

The importance and relevance of *amicus curiae* participation in litigating on the customary law of marriage

*Amanda Spies**

Associate Professor, Department of Public, Constitutional and International Law, University of South Africa

Summary

*With the South African Constitution recognising customary law as part of South Africa's legal system, debates arose as to the application of the equality principle within custom, as many customary practices were seen as discriminatory. The Recognition of Customary Marriages Act 120 of 1998 was the first piece of legislation that was enacted to address gender inequality within customary law, specifically customary marriages. Future litigation on the topic was deemed to be straightforward, entailing the mere interpretation and application of applicable provisions. However, what has emerged from litigating on the customary law of marriage is how litigators, and especially the participating *amicus curiae*, diverge on the litigation strategy to use. The article explores the relevance and importance of *amicus curiae* participation within a constitutional framework and establishes whether such participation has contributed to ensuring that women living under customary law's claims to culture and equality are understood in the right context.*

Key words: *customary law; Recognition of Customary Marriages Act; amicus curiae participation; Constitutional Court*

* LLB LLM (Pretoria), PhD (Witwatersrand); spiesa@unisa.ac.za. This article is partially based on the author's PhD study entitled '*Amicus curiae* participation, gender equality and the South African Constitutional Court'.

1 Introduction

Amicus curiae is a well-established concept in law. Translated literally from Latin, the term means ‘friend of the court’.¹ In its most basic form, and at a court’s discretion, the *amicus curiae* throughout legal history provided information on areas of law that the court regarded as complex and beyond its expertise.² From the outset it was clear that the *amicus curiae* was not a litigating party, but merely assisted a court. However, over the years, the role of *amicus curiae* evolved and courts gradually acknowledged that they could represent third party interests that were previously ignored under adversarial court systems.³ South Africa’s favourable constitutional climate, and the establishment of the Constitutional Court, played an important role in developing the nature and purpose of *amicus curiae* participation.⁴

Of equal importance has been the express constitutional recognition of customary law as part of the South African legal system.⁵ With this recognition, and with African women increasingly engaging in intra-cultural debates about the meanings and manifestations of particular customs and accepting the living nature of customary law, *amicus curiae* participation has become an important role player in litigating on customary matters.⁶

The focus of the article is to explore the importance and relevance of *amicus curiae* participation in customary matters, specifically customary marriage matters, to establish whether the different litigation strategies they employ are able to influence the court in the decisions it reaches.

-
- 1 G Williams ‘The *amicus curiae* and intervention in the High Court of Australia: A comparative analysis’ (2000) 28 *Federal Law Review* 365 366.
 - 2 MK Lowman ‘The litigating *amicus curiae*: When does the party begin after the friends leave’ (1992) 41 *American University Law Review* 1243 1248.
 - 3 Lowman (n 2 above) 1249.
 - 4 The principle of participatory democracy is firmly entrenched in the Constitution of the Republic of South Africa, 1996. Sec 57(1)(b) of the Constitution recognises the importance of participation in the law-making process and states that the National Assembly may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement. Secs 70(1)(b) and 116(1)(b) contain similar provisions in respect of the National Council of Provinces and the provincial legislatures. The Constitutional Court was the first to adopt specific rules that regulated *amicus curiae* participation and has set the benchmark for this participation, remaining the preferred court in which to lodge these applications. See Rule 10 of the Rules of the Constitutional Court promulgated under Government Notice R1675 in Government Gazette 25726 (31 October 2003).
 - 5 Sec 211 of the Constitution states: ‘(1) The institution, status and role of traditional leadership, according to customary law, are recognised subject to the Constitution. (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.’
 - 6 L Mbatha et al ‘Culture and religion’ in E Bonthuys & C Albertyn (eds) *Gender, law and justice* (2007) 158 168.

2 Understanding the unique nature of litigating customary law matters

The place of customary law in South Africa's new constitutional dispensation has been the subject of much debate. During the negotiations for the interim Constitution, one of the key debates was whether customary law was going to be expressly recognised as part of South African law.⁷ In this debate, a particularly complicated and controversial issue arose, namely, as to whether the right to participate in one's culture could be reconciled with the equality principle, a key feature of the new Constitution. The conflict was especially complex as customary law, like most legal systems, had a very strong patriarchal foundation.⁸

The Congress of Traditional Leaders of South Africa (CONTRALESA) objected to the proposed equality provision, stating that in terms of their culture, they did not support equality for women.⁹ CONTRALESA argued that customary law should not be subject to the Bill of Rights, a standpoint that was vehemently opposed by all women delegates at the negotiations and rural women's organisations.¹⁰ These women argued that all women should be protected by the Bill of Rights, with the equality guarantee included, as its exclusion would be detrimental to the most oppressed and marginalised group – rural women.¹¹ The outcome was that customary law was recognised as part of South African law subject to the Bill of Rights.¹²

Law reform and litigation had an important role to play in addressing the potential conflict between customary law and the Bill of Rights. Customary law was codified in the Black Administration Act 38 of 1927 (BLA), entrenching and extending the subordination of women under customary law.¹³ The official and written sources of customary law were 'tainted by their association with colonialism and

7 Customary law means the customs and practices observed among the indigenous African people of South Africa. See secs 8 and 31 of the interim Constitution of the Republic of South Africa, 1993 (interim Constitution); F Kaganas & C Murray 'The contest between culture and gender equality under South Africa's interim Constitution' (1994) 21 *Journal of Law and Society* 409; T Nhlapo 'African customary law in the interim Constitution' in S Liebenberg (ed) *The Constitution of South Africa from a gender perspective* (1995) 157; W Lehnert 'The role of the courts in the conflict between African customary law and human rights' (2005) 21 *South African Journal on Human Rights* 241.

8 TW Bennett 'The equality clause and customary law' (1994) 10 *South African Journal on Human Rights* 122 123; E Bonthuys 'Accommodating gender, race, culture and religion outside legal subjectivity' (2002) 18 *South African Journal on Human Rights* 41.

9 C Albertyn 'Women and the transition to democracy in South Africa' (1994) *Acta Juridica* 39 57.

10 Albertyn (n 9 above) 57; Kaganas & Murray (n 7 above) 411.

11 Albertyn (n 9 above) 59.

12 Sec 211 Constitution.

13 See eg sec 11(3)(b) of the BLA that relegated customary wives as minors for purposes of contractual capacity and standing.

apartheid, and much of the law had been allowed to drift into stagnant backwater'.¹⁴ This was intensified when the apartheid government transferred legislative powers to the independent states, renouncing its responsibility in reforming customary law.¹⁵ The independent legislatures that took over were controlled by conservative chiefs who had little interest in disturbing their power structures, which led to an encoded traditional and very much patriarchal version of customary law.¹⁶

The Recognition of Customary Marriages Act 120 of 1998 (RCMA) was one of the first steps taken to reform customary law. The main goal of the Act is to remedy gender and racial inequality entrenched in official customary law and the 'perceived injustices of the unwritten patriarchal system of customary law' in relation to customary marriages.¹⁷ With not many other legislative initiatives, reformists soon turned to the courts.¹⁸ However, to litigate on a customary matter means that the actual content of custom has to be established. There is strong support for the idea that only the law as it is lived by its people should be heeded.¹⁹ This is known as 'living' customary law, as opposed to the codified and outdated sources available to courts, mainly through the BLA, known as 'official' customary law. The problem with living customary law is that it is drawn from modern social practice which differs over time and place, which is in conflict with courts' need for legal certainty.²⁰

Litigating on matters pertaining to the customary law of marriage was seen to be easier as there was already a clear framework in place with ensuing litigation supposedly only revolving on the interpretation of specific provisions. However, what is emerging from litigating on the customary law of marriage is how litigators, and especially the *amicus curiae*, diverge on the litigation strategy to use.

Some have chosen to focus on a rights-based approach that relies on the rights to equality and dignity to prove that an infringement has occurred, as illustrated through the *Gumede v President of the Republic of South Africa* judgment with the Women's Legal Centre (WLC) as *amicus curiae*.²¹ Others have called for the application of rules of living customary law, provided this does not violate the Bill of

14 TW Bennett 'Re-introducing African customary law to the South African legal system' (2009) 57 *American Journal of Comparative Law* 1 3.

15 Bennett (n 14 above) 3.

16 Bennett 4.

17 J Bekker & G van Niekerk '*Gumede v President of the Republic of South Africa*: Harmonisation, or the creation of new marriage laws in South Africa' (2009) 24 *Southern African Public Law* 206 207.

18 Bennett (n 14 above) 4. Bennett refers to the planned reform of customary succession that, despite a South African Law Commission discussion paper, was not acted on; see in this regard South African Law Reform Commission *Customary Law of Succession Discussion Paper* 93 Project 90 (2000).

19 Bennett (n 14 above) 2.

20 Bennett 9.

21 2009 (3) SA 152 (CC).

Rights and, where necessary, its development. This will be illustrated by the *Mayelane v Ngwenyama* judgment with the Commission for Gender Equality (CGE) and National Movement for Rural Women (NMRW) as *amici curiae* supporting this approach.²²

The intention of the article is to establish how the divergent litigation strategies of the *amici curiae* have contributed to ensuring that women living under customary law are able to utilise their constitutional rights, ensuring that claims of culture, gender and diversity are understood in the right context. In order to unpack the relevant judgments and ensuing strategies, it is important to understand the reasons why public interest organisations participate as *amici curiae* and the specific organisational intent in participating in these matters.

3 Intervening in the public interest

Public interest law has been described as a focus 'on the wider public interest rather than the more private interest of a particular individual'.²³ A public interest group may be defined broadly as a free-standing voluntary organisation typically established to further a particular cause or simply to provide the poor with access to justice.²⁴

There are many reasons why public interest groups decide to litigate. Collins identifies five general, often interrelated, reasons why public interest groups choose litigation as a means to an end.²⁵ First, groups may turn to the courts when they lack access to alternative venues, such as the executive. Second, there are certain unique benefits that can be ascribed to judicial decisions, such as its precedent-setting capacity, especially in relation to constitutional decisions.²⁶ Third, litigation may be a means of protecting gains won through other avenues, such as defending a specific piece of legislation.²⁷ Fourth, groups 'may seek out the judicial arena to counterbalance their opposition's participation'.²⁸ Lastly, organisations may use the court system when their goals predispose them to litigate.²⁹

Most public interest groups choose not to enter the legal arena and to concentrate their resources on engaging the executive and general

22 2013 (4) SA 415 (CC).

23 G Budlender 'On practising law' in H Corder (ed) *Essays on law and social practice in South Africa* (1988) 319 322.

24 LB Nielsen & CR Albiston 'The organization of public interest practice: 1975-2004' (2006) 84 *North Carolina Law Review* 1591.

25 PM Collins *Friends of the Supreme Court: Interest groups and judicial decision making* (2008) 24.

26 Collins (n 25 above) 24.

27 As above.

28 As above.

29 The Women's Legal Centre (WLC) may be seen as an example. See the organisational goals of the WLC, as discussed hereunder.

advocacy. When they do decide to enter the legal arena, it is often not as a direct party to the litigation and the method of participation differs.³⁰ They may set up a test case which usually rests on a constitutional issue. Here, organised interests would want to challenge legislation or policy, or an individual could approach an organisation with the intention of challenging legislation or policy.³¹ This method is not often used, as it is time-consuming and requires a great deal of resources.³² Public interest groups may also decide to sponsor a case brought by others. Here, an organisation will assist with costs and resources in exchange for using the case as a means of highlighting its own interests.³³ Again, this is very expensive and time-consuming, and gives a group less leeway to structure a case.³⁴

Another method of participation, as discussed above, is *amicus curiae* participation. This type of participation is less costly and, as *amicus*, it may be able to introduce a new or alternative legal position and introduce sociological evidence to a court.³⁵ Given the low costs and flexibility associated with this method of participation, it is the clear choice for public interest groups when they decide to litigate as a non-party.³⁶

Within the South African context, groups and organisations have been very receptive to utilising *amicus curiae* participation as a cost-effective and efficient method of representing the public interest. In almost all customary cases brought before the Constitutional Court, *amicus curiae* applications were filed, and a range of women's and public interest organisations were allowed to make submissions to the Court. As this article focuses on cases pertaining to the customary law on marriage, it is important to understand the organisational structure and intent of the CGE, NMRW and WLC.

3.1 Commission for Gender Equality

The CGE is a specific constitutional body established to promote respect for gender equality and to aid its protection and attainment.³⁷ It is an independent institution subject only to the Constitution and the law, and has the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.³⁸

30 Collins (n 25 above) 25.

31 As above.

32 As above.

33 Collins (n 25 above) 26.

34 As above.

35 Collins (n 25 above) 27.

36 As above.

37 Secs 181 & 187 Constitution.

38 Secs 181(2) & 187(2) Constitution. The mandate and further regulations pertaining to the CGE are set out in the Commission for Gender Equality Act 39 of 1996.

To CGE from its inception differed on whether its identity should be feminist, as opposed to implementing a general gender framework.³⁹ The CGE moved toward a more general framework and focused on poor rural women, hence its interest in customary law matters and its participation as *amicus curiae* in these cases.⁴⁰

3.2 National Movement of Rural Women

The NMRW is a national membership organisation that serves the interests of rural women.⁴¹ It was established to create a network where rural women could gather, discuss their problems and take action, and its main objective is the empowerment of rural women. The NMRW with its close connection to rural women has been ideally placed to represent the interests of women living under customary law.

3.3 Women's Legal Centre

The WLC is a non-profit, independently-funded law centre that seeks to achieve equality for South African women through litigation.⁴² Its litigation strategy is outcome-based, and a case will be taken on if it has the potential to benefit a substantial group of women in the overturning of discriminatory legislation, to create new jurisprudence or extend existing jurisprudence, and create the possibility of positive orders that would enforce women's human rights. Representing women in customary law matters falls squarely within their mandate.

Focusing on the *amicus curiae* participation of the above organisations in matters pertaining to the customary law of marriage, the question that should be asked is whether they have been able bring information to the court that has led to a decision conscious of the impact it might have on the relevant women's lives.

39 A Gouws 'The state of the national gender machinery: Structural problems and personal politics' in S Buhlungu et al (eds) *State of the nation: South Africa 2005-2006* (2006) 143 152.

40 The customary matters in which the CGE appeared as *amicus curiae* in the Constitutional Court include *Bhe & Others v Magistrate, Khayelitsha & Others*; *Shibi v Sithole & Others*; *South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC) (*Bhe*); *Shilubana & Others v Nwamitwa* 2009 (2) SA 66 (CC); *Mayelane* (n 22 above).

41 Information obtained from http://www.nmrw.org/?page_id=2 (accessed 14 August 2013).

42 Information obtained from <http://www.wlce.co.za/> (accessed 15 August 2013).

4 Women's interests and the customary law of marriage

4.1 *Gumede v President of the Republic of South Africa (WLC as amicus curiae)*

As stated, the most significant and systematic reform of customary law after the advent of democracy was the enactment of the RCMA.⁴³ The Act was the first comprehensive piece of legislation to address gender and racial inequality concerning customary marriages.⁴⁴ Since the implementation of the Act, one of the areas of concern was the different proprietary consequences of marriages provided for reliant on when a customary marriage came into existence.⁴⁵ All customary marriages concluded after the commencement of the Act (15 November 2000) would be a marriage in community of property and loss.⁴⁶ The proprietary regimes of all marriages concluded before the commencement of the Act would be governed by customary law.⁴⁷

Gumede argued that these provisions discriminated unfairly against her on the grounds of race and gender.⁴⁸ *Gumede* had been married in terms of customary law, well before the enactment of the RCMA. When she sought a divorce from her husband, she found that she was not entitled to any of the property that had accrued during the marriage, as the customary law, specifically the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law, determined that a husband, as head of the family, would be the sole owner of all family property.⁴⁹

The WLC applied to be admitted as *amicus curiae* since it had for several years dealt with the impact of customary law on the lives of women and children. For the WLC, it was important for the court to understand the disadvantaged position of women to whom the RCMA applied, as it was of the opinion that *Gumede* did not sufficiently highlight this vulnerability, since she focused mainly on the ensuing unfair discrimination.

The WLC focused on the group of women to whom the RCMA applied (mostly African women living in rural areas), and stressed that these women were marginalised and vulnerable and had been

43 Mbatha et al (n 6 above) 161.

44 Bekker & Van Niekerk (n 17 above) 206-207.

45 L Mbatha 'Reflection on the rights created by the Recognition of Customary Marriages Act' (2005) *Agenda* 42-43.

46 Sec 7(2) RCMA; *Gumede* (n 21 above) para 10.

47 Sec 7(1) RCMA.

48 *Gumede* (n 21 above) para 1.

49 Natal Code of Zulu Law published in Proc R151 of 1987, Government Gazette 10966; *Gumede* (n 21 above) para 11.

'historically and systematically subjected to discrimination on various and intersecting grounds'.⁵⁰

The WLC referred to several international and African regional human rights instruments, and indicated that the discrimination allowed by the RCMA was unfair.⁵¹ Its main contention is summarised in the following statement:⁵²

To say to women in pre-Act marriages, these being black, mainly rural women who will tend to be older, that all other people (whether married under civil law or new customary marriages) deserve the protection of the Constitution and the right to equality, but they do not, fundamentally violates their dignity.

The WLC argued that the court had to be mindful of the changing circumstances of migrant labour and urbanisation that had led to the disintegration of the extended family and subsequent extended support systems. These circumstances left women vulnerable to eviction and homelessness upon divorce.⁵³ This vulnerability was much worse for older women, who were further disadvantaged by apartheid due to restrictions on their education and freedom of movement.⁵⁴ The WLC focused on the remedy it thought the court should provide in order to protect as many women as possible and not necessarily only Gumedede. Its argument was that a workable remedy should consider women who found themselves in polygynous unions:⁵⁵

We were hoping the court would go further than it needed to and extend the remedy to women in polygynous marriages, or comment on their position obiter, which sets the scene for further law reform or litigation. This is because many women in South Africa are not in monogamous marriages. The law needs to develop in such a way as to ensure the equal treatment of women in polygynous marriages, and cases where there is both a civil and customary marriage, where there is a domestic partnership and a marriage (either customary or civil). In this regard, an expression that women are entitled to statutory remedies that are just and equitable would benefit many women.

The remedy suggested by the WLC required property acquired by the parties to be held in community of property until a second marriage was concluded. Property acquired after a second or subsequent marriage was to be divided in proportion to the respective

50 S Cowen & N Mangcu-Lockwood *Written submissions of the amicus curiae CCT 50/08* para 10.

51 Cowen & Mangcu-Lockwood (n 50 above) paras 21-35. They specifically relied on sec 18 of the African Charter on Human and Peoples' Rights (1981); sec 23 of the International Covenant on Civil and Political Rights (1966); sec 16 of the Convention on the Elimination of Discrimination Against Women (CEDAW) (1979); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003); and the SADC Protocol on Gender and Development (2008).

52 Cowen & Mangcu-Lockwood (n 51 above) para 19.

53 As above.

54 As above.

55 Interview J Williams, WLC (14 March 2013).

contributions (both monetary and non-monetary) of the spouses to the respective marriages, in a manner that was deemed just and equitable by a court, taking into account the factors referred to in section 7(7) of the RCMA.⁵⁶

The Court approached the matter as an equality matter in terms of section 9 of the Constitution and found that the relevant provisions discriminated on the grounds of gender as they discriminated between a husband and wife, as only wives were subjected to the unequal proprietary distribution, and between different classes of women, as only 'old' marriages were subjected to the proprietary consequences in terms of the Codes.⁵⁷

The Court hinted at the arguments of the WLC and the relevant context provided, stating that '[t]he marital property system renders women extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent'.⁵⁸ The Court ordered that all customary marriages be marriages in community of property and limited its retrospectivity to not affect marriages that had already been terminated.

The Court acknowledged the usefulness of the WLC's submissions with regard to the relevant international and regional instruments, and the vulnerability and position of the class of women affected by the RCMA. However, it found that its arguments in relation to pre-Act polygynous unions should not form part of its decision and that, at most, the judgment could draw the attention of the legislature to cure the possible *lacuna*.⁵⁹ The proprietary consequences of polygynous unions would be regulated by customary law until parliament intervened.⁶⁰

Despite the Court not adopting the WLC's suggested remedy, when reading the judgment it becomes clear that the contextual evidence presented by the WLC assisted the Court in acknowledging the vulnerability of women in customary marriages. The Court focused on the patriarchal nature of the relevant Natal codes and the need for those entrenched values to change within a constitutional

56 Cowen & Mangcu-Lockwood (n 51 above) para 54. Sec 7(7) of the RCMA states: 'When considering the application in terms of subsection 6 – (a) the court must – (i) in the case of a marriage which is in community of property or which is subject to the accrual system – (aa) terminate the matrimonial property system which is applicable to the marriage; and (bb) effect a division of the matrimonial property; (ii) ensure an equitable distribution of the property; and (iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted; (b) the court may – (i) allow further amendments to the terms of the contract; (ii) grant the order subject to any condition it may deem just; or (iii) refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.'

57 *Gumede* (n 21 above) para 34.

58 *Gumede* para 36.

59 *Gumede* para 55.

60 As above.

framework.⁶¹ It may be that the Court, in not adopting the WLC's proposed remedy, was cautious of overstepping its boundaries in changing a democratically-implemented piece of legislation which was highly regarded.⁶²

The Recognition Act was assented to and took effect well within our new constitutional dispensation. It represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country. Past courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary 'unions'.

Gumede set a precedent concerning the interpretation of the provisions of the RCMA in line with the constitutional right to equality, and with the Court's next decision it became clear that this interpretation had to happen within the applicable custom.⁶³

4.2 *Mayelane v Ngwenyama* (CGE, NMRW and WLC as amici curiae)

When the RCMA was drafted, a contentious issue was the recognition of polygynous marriages, since it has been viewed as a patriarchal institution with not much relevance in modern society.⁶⁴ Research indicated that many women were against its legal recognition. However, non-recognition was not really an option, as many women were in these marriages and continued to enter into them.⁶⁵

A compromise was reached with the drafting of the RCMA as it extended protection to women and children that found themselves in polygynous marriages.⁶⁶ The compromise was the serial division of estates that required a husband, who wanted to enter into a further customary marriage, to make an application to court to approve a written contract that regulated the future matrimonial property systems of the marriages.⁶⁷ However, many uncertainties remained, as the RCMA did not provide for the equal treatment of wives in

61 *Gumede* (n 21 above) para 17.

62 *Gumede* para 16 (footnotes omitted).

63 See *Mayelane* (n 22 above) para 77, where the Court referred to the *Gumede* judgment in stressing the equal status and capacity of spouses.

64 Mbatha et al (n 6 above) 178; F Kaganas & C Murray 'Law, women and the family: The question of polygyny in a new South Africa' (1991) *Acta Juridica* 116; PE Andrews 'Who's afraid of polygamy? Exploring the boundaries of family, equality and custom in South Africa' (2009) 11 *Utah Law Review* 351.

65 Mbatha et al (n 6 above) 178.

66 C Albertyn & L Mbatha 'Customary law reform in the new South Africa' in SJR Cummings et al (eds) *Gender, citizenship and governance: A global sourcebook* (2004) 51-54.

67 Sec 7(6) of the RCMA states: 'A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.'

polygynous marriages.⁶⁸ This was especially relevant with regard to consent, as the Act required only the consent of the parties to the marriage, and it was uncertain whether the consent of existing wives was required for the conclusion of a subsequent marriage.⁶⁹ The *Mayelane* matter came to focus on this specific issue, namely, whether the consent of a first wife was necessary for the conclusion of a subsequent customary marriage and whether compliance with section 7(6) of the RCMA was a requirement for the validity of a subsequent customary marriage.⁷⁰

Mayelane had been married to her husband in 1984 in terms of customary law. Upon her husband's death in February 2009, she approached the Department of Home Affairs to register her marriage when she was informed that another wife, Ngwenyama, who had allegedly entered into a customary marriage with her husband in 2008, had also applied for the registration of a marriage with her husband.⁷¹ Both the wives disputed the validity of the other's marriage.

Mayelane applied to the High Court for an order to declare her customary marriage valid and that of Ngwenyama null and void, on the basis that she had not consented to the second marriage as required by Tsonga custom.⁷² The High Court granted both orders and determined the matter by interpreting and applying section 7(6) of the RCMA and not considering the consent issue.⁷³ The High Court interpreted the section to be peremptory in that, if a husband failed to obtain court approval of a document that would regulate the proprietary consequences of the marriages, a subsequent marriage would be void.⁷⁴ Ngwenyama appealed the decision.

The Supreme Court of Appeal (SCA) found that section 7(6) did not regulate the validity of a customary marriage but only its proprietary consequences.⁷⁵ The SCA confirmed the order of the High Court, but also overturned the invalidity in relation to Ngwenyama's marriage. Mayelane appealed the latter part of the SCA decision to the Constitutional Court.

68 Mbatha et al (n 6 above) 179.

69 As above. Sec 3 of the RCMA sets the requirements for a valid customary marriage and states: '(1) For a customary marriage entered into after the commencement of this Act to be valid – (a) the prospective spouses – (i) must be above the age of 18 years; and (ii) must both consent to be married to each other under customary law; and (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.'

70 The ensuing discussion of the *Mayelane* judgment is reliant on a detailed case note discussion: A Spies 'Relevance and importance of the *amicus curiae* participation in *Mayelane v Ngwenyama*' (2015) 1 *Stellenbosch Law Review* 156.

71 Facts as provided in the SCA judgment *MM v MN & Another* 2012 (4) SA 527 (SCA) paras 3-4.

72 *Mayelane* (n 22 above) para 4.

73 *Mayelane* paras 4-5.

74 *Mayelane* para 6.

75 As above.

For the Constitutional Court, unlike the High Court and SCA, who only judged the matter according to an interpretation of section 7(6), the consent issue was crucial in adjudicating the matter, and it issued directives requesting the parties to consider the implications.⁷⁶ It was only after all the parties had filed their submissions, and the Court had benefit of all the arguments, that it again issued a set of directives requesting the parties to submit affidavits that would set out consent to polygynous marriages according to Tsonga custom.⁷⁷ This hinted at the fact that the Court planned to ground its decision in the particular custom. The WLC and the CGE, together with the NMRW, applied to be admitted as *amici curiae* in the Constitutional Court.

The WLC focused on establishing equality between the different wives with regard to their lived realities and vulnerability as a group.⁷⁸ The WLC supported the SCA's decision and was critical of the Constitutional Court's decision to focus on consent.⁷⁹ Before the Court issued its second set of directives, the WLC argued that the issue of consent was an issue of custom, and that there was not sufficient information before the Court to establish or develop the applicable customary rules.⁸⁰

The WLC further argued that it was not only the existence of the consent requirement that had to be established under customary law, but also the 'contours of a consent requirement'.⁸¹ This would mean that the Court would have to view consent within the context that women do not have an equal bargaining position in relationships, as well as a range of other questions, such as what consent means; whether express consent is required or whether tacit consent would suffice; what the consent should relate to; whether consent to polygyny is enough or whether it must relate to a particular individual and her family; and whether consent should be given at the time of the subsequent marriage or whether it could be procured earlier.⁸² The WLC argued that even if the Constitutional Court were to remit the matter back to the High Court to establish custom, it would not yield great certainty for women and would be a very slow process in securing rights protection for all the women concerned.⁸³

For the WLC, one of the most important questions was what the consequences of a subsequent marriage would be if it was concluded without the necessary consent. Would the marriage be void from the

76 Directions of the Constitutional Court dated 1 August 2012, CCT 57/12.

77 As above.

78 Notice of motion to be admitted as *amicus curiae* of the WLC, affidavit deposed to by JL Williams, CCT 57/12 para 4.

79 Notice of motion (n 78 above) para 34.

80 S Cowen & N Mji *Written submissions of the WLC*, CCT 57/12 para 35.

81 As above.

82 Cowen & Mji (n 80 above) para 35.1.

83 Cowen & Mji para 38.

start or would it be a ground for nullification of the marriage and, subsequently, what patrimonial consequences would follow?⁸⁴

The WLC attempted to construct a remedy that would best protect all the parties in the relevant circumstances. They argued that the appropriate route would be to treat marriages without consent as voidable rather than void.⁸⁵ A second marriage would thus be voidable once knowledge of this marriage comes to light, and it would be voidable from the date of a court order.⁸⁶ They conceded that it might violate the rights of women in second marriages, but that at least it would not be invalid from the outset.⁸⁷ Furthermore, if (as in this case) the existence of a subsequent marriage only came to light when a husband died, the second marriage would continue to be valid, but that did not mean that the first wife was without recourse as the Master would have a discretion and the right to refer a relevant dispute to a magistrate or traditional leader.⁸⁸

After the Court issued its second set of directives and it was clear that it planned to ground its decision within the particular custom, the WLC filed an expert affidavit by an elder and advisor to traditional leaders.⁸⁹ Mr Mayimele stated that a first wife may be informed of a subsequent decision but that the husband makes the decision to marry again.⁹⁰

The CGE and NMRW believed that the questions to be answered revolved around the establishment of specific rules of living custom, allowing these to be applied and, if necessary, developed, to bring them in line with the Constitution. They argued that customary law should only be developed once a court had a clear understanding of the content of the custom it intended to develop and that the matter should, therefore, be remitted to the High Court to reconsider the relevant custom.⁹¹

In response to the Court's second directives, the CGE and NMRW filed a range of affidavits, after having consulted directly with members of the Tsonga community. These affidavits described the law and practices relating to polygyny in that culture.⁹² In contrast to the evidence provided by the WLC, all the affidavits confirmed that in

84 Cowen & Mji para 35.2.

85 Cowen & Mji para 51.

86 As above.

87 Cowen & Mji (n 80 above) para 52.

88 Cowen & Mji para 54. In this regard, they referred to sec 5 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

89 Affidavit of HH Mayimele filed on behalf of the WLC, CCT 57/12.

90 *MM v MN* (n 71 above) para 56.

91 T Ngcukaitobi & M Bishop *Written submissions of the CGE & NMRW*, CCT 57/12 para 10.2.

92 The affidavits included affidavits by MS Bungeni; M Rikhotso; MD Shiranda and KI Nkanyani. They also commissioned an expert, Dr M Mhlaba, to provide his opinion on the issues raised by the Court; see the filing sheet of the CGE over NMRW in response to the Court's directions dated 25 February 2013, CCT 57/12.

Tsonga custom, consent was a requirement for the conclusion of a subsequent marriage.⁹³

The Constitutional Court confirmed the SCA's decision that the RCMA did not prescribe any consent requirement for a valid second or subsequent customary marriage, and followed the NMRW's and CGE's arguments that it was necessary to determine the content of custom, which justified its call for further evidence in this regard.⁹⁴

The Court largely relied on the affidavits filed by the *amici curiae*, especially those of the CGE and NMRW, in establishing whether Tsonga custom prescribed consent.⁹⁵ The Court accepted, based on the evidence, that Tsonga custom required consent for a subsequent marriage, viewing the different opinions as nuance and accommodation rather than contradiction.⁹⁶

The Court proceeded to consider the relevant evidence within the constitutional framework of equality and dignity.⁹⁷ Unlike the WLC, who focused on equality between the different wives and their equal treatment, the Court focused on equality between husband and wife and found that the particular custom had to be developed in light of these principles to unequivocally require consent.⁹⁸

Ngwenyama's marriage was found to be null and void and, to protect parties in existing customary marriages, the requirement was to be prospective and made known to the public through the Houses of Traditional Leaders and the Minister of Home Affairs.⁹⁹

Through the *Mayelane* matter it became clear that the *amici curiae* employed different litigation strategies in participating as such in customary law matters. The first strategy (supported by the CGE and the NMRW in *Mayelane*), the custom-based approach, advocates that the Court should establish what the actual living custom is, should enquire as to whether that custom complies with constitutional norms and, if it does not, should develop the particular custom. Although the emphasis is on custom, it is custom operating within a constitutional framework. Here, a decision would not be applicable to

93 See the Court's summary of the affidavit evidence in *MM v MN* (n 71 above) paras 55-59.

94 *Mayelane* (n 22 above) paras 28-42; notice of motion to be admitted as *amici curiae* of the CGE & NMRW, CCT 57/12 para 35.12.

95 *Mayelane* (n 22 above) para 18.

96 *Mayelane* paras 54-61.

97 *Mayelane* paras 62-69.

98 *Mayelane* para 75.

99 *Mayelane* (n 22 above) para 89; Zondo J and Jafta J (with Mogoeng J and Nkabinde J concurring) in separate minority judgments criticised the majority, specifically in relation to the issuing of the second set of directives and the call for further evidence. Zondo J argued that the Court should not have called for additional evidence and that the matter could have been dealt with on the records from the High Court and SCA. He found that the Court, as appellate court, was not in a position to deal with contradictory evidence as clearly presented in the affidavits. For Zondo J, the evidence tendered by *Mayelane* and

everyone, but only those that practise a specific custom, allowing customary law to develop alongside the Constitution.

The second strategy (supported by the WLC in *Gumede* and in *Mayelane*), the rights-based approach, points to the evidentiary difficulty in establishing proof of living custom and argues that the Court should, considering the vulnerability of the parties, provide immediate relief and establish legal certainty pertaining to specific rights claims. This position acknowledges the importance of living custom, although it is not applied.

In adopting different strategies, the question should be asked whether the *amici* were successful in representing these women's lives and whether they contributed to ensuring that women living and married under customary law are able to utilise their constitutional rights.

5 Conclusion

The divergent strategies identified in the above decisions are interesting and possibly could be ascribed to the different organisational goals of the participating *amici curiae*. As discussed above, the CGE, with its mandate of focusing on rural women, and the NMRW, as a grassroots organisation, felt strongly about the protection and development of customary law to serve the women to whom it applies. On the other hand, the WLC, as a rights-based organisation, wants to benefit as many women as possible from a single decision and has tailored its arguments to focus on specific remedies that flow from a breach of the equality provision of the Constitution.¹⁰⁰

However, despite a difference in strategy, the participating *amici curiae* had the communal goal of bettering the position of women in society living under customary law. They were able to illustrate that the rights to culture and equality are not oppositional but rather interrelated, a complexity that courts need to understand without

99 the affidavit from her uncle pertaining to Tsonga custom was sufficient in establishing that consent was a requirement and that Ngwenyama had failed to prove that she had entered into a customary marriage with the deceased. According to him, there was no valid marriage between Ngwenyama and the deceased, irrespective of whether one would take into account the additional affidavits; see *Mayelane* (n 22 above) paras 90-131. Jafta J asserted that development was not needed as this was never argued by any of the parties and fell outside the scope of the case. For Jafta J, there were no compelling reasons, especially when not argued by the parties, why the Constitutional Court should sit as a court of first and last instance considering the development of customary law. In agreeing with Zondo J, Jafta J found that Ngwenyama had failed to prove that a customary marriage existed between her and the deceased and that Tsonga custom required consent which rendered development unnecessary; see *Mayelane* (n 22 above) paras 132-157.

100 For a discussion of the WLC's litigation strategy, see R Cowan 'The Women's Legal Centre during its first five years' (2005) *Acta Juridica* 273 280.

feeling that they have to make a choice between different competitive rights.¹⁰¹ The particular customary rule, as lived, needs to be understood, as well as the social context of the relevant women. This requires knowledge 'of the actual reality of people's lives, their place within the community and the power, resources and interests implicated by the dispute'.¹⁰² The *amici curiae* played a crucial role in providing this contextual evidence to the court, which enabled it to suggest legal solutions that address women's subordination through law. With the acknowledgment that the law has a limited ability to radically transform gender relations, the *amici curiae* participating in these matters illustrated that if women's experiences are placed before a court, they could assist in the redefinition of existing legal issues.¹⁰³ In this sense, the law should be viewed as an important site of struggle, despite its gendered disparity, as it could 'be harnessed in a positive way to improve women's lives', as illustrated by the decisions.¹⁰⁴ Generally, rights claims give women an important sense of collective identity, actively shape public discourse and are a source of empowerment.¹⁰⁵ The public nature of rights assertion is especially significant because of the often private nature of discrimination against women, especially in a customary setting.¹⁰⁶

The importance of *amicus curiae* participation, not only within a South African context, is the way in which it fosters democratic ideals within judicial decision making:¹⁰⁷

Judges are required to subject public and private power to the demand for dialogic justification; to participate in a transformative debate about the relationship between the individual and collective. It is their duty to resist normative closure, to renounce attempts to make the current boundary between the collective and the individual appear natural and necessary; to challenge the assumption that 'the people' have a fixed identity, or that a broad social consensus is 'out there' waiting to be discovered. It is their responsibility to facilitate democratic deliberation; to promote respect for the 'marginalised other'; to allow a multiplicity of voices to be heard. As participants in a culture of justification, judges are required to take responsibility for their own actions, to spell out the moral and political values upon which their decisions rest.

101 S Moller Okin 'Feminism and multiculturalism: Some tensions' (1998) 108 *Ethics* 661 666.

102 C Albertyn "'The stubborn persistence of patriarchy'? Gender equality and cultural diversity in South Africa' (2009) 2 *Constitutional Court Review* 165 184; see also A Claasens & S Mnisi 'Rural women redefining land rights in the context of living customary law' (2009) 25 *South African Journal on Human Rights* 491 492.

103 K van Marle & E Bonthuys 'Feminist theories and concepts' in Bonthuys & Albertyn (n 6 above) 15 46.

104 C Albertyn 'Feminism and the law' in C Roederer & D Moelendorf (eds) *Jurisprudence* (2004) 291 295.

105 S Roach *Law and social change* (2000) 172.

106 As above.

107 H Botha 'Judicial dissent and democratic deliberation' (2000) 15 *South African Public Law* 321 322.

Amicus curiae participation assists in this process as it provides the opportunity for persons that may be affected by a judgment to participate, and so adds legitimacy to the judicial process and reassures the public of the courts' receptiveness to the norm of democratic inclusion.¹⁰⁸ However, *amicus curiae* participation does much more in terms of the democratic process, as it provides real democratic benefits to vulnerable groups.¹⁰⁹ In this sense, *amicus curiae* participation provides an important channel of communication with the judiciary, as an *amicus* is in the position to represent a vulnerable group's interests, allowing for a multiplicity of voices to be heard.¹¹⁰

The *amici curiae* that participated in the above matters played an especially important role, considering South Africa's history and the need for claims of culture, gender and diversity to be understood in the right context.¹¹¹ The *amici curiae* (despite their differences in strategy) were able to represent the voices of a specific vulnerable and marginalised group and ensured that these women's voices were heard before the court, strengthening South Africa's commitment to participatory democracy.

In future matters pertaining to customary law, and the customary law of marriage, *amici curiae* have a definite role to play in placing evidence of lived custom before the court to ensure its development within the constitutional framework of equality. Ultimately, *amicus curiae* participation fosters democratic ideals by allowing interest groups the option of influencing the way in which legal decisions are made by representing the voices of those not before court.¹¹²

108 OS Simmons 'Picking friends from the crowd: *Amicus* participation as political symbolism' (2009) 42 *Connecticut Law Review* 187 198.

109 Simmons (n 108 above) 199.

110 As above.

111 Albertyn (n 102 above) 196.

112 R Garcia 'A democratic theory of *amicus* advocacy' (2008) 35 *Florida State University Law Review* 315.