CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 8/02

IN RE CERTAIN AMICUS CURIAE APPLICATIONS

relating to

MINISTER OF HEALTH AND OTHERS Appellants

versus

TREATMENT ACTION CAMPAIGN AND OTHERS Respondents

together with

INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA First Amicus Curiae

COMMUNITY LAW CENTRE Second Amicus Curiae

COTLANDS BABY SANCTUARY Third Amicus Curiae

Heard on : 2 May 2002

Decided on : 2 May 2002

Reasons delivered on : 5 July 2002

JUDGMENT

THE COURT:

[1] This judgment deals with an application for admission as amicus curiae by Professor Mhlongo (the applicant) and an application by Cotlands Baby Sanctuary

(Cotlands), one of the amici, to adduce further evidence in an appeal by the government against orders made against it in the High Court. These applications were made at the commencement of the appeal proceedings and were refused. We intimated that we would furnish our reasons later. These are our reasons.

The amicus curiae application

[2] On the morning of the first day of the hearing Professor Mhlongo, head of the Department of Medicine and Primary Health Care at the Medical University of South Africa, applied to be admitted as amicus for the purpose of presenting certain new evidence. This related to two aspects, namely, first, the circumstances and implications of the withdrawal by the manufacturers of an application to licence nevirapine in the United States of America for the prevention of mother-to-child transmission of HIV; and second, evidence challenging the scientific integrity of the method, the conclusions and the recommendations of the clinical trial that led to the approval of nevirapine for such use.

[3] A person may be admitted as an amicus either on the basis of the written consent of all the parties in the proceedings[1] or on the basis of an application addressed to the Chief Justice.[2] In the latter event admission is entirely in the discretion of the Court. In

1 Rule 9(1).

2 Rule 9(4).

the exercise of that discretion the Court will consider whether the submissions sought to be advanced by the amicus will give the Court assistance it would not otherwise enjoy. The requirements for admission as an amicus are set out in Rule 9 and, as this Court pointed out in *Fose v Minister of Safety and Security*:[3]

> "It is clear from the provisions of Rule 9 that the underlying principles governing the admission of an *amicus* in any given case, apart from the fact that it must have an interest in the proceedings, are whether the submissions to be advanced by the *amicus* are relevant to the proceedings and raise new contentions which may be useful to the Court. The fact that a person or body has, pursuant to Rule 9(1), obtained the written consent of all parties does not detract from these principles; nor does it diminish the Court's control over the participation of the *amicus* in the proceedings, because in terms of subrule (3) the terms, conditions, rights and privileges agreed upon between the parties and the person seeking *amicus* status are subject to amendment by the [Chief Justice]." (Footnotes omitted.)

To this we would add that the application for amicus status must be made timeously and, failing that, condonation must be sought without delay.

[4] In an application for leave to appeal an amicus wishing to be admitted with the leave of the Chief Justice, must apply for admission within 10 days after the application for leave to appeal has been lodged with the Registrar of this Court. Where this is not possible, an application for condonation must be made as soon as possible. Here the application for leave to appeal was lodged on 8 January 2002 and the application for

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[3] 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) para 9.

admission as amicus was made on 2 May 2002, when condonation was first mentioned.

[5] 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. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence.

[6] The applicant's purpose in seeking admission as an amicus was to enable him to challenge the scientific integrity of the clinical trial that led to the approval by the Medicines Control Council of nevirapine for the prevention of mother-to-child transmission of HIV. The applicant wanted to introduce a substantial body of new evidence in support of a challenge to the decision of the Council to approve the use of nevirapine for this purpose. The evidence was untested and the submissions based on it would have opened an entirely new issue on appeal. It was therefore inappropriate for the amicus belatedly to try to introduce the challenge to the approval of nevirapine as a new issue in the case.

[7] Moreover, allowing the applicant to raise this new issue on the first day of a protracted hearing would have been both disruptive and prejudicial to the parties. It would have necessitated the postponement of an otherwise urgent matter and inevitable delay in resolving a matter that required urgent attention. It would therefore not have been in the interests of justice to admit the applicant as an amicus in these circumstances. That is why the application was refused.[4]

Application by Cotlands to adduce further evidence

[8] Cotlands was admitted as an amicus. It then sought leave to place certain evidence before the Court in terms of Rule 30.[5] That rule permits a duly admitted amicus "to canvass factual material which is relevant to the determination of the issues before the Court and which do not specifically appear on the record". However, this is subject to the condition that such facts "are common cause or otherwise incontrovertible" or "are of an official, scientific, technical or statistical nature, capable of easy verification." This rule has no application where the facts sought to be canvassed are disputed. A dispute as to the facts may and, if genuine, usually will demonstrate that they are not

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4 An application by the Clinicians Discussion Forum made on 26 April 2002 was also refused as it was out of time and an attempt was made to introduce new evidence at a very late stage of the hearing.

5 Rule 30(1) of the Constitutional Court Rules provides that:

> "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 which is relevant to the determination of the issues before the Court and which do 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."

"incontrovertible" or "capable or easy verification." Where this is so, the material will be inadmissible.[6]

[9] Accepting that there is some evidence of this nature on the record, Cotlands wanted to present more specific evidence of the circumstances in which HIV-positive children live and die. Such evidence is not irrelevant, although the case was fundamentally about the constitutional right to health care, in particular, the reduction of mother-to-child transmission of HIV. While the proposed evidence might have been useful in educating the Court about such conditions, the evidence on record was sufficient for it to understand the plight of children living with HIV/AIDS. For the Court to determine these issues it needed no further evidence of the living conditions of HIV children.

[10] Apart from the aforegoing, in its letter opposing the admission of Cotlands as an amicus, government had pointed out that the evidence sought to be led might not be incontrovertible and that having regard to the late stage at which the application was made, it would not have sufficient time properly and effectively to respond to the new evidence. Admission of the new evidence might well have opened up a new area of dispute on an issue which was not strictly germane to the issues before the Court.

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6 *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (2) SACR 540 (CC); 1997 (10) BCLR 1348 (CC) paras 22-5; *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) para 10, 11 and 98.

[11] For these reasons the application to adduce further evidence was refused.

Chaskalson CJ	Langa DCJ	Ackermann J	Du Plessis AJ
Goldstone J	Kriegler J	Madala J	Ngcobo J
O'Regan J	Sachs J	Skweyiya AJ	

For the Applicant:	M Khoza
For the Third Amicus Curiae:	S Cowen instructed by the Wits Law Clinic, Johannesburg