

**IN THE HIGH COURT OF SOUTH AFRICA
KWA-ZULU NATAL DIVISION, PIETERMARITZBURG**

Case No.: 13062/22P

In the application of:

THE HELEN SUZMAN FOUNDATION

Applicant for Admission
as *Amicus Curiae*

In re the matter between:

WILLIAM JOHN DOWNER

Applicant

and

JACOB GEDLEYIHLEKISA ZUMA


Respondent

FILING SHEET

KINDLY TAKE NOTICE THAT the Helen Suzman Foundation ("**the HSF**") hereby delivers the following documents in the application for admission as *amicus curiae* under case no. 12770 / 2022P:

1. Practice note for the HSF;
2. Short-form heads of argument for the HSF;
3. Long-form heads of argument for the HSF;
4. List of authorities for the HSF; and
5. Draft order.

Dated at **Johannesburg** on **6 December 2022**.

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THE HELEN SUZMAN FOUNDATION'S PRACTICE NOTE

DATE OF HEARING: 8 DECEMBER 2022

1. Case name and number

As set out above.

2. Nature of relief sought

The Helen Suzman Foundation (**HSF**) seeks leave to be admitted as *amicus curiae* in the application to set aside the respondent's summons in the private prosecution proceedings to be conducted by him against the applicant (**the main application**).

3. **Issues for determination**

Whether the HSF has met the requirements for admission as *amicus curiae* in that it has an interest in the main application and proposes to make submissions that will be different from the parties, relevant and useful to the court deciding the main application.

4. **Incidence of onus**

The court has a general discretion whether to admit an *amicus curiae*.¹ The applicant for admission is required to show that it has met the requirements for admission.

5. **Common cause facts**

5.1 The HSF is a public interest organisation.

5.2 The HSF seeks leave to be admitted as *amicus curiae* to advance two main arguments at the hearing of the main application.

6. **Material disputes of fact**

There are no material disputes of fact relevant to the determination of the HSF *amicus* application. There are numerous unfounded and gratuitous allegations made against the HSF in the answering affidavit of the respondent. While those allegations are strenuously denied by the HSF, they are not pertinent to the question whether the HSF should be admitted as *amicus curiae*.

¹ *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) para 22

7. **Parts of the papers necessary for determination**

7.1 The founding affidavit in the HSF's application for admission as *amicus curiae*.

7.2 From paragraph 40 to 125 of the respondent's consolidated answering affidavit filed on 2 December 2022.

7.3 The founding papers in the main application.

8. **Brief summary of the applicants' arguments**

8.1 The HSF will demonstrate that it has met the three requirements for admission as *amicus curiae* in Mr Downer's application to stay the private prosecution brought against him by Mr Zuma.

8.2 First, the HSF has met the procedural requirements for admission. There is no merit to Mr Zuma's objection that the application is out of time, since the HSF filed its application the day after it received Mr Downer's consenting response. In any event, Mr Zuma was afforded the exact time period in Rule 16A(7).

8.3 Second, the HSF has an interest in the main application, which seriously implicates the rule of law. Mr Zuma's argument that the HSF is partisan are not a bar to its admission as *amicus*. Neutrality is not a requirement for admission as an *amicus*. Nor does supporting one party disqualify a prospective *amicus*. The HSF's submissions are directed towards a just outcome and seek to encourage the Court to view the case from a different perspective.

8.4 Third, the submissions which the HSF intends to make in the main application are relevant and will be of assistance to the Court. The private

prosecutorial power is highly susceptible to abuse because it is an exceptional power with heavy consequences and limited internal protections. The Court must guard against such abuses. Mr Zuma's own version reveals the ulterior motive behind the private prosecution: it is to conduct a trial about the alleged political motives behind his own criminal trial. Coupled with the absence of a reasonable basis to prosecute, the private prosecution should be stayed. This perspective of the main application differs from Mr Downer's. Mr Zuma's disagreement with the underlying argument is not a matter for this Court to decide.

- 8.5 In the premises the HSF's application ought to succeed with costs. The award of costs is justified by Mr Zuma's unreasonable opposition and his repeated use of unfounded invective.

9. List of authorities

A list of authorities is provided with the long heads of argument. Where specific attention will be drawn to a case in the list of authorities, this is indicated with an asterisk.

10. Expected duration of the matter

2 hours

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Chambers, Sandton
6 October 2022

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HELEN SUZMAN FOUNDATION'S SHORT HEADS OF ARGUMENT:

AMICUS CURIAE APPLICATION

- 1 The Helen Suzman Foundation ("HSF") seeks admission as *amicus curiae* in Mr Downer's application to set aside Mr Zuma's private prosecution of him ("the main application"). To succeed, the HSF must show an interest in the proceedings and demonstrate that it will make submissions that are relevant, of assistance to the court, and different from the other parties. The HSF has satisfied these requirements.

- 2 First, the HSF has met the procedural requirements for admission. Mr Zuma disagrees, contending that the HSF's application is brought late without a condonation application.

But there is no merit in this objection. The HSF sought the parties' consent in early November 2022. Mr Zuma did not respond. Mr Downer's consenting response arrived on 24 November 2022. The HSF filed this application the very next day. In doing so, it afforded Mr Zuma the exact time periods stipulated in Rule 16A(7) for a response. Mr Zuma complied with those time periods by filing his answering affidavit on 2 December 2022. Consequently, there is no basis for Mr Zuma's procedural objection.

3 Second, the HSF has demonstrated that it has an interest in the proceedings. The main application concerns issues that seriously implicate the rule of law. The HSF's interest is in the correct application of the law. Mr Zuma contends that the HSF is partisan because its submissions favour Mr Downer's case and not his. He misconstrues the facts and the law in this regard.

3.1 Neutrality is not a requirement for admission as an *amicus*. There is nothing improper about an *amicus* supporting the contentions made by one party, or seeking to dissuade the court from adopting another party's contentions.¹ Even when an *amicus's* support of one side is vigorous, that has not disqualified it from participating.² *Amici* regularly support one or another side of a case.³

¹ *S v Molimi* 2008 (3) SA 608 (CC) at para 22;

² *Koka NO v Willow Waters Home Owners Association (Pty) Ltd (Association of Residential Communities CC and National Association of Managing Agents Amicus Curiae)* 2013 JDR 1338 (GNP) paras 43 to 45.

³ A survey of the case law supports this. See: *Chakanyuka and Others v Minister of Justice and Correctional Services and Others (Scalabrini Centre of Cape Town, The International Commission of Jurists and Pan-African Bar Association of South Africa Amicus Curiae)* 2022 JDR 2207 (CC) para 64. Also: *Economic Freedom Fighters and Others v Manuel* 2021 (3) SA 425 (SCA) para 110 and *S v Engelbrecht (Centre for Applied Legal Studies intervening as amicus curiae)* 2004 (2) SACR 391 (W)

- 3.2 What is required is for the *amicus*'s submissions to be directed toward a just outcome.⁴ This may involve an *amicus* encouraging the Court to adopt a particular outcome from a different perspective. This is exactly what HSF seeks to do.
- 3.3 The HSF is not the category of cases where its “partisan” stance disqualifies it from participating. The HSF does not pursue purposes extraneous to the case before the court, as in *Komape*.⁵ Nor does the HSF pursue a political agenda which should properly be achieved in political structures, as the Democratic Alliance tried to do in *OUTA*.⁶
- 4 Third, the HSF's submissions are relevant and will assist the court in deciding the main application in due course. The HSF makes two primary submissions.
- 4.1 The fact that private prosecutions have very few inbuilt safeguards and this particular private prosecution has an impact on prosecutorial independence, should be relevant factors considered when the court determines whether Mr Zuma's private prosecution is an abuse of process.
- 4.2 It is patent from the documents with which Mr Zuma has commenced this private prosecution, that he pursues the prosecution for ulterior political purposes. Coupled with the absence of reasonable and probable grounds for prosecuting Mr Downer, a court may grant the relief Mr Downer seeks.

⁴ *National Director of Public Prosecutions v Zuma* 2012 (6) SA 223 (CC) at para 13

⁵ *Komape and Others v Minister of Basic Education and Others* 2020 (2) SA 347 (SCA)

⁶ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC)

5 Mr Zuma's affidavit is primarily devoted to refuting the validity of the HSF's submissions. Although Mr Zuma is wrong on every score — and the HSF will show why in the main application — this Court is not required to rule upon the correctness of HSF's submissions at this stage. That role is for the Court hearing the main application.⁷ Nevertheless, the approach that Mr Zuma takes in his answering affidavit confirms that the HSF should be admitted as *amicus curiae* because the submissions it seeks to raise are clearly relevant to the issues in the main application. If they were not, Mr Zuma would simply have responded on the basis that they were irrelevant. But he has not done so. Instead, he engages in a detailed debate about the limits of prosecutorial independence and the contours of the abuse of process doctrine in private prosecutions. Both of those issues will materially affect the outcome of the main application.⁸

6 What remains of Mr Zuma's opposition is the criticism that the HSF's submissions are no different to Mr Downer's. He is incorrect.

6.1 Mr Downer's case is that the private prosecution is an abuse because its ulterior purpose is to discredit him as a prosecutor. The HSF's submission about abuse of process is different. The HSF intends to show that Mr Zuma's own documents reveal a different ulterior purpose: Mr Zuma wants to conduct a trial about the alleged political motives in prosecuting him. The ulterior purpose is evident from the documents with which Mr Zuma, himself, initiated the private prosecution.

⁷ *Applications for admission as amici curiae by various UN bodies and Human Rights Watch: In re certification application by various applicants and others v Anglo American SA (Ltd)* (2020/32777) [2022] ZAGPJHC 935 (25 November 2022) unreported, para 22

⁸ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre (Helen Suzman Foundation and others as amici curiae)* 2016 (3) SA 317 (SCA) paras 29 and 30

- 6.2 In addition, the HSF seeks to make submissions about the exceptional power wielded by private prosecutors and the limited protection against abuse of that power provided in the Criminal Procedure Act.⁹ Moreover, given the particular circumstances in which this private prosecution is brought, the prosecution itself undermines prosecutorial independence.¹⁰ Mr Downer makes none of these points.
- 7 In the circumstances, the HSF's application should succeed with costs. While an *amicus* is not ordinarily entitled to costs,¹¹ the award of costs is warranted where (i) opposition was unreasonable,¹² or (ii) in opposing the intervention, the resisting party has maligned the *amicus*.¹³ Mr Zuma's opposition has both these features. His opposition is unreasonable because he does not provide any sustainable reasons for the HSF not being able to contribute to the main application. And his opposition it is laden with invective of the most egregious sort. Mr Zuma repeatedly accuses the HSF of being racist, bigoted, and adopting apartheid logic, without any factual foundation for these serious accusations.¹⁴
- 8 The HSF therefore seeks admission as *amicus curiae* to present oral and written submissions in the main application, with costs on an attorney and client scale, including the costs of two counsel.

⁹ FA to HSF *amicus* application, p17, para 36

¹⁰ FA to HSF *amicus* application, pp26-28, paras 69 to 74

¹¹ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 63

¹² *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA) at para 53 which was followed in *Dladla and Others v City of Johannesburg and Another* 2014 (6) SA 516 (GJ) paras 44 to 46

¹³ *Applications by Various UN Bodies*, cited at footnote 7 above, at para 44

¹⁴ *Knoop NO and Another v Gupta and Another* 2021 (3) SA 88 (SCA) para 145

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6 December 2022**

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HELEN SUZMAN FOUNDATION'S HEADS OF ARGUMENT:

AMICUS CURIAE APPLICATION

TABLE OF CONTENTS

INTRODUCTION	3
THE TEST FOR ADMISSION AS AMICUS CURIAE.....	4
Perspectives	6
An amicus supporting a side	7
Materially affect the outcome.....	11
HSF MEETS THE TEST	13
The timing of the application	17
The HSF's alleged bias	18
The HSF's interest	19
<i>Amici</i> in criminal cases	21
Repetition.....	21
Conclusion on admission	23
COSTS	23

INTRODUCTION

- 1 This is an application by the Helen Suzman Foundation to be admitted an *amicus curiae* in the application that Mr Downer has brought to set aside Mr Zuma's private prosecution of him. We shall refer to Mr Downer's application as "the main application" in these heads of argument.

- 2 The only question before this court is whether the Helen Suzman Foundation will contribute new and relevant submissions that will be of assistance to the court deciding the main application in due course.

- 3 This court is not asked to decide whether the submissions that HSF intends to make are correct.
 - 3.1 The court does not have to determine whether prosecutorial independence is undermined when a criminal accused brings a private prosecution against his prosecutor while his own criminal proceedings are pending.
 - 3.2 This court also does not have to decide whether Mr Zuma's private prosecution of Mr Downer is an abuse of process, or whether it is pursued with an ulterior purpose and without the genuine intention of securing a conviction.
 - 3.3 This court is also not asked to determine whether there are reasonable or probable grounds for the prosecution of Mr Downer.

- 4 All of those questions will be determined by the court that hears the main application.

5 However, Mr Zuma's affidavit opposing the admission of the HSF as *amicus curiae* is primarily devoted to arguments about why the HSF's submissions are wrong. Those arguments are not, however, a reason to refuse to admit HSF. If anything, they are reasons to admit HSF so that the very real debates about the limits of prosecutorial independence and the contours of the abuse of process doctrine in private prosecutions can be properly ventilated before the court hearing the main application.

6 As we shall show in the course of these heads of argument, the HSF has met the test for admission as *amicus curiae*. Our submissions are structured in three parts.

6.1 First, we set out the test for admission as *amicus curiae*.

6.2 Second, we show how HSF meets each of the requirements for admission.

6.3 Third, we deal with the question of costs.

THE TEST FOR ADMISSION AS AMICUS CURIAE

7 An *amicus curiae* assists the Court by furnishing information or argument regarding questions of law or fact. It differs from an intervening party in the sense that it need not have a direct interest in the outcome of the litigation, and joins the proceedings as a friend of the Court because of its expertise on or interest in the matter before the Court.¹

8 The Constitutional Court has explained the role of an amicus as follows:

¹ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at 27H–28B.

“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.”²

- 9 The rule governing admission of *amici curiae* in the High Courts is Rule 16A. Under the rule, a party seeking admission as an *amicus curiae* must:
- 9.1 seek the written consent of the parties, and, in the absence of such consent, apply to court for admission;³
 - 9.2 show that it has an interest in the proceedings;⁴ and
 - 9.3 demonstrate that it will make submissions that are relevant, will assist the court, and are different from those of the other parties.⁵
- 10 The requirement that an *amicus curiae*'s submissions be different from those of the parties has received considerable attention from the courts. The important principles that have emerged from the case law are threefold.

² *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) at para 5.

³ Uniform Rule 16A(2) and 16A(5).

⁴ Uniform Rule 16A(6)(a).

⁵ Uniform Rule 16A(6)(b).

- 10.1 The value of an *amicus curiae*'s contribution to a case often lies in the different perspective it brings on the issues between the parties.
- 10.2 An *amicus curiae* is not prevented from supporting one party's side of a case, even vigorously.
- 10.3 The contribution of an *amicus* must materially affect the outcome of the case.

11 We deal with each of these three principles below.

Perspectives

12 Our law recognises that an *amicus curiae* provides assistance to a court when it offers a different perspective on the issues between the parties. In *Koyabe*,⁶ the Constitutional Court held as follows:

“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.”⁷ (emphasis added)

⁶ *Koyabe and Others v Minister of Home Affairs and Others (Minister of Home Affairs as Amicus Curiae)* 2010 (4) SA 327 (CC)

⁷ *Koyabe* para 80

- 13 In *Minister of Defence v Potsane*,⁸ the Constitutional Court said the following about the contribution of a different perspective by the National Director of Public Prosecutions as *amicus curiae*:

*“As for the intervention by the NDPP as an amicus, the argument presented on his behalf was helpful, not only for adding to the debate but for contributing a different perspective. This was particularly important. The basic contention on the part of the soldiers in both cases was that the Act, in breach of the Constitution, purported to authorise military prosecutors to trespass on the exclusive domain of the NDPP. Although the contention was one of constitutional law on which this Court would have to arrive at its own conclusion, it was valuable to hear from the NDPP what the attitude of that office was - the more so as oral argument in support of the submissions on behalf of the NDPP was presented by his national deputy, Dr D'Oliveira, who has extensive managerial experience in the country's civilian prosecution establishment.”*⁹ (emphasis added)

An *amicus* supporting a side

- 14 There is nothing improper about an *amicus curiae* supporting the contentions of one of the parties. Indeed, in *S v Molimi*,¹⁰ the Constitutional Court expressed its gratitude for the approach of the *amicus curiae* because the *amicus* “...not only generally supported the contentions raised by the applicant but also contributed a different perspective”.¹¹ And

⁸ *Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others* 2002 (1) SA 1 (CC)

⁹ *Minister of Defence v Potsane* para 9

¹⁰ *S v Molimi* 2008 (3) SA 608 (CC)

¹¹ *S v Molimi* para 22

even where an *amicus curiae*'s support for one side of a case has been described as "vigorous," that neither barred its admission, nor warranted an adverse costs award.¹²

15 A survey of the case law dealing with the contributions made by *amici curiae* shows that *amici* regularly support one or other side of a case. We list below, just a few examples of these cases:

15.1 In the recent decisions of the Constitutional Court decision in *Chakanyuka*,¹³ and *Fidelity*,¹⁴ all of the *amici* supported the position of one of the parties to the litigation.

15.2 In the case of *Economic Freedom Fighters v Manuel*,¹⁵ the *amicus curiae* supported Mr Manuel's submissions and argued that victims of defamation should be able to approach a court on motion to seek relief, including the recovery of damages.

16 Neutrality is not a requirement for admission as an *amicus*. What is required is for the submissions to be directed toward a just outcome.¹⁶ This is a fine, but important distinction. The interest of an *amicus* must be an interest in the correct application of the law.¹⁷ This

¹² *Koka NO v Willow Waters Home Owners Association (Pty) Ltd (Association of Residential Communities CC and National Association of Managing Agents Amicus Curiae)* 2013 JDR 1338 (GNP) paras 43 to 45.

¹³ *Chakanyuka and Others v Minister of Justice and Correctional Services and Others (Scalabrini Centre of Cape Town, The International Commission of Jurists and Pan-African Bar Association of South Africa Amicus Curiae)* 2022 JDR 2207 (CC) para 64

¹⁴ *Minister of Police and Others v Fidelity Security Services (Pty) Limited (Sakeliga NPC, National Hunting and Shooting Association, Professional Hunting Association of South Africa and Gun Owners South Africa NPC Amicus Curiae)* 2022 JDR 1862 (CC) para 22

¹⁵ *Economic Freedom Fighters and Others v Manuel* 2021 (3) SA 425 (SCA) para 110

¹⁶ *National Director of Public Prosecutions v Zuma* 2012 (6) SA 223 (CC) at para 13

¹⁷ *Ex Parte Goosen and Others* 2020 (1) SA 569 (GJ) at para 16

may necessitate encouraging the court towards a particular direction. But that alone does not disqualify a prospective *amicus*.

- 17 Indeed, in the case of *S v Englebrecht*,¹⁸ the Gauteng High Court expressly held in a criminal case involving a number of *amici curiae*, that “*neutrality is neither necessary nor a requirement of the amicus function*”.¹⁹ Satchwell J observed that:

“...it is difficult to conceive that any individual or organisation would wish to intervene as an *amicus* unless there was a particular piece of information or area of learning or point of view of which the *amicus* wished the Court to be cognisant. The aloof and disinterested and apathetic would be highly unlikely to seek to enter the arena at all.”

- 18 The cases in which our courts have refused to admit *amici* applicants because of their “partisan” position, involved: (i) prospective *amici* using their interventions to pursue purposes extraneous to the case before the court, or (ii) instances where the prospective *amicus* had an alternative forum through which to ventilate its position.

- 18.1 In *Komape*,²⁰ a firm of attorneys sought leave to be admitted as *amicus curiae* in a delictual claim against the Minister of Education arising from the death of a child in a pit latrine at a primary school. The firm of attorneys sought to intervene because the outcome of that case had a bearing on a class action in which they represented

¹⁸ *S v Engelbrecht (Centre for Applied Legal Studies intervening as amicus curiae)* 2004 (2) SACR 391 (W)

¹⁹ *S v Engelbrecht* para 50

²⁰ *Komape and Others v Minister of Basic Education and Others* 2020 (2) SA 347 (SCA)

the class action plaintiffs. The Supreme Court of Appeal rejected their application for admission as *amici*, reasoning as follows:

“RSI’s application did not pass the threshold of this test for a number of reasons. First, an amicus should be objective and not seek to advance an interest of its own. That is not here the case. Mr Spoor, who appeared on behalf of RSI, informed us from the bar that he and his firm were acting on a contingency basis in the claim brought against Tiger Brands. That being so, despite their professed intention to be acting in the present matter solely in the interest of developing the common law, there can be no doubt that they enjoyed a financial interest in attempting to persuade this court that damages for a claim thus far unrecognised in this country, should be awarded. Should such a claim be established, the beneficiaries of the class action would probably receive a substantially higher payment than would otherwise be the case, and RSI’s contingency fee be concomitantly increased. RSI thus also had its own personal financial interest at stake. For that reason alone, it would be inappropriate to admit RSI as an amicus.”²¹ (emphasis added)

18.2 Another example is the Constitutional Court’s decision in *OUTA*,²² where the Court rejected the Democratic Alliance’s attempt to intervene as *amicus* on the basis that its interest was avowedly political and would be better met through political channels. Moseneke DCJ said:

*“The Democratic Alliance says it is entitled to be admitted as amicus because in *Democratic Alliance v President*, the Supreme Court of Appeal recognised its interest and standing in pursuing public interest litigation. That may be so. But, I do think that there is a distinct difference between a political party*

²¹ *Komape* at para 5

²² *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC)

litigating to advance public interest in its own name, on the one hand, and propping itself up as a friend of the court, on the other. Here the Democratic Alliance has made common cause with the respondents and has strenuously urged us to dismiss the appeal. It is plainly the fifth wheel of the respondents. Its overall partisan position is better suited to a litigant than a friend of the court.

The avowedly political nature of what the Democratic Alliance calls its “interest” in this case makes it inappropriate to seek admission as an amicus rather than as an intervening party. Moreover, its “interest” could find full expression in the National and Provincial Legislatures and Municipal Councils where it says it is widely represented. It would therefore be inappropriate to permit the Democratic Alliance to advance a sectarian interest under the guise of amicus curiae.”²³

- 19 *Komape* and *OUTA* are rare cases where an *amicus* applicant was approaching the court to serve its own ends. That is a different situation to the case in which an *amicus* applicant wishes to place before the court relevant useful submissions to assist the court in reaching a determination on the issues between the parties.

Materially affect the outcome

- 20 In *Southern African Litigation Centre*,²⁴ the Supreme Court of Appeal stressed that, in order for an *amicus curiae* to be admitted to a case, its submissions must not be tangential to the real issues in the case. The *amicus*'s contribution must be capable of materially affecting the outcome of the case. The SCA held as follows:

²³ *OUTA* paras 14-15

²⁴ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre (Helen Suzman Foundation and others as amici curiae)* 2016 (3) SA 317 (SCA)

“Finally, new contentions are those that may materially affect the outcome of the case. It is not feasible to be prescriptive in this regard but prospective amici and their advisers must start by considering the nature and scope of the dispute between the parties and, on that basis, determine whether they have distinct submissions to make that may alter the outcome or persuade the Court to adopt a different line of reasoning in determining the outcome of the appeal. Obvious examples would be urging the Court to adopt reasoning based on provisions of the Constitution in construing a statute, where the parties have not taken that course, or a submission that the fundamental legal principles to be applied in determining the dispute are other than those submitted by the parties where their adoption would materially affect the outcome of the case. No doubt others can be imagined.”²⁵

- 21 It is therefore not sufficient for an *amicus* merely to wish to alert to court to additional case law or academic writings on issues already traversed by the parties.²⁶ An *amicus* must be able to show that the contribution it wishes to make to the case will have a bearing on its outcome, or that it may encourage the court to adopt a different line of reasoning.
- 22 As we show in the next section of these heads of argument, the HSF meets all these requirements for admission as an *amicus curiae*.

²⁵ *Southern African Litigation Centre* at para 30

²⁶ *Southern African Litigation Centre* at para 29

HSF MEETS THE TEST

23 In the main application, Mr Downer seeks to set aside the summons that initiated the prosecution against him and to obtain an interdict preventing Mr Zuma from initiating a private prosecution against him on similar terms.

24 Mr Downer contends that the private prosecution against him is an abuse of process.

25 The HSF seeks leave to be admitted as an *amicus curiae* in the main proceedings in order to advance two primary submissions.

25.1 It contends that the fact that private prosecutions have very few inbuilt safeguards and this particular private prosecution has an impact on prosecutorial independence, should be relevant factors taken into account when the court determines whether to Mr Zuma's private prosecution is an abuse of process.

25.2 It submits that it is evident from the documents, with which Mr Zuma has commenced this private prosecution, that he pursues the prosecution for ulterior political purposes. And when that fact is coupled with the fact that reasonable and probable grounds for prosecuting Mr Downer are absent, a court may grant the relief Mr Downer seeks.

26 Mr Zuma opposes the admission of HSF on five main grounds.

- 26.1 Mr Zuma says that the HSF's application is late and it should not be entertained as a result.²⁷
- 26.2 Mr Zuma contends that the HSF is partisan,²⁸ biased,²⁹ disingenuous³⁰ and not impartial.³¹
- 26.3 Mr Zuma also contends that the HSF has failed to establish a "tangible interest" in the case³² and that HSF's submissions do not contain "*clearly identified evidence that Mr Zuma's prosecution is an abuse of the sort that this court should not countenance*".³³
- 26.4 Mr Zuma highlights that the courts have been reluctant to admit *amici* in criminal cases.³⁴
- 26.5 Mr Zuma contends that the HSF will add nothing new to the main application.³⁵

27 We shall deal with each of these five grounds of opposition below.

28 However, it is important first to emphasise this: Mr Zuma dedicates the bulk of his affidavit to refuting the validity of the points that HSF intends advancing before the court hearing

²⁷ AA to HSF amicus application, pp 54-55, para 40

²⁸ AA to HSF amicus application, p66, para 64 and pp76-77, para 88

²⁹ AA to HSF amicus application, pp79-80, para 95

³⁰ AA to HSF amicus application, p86, para 110

³¹ AA to HSF amicus application, p76, para 86

³² AA to HSF amicus application, p81, para 98

³³ AA to HSF amicus application, p81, para 99

³⁴ AA to HSF amicus application, pp78-79, para 93

³⁵ AA to HSF amicus application, pp79-80, para 95

the main application. As we set out in the beginning of these heads of argument, Mr Zuma's reasons for saying that the submissions of the HSF are wrong is a reason, in itself, to admit the HSF as *amicus curiae*.

29 The Gauteng High Court has recently recognised that arguments offered by a party opposing the admission of an *amicus curiae* designed to show that the submissions of the *amicus* are wrong, are matters properly to be left to the court determining the main proceedings.³⁶

30 The majority of Mr Zuma's answering affidavit in fact traverses the very issues that the court hearing the main application will need to determine. For example:

30.1 Mr Zuma argues that a court should only stop a private prosecution in very rare circumstances because to do so impacts on the private prosecutor's rights under section 34 of the Constitution to access the courts.³⁷ But this is a question about the reach of the right under section 34 and whether litigation that is itself an abuse of process even implicates the right under section 34. The Constitutional Court has recently held that it does not.³⁸ The important point is that the question of the application of the right of access to courts to this case is a matter that will be determined in the main application.

³⁶ *Applications for admission as amici curiae by various UN bodies and Human Rights Watch: In re certification application by various applicants and others v Anglo American SA (Ltd)* (2020/32777) [2022] ZAGPJHC 935 (25 November 2022) unreported, para 22

³⁷ AA to HSF amicus application at: p65, para 62; p66, para 68; p71, para 76; and p85, para 109

³⁸ *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* [2022] ZACC 37 (14 November 2022) para 94

- 30.2 Mr Zuma contends that because the Criminal Procedure Act of 1977 already contains sufficient safeguards against unfounded and vexatious private prosecutions, an abuse of process basis for stopping the prosecution at the outset is not required.³⁹ But the question whether the protections of the existing law exclude a self-standing abuse of process basis to stop a private prosecution is a question to be determined in the main application.
- 30.3 Mr Zuma says that the HSF has misconstrued the judgment of Harms DP in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA). He contends that that judgment finds that “a bad motive does not destroy a good case”.⁴⁰ But elsewhere in his answering affidavit, Mr Zuma recognises that Harms DP accepted that a prosecution may be wrongful if, in addition to having a bad motive behind it, reasonable and probable grounds for prosecuting were absent.⁴¹ The proper analysis of Harms DP’s finding in the 2009 *NDPP v Zuma* is therefore an issue that will need to be determined by the court deciding the main application.
- 30.4 Mr Zuma says his private prosecution of Mr Downer does not impact prosecutorial independence in any way.⁴² But precisely what prosecutorial independence requires and whether this particular private prosecution, which is pursued by a criminal accused against his prosecutor while his own prosecution is pending, implicates prosecutorial independence, is a matter to be determined by the court hearing the main application.

³⁹ AA to HSF amicus application at: pp68-69, paras 70-71; and p85, para 108.

⁴⁰ AA to HSF amicus application, p86, para 110

⁴¹ AA to HSF amicus application, p73, para para 80

⁴² AA to HSF amicus application at: p73, para 81; pp83, paras 104-105; and p86, para 112

31 Mr Zuma's answering affidavit therefore serves to confirm that the submissions that the HSF seeks to place before the court hearing the main application are important and relevant. If they were not so, Mr Zuma would simply have said that they were irrelevant to the main application. But he does not do that. Instead, he spends pages and pages of his application explaining why the HSF's submissions are wrong. That there is a real debate to be had about these issues underscores their importance and relevance to the determination of the main application.

32 Next we deal with Mr Zuma's five actual grounds of opposition to the HSF's application.

The timing of the application

33 Mr Zuma complains that the application brought by the HSF is late. It is not.

34 In early November 2022, the HSF wrote to the parties to seek their consent to its admission as *amicus curiae*.⁴³ While it waited for a response from the parties, it prepared an application for admission in accordance with the Rules.

35 The HSF finally received a response from Mr Downer's attorneys on 24 November 2022 indicating that Mr Downer consented to the admission of the HSF.⁴⁴

36 The HSF's application was launched the following day, on 25 November 2022. It provided Mr Zuma with the exact time period afforded to a party wishing to oppose an *amicus*

⁴³ FA to HSF amicus application, p13, para 26

⁴⁴ FA to HSF amicus application, p13, para 27

application under Uniform Rule 16A(7). Mr Zuma duly complied with that time frame and filed his answering affidavit on 2 December 2022.

- 37 The HSF's application was therefore not late and the application for admission should be determined on its merits.

The HSF's alleged bias

- 38 Mr Zuma contends that the HSF is insufficiently independent to be admitted as an *amicus curiae*. But, as we set out above, the law does not require neutrality from an *amicus curiae*. On the contrary, it requires an *amicus* to present relevant and helpful submissions to a court which may support one parties.

- 39 Mr Zuma's major complaint on this score appears to be directed at what he takes to be intemperate language used by the HSF. He complains that this language is evidence of the HSF's bias against him. This attack is unwarranted. The language and tone of the HSF's affidavit are measured, relevant, and proportional to the very serious issues raised in Mr Downer's application.

- 40 Mr Downer accuses Mr Zuma of abusing the process of the courts. The HSF wishes to make submissions to the court hearing the main application that will show that, on the basis of Mr Zuma's own documents, it is clear that he misuses the court's processes and seeks to achieve political ends unconnected with the reasonable and probable prosecution of Mr Downer. These are grave matters that implicate the rule of law.

41 Thus when the HSF says that Mr Zuma acts in bad faith and with an ulterior purpose, that Mr Zuma has undermined the prosecutorial independence of the NPA, and that he debases the criminal justice system, it says these things in the context of a case about *abuse*. It makes the allegations that are commensurate with the gravity of these issues for the rule of law. The language the HSF uses does not evidence bias against Mr Zuma. On the contrary, the HSF's founding affidavit identifies the relevant factors that will weigh with the court when it decides whether this private prosecution is an abuse of the court's processes.

42 There is, accordingly, no merit in the allegation that HSF is biased against Mr Zuma.

The HSF's interest

43 Mr Zuma says that the HSF has failed to establish any tangible interest in this case and contends that one will "search in vain" for any evidence in the founding affidavit of Mr Zuma's alleged abuse of process.

44 But there is ample evidence in the HSF's founding affidavit of Mr Zuma's abuse of process. It lies in Mr Zuma's own documents. From paragraphs 48 to 66 of HSF's founding affidavit, the HSF provides a detailed analysis of Mr Zuma's own statement of substantial facts and witness list to show that Mr Zuma's own approach to this prosecution reveals its ulterior purpose.

45 Mr Zuma provides two responses to these paragraphs of the HSF's affidavit.

45.1 First, he makes a point of law and says that the HSF does not properly understand the import of Harms DP's finding in the 2009 *NDPP v Zuma* judgment.⁴⁵ However, that is not an answer on the facts.

45.2 On the facts, Mr Zuma does not dispute that his witness list and statement of substantial facts traverses issues unconnected in any way to the elements of the crime he accuses Mr Downer of having committed.

45.3 Second, Mr Zuma says that a litigant is entitled to plead his case in whatever way he wishes.⁴⁶ That is true, but a litigant is also bound by what he pleads. The pleading flexibility afforded to a litigant does not include a freedom to frame a private prosecution for ulterior purposes. Nor does it allow that party to escape the scrutiny of what he has said in his pleading.

45.4 The question whether Mr Zuma's witness list and statement of substantial facts reveals that he pursues the prosecution of Mr Downer for ulterior purposes is a matter that, if the HSF is admitted *amicus curiae*, will be determined in the main application.

46 The HSF's application goes into great detail analysing what the witness list and statement of substantial facts means for the main application. It seeks to be admitted to advance an argument that Mr Zuma's own documents reveal his ulterior purpose in pursuing Mr Downer's prosecution. That argument has a direct bearing on the abuse of process grounds on which Mr Downer seeks to have the prosecution quashed.

⁴⁵ AA to HSF amicus application, p89, para 120

⁴⁶ AA to HSF amicus application, p89, para 121

***Amici* in criminal cases**

47 Mr Zuma draws the court's attention to the Constitutional Court's decision in *Basson*,⁴⁷ where it held that the courts should be slow to admit an *amicus curiae* in criminal matters because of the risk of stacking the case against the accused.⁴⁸

48 However, *Basson* has no application in this case. The HSF does not seek leave to be admitted as an *amicus curiae* in the criminal prosecution of Mr Downer; it seeks to be admitted as an *amicus* in the *civil* case that Mr Downer has brought to set aside the summons against him.

Repetition

49 Mr Zuma claims that the HSF does no more than restate Mr Downer's arguments.⁴⁹ He therefore contends that the HSF should not be admitted to the main application because it will add nothing of value to the court.

50 This is incorrect.

51 Mr Downer seeks to set aside his prosecution on the basis that it is an abuse of process. He claims that the prosecution is pursued with the ulterior purpose of discrediting him as

⁴⁷ *Ex parte Institute for Security Studies : In re S v Basson* 2006 (6) SA 195 (CC)

⁴⁸ AA to HSF amicus application, pp78-79, para 93

⁴⁹ AA to HSF amicus application, p79, para 95

Mr Zuma's prosecutor. The focus of Mr Downer's case for abuse of process is therefore on Mr Zuma's efforts to discredit him.

52 The HSF seeks to make a different submission about abuse of process. The HSF intends to show that Mr Zuma's own documents reveal a different ulterior purpose. It is a purpose of using the courtroom for something other than the administration of justice.

53 The HSF submits that even if one assumes that Mr Zuma's statement of substantial facts is true, the facts he traverses bear no relevance to the charges in the indictment. On the contrary, the statement of substantial facts reveals that Mr Zuma wishes to conduct a trial about the alleged political motives in prosecuting him.⁵⁰

54 HSF also submits that Mr Zuma's witness list confirms this ulterior purpose because it indicates that Mr Zuma intends to call witnesses at the trial who have no link at all to the charges that Mr Downer faces.⁵¹

55 In addition, the HSF seeks to make submissions about the exceptional power wielded by private prosecutors and the limited protection against abuse of that power provided in the Criminal Procedure Act.⁵²

56 It seeks to show that because of the particular circumstances in which this private prosecution is brought, the prosecution itself undermines prosecutorial independence.⁵³

⁵⁰ FA to HSF amicus application, pp17-18, para 40

⁵¹ FA to HSF amicus application, p18, para 41

⁵² FA to HSF amicus application, p17, para 36

⁵³ FA to HSF amicus application, pp26-28, paras 69 to 74

Mr Downer makes none of these points. If the HSF is admitted as *amicus curiae* in the main application, it will not double up on the arguments presented by Mr Downer. It intends to make a novel and unique contribution to the question whether Mr Zuma's application is an abuse of process.

Conclusion on admission

57 The HSF has met the test for admission.

57.1 It sought the consent of the parties but when none was forthcoming from Mr Zuma, it launched this application.

57.2 It has a clear interest in upholding the rule of law⁵⁴ and the misuse of the judicial system for ulterior purposes undermines a system based on the rule of law.

57.3 It seeks to make novel and useful submissions when the main application is determined.

COSTS

58 While *amici curiae* are generally neither entitled to, nor liable for, the costs of their participation in the main proceedings,⁵⁵ costs for the unreasonable opposition of an application for admission as *amicus curiae* have been granted.

⁵⁴ Its role in litigating to uphold the rule of law has been repeatedly recognised by the courts. See, for example, *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) para 6; *Forum De Monitoria Do Orçamento v Chang and Others* 2021 JDR 3325 (GJ) paras 22 to 23

⁵⁵ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 63

59 In *Jeebhai*,⁵⁶ the SCA held as follows:

*“The amicus contended that the respondents ought to pay their costs for having unreasonably opposed their application to be admitted as amicus curiae in this court. In this matter the submissions of the amicus were of considerable assistance to the court. There were no proper grounds for opposing its application and I agree that it is appropriate that the respondents pay such costs.”*⁵⁷

60 The same approach was adopted in *Dladla and Others v City of Johannesburg and Another* 2014 (6) SA 516 (GJ) paras 44 to 46.

61 In the recent decision of the Gauteng High Court dealing with the admission of the UN Special Rapporteurs as *amici curiae* in a class action against Anglo American, the court ordered costs against Anglo because it found that Anglo had maligned the UN Bodies by asserting that they were biased against it without laying a factual foundation for the allegation.⁵⁸

62 Mr Zuma’s affidavit opposing the admission of the HSF makes repeated allegations of the most egregious kind against the HSF. It is accused of being racist,⁵⁹ bigoted,⁶⁰ and of adopting apartheid logic.⁶¹ These are very serious allegations.

⁵⁶ *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA)

⁵⁷ *Jeebhai* para 53

⁵⁸ *Applications for admission as amici curiae by various UN bodies and Human Rights Watch: In re certification application by various applicants and others v Anglo American SA (Ltd)* (2020/32777) [2022] ZAGPJHC 935 (25 November 2022) unreported, para 44

⁵⁹ AA to HSF amicus application, p58, para 49

⁶⁰ AA to HSF amicus application at p61, para 55; p72, para 78

⁶¹ AA to HSF amicus application, p58, para 49

63 In *Knoop NO*, the Supreme Court of Appeal held that serious allegations in an affidavit should only be made after due consideration of their relevance and whether there is a tenable factual basis for them.⁶² But Mr Zuma presents no credible factual basis for maligning the HSF.

64 In addition, Mr Zuma's answering affidavit is mainly devoted to reciting the entire history and his alleged abuse at the hands of the NPA. His approach in the affidavit therefore confirms, rather than refutes, the HSF's central submission. Mr Zuma intends to use his private prosecution of Mr Downer to dredge up all the issues concerning the political interference in his own prosecution which have nothing at all to do with the charges he has brought against Mr Downer.

65 That Mr Zuma spends so much time in an affidavit, which should deal only with the question whether the HSF should be admitted as an *amicus curiae*, rehashing these old arguments, reveals the abuse underpinning his private prosecution of Mr Downer. He is not genuinely interested in obtaining a conviction for the charges he pursues. He is interested in repeating, for the umpteenth time, his claims of political interference. His insistence on traversing this irrelevant matter, even in an application dealing solely with the question whether a party should be admitted as an *amicus*, reinforces the HSF's reason for applying to be admitted and justifies an order for costs on an attorney and client scale against Mr Zuma.

⁶² *Knoop NO and Another v Gupta and Another* 2021 (3) SA 88 (SCA) para 145

66 The HSF therefore seeks admission as *amicus curiae* to present oral and written submissions in the main application, with costs on an attorney and client scale, including the costs of two counsel.

Kate Hofmeyr SC

Mabasa Sibanda

Counsel for the Helen Suzman Foundation

**Chambers, Sandton
6 December 2022**

**IN THE HIGH COURT OF SOUTH AFRICA
KWA-ZULU NATAL DIVISION, PIETERMARITZBURG**

Case No.: 13062/22P

HELEN SUZMAN FOUNDATION

Applicant for admission
as *amicus curiae*

In re: the matter between:

WILLIAM JOHN DOWNER

Applicant

and

JACOB GEDLEYIHLEKISA ZUMA

Respondent

HELEN SUZMAN FOUNDATION'S LIST OF AUTHORITIES:

AMICUS CURIAE APPLICATION

CONSTITUTION COURT		
1.	<i>Chakanyuka and Others v Minister of Justice and Correctional Services and Others (Scalabrini Centre of Cape Town, The International Commission of Jurists and Pan-African Bar Association of South Africa Amicus Curiae) 2022 JDR 2207 (CC)</i>	
2.	<i>Ex parte Institute for Security Studies : In re S v Basson 2006 (6) SA 195 (CC)</i>	*
3.	<i>Hoffmann v South African Airways 2001 (1) SA 1 (CC)</i>	*
4.	<i>In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 713 (CC)</i>	
5.	<i>Koyabe and Others v Minister of Home Affairs and Others (Minister of Home</i>	*

	<i>Affairs as Amicus Curiae</i>) 2010 (4) SA 327 (CC)	
6.	<i>Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others</i> 2002 (1) SA 1 (CC)	
7.	<i>Minister of Police and Others v Fidelity Security Services (Pty) Limited (Sakeliga NPC, National Hunting and Shooting Association, Professional Hunting Association of South Africa and Gun Owners South Africa NPC Amicus Curiae)</i> 2022 JDR 1862 (CC)	
8.	<i>National Director of Public Prosecutions v Zuma</i> 2012 (6) SA 223 (CC)	
9.	<i>National Treasury and Others v Opposition to Urban Tolling Alliance and Others</i> 2012 (6) SA 223 (CC)	
10.	<i>S v Molimi</i> 2008 (3) SA 608 (CC)	
SUPREME COURT OF APPEAL		
11.	<i>Economic Freedom Fighters and Others v Manuel</i> 2021 (3) SA 425 (SCA)	
12.	<i>Jeebhai and Others v Minister of Home Affairs and Another</i> 2009 (5) SA 54 (SCA)	*
13.	<i>Knoop NO and Another v Gupta and Another</i> 2021 (3) SA 88 (SCA)	*
14.	<i>Komape and Others v Minister of Basic Education and Others</i> 2020 (2) SA 347 (SCA)	
15.	<i>Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre (Helen Suzman Foundation and others as amici curiae)</i> 2016 (3) SA 317 (SCA)	*
16.	<i>Ntlemeza v Helen Suzman Foundation and Another</i> 2017 (5) SA 402 (SCA)	
HIGH COURT		
17.	<i>Applications for admission as amici curiae by various UN bodies and Human Rights Watch: In re certification application by various applicants and others v Anglo American SA (Ltd) (2020/32777) [2022] ZAGPJHC 935 (25 November 2022) unreported</i>	
18.	<i>Dladla and Others v City of Johannesburg and Another</i> 2014 (6) SA 516 (GJ)	
19.	<i>Ex Parte Goosen and Others</i> 2020 (1) SA 569 (GJ)	
20.	<i>Forum De Monitoria Do Orçamento v Chang and Others</i> 2021 JDR 3325 (GJ)	

21.	<i>Koka NO v Willow Waters Home Owners Association (Pty) Ltd (Association of Residential Communities CC and National Association of Managing Agents Amicus Curiae)</i> 2013 JDR 1338 (GNP)	
22.	<i>Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others</i> [2022] ZACC 37 (14 November 2022)	
23.	<i>S v Engelbrecht (Centre for Applied Legal Studies intervening as amicus curiae)</i> 2004 (2) SACR 391 (W)	*

**IN THE HIGH COURT OF SOUTH AFRICA
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Case No.: 13062/22P

In the application of:

THE HELEN SUZMAN FOUNDATION

Applicant for Admission
as *Amicus Curiae*

In re the matter between:

WILLIAM JOHN DOWNER

Applicant

and

JACOB GEDLEYIHLEKISA ZUMA

Respondent

THE HELEN SUZMAN FOUNDATION'S DRAFT ORDER

HAVING read the documents filed of record, heard counsel, and having considered the matter –

THE COURT ORDERS THAT:

1. to the extent necessary, any non-compliance with paragraph 9.4 of this Court's Practice Manual is condoned;
2. the Helen Suzman Foundation is admitted as *amicus curiae* in the application to set aside the Respondent's summons in the private prosecution proceedings to be conducted by him against the Applicant ("**the main application**");

3. the Helen Suzman Foundation is granted leave to submit written and oral argument in the main application; and
4. the Respondent is directed to pay the costs of this application on an attorney and client scale, including the costs of two counsel.