Chapter 8
Amicus Curiae

Geoff Budlender

8.1 Introduction

(a) Traditional conceptions of the amicus curiae

The term amicus curiae can have a wide variety of meanings.[1] Traditionally, the most common form of amicus curiae is a person who appears at the request of the

1 For a discussion of different types of amicus curiae, see HG Erasmus *Superior Court Practice* (1994) C4-19–C4-20; Christina Murray 'Litigating in the Public Interest: Intervention and the Amicus Curiae' (1994) 10 *SAJHR* 240, 241–43.

court to represent an unrepresented party or interest.[2] The task of such an amicus is to present the best possible case for the unrepresented party or interest. In such cases, the role of the amicus does not differ in principle from that of the paid legal representative of a party. A second form of amicus responds to a request by a court for counsel to appear before it to provide assistance in developing answers to novel questions of law which arise in a matter, or (less commonly) where a person asks leave to intervene for this purpose. In such cases, the amicus curiae does not, ostensibly, represent a particular interest or point of view. A third common type of amicus curiae takes the form of the Law Society or Bar Council's intervention in an application for the admission of a legal practitioner. The professional body makes submissions to the court not to represent the interests of the professional body's members, but to assist and to advise the court in promoting the interests of the administration of justice.

(b) Amicus curiae in the new constitutional order

The new constitutional order introduced a fourth form of amicus curiae: a non-party requests the right to intervene so that it might advance a particular legal position which it has itself chosen.[3] This form of amicus was not permitted under the common law.[4] This new form of amicus curiae reflects two important changes brought about by our new constitutional democratic order. First, it reflects the underlying theme of participatory democracy in the Final Constitution. In matters of broad public interest, such as the interpretation of the Final Constitution, courts are more disposed towards listening to the voices of persons other than the parties to a particular dispute. Secondly, it reflects the fact that constitutional litigation often affects a range of people and interests that go well beyond those of the parties already before the court.

Courts in many jurisdictions have adopted special procedures for the intervention of non-parties (sometimes referred to as third-party interventions) in litigation of this kind.[5] The comments of Lieven and Kilroy with regard to the Human

Rights Act in the United Kingdom apply with equal force to constitutional litigation in South Africa:

> The Public Law Project in their report on third party interventions point out that judicial review cases increasingly raise fundamental social, moral and economic issues and require competing rights and interests to be finely balanced or difficult policy questions to be addressed. Often such cases raise issues of more general significance beyond the interests of parties to the litigation. PLP observe that the advent of the HRA [Human Rights Act] only strengthens the need for specialist information. Not only are previously

2 See, eg, *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA).

3 Unlike the first two traditional forms of amicus curiae, the amicus is the intervening non-party, not the legal practitioner who appears before the court on its behalf.

4 *Connock's (SA) Motor Co Ltd v Pretorius* 1939 TPD 355, 356-57.

5 For an overview of the position in various countries, see Nathalie Lieven & Charlotte Kilroy 'Access to the Court under the Human Rights Act: Standing, Third Party Intervenors and Legal Assistance' in Jeffrey Jowell & Jonathan Cooper (eds) *Delivering Human Rights: How the Human Rights Act is Working* (2003) 115.

> untested issues of fundamental and competing rights now coming before the courts which must be decided within complex social context, but in addition the courts are now required to apply the doctrine of proportionality when determining whether any interference with qualified rights is justified, and in doing so may need to weigh the impact upon other groups who are not represented by the litigants. The notion that the issues are merely between the parties will often not be correct.[6]

The response of the Constitutional Court in *Ferreira v Levin* reflects Lieven and Kilroy's' contention that courts must be aware of the impact of constitutional litigation on parties not already before the court.[7] In *Ferreira* – a matter that addressed various constitutional questions arising from the provisions of the Companies Act[8] which deal with examinations conducted during the winding up of a company – the Court invited and accepted written memoranda from the Association of Law Societies, the Public Accountants' and Auditors' Board, the South African Institute of Chartered Accountants and the Association of Insolvency Practitioners of South Africa.[9] The Court's rationale for these invitations was that the outcome of the case potentially affected very many non-parties.

This chapter is almost exclusively concerned with this new or fourth form of amicus curiae. Constitutional Court rule 10 describes this form of amicus as a person that is 'interested in any matter before the Court' and which chooses at its own initiative to seek to intervene in the proceedings. This form of amicus is also contemplated in the rules of other courts.[10]

Rule 10(6) makes it clear that to qualify as an amicus, the person must be 'interested' in the proceedings. That interest must be described in the application for admission. The rule also requires that the would-be amicus identify the 'position' which it will adopt in the proceedings. The amicus curiae is, therefore, by definition not a disinterested party. The amicus curiae in constitutional litigation under Constitutional Court rule 10 — or equivalent rules in other courts — is similar to an amicus curiae in the Supreme Court of the United States. In the US Supreme Court, an 'amicus brief' is 'filed by someone not a party to the case but

interested in the legal doctrine to be developed there because of the relevance of that doctrine for their own preferred policy or later litigation'.[11]

Despite this express recognition of the amicus as an interested party, traditional conceptions of the amicus curiae as a friend of the court, whose primary task is to

6 Lieven & Kilroy (supra) at 129.

7 *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (4) BCLR 441 (CC)('*Ferreira*') at para 4. See also Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 15-16.

8 Act 61 of 1973.

9 *Ferreira* (supra) at para 4.

10 See § 8.4 infra.

11 Kermit L Hall (ed) 'Amicus Brief' *The Oxford Companion to the Supreme Court of the United States* (1992) as quoted by Murray (supra) at 244.

assist the court rather than to put forward a particular point of view, persist in the jurisprudence.[12] In *Hoffmann v South African Airways* the Constitutional Court offered the following account of the role of the amicus curiae:

> An amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position.[13]

This description, with all due respect, rather confuses matters. To assert that an amicus joins proceedings 'as a friend of the Court . . . to assist the Court' is to perpetuate a fiction which is derived from the more traditional forms of amicus, and of course from the term amicus curiae itself. In truth, an amicus under rule 10 intervenes in the proceedings because it has an interest of its own which it wishes to promote. Under rule 10, it not only chooses its own position but is, in fact, required by rule 10(6) to identify that position in its application for admission.

A party or a person requested by the Court to argue a particular position, to represent an unrepresented party or interest, or to advise the court is not an amicus curiae in terms of rule 10. Such a person is not required to follow the rule 10 procedures, such as requesting the parties to consent to its participation as an amicus curiae, and making application to the Court in that regard.[14] The request comes from the Court, and the person concerned is an amicus in the traditional sense. The terms of participation are determined by the invitation or request made by the Court.

A clear example of this distinction emerged in the very first case argued in the Constitutional Court, *S v Makwanyane*.[15] In *Makwanyane*, the Court requested that the Johannesburg Bar Council appoint counsel to represent the unrepresented

accused. In his judgment, Chaskalson P referred to counsel who performed this role as acting pro amico.[16] He did not describe them as amici curiae. By contrast, a number of 'rule 10-type'[17] amici curiae made written submissions. Several of these amici sought and received permission to submit oral argument. They were the Black Advocates Forum, Lawyers for Human Rights, the Society for the Abolition of the Death Penalty in South Africa, and a private individual who was a campaigner for the

12 See *In Re Northern Ireland Human Rights Commission* [2002] UKHL 25 at para 24 (Lord Slynn emphasized the distinction between a conventional amicus curiae, who takes a non-partisan approach to the case, and a third party intervenor who advocates a particular position.) See also Sarah Hannett 'Third Party Intervention: In the Public Interest?' [2003] *Public Law* 128.

13 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC)('*Hoffmann*') at para 63.

14 Erasmus (supra) at C4-20.

15 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) ('*Makwanyane*').

16 *Makwanyane* (supra) at para 50.

retention of the death penalty. The South African Police Service submitted an 'amicus brief', but did not make oral submissions.

(c) Amicus curiae contrasted with an intervening party

The passage from *Hoffmann* quoted above draws attention to the important distinction between an amicus curiae, which is 'interested' in the proceedings but has no right to participate in them, and an intervening party, which has a 'direct interest' and may intervene as a matter of right in the ordinary manner. Every party which has a 'direct interest' in the proceedings will be 'interested' in the proceedings; but it does not follow that every party which is 'interested' has a 'direct interest'. In logical terms, those who have a direct interest are a subset of those who are interested.

It is, therefore, possible for a person to seek to intervene on two alternative bases: that it has a direct interest and should therefore be admitted as of right; or that it is 'interested' and should be admitted as an amicus curiae. In *Kyalami Ridge* — a matter that engaged the legality of steps taken by the government to provide emergency housing for flood victims on government-owned land — an association representing private land-owners in the vicinity of the proposed emergency camp applied for an interdict to stop the settlement of the flood victims on the government-owned land.[18] The applicant did not join the flood victims as parties to the litigation. When the matter reached the Constitutional Court, one of the flood victims applied for leave to intervene in the application as a party and, alternatively, as an amicus curiae. He was admitted as a party, on the basis that he had 'a direct and substantial interest in the proceedings', and was therefore 'entitled to be joined as a party in his own right'.[19]

This distinction between an intervener and an amicus has considerable significance for three reasons. First, a person with a 'direct and substantial interest' has a right to intervene in the proceedings, and does not ask for any special dispensation. An amicus needs permission to intervene. Secondly, a person who intervenes as a party has procedural rights, such as the right to adduce evidence and to present oral argument to the Court. An amicus curiae has no such rights unless

they are specifically granted by the Court. Thirdly, an intervening party is subject to the usual rules as to its ability to recover costs, and its liability for costs of opposing parties. In the ordinary course, an amicus curiae is neither awarded costs nor ordered to pay the costs of opposing parties.

These differences have the result that a would-be participant who (like Mr Mukhwevho in *Kyalami Ridge*) is a person with a direct and substantial interest may need to make a strategic decision as to whether to seek to intervene as a party or as

17 Rule 9 was the rule governing amici then in force. See Rules of the Constitutional Court, Government Gazette 16204, Regulation Gazette 5450 (6 January 1995).

18 *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC)('*Kyalami Ridge*').

19 Ibid at para 30.

an amicus curiae. This choice carries advantages and disadvantages that will vary with the particular circumstances of the case.

8.2 Parameters of the role of the amicus

An amicus curiae does not have the right to raise a new cause of action. If the amicus wishes to do so, that should be referred to in its application for admission, and permission to do so must be sought. The Chief Justice will then decide whether it would be appropriate to permit such an issue to be raised in the appeal.

Such permission is unlikely to be given if it would involve the joining of additional parties to the litigation, or if there is a likelihood that one or more of the parties would be prejudiced.[20] For example, in *VRM v Health Professions Council of South Africa & Others*, application was made for admission as an amicus curiae in an appeal which was pending before a full bench of the Transvaal Provincial Division.[21] The applicant had not raised a constitutional issue in the main case, but the amicus curiae wished to do so in the appeal. The court held that it was not in the interests of justice to seek determination of important constitutional issues raised by the would-be amicus curiae when such issues had not been properly raised, canvassed and debated in the court a quo. The court accordingly refused the application for admission as an amicus curiae.[22]

It does not follow from the finding in *VRM* that the amicus is always limited to the issues raised by the parties. If a matter has been raised and dealt with on the papers, the amicus may address it. In *Grootboom*, the applicants had asserted a right under FC s 26 (the right to housing) and FC s 28(1)*(c)* (the child's right to shelter).[23] The High Court decided the FC s 26 argument against the applicants, and the FC s 28(1)*(c)* argument in favour of the applicants. On appeal, the written argument submitted by the parties concentrated on the meaning and import of FC s 28(1)*(c)*. The amici curiae sought to broaden the arguments engaged by the Constitutional Court by contending that all of the applicants (including those who were adults) were entitled to shelter by reason of minimum core obligations

incurred by the State in terms of FC s 26. The Constitutional Court articulated no objection to the content of the amici's intervention and, ultimately, grounded its findings in terms of its view of the State's obligations under FC s 26.[24]

The statement by the Constitutional Court in *Hoffmann* that an amicus 'is neither a loser nor a winner'[25] might lead one to conclude that an amicus may never ask for relief. This is not so. In *Moise*, the Constitutional Court had declared certain

20 *De Beer NO v North Central Local Council and South Central Local Council & Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC), 2001 (11) BCLR 1109 (CC) at para 31.

21 2004 (3) BCLR 311 (T).

22 Ibid at 316.

23 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*').

24 *Grootboom* (supra) at para 18.

provisions of a statute invalid.[26] Thereafter, the amicus curiae in the original proceedings applied to the Court for a variation of the order of invalidity. It asked that the order be made retrospective so as to apply to all extant actions that had not already been time-barred when the Interim Constitution came into effect.[27] The amicus curiae contended that the failure to address the retrospective effect of the invalidity constituted an error in the judgment of the Court which fell to be corrected. The Court held that the order was, in any event, retrospective as a matter of law, and the application was dismissed. The *Moise* Court did not, however, question the right of the amicus curiae to bring the application. On the contrary, the Court stated that the amicus 'is to be commended for conscientiously raising in the public interest a perceived error in need of correction'.[28]

8.3 Amicus curiae in the Constitutional Court

The Constitutional Court was the first to introduce a rule which made provision for the intervention of an amicus curiae and which regulated that intervention. The rules of other courts are based broadly on that model and use similar concepts. I shall therefore deal first, in some detail, with the amicus curiae in the Constitutional Court. As we shall see in the section that follows, much of this analysis and commentary applies to the amicus in other courts.

It should be noted at the outset that that an amicus curiae does not appear to be a 'party' in terms of the rules.[29] It follows that those rules which refer to a party and its rights do not refer to an amicus curiae.

(a) Constitutional Court rule 10

Constitutional Court rule 10 provides as follows:

> (1) Subject to these rules, any person interested in any matter before the Court may, with the written consent of all the parties in the matter before the Court, given not later than the time specified in subrule (5), be admitted therein as an amicus curiae upon such terms and conditions and with such rights and privileges as may be agreed upon in

> writing with all the parties before the Court or as may be directed by the Chief Justice in terms of subrule (3).

25 *Hoffmann* (supra) at para 63.

26 *Moise v Greater Germiston Transitional Local Council: Minister of Justice & Constitutional Development Intervening (Women's Legal Centre as amicus curiae)* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC).

27 *Ex Parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC).

28 Ibid at para 3.

29 See, in this regard, rule 31 which distinguishes between a 'party' to any proceedings before the Court, and an amicus curiae. This approach is also reflected in the judgment in *Hoffmann*, which similarly distinguishes between an amicus and a party.

(2) The written consent referred to in subrule (1) shall, within five days of it 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.

(3) The Chief Justice may amend the terms, conditions, rights and privileges agreed upon as referred to in subrule (1).

(4) If the written consent referred to in subrule (1) has not been secured, any person who has an interest in any matter before the Court may apply to the Chief Justice to be admitted therein as an amicus curiae, and the Chief Justice may grant such application upon such terms and conditions and with such rights and privileges as he or she may determine.

(5) If time limits are not otherwise prescribed in the directions given in that matter an application pursuant to the provisions of subrule (4) shall be made not later than five days after the lodging of the respondent's written submissions or after the time for lodging such submissions has expired.

(6) An application to be admitted as an amicus curiae shall —

(a) briefly describe the interest of the amicus curiae in the proceedings;

(b) briefly identify the position to be adopted by the amicus curiae in the proceedings; and

(c) set out the submissions to be advanced by the amicus curiae, their relevance to the proceedings and his or her reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

(7) An amicus curiae shall have the right to lodge written argument, provided that such written argument does not repeat any matter set forth in the argument of the other parties and raises new contentions which may be useful to the Court.

(8) 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.

(9) An order granting leave to be admitted as an amicus curiae shall specify the date of lodging the written argument of the amicus curiae or any other relevant matter.

(10) An order of Court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of an amicus curiae.

(11) The provisions of rule 1(3) shall be applicable, with such modifications as may be necessary, to an amicus curiae.

(b) The mechanism for admission

At first glance, rule 10 appears to contemplate two mechanisms for admission as an amicus curiae: (1) through rule 10(1), which requires the consent of the parties (on the basis that under rule 10(3) the Chief Justice may amend the terms, conditions, rights and privileges which have been agreed upon with the parties); or (2) alternatively through rule 10(4), by the permission of the Chief Justice, with the Chief Justice granting the application on such terms and conditions and with such rights and privileges as he or she may determine. One might be forgiven for

taking this approach, not only because of the apparent meaning of the words, but because the Constitutional Court has itself on occasion read the rule in that manner.[30]

However, the Constitutional Court has now made it clear that there are not two discrete means of securing admission as an amicus curiae:

> An amicus is a friend of the Court and no person may be admitted as an amicus without the consent contemplated in subrule 10(4) . . . it is implicit, if not explicit, from subrule 10(1) that after obtaining the necessary consent [of the parties] an applicant for admission as an amicus must still make an application to the Chief Justice for admission as an amicus.[31]

That statement in *Institute for Security Studies* is now the unequivocal position of the Constitutional Court. Not only does it post-date previous statements on the subject, but the Court has also stated that its holding in *Institute for Security Studies* 'must be regarded as a general instruction on how to prepare an application for admission as an amicus.'[32]

(c) Procedure for applying for admission as an amicus curiae

Institute for Security Studies sets out the steps which an applicant should take in order to obtain admission as amicus curiae.

The first step is to apply to the other parties for their consent under rule 10(1). This request must place the parties in a position where they can assess properly whether the request complies with the underlying principles governing applications for admission as amicus curiae.[33] Those principles are whether the submissions sought to be advanced are relevant to the issues before the court, will be useful to the court and are different from those of the other parties.[34] These matters are to be readily ascertainable from the application.

The next step is to seek the consent of the Court. If the written consent of the parties has been obtained, it does not follow automatically that the Court is bound to admit the applicant. The Court may refuse to admit the applicant where the principles referred to have not been satisfied.[35] The fact that the applicant has obtained the written consent of the parties contemplated in subrule 10(1) is simply a

---

30 *In re Certain Amicus Curiae Applications: Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 713 (CC), 2002 (10) BCLR 1023 (CC)('*Certain Amicus Curiae Applications*') at para 3 ('A person may be admitted as an amicus either on the basis of the written consent of all the parties in the proceedings or on the basis of an application addressed to the Chief Justice.')

31 *Institute for Security Studies: In re S v Basson* CCT 30/03 (Unreported decision of 9 September 2005)('*Institute for Security Studies*') at paras 6 and 9.

32 Ibid at para 11.

33 Ibid at para 10.

34 Ibid at para 7.

35 Ibid at para 7.

factor to be taken into consideration in the exercise of the Court's discretion whether or not to admit a person as an amicus.[36]

If time limits have not been otherwise prescribed in the directions given in a matter, then in those cases where the written consent of the parties has not been secured, application for admission should be made to the Chief Justice not later than five days after the lodging of the respondent's written submissions, or after the time for lodging such submissions has expired.[37] The rules are silent as to the time within which the application is to be made to the Chief Justice if the written consent of the parties has been secured. Having regard to the interpretation which the Constitutional Court has now given to the rule, the five-day period may well also apply where the written consent of the parties has been obtained in terms of rule 10(1).

(d) Content of the application for admission

Institute for Security Studies also sets out what is to be contained in the application to the Chief Justice:

> Subrule 10(6)*(c)* requires an application for admission as an amicus curiae to set out the submissions to be advanced, their relevance to the proceedings, the reasons for believing that the submissions would be useful to the Court and different from those of the other parties to the proceedings. It is not always easy to assess these matters from mere allegations in the affidavit in support of an application for admission as amicus. Nor is it possible to assess them from a letter requesting consent to be admitted as amicus curiae. For a proper assessment of these matters to be made, the application for admission as an amicus must ordinarily be accompanied by a summary of the written submissions sought to be advanced. This will enable the Court to assess the application properly and evaluate the submissions sought to be advanced in the light of the principles governing the admission of an amicus. An applicant who fails to comply with this requirement runs the risk of the application being refused if the matters required by rule 10(6)*(c)* are not readily ascertainable from the application.[38]

Where the Chief Justice admits the applicant as an amicus curiae, the notice of admission invariably sets out the terms and the conditions of such admission, and the rights and the privileges which the amicus curiae is to have.

(e) Court's discretion as to whether to admit an amicus curiae

In *Institute of Security Studies*, the Court described the 'underlying principles' governing applications for admission as an amicus curiae as follows: *(a)* whether the submissions sought to be advanced are relevant to the issues before the Court, *(b)* whether the submissions will be useful to the Court and *(c)* whether the submissions are different from those of the other parties. It is striking that the judgment does not refer to an assessment of the 'interest' of the applicant in the proceedings as one of the underlying principles. Rule 10(1) states that only a person 'interested' in a matter before the Court may apply for admission as an amicus. In all likelihood, the

36 Ibid at para 9.

37 Rule 10(5).

38 *Institute for Security Studies* (supra) at para 10.

reason for the Court's silence on this matter is that, in practice, this threshold test is fairly easily satisfied.

Erasmus suggests that the sort of 'interest' contemplated in the rule is 'an interest in the issues of law and policy involved in the matter by way of (for example) a standing commitment to the advancement of a particular point of view in relation to those issues, or a specialised knowledge of the matters in issue.'[39] This approach is consistent with the practice of the Constitutional Court. The threshold requirement of an 'interest' has never been a stumbling-block to admission as an amicus. If the applicant proposes to make submissions which are indeed relevant to the issues before the Court, which will be useful to the court, and which are different from those of the other parties, the Court will not refuse the application on the basis that the applicant is not sufficiently 'interested' in the matter before the Court.

However, when considering whether the applicant for admission as an amicus curiae has satisfied the principles underlying the rule, the fact that the person was admitted as an amicus curiae in the court below does not in itself give such a person the right to be admitted as an amicus in the Constitutional Court.[40] In criminal cases, an additional factor is relevant to the exercise of rule 10 discretion by the Court:

> As a general matter, in criminal matters a court should be astute not to allow the submissions of an amicus to stack the odds against an accused person. Ordinarily, an accused in criminal matters is entitled to a well-defined case emanating from the state. If the submissions of an amicus tend to strengthen the case against the accused, this is cause for caution. This, however, is not an inflexible rule. But it is a consideration based on fairness, equality of arms, and more importantly, what is in the interests of justice.'[41]

(f) Submission of argument by an amicus curiae

Admission as an amicus curiae carries with it the right to lodge written argument, provided that the written argument does not repeat matters set forth in the argument of other parties and raises new contentions which may be useful to the Court.[42] The directions given by the Chief Justice invariably set out the time limits for the lodging of written argument.

Rule 10(8) states flatly that an amicus curiae 'shall not present oral argument'. While that is the default position provided by the rules, it is not the invariable position or even the usual practice. In practice, a person admitted as an amicus is usually permitted, on application, to present oral argument. While rule 10 does not provide for this exercise of discretion, the power to permit the amicus to offer oral argument would appear to be derived from rule 32(2). Rule 32(2) states that the Court or the Chief Justice may give such directions in matters of practice, procedure and the disposal of any appeal, application or other matter as the Court

39 HG Erasmus *Superior Court Practice* (1994) C4-23.

40 *Institute for Security Studies* (supra) at para 11.

41 Ibid at para 15.

42 Rule 10(7).

or Chief Justice may consider just and expedient. The test is therefore whether it is 'just and expedient' to permit the amicus curiae to present oral argument. Given the Court's reliance on oral argument as an opportunity for members of the Court to debate issues raised in heads of argument, it is easy to understand why the Court will ordinarily allow a person who has been admitted as an amicus — and whose submissions by definition are different from those of the parties and may be useful to the court — to submit oral argument. Time limits are usually laid down to ensure that the hearing of the matter is not unnecessarily prolonged.

(g) New factual material and evidence

An amicus curiae is, like the parties, permitted by rule 31 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.

The scope of rule 31 is dealt with elsewhere in this volume.[43] The rule's essence is that the material must be of such a nature that it does not lead to any genuine and serious dispute of fact. Typically, the material submitted under this rule consists of statistical information from sources which are generally accepted as reliable,[44] articles from learned journals, government reports, reports of official bodies, and empirical data relevant to the matters at issue.[45] Where an amicus seeks to introduce evidence in terms of rule 31, a dispute as to the facts 'if genuine, usually will demonstrate that they are not "incontrovertible" or "capable of easy verification". Where this is so, the material will be inadmissible.'[46]

A question which has not yet been answered by the Constitutional Court is under what circumstances will an amicus curiae be permitted to introduce evidence which does not fall within the rubric of rule 31. Rule 10(8) states that, 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. That injunction can, however, not be invariable. It is followed

immediately by the injunction that the amicus curiae shall not present oral argument, and as we have seen, the Court has the power to permit oral argument. The Court must therefore also have the power to permit an amicus curiae to adduce additional evidence outside rule 31.

---

43 See Kate Hofmeyr 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5.

44 *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 12.

45 *Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae)* 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC) at paras 3 and 26. The material admitted by the Court in this matter is described at footnotes 35, 36 and 37 of the judgment and gives a good indication of the range of material deemed admissible.

46 *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at paras 22–25; *Prince v President, Cape Law Society & Others* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) at paras 10, 11 and 98; *Certain Amicus Curiae Applications* (supra) at para 8.

The general principle is that ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence. Similarly, evidence which is untested, and will lead to submissions which open an entirely new issue on appeal, will generally not be permitted. A further factor will be whether the new evidence will necessitate the postponement — and thus the resolution — of an otherwise urgent matter.[47] It is clear, however, that the role of an amicus is not limited to questions of law: the amicus also turns the Court's attention to relevant matters of fact.[48]

Whether the submission of new evidence will be permitted in any given case will depend on what is 'just and expedient' (the governing principle of rule 32(2)). Factors relevant to this assessment include: *(a)* the delay caused by giving the other parties an opportunity to respond to the new evidence; *(b)* the Constitutional Court's reluctance to deal with evidential material without having the benefit of the views of another court;[49] *(c)* the cogency of the evidence; and *(d)* the importance of the evidence to the matters which the Court has to decide. Where a party has, in its evidence, referred to the views or conduct of another person, which is not a party, but which is in fact interested in the proceedings and is subsequently admitted as an amicus curiae, that ought to strengthen the claim of the amicus to put its position on the record for the benefit of the Court.[50]

8.4 Amicus curiae in other courts

(a) Supreme Court of Appeal

In the Supreme Court of Appeal, the admission of an amicus curiae is dealt with in rule 16. That rule is for practical purposes identical to Constitutional Court rule 10. There are, however, two exceptions.

First, rule 16(5) provides that an application for admission as an amicus curiae shall be made within one month after the record has been lodged with the Registrar. This proviso therefore requires lodging of the application by the amicus at an earlier stage than is the case in the Constitutional Court.

Secondly, the rules of the Supreme Court of Appeal do not have a provision equivalent to Constitutional Court rule 31 that might accommodate documents lodged to support non-disputed factual claims. The amicus curiae in the SCA is therefore limited on appeal to the record. That said, Rule 11(1)*(b)* authorizes the President of the Court or the Court to give directions in matters of practice, procedure and the disposal of any appeal in such manner as the President or the

47 Certain *Amicus Curiae Applications* (supra) at paras 6 and 7.

48 Ibid at para 5.

49 In this regard, the jurisprudence dealing with direct access to the Constitutional Court is relevant.

50 See, eg, *Magidimisi NO v Premier of the Eastern Cape* (High Court, Bisho, Case No 2180/2004). In *Magidimisi,* the respondents made general statements about the conduct of the administration of the system of social grants, and contrasted their relationship with the applicants' attorney with their relationship with the Black Sash, a non-governmental organisation. The Black Sash was admitted as an amicus curiae, and was permitted to place before the court evidence as to its relationship with the respondents, and their administration of the social grant system.

Court may consider just and expedient. This rule would appear to give the President and the Court the power to permit an amicus curiae to adduce additional evidence, just as they have the power to authorize an amicus curiae to present oral argument notwithstanding the statement in rule 16(8) that an amicus shall not present any oral argument.

(b) Labour Appeal Court

In the Labour Appeal Court, the admission of an amicus curiae is dealt with in rule 7. The criteria for admission as an amicus curiae are, for all practical purposes, identical to those in the Constitutional Court. The person concerned must be 'interested' in the proceedings before the Court.[51] The application for admission must describe the interest of the amicus, identify the position to be adopted by the amicus, set out the submissions to be advanced by the amicus, demonstrate the relevance of the submissions to the proceedings, and reflect that person's reasons for believing that the submissions will be helpful to the Court and different from those of the other parties.[52]

Rule 7 makes no provision for a request to the other parties to consent to the admission of the would-be amicus curiae. The application is made directly to the Judge President or a Judge authorized by the Judge President. The application must be made not later than fifteen days before the date of hearing.[53]

The amicus curiae has the right to deliver written argument.[54] No reference is made in the rules to the submission of oral argument. But as *Woolworths* indicates, oral argument is permitted on occasion.[55] If new matters or arguments are raised by the amicus curiae, any other party has the right to file written argument within five days from the date on which the argument of the amicus curiae was served on those parties.[56]

An order of court dealing with costs 'may make provision for the payment of the intervention of the amicus curiae'.[57] This rule could be narrowly construed to mean that an order may be made for the payment of the costs incurred by the

51 Rule 7(1).

52 Rule 7(4).

53 Rule 7(3).

54 Rule 7(5).

55 *Woolworths (Pty) Ltd v Whitehead (Women's Legal Centre Trust Intervening)* 2000 (3) SA 529 (LAC).

56 Rule 7(6).

57 Rule 7(7).

amicus, but not an order for costs against the amicus curiae. However, in *Woolworths*, the court implicitly accepted the proposition that it possessed the power to make an order for costs against an amicus curiae.

(c) High Court

In the High Court, the making of submissions by amici curiae is linked to rule 16A. Rule 16A requires a person raising a constitutional issue in an application or action to give notice thereof to the registrar at the time of filing the relevant affidavit or pleading. The registrar is required to place that notice forthwith on a notice board which has been designated for that purpose. The purpose of the rule is to bring the constitutional challenge to the attention of persons who may be affected by, or who may have a legitimate interest in, the case. This rule enables such persons to seek to intervene either as a party, or as an amicus curiae.[58]

The intervention process created by rule 16A is generally similar to that created by rule 10 in the Constitutional Court. There are, however, some significant differences.

The time limit for making application to the High Court for admission as an amicus curiae is not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was raised. This time period is much shorter than that of either the Constitutional Court or the Supreme Court of Appeal.

Unlike the rules of the Constitutional Court and Supreme Court of Appeal, High Court rule 16A makes provision for a party to oppose an application for admission as an amicus curiae. A party wishing to oppose is required to file an answering affidavit within five days of service of the application upon that party. The answering affidavit must clearly and succinctly set out the grounds of opposition. The court hearing the application for admission may refuse it or grant it upon such terms and conditions as it may determine.[59]

The rule is silent both on the question of the admission of evidence, and on the presentation of oral argument. It is, therefore, clear that a High Court has the discretion to permit both. It is rather easy to understand why this is so, particularly in relation to the question of evidence. The Constitutional Court and the Supreme Court of Appeal are (subject to very limited exceptions in the case of the Constitutional Court) courts of appeal. They do not hear matters at first instance. Appeals are, as a result, generally limited to the record of the court a quo. Where, however, the matter is heard at first instance by the High Court, it will be easier for an amicus curiae to persuade the court that it should be permitted to adduce evidence.

In *Modderklip*, the applicant — who had already obtained an eviction order from the High Court — sought an order that the governmental respondents were to take immediate steps to evict unlawful occupiers from land owned by the applicant.[60] AgriSA, a voluntary association representing commercial farmers, sought leave to

58 *Fourie & Another v Minister of Home Affairs & Others* 2005 (3) SA 429 (SCA), 2005 (3) 241 (SCA) ('*Fourie*') at para 55; *Shaik v Minister of Justice and Constitutional Development & Others* 2004 (3) SA 599 (CC), 2004 (4) BCLR 333 (CC) at para 24; *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C), 2004 (12) 1328 (C) at para 21.

59 Rule 16A(8).

intervene as an amicus curiae. The High Court not only permitted this intervention, but also permitted the amicus curiae to file affidavits providing a factual foundation for the submissions which it wished to make.[61]

(d) Land claims court

In the Land Claims Court the admission of an amicus curiae is dealt with in rule 14. Rule 14 is quite detailed and differs in some material respects from the framework created by Constitutional Court rule 10.

The most material difference is that rule 14(1) makes it clear that there are two alternative routes for admission as an amicus curiae: *(a)* through written agreement between the would-be amicus and all participating parties;[62] or *(b)* by order of the presiding judge or the court.[63] It seems clear that once the consent of all participating parties has been obtained, there is no requirement of permission of the presiding judge or the court. The agreement must be delivered or the application for admission must be made within 10 days after the filing of the last affidavit or pleading referred to in the rules, or after the time for filing such document has expired.[64]

Where application is made for an order admitting an amicus curiae, a party may oppose by filing an answering affidavit. The applicant may then file a replying affidavit.[65] The matter is dealt with in chambers by the presiding judge without any person being present. The judge may make an order on the application or refer it to the court for argument and decision.[66]

The question of evidence is dealt with explicitly. An application to the court for an order admitting a person or organisation as an amicus curiae must contain a summary of the evidence (if any) to be presented by the amicus.[67] The agreement with the participating parties, or the order of court admitting the amicus, must set forth the right (if any) which the amicus curiae has to produce evidence to the court,

---

60 *Modderklip Boerdery (Edms) Bpk v President van die RSA & Andere* 2003 (6) BCLR 638 (T) ('*Modderklip*').

61 Ibid at para 23. For more on the nature of the evidence, see *Modderklip* (supra) at para 30. The governmental respondents objected to this evidence, but the objection was rejected, partly on the grounds that the respondents had had the opportunity to answer it. Ibid at para 30.

62 Rule 14(1)*(a)*.

63 Rule 14(1)*(b)*.

64 Rule 14 (1A).

65 Rule 14(3) and (4).

66 Rule 14(5).

67 Rule 14(2)*(b)*(iii).

to cross-examine witnesses, to make written submissions, and to present oral argument to the court.[68] The possibility of the active participation of the

amicus through the presentation of evidence and cross-examination of witnesses is thus explicitly contemplated. The court may, at any time, vary the rights of the amicus set out in an agreement with the participating parties or in a prior order of the court.[69]

Unless the court orders otherwise, an amicus curiae is not entitled to any order for costs against any party. It may, in addition, not be subject to any order for costs in favour of any party.[70]

(e) Labour Court

In the Labour Court, the admission of an amicus curiae is dealt with in rule 19. This rule is identical to rule 7 of the Labour Appeal Court, except that the time for the filing of written argument in response to new matters or arguments raised by the amicus curiae is seven days from the date on which the argument of the amicus curiae was served on the parties.[71]

8.5 Costs

Constitutional Court rule 10(1) provides that an order of court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of an amicus curiae. From this it appears that an order for costs may be made both in favour of and against an amicus curiae. However, that is seldom if ever done. There has not yet been any case in which the Constitutional Court has made such an order.

In *Hoffmann*, the amicus curiae asked for an order that the unsuccessful respondent pay its costs. Ngcobo J for the Court stated the general principle as follows:

> An amicus, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs. Whether there may be circumstances calling for departure from this rule is not necessary to decide in this case. Suffice it to say that in the present case no such departure is warranted.[72]

As pointed out above, rule 10(1) does in fact provide that an order of court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of an amicus curiae. There must therefore be circumstances in

68 Rule 14(6).

69 Proviso to Rule 14(6).

70 Rule 14(7).

71 Rule 19(6).

72 *Hoffmann* (supra) at para 63.

which such an order may be made. The implication of the judgment of Ngcobo J is that exceptional circumstances are required before such an order will be made.

In *Woolworths (Pty) Ltd v Whitehead (Women's Legal Centre Trust Intervening)*, the appellant succeeded in its appeal to the Labour Appeal Court.[73] It contended that

the amicus, which had supported the position of the unsuccessful respondent, should be ordered to pay the costs occasioned by its intervention. The applicant contended that the amicus had raised issues collateral to those defined by the pleadings and the parameters of the lis between the parties, and that this intervention went beyond the proper functions of an amicus. Conradie JA did not agree:

> The amicus has contributed valuable submissions on the appropriateness of the test for determining unfairness and has assisted the Court on the question of onus. In my view the amicus does not deserve to be mulcted in costs.[74]

Zondo AJP agreed with Conradie JA that the amicus curiae should have been admitted:

> Even though the basis on which I have decided the matter did not require much of the arguments presented by the amicus, I am unable to say that the amicus was unnecessary or that he addressed collateral issues. I think he was sufficiently helpful to the Court.[75]

No order for costs was made either in favour of or against the amicus.[76]

The law reports identify only one case in which an amicus curiae has either been awarded its costs, or ordered to pay costs. In *Modderklip Boerdery*, the High Court ordered the respondents to pay the costs of the amicus curiae with regard to an unsuccessful application by the respondents for the striking out of certain evidence. That order for costs was not affected by the judgment of the Supreme Court of Appeal.[77] When the matter came before the Constitutional Court, Langa ACJ noted that 'it is unusual and indeed it will rarely be appropriate for costs to be awarded in favour of an amicus curiae'. However, the state had expressly stated that it was not seeking to overturn the order of the High Court awarding those costs to the amicus curiae. There was, accordingly, no basis for the Constitutional Court to interfere with the costs order.[78]

73 2000 (3) SA 529 (LAC)('*Woolworths*').

74 *Woolworths* (supra) at para 52.

75 Ibid at para 28.

76 Ibid at para 151.

77 *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (AgriSA and Legal Resources Centre, amici curiae)*; *President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA) at para 50.

78 *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (AgriSA & Others, amici curiae)* 2005 (5) SA 3 (CC), 2005 (9) BCLR 786 (CC) at para 67.

A court has made a costs order against an amicus curiae in one unreported case. In *Fourie & Another v Minister of Home Affairs & Others*, Roux J, in the Transvaal Provincial Division of the High Court, was of the opinion that the conduct of the amicus curiae went well beyond what had been regarded as proper by the Constitutional Court in *Treatment Action Campaign*. He ordered the amicus to pay the respondents' costs jointly and severally with the appellants. However, the respondents (wisely) abandoned that part of the order of the court.[79] The Supreme Court of Appeal did not make any order in respect of the costs of the amicus curiae, or the costs incurred as a result of the intervention of the amicus curiae.

---

79 *Fourie* (supra) at para 55.