

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 25/09

In the application of:

THE HUMAN RIGHTS COMMISSION OF SOUTH AFRICA Applicant for admission
as an amicus curiae

In the matter between:

STEFAANS CONRAD BRUMMER Applicant

and

THE MINISTER OF SOCIAL DEVELOPMENT First Respondent

**DIRECTOR-GENERAL OF THE DEPARTMENT
OF SOCIAL DEVELOPMENT** Second Respondent

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT** Third Respondent

THE SOUTH AFRICAN HISTORY ARCHIVES TRUST Amicus Curiae

WRITTEN ARGUMENT IN SUPPORT OF ADMISSION AS AMICUS CURIAE

1. This written argument is offered in light of the Directions of the Court dated 25 May 2009 ("the Directions"), in which the applicant for admission as amicus curiae ("the SAHRC") was directed to file written argument in support of its admission by 15.00 on Monday 25 May 2009.
2. The Directions were received by the SAHRC representatives at 13h50 on 25 May 2009 (and faxed to the legal representatives at approximately only 13h00). This submission will seek to adhere as closely to the timetable laid down in the Directions as possible. Counsel for the SAHRC apologises to the Court if the attempt to combine a meaningful submission with the attempt to adhere to the timetable leads to a failure to adhere to the 15.00 deadline.
3. On Friday 22 May 2009, the SAHRC filed a comprehensive affidavit detailing why, in its submission, it had an interest in the proceedings as contemplated in Rule 10 of the Court's Rules, and why the submissions it may offer are useful and new in the sense of not being matter addressed by the other parties. The comprehensive nature of the affidavit was partly due to the fact that the respondents had, in answer to the SAHRC's letter requesting consent to admission as amicus curiae,¹ responded by means of a letter dated 22 May 2009 that such consent would be refused, and

¹ Letter of 21 May 2009, Amicus Application attachment "A", p29-33.

offered reasons for such refusal.² The applicant and the amicus curiae, SAHA, both gave their written consent for such admission.³

4. The SAHRC has served and filed its written argument (subject to being admitted as amicus) with the Court,⁴ in which it develops both the reasons why its perspective is submitted to be useful and the submissions it makes on condition that it be admitted as amicus curiae.

5. The interest of the SAHRC is detailed in its application. In particular, with respect to the matter before the Court, which deals with the implementation of the Promotion of Access to Information Act 2 of 2000 (“PAIA”), the SAHRC details its peculiar statutory mandate to monitor the implementation of the Act, and submits that this places it in a unique position to place factual material before this Court in terms of Rule 31, that would form a useful context for the Court’s decision in these confirmation proceedings and in the leave to appeal concerning the question whether the applicant ought to have been granted condonation and access. As the SAHRC is a body statutorily charged with monitoring the implementation of the statute, such information as it has available that may be relevant to the proceedings arising out of this function is pre-eminent Rule 31 material in this matter.

² Letter of 22 May 2009, Amicus Application attachment “D”.

³ Letter Applicant 21 May 2009, Amicus Application attachment “B”, p34; SAHA letter 21 May 2009, Amicus Application attachment “C”, p35.

⁴ On 25 May 2009.

6. The factual information plays a two-part role. First, it is important to note that the confirmation proceedings in the instant case entail, at least at some level, an empirical question, namely how much negative impact on the right to access to justice is in fact entailed by the 30 day limitation contained in s78(2) of PAIA. The SAHRC's experience in the monitoring of the implementation of PAIA, namely that PAIA enforcement through the courts is greatly deterred by the perceived procedure-driven complexity of the process, is submitted to be a useful piece of background factual information that may assist the Court in considering how to answer such empirical question.

7. Furthermore, the SAHRC is in a position to bring to the Court's attention the fact that compliance with time-periods on the part of public bodies who are called upon to grant or refuse requests for access under PAIA is systematically problematic. This, as pointed out in the application, and developed in the written submissions, is further relevant background material against which the confirmation proceedings, as well as the question at issue in the application for leave to appeal (namely condonation for failure to adhere to the time period) may usefully be considered. It is submitted that the fact that the question of adherence to a statutorily mandated time-period on the part of the applicant occurs in the context of systematic failure to adhere to such time periods on the part of

public bodies is a relevant background factor that may weigh in the assessment of these two questions in this application.

8. The respondents object that, if the SAHRC has a complaint about the extent to which public bodies complied with their various obligations under PAIA, then it has remedies that it can pursue in terms of its own statutory mandate, but that such complaints are not relevant to the application before this Court. The SAHRC responds that the failures it highlights in its affidavit are put before the Court as part of the background context in which two empirically driven questions, relevant to the issues before this Court, may usefully be considered – whether the burden placed on applicants in section 78(2) is an appropriate and justifiable, or arbitrary, burden in all the circumstances, and whether condonation ought to have been granted to the applicant for failing to adhere to the time period laid down in section 78(2).
9. The SAHRC is in a position to make available such material as it may glean and present to this Court on the context arising out of its unique statutory position in relation to this Act. Whether or not the material is taken into consideration in the Court's arriving at its decision, the SAHRC submits that it fulfils its statutory and constitutional function by seeking to assist the Court by making such background material as it possesses

available in circumstances where it seems relevant to the determination that the Court is called upon to make in this application.

10. In addition, the SAHRC identified an important dimension in the application – that is the presence of the freedom of expression dimension in the circumstances of this case which deal with an attempt to obtain information to enable the applicant to report accurately on alleged serious misconduct at high governmental level. This dimension, which the SAHRC submits informs the interpretation of section 39(1)(b)(iii)(ee) of PAIA, a provision that has not yet received any judicial attention, was present and raised in the papers in this matter and yet did not receive attention in the written submissions filed by the other parties. In the SAHRC's submission, the issue is potentially decisive of the merits of the appeal.

11. Since this dimension is present in the papers, and, the SAHRC submits, potentially decisive, or at least significant (given the fact that an assessment under section 46 of the Act would have been appropriate in this matter), the fact that it has not been canvassed in the written arguments to date renders it all the more appropriate that it be addressed by an amicus curiae. After all, such a scenario is precisely what Rule 10 envisages – an issue that is in fact raised on the papers, but that is not already canvassed in the other written submissions before the Court.

12. As pointed out by Geoff Budlender:⁵

“It does not follow from the finding in *VRM*⁶ that the amicus is always limited to the issues raised by the parties. If a matter has been raised and dealt with on the papers, the amicus may address it. In *Grootboom*,⁷ the applicants had asserted a right under FC s26 (the right to housing) and FC s28(1)(c) (the child’s right to shelter). The High Court decided the FC s26 argument against the applicants, and the FC s28(1)(c) argument in favour of the applicants. On appeal, the written argument submitted by the parties concentrated on the meaning and import of FC s28(1)(c). The amici curiae sought to broaden the arguments engaged by the Constitutional Court by contending that all of the applicants (including those who were adults) were entitled to shelter by reason of minimum core obligations incurred by the State in terms of FC s26. The Constitutional Court articulated no objection to the content of the amici’s intervention and, ultimately, grounded its findings in terms of its view of the State’s obligations under FC s26.”

13. It is submitted that the nature of the SAHRC’s interest, the nature of the submissions it wishes to advance, and the reasons why these are useful to the Court and not addressed by the other parties are clearly identified in

⁵ Chaskalson et al *Constitutional Law of South Africa* Second Edition, Vol. 1, 8-5 to 8-6.

⁶ *VRM v Health Professions Council of South Africa & Others* 2004 (3) BCLR 311 (T)

⁷ *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC).

the application, as required in the discussion of these issues by this Court in *Institute for Security Studies: In re S v Basson* 2006 (6) SA 195 (CC). The underlying principles laid down there, it is submitted, are applicable in the case of the admission of the SAHRC:

13.1. the submissions are relevant to the issues before the Court;

13.2. the submissions will be useful to the Court; and

13.3. the submissions are different from those of the other parties.

14. The respondents also suggest that, given that the written argument of the SAHRC on the submissions it seeks to advance will be received only the day before the scheduled hearing, the respondents may be prejudiced in their ability to deal with such submissions properly.

15. The timing of the filing of the submissions was a function of the timing of the filing of the submissions of the other parties relative to the date scheduled for the hearing. As pointed out in its application, the SAHRC was able to assess the extent to which it could add useful submissions that were not already addressed by the parties only once the written submissions had been received, and the respondents' submissions were received only on 19 May 2009. The Rule provides for filing an application

to be admitted as an amicus within 5 days of receipt of the respondents' submissions or the expiry of the time for such filing, precisely because it is only after such submission that a prospective amicus applicant can conscientiously state that its submissions are not addressed by the other parties.

16. It appears from the Directions of the Court as if the Court envisages the possibility of addressing any possible prejudice that the respondents may face in needing to deal with the SAHRC's written submissions by considering the possibility of further directions relating to submissions in answer to the written submissions filed by the SAHRC on 25 May 2009. Naturally, the SAHRC can have no objection to any such opportunity being afforded to any party who feels that party wishes to be in a position to address submissions made by the SAHRC.

17. The position remains that, if and to the extent that the submissions sought to be advanced by the SAHRC are indeed useful and relevant to this application, they ought, in the interests of justice, to form part of the determination of this matter. This is particularly so given the fact that the freedom of expression and section 46 public interest dimension was, we submit, so centrally present and applicable in this matter. Furthermore, given that the question of the applicability of the international jurisprudence surrounding a potential clash of free speech and fair trial

interests, in the sphere of the application of s39(1)(b)(iii)(ee) would serve, in our submission, usefully to assist in the proper determination of a provision that has not received any judicial attention, it would not be in the interests of justice to neglect such a dimension.

18. If the only way to have these matters fairly and appropriately adjudicated in this Court must entail an opportunity to be afforded to others to file written submissions in response, then it is submitted this would be an appropriate mechanism to address any potential prejudice that may arise out of the admission of the SAHRC as an amicus so shortly before the hearing, without losing the opportunity of having an important dimension present in the matter feature in its determination.

19. The Directions provide that any affidavits in response to the SAHRC affidavit seeking admission as amicus curiae be filed by 09.00 am on 26 May 2009. The SAHRC will endeavour, in the hearing of its application for admission, to deal with whatever is filed in accordance with such Directions in argument.

20. The SAHRC respectfully requests the Court to consider the elaboration of its interest and the usefulness of its submissions contained in both its application to be admitted filed on 23 May 2009 and in its written argument

filed on 25 May 2009, and to consider these submissions in the light of such elaboration.

Frank Snyckers

Kate Hofmeyr

Kirsty McLean

Counsel for SAHRC

25 May 2009