

BREAKING THE SILENCE – FRIENDS OF THE COURT CAN ADDUCE EVIDENCE

***Children’s Institute v Presiding Officer of the
Children’s Court District of Krugersdorp***
Case CCT 69/12 [2012] ZACC 25

1 Introduction

An *amicus curiae*, literally friend of the court, is a person or organization with a strong interest or views on the subject matter of an action, but not a party to the action who may petition a court for permission to file an application on behalf of a party (Garner *Black’s Law Dictionary* 7ed (1999) 83; and see also Covey “*Amicus Curiae: Friend of the Court*” 1959–1960 9 *DePaul LR* 30). Other definitions state that the *amicus* is able to advise the court on matters of fact (Angell “*The Amicus Curiae: American Development of English Institutions*” 1967 16 *International and Comparative Law Quarterly* 1017). An *amicus curiae* educates the court on points of law that are in doubt, gathers or organizes information, or raises awareness about some aspect of the case that the court might otherwise overlook (Robbins “*False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals Under the Hotrolled Lead/Asbestos Doctrine*” Winter 2003 44 *Harvard ILJ* 317–329). Justice O’Connor of the United States Supreme Court has justified the *amicus* procedure on ground that “[t]he ‘friends’ who appear today usually file briefs calling our attention to points of law, policy considerations, or other points of view that the parties themselves have not discussed” (Honourable Justice Sandra Day O’Connor in her speech while accepting Henry Clay Medallion from the Henry Clay Memorial Foundation on 4 October 1996, <http://www.henryclay.org/henry-clay/attorney/> accessed 2013-05-13; and see also Collins *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (2008) 48). The participation of *amicus curiae* in litigation is a practice which has been entrenched in the common law and civil law of various jurisdictions (Schmidt “*History, Purpose and Philosophy of Amicus Advocacy: The AELE Amicus Brief program*” <http://www.aele.org/history.html> accessed 2013-05-12). It is for this reason that an *amicus* has become versatile and is said to fulfil a wide range of important functions (Murray “*Litigating in the Public Interest: Intervention and the Amicus Curiae*” 1994 *SAJHR* 242). The participation of *amicus curiae* in litigation is a well-established practice in South African legal history. Indeed, the South African courts “are increasingly recognizing that certain matters must necessarily involve the perspectives and voices of organizations or entities that may not have a direct legal interest in the matter” (Brickhill and Du Plessis “*Two’s Company, Three’s a Crowd in Investor-State Arbitration (Piero v South Africa)*” 2011 27(1) *SAJHR* 152). *Amicus curiae* briefs have helped the

courts to clarify and develop judicial approaches that would assist the courts in handling intricate issues (Mubangizi and Mbazira “Constructing the *Amicus Curiae* Procedure in Human Rights Litigation: What can Uganda Learn from South Africa?” 2012 *Law and Democracy Development* 204; and Thabane “Stacking the Odds Against the Accused: Appraising the Curial Attitude Towards *Amici* Participation in Criminal Matters” 2011 24(1) *SACJ* 23–24).

The role of *amicus curiae* in South Africa must be viewed against the background of public-interest litigation which is largely the result of the “apartheid” era in which human-rights activists and civil society organizations sought to fight the inequalities of the “apartheid” regime (Mubangizi and Mbazira 2012 *Law and Democracy Development* 208). With the advent of the Constitution the challenge has now moved away from addressing inequalities of the past but towards ensuring that all persons benefit from the rights enshrined in the Constitution (Badwaza “Public Interest Litigation as Practiced by South African NGOs: Any Lessons for Ethiopia?” Unpublished LLM dissertation submitted to the University of Western Cape (2005) 36). This has been greatly helped due to the South African Constitution adopting a liberal position with regard to *locus standi* (Mubangizi and Mbazira 2012 *Law and Democracy Development* 208). This approach has been useful especially for those wishing to enforce the rights in the Bill of Rights of the Constitution by litigating in the public interest. Although, technically, *locus standi* can be distinguished from the *amicus curiae* procedure, the courts have applied the same *locus standi* flexibility to the *amicus curiae* procedure (Mubangizi and Mbazira 2012 *Law and Democracy Development* 208).

In light of this, organizations sought to be admitted as *amicus curiae* in order to adduce statistical evidence, initiate court cases or have sought to be admitted as *amicus curiae* on behalf of individuals or groups in litigation. The Children’s Institute at the University of Cape Town (hereinafter “Children’s Institute”) in the case of *Children’s Institute v Presiding Officer of the Children’s Court District of Krugersdorp* (Case CCT 69/12 [2012] ZACC 25) is a classic example of such a case. The Children’s Institute sought to be admitted as *amicus curiae* in order to adduce statistical evidence demonstrating why orphaned children living with family members should receive the foster child grant. The Children’s Institute contended that the Children’s Court decision would lead to roughly 350 000 orphaned children (who live with family members) losing their foster grants (<http://www.golegal.co.za/courts/evidence-submitted-friend-court> accessed 2013-05-13).

The Constitutional Court in *Children’s Institute v Presiding Officer of the Children’s Court District of Krugersdorp* (*supra*) discussed the role of the *amicus* as envisioned in the Uniform Rules as being very closely linked to the protection of the constitutional values and the rights enshrined in the Bill of Rights (par [1]). It further stated that friends of the court played a variety of roles at common-law, and that Rule 16A was specifically intended to facilitate the role of *amici* in promoting and protecting public interest, the court acknowledged that in such cases *amici* played an important role first by ensuring that courts considered a wide range of options, were well informed and they increased access to courts by creating space for

interested non-parties to provide input on important public interest matters especially those related to constitutional issues (par [26] and [27]). The Constitutional Court acknowledged that it was not a favourable situation for it to sit as a court of first and final instance in relation to new issues or a factual material, yet in such a case, it became necessary, since cases which *amici* are involved in usually affect children, the vulnerable, the marginalized and the indigent (par [29] and [30]). The court also made note of a court's responsibility as upper guardians of all children (par [29] and [30]). This case note aimed to provide a discussion of the *amicus curiae* with specific reference to the important judgment of the Constitutional Court *Children's Institute v Presiding Officer of the Children's Court District of Krugersdorp* (*supra*) which set out the principles as to whether Rule 16A of the Uniform Rules, properly interpreted, permitted High Courts to allow a friend of the court (*amicus curiae*) to adduce evidence in support of the submissions it sought to advance.

1 1 *The origin, meaning and application of the amicus curiae*

The case which initially described the role of an *amicus* in South African law was the case of *Connock's (SA) Motor Co Ltd v Pretorius* (1939 TPD 355) where Millin J stated (par [356]) that "the definition of the term is to be found in several legal dictionaries [that] speak of an *amicus* as a bystander – someone who is present in court and not concerned with the matter in hand, who may be counsel or may not". This traditional role of the *amicus* has changed considerably. The *amicus* now fulfills a wide range of functions and plays a much more formal role in litigation (Mubangizi and Mbazira 2012 *Law and Democracy Development* 203).

The Constitutional Court Rules in 1995 was the first legislative provision that provided for *amicus curiae* (Initially Rule 9 of the Constitutional Court Rules of 1995, now Rule 10 of the Constitutional Court Rules of 2003). Rule 10 of the Constitutional Court Rules provides guidelines as to who can act as an *amicus curiae* in a Constitutional Court hearing. In this regard, the rule provides that any person interested in any matter before the Court may, with the written consent of all the parties, be admitted as *amicus curiae* (Rule 10(1)). Under Rule 10(4), if consent is not given by the parties to the case, an application may be made to the Chief Justice. The rule also provides for the form and content of an *amicus curiae* application (Rule 10(6)). The application should briefly describe the interest of, and the position to be adopted by, the *amicus*. The application should also set out the submissions and state their relevance to the proceedings (Rule 10(6)). Constitutional Rule 10 was later drafted and introduced into the rules regulating practice in the High Courts (Rule 16A of the Rules Regulating the Conduct of Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa 1965, inserted by GN 849 of 25 August 2000, also known as the Uniform Rules of Court (hereinafter "Uniform Rules").) Rule 16A of the Uniform Rules, which is drafted along the same lines as Rule 10 of the Constitutional Court Rules, provides for submission by *amicus curiae* in a High Court.

The role of *amicus curiae* in South Africa can best be understood through an examination of court decisions which have defined the role of the *amicus curiae*.

In *Government of the Republic of South Africa v Grootboom* (hereinafter “*Grootboom* case”) (2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC)), Justice Albie Sachs commented on the role that the *amicus curiae* played in the case. The Justice stated the following:

“I might mention that we were helped at the hearing in a most considerable way by the participation of the Human Rights Commission and the Community Law Centre of the University of the Western Cape. Counsel for the Legal Resources Centre appeared on their behalf and succeeded in broadening the debate so as to require the Court to consider the right of all South Africans to shelter, whether they had children or not ... The case showed the extent to which lawyers can help the poor to secure their basic rights” (Sachs “The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case” in Jones and Stokke *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (2005) 131).

Amicus curiae have featured in a number of cases and has assisted the courts in dealing with often difficult and complicated issues (Mubangizi and Mbazira 2012 *Law and Democracy Development* 204). The Constitutional Court in *Mazibuko v City of Johannesburg* (2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC)) had to consider an appeal regarding the proper interpretation of section 27(1)(b) of the Constitution which provides that everyone has the right to have access to sufficient water (par 1 of the judgment). The case concerned two major issues: the first was whether the City’s policy in relation to the supply of free basic water, and particularly, its decision to supply 6 kilolitres of free water per month to every account holder in the city (the Free Basic Water policy) was in conflict with section 27 of the Constitution or section 11 of the Water Services Act. The second major issue was whether the installation of pre-paid water meters by the first and second respondents was lawful (par 6 of the judgment). The *amicus curiae* in this case was the Centre for Housing Rights and Evictions (COHRE) (an international non-governmental organization which works to promote and protect economic, social and cultural rights) (par 5 of the judgment). The role played by COHRE was important as it addressed the court on critical issues, including the duty to consider international and foreign law, the right to water in international law, the positive right to free basic water, the negative right to water, the procedural challenge to pre-payment meters and the equality challenge (Mubangizi and Mbazira 2012 *Law and Democracy Development* 204). Based on these submissions by the *amicus curiae* the Constitutional Court held, firstly, that section 27 placed an obligation on Government to take reasonable legislative and other measures to seek the progressive realization of the right to water and, secondly, that the installation of the meters was neither unfair nor discriminatory (par 155–169 of the judgment).

The role played by the by various *amici* in *The Minister of Health v Treatment Action Campaign (TAC) (2)* (*TAC* case) (2002 (5) SA 721; 2002 (10) BCLR 1033) was also important. The case concerned two issues. Firstly, the right given to everyone to have access to public health-care services and the right of children to be afforded special protection and

secondly, whether in terms of the provisions of sections 27 and 28 of the Constitution the Government is constitutionally obliged to plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout South Africa (par 4 and 5 of the judgment).

The Minister of Health and the Treatment Action Campaign (TAC), The Institute for Democracy in South Africa (IDASA), the Community Law Centre (CLC) and Cotlands Baby Sanctuary were admitted as *amici curiae*. IDASA and CLC combined their submissions and Cotlands Baby Sanctuary made separate submissions. It was contended by IDASA and CLC that section 27(1) of the Constitution established an individual right vested in everyone (par 26 of the judgment). This right, so the contention went, had a minimum core to which every person in need was entitled. The arguments presented by IDASA and CLCs were based firstly on the right of access to health-care services and secondly, the rights of children to basic health care services (par 26 of the judgment). Cotlands Baby Sanctuary's submissions considered the reasonableness of measures taken by the State to make available in its public health-care system an affordable drug that could significantly reduce the risk of a child being born HIV positive and thus with a life-threatening condition, amongst others (par 32–43 of the judgment). The court held that the Government's policy fell short of compliance with sections 27(1) and (2) of the Constitution. The Court held that Government had to devise and implement within its available resources a comprehensive and co-ordinated programme to realize progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV, and that Government had to introduce reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and make appropriate treatment available to them for such purposes (par 45 of the judgment).

In Re: Certain Amicus Curiae Applications; Minister of Health v Treatment Action Campaign (2002 (5) SA 713 (CC)) dealt with various applications for admission as *amici curiae* to adduce further evidence in the appeal by the Government against orders made against it by the High Court in the aforementioned case. In passing its judgment the court (par [5]) set out the role of *amicus curiae* as follows:

“The role of an *amicus is* to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The *amicus* must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an *amicus* to try to introduce new contentions based on fresh evidence”.

The scope of this paper does not intend to provide a detailed analysis of all the cases where *amicus curiae* have played a role. There are a plethora of other judgments where the *amicus curiae* have played a significant role and have drawn the courts' attention to matters that would not have ordinarily been within the scope of the case (see the following

cases in this regard: *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC); *Du Toit v Minister of Welfare and Population Development* 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC); *Hassam v Jacobs NO* 2009 (11) BCLR 1148 (CC); 2009 (5) SA 572 (CC); *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); *Omar v Government of the Republic of South Africa* 2006 (2) BCLR 253 (CC); 2006 (2) SA 289 (CC); *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (8) BCLR 872 (CC); 2006 (2) SA 311 (CC); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); and *Ferreira v Levin*, 1996 (4) BCLR 441 (CC).

It should be noted that while the *amicus curiae* procedure has been used in a number of cases, most notably in cases dealing with economic, social and cultural rights where the role of *amicus curiae* has also been debated and discussed in criminal matters (Thabane 2011 24(1) SACJ 19–32). The courts in *Ex Parte Institute for Security Studies: In re Basson* (2006 (6) SA 195 (CC)) and *S v Zuma* (2006 (2) SACR 257 (W)) adopted a narrower approach as far as the admittance of an *amicus curiae* in criminal matters was concerned. The courts in *Ex Parte Institute for Security Studies: In re Basson* (*supra*) and *S v Zuma* (*supra*) were reluctant to admit an *amicus curiae* where the evidence presented by the *amicus curiae* would have the effect of strengthening the state's case against the accused and could possibly undermine the accused's right to a fair trial (Thabane 2011 24(1) SACJ 29). The court in *Ex Parte Institute for Security Studies: In re Basson* (*supra*) did point out that this was not an inflexible rule but that the courts had to be guided by fairness, equality of arms and the interest of justice (*Ex Parte Institute for Security Studies: In re Basson supra* par 15). Thabane (2011 24(1) SACJ 32) correctly suggested that although our courts would be guided by the judgments in *Ex Parte Institute for Security Studies: In re Basson* (*supra*) and *S v Zuma* (*supra*) as to when not to admit *amici*, it had to be kept in mind that there were circumstances where the *amici* would clearly be of immense value to the court and it would result in an injury not only to those seeking to be admitted as *amici* but also to the interests of justice should the *amici* not be allowed to give evidence in the proceedings (Frey "Trial Balloon: *Amici Curiae*: Friends of the Court or Nuisances?" 2006–2007 33 *Litigation* 5).

2 Facts

SS a minor child, was brought to live with Mr Mbuzeli Bennet Lamani and Mrs Nontobeko Elizabeth Lamani (his great aunt and uncle) by his mother in 2002. They raised him as their own child, supporting him from their meagre earnings. After the child's mother died on 18 June 2007, Mrs Lamani reported the matter on 8 November 2007 to the Department of Social development in Krugersdorp. An application for a foster-care order was brought by the Centre for Child Law on behalf of the minor child and set down in the Children's Court in the district of Krugersdorp (*SS (A Minor Child) v Presiding Officer of the Children's Court, District Krugersdorp* [2011] ZAGPJHC 139; [2012] 1 All SA 231 (GSJ) par [1] and [2], (Wepener J, Mokgoathheng J concurring) (High Court judgment)). In addition to this an

order was also sought declaring SS to be a child in need of “care and protection” under the Children’s Act 28 of 2005 (hereinafter “the Children’s Act”) in order for the great uncle and aunt to receive a foster-child grant of up to R770. This grant is significantly greater than the child-support grant of up to R280 made in respect of many other poor children. The “Increase in Respect of Social Grants”, published under Government Notice 256 in Government Gazette 35189 of 29 March 2012, provides that foster-child grants are a maximum of R770 per month and child-support grants a maximum of R280 per month. Section 6 of the Social Assistance Act 5 of 2010 provides that a person is eligible for a child-support grant if he or she is the primary caregiver of the child in question. Pursuant to the inquiry in terms of section 155 (1) of the Children’s Act, on 20 January 2011, the Child Commissioner delivered the judgment that included the order that the minor child was *inter alia*, not in need of care as envisaged in section 150(1)(a) the Children’s Act. The court reasoned that there was no need to regulate a situation in which the child was placed with family members (par [3] and [4]).

On appeal in the South Gauteng High Court (hereinafter “the High Court”), the Children’s Institute sought to be admitted as an *amicus curiae*. According to the Children’s Institute, an outcome upholding the Children’s Court’s decision would result in approximately 350 000 orphaned children who live with family members losing the foster-child grants currently being received. The Children’s Institute made an application to the High Court to adduce evidence. It sought to lead evidence of a statistical nature to demonstrate why orphaned children living with family members should qualify for foster-child grants. The application was refused by the High Court (par [5] and [6]).

The High Court held that in terms of Rule 16A of the Uniform Rules an *amicus* may not adduce evidence (*SS (A Minor Child) v Presiding Officer of the Children’s Court, District Krugersdorp supra* par 21). It further held that a High Court may not use its inherent power to regulate its own process under section 173 of the Constitution of the Republic of South Africa, 1996, (hereinafter “section 173”) to allow an *amicus* to adduce evidence because to do so would amount to creating a new substantive right (*SS (A Minor Child) v Presiding Officer of the Children’s Court, District Krugersdorp supra* par 20). The *amicus* in the matter, the Children’s Institute, was refused leave to appeal in both the High Court and the Supreme Court of Appeal (SCA) (par [2]).

The appeal in the High Court dealt with the proper interpretation of section 150(1)(a) of the Children’s Act. The court held that the view adopted by the Child Commissioner was a very short-sighted and narrow interpretation of section 150(1)(a). On the Child Commissioner’s interpretation a child who has a caregiver could not be a child in need of care and protection and therefore cannot be placed in foster care. On his interpretation a child was in need of care and protection if he had been abandoned or orphaned and had no caregiver and that if any person claimed or took responsibility for the child then the child has “visible means of support”, and thus could not be a child in need of care and protection in terms of section 150(1)(a) of the Children’s Act, and could not be placed in the foster care of the caregiver (*SS (A Minor Child) v Presiding Officer of the Children’s Court, District Krugersdorp supra* par [16]). The judge in the High Court held that the Child Commissioner

erred in the interpretation of the phrase “without visible means of support” in section 150(1)(a) to mean that “a child is in need of care and protection if the child has been abandoned or orphaned and has no caregiver who is willing to support the child”. The judge was of the view that the Commissioner should have interpreted the words “without visible means of support” to include family members that are current caregivers to be eligible for foster-care grants. To interpret the phrase in this way is consistent with the plain meaning of the statute, is in keeping with the intention of the legislature and also promotes familial caregivers. If this were not the case then the phrase “visible means of support as relating to the caregivers runs contrary to the best interests of the child and will have the effect of dissuading family members from stepping in to help support the minor child early in the orphanage of that child” (*SS (A Minor Child) v Presiding Officer of the Children’s Court, District Krugersdorp supra* par [40]–[41]).

The court held that as the minor child is related to his foster parents (see par above) he should be placed in their foster care until he turns 18 years. The court was of the view that in terms of section 150(1)(a) of the Children’s Act the minor child is an orphan, is in need of care and protection and is without any visible means of supports and should be placed in the foster care of his grandparents (*SS (A Minor Child) v Presiding Officer of the Children’s Court, District Krugersdorp supra* par [42]–[44]).

3 Legal issues

The central question in the appeal before the Constitutional Court was whether Rule 16A of the Uniform Rules, properly interpreted, permits High Courts to allow a friend of the court (*amicus curiae*) to adduce evidence in support of the submissions it seeks to advance. Rule 16A of the Uniform Rules itself points to the role that *amici* play in constitutional litigation by referring to “any interested party in a constitutional issue”. If Rule 16A of the Uniform Rules does not provide for the adduction of evidence by an *amicus*, a secondary question is whether a High Court’s inherent power under section 173 of the Constitution to regulate its own process allows it to hear evidence tendered by an *amicus* (par [1]).

4 Judgment

The Constitutional Court held that it was in the interests of justice to grant leave to appeal. This was so because of the significant role played by the amici in the administration of justice and because of the restrictive effect of the High Court judgment on the ability of *amici* to adduce evidence and render assistance to the courts in the administering of justice (par [11]–[12]). The court made reference to the important role played by *amici curiae* in advocating on behalf of vulnerable groups, and the invaluable contribution made by *amici curiae* to South African jurisprudence (*Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) par [80]; and *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) par [19]).

The court also considered the fact that the decision in the High Court to disallow the *amicus curiae* from adducing evidence was made by a full bench and would be highly persuasive to other judges sitting in the High Court. In these circumstances the limitation on the ability of *amici* to adduce evidence could have serious consequences for *amici curiae* to render assistance to the courts in the future, more so because the Supreme Court of Appeal refused leave to appeal (par [14]). The Constitutional Court accordingly granted the leave to appeal.

The Constitutional Court held that rule 16A of the Uniform Rules allows for an *amicus* to adduce evidence. The Justice Khampepe (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Nkabinde J, Skweyiya J, Van der Westhuizen J, Yacoob J and Zondo J concurring) stated that both a textual and purposive interpretation of the rule support this conclusion (par [34]). The Justice went on to add that even if Rule 16A of the Uniform Rules did not provide for evidence to be adduced by an *amicus*, section 173 of the Constitution gave the courts the inherent power to regulate their own processes and that included the ability to allow amici to adduce if it was in the interest of justice to do so. The Justice did point out, however, that whether and to what extent to allow an *amicus* to adduce evidence in support of its submissions remained within the discretion of the High Court which was guided by the interests of justice. The appeal was accordingly granted (par [39]–[40]).

5 Analysis and discussion

5.1 Rule 16 A

The admission of an *amicus curiae* is governed by Rule 16A of the Uniform Rules. The relevant part of the Rule for the purposes of this case provides:

- “(2) Subject to the provisions of national legislation enacted in accordance with section 171 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and these rules, any interested party in a constitutional issue raised in proceedings before a court may, with the written consent of all the parties to the proceedings, given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was first raised, be admitted therein as *amicus curiae* upon such terms and conditions as may be agreed upon in writing by the parties.
- (3) The written consent contemplated in subrule (2) shall, within five days of its having been obtained, be lodged with the registrar and the *amicus curiae* shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.
- (4) The terms and conditions agreed upon in terms of subrule (2) may be amended by the court.
- (5) If the interested party contemplated in subrule (2) is unable to obtain the written consent as contemplated therein, he or she may, within five days of the expiry of the 20-day period prescribed in that subrule, apply to the court to be admitted as *amicus curiae* in the proceedings.
- (6) An application contemplated in subrule (5) shall –
 - (a) briefly describe the interest of the *amicus curiae* in the proceedings;
 - (b) clearly and succinctly set out the submissions which will be advanced by the *amicus curiae*, the relevance thereof to the proceedings and

- his or her reasons for believing that the submissions will assist the court and are different from those of the other parties; and
- (c) be served upon all parties to the proceedings.
- (7) (a) Any party to the proceedings who wishes to oppose an application to be admitted as an *amicus curiae*, shall file an answering affidavit within five days of the service of such application upon such party.
- (b) The answering affidavit shall clearly and succinctly set out the grounds of such opposition.
- (8) The court hearing an application to be admitted as an *amicus curiae* may refuse or grant the application upon such terms and conditions as it may determine.
- (9) The court may dispense with any of the requirements of this rule if it is in the interests of justice to do so" (author's own emphasis added).

5.2 *The High Court interpretation of Rule 16A*

The High Court held that Rule 16A of the Uniform Rules only permits an *amicus curiae* to be admitted to the proceedings but prohibits it from leading evidence. The Judge in the High Court stated that he was of the view that Rule 16A of the Uniform Rules permitted an interested party to be admitted as an *amicus curiae* in the proceedings by the court after a consideration of all the relevant facts but that there was no provision in Rule 16A of the Uniform Rules for the admission of additional facts. The High Court accordingly concluded that High Courts had no inherent power under the Uniform Rules to receive evidence from an *amicus*. The High Court went on to add that a court's inherent power under section 173 to regulate its own processes did not include the reception of additional evidence from an *amicus*. The court was of the view that the admission of new evidence in these circumstances would amount to the creation of a new right for an *amicus* (*SS (A Minor Child) v Presiding Officer of the Children's Court, District Krugersdorp supra* par [20]–[21]).

5.3 *Textual analysis of Rule 16A*

Rule 16A of the Uniform Rules allows the courts to exercise a great amount of discretion in determining whether to admit *amici curiae* as well as the terms and conditions under which they may participate in the court proceedings (par [19]).

Rule 16A of the Uniform Rules can be divided into two broad parts. Subrules (2) to (4) govern an agreement between the parties on terms and conditions for the admission of an *amicus*, while subrules (5) to (8) regulate a disagreement between the parties. Under both of these parts of the Rule it is clear that the court makes the final determination on what terms and conditions are set for the admission of the amici. Subrule (4) allows the court to amend the terms and conditions decided upon by the parties, whilst the power of the courts to determine the terms and conditions itself is set out in subrule (8). The wide discretion given to the High Courts is emphasized in subrule 9 which provides that a court "may dispense with any of the requirements of this Rule if it is in the interests of justice to do so". From these subrules it can be seen that the only limitation on a court's discretion to

dispense with any of the requirements of Rule 16A, is whether it is in the interests of justice to so.

The High Court interpreted subrule (5) to mean that the court may permit submissions to be made by the *amicus curiae* but that the *amicus* may not provide evidence. The Constitutional Court held that this was a narrow interpretation of the subrule and was misguided, firstly, because Rule 16A made no mention of oral submissions yet the courts routinely permit an *amicus* to make oral submissions and secondly because other High Court decisions have concluded that an *amicus* might adduce evidence (par [22]); see also (*Governing Body, Rivonia Primary School v MEC for Education: Gauteng Province (Equal Education as Amici Curiae)* 2012 (5) BCLR 537 (GSJ); *Wesbank, A Division of FirstRand Ltd v Papier (National Credit Regulator as Amicus Curiae)* 2011 (2) SA 395 (WCC) par [29]–[30]; *De Gree v Webb (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2006 (6) SA 51 (WLD) [52B–D]; *S v Engelbrecht (Centre for Applied Legal Studies intervening as Amicus Curiae)* 2004 (2) SACR 391 (WLD) par [14]; and *Modderklip Boerdery (Edms) Bpk v President van die RSA* 2003 (6) BCLR 638 (T) par [29] and [38]). In *S v Engelbrecht (supra* par [37]) the court treated the term “submissions” to include background information not supplied by the original parties. The court in *S v Engelbrecht (supra* par [37]) requested “written submissions” from the *amicus curiae* on the “[a]pplication of relevant research, academic scholarship and legal and juristic developments” to “contextualise the behavior and/or criminal actions of the accused”. In light of the above it is clear that submissions that may be made by an *amicus curiae* can be interpreted to include written oral evidence and that Rule 16A empowers a High Court to admit any submissions by an *amicus* and to determine whether those admissions will include: written argument, oral argument as well as the nature and the extent of evidence sought to be led. In the making of these determinations the court must be guided by what is in the interests of justice (par [23]; and see also Murray 1994 10 SAJHR 259).

Justice Khampepe held that the wording of subrule (9) was permissive. It therefore empowered a court to dispense with any of the requirements of Rule 16A if it is in the interests of justice to do so. Khampepe J, held that the High Court’s conclusion that evidence by an *amicus* never be adduced under any circumstances was incorrect (par [24]).

5 4 Purpose of Rule 16A and the role of the *amicus curiae*

It was argued by the Children’s Institute that Rule 16A was intended to facilitate admission of *amici curiae*. Before the introduction of Rule 16A and its counterpart, Rule 10 of the Constitutional Court Rules, there were no formal rules guiding courts in the admission of an *amicus curiae*. As a result, the courts took a narrow approach regarding the admission of an *amicus curiae* in court proceedings (Murray 1994 10 SAJHR 257). The introduction of Rule 16A was to remedy this *lacuna* in the law and to take cognizance of the fact that constitutional cases often had far-reaching ramifications that went beyond the interests of the parties concerned (*Rates Action Group v City of Cape Town* 2004 (5) SA 545 (CPD) par [553].)

The role envisioned of an *amicus* in the Uniform Rules is very closely linked to the protection of constitutional values and the rights enshrined in the Bill of Rights. Rule 16A (2) describes an *amicus* as an “interested party in a constitutional issue raised in proceedings”. The friends of the court had historically played a variety of roles at common-law but Rule 16A was specifically intended to promote the role of *amici* in promoting and protecting the public interest (Erasmus *Superior Court Practice Service Issue 36* (2011) C4–19; see also Murray 1994 10 SAJHR 256–258; and Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* (2010) 92). The author refers to a number of cases where the courts acknowledged the useful role of *amici*. The Rule does this by recognizing the important role that *amici* play in ensuring that the courts consider a wide range of issues and by increasing access to the courts by permitting non-interested parties to provide input and information to the courts on important public-interest matters (Murray 1994 10 SAJHR 250–254; see also *S v Engelbrecht supra* par [14], where the court stated that the admission of *amici curiae* may ensure that the court considered a wider range of options when coming to a decision and ensured that it was better informed).

Khampepe J stated that the role of a friend of the court could be defined as one that assisted the courts in effectively promoting and protecting the rights enshrined in the Constitution (par [27]). Section 39(2) of the Constitution requires that, when interpreting any legislation, courts had to promote the “spirit purport and objects of the Bill of Rights”. In instances where there were two reasonable interpretations of a provision, section 39(2) dictates that a court must prefer the interpretation that best promotes the spirit, purport and objects of the Bill of Rights (*Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) par [46]–[47]). To allow an *amicus* to adduce evidence in public-interest matters best promotes the spirit, purport and objects of the Bill of Rights. Therefore in cases such as the present the correct interpretation of Rule 16A must be to allow the courts to consider evidence.

Rule 16A does not explicitly mention evidence. However, the rules of the Constitutional Court provide that an *amicus* may, when appropriate, adduce evidence under Rule 31 of the Constitutional Court Rules. Rule 31 states (the relevant part):

- “(1) Any party to any proceedings before the Court and an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts –
- (a) are common cause or otherwise incontrovertible; or
 - (b) are of an official, scientific, technical or statistical nature capable of easy verification.”

Rule 10 (8) the Constitutional Court Rules provides:

“Subject to the provisions of rule 31, an *amicus curiae* shall be limited to the record on appeal or referral and the facts found proved in other proceedings and shall not add thereto and shall not present oral argument.”

Justice Khampepe stated that courts of first instance had to be permitted to hear and admit evidence from *amicus curiae* to prevent a situation where appellate courts are inundated with new evidence. If this was not the case it could lead to a situation where an appellate court might hear new evidence that was not heard by the High Court. The High Courts should not knowingly have left relevant evidence that could have been received by them to be produced at the appellate level. On the contrary they should strive to accommodate the reception of evidence if it related to issues at hand, was of appreciable assistance to the Court in the adjudication of issues before it and if it would have been in the interests of justice to do so (par [29]; and see also *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (AD) 616H). This is of greater importance in cases in which *amici* are involved because these cases often dealt with issues that affected children, the marginalized, the vulnerable, and indigent (par [30]).

The information provided by *amicus* is often based on broader considerations and therefore must be premised on facts and evidence such as statistics and research. It makes little sense for a court to allow the presentation of evidence which is unsupported by facts. An *amicus curiae* will not always be allowed to lead evidence in the course of his/her submissions. The admissibility in each particular case must be determined according to whether it is in the interest of justice to do so, and what the interests of justice require in a particular case must be left to the High Court to decide as the High Court is the best place to do so after having heard the evidence in relation to issues and the factual material (par [31]–[32]).

5.5 *Inherent power under section 173*

Section 173 of the Constitution provides that:

“The Constitutional Court, Supreme Court appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common goal, taking into account the interests of justice.”

The High Court found that section 173 was not applicable in this case because allowing an *amicus* to produce evidence would constitute the creation of new substantive rights, which goes beyond the scope envisioned section 173. The High Court relied on the case of *Oosthuizen v Road Accident Fund* (2011 (6) SA 31 (SCA)) in reaching its decision. In *Oosthuizen v Road Accident Fund* supra, the appellant sought to have his claim transferred from the Magistrates Court to the North Gauteng High Court after his claim had been prescribed. The appellant (Oosthuizen) sustained serious bodily injuries as a result of a motor accident in March 2003. A year later the appellant issued summons against the respondent (RAF) in the Magistrate’s Court. After this the appellant obtained two medico-legal reports which indicated that the appellant’s future loss of earnings to be in excess of R100 000.00 and thus beyond the jurisdiction of the Magistrate’s Court. The High Court held that there was in fact no statutory provision or a rule in the High Court or Magistrate’s Court which permitted a transfer to the plaintiff’s request from the Magistrate’s Court to the High Court. Furthermore by the time that the application had been made to transfer the matter it had subsequently been prescribed. The appellant

then took the matter on appeal to the SCA. The SCA held that whilst the Magistrate's Court allowed for a defendant to request a transfer there was no section or rule which allowed for a plaintiff to do the same. A plaintiff chose the forum in which to litigate and had to bear the consequences thereof. The appellant further attempted to rely on the inherent jurisdiction of the High Court to rescue the situation. The appellant argued that section 173 was applicable in that case by contending that the High Court was entitled, and indeed compelled, to come to the appellant's assistance by exercising its inherent jurisdiction to regulate its own process. The SCA held that Section 173 did not give any of the courts mentioned therein, including the High Court, *carte blanche* to meddle or interfere in the affairs of inferior courts. The SCA held that, to allow the application, would in effect, permit the appellant to bypass prescription and to do so would have a substantial effect, namely the revival of a prescribed claim (*Oosthuizen v Road Accident Fund supra* par [23] and [26]).

Khampepe J was of the view that the present case was clearly distinguishable from *Oosthuizen v Road Accident Fund (supra)*. The Justice stated that the adduction of evidence fell under ambit of the court's power to regulate its own processes and did not create a new substantive right (Schwikkard *Principles of Evidence* (2010) 1–2). She went on to add, that even if Rule 16A did not provide for an *amicus* to adduce evidence, section 173 could have appropriately been invoked by the High Court to allow an *amicus* to do so (par [38]).

6 Impartiality of *amicus curiae*?

The traditional view is that the *amicus curiae* must always act for the benefit of the court to promote accuracy in court judgments rather than asserting its own or any other agenda. (Beckwith and Sobernheim "*Amicus Curiae* – Minister of Justice" 1948 17 *Fordham LR* 38). Owing to the adversarial nature of our court system it has been argued that it was unrealistic to expect that *amicus curiae* would always observe a neutral stance in the proceedings without choosing sides (Budlender "*Amicus Curiae*" in Woolman (ed) *South African Constitutional Law* (2008) 3–8); and Thabane 2011 24(1) *SACJ* 26).

The court in *Hoffmann v South African Airways (supra)* was cognizant of the possibility of *amicus curiae* choosing sides. It was observed by the court in *Hoffmann v South African Airways (supra)* par 28A of the judgment that the *amicus* "chooses the side it wishes to join unless requested by the court to urge a particular position". It is when the *amicus* chooses sides that the line between the role of an *amicus curiae* as friend of the court or a friend to a litigant is blurred.

Thabane (2011 24(1) *SACJ* 26) pointed out that the *amicus curiae* acting as a friend of a party might serve two purposes. The first; to illuminate the party's position by illuminating their somewhat weak arguments or, secondly, they might serve a more tactical purpose of taking risks that the party could not entertain without comprising their case. Krislov ("*Me Amicus Curiae*

Brief: From Friendship to Advocacy” 1962–1963 72 *The Yale LJ* 711–712) notes that the *amicus* may present:

“Subtle variations of the basic argument, or emotive and even questionable arguments that might result in a successful verdict, but are too risky to be embraced by the principal litigant. The strategy here is ... instead of identifying new techniques with a litigant’s official position, it may very well be advantageous to label the new as unofficial so that, if it should be rejected, a minimum of disapprobation attaches to the official cause. Arguments that might anger the Justices, doctrines that have not yet been found legally acceptable, and emotive presentations that have little legal standing can best be utilized in most instances by the *amicus* rather than by the principals.”

When the *amicus* seeks to advance the interests of a particular litigant it may be said that *amicus curiae* serves the party and not the court. It is only when organizations such as the Children’s Institute in *Children’s Institute Presiding Officer of the Children’s Court District of Krugersdorp (supra)* and similar organizations provide the court with clear and succinct submissions which raise new contentions or provide factual material that is common cause or otherwise incontrovertible or of an official, scientific, technical or statistical nature, capable of easy verification that they may appropriately be referred to as friends of public interest (Rule 10(6) and (7)) of the Constitutional Court Rules; *In Re Certain Amici Curiae Applications: Minister of Health v Treatment Action Campaign supra*).

7 Conclusion

Given the important role that *amici curiae* play in our society with regard to advocating on behalf of the vulnerable, clarity on the question of their ability to adduce evidence is greatly warranted. *Amici curiae* have made an invaluable and indelible contribution in South African jurisprudence and their increased participation in litigation is welcomed and encouraged. The effect on potentially limiting the *amici’s* ability to adduce evidence in the future would have had the effect of crippling the assistance provided by *amici* to the courts and would have also had the effect of preventing litigants with limited resources from having access to the courts, especially in cases where public interest is high. The Uniform Rules now, properly interpreted, enable *amici* to lead evidence if the interests of justice so demanded. It is important to note that when the *amici* do lead evidence they must recognize that their role is to assist the court in illuminating issues that the court would not ordinarily consider, rather acting in manner that may further or prejudice the case of either parties to the dispute. In light of the judgment the role of an *amicus* can now be defined as one that assists the courts in effectively promoting and protecting the rights enshrined in our Constitution.

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