16A Submissions by an *amicus curiae*

(1)*(a)* Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.

(b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.

(c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.

(d) The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the notice board for a period of 20 days.

(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 No. 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 an *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.

[Rule 16A inserted by GN R849 of 25 August 2000.]

Commentary

General. In *Hoffmann v South African Airways* [1] the Constitutional Court framed the role and status of an *amicus curiae* as follows:

> '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.'

The purpose of this rule is to enable parties interested in a constitutional issue to seek to be admitted as *amici curiae* in the case in which the issue is raised so that they can advance submissions in regard thereto. [2] The rule is permissive and does not prohibit the introduction of evidence in support of its submissions by an *amicus curiae* in the High Court, if it is in the interests of justice. However, whether, and to what extent, to allow an *amicus* to adduce evidence in support of its submissions remains within the discretion of the High Court, guided by the interests of justice. [3]

This rule permits 'any interested party in a constitutional issue raised in proceedings before a court' to be admitted in such proceedings as *amicus curiae* with the written consent of all the parties to the proceedings or with the leave of the court. In terms of subrule (9) the court may dispense with any of the requirements of this rule if it is in the interests of justice to do so.

In *Maughan v Zuma* [4] the full court summarized the position in regard to the admission of an *amicus curiae* under this rule as follows (footnotes omitted):

> '[143] Emanating from the case law concerning the admission of amici curiae, a number of principles have emerged. These relate to the nature of the amicus curiae's role in the proceedings and in the determination of whether or not it ought to be admitted. These principles are the following:
>
> *(a)* an amicus curiae's contribution lies in the additional, new and different perspective it brings on the issues between the parties;
>
> *(b)* the amicus is not prevented from supporting one party's side of the case, and neutrality of the amicus is not a requirement in the proceedings;
>
> *(c)* the contribution which an amicus makes must materially affect the outcome of the proceedings.'

It is inappropriate for a political party seeking to advance a purely political agenda or sectarian interest to seek admission to the Constitutional Court as an *amicus curiae* rather than as an intervening party. [5]

In *SJ v SE* [6] the parties were in agreement that an *amicus curiae* should be admitted. However, neither of the parties had raised a constitutional issue in which the *amicus curiae* had an interest as contemplated in rule 16A of the Uniform Rules of Court. The *amicus* had raised a constitutional issue *mero motu*. That was contrary to the unambiguous language of rule 16A and, consequently, the admission was refused by the court. [7]

In *Helen Suzman Foundation v McBride* [8] the appellant was admitted as an *amicus curiae* by the court *a quo* in terms of rule 16A on the basis that it would show that the respective interpretations of s 6(3)*(b)* of the Independent Police Investigative Directorate Act 1 of 2011 contended for by the parties to the case were correct or constitutionally compliant. The appellant propounded another interpretation which, according to it, was one which best vindicated the relevant constitutional imperatives. Subsequently, the parties reached a settlement agreement which, despite objections by the appellant, was made an order of court by the court *a quo*. At this point Corruption Watch, the other *amicus curiae*, exited the scene. Unhappy with the order, the appellant brought an application for leave to appeal which was unsuccessful. It then obtained the leave of the Supreme Court of Appeal to appeal against the order. On appeal in the latter court it sought to broaden the scope of its challenge to one that was not foreshadowed at all in its application to be admitted as an *amicus curiae*, or at all by the parties. The Supreme Court of Appeal, in dismissing the appeal, held: [9]

> 'The attempted broadening of the scope of the challenge before us as to the lack of guidelines in the processes of the PCP, which was not foreshadowed at all, either in the application for admission as an amicus and certainly not by any of the parties, is impermissible. There was no evidence on which such an adjudication could take place and there was no attempt by the HSF,

> in the court below, to adduce such evidence which would then, in turn, have given the opposing parties a right to challenge by way of evidence and submissions of their own. What an amicus should not be permitted to do is to make out an entirely new case on appeal without the necessary evidence and without regard to due process. As pointed out above, events have overtaken the agreement reached by the parties. The order sought by the amicus would have Mr McBride reinstated in a post he does not intend to return to. At least notionally, it would displace the present executive director of IPID and at the very least would render his appointment questionable, without him or her being heard. It is at this point that an amicus ceases to be an amicus and becomes a litigant. It is thus not unsurprising that Corruption Watch exited the scene after the settlement agreement between the primary disputants.'

In *Democratic Alliance v African National Congress (Afriforum NPC as amicus curiae)* [10] Afriforum NPC was granted leave to be admitted as an *amicus curiae*. In its application to be admitted as *amicus curiae*, Afriforum NPC said it intended to canvass seven unique matters which would be helpful to the court. However, during argument it completely strayed from its intended points and launched into a discussion about the policy, the minutes of the Deployment Committee of the ANC and how the Committee or the ANC seeks to seize control of every aspect of the state in an effort to avoid accountability, including how the ANC no longer has

white faces in its ranks. Apart from the apparent irrelevance of some of the points advanced, it was clear that Afriforum NPC had made common cause with the applicant. Its voice as a friend of the court was missing as it had turned into what the court in *National Treasury v Opposition to Urban Tolling Alliance* [11] called the 'fifth wheel of the applicanl [sic]'. [12] The full court, in conclusion on this point, stated that Afriforum NPC 'should strive to acquaint itself with the words of the court in *OUTA*'. [13]

Rule 10 of the Rules of the Constitutional Court provides for the admission of an *amicus curiae* in any matter before the Constitutional Court. See further, in this regard, Volume 1 third edition, Part B1.

Subrule (1): General. In *Shaik v Minister of Justice and Constitutional Development* [14] the Constitutional Court stated that the purpose of rule 16A(1) is as follows:

> 'The purpose of the Rule is to bring to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the constitutional challenge, in order that they may take steps to protect their interests.'

In *Phillips v SA Reserve Bank* [15] the Supreme Court of Appeal stated that this subrule has to be interpreted in the light of the purpose for which it was enacted:

> 'Rule 16A(1)(i) [*sic*] has accordingly to be interpreted in the light of the purpose for which it was enacted, viz to bring cases involving constitutional issues to the attention of persons who may be affected by or have a legitimate interest in such cases, so that they may take steps to protect their interests by seeking to be admitted as amici curiae with a view to drawing the attention of the court to relevant matters of fact and law to which attention would not otherwise be drawn (*Shaik v Minister of Justice and Constitutional Development* supra para 24; and *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Campaign and Others* 2002 (5) SA 713 (CC) (2002) (10) BCLR 1023; [2002] ZACC13) para 5).'

The majority of the Supreme Court of Appeal, however, cautioned that a balance is to be struck between the application of a purposive approach and the weight of the words employed in the subrule. [16]

Subrule (1)*(a)*: 'Shall give notice.' In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal (Mont Blanc Projects and Properties (Pty) Ltd and Another as Amici Curiae*) [17] the applicant failed to give the requisite notice. The application was accordingly postponed to enable the applicant to comply with the provisions of this subrule, which it duly did. At the resumed hearing, the court ordered that the initial non-compliance with this subrule was condoned and that the exhibition of a notice in terms of this subrule on the court's notice board for a period of approximately one month was substantial compliance with the provisions of the subrule. It is submitted that if the person who raises the constitutional issue fails to give the requisite notice, any other party to the proceedings should be entitled to do so in order to prevent a postponement of the case as has transpired in the *Johannesburg Metropolitan* case. As it is doubted whether the placement of the notice by the registrar on the designated notice board is really effective and sufficiently serves the purpose of rule 16A, it is submitted, further, that the party who raises the constitutional issue (or in the event of such

party failing to give the requisite notice, any of the other parties to the proceedings) should also give notice of the constitutional issue to each of the other parties as well as to all persons who might have a direct and substantial interest in the issue.

Subrule (1)*(b)*: 'Contain a clear and succinct description of the constitutional issue.' The subrule creates a 'need for specificity'. [18] A terse, uninformative description of the constitutional issue concerned will be insufficient. [19]

The majority in *Phillips v SA Reserve Bank* [20] (*per* Majiedt JA) stated the position to be as follows:

> 'I respectfully disagree with my learned colleague in his observation in para [36] above that a prospective amicus needs only to know what legislative provision is being challenged and that, for the rest, he or she can then have regard to the court file to ascertain whether relevant matters of fact and law are contained in the applicant's papers. I do not think the legislature intended to burden affected and interested persons in this manner. To require of a prospective amicus to trawl through papers which are more often than not quite voluminous, is to defeat the very purpose of rule 16A(1)*(b)*. The rule has, in my view, the objective of providing sufficient information to affected and interested persons of what the constitutional challenge is all about, thereby obviating the need of scouring lengthy papers to obtain the relevant information.
>
> The use of the word "succinct" in rule 16A(1)*(b)* is in my view deliberate — it signifies the requirement of a "brief and clear expression" (as defined in the *Concise Oxford English Dictionary* 12 ed (2011)) of the constitutional issue concerned. A description can only be "brief and clear" when it has some particularity — a terse regurgitation of the orders sought hardly leaves any room for such a brief and clear description.'

Subrule (1)*(c)*: 'The registrar shall . . . forthwith.' It is clear from the wording of this subrule that it is the duty of the registrar to see to it that the notice is put on the notice board designated for that purpose and, further, to see to it that it stays there for the required period. [21] To ensure proper compliance with the rule, the Supreme Court of Appeal, in *Phillips v SA Reserve Bank*, [22] suggested the following practice, to be followed in the future:

> 'Regard being had, however, to the fact that it appears that problems (real or imagined) relating to compliance with rule 16A appear to arise not infrequently in constitutional cases, it is advisable that those responsible for drafting (and settling) founding affidavits in constitutional cases (and, where appropriate, opposing affidavits in which constitutional issues are raised which are not previously raised in the proceedings) should make it a practice of inserting an allegation that a notice (a copy of which is annexed) has been prepared in terms of the rule, and is to be handed to the registrar for the necessary action when the founding (or opposing) affidavit is filed. It is also advisable that the notice, when removed from the notice board after the 20-day period has elapsed and put into the file, be included among the "necessary" documents which go before the judge. The attorneys acting for departments or organs of state which are respondents in such cases should also follow the practice of checking as soon as the papers are received, that the

rule has been complied with and, if it appears not to have been, of bringing the omission to the attention of the applicant's attorney. Constitutional litigation should not be a game of forfeit and state respondents should take timeous steps to assist applicants to have constitutional issues raised with a minimum of obstruction.'

See, however, the notes to subrule (1)*(a)* s v 'Shall give notice' above.

Subrule (1)*(d)*: 'The notice . . . shall remain on the notice board for the period of 20 days.' It is the duty of the registrar to see to it that the notice remains on the notice board for the required period. [23]

Subrule (2): 'Written consent of all the parties to the proceedings.' The parties requested to give their written consent must be placed in a position where they can assess properly whether the request complies with the underlying principles governing applications for admission as *amicus curiae*. [24] This entails, it is submitted, that the request should, as a general rule, contain at least the information contemplated in subrule (6).

'Given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was first raised.' It is submitted that this period is illogical in the light of the provisions of subrule (1)*(d)*. The written consent of the parties to the proceedings should rather be given within a stipulated period calculated from the date on which the period of 20 days provided for in subrule (1)*(d)* has expired.

Subrule (6): 'An application contemplated in subrule (5) shall.' As to the requirements to be met, see, in general, *Applications for admission as amicii curiae by various UN bodies and Human Rights Watch: In re certification application by various applicants and others v Anglo American SA (Ltd)*. [25]

Subrule (6)*(b)*: 'Clearly and succinctly set out the submissions which will be advanced.' In Constitutional Court proceedings it has been held that for a proper assessment of these matters to be made, the request for written consent must ordinarily be accompanied by a summary of the written submissions sought to be advanced. [26] See further, in this regard, the notes to rule 10(6)*(c)* of the Rules of the Constitutional Court s v 'Set out the submissions to be advanced by the *amicus curiae*' in Volume 1 third edition, Part B1.

Subrule (9): 'May dispense with any of the requirements . . . if it is in the interests of justice.' Where the parties to the matter agree to dispense with the notice requirement under this rule, such agreement was relevant but not dispositive of the matter. The court should consider whether it is in the interests of justice to dispense with any of the requirements. It has been held [27] to be in the interests of justice to dispense with the notice requirement where the constitutional challenge has been brought to the attention of all persons who might be affected or who have a legitimate interest in the case and where there was an element of urgency in the proceedings and it was in the public interest that the dispute be resolved.

Costs. In accordance with the general principle applicable in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs and no order as to costs should be made where wasted costs were incurred as the result of non-compliance with rule 16A. [28]

An *amicus curiae* appears not as a party, but as a friend of the court, and it is well established that it is thus not entitled to costs. [29] It is submitted that this principle also applies to an *amicus curiae* admitted under rule 16A.

1 2001 (1) SA 1 (CC) at 27H–28B; *In re Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign* 2002 (5) SA 713 (CC) at 715E–G; *Amardien v Registrar of Deeds* 2019 (3) SA 341 (CC) at 361A–B; *Maughan v Zuma* 2023 (5) SA 467 (KZP) (a decision of the full court) at paragraph [141].

2 *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) at 452E. In *African National Congress v Harmse and Another: In re Harmse v Vawda (Afriforum and Another Intervening)* 2011 (5) SA 460 (GSJ) the court found assistance in the text to this footnote (at 480B–C), and remarked that it did not appear as if the rule is peremptory (at 480B).

3 *Children's Institute v Presiding Officer, Children's Court, Krugersdorp* 2013 (2) SA 620 (CC) at 626A–C and 631H–632B. *Semble*: Even if rule 16A did not provide for evidence to be adduced by an *amicus*, s 173 of the Constitution of the Republic of South Africa, 1996, gives the High Court the inherent power to regulate their own process, and this included the ability to allow *amici curiae* to adduce evidence if the interests of justice so demanded (at 626A–C and 631G). See also *Baleni v Regional Manager, Eastern Cape Department of Mineral Resources* 2021 (1) SA 110 (GP) at paragraphs [59]–[67].

4 2023 (5) SA 467 (KZP).

5 *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) at 228D–F.

6 2021 (1) SA 563 (GJ).

7 At paragraphs [20]–[29].

8 2021 (5) SA 94 (SCA).

9 At paragraph [67].

10 [2024] 2 All SA 382 (GP) (a decision of the full court).

11 2012 (6) SA 223 (CC).

12 At paragraphs [13]–[14].

13 At paragraph [7].

14 2004 (3) SA 599 (CC) at 610H.

15 2013 (6) SA 450 (SCA) at 459B–D and 466H–I.

16 *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA) at 466I–467F.

17 2008 (4) SA 572 (W) at 575A–C.

18 *Shaik v Minister of Justice and Constitutional Development* 2004 (3) SA 599 (CC) at 610H.

19 *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA) at 466I. The majority of the Supreme Court of Appeal (*per* Majiedt JA) accordingly held (at 466G):
'To simply give notice that the impugned regulations are "inconsistent with the Constitution and invalid", begs the very question raised in rule 16A(1)(*b*). Such a description does not in my view provide an answer to the enquiry of what the constitutional issue is.'

20 2013 (6) SA 450 (SCA) at 469E–H.

21 *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA) at 461H–I.

22 2013 (6) SA 450 (SCA) at 464G–465A.

23 *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA) at 461H–I.

24 See *Ex Parte Institute for Security Studies: In re S v Basson* 2006 (6) SA 195 (CC) at 200E.

25 Unreported, GJ case no 2020/32777 dated 25 November 2022) at paragraphs 8–9 and the authorities there referred to.

26 *Ex Parte Institute for Security Studies: In re S v Basson* 2006 (6) SA 195 (CC) at 200D–E.

27 *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) at 554A–E. See also *MSM obo KBM v MEC for Health, Gauteng* 2020 (2) SA 567 (GJ) at paragraphs [13]–[14].

28 *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA) at 465B–H and 470G–H.

29 *Ex parte De Vos* 1953 (2) SA 642 (SR) at 643D–H; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) at paragraph [67]; *Komape v Minister of Basic Education* 2020 (2) SA 347 (SCA) at paragraph [71]; *Eskom Holdings SOC Ltd v*

Resilient Properties (Pty) Ltd and Other Cases 2021 (3) SA 47 (SCA) at paragraph [92].