

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No.: 42162/18

In the application of:

NASREEN RAJAB-BUDLENDER

NOZIZIWE SILINDILE VUNDLA

CAROL KHOLEKA ZAMA

PENELOPE JOY PARENZEE

NICOLE LOUISE FRITZ

Acting in their capacity as

WOMEN'S LEGAL CENTRE TRUST

Amicus Curiae Applicant

to be admitted as *amicus curiae* in the matter between:

KM

Applicant

and

UNIVERSITY OF SOUTH AFRICA

First Respondent

PROFESSOR KGOMOTSO MASEMOLA

Second Respondent



UNIVERSITY OF SOUTH AFRICA:
THE OFFICE OF THE DEAN OF STUDENTS

Third Respondent

CHAIRPERSON OF THE DISCIPLINARY COMMITTEE

Fourth Respondent

UNIVERSITY OF SOUTH AFRICA:
THE EXECUTIVE DIRECTOR: LEGAL SERVICES AND
INFORMATION OFFICER, MR JAN VAN WYK

Fifth Respondent

UNIVERSITY OF SOUTH AFRICA:
THE INFORMATION OFFICER

Sixth Respondent

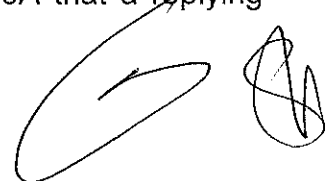
REPLYING AFFIDAVIT

I, the undersigned,

SEEHAAM SAMAAI

do hereby take oath and state:-

1. I deposed to the founding affidavit filed in support of the *amicus* applicant's application to intervene in the above matter. I am duly authorised to depose to this affidavit in terms of the resolution adopted by the Women's Legal Centre Trust's (WLC) Board of Trustees dated 18 April 2019, and which was annexed to the founding affidavit at SS1.
2. The facts stated herein are within my own knowledge, and are true and correct, unless the contrary appears from the context.
3. I have read the opposing affidavit of Juliette Grosskopf filed on behalf of the first to sixth respondents. While it is not obligatory under rule 16A that a replying



affidavit is filed, I depose to this affidavit in order to respond to the averments in Grosskopf's affidavit.

4. At the outset we note that the respondents have adopted a hostile approach to our application and have assigned dismissive contempt to the WLC application. Their stance is noted with regret as the WLC's only intention is to further the rights of women in South Africa in line with their rights under the Constitution.
5. When dealing with complaints of a sexual nature, the respondents fail to appreciate the necessity of a Court and public institutions taking into account a victim-centred approach when handling sexual harassment complaints. The respondents' position that the amicus application is "irrelevant", "inconsequential" and "unjustified" exposes before the Court the lack of regard UNISA, as a public institution, has for the social and psychological evidence the WLC wishes to place before the Court in relation to such complaints. It is precisely for this reason that the WLC application for leave to intervene ought to be granted.

AD PARAGRAPH 1

6. The deponent's majority, gender, and position in the employ of the first respondent are noted; however, it is denied that the deponent has the necessary authority to depose to this affidavit on behalf of the first to sixth respondents collectively. The deponent fails to attach any document evidencing such authority to depose to the affidavit on behalf of the individuals cited, or the relevant person mandated to give authority to Grosskopf to do so on behalf of the departments cited. Grosskopf's authority to depose to the affidavit on behalf of all six respondents is disputed.
7. In the alternative, should the Court accept the affidavit as though it has been deposed to on behalf of all six respondents, I respond below to the allegations made in the affidavit. I do so whilst maintaining my submission that the affidavit should be treated as though it was not filed on behalf of the six respondents.

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AD PARAGRAPH 2 – 4

8. The contents of these paragraphs are denied. It is disputed that the contents are within Grosskopf's personal knowledge and are true or correct.

AD PARAGRAPH 5

9. Grosskopf's denial as stated herein is strongly denied. As the Director of the Women's Legal Centre ('WLC' or 'the Centre'), I am deeply involved in the work done, and have a firm grasp on the intricacies of the matters run by the Centre. To allege that the contents of the affidavit are not within my personal knowledge, and true or correct, misrepresents my role as Director of the Centre, and my level of engagement with the concerns underlying the application to intervene.

AD PARAGRAPH 6 - 7

10. It is denied that the general observations about sexual harassment and its occurrence at universities and colleges is of no relevance to the matter at hand.

10.1. Sexual violence in our society is pervasive and places of education are not spared such violence. The applicant in the main matter alleged that she was sexually harassed by the second respondent. She is one of many women in our country and other countries around the world to have faced and experienced sexual violence in educational institutions. The first to sixth respondent cannot in good conscience want to have this matter dealt with in a vacuum devoid of the context of women's lived realities. The respondents collectively maintaining that the second respondent did not sexually harass the applicant is insufficient to exclude the observations about the pervasive nature of sexual harassment, as noted by our courts, and that this is replicated when it occurs at campuses.

10.2. It is myopic, as are a number of allegations made by the deponent, to view the *amicus* intervention as only assisting or furthering the case of the applicant. It grossly misunderstands the WLC's intervention.

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11. The application is made with the sole aim of providing assistance to the Court in its review of the respondents' conduct, from the occurrence of the sexual harassment and its context, the process adopted by the respondents, to its outcome and finalisation.
12. As the Court reviews the processes adopted by the respondents, the *amicus* seeks to place before the Court an alternative institutional approach to the handling of sexual harassment matters, one which the WLC submits is best practice given the nature of sexual harassment complaints and matters. The Centre advances a specific lens through which sexual harassment matters ought properly to be viewed and handled. There is an appropriate and sensitized way in which an institution can respond to and manage complaints of sexual harassment and this, we submit, is directly relevant in all circumstances including the present review.
13. The contents of paragraph 7 are noted and will be addressed further in legal argument. It illustrates an anaemic understanding of the presence of power in sexual harassment matters and the forms these take on; and the ways in which a victim of sexual harassment should be supported in fact, but also made to feel supported during the complaints process. Whether the applicant felt supported during the complaint and disciplinary process is a question that falls to be determined on the basis of the record and the application of the Plascon-Evans principle.

AD PARAGRAPH 8 - 13

14. The contents herein are noted, save to deny the allegation that the *amicus* intervention, as stated in paragraph 9, is unwarranted.
15. The intervention is premised on the need to place before the Court a specific approach to handling sexual harassment matters, which approach has not been discussed in the papers of the applicant or respondents. To do so is not unwarranted, but necessary. The Courts have made great inroads when interpreting sexual harassment laws in South Africa, yet institutions continue to

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fail women when complaints of sexual harassment are made. This failure occurs in implementation of sexual harassment laws and policies. The current matter, on the pleadings before the Court, is no different.

16. The respondents' stance that they followed their legal obligations, in that second respondent "*was duly disciplined before a selected and mandated disciplinary committee in terms of disciplinary code and procedure... and an outcome was issued,*", indicates a clear failure to appreciate the nature of the inquiry before this Court. The minutiae of the process adopted by UNISA will be the subject of scrutiny and it is the WLCs position that the standard against which the process is scrutinised is a victim-centred approach.
17. In the Court's assessment of the processes of the respondents, we submit that a victim-centred approach should be the lens through which this assessment takes place. It is therefore necessary for us to place the features thereof before the Court so that it is in a better position to make its determination in the review proceedings. A failure to do so would deprive the Court of the ability to determine the review with the appropriate nuance and context, and an appreciation of the need to take positive policy-driven steps to ensure a complainant is protected in a manner equal to an alleged perpetrator.
18. A victim-centred approach therefore will assist the Court in its determination as to whether the necessary steps were taken to afford the applicant the necessary support she needed, and whether imposing discipline against the second respondent in the manner that they did was sound in law and process.

AD PARAGRAPH 14 - 16

19. The contents of paragraph 14 are denied. The *amicus* maintains that on the interpretation of the allegations made by the applicant, the processes adopted by the respondents marginalised the applicant. The issue comprises legal argument and submissions will be made thereon at the hearing of the application.

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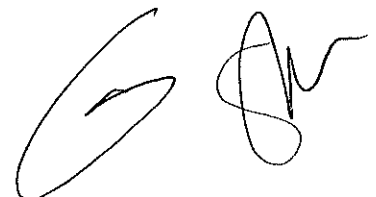
20. The emphasis the respondents place on the process adopted overlooks the fact that in all other respects the process failed to appreciate and implement a victim-centred approach.

AD PARAGRAPH 17 - 21

21. The contents herein are noted.
22. We submit that a victim-centred approach believes the complainant when she comes forward to complain of sexual harassment, as it understands the social context within which women make these complaints. As a result, the allegations made by the applicant and the respondents were assessed according to the features of a victim-centred approach.
23. The remainder of these paragraphs and the submissions regarding Mr Labuschagne comprise legal argument and will be dealt with in heads of argument with reference to the record of proceedings. The interpretation of the facts and the assumptions alleged by the respondents in this regard are denied.
24. The WLC intervention is centred on the importance of adopting a victim-centred approach in disciplinary proceedings involving sexual complaints. Neither party made averments in the pleadings on this issue, it is relevant to the relief sought in the applicant's notice of motion and the Centre believes the evidence will be of assistance to the Court.

AD PARAGRAPH 22 - 26

25. The allegation in paragraph 22 is denied. The basis upon which the Centre seeks to intervene is not inconsequential, but relevant and necessary in order to ensure that the relevant considerations are before the Court.
26. The contents of paragraph 25 are denied and show the respondents' misunderstanding of the principles on which a victim-centred approach is based.

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The averments comprise legal argument and will be dealt with at the hearing of the application.

AD PARAGRAPH 27 - 28

27. The contents of these paragraphs are denied, and I refer to what is stated hereinabove in relation to the relevance of the evidence to the issues before this Court.

AD PARAGRAPH 29 - 30

28. The contents herein are denied. To dismiss it as irrelevant reveals the respondents' unwillingness to understand and engage in alternative processes that seek to assist the complainants in sexual harassment matters.

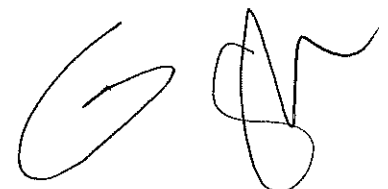
AD PARAGRAPH 31 - 33

29. The contents herein are denied. Legal argument will address the issues raised in this section; however we add that the averments made in this section seem to misunderstand the case as set out by the applicant in the main application, and thus the discussion of a victim-centred approach to the relief sought by the applicant.

30. The main applicant necessarily argues, in Part B of the relief sought, that the first respondent's policies are inadequate in dealing with sexual harassment as between students and employees. The respondents make no explicit provision for the handling of such matters.

AD PARAGRAPH 34 – 36

31. The contents contained herein are noted, comprise legal argument and will be dealt with at the hearing of the application. While it is admitted that UNISA has a policy in place, it is denied that the existence of a policy is determinative of

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whether the respondents' have conducted themselves in a lawful and defensible manner.

AD PARAGRAPHS 37 - 38

32. The contents herein are vehemently denied. To state that the Centre's intervention is based on malicious intent due to the respondents' choice not to engage with the contents thereof, and the arguments advanced in the *amicus* application, is pernicious. No evidence is placed before the Court to support this statement and the insinuation without factual basis falls to be struck from the affidavit.
33. It is also not the Centre's intention to '*re-arrange the applicable policies and disciplinary codes and procedures*' of the first respondent. This is the relief sought by the main applicant. The Centre, in advancing a victim-centred approach and seeking to place such before the Court, applied the approach to the relief sought by the main applicant. The respondents conflate the applicant's case before the Court with the Centre's interest in the matter.

AD PARAGRAPHS 39 - 40

34. The contents herein are denied, they comprise speculative conclusions and legal argument. The Centre has set out the valid legal grounds to elucidate the applicability and relevance of international and comparative law to the current matter. Neither party has placed evidence of this kind before the Court and the WLC position is thus not repetitive of the evidence already before the Court.

AD PARAGRAPH 41 - 42

35. The contents herein are denied.

AD PARAGRAPHS 43 - 50

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36. The allegations made herein are denied. Legal argument will be advanced to address the issues raised herein.
37. The respondents fail to appreciate the constraints faced by a small public interest law firm, which operates purely on public donations that it receives. The Centre has limited access to funding and resources and does not have access to state funds to pursue litigation. The Centre must therefore be studious in deciding which cases merit intervention.
38. The Centre employs four legal practitioners all of whom have a heavy case load. The decision to seek leave to participate in the application is not a decision a single attorney makes but is a decision made at committee level. It was determined that the issues raised in this matter are of critical and strategic importance for the Centre and that the Centre has a wealth of information to contribute.
39. Obtaining the complete set of pleadings occurred within the ordinary course of our business, which includes internal meetings, meetings with funders, existing programme-specific deadlines over and above the current matter, that require attorney oversight, among others. Due to these commitments the WLC was unable to obtain the pleadings, formulate a legal opinion, source the necessary funds to brief counsel, and to obtain counsel's opinion on whether there are merits to our application within the timeframes provided for in the rules of court.
40. At present, the main application has not been allocated a hearing date. There has been no exchange of written legal submissions from the main parties before the Court and no clear indication of when such shall be exchanged. The timeline as it currently stands affords us the opportunity to intervene in these proceedings without prejudice to the parties, the proceedings, or the Court. It is therefore denied that the Centre has taken a lax approach to these proceedings or that it has disrespected the rules of this Court.

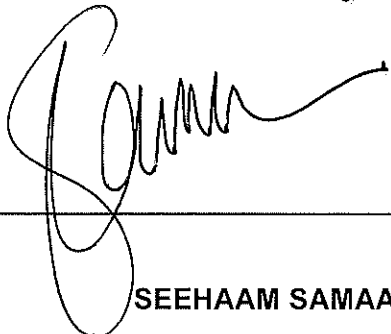
AD PARAGRAPHS 51 - 54

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41. The contents herein are denied. Legal argument will be advanced to address these issues.
42. The respondents' decision to oppose the application is not a factor in the determination of actual or potential prejudice. The question of whether the WLC intervention is permitted is for the Court to determine and it is within the Court's discretion to deny the application regardless of the views of the parties to the litigation. As such, it was not necessary for the respondents to oppose the application made to Court to admit the Centre as *amicus*.
43. Consequently, any costs incurred by the respondents in opposing this application was due to its own doing and should be borne by the respondents.

CONCLUSION

44. The Centre has demonstrated its interest in the matter, and the unique points it seeks to advance to assist the Court in its determination of this matter. It is in the interest of justice that the application for leave to intervene be granted in accordance with rule 16A.
45. Its application to be admitted as *amicus* should be upheld, and the respondents' prayer to dismiss the application with costs should be dismissed. It is unusual for a public institution to seek costs against a non-profit organisation acting in the public interest and, should the respondents' persist in seeking this relief, legal argument on the question of costs will be made.
46. The Centre accordingly prays to be admitted as *amicus curiae* in the above matter.

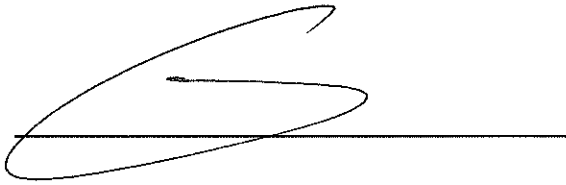


SEEHAAM SAMAAI



I certify that on this 6th day of JUNE 2019, in my presence at CAPE TOWN the deponent signed this declaration and declared that she:

- a) knew and understood the contents hereof;
- b) has no objection to taking this oath;
- c) considered this oath to be binding on his/her conscience and uttered the words "I swear that the contents of this declaration are true, so help me God".



COMMISSIONER OF OATHS

CHARL JOHN MAY
PRACTICING ATTORNEY/
COMMISSIONER OF OATHS
TYBERVALLEY CHAMBERS
27 WILHE VAN SCHOORORNE
TYBER VALLEY

