section 25 of the Constitution must be interpreted with due regard to the constitutional commitment to substantive equality and the



recognition of the need for transformative or restitutionary measures by the state, in sections 1(a), 9(2) and other relevant provisions of the Constitution. CALS will further argue that section 25 of the Constitution itself envisages the need for such measures by providing in section 25(4) that for the purposes of the property clause "the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources"; and in section 25 (8), that no provision of the property clause "may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)".

- 41 In addition, because section 39(2) of the Constitution enjoins courts interpreting legislation to "promote the spirit, purport and objects of the Bill of Rights", CALS will contend that the MPRDA must be interpreted with due regard to these provisions of the Constitution.

#### International law

- 42 If admitted, CALS will make submissions regarding the recognition in various international law instruments that it is permissible for states to take special measures for the purpose of seeking the advancement of particular racial or ethnic groups, women and other groups in appropriate circumstances.

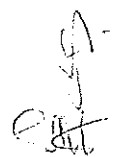


43 In particular, reliance will be placed on the following instruments and on decisions and authoritative statements issued by the relevant international organs:

43.1 the **International Convention on the Elimination of all Forms of Racial Discrimination 1965 (CERD)**, to which South Africa is a party, and which recognises that "special measures [may be taken] for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedom" (art 1.4);

43.2 the **African Charter on Human & Peoples' Rights 1986 (Banjul Charter)**, to which South Africa is a party, which recognises that the right to property may be encroached upon "in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws" (art 14) and which entrenches the right of all peoples to "freely dispose of their wealth and national resources" and that this right "shall be exercised in the exclusive interest of the people" (art 21);

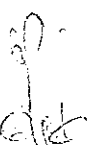
43.3 the **International Covenant on Civil and Political Civil Rights 1966 (ICCPR)**, to which South Africa is a party, and which recognises that "all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and



international law. In no case may a people be deprived of its own means of subsistence" (art 1(2)) and the right to equality before the law and equal and effective protection against discrimination (article 26), the latter being interpreted by the Human Rights Committee in its General Comment No: 18 10/11/89 on Non-Discrimination as follows at para:

"The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant."

43.4 the **Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW)**, to which South Africa is a party, which obliges states to undertake affirmative action and specifies that such measures should be aimed at addressing imbalances and past discriminatory practices. (art. 4); and



43.5 the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), which has been signed by South Africa, which has been used by the Constitutional Court in the interpretation of our Constitution, and which recognises that "all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence" (art 1(2)) and article 2 which provides that States Parties must "take steps ... with a view to achieving progressively the full realization of the rights" and "guarantee" the rights "without discrimination of any kind";

44 CALS will submit that South Africa's international law obligations and the permissibility under international law of special measures targeted at particular disadvantaged groups in order to pursue restitutionary purposes are of great significance for the interpretation of section 25 of the Constitution. CALS will submit that these international law principles support an interpretation of section 25 in terms of which the impugned provisions of the MPRDA meet constitutional muster generally; and in this matter do not give rise to expropriatory effects and/or arbitrary deprivation of property; in any event do not amount to compensable expropriation; but if they do, the amount of compensation must be calculated with reference to the provisions of section 25(3) of the Constitution.



## Foreign law

- 45 In *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng, 2005 (1) SA 530 (CC)*, Yacoob J (for the majority of the Constitutional Court) held as follows at para 32:

“Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.”


- 46 In the emphasised dictum, the Constitutional Court accordingly recognised that “normal restrictions on property” that are found in an open and democratic society do *not* amount to deprivation. As such, legal submissions regarding analogous regulatory regimes in respect of mineral rights in foreign jurisdictions should inform this Court’s determination whether the impugned provisions of the MPRDA constitute a deprivation at all and, if so, whether such deprivation is arbitrary.

- 47 In this context, CALS will make legal submissions regarding the regulation of mineral rights in foreign jurisdictions and the extent to which other jurisdictions adopt approaches similar to the scheme of the MPRDA. CALS recognises that foreign law must be approached with caution and with due sensitivity to important differences between foreign legal systems and our own, as well as differences of social, economic and political context. Bearing in mind the need for appropriate caution, CALS wishes to make legal submissions regarding helpfully analogous



regulatory regimes in the context of mining and industry, as well as the legal approach to regulatory regimes implicating property rights in several jurisdictions which are instructive to the determination of the dispute that is before this Court.

- 48 CALS will make legal submissions regarding the regulation of mining and industry in other jurisdictions both for the purpose of drawing analogies, and for the purpose of comparing and contrasting such other regulatory regimes with the MPRDA.
- 49 In addition, CALS will make legal submissions regarding the constitutional testing of regulatory regimes that implicate property rights in other jurisdictions. CALS has access to research capacity and expertise in this area, and is in a position to produce an analysis of the position in other jurisdictions which, I submit, will be of assistance to the Court.
- 50 CALS will submit that the existence of regulatory regimes analogous to the MPRDA as well as constitutional doctrines that accommodate and permit such regimes demonstrate that the MPRDA imposes "normal restrictions on property use or enjoyment found in ... open and democratic societ[ies]", as contemplated by the Constitutional Court in *Mkontwana* in the passage quoted above.

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## V THE EVIDENCE THAT CALS INTENDS TO LEAD

### The proposed procedure for dealing with evidence

51 CALS recognises that although Rule 16A expressly provides for *amicus* interventions in actions, *amici curiae* have not frequently sought to intervene in actions. CALS also recognises that an *amicus* intervention in a civil trial raises procedural questions, particularly in relation to evidence. I accordingly set out below the procedural approach that CALS proposes in respect of its evidence, if it is admitted, in order not unduly to lengthen the proceedings or increase their cost, while endeavouring to be of assistance to the Court:

- 51.1 CALS will introduce limited evidence, principally of a contextual nature. (I describe its actual content in more detail below.)
- 51.2 CALS anticipates that the content of this evidence will be uncontroversial. It proposes that the evidence be submitted in the first instance by way of affidavit.
- 51.3 CALS therefore does not contemplate introducing any oral evidence, but will tender its deponent(s) for cross-examination, should any of the parties wish to cross-examine them.
- 51.4 CALS anticipates that it is not likely that the parties will wish to do so, given that the factual material put up by CALS is likely to be uncontroversial and not in dispute.



51.5 CALS does not seek the opportunity to cross-examine the witnesses of the parties.

52 The introduction of evidence by an *amicus curiae* is accepted where the court is satisfied that it may be of assistance. An example of this is **Modderklip Boerdery (Pty) Ltd v President van die RSA en Andere** 2003 (6) BCLR 638 (T), in which Agri South Africa (coincidentally one of the Plaintiffs in the matter before this Court) was admitted as an *amicus curiae* and was permitted to introduce certain evidence of an expert nature. It appears from the judgment that the evidence in question was of assistance to the Court, including when the matter went on appeal to the Supreme Court of Appeal and then to the Constitutional Court: **Modderfontein Squatters, Greater Benoni Town Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd** 2004 (6) SA 40 (SCA); and **President of the Republic of South Africa & another v Modderklip Boerdery (Pty) Ltd (Agri SA & others, Amici Curiae)** 2005 (5) SA 3 (CC).

The content of the evidence that CALS intends to adduce

53 The limited evidence that CALS seeks to introduce will seek to place this action in the broader context of the implementation of the MPRDA as a whole. CALS will place before the Court information in relation to the scale of potential claims against the state identical or similar to those of the current plaintiffs, their budgetary implications for the state, and the potential impact of the decision of the

P. J. K. E.

Court in this matter on existing and potential international investment disputes involving South Africa.

54 I respectfully submit that this limited evidence is relevant, will be of assistance to the Court, and would not otherwise be before the Court because the evidence has not or would not be advanced by the other parties to the matter.

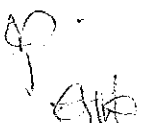
54.1 Domestic context

54.1.1 CALS will seek to introduce affidavit evidence regarding the potential economic implications of the outcome of this matter for the implementation of the MPRDA and their possible impact on South Africa's developmental goals.

54.1.2 This evidence will include the estimated cost of awarding compensation – on different possible scales – to holders of mineral rights at the time of the enactment of the MPRDA in positions analogous to those of the plaintiffs in the present actions, in the context of the current fiscal position of the Government.

54.2 International context

54.2.1 South Africa is party to at least twenty bilateral investment treaties ("BITs"), in terms of which it has undertaken treaty obligations both to foreign, predominantly European, states and

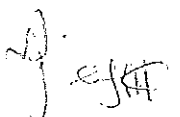


to foreign investors registered in those states. While the terms of these BITs differ, they have in common certain principal features, including:

- clauses providing that, where a government act is characterised as an expropriation, foreign investors are entitled to claim compensation, often at full market value, without regard to any limitations on compensation that may exist under domestic law;
- clauses establishing dispute resolution mechanisms that entitle foreign investors to refer disputes to arbitration before ad hoc international tribunals such as tribunals constituted under the International Centre for Settlement of Investment Disputes (ICSID).

54.2.2 One such dispute involving South Africa, and in which the cause of action is based upon the enactment of the MPRDA, is already underway before ICSID. **Piero Foresti, Laura De Carli & Others / Republic Of South Africa (ICSID Case No. ARB(AF)07/01)**. The claimants in **Piero Foresti** seek an amount of 266 million Euros in compensation.

54.2.3 Approximately 3% of South African land is foreign-owned. If those foreign owners are nationals of states with which South



Africa has concluded a BIT, they may be entitled to refer disputes to international tribunals such as ICSID.

54.2.4 In addition, land-owners who are, on the face of it, South African, may be entitled to refer disputes to an international investment arbitration tribunal by virtue of their relationship to a foreign holding company.

54.2.5 CALS will accordingly seek to adduce evidence, on affidavit, regarding the scale of potential international claims against South Africa and the possible implications of the outcome of the present matter for such disputes.

## VI CONCLUSION

55 CALS accordingly prays for an order in terms of the notice of motion to which this affidavit is attached, admitting CALS as *amicus curiae* for the purpose of making oral and written legal submissions and adducing limited evidence on affidavit.



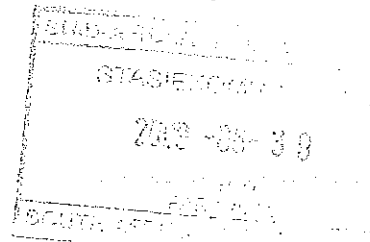
*Jacqueline Claire Annette Dugard*

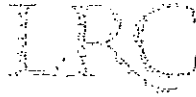
**JACQUELINE CLAIRE ANNETTE DUGARD**

The Deponent has acknowledged that she knows and understands the contents of this affidavit which was signed and sworn to before me at *Langley Police Station* on this the *30* day of June 2009 the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended and Government Notice No. R 1648 of 17 August 1977, as amended having been complied with.

*John H. Lee*

**COMMISSIONER OF OATHS**





"JD1"

LEGAL RESOURCES CENTRE

NPO No. 023-004

PEO No. 930003292

National Office • 7<sup>th</sup> Floor Bram Fischer House • 25 Rissik Street • Johannesburg 2001 • South Africa • www.lrc.org.za

PO Box 9495 • Johannesburg 2000 • South Africa • Tel: (011) 638 6601 • Fax: (011) 638 4876 • Docex 278

15 June 2009

TO: MACROBERT INC  
Plaintiff's Attorneys (Agri SA matter)  
Cnr Charles and Duncan Streets  
Brooklyn  
PRETORIA  
Ref: SM Jacobs/684526  
By fax: 012 425 3600

TO: GEO KILLIAN ATTORNEYS  
Plaintiff's Attorneys (Van Rooyen matter)  
1<sup>st</sup> Floor, Harrogate Park  
1237 Pretorius Street  
Hatfield  
Ref: Mr Geo Killian  
By fax: 013 932 1075

AND TO: STATE ATTORNEY  
Defendant's Attorneys  
Bothongo Heights  
8<sup>th</sup> Floor  
167 Andries Street  
PRETORIA  
Ref: Mr SP Mathebula/6658/2007/ Z51 SMCG  
By email: smathebula@justice.gov.za

Dear Sirs

REQUEST FOR CONSENT TO BE ADMITTED AS AMICUS CURIAE IN  
RE:  
AGRI SOUTH AFRICA / MINISTER OF MINERALS AND ENERGY  
(Case No: 55896/2007); VAN ROOYEN / MINISTER OF MINERALS  
AND ENERGY (Case No: 10235/08)

1. We refer to the above matter. We represent the Centre for Applied Legal  
Studies (CALs), an independent research, advocacy and public interest  
litigation organisation committed to promoting democracy, justice, equality

National Office:  
Cape Town:  
Durban:  
Grahamstown:  
Johannesburg:  
Constitutional Litigation Unit:

J Love (National Director), K Reinecke (Director: Finance), A Reed (Director: Donor Liaison)  
JW Piensar (Director), A Andrews, CM Fortuin, S Kehanovitz, WR Kerfoot, C May, HJ Smith, LP KubuKe  
MR Chetty (Director), S Samuel  
S Sephton (Director), K Govender  
N Gobofo (Director), S Dhever, N Fakir  
G Bizos SC, A Friedman, J Biko's

Handwritten initials/signature

and peace in South Africa and to addressing and undoing South Africa's legacy of oppression and discrimination.

2. CALS has had regard to the two notices in terms of Rule 16A of the Uniform Rules of Court in the above matters, in materially identical terms, which were posted on the notice board of the North Gauteng High Court on 20 May 2009.
3. CALS hereby requests the consent of the plaintiff and defendant to be permitted to intervene as amicus curiae in the above consolidated matter. If admitted, CALS intends to:
  - i. Make written and oral legal submissions; and
  - ii. Introduce limited evidence.
4. The legal submissions that CALS intends to advance will address the proper interpretation of the relevant provisions of the Minerals and Petroleum Resources Development Act 28 of 2002 ("MPRDA") and section 25 of the Constitution, in light of relevant:
  - a. international law; and
  - b. foreign law

in terms of section 39(1) and (2) of the Constitution.
5. The limited evidence that CALS seeks to introduce will seek to place this action in the broader context of the implementation of the MPRDA as a whole. CALS will place before the court information in relation to the scale of potential claims against the state identical or similar to those of the current


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JHL

plaintiffs, their budgetary implications, and the impact of the decision of the Court in this matter on existing and potential international investment disputes involving South Africa.

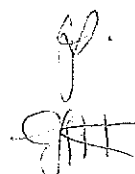
6. Accordingly, CALS has the potential to be of assistance to the court by placing before it evidence and legal submissions relevant to the legal issues in these matters and different to the anticipated evidence and submissions of the parties.

7. Kindly inform us by close of business on Wednesday, 17 June 2009, whether your client consents to the admission of CALS as an amicus curiae on the terms set out above.

Yours faithfully



**LEGAL RESOURCES CENTRE:**  
Jason Brickhill





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\*\*\* TX REPORT \*\*\*  
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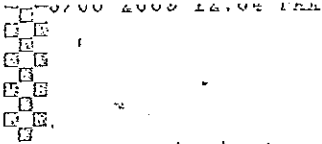
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\*\*\* TX REPORT \*\*\*  
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TRANSMISSION OK

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*[Handwritten signature]*



"JD2"



# Office of the State Attorney Pretoria

Private Bag X 91  
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0001  
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8<sup>th</sup> Floor  
167 Andries Street

Tel: (Switchboard): (012) 309 1500  
(Direct Line): (012) 309 1627  
(Secretary): (012) 309 1621  
Fax (General) : (012) 328 2662/3  
(Direct) (012) 328 9294  
(Personal) 086 629 1380

17 JUNE 2009

Enquires: S P MATHEBULA  
Email: [simathebula@justice.gov.za](mailto:simathebula@justice.gov.za)

My Ref: 6932/2008/Z51/KF  
Your Ref: JASON BRICKHILL

BY FAX: (011) 838-4876 (TEL: (011) 838-6601)

Legal Recourses Centre  
P O Box 9495  
JOHANNESBURG  
2000

Dear Mr Brickhill

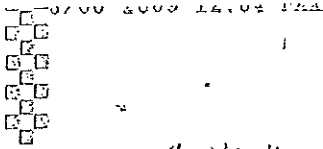
REQUEST FOR CONSENT TO BE ADMITTED AS AMICUS CURIAE IN

RE:

AGRI SOUTH AFRICA / MINISTER OF MINERALS AND ENERGY  
(CASE NO: 55898/2007);

VAN ROOYEN / MINISTER OF MINERALS AND ENERGY (CASE NO: 10235/06)

*Handwritten signature or initials in the bottom right corner.*



# Office of the State Attorney Pretoria

---

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0001  
Docex: 298

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8<sup>th</sup> Floor  
167 Andries Street

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(Direct Line): (012) 309 1627  
(Secretary): (012) 309 1621  
Fax (General) : (012) 328 2662/3  
(Direct) (012) 328 9294  
(Personal) 086 629 1380

17 JUNE 2009

---

Enquires: S P MATHEBULA  
Email: [simathebula@justice.gov.za](mailto:simathebula@justice.gov.za)

My Ref: 5932/2008/Z51/KF  
Your Ref: JASON BRICKHILL

---

BY FAX: (011) 838-4876 (TEL: (011) 838-6601)

Legal Recourses Centre  
P O Box 9495  
JOHANNESBURG  
2000

Dear Mr Brickhill

REQUEST FOR CONSENT TO BE ADMITTED AS AMICUS CURIAE IN

RE:

AGRI SOUTH AFRICA / MINISTER OF MINERALS AND ENERGY  
(CASE NO: 55898/2007);

VAN ROOYEN / MINISTER OF MINERALS AND ENERGY (CASE NO: 10235/06)

*Handwritten signature/initials*

"JD3"



PROKUREURS \* TRANSPORTBESORGERE \* BOEDELBEREDDERAARS  
ATTORNEYS \* CONVEYANCERS \* ADMINISTRATOR OF ESTATES

LISULIAGEBOU  
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POSBUS 402  
BRONKHORSTSPRUIT  
1020  
TEL. (013) 9322911/2  
9322927/8  
FAKS (013) 9321075  
e-pos: [geokil@sanla-not.co.za](mailto:geokil@sanla-not.co.za)  
DOCEX: DX2 BRONKHORSTSPRUIT

LISULIA BUILDING  
65 KRUGER STREET  
PO BOX 402  
BRONKHORSTSPRUIT  
1020  
TEL. (013) 9322911/2  
9322927/8  
FAX: 086 512 6652  
e-mail: [geokil@sanla-not.co.za](mailto:geokil@sanla-not.co.za)

Ons verw / Our ref: MR KILIAN/LF/V3178(A)      U verw / Your ref: JASON BRICKHILL      Datum/Date: 22 JUNE 2009

BY FAX (011) 838 4876  
Legal Resource Centre  
JOHANNESBURG

Dear Sirs

REQUEST FOR CONSENT TO BE ADMITTED AS AMICUS CURIAE IN  
RE:  
AGRI SOUTH AFRICA / MINISTER OF MINERALS & ENERGY (CASE NR: 55896/2007)  
A M VAN ROOYEN / MINISTER OF MINERALS & ENERGY (CASE NO: 10235/2008)

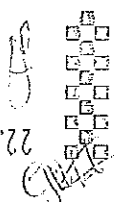
Your letter dated 15 June 2009 refers.  
My client is not prepared to consent to your request.

Yours faithfully  
GEO KILIAN

Geo Kilian B.Juris LLS – Cell: 083 6100 535  
BTW/VAT Reg no: 411 0111 459  
Praktijk/Practice No: 721

GEO KILLIAN BSP  
GEO KILLIAN BSP

22 Jun. 2009 11:48





"JD4"

MacRobert Building, chr Charles and Duncan Streets, Brooklyn, Pretoria, RSA  
 Private Bag X18 Brooklyn Square 0075 Doccx 43 Pretoria  
 Telephone +27 12 425 3400 Telefax +27 12 425 3600  
 www.macrobert.co.za law@macrobert.co.za  
 Incorporated No 1978/004894/21

LEGAL RESOURCES CENTRE  
 7<sup>th</sup> FLOOR BRAAM FISCHER HOUSE  
 25 RISSIK STREET  
 JOHANNESBURG  
 FAX: 011 834 4273

MJ/vN

YOUR REF: Jason Brickhill

OUR REF: 684526

DATE: 17 June 2009

Dear Sirs

APPLICATION TO BE ADMITTED AS AMICUS CURIAE - CENTRE FOR APPLIED LEGAL  
 STUDIES IN RE: AGRI SOUTH AFRICA / MINISTER OF MINERALS AND ENERGY

We refer to the abovementioned matter as well as your letter dated 15 June 2009.

Kindly note that we have not been in a position to obtain instructions from our client with regards to your client's request to be admitted as *amicus curiae*.

We will make every effort to revert to you before close of business on Friday, 19 June 2009.

Kindly acknowledge receipt hereof.

We trust you find this in order.

Yours faithfully

MACROBERT INC

PER: A S VAN NIEKERK

Direct telephone number : (012) 425-3531  
 Direct telefax number : (012) 425-3653  
 Email address : avniekerk@macrobert.co.za

Conveyancers Notaries & Trade Mark Agents

Directors GK Hey (Chairman) LM Manku LM Katrik HP van der Merwe MJ Ferreira AMG Suidman GL van der Westhuizen SM Jacobs CA Wessels N Orins  
 NA Jans van Rensburg L Havanga LE Booij J Albani GP van der Merwe S van der Merwe KM Grog D Vosas  
 Consultants FGT Rauben DER Bendoric A J Lullig DE Pless  
 Associates KI Refrany PO du Pré Le Reux R Jacobs D Lambrechts L Coetzee Louwrens CH Combé JA Erasmus JD van Broekhuizen  
 Attended by M Naussa S Hoyal S Lancaster JJ Popov V Ramôez Z Mokwêre AS van Niekerk I Mahere AE McCosbe  
 Dept Toan  
 Durban

Tel: (021) 422 8555  
 Tel: (031) 504 7165

Fax (021) 422 3515  
 Fax (031) 354 2768

Handwritten initials/signature

"JD5"



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Incorporated No 1978/004694/21

LEGAL RESOURCES CENTRE
7TH FLOOR BRAAM FISCHER HOUSE
25 RISSIK STREET
JOHANNESBURG
FAX: 011 834 4273

YOUR REF: Jason Brickhill OUR REF: MJ/AVN 684526 DATE: 19 June 2009

Dear Sirs

APPLICATION TO BE ADMITTED AS AMICUS CURIAE - CENTRE FOR APPLIED LEGAL STUDIES IN RE: AGRI SOUTH AFRICA / MINISTER OF MINERALS AND ENERGY

We refer to the abovementioned matter.

It is our instruction not to consent to the Centre for Applied Studies to be admitted as amicus curiae until such time as we are informed as to the mechanism your client proposes to be admitted as amicus curiae in view of the fact that we are dealing with an action.

We await to hear from you in this regard.

Yours faithfully

[Handwritten signature]

MACROBERT INC

PER: S M JACOBS

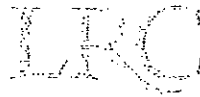
Direct telephone number : (012) 425-3453
Direct telefax number : (012) 425-3653
Email address : mjacobs@macrobert.co.za

Conveyancers Notaries & Trade Mark Agents

Directors: GK Hey (Chairman) JH Mashengu LM Keldrick KP van der Merwe MJ Ferrante AMQ Sulman GL van der Westhuizen SM Jacobs GK Wessels N Ojine
NA Jansen van Rensburg L Havenga LE Steil J Albense BF van der Merwe S van der Merwe KM Greig D Vogel
Consultants: FGT Reddy DBR Bechtel AJ Lullig DE Plett
Associates: KI Rallier PG du Preez R Jacobs D Lemmermans L Coates Louwens DM Combe JA Erasmus JD van Broekhuizen
Assisted by: M Ncube S Haysi S Lencio JI Popov V Rando Z Makhulu AB van Niekerk I Mahare; AE McCabe
Cape Town Tel: (021) 423 3626 Fax: (021) 423 3615
Durban Tel: (031) 304 7166 Fax: (031) 304 2725

[Handwritten initials/signature]

"JD6"



LEGAL RESOURCES CENTRE

NPO No. 023-004

PBO No. 930003292

National Office • 7<sup>th</sup> Floor Bram Fischer House • 25 Rissik Street • Johannesburg 2001 • South Africa • www.lrc.org.za

PO Box 9495 • Johannesburg 2000 • South Africa • Tel: (011) 838 6601 • Fax: (011) 838 4676 • Docex 278

15 June 2009

TO: MACROBERT INC  
Plaintiff's Attorneys (Agri SA matter)  
Cnr Charles and Duncan Streets  
Brooklyn  
PRETORIA  
Ref: SM Jacobs/684526  
By fax: 012 425 3600

Dear Sirs

REQUEST FOR CONSENT TO BE ADMITTED AS AMICUS CURIAE IN  
RE:

AGRI SOUTH AFRICA / MINISTER OF MINERALS AND ENERGY  
(Case No: 55896/2007); VAN ROOYEN / MINISTER OF MINERALS  
AND ENERGY (Case No: 10235/08)

1. We refer to the above matter and your letter of earlier today, in which you requested clarification of the "mechanism" by which our client seeks to be admitted as *amicus curiae* in view of the fact that the matter is an action.
2. Our client seeks to be admitted as *amicus curiae* in terms of Rule 16A of the Uniform Rules of Court, which rule is applicable both to application and action proceedings, and pursuant to the notice in terms of Rule 16A published by the defendant.

Yours faithfully

LEGAL RESOURCES CENTRE:  
Jason Brickhill



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\*\*\* TX REPORT \*\*\*  
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TRANSMISSION OK

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"JD7"



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Private Bag X18 Brooklyn Square 0075 Docex 43 Pretoria
Telephone +27 12 426 3400 Telefax +27 12 426 3600
www.macrobert.co.za law@macrobert.co.za
Incorporated No 1978/004684/21

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7TH FLOOR BRAAM FISCHER HOUSE
25 RISSIK STREET
JOHANNESBURG
FAX: 011 834 4273

MJ/AvN

YOUR REF: Jason Brickhill

OUR REF: 684526

DATE: 23 June 2009

Dear Sirs

APPLICATION TO BE ADMITTED AS AMICUS CURIAE - CENTRE FOR APPLIED LEGAL STUDIES IN RE: AGRI SOUTH AFRICA / MINISTER OF MINERALS AND ENERGY

We refer to the abovementioned matter.

We have noted the contents of your letter dated 15 June 2009, which we received on 19 June 2009.

Our question is not in terms of what rule your client will be admitted as amicus curiae, rather the practical manner in which your client will participate in the trial. Will your client make written or oral submissions, or apply to be joined as party to the proceedings?

Kindly provide us with a draft application in order to properly advise our client.

We await to hear from you in this regard.

Yours faithfully

[Handwritten signature]

MACROBERT INC

PER: S M JACOBS

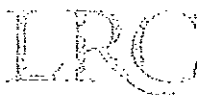
Direct telephone number : (012) 425-3453
Direct telefax number : (012) 425-3653
Email address : mjacobs@macrobert.co.za

Conveyancers Notaries & Trade Mark Agents

Directors GK Hsy (Chairman) LM Mahlangu LM Kellrick HF van der Merwe MJ Farrells AMG Swinnen GL van der Westhuizen SM Jacobs CA Weese's N Celsio
NA Jantze van Rensburg L Havenga LE Scau J Albense GP van der Merwe B van der Merwe KM Gieig D Veges
Consultants FGT Rietveld D&R Batenhorst AJ Lutjeh DE Pless
Associates KJ Raftery PC du Pré Le Roux R Jacobs D Lambrecht L Coetzee Lourenco OH Combré JA Erasmus JD van Rieckhuyzen
ASSISTED by M Naudé G Hayat G Lencaster JI Popov V Ramôes Z Mokhele AS van Niekerk I Maharej AE McCabe
Cape Town Tel: (021) 423 3695 Fax (021) 423 3616
Durban Tel: (031) 304 7166 Fax (031) 304 2789

[Handwritten initials]

"JD8"



LEGAL RESOURCES CENTRE

NPO No. 023-004

FBO No. 93003292

National Office • 7<sup>th</sup> Floor Bram Fischer House • 25 Rissik Street • Johannesburg 2001 • South Africa • www.lrc.org.za

PO Box 9405 • Johannesburg 2000 • South Africa • Tel: (011) 838 6801 • Fax: (011) 838 4876 • Docex 278

25 June 2009

TO: MACROBERT INC  
Plaintiff's Attorneys (Agri SA matter)  
Cnr Charles and Duncan Streets  
Brooklyn  
PRETORIA  
Ref: SM Jacobs/684526  
By fax: 012 425 3600

Dear Sirs

REQUEST FOR CONSENT TO BE ADMITTED AS AMICUS CURIAE IN  
RE:  
AGRI SOUTH AFRICA / MINISTER OF MINERALS AND ENERGY  
(Case No: 55896/2007); VAN ROOYEN / MINISTER OF MINERALS  
AND ENERGY (Case No: 10235/08)

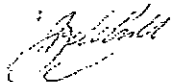
- 1 We refer to the above matter and your letter of yesterday.
- 2 Our client will apply to be admitted as an *amicus curiae*, and not to be joined as a party in the proceedings.
- 3 The practical manner in which our client, the Centre for Applied Legal Studies (CALS), proposes to participate in the proceeding, in order not unduly to lengthen the proceedings or unnecessarily increase their cost for the parties, while endeavouring to be of assistance to the Court, is the following:
  - 3.1 CALS will make written and oral legal submissions during the argument stage of the proceedings.
  - 3.2 CALS will lead relatively narrow evidence, principally of a contextual nature. (We have described its actual content in more detail in our initial letter of 15 June 2009.)

National Office:  
Cape Town:  
Durban:  
Grahamstown:  
Johannesburg:  
Constitutional Litigation Unit:

J Love (National Director), K Rehecke (Director: Finance), A Reed (Director: Donor Liaison)  
J W Pienaar (Director), A Andrews, C M Fortuin, S Kahana, W R Kerfoot, C May, H J Smith, L P Kubackel  
M R Chetty (Director), S Samuel  
S Sephton (Director), K Govender  
N Gobodo (Director), S Dhever, H Faltz  
G Bizos SC, A Friedman, J Brickhill

- 3.3 CALS will seek to do so in a way that will be uncontroversial and minimize costs, by putting up its evidence by way of affidavit.
- 3.4 CALS does not contemplate leading any oral evidence, but will tender its deponent(s) for cross-examination, should any of the parties wish to cross-examine them. CALS does not anticipate that the parties would wish to do so, given that the factual material put up by CALS in this regard is likely to be largely uncontroversial and not in dispute.
- 3.5 CALS does not seek the opportunity to cross-examine the witnesses of the parties.
- 4 This procedural approach to evidence that CALS proposes is analogous to the approach taken by the *amicus curiae* in the case of *Modderfontein Squatters, Greater Benoni Town Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) in which an *amicus curiae* was permitted by the Supreme Court of Appeal to adduce certain evidence of an expert nature by means of affidavit.
- 5 We are not in a position to furnish you with a draft application at this stage, but trust that we have addressed your questions. We should be grateful if you were to provide us with your client's response to our request by close of business tomorrow, Friday 25 June 2009.

Yours faithfully



LEGAL RESOURCES CENTRE:  
Jason Brickhill



0124253423

"JD9"



MacRobert Building, cnr Charles and Duncan Streets, Brooklyn, Pretoria, RSA
Private Bag X18 Brooklyn Square 0075 Docex 43 Pretoria
Telephone +27 12 425 3400 Telefax +27 12 425 3600
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Incorporated No 1978/004694/21

Legal Resources Centre
DX 278
Johannesburg

By fax: (011) 838 4676

YOUR REF: Jason Brickhill

OUR REF: MJ/klr
684526

DATE: 29 June 2009

Dear Sirs

REQUEST FOR CONSENT TO BE ADMITTED AS AMICUS CURIAE IN:
AGRI SOUTH AFRICA / MINISTER OF MINERALS AND ENERGY (CASE NO. 56896/2007)
VAN ROOYEN / MINISTER OF MINERALS AND ENERGY (CASE NO. 10235/06)

We refer to your letter of the 25th June 2009.

We have noted the procedural manner set out in paragraph 3 of your letter.

We acted on behalf of Agri SA who was the amicus curiae in the Modderfontein squatters matter referred to in paragraph 4 of your letter. The procedural approach for evidence referred to is not correct as the Modderklip squatter matter was an application before the court to which our client applied to be admitted as an amicus curiae. Evidence was merely led by way of affidavit and the cross examination of witnesses was not relevant since action procedures were not followed.

In terms of Rule 16A(2) of the uniform court rules, it is required that our client provides its permission for your client to be admitted as amicus curiae, within 20 days after the filing of your client's affidavit

Conveyancers Notaries & Trade Mark Agents

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NA Jense van Rensburg L Hvenge LE Both J Albarico GP van der Merwe S van der Merwe KM Greig D Veges
Consultants FGT Rasoff DBR Beersford AJ Lullie DE Piff
Appraisers MI Rafferty FC du Preez Le Roux R Jacobs D Lombrecht L Cover Laurence CH Combr JA Erasmus JD van Broekhuizen
Accountants M Neude S Hylle S Lencovier B Popov V Remes Z Mookhele AS van Niekerk I Mahere AE MacDube
Cape Town Durban
Tel (021) 423 3885 Tel (021) 204 7445
FLX (021) 423 3510 Fax (021) 204 2769

Handwritten signature/initials

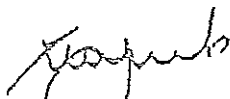
0124253423

or pleading in which the constitutional issue was first raised. To date our client has not received your client's affidavit or pleading and we request that you comply with Rule 16A in order to obtain our client's instructions in this regard. We are of the view that an affidavit will be applicable when an *amicus curiae* is admitted in motion proceedings, similar to the Modderfontein squatters matter and a pleading is relevant in regard to action proceedings.

Upon receipt of your client's pleading, the terms and conditions upon which your client be admitted as *amicus curiae* may thereafter be agreed in writing between the parties.

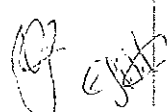
We await to hear from you in this regard.

Yours faithfully

  
MACROBERT INC

PER: S M JACOBS

Direct telephone number : (012) 425-3453  
Direct telefax number : (012) 425-3653  
Email address : mjacobs@macrobert.co.za

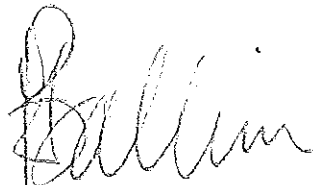


I, the undersigned

**YUNUS BALLIM**

state under oath the following:

1. I am an adult Professor of the University of the Witwatersrand, 1 Jan Smuts Avenue, Johannesburg (the University).
2. I am presently the Acting Vice-Chancellor and Principal of the University and I am duly authorised to depose to this affidavit on its behalf.
3. The facts contained herein are to the best of my knowledge true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge.
4. I have read the founding affidavit in the application by the Centre for Applied Legal Studies (CALs) seeking admission as *amicus curiae* in the present proceedings and I confirm the contents thereof insofar as they pertain to the University and to CALs.



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DEPONENT



SIGNED and SWORN to before me at JOHANNESBURG on the 30 day of JUNE 2009, after the deponent stated that he is aware of the content of this statement and considers the oath to be binding on his conscience. I certify that the regulations provided for in the Government Gazette Notice R. 1258 of 21 July 1972 have been complied with.



COMMISSIONER OF OATHS

FULL NAMES:

DESIGNATION:

ADDRESS:

MELODY JEAN ENGELBRECHT  
Commissioner of Oaths District of Johannesburg  
ADMISSIONS OFFICER  
STUDENT  
University of the Witwatersrand, Johannesburg  
1 Jan Smuts Avenue, Johannesburg 2001

