

RELEVANCE AND IMPORTANCE OF THE AMICUS CURIAE PARTICIPATION IN *MAYELANE V NGWENYAMA*

[DISCUSSION OF *MAYELANE V NGWENYAMA* 2013 4
SA 415 (CC)]

Amanda Spies
LLB LLM (UP) PHD (WITS)
Senior Lecturer, Department Public, Constitutional and International Law, University of
South Africa*

1 Introduction

An *amicus curiae* (“friend of the court”) is a non-litigious party to litigation that assists courts to reach a decision on areas of the law it regards as complex and beyond its expertise.¹ Over the years, *amicus curiae* participation has evolved and today, it enables courts to understand the point of view of those who will be affected by their decisions, recognising that the public has a legitimate interest in influencing the way in which law is made.²

Amicus curiae participation lies solely within the discretion of a court and, organisations or individuals wanting to participate as such have to approach a relevant court for permission to do so. The Constitutional Court has set the benchmark for *amicus curiae* participation in South African law, as it was the first court to officially adopt rules that regulated this form of participation.³ In terms of these rules, a party wishing to participate as *amicus curiae* needs to lodge an application clearly setting out its interest in the matter, the position it plans to adopt and indicate that its submissions would be relevant and different from those of the litigating parties.⁴ Although the Constitutional Court rule suggests that admission as *amicus curiae* can be sought with the

* This case note is based on a case study that formed part of my PHD study entitled *Amicus Curiae Participation, Gender Equality and the South African Constitutional Court*.

¹ M Lowman “The Litigating *amicus curiae*: When Does the Party Begin After the Friends Leave” (1992) 41 *Am U L Rev* 1243 1244.

² C Murray “Litigating in the Public Interest: Intervention and the *amicus curiae*” (1994) 10 *SAJHR* 240 246; P Bryden “Public Interest Intervention in the Courts” (1987) 66 *Can BR* 490 513.

³ Rule 10 of the Constitutional Court Rules GN R 1675 in *GG* 25726 of 31-10- 2003. Other courts have adopted similar rules see for example rule 16A of the Uniform Court Rules first promulgated under GN 315 in *GG* 19834 of 12-03-1999; rule 16 of the Supreme Court of Appeal Rules first promulgated under GN 1523 in *GG* 19507 of 27-11-1998; rule 7 of the Labour Court Rules first promulgated under GN 1665 in *GG* 17495 of 14-11-1996; rule 7 of the Labour Appeal Court Rules first promulgated under GN 1666 in *GG* 17495 of 14-10-1996; rule 14 of the Land Claims Court Rules first promulgated under GN 300 in *GG* 17804 of 21-02-1997.

⁴ Rule 10(6) of the Constitutional Court Rules; G Budlender “Amicus Curiae” in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 7 2006) 8-1.

consent of the parties, or via the permission of the Chief Justice,⁵ the Court has unequivocally stated that its permission is the only requirement pertaining to admission, irrespective of the consent obtained by the parties.⁶

In the *Institute for Security Studies: In re Basson* case, the Constitutional Court analysed the rule regarding *amicus curiae* participation and provided clarity for all subsequent applications. The Court stressed that in exercising its discretion whether to allow a person or organisation to act as *amicus curiae*, it would consider whether the submissions were relevant and useful to the Court and, most importantly, different from those of the other parties.⁷ This is very relevant, as an *amicus curiae* does not have the right to raise a new cause of action, and is limited to the record of appeal, unless the new material is, in accordance with rule 31, common cause or otherwise incontrovertible or is of an official, scientific, technical or statistical nature and capable of easy verification.⁸ The Constitutional Court has followed a strict approach to the type of evidence allowed by *amicus curiae* and have identified the purpose of *amicus curiae* participation by stating that:

“The role of an *amicus* is to draw the attention of the Court to the relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in 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 and introduce new contentions based on fresh evidence.”⁹

Considering this background, *amicus curiae* participation has become particularly relevant in litigating on customary law matters, as the actual content of custom has to be established. There is strong support that customary law as it is lived by its people should be heeded (what is known as “living” customary law), as opposed to the codified and outdated sources of customary

⁵ Rule 10(1) of the Constitutional Court rules state:

“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).”

⁶ *Institute for Security Studies: In re S v Basson* 2006 6 SA 195 (CC) para 6, the judgment dealt with the application for admission as *amicus curiae* by the Institute for Security Studies. The respondent declined the necessary consent to act as *amicus*, upon which the Institute applied to the Court for admission as *amicus curiae*.

⁷ Para 7.

⁸ Budlender “Amicus Curiae” in *CLOSA* 8-11; Rule 31 of the Constitutional Court Rules states:

“(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 relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts are— (a) common cause or otherwise incontrovertible; or (b) are of an official, scientific, technical or statistical nature capable of easy verification.(2) 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 a proper decision by the Court.”

⁹ *In Re: Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign* 2002 5 SA 713 (CC) para 5.

law relied upon mostly in terms of the Black Administration Act 38 of 1927.¹⁰ The problem with establishing the content of so-called “living” customary law is that it is drawn from modern social practice and in conflict with courts’ need for legal certainty.¹¹

Amicus curiae participation has become particularly relevant in this sense as an *amicus* could be ideally placed to assist a court to establish the content of customary law. The Constitutional Court’s recent decision in *Mayelane v Ngwenyama* (“*Mayelane*”)¹² illustrates the unique role of *amicus curiae* participation in customary law matters. The discussion that follows focuses on the role and (potential) influence of the *amicus curiae*’s arguments in the *Mayelane* matter, especially in the context of the Constitutional Court’s consideration of customary law.

2 Polygyny and consent: The case of *Mayelane v Ngwenyama*

The customary law of marriage allows for polygyny, enabling a man to marry more than one wife if he so wishes.¹³ The recognition of these marriages was a contentious issue when the Recognition of Customary Marriages Act 120 of 1998 (the “RCMA”) was drafted. The practice was viewed as a patriarchal institution that provided men with access to the sexual, reproductive and other services of several women, while the wives have to share the material and emotional benefits of a single man.¹⁴

Research indicated that many women were against the legal recognition of polygyny. However, non-recognition was not really an option, as many women were in these marriages and continued to enter into them for various reasons.¹⁵

During the drafting of the RCMA, a compromise was reached in extending legal protection to women and children that found themselves in polygynous marriages.¹⁶ The compromise was the serial division of estates that required a husband, who wanted to enter into a further customary marriage, to make

¹⁰ TW Bennett “Re-introducing African Customary Law to the South African Legal System” (2009) 57 *Am J Comp L* 1 2. This position was also confirmed by the Constitutional Court in matters such as *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC); *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).

¹¹ Bennett (2009) *Am J Comp L* 9.

¹² *Mayelane v Ngwenyama and Minister of Home Affairs* 2013 4 SA 415 (CC).

¹³ TW Bennett *Customary Law in South Africa* (2004) 242.

¹⁴ L Mbatha, N Moosa & E Bonthuys “Culture and Religion” in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 158 178.

¹⁵ Mostly women enter into polygamous unions as they believe that it will provide them with more independence in sharing their burden of work (especially in raising children) that would enable them to obtain work outside the home; see Mbatha et al “Culture and Religion” in *Gender, Law and Justice* 178; F Kaganas & C Murray “Law, Women and the Family: The Question of Polygyny in a New South Africa” (1991) *Acta Juridica* 116 130.

¹⁶ C Albertyn & L Mbatha “Customary Law Reform in the New South Africa” in SJR Cummings, H van Dam & M Valk (eds) *Gender, Citizenship and Governance: A Global Sourcebook* (2004) 51 54.

an application to a court to approve a written contract regulating the future matrimonial property systems of the marriages.¹⁷

However, there are still many uncertainties, as the RCMA does not provide for the equal treatment of the different wives in polygynous marriages.¹⁸ This is especially relevant with regard to consent, as the RCMA only requires consent of the parties to the marriage and it is uncertain if consent of existing wives is required for the conclusion of a subsequent customary marriage. In this regard, section 3 of the RCMA only states:

- “(1) For a customary marriage entered into after the commencement of this Act to be valid –
- (a) The prospective spouses-
 - (i) must be above the age of 18 years; and
 - (ii) must both consent to be married to each other under customary law; and
 - (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.”

The facts of the *Mayelane* case illustrate some of the intricacies a polygynous marriage brings to the fore. The question was whether the consent of a first wife was necessary for the conclusion of a subsequent customary marriage and whether compliance with section 7(6) of the RCMA was a requirement for the validity of a subsequent customary marriage.

The applicant, Mayelane married her husband in terms of Tsonga customary law in 1984. Upon his death in 2009, she approached the Department of Home Affairs to register her marriage. She was informed that another woman, Ngwenyama, who allegedly entered into a customary marriage with her husband in 2008, had also applied for registration.¹⁹ Both wives disputed the validity of the other’s marriage.

Mayelane applied to the High Court for an order declaring her customary marriage valid and that of Ngwenyama’s null and void on the basis that she did not consent to the second marriage as required by Tsonga custom. The High Court granted both orders and determined the matter by interpreting and applying section 7(6) of the RCMA and without considering the consent issue.²⁰ Bertelsman J interpreted section 7(6) to be peremptory and held that if a husband failed to obtain court approval of a document regulating the proprietary consequences of his marriages, a subsequent marriage would be void.²¹ Ngwenyama appealed the decision to the Supreme Court of Appeal (“SCA”).

¹⁷ S 7(6) of the RCMA; see C Muller-Van der Westhuizen “Vonnisbespreking: Die Onsekerhede Aangaande die Toepaslike Huweliksgoederebedeling(s) in Poligame Gewoonteregterlike Huwelike by Nienakoming van Artikel 7(6) van die Wet op Erkenning van Gebruiklike Huwelike” (2014) 11 *LitNet Akademies* 155 for a discussion of the *Mayelane* judgment in light of the uncertainties surrounding the matrimonial property systems that arise in polygynous marriages should section 7(6) of the RCMA not be complied with.

¹⁸ S 6 of the RCMA does provide for the equal status and capacity of spouses but this section only regulates equal treatment between husband and wife and not equality of treatment between different wives; also see Mbatha et al “Culture and Religion” in *Gender, Law and Justice* 179.

¹⁹ *Mayelane v Ngwenyama and Minister of Home Affairs* 2013 4 SA 415 (CC) para 4.

²⁰ Para 5.

²¹ Para 6.

The SCA found that section 7(6) did not regulate the validity of a customary marriage, but only its proprietary consequences.²² It confirmed the order of the High Court, but overturned the order of invalidity in relation to Ngwenyama's (the second wife's) marriage. Mayelana was not satisfied with the outcome of the case and she appealed to the Constitutional Court.

For the Constitutional Court, unlike the High Court and SCA, the consent issue was crucial in adjudicating the matter. The Constitutional Court's difference in interpretation highlights the difficulty and uncertainty that courts have in adjudicating customary law matters. Courts, as is evident from the approach followed by the High Court and SCA, are much more comfortable in relying on clear legal rules (section 3 and 7(6) of the RCMA) in adjudicating customary matters rather than relying on the application of actual customary law. The Constitutional Court heeded Mayelane's argument that she did not consent to the subsequent marriage and instead of framing the matter as mere interpretational of the relevant legislation, decided to ground its decision in the custom itself. The Constitutional Court issued specific directives and requested the parties to consider the following:

- “(i) whether it was necessary for the applicant to lodge a cross-appeal to the Supreme Court of Appeal in view of the fact that she was the successful party in the High Court proceedings.
- (ii) If no cross-appeal was necessary:
 - (a) whether the contrary finding of the Supreme Court of Appeal raises an issue that confers jurisdiction on this Court to determine the application for leave to appeal and, if leave is granted, the appeal;
 - (b) whether it is a requirement for the validity of a second or subsequent customary marriage that the consent of the wife of the first customary marriage had to be obtained; and, if so;
 - (c) whether the High Court should have found that the necessary consent was obtained.”²³

It was only after all the parties had filed their submissions and the Court had the benefit of all the arguments, that it again issued a set of directives that hinted towards the fact that it planned to ground its decision in the particular custom. The second set of directives requested:

- “1. The parties and the *amici* are invited to file statements by way of affidavit or affirmation on the issues described in paragraph 2 below. The statements must be lodged by 22 March 2013.
- 2. The above statements must address the following questions:
 - (i) under Tsonga customary law, is the consent of a first wife a requirement for the validity of a subsequent customary marriage entered into by that first wife's husband;
 - (ii) if so –
 - (a) What are the requirements, if any, regarding the manner and form of the consent; and
 - (b) What are the consequences, if any, of the failure to procure the first wife's consent or of any defects in relation to the manner or form of the consent?
- 3. The above sworn statements must have due regard to and adequately reflect authoritative sources of customary law, which sources may include writers on customary law, case law, testimony from traditional leaders and other expert evidence.”²⁴

²² Para 6 the SCA decision is reported as *MN v MM* 2012 4 SA 527 (SCA).

²³ Constitutional Court Directions in *Mayelane v Ngwenyama and Minister of Home Affairs* 2013 4 SA 415 (CC).

²⁴ Constitutional Court Directions in *Mayelane v Ngwenyama and Minister of Home Affairs* 2013 4 SA 415 (CC).

With the Court's focus on the particular custom and the need to take account of living customary law,²⁵ the participation by the *amicus curiae* became particularly relevant as an avenue through which proof of practised custom and the reality of peoples lives' could be placed before the Court. The analysis that follows focuses on the role that the *amici curiae* played in establishing the content of customary law, and highlights the role that *amicus curiae* participation plays in influencing judicial decision-making.

3 The participating *amici curiae*

The Women's Legal Centre ("WLC") and the Commission for Gender Equality ("CGE") together with the Rural Women's Movement ("RWM"), applied to be admitted as *amici curiae* in the Constitutional Court. All these organisations had a history of participating as *amici curiae* in customary law matters with the CGE participating as *amicus curiae* in both *Bhe v Magistrate, Khayelitsha* ("*Bhe*")²⁶ and *Shilubana v Nwamitwa* ("*Shilubana*")²⁷; the RWM participating in *Shilubana* and the WLC participating in *Gumede v President of the Republic of South Africa* ("*Gumede*")²⁸ and the SCA decision in *Mayelane*.

The WLC focused on establishing equality between the different wives questioning the Constitutional Court's decision to focus on consent.²⁹ Before the Court issued its second set of directives, the WLC argued that the issue of consent was an issue of custom and that there was not sufficient information before the Court to establish or develop the applicable customary law rules.³⁰ The WLC further argued that it was not just consent that had to be established, but also the "contours of a consent requirement".³¹ In considering consent, this would mean that the Court would have to view consent within the context that women do not have an equal bargaining position in relationships and establish what it entails by seeking answers to questions such as: What does consent mean? Does the wife express consent or would tacit consent suffice? What must the consent relate to? Is consent to polygyny enough or must it relate to a particular individual and her family? Should consent be given at the time of the subsequent marriage or could it be procured earlier?³²

After the Court issued its second set of directives (set out above) and it was clear that it planned to ground its decision within the particular custom, the WLC filed an expert affidavit by an elder and advisor to traditional leaders.³³

²⁵ See in this regard the decisions of the Constitutional Court in *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC); *Shilubana v Nwamitwa* 2009 2 SA 66 (CC).

²⁶ 2005 1 SA 580 (CC).

²⁷ 2009 2 SA 66 (CC).

²⁸ 2009 3 SA 152 (CC).

²⁹ Notice of Motion to be admitted as *amicus curiae* in *Mayelane v Ngwenyama and Minister of Home Affairs* 2013 4 SA 415 (CC) para 4.

³⁰ Written Submissions of the WLC in *Mayelane v Ngwenyama and Minister of Home Affairs* 2013 4 SA 415 (CC) para 35.

³¹ Para 35.

³² Para 35.1.

³³ Affidavit of Hlanganani Hamilton Mayimele in *Mayelane v Ngwenyama and Minister of Home Affairs* 2013 4 SA 415 (CC).

The deponent, Mr Mayimele, stated that a first wife may be informed of a subsequent decision, but that the husband makes the decision to marry again.³⁴

The CGE and RWM took a different view. They grounded their arguments in the application of customary law. For them the specific rules of living custom had to be established and, if necessary, developed to bring them in line with the Constitution of the Republic of South Africa, 1996 (“Constitution”). Before the Court issued its second set of directives, they were in favour of remitting the matter back to the High Court to establish the particular custom.³⁵

In response to the Court’s second set of directives, the CGE and RWM filed a range of affidavits in which they directly consulted with members of the Tsonga community that described the law and practices relating to polygyny in that culture.³⁶ In contrast to the evidence provided by the WLC, most of the affidavits confirmed that consent was a requirement in the conclusion of subsequent Tsonga marriages.³⁷

The contradiction in the affidavit evidence presented by the *amici curiae* is interesting and could be ascribed to the different litigation strategies followed by the organisations, which influenced their choice in deponents. The CGE and especially the RWM felt strongly about the protection and development of customary law and followed an approach that centred on the community’s interpretation of custom.³⁸ In general, the WLC is rights centred in its litigation strategy, wanting to benefit as many women as possible from a single decision and, in this case, a remedy grounded in custom would only benefit Tsonga women.³⁹

Considering the arguments by the *amici curiae*, it should be established whether it influenced the decision reached by the Court and if it enabled the Court to make a more informed decision conscious of the impact the finding might have on the relevant communities.

4 The Constitutional Court’s decision and its interpretation of the *amici curiae*’s arguments

With the Constitutional Court’s second set of directives, it was clear that the case dealt with establishing the content of living customary law and its development, if needed.⁴⁰ The Constitutional Court confirmed the SCA’s

³⁴ Para 56.

³⁵ Written Submissions of the CGE and NMRW in *Mayelane v Ngwenyama and Minister of Home Affairs* 2013 4 SA 415 (CC) para 10.2.

³⁶ The affidavits included affidavits by Mbhazima Surprise Bungeni; Mamaila Rikhotso; Mkhathshane Daniel Shiranda and Khazamula Isaac Nkanyani and an expert affidavit by Dr Mabalana Mhlaba.

³⁷ See the Court’s summary of the affidavit evidence in *Mayelane v Ngwenyama and Minister of Home Affairs* 2013 4 SA 415 (CC) paras 55-59.

³⁸ Written submissions of the CGE and NMRW in *Mayelane v Ngwenyama and Minister of Home Affairs* 2013 4 SA 415 (CC).

³⁹ For a discussion of the WLC’s litigation strategy see R Cowan “The Women’s Legal Centre During its First Five Years” (2005) *Acta Juridica* 273 280 also available on their website at <<http://www.wlce.co.za>> (accessed 02-12-2014).

⁴⁰ *Mayelane v Ngwenyama and Minister of Home Affairs* 2013 4 SA 415 (CC) para 1. The majority decision was delivered by Froneman J, Khampepe J and Skweyiya J with Moseneke DCJ, Cameron J and Yacoob J concurring.

decision and found that the RCMA did not prescribe any consent requirements for a valid second or subsequent customary marriage.⁴¹ It accepted the RWM's arguments and found that it was necessary to determine the content of living custom.⁴² The Court greatly relied on the affidavit evidence filled by the *amici curiae* giving credit to them in the judgment:

"The *amici* provided invaluable submissions throughout the proceedings before this Court. In particular, the *amici*'s submissions in response to this Court's request for further information regarding Xitsonga customary law have been crucial to the outcome of this case."⁴³

The variations in the affidavit evidence was not regarded as material, but seen as "nuance and accommodation" and the Court accepted that Tsonga custom required consent for a subsequent marriage.⁴⁴

Having established the consent requirement under customary law, it proceeded to consider the relevant evidence within the constitutional framework of equality and dignity.⁴⁵ Unlike the WLC, who focused on equality between the different wives and their equal treatment, the Court focused on equality between husband and wife:

"Are the first wife's rights to equality and human dignity compatible with allowing her husband to marry another woman without her consent? We think not. The potential for infringement of the dignity and equality rights of wives in polygynous marriages is undoubtedly present. First, it must be acknowledged that 'even in idyllic pre-colonial communities, group interests were framed in favour of men and often to the grave disadvantage of women and children.' While we must accord customary law the respect it deserves, we cannot shy away from our obligation to ensure that it develops in accordance with the normative framework of the Constitution. Second, where subsequent customary marriages are entered into without the consent of the first wife, she is unable to consider or protect her own position. She cannot take an informed decision on her personal life, her sexual or reproductive health, or on the possibly adverse proprietary consequences of a subsequent customary marriage. Any notion of the first wife's equality with her husband would be completely undermined if he were able to introduce a new marriage partner to their domestic life without her consent."⁴⁶

Despite finding that Tsonga custom did require consent, the Court found that the particular custom should, nevertheless, be developed in light of the principles of equality and dignity, to unequivocally require consent.⁴⁷ Himonga and Pope are of the opinion that this decision to develop custom could have been motivated by the variations in the witnesses' affidavits and the Court did not want any uncertainty in this regard.⁴⁸

Ngwenyama's marriage was found to be null and void. To protect parties in existing customary marriages the requirement was to be prospective and made known to the public through the Houses of Traditional Leaders and the Minister of Home Affairs.⁴⁹

⁴¹ *Mayelane v Ngwenyama and Minister of Home Affairs* 2013 4 SA 415 (CC) para 45.

⁴² Para 45.

⁴³ Para 18.

⁴⁴ Para 54-61.

⁴⁵ Para 62-69.

⁴⁶ Para 71-72 (footnotes omitted).

⁴⁷ Para 75.

⁴⁸ C Himonga & A Pope "Mayelane v Ngwenyama and Minister of Home Affairs: A Reflection on Wider Implications" (2013) *Acta Juridica* 318 324.

⁴⁹ *Mayelane v Ngwenyama and Minister of Home Affairs* 2013 4 SA 415 (CC) para 89.

The minority decisions, delivered by Zondo J and Jafta J (with Mogoeng J and Nkabinde J concurring) respectively, were both critical of the Court's call for further evidence pertaining to the content of custom and the majority's reliance on this evidence. Zondo J argued that the Court should not have called for additional evidence and that the matter could have been dealt with on the records of the High Court and SCA. He held that the Constitutional Court, as an appellate court, was not in a position to deal with contradictory affidavit evidence. For Zondo J, the evidence tendered by Mayelane and the affidavit from her uncle was sufficient in establishing that consent was a requirement in Tsonga custom and he held that Ngwenyama failed to prove that she entered into a customary marriage with the deceased. According to him, there was no valid marriage between Ngwenyama and the deceased, irrespective of whether one would take into account the additional affidavits.⁵⁰

Jafta J asserted that the development of customary law was not required as this was never argued by any of the parties and fell outside the scope of the case. For Jafta J, there were no compelling reasons, especially when not argued by the parties, for the Constitutional Court to sit as a court of first and last instance to consider the development of customary law. He agreed with Zondo J and held that Ngwenyama failed to prove that a customary marriage existed and that Tsonga custom required consent, which rendered development unnecessary.⁵¹

The minority decisions indicate that there is still a great deal of uncertainty as to the role and acceptability of the *amicus curiae* in presenting evidence to a court pertaining to the content of custom. This might not be attributed to the role of *amicus curiae* participation in general, but rather an uncertainty as to what would be regarded as sufficient proof of actual custom. It is clear that the minority was uncomfortable with accepting what they regarded as contradictory affidavit evidence as proof of custom. Himonga and Pope point to the fact that one should remember that the source of living customary law is the community as defined by the context of the facts of each case.⁵² They supported the majority decision that relied on affidavit evidence from a cross-section of people that represented the community.⁵³

From the above, it is clear that the Court was influenced by the *amici curiae*'s arguments and it is necessary to confirm the impact this method of participation has in assisting courts in reaching decisions conscious of its wider implications.

5 Confirming the importance of *amici curiae* participation in litigation

From the above discussion, it is clear that *amicus curiae* participation in litigation is important, allowing participation in court by a range of people and representing interests that go well beyond those of the actual parties. The

⁵⁰ Para 90-131.

⁵¹ Para 132-157.

⁵² Himonga & Pope (2013) *Acta Juridica* 327.

⁵³ 327.

Mayelane judgment is indicative that *amicus curiae* participation may lead a court to decide a matter differently than it would have otherwise, conscious of its impact through the “multidimensional and anti-foundational representation of people’s lives”.⁵⁴ Ultimately, *amicus curiae* participation sensitises a court in its decision-making process and ensures that a court is better informed when making its decision.⁵⁵

The *amicus curiae* participation was of specific importance in *Mayelane* as it was difficult to adjudicate a matter that seemingly pitted two women, each equally vulnerable and disadvantaged, against each other. The Court attached great value to the *amici curiae* briefs and engaged with several of the arguments indicating the importance and relevance of this method of participation.

The *Mayelane* judgment also unequivocally established the place of customary law within our legal system, rejecting arguments by the WLC which had its basis in the law of contract, stressing that the focus had to be on customary law:

“Courts must understand concepts such as “consent” to further customary marriages within the framework of customary law, and must be careful not to impose common-law or other understandings of that concept. Courts must also not assume that such a notion as “consent” will have a universal meaning across all sources of law.”⁵⁶

The Court accepted and adopted the arguments of the CGE and RWM finding that the content of custom had to be established and developed to bring it in line with the Constitution.

Although the Court rejected the WLC’s arguments, it did have merit in focusing on the right to dignity and equality of the different wives. The Court’s approach has been criticised as it seemingly favours the first wife’s right to equality and dignity over a subsequent wife’s.⁵⁷ In this regard, Himonga and Pope argue that the Court should have considered the statutory requirements for customary marriages and the *de facto* impact of the RCMA in the lives of ordinary people.⁵⁸ This would have required the Court at least to give an indication of the husband’s legal obligations in terms of the RCMA and the moral obligation he has to “respect the constitutional rights of the women he wishes to call his wives.”⁵⁹ Although the WLC’s approach was rights-based in relation to the law of contract, it still had valuable arguments in relation to balancing the rights of both wives, which according to them, was a constitutional imperative.

The Court, in issuing its second set of directives, prevented the matter from being remitted back to the High Court and established a unique role for *amicus curiae* in providing the relevant evidence pertaining to lived custom.

⁵⁴ J Conaghan “Intersectionality and UK Equality Initiatives” (2007) 23 *SAJHR* 317 322.

⁵⁵ Murray (1994) *SAJHR* 250.

⁵⁶ *Mayelane v Ngwenyama and Minister of Home Affairs* 2013 4 SA 415 (CC) para 49.

⁵⁷ Himonga & Pope (2013) *Acta Juridica* 332; P de Vos “Between a Rock and a Hard Place for Wives in Polygynous Marriages” (11-06-2013) *Constitutionally Speaking* <<http://constitutionallyspeaking.co.za/between-a-rock-and-a-hard-place-for-wives-in-polygynous-marriages/>> (accessed 24-03-2013).

⁵⁸ Himonga & Pope (2013) *Acta Juridica* 332.

⁵⁹ 332.

In its previous decisions pertaining to customary law,⁶⁰ the *amicus curiae* complied with its more traditional role in assisting the Court in an area of law with which it might be unfamiliar. However, in *Mayelane* the Court specifically relied on the *amici curiae* to establish the content of customary law. The majority's decision in this regard was not well received and the minority decisions clearly indicate the uncertainty in relation to establishing the content of actual custom.

However, this should not negate the role that *amicus curiae* participation could play in future customary law matters. Certain organisations would be ideally placed to establish the content of custom, as illustrated by the RWM, a national membership organisation that serves the interest of rural women in a customary setting.⁶¹ The *Mayelane* judgment confirmed the importance of *amicus curiae* participation in customary matters and even more so in the establishment of the content of customary law.

As stated, the purpose of *amicus curiae* participation is to ensure that courts understand the point of view of those who would be affected by their decisions and both the *amici curiae* in *Mayelane* were able to represent the lives of rural women living under customary law. The WLC focused on these women's right to equality and dignity, with the CGE and the RWM stressing the importance of acknowledging the role that custom played in their lives. Both of the *amici curiae*'s arguments were equally important and necessary for the Court to make a decision, with due regard of its implications.

Albertyn aptly frames the need for *amicus curiae* participation in customary matters, especially where equality is a consideration:

“Claims of culture, gender and diversity – controversial and contested as they are – emphasise the need for multiple voices and multiple sites of engagement. The context of the claim needs to be clearly understood, competing narratives of culture aired, the interpretation and application of values made public and debated.”⁶²

Although the *amici curiae* played an important role in assisting the Court to prove the content of custom, courts should be wary and closely scrutinise the organisational intent of participating *amicus curiae*. *Amicus curiae* might choose a version of custom that best suit their organisational goals, as illustrated by the evidence tendered by the WLC. However, this should not negate the role that *amicus curiae* participation could play in future matters concerning customary law. This will require courts to be cautious in its admission of *amicus curiae*, choosing organisations that would best promote the development of custom as opposed to its own litigation strategy.

Although the litigation strategy of the *amici curiae* has been divergent, the *amici curiae* were able to represent the voices of women in polygynous marriages by focusing on their constitutional rights entitlements within a customary law framework. The Constitutional Court, by relying on the

⁶⁰ *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC); *Shilubana v Nwamitwa* 2009 2 SA 66 (CC); *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC).

⁶¹ NMRW Mission Statement <http://www.nmrw.org/?page_id=2> (accessed 01-12-2014).

⁶² C Albertyn “‘The Stubborn Persistence of Patriarchy’? Gender Equality and Cultural Diversity in South Africa” (2009) 2 *Constitutional Court Review* 165 196.

affidavits of the *amici curiae* to establish the content of custom, opened the door for a renewed role for *amicus curiae* participation in customary matters and it will be interesting to scrutinise the impact these participations has in future customary law matters.

SUMMARY

Amici curiae have for many years assisted courts to reach decisions with the Constitutional Court being the first court to acknowledge this contribution by implementing specific rules to administer *amici curiae* participation. Recently the participating *amici curiae* in *Mayelane v Ngwenyama* were able to establish a unique role and identity for this form of participation in litigation by assisting the Constitutional Court to determine the content of living customary law. This contribution explores the *amici curiae* participation in the *Mayelane* matter and analyses the Constitutional Court's reliance on the *amici* to inform it on the content of Tsonga custom to establish if a wife's consent is a requirement in entering into a subsequent marriage. The analysis is called for to confirm the impact *amici curiae* participation has in assisting courts to reach decisions conscious of the impact it has on the community it serves.