

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 186/CAC/JUNE20
CT CASE NO.: CR0003Apr20
CC CASE NO.: 2020APR0035

In the appeal of:

**BABELEGI WORKWEAR
AND INDUSTRIAL SUPPLIES CC**

Appellant

and

THE COMPETITION COMMISSION

Respondent

HEALTH JUSTICE INITIATIVE

First Amicus

OPEN SECRETS NPC

Second Amicus

FILING SHEET

TAKE NOTICE that the First and Second Amicus file herewith the First and Second Amicus' heads of argument.

DATED ON THIS 27th day of August 2020 at Bryanston.

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**FIRST AND SECOND AMICUS CURIAE'S WRITTEN SUBMISSIONS
APPLICATION FOR FURTHER EVIDENCE**

INTRODUCTION

1 “*Knowledge is essential for understanding,*” observed Justice Brandeis a hundred years ago, “*and understanding should precede judging.*”¹ In this vein, the Health Justice Initiative (“**HJI**”) and Open Secrets NPC take part in these proceedings. Their primary objective is simple – to assist this Court, when determining the appeal before it, to have the relevant factual and legal context. For context is paramount. Indeed, “*In law context is everything*”.²

¹ *Jay Burns Baking Co. v Bryan* 264 US 504, 520 (1924) (dissenting).

² Lord Steyn in *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 443 (HL) at 447a, cited in *Triomed (Pty) Ltd, Aktiebolaget Hässle and Another v 2003 (1) SA 155 (SCA)* at para 1.

2 Open Secrets and HJI were admitted as *amicus curiae* in this appeal. They also filed an application for leave to adduce further evidence in the appeal.³

3 The amici request that this Court admit the evidence of four experts:

3.1 **Dr Noncayana Tracey Dawn Naledi**, a public health physician, and the Deputy Dean: Health Services at the School of Public Health, University of Cape Town (UCT). Dr Naledi was previously the Chief Director: Health Programmes in the Western Cape Department of Health.⁴

3.2 **Mr Andrew Lofts Gray**, a pharmacist and Senior Lecturer in the Division of Pharmacology Discipline of Pharmaceutical Sciences at the School of Health Sciences at the University of KwaZulu-Natal in South Africa.⁵

3.3 **Mr Ihsaan Bassier**, an academic, and PhD candidate in Economics at the University of Massachusetts, with a research focus on labour and the political economy of development and the need for state intervention to provide social assistance in the time of a pandemic.⁶

3.4 **Professor David Bilchitz**, Professor of Fundamental Rights and Constitutional Law at the University of Johannesburg and Director of

³ The application to adduce new evidence ("the application") was filed on 24 August 2020 in accordance with this Court's directive.

⁴ Dr Naledi's expert affidavit is Annexure FA2 (p30) to the founding affidavit of the application.

⁵ Mr Gray's expert affidavit is Annexure FA3 (p64) to the founding affidavit of the application.

⁶ Mr Bassier's expert affidavit is Annexure FA4 (p285) to the founding affidavit of the application.

the South African Institute for Advanced Constitutional, Public Human Rights and International Law (SAIFAC) since 2009.⁷

AN AMICUS CURIAE MAY BE PERMITTED TO ADDUCE NEW EVIDENCE

4 Rule 28 of the Rules of this Court (“**the CAC Rules**”) provides that: “*Rule 16 of the Rules of the Supreme Court of Appeal, read with the changes required by the context, apply to proceedings before the Court, except that a reference in that Rule to the Chief Justice must be read as a reference to the Judge President.*”⁸

5 It is so that Rule 16(8) of the Supreme Court of Appeal’s Rules (“**SCA Rules**”) provides that “*[a]n amicus curiae shall be limited to the record on appeal and may not add thereto and, unless otherwise ordered by the Court, shall not present oral argument*”. However, we submit that this position is not invariable. While an amicus plainly has no right to introduce evidence, the Rule does not preclude this Court from receiving evidence for the following reasons:

5.1 This Court has the power under section 19(b) of the Superior Courts Act 10 of 2013 to “*receive further evidence*”. The Rules of Court cannot validly preclude the Court from exercising a power which is conferred upon it by (later) statute.

5.2 The Supreme Court of Appeal found in *Nova Property Group Holdings Ltd and Others v Corbett and Another (M & G Centre for Investigative*

⁷ Mr Bilchitz’s expert affidavit is Annexure FA4 (p384) to the founding affidavit of the application.

⁸ Rules for the conduct of proceedings in the Competition Appeal Court, GNR.857 of 1 September 2000 (“the CAC Rules”).

Journalism NPC as Amicus) [2016] 3 All SA 32 (SCA) that the “court’s power to regulate its own process in terms of s 173 of the Constitution may be invoked to allow an amicus to adduce further evidence, if to do so would promote the interests of justice.”⁹ Thus, even if the SCA Rules or CAC Rules do expressly provide for an amicus to adduce evidence, section 173 of the Constitution can appropriately be invoked by the Court to allow an amicus to do so.¹⁰

5.3 In *Nova Property Group Holdings*, Kathree-Setiloane JA concluded that the Supreme Court of Appeal:¹¹

“... may, in appropriate circumstances, permit an amicus to adduce evidence, provided the requirements of s 19 (b) of the Superior Courts Act are met, namely that: (a) a sufficient explanation is provided for why the evidence was not introduced before the court a quo; (b) there is a prima facie likelihood that the evidence is true; and (c) the evidence is materially relevant to the outcome ...”

5.4 Rule 16(8) of the SCA Rules must be read with Rule 34 of the CAC Rules. Rule 34 provides that the Judge President of this Court may: “give any directions that are considered just and expedient in matters of practice and procedure.” We submit that this empowers the Court to admit evidence tendered by an amicus. The phrase “just and expedient” should be interpreted in this context as akin to the “interests of justice” test applied by the Constitutional Court in *Children’s Institute*.¹²

⁹ *Nova Property Holdings* para 13.

¹⁰ *Children’s Institute* para 38.

¹¹ *Nova Property Group Holdings* para 14.

¹² *Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp and Others* 2013 (2) SA 620 (CC) para 32.

5.5 Furthermore, section 39(2) of the Constitution requires that, when interpreting any legislation, a Court must promote the spirit, purport and objects of the Bill of Rights. This duty is one in respect of which “*no court has a discretion*” and which must “*always be borne in mind*” by the courts.¹³ This requires more than the avoidance of an interpretation which renders a statutory provision unconstitutional.¹⁴ It requires also the adoption of an interpretation which “*better*” promotes the spirit, purport and objects of the Bill of Rights, provided that the provision is reasonably capable of such an interpretation.¹⁵

5.6 In *Children’s Institute*, the Constitutional Court held as follows:

“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”¹⁶ (emphasis added).

5.7 We submit that a similar approach must be adopted when interpreting Rule 28 of the CAC Rules together with Rule 16 of the SCA Rules.

6 The Constitutional Court held that an amicus must, in appropriate cases, be permitted to adduce evidence in the High Court for at least two key reasons:

6.1 The fact that the Constitutional Court is permitted to admit evidence adduced by amici curiae supports the proposition that courts of first

¹³ *Phumelela Gaming and Leisure Limited v Grundlingh and Others* 2007 (6) 350 (CC) paras 26 – 27.

¹⁴ *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC) para 47.

¹⁵ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) paras 46, 84 and 107.

¹⁶ *Children’s Institute* para 27 (concerning Rule 16A of the Uniform Rules of Court).

instance must be permitted to adduce evidence, because it is generally not in the interests of justice for the Constitutional Court to sit as a court of first and final instance in relation to new issues and factual material.¹⁷ We submit that it would be anomalous if an amicus could introduce evidence in the High Court and the Constitutional Court, but not this Court.

6.2 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. It would make little sense to allow the presentation of bare submissions unsupported by any facts.¹⁸

7 The Constitutional Court has also recognised that amici curiae can play a critical role in dealing with constitutional issues:

“Amici curiae have made and continue to make an invaluable contribution to this court's jurisprudence. Most, if not all, constitutional matters present issues, the resolution of which will invariably have an impact beyond the parties directly litigating before the court. Constitutional litigation by its very nature requires the determination of issues squarely in the public interest, and insofar as amici introduce additional, new and relevant perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged.”¹⁹

¹⁷ *Children's Institute* para 30.

¹⁸ *Children's Institute* para 31. Reiterated in *Nova Property Holdings* at para 13 and 14.

¹⁹ *Koyabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) para 80.

8 These considerations apply equally to the present matter. We accordingly submit that this Court may in appropriate instances permit an amicus to adduce evidence.²⁰

THE REQUIREMENTS

9 The test explained in *Nova Property Group Holdings* for the admission of evidence by amici is different to the test imposed by the Supreme Court of Appeal and Constitutional Court for a litigant in the matter seeking to introduce new evidence on appeal. In those instances, our courts have stated that a court may receive further evidence in terms of section 19(b) of the Superior Courts Act if a party can show that the evidence is reliable, weighty, material and presumably to be believed, and accompanied by an acceptable explanation for the fact that the evidence was not adduced in the trial court.²¹ This is the test adopted by this Court in *Association of Mineworkers and Construction Union v Competition Tribunal of South Africa and others [2019] JOL 45071 (CAC)* where AMCU – a party in the litigation - applied for leave to produce new evidence on appeal.²²

10 The tests are, however, substantially similar.²³ We adopt the test set out in *Nova Property Group Holdings* but submit that the amici also meet the requirements of the ordinary test for litigants under section 19(b) of the Superior Courts' Act.

²⁰ See also *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1211; [2000] 12 BLLR 1365 (CC) (28 September 2000).

²¹ *Rail Commuters Action Group v Transnet Limited t/a Metrorail*; 2005 (2) SA 359 (CC) paras 42 – 43. *Dormell Properties 282 CC v Renasa Insurance Co Ltd and others* [2011] 1 All SA 557 (SCA)

²² *Association of Mineworkers and Construction Union and another v Competition Tribunal of South Africa and others* [2019] JOL 45071 (CAC) at para 50.

²³ The High Court in Pretoria and Cape Town have more recently adopted a test similar to that applied by Kathree-Setiloane JA in *Nova Holdings Property*. See *KNS Construction (Pty) Ltd v Genesis on Fairmount Joint Venture* [2020] JOL 47486 (GJ) and *Mayekiso and another v Patel NO and others* [2019] 1 All SA 221 (WCC)

11 In the circumstances, HJI and Open Secrets to adduce new evidence in this Honourable Court if it would promote the interests of justice and provided the following requirements are met:

11.1 there must be a sufficient explanation for why the evidence was not introduced before the Tribunal;

11.2 there must be a *prima facie* likelihood that the evidence is true; and

11.3 the evidence must be materially relevant to the outcome of the matter.

THE INTERESTS OF JUSTICE REQUIRE THE ADMISSION OF THE EVIDENCE

12 The amici deal comprehensively with these requirements in the founding affidavit.²⁴ We submit that the interests of justice would be best promoted if the evidence is admitted by this Court and included in the appeal record for the following main reasons:

12.1 This is a matter involving constitutional issues. As the Constitutional Court pointed out, constitutional matters present issues that have an impact beyond the parties directly litigating before the Court.

12.2 The proposed evidence will provide the factual foundation and context for the amici's legal submissions. The evidence of the expert witnesses will support the amici's case that an exceptional, and human-rights based, approach to excessive pricing jurisprudence is warranted in the context of a pandemic. This is a "new and relevant perspective" which

²⁴ Founding Affidavit p 19 – 26, para 46

the amici submit will assist this Court in arriving at the form of nuanced judicial reasoning and outcomes encouraged by the Constitutional Court.

12.3 This was the first Covid-19 related case to be referred to the Tribunal for determination.²⁵ This Court considers the application of the amended section 8 of the Competition Act for the first time. It does so in an unprecedented context of a worldwide pandemic.

12.4 The evidence that the amici wish to adduce on appeal is true and in most cases, incontrovertible. The evidence does not raise new factual disputes and does not address the particular facts of Babelegi's conduct. It is also unlikely that either party will dispute the evidence, or that it would be able to do so. The evidence is consistent with, and provides a factual basis for, many of the Tribunal's statements, and submissions by the Commission.

12.5 The evidence is materially relevant to the outcome of the appeal. The Tribunal accepted the Commission's contention that the complaint referral must be considered within the context of the Covid-19 outbreak and its impact on the world, in general, and on South Africa in particular.²⁶ The amici submit that it is not only the economic impact of the pandemic that is relevant to the current matter and the legal issues at hand. The full context of Covid-19 includes a consideration of how the pandemic exacerbates the strains and challenges of the South

²⁵ Record p 207, para 11

²⁶ Record p 558, para 6-9.

African healthcare system, how socio-economic factors determine access to healthcare and PPE, the inability of the current medical supplies pricing framework to regulate price gouging, and the broader social consequences and the human rights implications of the pandemic.

12.6 Evidence of this nature has not been adduced by either party and is not part of the record before this Court. It is common cause that the Commission was inundated with excessive pricing complaints in the first few weeks of the national lockdown.²⁷ It was required to consider and investigate all complaints and formulate its referrals against the offending firms without delay. The initial matter was brought on an extremely urgent basis before the Tribunal and within two days of the Commission's decision to prosecute the matter.²⁸ The Commission describes the COVID-19 pandemic in just two pages of its referral affidavit and focusses more narrowly on the economic consequences of COVID-19.²⁹ It was simply not possible for the Commission to canvas all aspects of the case, but that should not prevent this Court from doing so now.

12.7 The Commission does make submissions on the broader impact of the pandemic, and notes in the referral affidavit that the livelihoods and incomes of millions of South Africans have been impacted by the national state of disaster and that this requires the rights and interests

²⁷ Record p 32, para 77

²⁸ Record p 30, para 70.

²⁹ Record p 10-11.

of consumers to be protected to the greatest degree possible.³⁰ The amici build on this evidence, providing a more detailed factual foundation for these statements, and creating the basis for its constitutional arguments.

- 13 The amici have provided a full explanation for why the evidence was not led before the Tribunal and set out their steps to bring this application as soon as reasonably possible after becoming aware of the need to intervene in this appeal.³¹ The amici filed its application in accordance with the timelines imposed by this Court notwithstanding the fact that it only received the full record two court days before the application was due.

CONCLUSION

- 14 In the circumstances, we submit that the evidence should be admitted and form part of the record of appeal.

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Chambers, Sandton

27 August 2020

³⁰ Record p 31, para 36.

³¹ Founding Affidavit p21, para 52 – 58.

TABLE OF AUTHORITIES

South African cases

Association of Mineworkers and Construction Union and another v Competition Tribunal of South Africa and others [2019] JOL 45071 (CAC)

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

Dormell Properties 282 CC v Renasa Insurance Co Ltd and others [2011] 1 All SA 557 (SCA)

Fraser v Absa Bank Ltd (NDPP as Amicus Curiae) 2007 (3) SA 484 (CC)

Hoffmann v South African Airways (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1211; [2000] 12 BLLR 1365 (CC) (28 September 2000).

Koyabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 (CC)

Nova Property Group Holdings Ltd and Others v Cobbett and Another (M & G Centre for Investigative Journalism NPC as Amicus) [2016] 3 All SA 32 (SCA)

Phumelela Gaming and Leisure Limited v Grundlingh and Others 2007 (6) 350 (CC)

Rail Commuters Action Group v Transnet Limited t/a Metrorail; 2005 (2) SA 359 (CC)

Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) 783A–B.

Triomed (Pty) Ltd, Aktiebolaget Hässle and Another v 2003 (1) SA 155 (SCA)

Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another 2009 (1) SA 337 (CC)

Foreign cases

Jay Burns Baking Co. v Bryan 264 US 504, 520 (1924)

R v Secretary of State for the Home Department, ex parte Daly [2001] 3 All ER 443 (HL)

