

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A3056/11

DATE:25/10/2011

REPORTABLE

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

S S (A MINOR CHILD)

Appellant

And

**THE PRESIDING OFFICER OF THE CHILDREN'S
COURT, DISTRICT KRUGERSDORP**

First Respondent

MINISTER OF SOCIAL DEVELOPMENT

Second Respondent

**MEC FOR HEALTH AND SOCIAL DEVELOPMENT,
GAUTENG**

Third Respondent

In re

CHILDREN'S INSTITUTE

Proposed Amicus Curiae

N C M (A MINOR CHILD)

Proposed Appellant

J U D G M E N T

Summary

Appeal – filing of heads timeously necessary for courts to properly prepare for the hearing - applicant for admission as amicus curiae must comply with Rule 16A - such compliance to be timeous to avoid application for condonation - failure to apply for condonation - amicus status in High Court allows a party to make submissions only - no right to lead evidence - procedure different to that of Constitutional Court which allows for evidence subject to certain constraints - joinder of parties with direct and substantial interest in matter pursuant to court's inherent power to do so.

[1] An appeal by the appellant has been enrolled for hearing today. The appeal is against a judgment and order of the presiding officer of the children's court held in the magisterial district of Krugersdorp. The appeal is specifically against the finding of the learned magistrate that a minor child, one SS, is not in need of care and protection as envisaged in S 150(1)(a) of the Children's Act 38 of 2005 (the Children's Act) and a consequent refusal to place the child in foster care. The judgment was delivered pursuant to an enquiry in terms of s 155(1) of the Children's Act.

[2] Three applications have to be dealt with prior to dealing with the merits of the appeal. The first is an application by the second and third respondents, being the Minister of Social Development and the Member of the Executive Council for Health and Social Development, Gauteng, respectively, to be

joined in the matter either as *amici curiae* or as respondents. The second application is by the Children's Institute, the proposed *amicus curiae*, in terms of which it seeks to be admitted as *amicus curiae* in the appeal. The third application is brought by the proposed appellant by way of urgency to hear another matter together with the appeal already before this court.

Joinder of Second and Third Respondents

[3] After the presiding officer delivered judgment, the appellant filed a notice of appeal. The notice introduces the second and third respondents and it was served on these two respondents, who were not parties before the presiding officer. There is no indication as to how it came about that these two respondents were joined in the proceedings and there appears nothing from the record why these two respondents were cited in the appeal. In supplementary heads of argument, which the appellant filed on 19 October 2011 it is said that "*This appeal is unusual in that the Second Respondent was not a party in the matter in the Children's Court, and was joined as a respondent by the appellant, only at the Appeal stage.*"

No application to join parties served before any court.

[4] The next step was that the appellant filed what is referred to as "*index of pleadings filed after the lodging of record*". Amongst the documents is a notice to oppose by the second and third respondents as well as a withdrawal of that notice. In the notice of withdrawal of the notice of intention to oppose the second and third respondents state that they will, at the hearing of the appeal, ask leave of the court to make legal and/or factual submissions "*more*

or less as the friend of the court or as it may be convenient to the court or as the respondents in order to assist the court to come to a decision". The second and third respondents further state in the notice of withdrawal that they *"will ask leave of the court to file an affidavit on the legal and or factual issues relevant to the appeal"*. The second respondent then filed an affidavit by the Director General of the Department of Social Development on behalf of the second respondent. The affidavit sets out the facts of the matter as it occurred before the presiding officer and proceeds to set out argument regarding the matters on appeal before this court.

[5] A joinder of the second and third respondents is required by Uniform Rule 10A if the constitutional validity of a law is challenged. Rule 10A reads:

"If in any proceedings before the court, the constitutional validity of a law is challenged, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings."

However, in this matter there is no challenge to the validity of the legislation as far as the appellant and the two respondents are concerned. It concerns the interpretation of legislation and the joinder cannot be pursuant to rule 10A.

[6] The joinder of a party is necessary when the interests of such a party may be affected by the court's order. The test is whether or not a party has a "direct or substantial interest" in the subject matter of the action or has a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. See *Amalgamated Engineering*

Union v Minister of Labour 1949 (3) SA 637 (A) at 657. A court may then *mero motu* join such a party.

[7] The second and third respondents did not make application pursuant to Uniform Rule 16A to be admitted as *amicus curiae*. I will assume that the filing of the affidavit by the second respondent does so constitute an application to be admitted as *amicus curiae*. However, there is no provision in rule 16A for the reception of an affidavit filed on behalf of such a party. The affidavit filed by the second and third respondents summarises the facts of the matter before the presiding officer and contains argument regarding the interpretation of certain sections of the Children's Act which are substantially similar arguments to those of the appellant, save that an argument regarding the interpretation of s 150(1)(a) of the Children's Act differs from the argument submitted by the appellant. The second and third respondents nevertheless support the relief that the appellant seeks.

[8] However, I am of the view that the second and third respondents have a direct and substantial interest in the order which the court may give and their joinder is necessary. See *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 at 366B-D. Without considering the manner in which such a joinder may be effected, the second and third respondents are pursuant to their application contained in the affidavit entitled to be joined in these proceedings. A party so joined must of necessity be allowed to file an affidavit to place facts relevant to the issues before a court and have the

opportunity to be heard. See: *Pretorius v Slabbert* 2000 (4) SA 935 (SCA) at 939E.

Admission of Proposed Amicus Curiae

[9] Also contained amongst the documents filed after the lodging of the record is a notice in terms of rule 16A(1) given by the appellant. In it, it is stated that the appellant is raising a constitutional issue in that:

“1. *This application concerns primarily the duty of a presiding officer in a Children’s’ Court.*

1.1 *To properly take into account the constitutional obligation to apply sections 39(2) and 28(2) of the Constitution when interpreting s 150(1)(a) of the Children’s Act 38 of 2005 by reading “and without visible means of support” in s 150(1)(a) as “or without visible means of support”.*

1.2 *To properly take into account the constitutional obligation to apply s 39(2), and s 38(2) when determining the meaning of “visible means of support” in s 150(1)(a) of the Children’s Act 38 of 2005”.*

On the assumption that the issues on appeal are indeed constitutional issues the provisions of rule 16A would then apply to parties who wish to be admitted as *amici curiae*.

[10] The appellant, represented by the Centre for Child Law, filed heads of argument timeously. Thereafter, on 11 October 2011 the second respondent filed heads of argument dealing with the questions to be determined on appeal. Although there is a reference contained in these heads to the

proposed *amicus curiae* having applied to be admitted as *amicus curiae*, no such application was on record.

[11] On 19 October 2011 i.e. 6 days before the hearing of the matter, the proposed *amicus curiae* filed a notice of motion seeking leave to be admitted as *amicus curiae* and seeking leave for the opportunity to adduce additional evidence, which evidence is set out in an affidavit filed in support of the application to be admitted as *amicus curiae*.

[12] It is clear from the contents of the affidavit that the proposed *amicus curiae* applies to present argument, which is substantially different to the arguments already submitted by the appellant and the second respondent. Heads of argument were not filed when the application to be admitted as *amicus curiae* was filed. It was difficult to foreshadow the exact nature of the argument to be submitted by the proposed *amicus curiae* save that it in the affidavit referred to legal argument as follows:

“Rather this Court should:

- 8.1 Hold that the intention of the legislature as expressed through the Children’s Act is at odds with the constitutional requirements in that it does not provide for orphans living with family to have access to adequate and timeous social assistance grants;*
- 8.2 Hold that the State should make the necessary legislative amendments by end 2012 in light of this Court’s judgment to clarify the position and put the necessary structures and funding in place; and*
- 8.3 Direct that, as an interim measure, section 150(1)(a) of the Act has to be interpreted to allow orphaned children living with family to access the Foster Child Grant.”*

[13] The filing of heads of argument timeously, with proper references to authorities, is an important step in the hearing of any appeal. It allows the presiding judge to embark upon the necessary research and consideration of the matter and arguments contained in the parties' heads of argument prior to the hearing of an appeal. The hearing of appeals, after research and having due consideration to the argument submitted to a court, allows for a court to be meaningfully engaged in discourse during the hearing of oral argument and has been a cornerstone of successful appeal procedures in our courts. A judge who has to listen to arguments presented during the hearing, unprepared as to the nature and extent of the argument, cannot do justice to a matter before him or her.

[14] In this matter there is an attempt to radically depart from the prescribed appeal procedure and the procedure prescribed in Rule 16A. A proper consideration as to whether the proposed *amicus curiae* should be allowed to be admitted as such, as well as the question whether it should be allowed to present evidence and to change the nature of the appeal before the court, must, in my view, be considered with due regard to the provisions of rule 16A.

[15] 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. In order to justify the placing of the additional facts before this court, the proposed *amicus curiae* relies on s 173 of the Constitution as read with Rule 31 of the Constitutional Court Rules for its argument that additional facts should be received on appeal. Should it be decided that, based on the rule of the Constitutional Court, further evidence may be lead, further considerations come into play. Constitutional Court rule 31 also provides that “*All other parties shall be entitled, within the time allowed by these Rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for the proper decision by the court*”. In deciding whether to import the provisions of the rules of the Constitutional Court into an appeal hearing in a High Court, it will also have to be considered whether all the additional requirements contained in Constitutional Court Rule 31 should be complied with in the High Court and not only the partial importation of the rule as argued by the proposed *amicus curiae*. But this aspect need not be decided. There is no provision in the Uniform Rules for the adducing of additional evidence before a High Court. “*The purpose of the Rule is to enable parties interested in a constitutional issue to seek to be admitted as amicus curiae in the case in which the issue is raised so that they can advance submissions in regard thereto*” – per Farlam AJA (as he then was) in *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA) at 452 E – F. (My emphasis).

[16] S 173 of the Constitution provides:

“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”

The development of the common law is not under consideration. The argument is that the court is entitled to “regulate its own process” by allowing the admission of additional evidence in the same manner as the Constitutional Court pursuant to its Rule 31.

[17] In *Parbhoo and others v Getz N.O. and another* 1997 (4) SA 1096 (CC) it was said in par 4

“Section 173 of the 1996 Constitution confers on the Constitutional Court the inherent power to protect and regulate its own process. In S v Pennington and Another this Court decided the following:

'Section 173 of the 1996 Constitution gives this Court an "inherent power" to "protect" and "regulate" its process. It is a power which has to be exercised with caution. It is not necessary to decide whether it is subject to the same constraints as the "inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice" which vested in the Appellate Division prior to the passing of the 1996 Constitution. Even if it is subject to such constraints, the present situation, in which there is a vacuum because the legislation and rules contemplated by the Constitution have not been passed, is an extraordinary one in which it would be appropriate to exercise the power.'

Rule 16A(2) provides:

“Subject to the provisions of national legislation enacted in accordance with section 171 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), and these rules, any interested party in a constitutional issue raised in proceedings before a court may, with the written consent of all the parties to the proceedings, given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was

first raised, be admitted therein as amicus curiae upon such terms and conditions as may be agreed upon in writing by the parties.”

[18] In *Phillips and others v the National Director of Public Prosecutions* 2006 (1) SA 505 (CC) at par 47 and 48 it was said:

“[47] The Constitution requires that judicial authority must vest in the courts which must be independent and subject only to the Constitution and the law. Therefore courts derive their power from the Constitution itself. They do not enjoy original jurisdiction conferred by a source other than the Constitution. Moreover, in procedural matters, s 171 makes plain that '(a)ll courts function in terms of national legislation and their rules and procedures must be provided for in national legislation'. On the other hand, s 173 of the Constitution preserves the inherent power of the courts to protect and regulate their own process in the interests of justice...

[48] In Parbhoo and Others v Getz NO and Another too, this Court turned to its 'inherent power' to meet an 'extraordinary' procedural situation pending enactment of relevant legislation and promulgation of rules of procedure. In both cases the points are made that ordinarily the power in s 173 to protect and regulate relates to the process of court and arises when there is a legislative lacuna in the process. The power must be exercised sparingly having taken into account interests of justice in a manner consistent with the Constitution.”

[19] In *Western Bank Ltd v Packery* 1977 (3) SA 141(T), Coetzee J (as he then was) held at 141A-142E:

This practice developed under the umbrella of the Supreme Court's inherent power and is a typical example of its application. There are, however, clear and definite limits to this power, and the Court is not, merely in the interests of justice, at large to do or undo as it wishes in the field of adjectival law. The Rules of Court are delegated legislation, have statutory force and are binding on the Court. In procedural matters the Court's inherent power is summarised

thus by Herbstein and Van Winsen in *The Civil Practice of the Superior Courts of South Africa*, 2nd ed., p. 23:

"Where, for example, a particular matter is not provided for by the Rules of Court, the Superior Courts will, in the exercise of their inherent powers, deal with it. The Court has thus an inherent power to order a party to give particulars of an allegation in his pleading, to strike out portions of pleadings or to add further defendants either on the application of a party or on its own motion. In addition to powers under any Rule of Court which might justify a particular procedure, it has the power to prevent any abuse of its process and to prevent vexatious litigation. In the exercise of this power it can prohibit a litigant from bringing further proceedings without leave of the Court, or may order a vexatious litigant to give security for the costs of the other side".

The learned authors refer in a footnote to the oft quoted dictum of GARDINER, J.P., in *Ncoweni v Bezuidenhout*, 1927 CPD 130:

"The Rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice".

(My italics.) Thus, where a particular matter is provided for by the Rules, and they can therefore not be said to be deficient in that respect, the scope for the exercise of inherent powers is limited to prevention of abuse of its process. In *Hudson v Hudson and Another*, 1927 AD 259, DE VILLIERS, J.A., said:

"Every Court has the inherent power to prevent the abuse of the machinery provided for the purpose of expediting the business of the Court."

and at p. 268:

"... but it is a power which has to be exercised with great caution, and only in a clear case."

An examination of the decisions in the Transvaal before 1965 in which a departure from a Rule of Court was allowed shows clearly that only in two respects was this done and then only in the absence of express provision to the contrary and in proper circumstances. The Courts have (1) extended provisions as to time for the doing of any act and (2) condoned certain irregularities or non-compliance with the Rules. See *General Plumbing Supplies (1956) (Pty.) Ltd. v Continental Engineering Co. (Pty.) Ltd.*, 1960 (3) SA 663 (W); *Lenz Township Co. (Pty.) Ltd. v Munnick and Others*, 1959 (4) SA 567 (T); *Badenhorst v Poulitides*, 1963 (1) SA 471 (T); *Service Motor Supplies (1956) (Pty.) Ltd. v Fouche and Another*, 1960 (3) SA 672 (W). Cf.

Rich and Others v Lagerwey, [1974 \(4\) SA 748 \(AD\)](#) at p. 756, where WESSELS, J.A., said the following:

"Prior to the coming into operation of the Uniform Rules on 15 January 1965, DE WET, J.P., considered the question whether a Court has an inherent power to order the hearing of viva voce evidence in provisional sentence cases - see Extension Investments (Pty.) Ltd. v Ampro Holdings (Pty.) Ltd., [1961 \(3\) SA 429 \(W\)](#). After surveying the Rule and authorities in considering the practice in the Courts, he concluded that the Court has no such inherent power. I am in respectful agreement with this conclusion. In my opinion, a Court's power to order the hearing of oral evidence is now governed by the provisions of Rule 87. I am, of course, not here concerned with the defendant's right to require a plaintiff to give evidence in terms of the provisions of sec. 11 of the Limitation and Disclosure of Finance Charges Act, 73 of 1968. I am, likewise, not here concerned with the question whether a Court has the power to order the hearing of evidence, other than that relevant to the verity of the defendant's signature (or that of his agent), where the exercise of a power purports to derive from the consent of the parties. See Williamson v Dragon Mountain Inn (Pty.) Ltd., [1962 \(3\) SA 447 \(N\)](#) at p. 456D - F. I would observe that, having regard to the nature and purpose of provisional sentence proceedings a Court would exercise such a power only in very exceptional circumstances".

It is interesting to note that in the Uniform Rules these two grounds for the exercise of its inherent power, namely the extension of time for doing any act, and the condonation of non-compliance with the Rules, are the only ones which are now mentioned in Rule 27, on which a departure from the Rules may be made by the Court. The fact that the Rules contain such specific powers now seems to me to be a strong indication of an underlying intention that these are the only powers of which the Court is now possessed in this respect, save of course the general overriding power to prevent an abuse of its process, as set out in Hudson's case, supra. In other words, only in those areas where the Rules are silent is there still scope for exercising an inherent power, in the words of GARDINER, J.P., to grant orders "which would help to further the administration of justice".

[20] The admission of evidence before this court would, in my view, be creating a new right for *amici curiae*. However, a High Court may not use its

inherent jurisdiction to create such a right. See *Oosthuizen v RAF* 2011 JOL 26286 (SCA) par 26.

[21] The Supreme Court Act 59 of 1959 (“the Supreme Court Act”) and the Uniform Rules have been passed and promulgated and provide for the procedure to be followed and there is no legislative *lacuna* in the High Court process. It, differently from the Constitutional Court procedure, does not allow for the reception of evidence. There is consequently no basis in law for the reception of further evidence submitted by an *amicus curiae* in the High Court.

[22] Having regard to the foregoing I am of the view that the application to lead further evidence in a High Court has no basis in law and that the application to lead evidence should be refused.

[23] There is no proper explanation why the application was brought at this late hour and no substantive application for condonation has been made for the bringing of the application to be admitted as *amicus curiae* outside the time limits provided for in rule 16A. *In Re Certain Amicus Curiae Applications: Minister of Health and others v Treatment Action Campaign and others* 2002 (5) SA 731 (CC) at 715D it was said “*To this we would add that the application for amicus status must be made timeously and, failing that, condonation must be sought without delay*”. I am of the view that, in the absence of a substantive application for condonation the proposed *amicus curiae* should not be admitted to appear at such a late stage of the proceedings. This failure and its failure to bring the application timeously as

well as the failure to file heads of argument disallow the proposed *amicus curiae* to be admitted in these proceedings today. However, by virtue of the fact that *amici* generally provide assistance to courts, we are prepared to postpone this matter so that the proposed *amicus curiae* can comply with the provisions of Rule 16A in good time.

Hearing of appeal on urgent basis

[24] I now turn to the urgent application. On 19 October 2011, 5 days prior to the hearing of the appeal in the matter of SS, under case number 3056/11, a notice of motion was filed wherein urgent relief is sought. The relief sought is to hear another matter (the N C M matter), on appeal, on the same day before the same court where the SS matter is to be heard.

[25] It is alleged that that there are similarities between the two matters and that the argument in the N C M matter will be similar to the arguments in the SS matter with the result that it will not serve the interests of justice to separate the two matters as both deal with one issue of law. No facts to support the allegation that the interests of justice will not be served by hearing each matter separately have been placed before the court. Indeed, it is clear from the affidavit that there are issues in the N C M matter, which are fundamentally different to the issues in the SS matter. One overlapping argument does not justify that both matters should be heard together.

[26] I am unpersuaded that a new matter should be placed on an appeal roll on an urgent basis. Each matter needs to be properly evaluated. Although the affidavit in support of the application to hear the matters together, refers to heads of argument that were filed at the request of my brother Mokgoatlheng J on 14 October 2011, I was not favoured with these heads of argument, nor was he until 24 October 2011, a day prior to the hearing. It is also said in the affidavit that my brother Mokgoatlheng J required that the proposed appellant file heads of argument.

[27] It is a practice in this Division for the registrars of judges to telephone legal representatives of parties, when judges prepare for the hearing of appeals and heads of argument are absent, to enquire about such absence. This would normally indicate whether a matter is proceeding or whether there was an administrative difficulty with the filing of the heads of argument. The enquiry is based purely on the records received by judges from the Registrar's office. It does not constitute an invitation to a party to file heads of argument, least of all a party who is not a party to the proceedings, the latter which are properly before court. It is purely an administrative function performed by the registrars of judges without having regard to the entitlement or content of the appeal otherwise of a party to submit heads of argument.

[28] I am not prepared to deal with NCM matter on appeal without having an opportunity of having due regard to the record and argument submitted prior to the date of hearing and I repeat what I have said hereinbefore

regarding the late or non filing of heads of argument by the *amicus curiae*, which observations are equally applicable to the urgent application.

Foster Care Parents

[29] A final matter to be dealt with is the absence of the proposed foster care parents before this court. They certainly have a direct and substantial interest in the matter. During the proceedings before the presiding officer it was recorded that Mr and Mrs L were present and that “*Application was made that he/she/they join (s) the proceedings because: Present caregivers and prospective foster parents*”. They were present during the inquiry and were questioned thereat. Utilising my inherent powers I would order that Mr and Mrs L be joined in these proceedings and it would suffice if an affidavit attested to by them is filed in which they advise that they are aware of the proceedings and that they abide the outcome thereof, if they so do. Such affidavit has not been filled and they are properly before us.

Orders

I propose the following orders:

[30] The application by the proposed *amicus curiae* to lead further evidence in the High Court is refused.

[31] The application by the proposed *amicus curiae* to be admitted as such is postponed *sine die*. In order to allow the proposed *amicus curiae* to apply to

be admitted at the hearing of this matter everything necessary is to be done within a period of two weeks of this order by the filing of appropriate papers. Thereafter the parties may move to have the matter set down for hearing with due regard being had to chapter 7 of the Practice Manual of the South Gauteng High Court. If the parties form the view that the matter might be one of long duration i.e. that the arguments might take longer than one day or that the matter requires special allocation, the Deputy Judge President should be approached for appropriate directions regarding the hearing of the matter.

[32] The application by the second and third respondents to be admitted as respondents in the appeal is granted.

[33] The application to hear the appeal of the NCM matter under case number 3057/11 is refused.

Judge W L Wepener
Judge of the High Court

I agree, it is so ordered

Judge R Mokgoatlheng
Judge of the High Court

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DATE OF JUDGMENT	25 OCTOBER 2011