



**Access to Justice in Namibia:
Proposals for Improving Public Access to Courts**

AMICUS CURIAE **PARTICIPATION**

Paper No. 4



Zoila Hinson and Dianne Hubbard
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Access to justice is both an independent human right and a crucial means to enforce other substantive rights. Namibia has a progressive, modern constitution, guaranteeing an impressive set of rights for the individual. Yet without a realistic means to enforce those rights, substantive guarantees can far too easily become merely a set of empty promises.

The Constitution of Namibia guarantees access to justice. But some legal procedures limit the ability of individuals, particularly marginalised populations, to access the courts. In this series of papers, the Legal Assistance Centre examines several discrete access to justice issues, including examples from other jurisdictions and arguments put forward by government, civil society and academia. On the basis of this information, we propose reforms to improve access to justice in Namibia.

This series of papers on access to justice covers the following four topics:

- (1) access to justice as a human right
- (2) *locus standi* (standing to bring a legal action)
- (3) costs and contingency fees
- (4) *amicus curiae* participation.

The paper on access to justice as human right includes a brief summary of our recommendations on the other three topics.

Zoila Hinson is a graduate of Harvard College and Harvard Law School. She served as a clerk to the Honourable Carlos F. Lucero of the US Court of Appeals for the Tenth Circuit from 2009 to 2010, and was based at the Legal Assistance Centre as a Fulbright Scholar in 2011. She is currently an associate with the US law firm Jenner & Block and a member of the New York Bar.

Dianne Hubbard holds degrees from the University of North Carolina, Harvard Law School and Stellenbosch University. She served as a clerk to Justice Daniel Moore of the Alaska Supreme Court in 1985 and worked for the Lawyers Committee for Human Rights in New York (now known as Human Rights First) during 1986 and 1987. She came to Namibia to work with Adv Anton Lubowski on the NamLaw Project in 1988 and has been the Coordinator of the Gender Research & Advocacy Project of the Legal Assistance Centre since 1993.



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4 Marien Ngouabi Street (former name Körner Street), Windhoek
PO Box 604, Windhoek, Namibia
Tel. 061-223356 • Fax 061-234953
Email info@lac.org.na Website www.lac.org.na

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AMICUS CURIAE PARTICIPATION

Summary

We propose that Namibia introduce court rules permitting and regulating the admission of *amici curiae* (“friends of the court”). The term is used in different contexts, but here we refer to a non-party who submits arguments to the court.

Court rulings often affect groups and interests beyond those of the specific parties to a case, who should be able to present relevant information to the court. Drawing on example from other jurisdictions such as Canada, the United States and South Africa, the Namibian courts should introduce rules which will allow them to take advantage of *amicus* expertise whilst avoiding being overwhelmed by unnecessary and repetitive argument. With an overburdened court system and overworked judges, Namibia is likely to derive particular benefit from the admission of *amicus curiae*. **Although the admission of this type of *amicus* is not currently forbidden under Namibian court rules, the rules also do not provide for it and it appears to have been used only in a single case to date.**¹

Ideally, *amici curiae* help ensure that the court considers the best possible arguments and the full array of interests implicated in particular cases. *Amici* can also permit the court to take advantage of specialised expertise on a particular subject matter, particularly on technical issues.

The input of *amici curiae* can advance several important objectives:

- It can provide **valuable information on relevant facts and case law** that the parties may not have considered or may have missed.
- It can investigate **new arguments** including the constitutional implications of an issue or the possible social, political, and economic consequences of a judicial decision.
- It can vindicate participatory democratic values by **allowing courts to listen to the opinions of all those whose interests are implicated by a potential decision.**

“The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court.”

In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 713 (CC) at para 5

¹ *S v Zemburuka (1)* 2003 NR 112 (HC).

Specific provision for the admission of *amicus curiae* is necessary because existing rules allowing for intervention are insufficient to permit these advantages. Intervention is restricted to parties with a “direct and substantial interest” in the subject of litigation, ie those with standing. The right of intervention can, at most, occasionally ensure that one or two additional parties will be able to protect their own narrow interests. Persons and groups with interests which will be affected by the case will in many cases lack standing to approach the court as parties, but could provide useful and pertinent input as *amici*. Admission of *amicus curiae* can be restricted to those with new and relevant information and arguments, to prevent the court from being overwhelmed by redundant input and busybodies.

RECOMMENDATION

We suggest that *amicus curiae* participation should be allowed in Namibia, governed by the following principles:

- (1) *Amicus curiae* should be permitted in principle at both the High Court and the Supreme Court, and at trials, appeals and other judicial proceedings.
- (2) An *amicus curiae* should be admitted and allowed to make written submissions only with the leave of the court.
- (3) A potential *amicus* must demonstrate an interest in the proceedings.
- (4) An application for admission as *amicus curiae* should outline the submissions to be advanced, their relevance to the proceedings, and the reasons for believing that the submissions are likely to be useful to the court and different from those of the other parties to the proceedings. The court and the parties will evaluate the application in terms of the submission’s relevance, usefulness, and likely difference from the arguments of the parties.
- (5) *Amici curiae* should be permitted to address all types of issues, not just constitutional questions.
- (6) An *amicus* should be permitted to raise issues or causes of action not raised by the parties only under extraordinary circumstances, and only with the court’s express permission.
- (7) An *amicus* may offer oral argument in support of a party with that party’s permission, or apply to the court for permission to present oral argument which does not support any of the parties. In either case, the court may fix or limit the time given to a particular *amicus* for oral argument, or the total time in which *amici* supporting a particular party to the case may present oral argument.
- (8) At the discretion of the court, an *amicus curiae* may introduce factual evidence that is of common cause or otherwise incontrovertible or is of an official, scientific, technical, or statistical nature such that the information can be easily verified. If an *amicus* wishes to introduce factual evidence, it must include this request in its application to the court. The application should outline the material to be introduced and its relevance to the proceedings; establish that it is one of the categories of permitted factual submissions; and that it will not unduly delay the proceedings.
- (9) Submissions from an *amicus* should be served on all parties to the litigation.
- (10) The rules should specify time-frames and limits on the length of *amicus* submissions.
- (11) The following government entities should be entitled to admission as *amici curiae* in a case as of right: Attorney-General, Prosecutor-General and Ombudsman.
- (12) An order for a party to pay costs may make provision for the payment of costs incurred as a result of the admission of *amici curiae*, but no order for costs may be made against an *amicus curiae*.

AMICUS CURIAE PARTICIPATION

1. Current position on *amici curiae* in Namibia

Amici curiae appear in several forms in Namibian and South African common law. The most typical form is a person requested by the court to represent a party or interest lacking its own representation;² Namibian case law includes numerous examples of legal practitioners representing criminal defendants without pay.³ Similarly, a court may call on a legal practitioner who is not representing a party to address a complex, difficult or novel point of law.⁴ In other cases, a Bar Council or Law Society may appear to advise the court on matters related to the profession.⁵ At common law, an *amicus curiae* also includes “a lawyer appointed by the court ... to argue a case on review”.⁶

Court regulations in Canada, the United States, and now South Africa, have permitted a new form of *amicus curiae* to emerge: a non-party who requests the opportunity to submit written and perhaps oral argument to represent interests and provide information not been presented by the parties themselves.⁷

The Namibian High Court has allowed this kind of *amicus curiae* in at least one case to date. In *S v Zemburuka (1)*,⁸ the appellant who was appealing a conviction of indecent assault challenged the delegation of counsel to represent the State. The appellant argued that, under Article 86 of the Constitution, only the Prosecutor-General had the authority to oppose criminal appeals or to delegate the authority to do so; since no one was at that time occupying the post of Prosecutor-General, then no one had that authority, as the Constitution does not provide for an Acting Prosecutor-General.⁹ The State argued that the appellant should have made this argument in an application for declaratory relief rather than on appeal, because non-parties had an interest in the case.¹⁰ The High Court agreed that there were “persons who may have an interest in the

² See Geoff Budlender, “Amicus Curiae” in Woolman *et al*, eds, *Constitutional Law of South Africa* 2d ed, 2006 (hereinafter “**Budlender**”) at 8-1; see, eg, *Fantasy Enterprises v Minister of Home Affairs & another* 1998 NR 96 (HC) (Attorney General appearing as *amicus curiae*).

³ See, eg, *S v Afrikaner* 2008 (2) NR 424 (HC); *S v Araeb* 2006 (2) NR 569 (HR); *S v Kastoer* 2006 (2) NR 450 (HC); *S v Hoaseg* 2006 (1) NR 317 (HC); *S v Amalovu* 2005 NR 438 (HC); *S v Boois* 2004 NR 74 (HC); *S v Hendriks* 2004 NR 20 (HC); *S v Beukes & another* 2000 HR 170 (HC); *S v Babiep* 1999 NR 170 (HC); *S v Kambu* 1998 NR 194 (HC); *S v Heiderreich* 1998 NR 229 (HC); *S v Baptista* 1991 NR 103 (HC).

⁴ See Budlender at 8-1. Christina Murray discusses these first two categories of *amici* as different aspects of a single type: “Perhaps the best-known amicus is the one requested by the court to represent an unrepresented defendant or respondent in a matter involving complex points of law.” Christina Murray, “Litigating in the Public Interest: Intervention and the Amicus Curiae”. 10 *SAJHR* 240 (1994) (hereinafter “**Murray**”) at 241, citing, as an example, *Ex parte Kaplan and others NNO: In re Robin Consolidated Industries Ltd* 1987 (3) SA 413 (W).

⁵ Budlender at 8-1; Murray at 241.

⁶ Murray at 242-43. This article also notes that “an advocate who presents the case of an administrative body when decisions are taken on review often assumes the role of an amicus rather than an adversary”.

⁷ See Budlender at 8-1 (defining this type of *amici curiae* as a non-party which requests the right to intervene “so that it might advance a particular legal position which it has itself chosen”); Murray at 243 (defining this type of *amici curiae* as “intervention in a case to represent an interest not represented by the parties”).

⁸ *S v Zemburuka (1)* 2003 NR 112 (HC).

⁹ Id at 112G-H.

¹⁰ Id at 114E.

Court's interpretation of the Constitution [who] cannot be joined as parties to the proceedings in the context of a criminal appeal," but noted that "the nature of their interests and the importance of the issue raised *in limine* are such that fairness requires them to be afforded an opportunity to be heard".¹¹ The Court therefore invited certain persons with an interest in the matter (namely, the President, the Attorney-General and the Acting Prosecutor-General) to present argument on the point *in limine* as *amici curiae* on specific questions of law only.¹² Noting that its jurisdiction on criminal appeals was limited, the Court nonetheless drew on its "inherent powers to regulate its proceedings" as authority for this procedure, noting that it "frequently invites or appoints counsel as *amicus curiae* to represent an undefended appellant" despite the absence of statutory authority to do so.¹³ The Court noted the benefits of allowing such *amicus curiae*: "Enhancing both the quality of argument and the more extensive ventilation of relevant issues in that manner, the Court is eventually better equipped to arrive at a just decision of the case."¹⁴

The Attorney-General was the only party which responded to the invitation to make *amicus* representations, and these representations were cited in the subsequent judgement, *S v Zemburuka (2)*.¹⁵ In fact, the *amicus* submissions appeared to be relied upon in particular for the Court's holding that the constitutional reference to the appointment of a Prosecutor-General implicitly encompasses the appointment of an Acting Prosecutor-General.¹⁶

2. Benefits of *amici curiae*

***Amicus* submissions can provide information that the parties may have neglected, thus improving the accuracy or the correctness of the court's decision.**¹⁷ *Amici* can provide two types of relevant information. First, they can ensure that courts are made aware of all relevant case law. Ensuring a full and accurate survey of the relevant case law seems a particular challenge in a judicial system such as Namibia's, where judges are overworked and without the support of judicial clerks. The additional research provided by *amici* can also ensure that attorneys do not omit relevant case law that does not support their position, either as a good faith error or in order to deceive.¹⁸ Secondly, *amici* can provide relevant factual information and explanations that may lie beyond the court's (or the parties') expertise. For example, a survey of former United States Supreme Court clerks found that *amicus* briefs were "most helpful in cases involving highly technical and specialised areas of law, as well as complex statutory and regulatory cases".¹⁹

¹¹ Id at 116J-117A. "It is not difficult to imagine the sweeping consequences if the appellant's contentions are correct. It will bring all criminal prosecutions in the country to a halt; it will cast doubt on the validity of all criminal proceedings conducted since 1 December 2002; it may affect the results of all appeals defended or prosecuted since that date; it may lead to the invalidity of all decisions taken by the acting Prosecutor-General or other officials who purported to act on his delegation and it may affect the validity of the appointment of Mr John Walters to that office and the remuneration appointed the acting Prosecutor-General, the Attorney-General (who is constitutionally required to exercise final responsibility for the Office of the Prosecutor-General) and the acting Prosecutor-General in his personal capacity count amongst those who have an interest – quite apart from the interest the public may generally have – in the Court's decision." Id at 116A-D.

¹² Id at 117E-F.

¹³ Id at 117C-D.

¹⁴ Id at 117E.

¹⁵ 2003 NR 200 (HC) at 202-203 and 209-211.

¹⁶ Id at 211A-213A.

¹⁷ See Benjamin RD Alarie & Andrew J Green, "Interventions as the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance", available at <http://ssrn.com/abstract=1498747> (hereinafter "**Alarie & Green**") at 2-3. Hearing from an *amicus*, "the Court will be learning information or be exposed to arguments that it would not otherwise be exposed to, therefore increasing the probability that the Court will reach an optimal disposition of the appeal". Id at 5.

¹⁸ John Koch, "Making Room: New Directions in Third Party Intervention", 48 *University of Toronto Faculty of Law Review* 151 (1990) (hereinafter "**Koch**") at 153-54.

¹⁹ Kelly J Lynch, "Best Friends? Supreme Court Law Clerks on Effective *Amicus Curiae* Briefs", 20 *Journal of Law & Politics* 33 (2004) (hereinafter "**Lynch**") at 40. The clerks singled out areas such as insurance, tax, patent, and bankruptcy law as specialised areas in which the *amicus* briefs were particularly helpful. Id at 41.

In practice, *amici* seem particularly successful at providing information which parties have omitted. A study of *amicus* briefs submitted to the United States Supreme Court found that “64.0 percent of *amicus* briefs supporting petitioners and 70.3 percent of *amici* favouring respondents offered, at least in part, information not contained in their party’s brief”. Typically in the US, such additional information “presents the dispute from another legal perspective, discusses policy consequences, or comments on norms governing the interpretation of precedent or statutes”.²⁰

***Amici* also ensure courts hear the best arguments and the widest array of legal positions, by providing legal arguments that may be ignored or neglected by the parties.** In other jurisdictions, these arguments have sometimes proved very useful to the courts. For instance, although it is not its typical practice,²¹ the United States Supreme Court has occasionally based its judgment on an argument raised only by an *amicus*.²²

The input of *amici* can be particularly relevant when the briefs or heads of argument produced by the parties are simply not very good. Interviews with United States Supreme Court clerks found that “where the merits briefs were deficient ... clerks would resort to the typically subordinate *amicus* briefs for assistance”; one clerk explained that *amicus* briefs “help when the quality of party lawyering is not so great and the *amicus* filer can brief the case better on both the law and its applications”.²³

In addition to presenting different legal arguments, *amici* can also present different policy arguments, highlighting information about the potential impact of the court’s decision beyond the immediate parties in the case. For example, a holding interpreting a statute or constitutional provision can have wide-ranging implications; what might seem like a fair decision between two parties might create an unjust rule.²⁴ Scholars have argued that “through a variety of inputs, the courts will obtain the fullest exposure to the potential effects of the decision”.²⁵ In particular, *amici* can draw the court’s attention to “wider interests implicated by a case” that may not interest the parties, provide social science data and information useful to the court to justify its ruling,²⁶ and assist courts to anticipate how their decisions will be implemented.²⁷

In the United States, such information has proven particularly helpful at the *certiorari* stage when the Supreme Court decides whether to grant a party leave to appeal the decision of a federal appellate or state supreme court. Quantitative research has demonstrated that “the presence of *amicus curiae* briefs significantly and positively increases the chances of the justices’ binding a case over for full treatment”.²⁸ One scholar has argued that *amici* are able to effectively shape the

²⁰ James F Spriggs II & Paul J Wahlbeck, “*Amicus Curiae* and the Role of Information at the Supreme Court,” 50 *Political Research Quarterly* 365 (1997) (hereinafter “**Spriggs & Wahlbeck**”) at 372.

²¹ The US Supreme Court has noted that, as a general rule, it will not address issues raised only by an *amicus*. See, eg, *Del-Costello v International Brotherhood of Teamsters* 462 US 151 (1983) at 154 & note 2, citing *United Parcel Service, Inc v Mitchell* 451 US 56 (1981) at 60 note 2.

²² In *Mapp v Ohio* 367 US 643 (1961), the Court followed a course of action raised only by an *amicus*, the American Civil Liberties Union, and overruled an earlier Supreme Court decision – holding that the rule prohibiting the admission of illegally-obtained evidence at trial should apply to state governments as well as the federal government. At 646 note 3 (overruling *Wolf v Colorado* 338 US 25 (1949)). See also, eg, *Webster v Reproductive Health Services* 492 US 490 (1989); *Teague v Lane* 489 US 288 (1989) (plurality opinion of O’Connor J) at 300; *Oregon ex rel State Land Bd v Corvallis Sand & Gravel Co* 429 US 363 (1977) at 368 note 3, 382.

²³ Lynch at 42.

²⁴ *Amicus* briefs reflect 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”. Budlender at 8-1.

²⁵ Koch at 152.

²⁶ Lynch at 42.

²⁷ Spriggs & Wahlbeck at 368.

²⁸ Gregory A Caldeira & John R. Wright, “Organized Interests and Agenda-Setting in the US Supreme Court”, 82 *American Political Science Review* 1109 (1988) (hereinafter “**Caldeira & Wright**”) at 1110.

certiorari decision because an *amicus* brief “provides the justices with an indication of the array of social forces at play in the litigation”²⁹ – thus helping to indicate which cases and issues are important in a broad social, economic, or political sense and are thus more worthy of Supreme Court review.³⁰

Concerns about the broad policy implications of a decision seem particularly pertinent in countries such as South Africa and Namibia, which have constitutions designed to transform societies into participatory democracies. ***Amici can assist the courts to consider the policy implications of a case for all citizens – not only those with the money, knowledge and opportunity to access the court system – thus helping the courts ensure that the Constitution and statutes are interpreted in ways that vindicate democratic values and protect the rights of all citizens.***

Moreover, **the very act of permitting *amicus curiae* in itself enhances participatory democratic values by allowing for wider public participation,³¹ allowing constituencies which are not parties to the case to “feel that their voices have been heard by the Court”.**³² Even if an *amicus*’s position is ultimately rejected by the court, the very fact that *amici* have had the opportunity to make their voices heard “creates a moral obligation on them to accept the legitimacy of the decision”.³³ Thus, allowing for the admission of *amicus curiae* reflects the underlying theme of participatory democracy in the Namibian Constitution.

3. Concerns about *amicus curiae*

Despite the many advantages of *amicus curiae*, the use of *amici* can present legitimate concerns.

The biggest objection to *amicus* submissions is that they waste precious judicial resources by reiterating identical arguments and forcing judges to read extra material.³⁴ In terms of volume, the admission of *amicus curiae* can generate a lot of work for the courts. In the United States, for example, at least one *amicus* brief was filed in 85% of cases heard by the Supreme Court in 1986-1995.³⁵ Indeed, *amicus* participation in the US Supreme Court has risen drastically over the course of the twentieth century, from 531 briefs in the decade between 1946 and 1955 to nearly 5000 in the decade between 1986 and 1995.³⁶ Still, the United States remains the exception, with an exceptionally high number of *amicus* filings – and this is due to in part to the US Supreme Court’s policy of permitting “essentially unlimited *amicus* participation”.³⁷ Rules that more strictly limit *amicus* participation or courts more disciplined in their use of *amici* would substantially address the concern that Namibian courts would be overwhelmed by the sheer volume of *amici*.

Fears that *amicus* briefs will uselessly reiterate the same arguments seem misplaced or exaggerated. Although many *amicus* briefs do repeat information or arguments presented by the parties, research in the United States found that the majority also contained new arguments, and that approximately a quarter of *amicus* briefs filed were composed entirely of new information

²⁹ Id at 1111.

³⁰ Id at 1122.

³¹ Budlender at 8-1 (discussing the final South African Constitution).

³² Alarie & Green at 7.

³³ Koch at 152.

³⁴ See Eugene Meehan, “Intervening in the Supreme Court of Canada,” 16 *Advocates Quarterly* 137 (1994) at 146; Koch at 154-55.

³⁵ Joseph D Kearney & Thomas W Merrill, “The Influence of *Amicus Curiae* Briefs on the Supreme Court,” 148 *University of Pennsylvania Law Review* 743 (2000) (hereinafter “**Kearney & Merrill**”) at 744.

³⁶ Id at 752.

³⁷ Caldeira & Wright at 784.

and arguments that parties did not include or address.³⁸ Moreover, the US Supreme Court appears to find the information and arguments presented in *amicus* briefs useful; its decisions referenced one or more *amicus* briefs in approximately 28% of the cases in which such briefs were filed between 1946 and 1995.³⁹ In fact, the percentage of cases in which *amicus* briefs were filed that referenced those briefs actually rose over time, to just under 37% of cases with *amicus* filings between 1986 and 1995.⁴⁰ This suggests that the Supreme Court finds *amicus* briefs useful – perhaps increasingly so – rather than repetitive.⁴¹

Rules governing the admission of *amicus* briefs can address concerns about repetition in various ways. First, Namibia could require *amici curiae* to wait until after the parties’ heads of argument have been filed before filing *amicus* briefs. If *amici* know what the parties’ arguments are, they can avoid repeating them and wasting the courts’ time and their own work. Further, as discussed below, Canada and South Africa require that *amicus* submissions be relevant to the proceedings as well as “useful to the Court and different from those of the other parties”.⁴² By applying similar requirements, Namibian courts can discourage repetition and discourage the high rates of *amicus* participation that have developed under the US Supreme Court’s more permissive approach.

Another concern foreign scholars have identified is that a large number of *amicus* filings may “overwhelm the original issues in the litigation”.⁴³ It is unclear how legitimate this concern is in practice, as no examples are cited of cases in which the courts actually lost track of the original issues between the parties. Canada and South Africa address this potential problem by requiring that an *amicus* have an “interest” in the case; a similar rule in Namibia would help ensure that the focus of the litigation remains on the issues raised by the parties.⁴⁴

New causes of action raised by *amicus* counsel can be key to understanding the full implications of a case.⁴⁵ However, the introduction of new causes of action can also be regulated by requiring the court’s permission for this. Courts could also follow the South African example and decline to admit an *amicus* where this would prejudice the existing parties or require the joinder of a new party.⁴⁶ New arguments could also be disfavoured if they would require new evidentiary

³⁸ “Approximately 67 percent of all *amicus* briefs, that is, both those supporting the petitioner and those supporting the respondent, tendered arguments not contained in the party’s brief they supported; and 25.1 percent of *amici* briefs were entirely comprised of arguments not made by the litigant’s brief.” Spriggs & Wahlbeck at 373.

³⁹ Kearney & Merrill at 757.

⁴⁰ *Id* at 757. The authors of this study also “catalogued the extent to which the Court over the past fifty years has actually quoted the arguments of *amici*. The incidence of quotations could yield a truer approximation of the extent to which the Court has actually relied on *amicus* arguments, particularly when assessed on a relative basis over time. We found a total of 316 decisions in which one or more *amicus* arguments were quoted by the Court ... [T]he incidence of quoted arguments in cases with *amicus* filers also increases over the five decades. Particularly noteworthy is the fact that the rate of such cases with quoted *amici* jumps in the most recent decade to over 15%, which is more than double the rate of the first three decades and almost double the rate of the fourth.” *Id* at 758 (internal citations omitted).

⁴¹ If *amicus* briefs were, as a general rule, simply reiterating one another’s arguments, we might expect that the percentage of *amicus* briefs cited would fall as the number of *amicus* filings rose. If the briefs repeated an argument, judges could simply pick the best version of an argument and cite to that brief without needing to read other versions of the same argument. However, the same study that observed the increase in citations per case concluded that “that the rate of citations and quotations per brief is more or less keeping pace with the increase in filings”. *Id* at 761. In other words, even if a certain portion of the *amicus* briefs repeat arguments, a relatively fixed percentage of the *amicus* briefs remain useful to and are cited by the US Supreme Court.

⁴² Constitutional Court of South Africa Rule 10(6). Rule 57(2)(b) of the Rules of the Supreme Court of Canada uses virtually identical language to lay out the requirements for intervention. In the United States, the filing of an *amicus* brief that does not bring to the attention of the Court relevant matters not already covered by the parties is “not favoured.” Supreme Court Rule 37(1).

⁴³ Koch at 154 (1990), citing *A.G. Canada v Aluminum Company of Canada* (1987) 35 DLR (4th) 495.

⁴⁴ Constitutional Court Rule 10(1), 10(4); Supreme Court of Canada Rule 55.

⁴⁵ For example, in *Mapp v Ohio* (discussed in note 21 above), the US Supreme Court probably would not have ruled on the constitutional issue had the ACLU not raised it in an *amicus* brief.

⁴⁶ Budlender at 8-5, citing *VRM v Health Professions Council of South Africa & Others* as an example.

submissions or additional factfinding. In cases where *amici* were permitted to raise new causes of action, the parties could be given an opportunity to submit additional heads of argument in response.

Scholars have also expressed the concern that disproportionate filing of *amicus* submissions in support of one side may create the appearance of favouritism or “the perception that the other side was being ganged up on”.⁴⁷ In *Jaffee v Redmond*,⁴⁸ for example, Justice Scalia of the US Supreme Court noted that “the Court was the beneficiary of no fewer than 14 *amicus* briefs supporting respondents,” while not a single *amicus* brief was filed in support of the petitioner. Justice Scalia implied that the Supreme Court had, in essence, allowed itself to be swayed by this surge of interest from professional organisations.⁴⁹ In practice, however, there is no evidence of any such favouritism in the US system: parties with *amicus curiae* support do not win substantially more often than those without.⁵⁰ Thus, although the US Supreme Court may take advantage of the expertise or legal arguments of particular *amici*, there is no evidence that the mere fact that one side has more *amicus* support than the other affects the outcome of a case. Moreover, *Jaffee* itself seems to be a unique case; as of 1999, “no other case ... had a disparity of at least fourteen briefs on one side and zero on the other”.⁵¹

Even the perception of favouritism, however, could undermine the perceived legitimacy of the court’s decision. It is therefore imperative to avoid the perception of *amici* “piling on” against one of the parties. All three foreign systems considering in our research have instituted controls over the number of *amici curiae*. In Canada⁵² and South Africa,⁵³ a potential *amicus* must receive the court’s permission to file an *amicus* brief. In the United States, either the permission of the Supreme Court or the permission of all parties is required.⁵⁴ By instituting similar systems, the courts can avoid any perceptions of unfairness.

Some may worry that parties who should or could be interveners will use the *amicus* role to escape an award of costs. In South Africa, Canada, and the United States, a party who could in theory be joined or intervene, can apply to submit arguments as an *amicus curiae* instead. In South Africa and Canada, such a status would permit the party to escape an award of costs if his side loses. Both jurisdictions, however, permit the party to make this strategic choice. An analysis of the costs and benefits of the different statuses reveals that the *amicus* status has sufficient costs and inconveniences to prevent abuse. First, a potential *amicus* must seek the permission of the court or

⁴⁷ Koch at 154 (1990).

⁴⁸ 518 U.S. 1 (1996).

⁴⁹ Id at 35-36.

⁵⁰ “Overall, the *amici* appeared to have little impact. The differences in the success rates of litigants who received *amicus* support and those who did not was trivial. Even when controls were added for the issue in the cases, the nature of the litigant supported, and whether the litigant was the appellant or the respondent, the differences remained either small or nonexistent. Thus, while there may be particular cases in which the arguments presented by groups appearing as *amici* decisively influenced the Court’s thinking, there is no general pattern which suggests that a litigant’s chances for success depend on whether or not an *amicus curiae* brief is filed in the litigant’s behalf.” Donald R Songer & Reginald S Sheehan, “Interest Group Success in the Courts: *Amicus* Participation in the Supreme Court”, 46(2) *Political Research Quarterly* 339 (1993) at 350-351.

⁵¹ Kearney & Merrill at 793.

⁵² Rule of the Supreme Court of Canada 55.

⁵³ See Constitutional Court of South Africa Rule 10(1) (“any person interested in any matter before the Court may, with the written consent of all the parties in the matter ... be admitted ... as an *amicus curiae*”); Rule 10(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 may grant such application upon such terms and conditions and with such rights and privileges as he or she may determine.”).

The text of Rule 10 suggests that an *amici* may be admitted either with the consent of all the parties. The Constitutional Court has held, however, that the Chief Justice’s permission is required for an *amicus* brief to be accepted. *Institute for Security Studies: In re S v Basson* CCT 30/03 (Unreported decision of 9 September 2005) at paras 6, 9.

⁵⁴ Supreme Court Rule 37(2)(a)-(b).

the parties in order to be admitted; thus a party who elects to seek *amicus* status rather than intervening as a matter of right risks being shut out of the litigation altogether. Second, an *amicus* cannot submit record evidence, but is restricted to evidence that is of common cause or otherwise incontrovertible. An *amicus* also has no right to make oral submissions and must obtain the permission of the parties or the court to advance oral argument. Perhaps most importantly, an *amicus* has no opportunity to have his interests adjudicated; although the rule of law handed down may affect his rights, the court will not specifically address them or take them into consideration in handing down its ruling. In other words, parties avoiding intervention to escape adverse costs awards would ultimately give up significant advantages that would better allow them to protect their own interests. They could not simply abuse the *amicus* system by preserving the same rights as interveners whilst escaping costs.

4. *Amici curiae* in other jurisdictions

A survey of the rules for *amicus curiae* in a sample of other legal systems can provide guidance about how a Namibian system for admitting *amici curiae* could take full advantage of the aid *amici* can provide whilst also including safeguards against the potential problems identified.

4.1 South Africa

In South Africa, non-parties may make submissions as *amici curiae* in the Constitutional Court, the Supreme Court of Appeal,⁵⁵ the Labour Appeal Court,⁵⁶ the High Court,⁵⁷ the Land Claims Court,⁵⁸ and the Labour Court.⁵⁹ The rules for *amici* in the Constitutional Court appear to serve as models for the rules in the lower courts.

Before the introduction of Rule 16A and its counterpart, Rule 10 of the Constitutional Court Rules, there were no formal rules guiding courts on the admission of an *amicus curiae*. Courts consequently took a fairly narrow approach to the admission of *amici* and there were no clear provisions for intervention in public interest matters. The purpose of Rule 16A was to remedy this lacuna in the law with an appreciation that “constitutional cases often have consequences which go far beyond the parties concerned”.

Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp and Others
[2012] ZACC 25 at para 25 (citations omitted)

Constitutional Court

The Constitutional Court Rules require that a non-party seeking to be admitted as an *amicus curiae* have an “interest in any matter before the Court”.⁶⁰ The potential *amicus* must describe this interest in the initial submission to the Court.⁶¹ The Constitutional Court has held that this

⁵⁵ Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa, Rule 16.

⁵⁶ Labour Appeal Court Rules, Rule 7.

⁵⁷ Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, Rule 16A.

⁵⁸ Land Claims Court Rules, Rule 14.

⁵⁹ Labour Court Rules, Rule 7.

⁶⁰ Rules of the Constitutional Court, Rule 10(1), 10(4).

⁶¹ Rule 10(6).

interest is not the same as the “direct interest” required for intervention (or common law *locus standi*).⁶² This difference matters because a person with a “direct and substantial interest” may intervene in a case as of right whilst an *amicus* needs permission to submit heads of argument; in turn, 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, whilst an *amicus* has no such rights unless they are specifically granted by the Court”.⁶³ Furthermore, an intervener will be able to recover costs from the opposing party in the case of victory, but will be liable for costs if he or she loses. In contrast, normally an *amicus* is “neither awarded costs nor ordered to pay the costs of opposing parties”.⁶⁴ Nonetheless, Rule 10(10) expressly provides that a costs order may “make provision” for costs incurred due to the involvement of an *amicus*.⁶⁵

A potential *amicus* must submit an application for admission to the Constitutional Court.

According to a 2005 Constitutional Court decision, an application must set out the “interest of the *amicus curiae* in the proceedings”; “the position the *amicus curiae* will adopt”; and 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”. The application should include “a summary of the written submissions sought to be advanced” that the Court can use to evaluate the application in light of the principles governing the admission of *amici*.⁶⁶

Notably, the Court’s list of principles governing the admission of *amici* in this case appears to include only the submissions’ relevance, usefulness and difference from the submissions of the other parties.⁶⁷ It did not include the applicant’s “interest”. Commentator Geoff Budlender explains this omission as indicating that “in practice, this threshold test is fairly easily satisfied”.⁶⁸ He suggests the required interest is merely an interest in the law and policy implicated by the case and would be satisfied by “(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.”⁶⁹ However, the fact that an *amicus* has been admitted in a lower court does not give the person an automatic right to be admitted as an *amicus* in the Constitutional Court.⁷⁰

Before applying for admission, a potential *amicus* must apply to the other parties for their consent under Rule 10(1). The application must give the other parties the opportunity to assess “whether the request complies with the underlying principles governing applications” (ie relevance, usefulness, and difference from other parties’ submissions).⁷¹ The text of Rule 10(4) indicates that if the written consent of the other parties “has not been secured”, then the parties must seek the permission of the Chief Justice. The Constitutional Court has held, however, that even if the other parties have agreed, the consent of the Chief Justice is nonetheless required.⁷² A

⁶² See *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at para 63 (“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.”).

⁶³ Budlender at 8-4 to 8-5.

⁶⁴ *Ibid.*

⁶⁵ Rule 10(10).

⁶⁶ *Institute for Security Studies: In re S v Basson* CCT 30/03 (Unreported decision of 9 September 2005) at para 10.

⁶⁷ *Id* at para 10; see Budlender at 8-9.

⁶⁸ Budlender at 8-9.

⁶⁹ *Id* at 8-10.

⁷⁰ *Institute for Security Studies: In re S v Basson* CCT 30/03 at para 11.

⁷¹ *Id* at para 10.

⁷² *Id* at paras 6, 9 (“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*.”)

potential *amicus* must apply either to the parties or to the Chief Justice within five days of the lodging of the respondent's written submissions, or within five days of the expiration of the deadline for lodging these submissions.⁷³

Because an *amicus* is not a party to the case, the *amicus* does not have a party's rights to submit oral argument and evidence. Once an *amicus* has been admitted, the *amicus* may advance written submissions as of right.⁷⁴ In contrast, Rule 10(8) states that an *amicus* may not present oral argument; according to commentator Geoff Budlender, however, the court can permit an *amicus* to present oral argument on application.⁷⁵ Under Rule 31, an *amicus* may submit new factual material only if the facts are agreed upon by the parties or incontrovertible or are of "an official, scientific, technical or statistical nature capable of easy verification".⁷⁶ Budlender explains when the introduction of new evidence will be permitted:

[O]rdinarily 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 delay the resolution – of an otherwise urgent matter 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(3)). 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; (c) the cogency of the evidence; and (d) the importance of the evidence to the matters which the Court has to decide.⁷⁷

An *amicus* may not, however, raise a new cause of action without express permission from the Court. An *amicus* may seek permission to raise a new cause of action in its application for admission, but the Chief Justice will decide whether the *amicus* may raise the issue.⁷⁸ Permission will probably not be granted if the new issue would require joining a new party or would be likely to prejudice one of the existing parties.⁷⁹ If a matter has been dealt with below, but abandoned at the Constitutional Court, an *amicus* may still address it.⁸⁰

The Court's order granting the *amicus*'s application "shall specify the date of lodging the written argument of the *amicus curiae* or any other relevant matter".⁸¹

The Constitutional Court recently stated that *amici* play an important role in advocating on behalf of vulnerable groups, that "*amici curiae* have made and continue to make an invaluable

⁷³ Rule 10(5).

⁷⁴ Rule 10(2), (7).

⁷⁵ Budlender at 8-10. The commentator reasons that "the power to permit the *amicus* to offer oral argument would appear to be derived from rule 32(2). Rule 32(3) 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 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."

⁷⁶ Id at 8-11.

⁷⁷ Id at 8-5 (footnote omitted).

⁷⁸ Ibid.

⁷⁹ *De Beer NO v North Central Local Council and South Central Local Council & Others (Umhlatuzana Civic Association Intervening)* 2001 (2) SA 429 (CC) at para 31.

⁸⁰ See, eg, *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC).

⁸¹ Rule 10(9).

contribution to its jurisprudence and that their participation in litigation is to be welcomed and encouraged”.⁸²

Supreme Court of Appeal

Unlike the Constitutional Court, **the Supreme Court of Appeal permits an interested party to be admitted as *amicus curiae* without the Court’s permission if the *amicus* obtains the parties’ consent.**⁸³ **If the potential *amicus* fails to obtain this consent, he or she may still apply to the President of the Court.** The President decides whether to admit the *amicus* “upon such terms and conditions and with such rights and privileges as he or she may determine”.⁸⁴ An application to the President of the Court must be made within one month of the lodging of the record with the registrar; however, this deadline does not apply to admissions by permission of the parties.⁸⁵ The application must describe the applicant’s interest in the proceedings; identify the position to be adopted; and “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”.⁸⁶ The rules expressly provide that an *amicus* has the right to lodge written argument that does not repeat the parties’ arguments and “raises new contentions which may be useful to the Court”.⁸⁷ Written arguments are limited to twenty pages, unless a judge orders otherwise.⁸⁸ An *amicus* may not present oral argument absent a court order.⁸⁹ An order admitting a party as an *amicus* must specify a date for the lodging of the *amicus*’s written argument and any other relevant matters.⁹⁰

Two aspects of the Supreme Court of Appeal Rules are of note. First, unlike in the Constitutional Court, here *amici* are expressly limited to the record on appeal.⁹¹ Second, Rule 16(10) provides that “[a]n order of the Court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of the *amicus curiae*”.⁹²

High Court

***Amicus* submissions are permitted in the High Courts of South Africa under Rule 16A,** which requires that a party who seeks to raise a constitutional issue give notice to the Registrar when he files the relevant affidavit or pleading.⁹³ The Registrar then places the notice on a board designated for that purpose in order to inform other people with a legitimate interest in the case.⁹⁴

Any party interested in a constitutional issue raised in the proceedings may be admitted as an *amicus* with the consent of the parties.⁹⁵ The *amicus* must obtain this permission within

⁸² *Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp and others* (CCT 69/12) [2012] ZACC 25 (9 October 2012) at para 15.

⁸³ Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa, Rule 16(1).

⁸⁴ Rule 16(4).

⁸⁵ Rule 16(5). These deadlines are before deadlines for the parties’ filings. The appellant must lodge his heads of argument within six weeks of the lodging of the record. Rule 10(1)(a).

⁸⁶ Rule 16(6).

⁸⁷ Rule 16(7)(a).

⁸⁸ Rule 16(7)(b).

⁸⁹ Rule 16(8).

⁹⁰ Rule 16(9).

⁹¹ Rule 16(8).

⁹² Rule 16(10).

⁹³ Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa, Rule 16A(1)(a).

⁹⁴ Rule 16A(1)(c).

⁹⁵ Rule 16A(2).

twenty days of the filing of the affidavit or pleading in which the constitutional issue was first raised.⁹⁶

If the *amicus* applicant is unable to get the consent of the parties, then he may apply to the court for consent to be admitted, within twenty-five days of the filing of the affidavit or pleading in which the constitutional issue was first raised.⁹⁷ The application must describe the interest of the applicant in the proceedings, describe the submissions and their relevance to the proceedings, and state “reasons for believing that the submissions will assist the court and are different from those of the other parties”. The application must be served on all parties.⁹⁸ A party to the proceeding may oppose the application by filing an answering affidavit that spells out “clearly and succinctly” the grounds of opposition.⁹⁹ The Court may permit or deny the application at its own discretion.¹⁰⁰

It should be noted that *amicus curiae* participation in South African High Courts appears to be limited to constitutional cases.

In 2012, the Constitutional Court unanimously held that High Court Rule 16A is broad enough to allow *amici* to present evidence.¹⁰¹ The underlying case concerned eligibility for a foster care grant in respect of a child who was living with family members. One *amicus*, the Children’s Institute, sought to introduce statistical evidence regarding the impact of the issue on other similarly-situated children. The High Court had held that the rule permits *amici* to make legal arguments, but not to introduce evidence. However, the Constitutional Court held that “Rule 16A does not prohibit the introduction of evidence by an *amicus curiae* in a High Court”, and that the High Court has discretion to allow an *amicus* to give evidence, and to determine the extent of the evidence which may be admitted in a particular case – based on the “interests of justice”.¹⁰² It found that Rule 16A was –

specifically intended to facilitate the role of *amici* in promoting and protecting the public interest. In these cases, *amici* play an important role first, by ensuring that courts consider a wide range of options and are well informed; and second, by increasing 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.¹⁰³

The Court noted that the legal argument presented by an *amicus* will often draw on broader considerations than those of the parties before the Court, which is often the very purpose of allowing *amicus* participation, and that such legal arguments will often “be premised on facts and evidence not before the court, including statistics and research”; “it would make little sense to allow the presentation of bare submissions unsupported by any facts”.¹⁰⁴ It asserted that “Courts adjudicating constitutional issues, in particular those relating to vulnerable groups like children, should be slow to refuse to receive evidence that may assist them in arriving at a just outcome”.¹⁰⁵

⁹⁶ Rule 16A(2).

⁹⁷ Rule 16A(5).

⁹⁸ Rule 16A(6).

⁹⁹ Rule 16A(7).

¹⁰⁰ Rule 16A(8).

¹⁰¹ *Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp and others* [2012] ZACC 25.

¹⁰² At para 23. More specifically, the Court found that the term “submissions” in the Rule is broad enough to cover written and oral argument as well as evidence, and that the Court has a wide discretion to dispense with any of the Rule’s requirements based on the interests of justice under Rules 16A(9).

¹⁰³ At para 26.

¹⁰⁴ At para 31.

¹⁰⁵ At para 33.

4.2 Canada

Supreme Court

In the Canadian system, the equivalent of *amicus* status is permitted through public interest intervention.¹⁰⁶ The Canadian Supreme Court rules for intervenors substantially resemble the South African rules on the admission of *amici*.¹⁰⁷ Indeed, several of the South African rules appear to have been copied nearly verbatim from the Canadian system.

First, **like an *amicus* in South Africa, an intervener at the Canadian Supreme Court must be “interested”.** The affidavit supporting the motion for public interest intervention must identify the applicant and describe his or her interest in the proceeding, including any prejudice he or she may suffer if denied intervention.¹⁰⁸ The required interest need not be the same as the interest for standing or intervention as of right. The Supreme Court of Canada has stated that the interest criteria “is easily satisfied by an applicant who has a history of involvement in the issues giving the applicant an expertise which can shed fresh light or provide new information on the matter”.¹⁰⁹ Thus public interest organisations such as the Women’s Legal Education and Action Fund have frequently used such intervention to advance their causes.¹¹⁰ In practice, the Canadian Supreme Court grants more than 90% of applications to intervene.¹¹¹

Under the rules, **a judge must decide to admit an *amicus*; the permission of the parties is insufficient.**¹¹² The motion to be admitted must identify the position the *amicus* will take in the proceeding. It must also explain the submissions to be advanced, their relevance to the proceedings and the “reasons for believing that the submissions will be useful to the Court and different from those of the other parties”.¹¹³ Thus the requirements for the motion are nearly identical to those for an application for admission under Rule 10(6)(c) of the Constitutional Court of South Africa.

Unlike in South Africa, however, the rules specify that a party can apply to intervene in “an application for leave to appeal, an appeal or a reference”.¹¹⁴ Thus, interveners are not restricted to the merits stage. A motion to intervene in an application for leave to appeal must be made within 30 days after the filing of the application.¹¹⁵ An application to intervene in the merits stage of the appeal must be filed within four weeks after the filing of the appellant’s factum.¹¹⁶

If the motion to intervene is granted, then the intervener may file a written submission. The judge may also permit the intervener to “adduce further evidence or otherwise to supplement the record”.¹¹⁷ An intervener may make oral argument at the judge’s discretion, and the judge determines the time permitted for oral argument.¹¹⁸ However, an intervener may

¹⁰⁶ See Koch at 157-58.

¹⁰⁷ See Amanda Jane Burgess, “Interveners Before the Supreme Court of Canada, 1997-1999: A Content Analysis” 1-2 (2000).

¹⁰⁸ See Rules of the Supreme Court of Canada, Rule 57(1).

¹⁰⁹ Motion by Suzanna Maria Cote for leave to intervene in *Reference Re Sections 32 and 34 of the Workers’ Compensation Act*, [1989] S.C.B. 925, 927.

¹¹⁰ See Ian Brodie, “From NAACP to LEAF: American Legal Exports to Canada” at 11 (identifying LEAF as the most frequent interest group intervener before the Supreme Court of Canada).

¹¹¹ Alarie & Green at 2.

¹¹² Rule 55.

¹¹³ Rule 57(2)(b).

¹¹⁴ Rule 55.

¹¹⁵ Rule 56(a).

¹¹⁶ Rule 56(b).

¹¹⁷ Rule 59(1)(b).

¹¹⁸ Rule 59(2).

not “raise new issues unless otherwise ordered by a judge”.¹¹⁹ Finally, the judge may “impose any terms and conditions and grant any rights and privileges that the judge may determine”.¹²⁰ These terms and conditions apparently include deadlines for filing written submissions, which are not addressed elsewhere in the rules.

Notably, **the rules also permit the Attorney General to intervene as of right in any case involving a constitutional question.**¹²¹ Unsurprisingly, this has led to the Attorney General being one of the most frequent interveners.

Federal Courts

Both the Federal Court of Appeal and the Federal Court also permit such interveners. Under Rule 109(1) of the Federal Court Rules, which apply to both courts, the court may, on an applicant’s motion, grant the applicant leave to intervene. The notice of the motion seeking leave to intervene must “describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding”.¹²² If the motion is granted, the court must give directions regarding the intervener’s role, including costs, rights of appeal, and any other procedural matters; it must also give instructions regarding the service of documents.¹²³

4.3 United States

Supreme Court

In contrast to the situation in Canada and South Africa, the United States Supreme Court rules do not require that an applicant for *amicus curiae* status have an “interest” in the proceedings. The only substantive requirement is the statement that an *amicus* brief that “brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court”.¹²⁴ An *amicus* brief that fails to do so, however, is not disallowed, but merely “not favoured”.¹²⁵

Unlike in Canada and South Africa, the permission of the US Supreme Court is not necessary for *amicus* participation. An *amicus* can be admitted on the consent of all the parties. Indeed, Supreme Court Rule 37(2)(b) states that a motion to be admitted as an *amicus* without the consent of the parties is “not favoured”. In practice, however, parties consent to most *amicus* applications,¹²⁶ and when they do not the Court generally admits them. Between 1969 and 1981, for example, the Court granted motions for *amicus* participation in 91% of the cases where one or more parties had denied consent.¹²⁷ An *amicus* brief must be submitted “within the time allowed for filing the brief for the party supported”. If the brief supports neither party, it must be filed within the time allowed for filing the petitioner’s or appellant’s brief.¹²⁸

¹¹⁹ Rule 59(3).

¹²⁰ Rule 59(1)(b).

¹²¹ Rule 61(4).

¹²² Federal Court Rules, Rule 109(2).

¹²³ Rule 109(3).

¹²⁴ United States Supreme Court Rule 37(1).

¹²⁵ *Ibid.*

¹²⁶ Caldeira & Wright at 784.

¹²⁷ *Id.* at 785.

¹²⁸ Rules of the Supreme Court of the United States, Rule 37(3)(a).

As in Canada, the opportunity for *amicus* participation extends beyond the plenary review stage. An *amicus* brief may be filed before “the Court’s consideration of a petition for a writ of *certiorari*, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ”.¹²⁹

With a party’s consent, an *amicus* may argue orally on that party’s side.¹³⁰ **If the *amicus* does not obtain consent, then counsel may file a motion seeking the Court’s leave to present oral argument,** explaining “why oral argument would provide assistance to the Court not otherwise available”.¹³¹ According to the Supreme Court Rules, such leave will be granted only in “the most extraordinary circumstances”.¹³²

As in South Africa and Canada, *amici* may also submit “non-record material”. To do so, they must send a letter to all parties that describes the material and the reasons “why it may properly be considered by the Court”.¹³³ The rules do not discuss substantive requirements for what factual material may “properly be considered”.

The United States has the widest array of individuals who may submit *amicus* briefs as of right. These include the Solicitor General; any US agency allowed by law to appear before the Supreme Court; any State, Commonwealth, Territory, or Possession; and any city, county, town, or similar entity.¹³⁴

Federal Appeal Courts

In federal appellate courts, the admission of *amici curiae* is governed by Rule 29 of the Federal Rules of Appellate Procedure. This rule allows the federal government, any officer or agency of the United States, or a state to file an *amicus* brief as a matter of right. All other *amici curiae* require either the consent of all parties or the leave of the court.¹³⁵ A motion to be admitted as an *amicus* should state the applicant’s interest and “the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case”. It should also be accompanied by a proposed brief. The *amicus* brief should be no more than fifteen pages unless the court has authorised a longer submission.¹³⁶ An *amicus* must file its brief and motion within seven days after the party it supports files its principal brief. If the *amicus* supports neither party, then it must file its brief within seven days of the filing of the appellant or petitioner’s brief.¹³⁷ An *amicus* may not file a reply brief¹³⁸ or present oral argument¹³⁹ without the court’s permission.

Federal District Courts

Although the Federal Rules of Civil Procedure do not expressly allow for *amicus* briefs, in practice federal district courts do permit them.¹⁴⁰

¹²⁹ Rule 37(2)(a).

¹³⁰ Rule 28(7).

¹³¹ Rule 28(7).

¹³² Rule 28(7).

¹³³ Rule 32(3).

¹³⁴ Rule 37(4).

¹³⁵ Federal Rules of Appellate Procedure, Rule 29(a).

¹³⁶ Rules 29(d), 32(7)(A).

¹³⁷ Rule 29(e).

¹³⁸ Rule 29(f).

¹³⁹ Rule 29(g).

¹⁴⁰ See, eg, *Gilda River Indian Community v United States*, 2011 WL 826282 (D Ariz 3 Mar 2001); *Quintero v United States*, 2011 WL 836735 (ED Cal 2 Mar 2011); *Kline v Mortgage Electronic Sec. Systems*, 2011 WL 692235 (SD Ohio 18 Feb. 2011).

5. Recommendations

We propose the following principles to govern the admission of *amicus curiae* in the Namibian High Courts and Supreme Court. These proposals are designed to respond to concerns that have been raised about admission of *amicus* in foreign systems and to particular challenges faced by the Namibian courts.

- (1) ***Amicus curiae* should be permitted in principle at both the High Court and the Supreme Court, and at trials, appeals and other judicial proceedings.**

All three foreign jurisdictions considered permit *amicus curiae* at the trial level, although they are much more commonly used at the appellate level. Namibia should follow suit because the arguments and expertise offered by *amicus curiae* are equally valuable at the trial stage. Indeed, ensuring that the trial court “gets it right” the first time may actually save the court money by preventing the need for appeal.

- (2) **An *amicus curiae* should be admitted and allowed to make written submissions only with the leave of the court.**

A potential *amicus* should be required to obtain the leave of the court. This control will help to prevent the court from being flooded with repetitive submissions. Such a rule will also give the court control over the admission of *amici*, helping to ensure that the focus remains on the original issues in the case and the central dispute between the parties. This approach will also enable the court to exclude unhelpful arguments, such as those from lay litigants who approach the court on frivolous matters.

Once an *amicus* in Namibia has been admitted, that *amicus* should be able to submit written heads of argument or other appropriate submissions as a matter of right; without permitting written submissions there is no purpose in admitting the *amicus*. This recommendation follows the example of all three foreign jurisdictions considered.

Admission of an *amicus* in a civil or criminal trial or in other proceedings is expected to be unusual and could arise at different points in the proceedings. We suggest that permission from the court should be given only if the court is satisfied that no party will be prejudiced thereby.

- (3) **A potential *amicus* must demonstrate an interest in the proceedings.**

Requiring an interest in the proceedings will help to screen out busybodies and those who cannot offer useful information or arguments. As in both Canada and South Africa, however, it should be clear that the requisite interest need not be the “direct and substantial” or “legal” interest required for standing or intervention as of right. Rather, the required interest should be a previously-demonstrated interest in the law and policy issues implicated in the case. The interest could be easily met by an organisation or individual who has a standing commitment to advancing a given policy or point of view related to the issues or who has demonstrated a particular expertise or specialisation related to the issues. Such an interest requirement will encourage only those *amici* capable of making a valuable contribution to the proceedings.

Requiring a “direct and substantial interest” in the litigation would render the *amicus*’s role redundant, as anyone with such an interest could simply intervene in the litigation itself.

Requiring such an interest would therefore deprive the court of the very arguments and expertise that justify admitting *amici* in the first place.

Because an *amicus curiae* is not a party to the case, he or she lacks both the rights and the duties attendant on parties who intervene. An *amicus* should not be permitted to submit evidence as of right, for example, and should be required to obtain the permission of the court to argue orally. However, as a non-party, an *amicus* is not bound by *res judicata* as a result of the decision, and normally will not be ordered to pay the costs of the party whose interest the *amicus* opposes.

- (4) An application for admission as *amicus curiae* should outline the submissions to be advanced, their relevance to the proceedings, and the reasons for believing that the submissions are likely to be useful to the court and different from those of the other parties to the proceedings. The court and the parties will evaluate the application in terms of the submission's relevance, usefulness, and likely difference from the arguments of the parties.**

This rule would follow the language of the corresponding Canadian and South African rules. By requiring an applicant to explain why its submission is relevant, the rule helps ensure the focus of the litigation remains on the disputes between the parties and excludes the mere busybody whose submissions would waste the court's time. By requiring *amicus* submissions to be likely to be different from the arguments advanced by the parties, the rule ensures that such submissions are actually useful to the court.

- (5) *Amici curiae* should be permitted to address all types of issues, not just constitutional questions.**

There should not be substantive restrictions as to the types of issues *amici curiae* may address – ie, *amici curiae* should not, for example, be restricted to constitutional issues or cases raising constitutional concerns. Although the High Courts in South Africa restrict *amicus* to constitutional concerns, that is the only South African court that does so, and Canada and the United States apply no such restrictions. Thus the majority of foreign courts considered permit *amici curiae* at all levels to address non-constitutional issues and do not restrict the substance of arguments.

Namibia should permit *amici curiae* to address non-constitutional concerns because the expertise, information and legal arguments that amici can provide will apply in non-constitutional as well as constitutional cases. At times, *amici* contributions may be even more relevant in non-constitutional issues. Tax law, for example, can present particular challenges to a judge with a generalist background. The explanations offered by an expert, including factual information about how a particular interpretation of a tax code provision would affect thousands of other Namibians, could be useful and relevant. Similarly, cases involving water rights and mining concerns may involve issues of a highly scientific and technical nature that may prove difficult to judges without extensive expertise in the field. Again, *amicus* input may prove invaluable.

- (6) An *amicus* should be permitted to raise issues or causes of action not raised by the parties only under extraordinary circumstances, and only with the court's express permission.**

Restricting *amici* to the issues and causes of action raised by the parties will in most circumstances prevent *amicus* issues from overwhelming the parties' issues. However, the Court should have discretion permit an *amicus* to raise a new issue. A case in which an *amicus* points out a constitutional issue or discusses constitutional implications that have been neglected by the parties, for instance, might be a situation where it would be appropriate and useful to permit the *amicus* to raise a new issue. An application by an *amicus* to raise a new issue should identify that issue, and explain its public importance and why it is appropriate for the court to consider the issue. An *amicus* should not normally be permitted to raise new issues that would require additional fact-finding beyond facts that are of common cause or otherwise incontrovertible. An *amicus* should also not be permitted to raise new issues which would materially prejudice one of the parties.

- (7) An *amicus* may offer oral argument in support of a party with that party's permission, or apply to the court for permission to present oral argument which does not support any of the parties. In either case, the court may fix or limit the time given to a particular *amicus* for oral argument, or the total time in which *amici* supporting a particular party to the case may present oral argument.**

This rule recognises that *amici* may be able to offer useful clarification and guidance through oral argument, but nonetheless keeps the focus of oral argument on the dispute between the parties. The rule gives primary control over oral argument to the parties: An *amicus* may make oral argument supporting a party if that party consents. By permitting coordination, the rule helps avoid the possibility that an *amicus*'s oral argument will simply reiterate those of the parties. However, the court may grant an *amicus* leave to present oral argument even if the argument is not viewed as being in support of any party.

- (8) At the discretion of the court, an *amicus curiae* may introduce factual evidence that is of common cause or otherwise incontrovertible or is of an official, scientific, technical, or statistical nature such that the information can be easily verified. If an *amicus* wishes to introduce factual evidence, it must include this request in its application to the court. The application should outline the material to be introduced and its relevance to the proceedings; establish that it is one of the categories of permitted factual submissions; and that it will not unduly delay the proceedings.**

This rule advances two of the purposes of *amici*: First, it permits an *amicus curiae* to provide the court with useful information, including factual information, that the parties may have missed or omitted. Second, the rule allows *amici* to make arguments about the broader social, political, and economic consequences of a decision in a particular case. *Amici* should be permitted to submit the identified kinds of factual information because the parties may not have the ability or inclination to survey the social or political import of a decision. In particular, an *amicus curiae* may have background and expertise in the subject matter of the litigation and may be able to draw on information and resources of which an individual litigant is unaware. Further, litigants are more likely to focus narrowly on the case outcome, and so may neglect to present the broader policy ramifications implicated by the decision.¹⁴¹ For example, a party alleging gender discrimination in employment would likely focus his or her case on establishing the elements of the delict. In contrast, an *amicus* might present statistics regarding the widespread nature of such gender discrimination, how

¹⁴¹ Sprigg & Wahlbeck at 367.

many women are the primary wage earners for their families, and how much money Namibia wastes or loses due to gender discrimination.

In order to keep the litigation focused on the dispute between the parties, an *amicus* should not be permitted to submit new evidence on factual points that are being disputed between the parties, that should be part of the record or that could be used directly to support or contradict an element of a party's claim.

Furthermore, in order to prevent *amici* concerns from overwhelming the case, an *amicus* may not submit evidence if doing so would significantly delay the proceedings.

(9) Submissions from an *amicus* should be served on all parties to the litigation.

Because the court will be considering the arguments and factual evidence presented by *amici curiae*, any heads of argument and accompanying evidentiary submissions must be made available to all parties. The *amicus* should file a sufficient number of copies of its papers with the Registrar to provide at least one copy for each judge assigned to the case, and be required to serve copies on all parties.

(10) The rules should specify time-frames and limits on the length of *amicus* submissions.

Amicus submissions in appeals

One issue that remains to be resolved is when *amicus* papers would need to be filed, considering the need to permit the opposing party to read and respond to the *amicus* submissions and the need to prevent repetition of the parties' arguments.

One approach would be to set a fixed time limit related to the timeframes which must be followed by the parties. An alternative approach would be to follow the examples of the Canadian Supreme Court and South African Constitutional Court and permit the court to set deadlines for the *amici*'s substantive submissions as it sees fit in the circumstances of the case, once an *amicus* has been admitted. This approach would be the simplest, particularly given that we do not anticipate that *amicus curiae* will often seek admission in Namibia.

The proposed High Court rule appended to this paper gives the presiding judge discretion to set a timeframe, but suggests that *amici* in an appeal matter should normally provide their submissions at the same time as the heads of argument of the parties. This gives *amici* the maximum leeway while still avoiding delays. The Supreme Court could adopt a similar approach.

Amicus submissions in trials and other non-appellate proceedings

Because an application for admission of *amicus* could sensibly arise at different points in a trial or another non-appellate proceeding, we have proposed leaving this issue to the discretion of the presiding judge.

Length

To avoid overburdening the courts and the parties, we suggest a page limit for *amicus* submissions of 20 pages.

(11) The following government entities should be entitled to admission as *amici curiae* in a case as of right: Attorney-General, Prosecutor-General and Ombudsman.

These key government offices should have a right of admission as *amici* because the state will often have a useful and unique knowledge of and interest in the widespread effects of a court decision. First, the government will have a unique interest in the validity and constitutionality of legislation. If a court case will either directly decide that legislation or government action is constitutional, or will have implications that affect the application of legislation, the government should have the opportunity to weigh in. Second, the government has access to a broad range of statistical information about the practical effects of policies. Not only can it provide this information to the court, it may be able to identify how a particular decision would have a widespread effect that individual parties or narrow interest groups may not. The government also presumably has an interest in the welfare of all Namibians.

(12) An order for a party to pay costs may make provision for the payment of costs incurred as a result of the admission of *amici curiae*, but no order for costs may be made against an *amicus curiae*.

If an *amicus* meets the requirements for participation in a case, then it is implicit that the participation of the *amicus* will assist the court and therefore benefit the public interest. Therefore, we recommend that *amici curiae* be immune from costs orders. Since *amici* will require the leave of the court to participate, the prospects of a costs order is not needed to deter overzealous participants. Also, since an *amicus* is not necessarily supporting any particular party to the case, the principle of costs following the event would not logically apply.

6. Conclusion

Namibia should adopt a procedure to permit interested third-parties such as public interest organisations to seek admission in cases as *amici curiae*. Their input can:

- provide valuable information on relevant facts and case law that the parties may not have considered or may have missed;
- investigate new arguments including the constitutional implications of an issue or the possible social, political, and economic consequences of a judicial decision; and
- vindicate participatory democratic values by allowing courts to listen to the opinions of all those whose interests are implicated by a potential decision.

The experiences of South Africa, Canada, and the United States demonstrate the utility of *amici curiae* and provide models for a system of rules governing the practice. Following these examples, the principles proposed here seek to create a workable system that can allow courts access to the knowledge of interested organisations and experts whilst also controlling the admission of *amici* to ensure that their submissions will be appropriate and will not entail excessive or repetitive argument. Far from burdening the courts, *amicus* inputs can help ensure the fair administration of justice and vindicate the rights of all citizens.

APPENDIX

DRAFT HIGH COURT RULE PROPOSED BY LEGAL ASSISTANCE CENTRE

A version of this draft was submitted to the Judge President of the High Court of Namibia in September 2012 for possible inclusion in the revised Rules of the High Court, and re-submitted in December 2012 (and as shown here) with some modifications to address potential abuses.

Amici curiae

Definition

(1) For purposes of this rule, “written submissions” means heads of argument, factual submissions, explanatory material or any other information which is relevant to the case in question.

General rule

(2) (a) Subject to these rules, any person with an interest in any matter before the Court may be admitted therein as an *amicus curiae* upon such terms and conditions and with such rights and duties as may be directed.

(b) Such interest need not be the same as an interest which would support standing in the case at hand, but need be only some pre-existing involvement, experience, connection or commitment regarding a matter addressed by the case.

Appeal cases

(3) (a) A person or group may apply to the presiding judge for leave to be admitted as an *amicus curiae* in an appeal case not later than five days after the close of pleadings.

(b) Such application shall be served upon all parties to the proceedings and must be supported by an affidavit which shall –

(i) describe the interest of the *amicus curiae* in the proceedings;

(ii) identify the position to be adopted by the *amicus curiae* in the proceedings, including whether the *amicus curiae* intends to raise issues or causes of action not addressed by the parties, in which case the application must identify the new issue or cause of action to be introduced, explain its public importance and motivate why it is appropriate for the court to consider such new matter;

(iii) briefly outline the submissions to be advanced by the *amicus curiae*, their relevance to the proceedings, and the reasons for believing that such submissions are likely to be useful to the Court and different from those of the other parties to the proceedings; and

(iv) indicate whether the *amicus curiae* wishes to present oral argument.

(c) Such application may include a request to introduce factual evidence provided that the application –

- (i) outlines the factual material to be introduced and its relevance to the proceedings;
 - (ii) establishes that the factual material is common cause or otherwise incontrovertible, or is of an official, scientific, technical, or statistical nature such that the information can be easily verified;
 - (iii) establishes that the factual material in question does not address a factual issue that is part of the record; and
 - (iv) establishes that the introduction of such factual material will not unduly delay the proceedings.
- (d) Any party to the proceedings who wishes to oppose an application for admission as an *amicus curiae* shall file an answering affidavit clearly and succinctly setting out the grounds of such opposition within five days of the service of such application upon such party.
- (e) The judge presiding in the case may grant such application upon such terms and conditions and with such rights and duties as he or she may determine, if satisfied that the admission of the *amicus curiae* is likely to be useful to the Court and will not materially prejudice any of the parties to the case.
- (f) An order granting leave to be admitted as an *amicus curiae* may specify the date for filing the written submissions of the *amicus curiae* or any other relevant matter.
- (g) The court may dispense with any of the requirements of this rule if it is in the interests of justice to do so.

General procedural issues

- (4) (a) The written submissions of an *amicus curiae* shall normally be due at least 10 days before the appeal is set down for argument, unless the judge presiding in the case sets another timeframe.
- (b) The written submissions of an *amicus curiae* may not be longer than 20 pages.
- (c) An *amicus curiae* must file with the Registrar a copy of its written submissions for each judge hearing the case, and serve a copy on each party.
- (d) Where the judge presiding in the case permits oral argument, the judge may fix or limit the time given to a particular *amicus curiae* for oral argument, or the total time in which *amici curiae* supporting a particular party to the case may present oral argument.

Admission as an *amicus curiae* in other civil or criminal proceedings

- (5) (a) A person or group seeking admission as an *amicus curiae* in a civil or criminal trial or other non-appellate civil or criminal proceeding may apply at any point in the proceeding to the judge presiding in the case for leave to be admitted as an *amicus curiae*, and the judge, after allowing the parties in the case an opportunity to present any objections, may grant such leave, upon such terms and conditions and with such rights and duties as he or she may determine, if satisfied that the admission of the *amicus curiae* is likely to be useful to the court and will not materially prejudice any of the parties to the case.
- (b) An *amicus curiae* shall not be allowed to present factual material –
- (i) in a civil trial, if it pertains to a factual point that is being disputed between the parties or that could be used directly to support or contradict an element of a party's claim or

- (ii) in a criminal trial, if it pertains to an element of the alleged crime or an accused's defence.
- (c) Subrule (3) shall otherwise apply to an application under this rule, with the necessary changes.

Right of admission as *amicus curiae*

- (6) The following government offices shall be entitled to be admitted as *amici curiae* –
 - (i) Attorney-General;
 - (ii) Prosecutor-General; and
 - (iii) Ombudsman;

Provided that the judge presiding in the case may impose such terms and conditions as he or she deems fit and specify the date of lodging the written submissions of such *amici curiae*.

Costs

- (7) An order for a party to pay costs may make provision for the payment of costs incurred as a result of the admission of *amici curiae*, but no order for costs may be made against an *amicus curiae*.