CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 69/12
ZACC 25

In the matter between:

CHILDREN'S INSTITUTE	Applicant
and	
PRESIDING OFFICER OF THE CHILDREN'S COURT, DISTRICT OF KRUGERSDORP	First Respondent
MINISTER OF SOCIAL DEVELOPMENT	Second Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH AND SOCIAL DEVELOPMENT, GAUTENG	Third Respondent
SS	Fourth Respondent

Heard on : 18 September 2012

Decided on : 9 October 2012

JUDGMENT

KHAMPEPE J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Nkabinde J, Skweyiya J, Van der Westhuizen J, Yacoob J and Zondo J concurring):

Introduction

[1] The central question in this appeal is whether Rule 16A[1] of the Uniform Rules of Court (Uniform Rules), properly interpreted, permits High Courts to allow a friend of the court (amicus curiae) to adduce evidence in support of the submissions it seeks to advance. If Rule 16A does not provide for the adduction of evidence by an amicus, a secondary question is whether a High Court's inherent power under section 173 of the Constitution to regulate its own process allows it to hear evidence tendered by an amicus.[2]

[2] The South Gauteng High Court, Johannesburg (High Court) held that in terms of Rule 16A an amicus may not.[3] It further held that a High Court may not use its inherent power to regulate its own process under section 173 to allow an amicus to adduce evidence because to do so would amount to creating a new substantive right. The amicus in that matter, the Children's Institute at the University of Cape Town[4] (Children's Institute), was refused leave to appeal in both the High Court and the Supreme Court of

[1] See [7] below for the relevant portions of Rule 16A.

[2] The full text of section 173 is as follows:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[3] *SS (A Minor Child) v Presiding Officer of the Children's Court, District Krugersdorp and Others* [2011] ZAGPJHC 139; [2012] 1 All SA 231 (GSJ) (Wepener J, Mokgoatlheng J concurring) (High Court judgment).

[4] The Children's Institute's mission is to contribute to the development of laws, policies, programmes and service interventions for children in a way that will promote equity, realise children's rights and improve the conditions of all children in South Africa.

Appeal. The first, second, third and fourth respondents have filed notices to abide by this Court's decision.

Background

[3] This appeal arises out of an enquiry whether SS, the fourth respondent, a minor orphan living with his great-aunt and great-uncle,[5] was "in need of care and protection" as defined under section 150(1)(a) of the Children's Act[6] and therefore whether his caregivers were eligible for a foster child grant.[7]

[4] SS, together with his great-aunt and his great-uncle, applied to the Children's Court to have SS declared a "child in need of care and protection" under the Children's Act in order to receive a foster child grant of up to R770. This grant is significantly greater than the child support grant of up to R280 made in respect of many other poor children.[8] The Children's Court refused the application, finding that SS was not a child

[5] On 27 August 2012, we issued an order prohibiting the disclosure of details that may reveal the identity of SS. The order read:

> "1. In all papers filed or to be filed in this matter the fourth respondent, a minor, must be referred to as 'SS'.
>
> 2. No person may publish in any manner whatsoever any information which reveals, or may reveal, the identity of the fourth respondent."

[6] 38 of 2005. Section 150(1)(a) provides that a child is in need of care and protection if the child "has been abandoned or orphaned and is without any visible means of support".

[7] Section 8 of the Social Assistance Act 13 of 2004 provides that a foster parent is eligible for a foster child grant for a child so long as that child satisfies the requirements of the Child Care Act 74 of 1983 (now the Children's Act).

[8] The "Increase in Respect of Social Grants", published under Government Notice 256 in *Government Gazette* 35189 of 29 March 2012, provides that foster child grants are a maximum of R770 per month and child support grants a maximum of R280 per month. Section 6 of the Social Assistance Act provides that a person is eligible for a child support grant if he or she is the primary caregiver of the child in question.

in need of care and protection under the Children's Act. The Court reasoned that there was no need to regulate a situation in which the child was placed with family members.

[5] On appeal in the High Court, the Children's Institute sought to be admitted as an amicus curiae. According to the Children's Institute, an outcome upholding the Children's Court's decision would result in approximately 350 000 orphaned children who live with family members losing the foster child grants currently being received.

[6] The Children's Institute made an application to the High Court to adduce evidence. It sought to lead evidence of a statistical nature to demonstrate why orphaned children living with family members should qualify for foster child grants. The application was refused.

High Court interpretation of Rule 16A

[7] The admission of amici curiae is governed by Rule 16A. The Rule provides, in relevant part:

> "(2) Subject to the provisions of national legislation enacted in accordance with section 171 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and these rules, any interested party in a constitutional issue raised in proceedings before a court may, with the written consent of all the parties to the proceedings, given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was first raised, be admitted therein as *amicus curiae* upon such terms and conditions as may be agreed upon in writing by the parties.

(3) The written consent contemplated in subrule (2) shall, within five days of its having been obtained, be lodged with the registrar and the *amicus curiae* shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.

(4) The terms and conditions agreed upon in terms of subrule (2) may be amended by the court.

(5) If the interested party contemplated in subrule (2) is unable to obtain the written consent as contemplated therein, he or she may, within five days of the expiry of the 20-day period prescribed in that subrule, apply to the court to be admitted as 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." (Emphasis added.)

[8] The High Court found that Rule 16A only permits an amicus curiae to be admitted to the proceedings but prohibits it from leading evidence:

"I am of the view that pursuant to Uniform Rule 16A(2) an interested party may be admitted as *amicus curiae* in proceedings by the court after exercising its discretion

> judicially whether to admit a party to the proceedings after consideration of all the relevant facts. The admission of additional facts is an entirely different question as there is no provision in Rule 16A for the admission of such evidence."[9] (Emphasis added.)

[9] The High Court accordingly concluded that High Courts have no power under the Uniform Rules to receive evidence from an amicus and are limited to receiving argument only.[10]

[10] The High Court further indicated that a court's inherent power under section 173 of the Constitution to regulate its own process did not include the reception of additional evidence from an amicus. It found that the admission of evidence would amount to the creation of a new right for an amicus.[11]

Leave to appeal

[11] The matter involves the proper interpretation of the nature and ambit of the High Courts' powers under Rule 16A in relation to the reception of evidence by an amicus. Rule 16A itself points to the role that amici play in constitutional litigation by referring to "any interested party in a constitutional issue". This matter also implicates the proper interpretation and application of section 173 of the Constitution. These are constitutional issues of substance.

[9] High Court judgment above n 3 at para 15.

[10] Id at para 21.

[11] Id at para 20.

[12] It is in the interests of justice to grant leave to appeal given the significant role played by amici in the administration of justice[12] and the restrictive effect of the High Court judgment on the ability of amici to adduce evidence and render appreciable assistance to courts in effectively administering justice.

[13] Furthermore, it is important to address two preliminary matters, namely, mootness and appealability of an interlocutory order. I am satisfied that neither serves as a hurdle to this Court's ability to hear this matter.

[14] On the question of mootness, even though the underlying case concerning SS has been resolved without the assistance of additional evidence from the Children's Institute,[13] it cannot be said that the issue is moot with regard to other amici seeking to adduce evidence in the High Court. Since the decision of the High Court was made by a full bench, it will be highly persuasive to judges hearing an application of this sort and is binding on judges in the South Gauteng High Court, Johannesburg. Under these circumstances, the potential limitation on amici's ability to adduce evidence and therefore render effective assistance to courts in the future, is significantly crippled. This is further exacerbated by the fact that the Supreme Court of Appeal refused leave to appeal. This means that the High Court's decision stands and is binding.

[12] See [15] below.

[13] The application by SS to be declared a child in need of care and protection was later granted on appeal by the High Court. See *SS v Presiding Officer of the Children's Court: District of Krugersdorp and Others* [2012] Case No A3056/11, 29 Aug 2012, as yet unreported (Saldulker J, Potgieter AJ concurring).

[15] Counsel for the Children's Institute emphasised, in argument, that as a result of the High Court judgment amici have been hesitant, on the strength of this decision, to apply for leave to adduce evidence. Given the important role played by amici curiae in advocating on behalf of vulnerable groups, clarity on the question of their ability to adduce evidence is warranted. This Court has found that amici curiae have made and continue to make an invaluable contribution to its jurisprudence and that their participation in litigation is to be welcomed and encouraged.[14] It is patent that a decision on this appeal will continue to have an important and far reaching practical effect.[15]

[16] On the question of appealability, this too presents no hurdle to the determination of this application. As the Children's Institute points out, refusing an amicus leave to adduce evidence will generally be an interlocutory order. Given the importance of the constitutional issues to be determined in this matter and because the order is final in effect, it is in the interests of justice that we grant leave to appeal against this interlocutory order.[16]

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[14] *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as* Amicus Curiae*)* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) at para 80. See also *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 19, which lauds the role of public interest groups in litigation.

[15] In *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC) at para 32, this Court found that mootness is not an absolute bar to deciding an issue. Rather, one consideration in deciding whether to grant leave to appeal is whether the court's order will have any practical effect.

[16] *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at paras 21-4 and *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at paras 8 and 10. In *Khumalo*, this Court held that when deciding whether it is in the interests of justice to hear an appeal against an interlocutory ruling, a court must take into consideration various factors including, "the effect that upholding the exception may have upon the trial proceedings in the High Court"

Substantive issue

[17] Properly interpreted, Rule 16A is in my view permissive and allows for an amicus to adduce evidence. Both a textual and purposive interpretation of the Rule support this conclusion. In any event, even if Rule 16A does 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. The High Court's reliance on the decision in *Oosthuizen v Road Accident Fund*,[17] to conclude that to do so would amount to the creation of a new right, is misplaced.[18]

[18] I begin with a textual analysis of Rule 16A, followed by an examination of both the purpose of Rule 16A as well as the role of amici curiae in court proceedings. I conclude by clarifying the courts' inherent power under section 173 of the Constitution as it relates to this case.

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and "the importance of a determination of the constitutional issues raised by the exception". See also *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at paras 47, 50, 53, 55 and 57.

[17] 2011 (6) SA 31 (SCA).

[18] See [36]-[38] below.

Textual analysis of Rule 16A

[19] Rule 16A read as a whole[19] provides courts with a great deal of discretion in determining whether to admit amici and, more importantly, the terms and conditions under which they may participate in court proceedings.

[20] The Rule can conceptually be divided into two broad parts: subrules (2) to (4) govern an agreement between the parties on terms and conditions for the admission of an amicus, while subrules (5) to (8) in turn regulate a disagreement between the parties. Under either course, the Rule makes it clear that the court makes the final determination on what terms and conditions are set for the admission of amici. Subrule (4) allows the court to amend the terms and conditions decided upon by the parties, whilst subrule (8) empowers the court itself to determine the terms and conditions. In order to lay emphasis on the wide discretion a High Court enjoys, subrule (9) provides that a court "may dispense with any of the requirements of this rule if it is in the interests of justice to do so." Therefore, the only limitation on a court's discretion to dispense with any of the requirements of the Rule, is whether it is in the interests of justice to do so.

[21] The High Court relied on the fact that the Rule mentions "submissions" but not "evidence" to conclude that the Rule must necessarily be narrowly interpreted to include submissions only. Given the Rule's emphasis on the court's discretion to set terms and conditions, this narrow interpretation is, in my view, misguided. First, as the Children's

[19] See [7] above where Rule 16A is quoted in relevant part.

Institute rightly contends, the Rule makes no mention of "oral" submissions and yet courts, including the South Gauteng High Court, Johannesburg, routinely permit an amicus to make oral submissions.

[22] Second, there is nothing in the Rule to suggest that the term "submissions" is limited only to written (or oral) arguments. This interpretation is bolstered by the fact that other High Court decisions, including decisions of the South Gauteng High Court, have concluded that an amicus may adduce evidence.[20] For instance, in *Engelbrecht*, the South Gauteng High Court treated the term "submissions" to include "background information not supplied by the original parties, thus enabling the Court to make decisions confident of their social consequences".[21] Therefore, "submissions" ought to be interpreted to include written or oral argument, or evidence.

[23] Thus, properly construed, the phrase "terms and conditions as it may determine" in Rule 16A(8) empowers a High Court to admit any "submissions" by an amicus and to determine whether those submissions will include: (a) written argument, and if so, to what extent; (b) oral argument, and if so, the duration thereof; and (c) the nature and

[20] *Governing Body, Rivonia Primary School and Another v MEC for Education: Gauteng Province and Others (Equal Education and Another as* Amici Curiae*)* 2012 (5) BCLR 537 (GSJ); *Wesbank, A Division of FirstRand Ltd v Papier (National Credit Regulator as* Amicus Curiae*)* 2011 (2) SA 395 (WCC) at paras 29-30; *De Gree and Another v Webb and Others (Centre for Child Law, University of Pretoria,* Amicus Curiae*)* 2006 (6) SA 51 (WLD) at 52B-D; *S v Engelbrecht (Centre for Applied Legal Studies intervening as* Amicus Curiae*)* 2004 (2) SACR 391 (WLD) at para 14; and *Modderklip Boerdery (Edms) Bpk v President van die RSA en Andere* 2003 (6) BCLR 638 (T) at paras 29 and 38.

[21] *Engelbrecht* id at para 37 (footnotes omitted). The order of that Court requested "written submissions" from the amicus curiae on the "[a]pplication of relevant research, academic scholarship and legal and juristic developments" to "contextualise the behavior and/or criminal actions of the accused". See also Murray "Litigating in the Public Interest: Intervention and the Amicus Curiae" (1994) 10 *SAJHR* 240 at 259 (Murray).

extent of the evidence sought to be led, and if so, under what conditions. In making these determinations the Court will obviously be guided by what is in the interests of justice.

[24] Moreover, the wording of subrule (9) is permissive. It empowers a court to dispense with any of the requirements of the Rule if it is in the interests of justice to do so. On a textual reading of the Rule, therefore, the High Court's conclusion that evidence by an amicus could never be adduced under any circumstances is incorrect. My textual interpretation is fortified by the purpose of the Rule.

Purpose of Rule 16A and the role of an amicus curiae

[25] Counsel for the Children's Institute emphasised in oral argument that Rule 16A was intended to facilitate admission of amici curiae. I agree. Before the introduction of Rule 16A and its counterpart, Rule 10 of the Constitutional Court Rules,[22] there were no formal rules guiding courts on the admission of an amicus curiae.[23] Courts consequently took a fairly narrow approach to the admission of amici and there were no clear

[22] Rule 10 governs the admission of amici curiae in this Court. It provides, in relevant part:

> "(1) Subject to these rules, any person interested in any matter before the Court may, with the written consent of all the parties in the matter before the Court, given not later than the time specified in subrule (5), be admitted therein as an *amicus curiae* upon such terms and conditions and with such rights and privileges as may be agreed upon in writing with all the parties before the Court or as may be directed by the Chief Justice in terms of subrule (3).
>
> . . .
>
> (3) The Chief Justice may amend the terms, conditions, rights and privileges agreed upon as referred to in subrule (1)."

[23] Murray above n 21 at 257.

provisions for intervention in public interest matters.[24] 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."[25]

[26] Thus, the role of an amicus envisioned in the Uniform Rules is very closely linked to the protection of our constitutional values and the rights enshrined in the Bill of Rights. Indeed, Rule 16A(2) describes an amicus as an "interested party in a *constitutional issue* raised in proceedings".[26] Therefore, although friends of the court played a variety of roles at common law, the new Rule was specifically intended to facilitate the role of amici in promoting and protecting the public interest.[27] In these cases, amici play an important role first, by ensuring that courts consider a wide range of options and are well informed;[28] 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.[29] As this Court has noted:

> "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

[24] Id at 256-8. See also Erasmus *Superior Court Practice* Service Issue 36 (Juta, Cape Town 2011) (Erasmus) at C4–19.

[25] *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (CPD) at 553I.

[26] Emphasis added.

[27] See Erasmus above n 24 at C4–19, noting that "[n]one of the existing variants of *amici curiae*, which developed in the context of civil and criminal litigation, was adequate for constitutional matters such as those heard by the Court . . . public law litigation may often take a different form from that on which the traditional model of litigation is based".

[28] *Engelbrecht* above n 20 at para 14, stating that the admission of amici curiae "may ensure that the Court considers a wider range of options when coming to a decision and that it is better informed."

[29] Murray above n 21 at 250-4.

> 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."[30]

[27] The role of a friend of the court can, therefore, be characterised as one that assists the courts in effectively promoting and protecting the rights enshrined in our Constitution. Section 39(2) of the Constitution requires that when interpreting any legislation, courts must promote the "spirit, purport and objects of the Bill of Rights." Where there are two reasonable interpretations of a provision, section 39(2) mandates a court to prefer the interpretation that better promotes the spirit, purport and objects of the Bill.[31] In public interest matters, like the present case, allowing an amicus to adduce evidence best promotes the spirit, purport and objects of the Bill of Rights. Therefore, the correct interpretation of Rule 16A must be one that allows courts to consider evidence from amici where to do so would promote the interests of justice.

[28] Finally, it is true that Rule 16A does not explicitly mention "evidence". However, the Rules of the Constitutional Court provide that an amicus may, where appropriate, adduce evidence under Rule 31. It states, in relevant part:

> "(1) Any party to any proceedings before the Court and an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is

[30] *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 13; 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023 (CC) at para 5.

[31] See *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at paras 46-7.

> relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
>
> (a) are common cause or otherwise incontrovertible; or
>
> (b) are of an official, scientific, technical or statistical nature capable of easy verification."[32]

[29] The High Court's decision consequently leads to the paradoxical result that an appellate court may hear new evidence that High Courts may not. This cannot be the case. Courts of first instance must be permitted to admit evidence from an amicus curiae to avoid a situation where appellate courts are inundated with new evidence. In principle, courts of first instance should strive to accommodate the reception of evidence if this would be in the interests of justice. They should not knowingly leave relevant evidence that could have been received by them to be adduced at the appellate level. This is because appeals are generally limited to the record of the court below. Accordingly, the fact that the Constitutional Court, as a court of appeal, is permitted to admit evidence adduced by amici curiae further lends support to the notion that courts of first instance must be permitted to do the same.

[30] Indeed, it is generally not in the interests of justice for this Court to sit as a court of first and final instance in relation to new issues or factual material. Yet the judgment of the High Court makes this position far more likely in relation to evidence adduced by an

[32] See also Rule 10(8) of this Court's Rules, which provides:

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

amicus. This is particularly problematic because cases in which amici are involved often affect our children, the vulnerable, the marginalised and the indigent. And a High Court would, like in this case, be unable to admit evidence tendered by an amicus even if it were necessary to do so in the exercise of the Court's responsibility as the upper guardian of all children. This would be patently unjust.

[31] It is trite that evidence comprises statements made in court under oath, affirmation, or warning and includes documents produced and received in court, whilst argument is merely persuasive comment made by the parties or their legal representatives in regard to questions of fact or law. Importantly, the persuasive comment of an amicus will often draw on broader considerations, and thus be premised on facts and evidence not before the court, including statistics and research. And, it would make little sense to allow the presentation of bare submissions unsupported by any facts.

[32] Of course, this is not to say that amici will always be allowed to lead evidence in the course of their submissions. The admissibility in each particular case will be determined according to whether it is in the interests of justice to do so. This Court's Rules on the admissibility of evidence by an amicus are relatively strict and circumscribed, but that is not to say that the same criteria must be applied in the High Court. What the interests of justice will require in a particular case must be left to High Courts to decide.

[33] There is nothing in the High Court's reasoning to suggest that the evidence of an expert nature the Children's Institute sought to tender was not relevant to the issues that the Court had to adjudicate. Nor can I find any. It seems to me therefore that as it relates to the issue of relevance, the reception of this evidence would have been of appreciable assistance to the Court in the adjudication of the issues before it.[33] 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.

[34] In my view, a proper interpretation of Rule 16A that permits the adduction of evidence is consistent with both a textual reading of the Rule as well as its underlying purpose. It also provides invaluable space for friends of the court in public interest matters and, by doing this, promotes access to the courts and ensures that courts are well informed on public interest matters when making decisions. This case is a classic example of the type where evidence tendered by an amicus would have been most valuable. High Courts often hear vulnerable litigants with limited resources. These litigants are invariably unable to produce the kind of compelling evidence that an expert, like the Children's Institute, may be able to provide. In these instances, the amicus speaks to aid voiceless and penniless people and assists the court in making an informed decision.

[33] *Gentiruco A.G. v Firestone S.A. (Pty.) Ltd*. 1972 (1) SA 589 (AD) at 616H.

Inherent power under section 173

[35] In view of my interpretation of Rule 16A, it is not necessary to deal with the Children's Institute's argument, that section 173 of the Constitution empowers High Courts to regulate their own process and therefore to admit evidence from amici, save in passing to clarify the High Court's finding on the issue.

[36] The High Court found that section 173 was not applicable in this case because allowing an amicus to adduce evidence would constitute the creation of a new substantive right, which goes beyond the scope envisioned by section 173. In reaching this conclusion, the High Court placed reliance on *Oosthuizen*.[34]

[37] In *Oosthuizen*, the appellant sought to have his claim transferred from the Magistrate's Court to the North Gauteng High Court, Pretoria after his claim had prescribed. The Supreme Court of Appeal held that to allow the transfer would, in effect, permit the appellant to bypass prescription and to do so would have a substantive effect, namely the revival of a prescribed claim.[35]

[38] The facts of this case are clearly distinguishable from *Oosthuizen*. The adduction of evidence falls under the ambit of a court's power to regulate its own process and does

[34] Above n 17.

[35] Id at paras 23 and 26.

not create a new substantive right.[36] Thus, even if Rule 16A did not provide for an amicus to adduce evidence, section 173 could have appropriately been invoked by the High Court to allow an amicus to do so.

Conclusion

[39] I find that Rule 16A does not prohibit the introduction of evidence by an amicus in a High Court. However, whether, and to what extent, to allow an amicus to adduce evidence in support of its submissions remains within the discretion of the High Court, guided by the interests of justice.

Order

[40] The following order is made:

(a) Leave to appeal is granted.

(b) The appeal is upheld.

(c) The order in paragraph 30 of the judgment of the South Gauteng High Court, Johannesburg is set aside.

(d) It is declared that Rule 16A of the Uniform Rules of Court permits an amicus curiae to adduce evidence in support of its submissions, if it is in the interests of justice.

[36] This is because whether a party may adduce evidence falls under adjectival law rather than substantive law. See Schwikkard *Principles of Evidence* 3 ed (Juta, Cape Town 2010) at 1-2.

For the Applicant:	Advocate G Budlender SC and Advocate S Budlender instructed by the Legal Resources Centre.