

## REPRESENTATIVE STANDING IN SOUTH AFRICAN LAW

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### [A] CONSTITUTIONAL DEVELOPMENTS IN SOUTH AFRICA: FROM COLONIAL OUTPOST TO NON-RACIAL DEMOCRACY

From the second British occupation of the Cape of Good Hope in 1806<sup>1</sup> until recently, British constitutional institutions have dominated South African political life.<sup>2</sup> At the heart of the various South African constitutions since Union in 1910 – the South Africa Act of 1909 (the union Constitution), the Republic of South Africa Constitution Act 32 of 1961 (the republican Constitution) and the Republic of South Africa Constitution Act 110 of 1983 (the tricameral Constitution) – lay the doctrine of the sovereignty of Parliament. It is now widely accepted that this doctrine, because it was separated from its principal political counter-balance, universal franchise, was particularly inappropriate. It allowed for gross abuses of human rights by those in power.<sup>3</sup> One of the dominant features of the doctrine of parliamentary sovereignty was that it envisaged, in the words of the late Mr Justice Ismail Mahomed, a 'legally emasculated judiciary with no judicial teeth to bite into or destroy enactments emanating from Parliament which invade without justification, the deepest wisdom of the common law, or which transgress rights so fundamental for each individual in our

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<sup>1</sup> See generally, Davenport and Saunders *South Africa: A Modern History* (5 ed) London, MacMillan Press Ltd: 2000, 42.

<sup>2</sup> See Dugard *Human Rights and the South African Legal Order* Princeton, Princeton University Press: 1978, 8-9 and 14-28. See too Klug 'Historical Background' in Chaskalson et al (eds) *Constitutional Law of South Africa* Cape Town, Juta and Co: 1996, 2-1. See further Corder and Davis 'Law and Social Practice: An Introduction' in Corder (ed) *Essays on Law and Social Practice in South Africa* Cape Town, Juta and Co: 1988, 1, 15-19.

<sup>3</sup> Indeed, Dugard (note 2), writing in 1978, said that 'loyalty to this principle has, more than any other legal factor, brought about the debasement of the South African legal system' (at 36) and that '[c]ivil liberty and the Rule of Law were sacrificed on the altar of parliamentary supremacy to the idol of apartheid. Many British institutions and traditions were discarded by the National Party in the first decade of its rule after 1948, but the British tradition of legislative sovereignty was not one of these' (at 28).

civilization as to be manifestly incapable of alienation to the State, save in the gravest of emergencies, or which are otherwise so irrational, oppressive or arbitrary as to be inconsistent with the legitimate pursuit of justice and order'.<sup>4</sup>

The story of the struggle for freedom in South Africa is well known and has been described as 'one of the great contemporary modern dramas'.<sup>5</sup> That struggle, despite having developed into low intensity civil war, was concluded through a negotiated settlement. Those negotiations were entered into between the government at the time, and the organisations and parties supporting it, on the one hand, and the liberation movements, and the organisations and parties supporting them, on the other. They produced a new constitutional dispensation and the first democratic elections in the history of the country, held on 27 April 1994. Soon thereafter, on 10 May 1994, Mr Nelson Mandela, once the most famous political prisoner in the world, was inaugurated as the first President of the new democratic Republic of South Africa.<sup>6</sup>

The new constitutional order made a fundamental break with the past. An interim Constitution<sup>7</sup> served as a bridging mechanism from the race-based tricameral Constitution to a final Constitution drafted, after the 1994 elections, by a Constitutional Assembly comprised of the National Assembly and the Senate<sup>8</sup> and certified by the Constitutional Court<sup>9</sup> to be in compliance with certain agreed

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<sup>4</sup> 'The Impact of a Bill of Rights on Law and Practice in South Africa' June 1993 *De Rebus* 460. For examples of the limits of judicial power under the apartheid system, one need look no further than the cases dealing with the removal of coloured voters in the Cape from the common voters roll in the 1950s, *Harris and others v Minister of the Interior and another* 1952 (2) SA 428 (A), *Minister of the Interior and another v Harris and others* 1952 (4) SA 769 (A) and *Collins v Minister of the Interior and another* 1957 (1) SA 552 (A).

<sup>5</sup> Abel *Politics by Other Means: Law in the Struggle Against Apartheid, 1980 to 1994* New York, Routledge: 1995, 1.

<sup>6</sup> On the process of negotiations and the road to democracy, see Sparks *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution* Sandton, Struik Distributors: 1994. See too Davenport *The Transfer of Power in South Africa* Cape Town, David Phillip: 1998.

<sup>7</sup> The Constitution of the Republic of South Africa Act 200 of 1993. The Preamble spoke, *inter alia*, of the 'need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'.

<sup>8</sup> Interim Constitution, s 68(1).

<sup>9</sup> The Constitutional Court was a new court created by s 98 of the interim Constitution. It is the highest court in respect of constitutional issues. It continued to exist by virtue of s 167 of the final Constitution.

constitutional principles contained in Schedule 4.<sup>10</sup> The final Constitution, the Constitution of the Republic of South Africa, 1996, came into operation on 4 February 1997 after it had been certified by the Constitutional Court as being in compliance with the constitutional principles.<sup>11</sup> It was signed into law by President Mandela at Sharpeville, the scene, in 1960, of one of the more notorious of the massacres of unarmed black protestors by members of the South African Police.<sup>12</sup>

The final Constitution (like the interim Constitution) creates a constitutional state: s 2 provides that it is the 'supreme law of the Republic' and that law or conduct inconsistent with it is invalid. Section 1, which contains founding provisions, describes the Republic of South Africa as 'one, sovereign democratic state' founded on the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms',<sup>13</sup> non-racialism and non-sexism,<sup>14</sup> constitutional supremacy and the rule of law<sup>15</sup> and 'universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness'.<sup>16</sup>

A Bill of Rights provides the standard against which law or conduct (mainly but not exclusively of State functionaries) is to be tested. The principal features of the Bill of Rights are the following: first, it contains rights of all three generations – civil and political rights,<sup>17</sup> social and economic rights<sup>18</sup> and environmental and developmental rights;<sup>19</sup> secondly, while it applies principally to the State,<sup>20</sup> provision

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<sup>10</sup> Interim Constitution, s 71.

<sup>11</sup> See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC).

<sup>12</sup> Devenish *A Commentary on the South African Constitution* Durban, Butterworths: 1998, 22.

<sup>13</sup> Section 1(a). On s 1 generally see Henderson 'Putting Section 1 to Work: Some Preliminary Thoughts on the First of the Founding Provisions of the New Constitution' (1998) 115 *SALJ* 215; see too Devenish (note 12), 27-32.

<sup>14</sup> Section 1(b).

<sup>15</sup> Section 1(c).

<sup>16</sup> Section 1(d). In terms of s 74(1) of the Constitution, s 1 can only be amended with a supporting vote of at least 75 percent in the National Assembly and a majority of at least six out of nine provincial delegations in the upper house, the National Council of Provinces.

<sup>17</sup> See for example s 9 (equality and freedom from unfair discrimination), s 10 (the right to human dignity), s 11 (the right to life) and s 12 (the right to freedom and security of the person).

<sup>18</sup> See for example s 23 (labour relations), s 26(1) (the right of access to adequate housing) and s 27(1)(a) (the right of access to health care services).

<sup>19</sup> See s 24.

is made for a measure of 'horizontal' application;<sup>21</sup> thirdly, while some rights contain their own internal limitations<sup>22</sup> a general limitation provision forms part of the Bill of Rights;<sup>23</sup> fourthly, it provides specifically for the derogation of rights, by way of detailed provisions regulating the declaration of states of emergency and State conduct during its currency;<sup>24</sup> and fifthly, it provides for a far broader approach than the common law to standing when fundamental rights are affected or threatened.<sup>25</sup>

Section 38 of the Constitution reads:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interests; and
- (e) an association acting in the interest of its members.'

In order to place the reform of standing into perspective, it will be necessary to consider the place of rules of standing in a broader public law context and to examine the pre-1994 common law. Against this background, s 38 of the Constitution will be analysed and an assessment of the South African judiciary's performance in responding to the reforms will be made.

## **[B] STANDING IN GENERAL**

### **(1) Standing in Public Law and Private Law**

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<sup>20</sup> Section 8(1) says: 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State.' (For a definition of an organ of State see s 239.)

<sup>21</sup> Section 8(2) says: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' For comment on this provision see Davis and Cheadle 'The Application of the 1996 Constitution in the Private Sphere' (1997) 13 *SAJHR* 44. See further *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC), paras 29-34.

<sup>22</sup> For instance, the right to freedom of expression contained in s 16(1) is limited by three exclusions contained in s 16(2). Their effect is that 'propaganda for war', 'incitement of imminent violence' and 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm' are excluded as constitutionally protected forms of expression.

<sup>23</sup> It is contained in s 36. For the limitation of a fundamental right to be valid, it must have been achieved through 'law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...'

<sup>24</sup> Section 37. See Devenish, (note 12), 92-95.

<sup>25</sup> Section 38.

The rules of standing – basically that a litigant must have capacity to sue and a sufficient interest in the proceedings<sup>26</sup> -- operate to allow certain cases through the doors of the court and to keep others outside.<sup>27</sup> The operation of the rules of standing is both important and, often, controversial: the drawing of lines by courts to distinguish between those litigants allowed through their doors and those kept outside has obvious implications for the right of the citizenry to access to justice. Standing therefore has constitutional significance.<sup>28</sup> The rules of standing are much more than neutral procedural provisions: in public law, at least, the approach of the courts to standing ‘reflects more clearly than anywhere else the prevailing system of values upon which the law is based’.<sup>29</sup> Cameron, writing about the application of the rules of standing during emergency rule in South Africa in the 1980s, is forthright in this regard. He says that the elements of the common law rules ‘are highly manipulable’ and that whether ‘an applicant’s interest is only “academic” or whether the litigation is “premature” involves a value judgment that will differ from judge to judge and from case to case. The standing requirement can be manipulated by judges who feel disinclined to hear certain cases or to decide certain issues for reasons which are not openly expressed...’.<sup>30</sup>

The fact that the rules of standing have been developed within a private law paradigm has added to the problem. The same rules are not necessarily suited to

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<sup>26</sup> Baxter *Administrative Law* Cape Town, Juta and Co: 1984, 644 (hereafter referred to as Baxter). The first aspect – legal capacity -- is not dealt with in this paper. By and large, it raises few controversial issues and is largely unaffected by the new constitutional order in South Africa.

<sup>27</sup> Craig *Administrative Law* (3 ed) London, Sweet and Maxwell: 1994, 479. See too Loots ‘Standing, Ripeness and Mootness’ in Woolman, Roux, Klaaren, Stein and Chaskalson (eds) *Constitutional Law of South Africa* (2 ed) Vol 1) Cape Town, Juta and Co: 2005, 7-1 to 7-2.

<sup>28</sup> De Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5ed) London, Sweet and Maxwell: 1995, para 2-001 (hereafter referred to as De Smith, Woolf and Jowell). Within this context, Cane ‘The Function of Standing Rules in Administrative Law’ 1980 *PL* 303, 303 makes the point that answering the question of why one applicant for review, but not another, has standing with the response that the applicant with standing ‘has a legal right or has suffered special damage or is a person aggrieved give only limited help because they are most often used as conclusions of arguments about values and policies the premises of which are unexpressed’.

<sup>29</sup> Baxter, 644. On whether standing is a procedural or substantive issue see Cane (note 28), 304.

<sup>30</sup> ‘Legal Standing and the Emergency’ in Haysom and Mangan (eds) *Emergency Law* Johannesburg, Centre for Applied Legal Studies: 1987, 61, 65.

adjudication in which public law rights and interests are in issue.<sup>31</sup> The reason for this is explained by O'Regan J in *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others*.<sup>32</sup>

'Existing common law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not affect people who are not parties to the litigation. In such cases the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or constitutional nature. Not all non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than of a public character. But it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation. In recognition of this, section 7(4) casts a wider net for standing than has traditionally been cast by the common law.'

The constitutional significance of standing to which De Smith, Woolf and Jowell referred lies primarily in two related issues: whether unlawful conduct may be permitted to persist because no individual litigant has a sufficient personal interest to be 'allowed' by the courts to stop it<sup>33</sup> and its inverse, whether persons who do not necessarily have a direct, substantial and personal interest can approach the courts for relief because those with a direct, substantial and personal interest are not able

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<sup>31</sup> See Chayes 'The Role of the Judge in Public Law Litigation' 91(1976) 89 *Harvard Law Review* 1281; Sunstein 'Standing and the Privatisation of Public Law' (1988) 88 *Columbia Law Review* 1432; Cane 'Standing up for the Public' [1995] *PL* 276.

<sup>32</sup> 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC), para 229. The court was dealing with s 7(4) of the interim Constitution which was essentially similar to s 38 of the final Constitution.

<sup>33</sup> De Smith, Woolf and Jowell, para 2-001 say of this issue: 'At its heart is the question whether it can ever be right, as a matter of principle, for a person with an otherwise meritorious challenge to the validity of governmental action to be turned away by the court on the ground that his rights or interests are not sufficiently affected by the impugned decision? To put this another way, are there some governmental decisions, the legality of which is otherwise justiciable, but in respect of which no one person has been sufficiently affected to enable a legal challenge to be made? To answer yes to these questions presupposes that the primary function of the court's supervisory jurisdiction is to redress individual grievances, rather than that judicial review is concerned, more broadly, with the maintenance of the rule of law.'

to do so for one or other reason.<sup>34</sup> The context within which these questions have to be answered is this: if the rules of standing are too restrictive, they will act as inhibitors to the achievement of justice and may undermine the rule of law; if, on the other hand, the rules are too loose, they may undermine the proper functioning of the courts by opening their doors to frivolous cases, which would consume scarce judicial resources at the expense of more deserving cases.<sup>35</sup>

## (2) The Rules of Standing: South African Common Law

The matter of *Dalrymple and others v Colonial Treasurer*<sup>36</sup> highlights the constitutional problem created by the traditional approach to standing when issues affecting the public at large are at stake. It also articulates the common law position. The applicants were members of the legislature of the Transvaal Colony. They sought an interdict to prevent the respondent from making payments to members of the legislature which were not authorised by the relevant legislation.<sup>37</sup> The illegality

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<sup>34</sup> Budlender, 'The Accessibility of Administrative Justice' 1993 *Acta Juridica* 128, 131, in the context of public interest litigation, outlines the problem thus: 'Often, people whose rights are infringed cannot themselves go to court to protect them. There are many possible reasons for this: for example, they may not be aware of their rights, or they may fear victimization. This is particularly likely in the field of administrative justice, where the subject will often have a continuing relationship with the public authority, and may fear challenging powerful administrators. In such cases, the rules of *locus standi* stultify justice, because the only person who is permitted to challenge the unlawful action in question is unable to do so.'

<sup>35</sup> It is by no means clear that the courts would, indeed, be flooded with frivolous cases if the rules of standing were relaxed. It is noteworthy that the trend in democratic systems of government has been to extend standing: so, for instance, Mr Justice PN Bhagwati, writing of this process in the jurisprudence of the Indian Supreme Court, of which he was a leading member and a former Chief Justice, referred to the breaking of the 'chains forged by the traditional doctrine of standing' to make available access to justice 'for the purpose of making basic human rights meaningful for the large mass of people' (cited in Budlender (note 34), 132). See too Sorabjee 'Obliging Government to Control Itself: Recent Developments in Indian Administrative Law' 1994 *PL* 39, 49 who says of judge-made reforms of the rules of standing: 'One of the most significant contributions made by the Indian judiciary is its liberalization of the doctrine of *locus standi*.' See further, for a debunking of the floodgates argument in South Africa, *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and others* 1996 (3) SA 1095 (Tk), 1106D-H and *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another* 2001 (2) SA 609 (E), 624B-E.

<sup>36</sup> 1910 TS 372.

<sup>37</sup> For a summary of the facts see 373-374. This case arose shortly before the South Africa Act of 1909 brought the Union of South Africa into existence on 31 May 1910. The former South African Republic (sometimes also referred to as the Transvaal Republic) and the Orange Free State had been defeated by the British in the Anglo-Boer South African War (from 1899 to 1902), had been occupied and had lost their independence, becoming the Transvaal and Orange River Colonies

of the payments was accepted by Innes CJ and Bristowe J.<sup>38</sup> Despite this their application was dismissed because it was held that they lacked standing. Innes CJ set out the position as follows:<sup>39</sup>

'The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes the breach of a duty owed to him by the wrong-doer, or unless it causes him some damage in law. This principle runs through the whole of our jurisprudence. It is not confined merely to the civil side: it is of equal force in regard to criminal procedure. Just as no man can claim damages in a civil action unless he has himself been injured, so no man may institute a private prosecution unless he has been specially affected by the crime. And the rule applies to wrongful acts which affect the public, as well as to torts committed against private individuals. The acts complained of in this instance fall within the former category.'

Limited concessions have been made to the 'class' nature of certain claims in a few narrowly defined circumstances. The first is the rule that is drawn from the case of *Patz v Greene and Co.*<sup>40</sup> It falls far short of according standing to litigate in the public interest. The rule, drawn from the English case of *Chamberlaine v Chester and Birkenhead Railway Co*<sup>41</sup> is to the effect that where legislation is intended to protect a defined category of persons, it will be presumed that a violation of the legislation will, as a matter of course, affect individual members of the protected category with the result that a member of the protected category will have standing

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respectively. These colonies were granted responsible government in 1907. The franchise was limited to white males. (See Davenport and Saunders *South Africa: A Modern History* (note 1), Chapter 9. The other component parts of the Union of South Africa were the older colonies of the Cape of Good Hope and Natal, both of which had achieved responsible government much earlier.

<sup>38</sup> At 378 (Innes CJ) and at 398 (Bristowe J). Wessels J was equivocal about the illegality of the payments and avoided having to make a specific finding on this issue. Innes CJ, with Bristowe J concurring, ordered that each party pay their own costs. Innes CJ stated, at 403: 'The ordinary rule would lead us to discharge the rule with costs. But the view I take is that there was a clear illegality, and a very important constitutional point raised in connection with that illegality; and I think that this is a case where the Court should exercise the wide discretion which it always reserves in the matter of costs, and in discharging the rule should make no order as to costs.'

<sup>39</sup> At 379. In *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87, 100 Wessells CJ held that in order to be accorded standing a litigant was required to have 'a direct interest in the matter and not merely the interest which all citizens have'. See too *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) in which the same rules were applied despite the fact that the validity of legislation was being challenged against the bill of rights operative at that stage in the territory now known as Namibia.

<sup>40</sup> 1907 TS 427.

<sup>41</sup> 18 LJ Ex 494.



to challenge the action without having to establish that his or her interests were in fact affected.<sup>42</sup>

The second concession is the standing afforded to ratepayers to challenge the actions of their local authorities. The rationale for affording this class of litigant standing is not particularly clear. Baxter, in dealing with various attempts by the courts to justify ratepayer, but not taxpayer, standing says that they 'are scarcely valid, let alone persuasive' and that a more realistic (albeit unprincipled) basis for the difference is simply that the courts fear that the floodgates will be opened 'to a rush of challenges to official action from an extremely wide group of potential litigants' if tax payer standing was recognised.<sup>43</sup>

The most expansive common law exception to the individualized view of standing is to be found in the case of *Wood and others v Ondongwa Tribal Authority and another*.<sup>44</sup> It applies when life or individual liberty is in issue. The first and second applicants were the Anglican bishop of Damaraland in Namibia and the Lutheran bishop of Ovango Kavango, also in Namibia. They had launched an application to interdict unlawful random assaults (which went together with unlawful deprivations of liberty) on members or suspected members of two political parties,

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<sup>42</sup> At 433. On the rule in general see Baxter, 659-670. For a good example of the rule in operation see *Director of Education, Transvaal v McCagie and others* 1918 AD 616. But see Cane, op cit, 314, who says of the rule (in English law): 'In this sense special damage is essentially a private law concept for although it is not such as would give rise to an action for damages in private law, and although special damage need not relate to an interest in the nature of property, it does make the individual and his interests central to the question of standing.'

<sup>43</sup> Baxter, 659. In *Dalrymple*, supra, 383-385 Innes CJ suggested that in the case of certain municipalities the statute which formed them created a *universitas* of which every ratepayer was a member, and was thus vested with 'a clear right to object to any user of that property outside the terms of the statutory charter'; and in respect of other municipalities, that a ratepayer had a sufficiently direct interest in the legality of any violation of the statute which created the municipality arising from a fiduciary relationship between municipality and ratepayer. Wessels J, in the same case, appeared to accept these reasons but also founded a ratepayer's standing on his or her statutory 'right of supervision and interference in municipal affairs' (at 395). Bristowe J, in the third judgment, offered a rather alarming basis in the course of grappling with the argument that, if a ratepayer has standing in respect of acts of a municipality, so should a taxpayer in respect of the acts of the central government: municipal councillors, he said, were 'drawn from all classes of the population, and are not necessarily persons who can be trusted to keep strictly within their powers and to subordinate their private interests to their public duties' whereas the 'great officers of State are tried men who have earned the trust reposed upon them, and the very immensity of the trust is in itself a guarantee that it will not be betrayed' (at 401-402).

<sup>44</sup> 1975 (2) SA 294 (A). For an account of the facts and background to this matter, see Soggot *Namibia: The Violent Heritage* London, Rex Collings: 1986, 61-75. Soggot, an advocate at the Johannesburg Bar, argued the case for the applicants in the Supreme Court of South West Africa and (for the appellants) in the Appellate Division.

the Democratic Co-operative Development Party (Demkop) and the South West Africa Peoples' Organization (SWAPO) perpetrated by members of the tribal police of two tribal authorities. The applicants did not know those whom they sought to protect and, indeed, the protectees were not identifiable, given the random nature of the illegal conduct.

Rumpff CJ held that in cases of this nature an applicant's interest should be 'widely construed because illegal deprivation of liberty is a threat to the very foundation of a society based on law and order' and that such an applicant would be acting in a way 'not dissimilar to the way in which a *negotiorum gestor* would act in our law, or a person would be permitted to act as a curator *ad litem* to an unknown, absent or inaccessible person ... except that he would attempt to protect something far more precious than property'.<sup>45</sup> This form of standing is, however, subject to conditions. They are: first, the applicant must satisfy the court that the protectee is not able to make the application himself or herself; secondly, the applicant would have to satisfy the court that he or she had 'good reason' for making the application; and thirdly, the applicant would be required to establish that the protectee would have made the application himself or herself had this been possible.<sup>46</sup> Finally, it is important to bear in mind that the standing accorded the appellants in *Wood* was personal rather than representative: it was held that in the circumstances the bishops had a sufficiently direct interest.<sup>47</sup> Indeed, the court held specifically that the *actio popularis* of Roman law – in terms of which citizens were able to litigate to protect the public interest – was not part of South African law.<sup>48</sup>

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<sup>45</sup> At 311H.

<sup>46</sup> At 311F-G. See too Cameron 'Legal Standing and the Emergency' in Haysom and Mangan (eds) *Emergency Law* (note 30), 66.

<sup>47</sup> For an application of *Wood* see *Deary NO v Acting President, Rhodesia and others* 1979 (4) SA 43 (R) in which the standing of the Roman Catholic Church was recognised for the purposes of proceedings to interdict allegedly unlawful executions of people sentenced to death by courts martial. Beck J, in arriving at this conclusion held: 'It must be said at the outset that the Court will be slow indeed to deny *locus standi* to an applicant who seriously alleges that a state of affairs exists, within the Court's area of jurisdiction, whereunder people have been, are about to be, and will continue to be unlawfully killed ... . The non-frivolous allegation of a systematic disregard for so precious a right as the right to life is an allegation of an abuse so intolerable that the Court will not fetter itself by pedantically circumscribing the class of persons who may request the relief of these interdicts.' (At 45F-G.) On the limitation of the scope of *Wood* in South Africa (during the state of emergency) see Loots 'Keeping *Locus Standi* in Chains' (1987) 3 *SAJHR* 66.

<sup>48</sup> At 310D-G.

## [C] STANDING AND THE CONSTITUTION

Section 38 of the Constitution provides for standing for a broad range of litigants in litigation concerning violations or threatened violations of fundamental rights. The Constitutional Court held at an early stage that a broad and generous approach to the application of the Constitution's standing provisions is required. It did so in *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others*<sup>49</sup> in which Chaskalson P (for the majority) said of s 7(4)(b) of the interim Constitution that, while it was important that courts deployed their resources to deal with concrete disputes, there was no reason for adopting a narrow approach to standing in constitutional litigation: a broad approach would be 'consistent with the mandate given to this court to uphold the Constitution and which serves to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled' and that the breadth of the categories of persons specified in the section is also indicative of a broad approach to its application being warranted.<sup>50</sup> O'Regan J located the standing provisions within the new and enhanced role of the judiciary in a constitutional state. She held:<sup>51</sup>

'Section 7(4) is a recognition too of the particular role played by the Courts in a constitutional democracy. As the arm of government which is entrusted primarily with the interpretation and enforcement of constitutional rights, it carries a particular democratic responsibility to ensure that those rights are honoured in our society. The role requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact.'

In *Beukes v Krugersdorp Transitional Local Council and another*<sup>52</sup> Cameron J held that the broad approach to standing was appropriate in all courts -- not only in the Constitutional Court -- when adjudicating constitutional issues, and this approach applied not only to deciding who had standing but also to 'how that standing may be

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<sup>49</sup> Note 32.

<sup>50</sup> Para 167. See too *Van Huysteen and others NNO v Minister of Environmental Affairs and Tourism and others* 1996 (1) SA 283 (C), 300H-302G.

<sup>51</sup> Para 230.

<sup>52</sup> 1996 (3) SA 467 (W).

evidenced'.<sup>53</sup> The same judge, sitting in the Supreme Court of Appeal has, in *Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuza and others*<sup>54</sup> applied the same broad and generous approach in developing the common law of jurisdiction in respect of a class action in which a substantial number of members of the class resided outside the jurisdiction of the court in which the proceedings were instituted. He held that, even if in strict terms, the court may not have had jurisdiction over these beneficiaries of the class action, 'it is plain that the Constitution requires adjustment of the relevant rules, along sensible and practical lines, to ensure the efficacy of the class action mechanism'.<sup>55</sup>

#### (1) People Acting in Their Own Interest

At first blush, s 38(a) of the Constitution might appear to do no more than constitutionalise the general rule of the common law. This is not so for two reasons: first, it concerns more than standing, acting as it (and the rest of s 38) does as an adjunct to s 34, the fundamental right of access to court;<sup>56</sup> secondly, because s 38 displays a deliberate bias towards enhanced access to court and because it applies

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<sup>53</sup> At 474E-F. Southwood J interpreted s 38 in much the same way in *Gerber v Voorsitter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening* 1998 (2) SA 559 (T). He held that the aim of the section was clear and unambiguous: it was intended to make provision for virtually unlimited standing so that as little interference as possible would occur in respect of the means of approaching courts, the nature of the enquiry and the remedy to be granted. The purpose of the section was to ensure that fundamental rights were upheld. To achieve this purpose courts had to be placed in the position to be able to determine whether an applicant's fundamental rights had been infringed or threatened and to grant appropriate relief where such violations had occurred. (At 569D-F.)

<sup>54</sup> 2001 (4) SA 1039 (SCA), paras 21-27. See too the judgment of Froneman J in the court below, in *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another* (note 35), 619C-D: 'Particularly in relation to so-called public law litigation there can be no proper justification of a restrictive approach. The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons may be affected by the case. The emphasis will often not only be backward-looking, in the sense of redressing past wrongs, but also forward-looking, to ensure that the future exercise of public power is in accordance with the principle of legality (compare the remarks of O'Regan J in *Ferreira v Levin* (supra at para [229])). All this speaks against a narrow interpretation of the rules of standing.'

<sup>55</sup> Para 23.

<sup>56</sup> Trengove 'Procedure' Juta's Seminar on Constitutional Litigation, Procedure and Practice, March 1995, 7. See too *De Lille and another v Speaker of the National Assembly* 1998 (3) SA 430 (C), para 41, in which Hlophe J held that an ouster clause in s 5 of the Powers and Privileges of Parliament Act 91 of 1963 was invalid because it conflicted, *inter alia*, with s 34 and s 38 of the Constitution.

to anyone acting in their own interest, rather than anyone who has a direct and substantial interest in the subject matter of the litigation, individual standing in constitutional cases is broader than the common law equivalent.

This broader approach is evident in the majority judgment in *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others*.<sup>57</sup> The applicants had challenged the validity of s 417 of the Companies Act 61 of 1973 after they had been summoned to be examined on the affairs of companies which were in the process of being wound up. The section provided that an examinee 'may be required to answer any question put to him ... notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him'. The applicants argued that this provision infringed (*inter alia*) their fair trial right against self-incrimination. They had not been examined yet and had, consequently, not incriminated themselves or been faced with such self-incriminatory evidence in a trial. It was contended on behalf of the respondents that the applicants had no standing in terms of s 7(4)(b)(i) of the interim Constitution because their fair trial rights had not, as yet, been impaired.

Chaskalson P rejected this argument because, he held, it was 'highly technical to say that a witness called to a section 417(2)(b) enquiry lacks standing to challenge the constitutionality of the section. A witness who genuinely fears prosecution if he or she is called upon to give incriminatory answers cannot be said to lack an interest in the decision on the constitutionality of this section'.<sup>58</sup> He concluded that where 'the impugned section of the Companies Act has a direct bearing on the applicants' common law rights, and non-compliance with this section has possible criminal consequences, they had sufficient standing in my view to secure a declaration from this court as to the constitutionality of the section'.<sup>59</sup> Both Chaskalson P and O'Regan J (who found that, on the facts, the applicants had not established personal standing but had public interest standing) observed that a person could have a sufficient interest in a matter despite the fact that that litigant's rights were not affected or threatened. They cited, as an example, the well known

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<sup>57</sup> Note 32.

<sup>58</sup> Para 163.

<sup>59</sup> Para 166. See too *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and others* 2002 (6) SA 370 (W).

Canadian case of *R v Big M Drug Mart Limited*<sup>60</sup> in which a juristic person, which did not enjoy a right to freedom of religion itself, was nonetheless able to challenge the constitutionality of Sundays observance legislation because it infringed such a right.

In line with this approach, Heher J, in *National Coalition for Gay and Lesbian Equality and others v Minister of Justice and others*<sup>61</sup> accepted that the applicant organisation had a sufficient interest itself to challenge the constitutionality of rules of common law and statutory provisions which criminalised various forms of consensual sexual conduct between adult men. Two of the organisation's objectives were to 'promote equality before the law for all persons, irrespective of their sexual orientation' and to 'challenge by means of litigation ... all forms of discrimination on the basis of sexual orientation'.<sup>62</sup> In *City of Cape Town v Ad Outpost (Pty) Ltd and others*<sup>63</sup> the respondents relied on the right to freedom of expression, entrenched in s 16 of the Constitution, to challenge a by-law that prohibited the erection of advertising bill boards without permission. They erected the bill boards but were not responsible for the information or ideas that the advertisements imparted. It was argued that s 16 had no application because the freedom of expression of the respondents was not affected or threatened. Davis J rejected this argument. He held that the generous approach to standing required by the Constitution justified the conclusion that the 'respondents have a clear interest in ensuring that the right of freedom of expression is not breached in an unjustifiable manner'.<sup>64</sup>

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<sup>60</sup> (1985) 18 DLR (4<sup>th</sup>) 321 (SCC).

<sup>61</sup> 1998 (6) BCLR 726 (W).

<sup>62</sup> At 732C-D.

<sup>63</sup> 2000 (2) SA 733 (C).

<sup>64</sup> At 748F-G. See too *Van Huysteen and others NNO v Minister of Environmental Affairs and Tourism and others* (note 50) in which Farlam J held that s 7(4)(b)(i) of the interim Constitution was wide enough to cover the interest of a trustee when he or she sues on behalf of a trust (at 301F-G). In *Bafokeng Tribe v Impala Platinum Ltd and others* 1999 (3) SA 517 (B), 545G-551A Friedman JP held that a tribe, as the beneficiary of a trust, could sue in its own name when the trustee, the Minister of

## (2) People Acting on Behalf of Others Who Cannot Act in Their Own Name

Section 38(b) extends the principle developed in *Wood and others v Ondongwa Tribal Authority and another*<sup>65</sup> to litigation to vindicate all fundamental rights and not just the right to freedom. As with the rest of s 38, this provision should be broadly construed to enhance access to justice, along the lines of the Indian judge-made rules upon which it was modelled (along with *Wood*).<sup>66</sup> Differing approaches to this form of representative standing have been adopted in two cases concerning the cancellation of social assistance.<sup>67</sup>

In *Maluleke v MEC, Health and Welfare, Northern Province*<sup>68</sup> the applicant's old age pension, along with the pensions of 92 046 others, was suspended as part of a process to root out people who were receiving social grants to which they were not entitled. The 92 046 people had been identified by the computer system used by

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Land Affairs, had not sued on its behalf and was faced with a serious conflict of interest. By way of contrast, Pickering J, in *Congress of Traditional Leaders of South Africa v Minister for Local Government, Eastern Cape and others* 1996 (2) SA 898 (Tk) held that the applicant did not have a sufficient interest in the subject matter of the litigation, namely, the validity of certain pieces of local government legislation, because it had not alleged that the rights of traditional leaders were being infringed by the legislation because of their membership of the applicant or that it was prevented by the legislation from pursuing its objects, which were, essentially, the protection and promotion of the institution of traditional leadership. (At 905E-F.)

<sup>65</sup> Note 44.

<sup>66</sup> Trengove (note 56), 8-9. Third party litigation is allowed in India by any person or organization suing on the basis of an infringement of 'any constitutional or legal right' where the person or class of persons whose rights have been violated are 'unable to approach the court personally because of poverty, helplessness, disability, or a socially or economically disadvantaged position'. See *SP Gupta v Union of India* (1982) AIR 149 (SC), 189. See further Loots 'Standing to Enforce Fundamental Rights' (1994) 10 SAJHR 49, 50.

<sup>67</sup> In addition to these cases, the equivalent section of the interim Constitution was interpreted by Cameron J in *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensionfondsen 'n ander* 1997 (8) BCLR 1066 (T) in which the applicant, a local authority, had sought to free itself from a relationship with the respondent pension fund, relying, inter alia, on the fundamental right to freedom of association. Cameron J held that both parties were organs of state. He left undecided the question whether an organ of state could be the bearer of fundamental rights but observed that it was conceivable that an organ of state could litigate on behalf of a person who could not institute the proceedings himself or herself, in terms of the Constitution. (At 1075B-C.) He concluded, however, that broad as the approach of the courts should be to standing in constitutional litigation, it was still necessary for an applicant to set out in the pleadings the basis and nature of any claim to act on behalf of others, which the applicant in this instance had failed to do. (At 1076A-F.)

<sup>68</sup> 1999 (4) SA 367 (T). For comment on this decision, see Plasket 'Standing, Welfare Rights and Administrative Justice' (2000) 117 SALJ 647.

the respondent's Department as 'suspect beneficiaries' because their records were incomplete. The respondent believed that of this number some 30 000 to 60 000 were 'fraudulent beneficiaries' and that their fraud cost the State between R14 million and R28 million per month. A decision was taken to suspend payments to the 92 046 beneficiaries so that they could then present themselves for re-registration, at which stage their entitlements could be determined properly. The idea was that those who proved to be genuine beneficiaries would be reinstated and paid arrears for the period of suspension. By the end of June 1998, a total of 55 284 people (including the applicant) had had their pensions reinstated and 37 762 people, assumed to be 'ghost pensioners', had been removed from the system.

The applicant had applied for a declarator that the suspension of her pension was unlawful and a mandamus to compel the respondent to pay her interest from the time of cancellation to the time of reinstatement. She applied for similar relief for everyone who had been prejudiced in the same way during this process. She succeeded on her own behalf as Southwood J found that the respondent did not have lawful authority to stop the applicant's pension in the circumstances.<sup>69</sup> She did not succeed in her capacity as a representative litigant. Southwood J held that it had not been clearly alleged in the papers which fundamental rights had been infringed or threatened, and consequently, the extended standing provisions of s 38 had not been activated.<sup>70</sup> Secondly, he stated that it was 'difficult to imagine' how the suspension of social grant payments could be an infringement of the Bill of Rights, despite having found the suspension of the applicant's pension to have been effected without lawful authority – in other words, in the face of the fundamental right to lawful administrative action.<sup>71</sup> Thirdly, he held that even if the infringement of a fundamental right had been established, he was not persuaded that the applicant

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<sup>69</sup> At 373D.

<sup>70</sup> It is not clear how Southwood J came to this conclusion because the papers set out in some detail the rights infringed. They were the right to lawful administrative action, procedurally fair administrative action (s 33(1) of the Constitution), the right of access to social security, including social assistance (s 27(1)(c)) and the right to be free from arbitrary deprivation of property (s 25(1)).

<sup>71</sup> At 373J-374A. See *Ngxuza and others v Permanent-Secretary, Department of Welfare, Eastern Cape and another* (note 35), 622F-G, in which Froneman J questioned Southwood J's conclusion. He held: 'It is not clear to me why Southwood J found it difficult to imagine how the suspension of payment of social benefits could be an infringement of a right in the Bill of Rights. He had himself found that the suspension of benefits in that case was unlawful. That in itself appears to me to be an infringement of the right to just administrative action contained in section 33 of the Bill of Rights.'



had standing either in terms of s 38(b), s 38(c) or s 38(d) to represent the interests of all of those affected by the respondent's decision. In respect of s 38(b) he held simply that there was no evidence to show that the 92 046 affected pensioners could not act in their own interests.

One hardly needs screeds of sociological evidence to know that most people affected by the decision were, from a practical point of view, unable to litigate on their own behalf. So notorious are the socio-economic conditions of the majority of South Africans that a court could take judicial notice of this fact, as Didcott J did in *Mohlomi v Minister of Defence*<sup>72</sup> for the purpose of considering the constitutional validity of a sixth-month limitation of action provision. He held that the disparity between the sixth-month provision and the normal three-year provision in terms of the Prescription Act 68 of 1969 'must be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the main stream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons'.<sup>73</sup> Southwood J approached the interpretation of s 38(b) on too narrow a basis. Social grants are given on the basis of need (the successful applicants having passed a means test) and are far from princely in amount.<sup>74</sup> It is fair to assume that, with the State legal aid system providing little assistance in civil matters, none of the 92 046 affected pensioners were able to approach a court for relief individually because of their poverty.<sup>75</sup>

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<sup>72</sup> 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC), para 14.

<sup>73</sup> Para 14. See too, *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851, para 69 in which Ackermann J held that in a country such as South Africa 'where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated'. This passage was cited with approval by Southwood J himself in *Gerber v Voorsitter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening* (note 53), 570E-F.

<sup>74</sup> Old age pensions and disability grants are at present about R700.00 per month (about £50.00). At the time of the judgment they were R470.00 per month.

<sup>75</sup> The applicant was represented by the Legal Resources Centre, a privately funded organisation that represents indigent people free of charge in cases involving issues of public interest.

A far more realistic approach to the issue was taken by Froneman J in *Ngxuza and others v Permanent-Secretary, Department of Welfare, Eastern Cape and another*.<sup>76</sup> In this case, four applicants whose disability grants had been cancelled by the first respondent applied, on their own behalf and on behalf of all similarly situated people in the province, for the reinstatement of the grants. They claimed standing to do so, on the basis of s 38(a), in their own interest, and on the basis of s 38(b), s 38(c) and s 38(d), as representative litigants. They claimed that the grants of approximately 100 000 people had been cancelled by the first respondent in violation of the right of everyone to fair administrative action. In holding that the applicants had standing, in terms of s38(b), to litigate on behalf of all of those whose grants had been cancelled, Froneman J observed that the evidence before him tended to confirm the 'correctness of the situation sketched by Didcott J' in *Mohlomi* and quoted above.<sup>77</sup> He proceeded to say that in the Eastern Cape Province, a substantial proportion of the population is poor, many people live in rural areas far from lawyers, roads are poor, public transport is erratic and the legal aid system is in a state of crisis.<sup>78</sup> He concluded that there was evidence before him that 'many people in similar circumstances as the applicants are unable to individually pursue their claims because they are poor, do not have access to lawyers and will have difficulty in obtaining legal aid. Effectively they are unable to act in their own name'.<sup>79</sup>

*Ngxuza* was followed in *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and others*<sup>80</sup> in which a voluntary association was held to have standing in terms of s 38(b) (as well as in terms of s

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<sup>76</sup> Note 35.

<sup>77</sup> At 621G.

<sup>78</sup> At 621G-H.

<sup>79</sup> At 622J-623A. The Supreme Court of Appeal, in *Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuza and others* (note 54) did not find it necessary to deal with Froneman J's findings that the respondents on appeal had standing in terms of s 38(b) and s 38(d). It dismissed the appeal on the basis that Froneman J was correct in holding that the respondents had standing to litigate on behalf of a class of similarly placed people whose disability grants had all been cancelled in violation of their fundamental right to procedurally fair administrative action. The first paragraph of the judgment may, however, be understood as support for Froneman J's findings on the inability of the members of the class to litigate on their own behalf. Cameron JA held (at para1): 'The law is a scarce resource in South Africa. This case shows that justice is even harder to come by. It concerns the ways in which the poorest in our country are to be permitted access to both.' (See too paras 11 and 12).

<sup>80</sup> 2002 (6) SA 66 (T).

38(d) and s 38(e)) to apply for the reviewing and setting aside of a decision taken by the respondents to cut off the water supply to the Lebohang Township. Kruger AJ held that the applicant had standing in terms of s 38(b) because it was clear from the papers that 'the people affected by the alleged discontinuation of the water supply are mostly indigent and are unable to individually pursue their claims because of that fact. They are effectively unable to act in their own name'.<sup>81</sup>

It stands out that, much like its common law equivalent, s 38(b) has been sparingly applied. The reasons for this differ. In the case of the common law equivalent, the courts were reluctant to accord representative standing except in the direst of circumstances: it was made clear that this form of standing was truly an exception to the general rule.<sup>82</sup> In the case of standing in terms of s 38(b), however, the problem is the inverse. Section 38 accords standing so liberally that s 38(b) is something of the poor relation of s 38(c) and s 38(d): more often than not a litigant who is able to rely on s 38(b) will also be able to rely on s 38(c) and s 38(d).

### (3) People Acting as Members of, or in the Interest of a Group or Class

Section 38(c) introduces class actions into South African law. The essence of a class action is that 'one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and

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<sup>81</sup> Para 27. See too *Cash Paymaster Services (Eastern Cape) (Pty) Ltd v Member of the Executive Council Responsible for Social Welfare and another* TkhC 30/3/07 (Case No. CA and R 169/06) unreported, 6 in which Jansen J held that the respondents (applicants in the court below) had standing in terms of s 38(b) to interdict the appellant (to whom the function of paying social grants had been outsourced by the provincial government) from deducting money from the amounts payable to some 7 000 pensioners. The impracticality of each pensioner seeking to enforce his or her rights 'justifies a finding that they are effectively unable to act in their own names and that the respondents therefore qualify to act on their behalf'. Also see *Stutterheim High School v Member of the Executive Council, Department of Education, Eastern Cape Province and others* ECD 5 June 2007 (Case No. 2568/06) unreported, para 57 in which Plasket J held that where an application had been brought by a School Governing Body whose term of office had expired, the deponent to the founding affidavit, the chairperson of the defunct SGB, had standing in terms of s 38(b): 'The facts also establish that the school, having no SGB, is unable to litigate in its own name and that Mr Andrews, albeit under the mistaken belief that he was the chairperson of a lawfully empowered SGB, brought the application to protect the interests of the school. It is implicit in this that, had it been possible, the school would have litigated in its own name, as it tried to do. He has accordingly established that he has standing in terms of s 38(b) of the Constitution.'

<sup>82</sup> See generally, Loots 'Keeping *Locus Standi* in Chains' (note 47).

individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it'.<sup>83</sup> The Constitution, in creating this form of standing, does not prescribe how the class should be defined and identified, who may enforce a successful class action and who is bound if it fails. It is widely regarded as necessary that these procedural issues be regulated by way of legislation, whether in the form of a statute or rules of court.<sup>84</sup> While there has been talk of such regulation, nothing appears to have been done to bring the necessary legal instrument into being. It has been left to the courts to develop appropriate rules of procedure to give effect to class actions using their inherent jurisdiction, now entrenched in s 173 of the Constitution, to regulate their own processes and to develop the common law. These procedural rules will have to accord with the spirit, purport and objects of the Bill of Rights.<sup>85</sup>

*Beukes v Krugersdorp Transitional Local Council and another*<sup>86</sup> was one of the earlier cases to recognise the standing of a party to sue on behalf of members of a class of similarly placed ratepayers. The respondent challenged the applicant's standing because, it was argued, he had not defined the class accurately enough so that the interests of its individual members could be determined. The people whom the applicant represented had all appended their names, addresses and telephone numbers to a form entitled 'list of group to class action' and in which they authorized the applicant to bring an application on their behalf 'to declare invalid the conduct of the Transitional Local Council of Krugersdorp, concerning the distinction which is made in respect of the levying of municipal rates and for an order declaring that we also are entitled to pay municipal rates at a flat rate'.<sup>87</sup> Cameron J rejected the respondent's argument. He held:<sup>88</sup>

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<sup>83</sup> *Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuza and others* (note 54), para 4. See too Loots 'Standing to Enforce Fundamental Rights' (note 66), 58; De Vos 'Reflections on the Introduction of a Class Action in South Africa' 1996 TSAR 639.

<sup>84</sup> Trengove (note 56), 10. See too Estelle Hunter 'The Draft Legislation Concerning Public Interest Actions and Class Actions: the Answer to all Class Ills?' (1997) 30 CILSA 304, 305.

<sup>85</sup> Constitution, s 39(2). See too *Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuza and others* (note 54), para 12.

<sup>86</sup> 1996 (3) SA 467 (W).

<sup>87</sup> At 472H-I.

<sup>88</sup> At 474F-H. Two other cases bear mention here. In *Bafokeng Tribe v Impala Platinum Ltd and others* (note 64) Friedman JP held that the plaintiff tribe had standing in terms of the Constitution to litigate on behalf of its members as a representative litigant (at 545F-551A) and in *Minister of Health*

'In the present case, the founding papers proceed explicitly from the averment that the Applicant as well as the listed persons live in "white areas", and that they are for this reason affected unfairly by the TLC's discriminatory rates policy. From this it seems to be plain that the group or class of persons as a member of whom and in whose interests the applicant is acting are those ratepayers of Krugersdorp within the TLC's authority who do not enjoy the benefit of "flat rate" municipal charges. It would run counter to the spirit and purport of the interim Constitution to require that persons who identify themselves as members of a group or class as a member of whom and in whose interest a litigant acts, should reiterate with formalistic precision the complaint with which they associate themselves. Even more contrary to the spirit and purport would be to require that they attest to their status or that they put in affidavits joining in the litigation. Mr De la Rey's contention that no unnecessary restrictions should be placed on the application of s 7(4)(b)(iv), and that it should be read so as to avoid obstructions on its invocation, seems to me to be correct.'

What emerges from *Beukes* and other cases that have recognised the right of a litigant to sue on behalf of a class is that access to court should not be restricted by the application of over-technical rules of procedure. This does not mean, however, that class actions will always be appropriate.<sup>89</sup> When representative standing is appropriate and when it is not are at the heart of the decisions in *Maluleke v MEC*,

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*and Welfare v Woodcarb (Pty) Ltd and another* 1996 (3) SA 155 (N) Hurt J held that the applicant had standing to interdict the unlawful burning of the by-products of a sawmill because he was the Minister responsible for the administration and enforcement of the Atmospheric Pollution Prevention Act 45 of 1965 which proscribed the respondent's conduct in the absence of a permit (at 161H-162A) and as a representative litigant suing on behalf of a class of people, namely the respondent's neighbours, because the burning operations constituted an infringement of their fundamental right to an environment which was not detrimental to their health or well being (at 164E-G).

<sup>89</sup> In *Lifestyle Amusement Centre (Pty) Ltd and others v Minister of Justice and others* 1995 (1) BCLR 104 (C) only one of a class of nearly 2000 small-scale, unlicensed casino operators resided within the jurisdiction of the court and four of this number claimed to act on behalf of the class in claiming interim relief pending a constitutional challenge to the gambling legislation. Van Den Burgh AJ dismissed their application because it amounted to impermissible forum shopping and an abuse of process (at 111B). The applicants had stated forthrightly that they had brought their application in the Cape because judges in other divisions had dismissed similar applications. In *Matiso v Commanding Officer, Port Elizabeth Prison and another* 1994 (3) SA 899 (SE) the applicant, an imprisoned judgment debtor, sought orders for her release from civil imprisonment, the release of all other civilly imprisoned judgment debtors in the prison and an interdict to prevent the respondent from taking into custody any other judgment debtors, pending an application to the Constitutional Court to set aside sections of the Magistrates' Courts Act 32 of 1944 that purported to authorise civil imprisonment for debt. Melunsky J granted an order for the release of the applicant, referred the constitutional issue to the Constitutional Court and directed that the applicant was to initiate proceedings in that court within one month. He granted leave to the remaining judgment debtors in the Port Elizabeth Prison to apply to join in the proceedings as co-applicants (at 904C-D). He did not allow the applicant to litigate on behalf of other imprisoned judgment debtors because this would have had the effect of granting relief without the judgment creditors of each judgment debtor having the opportunity of being heard (at 903E-F).

*Health and Welfare, Northern Province*,<sup>90</sup> on the one hand, and *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another*,<sup>91</sup> on the other.

In *Maluleke* Southwood J rejected the applicant's argument that she had standing to litigate on behalf of 92 046 similarly placed pensioners because they formed a class which she represented. It will be recalled that he had also rejected her standing to litigate for them because they were not able to litigate in their own names, or in the public interest. His reasons for holding that the applicant did not have standing as a class litigant were that the group of people concerned 'constitute a group or class in only the vaguest and broadest sense – payment of their benefits was suspended', that the circumstances of each person could differ and thirdly that it was not apparent that the members of the class were aware of the litigation and were willing to be bound by it and any costs order that could be made.<sup>92</sup>

As with the application of s 38(b), Southwood J's approach to s 38(c) was too narrow. The first problem has a simple answer. The Constitution does not say that the group or class must be close-knit or have more than one defining characteristic. Indeed, all that is necessary is one characteristic – in this instance, the common thread of all suffering a similar infringement of their fundamental rights at the hands of the same respondent and as a result of one decision.<sup>93</sup> The second problem – that each person's circumstances could differ – is more apparent than real. It stems from the fact that the race- and ethnically-based social assistance legislation in force before April 1994 has not been rationalised and so, in the Northern Province (now known as Limpopo Province), one of seven different statutes applied, depending on where a particular pensioner lived. Despite the plethora of legislation, however, the 92 046 affected pensioners were prejudiced by one decision to suspend their grants until they could convince officials of their entitlement.<sup>94</sup>

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<sup>90</sup> Note 68.

<sup>91</sup> Note 35.

<sup>92</sup> At 374C-D.

<sup>93</sup> Southwood J, it would appear, approached the issue of standing from a narrow private-law model of adjudication rather than from a broader perspective consonant with the extended standing provisions of the Constitution, which he himself had recognised earlier in *Gerber v Voorsitter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening* (note 53), 569D-F.

<sup>94</sup> The social assistance legislation of the various so-called independent homelands and self-governing homelands prior to 1994 was similar because the various homeland statutes were all based

The third problem which Southwood J raised is one not of the applicant's making. No legislation has been passed to regulate class actions and class actions are unknown to the common law. As a result, no statutory or common law rules were in place to regulate such matters as notice to members of the class or costs orders. As a judgment would have affected the rights of the 92 046 pensioners, members of the class would have to have been given some form of notice of the proceedings and be given an opportunity to associate with, or disassociate from them. But the fact that the applicant did not manufacture a notice procedure which may or may not have met with Southwood J's approval ought not to have meant that the application was dismissed on this basis. Courts are the masters of their own procedures and have an inherent jurisdiction to develop procedures so that justice may prevail. Southwood J should have ordered that notice in an appropriate form be given to the affected pensioners, before dealing with the merits, rather than dismiss the application on this basis.

Froneman J's judgment in *Ngxuzza* stands in stark contrast to Southwood J's judgment. He confronted the problems of extended standing, such as the difficulty of ensuring that class litigants represent the interests of the class properly, by holding that the solution lies not in deviating from the broad approach to standing required by the Constitution and endorsed by the courts but rather in developing new and innovative judicial responses to give effect to s 38.<sup>95</sup> This is the essential conceptual difference between this judgment and *Maluleke*: Southwood J saw only the problems, but Froneman J also saw the solutions. Froneman J held that the applicants had established that they had standing to act for the class (and in the public interest) because: first, they established a common interest that related to the infringement of a fundamental right as they and those they claimed to represent had

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on the Social Pensions Act 37 of 1973, the statute that applied to black pensioners living outside the homelands – in what was often termed 'white South Africa'.

<sup>95</sup> For instance he held specifically, at 623B-C, that 'the many practical difficulties associated with representative and class actions, highlighted in the *Maluleke* case, cannot justify the denial of such an action where the Constitution makes specific provision for it'. At 625A-B, he observed that if 'there is a clearly defined class of people who have been wronged in the manner required by section 38 it is no answer for either the judicial or administrative arms of government to say that it will be difficult to give them redress'.

all had their grants discontinued 'in the same unlawful manner by the respondents';<sup>96</sup> secondly, the class that the applicants wished to represent was 'sufficiently clear and identifiable'; and thirdly, the applicants were members of that class.<sup>97</sup>

The approach taken by Froneman J is perhaps best summed up by what he drew from the comparative law to which he was referred. He held that the importance of the foreign case law lay in the assistance it rendered to South Africans in 'our quest for democracy'.<sup>98</sup> From the Indian law he learnt that 'flexibility and a generous approach to standing in a poor country is "absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objective" (in the words of Bhagwati J in *SP Gupta and Others v President of India and Others* (1982) 2 SCR 385; (1982) ASC 149 at 189-190'. From the Anglo-American common law he drew the lesson that representative standing 'should be treated as being not a rigid matter of principle, but a flexible tool of convenience in the administration of justice, and should be applied, not in a strict and rigorous sense, but according to its wide and permissive scope'.<sup>99</sup>

Froneman J's judgment was upheld by the Supreme Court of Appeal in *Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuza and others*.<sup>100</sup> Cameron JA was particularly harsh in his criticism of the way the appellants had exercised their powers in implementing the wholesale cancellation of disability grants in the Eastern Cape and of their conduct in the litigation that flowed from this.<sup>101</sup> On the central question of whether a case had been made out for

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<sup>96</sup> At 624G. Note that it was established on the papers that the procedure that the respondents adopted to cancel grants did not comply with the requirements of the fundamental right to procedurally fair administrative action, as envisaged by s 33(1) of the Constitution. See in this respect, *Bushula and others v Permanent Secretary, Department of Welfare, Eastern Cape and another* 2000 (2) SA 849 (E). Note too that s 27(1)(c) of the Constitution gives to everyone a fundamental right of access to social security including 'if they are unable to support themselves and their dependants, appropriate social assistance'. See further, *Ngxuza*, 622G-I.

<sup>97</sup> At 625E.

<sup>98</sup> At 623C-D.

<sup>99</sup> At 623D-F.

<sup>100</sup> Note 54. It was held that, as the respondents had opted to sue as class litigants, rather than in the public interest – a choice Froneman J had given them – there was no need, on appeal, to deal with whether they had standing in terms of s 38(b) or s 38(d).

<sup>101</sup> At para 15 Cameron JA said the following, which is indicative of the manner in which the court viewed the conduct of the appellants: 'All this speaks of a contempt for people and process that does not befit an organ of government under our constitutional dispensation. It is not the function of the courts to criticize government's decisions in the area of social policy. But when an organ of



standing in terms of s 38(c), the court saw none of the difficulties that had plagued Southwood J in *Maluleke*. Cameron JA held:<sup>102</sup>

'The complaint that the class was not adequately defined in the order of the court below is difficult to appreciate. There can be no conceptual complaint about the clarity of the group's definition. From the point of view of practical definition, it is beyond dispute that (1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants, through their legal representatives, the Legal Resources Centre, will fairly and adequately protect the interests of the class. The quintessential requirements for a class action are therefore present.'

Two further matters warrant brief mention to illustrate the application of s 38(c). The first is *Coetzee v Comitis and others*,<sup>103</sup> in which the applicant, a professional footballer, claimed standing in the interests of professional footballers and potential professional footballers to challenge the constitutionality of certain of the rules and regulations of the National Soccer League – the NSL -- dealing with transfers of players. Traverso J found that the NSL performed public functions (as it enjoyed the exclusive power to regulate professional football in the country), that football has a large following and that the 'fate' of players is a matter of public interest: it being alleged by the applicant that the rules and regulations under challenge violated the fundamental rights of players to just administrative action, fair labour practices, freedom of association and human dignity, this was, she said, 'patently a matter of such vast public interest, that a narrow approach would be inappropriate'.<sup>104</sup> She held accordingly that the applicant had standing to represent the class of professional and potential professional footballers.<sup>105</sup>

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government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution which commands all organs of state to be loyal to the Constitution, and requires that public administration be conducted on the basis that "people's needs must be responded to". It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The province's approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as if it was at war with its own citizens, the more shamefully because those it was combating were in terms of secular hierarchies and affluence and power the least in its sphere.'

<sup>102</sup> Para 16. Note that, at para 19, Cameron JA held that, to the extent that *Maluleke* and *Lifestyle Amusement Centre (Pty) Ltd v Minister of Justice* (note 89) questioned 'the availability of the class action in our law', or suggested 'different criteria for constituting and defining a class for the purposes of a class action' he was unable to agree with them and 'to the extent that they are inconsistent with this judgment they must be regarded as overruled'.

<sup>103</sup> 2001 (1) SA1254 (C).

<sup>104</sup> Para 17.8.

<sup>105</sup> Para 17.10.

The final case to be discussed under this heading is *Rail Commuter Action Group and others v Transnet Ltd t/a Metrorail and others (No. 1)*<sup>106</sup> in which a number of individuals and a voluntary association – the first applicant – applied for wide-ranging declaratory and mandatory relief against the respondent that was intended to force it to address the incidence of violent crime on its suburban trains in and around Cape Town. The respondent is a public company that was established by statute – the Legal Succession to the South African Transport Services Act 9 of 1989 – and its only shareholder is the State. The applicants' case was based on alleged breaches of duties owed by the respondent to commuters on its trains in terms of statute and the common law (both in terms of delict and contract), bolstered by the Constitution.<sup>107</sup> The respondent challenged the standing of the first applicant to institute the proceedings on behalf of train passengers in general. Davis and Van Heerden JJ held that the first applicant had standing on this basis and that such a body, 'formed to protect the rights of a vulnerable constituency and with the object of holding a public body accountable to the public should, it seems, not be subjected to unnecessary restrictions before being heard by our Courts'.<sup>108</sup>

#### (4) People Acting in the Public Interest

The class action provision relates to a limited (although not necessarily small) number of similarly situated claimants being represented by one of their number or another person. A public interest litigant would litigate on an *issue*, which he or she

<sup>106</sup> 2003 (5) SA 518 (C).

<sup>107</sup> Section 7(2) of the Constitution places both negative and positive duties on the State. It requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights'. Section 8(1) states that the Bill of Rights 'binds the legislature, the executive, the judiciary and all organs of state'. Transnet Ltd is an organ of state. See *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA). Section 12 of the Constitution entrenches a fundamental right to freedom and security of the person which includes the right 'to be free from all forms of violence from either public or private sources'.

<sup>108</sup> At 556H-I. See too *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and others* (note 80), para 24. Two relatively recent class actions that highlight the importance of s 38(c) are: *Kiliko and others v Minister of Home Affairs and others* 2006 (4) SA 114 (C), in which a group of Congolese applicants for refugee status applied in their own interest and in the interest of all other similarly placed people for a declarator concerning the constitutionality of the respondent's department's practice of only processing 20 applications per day, and to compel the department to process their applications within a reasonable time; and *N and others v Government of the Republic of South Africa and others (No. 1)* 2006 (6) SA 543 (D), in which a group of HIV positive prisoners applied on their own behalf and on behalf of all similarly placed prisoners in the Westville prison for orders directing the respondents to provide them with proper treatment for their condition.

would claim is of public interest.<sup>109</sup> In *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others*,<sup>110</sup> O' Regan J held, in a dissenting judgment on this issue, that the applicants, in challenging the constitutionality of s 417 of the Companies Act, had standing to do so in the public interest. She held:<sup>111</sup>

'This Court will be circumspect in affording applicants standing by way of s 7(4)(b)(v) [of the interim Constitution] and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case.'

She held further that while ordinarily, it would be necessary for a litigant to allege an infringement of or threat to a fundamental right, this was not necessary for public interest litigants. They only had to allege that 'objectively speaking, the challenged, rule or conduct is in breach of a right enshrined in chap 3 [of the interim Constitution]. This, she said, flowed from the very notion of action in the public interest as the public 'will ordinarily have an interest in the infringement of rights generally, not particularly'.<sup>112</sup>

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<sup>109</sup> See De Vos 'Reflections on the Introduction of a Class Action in South Africa' (note 83), 640 and Cane 'Standing up for the Public' (note 31), 276.

<sup>110</sup> Note 32.

<sup>111</sup> Para 234. This dictum was subsequently affirmed in *Lawyers for Human Rights and others v Minister of Home Affairs and another* 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC), para 17. See too *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and another* 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC), paras 20-22.

<sup>112</sup> Para 235. *Mhleka v Head of the Western Transkei Regional Authority and another: Feni v Head of the Western Transkei Regional Authority and another* 2001 (1) SA 574 (Tk) provides a good example of the public interest standing provision being applied. The applicants, who had been convicted and sentenced by the Western Transkei Regional Authority Court, challenged the constitutionality of various sections of the Regional Authority Courts Act 13 of 1982 (Tk). They did so in their own interest and also in the public interest, claiming that the issues involved affected the 'large majority of the population of the former Republic of Transkei' (at 585B). The respondents at first contended that the applicants did not have public interest standing but later conceded that they did. The court appears to have accepted that the applicants did, indeed, have public interest standing: it first set aside the convictions and sentences on the basis of various irregularities in the trials of the applicants (at 581H-584H) and then proceeded to deal with the constitutionality of the sections of the Act that the applicants had challenged, setting them aside.

In *Port Elizabeth Municipality v Prut NO and another*<sup>113</sup> the appellant had appealed against the dismissal of an application in which it had applied for a declarator that its differential treatment of ratepayers who owed rates in terms of the Municipal Ordinance 20 of 1974 (C) and residents who owed service charges in terms of the Black Local Authorities Act 102 of 1982 did not constitute unfair discrimination in terms of the Constitution. The appellant wanted to write off approximately R62.6 million which was owed to it by people living in the black residential areas formerly governed by the Act but it wanted to collect what was owed to it by people living in the former white areas which had previously been governed by the Ordinance. Melunsky J addressed the issue of whether the appellant had standing on the basis that a court 'should be slow to refuse to exercise its jurisdiction' in terms of the Constitution 'where a decision will be in the public interest and where it may put an end to similar disputes'.<sup>114</sup> He concluded:<sup>115</sup>

'The result is that there seems to be no reason for denying the appellant standing, not only because it is acting in its own interest but also because it is acting in the public interest. In this regard it should be noted that it is clearly in the public interest to have clarity on whether the municipality's decision to write off more than R62m discriminates unfairly against other service-charge debtors or ratepayers. Furthermore a decision once given in this application will not be academic: it will have an effect on all persons in the position of the two respondents. Moreover, and in the words of Chaskalson P ... in *Ferreira*, there is "a pressing public interest that the decision be given as soon as possible".'

*Prut's* case, when reduced to its basics, is authority for the proposition that if an issue of constitutionality is one of public interest, a representative litigant may vindicate the public interest as long as the issue is a real, and not merely an academic, one. On this basis, Froneman J recognised the standing of the applicants in *Ngxuzza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another*<sup>116</sup> to sue in the public interest. So too did Pillay AJ in *Nomala v*

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<sup>113</sup> 1996 (4) SA 318 (E).

<sup>114</sup> At 325E-F.

<sup>115</sup> At 325J-326B.

<sup>116</sup> Note 35, 625D-626H. In applying *Prut's* case to the facts he held (at 625G-I): 'In an oblique way the respondents did raise this as an issue in the papers by suggesting that the matter should not be decided in a court of law, but that the affected beneficiaries should pursue the matter through the offices of the Public Protector and the Human Rights Commission. On a purely factual level the applicants have answered that by detailing the history of the efforts made to pursue the matter through the office of the Public Protector and the efforts of the Human Rights Commission to rectify

*Permanent Secretary, Department of Welfare and another*.<sup>117</sup> The issue in this matter was whether a standard-form letter informing people that their disability grant had been cancelled or that an application for such a grant had been refused contained a statement of the reasons for the decision, as required by the relevant regulations. (The standard-form letter contained five grounds, such as ‘not disabled’ or ‘able to work’ which, Pillay AJ held were not reasons.) He held that the applicant had standing, on the basis of *Prut*, to seek relief on this issue in the public interest because it was not academic, having earlier in his judgment made the point that ‘it is undisputed that the standard-form reasons have been used and will continue to be used to justify all decisions taken by the department...’.<sup>118</sup>

The Constitutional Court has now had occasion to deal comprehensively with s 38(d). In *Lawyers for Human Rights and others v Minister of Home Affairs and another*<sup>119</sup> Yacoob J stressed the primary importance of ensuring that the litigant who claims public interest standing does so genuinely and that the court must satisfy itself that, objectively, it is in the public interest that the proceedings be brought. He also held that ordinarily it will not be in the public interest that abstract issues be brought to court, that is not an ‘invariable principle’ and circumstances may arise in which it is in the public interest to hear abstract matters.<sup>120</sup> In *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and another*<sup>121</sup> the

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the appalling situation. These are bodies constitutionally mandated to pursue matters of this kind, but where the State fails to provide them with the means to do so it seems almost bizarre to insist that the courts are precluded from coming to the assistance of the applicants.’

<sup>117</sup> 2001 (8) BCLR 844 (E).

<sup>118</sup> At 853D.

<sup>119</sup> Note 111.

<sup>120</sup> Para 18. See for example *Director of Public Prosecutions, Eastern Cape and another v Louw NO: In Re Makinana* 2004 92) SA 46 (E) in which it was held that the Director of Public Prosecutions and the Legal Aid Board had standing in the public interest to apply for a declarator concerning the jurisdiction of district and regional magistrate’s courts to hear bail applications in cases in which accused persons had been charged with a Schedule 6 offence, magistrates in both these tiers of the judicial system asserting a lack of jurisdiction once an accused person’s trial had commenced. The appellant, whose bail application had been refused by a regional magistrate on this basis, had been acquitted shortly before his bail appeal was to be heard. Despite this the court dealt with the issue because ‘the rights of other people charged with offences are, and will continue to be, adversely affected unless a definitive ruling is made’ and that this was in the public interest ‘not only because fundamental rights are in issue but also because the dispute between magistrate’s court and regional court magistrates as to who should hear bail applications has the potential to adversely affect the very legitimacy of the criminal justice system in the province’ (para 13).

<sup>121</sup> Note 111.

court endorsed Yacoob J's views and set out the factors that must be taken into account in determining whether a litigant has public interest standing:<sup>122</sup>

'The factors that would be relevant would be: Whether there is another reasonable and effective manner in which the challenge may be brought; the nature of the relief sought and the extent to which it is of general and prospective application; the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court; the degree of vulnerability of the people affected; the nature of the rights said to be infringed; as well as the consequences of the infringement. The list of factors is not closed.'

Not all cases have dealt with s 38(d) in accordance with the broad approach endorsed by the Constitutional Court. For instance, the way in which the issue of public interest standing was dealt with in *Prior v Battle and others*<sup>123</sup> was curious. The applicant challenged the constitutional validity of two sets of provisions in the Transkei Marriage Act 21 of 1978 which vested in a husband marital power over his wife as an inevitable and unalterable consequence of both civil and customary marriages. Ms Prior was married civilly. The respondents argued that she lacked standing to challenge the provisions as they affected civil marriages because, being subject to the marital power of her husband, she required his assistance to litigate. This argument was rejected by Miller J on two grounds: first, he held that Ms Prior had standing to litigate in her own interest, and secondly, he held that she also had standing to litigate in the public interest.<sup>124</sup> Ms Prior also challenged the validity of the customary marriage provisions, claiming public interest standing to do so. On this score she was unsuccessful. Miller J held that because her marriage was not a customary marriage she did not have a sufficient legal interest to challenge the constitutionality of the customary marriages provisions of the Act.<sup>125</sup> He made no reference to public interest standing in this context as he had done to bolster Ms Prior's standing to challenge the civil marriages provisions of the Act. Miller J appears to have misconceived the nature of the enquiry in a most fundamental way: he appears to have ignored the fact that public interest standing presupposes that

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<sup>122</sup> Para 21.

<sup>123</sup> 1999 (2) SA 850 (Tk).

<sup>124</sup> At 857B-858B.

<sup>125</sup> At 860D-G.

the applicant need not, himself or herself, have a direct and substantial interest in the subject matter of the dispute.<sup>126</sup>

*Maluleke v MEC, Health and Welfare, Northern Province*<sup>127</sup> also found that the applicant lacked standing to litigate in the public interest. Southwood J took the view that ‘the facts show that it would not be in the public interest to deal with the relevant issues *en masse*’ as there could be ‘different facts and different legal considerations which simply make it impossible to deal with the rights of 92 000 people as if they were the same as those of the applicant’.<sup>128</sup>

It has been argued above that it was, indeed, possible to deal with the cases of all of the affected pensioners together. *Prut’s* case would tend to confirm that this is possible: some of the circumstances of individual debtors may have varied but the main issue, the constitutionality of the decision to write off some debts but not others, was common to all of those whose debts were not going to be written off. That is precisely what made the issue one of public interest. By the same token, the fact that 92 046 pensions were suspended for the same reason by the same official – and 92 046 people were denied their fundamental right of access to social assistance – in circumstances that infringed their fundamental rights to lawful and procedurally fair administrative action surely raised a justiciable issue of public interest. The realities of South African life are such that the 92 046 pensioners would not, from a practical point of view, have been able to litigate for themselves. By denying the applicant standing, Southwood J effectively denied them the relief that he had held the applicant was entitled to. In other words, he deprived them of the only opportunity that they had of redress. Even if they had been able to litigate individually, it is unlikely that 92 046 individual applications all dealing with the same issues of law could be regarded as a more cost-effective utilisation of judicial resources than one application that disposed of the issue once and for all. How would the roll of the Transvaal Provincial Division deal with an additional 92 046 applications?<sup>129</sup>

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<sup>126</sup> See in this regard, *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* (note 32), paras 230 and 235.

<sup>127</sup> Note 68.

<sup>128</sup> At 374D-E.

<sup>129</sup> By way of contrast, see Jansen J’s judgment in *Cash Paymaster Services (Eastern Cape) (Pty) Ltd v Member of the Executive Council Responsible for Social Development and another* (note 81) in which he founded the respondent’s representative standing on the impracticality of each affected

### (5) Associations Acting in the Interest of Their Members

Section 38(e) of the Constitution provides certainty in the place of the rather untidy common law position: the general rule of the common law is that an association does not have standing to litigate on behalf of its members<sup>130</sup> but in some instances courts have allowed associations to do so.<sup>131</sup> Loots has suggested that, despite the restrictive general rule, the courts tended towards recognition of the idea that an organisation should be able to represent the interests of its members and that the conflicting case law on the issue was the reason for the inclusion of the predecessor of s 38(e) in the interim Constitution.<sup>132</sup>

In line with the generous approach to the interpretation of the Constitution's standing provisions generally, the term 'association' should not be narrowly construed. Trengove has argued that the term should include 'unincorporated associations, associations incorporated at common law, statutory associations and partnerships' and that it ought to include as well associations created specifically 'to serve as vehicles for the institution of particular legal proceedings in the interest of their founding members'.<sup>133</sup> The section has also been held to include an association acting on behalf of only one of its members, rather than its members in general, in circumstances in which the administrative decision that was the subject matter of the

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person suing in his or her own name and that it was in the public interest that 'the political head of the department responsible for social welfare of the poor and the people in need act on their behalf when their right to social assistance has been infringed' (at 7).

<sup>130</sup> See for instance, *South African Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O).

<sup>131</sup> See for instance *African National Congress (Border Branch) and another v Chairman, Council of State of the Republic of Ciskei and another* 1992 (4) SA 434 (Ck). This case was decided at a time when the so-called independent homeland of Ciskei was ruled by a military government which had seized power in a *coup d'etat*. The constitution that the military government introduced, the Ciskei Constitution Decree 45 of 1990, contained in Schedule 6 a justiciable bill of rights. The issue which was the subject of the litigation in this case was the validity of detention without trial legislation.

<sup>132</sup> Loots 'Standing to Enforce Fundamental Rights' (note 66), 57.

<sup>133</sup> Trengove (note 56), 8. For an example see *Nelson Mandela Metropolitan Municipality and others v Gryvenouw CC and others* 2004 (2) SA 81 (SE), paras 52-67; *Rail Commuter Action Group and others v Transnet Ltd t/a Metrorail and others (No. 1)* (note 106), 556G; *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and others* (note 80), paras 24-25.



challenge could possibly have been applied against other members of the association.<sup>134</sup>

Section 38(e) has been the subject of little controversy. So, for instance, in *Transvaal Agricultural Union v Minister of Land Affairs and another*<sup>135</sup> it was accepted without argument that the applicant could, on behalf of its members, challenge (unsuccessfully, as it happened) certain provisions of the Restitution of Land Rights Act 22 of 1994. In *Premier, Mpumalanga and another v Executive Committee, Association of State-Aided Schools: Eastern Transvaal*<sup>136</sup> it was likewise accepted without argument that the respondent (on appeal) had standing to challenge (which it did successfully) a decision taken by the appellants to stop paying subsidies to various State-aided schools.

## **[D] THE DEVELOPMENT OF THE COMMON LAW**

### (1) South African Common Law

The Cape of Good Hope was first colonised in 1652 by a Dutch chartered company, the Dutch East India Company. It established a provisioning station for its ships sailing to and from the east on the site that is now Cape Town. Despite being a trading company, it exercised the powers of government wherever it colonised and, in terms of its charter, the law that was applied in its possessions was the law of the province of Holland, a system of Roman-Dutch law.<sup>137</sup> When the British occupied the Cape in 1806, Roman Dutch law remained the common law of the colony by virtue of a rule of English common law that the law of a conquered territory remains in place

<sup>134</sup> *South African Veterinary Council and another v Veterinary Defence Association* 2003 (4) SA 546 (SCA), para 46. See, by way of contrast, *Western Cape Residents Association obo Williams and another v Parow High School* 2006 (3) SA 542 (C), in which the relief claimed (in relation to the daughter of two members) was entirely unique to her.

<sup>135</sup> 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC), para 1.

<sup>136</sup> 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC), para 3.

<sup>137</sup> See Davenport and Saunders (note 1), 21-29; Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution* London, Stevens and Sons: 1960, 10-18; Hahlo and Kahn *The South African Legal System and its Background* Cape Town, Juta and Co: 1968, 571-575; Schutte 'Company and Colonists at the Cape' in Elphick and Giliomee (eds) *The Shaping of South African Society, 1652 to 1820* Cape Town, Longman Penguin: 1979, 173, 174-175; Fagan 'Roman-Dutch Law in its Historical Context' in Zimmerman and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* Cape Town, Juta and Co: 1996, 33.

until it is changed by the conquering power.<sup>138</sup> A process of law reform was commenced at the Cape in the 1820s and 1830s. A Supreme Court of general jurisdiction, modelled on the English superior courts was created (by the First Charter of Justice in 1827). The law of evidence and of criminal procedure were modernised by the introduction of English law. Company law and the law of negotiable instruments were codified along the lines of equivalent English statutes. And the law that was left untouched, directly, by the reforms was nonetheless influenced to a greater or lesser degree by the pre-eminence of an English system of governance, public administration and administration of justice. In addition, the judges, in the earlier stages of the British occupation, came from Britain, and legal practitioners tended, increasingly, to have been schooled in British universities, rather than Dutch universities. In any event, Roman-Dutch law had ceased to be a living system in the Netherlands as a result of the codification of the law that followed French conquest (in 1809).<sup>139</sup> It has been said that, by Union in 1910, '[b]y a process of imperceptible accretion, not unlike *alluvio*, aided by legislation with an English bias, a layer of English rules and concepts became superimposed upon the law of Grotius and Voet. Roman-Dutch law was assuming an anglicized look'.<sup>140</sup>

One of the consequences of the establishment of a British-style superior court in the Cape Colony, and subsequently in the colonies of Natal (in 1857), the Transvaal Colony and the Orange River Colony (both in 1902), was that these courts assumed an inherent jurisdiction to determine all matters, irrespective of subject-matter or amount, arising within their territorial jurisdiction, the power to regulate and protect their own procedures and processes and the power to discipline legal practitioners.<sup>141</sup> When the Supreme Court of South Africa was established at Union in 1910, the various Provincial and Local Divisions, as well as the Appellate Division, continued to exercise this inherent jurisdiction. It is the inherent jurisdiction that also justifies the power vested in the superior courts to develop the common law. Prior to 1994, the courts used this power conservatively and sparingly. The interim and final

<sup>138</sup> *Campbell v Hall* (1774) 1 Cowp. 204, 209.

<sup>139</sup> See Hahlo and Kahn *The South African Legal System and its Background* (note 133), 575-578; Van Winsen, Cilliers and Loots *Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa* (4 ed) Cape Town, Juta and Co: 1997, 2-4.

<sup>140</sup> Hahlo and Kahn *The South African Legal System and its Background* (note 133), 578

<sup>141</sup> Van Winsen, Cilliers and Loots (note 135), 37-40.

Constitutions brought about a radical change to the development of the common law. Section 173 of the final Constitution provides that the 'Constitutional Court, the Supreme Court of Appeal and the High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice'. Section 39(2) states that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.<sup>142</sup>

During the late 1980s and early 1990s, a reform initiative within the Appellate Division, then the highest court in the country, was evident in public law matters,<sup>143</sup> despite this court's otherwise poor record in defence of human rights during the years of emergency rule.<sup>144</sup> While the reformers did not alter the common law rules of standing on anything like the grand scale of the Indian judiciary, it is true to say that the rules of standing were, at least to an extent, relaxed in their application and less formalistically applied.<sup>145</sup> Since 1994, the common law rules of standing have been developed both substantively and procedurally on the basis of the obligation to do so in accordance with the spirit, purport and objects of the Bill of Rights.

## (2) Substantive Development

In *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and others*,<sup>146</sup> Pickering J questioned

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<sup>142</sup> On the obligation placed on courts to develop the common law, see *Du Plessis and others v De Klerk and others* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC), para 60; *National Media Ltd and others v Bogoshi* 1998 (4) SA 1196 (SCA); *Carmichele v Minister of Safety and Security and another* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC), paras 33-36.

<sup>143</sup> See Corder and Maluwa 'Administrative Justice in Southern Africa: Background and Some Issues' in Corder and Maluwa (eds) *Administrative Justice in Southern Africa* Cape Town, Department of Public Law, University of Cape Town: 1997 who wrote: 'In South Africa, perhaps spurred by forthright academic and popular disquiet, the judiciary itself embarked on a process of incremental reform in the late 1980's, paradoxically at the time of the most relentless executive lawlessness yet experienced.'

<sup>144</sup> See Ellmann *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* Oxford, Clarendon Press: 1992; Haysom and Plasket 'The War Against Law: Judicial Activism and the Appellate Division' (1988) 4 *SAJHR* 303; Corder and Davis 'A Long March: Administrative Law in the Appellate Division' (1988) 4 *SAJHR* 281.

<sup>145</sup> See, for instance, *Jacobs en 'n ander v Waks en andere* 1992 (1) SA 521 (A). See too *Steel and Engineering Industries Federation and others v National Union of Metal Workers of South Africa* (1) 1993 (4) SA 190 (T), 194J-195A.

<sup>146</sup> Note 35.

the fundamentals of the traditional approach to standing, and suggested its reform in respect of environmental matters. It was common cause that, over a fairly lengthy period of time and along the entire Transkei Wild Coast, environmentally harmful and unlawful practices were occurring on a regular basis: persons were acquiring from local chiefs the 'right' to occupy and to build holiday houses on prime coastal land, for as little as R200.00 and a bottle of brandy. This wide-spread practice was in contravention of s 39 of Decree 9 (Environmental Conservation) of 1992 (passed by the Military Council of the former Republic of Transkei). It created a 'coastal conservation area' of 1 000 metres from the high water mark inland along the entire coast and within which a number of activities such as clearing land or erecting buildings were prohibited except on the authority of a permit issued by the relevant department 'in accordance with the plan for the control of coastal development approved by resolution of the Military Council'.<sup>147</sup> The government had done little to enforce the law and appeared to be unwilling to do so unless it was politically expedient to do so.<sup>148</sup>

Section 29 of the interim Constitution provided that every person had a fundamental right to 'an environment which is not detrimental to his or her health or well-being'. Despite the fact that the applicant sought to rely on this right, it clearly did not apply and hence could not activate the extended standing provided for in s 7(4) when a fundamental right is affected or threatened. Pickering J dealt with standing at common law at some length. He started by saying:<sup>149</sup>

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<sup>147</sup> At the time the proceedings were instituted the Military Council no longer existed and neither did the Republic of Transkei, which had, in 1976, been the first of four homelands to be given nominal independence by the South African government as part of the grand design of the policy of apartheid. The laws of the Transkei, and indeed, all laws in force anywhere in the national territory were kept in force, subject to constitutional compatibility or repeal by the competent authority, by s 229 of the interim Constitution.

<sup>148</sup> At 1107B Pickering J referred to a Task Group that had been established to deal with the problem but this body resolved to 'determine political support for proposed action against owners of cottages erected illegally' (at 1108A) before taking other rather half-hearted action such as requesting that 'all illegal activities perpetuated in the erection of illegal cottages and alienation of land be ceased' (at 1108G). He concluded: 'In these circumstances, where "political support" for legal action had to be first determined and where persons illegally allocating sites, sometimes in return for little more than a bottle of brandy, were to be "requested" to stop doing so applicants' averred sense of frustration at the lack of any concrete action in terms of s 39 of the Decree becomes almost palpable. The overwhelming sense to be gained from a reading of the minutes of the Task Group is that of the slow and inexorable grinding of wheels across a bureaucratic landscape, regardless of the urgency of the situation.'

<sup>149</sup> At 1105A-B.

'I may mention that in my opinion there is also much to be said for the view that, in circumstances where the *locus standi* afforded persons by s 7 of the Constitution is not applicable and where a statute imposes an obligation upon the State to take certain measures in order to protect the environment in the interests of the public, then a body such as the first applicant, with its main object being to promote environmental conservation in South Africa, should have *locus standi* at common law to apply for an order compelling the State to comply with its obligations in terms of such statute.'

On that well-worn objection to the extension of standing, that the floodgates would be opened and the courts would be inundated with cases brought by cranks, busy-bodies and mischief-makers, he observed that 'it may sometimes be necessary to open the floodgates in order to irrigate the arid ground below them'.<sup>150</sup> On the dangers of a rash of frivolous or vexatious litigation, he said that the 'meddlesome crank and busybody with no legal interest in a matter whatsoever, mischievously intent on gaining access to the court in order to satisfy some personal caprice or obsession, is, in my view ... more often a spectral figure than a reality' and that if such people are tempted to flood the courts with frivolous or vexatious litigation, 'an appropriate order of costs would soon inhibit their litigious ardour'.<sup>151</sup> He thus held that the applicant had standing and, on the merits, found in its favour, issuing a mandamus to compel the government to enforce the Decree.

In *McCarthy and others v Constantia Property Owners' Association and others*<sup>152</sup> Davis J was called upon to decide whether members of a voluntary association had standing to seek orders to set aside agreements made by its office-bearers with a property developer contrary to the terms of its constitution. A number of years prior to the litigation, the first respondent had entered into agreements with the second respondent to limit the size of a shopping centre which the latter planned to develop in Constantia, Cape Town. Pursuant to these agreements, servitudes in favour of the first respondent were registered over the property, embodying the agreements, and limiting the rights of the first respondent to expand the shopping centre. Some time later, the office-bearers of the first respondent agreed to allow the second respondent to expand the shopping centre in contravention of the earlier agreements and the servitudes. It was alleged by the applicants that this decision

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<sup>150</sup> At 1106E.

<sup>151</sup> At 1106G-H.

<sup>152</sup> 1999 (4) SA 847 (C).

was a nullity as it had been taken in conflict with the terms of the first respondent's constitution.

The point was taken that the applicants lacked standing. It was argued that they did not have a direct interest in the issue because the servitudes, being in favour of the first respondent (which was a juristic person), could only be enforced, waived or relaxed by it. Davis J held that the issue of standing could no longer be dealt with as before because s 38 of the Constitution required a broad approach when fundamental rights were involved<sup>153</sup> and that this section had 'radically extended' the common law of standing.<sup>154</sup> He observed, however, that the applicants had not relied on a breach of or threat to a fundamental right and the Bill of Rights right was not, in any event, directly applicable.<sup>155</sup> He then developed the common law in accordance with the spirit, purport and objects of the Bill of Rights. In concluding that the applicants – who had approached the court to 'protect the environmental fabric of their suburb' – had standing, Davis J stated:<sup>156</sup>

'In the context of the present case the Constitution clearly envisages a generous regime of access to courts. In addition it purports to protect the environment. Section 8(2) provides that [a] provision in the Bill of Rights binds all natural and juristic persons, if and to the extent, that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. Whatever the interpretation of this opaque phrase, it is clear that its intention was to extend the scope of application of the Bill of Rights. In short, the Bill of Rights was not only designed to introduce the culture of justification in respect of public law but intended to ensure that the exercise of private power should similarly be justified. Accordingly the carefully constructed but artificial divide between public and private law which might have dominated our law prior to the constitutional enterprise can no longer be sustained in an uncritical fashion and hence unquestioned application.'

### (3) Procedural Development

In *Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuza and others*<sup>157</sup> the appellants argued that the respondents ought to have

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<sup>153</sup> At 854E.

<sup>154</sup> At 854H.

<sup>155</sup> At 854I.

<sup>156</sup> At 855B-E.

<sup>157</sup> Note 54.

litigated in the Ciskei Division of the High Court in Bhisho, rather than in the Eastern Cape Division of the High Court in Grahamstown. Their argument was that the former court had jurisdiction over the appellants because Bhisho is the seat of the provincial government, while the members of the class in whose interest the respondents had litigated resided within the jurisdiction of the Grahamstown court, the Bhisho court, which has jurisdiction over the territory of the former homeland of Ciskei, and the Transkei High Court in Mthatha, which has jurisdiction over the territory of the former homeland of Transkei. (Both the interim and final Constitutions provided for the continued existence of all courts functioning at the time that they came into operation, and the saving of their jurisdiction, pending the rationalisation of the structures and jurisdictions of the courts, which is yet to happen.) All three courts function in the Eastern Cape Province, which was created by the interim Constitution out of a part of the Cape of Good Hope and the two so-called independent homelands of Transkei and Ciskei.

The appellants' argument, Cameron JA said, had more superficial attraction than the others raised by them but still stood to be rejected.<sup>158</sup> He held that the fact that 'the necessary rationalisation has not yet occurred within the Eastern Cape Province can hardly be laid at the door of the applicants or the class they seek to represent' and that the province 'should seek to exploit the situation is a further miserable reflection on the way it has conducted itself in this litigation'.<sup>159</sup> On the merits of the point itself, Cameron JA held:<sup>160</sup>

'The objection in any event has no substance. First, this is no ordinary litigation. It is a class action. It is an innovation expressly mandated by the Constitution. We are enjoined by the Constitution to interpret the Bill of Rights, including its standing provisions, so as to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom". As pointed out earlier we are also enjoined to develop the common law — which includes the common law of jurisdiction — so as to "promote the spirit, purport and objects of the Bill of Rights". This Court has in the past not been averse to developing the doctrines and principles of jurisdiction so as to ensure rational and equitable rules. In *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd* [1962 (4) SA 326 (A)] this Court held, applying the common law doctrine of cohesion of a cause of action (*continentia causae*), that where

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<sup>158</sup> Para 20.

<sup>159</sup> Para 21.

<sup>160</sup> Para 22.

one court has jurisdiction over a part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause. The partial location of the object of a contractual performance (a bridge between two provinces) within the jurisdiction of one court therefore gave that court jurisdiction over the whole cause of action. The Court expressly left open the further development and application of the doctrine of cohesion of causes. The present seems to me a matter amply justifying its further evolution. The Eastern Cape Division has jurisdiction over the original applicants, and over members of the class entitled to payment of their pensions within its domain. That in my view is sufficient to give it jurisdiction over the whole class, who subject to satisfactory “opt-out” procedures will accordingly be bound by its judgment.’

## [E] CONCLUSION

A striking feature of the academic writing on standing in South Africa is that there is a great deal of unanimity that the common law rules of standing are inadequate, certainly in public law matters. There was, despite this, scant recognition of this inadequacy on the part of the judiciary prior to 1994: the judiciary maintained the narrow rules against challenge, even in the face of trenchant debunking of the foundations upon which that narrow conception rested, principally the so-called floodgates argument.<sup>161</sup> Despite this unpromising foundation, the standing provisions of the interim and final Constitutions have had a profound effect on South African law.

This was made possible by a series of important cases that approached the issue from a broad and purposive perspective, rather than from a narrow and legalistic one. *Ferreira v Levin NO and others*; *Vryenhoek and others v Powell NO and others*<sup>162</sup> set the tone at an early stage and, thereafter, cases such as *Buekes v Krugersdorp Transitional Local Council and another*,<sup>163</sup> *Port Elizabeth Municipality v Prut NO and another*<sup>164</sup> and *Wildlife Society of Southern Africa and others v Minister*

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<sup>161</sup> See Baxter, 672. See too Budlender (note 34), 132-133, who says: ‘The call for the relaxation of the rules of *locus standi* is usually met by the argument that this will “open the floodgates”. This is misconceived, for two reasons. First, if the cases are well-founded, there can be no objection to a flood of people trying to achieve justice. And secondly, the concern that people will flood the courts with unfounded litigation is simply not borne out by the international experience.’

<sup>162</sup> Note 32.

<sup>163</sup> Note 86.

<sup>164</sup> Note 113.



of *Environmental Affairs and Tourism of the Republic of South Africa and others*<sup>165</sup> played a significant role in developing the emerging jurisprudence and in stripping the new rules of standing of unnecessary formalism. To an extent, the land-mark decision of *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another*<sup>166</sup> was made possible by the ground-breaking work of the judges in these cases, supplemented by the insights of Froneman J. The Supreme Court of Appeal then made its own indelible mark in the form of Cameron JA's judgment in *Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuza and another*.<sup>167</sup> By this stage, representative standing, once not possible in South African law, was accepted without demur as being necessary to achieve the aims and objects of the Constitution.

The fears that had kept representative standing at bay simply disappeared like the morning mist: the floodgates did not open and cranks and busybodies did not force their way into the courts with their frivolous and vexatious claims. Indeed, the courts continued as before but, on those occasions when class actions, public interest suits or the like were brought, a far less formalistic approach to standing had become the norm, with a resultant benefit for the promotion and fulfilment of that bulwark of the rule of law, the fundamental right of everyone to access to court. The acceptance of a broad and generous approach to standing has made standing much less of a significant issue than it was in an earlier era. That too is beneficial for the right of access to court: disputes tend to be dealt with on their merits, rather than being stopped in their tracks at a preliminary stage.

The need for extended standing, especially when fundamental rights are in issue, should not blind one to the fact that this type of litigation brings with it its own set of problems. Froneman J identified the main problem in *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another*<sup>168</sup> as being that of ensuring proper representation when a person litigates for a class or in the public interest. (Indeed, the point is made strongly in *Lawyers for Human Rights and*

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<sup>165</sup> Note 35.

<sup>166</sup> Note 35.

<sup>167</sup> Note 54.

<sup>168</sup> Note 35.

*others v Minister of Home Affairs and another*<sup>169</sup> that the principal enquiry, when a litigant claims to be acting in the public interest, is whether he or she is doing so genuinely.) In *Ngxuza* Froneman J said that the problem can be addressed by ensuring that only those who wish to be affected by the outcome of a case, that those who associate themselves with a case are given the opportunity to make representations and that the representative litigant represents future interests adequately.<sup>170</sup> He stressed that these problems should not be regarded as factors that inhibit a broad approach to standing but that they ‘require safeguards to ensure the broadest and most effective representation in and presentation of public interest litigation’.<sup>171</sup> In the absence of specific legislation or rules regulating representative standing, these concerns can be addressed by way of the court giving appropriate directions for publication of the proceedings and then controlling the conduct of the representative litigant. Indeed, this is precisely what happened in *Ngxuza*. It was particularly important that such arrangements were made because the relief claimed would have had a direct and personal bearing on each member of the class, as the representative litigants applied for the re-instatement of all disability grants that had been cancelled over a specified period. It was necessary, therefore, to ensure that the members of the class were given notice (which was done through the press and on radio in English, Afrikaans, isiXhosa and Sesotho), were given an opportunity to opt out, if they wished to – an opportunity of which no one availed themselves – and were given an opportunity to join the proceedings if they wished to.

In other cases, where for instance, the relief claimed is the setting aside of a piece of legislation or an administrative act, or a declarator to the effect that certain conduct is unconstitutional or otherwise unlawful, it may not be necessary to formulate directions for the representative litigant to observe: a finding that he or she is genuinely acting in the public interest would be sufficient to protect the interests of those who stand to benefit. This point is of importance when legislation is drafted to regulate representative standing: it must be flexible so that it can be applied if and to the extent necessary in the circumstances. It has been necessary to formulate

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<sup>169</sup> Note 111, para 18.

<sup>170</sup> Note 35, at 619E-F.

<sup>171</sup> Note 35, at 619F.

directions for representative litigants in very few cases and it would be a great pity if the lack of formalism that has served the cause of access to justice so well thus far was lost because of rigid, formalistic procedural rules. Froneman J's point in *Ngxuza* -- that the regulation of standing raises practical issues that must be addressed sensibly and pragmatically – is a good one.

The necessity to develop representative standing in a country like South Africa is important from a practical point of view. One of the leading figures in the Indian legal revolution, Krishna Iyer J, in *Fertilizer Corporation Kamgar Union (Regd) v Union of India*,<sup>172</sup> made the point that 'it is essential that the Rule of Law must wean the people away from the lawless street and win them for the court of law'. The extension of standing does this by enhancing access to justice in a meaningful way and, in so doing, contributes to stability in society. This has been recognised by the Constitutional Court with reference to s 38 generally: in *Fose v Minister of Safety and Security*<sup>173</sup> Ackermann J held that it was important in a country like South Africa, with such stark disparities of wealth, opportunity and consequently access to court, that when it is established that fundamental rights have been infringed or threatened, courts ensure that those rights are vindicated. Without the means of ensuring that the protection of the law can reach those who need it most, the fundamental rights contained in the Bill of Rights would be in danger of being regarded by the majority of South Africans as empty promises or, perhaps worse, a charter of luxuries available to the rich and powerful to entrench still further their positions of privilege. In this sense, s 38 may be seen as a particularly important gateway to the achievement of social justice and fundamental human rights that the preamble to the Constitution promises.

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<sup>172</sup> 1981 (1) SCC 568, 584.

<sup>173</sup> Note 73, para 69.