MEMORANDUM ON THE ADMISSION OF AMICI CURIAE IN CRIMINAL PROCEEDINGS AND ESTABLISHMENT OF SPECIAL COURTS FOR TRC CASES IN SOUTH AFRICA

In re: S v WHJ Coetzee and A Pretorius (Case no CC19/2016)

Table of Contents

INTRODUCTION 2

AMICI CURIAE IN CRIMINAL PROCEEDINGS 3

GENERAL PROCEDURAL FRAMEWORK FOR ADMISSIONS OF AMICI 3

THE ROLE OF AMICI IN CRIMINAL PROCEEDINGS 5

CASE LAW ANALYSIS ON THE ROLE OF AMICI IN CRIMINAL PROCEEDINGS 7

S v Engelbrecht (Centre for Applied Legal Studies Intervening as Amicus Curiae) 2004 (2) SACR 391 (W) 7

S v Zuma 2006 (2) SACR 257 (W): 13

Children's Institute v Presiding Officer, Children's Court, Krugersdorp, and Others 2013 (2) SA 620 (CC): 18

CONCLUSION ON AMICI IN CRIMINAL PROCEEDINGS 22

ESTABLISHING A SPECIAL COURT FOR TRC HEARINGS IN SOUTH AFRICA 24

“SPECIALISED COURTS” IN SOUTH AFRICA 24

The Labour Court and Labour Appeal Court 24

Tax Courts 25

Equality Courts 26

The Competition Appeal Court 27

Land Claims Court 28

PRACTICALITY AND FEASIBILITY OF ESTABLISHING A “SPECIALISED COURT” FOR TRC CASES 29

“DEDICATED COURTS” IN SOUTH AFRICA 30

Sexual Offences Courts 31

Specialised Commercial Crime Courts 37

PRACTICALITY AND FEASIBILITY OF ESTABLISHING A “DEDICATED COURT” FOR TRC CASES 39

CONCLUSION 40

INTRODUCTION

1. I have been asked to provide an opinion on the following:

   1.1. First, whether, in criminal proceedings, amici curiae (hereinafter “amici”) might be admitted at the trial stage or the sentencing stage only; and (ii) the ambit of the role amici may play in such proceedings; and

   1.2. Second, the prospect and feasibility of establishing a special court in South Africa to hear TRC cases.

2. For the reasons set out below, I conclude in respect of the first topic that amici curiae may be admitted during *any* stage of criminal proceedings (that is, during the trial, argument or sentencing stage) depending on the purpose of their intervention and considerations of convenience and justice to both the Court and the parties to the proceedings.

3. I further conclude that the ambit of their role may be considerably wide, extending beyond legal submissions of a purely constitutional nature and even, in an appropriate case and where the interests of justice warrant, involving the giving of evidence to assist the court in resolving factual issues.

4. In respect of the second topic, I conclude that it is more feasible to establish a “dedicated court” for the prosecution of TRC cases, than a “specialized court”. The crucial distinction between the two concepts is drawn later in this opinion.

There may, however, be practical drawbacks in having such courts established any time in the near future, as their establishment seems to largely depend on ad hoc political and public pressure placed on the government and National Prosecuting Authority.

AMICI CURIAE IN CRIMINAL PROCEEDINGS

<u>GENERAL PROCEDURAL FRAMEWORK FOR ADMISSIONS OF AMICI</u>

5. The admission of amici in criminal proceedings in the High Court is regulated by Rule 16A of the Uniform Rules of Court.[1]

---

[1] According to Rule 16A:

> (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.

6. To a large extent, Rule 16A of the Uniform Rules mirrors Rule 10 of the Constitutional Court Rules on the admission of amici. The difference, however, is that a party wishing to be admitted as amicus in the Constitutional Court is the initiator of the process, whereas in Rule 16A the process is initiated by way of notice, by a *party to the proceedings*, to the Registrar.

7. A party wishing to be admitted as amicus in the High Court may, however, ask the court to dispense with the notice requirement, by invoking Rule 16A (9)[2] or the High Court's general discretion to dispense with or condone non-compliance with the Rules.

---

(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.

[2] See Rule 16(A) 9 *supra*, where the court may dispense with any of the requirements of the rule if it is in the interests of justice to do so. See further *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) at para 25, where the court dispensed with the notice requirement on the basis that in the proceedings before the Court had had already received very wide notice in the public media. The purpose of the notice requirement had therefore been achieved in substance, being that the existence of the litigation had been brought to the attention of persons who might wish to intervene (ibid). See further *S v Engelbrecht (Centre for Applied Legal Studies Intervening as Amicus Curiae)* 2004 (2) SACR 391 (W) at para 28, where Satchwell J dispensed with the time periods of Rule 16A.

8. An amicus may therefore unilaterally invoke Rule 16A and motivate in its application for the notice requirement to be dispensed with.

9. Another critical aspect of Rule 16A is that it purports to confine the submissions of amici in the High Court to constitutional issues[3]. However, as I will explained below, the High Court has adopted a broad interpretation of the Rule, so as to enable a wider ambit of issues to be canvassed by amici in proceedings before the High Court.

THE ROLE OF AMICI IN CRIMINAL PROCEEDINGS

10. The role of amici in criminal matters has primarily aligned itself with assisting courts on questions concerning the constitutionality of criminal offences.

11. The Constitutional Court in particular has been faced with a plethora of these instances. See for example, *S v Makwanyane* 1995 (3) SA 391 (CC), where The Black Lawyers' Forum, Lawyers for Human Rights, the Centre for Applied Legal Studies, the Society for the Abolition of the Death Penalty in South Africa and Ian Glauber were admitted as amici curiae. This was regarding the constitutional challenge to the competence of the death sentence.

12. See further *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), involving a constitutional challenge to provisions of the Liquor Act 27 of 1989

[3] See Rule 16A (1)(a) in this regard.

that prohibited the sale of liquor on Sundays and at times other than those specified in the Act. The South African Liquor Store Association was admitted as amicus and aligned itself with the accused and against the state.

13. In *S v Mamabolo (E TV & others Intervening)* 2001 (3) SA 409 (CC) the accused challenged the constitutionality of the offence of scandalizing the court. Etv, Business Day and the Freedom of Expression Institute were admitted as amici and supported the accused's challenge.

14. *S v Jordan & others (Sex Workers' Education and Advocacy Task Force & others as Amici Curiae)* 2002 (6) SA 642 (CC) concerned a constitutional challenge to provisions criminalizing prostitution. The Sex Workers' Education and Advocacy Taskforce, Centre for Applied Legal Studies and the Reproductive Health Research Unit, and Commission for Gender Equality were admitted as amici.

15. The direct involvement of amici in criminal proceedings itself is less frequent. There is, however, sound judicial precedent established in a handful of cases, on the various roles amici may play in these instances.

16. An analysis of these cases will shed light on the stages during which amici may be admitted in criminal proceedings, as well as the ambit of their role such proceedings.

CASE LAW ANALYSIS ON THE ROLE OF AMICI IN CRIMINAL PROCEEDINGS

S v Engelbrecht (Centre for Applied Legal Studies Intervening as Amicus Curiae) 2004 (2) SACR 391 (W)

A. Background:

17. On 13 August 2003, Mrs Engelbrecht pleaded guilty to the murder of her husband and was convicted and charged pursuant to a statement in terms of section 112(2) of the Criminal Procedure Act of 1977 (the "CPA").[4]

18. Following her conviction, the defence sought a postponement of the imposition of sentence, to enable the defence to procure the assistance of a psychiatrist.[5]

19. The defence intended to argue that the circumstances of domestic abuse present in the lives of Mr and Mrs Engelbrecht and relevant to the death of Mr Engelbrecht would conduce towards the Court handing down a sentence on a basis similar to that handed down in other matters, where allegations of similar abuse had been accepted by the Court.[6]

20. The proceedings were accordingly postponed to 1 December 2003.

[4] *Engelbrecht* 394H-I.
[5] Ibid 394I.
[6] Ibid 394I-395A.

21. In the interim, on 14 August 2003, an application was brought for Mrs Engelbrecht to be released on bail.[7] The bail application was heard before Satchwell J, the presiding officer in the main criminal trial.

22. During that application, Mrs Engelbrecht gave evidence to the effect that she had been subjected to physical and verbal violence by her late husband over a substantial period of time.[8] In essence, she gave evidence that she had felt driven, by reason of such abuse, to the action which brought about the death of her husband.[9]

23. The State did not concede this defence and made clear that they would be challenging this evidence at the sentencing stage of the main proceedings.[10]

24. In the light of the evidence given by Mrs Engelbrecht during the bail proceedings, Satchwell J found it prudent to he receive, "full assistance in proper appreciation and understanding of the context within which domestic abuse takes place, the impact on the victim, actual and perceived avenues open to victims to escape such abuse, the role of both the private and public sector in preventing or reducing domestic violence, the incidence of violence (including killing) perpetrated upon the abusive partner by the abused victim, the context to such killings, legal developments in South African and other jurisdictions with regard thereto."[11]

[7] Ibid 395B.
[8] Ibid.
[9] *Engelbrecht* 395C.
[10] Ibid 395C-D.
[11] Ibid 395E-H.

25. Satchwell J accordingly decided to invoke section 186 of the CPA, a provision which empowers the court “at any stage of criminal proceedings” to cause a witness to appear in court if “the evidence of such witness appears to the court essential to the just decision of the case”.[12]

26. A letter was subsequently addressed to the Centre for Applied Legal Studies (CALS) and the Centre for the Study of Violence and Reconciliation (CSVR), whereby they were ***invited to lead evidence before and address argument*** to this Court in the matter of S v Engelbrecht (my emphasis added).[13]

27. In response, CALS found it best to participated by way of submitting an amicus curiae brief, and advised that it would proceed to obtain the necessary permission from the parties to submit such a brief.[14]

28. CSVR advised that one Lisa Vetten of the CSVR had agreed to appear as an expert witness in the matter.[15]

29. CALS proceeded to bring an application in terms of Rule 16A of the Uniform Rules, which application was opposed by the State.

B. Submissions proposed by CALS as amicus:

[12] Ibid 395G-I.
[13] *Engelbrecht* 395H-396G.
[14] Ibid 396G-I.
[15] Ibid.

30. In its founding affidavit to the Rule 16A application, CALS identified the issues it wished to address the Court on as follows[16]:

    30.1. The position of abused women in society and their treatment by the legal system, in particular misconceptions commonly held about their behaviour when they kill their abusers; and

    30.2. The interpretation and exercise of sentencing discretion in the light of constitutional rights and values.

31. CALS further detailed the submissions it wished to advance as follows[17]:

    31.1. The extent to which the exercise of judicial discretion and sentencing must have due regard to the Constitution, and to constitutional rights and values, including those of gender equality, dignity and freedom and security of the person, in light of section 39 of the Constitution;

    31.2. That equality and dignity require the Court to treat all convicted persons with equal concern and respect in determining an appropriate sentence. This entails, inter alia, that the circumstances of the accused in the context within which the crime was committed be fully appreciated and understood by the Court. In cases of abused women who kill, it requires consideration of:

[16] Ibid 402D-E.
[17] *Engelbrecht* 402E-I.

(a) The history of abuse;

(b) the effects of abuse on the accused;

(c) the lack of options for and inadequate protection of abused women in South Africa;

(d) the prospects for recidivism;

(e) the gendered context of unequal power relations in which abuse occurs;

(f) the extent to which the situation of abuse, as well as the failure of the State to protect the accused from such abuse, must be taken into account in the determination of just sentence; and

(g) the manner in which South African case law and comparative jurisdictions have addressed the sentencing of abused women who kill their abusive partners.

C. Discussion of the role of amici by Satchwell J:

32. In determining whether CALS could utilise Rule 16A, having regard to the nature of its proposed submissions, Satchwell J identified three types of amici at common law[18]:

32.1. The first being, "the one who is requested by the court to represent an unrepresented (and usually indigent) defendant or respondent in a matter involving complex points of law;

[18] *Engelbrecht* 398A-C.

32.2. The second being, “the counsel who appears in a matter, at the request of the court, not in order to represent a party but to assist the court with important questions that fall to be decided by the court”; and

32.3. The third being, “the intervention in a case (after obtaining leave from the court) by an 'outsider' who has an interest not represented by the parties”[19].

33. Satchwell J noted that the proposed submissions by CALS may have met one of the functions of amici, by providing,“background information supplied by the original parties, thus enabling the Court to make decisions confident of their social consequences”.[20]

34. Satchwell J further recognized that such roles are not mutually exclusive, but may exist simultaneously, as was the case with CALS (who essentially wore “two hats” – a party requested by the court to assist on issues and, by virtue of its Rule 16A application, an 'outsider' having an interest not represented by the parties who applies for leave to intervene in a case).[21]

35. In further discussing the role of amici in criminal proceedings, Satchwell J held that, in view of the constitutional obligation on courts to develop the common

---

[19] See commentary by Erasmus to Rule 10 of the Constitutional Court Rules, where he explains the three types of amici in legal proceedings. Satchwell J further notes the Erasmus commentary, under the former Rule 9 of the Constitutional Court Rules, that “the amicus curiae is a familiar figure in our courts, exercising different functions” and further notes the remarks of Murray that, “the institution of amicus is versatile, and… fulfils a wide range of diverse and important functions'.

[20] *Engelbrecht* 402I.

[21] Ibid 398E-F.

law, 'taking into account the interests of justice', the proposed intervention of CALS enabled “substantive issues of social and legal significance to be properly aired in the interests of a fair trial and also ensures utilisation of common-law processes in a manner consistent with constitutional principles.”[22]

36. CALS was accordingly admitted as amicus in the criminal proceedings, after having satisfied all criteria in terms of Rule 16A.

37. In this regard, it must be noted that the Court recognized that an application for admission of a amici curiae may be brought either in terms of the common law or Rule 16A. And further held that Rule 16A may be used as a procedural guideline in either instance.[23]

38. The Court found it unnecessary to decide whether the application was brought in terms of the common law or Rule 16A but satisfied itself that the submissions sought to be advanced fulfilled the purpose of intervention of amici as envisaged by the common law and Rule16A.

S v Zuma 2006 (2) SACR 257 (W):

39. The Court in *S v Zuma* was more conservative in its approach to the admission of amici in criminal proceedings than the Court in *Engelbrecht*.

[22] Ibid 399E-F.

[23] *Engelbrecht* 399F-G.

40. The application for admission of amici was dismissed on a strict interpretation of the requirements of Rule 16A, as opposed to the broader and more purposive approach to amici adopted in *Engelbrecht*.

41. The judgement by Van der Merwe J provides useful insight, however, on the stage during which such an application may be brought, and further confirms the basic principles applicable to admissions of amici.

A. Background:

42. In this case, three applicants applied to be admitted as amici curiae in the criminal proceedings before the High Court in terms of Rule 16A, requesting leave to lead expert evidence and to present written and oral submissions.[24]

43. The applicants sought to introduce matter relating to, inter alia, constitutional issues on women's rights to freedom and security of the person, equality, privacy, human dignity and fair-trial rights and expert knowledge relating who rape survivors and statistics on their reporting habits.[25]

B. Timing of the application:

44. The rule 16A application was brought <u>during the trial on the merits</u>. I say this because as Van der Merwe J mentions obiter, "I was informed that it is

---

[24] *Zuma* 258E.
[25] Ibid 259D-H.

imperative that the argument be ***heard before the application in terms of s 174 of the Criminal Procedure Act is entertained***"[26] and further mentions that "the trial stood down for a week and, if I recall correctly, ***the State said that it was not closing its case, but it might when the matter resumed***"[27] (my emphasis added).

45. The application for admission as amici would therefore have been brought before the close of the State's case on the merits.

46. I importantly note that the bringing of the application at this stage of the trial (i.e., during the hearing on merits) was not challenged – the only criticisms in relation to timing of the application being the delay that it would cause in the finalization of the trial, that the applicants could have approached the State before the close of its case to ascertain which further witnesses were being called and offer assistance to the State, and that the complainant would have had to be recalled to give evidence.[28]

47. The fact that the application was brought during the trial stage was therefore not in issue, however the timing of the application in general proved fatal.

48. In fact, it may be suggested that if the three intervening amici applied timeously, and if their evidence had been new (in the sense that the state had not led similar expert evidence) they would have been admitted as amici.

---

[26] Ibid 258G.
[27] *Zuma* 265C.
[28] Ibid 265A, 265B, 265C-D.

49. I further note two cases cited by the Court, but only insofar as timing is concerned in the admission of amici during criminal proceedings:

49.1. In *S v Blaauw* 1999 (2) SACR 295 (W) an accused had been committed by a regional court magistrate for sentencing in the High Court in terms of the provisions of s 52(1) of the Criminal Law Amendment Act 105 of 1997. Borchers J, having perused the record and experiencing certain difficulties in interpreting the relevant provisions of the legislation, requested assistance of the Legal Resources Centre. Counsel appeared as amicus curiae on behalf of the Legal Resources Centre. The intervention of the amicus therefore came at the sentencing stage, and on request by the magistrate.

49.2. In *S v Boesman* 1990 (2) SACR 389 (E) the advocates who had previously appeared on behalf of the accused were called by the State as witnesses. The Eastern Cape Society of Advocates sought leave to intervene as amicus curiae, arguing that it would be an unprecedented decision with far-reaching effects of grave concern to the Society of Advocates if erstwhile counsel for the accused could be called as witnesses. The intervention of the Society came after Zietsman J granted the State leave to reopen its case on the merits.

C. Discussion on the role of amici in criminal proceedings by Van der Merwe J:

50. In rejecting the application for admission of amici, Van der Merwe J quoted the general principles relating to the admission of amici from *Institute for Security Studies in re: Basson*[29]:

"In the exercise of its discretion whether or not to admit a person as an amicus this Court will have regard to the principles that govern the admission of an amicus. These 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."[30]

51. Van der Merwe J therefore reiterated the requirements of Rule 16A, and in doing so held that none of the three applicants could contribute to any fact relevant to the incident in question[31], and that the maters the applicants wished to raise in their evidence and submissions had already been canvassed by an expert for the State.[32]

52. The judgement by Van der Merwe J therefore confirmed that an amicus must bring something new to the table, and that the submissions or evidence it seeks to submit must be useful to the Court.

53. The learned Judge notably found it prudent to repeat the cautionary remarks of the Constitutional Court in *Institute for Security Studies in re: S v Basson*:

[29] [2005] ZACC 4.
[30] *Zuma* 264E.
[31] Ibid 264H.
[32] Ibid 265D-E.

"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."[33]

54. The learned Judge did not apply this principle to the application before it, but presumably mentioned it obiter to emphasize the general approach courts ought to take in the admission of amici in criminal proceedings.

Children's Institute v Presiding Officer, Children's Court, Krugersdorp, and Others 2013 (2) SA 620 (CC):

55. Although not dealing with the admission of amici in criminal proceedings in particular, this case provides crucial jurisprudence on the specific role amici play in High Court proceedings generally.

56. The Constitutional Court seemed to have reverted to the purposive interpretation adopted in *Engelbrecht*.

A. Background:

[33] At para 15.

57. This case concerned an appeal regarding whether rule 16A (1) of the Uniform Rules of Court, properly interpreted, permitted high courts to allow amicus curiae to adduce ***evidence*** in support of the submissions it sought to advance.[34]

58. If the Court found that Rule 16A did not provide for the adduction of evidence by an amicus, a secondary question was whether a high court's inherent power under section 173 of the Constitution to regulate its own process allowed it to hear evidence tendered by an amicus.[35]

59. In the High Court, the Children's Institute brought an application in terms of Rule 16A in respect of the main proceedings, seeking to adduce 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.[36]

60. The main proceedings concerned an appeal to the High Court, arising from an enquiry into whether a minor orphan living with his great-aunt and great-uncle was 'in need of care and protection', as defined in terms of section150(1)(a) of the Children's Act, and therefore whether his caregivers were eligible for a foster child grant.[37]

61. The minor child, together with his great-aunt and his great-uncle, applied to the children's court to have the child declared a 'child in need of care and protection'

[34] *Children's Institute* para 1.
[35] *Children's Institute* para 1.
[36] Ibid para 6.
[37] Ibid para 3.

under the Children's Act, to receive a foster child grant of up to R770. This grant would have been significantly greater than the child support grant of up to R280 made in respect of many other poor children.[38]

62. The children's court refused the application, finding that the minor child was not a child in need of care and protection under the Children's Act.[39]

63. This necessitated an appeal to the High Court, at which stage the Children's Institute sought to be admitted as amicus.

B. Discussion on the role of amici in High Court, by Khampepe J:

64. In determining whether or not amici could seek leave to adduce evidence in proceedings, the Court held that the role of an amicus envisioned in the Uniform Rules of High Court is very closely linked to the protection of constitutional values and the rights enshrined in the Bill of Rights.[40]

65. The Court held further held that although Rule 16A (2) describes an amicus as an 'interested party in a constitutional issue raised in proceedings', ***the new rule was specifically intended to facilitate the role of amici in promoting and protecting the public interest*** (my emphasis added).[41]

[38] Ibid para 4.
[39] *Children's Institute* para 4.
[40] Ibid para 26.
[41] Ibid.

66. The Court therefore adopted a broad interpretation of the role of amici as intended by Rule 16A, holding that in public interest cases, amici: (1) ensure that courts consider a wide range of options and are well informed and (2) increase access to the courts by creating space for interested non-parties to provide input on important public interest matters, particularly those relating to constitutional issues.[42]

67. The Court therefore concluded that the role of an amicus could be characterised as one that assists the courts in effectively promoting and protecting the rights enshrined in the Constitution.[43]

C. Interpreting the nature and extent of 'submissions' by amici

68. Importantly then, the Court went on to hold that Rule 16A should also be interpreted to allow courts to consider **evidence**[44] from amici, where it is in the interests of justice to do so.[45]

69. The Court held further that, even if rule 16A did not provide for evidence to be adduced by an amicus, section 173 of the Constitution gives courts the inherent power to regulate their own process, and this includes the ability to allow amici to adduce evidence if the interests of justice so demand.[46]

---

[42] *Children's Institute* para 26.
[43] Ibid para 27.
[44] The Court reiterated that evidence comprises of statements made in court under oath, affirmation, or warning and includes documents produced and received in court; Ibid para 31. The range of evidence amici may seek to introduce may therefore be considerably wide, subject to the ordinarily rules of admission of evidence.
[45] Ibid para 27.
[46] Ibid para 17.

70. The Court cautioned, however, that the leading of evidence by amici depends on whether it is in the interests of justice to do so. And what the interests of justice will require in a particular case must be left to high courts to decide.[47]

71. The Court further confirmed that 'submissions' includes **written or oral argument** by amici, and Rule 16A (8) empowers the court to determine the conditions under which such submissions may be made (such as the extent of written submissions, the duration of oral argument, and the nature and extent of evidence to be led).[48]

72. In making these determinations, the court will be guided by what is in the interests of justice in a particular case.

73. The judgement is significant in this regard- it casts the net wide for amici in High Court in terms of the type of submissions they may be permitted to advance.

CONCLUSION ON AMICI IN CRIMINAL PROCEEDINGS

74. In consideration of all the above, I am therefore of the opinion that:

74.1. On an analysis of *Engelbrecht* and *Zuma*, amici curiae may be admitted during any stage of criminal proceedings (that is, during the trial,

---

[47] *Children's Institute* para 32.
[48] *Children's Institute* para 23.

argument or sentencing stage) depending on the purpose of their intervention and considerations of convenience and justice to the Court and the parties to the proceedings; and

74.2. On analysis of all the cases cited above, the role of an amicus may be considerably broad, extending beyond legal submissions of a purely constitutional nature and even, in an appropriate case and where the interests of justice warrant, involving the giving of evidence to assist the court in resolving factual issues.

74.3. However, the cautionary remarks in *Institute for Security Studies in re: Basson* cannot be ignored.

74.4. I therefore advise that, when applying to be admitted as amici in criminal proceedings in particular, a party must be cautious not to seek to advance submissions that would “stack the odds against an accused person”. This does not preclude the giving of submissions that would invariably strengthen the case against the accused but cause court to approach the proposed admission with caution.

74.5. If the submissions of the amicus tend to strengthen the State’s case, a strong case should be made out for why the interests of justice should nevertheless favour the amicus’ admission.

ESTABLISHING A SPECIAL COURT FOR TRC HEARINGS IN SOUTH AFRICA

75. From an analysis of South Africa's specialised court structure, I find it pertinent to first distinguish between, what I deem to be, "specialised courts" and "dedicated courts" in South Africa. I have created this broad distinction based on the different ways in which special courts in general have been established in South Africa.

76. The distinction is crucial in ultimately determining the feasibility and practicality of establishing a special court for TRC hearings.

"SPECIALISED COURTS" IN SOUTH AFRICA

77. "Specialised courts" in South Africa seem to consist primarily of courts which have been established by *specific legislation*, providing for the creation of a court outside the normal civil structure, and conferring a determined jurisdiction to these courts.

78. The most well-known "specialised courts" in South Africa are the following (and I will provide a synopsis on how each court is established and regulated, in view of determining questions of practicality and feasibility):[49]

The Labour Court and Labour Appeal Court

[49] Note: Most of the information obtained on each court has been sourced from https://www.justice.gov.za/about/sa-courts.html and a reading of the specific legislation mentioned hereunder.

79. The Labour Court was established by the Labour Relations Act, 1995, and enjoys a status similar to that of a division of the High Court.

80. The Labour Court has exclusive jurisdiction over cases arising from the Labour Relations Act, 1995, such as unfair labour practices, unfair dismissals, strikes, matters arising from the Basic Conditions of Employment Act, 1997, mattes arising from the Employment Equity Act, 1998 (such as discrimination and affirmative action) and the Unemployment Insurance Act, 2001.

81. The Labour Appeal Court was also established by the Labour Relations Act, 1995, and has a status similar to that of the Supreme Court of Appeal.

82. Subject to the Constitution and despite any other law, the Labour Relations Act confers exclusive jurisdiction to the Labour Appeal Court to:

    82.1. hear and determine all appeals against the final judgments and the final orders of the Labour Court; and

    82.2. decide any question of law reserved in terms of section 158(4) of the Act.

Tax Courts

83. The Tax Court is a court established in terms of section 83(3) of the Income Tax Act 1962.

84. Special income tax courts sit within provincial divisions of the High Court. In these courts, a judge of the High Court ("the president" of the tax court) is assisted by an accountant with not less than ten years' standing and a representative of a commercial community.

85. The court deals with disputes between taxpayers and the South African Revenue Service (SARS), where the dispute involves an income tax assessment of more than R 100 000.

86. Judgments are binding on the parties before the court and are only of persuasive value in respect of other tax cases.

87. The Judge President of the Division of the High Court nominates and seconds a judge or an acting judge of the division to be the president of the tax court. A secondment applies for a period, or for the hearing of a particular case.

88. The Commissioner of the South African Revenue Services appoints the registrar of the tax court. The registrar and persons appointed in the office of the registrar are SARS employees.

Equality Courts

89. Equality Courts were created by the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (or Equality Act).

90. Equality courts are specialised courts designated to hear matters relating to unfair discrimination, hate speech and harassment.

91. For the purpose of the Equality Act, every High Court is Equality Court for the area of its jurisdiction.

92. In 2009, the Minister of Justice and Constitutional Development designated all Magistrate's Courts as equality courts in Government Gazette 32516, GoN 859, with Equality Clerks appointed to assist the public when lodging complaints.

The Competition Appeal Court

93. The competition appeal court was established in terms of section 36 of The Competition Act 89 of 1998.

94. The Court has, inter alia, the following functions:
    - 94.1. To consider any appeal from, or revie of, a decision of a Competition Tribunal,
    - 94.2. To confirm, amend or set aside a decision or an order that is the subject of appeal
    - 94.3. To give any judgement or make any order that the circumstances may require.

95. The court has a similar status to that of a High Court and has jurisdiction throughout the country.

96. The Competition Act 89 of 1998 requires for at least three members to be judges of the High Court, one of whom must be designated by the President to be the Judge President of the Competition Appeal Court.

Land Claims Court

97. The Land Claims Court was established in 1996 through the Restitution of Land Rights Act of 1994.

98. The Court specializes in dealing with disputes arising out of the Restitution of Land Rights Act, 1994, the Land Reform (Labour Tenants) Act, 1996 and the Extension of Security of Tenure Act, 1997.

99. Its primary focus is dealing with land restitution/land claims cases. The court deals with restitution cases in the form of referrals from the commissioner's office or when they come directly through claimants or affected land owners.

100. The Land Claims Court enjoys the same status as the High Courts.

101. Any appeal against a decision of the Land Claims Court lies with the Supreme Court of Appeal, and if appropriate, to the Constitutional Court. The Land Claims Court can hold hearings in any part of the country, if it thinks this will make it more accessible, and it can conduct its proceedings in an informal manner if appropriate to do so.

PRACTICALITY AND FEASIBILITY OF ESTABLISHING A "SPECIALISED COURT" FOR TRC CASES

102. Needless to say, based on the above, I am of the opinion that it is neither practical, nor feasible, to establish a "specialised court" for TRC cases in South Africa.

103. The current "specialised courts" have all been established through very specific legislation, and all operate within the exclusive jurisdiction given to it by that legislation, to hear cases of a very specific nature.

104. These courts seem to have been established in a bid to "divide the labour" of ordinary courts, by facilitating the expeditious and cost-effective resolution of matters that are more likely to be more frequent and high-volume throughout the country, whilst ensuring that the policy objectives underpinning each of the governing legislation are effectively implemented.

105. The prosecution of TRC cases is, however, only a recent development. In my opinion, therefore, it will take some time for such cases to be considered frequent and large enough (in volume) to necessitate the allocation of a separate forum dedicated entirely to it and regulated by its own legislation.

106. It further goes without saying that, if one were to propose a Bill on the hearing of TRC cases which caters for the establishment of these courts and regulates them, the ordinary legislative process itself may take years to complete.

107. I further note that there is no general legislation that allows for the ad hoc establishment of specialised courts in South Africa – the only “general” law regulating this being section 34 of the Constitution:

‘[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, ***another independent and impartial tribunal or forum*** (my emphasis added).

108. The establishment of these specialised courts is therefore born from the implications of section 34 of the Constitution.

“DEDICATED COURTS” IN SOUTH AFRICA

109. “Dedicate courts” are those which, in my opinion, have been reserved for the hearing of specific types of cases.

110. They are different to “specialised” courts in that they are not born of legislation.

111. These courts are merely assigned to hear specific types of cases, and operate within pre-existing judicial structures.

112. The most apt examples of “dedicated courts” in South Africa are the Sexual Offences Courts and the Specialised Commercial Crimes Courts.

Sexual Offences Courts[50]

113. The history of Sexual Offence Courts (also known as "SOCs") is a long and complex one.

114. I will attempt to summarize this history, only to the extent that it highlights the various mechanisms through which these courts have been established.

115. The first Sexual Offences Court was introduced in South Africa as an innovative measure to improve the adjudication of sexual offences.

116. In 1993, the then Attorney-General of the Western Cape initiated the establishment of the Sexual Offences Courts at the Wynberg Regional Court in Cape Town. This was a pilot project aimed at responding to and preventing the soaring figures of rape cases that were reported in the area at the time.

117. Particular attention was given to the need to provide an intervention mechanism for victims, who often experienced "secondary victimization" whenever they engaged with the criminal justice system.

---

[50] Information sourced from:

- 'Report on the Re-establishment of Sexual Offences Courts', compiled by the Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters, August 2013, Department of Justice and Constitutional Development;
- https://www.justice.gov.za/about/sa-courts.html;
- https://rapecrisis.org.za/part-1-the-history-of-sexual-offences-courts-in-south-africa/.

118. Further, at the time, women's rights activists lobbied for better court services for rape survivors.

119. The initiative became known as the Wynberg Sexual Offences Court Project, and had three objectives:

119.1. To reduce the insensitive treatment of victims in the criminal justice system by following a victim-centred approach;

119.2. To adopt a coordinated and integrated approach among the various role-players who deal with sexual offences; and

119.3. To improve the investigation and prosecution, as well as the reporting and conviction rates in sexual offence cases.

120. A multi-disciplinary team was also established to provide assistance to a victim from the the moment the victim reported a sexual offence.

121. A social worker from the former Department of Welfare was appointed as a full-time support services coordinator and was tasked with the coordination and provision of intermediary, counselling, and other appropriate services to victims.

122. In 1997, the Project was evaluated by Rape Crisis Cape Town and the African Gender Institute at UCT and was found to be partially successful in establishing

integration and teamwork among different role-players dealing with sexual offences, in reducing victim trauma and in improving reporting and conviction rates.

123. This was regarded as a commendably achievement after only four years of operation. The pilot proved to be a huge success, maintaining the conviction rate of up to 80% over a period of a year.

124. This motivated the NPA to establish further Sexual Offences Courts around the country with the aim of targeting first areas which had a high prevalence of sexual violence.

125. The NPA accordingly created the National Sexual Offences Court Task Team in 1998. The objectives of this task team included the replication of the Wynberg Sexual Offences Courts model to all regional court districts in the country and the provision of specialised training to justice court personnel and other key role-players dealing with sexual offences.

126. In 1999, the country saw the birth of the second court that dealt exclusively with sexual offences cases in Bloemfontein. This was established as an integrated effort by a number of organisations.

127. No national blueprint was available at the time, and so role-players designed their own blueprint, closely resembling certain aspects of the Wynberg model.

128. From 1999, further Sexual Offences Courts were established, and by 2000 these were available in Durban, Parow and Grahamstown.

129. In 2002, a Blueprint for Sexual Offences Courts was developed by the Sexual Offences and Community Affairs Unit (SOCA Unit) within the NPA.

130. In February 2003, the National Strategy for the Rollout of Specialised Sexual Offences Courts was announced.

131. In terms of the blueprint, Sexual Offence Courts are regional courts dedicated exclusively to sexual offences. These courts have specific objectives, namely to:

    131.1. Provide for the effective prosecution and adjudication of sexual offences;
    131.2. Increase the reporting and conviction rates;
    131.3. Reduce the cycle time of cases; and
    131.4. Reduce secondary victimisation for survivors.

132. The aim of the Sexual Offences Courts was to enhance the efficient prosecution and adjudication of sexual offences and to respond to victims' needs.

133. The SOCA Unit facilitated the establishment of a written agreement between the NPA and the Department of Justice and Constitutional Development, in which they collectively undertook to streamline the roll-out and management of Sexual Offences Courts.

134. By March 2003, 20 Sexual Offences Courts had been established, and in March 2004 this number rose to 47 courts. By the end of 2005 there were 74 courts, which resulted in more cases being finalised, an improved handling of victims, improved cycle times and improved conviction rates.

135. In 2005, however, the then Minister of Justice and Constitutional Development grew concerned over the proliferation of specialised courts, which were, at the time, better resourced than the mainstream courts.

136. Concerns were rising over the inequitable distribution of services to all victims of crime. The fact that the Sexual Offences Courts were better resourced than other courts was seen as a serious violation of the constitutional right of other victims of crimes to equal protection and benefit of the law.

137. In 2005, the Justice Minister asked for a review to assess whether these courts had been effective, to see if they were sustainable, and to revise the terms of reference for establishing them.

138. Eventually, the SOCs roll out stopped, and survivors had to continue to seek justice from the ordinary courts.

139. The Sexual Offences Act was updated and signed into law in 2008, with an expansion in the number of crimes that legally constituted a sexual offence, and a broader definition of rape.

140. The new law required the Minister of Justice, in partnership with other Ministers, to develop and adopt a National Policy Framework to make sure that the Sexual Offences Act could be implemented properly and to make sure that survivors received the least traumatising protection from the law.

141. The Department eventually began to develop a policy to integrate sexual offences courts into mainstream courts, but reporting statistics drastically decreased.

142. By 2011/12 the NPA reported that dedicated sexual offences courts "no longer exist."

143. In 2011, the Deputy Minister of Justice, Andries Nel, requested a position paper on status of SOCs, to begin discussion on revitalising these courts.

144. By 2012, the Minister of Justice, Jeff Radebe, established the Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters (MATTSO) to reinvestigate the need for these courts.

145. MATTSO undertook their work, and in 2013 produced a detailed report. After a thorough investigation, MATTSO recommended that SOCs be re-established in South Africa.

146. New models of SOCs were introduced, providing recommendations on the minimum requirements necessary for the establishment of an SOCs.

147. Reinvigoration of the SOCs roll-out then began, albeit moving at a much slower rate than before.

148. The Department reiterated its commitment throughout the years to SOC rollouts and, as of April 2022, 116 regional courts were upgraded to Sexual Offences Courts.

Specialised Commercial Crime Courts[51]

149. Specialised Commercial Crime Courts were established as a result of collective efforts between the National Prosecuting Authority and the Department of Justice and Constitutional Development, to combat commercial crime.

150. Shortly after the creation of a Specialised Commercial Crime Unit (SCCU) within the NPA, the first Specialised Commercial Crime Court was established in Pretoria November 1999.

151. The court was established to help rectify the perceived inability of the criminal justice system to cope with cases of commercial crime, and further provided a mechanism for the effective handling of the complexities that come with commercial crime cases.

[51] Information under this heading is sourced from:

- https://www.justice.gov.za/about/sa-courts.html;
- https://www.justice.gov.za/m_statements/2022/20220209-SpecialCommericalCrimesCourt.html;
- Altbeker A, 'A MODEL FOR JUSTICE DELIVERY? The Specialised Commercial Crime Court', SA CRIME QUARTERLY No 2 NOVEMBER 2002.

152. The SCC Unit consists of a team of prosecutors, led by a deputy director of public prosecutions, and is tasked with bringing cases of commercial criminality to trial. Commercial and organised commercial crimes are investigated by the commercial branches of the South African Police Services, and cases are prosecuted by the Specialised Commercial Crimes Unit of the NPA.

153. The Specialised Commercial Crimes Courts operate from regional courts. As of 2022, Specialised Commercial Crimes Courts are found in all nine regional divisions of South Africa.

154. In 2022, The Department of Justice and Constitutional Development established two more specialised commercial crimes courts in Mthatha and East London in the Eastern Cape to bolster efforts to fight against corruption.

155. These courts were established following the commitment made by President Cyril Ramaphosa to the National Council of Provinces, when he responded to questions pertaining to alleged Covid-19 corruption and procurement irregularities.

156. The President, in sum, recognized the rise in serious commercial crimes and incidents of COVID-19 corruption, and committed to fast-tracking the establishment of additional commercial crimes courts and increasing the capacity of existing ones.

157. To give effect to the President's commitment, the Minister of Justice and Correctional Services directed that the Department of Justice and Constitutional Development coordinate and facilitate the establishment of the new Special Commercial Crime Courts.

PRACTICALITY AND FEASIBILITY OF ESTABLISHING A "DEDICATED COURT" FOR TRC CASES

158. An analysis of the way in which "dedicated courts" have been established in South Africa reveals that there are three primary factors responsible for its creation:

(1) The most prevalent needs of society, and service delivery capacity to meet those needs;
(2) Political pressure/influence; and
(3) Most importantly, collaborative efforts between government and the NPA.

159. Again, prosecution of TRC cases in South Africa is fairly knew, and it will take a considerable amount of time for trends on, for instance, the efficacy of such prosecutions, the capacity of our courts to deal with these prosecutions, and the amount of skill needed, to be established and analysed before the need for establishing dedicated courts for TRC prosecutions can be properly determined.

160. From a feasibility point of view, I am of the opinion “dedicated courts” for TRC prosecutions are to be preferred over “specialised courts”. This is because “dedicated courts” operate within pre-existing judicial structures and will not require duplication of resources and entail long-dawn legislative processes.

161. From a practical perspective, however, much public and political pressure would have to be put onto government and the NPA for them to consider dedicating courts to the hearing of TRC cases. This all takes time and is highly unlikely to produce immediate results.

162. However, placing enough public and political pressure in the interim may assist in expediting efforts of government and the NPA, to at least begin considering the possibility of establishing dedicated courts for TRC cases in South Africa.

163. I have not traversed the possibility of establishing a *tribunal* for the prosecution of TRC cases in South Africa, as this is beyond the scope of my mandate and will require a separate opinion dedicated to it.

164. However, it may be worth looking into the prospects of this avenue.

CONCLUSION

165. I trust that this opinion has provided clarity on the admission of amici curiae in criminal proceedings, and the feasibility and prospects of establishing special courts for the prosecution of TRC cases in South Africa.

CJ Moodley

Chambers, Durban

21 September 2022