

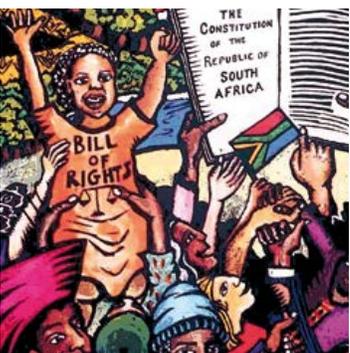


Public interest litigation and social change in South Africa: Strategies, tactics and lessons

EXECUTIVE SUMMARY



By Steven Budlender,
Gilbert Marcus SC and
Nick Ferreira



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Executive summary



In 2007, The Atlantic Philanthropies (Atlantic) approached two legal practitioners, Gilbert Marcus SC and Steven Budlender, to conduct an evaluation of public interest litigation in South Africa, following Atlantic's substantial investment in the field. The resulting report – *A strategic evaluation of public interest litigation in South Africa* – was published in 2008. This report has now evolved into a book entitled *Public interest litigation and social change in South Africa: Strategies, tactics and lessons*, with a further co-author, Nick Ferreira. The book is a revised and expanded version of the initial study, providing new insights and covering post-2008 developments in the field of public interest litigation in South Africa.

A draft of the book was presented and enthusiastically received at a recent International Human Rights Funders Group conference in New York (*Strategic litigation as an advocacy tool*, 14 & 15 July 2014).

In this publication we share a distillation of the main findings of the book.

The book in its entirety will be available on our website (www.atlanticphilanthropies.org) in the second half of October 2014, and on CD and in hard copy by early November 2014. Details on how to order a CD or a hard copy will also be posted on our website.



In **Chapter 1** the authors identify the main challenges facing the public interest litigation environment in South Africa.

They conclude that a major challenge is a **lack of funding and resources**. This challenge is also substantially responsible for a second major challenge – **the difficulty faced by public interest litigation organisations in attracting and retaining sufficient quality personnel**.

These challenges are matters of significant concern. International research suggests that progressive Constitutions and progressive judges – both of which South Africa undoubtedly possesses – are insufficient to achieve substantial progress on human rights unless there are sufficient resources to sustain support structures (in the form of rights advocacy organisations and rights advocacy lawyers) for legal mobilisation.

Given the massive inequality and poverty continuing to face South Africa, the authors warn that if organisations engaged in this work do not receive adequate support, there is a danger that the gains of the last few years will be undermined.

The remaining challenges discussed in this chapter arise from the beginnings of a potential backlash to public interest litigation – in the form of **increased hostility by government towards public interest litigation, and the use of public interest litigation tactics by organisations opposed to social change**.

In **Chapter 2** the authors present, analyse and extract lessons from seven case studies of public interest litigation in South Africa across seven different substantive areas: gay and lesbian rights, housing, health care, water, electricity, sanitation and education. These case studies are:

- the National Coalition for Gay and Lesbian Equality case on the criminalisation of sodomy and subsequent litigation concerning gay and lesbian rights;
- the Grootboom case on the right to housing;
- the Treatment Action Campaign case on prevention of mother-to-child transmission of HIV;
- the Mazibuko case on access to water;
- the Joseph case on access to electricity;

- the Nokotyana case on sanitation; and
- a collective case study of four recent, key pieces of litigation on the right to basic education.

In **Chapter 3**, on the basis of these case studies as well as other examples, the authors identify four strategies that should be used in combination in order to use rights to achieve social change.

The first is **public information**. Public campaigns that inform ordinary people of their rights are an essential component of any effort to achieve social change on rights issues. They are critical if people are to understand the role that law and legal rights can play in achieving social justice. Moreover, without such campaigns, those conducting public interest litigation are unlikely to be able to obtain the required information to launch successful litigation, to generate substantial support from ordinary people – which plays an important role in perceptions of litigation by courts, the public and government – or to transform any litigation victory into concrete progress on the ground.

The second is **advice and assistance**. It is essential that there are intermediary organisations which enable people to claim their rights, by giving advice, directing them to appropriate institutions, assisting them with the formulation of their claims, and taking matters up on their behalf – all of which can occur successfully without necessarily engaging in litigation. This strategy too has substantial benefits for litigation, particularly because

it provides an efficient means of identifying the core issues that are affecting large numbers of ordinary people. It thus allows public interest litigation to be designed effectively and to target maximum impact, while also improving the prospects that a victory in a landmark case actually translates into tangible benefits for people far beyond those directly involved.

The third is **social mobilisation and advocacy**. It is clear from this study that the assertion of rights is generally most effective when linked to social movements. Rights have to be asserted both outside and inside the courts. Some form of social movement is necessary to identify issues, mobilise support, apply political pressure, engage in litigation where necessary, and monitor and enforce favourable orders by the courts.

The fourth is **litigation**. While successful litigation must not be seen as an end in itself, it can play a pivotal role when combined with the three strategies set out above. Properly used, litigation enables poor or marginalised groups to achieve impact and success that would not be available to them if they were limited only to the strategies set out above.

The authors do not imply that it is vital that a single organisation itself be integrally involved in each of these four strategies. Often this is not possible, and specialist litigation organisations frequently have an important role to play. Indeed, these four strategic processes should preferably not be directed by lawyers as ‘experts’ or outsiders but instead be framed by the

initiatives and actions of communities themselves.

In **Chapter 4** the authors conclude that in order to achieve social change via litigation, it is critical that litigation be properly conceptualised, run and followed up. In this regard, they identify seven factors that are critical to maximising the prospect that public interest litigation succeeds and achieves social change.

Proper organisation of clients. While public interest litigation can be run on behalf of a few disparate individual clients, the authors conclude that this is usually not an effective way of achieving social impact. Generally speaking, public interest litigation is likely to achieve greater social change when the client is an organisation or movement with a direct interest in the matters being litigated. Moreover, public interest litigation is likely to achieve greater social change when the client plays an active and engaged role, rather than allowing legal representatives to make key decisions without proper client input.

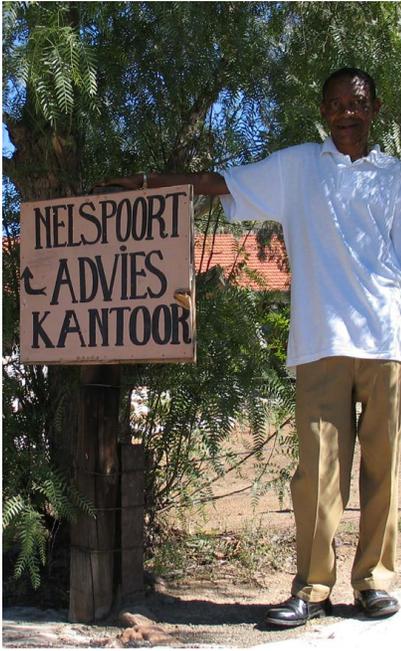
Overall long-term strategy. Where public interest litigation achieves maximum social impact, this is invariably not by virtue of a single case. Rather, it tends to require a series of cases brought on different but related issues over a substantial period of time. It is therefore critical that organisations seeking to utilise public interest litigation to achieve social impact do not attempt to rely on ‘one-shot’ success. Instead, they must develop a coherent long-term strategy that allows them to



benefit from the substantial advantage that derives from being a repeat player in the courts.

Co-ordination and information-sharing. In virtually any given area of public interest litigation, there are multiple organisations with similar aims, all seeking to achieve success via litigation. If there is insufficient co-ordination and information-sharing between these organisations, there is a real danger that resources will not be used effectively and, even more damagingly, viable cases will be undermined by other conflicting cases being brought by other organisations simultaneously or beforehand. Successful public interest litigation therefore requires co-ordination and information-sharing among the organisations involved so that they can build on each other’s successes.

Timing. Timing is an essential element in any public interest litigation that is to have meaningful impact. Litigation



should not commence until and unless the climate is right and the relevant evidence is in place. The effects of running litigation too soon can be disastrous – particularly as an unsuccessful piece of public interest litigation could, in practice, permanently foreclose the issue from being re-litigated. It is also helpful to be able to demonstrate that court action has not been the first port of call for the litigants involved. Where litigation is against government on controversial issues, courts will tend to be far more receptive and sympathetic where it can be demonstrated that the litigants have repeatedly sought to engage with government to find a solution but that none has been achieved.

Research. A critical and often neglected facet of successful public interest litigation is the need for detailed research in advance of and during litigation. Legal research, including using foreign and international law, is essential if public interest litigation is to be given a proper theoretical

foundation. The need for access to proper factual research, particularly in socio-economic rights cases, is just as acute. Those involved in running such litigation must have access to relevant research capabilities – either within their own organisation or via alliances with other organisations.

Characterisation. A substantial component of any successful case is the characterisation debate – that is, ensuring that a case is brought under the appropriate right and is correctly pitched to the court. Any given case can be viewed and perceived in multiple ways by the courts and by the public. It is thus important for those involved in public interest litigation to demonstrate that the issues at stake are critical, that the assertion of fundamental rights is being used to redress unfairness and inequality rather than perpetuate it, and that countless, real people are being affected on a daily basis.

Follow-up. Perhaps the most important factor of all in ensuring that public interest litigation has the maximum social impact is the need for proper follow-up post-litigation. This mainly involves ensuring that a litigation victory is translated into practical benefits for a large number of people on the ground, including those not directly involved in the litigation. This is ideally done by a combination of legal and political pressure. While the use of innovative and wide-ranging remedial powers by the courts is important for achieving social impact, it is arguably less important than the capacity and willingness of the organisations involved to properly follow up and enforce whatever order is granted.

In **Chapter 5** the authors identify three procedural mechanisms which promote effective public interest litigation in the South African environment.

The first is the **broad rules of standing** contained in South Africa's Constitution and applied by its courts. These have been essential in allowing effective public interest litigation and have recently been developed further by courts embracing the idea of class actions. While this is a welcome and important development, the authors consider that class actions should only be used in a relatively narrow category of cases – namely, where the aim is to seek specific, enforceable relief (including awards of damages) in respect of large numbers of unnamed individuals or entities.

The second is the **protective costs regime** adopted by South African courts in relation to constitutional litigation. In constitutional litigation between private parties and government, the courts have adopted the principle that if government loses, it should pay the costs, and if government wins, each party should bear its own costs. This has been critical to enabling effective public interest litigation.

The third consists of the **significant opportunities for interventions by amici curiae**. These interventions can play an essential role in seeking to achieve social change. They allow public interest organisations to influence the development of the law without having to start litigation themselves and can prevent retrogressive judicial decisions occurring.



In closing

South Africa's Constitution is one of the most progressive in the world. It contains powerful and far-reaching provisions, including in relation to socio-economic rights. Yet, South Africa also continues to face massive inequality and poverty. It is therefore essential that the Constitution is used in a manner that produces tangible and lasting social change. As Judge Dennis Davis has pointed out:

A failure by successful litigants to benefit from constitutional litigation [...] can only contribute to the long-term illegitimacy of the very constitutional enterprise with which South Africa engaged in 1994. A right asserted successfully by litigants who then wait in vain for any tangible benefit to flow from the costly process of litigation, is rapidly transformed into an illusory right and hardly represents the kind of conclusion designed to construct a practice of constitutional rights so essential to the long-term success of the constitutional project.

DM Davis, *Adjudicating the Socio-economic Rights in the South African Constitution: Towards 'Deference Lite'?*, in *South African Journal on Human Rights*, Vol. 22, Part 2: 2006, page 314.

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Biographies

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is an advocate at the Johannesburg Bar and specialises in human rights and constitutional law. He has appeared in numerous key public interest cases in the Constitutional Court and the Supreme Court of Appeal, frequently acting as lead counsel. He previously clerked at the Constitutional Court for then Chief Justice Arthur Chaskalson.

Gilbert Marcus SC

is a senior advocate at the Johannesburg Bar and specialises in human rights and constitutional law. He is one of South Africa's most respected advocates and has represented clients in some of the country's seminal political trials under apartheid, as well as in path-breaking Constitutional Court cases. He is an honorary Professor of Law at the University of the Witwatersrand.

Nick Ferreira

is an advocate at the Johannesburg Bar and specialises in human rights and constitutional law. He has master's and doctoral degrees in philosophy from Oxford University, where he studied as a Rhodes Scholar. On returning to South Africa, he clerked for Justice Edwin Cameron at the Constitutional Court.

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