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The actuary as *amicus curiae*

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ABSTRACT

The role of an *amicus curiae* as a party to litigation is closely linked to promoting constitutional values and protecting the public interest. There is no question that interventions by *amici curiae* have played a critical role in aiding the judiciary in many public interest cases. The Actuarial Society of South Africa is prioritising its focus on advancing issues of public interest and serving a broader spectrum of the populace. However, it has yet to utilise this specific mechanism to manifest this mandate. The Actuarial Society of South Africa can provide a numerical perspective on various rights disputes deriving from the Constitution. In contrast, the courts have asked other professional bodies, such as the South African Institute of Chartered Accountants, to join proceedings. Actuarial bodies, particularly those in the United States of America, are actively involved in public interest matters and occasionally join *amicus curiae* proceedings. Following an exploration of the use of *amici curiae* in South African and African courts, this paper seeks to identify a test case where the Actuarial Society of South Africa may join proceedings as a friend of the court. The mechanism and procedure for joining the court as an *amicus curiae* and the risks and benefits of joining proceedings are examined.

KEYWORDS

Amicus curiae, Actuarial Society of South Africa, actuarial evidence, Constitution, public interest, litigation

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1. INTRODUCTION

1.1 Background

1.1.1 The Constitutional Court set out the role of an *amicus curiae* (friend of the court) in the matter of *In Re: Certain Amicus Curiae Applications; Minister of Health* v *Treatment Action Campaign*[1] as follows:

> 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.

1.1.2 In the ordinary course of litigation, parties engage the court process to resolve a dispute by requesting a type of relief on offer to them by the specific court they choose to approach. Each party has the right to brief any kind of expert to furnish the court with expert evidence to further their arguments on their instruction. The expert is not a party to the proceedings but a tool in the litigation strategy of the individual litigants. Expert witnesses are paid by their instructing party; while they do have a duty to the court, their evidence is used to substantiate the position that the litigant places before the court.

1.1.3 Sometimes, a dispute can raise a need for relief that has a reach beyond the specific parties to the litigation, that will affect the public as a whole. This is commonly referred to as public interest litigation. Once the interest of a wider aspect of the public is brought within the ambit of the case, the need arises for all material relevant to determining the effect of the proposed relief to be brought to the attention of the court, particularly the Constitutional Court, where the majority of these types of cases are finalised. Due to the parties to a dispute each having their own agenda, it is possible for them each to argue their specific cases without necessarily raising all possible contentions out of the evidence before the court.

1.1.4 Any party to a court action must have *locus standi*, that is, a connection of some kind to the case. The vehicle of an *amicus curiae* creates a mechanism by which a range of factual information can be raised, for the benefit of creating a wider parameter within which to understand the effects of the issues to be determined by the court.

1.1.5 Whilst the above passage indicates that an *amicus curiae* does not have the right to raise a new cause of action, leeway is created due to Rule 31 of the Constitutional Court.[2] In particular, Rule 31 permits an *amicus curiae*, where appropriate, to canvass factual material relevant to the determination of the issues before the court. That may include material

1 *In Re: Certain Amicus Curiae Applications*; *Minister of Health and Others* v *Treatment Action Campaign and Others* (CCT8/02) [2002] ZACC 13

2 Rule 31 of the Constitutional Court Rules promulgated in terms of the Constitutional Court Complementary Act 13 of 1995

that does not explicitly appear on the record, provided such facts are official, scientific, technical or statistical and capable of easy verification. The court has further discretion to permit an *amicus curiae* to adduce additional evidence outside the ambit of Rule 31. Actuarial expert evidence would usually fall squarely within what Rule 31 has envisaged as official, scientific, technical or statistical facts.

1.1.6 Invariably, parties acting as an *amicus curiae* present as representative bodies such as non-governmental organisations, community-based groups, or citizens' rights organisations. As such, one would not expect an individual actuary to approach the court as an *amicus curiae* (as they do in their capacity as an expert witness), but rather actuarial perspective in public interest matters could be presented under a professional body such as the Actuarial Society of South Africa (ASSA).

1.1.7 Section 24 of the Code of Conduct[3] of the ASSA encourages members to serve the public interest by engaging with regulators and participating in public debate. Ordinarily this is done through the formal structures of the ASSA such as the Healthcare Committee's input into the National Health Insurance Bill[4] and the Retirement Matters Committee's input into National Treasury's proposed two-pot system.[5]

1.1.8 Section 25 of the Code of Conduct encourages members to consider the public interest when rendering actuarial services. If members meet the requirements of legislation (such as the Pension Funds Act[6]), the Constitution of the ASSA, applicable Standards of Practice and the Code of Conduct, they will be deemed by the ASSA to have met the expectations of the profession with respect to the public interest.

1.1.9 Section 24 considers a broad definition of public interest (the public at large), whereas Section 25 considers a narrow definition of public interest (a smaller community within a broader national community). South African courts have recognised both broad and narrow definitions of the public interest.[7] Actuarial bodies may join proceedings under both the broad definition and narrow definition of the public interest as discussed in Section 5 of this paper.

1.2 Importance of this research

1.2.1 Serving the public interest is a vital part of the vision and mission of the ASSA. To date, the ASSA's participation in public interest matters has included commentary on various bills and participation in parliamentary portfolio committee briefings. Joining a court action as a friend of the court may be a further useful tool at its disposal to further its public interest endeavours.

1.2.2 This paper shows how various public interest organisations in South Africa and Africa have successfully joined court proceedings as a friend of the court. A concrete

3 Actuarial Society of South Africa. Code of Conduct (2015) www.actuarialsociety.org.za
4 National Health Insurance Bill B11 of 2019
5 National Treasury. Encouraging South African households to save more for retirement. Discussion paper, 14 December 2021
6 Pension Funds Act 24 of 1956
7 *Maharaj* v *Chairman Liquor Board* 1997 (1) SA 273 (N)

case is made for impactful litigation in the public health arena in South Africa, that could be considered by the ASSA. The paper also assesses the risk and benefits of such participation to the ASSA.

1.3 Aims

1.3.1 The main aim of this research is to set out a test case in the public health arena where the ASSA can consider acting as an *amicus curiae*.

1.3.2 The following questions are considered:

— How has the role of an *amicus curiae* been used in South African and African courts in order to promote the public interest?
— Are there any examples of international actuarial bodies that have joined court proceedings as an *amicus curiae*?
— What are the mechanisms and procedures for joining proceedings as an *amicus curiae*?
— What are the risks and benefits to a professional body in joining proceedings as a friend of the court?

1.4 Plan of development

1.4.1 The paper unfolds as follows: Section 2 provides a literature review, Section 3 provides an overview of South African case law and Section 4 provides an overview of African case law. Section 5 describes some examples of the *amicus curiae* work of the American Academy of Actuaries. Section 6 discusses the mechanism and procedure for admission as an *amicus curiae* in the various court structures such as the High Court, Supreme Court of Appeal and the Constitutional Court. Section 7 juxtaposes the role of an actuary as an expert witness against that of an *amicus curiae*.

1.4.2 Section 8 provides a test case in the public health arena where the ASSA could join proceedings as an *amicus curiae*. Section 9 sets out the benefits and risks to a professional body of acting as an *amicus curiae*. The paper concludes in Section 10.

2. LITERATURE REVIEW

2.1 In October 1902, actuary Mr Ralph Price Hardy, in proposing a vote of thanks to the then president of the Institute of Actuaries Mr William Hughes, noted that the Institute's reputation had been enhanced by freely imparted technical knowledge in response to the demands of the public (Higham & MacLeod, 1902). In particular he wanted to draw attention to:

> … the very high compliment paid to the Institute, as a chartered and scientific body, in making it *amicus curiae* in respect of the financial position of those several funds administered by the Patriotic Commissioners. It was well known that for some years past considerable friction had ensued between the naval and military services and the Commissioners as a body. This Institute's report will entirely remove that tension.

2.2 Interestingly, the above assistance had close ties to the South African War of 1899–1902. The South African War created nearly 5,000 British working-class war widows and

during the war, the British state for the first time started paying state pensions to widows (Riedi, 2021). Prior to this, the payment of widows' pensions was reliant on charitable donations administered by the Royal Patriotic Fund.

2.3 Whilst Mr Hardy's reference to an *amicus curiae* was the first in any actuarial journal, it was not used in the correct context because he presumably confused *amicus curiae* for *pro amico* (in that the services to which he refers were rendered on an unpaid basis). In this paper, *amicus curiae* will refer to the use within a legal context, which is as a friend of the court. Such work could however in certain instances be undertaken on a *pro bono publico* basis.

2.4 Budlender et al. (2014) point to three forms of *amicus curiae* prior to South Africa's new constitutional dispensation. The first form of an *amicus curiae* is a person who appears at the request of the court to represent an overlooked party or vantage point. The second form is where a court requests counsel to assist it on complex or unusual aspects of the law that arise in a matter. Thirdly, a common type of an *amicus curiae* is the Law Society or Bar Council which assists and advises the court in promoting the interests of the administration of justice by way of the admission of legal practitioners to practise.

2.5 South Africa's new constitutional dispensation introduced a fourth type of an *amicus curiae*, described in *Children's Institute* v *Presiding Officer of the Children's Court, District of Krugersdorp and Others*:[8]

> The role of a friend of the court can, therefore, be characterised as one that assists the courts in effectively promoting and protecting the rights enshrined in our Constitution. Section 39(2) of the Constitution requires that when interpreting any legislation, courts must promote the 'spirit, purport and objects of the Bill of Rights.' Where there are two reasonable interpretations of a provision, section 39(2) mandates a court to prefer the interpretation that better promotes the spirit, purport and objects of the Bill. In public interest matters, like the present case, allowing an amicus to adduce evidence best promotes the spirit, purport and objects of the Bill of Rights.

2.6 Brickhill & Du Plessis (2011) observe that South African courts increasingly recognise that certain cases must necessarily involve the input from organisations that may not have a direct legal interest in the outcome of a matter. These organisations argue their understanding of the public interest.

2.7 Lowther & McMillan (2006) note that the third strand of their proposed professionalism model, namely the professional body, concerns itself with how actuaries create and maintain an association that is tasked with ensuring that skills (the first strand) are delivered in the agreed manner (the second strand). An example of the manifestation of the third strand would be the profession's commitment to the public interest. In 2005, the ASSA set up a task group

8 *Children's Institute* v *Presiding Officer of the Children's Court, District of Krugersdorp and Others* (CCT 69/12) [2012] ZACC 25; 2013 (1) BCLR 1 (CC); 2013 (2) SA 620 (CC)

to define what an obligation to serve the public interest means. The task group recommended that it was up to the members of the Society to reach a consensus on a public interest role that all members would be willing and able to execute (Lowther, et al., 2005).

2.8 Larsen (2014) notes that in the United States, Supreme Court decisions often turn on generalised facts. Whilst the Supreme Court has shown an increased appreciation for empirical factual support for legal arguments, by turning to motivated interest or advocacy groups to fill the need and indeed relying on their *amicus* briefs as evidence on factual claims, the courts risk tainting decisions with unreliable evidence. It is argued that the adversarial system provides weak checks on *amici* fact-finding.

2.9 When called upon to assist in a public interest matter, it is important not to disempower aggrieved communities or social movements. As noted by Moseneke (2016), the role of the public interest lawyer is to support and not to take over grassroots voices. This is an important message for actuaries who become involved in such matters.

2.10 Box-Steffensmeier et al. (2013) caution that organised groups seek to influence outcomes at every level of governance, and the aims of these groups are in no way assured to be aligned with the aims of a majority of citizens. They find that groups that are more connected with other interest groups and participate more regularly in court proceedings have a greater effect on the probability that a court rules in their favour, compared to infrequent participations or groups that participate on their own.

2.11 Subramanien (2013) notes that the participation of an *amicus curiae* in South Africa has historically been in the context of public interest litigation by human rights activists and civil society organisations that sought to fight the inequalities of the apartheid regime. The focus has now moved away from addressing inequalities and towards ensuring that all persons benefit from the rights enshrined in the Constitution. The author cites the matter of *Children's Institute* v *Presiding Officer of the Children's Court District of Krugersdorp* as a classic example of a matter where the *amicus curiae* sought to be admitted in order to adduce statistical evidence, to demonstrate why orphaned children living with family members should receive a foster child grant.

3. SOUTH AFRICAN CASE LAW

3.1 The death penalty

3.1.1 One of the earliest rulings of the Constitutional Court was the matter of *S* v *Makwanyane and Another.*[9] That matter ruled that Section 277 of the Criminal Procedure Act[10] on the death penalty was unconstitutional. The death penalty in South Africa was thus

9 *S* v *Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1

10 Section 277 of the Criminal Procedure Act (1977)

effectively abolished on 6 June 1995 when the Constitutional Court handed down its decision. Prior to abolishing the death penalty, on 2 February 1990, a moratorium was announced on all executions in South Africa. The last execution occurred on 14 November 1989.

3.1.2 Several *amici curiae* joined the matter, namely Lawyers for Human Rights, the Centre for Applied Legal Studies, The Society for the Abolition of the Death Penalty in South Africa, the Black Advocates Forum, the South African Police and Ian Glauber.

3.1.3 The South African Police provided statistics showing that between 1988 and 1993, approximately 9000 murder cases were brought before the court each year. The Constitutional Court judgment noted that in the more than 40 000 cases that have been heard since the moratorium, only 243 persons were sentenced to death and of these sentences, only 143 were confirmed on appeal. Lawyers for Human Rights, the Centre for Applied Legal Studies and The Society for the Abolition of the Death Penalty in South Africa pointed out that of the 2740 persons executed in South Africa between 1910 and 1975, less than 100 were white.

3.1.4 Notably, no evidence was provided concerning the probability that someone who has been sentenced for murder and is released on parole will commit another murder. As noted in the Constitutional Court judgment, with the abolition of the death penalty, society needs the firm assurance that the murderer will not be released from prison if there is a reasonable possibility that he/she will repeat the crime. The prediction of recidivism is a well-established field that uses actuarial risk models. It may have been instructive for the Constitutional Court to know what the recidivism rate for those serving sentences for murder has been internationally during their deliberations. The use of actuarial risk models could also inform the courts of the appropriate length of sentences.

3.2 The right to water

3.2.1 Section 27(1)(b) of the Bill of Rights,[11] states that everyone has the right to have access to sufficient food and water. The right to sufficient water formed the basis of the Constitutional Court matter of *Mazibuko and Others* v *City of Johannesburg and Others.*[12]

3.2.2 Ngcukaitobi (2021) notes that little attention has been given to water-related reform, yet land and water are inseparable. With one of South Africa's eight metropolitan municipalities currently facing severe water restrictions,[13] the right to sufficient water is likely to be a topic for further litigation in coming years.

3.2.3 The *Mazibuko* matter concerned the reasonableness, fairness and lawfulness of the water policy of the City of Johannesburg, specifically with regard to a pilot project in Phiri, Soweto. Five residents of Phiri challenged the constitutional validity of the introduction of a free basic water allowance of 6 kilolitres per household per month for every household in Johannesburg and the introduction of prepaid water meters.

11 Bill of Rights (1996)

12 *Mazibuko and Others* v *City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC)

13 https://www.nelsonmandelabay.gov.za/page/drought-mitigation-plans-and-projects

3.2.4 The Centre on Housing Rights and Evictions (COHRE) joined the matter as an *amicus curiae*. COHRE submitted that the provision of less than 50 litres of water per person per day and the use of pre-payment meters in Phiri constituted unreasonable, retrogressive, unprocedural and discriminatory measures in violation of the City of Johannesburg's constitutional and international obligations.

3.2.5 The Constitutional Court ruled that the City of Johannesburg's free basic water policy was reasonable, but refused to give a quantified content to Section 27 of the Constitution, holding that this would not be appropriate especially where the quantity asked for was not clearly proven on the papers. The introduction of prepaid meters was found to be authorised by law, fair and not discriminatory.

3.2.6 The Constitutional Court judgment was viewed as a win for government and a significant set-back for public interest litigation. Had the applicants engaged actuaries to model the practical and cost implications of the broad relief sought by them (50 litres of water per person per day), a more cost-effective, calculations-based type of relief may have been sought. Consequently the actuarial input may have informed litigation strategies differently.

3.2.7 Future litigation around the right to water will also need to take into account the effects of climate change, an area where actuaries have started formalising their input. As noted by the Institute and Faculty of Actuaries (2019), the expected change to the quantity and quality of water resources caused by climate change may contribute to mass population migrations with inherent consequences of political stability and violent conflict in some regions.

3.3 Self-incrimination

3.3.1 In *Ferreira* v *Levin NO and Others*,[14] the Constitutional Court was asked to determine whether Section 417 of the Companies Act[15] was constitutional. Section 417 concerns the winding-up of a company unable to pay its debts and the summoning of evidence from directors, officers or any other person believed to be capable of giving information concerning the trade, dealings, affairs or property of the company.

3.3.2 In the course of proceedings, the Constitutional Court invited and accepted written memoranda from the Association of Law Societies, the Public Accountants' and Auditors' Board, the South African Institute of Chartered Accountants and the Association of Insolvency Practitioners of Southern Africa. A joint memorandum was provided to the Constitutional Court by the Public Accountants' and Auditors' Board (the Board), and the South African Institute of Chartered Accountants (the Institute) on 22 April 1995.

3.3.3 The memorandum sought to provide the Constitutional Court with the Board's and the Institute's opinion on the following questions:

— whether Section 417(2)(b) of the Companies Act is unconstitutional in that it compels a person summoned to an inquiry to testify and produce documents, even though such a person seeks to invoke the privilege against self-incrimination;

14 *Ferreira* v *Levin NO and Others*; *Vryenhoek and Others* v *Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1

15 Companies Act 61 of 1973

— whether evidence given by any person at an inquiry in terms of Section 417 of the Companies Act falls to be excluded in any subsequent criminal proceedings brought against such person where such evidence may be incriminating and was extracted without recognition of such person's privilege against self-incrimination;
— whether a person appearing at an inquiry in terms of Section 417 of the Companies Act is entitled to have prior access to a copy of the record of the examination of all other persons examined at the inquiry and all documents in the possession of the liquidator or those prosecuting the inquiry relevant to the interrogation of such person;
— whether a person is required to give testimony at an inquiry in terms of Section 417 which testimony may tend or have the effect of supporting a civil claim against such person; and
— whether a person who has given testimony at an inquiry in terms of Section 417 may have such testimony excluded in any subsequent civil proceedings.

3.3.4 The Board's and the Institute's reply noted that:

— an accountant or auditor being examined in terms of Section 417 of the Companies Act ought not to be able to refuse to testify or to produce documents where such testimony or documents may tend to evidence improper professional conduct on his or her part;
— such testimony and documents should be admissible as evidence in any subsequent disciplinary proceedings conducted by the Board or the Institute;
— should the Constitutional Court hold that such evidence may not be used in any subsequent criminal or civil proceedings, then the Board and the Institute would not disclose such evidence to any party for such purpose;
— a person being examined ought not to have prior access to the record of examination of all other persons examined at the inquiry; and
— a person being examined ought not to have prior access to all documents in the possession of the liquidator or those prosecuting the inquiry relevant to the person being examined.

3.3.5 It is instructive that in their response, the Board and the Institute recognised striking a balance between competing interests. On the one hand, the interests of the Board, the Institute, creditors, shareholders and the liquidators justify cheap and speedy procedures for identifying the causes of the winding up of a company, and establishing any misconduct by accountants and auditors. On the other hand, there are the interests of the examinee in not being prejudiced by giving answers which might tend to incriminate him or her and that may subsequently be used in evidence.

3.3.6 In the final analysis the Constitutional Court found that Section 417(2)(b) infringed the rule against self-incrimination and the right of a person to a fair trial in terms of Section 25(3) of the Constitution. The court acknowledged the role of the Board and the Institute:

> We are at the beginning stages of utilising the amicus curiae intervention procedures for which provision is made in Constitutional Court rule 9. We wish to acknowledge the valuable assistance derived by this Court from the argument on behalf of the amici curiae, JSN Fourie and others, as well as from the memoranda filed by the above mentioned professional bodies.

4. AFRICAN CASE LAW

4.1 Kenya

4.1.1 The Constitution of Kenya[16] provides that an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules[17] defines a friend of the court as a person or entity that is expert in an issue that is the subject matter of proceedings, but is not a party to the case and serves to benefit the court with its expertise.

4.1.2 In *Trusted Society of Human Rights Alliance* v *Mumo Matemo & 5 others*,[18] the Supreme Court of Kenya developed rules to determine the admission of an *amicus curiae* to a case. In particular, it was held that admission of a friend of the court should be governed by principles of neutrality and fidelity to the law. This is in contrast to other common law countries including South Africa, where an *amicus curiae* may adopt a specific position on a matter.

4.1.3 The matter of *Baby 'A' and Another* v *Attorney General and Others*[19] saw intervention from the Kenya Human Rights Commission as an *amicus curiae*. In that matter, Baby A was born intersex, with both male and female genitalia. The hospital had marked Baby A's gender with a question mark on the legal paperwork, with the result that no birth certificate had been issued as the Registrar of Births and Deaths only provided for two options for gender, being male or female. The court's finding was aligned to the *amicus curiae* in the matter, noting that while there was no evidence of Baby A having undergone discrimination, there was a need to register intersex children to prevent future discrimination. The court acknowledged that there was a need to create laws and guidelines that protected intersex persons, but left this to the legislature. In 2019, Kenya became the first African country to collect statistics on intersex people in its national population census.

4.2 Nigeria

4.2.1 One of the obstacles for the admission of an *amicus curiae* in Nigerian courts is the lack of civil procedure rules or any other rules of court. Two broad ways in which they have been able to participate in court proceedings historically is by invitation from the court, or by invitation from parties to proceedings. The latter however must be done with leave of the court.

4.2.2 Anozie & Windgate (2020) discuss the landmark Supreme Court case of *Centre for Oil Pollution Watch* v *NNPC*.[20] They note that non-governmental organisations have been at the forefront of securing environmental justice for the people of the Niger Delta

16 Constitution of Kenya, 2010 art 22(3)(e)
17 Mutunga Rules, 2013 rule 2
18 *Trusted Society of Human Rights Alliance* v *Mumo Matemo & 5 Others* (Petition 12 of 2013) [2015] eKLR 41
19 *Baby 'A' (suing through the Mother E.A.) & another* v *Attorney General & 6 others* [2014] eKLR, petition no. 266 of 2013
20 *Centre for Oil Pollution Watch* v *NNPC* (2018) LPERL-50830 (SC)

who suffer from the effects of oil pollution, but in the past have lacked the necessary legal standing to pursue such cases in their own capacity.

4.2.3 In the Supreme Court ruling, it was found that environmental non-governmental organisations that were previously unable to institute action under existing public interest procedures may now institute action in their own right so as to prevent or remedy environmental pollution. The decision was aided by five teams of senior advocates who made up the *amicus curiae* in the matter. The import of the case is that Nigerian courts now recognise claims by non-governmental organisations for damages arising from oil pollution in the category of public interest litigation.

4.2.4 Reddy & Thomson (2015) note that environmental damage can be wrought in the short term, but it may take many years to reverse the damage done by one year of activity. Actuaries would be well placed to join non-governmental organisations in developing countries in order to model such effects and hence strengthen legal arguments. The provision of technical information and modelling in environmental litigation can aid the decision making of courts.

4.3 Malawi

4.3.1 The Malawi High Court Civil Procedure Rules[21] provide for any person interested in any matter in a proceeding before the court, with the permission of the court, to be admitted as an *amicus curiae* upon such terms and conditions as the court may determine.

4.3.2 In *Gwanda* v *The State*,[22] four *amici curiae* joined the matter, namely the Legal Aid Bureau; the Centre for Human Rights Education, Advice and Assistance; the Paralegal Advisory Services Institute, and the Malawi Law Society.

4.3.3 In the matter, Mr Gwanda, a street vendor by trade, was arrested in terms of Section 184 of the Malawian Penal Code[23] that was adopted on 1 April 1930. He was charged with being a rogue and a vagabond, concepts that found their way into Malawian law due to their colonial ties. The wording of the Malawian Penal Code can be traced back to the Vagrancy Act[24] in the United Kingdom, that consolidated all other laws relating to vagrants in the early 1800s.

4.3.4 The extent of colonialisation is illustrated in the African Court on Human and Peoples' Rights advisory opinion,[25] where it was noted that at least 18 African countries still have laws containing vagrancy offences. A vagrant is defined as any person who does not have a fixed abode nor means of subsistence, and who does not practise a trade or profession. As noted by Mr Gwanda following the conclusion of the trial:

> I believe poverty is no crime.

21 Malawi High Court Civil Procedure Rules (2017) Order 19
22 *Gwanda* v *The State* [2017] MWHC 23
23 Malawi Penal Code (Chapter 7:01) [as amended to Act No. 8 of 1999]
24 Vagrancy Act of 1824.
25 Request for Advisory Opinion by The Pan African Lawyers Union on the Compatibility of Vagrancy Laws with The African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa No. 001/2018 Advisory Opinion 4 December 2020

4.3.5 Some African countries still have antiquated and oppressive vagrancy laws. In order to fast track change, statistical and demographic research into questions such as how migration is changing, how policies affect migration and what the social and economic implications of migration are on various African countries, will serve the judiciary well.

5. ACTUARIAL BODIES AS AN *AMICUS CURIAE*

5.1 Obamacare

5.1.1 On 23 March 2010, the United States Congress enacted the Patient Protection and Affordable Care Act, commonly referred to as the Affordable Care Act (ACA) or Obamacare. The purpose of the ACA was to increase the number of Americans covered by health insurance and decrease the cost of healthcare. One of the key provisions of the ACA is the individual mandate that requires most Americans to maintain minimum essential health insurance coverage. Individuals who are not exempt and who do not receive health insurance through an employer or government programme, are required to purchase insurance from a private company. With effect from the beginning of 2014, non-compliant individuals would be required to make a shared responsibility payment and that penalty would be paid to the Internal Revenue Service along with an individual's taxes. The ACA has been referred to as President Barack Obama's signature legislative achievement.[26]

5.1.2 Gluck et al. (2019) note that the ACA is the most challenged statute in American history. The ACA has faced seven United States Supreme Court challenges since its enactment. The first such challenge was the matter of *National Federation of Independent Business* v. *Sebelius*.[27]

5.1.3 Prior to reaching the Supreme Court (the highest court in the United States), the matter had initially been heard by the United States District Court for the Northern District of Florida. In a ruling on 31 January 2011, the District Court ruled that the individual mandate provision was unconstitutional and since it could not be severed from the body of the act, this caused the entire act to be invalid.

5.1.4 The United States federal government appealed the ruling of the District Court and the matter was then heard by the Eleventh Circuit Federal Court of Appeals. On 12 August 2011, the Federal Court of Appeal upheld the District Court's finding that the individual mandate was unconstitutional in a split 2–1 decision, but upheld the constitutionality of the remainder of the ACA.

5.1.5 On 28 September 2011, the Obama Administration petitioned the Supreme Court for a review of the decision. On 14 November 2011, the Supreme Court granted a review in the case. Oral arguments were then heard by the Supreme Court from 25 March 2012 to 27 March 2012.

5.1.6 The American Academy of Actuaries (AAA) is a non-profit professional association for actuaries of all specialties practising in the United States. That body is the

26 *NFIB* v *Sebelius and the Individualization of the State Action Doctrine*. (2014). *Harvard Law Review*, **127**(4), 1174–1195

27 *National Federation of Independent Business* v. *Sebelius* 567 U.S. 519 (2012)

public voice for the actuarial profession in the United States and provides independent and objective actuarial information, analysis and education for the formulation of public policy. Importantly, the Academy identifies and addresses issues of public interest to which actuarial science can provide a unique understanding.

5.1.7 With respect to the hearing in the Supreme Court, the AAA filed an *amicus curiae* brief on 27 January 2012 in an effort to assist the Supreme Court in understanding the actuarial consequences of a decision to invalidate the individual mandate.

5.1.8 In court papers, the AAA noted that:

> The Academy takes no position on the constitutionality of the individual-mandate provision, or on any of the other issues besides severability that are before the Court in the litigation concerning the Act. The Academy files this brief for the sole purpose of informing the Court of its judgment that, from an actuarial perspective, a decision invalidating only the individual-mandate provision would impose an unsound regulatory regime on the American health-insurance market—a regime that Congress would not have intended.
>
> However the Court rules on the constitutionality of the individual-mandate provision, therefore, the guaranteed-issue and community-rating provisions should stand or fall together with it.

5.1.9 The AAA provided detailed argument, noting that through the guaranteed-issue and community-rating provisions, the ACA eliminates the ability of insurers to deny coverage based on pre-existing conditions, eliminates the ability of insurers to base premiums on health status, and substantially limits the ability of insurers to vary premiums based on other characteristics associated with healthcare costs. In light of the guaranteed-issue and community-rating provisions, it was argued that the individual-mandate provision of the ACA is a vital mechanism for keeping insurance pools fully stocked with lower-risk individuals.

5.1.10 On 28 June 2012, the Supreme Court overturned the judgment of the Eleventh Circuit Federal Court of Appeals in a split 5–4 decision. The Supreme Court upheld the individual mandate as constitutional. By implication, this coincided with the AAA's opinion that the constitutionality of the individual mandate should stand with the guaranteed-issue and community-rating provisions.

5.1.11 The above matter is indicative of an actuarial body acting as an *amicus curiae* in the broad definition of public interest.

5.2 Actuarial Standards of Practice

5.2.1 In a further matter, the AAA filed an *amicus* brief in the matter of *Willens* v. *Northwestern Mutual Life Insurance Co.* [28] on 29 March 2004. That matter was enrolled in the Superior Court of the State of California (County of Los Angeles). The purpose of the brief was to clarify when Actuarial Standards of Practice (ASOPs) apply to individual assignments performed by actuaries and the process of developing and adopting ASOPs.

28 *Willens* v. *Northwestern Mutual Life Insurance Co.* Case No. BC 221648

5.2.2 Similar to the ASSA Advisory Practice Note 901,[29] Precept 3 of the AAA's Code of Professional Conduct,[30] provides that where a question arises with regard to the applicability of a standard of practice, or where no applicable standard exists, an actuary shall use professional judgement, taking into account generally accepted actuarial principles and practices.

5.2.3 In this particular matter, Northwestern Mutual Life Insurance Co. (Northwestern Mutual) actuaries examined ASOP 15,[31] for guidance in allocating divisible surplus among different groups of disability insurance policyholders. The applicable ASOP 15 at the time applied to dividends illustrated or distributed under the provisions of participating policies issued for delivery in the United States by mutual and stock life insurance companies and by fraternal societies and associations.

5.2.4 It was represented that in the absence of an ASOP dealing with dividend determination for disability insurance policies, the actuaries of Northwestern Mutual looked to ASOP 15 for guidance in how to allocate divisible surplus among different groups of policyholders. The plaintiffs in the law suit in question questioned the appropriateness of the decision of Northwestern Mutual's actuaries to do so.

5.2.5 The *amicus* brief of the AAA explained that if the disability policies at issue in the *Willens* case fell within the defined scope of ASOP 15, the code requires Northwestern Mutual's actuaries to comply with it. However, in the absence of a standard that deals expressly with the allocation of divisible surplus for disability insurance, the code requires the actuary to exercise professional judgement in dividing the surplus, taking into account the guidance set out in ASOP 15 and acting consistently with generally accepted principles and practices.

5.2.6 A second question raised by the plaintiffs in the matter was the participation of a Northwestern Mutual actuary in the drafting of ASOP 15. It was alleged that this unduly influenced the language of the standard that was adopted by the Actuarial Standards Board (ASB).

5.2.7 The AAA explained that the ASB uses a separate operating committee to develop each standard and that every standard is carefully reviewed, edited, and approved by the entire ASB. It was recorded that every new or amended standard is exposed to the actuarial profession and other interested parties through a broad period of notice and comment. All comments that are received are considered and answered in writing by the operating committee under the active oversight of the ASB. It was emphasised that the ASB process appropriately maintains the integrity of the standards. In addition, it would be highly unlikely that a single individual would unduly influence the drafting process involving the active participation of many professionals.

29 Actuarial Society of South Africa. APN901: General Actuarial Practice (2021)
30 American Academy of Actuaries. Code of Professional Conduct (2001)
31 Actuarial Standards Board. Dividend determination for participating individual life insurance policies and annuity contracts (1990)

5.2.8 Subsequent to the matter, the scope of ASOP 15 was extended to Dividends for Individual Participating Life Insurance, Annuities, and Disability Insurance with effect from March 2006.

5.2.9 The above matter is indicative of an actuarial body acting an *amicus curiae* within the narrow definition of public interest.

6. MECHANISM AND PROCEDURE FOR ADMISSION AS AN *AMICUS CURIAE*

6.1 It is important to examine the principles governing the admission of *amicus curiae* as compliance with these principles will ensure proper assessment of such applications. Consent is not merely granted just because an organisation asks to join proceedings as a friend of the court. Admission of *amici* in the Constitutional Court is governed by Rule 10 of the Constitutional Court Rules. Different rules govern admission of *amici* in the High Court and the Supreme Court of Appeal, but essentially the same principles apply.

6.2 Subrule 10(1) provides for an organisation to be admitted as an *amicus curiae* provided that it receives the written consent of all parties. Even in matters where written consent has been obtained from all parties, the court is not bound to automatically admit that organisation as a friend of the court. The court still needs to satisfy itself whether regard has been had to the principles that govern the admission of an *amicus curiae.* These principles are whether the submissions sought to be advanced are relevant to the issues before the court, will be useful to the court and are different from those of the other parties. Subrule 10(7) states that the submission should raise new contentions and should not repeat the arguments set out by other parties.

6.3 In matters where written consent has not been obtained from all parties, the *amicus curiae* can approach the Chief Justice in terms of subrule 10(4). The Chief Justice may grant such an application upon such terms and conditions and with such rights and privileges as he or she may determine.

6.4 Irrespective of the mechanism for admission, it was ruled in *Institute for Security Studies: In re S* v *Basson*[32] that no person may be admitted without the consent contemplated in subrule 10(4). That is, after obtaining written consent in terms of subrule 10(1), an applicant must still make an application to the Chief Justice for admission.

6.5 Subrule 10(6)(c) requires an application for admission as an *amicus curiae* to set out the submissions to be advanced, their relevance to the proceedings, the reasons for believing that the submissions would be useful to the court and different from those of the other parties to the proceedings. For a proper assessment to be made, the application for admission as an

32 *Institute for Security Studies: In Re S* v *Basson* (CCT30/03B) [2005] ZACC 4; 2006 (6) SA 195 (CC)

amicus curiae must ordinarily be accompanied by a summary of the written submissions sought to be advanced. This will enable the Court to assess the application properly.

6.6 There are no formal limits on the length of heads of argument of an *amicus curiae* in the Constitutional Court. However, heads of argument filed by the parties are limited (by directions of the Court) to fifty pages. When *amici* are admitted, the directions frequently limit the length of heads of argument. The heads of argument are based on the evidence presented by the *amici* and the applicable legal principles.

6.7 A plain reading of subrule 10(8) indicates that *amici curiae* are not permitted to present oral argument. Budlender (2006) notes however that whilst that may be the default position, it is not the usual practice. The Constitutional Court has discretion to permit the *amicus curiae* to offer oral argument and that appears to be derived from subrule 32(2). In the Supreme Court of Appeal, Rule 16(8) of the rules regulating the conduct of proceedings in that court limits the *amicus curiae* to the record on appeal, unless directed otherwise by the court.

7. EXPERT WITNESS VERSUS *AMICUS CURIAE*

7.1 A distinction must be drawn between individual actuaries acting as expert witnesses for litigants, and the ASSA or another appropriate actuarial body acting as an *amicus curiae*.

7.2 An actuary acting as an expert witness for an individual party does so on the instruction of that party and the contentions contained in the expert report are usually limited to the information and bases provided by the client. This is not always the case. An actuarial expert may testify on the basis of his or her own research and expertise, wholly independent of the client. In contrast, the role of the ASSA acting an as *amicus curiae* is envisaged to consider the public interest component of the case in its entirety and provide an actuarial perspective that is holistic. The briefing parameter is essentially twofold: first to promote the spirit, purport and objectives of the Bill of Rights, and secondly to manifest Section 24 of the ASSA Code of Conduct to serve the public interest. As long as the contentions raised canvass factual material based on scientific, technical or statistical fact, the ASSA may bring them to the court's attention.

7.3 An expert witness is paid for by the individual parties engaging in their services. The ASSA would be required to self-fund any participation as an *amicus curiae*, including the costs of legal counsel to draft papers and, where appropriate, present legal argument.

7.4 An expert witness almost always provides a written expert report containing his or her opinion. The client has the prerogative of whether or not to disclose this report to the court or merely utilise same for their own litigation strategy. If the expert report is served on all parties and incorporated as part of the court record, it becomes public. If the matter proceeds to trial, the expert will give oral evidence which would include being cross-examined by

all other parties. The scope of the oral evidence is generally limited to that contained in the expert report. Acting as an *amicus curiae* provides the ASSA with the opportunity to record their input in written heads of argument which is submitted to the court. An *amicus curiae* would not be required to give oral evidence or be subject to cross examination.

7.5 A litigating party decides whether or not to appoint an expert actuary. This is usually based on previous involvement of actuaries in the particular area of law under dispute and whether or not the client has sufficient funds. As is evident from Section 3 and Section 4 above, the ASSA is better placed to give creative consideration to instances where actuaries can add critical value to the courts in determining a far wider range of rights-based litigation than has been seen in practice to date.

7.6 By using a strategic impact litigation strategy, the ASSA would raise the profile of the actuarial profession as leaders in societal risk management. This culminates in the transition of the actuarial profession from service providers targeting the healthy and the wealthy, to drivers of well-considered social reform. This complements the ASSA's realisation of active citizenry.

8. A TEST CASE

> I can get no remedy against this consumption of the purse: borrowing only lingers and lingers it out, but the disease is incurable.[33]
>
> William Shakespeare: *Henry IV*, Part 2

8.1 Introduction

8.1.1 The South African Law Reform Commission (SALRC) has documented the medical negligence claims crisis facing the various provincial departments of health[34] and notes that:

> It must be emphasized again that the more money is taken from the public health sector to benefit a handful of successful claimants, the less money is available to improve services for the benefit of all users of public health services. It is the members of the poorest communities who have no option but to use public health services that are most affected by deteriorating health services standards due to depleted budgets. The solution to addressing the problems in the public health sector does not reside in making huge lump sum payments to a lucky few claimants. The same principles apply to any patient suffering a permanent injury and requiring long-term care, rehabilitation and treatment.

8.1.2 The above passage highlights the contentious issue of large lump sum payments. In the ensuing four sections, the once-and-for-all rule, the various defences

33 As quoted by Judge Eksteen in *MEC for Finance, Eastern Cape* v *LPC* [2022] 2091–2011 (ECM)
34 South African Law Reform Commission (2021). Discussion Paper 154 Project 141 Medico-Legal Claims

that have been raised—such as the public healthcare defence, periodic payments and the undertaking to pay defence—and the State Liability Amendment Bill are discussed.

8.1.3 The remaining sections provide additional information for the benefit of the court, and explain what additional information must be obtained so that the court can make a more informed decision concerning the appropriate payment mechanism.

8.2 The once-and-for-all rule

8.2.1 The once-and-for-all rule is a common law convention which requires that all damages flowing from a cause of action must be claimed in one court action. This is to prevent a plaintiff from making multiple claims against the same defendant arising from the same event. This rule means that damages for past harm and for future loss must be claimed within the same court action.

8.2.2 In the matter of *Member of the Executive Council for Health and Social Development, Gauteng* v *DZ obo WZ*,[35] the Constitutional Court held that damages due in law are to be awarded in money. In addition, damages may not be paid in periodic payments as an alternative to being paid in a lump sum. Finally, it was ruled that a defendant may not compensate a plaintiff by providing future medical services in the place of damages.

8.2.3 In order to allow damages to be paid in any of these ways rather than as a lump sum, the court would have to develop the common law. There are two possible justifications for developing the common law set out in the Constitution—firstly if it conflicts with the Bill of Rights or, secondly, if it is in the interests of justice for the common law to be developed.

8.2.4 The court chose not to develop the common law in this case, because it found that the Member of the Executive Council (MEC) for Health and Social Development, Gauteng had not put forward a sufficiently strong factual foundation for why the law should be changed. However, it did not rule out developments of the common law as a future possibility.

8.3 The public healthcare defence

8.3.1 This is an argument that was made by the MEC for Gauteng and was also raised by the MEC of the Eastern Cape as an *amicus curiae*. The argument was that instead of paying for future medical services rendered to the plaintiff in the private healthcare sector, the defendant should be allowed to provide these services directly to the plaintiff at a public hospital.

8.3.2 The court rejected this proposition. The court did not feel it was appropriate for it to develop the common law in this new direction, although it did recognise some of the benefits of doing so. For example, it recognised that in principle, providing medical services in the place of paying out damages would serve the purpose of compensation in a delictual claim (placing the plaintiff in the position they would have been in if the wrong had not occurred). The court left the door open for this to happen in future cases.

35 *Member of the Executive Council for Health and Social Development, Gauteng* v *DZ obo WZ* (CCT20/17) [2017] ZACC 37; 2017 (12) BCLR 1528 (CC); 2018 (1) SA 335 (CC)

8.3.3 Whilst the court did not accept the public healthcare defence, it accepted that the plaintiff would need to show that the damages claimed for private healthcare were reasonable. This would include demonstrating why it was reasonable to claim the costs of private healthcare, rather than public healthcare if the defendant had produced evidence that equivalent services of equal quality were available at a lesser cost. This is known as the mitigation of health costs defence. The court found that this defence was possible within the current ambit of the common law because it falls within the current law that a plaintiff must prove that the damages they are claiming are reasonable.

8.4 Periodic payments

8.4.1 The MEC for Gauteng argued that instead of damages being paid in a lump sum, they could be made by way of instalments. Froneman J found that whilst there are isolated examples of courts ordering damages in periodic payments, this is not a concept which is recognised within the common law. Froneman J referred to sources in English law which declined to amend the common law in order to allow periodic payments, stating it was a matter better left for the legislature to decide upon.

8.4.2 The court recognised some of the potential benefits of periodic payments, such as the difficulty of making an accurate calculation when awarding a lump sum. At the heart of this is the difficulty in predicting, with accuracy, the life expectancy of a child with cerebral palsy. The court acknowledged that periodic payments could be less speculative than a lump sum, especially where there are top-up provisions (allowing the plaintiff to apply for more money should further need occur) and claw back provisions (allowing the defendant to regain the remainder of the funds in the event of the early death of the child).

8.4.3 At the same time, it acknowledged that periodic payments posed potential difficulties with regard to inflation, taxation, etc. Froneman J opined that the common law would need to be developed in order to allow periodic payments and declined to develop the law to allow periodic payments in this case; however he suggested that in a future case where a fully pleaded argument for periodic payments had been made, the common law might be developed in this direction.

8.4.4 In a minority judgment, Jafta J, disagreed that periodic payments depart from the common law of South Africa. He argued that the fact that other common law jurisdictions demand a lump sum payment does not necessarily mean that the same should apply in South Africa. Jafta J cited examples such as judgment debts being paid in instalments in relation to execution on a person's home. He argued that the High Court has the inherent power to order periodic payments. However, he agreed with Froneman J that the MEC for Gauteng had not provided a persuasive factual basis for why the court should order periodic payments rather than a lump sum in this case.

8.4.5 Consequently, the court did not allow the defendant to pay damages as periodic payments; however this case laid the groundwork for the common law to change when a case with the right set of facts comes along.

8.5 The undertaking to pay defence

8.5.1 This was another argument put forward by the MEC for Gauteng, which was also raised by the MEC for the Eastern Cape. She argued that a claim for future medical expenses could be satisfied by an undertaking by the MEC to pay for medical expenses as and when they arose in the future. The MEC would undertake to pay invoices raised within 30 days. The payment would be made directly to the service provider. Froneman J felt that like periodic payments, this fell outside of the current possibilities of the common law. Jafta J disagreed, finding that this was simply an administratively different mechanism for payment of damages, rather than a different type of damages.

8.5.2 However, both judges agreed that it would not be appropriate to allow damages to be paid in this way on the facts of this case, because the defendant had not provided sufficient evidence to support their case. Therefore, like the other alternatives to a lump sum, this proposition was rejected by the court.

8.6 The State Liability Amendment Bill

8.6.1 The State Liability Amendment Bill[36] (the Bill) was introduced in the National Assembly on 30 May 2018. The Bill seeks to amend the State Liability Act, 1957, so as to provide for structured settlements for the satisfaction of claims against the State as a result of wrongful medical treatment of persons by servants of the State; and to provide for matters connected therewith. The memorandum on the objects of the Bill states that the Bill is promoted in the interim pending the outcome of the larger investigation into medico-legal claims by the SALRC.

8.6.2 Public hearings with respect to the Bill were held on 31 October 2018. According to National Assembly Rule 333(2), the Bill automatically lapsed when Parliament was dissolved on 7 May 2019, but was revived by the National Assembly on 29 October 2019.

8.6.3 The Portfolio Committee for Justice and Correctional Services (the Committee), who preside over the Bill, convened a meeting on 26 January 2021[37] in which the Bill was discussed. The Committee noted that it did not understand why the Bill is being brought before it when the matter is still being holistically investigated by the SALRC. It was stated that the Committee cannot consider a Bill which has not been fully processed without all the available information before the decision makers.

8.7 The missing link

8.7.1 Of crucial importance surrounding the debate of a lump sum as opposed to a structured settlement (consisting of a smaller lump sum, a payment in kind plus a periodic payment), is the historical experience of lump sum payments.

36 State Liability Amendment Bill B16 of 2018

37 South Africa. Parliament. Committee on Justice and Constitutional Development (2021). State Liability Amendment Bill: Briefing

8.7.2 Valuable insights would include whether or not plaintiffs actually benefit from lump sum awards, whether or not the numerous recommendations made in expert reports are actually implemented after litigation, what remains of the lump sum after a few years, the mortality experience of the children involved, and a comparison of the amount of the award paid out by the Department of Health compared to the amount that actually gets placed in trust for the plaintiff.

8.7.3 Research into the expenditure of lump sums is minimal.[38] A reason for this is the sensitive nature of the information that is required to properly account for the expenditure of a lump sum payment.

8.8 Claims paid data

8.8.1 Over the period from 1 April 2014 until 21 March 2021, total claims payments by the nine provincial health departments totalled approximately R9.76 billion.[39]

8.8.2 Claims payments are made out of provincial health department annual budgets. As noted by Wessels (2019):

> … the most worrying consequence of the excessive medical malpractice litigation against the state is that it may potentially undermine the department of health's ability to provide public healthcare in future … In other words, the problem is that an already overwhelmed and underfinanced public healthcare sector is exposed to the ever increasing amount of malpractice claims.

8.8.3 Data was obtained for an anonymised province containing claims paid from 1 April 2014 until 31 March 2021 as shown in Table 1.

TABLE 1. Claims paid from 01/03/2014 to 31/03/2021

Payment made on file in the financial year ending	Number of unique claim payments in financial year	Total claims payments in financial year	Average claim size
31/03/2015	33	R72,100,000	R2,200,000
31/03/2016	58	R245,300,000	R4,300,000
31/03/2017	40	R205,100,000	R5,200,000
31/03/2018	48	R378,400,000	R7,900,000
31/03/2019	66	R784,800,000	R11,900,000
31/03/2020	71	R793,900,000	R11,200,000
31/03/2021	97	R1,007,300,000	R10,400,000
Total	413	R3,486,600,000	R8,500,000

38 Road Accident Fund Commission Report (2002). Volume 3
39 Ibid., 37

8.8.4 The distribution of claim sizes, unadjusted for inflation, is shown in Table 2.

TABLE 2. Distribution of claims paid from 01/03/2014 to 31/03/2021

Claim size (million)	Number of claims	Total claims payments	Cumulative
< R1	150	R39,600,000	1.1%
R1–R2	16	R21,500,000	1.8%
R2–R5	30	R100,900,000	4.6%
R5–R10	44	R330,200,000	14.1%
R10–R15	49	R607,600,000	31.5%
R15–R20	83	R1,397,200,000	71.6%
> R20	41	R989,900,000	100.0%

8.8.5 Two firms of attorneys (or their associated firms) accounted for approximately 39% of all claim payments in the province, and approximately 14% of all claim payments in the country over the period from 1 March 2014 until 31 March 2021. Firm A settled 39 claims and received total payments of approximately R744.0 million with an average claim size of approximately R19.1 million. Firm B settled 40 claims and received total payments of approximately R612.2 million with an average claim size of approximately R15.3 million. It is possible that some claims were only partially settled and that additional amounts may be payable in respect of a file, but this was not immediately apparent from the data.

8.9 Trusts

8.9.1 Once a matter is settled and made an order of court, court orders invariably require that the monies be paid to the attorney's trust account and that thereafter a trust is to be established in respect of the child. In practice, either trusts are formed or in some matters a trust is not even established despite the court order.[40]

8.9.2 There is a clear lack of oversight in relation to trusts. Despite the fact that most court orders require that annual financial statements of the trust be lodged with the Master's Office, this is a meaningless provision. This is due to the fact that the Master's Office is oblivious to how much the actual award was and only has a record of the amount that is actually transferred into the trust account from the attorney's trust account. In addition, it is unclear if party-and-party costs recovered from the defendant are in fact paid into the trust.

8.9.3 With respect to Firm A, using the publicly available online Master's Office portal,[41] letters of authority were obtained that corresponded to 33 settlement values

40 *The South African Legal Practice Council and Another* v *Nonxuba and Others* (10313/2021) [2022] ZAWCHC 105

41 www.icmsweb.justice.gov.za

amounting to approximately R694.6 million. In all instances, the attorney representing the plaintiff also became a trustee of the trust set up for the child. With respect to curators, the courts have ruled on a conflict of interest in the matter of *Martin* v *Road Accident Fund*.[42] In that matter the court ruled that it is advisable that no member of the firm that represented the plaintiff should be appointed as the *curator bonis*, so that there is no conflict of interest when fees and disbursements have to be quantified and recovered. The conflict of interest described above has major financial implications for plaintiffs and should equally apply to trusts.

8.9.4 In all instances, three trustees were appointed: a chartered accountant, the attorney from the firm representing the plaintiff in the original court action, and a parent or guardian of the child. The same chartered accountant appeared as a trustee in 31 out of 33 trusts. Each trustee commands a trustee's fee and aside from the attorney and chartered accountant, each parent or guardian also receives a trustee's fee. Consideration should be given to establishing an umbrella trust so as to circumvent the additional fees generated by the arrangement described above.

8.9.5 Instances have been identified where the attorney acting for the claimant becomes a trustee of the trust set up for the birth-injured child and then also becomes the executor of the child's estate on death.

8.10 Triangulation of data

8.10.1 It is compulsory for trusts to be registered for tax purposes.[43] Trusts are required to submit an income tax return annually and it is compulsory for trusts to file a return on time. An entity such as the SALRC could consider using their powers in terms of the Commission Act.[44] For the purposes of investigating a matter of public concern, the Commission Act would permit the SALRC to summons any information it deems relevant to their investigation. It is imperative that information concerning whether trusts are complying with the Income Tax Act and the amounts left in various identified trusts be established from the South African Revenue Service (SARS).

8.10.2 The Legal Practice Council (LPC) is a national statutory body established in terms of the Legal Practice Act.[45] The LPC and its provincial councils regulate the affairs of and exercise jurisdiction over all legal practitioners (attorneys and advocates) and candidate legal practitioners. An important mandate of the LPC is to regulate the professional conduct of legal practitioners to ensure accountability. The LPC has the power to inspect attorneys' trust accounts and accounting records. The SALRC could request the LPC to investigate certain identified trusts with the view of determining how much of the original award was set up in trust for a successful claimant.

8.10.3 The identity numbers of the parents or guardians of various trusts are publicly available on the Master's Office Portal. The South African Social Security Agency

42 *Martin* v *Road Accident Fund* [1999] JOL 5350 (W)
43 Section 1 of the Income Tax Act 58 of 1962
44 Commission Act 8 of 1947
45 Section 4 of the Legal Practice Act 28 of 2014

(SASSA) can provide information on all social grant recipients linked to a particular parent or guardian. This will serve two purposes. Firstly, it will permit a more complete check of the vital status of various birth-injured children. Secondly, it will permit the court to know how many birth-injured children are receiving additional state-sponsored assistance, despite large lump sum awards having been concluded.

8.10.4 It is clear that the very nature of this data requires the aforementioned triangulation from SARS, the LPC and SASSA. As such, an independent, objective third party acting as an *amicus curiae* would be well placed as a vehicle to deliver this critical, as yet under-investigated, perspective to the courts.

9. BENEFITS AND RISKS OF *AMICI* BRIEFS

9.1 The risk of adverse cost orders

9.1.1 Humby (2009) explains that two principles have governed cost orders in South Africa since the early 1900s. Firstly, the court has judicial discretion to award costs and secondly, costs follow the event in that the successful party to litigation is normally awarded costs. Hence, the ASSA would want to avoid an adverse costs order in the event that the position adopted on a particular matter was rejected by the court.

9.1.2 The matter of *Trustees for the time being of the Biowatch Trust* v *Registrar Genetic Resources and Others*[46] provides protection however. The Constitutional Court ruled that:

> I conclude, then, that the general point of departure in a matter where the state is shown to have failed to fulfill its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door—at the end of the day, it was the state that had control over its conduct.

9.1.3 In litigation between the state and a private party seeking to assert a constitutional right, the so-called Biowatch principle provides protection for unsuccessful litigants from the obligation of paying costs to the state. This is different from ordinary civil litigation where an unsuccessful litigant is liable for the costs of the successful party. In the event that the ASSA adopted a position opposite to that of the state in a Constitutional Court matter, they would be limited to their own costs.

9.1.4 The matter of *Hoffmann* v *South African Airways*[47] stated further that with respect to an *amicus curiae*:

> It joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court. It chooses the side it wishes to join, unless requested by the court to urge a

46 *Biowatch Trust* v *Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) at para 56

47 *Hoffmann* v *South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1211; [2000] 12 BLLR 1365 (CC)

particular position. An amicus, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs.

9.2 The benefit of incremental change

9.2.1 Rosenberg (1991) notes that courts are political institutions and questions whether as political institutions they can be consequential in effecting significant social reform. Courts have traditionally been viewed as passive problem solvers and piece-meal adjudicators of private disputes. The result of this mixture of interesting but unconnected judgments is that it tells us little about whether or not courts produce social change. A natural concern of the ASSA membership (aside from the costs of litigation), would be whether or not involvement in a litigation matter would bring about any meaningful change.

9.2.2 Budlender, et al. (2014) emphasise that optimal societal impact is normally achieved through a series of cases and not a single case. There needs to be a coherent long-term strategy as it is unlikely that one case on its own will bring about the desired social change. A research report produced by actuaries may highly inform this long-term strategy, given the actuarial control cycle and the importance of feedback loops. To ensure that the long-term strategy has considered practical, statistical and economic knowledge, the reliance on credible actuarial research can be critical.

9.2.3 For an *amicus curiae*, there is an additional value of publicising the consequences of the decision a court is asked to make. The most crucial factor is ensuring that a public interest litigation victory translates into practical benefits for many people at grassroots level. Part of achieving such a goal is to create awareness, educate and empower communities as to the real impact of a ruling.

9.3 Other considerations

9.3.1 Litigation can be prohibitively expensive. As the SALRC notes, a worrying new trend is developing where persons or organisations who are not attorneys engage in litigation funding. Khoza (2018) notes that in South Africa there is no regulation of third party litigation funding agreements. Litigation funders are not subject to the Contingency Fees Act[48] and as a result litigants may be prejudiced where the funder receives a disproportionate percentage of the capital. In a matter that determines the future of medical malpractice litigation and litigation funding in this arena, plaintiffs are likely to have access to extensive legal resources, expertise and funding resources. A voluntary association wishing to participate as a friend of the court in such proceedings would require significant litigation funding. To this end the ASSA could conceivably create a mechanism, separate from itself (similar to the Actuarial Society Educational Trust), with the main objectives of the promotion or advocacy of human rights and democracy. This entity could then qualify as a public benefit organisation that is authorised to issue certificates in terms of Section 18A of the Income Tax Act.

48 Contingency Fees Act 66 of 1997

9.3.2 Easterly (2019) notes that friend of the court briefs can reduce litigant power disparities in federal appellate cases. There are clear power disparities at play in medical malpractice litigation, with a well-organised and well-funded plaintiff facing an inexperienced and disorganised defence. This is illustrated in *MEC for Finance, Eastern Cape* v *LPC*:

> They attribute their current embarrassment to numerous factors, including: the "excessive" litigation against the ECDOH; unscrupulous and dishonest attorneys; the incompetent and under resourced state attorney, particularly in the Mthatha office, who is unable to provide effective legal advice or representation …

10. CONCLUSION

10.1 The 1885 matter of *Clair* v *Port Elizabeth Harbour Board*[49] is the earliest account of an actuary being of assistance to South African courts in calculating damages. Numerous actuaries throughout the last 137 years have since contributed to South African common law, mostly in the personal injury arena. The ASSA has not acted as an *amicus curiae* in a public interest matter as yet.

10.2 Numerous *amici curiae* have assisted the courts in South Africa and Africa. The sample of matters discussed in this report range from the death penalty, the right to water, aspects of commercial law, issues around gender identity, environmental protection and vagrancy laws. In some of these matters, actuarial evidence could have presented factual material relevant to the issues to be determined before the court to aid their decisions. Internationally, actuarial bodies have become involved as *amici* in matters such as public health and the interpretation of professional standards of practice.

10.3 It is well known that South Africa is facing a medico-legal claims crisis that led to the publication of an issue paper by the SALRC in 2017, the introduction of the Bill in 2018 and a discussion paper by the SALRC in 2021.

10.4 The SALRC has emphasised that the more money is taken from the public health sector to benefit a handful of successful claimants, the less money is available to improve services for the benefit of all users of public health services. It is members of the poorest communities who cannot afford private health services that are most affected by depleted budgets. The SALRC states that the solution to addressing the problems in the public health sector does not reside in making huge lump sum payments to a few successful claimants. This is an assertion that will be challenged and any legislation to this effect is likely to be met with legal challenges.

10.5 In anticipation of the likely course of future litigation, this paper seeks to provide an additional view for the court to consider when assessing the payment methodology to

49 *Clair* v *Port Elizabeth Harbour Board* (1885–1887) 5 EDC 311

be employed in settling medical malpractice claims. The ASSA is well placed to present statistical, technical and factual material in a way that is neutral and faithful to the court.

10.6 The ASSA is well placed to promote constitutional values, social justice, equality, accountability and the rule of law by providing a much needed numerical perspective on issues facing the courts. It is hoped that this paper will provide the impetus for the ASSA to further their public interest endeavours by joining litigation proceedings as a friend of the court. With respect to the Constitution, Cameron (2014) notes that it requires:

> … me, you and all of us to give it life.

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