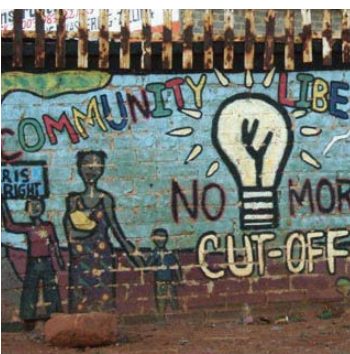




# Public interest litigation and social change in South Africa: Strategies, tactics and lessons



By Steven Budlender,  
Gilbert Marcus SC and  
Nick Ferreira



*This book is dedicated to  
the memory of Gerald Kraak*

1956 – 2014

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# Public interest litigation and social change in South Africa:

## Strategies, tactics and lessons

By Steven Budlender, Gilbert Marcus SC  
and Nick Ferreira

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# Abbreviations

Agri SA	Agri South Africa	MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
AIDS	Acquired Immune Deficiency Syndrome	MTCT	Mother-to-child transmission
ALP	AIDS Law Project	NAACP	National Association for the Advancement of Colored People
ANC	African National Congress	NADCAO	National Alliance for the Development of Community Advice Offices
APF	Anti-Privatisation Forum	NCGLE	National Coalition for Gay and Lesbian Equality
ARV(s)	Antiretroviral (drugs)	NCOP	National Council of Provinces
Atlantic	The Atlantic Philanthropies	NGO	Non-governmental organisation
BEFA	Basic Education for All	NNP	New National Party
CALS	Centre for Applied Legal Studies	PAIA	Promotion of Access to Information Act 2 of 2000
CCL	Centre for Child Law	PAJA	Promotion of Administrative Justice Act 3 of 2000
CER	Centre for Environmental Rights	PMTCT	Prevention of mother-to-child transmission
CLC	Community Law Centre	PPM(s)	Prepayment meter(s)
COSATU	Congress of South African Trade Unions	SAHA	South African History Archive
EE	Equal Education	SAHRC	South African Human Rights Commission
HIV	Human Immunodeficiency Virus	SAINT	South African Intrapartum Nevirapine Trial
IDASA	Institute for Democracy in Africa	SAPS	South African Police Service
JASA	Justice Alliance of South Africa	TAC	Treatment Action Campaign
JSC	Judicial Service Commission	TAU-SA	Transvaal Agricultural Union of South Africa
LASA	Legal Aid South Africa	US	United States
LDF	Legal Defense Fund	VIP	Ventilated improved pit
LGBT(s)	Lesbian, gay, bisexual and transgender (people)	Wits	University of the Witwatersrand
LGEP	Lesbian and Gay Equality Project		
LHR	Lawyers for Human Rights		
LRC	Legal Resources Centre		
MCC	Medicines Control Council		
MEC	Member of the Executive Council		

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The full text of the South African Constitution is available at [www.saflii.org/za/legis/consol\\_act/cotrosa1996423](http://www.saflii.org/za/legis/consol_act/cotrosa1996423). For easy reference, however, Chapter 2 of the Constitution (the Bill of Rights) has been included as Appendix A.

# Prologue:

## The Atlantic Philanthropies and public interest litigation in South Africa

# The Atlantic Philanthropies and public interest litigation in South Africa

**In 2013, The Atlantic Philanthropies (Atlantic) – an international foundation committed to investing its assets over a fixed period of time rather than in perpetuity – ended its grantmaking programme in South Africa. Over the course of its involvement in South Africa (since 1994) Atlantic invested over US\$355 million. Much of this spend was focused on advancing social justice, with support to strategic public interest litigation as a consistent element.**

Atlantic commissioned the report *A strategic evaluation of public interest litigation in South Africa* in 2008<sup>i</sup> (written by Gilbert Marcus SC and Steven Budlender) after seven years of support to human rights grantees, many of which had strategically and effectively used litigation to achieve lasting socio-economic change. The evaluation – which was not restricted to the work of Atlantic grantees, but surveyed the entire field of public interest litigation – was commissioned to distil which strategies, when combined with strategic litigation, had led to social change and might be emulated in the future.

The study was well received locally and internationally by public interest lawyers, the human rights sector more broadly, by academics and by

other international donors working in the field of social justice. It has been included in the curricula of many law degrees, and has served as a reference in several seminars, conferences and exchanges among South African and foreign legal practitioners across the world.

Although formal grantmaking in South Africa has now ended, Atlantic remains keen to explore the impact of its grantmaking, and in particular how best to secure enduring social change.

In this context, Atlantic is proud to present a revised and expanded version of the 2008 report entitled *Public interest litigation and social change in South Africa: Strategies, tactics and lessons*. This work (written by Steven Budlender, Gilbert Marcus SC and Nick Ferreira) was commissioned to update and develop the initial report and thus provides new insights and covers post-2008 developments in the field of public interest litigation in South Africa.

<sup>i</sup> [www.atlanticphilanthropies.org/sites/default/files/uploads/public\\_interest\\_litigation\\_sa.pdf](http://www.atlanticphilanthropies.org/sites/default/files/uploads/public_interest_litigation_sa.pdf).





'Justice under a tree' – the logo of the Constitutional Court of South Africa. The tree protects the people, and they look after the tree. Also, traditionally in South Africa, justice has taken place under a tree.

## Atlantic's Reconciliation and Human Rights Programme

Atlantic's decision to launch its Reconciliation and Human Rights Programme in South Africa in 2002 was motivated by the country's successful and peaceful transition from apartheid to democracy in 1994, against seemingly intractable odds – a powerful demonstration of the proposition that a peaceful, negotiated path from conflict and injustice to co-operation and reconciliation is possible.

A key element in the trajectory to South Africa's historic transition was the adoption of one of the most progressive Constitutions in the world. It provided a platform, for the first time, to extend a raft of human and socio-economic rights to vulnerable and disadvantaged South Africans – a compelling opportunity for Atlantic to stimulate

social change by backing key human rights organisations in the country.

Atlantic went on to support a national network of community-based, legal advice offices and public interest non-governmental organisations that identified issues which lent themselves to precedent-setting litigation and class actions, thus impacting large numbers of people. This network is an important component of South African civil society. In supporting these groups, Atlantic drew on the experience and success of the Treatment Action Campaign and other social movements in promoting and achieving tangible social change.

The imprint of Atlantic's support is evident in the many positive, socio-economic Constitutional Court rulings since 1996 – from the Richtersveld ruling<sup>ii</sup> where a community was awarded ownership of the mineral rights on land from which they had been forcibly removed under apartheid, to the instruction to government to roll out antiretroviral drugs to people with HIV,<sup>iii</sup> and the striking down of the Communal Land Rights Act 11

of 2004,<sup>iv</sup> which prevented women in communal areas from owning or inheriting land. These and other rulings have been groundbreaking and transformative, improving the lives of millions of people.

Key components of Atlantic's strategy to realise human and socio-economic rights in South Africa came to include:

- applied research to inform policy and legislation and to provide baseline data against which progress can be measured;
- community organisation and grass-roots mobilisation;
- lobbying and advocacy;
- litigation where advocacy and mobilisation fail; and
- networking and alliance-building.

This complex of strategies was in part informed by the findings and recommendations of the 2008 public interest litigation evaluation report.

<sup>ii</sup> *Alexkor Ltd & Another v Richtersveld Community & Others* [2003] ZACC 18; 2004 (5) SA 460 (CC).

<sup>iii</sup> Covered extensively in Chapter 2.

<sup>iv</sup> *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* [2010] ZACC 10; 2010 (6) SA 214 (CC).

*As one of the most progressive in the world, the South African Constitution provided a platform to extend a raft of human and socio-economic rights to vulnerable and disadvantaged South Africans – a compelling opportunity for Atlantic to stimulate social change by backing key human rights organisations in the country.*

## The impact of Atlantic's programme

Important advances have been made by grantees and partners in Atlantic's programme across its four focus areas:

- lesbian, gay, bisexual and transgender people;
- rural poverty;
- refugees and migrants; and
- organisations and initiatives that counter threats to democracy and advance constitutionalism.

In terms of the rights of lesbian, gay, bisexual and transgender people (LGBTs), the following – representing some of the most progressive advances in the world – has been achieved:

- The country's LGBT community has gained full citizenship, including the recognition of same-sex marriages, the decriminalisation of sodomy, the right of LGBT couples to adopt children, access by LGBT partners to each other's pension, health insurance and other benefits on the same basis as heterosexuals, and the right of long-term partners to inherit the assets of the other upon death.

- Discrimination on the basis of sexual orientation in the workplace has been outlawed.
- Under the country's refugee legislation, LGBTs faced with persecution in their own countries because of their sexuality are afforded asylum in South Africa.
- Funding has been provided for emerging transgender and intersex support groups.
- Government has passed legislation allowing individuals to register for identity documents in their chosen gender.
- Gender reassignment surgery is available through the public health service at Groote Schuur Hospital in Cape Town.

Atlantic's rural poverty grantees have used the law to alleviate the worst impacts of rural poverty through a network of advice offices and public interest law firms which provide free advice to the rural poor. Atlantic supported structures in six of South Africa's nine provinces and is leaving behind a national network of best-practice institutions and entities to carry on this work.

In protecting the rights of the rural poor, the advice offices have facilitated

the following:

- improved uptake of social grants;
- improved education on farms;
- access to water, housing, electricity and other services;
- prevention of illegal evictions from farms and litigation for security of tenure;
- opposition to the Communal Land Rights Act (mentioned above) and other retrogressive legislation which discriminates against women in the former tribal trust lands; and
- challenges to government's granting of concessions to mining houses to exploit resources without adequate community consultation or economic benefit.

Grantees have accomplished or been instrumental in accomplishing the following:

- 11 community-based advice office networks that provide legal advice and support to more than 60 000 clients each year;
- successful litigation compelling provincial government to remedy delays in the payment of social grants – a routine problem across the country until the establishment of the South African Social Security Agency (which centralised this role);



- a sophisticated campaign, spearheaded by the Black Sash, to incrementally increase eligibility for the Child Support Grant from those under the age of seven in 1998 to all children under the age of 18 by 2011. This has brought more than 10 million children into the social safety net. A similar campaign increased the number of children eligible for a Foster Care Grant from 40 000 in 1998 to just under half a million in 2011 – a response in part to the rising number of orphans, due to the HIV and AIDS pandemic;
- a reduction in the level of rural poverty, improved health and nutrition, increased levels of enrolment in schools, and reduced levels of illegal child labour;
- approximately 15 million rural women benefiting from the decision of the Constitutional Court to strike down the Community Land Rights Act, which limited their right to access, own and inherit land;
- four communities regaining ownership of mineral-rich land taken from them during apartheid;
- 15 communities benefiting from rulings against the negative impacts of mining; and

- communities across the country gaining access to clean and safe drinking water.

In the field of refugee and migrant rights, the work of Atlantic's grantees has had the following impact:

- the provision of legal advice and support as well as key social services to over 12 000 refugees seeking legal status to remain in the country;
- litigation resulting in the provision of education for child refugees, and in access to health services and emergency shelters for asylum seekers; and
- litigation forcing the closure of detention centres that failed to comply with human rights and minimum health standards.

Lastly, Atlantic also supported a number of new civil society initiatives that have materialised to counter threats to democracy and advance constitutionalism. They are characterised by extensive citizen engagement – in particular the emergence of a new and growing cadre of informed youth leadership – innovative advocacy strategies and effective strategic litigation.

These grantees have been prominent in securing a number of precedent-setting Constitutional Court rulings that prevent municipalities from evicting homeless people without providing alternative accommodation. In addition, the City of Cape Town has been compelled to provide adequate sanitation to residents of informal settlements. Also:

- The Social Justice Coalition has partnered with the Mayor of Cape Town to develop a city-wide sanitation policy for informal settlements.
- A national campaign against corruption was launched by the Council for the Advancement of the South African Constitution.
- Corruption Watch, an initiative of Section 27 and the Congress of South African Trade Unions, has been launched.
- Several issue-based movements have emerged around service delivery and education, all characterised by popular participation, in particular by young people.





Action by civil society, including litigation, has ensured that essential services have been provided to many communities – here, potable water.

*Photograph: Legal Resources Centre ©*

## In closing

While Atlantic has supported some key instances of strategic public interest litigation in South Africa since 2002, this publication (as the 2008 report) also includes other critical initiatives and developments, thus presenting a comprehensive contemporary survey of public interest litigation in the country. It points to a rapidly developing field, and to complex and innovative strategies

for social change, of which strategic litigation is but one.

We hope and trust that this publication will contribute to an increasingly rich and informed debate on how to use litigation to achieve lasting social change.

### **Martin O'Brien**

Senior Vice President, The Atlantic Philanthropies

### **Gerald Kraak**

Programme Executive: Reconciliation and Human Rights Programme (2002-2013), The Atlantic Philanthropies (South Africa)

# Introduction

# Introduction

**In 2007, at the request of The Atlantic Philanthropies (Atlantic), two of the authors of this publication – Gilbert Marcus SC and Steven Budlender – conducted an evaluation of public interest litigation in South Africa to determine, primarily, which combination of strategies has been most effective in advancing social change, as well as the relationship of public interest litigation to various aspects of social mobilisation.**

The evaluation report was published by Atlantic in 2008 (*A strategic evaluation of public interest litigation in South Africa*,<sup>1</sup> henceforth referred to as the 2008 report). As mentioned in the Prologue, it was widely recognised by public interest lawyers and organisations from South Africa and beyond as being helpful to their work.<sup>2</sup>

In the years that have passed since the publication of the 2008 report, there have been significant further developments in the South African legal environment. These have included:

- a series of decisions by the Constitutional Court on socio-economic rights;
- a striking and remarkable increase in the prominence of issues concerning the right to basic education, both in the public arena and in courts; and
- a move by more conservative organisations to embrace and make use of the tactics and strategies developed by progressive public interest organisations.

The period has also seen significant changes in the composition of South Africa's Constitutional Court, including the departure of the last four Justices appointed in 1994 and the appointment of new Chief Justices.

In light of these developments, and at the request of Atlantic, the 2008 report has now been substantially updated and revised. This 2014 publication also contains a great deal of new material, dealing in particular with the developments set out above. It is thus intended to replace the 2008 report, rather than supplement it.

As was the case with the 2008 report, we have written this publication by considering a range of information

<sup>1</sup> [www.atlanticphilanthropies.org/sites/default/files/uploads/public\\_interest\\_litigation\\_sa.pdf](http://www.atlanticphilanthropies.org/sites/default/files/uploads/public_interest_litigation_sa.pdf).

<sup>2</sup> For a contrasting and critical view of the 2008 report, see Jackie Dugard & Malcolm Langford, *Art or science? Synthesising lessons from public interest litigation and the dangers of legal determinism*, in *South African Journal on Human Rights*, Vol. 27, Part 1: 2011, pages 39-64.





Photograph: Legal Resources Centre ©

sources. These included engagements, both formal and informal, with a range of role-players in the public interest litigation arena – comprising judges, practitioners and key activists. In order to ensure that the views of the organisations and individuals concerned could be robustly expressed, we undertook that comments made to us would not be attributed to particular respondents.

We have structured this publication into five main chapters:

### Chapter 1: Changing trends in the South African public interest litigation environment

This chapter examines the changing trends in the South African public interest litigation environment, especially current challenges.

### Chapter 2: Case studies of South African public interest litigation

This chapter involves a discussion of a number of particularly important case studies of recent public interest litigation that provide support for many of the conclusions we reach later.

Firstly, we have included the three case studies presented and discussed in the 2008 report. They are:

- the National Coalition for Gay and Lesbian Equality (NCGLE) case on the criminalisation of sodomy and subsequent litigation concerning gay and lesbian rights;
- the Grootboom case on the right to housing; and
- the Treatment Action Campaign (TAC) case on the prevention of mother-to-child transmission of HIV.

Secondly, we present and discuss three additional, more recent case studies:

- the Mazibuko case on access to water;
- the Joseph case on access to electricity; and
- the Nokotyana case on sanitation.

These three cases were selected as each of them represented an attempt to develop the socio-economic rights jurisprudence of the courts in, as yet, untested areas – water, electricity and sanitation, respectively. Moreover, while these cases had very different histories and outcomes, the Constitutional Court delivered judgments in all three of them within a short period – October to November 2009. The different outcomes of the cases can therefore not be attributed to changes in the

composition of the Court, meaning that a study of their comparative approaches is all the more valuable.

Chapter 2 ends with a seventh, collective case study, where we examine a number of recent cases on different aspects of the right to basic education. Again, this was a relatively untested area until a few years ago. Since then, however, there has been a significant increase in the prominence of litigation regarding this right.

### Chapter 3: Four key strategies for using rights to achieve social change

This chapter deals with key strategies that should be used in conjunction with a public interest litigation strategy in order for the latter to achieve maximum success in advancing social change. We identify three such strategies:

- conducting public information campaigns to raise rights awareness;
- providing advice and assistance outside of litigation to assist people in claiming their rights; and
- making use of social mobilisation and advocacy to ensure that communities are actively involved in asserting rights inside and outside the legal environment.



### Chapter 4: Seven factors to maximise the prospect of ensuring that public interest litigation succeeds and achieves social change

This chapter focuses on the factors that should generally be present in order to maximise the prospects of public interest litigation succeeding and achieving social change. We have identified seven such factors:

- proper organisation of clients;
- overall long-term strategy;
- co-ordination and information-sharing;
- timing;
- research;
- characterisation; and
- follow-up.

### Chapter 5: Procedural mechanisms which promote effective public interest litigation

When we presented the 2008 report to public interest litigators in other jurisdictions, we were struck by the fact that the South African public interest litigation environment is, from a procedural point of view, a very generous one.

Consequently, this new chapter considers some of the procedural

mechanisms in place in South Africa which promote effective public interest litigation. This is important for two reasons.

Firstly, for foreign readers, it provides an insight into possible procedural reforms to be suggested in order to promote effective public interest litigation in their jurisdictions.

Secondly, for South African as well as foreign readers, it highlights the need for litigators to take full advantage of these mechanisms when designing and engaging in public interest litigation.

We draw attention to three main procedural mechanisms:

- broad rules of standing;
- a protective costs regime; and
- significant opportunities for interventions by *amici curiae*.

Three final preliminary points should be made in this introduction.

Firstly, we generally sought to use 31 December 2013 as a cut-off date for the matters discussed in this publication. However, on occasion we have included brief references to events occurring after that date where this was necessary to give a full context for the issues being examined.

Secondly, in a number of the cases discussed in this publication, one or two of the authors were involved as counsel. In those cases, we have taken particular care to rely primarily on the views and perceptions of those authors not involved as counsel, as well as the respondents who commented on the cases in question.

Lastly, we would like to express our thanks to Emma Webber for her invaluable assistance in finalising this work, particularly the case study dealing with the right to basic education. We would also like to express our thanks to Martin O'Brien and Gerald Kraak of The Atlantic Philanthropies for their continual support and eternal patience as the publication was being prepared and finalised. Finally, we would like to thank Helle Christiansen for her excellent assistance in the copy-editing and proofreading of the publication, and for putting up with our endless changes.

# Chapter 1:

## Changing trends in the South African public interest litigation environment

# Changing trends in the South African public interest litigation environment

There has undoubtedly been a significant evolution of the South African public interest litigation environment, especially over the last few decades. In this regard, we consider it helpful to deal with four main periods:

- the period prior to 1994;
- the period between 1994 and 2000;
- the period between 2000 and 2010; and
- the period from 2010 onwards.



## The period prior to 1994

In respect of the period prior to 1994,<sup>3</sup> our respondents emphasised that (at least in theory) the mechanisms for public interest litigation were very limited. There was no Bill of Rights, almost complete parliamentary sovereignty, very strict prescription laws that favoured the state, and a judiciary which often followed the letter of the law even though it may have taken the view that the laws were unjust.

Nevertheless, and notwithstanding this

<sup>3</sup> The use of public interest litigation in this period is addressed in detail in Richard L Abel's excellent work *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994*, Routledge, New York: 1995.

repressive political climate, government displayed a paradoxical attitude to the role of law and the judiciary. Despite its flagrant violation of human rights, government purported to hold the judiciary in the highest esteem and professed respect for the rule of law. This attitude, combined with government's attempts to use the law to entrench apartheid, ironically created opportunities for public interest lawyers to exploit gaps in the system. As Justice Edwin Cameron explains:

*These legal ploys were possible because, in its essence, apartheid was a project that used the law as its instrument. For most of its history, most of those enforcing it saw themselves as subject to the law and its constraints. This changed radically in the 1980s, when 'dirty tricks' campaigns were sprung, and murderous 'third forces' were unleashed.*

*Until then, security policemen, bureaucrats, politicians and lawyers, including apartheid-minded judges, thought of themselves as operating within the values of an ethically sound and respected legal system. They knew apartheid was criticised around the world, and that most black South*



Current Justices of South Africa's Constitutional Court (from the top, left to right):

Chief Justice Mogoeng Mogoeng,  
Deputy Chief Justice Dikgang Moseneke,  
Justice Bess Nkabinde,  
Justice Chris Jafta,  
Justice Edwin Cameron,  
Justice Johan Froneman,  
Justice Johann van der Westhuizen,  
Justice Mbuyiseli Madlanga,  
Justice Ray Zondo and  
Justice Sisi Khampepe.



*Africans rejected it vehemently, but they told themselves that there was a logic and justice to it.*

*Because of this, the legal system offered space to thwart apartheid's plans and grand designs. And hence the legal system often did operate as a brake. On occasion, the courts were a real constraint on what the apartheid apparatus was able to achieve. Apartheid bureaucrats found that implementation of their orders was sometimes slowed down. They found the courts served as a check on government and police action.*

*And it was the very legal trappings of apartheid, despite the evil they engendered, that laid the foundations for the constitutional system that followed.<sup>4</sup>*

Moreover, given the importance of the issue and the interest of the international community and foreign donors, considerable funding was available to engage in public interest litigation. Consequently, groups like the Legal Resources Centre (LRC), the Centre for Applied Legal Studies (CALS) and Lawyers for Human Rights (LHR) – as well as various

legal firms – engaged in a great deal of successful public interest litigation, focusing primarily on civil and political rights cases. It was as a result of this that public interest litigation became a critical tool to attack apartheid legislation.

Public interest litigation thus had a substantial advantage in that it had a clear target and focus. Its general purpose was to challenge the edifice of apartheid in its various manifestations. This allowed for carefully focused and motivated public interest litigation.

## The period between 1994 and 2000

Not surprisingly, a major shift took place in 1994 with the enactment of a supreme Constitution and Bill of Rights, as well as the creation of a liberal Constitutional Court. Our respondents emphasised the following issues in relation to the 1994-2000 period.

The coming into force of the interim

Constitution in 1993, followed by the final Constitution in 1997,<sup>5</sup> provided a wide array of mechanisms and machinery for effective public interest litigation. These included extensive fundamental rights – including socio-economic rights – as well as generous standing provisions and wide remedial powers.

In theory, therefore, the period between 1994 and 2000 ought to have been the high point for public interest litigation, particularly public interest litigation leading to social change.

However, notwithstanding this – and without wishing to discount the importance of a number of crucial constitutional victories during this period (for example, decisions striking down the death penalty and the criminalisation of sodomy) – our respondents stressed that the reality faced by many public interest organisations during this period was one of uncertainty and flux.

This was partly because there were relatively few lawyers who were well versed in the new Constitution and

<sup>4</sup> Edwin Cameron, *Justice – A Personal Account*, NB Publishers, Cape Town: 2014, page 57.

<sup>5</sup> *Constitution of the Republic of South Africa* 108 of 1996. The Constitution was signed into law in December 1996 and came into effect on 4 February 1997.

*In theory, the period between 1994 and 2000 ought to have been the high point for public interest litigation, particularly public interest litigation leading to social change. The reality faced by many public interest organisations, however, was one of uncertainty and flux.*

issues arising from it, particularly given that law schools had only just begun to teach it to their students. Moreover, because both the Constitutional Court and socio-economic rights protection were entirely new, jurisprudence on these issues was virtually non-existent. There was therefore a great deal of uncertainty surrounding the kinds of cases that should be brought before the Constitutional Court, the mechanisms that should be used to do so and the likely responses of the Court.

Combined with this was the fact that many of the individuals who had been active and developed substantial skills in the public interest litigation sphere left the sector during this period, often to work for government in order to assist it in the early days of democracy. While this was not surprising, and indeed plainly necessary, the exodus of public interest litigators and social activists necessitated the development of a new generation to replace them.

In conjunction with the belief held by some at least that the new government would ‘do the right thing’ and needed to be given the space to do so rather than being antagonised by public interest litigation, this all meant that much of the constitutional jurisprudence

of this early period focused on the effects of the Constitution on criminal law, rather than on socio-economic rights and social change. This was perhaps reinforced by the caution of the Constitutional Court during these early years – particularly, for example, the caution shown in the first case on socio-economic rights, *Soobramoney v Minister of Health*.<sup>6</sup> There, the Constitutional Court held that despite life-and-death circumstances facing a man unable to obtain dialysis treatment, it could not come to the assistance of the applicant as government’s policy did not violate the right to health care.

Indeed, where public interest litigation went beyond issues of criminal law, it often focused on defending human rights gains – for example, defending attacks on abortion laws – rather than attacking government policies or legislation.

<sup>6</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC).

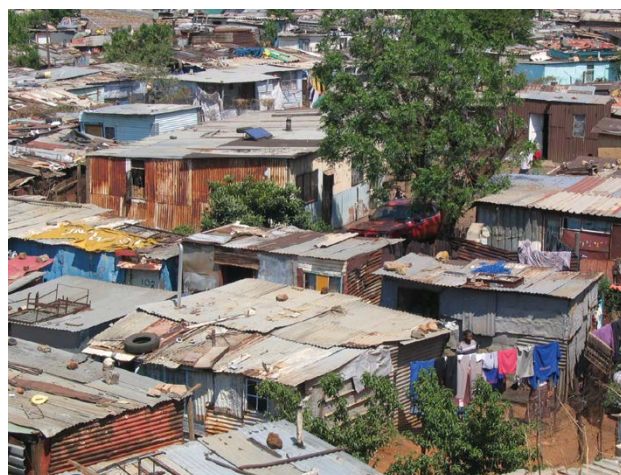
## The period between 2000 and 2010

The period from 2000 to 2010 saw a major shift in the nature of public interest litigation with a far greater focus on socio-economic rights, and public interest litigation during this period was, in many ways, groundbreaking.

A question raised by Atlantic in this regard was whether socio-economic rights received sufficient attention in the South African public interest litigation environment.

All our respondents agreed that this period was characterised by an increase (some termed it a “significant” increase) in socio-economic rights litigation. Nevertheless, virtually all respondents also emphasised that this was still insufficient and that there was not enough focus on socio-economic rights litigation, given how critical these rights are to addressing the persistent concerns of poor and marginalised South Africans.





Shanty town in Soweto, 2005.

Photograph: Matt-80/  
www.wikimedia.org ©

The inadequacies identified by the respondents in the socio-economic rights litigation that had taken place included:

- a focus on certain socio-economic rights – for example, housing, health care and land – to the exclusion of others which had not yet been addressed;
- inadequate attention being given to considering new issues that could have been the subject of public interest litigation; and
- insufficient monitoring, awareness-raising and related lobbying and advocacy initiatives.

Respondents stressed that the limited attention given to socio-economic rights was often due to the inability of communities that were the victims of violations of these rights to access courts and lawyers who could assist them in fighting for their rights. These comments make it clear that there were insufficient community-based or non-governmental organisations (NGOs) actively involved in dealing with socio-economic rights.

Respondents therefore all agreed that the role of public interest litigation organisations in the socio-economic

rights sphere was critical. As one respondent commented:

*A lot more needs to be done to strengthen the capacity of the existing public interest litigation organisations, both to survive and to improve on their work. These organisations are the main avenue for poor people to have access to social justice. Their collapse or possible weakening will deprive poor people of access to courts and possible entitlements that would come with going to courts.*

However, respondents also cautioned against too strongly seeking to separate one area of public interest litigation from another. Thus, while it was possible to have organisations focusing on children's rights, health rights, or gay and lesbian rights, many respondents took the view that it was essential that general public interest litigation organisations were also funded and supported in order to enable them to operate across a wide range of issues.

This view was expressed even by respondents engaged in specialised litigation organisations. One such respondent pointed to the fact that the International Commission of Jurists had tried to have a special dedicated fund

for children's socio-economic rights, to which any organisation could apply for funds. The respondent commented that in practice this did not work very well:

*It proved difficult to spend the money, organisations tried to 'engineer' cases, but this was not all that successful. I would not advise that donors should allocate funds specifically for socio-economic rights as a strategy to make more litigation happen in this field. A better solution is to promote networking between [NGOs] that work on the ground with people experiencing socio-economic rights deprivations, and litigation organisations.*

We endorse the view that it is necessary to have a mix of high-quality public interest litigation organisations, some specialist in nature and some operating across different areas. As we demonstrate in Chapter 2, the examples of the Grootboom and TAC cases make it clear that it is a mistake to think that different areas of public interest litigation are entirely separate from each other. While Grootboom was notionally only about the right to housing, success in the subsequent TAC case would have been far more difficult had Grootboom not already

*The period from 2000 to 2010 saw a major shift in the nature of public interest litigation with a far greater focus on socio-economic rights, and public interest litigation during this period was, in many ways, groundbreaking.*

been decided. Similarly, the successful cases now being litigated on the right to basic education build substantially on the principles enunciated in the Grootboom and TAC cases.

Our respondents emphasised three major challenges facing the South African public interest litigation sector in general at the beginning of the new millennium. These were:

- lack of funding;
- lack of experienced, skilled staff; and
- the attitude of government.

Although these challenges remain relevant today, they came to the fore during the 2000-2010 period and we therefore address each of them in turn below.

## Funding

Virtually all respondents emphasised that the advances in the last few years are presently threatened and may be undermined by the fact that there has been a substantial decrease in funding for public interest work. As one respondent commented:

*With the passage of the new Constitution, many international*

*funders assumed that South Africa's human rights problems had been solved and drastically reduced their funding of public interest litigation and other civil society groups. As a result, many public interest litigation organisations have been forced to close down some of their regional offices or allow their staff attorneys to take on private and corporate cases rather than focus exclusively on the public interest.*

Another respondent took a similar view but emphasised the massive resources available to the state:

*The major challenge facing public interest litigation groups in South Africa today is a lack of resources, especially when compared to those of the state. The state is better organised and retains a battery of lawyers, whereas many public interest litigation organisations are underfunded and thus understaffed. [...] International funders have become increasingly disinterested in public interest litigation in South Africa, and the wealthy in South Africa have yet to become a major source of charitable giving.*

Similar sentiments arose in a number of other responses. However, the views

expressed – at least in respect of the resources available to the state – need to be carefully qualified in our view. While it is true that, as a whole, the public interest litigation area might be under-resourced and under-skilled relative to the state, there are a number of core public interest litigation organisations that perform extraordinarily well and indeed seem to outdo the state consistently.

ProBono.Org (established in 2006) is an example of a newer organisation which has managed to unlock resources for public interest law by enlisting the support of the private legal profession. Moreover, the number of attorneys providing *pro bono* support to public interest litigation organisations has increased significantly over the past years.

In general terms though, there is no doubt that a lack of funding remains a major issue in respect of public interest litigation in South Africa. This is notwithstanding the sterling work done by Atlantic – mentioned by surveyed grantees and non-grantees alike. As a result of this lack of funding, there are relatively few public interest litigation organisations in South Africa at present. These organisations are generally

Advocate Stuart Wilson (top left) consulting with tenants facing eviction from tenements in the Johannesburg inner city in the mid-2000s.

Photograph: Jürgen Schadeberg ©



stretched to capacity and would be able to achieve a lot more with additional funding.

A related issue that Atlantic asked us to evaluate was whether other funders would step in as Atlantic phased out its support to the South African public interest litigation sector in 2013 as part of its planned spend-down. In respect of the organisations surveyed that received funding from Atlantic, it appears that virtually none of them relied solely on Atlantic for funding support – a variety of other funders are on board.

Despite this, all our respondents made it clear that there will almost certainly not be other funders that can step into Atlantic's shoes, at least not satisfactorily.

Respondents pointed particularly to the fact that other funders – for example, the Foundation for Human Rights and the Legal Aid Board (now Legal Aid South Africa – LASA) tended to only fund matters on a case-by-case basis. Moreover, LASA primarily funds criminal matters and provides only very limited funding for civil litigation. It is essential that other funding models support the public interest litigation sector in general and encourage the

growth and development of this sector.

Consequently, the views expressed were that Atlantic's exit will create a substantial gap. A number of respondents emphasised the critical role that Atlantic has played in providing upfront money for litigation. They stressed that there was often not enough time to fundraise at the time of intervening in a particular case. Therefore, without a predetermined, allocated budget, it would often be impossible for successful interventions to take place.

The continued funding difficulties facing public interest organisations are, in our view, a cause for significant concern. Without sufficient funding and support, public interest organisations will find it increasingly difficult to enforce rights and, still more, to do so in a manner which produces lasting social change.

This point emerges powerfully from Charles R Epp's work, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*.<sup>7</sup>

Epp studied in detail the growth of civil

rights in four jurisdictions: the United States (US), Britain, India and Canada. He concludes that the most significant determinant of the development of a 'rights revolution' is the existence of adequately resourced support structures for legal mobilisation – namely rights advocacy organisations and rights advocacy lawyers. As Epp explains:

*The basic lesson of this study is that rights are not gifts: they are won through concerted collective action arising from both a vibrant civil society and public subsidy. Rights revolutions originate in pressure from below in civil society, not leadership from above.*<sup>8</sup>

Even more importantly, Epp goes so far as to conclude that the existence of such support structures for legal mobilisation is more critical to achieving a rights revolution than virtually any other factor, including the text of the Constitution and the attitude of judges:

*Neither a written Constitution, a rights-supportive culture, nor sympathetic judges is sufficient for sustained judicial attention to and*

<sup>7</sup> University of Chicago Press: 1998.

<sup>8</sup> Charles R Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*, University of Chicago Press: 1998, page 197.

*There is no doubt that a lack of funding remains a major issue in respect of public interest litigation in South Africa. There are relatively few public interest litigation organisations in the country at present, and they are generally stretched to capacity.*

*support for rights. Protection of civil liberties and civil rights depends, in addition, on a support structure in civil society. Without a support structure, even the clearest constitutional rights guarantees are likely to become meaningless in the courts; but a vibrant support structure can extend and expand the feeblest of rights. Participants in constitutional democracy would do well to focus their efforts not only on framing or revising constitutional provisions, and not only on selecting the judges who interpret them, but also on shaping the support structure that defends and develops those rights in practice.<sup>9</sup>*

Thus, Epp concludes that even though India in many ways had an ideal environment for a rights revolution – including a generous Constitution and, at various stages, an activist judiciary – the absence of sufficient support structures for legal mobilisation meant that India has not witnessed a rights revolution to the extent of Canada, the US and Britain. In the case of the latter, for example, a rights revolution came about in spite of Britain appearing to have an inhospitable environment for such a revolution to occur.

<sup>9</sup> Epp *op.cit.*, page 205.

Epp's study constitutes a powerful argument for the continued funding and support of civil society organisations engaged in rights advocacy and litigation. Most critically, if his approach is correct, it suggests that although South Africa now has an extremely generous Constitution and generally progressive judges, this will be insufficient to achieve the fulfilment of rights, unless there is proper funding and assistance for support structures.

The only issue that Epp does not adequately interrogate in our view is precisely which strategies such rights advocacy organisations and rights advocacy lawyers should use in order to achieve lasting social change. We deal with this issue in Chapters 3 and 4.

## **Lack of experienced, skilled staff**

Linked to the problem of funding and financial resources was a second difficulty emphasised by a number of our respondents – that of recruiting and retaining quality staff, particularly staff who understood that public interest litigation was not like ordinary lawyering, and who therefore had more than simply legal skills. This was

substantially, although not exclusively, viewed as a problem of resources, with public interest litigation organisations finding it difficult to attract or retain sufficient staff members in light of competition from private law firms, government and the corporate sector. As one of our respondents commented:

*There is definitely a sense that the international funding environment is drying up, so public interest litigation organisations are operating with less human and financial resources which impact on our ability to effectively run cases.*

Another respondent expressed similar views:

*Skills shortage also plays a major role within these organisations. There is a high staff turnover because the best brains have either joined government or continue to be poached by government and its Chapter 9 Institutions.<sup>10</sup> So, sustainability within this sector is a major threat to growth in this field.*

<sup>10</sup> Refer Chapter 9 of the Constitution (State Institutions Supporting Constitutional Democracy): The Auditor-General, the Commission for Gender Equality, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Independent Electoral Commission, the Public Protector and the South African Human Rights Commission.



Community advice offices and paralegals play a crucial role in assisting poor and marginalised communities to access rights and services.

*Photograph: National Alliance for the Development of Community Advice Offices ©*



In the bulk of public interest cases, the organisations concerned choose to brief outside counsel from the Bar to argue the case and, most often, also to draft or settle the court papers. This is unsurprising given that in the vast majority of High Court cases in South Africa all types of litigants use outside counsel from the Bar to represent them. Moreover, this can often be an effective way of ensuring that additional skills and experience are available to public interest organisations for purposes of specific cases. However, we emphasise that this is not an adequate substitute for having experienced, skilled staff located within the organisations concerned. This remains critically important if public interest litigation is to achieve its full effect.

## Attitude of government

Some of our respondents also raised another obstacle to effective public interest litigation – the attitude of government.

In addition to difficulties in getting government to comply with court orders, respondents highlighted the apparent strategy of certain government

departments to settle matters at the last moment, thereby avoiding legal precedents being set that would inform future public interest litigation and allow proper jurisprudence to be built.

This was of particular concern to some respondents who felt that it could not be taken for granted that South Africa would necessarily have judges sympathetic to public interest litigation positions beyond the next few years. As one respondent explained:

*There is a risk that the courts might, in the future, become less open to creative remedies, and might cut back on judgments that take strong constitutional rights positions that fly in the face of public opinion. I therefore see the next decade as a crucial one in laying down precedents that will leave a public interest 'footprint' in South African jurisprudence.*

## The period from 2010 onwards – the beginning of a backlash?

As mentioned, many of the challenges highlighted above in relation to the 2000-2010 period continue to apply at present. However, notwithstanding the continuity of these challenges, we consider that public interest litigation in South Africa has entered a fourth period, beginning more or less at the end of the last decade.

One feature of this period has been the rapid rise of litigation around the right to basic education. This is plainly a welcome development and is covered separately in Chapter 2.

Yet, our respondents also pointed to several other emerging factors that have started to make things more difficult for progressive public interest litigators, and which indicate that the public interest litigation successes since 1994 have begun to produce a counter-mobilisation by opponents of

*One feature of the period from 2010 onwards has been the rapid rise of litigation around the right to basic education. However, several emerging factors have also started to make things more difficult for progressive public interest litigators.*

progressive social change.

This is not unique to South Africa. Other constitutional democracies that have experienced thriving phases of progressive public interest litigation have found that a backlash or conservative resistance often follows an initial period of successful public interest litigation.

In particular, other countries have experienced:

- the adoption and deployment of the techniques used in progressive public interest litigation by interest groups seeking to prevent or undo social change; and
- a backlash or resistance on the part of government to the social change sought through progressive public interest litigation.

Before we turn to recent developments on this score in the South African context, it is helpful to contextualise these issues by considering the manner in which they have played out in other jurisdictions. In this regard, perhaps the clearest example (and thus our focus) is the US in the period after the 'golden age' of progressive public interest litigation, namely the civil rights era.

The birth of public interest litigation in the US is widely attributed to

the National Association for the Advancement of Colored People (NAACP) and its Legal Defense Fund (LDF). In the 1930s, the NAACP started planning to use litigation to attack segregation – a plan that culminated in the landmark decision striking down racial segregation in *Brown v Board of Education*<sup>11</sup> some 20 years later.<sup>12</sup>

In the US, from the middle of the 1960s, numerous organisations were formed to bring litigation on behalf of left-wing or liberal causes. Cases were brought on issues including prison reform, foster care, special education programmes, access for the disabled, public housing, air, water and noise pollution, and more.<sup>13</sup>

The tactics used by these litigants for social change did not go unnoticed by those on the other side of the political spectrum:

*Inevitably, the successes of cause litigation by the left prompted the emergence of conservative interest group litigation.*<sup>14</sup>

In the mid-1970s, a host of conservative public interest litigation firms were formed, many of them funded directly or indirectly by corporations and seeking to advance the agendas of various powerful actors.<sup>15</sup>

In the 1980s and 1990s, conservative litigants took to the courts to oppose affirmative action, promote school choice, advocate the sanctity of private property, fight government regulation, oppose gay marriage and legalised abortion, include creationism in school curricula, and promote and defend the erection of religious symbols on public property. As Tamanaha points out:

*Conservative cause lawyers unabashedly borrowed litigation strategies pioneered by the LDF, taking care to find appealing clients, and searching around the country for opportunities to bring test cases that are likely to prevail.*<sup>16</sup>

The rise of conservative public interest litigation was given impetus by an increasingly right-wing judiciary

<sup>11</sup> *Oliver Brown, et al. v Board of Education of Topeka, et al.* 347 U.S. 483 (1954).

<sup>12</sup> See Epp *op.cit.*, page 39, and Brian Z Tamanaha, *Law as a Means to an End: Threat to the Rule of Law*, Cambridge University Press: 2006, page 158.

<sup>13</sup> Tamanaha *op.cit.*, page 160.

<sup>14</sup> Tamanaha *op.cit.*, page 161.

<sup>15</sup> For example, the Washington Legal Foundation uses litigation to pursue causes such as reducing government regulation and opposition to price controls. It is substantially funded by corporate interests, including foundations set up by the major pharmaceutical firms. See Tamanaha, *op.cit.*, page 171.

<sup>16</sup> Tamanaha *op.cit.*, page 162.



Artwork from 'Art for Activism' workshops organised by Gay and Lesbian Memory in Action in 2011 and 2012.

Photograph: Gay and Lesbian Memory in Action ©



resulting from the appointments made by former Presidents Ronald Reagan, George HW Bush and George W Bush (no doubt at least partly in response to successful progressive public interest litigation) which meant that courts became friendlier to conservative groups litigating in the public interest. In several areas, legislation undoing previous advances was also passed.

The issue of same-sex marriage illustrates the above. After several failed attempts in the 1970s, courts in Hawaii, Vermont and Alaska ruled in the 1990s that same-sex couples had a constitutional interest in being able to marry. These were important courtroom victories, but they prompted an immediate counter-mobilisation by opponents of same-sex marriage in those states but also in other states in the US, concerned that they might have to recognise same-sex marriages concluded in other states.<sup>17</sup> The reaction comprised amendments to state Constitutions to prohibit same-sex marriage, the passage of 'defence of marriage' acts prohibiting same-sex

marriage in 35 states,<sup>18</sup> and the passing of federal legislation exempting states from the requirements of the full faith and credit clause insofar as it pertained to recognising same-sex marriages concluded in other states. The decisions served as a rallying call for conservative activists against gay marriage.

A similar counter-mobilisation followed the 2003 Goodridge decision in Massachusetts.<sup>19</sup> However, this counter-mobilisation appears ultimately to have been unsuccessful, as demonstrated by the 2013 decision of the US Supreme Court in *US v Windsor*<sup>20</sup> and subsequent state cases that have used this decision to strike down bans on same-sex marriage.<sup>21</sup>

In summary, the golden age of progressive public interest litigation in the US was swiftly followed by a counter-mobilisation on the part of conservative forces:

*Liberals have painfully learned that instruments can be used in your favor,*

*or against you, with equal facility.*

*The tide has turned against liberals so much that a once-favored tool – cause litigation – has come to look like a fearsome weapon for the other side.*<sup>22</sup>

Several of our respondents indicated that South Africa has begun to experience a similar phenomenon. We address the recent emergence of conservative public interest litigation and of government resistance to progressive public interest litigation in turn.

## The use of public interest litigation by organisations opposed to social change

An increasing number of South African organisations have begun to use the tools and methods of public interest litigation in order to advance a conservative agenda. We will briefly discuss four examples.

<sup>17</sup> Ellen Ann Andersen, *Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation*, University of Michigan Press: 2005, page 180.

<sup>18</sup> Andersen *op.cit.*, page 218.

<sup>19</sup> Andersen *op.cit.*, page 235.

<sup>20</sup> *United States, Petitioner v Edith Schlain Windsor, in Her Capacity as Executor of the Estate of Thea Clara Spyder, et al.* 570 U.S. 12 (2013).

<sup>21</sup> David S Cohen & Dahlia Lithwick, *It's Over: Gay Marriage Can't Lose in the Courts*, *Slate Magazine*: 14 February 2014.

<sup>22</sup> Tamanaha *op.cit.*, page 163.

*Other constitutional democracies that have experienced thriving phases of progressive public interest litigation have found that a backlash or conservative resistance often follows an initial period of successful public interest litigation.*

### The affirmative action cases

The trade union Solidarity boasts a membership of more than 150 000 (mostly white) workers. It has a legal department with more than 30 staff members, including attorneys and advocates, and provides a range of legal services to its members.<sup>23</sup> Solidarity has fought a number of affirmative action cases in court as part of a deliberate and concerted campaign to limit the implementation of affirmative action legislation by public sector employers.

Perhaps the most high-profile of these cases is that of Renate Barnard, a police officer who was denied promotion on two occasions solely because she is white. She applied and was interviewed for the post of superintendent, obtaining a score of 86.67% from the interviewing committee and a recommendation that she be appointed. On receiving the panel's advice, however, the Divisional Commissioner recommended that the post remain unfilled because appointing a white candidate would aggravate the problem of a lack of demographic representivity in the relevant section

of the South African Police Service (SAPS). On a second occasion, Barnard again received the highest score, and this time the Divisional Commissioner recommended her appointment. The National Commissioner, however, refused to appoint her and withdrew the post.

Solidarity challenged the decision on behalf of Barnard in the Labour Court. The Labour Court found that it was inappropriate to apply the numerical goals in the SAPS' employment equity plan rigidly, and that:

*[...] the need for representivity must be weighed up against the affected individual's rights to equality and a fair decision made.*<sup>24</sup>

The Labour Court went on to find that recognition had to be given to the rights of the affected person to dignity and equality in making affirmative action decisions. The Court found that Barnard had been discriminated against and that the SAPS bore an onus to demonstrate that the discrimination was fair. The failure to appoint Barnard was found to be an irrational implementation of the SAPS' employment equity plan

because the SAPS had not given due consideration to her personal work history and circumstances. The Court ordered the SAPS to promote Barnard with retrospective effect.

The matter was then appealed by the SAPS to the Labour Appeal Court. On 2 November 2012, the Labour Appeal Court overturned the findings of the Labour Court. It held that the appointment of Barnard would have aggravated the over-representivity of white employees on level nine, and that it would have been a step backwards and a direct violation of a clear constitutional objective.

Barnard was granted leave to appeal and the Supreme Court of Appeal overturned the decision of the Labour Appeal Court.<sup>25</sup> The Supreme Court of Appeal found that the SAPS had not discharged the onus of showing that its discrimination on the basis of race was fair. The Court held that the SAPS' employment equity plan should not be mechanically and rigidly applied and that it should not constitute an absolute bar to the appointment of white candidates. The matter was then appealed and has been heard

<sup>23</sup> [www.solidaritysa.co.za](http://www.solidaritysa.co.za).

<sup>24</sup> *Solidarity obo Barnard & Another v South African Police Services* [2010] ZALC 10; 2010 (10) BCLR 1094 (LC), paragraph 25.1.

<sup>25</sup> *Solidarity obo Barnard v South African Police Service* [2013] ZASCA 177; 2014 (2) SA 1 (SCA).



Renate Barnard at Labour Court proceedings.

Photograph: Solidarity Media ©

by the Constitutional Court. At the time of writing, the judgment of the Constitutional Court had not yet been handed down.

Solidarity has at least another nine cases pending against organs of state in similar circumstances. The Barnard case is part of a concerted effort by the union to get the state to implement the Employment Equity Act 55 of 1998 in a particular way.<sup>26</sup> Solidarity's General Secretary Dirk Hermann says:

*If they appeal, it opens up a path for us to a constitutional judgement as well [...]. We have a battle to bring the public service back to the parameters of the Employment Equity Act. We believe that transformation must be within the parameters of the Constitution ... [i]t's a step to the future ... it's a protection of the [South African] Constitution.<sup>27</sup>*

Though the union's other cases are tailored to their own facts, it is clear that Solidarity views them as part of an attempt to determine:

*[...] whether affirmative action in South Africa is reasonable or not [and as*

*a question of] whether the ideology of absolute representivity should be implemented at the expense of service delivery.<sup>28</sup>*

It has said that affirmative action in South Africa is "sick to the core"<sup>29</sup> and called for a national summit to discuss the issue, failing which a constitutional challenge would be considered.

### The AfriForum v Julius Malema hate speech case

AfriForum is a civil society initiative of Solidarity. It is a non-profit advocacy body, and its stated purpose is to counter the withdrawal of minority racial groups from South African society. It aims to give minorities a voice

*[...] in a society where minorities are increasingly being ignored.<sup>30</sup>*

The organisation says that it campaigns:

*[...] for the protection and consolidation of civil rights, as contained in the South African Constitution and international conventions.<sup>31</sup>*

AfriForum approached the Equality Court and complained that Julius Malema, the then leader of the African National Congress (ANC) Youth League, had sung or chanted certain words at various public functions, translated as meaning 'shoot the Boer/farmer' or 'shoot the Boers/farmers, they are rapists/robbers'. AfriForum sought an order that these utterances constituted hate speech and an interdict preventing Malema from inciting hostility towards any ethnic group. It alleged that the words could reasonably be construed as demonstrating a clear intention to be hurtful or harmful to particular ethnic groups, as inciting and as promoting and propagating hatred.

The Transvaal Agricultural Union of South Africa (TAU-SA), whose primary objective is the protection of the property rights and safety of South African farmers, was granted leave to intervene as a complainant. The ANC intervened as a respondent.

During the course of the trial, there were discussions regarding a possible settlement. AfriForum withdrew the matter as against the ANC, but wished to proceed against Malema personally – possibly in an attempt to isolate him politically.

<sup>26</sup> See for example: *Affirmative action 'on its head': Solidarity*, Times Live: 23 March 2011; *Solidarity vs affirmative action – a war of attrition*, Daily Maverick: 19 November 2010.

<sup>27</sup> *Affirmative action ruling handed down*, Mail & Guardian: 27 February 2010.

<sup>28</sup> *Affirmative action 'on its head': Solidarity op.cit.*

<sup>29</sup> *Solidarity vows to fight affirmative action in Concourt*, Independent Online, Business Report: 18 March 2011.

<sup>30</sup> [www.afriforum.co.za](http://www.afriforum.co.za).

<sup>31</sup> *Ibid.*

That this was part of AfriForum and TAU-SA's litigation strategy appeared to be confirmed by the cross-examination of Malema, which was at times quite bizarre. Malema was cross-examined on numerous strange and irrelevant issues, including his attitude to communism and Leninism, the nationalisation of the mining industry and banks, land redistribution and compensation, the likelihood of Africa producing child soldiers, and the propensity of black people to become excitable and sing songs at political gatherings. The tone of the cross-examination also seemed to corroborate the supposition of a political isolation strategy on the part of AfriForum and TAU-SA. It frequently descended into petty squabbles – for example, an interchange between Malema and counsel for AfriForum about which of them was 'playing to the gallery', concluded by Malema's masterful reference to counsel's response to the application to open the hearing for television broadcast:

*I never wanted the gallery in the first place. It is you who said to My Lord you want cameras to run before you give your speech. I never said that.*<sup>32</sup>

In sum, AfriForum and TAU-SA's strategy appeared to be to embarrass Malema, rather than to ventilate the issues arising from the cause of action. In the view of many of our respondents, however, this strategy backfired spectacularly. Instead of undermining Malema politically, the trial gave him a platform and allowed him to portray himself as the target of a racial vendetta. Malema was articulate and persuasive as a witness and able to give coherent voice to the historical and political

considerations underlying the singing of the song and its meaning and history.

Crowds gathered outside the Equality Court, and members of the ANC and its Youth League gave speeches tapping into familiar anti-apartheid narratives of political resistance in the face of unjust legal persecution. Even after judgment was handed down against Malema, this did not appear to weaken him politically. On the contrary, the judgment provoked renewed criticism from members of the ANC and government that the courts are undemocratic, untransformed and dominated by a racist minority.

AfriForum's decision to institute this litigation and the manner in which it was conducted was in many ways a strategic miscalculation. Rather than isolating or weakening Malema, it ensured his continued prominence in the media and allowed him to cast himself in the mode of successor to struggle stalwarts such as former President Nelson Mandela. The presence of prominent ANC activist Winnie Madikizela-Mandela by his side for the duration of the trial was the most obvious sign that this was the message the trial sent. Addressing a crowd of supporters after the hearing, she said:

*We thank AfriForum for bringing us here to baptise our president, the future president of South Africa.*<sup>33</sup>

The litigation also gave the song in question a prominence it had never had before and provided an incentive for its rebellious singing at political gatherings as a way of thumbing one's nose at reactionaries, and indeed at the courts.

On the other hand, the litigation increased AfriForum's prominence on the national political stage. During the 18 months in which the matter received major press coverage, the size of AfriForum's donor base tripled. AfriForum also viewed the litigation as a way to put the issue on the agenda and to provide some leverage for government to take their complaints seriously.

On 12 September 2011, the Equality Court handed down judgment.<sup>34</sup> The extent of its order was extremely wide-ranging. The Court found that the song constituted hate speech and gave an order that appears to prohibit the use of the words and the singing of the song by any person in any circumstances whatsoever. Malema and the ANC were granted leave to appeal.

Shortly before the matter was due to proceed in the Supreme Court of Appeal, the parties reached a settlement. While the full rationale for the settlement is beyond the scope of this publication, it seems that the parties were at least partly influenced by the fact that the Supreme Court of Appeal itself appeared intent on avoiding the case. The judges concerned not only wrote to the parties asking expressly about settlement, but some also complained informally to colleagues or members of the Bar about the absence of such a settlement. This, in our experience, is effectively unprecedented.

The ultimate settlement, however, was an uneasy one and did not definitively resolve the issues concerned. On the one hand, the ANC and Malema

<sup>32</sup> Transcript of Proceedings in *AfriForum v Malema*, 20 April 2011, page 1022, lines 9-12.

<sup>33</sup> Cross-examination of 'future president of SA' ends, Mail & Guardian: 21 April 2011.

<sup>34</sup> *Afri-Forum & Another v Malema & Others* [2011] ZAEQC 2; 2011 (6) SA 240 (EqC).



Winnie Madikizela-Mandela (left) and Julius Malema at 'hate speech' court proceedings against Malema in April 2011.

Photograph: The Biggerpicture & Reuters ©



conceded that certain struggle songs may be hurtful to minority communities and agreed to 'encourage' supporters to act with restraint to avoid such hurt. On the other hand, AfriForum conceded that it was crucial to recognise and respect the rights of communities to celebrate and respect their cultural heritage. Nevertheless, despite the uneasy nature of the settlement, the issue has thus far not resurfaced.<sup>35</sup>

### The Agri South Africa case

Agri South Africa (Agri SA) is an agricultural union that promotes the interests of commercial farmers in South Africa. It approached the courts for an order that government's efforts to create a new regime of mineral rights through the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) constituted an expropriation of property. If so, government would potentially be required to pay enormous sums in compensation to holders of old-order mineral rights.<sup>36</sup> Agri SA:

*[...] instructed their attorneys [...] to find a suitable test case and to obtain cession of the relevant right-holder's right to compensation.<sup>37</sup>*

Agri SA obtained cession of the right to compensation for the purported expropriation of certain coal rights from a company and instituted an action claiming compensation from the state.

Before the passing of the MPRDA, the owner of land was also in principle the owner of the minerals beneath the surface of the land. In terms of common law and legislation, however, it was possible to separate mineral rights from ownership of the land. Immediately before the MPRDA came into force, holders of old-order mineral rights had numerous common-law rights, including the right to search for minerals, to sever such minerals if found, and the right of ownership of those minerals. These rights were transferable and could be sold or used as security. The holder was under no obligation to exploit the minerals.<sup>38</sup>

The MPRDA was enacted to make

provision for equitable access to and sustainable development of the country's mineral resources. It was designed in part to address the fact that the holders of old-order mineral rights were almost all white. To address this unjust distribution of mineral wealth and ensure that such rights do not lie dormant, the MPRDA made the state the custodian of all mineral rights in the country. It gave the Minister of Minerals and Energy the power to grant prospecting and mining rights and fundamentally altered the previous regime of private law mineral rights.

The Pretoria High Court found that the MPRDA radically changed the nature of old-order rights and that it did away with some of those rights entirely.<sup>39</sup> It followed that the MPRDA had expropriated the mineral rights held by Agri SA. Despite the fact that the Act did not grant the rights taken from Agri SA to the state, it did extinguish those rights and gave the Minister the power to grant rights with substantially the same content. The Court found that it therefore constituted an expropriation, and that the state was required to pay Agri SA R750 000 in compensation.

<sup>35</sup> Malema was subsequently expelled from the ANC and formed his own opposition party, the Economic Freedom Fighters, which won a number of seats in Parliament in the May 2014 elections.

<sup>36</sup> Witnesses for the state testified that the total amount of compensation could be as much as R90 billion, but the High Court dismissed this evidence as inaccurate.

<sup>37</sup> *Agri South Africa v Minister of Minerals and Energy* [2011] ZAGPPHC 62; 2012 (1) SA 171 (GNP), paragraph 15.

<sup>38</sup> *Agri South Africa v Minister of Minerals and Energy* [2011] ZAGPPHC 62 *op.cit.*, paragraph 29.

<sup>39</sup> *Agri South Africa v Minister of Minerals and Energy* [2011] ZAGPPHC 62 *op.cit.*

*There is nothing necessarily progressive or egalitarian inherent in a culture of rights. Courts and the language of rights can be even more effective at preventing transformation than assisting it.*

This decision was then held by the Supreme Court of Appeal to be wrongly decided.<sup>40</sup> In April 2013, the Constitutional Court agreed with the Supreme Court of Appeal that the High Court judgment had been incorrect.<sup>41</sup> The Constitutional Court held that the MPRDA did not result in an expropriation (as opposed to a deprivation) of property. In doing so, the Constitutional Court stressed the objects of the MPRDA to facilitate equitable access to the mining industry, promote sustainable development of South Africa's mineral and petroleum resources and advance the eradication of all forms of discriminatory practices in the mining sector. It also stressed that Section 25 (the property clause) in the Constitution should not be interpreted in a way that would threaten the possibility of maintaining a sensitive balance between existing private property rights and the pursuit of transformation, which the Section was designed to facilitate.

### Amicus interventions

Progressive public interest litigation litigants often have to contend with interventions by conservative interest groups. For example, the Justice Alliance of South Africa (JASA) is a frequent participant in litigation. JASA is a coalition of corporations, individuals and churches

*[...] fighting for justice and the highest moral standards in South African society.*<sup>42</sup>

It intervened in two recent matters in an effort to aid government to defeat constitutional challenges by progressive organisations.

The first was the Print Media case,<sup>43</sup> concerning a constitutional challenge to a statute giving extraordinarily wide censorship powers to a statutory board in respect of magazines. The second was the Teddy Bear Clinic case,<sup>44</sup> concerning a constitutional challenge to a statute criminalising consensual sexual behaviour between children under the age of 16.

<sup>42</sup> [www.justicealliance.co.za](http://www.justicealliance.co.za).

<sup>43</sup> *Print Media South Africa & Another v Minister of Home Affairs & Another* [2012] ZACC 22; 2012 (6) SA 443 (CC).

<sup>44</sup> *Teddy Bear Clinic for Abused Children & Another v Minister of Justice and Constitutional Development & Another* [2013] ZACC 35; 2014 (2) SA 168 (CC).

Both JASA interventions were ultimately unsuccessful in that the Constitutional Court upheld both constitutional challenges. However, in the Teddy Bear Clinic case in particular, JASA's intervention caused delays and required the organisations challenging the law to commit significant additional time and resources to combatting the argument and evidence adduced by JASA.

### Concluding observations

It is clear that conservative organisations in South Africa increasingly view litigation as a viable means for advancing their political interests. AfriForum expressly styles itself as a civil rights movement, dedicated to protecting the interests of what it sees as a marginalised minority. It has adopted the rhetoric and techniques of public interest litigation and constitutional rights to pursue this agenda. AfriForum explicitly drew inspiration from the litigation strategy of the TAC (refer Chapter 2).

This development parallels what occurred in the US, where:

*[...] the right has taken its cues from the left – constructing its own cultures of victimization and resistance and*

<sup>40</sup> *Minister of Minerals and Energy v Agri South Africa* [2012] ZASCA 93; 2012 (5) SA 1 (SCA).

<sup>41</sup> *Agri South Africa v Minister of Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC).





*deploying them both legally and politically.<sup>45</sup>*

There is nothing necessarily progressive or egalitarian inherent in a culture of rights. The US experience demonstrates that courts and the language of rights can be even more effective at preventing transformation than assisting it. The formalism of South Africa's legal tradition and the incremental common law heritage of judges mean that courts are often also quite conservative. As Scheingold points out:

*[...] rights have historically had more to do with the protection of property and privilege than their redistribution. Accordingly it should come as no surprise that rights can readily be inflected with non-egalitarian meaning – in both the legal and political arenas.<sup>46</sup>*

We do not cavil at the right of conservative groups to exercise their rights of access to courts, or to enter cases as friends of the court. We simply note that a new front of public interest litigation is being opened and that progressive organisations need to be

aware of this if they are to respond appropriately.

In this regard, it is notable that conservative organisations did not succeed in the Agri SA, Print Media or Teddy Bear Clinic cases. However, this was only because the progressive organisations involved in each case took the issue very seriously and actively sought to counter the approach of the conservative organisations. Thus, in the Agri SA case, CALS intervened as an *amicus curiae* in all three courts in support of the state. The other two cases saw the intervention of progressive organisations as *amici curiae* to support the progressive organisations already involved as the main litigants.

In our view, therefore, the following factors emerge from the above discussion for consideration by progressive public interest litigants:

- Progressive organisations must be alert to the kinds of litigation being brought by conservative groups and must be ready to intervene as *amici* where appropriate. Where possible, it is essential that progressive organisations attempt to dissuade courts from making regressive rulings, or moderate the impact of

such rulings.

- Progressive organisations in these kinds of cases may find themselves in a more defensive posture than they are accustomed to. They may be required to defend legislation and policy in some cases. Particularly in light of the fact that the state often fails to defend legislation sufficiently by adducing proper evidence, it will sometimes be desirable for progressive organisations to lead evidence as *amici*.
- Strategically, the above may help ease tensions with government because it means that the state and progressive civil society organisations will sometimes line up together against conservative litigants.

## Resistance by government to progressive public interest litigation

Recent public statements by senior government officials indicate that some members of the executive perceive public interest litigation as

<sup>45</sup> Stuart A Scheingold, *The Politics of Rights: Lawyers, public policy, and political change*, 2<sup>nd</sup> Edition, University of Michigan Press: 2004, page xxxiii.

<sup>46</sup> *Ibid.*

*Recent public statements by senior government officials indicate that some members of the executive perceive public interest litigation as an obstacle to the legitimate aims of elected officials.*

an obstacle to the legitimate aims of elected officials. For example, several senior ANC politicians have blamed unfavourable judgments on ‘untransformed’ courts, and accused the judiciary of playing an oppositional role in South African politics.<sup>47</sup>

In April 2014, while sitting on the Judicial Service Commission (JSC), a senior member of government thus commented that she found it :

*[...] a bit disturbing [that candidates wanted to be appointed judges] while espousing very fervent human rights activist tendencies.*<sup>48</sup>

Another senior member of government and of the JSC has argued that civil society and opposition parties have used litigation to constrain the exercise of power by Parliament and the executive.<sup>49</sup>

These public statements have been accompanied by public attacks on the *bona fides* of public interest litigants by

the ANC. For example, the Office of the ANC Chief Whip said the following in a statement about the resignation of Chief Justice Sandile Ngcobo, after a successful challenge by civil society groups to a provision allowing the President to extend the tenure of the Chief Justice:

*It is, in our view, questionable whether the decision by the parties responsible to mount a [Constitutional Court] challenge was taken in good faith. No similar legal challenges were taken when the same process was followed previously regarding the extension of the terms of office for former Justices Arthur Chaskalson and Pius Langa.*<sup>50</sup>

In June 2013, when faced with significant pressure from protests organised by the progressive organisation Equal Education (EE), the Minister of Basic Education responded with an extraordinary statement:

*[...] to suddenly see a group of white adults organizing black African children with half-truths can only be opportunistic, patronizing and simply dishonest to say the least.*<sup>51</sup>

In sum, there appears to be an increased degree of hostility on the part of government towards public interest litigation and progressive public interest organisations. This is a very serious concern. Public interest litigation is only effective when court orders obtained are properly implemented, and in most cases this requires implementation by government respondents. The increased degree of hostility by government towards public interest litigation means an increased risk of non-compliance or, potentially even worse, ‘malicious compliance’ – that is, deliberately complying with court orders to the minimum extent possible and in a manner that prevents the true purpose of a court order being achieved.<sup>52</sup>

For public interest litigation to be as effective as possible, the attitude of government should thus be taken into account in the conception and execution of cases, and public interest litigants may wish to consider the following:

- There may be non-legal reasons to run or decide not to run a case. Public interest litigants have limited political capital, and difficult

<sup>47</sup> See for example: *Constitutional Court used as opposition to ANC govt: Mantashe*, Times Live: 18 August 2011; *Malema takes aim at judiciary*, Independent Online: 14 September 2011; *What Mathole Motshekga really said – ANC*, Politicsweb: 2 October 2011.

<sup>48</sup> *Few Magistrates make the grade with JSC*, Business Day: 10 April 2014.

<sup>49</sup> *THE BIG READ: ANC's fatal concessions*, Times Live: 1 September 2009.

<sup>50</sup> *ANC Chief Whip's office on Justice Ngcobo's decision*, www.anc.org.za: 28 July 2011.

<sup>51</sup> *Equal Education is disingenuous: Minister Motshekga*, Statement issued by the Ministry of Basic Education: 18 June 2013.

<sup>52</sup> Comment by Mark Heywood at the 4th Public Interest Law Gathering, held at the Wits School of Law, 23 July 2014.

Indwe Advice Office in the Eastern Cape.

Photograph: National Alliance for the Development of Community Advice Offices ©



decisions may need to be made about which cases that capital should be expended on.

- Given the increasing pressure put on the courts by government, it is always desirable to give the court as much political cover as possible in the conceptualisation and presentation of a case. This is an additional pragmatic consideration in favour of seeking narrow rather than broad relief, and proceeding incrementally where possible.
- Where possible, it is preferable to attempt proactively to engage government outside court – for example, through negotiations and input into legislative processes.
- In crafting the relief sought, account must be taken of the likely response by the relevant government respondent, and of how the relief can anticipate and prevent non-compliance or malicious compliance. This is dealt with in greater detail in the case study on litigation on the right to basic education in Chapter 2.

## Conclusion

The overriding lesson of the new developments in the arena of public interest litigation presented in this

chapter is the importance of realising that South Africa cannot avoid a dispute over the meaning of its Constitution. This is a public fight for legitimacy.

In this debate, progressive forces have enjoyed the ascendancy since the advent of democracy. We have a progressive Constitution, which has been guarded by a largely progressive Constitutional Court, the legitimacy of which has not yet been seriously questioned.

Yet, to many of our respondents it appears that the pendulum has begun to swing in the other direction. In addition to trying to win their cases, progressive public interest litigators now need to litigate with a view to winning hearts and minds. They cannot allow public interest litigation to be portrayed as a narrow, elitist domain of power, the primary purpose of which is to 'subvert democracy'. It is important that progressive public interest litigation be widely understood for what it is, namely a mechanism for holding power to account in the interests of the powerless.

Even more than before, progressive organisations need to realise that perceptions matter. The racial composition of organisations and their attitudes matter. The tone of

engagement with government matters, as does the language used in affidavits and arguments presented to the courts. And more than ever, we must realise that litigation is just one part of a broader social change strategy that needs to be allied with broad-based political activism.

The manner of doing so has been demonstrated particularly well by EE and the LRC in their litigation regarding binding minimum norms and standards for school infrastructure. We deal with this litigation in much more detail in Chapter 2. For present purposes, we emphasise that EE and the LRC were at pains to ensure that the case was not only fought in court but also covered extensively and very positively in traditional media and on social media. In particular, the video *Build the Future* made by EE is a powerful and compelling example of the approach that can be taken and is essential viewing for anyone considering such a campaign.<sup>53</sup> Indeed, the Minister of Basic Education's somewhat extraordinary statement

<sup>53</sup> Available on YouTube. Other EE videos that merit viewing are: #FixOurSchools: Norms & Standards for School Infrastructure Now! (also on YouTube); and Equal Education's Campaign to Build the Future (available at [www.atlanticphilanthropies.org](http://www.atlanticphilanthropies.org)).





Residents from the Khutsong township on Gauteng's West Rand demonstrate outside the Constitutional Court in September 2007 against government's re-zoning of their community into the much poorer North West province.

Photograph: Antonio Muchave ©

referred to above can likely best be understood as an attempt to avoid the considerable build-up of pressure on the Minister that the campaign had produced.

In closing, the sustainability of what Charles Epp has called a 'rights revolution' depends on securing legitimacy beyond an elite group of legal practitioners:

*The continuation of nascent rights revolutions beyond their initial phases has also depended on broad support outside the judiciary. In each*

*of the countries in this study, the judicial rights agenda has grown in a sustained way only to the extent that it has been supported by continued, organized efforts in civil society. And those efforts, centred in rights-advocacy organizations, government-provided legal aid, and the racial and sexual diversification of the legal profession, have been strong only to the extent that they have reflected either collective support or broad undercurrents of democratization.<sup>54</sup>*

This implies that it is not enough for progressive groups only to succeed in litigation. They also have to become better at education, at public relations and at making their arguments accessible and compelling.

<sup>54</sup> Epp op.cit., pages 199-200.

# Chapter 2:

## Case studies of South African public interest litigation



# Case studies of South African public interest litigation

**We have considered a very large number of examples of South African public interest litigation in reaching our conclusions set out in the following chapters. We refer to a number of these cases in due course.**

**Nevertheless, the conclusions that follow are particularly well illustrated by seven specific case studies. We have deliberately chosen case studies that cover public interest litigation in seven different substantive areas: gay and lesbian rights, housing, health care, water, electricity, sanitation and education.**

The first three of these case studies were dealt with in the 2008 report, though we have supplemented some of the observations made there. The case studies concern three of the most significant pieces of public interest litigation during the period 1994-2008. They are:

- the National Coalition for Gay and Lesbian Equality (NCGLE) case on the criminalisation of sodomy and subsequent litigation concerning gay and lesbian rights;
- the Grootboom case on the right to housing; and
- the Treatment Action Campaign (TAC) case on prevention of mother-to-child transmission of HIV.

The next three case studies that we have chosen involved litigation on socio-economic rights in, as yet, untested

areas – water, electricity and sanitation. Moreover, each of these cases resulted in a decision by the Constitutional Court handed down within a short period – October to November 2009. They are:

- the Mazibuko case on access to water;
- the Joseph case on access to electricity; and
- the Nokotyana case on sanitation.

As we explain below, despite being decided by a single court within a very short period of time, these cases had sharply divergent outcomes. A study of their comparative approaches and results is thus all the more valuable.

Lastly, our seventh case study concerns litigation on the right to basic education. At the time of the 2008 report, there had been very little noteworthy litigation in South Africa regarding this right, despite the significant inadequacies regarding the provision of basic education that have existed for many years. Since then, however, there have been a large number of public interest basic education cases at High Court level. Four of the key pieces of litigation in this area are considered collectively in our seventh case study.



Participant in Pride celebrations,  
Johannesburg 2007.

Photograph: Nadine Hutton ©

## The National Coalition for Gay and Lesbian Equality case on the criminalisation of sodomy and subsequent litigation concerning gay and lesbian rights

Perhaps the most ambitious and extensive public interest litigation programme embarked on by a particular interest group in South Africa post-1994 is that undertaken by gay and lesbian groups.

### Background and overview

Initially, the litigation was undertaken by the NCGLE, an umbrella body that included among its members more than 70 organisations and associations representing lesbian, gay, bisexual and transgender (LGBT) people in South Africa. Later, litigation was undertaken by gay and lesbian individuals, as well as by successor organisations to the Coalition such as the Lesbian and Gay Equality Project (LGEF).

The scale of this litigation was unparalleled. In the period 1994-2007, no fewer than seven separate matters on gay and lesbian issues reached the Constitutional Court on issues ranging from adoption to same-sex marriage. Notably, not only did every case result in victory for those seeking to enforce gay and lesbian rights, but all seven judgments were also unanimous on the merits. The single dissenting judgment issued related to what constituted an appropriate remedy – not to the merits.

With the benefit of hindsight, these results may appear obvious and predictable given that Section 9(3) of South Africa's Constitution, unlike

virtually all other Constitutions, expressly outlaws unfair discrimination on the grounds of sexual orientation. However, in truth, the successes attained in this area and the now seeming inevitability of the cases can directly be attributed to the extraordinarily careful strategy adopted by gay and lesbian groups in South Africa.

The starting point, of course, was persuading the drafters of the Constitution to include a constitutional prohibition on unfair discrimination on grounds of sexual orientation. Such inclusion was by no means inevitable, given the lack of equivalent protection in most other jurisdictions and the variety of issues vying for attention during the constitutional drafting process.

The gay and lesbian rights cases make clear that the successes of litigation in this sector depended substantially on the mobilisation and advocacy strategies adopted by gays and lesbians from the outset – that is, at the stage of constitutional development. This included political pressure brought to bear by ANC members belonging to the LGBT community or sympathetic to the gay and lesbian cause, and

*Perhaps the most ambitious and extensive public interest litigation programme embarked on by a particular interest group in South Africa post-1994 is that undertaken by gay and lesbian groups.*

creating public awareness as well as a substantial academic discourse around gay and lesbian issues. These strategies meant that when litigation began, those involved did not need to rely on skilful legal arguments or litigation strategies to persuade the Constitutional Court to locate such rights under the rubric of privacy, liberty or dignity, as in other jurisdictions. Rather, the rights were set out in express terms in the Constitution as a result of the political victory that had been achieved during the constitutional development process.

## The sodomy case

Following this political victory, the first public interest case on gay and lesbian issues was brought by the NCGLE in 1998. This was the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*,<sup>55</sup> in which the Constitutional Court confirmed the High Court's decision to declare unconstitutional statutory and common law criminal prohibitions on sodomy.

The fact that the sodomy case was the opening chapter of South African public interest litigation on gay and lesbian

issues was not accidental.

The criminal law prohibiting sodomy was regarded by many as a great affront to the dignity of gays and lesbians and was plainly a vestige of apartheid-era attitudes towards them. It was thus a case that would manifestly provoke massive support not only in the gay and lesbian community, but also among liberal judges and liberal members of the public.

Moreover, there were clear precedents in foreign jurisdictions for court decisions striking down the criminalisation of sodomy – for example, *Dudgeon v United Kingdom*<sup>56</sup> and *Norris v Republic of Ireland*.<sup>57</sup>

Thus, while it was clear that the case still presented its difficulties – compounded by the fact that the Minister of Justice initially chose to oppose the order of invalidity sought – it was nevertheless the clearest gay and lesbian issue on which litigation could take place, and one that was likely to inspire the members of the Constitutional Court to set forth in detail the legal position regarding gays and lesbians and the need for them not to be unfairly

discriminated against. It was for these reasons that the NCGLE chose this as its first case.

While the choice of the issue was plainly correct, and while the prospects of success were very good, one must not overlook the fact that a series of strategic decisions had to be made regarding how to structure the case.

Firstly, the NCGLE had to decide whether to challenge the law in a proactive and abstract fashion, as opposed to in a defensive fashion when someone was charged with sodomy.

In general, a proactive and abstract constitutional challenge can raise significant complications. Indeed, the Constitutional Court recently (in *Savoi v National Director of Public Prosecutions*<sup>58</sup>) reaffirmed that this is the case, holding that while an abstract challenge is permissible:

*[t]his does not [...] make it irrelevant that this challenge is brought in the abstract. Courts generally treat abstract challenges with disfavour. And rightly so. [...] Abstract challenges ask courts to peer into the future, and*

<sup>55</sup> *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* [1998] ZACC 15; 1999 (1) SA 6.

<sup>56</sup> (1982) 4 EHRR 149.

<sup>57</sup> (1991) 13 EHRR 186.

<sup>58</sup> *Savoi & Others v National Director of Public Prosecutions & Another* [2014] ZACC 5; 2014 (1) SACR 545 (CC).

Former Minister of Justice  
Dullah Omar opposed the  
decriminalisation of sodomy,  
forcing the National Coalition  
for Gay and Lesbian Equality to  
go to the Constitutional Court.

Photograph: Luck Morojane ©



*in doing so they stretch the limits of judicial competence. For that reason, the applicants in this case bear a heavy burden – that of showing that the provisions they seek to impugn are constitutionally unsound merely on their face.*<sup>59</sup>

Nevertheless, the NCGLE ultimately decided that it could not justifiably refuse to bring a challenge until someone was charged. It considered that the effects and stigma created by criminalisation were so severe that the challenge had to be brought on a proactive, abstract basis.

Moreover, bringing the challenge in this way would allow the NCGLE a far greater degree of control over the litigation, its timing and characterisation than would have been the case with regard to a defensive challenge.

The NCGLE was presumably also influenced by the obvious strength of the merits of the case, and the fact that both the Dudgeon and Norris decisions mentioned above had been brought successfully in a largely abstract fashion.

Secondly, a related question was

whether it was necessary or appropriate for there to be an individual gay or lesbian person as an applicant, who would have to go on oath and say that he or she had committed an offence. The NCGLE took the view that in light of the broad standing provisions in South Africa's Constitution (an issue dealt with in Chapter 5) this was not necessary.

Thirdly, another issue that arose was whether the constitutional challenge should be confined to the rights to dignity and equality, or whether the right to privacy should also be invoked. This was a matter of some controversy as there were concerns that relying on the right to privacy might send the wrong signal. As explained in 1992 by later Justice Edwin Cameron (then a leading public interest lawyer and openly gay man):

*[T]he privacy argument has detrimental effects on the search for a society which is truly non-stigmatizing as far as sexual orientation is concerned. On the one hand, the privacy argument suggests that discrimination against gays and lesbians is confined to prohibiting conduct between adults in the privacy of the bedroom. This is manifestly not*

*so. On the other hand, the privacy argument may subtly reinforce the idea that homosexual intimacy is shameful or improper: that it is tolerable so long as it is confined to the bedroom – but that its implications cannot be countenanced outside. Privacy as a rationale for constitutional protection therefore goes insufficiently far, and has appreciable drawbacks even on its own terms.*<sup>60</sup>

In the end, the NCGLE decided to pursue the privacy argument as well as the equality and dignity arguments. It did so because the Dudgeon and Norris cases provided strong support for a finding of unconstitutionality on the basis of the privacy argument, and that it would therefore be unwise to jettison this argument. However, the NCGLE specifically drew the attention of the Constitutional Court to the concerns of Cameron set out above – meaning that the privacy argument was unlikely to be the sole basis for the judgment.

In a comprehensive and extensive judgment, the Constitutional Court unanimously struck down a series of

<sup>59</sup> *Savoi & Others v National Director of Public Prosecutions & Another op.cit.*, paragraph 13.

<sup>60</sup> Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, in *South African Law Journal*, Vol. 110: 1993, page 455.

*The gay and lesbian litigation demonstrates how fundamental it is that public interest organisations command sufficient legitimacy in the area in which they operate.*

criminal prohibitions contained in statutory and common law regarding the crime of sodomy. Moreover, it did so in ringing tones, condemning the manner in which gays and lesbians had been treated in South Africa, stressing their consequent vulnerability and the need for the law to protect them, and exhorting equal treatment for all, irrespective of sexual orientation.

One can only imagine how different the situation may have been had the first gay and lesbian public interest case concerned, for example, same-sex marriage.

This was not a remote prospect. At roughly the same time as the sodomy challenge was being launched, a foreign gay couple approached a leading South African human rights advocate and asked him to represent them in challenging the provisions of the law that prevented gay couples from getting married. The advocate indicated his concerns about bringing such a case at that time and also doing so on the basis of the wishes of a foreign couple, rather than a South African couple (which may have been more attractive to the court). He duly referred the couple to the NCGLE.

The NCGLE in turn explained to the couple that it had a careful and co-ordinated litigation strategy to achieve gay and lesbian equality steadily, but incrementally. The intention was to begin with victories that were easier to obtain and leaving more controversial and difficult issues, such as gay marriage, for later. The NCGLE explained that a defeat on the marriage case could have negative repercussions for a whole range of other gay and lesbian issues. The foreign couple recognised the value of this approach and, most critically, did not seek to undermine or second-guess the legitimacy of the Coalition. They therefore opted not to bring their application.

This demonstrates how fundamental it is that public interest organisations command sufficient legitimacy in the area in which they operate. Had there been no organisation equivalent to the NCGLE, or had the Coalition lacked sufficient legitimacy to persuade the couple to withdraw their case, the couple may well have proceeded to bring the same-sex marriage case at a time when, in our view, it may have faced real difficulties.

Indeed, at that stage, there were

virtually no court decisions anywhere in the world suggesting that a refusal to allow a same-sex marriage violated the right to equality, and while it is possible that the application would have succeeded in any event, the issue is open to some considerable doubt.

Instead, the NCGLE was able to proceed with its sodomy case and obtain the emphatic judgment to which we have already referred. This led to a series of cases brought by the NCGLE, or by gay and lesbian individuals.

## Subsequent cases

The next case brought by the NCGLE was *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*.<sup>61</sup>

This case concerned provisions in South African immigration laws which only allowed husbands or wives of South African residents to obtain rights to immigrate to South Africa. Thus, the legislation excluded same-sex life partners of South African citizens from obtaining the same benefits.

The case was a significant advancement

<sup>61</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC).





Judge Kathy Satchwell (left) with her partner Lesley Carnelley.

Photograph: Muntu Vilakazi & The Sunday Times ©

on the sodomy case. It went beyond establishing that gays and lesbians could not be criminally condemned for their actions. It was the first step in establishing that same-sex life partners ought to be afforded equivalent benefits to those granted to married heterosexual couples.

However, on the back of the sodomy judgment, the case proved relatively straightforward. Indeed, the government of the day, having opposed the matter in the High Court, withdrew a few days before the hearing in the Constitutional Court, meaning that there was no opposition to the order sought.

Again, the Constitutional Court had little hesitation in unanimously declaring that the law was invalid and, crucially for future cases, resolved the statutory difficulty itself by adopting a remedy of reading the words 'or same-sex life partner' into the legislation after the word 'spouse'. This was to have significant effects in the future.

In the years after the immigration decision, three cases were brought by gay and lesbian individuals seeking to achieve equality in specific areas. All were successful.

In *Satchwell v President of the Republic*

of South Africa,<sup>62</sup> a lesbian High Court judge challenged the constitutional validity of statutes and regulations which stated that only judges' spouses could obtain a series of pension and other benefits from the state, thereby excluding life partners of gay and lesbian judges from these benefits. The Constitutional Court struck down the relevant provisions and read in the words 'or same-sex life partner' to remedy the defect and to provide immediate relief to affected gays and lesbians.

In *Du Toit v Minister of Welfare and Population Development*,<sup>63</sup> another lesbian High Court judge and her partner successfully challenged the statutory prohibition on gay and lesbian couples jointly adopting children. Up to that point, gays and lesbians could adopt, but only individually, never as a couple. Notwithstanding the emotions sometimes raised by the issue of gay adoption, government did not pursue any objection to the case and a unanimous judgment was delivered declaring the statute invalid and

rectifying it in the same way as in the immigration case.

In *J & Another v Director-General, Department of Home Affairs*,<sup>64</sup> a lesbian couple undergoing artificial insemination challenged legislation that did not provide for registration of persons in permanent same-sex life partnerships as parents of children conceived. The Constitutional Court unanimously declared the legislation unconstitutional and remedied it in the same manner as previously.

## Same-sex marriage cases

In light of all of these victories, it rapidly became clear that the principal issue on which legal finality had not yet been obtained was the question of gay marriage. It should be noted that not all members of the gay and lesbian community felt that the achievement of gay marriage was necessarily desirable and certainly not the ultimate prize. However, for many people, it represented a vital step.

Crucially, from a litigation strategy

<sup>62</sup> *Satchwell v President of the Republic of South Africa* [2003] ZACC 2; 2002 (6) SA 1 (CC).

<sup>63</sup> *Du Toit v Minister of Welfare and Population Development* [2002] ZACC 20; 2003 (2) SA 198 (CC).

<sup>64</sup> *J & Another v Director-General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) SA 621 (CC).

*From a litigation strategy perspective, there was growing recognition by Constitutional Court judges that a major difficulty arose from the state's failure to deal with gay and lesbian relationships holistically.*

perspective, there was growing recognition by Constitutional Court judges – developed over the course of the various decisions and sometimes even manifested in comments from the bench – that a major difficulty arose from the state's failure to deal with gay and lesbian relationships holistically, or to allow them the same general benefits as accrued to married heterosexual couples. Indeed, the Supreme Court of Appeal had gone so far in *Du Plessis v Road Accident Fund*<sup>65</sup> as to develop the common law of delict by extending the spouse's action for loss of support to partners in permanent same-sex relationships.

Initially, however, it was not the NCGLE or its successor organisations that took the first move in challenging the prohibition on same-sex marriages. This was instead done by an individual lesbian couple in the case of *Fourie v Minister of Home Affairs*.<sup>66</sup>

In its original form, this case was not without its difficulties. Indeed, it initially failed in the High Court, with the judge concluding that the

applicants' case was doomed because they had only attacked the common law definition of marriage (which excluded gay and lesbian partners) and not the Marriage Act 25 of 1961, which would, in any event, prevent gays and lesbians from getting married.

Whatever the correctness of the High Court's view on this issue, its judgment demonstrated the difficulty of such a complex case being launched by individuals rather than by an organisation such as the NCGLE, which had great experience in litigating these kinds of matters and access to the top constitutional lawyers.

Nevertheless, on appeal, the case gave rise to a Supreme Court of Appeal judgment holding that the common law definition of marriage as excluding gay and lesbian partners was unconstitutional.

However, while government may have acquiesced in findings of unconstitutionality in other gay and lesbian cases, it was not prepared to let this matter rest. Instead, it mounted a substantial appeal to the Constitutional Court seeking to have the decision of the Supreme Court of Appeal overturned.

By that stage, however, the LGEP (effectively a successor to the NCGLE) had marshalled its resources and had launched a separate application in the High Court seeking to attack the relevant provisions of the Marriage Act. This timely intervention meant that the issue could be dealt with as a whole in the Constitutional Court and avoided the technical difficulties that had bedevilled the *Fourie* applicants in the High Court. It also meant that the Constitutional Court was not faced merely with individuals who were complaining about their desire to marry, but also with a credible organisation demonstrating that this was a widely held view among gays and lesbians.

Ultimately, despite the vigorous government appeal and the intervention by a number of Christian groups opposed to same-sex marriage, the Constitutional Court held unanimously in *Minister of Home Affairs v Fourie*<sup>67</sup> that it was unconstitutional for common law and for legislation to prohibit same-sex marriage. The only dissent related to the appropriate remedy, with one judge suggesting that the declaration of invalidity should take

<sup>65</sup> *Du Plessis v Road Accident Fund* [2003] ZASCA 86; 2004 (1) SA 359 (SCA).

<sup>66</sup> *Fourie & Another v Minister of Home Affairs & Others* [2004] ZASCA 132; 2005 (3) SA 429 (SCA).

<sup>67</sup> *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC).



Demonstration in favour of gay marriage in 2006.

Photograph: Nadine Hutton ©

effect immediately, while other judges suggested that it should take place over a longer term to allow Parliament to correct the defect itself.

That all 10 sitting judges of the Constitutional Court (including some who could legitimately be described as relatively conservative) were able to reach a unanimous decision is remarkable. In our view, this must be attributed to a significant degree to the careful litigation strategy embarked on by the NCGLE over the preceding eight years. This strategy succeeded in establishing and entrenching principles regarding the need for equal treatment of gays and lesbians in all contexts so emphatically that it made it virtually impossible for the Constitutional Court to do anything else but follow through to the logical conclusion that allowing for same-sex marriage (in one form or another) was necessary.

What remained was to lobby Parliament to persuade it to amend the law to allow gay marriage as required by the Constitutional Court order within 12 months.

This, however, turned out to be a difficult process. Public hearings held on proposed legislation produced

vigorous public dissent on the issue, and some members of Parliament were apparently deeply uncomfortable with the suggestion that gay marriage should be allowed.

Nevertheless, armed with the powerful Constitutional Court precedent and the threat that at the end of the 12-month period, the Court's order of invalidity would come into effect, the Civil Union Act 17 of 2006 was passed, giving gays and lesbians the right to obtain virtually all the benefits of marriage without actually calling a gay or lesbian union a 'marriage'.

The Act is certainly not perfect and some members of the gay and lesbian community have significant objections to it. What cannot be doubted, however, is that it represents a massive advance on many countries in the world in that the Act confers virtually all the benefits of marriage on same-sex couples.<sup>68</sup>

<sup>68</sup> In an additional case, *Gory v Kolver NO & Others* [2006] ZACC 20; 2007 (4) SA 97 (CC), the Constitutional Court upheld another victory for gay and lesbian litigants. It held that it was unconstitutional for the inheritance laws of South Africa to confer inheritance benefits on heterosexual spouses, but not on same-sex life partners.

## Lessons

In our view, the litigation of the NCGLE, its successors and individual gays and lesbians provides a virtual blueprint regarding successful public interest litigation in terms of achieving legal change. When (in Chapter 4) we set out the seven factors that we believe to be critical in maximising the prospect of public interest litigation succeeding and achieving social change, practically all of them were present in this campaign. They include particularly:

- the presence of a well-organised litigant who was a repeat player in constitutional litigation;
- an overall long-term strategy to achieve a goal step by step;
- an organisation that not only co-ordinated litigation around these issues, but generally had the legitimacy to ensure that the correct cases were brought at the right time; and
- an impeccable sense of timing.

However, the very same example also demonstrates that even the best planned and executed litigation which succeeds in achieving legal change may have far more limited effects in terms of social change.

On the one hand, the social change resulting from the litigation in this area is obvious. Gays and lesbians have experienced massive tangible benefits – they can have sex lawfully, they have immigration rights, can adopt children, derive pension and inheritance benefits, and they can enter into civil unions.

On the other hand, there remains a massive gulf between this legal recognition and the attitude of many ordinary South Africans. As one of our respondents in the gay and lesbian sector explained:

*Litigation strategies must be coupled with community-based activism and popularisation of legal advocacy to allow a deepening of public engagement with the issue of socio-economic rights. Rights are not only won through the courts, for they are only as lasting and meaningful as the extent to which they can be accessed. In our sector, an over-reliance on legal means to facilitate social change has meant that we now have a large gap between the policy and the personal reality on a range of rights issues.*

The respondent emphasised this point repeatedly throughout the engagement with us:

*A growing gap exists between our Constitution, our law and public opinion [...] The translation of technological argument into a colloquial argument should be a strategy that forms part of any litigation aimed at facilitating social change [...] The law may well create a vehicle for change and expand the parameters for such change, but the nature and extent of transformation will be driven by the people and communities that are impacted by litigation efforts.*

*Also, access to social justice will be facilitated by public processes and expanded services, not by legislative change alone. The power of administrative bureaucracies needs also to be taken on as part of the advocacy strategy to affect impact as a result of litigation. In many respects, the law is ahead of the populous and so the weightiness and legitimacy of political leadership and the legislature are critical in transformation that is meaningful and sustainable.*

The gay and lesbian litigation examples thus demonstrate a key issue dealt with in this publication: Even where legal victories result in legal change and tangible benefits for those concerned, they do not necessarily achieve sufficient social change if they are not done in conjunction with additional social mobilisation and advocacy strategies.

This is demonstrated partly by the process around the Civil Union Act. If there had been greater public support for gay marriage at the time the legislation was being debated, it may have been possible to persuade Parliament to simply amend the Marriage Act to allow gays and lesbians to marry under that Act, rather than creating the separate Civil Union Act. Moreover, there would have been far less pressure to allow civil servants the right to refuse to perform civil union ceremonies on ‘conscientious objection grounds’, something that made its way into the Civil Union Act and which is of concern to many in the gay and lesbian community.

In the years following the 2008 report, none of the legal victories in this area have been overturned or retarded.

However, very regrettably, the situation on the ground has not improved and, if anything, appears to have worsened. This has been compounded by significant structural and funding challenges facing organisations dedicated to promoting gay and lesbian rights.

## The Grootboom case on the right to housing

Our second case study – the Grootboom case – is perhaps the best known of South Africa’s cases on socio-economic rights.<sup>69</sup>

In some ways, the Grootboom case could not present a greater contrast with the gay and lesbian litigation discussed above. While the gay and lesbian litigation took place on the basis of a carefully formulated strategy over eight years and through multiple cases, the Grootboom litigation was a single case brought under circumstances of great urgency to deal with people in a truly desperate situation.

Though the basic facts of the case and the legal principles enunciated are relatively well known, there has been little or no assessment of the underlying facts and circumstances that led to the litigation. Indeed, even the outcomes

<sup>69</sup> This section draws substantially on Steven Budlender’s unpublished 2004 LL.M. paper at the New York University School of Law, *Giving Meaning to the Right to Housing: The Grootboom Litigation in South Africa*. This paper was based on personal interviews conducted in August 2000 by Dr Elsa van Huyssteen and Steven Budlender with community members, lawyers and other role-players in the Grootboom case.





Irene Grootboom.

Photograph: Ambrose Peters ©

of Grootboom have generally been insufficiently considered.

It is necessary to sketch these facts, circumstances and outcomes properly in order to place the Grootboom litigation in accurate perspective and adequately draw lessons from it. This is particularly so given that (as noted earlier) our brief made it explicitly clear that one of the issues Atlantic sought our input on was the reasons for the difference in outcome in the Grootboom and TAC cases.

## Background

The Grootboom case arose in 1998 in the Wallacedene area in Cape Town, where approximately 4 000 residents lived, almost all of them in informal housing/shacks and in appalling conditions. More than a quarter of the residents had no income at all, and more than two-thirds earned less than R500 a month. There was no water, sewage or refuse removal and only 5% of the shacks had electricity. Most of the shacks were extremely small.

In September 1998, heavy winter rainfall had left part of the Wallacedene area waterlogged. In one part of the area, there was a foot of water in the

shacks, causing repeated illnesses and a general worsening of the already terrible conditions. This part was known as Mooi Trap ('step carefully') because of all the water. Given a housing waiting list of at least seven years, the residents faced the prospect of remaining in intolerable conditions for an indefinite period. As a result, some of the residents of Mooi Trap moved out of Wallacedene and erected their shacks on vacant, privately owned land nearby – land that had been earmarked for low-cost housing. They claimed that they did not know that the land was privately owned and that they only became aware of this when the first eviction order was served on them. The total of 390 adults and 510 children who ultimately moved to this land named it New Rust ('new rest'). These 900 people were to become known as the Grootboom community.

The owner of the land responded by instituting eviction proceedings against the Grootboom community. An eviction order was granted on 8 December 1998 in the local Magistrate's Court. The Grootboom community did not have a lawyer and was not represented at the hearing. They were given a date by which they had to

leave the land, but did not do so. They maintained that they had nowhere to go as the space they had previously occupied in Wallacedene had now been occupied by other people.

No eviction took place, apparently due to the landowner's lack of funds, but in March 1999, he once again took the community to court to have them evicted. This time, the presiding Magistrate engaged in an unusual move by phoning a local attorney whom he knew – Julian Apollos – and asked him to represent the community.

## The community's response to the eviction proceedings

With the community now having a lawyer, there was a need for an important strategic decision. What would the community's response to the eviction proceedings be? They could oppose the eviction and argue that the requirements of the governing statute – the Prevention of Illegal Evictions Act 19 of 1998 – had not been met. They could launch proceedings against the local municipality (Oostenberg) or other levels of government, arguing



*In some ways, the Grootboom case could not present a greater contrast with the gay and lesbian litigation. While the latter took place on the basis of a carefully formulated strategy over eight years and through multiple cases, the Grootboom litigation was a single case brought under circumstances of great urgency to deal with people in a truly desperate situation.*

that their constitutional rights were not being upheld. They chose to do neither. Instead, they entered into an agreement that they would vacate the land by 19 May 1999. The agreement also provided that there would be mediation between the community and the Oostenberg Municipality, and that the Municipality would conduct a study in an attempt to identify other land that the community could occupy temporarily or permanently.

This decision is intriguing and warrants close attention. There were two main reasons for the decision.

Firstly, Julian Apollos apparently took the view that there were no legal grounds to object to the eviction. However, it seems that this assessment may well have been incorrect. The Constitutional Court, in its later judgment, stated that:

*[...] nor is it clear whether the eviction was in accordance with the provisions of the Prevention of Illegal Evictions Act.<sup>70</sup>*

In retrospect, there was at least an arguable case that this Act meant that the community could not be

evicted without some alternative accommodation being provided, especially because so many members of the community were children.

Secondly, Apollos took the view that the mediation and the study by the Municipality would be done in good faith, and that there was a very good chance of resolution. This proved overly optimistic. It turned out that the Municipality had already done a study of the area and had concluded that there was nowhere else that could be allocated to the community. The mediation failed because the Municipality's only response was that the community should return to its old land in Wallacedene. As mentioned earlier, the community was of the view that this was impossible, because the space they had previously occupied had now been occupied by other people.

The decisions taken by Apollos and the community clearly signalled that they were not intent on legal action. Rather, like most other South African communities faced with eviction, they believed that they had few legal rights and that their best strategic option was to use the law to put off the eviction

for as long as possible. In doing so, they wanted to use their only strategic advantage – the fact that they were on the land – to secure some form of settlement from what they hoped would be sympathetic authorities. There was certainly no suggestion at this stage that the law or the Constitution could or should be used against the Oostenberg Municipality. Indeed, Apollos and the community were relying on the goodwill of the Municipality. To instigate litigation would thus have been potentially very damaging to their chances of being allocated other land by the Municipality.

Ultimately, however, they had underestimated their legal rights and overestimated the goodwill of the Municipality, and (with hindsight) the decision to agree to vacate the land was to prove a damaging one. By mid-May 1999, mediation had reached a dead end, and the community was still on the land with no place to go. On 18 May 1999, one day before the community was due to leave, the Municipality forcibly evicted the community. As the Constitutional Court later described it, the eviction:

<sup>70</sup> *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19; 2001 (1) SA 46 (CC), paragraph 10.

Children at the Zolane Community Centre in the Nyanga township, Cape Town 2008.

Photograph: Sofia Tosolari & Treatment Action Campaign ©



*[...] was done prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents' homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were not there could not even salvage their personal belongings.<sup>71</sup>*

The community was now truly homeless. There was no space for them to return to in Wallacedene and their building materials had been destroyed. They were forced to simply camp on the sports field adjacent to Wallacedene with whatever plastic sheeting and other materials they could find. Within a week of the eviction, the winter rains began, rendering any shelter that the community had virtually worthless.

## The launch of court proceedings

A week after the community had been evicted, Apollos wrote to the Oostenberg Municipality describing the intolerable conditions under which the community was living and demanding that the Municipality meet its constitutional obligations and provide temporary accommodation for the

community. The letter explained that if this was not done, the community would launch a High Court application to compel government to comply with its constitutional obligations. The Municipality responded that it had supplied food and shelter for the community at the Wallacedene community hall, which bordered the sports field. It also explained that it was approaching the Western Cape provincial government for assistance in dealing with the problem. However, the community was dissatisfied with this response since the community hall in question could only house 80 people, who were at any rate not allowed to stay there at night.

As a result, on 31 May 1999, Apollos launched an urgent application on behalf of the community in the Cape High Court. They sought an order:

*(i) Directing first respondent, alternatively one or more of the other respondents, forthwith to provide adequate and sufficient basic temporary shelter and/or housing for the applicants and their children in such premises, and/or on such land, as is/may be owned and/or leased by one or more of the respondents, pending applicants and their children obtaining*

*permanent accommodation;*

*(ii) Directing first respondent, alternatively one or more of the other respondents, forthwith to provide adequate and sufficient basic nutrition, shelter, health and care services and social services to all of the applicants' children.<sup>72</sup>*

It was the first time the community had asserted any of its constitutional rights with regard to shelter and housing. Indeed, it may have been the first time any community in South Africa had asserted such rights. Despite the fact that the right to housing had been in the Constitution for over 18 months at that time, and despite the fact that many communities had been faced with eviction and forced to live in conditions just as terrible as those of the Grootboom community, to our knowledge there had been little or no litigation by communities claiming this right.

Taken at face value, the strategic decision to embark on litigation is in itself unremarkable. Negotiations had failed, the community no longer held the advantage of being on the disputed

<sup>71</sup> Ibid.

<sup>72</sup> *Grootboom & Others v Oostenberg Municipality & Others* [1999] ZAWCHC 1, Introduction.

*The Grootboom litigation may have been the first time any community in South Africa had asserted its constitutional rights to shelter and housing, despite the fact that the right to housing had been in the Constitution for over 18 months at that time, and despite the fact that many communities had been faced with eviction and forced to live in conditions just as terrible as those of the Grootboom community.*

land and they no longer trusted the Municipality. But this view obscures a broader question – what was it that put this community in a position to demand their rights when virtually no other community had done so?

It appears that there were three key factors:

- the community had legal representation;
- there was an unusually high level of community organisation; and
- politics.

The first factor – that Apollos was asked to represent the community by the Magistrate and agreed to do so with no likelihood of fees being paid – was crucial. It was Apollos who suggested litigation, drafted the court papers and secured the advocates to argue the case. Without his involvement, the litigation would not have occurred.

The presence of Apollos also relates to the second factor – the high level of community organisation. When the community first met with Apollos during the eviction hearings, he had to deal with more than 150 adults simultaneously. He refused to do so and insisted that the community elect a five-person committee to deal

with him. They did, and it was then that Irene Grootboom and Lucky Gwaza emerged as the leaders of the community. This committee was to play a key role in directing the strategies of the community, in providing the information and background necessary for the court application and in keeping the community involved in and informed of the court application. The committee was assisted in this regard by Doris Neewat, a former ANC councillor who lived nearby and had a law degree, but who was not a practising lawyer.

However, it is the third factor – politics – which is the most intriguing. It is not discussed at all in court records or in the Constitutional Court judgment that prior to launching the court application, the community tried to take the matter into its own hands. A few days after being evicted, the community organised a march to the offices of the Oostenberg Municipality. They were encouraged to do so by Doris Neewat. The marchers forced their way into a council meeting and demanded that something be done about their plight.

Although the municipal councillors were unmoved by the community's actions, they did respond in one way

that was to prove important. They phoned a prominent provincial ANC politician and asked him to sort out the situation. He immediately held discussions with the community leaders, and with Apollos and Neewat.

Far from resolving the situation, however, it was during these discussions that the community decided to embark on legal action against the Municipality. While it is clear that the community saw this as a way of gaining access to some relief and possibly housing, there were broader political ramifications at play. Various ANC role-players, including the prominent provincial politician already referred to, wanted to demonstrate that the New National Party (NNP – the then opposition party which controlled the relevant province and municipality) was not serving the community adequately. This was particularly pertinent because the 1999 national and provincial elections were at that point only a couple of weeks away.

This political backdrop to the case is important for a number of reasons:

- It again points to the fact that neither Apollos nor the community was intent on legal action. The community was intent on using

Khayelitsha on the Cape Flats, Cape Town 2007. Khayelitsha is reputed to be the largest and fastest growing informal settlement in South Africa.

Photograph: Audra Melton ©



- popular pressure, and Apollos was following his clients' instructions and had therefore not instituted legal proceedings. It was the intervention of the ANC provincial leadership that led to court action.
- It demonstrates that even at this early stage of the case there was already a potential divergence of interests between, on the one hand, the community and their lawyer and, on the other, the broader political cause of embarrassing the NNP.
  - And most importantly, it suggests that the demand of rights would not have happened in the same way had the community and its attorney not been strong ANC supporters and therefore pitted against the NNP-run local municipality.

## The High Court proceedings

Ultimately though, and whatever the initial political intentions, the litigation was launched against all three levels of government involved in providing housing – local and provincial government controlled by the NNP, and national government controlled by

the ANC. The attack focused only on the provision of housing or shelter for the 900 applicants – not for any broader group.

A few days after the urgent application had been lodged, a Cape High Court judge conducted an *in loco* inspection of the conditions under which the Grootboom community was living. He was sufficiently moved to order that – pending the final determination of the application – temporary accommodation be provided for the children in the community hall, as well as for one parent of each child who required supervision.

The High Court ultimately concluded that given the pressing demands on the state's scarce resources, it had not breached its obligations under the right to housing in terms of Section 26 of the Constitution, especially because this Section explicitly referred to the 'available resources' of the state. However, the Court did conclude that the state was in breach of its obligations to provide children with shelter in terms of Section 28(1)(c) of the Constitution because it had not provided shelter to children in a situation where their parents were unable to do so.

This was an enormous victory because, for the first time, the socio-economic rights in the Constitution seemed to have come to fruition. The community's lawyers did an excellent job of portraying the dire situation in which the community found themselves – a portrait that was undoubtedly greatly assisted by having literally hundreds of community members in court, including children and babies. Faced with scenes of desperate people and knowing the dreadful winter conditions in the Cape, there was clearly immense pressure on the Court to give the community some relief.

However, despite the victory, it was already becoming clear that the hurried manner in which the case had been litigated, and the fact that the legal team lacked experience in the new, untested realm of socio-economic rights meant there had been some significant errors. As the Cape High Court judgment made clear, the application of the Grootboom community had given insufficient attention to the remedy that would be appropriate. The community had not indicated the nature of the shelter to be provided, its location, or which of the respondents should be responsible therefore. Indeed, it was



*The High Court ruling in the Grootboom case was an enormous victory because, for the first time, the socio-economic rights in the Constitution seemed to have come to fruition.*

only in the replying affidavits that the applicants, through their attorney, made some practical suggestions as to the nature of the relief. The Court therefore could not grant any specific relief and was forced to postpone the case for three months, pending proposals from both sides on the relief that should be given.

## The Constitutional Court hearing

Before this could be done, however, government launched an appeal against the judgment before the Constitutional Court. The Court granted leave to appeal and set the case down for hearing. At the same time, the South African Human Rights Commission (SAHRC) and the Community Law Centre (CLC) intervened as *amici curiae*, represented by the LRC.

When the case was heard before the Constitutional Court and when the Court ultimately delivered its judgment, a fundamental shift occurred from the original narrow case to a far broader cause.

Firstly, the Constitutional Court proved extremely reluctant to follow the High

Court approach and decide the case on the basis of the rights of the children involved. This was partly because it would then mean – in this case as well as in future cases – that adults without children would not be accommodated at all, which seemed at odds with the spirit of the Constitution.

More importantly, because the children's rights contained no limitation with regard to resources, upholding them here would potentially 'open the floodgates' to all claims from homeless children, which would place unmanageable pressure on the state and the courts. With this concern in mind, the Constitutional Court hearing and judgment focused on the right to housing (Section 26 of the Constitution) instead of the children's right to shelter (Section 28). This was despite the fact that the community's lawyers had abandoned this leg of their argument when the case reached the Constitutional Court, presumably because it had been so thoroughly dismissed by the Cape High Court.

The space for the Constitutional Court to focus on Section 26 was created partly by the submissions of the LRC, representing the *amici curiae*, which urged the Court to decide the case on

Section 26 instead of Section 28. The LRC argued that government's housing programme, though substantial in size, did not comply with the state's obligations under Section 26 and contended that it was important for the Court to clarify this in its judgment and order to ensure that the Constitution was upheld.

Secondly, the case shifted away from the particular needs of the Grootboom community.

At the start of the Constitutional Court hearing, government surprised everyone by offering the community:

*[...] some alternative accommodation, not in fulfilment of any accepted constitutional obligation, but in the interests of humanity and pragmatism.<sup>73</sup>*

This was not an offer of settlement and the community accepted the offer without prejudice.

As an aside, though the offer was not one of settlement, this illustrates how easily government might have used the narrow claim of the particular group of plaintiffs to thwart the precedent-

<sup>73</sup> *Government of the Republic of South Africa & Others v Grootboom & Others op.cit.*, paragraph 91.



The 'Red Ants' (guards hired by the municipal authorities) breaking down shelters and evicting residents from an 'illegal' informal settlement in Eldorado Park, south-western Johannesburg, in 2003.

Photograph: Nadine Hutton ©



setting value of the case. A proper offer of settlement to the plaintiffs would have been almost impossible to resist and this would have prevented the case going ahead and a Constitutional Court-level precedent being established.

Nevertheless, the offer had a significant effect. Suddenly, it seemed far less important for the Constitutional Court to give a remedy that assisted the community directly. The Court therefore began to look even more closely at the broader implications of the case, rather than the plaintiffs involved.

This was exacerbated by a decision not to have any community members present at the proceedings. While this must have seemed sensible at the time, one can never overestimate the value of having real plaintiffs being visible at court proceedings – especially where the plaintiffs' circumstances were as sympathetic as those of the Grootboom community.

Thirdly, again at the instance of the LRC, the focus of the legal arguments became whether the precise parameters and contours of government's housing policy met its constitutional obligations.

This was a shift from the far starker arguments that the plaintiffs' lawyers were making, which asked simply whether these people had housing, and if not whether government could afford to supply it to them.

These shifts had a profound effect on the outcome of the case. In its judgment, the Constitutional Court:

- reversed the Cape High Court's ruling on both issues before it by finding a violation of Section 26 (the right to housing) but not a violation of Section 28 (children's right to shelter);
- emphatically rejected the notion that the constitutional rights could be used by individual plaintiffs to claim 'housing on demand', finding instead that such cases only involved an evaluation of the 'reasonableness' of the government programme at issue; and
- did not give a tangible remedial order to the community, despite finding a violation of Section 26. Instead, the Court issued a declaratory order explaining that government's policy generally was a breach of the right to housing in Section 26. It declared as follows:

(a) Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing.

(b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

(c) As at the date of the launch of this application, the state housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in paragraph (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.<sup>74</sup>

<sup>74</sup> Government of the Republic of South Africa & Others v Grootboom & Others *op.cit.*, paragraph 99.

*When the Grootboom case was heard before the Constitutional Court and when the Court ultimately delivered its judgment, a fundamental shift occurred from the original narrow case to a far broader cause.*

## The effect of the Legal Resources Centre intervention

The intervention of the LRC had complex repercussions. On the one hand, the intervention may be seen as damaging to the case because it took the focus away from the individual plaintiffs and their situation and focused on government's housing programme to the potential exclusion of individual relief. However, in our view, had it not been for the intervention of the LRC, it appears quite possible, and even likely, that the case might have been lost and would not have produced any binding precedent in favour of the right to housing for the plaintiffs, particularly once they had accepted government's humanitarian offer. The critical role of the LRC's intervention was emphasised by then Justice Albie Sachs. As he explained:

*The amicus intervention swung the debate dramatically. Most of the preceding arguments had failed to really look socio-economic rights in the eye. There had been technical arguments and attempts to frame the case in terms of children's rights, but [the LRC intervention] forced us*

*to consider what the nature of the obligations imposed by these rights was. Although we didn't accept the entire argument of the amici, this wasn't vital. What was important was the nature of the discourse. It was placing socio-economic rights at the centre of our thinking and doctrine.*<sup>75</sup>

One has to accept that this was an exceptionally difficult case. It was not a case about government doing nothing or ignoring the Constitution. Government had put in place a massive housing programme to deliver housing to poor people, and the Constitutional Court was acutely aware of the challenges facing government. The Court cited figures stating that, between March 1994 and September 1997, 362 160 houses had been built or were under construction, while an overall total of some 637 190 subsidies had been allocated by October 1997 for projects in various stages of planning or development.

Thus, for all the blunt arguments made by the Grootboom community's lawyers about how their clients did not have housing, it was far from clear

that this amounted to a breach of the right to housing when government was distributing houses to thousands of poor people, but had not reached these plaintiffs yet.

What the LRC's intervention managed to do was analyse government's housing programme with a sophistication and nuance that was lacking in the plaintiffs' case.

The LRC emphasised the size and scope of government's housing programme, but argued that it suffered from a crucial flaw – it was an 'all-or-nothing' policy. While poor people did get proper houses under the policy, they were often left waiting for years on inordinately long waiting lists.

The LRC argued that in addition to the housing programme, the Constitution required government to do something in the interim for people who were waiting and living in appalling circumstances. This involved security of tenure, effective protection from the elements, and basic water and sanitation services.

Though a number of the LRC's legal submissions were ultimately rejected, its approach to and analysis of government's housing programme

<sup>75</sup> Albie Sachs, *Concluding Comments on the Panel Discussion*, in ESR Review, Vol. 8, No. 1: May 2007, pages 18-19.

Living conditions for the Grootboom community in 2007.

*Photograph: Legal Resources Centre ©*



proved to be the core around which the Constitutional Court judgment was based. In particular, it looked at government's policies and showed that government itself had identified the need for an 'accelerated land management settlement scheme' that would cater to people in desperate need, but had failed to put such a programme in place.

Without the LRC's intervention and approach, it is quite possible that the Grootboom case would have had to go the way of *Soobramoney v Minister of Health, KwaZulu-Natal*. As noted in Chapter 1, there in its first decision on socio-economic rights, the Constitutional Court held that it could not come to the assistance of a dying man needing dialysis treatment as government's policy did not violate the right to health care.

A loss in the Grootboom case, following the loss in the *Soobramoney* case, would have been potentially devastating to future socio-economic rights litigation in South Africa.

## Outcomes of the case for the Grootboom community

As has been discussed above, at the hearing of the case before the Constitutional Court, government made an offer of some temporary accommodation for the community consisting of a marked-off site, provision for temporary structures intended to be waterproof, and basic sanitation, water and refuse services. As noted, the Grootboom community accepted the offer. The Court's judgment referred to this offer and its acceptance, but gave the community no additional relief.

However, the offer (which should have been relatively simple to implement) took months to materialise. It was made on 11 May 2000, but four months later – and with the Constitutional Court judgment still pending – nothing had been done to fulfil it. The Grootboom community was therefore forced to go back to the Constitutional Court with an urgent application to compel fulfilment of the offer. At the hearing of the urgent application, the parties

agreed on details regarding the implementation of the offer and these details were then, by consent, made an order of court.

Over the following few months, the offer was gradually implemented. The community continued to live on the Wallacedene sports field in their shacks, while government put in place the temporary and then permanent sanitation and water services required by the urgent order. Also, as per the urgent order, government paid over an amount of R200 000 for the purposes of obtaining materials to make the community's shacks waterproof. At the insistence of the community, these materials were bought and distributed by Julian Apollos rather than by government to ensure that the community got substantial value for money.

Though government had taken months to comply with its own offer and the terms of the urgent order, and notwithstanding some disagreement about whether every aspect of the order had in fact been complied with, it is clear that generally the terms of the offer and order were fulfilled.

However, it is equally clear that,

*Nearly 300 government houses were eventually distributed to the Grootboom community in July 2008 – more than eight years after the Constitutional Court judgment – but it remains unclear precisely how many of those involved in the case benefited.*

despite this, the majority of the Grootboom community continued to live in appalling conditions for many years. Nearly 300 government houses were eventually distributed to the community in July 2008<sup>76</sup> – more than eight years after the Constitutional Court judgment – but it remains unclear precisely how many of those involved in the case benefited.

This is demonstrated most emphatically by the position of Irene Grootboom herself. Mrs Grootboom died in August 2008, a month after the nearly 300 houses had been distributed to her community. She was penniless and still homeless,<sup>77</sup> living in the shack that she had built on the Wallacedene sports field. She was not allotted one of the 300 houses, though the spokesperson for the Western Cape MEC for Housing – at the time of the handover of the houses to the community – had stated that she was bound to benefit “in the next round”.<sup>78</sup> After negative publicity sparked by her death, Mrs Grootboom’s family eventually received a house in

September 2008.<sup>79</sup>

This appalling state of affairs led to obvious disillusionment within the community regarding the legal processes and their effect. The disillusionment stemmed mainly from the perception that the court victory meant that the community would be entitled to get actual housing, rather than some temporary form of shelter. Though the community was very pleased with the temporary offer made by government and celebrated when it was fulfilled, it continued to feel frustrated about the years where it had not been accommodated in government’s formal housing programme. This frustration was unsurprising and understandable. In the view of the community, and even in the view of the arguments that the community’s lawyers made before the court, this was a case where people’s rights had been violated because they were homeless. The natural remedy, of course, would then have been to provide the necessary housing.

From a technical point of view, the reality was slightly different. Nothing in the Constitutional Court judgment

suggested that formal housing for the community was on the immediate horizon. Rather, the Court’s judgment focused on the far narrower violation that took place because government did not have a programme in place to provide temporary relief to people in desperate situations. In fact, the Court went as far as to stress that government’s formal housing programme was:

*[a] major achievement. Large sums of money have been spent and a significant number of houses [have] been built.<sup>80</sup>*

It did find, though, that the housing programme was having, at best, a small effect on the massive housing backlog facing South Africa.

In truth, however, this technical issue is beside the point. It is difficult to conceive why, in the unusual circumstances of this case, relevant government officials did not make some arrangements for the community until eight years after the judgment.

A significant part of the explanation appears to have been that the Grootboom community no longer had

<sup>76</sup> *Hundreds say farewell to housing heroine*, IOL news: 10 August 2008.

<sup>77</sup> *Grootboom dies homeless and penniless*, Mail & Guardian: 8 August 2008.

<sup>78</sup> *Hundreds say farewell to housing heroine op.cit.*

<sup>79</sup> *W Cape government apologises*, IOL news: 10 September 2008.

<sup>80</sup> *Government of the Republic of South Africa & Others v Grootboom & Others op.cit.*, paragraph 53.





Many South African communities are still in dire need of decent housing.

Photograph: The Kuyasa Fund ©

effective legal representation. A few months after the case concluded, Julian Apollos merged his small law firm with the larger firm that had represented the Oostenberg Municipality in the case. There is no other law firm in close vicinity. This meant that recently, when the Grootboom community wanted to consider bringing another action against government, it had no lawyer to represent it.

At the same time, the organisational structure of the community had also been significantly weakened. In 2007, when the LRC attempted to assist the community to negotiate with government, there seemed to be a lack of effective community leadership, which made the process extremely difficult.

As one of Mrs Grootboom's lawyers said after her death:

*[T]he fact that she died homeless shows how the legal system and civil society failed her. [...] I am sorry that we didn't do enough following-up after judgement was given in her favour. We should've done more. I feel a deep regret today.<sup>81</sup>*

<sup>81</sup> Grootboom dies homeless and penniless op.cit.

## Broader outcomes

Despite the extraordinary disappointment one feels regarding the situation of Mrs Grootboom herself, it must be stressed that the Grootboom case has had a significant and tangible effect in a number of broader respects.

Firstly, the decision significantly affected government's housing policy, although it did not appear so initially. The Grootboom case held that what the Constitution required was a short-term emergency relief policy for anyone who finds themselves in desperate circumstances.

At first, there was no sign of government putting such a policy in place. However, in August 2003, three years after the decision was given, national and provincial governments finally approved a short-term emergency relief policy for people in desperate circumstances. It is worth quoting a summary of the policy:

*[This policy] deals with the rules for exceptional urgent housing situations. [It relates] to assistance to people who, for reasons beyond their control, find themselves in a situation of exceptional and urgent housing need such as the fact that their existing shelter has been*

*destroyed or damaged, their prevailing situation poses an immediate threat to their life, health and safety, or they have been evicted, or face the threat of imminent eviction. The assistance provided consists of funds in the form of grants to municipalities to give effect to accelerated land development, the provision of basic municipal engineering services and shelter. The assistance provided falls short of formal housing as provided for in other Programmes of the Housing Subsidy Scheme contained in the Housing Code, and is thus rendered only in situations of exceptional and urgent housing need.<sup>82</sup>*

The emergency relief policy explicitly acknowledges that it was devised and accepted as a direct result of the Grootboom decision and aims to meet what the Grootboom case laid down as the constitutional requirements of the right to housing.

This was followed, in 2004, by the adoption of Chapter 12 of the *National Housing Code*. The Code sets out the principles, guidelines and standards that apply to state housing programmes.

<sup>82</sup> National housing programme: Housing assistance in emergency circumstances, Department of Housing: 2004.

*The Grootboom decision played a major role in altering South African law on housing and evictions, and impacted significantly on government's attitude to socio-economic rights and socio-economic rights cases.*

Chapter 12 of the Code provides for assistance to people who find themselves in a housing emergency for reasons beyond their control. It is again expressly stated to be enacted pursuant to the Grootboom decision.

Secondly, the decision played a major role in altering South African law on housing and evictions. The Constitution requires that no eviction be granted until all the relevant circumstances have been taken into account by a court. As a result, there are many court decisions which make it clear that, effectively, eviction orders in respect of poor people will only be given when they are coupled with orders directing the relevant municipality to provide emergency housing to those being evicted. This is so irrespective of whether the evictions are taking place at the behest of the municipality or private landowners.<sup>83</sup>

There can be no question that South African courts have massively departed from previous case law on evictions, and the Grootboom case has been an obvious driving force. As Stuart Wilson

has commented:

*[T]he true potential of [Grootboom] has only really come to light through multiple later decisions in which its potential to stave off evictions which are likely to lead to homelessness has been recognised.<sup>84</sup>*

In this regard, the impact of Grootboom has certainly been felt very strongly by people on the ground because, in effect, it gives them security of tenure that they would not otherwise have. This is important not only because of the inherent value of security of tenure, but also because security of tenure plays an important role in allowing ordinary people and communities to organise and mobilise to protect and demand their rights.<sup>85</sup>

Thirdly, the Grootboom decision impacted significantly on government's attitude to socio-economic rights and socio-economic rights cases. It loomed large as an indication

that where government fails to act reasonably, it will be taken to court and defeated. According to a number of our respondents, it was for this reason that parts of government began factoring these issues into budget processes and became far more responsive to lawyers' letters pointing out programme flaws and requesting information. This is despite the fact that many government departments and officials had misgivings about the decision. However, because they recognised that it was good law, which would be enforced against them in court, they took it into account.

Lastly, there can be no doubt that the Grootboom decision had an enormous impact on subsequent socio-economic rights litigation and will continue to be the foundational socio-economic rights decision for many years to come.

In 2002, for example, the Constitutional Court repeatedly relied on the Grootboom decision in deciding the TAC case. This case, which we deal with next, was an enormously important and controversial case dealing with the provision of drugs for the prevention of mother-to-child transmission of HIV. Given government's vociferous defence of its AIDS policy and the public

<sup>83</sup> See for example: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33; 2012 (2) SA 104 (CC).

<sup>84</sup> Stuart Wilson, *Litigating Housing Rights in Johannesburg's Inner City: 2004-2008*, in *South African Journal on Human Rights*, Vol. 27, Part 1: 2011, page 130. For an analysis of the housing cases decided by the Constitutional Court after 2008, see: Jackie Dugard, *HSRC Review of the Courts – Paper on Socio-Economic Rights*, unpublished: 14 July 2014.

<sup>85</sup> Presentation by Jackie Dugard at the *4th Public Interest Law Gathering*, held at the Wits School of Law, 23 July 2014.

People being evicted from a building in the Johannesburg inner city in December 2013.

Photograph:  
Matthew Wilhelm-Solomon ©



attention and controversy that the TAC case generated, it might have been expected that this would be a difficult and close decision. The reality though, as various respondents made clear to us, was that it was the Grootboom principles regarding reasonableness that made the TAC decision relatively easy, at least as to whether there had been a violation of the Constitution. Without the Grootboom case, the TAC case would have been far more difficult to launch and decide, and – in the words of one of our respondents:

*[...] may not have happened at all when it did.*

The approach in the Grootboom case and the principles it laid down have also had a substantial effect in a number of socio-economic rights cases that have been brought subsequently on issues such as social grants,<sup>86</sup> education<sup>87</sup> and others, many of which produced very favourable settlements before the matters could even get to court. By holding that socio-economic

rights are enforceable and by insisting on subjecting all government socio-economic rights policies to a rigorous reasonableness standard, the Grootboom case has made possible many future cases to ensure that government is acting appropriately to achieve the progressive realisation of the socio-economic rights enshrined in the Constitution.

Thus, ironically, whatever the limits of the Grootboom case in terms of social change in the Grootboom community itself, it presented a remarkable and valuable victory that has played and will continue to play a key role in achieving tangible social change for other plaintiffs in a variety of areas.

A question that requires separate consideration though is whether and to what extent the identified third and fourth broader effects of the Grootboom case – that is, a more responsive attitude to socio-economic rights on the part of government and the effect on subsequent socio-economic rights litigation – were diminished by the later Mazibuko litigation. We address this further below as part of the Mazibuko case study.

## Lessons

The lessons to be learnt from the Grootboom case really permeate this entire publication. Suffice it to say at this point that the Grootboom case demonstrated that:

- Awareness of rights is an absolute precondition if communities are to enforce their rights in a manner that leads to social change.
- Advice and assistance are essential if people are to enforce their rights. This must include legal representation where necessary and, on a case of this scale and complexity, the legal representatives should ideally be familiar with national, foreign and international law at play.
- Although critical, the above facets are by themselves likely to be insufficient. What is necessary is for the communities to become socially mobilised, structurally organised and actively involved. This includes using political pressure wherever possible.

Finally, of all the factors necessary to ensure that litigation leads to social change, perhaps the most significant is follow-up. This applies irrespective of the kind of remedy granted by the court.

<sup>86</sup> See for example: *Khosa & Others v Minister of Social Development & Others* [2004] ZACC 11; 2004 (6) SA 505 (CC).

<sup>87</sup> See for example: *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Another* [2010] ZAWCHC 544; 2011 (5) SA 87 (WCC).



## The Treatment Action Campaign case on the prevention of mother-to-child transmission of HIV

One of the most well-known of all the decisions of the Constitutional Court, at least in the public eye, is the TAC case. Unlike the two case studies dealt with above, in the TAC case we have the advantage of a full written account of the background, strategies and outcomes of the case authored by someone directly involved in the case.

The article *Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign's case against the Minister of Health*<sup>88</sup> was written by Mark Heywood, co-founder of the TAC and its then National Secretary, and head of the AIDS Law Project (ALP – now Section27).

In what follows, rather than attempting to restate the facts relating to the TAC case in our own words, we have instead made extensive use of the article by Heywood.

### Background

For HIV-positive pregnant women, there is a 30% risk that the child will be infected with HIV, mostly during birth and the breastfeeding period. The issue of mother-to-child transmission (MTCT) of HIV was extremely important in South Africa given that, by 1998, it was estimated that up to 70 000 children were born with HIV every year, and there were already signs that HIV was causing a rise in infant mortality. Most of these children live short, painful lives, with HIV infection carrying a terrible toll for both parents and children.

One of the earliest and most enduring breakthroughs in the fight against the AIDS pandemic was the discovery in 1994 that the use of the antiretroviral (ARV) drug AZT could dramatically reduce the risk of MTCT. However, this would be of limited efficacy outside of industrialised countries because of the need to begin administering the drug relatively early in pregnancy and the infrastructural requirements for its delivery. Consequently, research began to find shorter and simpler ARV regimens that would also benefit patients in poorer countries. Ultimately, a clinical trial in Thailand demonstrated that a short course of AZT given to mother and child (starting at 36 weeks of pregnancy) still brought about significant reductions in MTCT.

It was with the aim of securing the benefits of these breakthroughs in medical science for mothers who were HIV positive that, as early as in 1997, various HIV and AIDS organisations began a period of sustained lobbying of the Minister and the Department of Health to develop a policy and

programme to prevent MTCT. The objective was to put pressure on government to implement the steps listed in the Department of Health's 1994 *National AIDS Plan for South Africa*. These included offering HIV testing at antenatal clinics on a voluntary basis and conducting research into methods of preventing perinatal transmission such as short-course AZT and non-nucleoside reverse transcriptase inhibitors.

The campaign received renewed impetus in December 1998 when the TAC was founded and set as one of its primary objectives a demand that government implement a programme to prevent MTCT. The TAC conducted extensive activities in this regard between 1999 and 2001, including meetings with the first and second post-1994 Ministers of Health, demonstrations, the drafting of memoranda, a 50 000-signature petition to the President and a campaign that targeted pharmaceutical companies to reduce the prices of essential ARV medicines, particularly AZT.

Initially, demands for a policy and plan on the prevention of mother-to-child transmission (PMTCT) received a relatively sympathetic ear from government. In 1998, for example, the Gauteng health department responded timeously to the results of the Bangkok-Thai study by announcing the establishment of five pilot sites where programmes to reduce MTCT would be introduced. On 30 April 1999, a meeting between the TAC and the then Minister of Health, Nkosazana Dlamini-Zuma, led to a joint statement that the price of AZT was the major barrier to a PMTCT programme, and to a promise that:

<sup>88</sup> Published in *South African Journal on Human Rights*, Vol. 19, Part 2: 2003, pages 278-315.





HIV-positive mother and  
HIV-negative child.

Photograph: Helen  
MacDonald ©

*[g]overnment would name an affordable price for the implementation of AZT to pregnant mothers and report within six weeks on the price and other issues pertaining to the prevention of mother-to-child transmission.<sup>89</sup>*

At this point, it appeared that the TAC's campaign would primarily target manufacturers of ARV medicines to force them to reduce their prices. However, an unanticipated and unfortunate diversion revealed itself in late 1999 – AIDS denialism.

Since the mid-1990s, a small group of scientists had developed a thesis that HIV had not been properly isolated as a virus, and that the real causes of AIDS were initially the recreational drugs taken by many gay men in the US in the late 1970s and early 1980s, and thereafter ARV medicines. This group (often referred to as 'AIDS dissidents') argued that, rather than helping to restore the immune system, ARV drugs destroy it by destroying cell replication and causing a range of life-threatening side effects. Although their arguments vary, the basic contention is that AIDS

in Africa is caused by poverty and that a range of poverty-related illnesses (such as tuberculosis) are misrepresented as HIV-related in order to create markets for first-world drugs, particularly ARVs.

When the TAC launched legal action to demand broader access to the drug Nevirapine in 2001, none of the affidavits filed by government officials made reference to these dissident views on ARV medicines or whether HIV is a cause of AIDS as reasons to justify the failure to develop or implement a programme. However, a sometimes hidden, sometimes open relationship was apparent between the then President Thabo Mbeki and AIDS denialists, and this seemed to be the primary reason for the delays in establishing a PMTCT programme.

The fact that such a relationship existed was first signalled in October 1999 in a speech by President Mbeki to the National Council of Provinces (NCOP). At the end of this speech, he unexpectedly questioned the safety of AZT and warned that the:

*[...] toxicity of this drug is such that it is, in fact, a danger to health.<sup>90</sup>*

The President informed the NCOP that he had instructed his new Minister of Health, Manto Tshabalala-Msimang (who succeeded Dlamini-Zuma in June 1999), to launch a probe into the safety of AZT and that, until it was complete, the drug would not be used in South Africa.

From this point onwards, progress in implementing a national programme to prevent MTCT was derailed. A few weeks later, on 16 November 1999, the Minister of Health announced to the National Assembly that although she was aware of the positive results of AZT:

*[...] there are other scientists who say not enough is yet known about the effects of the toxic profile of the drug, that the risks might well outweigh the benefits, and that the drug should not be used.<sup>91</sup>*

As a result, she instructed the Medicines Control Council (MCC) to review the use of AZT.

On 5 April 2000, the Minister of Health made a speech to Parliament that had all the hallmarks of 'dissidentese'. Raising

<sup>89</sup> Quoted from *Treatment Action Campaign News*, 26 July 2000.

<sup>90</sup> Department of Health, *Address to the National Council of Provinces*, Cape Town, 28 October 1999.

<sup>91</sup> Department of Health, *Statement to the National Assembly by Dr M E Tshabalala-Msimang MP, Minister of Health, on HIV/AIDS and related issues*, Tuesday, 16 November 1999.

*As early as in 1997, various HIV and AIDS organisations began a period of sustained lobbying of the Minister and the Department of Health to develop a policy and programme to prevent mother-to-child transmission of HIV. The campaign received renewed impetus in December 1998 when the TAC was founded.*

reasonable concerns about a number of deaths of adults on therapeutic drug trials that appeared to be associated with daily Nevirapine use as part of a combination of ARV drugs, she confused these deaths with the use of the same medicine for preventing intrapartum HIV transmission – despite the knowledge that it requires only one dose to mother and child and the fact that there were no reported adverse safety events concerning its use in PMTCT. Tshabalala-Msimang remained steadfast in opposition to AZT, stating that government would never use AZT in PMTCT.

## Government's choice of Nevirapine

An important development occurred in July 1999 when the first results of a drug trial in Uganda, known as HIVNET 012 (testing the efficacy of a single dose of Nevirapine in reducing MTCT), were released. The results showed that Nevirapine had similar efficacy to AZT but with a much less complex regimen.

In the face of presidential opposition to AZT, the Minister of Health and others latched on to Nevirapine as an alternative and quickly arranged a study

tour to Uganda, which included the objective of hearing more about the trial of this drug.

In answer to the growing pressure from the TAC, Nevirapine was now offered as government's probable medicine of choice and the TAC was persuaded to stall its demands pending the outcome of a local trial known as the South African Intrapartum Nevirapine Trial (SAINT). The TAC accepted the *bona fides* of the Minister, and for a period of nine months pressure on government was reduced. The TAC engaged in a number of other successful campaigns that aimed to bring down the price of essential anti-HIV medicines, and targeted patent abuse and drug pricing. This was generally not well received by clinicians working on PMTCT, who felt that the TAC had 'let government off the hook'.

As the preliminary results of the SAINT study (supporting the use of Nevirapine) had started to leak out in mid-2000, a new catalogue of excuses emerged from the Minister of Health. It seemed as if the clinicians' concerns were correct.

Fear of further delays and political interference in public health policy

appeared to be confirmed at the International AIDS Conference held in Durban in July 2000. The conference opened in controversy as President Mbeki spoke eloquently about poverty, but refused to name HIV as a specific challenge for Africa. At the same time, government declined an offer from Boehringer Ingelheim, the manufacturer of Nevirapine, of a 'free' supply of the drug for five years and reacted coolly to a preliminary announcement of the SAINT study results. It took the intervention of former President Nelson Mandela to quell the storm. In his closing speech at the conference, Mandela called for widespread interventions to prevent MTCT.

In response to these developments, the TAC publicly reinstated its threat of litigation. This threat of legal action in July 2000 raises important issues about the timing and objectives of the litigation. By this time, the TAC's campaign had already made government policy on PMTCT a matter of national concern and had achieved wide support. At the International AIDS Conference in Durban, the TAC seriously considered bringing an urgent High Court application

A sister at the Msunduzi Hospice comforts a dying man with AIDS at his home outside Pietermaritzburg, KwaZulu-Natal.

Photograph: Henner Frankenfeld  
& PictureNET Africa ©



for access to Nevirapine on behalf of several women in the late stages of pregnancy. However, despite scientific consensus on its safety and efficacy, the medicine was not yet registered in South Africa for PMTCT. AZT was registered, but it was felt that the greater cost of this medicine, together with a more complicated drug regimen, made successful litigation more difficult.

The TAC's legal counsel cautioned against commencing litigation before Nevirapine was registered, because although the TAC could point to precedents for 'off-label' use of medicines, and even instances where government policy endorsed this, a court would likely have stuck to the strict letter of the law. For a court formally to condone off-label use of medicines was inviting compromise in the system of medicine registration. There was no other option for the TAC but to continue the campaign while delaying the litigation. Pressure was now turned to the MCC to speed up registration of the drug, and to government to clarify its programme.

On 12 and 13 August 2000, the Department of Health convened a meeting with South African scientists to assess the new knowledge gleaned

from the Durban conference. After this meeting, the Health MinMEC – a committee consisting of the national Minister of Health and the heads (MECs – Members of the Executive Council) of the nine provincial health departments – decided that the current policy of not using AZT would continue and that the use of Nevirapine, once registered, would first be tested for two years at two pilot sites in every province. The reason for this was:

*[...] to determine whether or not the exercise would be feasible, taking into account all the operational issues. Should the pilot sites be successful, the next step would be phased implementation; should this not be possible the exercise would be terminated.<sup>92</sup>*

This approach ignored the ethical and constitutional obligation to provide Nevirapine to women who already knew they were HIV positive. It meant that even where a woman knew she was HIV positive and knew about the potential effects of Nevirapine but

wanted to take the drug, if she gave birth at a place other than a pilot site, she was not allowed to take the drug.

In April 2002, after substantial delays apparently due to significant political interference, the MCC finally formally registered Nevirapine for the prevention of intrapartum HIV transmission.

This removed the last obstacle to legal action. The TAC decided that both morally and politically it had no other option than to launch a case against government. As Heywood explains, the TAC was able to elicit the support of some of the most experienced constitutional lawyers in the country, whose commitment and professionalism were central to the success of the case.

## Politics and mobilisation

In essence, the TAC's challenge related to public health policy. It should have been managed by government as a legitimate challenge, envisaged and encouraged by the Constitution – similar, for example, to the Soobramoney case. But it was not.

Throughout this period, the denialist

<sup>92</sup> Health MinMEC Minutes, 18 August 2000, quoted from Mark Heywood, *Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign's case against the Minister of Health*, in *South African Journal on Human Rights*, Vol. 19, Part 2: 2003, page 286.

*In essence, the TAC's challenge related to public health policy. It should have been managed by government as a legitimate challenge, envisaged and encouraged by the Constitution. But it was not.*

AIDS policy was under fierce attack and the policy on Nevirapine – being essentially a manifestation of President Mbeki's AIDS policy – was ferociously defended. There also appeared to be political interference in the case, particularly apparent in pressure brought to bear on the SAHRC to withdraw its application to enter as *amicus curiae* in the case in support of the TAC.<sup>93</sup>

The TAC, however, was prepared for the politics that surrounded the case. It believed that the PMTCT policy was based on a political decision taken at the highest level of government. The TAC's constitution empowers it to engage in litigation as a means of challenging any type of discrimination relating to the treatment of HIV and AIDS in the private and public sector. This allows it to take legal action to enforce any right that is explicitly recognised in the South African Constitution. The reference to litigation in the TAC's constitution occurs in the same paragraph as a reference to:

*[...] lobbying, advocacy and all forms of legitimate social mobilisation.*<sup>94</sup>

For the TAC, litigation both emerges from and feeds back into a social context. Resort to litigation is not exclusive of other strategies. Litigation can also help catalyse mobilisation and assist public education on contested issues, as well as bring about direct relief to individuals or classes of applicants. Thus, between August and December 2001, the TAC engaged in intensive public mobilisation, attracting enormous support and media interest.

However, support within the TAC for a litigation strategy could not be taken for granted.

Internally, numerous workshops were conducted with TAC volunteers to explain the case. Externally, and among some of the TAC's main allies – particularly the Congress of South African Trade Unions (COSATU) – there was hesitation publically to endorse taking 'our' government to court. Going the route of litigation had to be defended against allies who considered it 'disloyal' or 'unpatriotic'. While COSATU welcomed each judgment in the TAC's favour, it never openly backed the litigation.

Mobilisation culminated on 25 and 26 November 2001, when rallies and

marches took place around South Africa, including an all-night vigil of 600 TAC volunteers outside the Pretoria High Court before the hearing commenced. For the two days of the hearing, the Court was packed with people wearing the TAC's trademark 'HIV-Positive' T-shirt, and with health professionals and journalists, all listening intently to the evolution of the argument.

The urgency of the case seemed to be understood by Judge Chris Botha, who handed down his judgment to a tense and expectant court on 14 December 2001. On all the key issues, the High Court found in favour of the TAC, commenting that in government's arguments:

*[t]here was no unqualified commitment to reach the rest of the population in any given time or at any given rate [...] a programme that is open-ended and that leaves everything to the future cannot be said to be coherent, progressive and purposeful.*<sup>95</sup>

Judge Botha further declared that:

*[a]bout one thing there must be no misunderstanding: a countrywide*

<sup>93</sup> Heywood, *op.cit.*, pages 299-300.

<sup>94</sup> *About the Treatment Action Campaign*, [www.tac.org.za](http://www.tac.org.za).

<sup>95</sup> *Treatment Action Campaign & Others v Minister of Health & Others*, High Court of South Africa (Transvaal Provincial Division), Case No. 21182/2001, page 24.





Former President Thabo Mbeki delivering his State of the Nation address at the opening of Parliament in February 2002.

Photograph: Trevor Samson ©

*MTCT prevention programme is an ineluctable obligation of the State.*<sup>96</sup>

The High Court's order was bold and original. It instructed government to allow Nevirapine to be prescribed where it was 'medically indicated' and where, in the opinion of the doctors acting in consultation with the medical superintendent, there was capacity to do so. The High Court also ordered government to develop:

*[...] an effective comprehensive national programme to prevent or reduce MTCT*<sup>97</sup>

and to return to the Court with this programme for further scrutiny before 31 March 2002.

The High Court judgment was welcomed in South Africa and worldwide. The acclaim, however, was not universal. In South Africa, it attracted the ire not only of government but also of a number of legal academics, one of whom declared it a case of "when judges go too far".<sup>98</sup> The accusation arose that the High Court had breached

the principle of separation of powers between the judiciary and the executive by interfering in health policy and ordering government to supply a specific medicine. Thus, on 18 December 2001, when the Minister of Health announced that she would seek leave to appeal directly to the Constitutional Court, it was claimed that the appeal was:

*[...] aimed at clarifying a constitutional and jurisdictional matter which, if left vague, could throw executive policymaking into disarray and create confusion about the principle of the separation of powers, which is a cornerstone of our democracy.*<sup>99</sup>

## The political and legal unravelling of government's case

When President Mbeki opened Parliament in February 2002, he appeared to shift government policy by promising that:

*[...] continuing work will be done to monitor the efficacy of antiretroviral interventions against mother-to-child transmission in the sites already*

*operational and any new ones that may be decided upon.*<sup>100</sup>

A few days later this shift seemed to be confirmed in a live television interview when President Mbeki explicitly stated that provinces should be able to provide a PMTCT programme according to their respective capacities and that provinces with the resources to extend the programme should not be delayed by provinces that did not have the resources.

This new approach appears to have been read by a number of senior ANC politicians as condoning the roll-out of the programme to health facilities where capacity existed or could easily be created. In particular, on 18 February 2002, the then ANC Premier of Gauteng, Mbhazima Shilowa, announced a bold roll-out of the programme. He promised that:

*[...] during the next financial year, we will ensure that all public hospitals and our large community health centres will provide Nevirapine.*<sup>101</sup>

<sup>96</sup> *Treatment Action Campaign & Others v Minister of Health & Others op.cit.*, page 25.

<sup>97</sup> *Treatment Action Campaign & Others v Minister of Health & Others op.cit.*, page 26.

<sup>98</sup> Kevin Hopkins, *Shattering the divide – when judges go too far*, in *De Rebus*, No. 409: March 2002.

<sup>99</sup> Department of Health, Press Release: 19 December 2001.

<sup>100</sup> *State of the Nation address by the President of South Africa, Thabo Mbeki, to the joint sitting of the Houses of Parliament, Cape Town, 8 February 2002*, [www.gcis.gov.za](http://www.gcis.gov.za).

<sup>101</sup> Quoted from *HIV drug to save 5 000 Gauteng babies a year*, Independent Online: 18 February 2002.

*On all key issues, the High Court found in favour of the TAC and issued a bold and original order. The judgment was welcomed in South Africa and worldwide, but attracted the ire of government and a number of legal academics.*

He also named nine further hospitals that would commence the programme within the next 100 days.

However, once again falling foul of public opinion and her own department – which had initially claimed that the Gauteng roll-out was within the parameters set by the Health MinMEC – the Minister of Health publicly rebuked Shilowa. Although Shilowa gave the impression of backing down after a behind-the-scenes meeting, the Gauteng programme continued. By October 2002, Shilowa was in a position to announce that Nevirapine was available at 70% of all health facilities in Gauteng.

During this period, politics and law developed an interesting dialectic. The pressure of the ongoing legal action forced government back into court, and the different stages of the appeal and application for execution order further spurred advocacy and social mobilisation – which in turn placed new pressures on government.

At its national executive committee meeting in January 2002, and in discussion with its legal team, the TAC had decided to embark on an offensive in response to the appeal, and

to return to the Pretoria High Court to seek an order of execution on the part of the judgment that instructed that Nevirapine be made available where capacity existed. The justification for this action was that it could save up to 10 lives a day during the period in which legal processes around the appeal took place – approximately six months. Outside and inside of court, the TAC argued that this approach was validated by developments in the political arena such as President Mbeki's 2002 State of the Nation address and the extension of the programme in Gauteng and KwaZulu-Natal.

On 1 March 2002, demonstrations took place at the Pretoria High Court during the hearing of government's application for leave to appeal to the Constitutional Court and the TAC's application for an execution order, which were heard together. Ten days later, on 11 March 2002, another judgment was handed down in favour of the TAC. In this judgment, the High Court granted the execution order and drew attention to the TAC's argument that up to 10 lives a day could be saved by execution of orders 1 and 2, and that this was not denied by government.

Inexplicably, government decided

to seek leave to appeal against this judgment directly to the Constitutional Court. In response, the TAC's legal team quickly filed a counter-application arguing that government's main purpose for further legal action was solely to stultify the execution order. New legal issues arose as to whether interlocutory orders could be appealed. The matter was heard on 22 March 2002 and judgment was handed down three days later.

In the days immediately before the hearing, government had taken advantage of the decision by Boehringer Ingelheim to withdraw its application to the U.S. Food & Drug Administration for the registration of Nevirapine as preventing intrapartum HIV transmission. Inside (and outside) of court, government cast this development as a safety issue, justifying its caution in making the medicine more widely available. However, the High Court saw this argument as a red herring, pointing out that if the registration of Nevirapine was withdrawn, it would apply to all uses of the drug, including at government pilot sites.

During this time, it seemed as if sensible legal advice to government was the last

Co-founder of the Treatment Action Campaign Zackie Achmat (left) with former President Nelson Mandela, 27 July 2002.

Photograph: Andrew October & Treatment Action Campaign ©



thing driving its case. It was as if a nerve had been touched and had triggered an irrational response that took everything to the extreme, regardless of public perceptions, lives lost or the cost of ongoing legal action. Thus, on 26 March 2002 (one day after the Pretoria High Court had dismissed the attempt to appeal the execution order) government launched a further and final application for leave to appeal – this time directly to the Constitutional Court. The application was heard on 3 April 2002.

In the court of public opinion, government's various appeals were lambasted by newspaper editorials and political cartoonists. The appeals were also a failure of legal strategy. Although the legal issues that the Constitutional Court had to decide in the latest appeal were narrow and different from those it would consider in the main appeal, they could not be decided without considering the broader issues, including the rationality of the PMTCT policy. The result was that government itself created a situation where the issues of the case were aired in the Constitutional Court a month before the date set for the full appeal.

During the hearing, the Constitutional Court judges appeared to be at a loss

as to why government was so fiercely opposed to the execution order. Not surprisingly, on 4 April 2002, the Constitutional Court refused government leave to appeal against the order of execution.

## Constitutional advocacy on the streets and in court

On 17 April 2002 – two weeks before the main appeal hearing in the Constitutional Court – Cabinet took South Africa and the world by surprise by releasing a statement on HIV and AIDS that, among other things, promised:

*[...] a Universal Roll-out Plan to be completed as soon as possible, in preparation for the post-December 2002 period.<sup>102</sup>*

For the first time, Cabinet publicly acknowledged that ARV drug treatments:

*[...] could help improve the conditions of [people living with HIV and AIDS] if administered at certain stages in the progression of the condition,*

*in accordance with international standards.<sup>103</sup>*

Against this backdrop, the TAC mobilised for the last leg of the case – to be heard in the Constitutional Court. A decision was taken to rally 'Stand Up for Your Rights' marches on the first day of the Constitutional Court hearing and demonstrations were prepared in Johannesburg, Cape Town and Durban. In Johannesburg, over 5 000 people marched to the Constitutional Court in support of the TAC.

On 2 May 2002, the Constitutional Court was filled with activists, doctors, nurses and the media. Two months later, on 5 July 2002, the judgments in the TAC case and related matters were handed down.

Unanimously, the Constitutional Court decided that government's policy had not met the state's constitutional obligations to provide people with access to health care services in a manner that was reasonable and took account of pressing social needs. Drawing on its own prior judgments and foreign jurisprudence, the Court confirmed the judiciary's right to issue instructions to government to amend

<sup>102</sup> Statement by Cabinet on HIV/AIDS, 17 April 2002.

<sup>103</sup> Ibid.

*On 5 July 2002, the Constitutional Court handed down judgments in the TAC case and related matters. Unanimously, the Court decided that government's policy had not met the state's constitutional obligations to provide people with access to health care services in a manner that was reasonable and took account of pressing social needs.*

policies where these were found to be unconstitutional. The judgment also insisted on the court's right to:

*[...] ensure that effective relief is granted [and to exercise] supervisory jurisdiction.<sup>104</sup>*

Without contradicting the High Court, the Constitutional Court stopped short of setting time frames for government on the basis that it accepted the *bona fides* of commitments made by government whose policy was no longer as rigid as it was when proceedings commenced. Instead, it ordered government without delay to:

*(a) Remove the restrictions that prevent Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites.*

*(b) Permit and facilitate the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics when in the judgement of the attending medical practitioner*

*acting in consultation with the medical superintendent of the facility concerned this is medically indicated, which shall if necessary include that the mother concerned has been appropriately tested and counselled.*

*(c) Make provision, if necessary, for counsellors based at public hospitals and clinics other than the research and training sites, to be trained for the counselling necessary for the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV.*

*(d) Take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.<sup>105</sup>*

Ironically, in light of the April Cabinet resolution, this was arguably a more intrusive order than that of the High Court. Time frames and an instruction to return to court were replaced with instructions requiring immediate action. Despite this, some observers have argued that, given the life and death nature of the human rights

issue and the history of government's conduct in the case, a supervisory order was both justified and necessary as it would make it easier to monitor and oversee compliance.

## Follow-up

The judgment of the Constitutional Court did not end the disputes over the provision of PMTCT services. After it was handed down, pressure continued to be necessary to ensure provinces complied with the court order. The TAC held meetings with the Director General of the Department of Health, the Deputy President of South Africa, and with MECs in the three least compliant provinces.

In September 2002, the TAC took a decision to launch rolling contempt of court proceedings against individual provinces, and this decision was communicated to the Director General. This triggered government's first serious attempt to provide the TAC with the information that the Constitutional Court held it was under a duty to make available. The information was inadequate but reflected a creeping compliance that benefited parents and children. For example, on 16 October

<sup>104</sup> *Minister of Health & Others v Treatment Action Campaign & Others* (No. 2) [2002] ZACC 15; 2002 (5) SA 721 (CC), paragraph 106.

<sup>105</sup> *Minister of Health & Others v Treatment Action Campaign & Others* op.cit, paragraph 135.3.



A Treatment Action Campaign demonstration in Durban, March 2002.

Photograph: Richard Shorey ©



2002, an email was received from a doctor in the Limpopo province saying that the provincial health department there had:

*[...] at long last [given] permission for the implementation of the PMTCT programme. I think this was due to pressure from the TAC/courts. [The] initiative came from their side this time and they seem to be in quite a hurry to get the programme up and running.*

## Lessons

As we highlight in the remainder of this publication, the TAC case is an almost perfect model of how to combine social mobilisation with litigation. It is without a doubt a shining example as to how litigation – when run properly and as part of a series of broader strategies – can achieve social change.

However, the one aspect of the TAC case that was, in retrospect, inadequate was its follow-up after the court victory. This is notwithstanding the efforts referred to above. The deficiencies in follow-up and their effect are well explained by Jonathan Berger:

*Perhaps because of its high profile work regarding the implementation of the public sector ARV treatment*

*programme – which owes its existence in large part to the Court victory – many people believe that the TAC has continually monitored the implementation of [the judgment], putting pressure on government to comply with the order. Given the detail of the order granted by the Constitutional Court, in some ways perhaps dispensing with the need for a structural interdict, it should have been possible for an organisation of the TAC's size and strength to do what is clearly required to ensure effective implementation. But this did not happen. Despite recognising the importance of the issue in the case, the organisation's focus was largely on the bigger picture, seeing [the judgment] as an entry point to develop the right to health in general and access to ARV treatment in particular. The TAC admits that it was a mistake to take its eye off the ball. Its current programme of action thus focuses attention on improving on the state's MTCT prevention programme.<sup>106</sup>*

<sup>106</sup> Jonathan Berger, *Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education*, in Varun Gauri & Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, 1<sup>st</sup> Edition, Cambridge University Press: 2008, page 80.

Berger adds that:

*[h]ad this work happened earlier, the drug regimen used in the PMTCT programme may have been improved – in line with current World Health Organization guidelines. Certainly, coverage of the programme, uptake and its linkages with the ARV treatment programme, would in all likelihood have been better.<sup>107</sup>*

## Broader consequences and ramifications

Despite the concerns about follow-up, it is important to appreciate the extraordinary practical effects of the case. These effects were not only about the provision of treatment to prevent MTCT of HIV. Rather it was about the manner in which South Africa would deal with and treat HIV and AIDS in general.

In 2000, the scale of the HIV and AIDS pandemic in South Africa was staggering. Whereas the prevalence of HIV among women attending public antenatal clinics had been less than 1% in 1990, by 1995 it was more than

<sup>107</sup> *Ibid.*

10%, and by 2000 it had passed 24%. Thus, almost a quarter of all pregnant women attending public health facilities in South Africa had HIV, and there was no sign of the rise in infections levelling off.<sup>108</sup>

When the TAC case was first conceptualised, it was hoped that it would be the first step towards achieving universal treatment for all people living with HIV. In this regard, the TAC saw the PMTCT litigation as an ideal starting point in dealing with the issue as opposed to, for example, litigation seeking ARVs for all HIV-positive people (which was regarded as too expensive to have good prospects), or ARVs for rape survivors (where the absence of clinical trials would be an obstacle to success).

Ultimately, the TAC did indeed achieve universal treatment for everyone living with HIV. This was because of the skilful way in which the TAC not merely succeeded in the litigation but regarded this as just one component of its overall struggle for access to medicines.

The effects are described compellingly by Justice Edwin Cameron (who was not a Constitutional Court judge at the time of the TAC decision):

*As a matter of political history, the court's decision was the pivot that eventually forced government to take decisive action in the epidemic. Although it responded grudgingly at first, government eventually gave effect to the ruling. Large-scale provision of ARVs began 30 months later, in December 2004.*

*Today, well over two million people in South Africa are living because of ARV treatment. [...] no one, rich or poor,*

*employed or unemployed, is denied treatment for AIDS because they cannot afford it.*

*The South African government programme to provide antiretroviral medications is the largest publicly provided AIDS treatment programme in the world. This is the most significant practical outcome of the court's decision. Although too many people are still dying of AIDS, the decision saved many lives. More even than Grootboom, the Nevirapine case materially changed the lives of hundreds of thousands and ultimately millions of people: it enabled them to not die. In this way, the court's decision had dramatic practical force.<sup>109</sup>*

As Cameron explains, this was in part because the Court's decision:

*[...] had a profound effect on public ideas and public discussion. [...] It was a rebuke not only for government inaction on AIDS drugs, but for the anguished and utterly unnecessary debate that led to that inaction. That poor women had a legal right to use anti-retroviral drugs to protect their babies from HIV transmission, and that government was constitutionally obliged to offer them the choice to do so, dealt a blow that would eventually prove fatal to the presidential discourse of denialism.<sup>110</sup>*

<sup>109</sup> Cameron, *Justice – A Personal Account* op.cit., page 197.

<sup>110</sup> Cameron, *Justice – A Personal Account* op.cit., pages 197 and 198-199.

## The Mazibuko case on access to water

One of the most controversial decisions of the Constitutional Court in the last few years is the decision in the Mazibuko case.<sup>111</sup> This case was the first and thus far only case on the right of access to sufficient water to reach the Constitutional Court.

### Background

The applicants in the Mazibuko case were five residents of Phiri, Soweto. Phiri is one of the poorest areas in Johannesburg. Many of its residents cannot afford to pay for basic services and water. Properties in Phiri are often occupied by multiple residents, all using the same water supply.

Until 2003, the residents of Phiri were provided with unlimited water in their homes, charged on a 'deemed consumption' basis at the rate of R68 per month. This rate assumed a monthly consumption of 20 kilolitres per household per month. It was part of the apartheid legacy of charging a fixed rate for water usage, irrespective of actual consumption, in the absence of water meters.

However, due to numerous factors, including Soweto's aging and leaking water infrastructure and a culture of non-payment (in protest against discriminatory service delivery), enormous amounts of water were lost in

<sup>111</sup> *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28; 2010 (4) SA 1 (CC).

<sup>108</sup> Cameron, *Justice – A Personal Account* op.cit., pages 140-141.



Soweto. Very little revenue in respect of water consumption was generated there.

As a result, the company responsible for providing water and sanitation in Johannesburg – Johannesburg Water – and the City of Johannesburg decided that it was necessary to alter the pattern of water usage in Soweto. They developed a plan that aimed to reduce unaccounted-for water, rehabilitate the water network, reduce demand for water and improve the rate of payment.

Phiri was selected as the area where the plan would first be implemented. In 2003 and 2004, residents were required to choose between a prepayment meter (PPM) and a yard tap. The yard tap had a restricted water flow providing only six kilolitres of water per month. The PPMs dispensed six kilolitres of free water per household per month, and once this free water allocation had been consumed, the PPMs automatically cut off the water supply unless more credit was purchased.

Residents with PPMs, unlike those in other suburbs of Johannesburg, were not given the option to buy water on credit. However, prepayment users paid significantly less for water than those on credit meters.

The response of members of the Phiri community was to resist the roll-out of the PPMs. There were two organisations integrally involved in this process – the Anti-Privatisation Forum (APF) and the Coalition Against Water Privatisation. Among the APF's core objectives were:

*[...] a halt to all privatisation of public sector entities and return of public control and ownership; [and] the co-ordination and intensification of antiprivatisation struggles in communities.<sup>112</sup>*

The move towards litigation was part of the effort to resist the roll-out of PPMs. As Dugard and Langford explain:

*Determined not to accept PPMs, the Phiri community embarked on a course of direct resistance against the roll-out. However, the resistance was critically undermined after the City secured a wide-ranging interdict. Activists were prohibited from coming within 50 meters of any PPM operations and private security companies were authorised to assist*

*in managing any infringements of these terms. This effectively put an end to the direct activism. With this avenue of protest effectively closed off, the community turned to the option of rights-based litigation as a tactic to challenge PPMs (together with the 'standpipe' yard taps that the City offered some residents as an alternative to PPMs).<sup>113</sup>*

## Litigation

The case was launched in the Johannesburg High Court in 2006. It was factually complex and involved enormous amounts of research and marshalling of evidence regarding budgets and policy considerations.

The litigation was brought with the assistance of experienced and knowledgeable public interest litigators. CALS served as the attorney for the applicants. Though the APF and the Coalition Against Water Privatisation were actively involved in the process, they did not participate as named applicants in the litigation.

As the quote from Dugard and Langford above makes clear, the litigation was “a tactic to challenge

<sup>112</sup> Jackie Dugard, *Civic Action and Legal Mobilisation: The Phiri water meters case*, in Jeff Handmaker & Remko Berkhout (eds), *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners*, Hivos/ISS Civil Society Building Knowledge Programme/Pretoria University Law Press, The Hague: 2010, page 87.

<sup>113</sup> Dugard & Langford *op.cit.*, page 43.



*One of the most controversial decisions of the Constitutional Court in the last few years is the decision in the Mazibuko case. This case was the first and thus far only case on the right of access to sufficient water to reach the Constitutional Court.*

PPMs”. During the writing of this publication, Dugard confirmed to us that this litigation was always primarily about the PPMs.

However, in some respects, this was not the way the case was presented to the court. The relief sought and the manner in which the case was presented, especially before the High Court, was broader and covered two main issues:

- Firstly, the applicants sought to have the use of PPMs declared unlawful.
- Secondly, the applicants challenged the City’s free basic water policy. In terms of this policy, every household in Johannesburg was provided with six kilolitres of free water per month. The applicants contended that this was unreasonable and constitutionally insufficient and that they were entitled to 50 litres per person per day free of charge.

Before the matter was heard in the High Court, the City made an offer of settlement. It offered to make its supplementary water provision measures, which would in effect have provided those in need with unlimited water, an order of court. The settlement offer would have ensured that those who required additional water but were

unable to pay for it would certainly be able to access at least 50 litres per person per day. The City was prepared to have the settlement made an order of court, with the consequence that non-compliance could be enforced by contempt proceedings. The applicants, however, refused the offer because it would have required them to relinquish the challenge to the PPMs.

The matter was then argued in the High Court and the applicants succeeded. They secured an order that the right to water entailed a free basic water supply of 50 litres per person per day and that PPMs were unlawful.<sup>114</sup>

The City then appealed to the Supreme Court of Appeal. The Court reduced the amount of water required to be supplied to 42 litres per person per day and required the City to reformulate its policy in light of this finding. The Court also found that the use of PPMs was unlawful but suspended the effect of its declaration of invalidity for two years to allow the City to amend its bylaws to allow for PPMs. This meant that PPMs could continue to be used during this period and raised a real possibility that the City would regularise the use of

PPMs within two years.

Despite the alterations made by the Supreme Court of Appeal to the High Court order, the Supreme Court of Appeal judgment still represented a significant victory for the applicants.

The applicants, however, elected to appeal the Supreme Court of Appeal judgment to the Constitutional Court. This was primarily because of the applicants’ concerns regarding the order of the Supreme Court of Appeal on the PPM issue.<sup>115</sup>

The applicants’ decision to appeal was an important and, with hindsight, ultimately damaging one. The appeal by the applicants in turn resulted in a cross-appeal by the City, meaning that the entire case was placed before the Constitutional Court. It is clear that the City would not have sought to appeal to the Constitutional Court in the absence of the appeal by the applicants.

In the Constitutional Court, the City did not seek to defend the policy that the applicants had originally challenged. Instead, it updated and revised the policy, partly in light of the challenge, and sought to put additional evidence

<sup>114</sup> *Mazibuko & Others v City of Johannesburg & Others* [2008] ZAGPHC 106.

<sup>115</sup> Dugard & Langford *op.cit.*, pages 44-45.





Wall mural in Phiri, Soweto.  
 Photograph: Anti-Privatisation  
 Forum ©

before the Constitutional Court of the changes it had made. Crucially, the City placed evidence before the Constitutional Court that it had expanded its indigent persons policy to include among others the following benefits:

- People who were registered as indigent would receive 10 kilolitres of free water per month, rather than the standard six kilolitres provided to everyone with a PPM.
- An allowance was made for an additional four-kilolitre allocation for emergencies.
- A mechanism was created for individuals to make representations for an additional allocation depending on their personal circumstances (including, for example, people living with HIV and AIDS).

These measures were provided under the City's interim policy for indigent persons. In terms of the final policy that it intended to implement, every indigent person would be entitled to at least 50 litres of free basic water per day, which was essentially what the applicants were asking the Constitutional Court to order.

The applicants disputed the admissibility of this new evidence, arguing that the policy should be evaluated as it was at the time the challenge was launched. The Constitutional Court rejected these contentions, holding that the duty of progressive realisation requires the state continually to review and revise its policies. The Court held that the evidence was admissible:

*[...] for the purpose of showing that the City accepts an obligation to continue to revise its policy consistently with the obligation to ensure progressive realisation of rights, and that it has done so.<sup>116</sup>*

## The judgment of the Constitutional Court

The Constitutional Court overturned the judgments of both lower courts, finding that the City's free basic water policy was reasonable. The Court refused to give quantified content to the right to water, holding that this would not be appropriate. It reaffirmed the approach to socio-economic rights that it had taken in the Grootboom and TAC cases. It found that the right to water:

*[...] does not require the state upon demand to provide every person with sufficient water [...]; rather it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.<sup>117</sup>*

Furthermore, the Court found that:

*[...] ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.<sup>118</sup>*

<sup>116</sup> *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28 op.cit., paragraph 40.

<sup>117</sup> *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28 op.cit., paragraph 50.

<sup>118</sup> *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28 op.cit., paragraph 61.

*The Mazibuko litigation was a tactic to challenge prepayment water meters, but in some respects, this was not the way the case was presented to the court.*

The Court pointed out that its orders in the Grootboom and TAC cases illustrated:

*[...] institutional respect for the policy-making function of the two other arms of government. The Court did not seek to draft policy or to determine its content. Instead, having found that the policy adopted by government did not meet the required constitutional standard of reasonableness, the Court, in Grootboom, required government to revise its policy to provide for those most in need and, in Treatment Action Campaign No 2, to remove anomalous restrictions.<sup>119</sup>*

The Constitutional Court summarised its approach to socio-economic rights cases as follows:

*[T]he positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard*

*of reasonableness. From Grootboom, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in Treatment Action Campaign No 2, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.<sup>120</sup>*

The Constitutional Court held that the High Court and the Supreme Court of Appeal had overlooked these considerations and erred by quantifying the content of the right.

Despite the applicants' disavowal of reliance on the concept of the 'minimum core',<sup>121</sup> the Constitutional

Court interpreted their free basic water claim as being "similar to"<sup>122</sup> a minimum core argument. The Court rejected the claim for the same reasons as in the Grootboom case.

Finally, the Constitutional Court spelt out its vision of the role and purpose of socio-economic rights litigation. The passage of the Mazibuko judgment is worth quoting at length in view of its potential effect on future public interest litigation:

*The outcome of the case is that the applicants have not persuaded this Court to specify what quantity of water is "sufficient water" within the meaning of Section 27 of the Constitution. Nor have they persuaded the Court that the City's policy is unreasonable. The applicants submitted during argument that if this were to be the result, litigation in respect of the positive obligations imposed by social and economic rights would be futile. It is necessary to consider this submission.*

*The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing,*

<sup>119</sup> *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28 *op.cit.*, paragraph 65.

<sup>120</sup> *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28 *op.cit.*, paragraph 67.

<sup>121</sup> A 'minimum core' approach to socio-economic rights involves a determination of some basic level of the relevant socio-economic right that every person is, absent extraordinary circumstances, able to claim. In both the Grootboom case (*Government of the Republic of South Africa & Others v Grootboom & Others op.cit.*, paragraphs 29-33) and the TAC case (*Minister of Health & Others v Treatment Action Campaign & Others op.cit.*, paragraphs 26-39), the Constitutional Court effectively rejected this approach in favour of a reasonableness approach.

<sup>122</sup> *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28 *op.cit.*, paragraph 52.



*litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy. When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open.*

*Not only must government show that*

*the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to “progressively realise” social and economic rights in mind. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution.*

*This case illustrates how litigation concerning social and economic rights can exact a detailed accounting from government and, in doing so, impact beneficially on the policy-making process. The applicants, in argument, rued the fact that the City had continually amended its policies during the course of the litigation. In fact, that consequence of the litigation (if such it was) was beneficial. Having to explain why the Free Basic Water policy was reasonable shone a bright, cold light on the policy that undoubtedly revealed flaws. The continual revision of the policy in the ensuing years has improved the policy in a manner entirely consistent with an obligation of progressive realisation.<sup>123</sup>*

<sup>123</sup> *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28 *op.cit.*, paragraphs 159-163.

## Lessons

The Constitutional Court judgment provoked outrage and dismay on the part of some public interest litigators and commentators, who interpreted it as the death knell for South African socio-economic rights litigation. It has been said, for example, that the Mazibuko judgment:

- [...] represents a retreat for the Court from its hey-day when (in the TAC case) it ordered the state to take steps to make Nevirapine available;<sup>124</sup>
- [...] endorses the neo-liberal paradigm of water provision adopted by the city, a policy which would often deny poor people access to adequate water because they would be unable to pay for the water needed to live;<sup>125</sup>

and that it is

- [...] a classic example of a lazy legalism as well as wholly biased and contradictory reasoning.<sup>126</sup>

<sup>124</sup> Pierre De Vos, *Water is life (but life is cheap)*, [www.constitutionallyspeaking.co.za](http://www.constitutionallyspeaking.co.za): 13 October 2009.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Constitutional Court rules against Phiri*, Coalition Against Water Privatisation, [www.apf.org.za](http://www.apf.org.za): 8 October 2009.

*The Constitutional Court judgment in the Mazibuko case provoked outrage and dismay on the part of some public interest litigators and commentators, who interpreted it as the death knell for South African socio-economic rights litigation.*

There is no doubt that the Mazibuko judgment is unhelpful for future litigation on socio-economic rights in South Africa. However, we do not consider that it has had or will have the apocalyptic effect initially claimed by its critics.

In what follows, we distil five main public interest litigation lessons from the Mazibuko case.

### **Taking a cautious approach when litigating rights without precedent**

The first lesson is that when litigating rights in respect of which no precedent exists, taking a cautious, incremental approach to the relief sought is the prudent option.

The Mazibuko case was the first serious attempt to litigate the right to water. It was suggested by a number of our respondents and by commentators that the first right to water case should have been on behalf of those who are worst off with respect to water – the many people who have no access to water at all – rather than people who were in the relatively advantaged position of having access to running water in their homes but could not afford to pay for it. This is a variation on the criticism that the first

case on a particular right should take as its focus the worst off, or the poorest of the poor.

It would have been difficult for the City of Johannesburg to resist, for example, a structural interdict compelling it to demonstrate what it was doing to extend access to water to the approximately 750 000 residents in the City who have none at all.

We consider that this point has much force and that it demonstrates how future cases on the right to water (and other socio-economic rights) might be run. Indeed, LHR is currently in the process of building and launching just such a case, on the right to water and on behalf of farming communities living without access to safe and clean water in the Northern Cape province.

We do not suggest that litigation must necessarily begin with the worst off. However, where it is possible to persuade a court that the relief sought would amount to giving content to a right in an incremental, restrained manner, it is more likely to succeed. The sexual orientation litigation discussed earlier is an example of this.

In fairness to the applicants in the Mazibuko case though, this point must

not be taken too far. As we have made clear above, irrespective of how the case was characterised in the media, and even in the litigation itself, it seems clear that the main concern of the applicants was to resist the installation of PPMs. At its core, therefore, the case was not as much about the City's water policy as it was about an attempt to prevent the implementation of the privatisation of water (and ultimately other) municipal services.

When understood in this way, the reasons why the case was not run on behalf of residents with no access to water at all become clear. Indeed, once one accepts the proposition that the case was fundamentally a case about resisting PPMs and privatisation, it is hard to conceive of better applicants.

However, with this understanding, additional difficulties which are of importance in their own right are revealed.

The first difficulty is that litigation is not generally a reliable means to obtain direct large-scale and radical policy change such as reversing the privatisation of the provision of basic services.

If the Mazibuko litigation is viewed





Communal tap for drinking water in Soweto.

Photograph: E Muench & www.wikimedia.org ©

as being primarily about PPMs and privatisation – and with the obvious benefit of hindsight – the case had a high mountain to climb. This case is then materially different from the Grootboom case (where no real policy considerations were at play) and the TAC case (which was about policy completely precluding access to medicines and on very dubious grounds).

The second difficulty is that achieving two different objectives in a single case can be problematic and counterproductive. In this case, the two aims – challenging PPMs and privatisation on the one hand, and challenging the free basic water policy on the other – did not always sit comfortably with each other.

As one of our respondents explained, if the aim was primarily to ensure wider access to water, it might well have made more sense for the organisations involved to organise registration and education campaigns to maximise the number of people who registered for the City's indigent persons benefits, thereby ensuring that more people had access to the 10 kilolitres of free water per month. However, this route would arguably have undermined the other leg

of the case – against PPMs.

The same potential tension is evident in the decisions the applicants had to take regarding whether to accept the settlement proposal and whether to appeal to the Constitutional Court. In both cases, the prepayment water issue suggested taking one route (refusing the settlement and proceeding with the appeal), whereas the free basic water policy issue might have suggested taking the opposite route.

### Ensuring the jurisprudential sustainability and practicality of the order sought

The second lesson relates to the vital importance of reassuring courts that the order sought is both jurisprudentially sustainable and practically workable.

In the Mazibuko case, the practical and cost implications of the broad, ambitious relief sought by the applicants regarding the City's free basic water policy ultimately counted against them. The applicants were unable to find any precedent in the world in which a court had ordered the provision of 50 litres per person per day

free of charge, let alone in a developing and water-stressed country like South Africa.

Moreover, an order invalidating the use of PPMs (especially with immediate effect as the applicants sought) would have had enormous financial implications for the City. Huge sums of money had already been spent and over 80 000 meters had already been installed. This was inevitably going to raise a risk that even if the court found for the applicants on the merits of the attack, it would be inclined to suspend the declaration of invalidity in terms of Section 172(1)(b)(ii) of the Constitution while the City corrected the defect – thus allowing the PPMs to remain in place.<sup>127</sup> This was the approach taken by the Supreme Court of Appeal.

At a broader level, we point out that the

<sup>127</sup> Section 172(1) of the Constitution provides:

*When deciding a constitutional matter within its power, a court—*

*(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*  
*(b) may make any order that is just and equitable, including—*  
*(i) an order limiting the retrospective effect of the declaration of invalidity; and*  
*(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.*

courts have, understandably, become increasingly receptive to requests by government departments for orders of suspending declarations of invalidity. This means that it is now critical for public interest litigants to consider at the outset whether:

- there is a risk of the court granting suspension;
- the extent to which this would prevent the aims of the litigation being achieved; and
- any evidence that could be placed before a court to dissuade it from granting such a suspension order.

### Causing indirect policy changes

A third lesson is that litigation can produce indirect policy changes, even where it is ultimately unsuccessful.

A City of Johannesburg official whom we interviewed commented that the mere existence of the Mazibuko litigation gave progressive bureaucrats in the City a lever with which to effect policy changes. The threat of an adverse order from the litigation made the City more responsive to such efforts than it otherwise would have been, and made the expansion of the indigent persons and social benefits programmes politically possible.

International experience suggests that litigation can give administrators who are willing to make changes political cover, or a tool for leverage.<sup>128</sup> This appears to have occurred in the Mazibuko case. The litigation contributed to a significant expansion of the City's social services provision for

indigent residents.

It is apparent that there are problems with the implementation of these types of policies – but it is here that extra-legal strategies such as mass-registration campaigns, engagement with the City, and protests where necessary, are appropriate.

### Value in spite of unsuccessful outcome

A fourth lesson that can be derived from the Mazibuko case is that litigation can serve valuable political purposes even when it is not successful.

It seems clear that there were significant benefits to running the Mazibuko litigation despite its unsuccessful outcome. Some of those involved argued that the benefits of having brought the case justified the decision of those involved:

*[T]he litigation was strategic – and successful – because it raised the profile of the issues and energised the movement at a time when direct protest had been crushed by state repression.<sup>129</sup>*

### Perceptions matter

The last lesson is that perceptions of litigation and its consequences matter. When it comes to trying to effect broad social change in government bureaucracies, perceptions of the results of litigation can be just as important as its actual direct legal effects. Even the tone and language of a judgment can be significant and may sometimes be more important than the ultimate order. For example, a leading gay rights activist in the US, Tom Stoddard, said

(when explaining the damage done by the failed sodomy reform case in the US Supreme Court):

*The most important judicial body in the United States has expressed a certain distaste for gay men and women and suggested they may be treated differently from other Americans.<sup>130</sup>*

In another example, the immediate practical effects of the Grootboom judgment taken alone were really quite limited in scope. However, it was widely perceived as a significant victory for the poor and a bloody nose for government, a perception that contributed to the bringing into effect of the Housing Code and other changes in the housing policy environment.

By contrast, the Mazibuko judgment was perceived as a big win for government and a significant reversal for public interest litigation.

After the judgment was delivered, there was considerable anxiety that the progress made in terms of government responsiveness would be diminished as a consequence.

When we raised this issue with a senior City of Johannesburg official, he disagreed that this had been the effect of the Mazibuko case. He emphasised that the effect of the Grootboom case and other cases had only really permeated senior levels of officialdom, with the bulk of officials content simply to implement whatever instructions came from above. In relation to these senior officials, he felt that the Mazibuko case made them more trusting of balance in the litigation process because they considered that this case gave more

<sup>128</sup> See for example: Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 2<sup>nd</sup> Edition, University of Chicago Press: 2008, pages 311-312.

<sup>129</sup> *Losers can be winners*, Business Day: 20 October 2009.

<sup>130</sup> Quoted from Andersen *op.cit.*, page 98.



Photograph: War on Want ©

emphasis to practicality as a relevant variable in implementing socio-economic rights than the cases which preceded it. Thus, his view appeared to be that these senior officials viewed the Mazibuko judgment as assisting them – but only where they embarked on practical methods of addressing socio-economic rights.

Accordingly, it appears to us that concerns about the Grootboom effect being dissipated by the Mazibuko case did not ultimately come to fruition. City officials with a sufficient understanding of the nuances of the Mazibuko judgment have taken cognisance of the fact that it was only the City's belated efforts to amend and alter its policies that led to success in the Constitutional Court.

## The Joseph case on access to electricity

### Background

The applicants in the case of *Joseph v City of Johannesburg*<sup>131</sup> were the tenants of a building in Johannesburg called Ennerdale Mansions. The tenants paid their electricity bills to the landlord as part of their rent accounts. The landlord had a contract with City Power<sup>132</sup> for the provision of electricity to the building. However, the landlord had not paid City Power for the electricity supplied to the building. As a result, and without notice to the tenants, City Power disconnected the electricity supply to Ennerdale Mansions on 8 July 2008.

The tenants had no idea why their electricity was disconnected and formed a committee to investigate the

reasons for the disconnection. Members of the committee visited the City Council offices and were informed that the electricity had been disconnected because the landlord's account was in arrears by about R400 000.

The disconnection had significant effects on the quality of life of the residents. Learners had to study by candlelight, food could not be stored as refrigeration was impossible, and heating was provided through the burning of paraffin or other fuels, with detrimental effect on the health of children and adults.

Many of the residents left the building as the lack of electricity made life there unbearable for them. Those who remained did so because it was the only accommodation in the area they could afford. The average household income at Ennerdale Mansions was R3 000-4 000 per month. Some of the households had no income at all.

### Litigation

The residents approached the University of the Witwatersrand (Wits) Law Clinic and were advised to launch proceedings in the High Court. The litigation was brought with the

<sup>131</sup> *Joseph & Others v City of Johannesburg & Others* [2009] ZACC 30; 2010 (4) SA 55 (CC).

<sup>132</sup> Private company responsible for the provision of electricity in Johannesburg, and wholly owned by the City of Johannesburg.

*The Joseph case was a narrow one. The applicants did not contend that they were entitled to free electricity, or that City Power was absolutely precluded from cutting off their electricity. What they contended was simply that they had a right to prior notice of the cut-off and a right to make representations before the cut-off occurred.*

assistance of CALS.

On 21 July 2008, the applicants brought an application in two parts. Their case was a narrow one. They did not contend that they were entitled to free electricity, or that City Power was absolutely precluded from cutting off their electricity. What they contended was simply that they had a right to prior notice of the cut-off and a right to make representations to City Power before the cut-off occurred. The notice could have happened by means of a general poster in the foyer of the building, and representations could have been made in writing.

The first part of the application (Part A), which was brought on an urgent basis to operate as interim relief pending the resolution of the second part (Part B), sought an order requiring the respondents to reconnect the electricity supply to the building and requiring City Power to conclude temporary electricity use agreements with the applicants to govern the contractual relationship between the parties.

In Part B, the applicants sought a declaration stipulating that, before disconnecting the electricity supply

to a building or residence, the respondents are required to ensure that the disconnection is procedurally fair as envisaged in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) – legislation that had been enacted to give effect to the right to administrative justice enshrined in Section 33 of the Constitution. PAJA creates wide-ranging procedural and substantive constraints on the exercise of public power.

Under the heading of procedural fairness, the applicants argued for a declaration that the electricity disconnection in this case was unlawful and invalid, as PAJA requires that:

- affected persons receive adequate notice;
- affected persons are afforded the right to make representations; and that
- all relevant circumstances are taken into account, including the personal circumstances of those to be affected.

The High Court dismissed Part A (the urgent relief) on the ground that the applicants did not have a *prima facie* right to the relief sought in Part B. Later, when it was heard, Part B was dismissed

on the ground that the residents had no contractual relationship with City Power and therefore had no rights that were affected by the disconnection. The High Court found that the landlord was entitled to notice of the disconnection because he had a contract with the City, but the residents were not.

The residents sought leave to appeal directly to the Constitutional Court. They conceded that they had no contractual rights against the City or City Power. They argued that they were nonetheless entitled to procedural fairness in terms of PAJA because access to electricity was a component of the right of access to adequate housing in terms of Section 26 of the Constitution.

They also argued that the disconnection affected their right to human dignity in terms of Section 10 of the Constitution, that they were entitled to be given notice before the cut-off, and that the City ought to have allowed them to make representations before the disconnection.

The Constitutional Court ruled in favour of the applicants, though not on the basis of the case they made out. The Court did not find that electricity was a component of the right of access to





adequate housing. Instead, it ruled that when City Power supplied electricity to the building, it did so in fulfilment of its constitutional and statutory duty to provide basic municipal services to all persons living in the City:

*When the applicants received electricity, they did so by virtue of their corresponding public law right to receive this basic municipal service. In depriving them of a service which they were already receiving as a matter of right, City Power was obliged to afford them procedural fairness before taking a decision which would materially and adversely affect that right.<sup>133</sup>*

Procedural fairness required that the applicants had to be given 14 days' pre-termination notice in the form of a physical notice placed in a prominent position in the building. Users were entitled to approach the City within the notice period in order to challenge the proposed termination or to tender arrangements to pay off arrears.

The Constitutional Court ordered the reconnection of the electricity supply to Ennerdale Mansions. Unfortunately, in the interim, the building's wiring had

been stolen. This made it impossible to reconnect the electricity without considerable expenditure to replace the wiring. The residents did not have access to the resources to pay for this and therefore did not obtain any direct relief as a result of the litigation.

## Lessons

### The advantages of narrow relief and defensive litigation

The first lesson derived from the Joseph case relates to the advantages that can result from narrow relief and defensive litigation.

The relief sought in Joseph was narrow and limited, despite the novelty of the legal argument in its favour. The effect of the order sought was merely to extend certain procedural fairness entitlements to people who lacked them under the law as it stood. Though the City of Johannesburg and City Power attempted to do so, it was not easy to paint this relief as imposing enormous burdens on them if it was granted. This made it easier for the court to grant the order sought.

The litigation was also defensive,

rather than offensive, in the sense that it involved applicants who went to court to prevent the state from taking action which reduced their access to an important good. Several of our respondents felt that it is easier to obtain relief in such cases than in cases where the applicants turn to courts to require organs of state to provide a good.

### Delivering meaningful outcomes for the applicants

The second lesson concerns the importance of trying to structure litigation in a manner that produces a meaningful outcome for those affected.

In the Joseph case, the applicants' legal representatives tried to do precisely that. They were alive to the fact that a victory at the end of the day would not resolve their applicants' urgent needs. Consequently, they sought the urgent interim reconnection order in Part A, pending the final determination in Part B.

Regrettably, the High Court refused the Part A relief, meaning that by the time Part B of the case succeeded in the Constitutional Court, the applicants

<sup>133</sup> *Joseph & Others v City of Johannesburg & Others* op.cit., paragraph 47.

*Two of the lessons that can be derived from the Joseph case relate to the advantages that can result from narrow relief and defensive litigation, and to the importance of trying to structure litigation in a manner that produces a meaningful outcome for those affected.*

could no longer get any effective relief, since the wiring at Ennerdale Mansions had been stolen and electricity could not be restored.

With the benefit of hindsight, it might well have been appropriate to try to appeal the High Court's refusal of the Part A application immediately to the Constitutional Court.

Such a course was recently followed successfully in the case of *South African Informal Traders Forum v City of Johannesburg*,<sup>134</sup> involving the removal by the City of Johannesburg of thousands of informal traders. In this case, when the High Court refused to grant urgent interim relief, the applicants felt that they had no other option but to take the bold step of appealing immediately to the Constitutional Court – which upheld the appeal and granted interim relief to the applicants.

### **No immediate relief but broader effects**

The third lesson relates to an awareness that sometimes litigation will have an effect on other people on the ground

even where the applicants obtain no relief themselves.

This was the case in *Grootboom*, and the Joseph case also demonstrates this very well. While the applicants got no effective relief (because the Constitutional Court's order could not be implemented due to a lack of wiring) the tangible effects of the order were felt in a later case – *Residents of Chiawelo Flats v Eskom*<sup>135</sup> & *City of Johannesburg*.<sup>136</sup>

This case involved a block of 420 flats in Soweto, housing many vulnerable people. Eskom had disconnected the electricity supply due to non-payment. When the disconnection was challenged on the basis of the Joseph decision, the matter was settled by agreement and an order was issued in terms of which:

- the electricity supply had to be reconnected; and
- Eskom had to engage with each applicant separately to conclude individual agreements regarding electricity supply, including where appropriate:

*[...] an affordable payment plan in respect of any arrears agreed between the parties.*<sup>137</sup>

Moreover, the Joseph litigation also appears to have had effects on the manner in which the City of Johannesburg conducts itself on electricity disconnections due to arrears. This was confirmed independently by a respondent of ours working at a public interest organisation and by an official from the City. The City official indicated that there was a “palpable shift” away from mass cut-offs towards data clean-up, customer focus and accuracy as the main tools to drive the collection of outstanding debt, and he considered that the Joseph case helped force this “bureaucratic culture change”.

### **Deciding whether to pursue an appeal**

The last lesson is about deciding whether to pursue an appeal to the Constitutional Court at all.

Having lost in the High Court, the applicants in the Joseph case wanted to appeal. Quite apart from ethical duties to the tenants, CALS had to decide

<sup>134</sup> *South African Informal Traders Forum & Others v City of Johannesburg & Others* [2014] ZACC 8; 2014 (6) BCLR 726 (CC).

<sup>135</sup> Parastatal electricity utility.

<sup>136</sup> *Residents of Chiawelo Flats v Eskom & City of Johannesburg*, South Gauteng High Court, Case No. 2010/35177.

<sup>137</sup> *Residents of Chiawelo Flats v Eskom & City of Johannesburg op.cit.*, paragraph 4.1.



Protest against electricity price hikes, January 2013.

Photograph: Erin Mc Luckie & The Daily Maverick ©

whether this was the correct move from a test case point of view or whether it would be better to wait for another case. Ultimately, CALS decided that the case should be appealed.

The Joseph case provides an instructive example of the factors that ought to be taken into account in deciding whether to pursue an appeal. It seems to us that the first question to be asked is always: What are the prospects of success? If those prospects are slim, then it will seldom be in the public interest to run the case. But what if, as here, the case was eminently plausible, albeit difficult? In other words, what if it is a 50-50 case?

In those circumstances, it seems to us that the focus shifts to another enquiry: Is this the right case to run on this issue? Clearly, where an issue has a 50-50 chance of success and will have a positive effect on people's lives in the event of a court victory, it ought to be litigated. But is this the right case in which to ventilate the issue?

In determining this, we believe the following questions need to be answered:

- Are these the right applicants?
- Are these the right respondents?

- Is this the best context to establish the right contended for?
- Is there any deficiency in the papers or in the evidence?
- Do the applicants have any alternative remedies?
- What will be the consequences of an unsuccessful attempt to run this case?

We address each of these questions in turn in the context of the Joseph appeal.

Firstly, were the applicants the right applicants? The applicants were certainly poor. However, they were not the poorest of the poor. If they were the poorest of the poor, the City's argument would probably have been that they ought to have applied for exemptions from paying under the City's indigent persons policy – therefore, the appeal would have been unlikely to succeed.

The applicants were families. They had among them numerous children and elderly people. They were thus plainly vulnerable.

Moreover, they were lawful occupiers who had paid their rent (and electricity) timeously. The fact that the applicants' conduct was so exemplary contributed to the sense that it was unfair that they should be disconnected without any

procedural safeguards whatsoever.

Secondly, were the respondents the right respondents? The primary respondent was City Power. This is a private entity, which would ordinarily raise concerns given that the assertion of socio-economic rights against private parties is controversial and relatively untested.

However, City Power was acting as the agent of the City of Johannesburg, which is the entity that bears the constitutional obligation for delivering services, including electricity. It accordingly accepted (as it had to) that it is akin to a state entity for the purposes of this litigation.

Thirdly, was this the best context to establish that the right to electricity forms part of the right to adequate housing? The case did not involve an attempt to get government to provide free electricity. It was therefore a 'negative' assertion of the right, not a 'positive' one. Indeed, it was a limited negative assertion of the right given that the tenants accepted that cut-offs could occur provided that correct procedure is followed.

Moreover, it was thought that while it may be that the extent to which

*The Joseph case provides an instructive example of the factors that ought to be taken into account in deciding whether to pursue an appeal.*

electricity formed part of the right to housing would depend on context, these were people living in an urban apartment block. If electricity formed part of the right anywhere, it would seem to be here.

Fourthly, was there any deficiency in the evidence or papers? There was none as far as CALS was aware. The case was designed as a constitutional test case and papers were carefully drawn up with this in mind.

Moreover, there was no deficiency exposed at the High Court level. The High Court judgment simply took a different principled point of view as a matter of law.

Fifthly, did the tenants have alternative remedies? This was a hotly contested issue in this case. City Power contended that there were alternative remedies available for the tenants such as compelling the landlord to pay City Power the outstanding arrears and engaging in direct billing with City Power.

The tenants disputed this, pointing to City Power's own inability to extract payment from the landlord and the fact that, by law, all arrears must be paid

before direct billing agreements are reached.

And, lastly, what would be the consequences if the judgment was appealed and lost in the Constitutional Court? Due to the narrow nature of the relief sought, CALS decided that the negative consequences of losing on appeal would be limited. The only result would be that the previous position – namely that persons in the situation of the applicants were not entitled to procedural fairness prior to electricity disconnections – would be confirmed by the Constitutional Court.

Because of this, no one would be any worse off than they were before the litigation. Since the case was conceptualised on such a novel basis (that access to electricity may be a component of the right of access to adequate housing), CALS believed that a loss would not preclude viable future litigation.

Essentially, CALS decided that there was no significant broader risk in pursuing the appeal. This is to be contrasted with other cases, where a losing appeal might inhibit future litigation on better facts such as in the Mazibuko case or in reasonable

chastisement cases discussed elsewhere in this publication.

In sum, CALS concluded that it was difficult to envisage a 'better' case on this issue arising in the foreseeable future. Perhaps the only real strategic weakness was the fact that the tenants did not have a contract with City Power – but the whole point of the case of course was to establish that procedural fairness obligations existed even without such a contract.

Ultimately, the decision to pursue the appeal proved beneficial. However, the point we make is a different one: These are the sort of questions that should be carefully considered whenever a major public interest case is initiated, or whenever a decision is taken regarding an appeal.

Of course, sometimes decisions will inevitably be made to run less than ideal cases, for ethical or other reasons. Where this occurs, however, the decision must be mindful of the weaknesses in the case and alive to the dangers involved.





Harry Gwala informal settlement.

Photograph: Dorothy Tang ©

## The Nokotyana case on sanitation

### Background

The third of the socio-economic rights cases decided by the Constitutional Court in late 2009 was the Nokotyana matter.<sup>138</sup>

The applicants in this case were residents of the Harry Gwala informal settlement in Ekurhuleni, Gauteng. The settlement lacked access to any basic services, including decent sanitation, water services and electricity.

In 2006, the Ekurhuleni Municipality submitted a proposal to the provincial MEC for Housing that the status of the settlement be upgraded to that of a formal township. This would have entitled the residents to basic services. The MEC did not respond to the proposal for a period of more than three years.

### Litigation

The applicants, represented by the *pro bono* department of a Johannesburg firm of attorneys, went to the High Court seeking an order that the Ekurhuleni Municipality provide them with basic services pending the decision on whether the settlement would be upgraded to a formal township. They sought:

- communal water taps;
- temporary sanitation facilities;
- refuse removal; and
- high mast lighting in key areas.

The Municipality did not resist the application for water taps and refuse removal, and the Court ordered it to provide these services immediately.

However, the High Court found that no case had been made out in respect of temporary sanitation services and high mast lighting, because in the absence of a decision to upgrade the settlement, the *National Housing Code* did not apply to the settlement.

The applicants then appealed to the Constitutional Court seeking an order compelling the Municipality to provide them with high mast lighting and temporary sanitation facilities, pending

a decision on whether the settlement would be upgraded *in situ*. In particular, they sought one ventilated improved pit (VIP) latrine per household, rather than the one chemical toilet per 10 families offered to them by the Municipality. They relied on their right of access to adequate housing, arguing that adequate sanitation was a component of this right.

Government respondents argued that it was impractical to invest in VIP latrines before the decision as to whether the settlement should be upgraded had been taken, since such a significant investment would then be wasted if a decision to relocate the settlement was taken.

It was on appeal to the Constitutional Court that it became clear that there were significant problems with the manner in which the Nokotyana case was conceptualised and formulated.

Firstly, the applicants' representatives failed to realise that the core of the case was the failure of the Gauteng provincial government to process the Ekurhuleni Municipality's application to upgrade the settlement. As a result, they did not seek relief in this regard and did not include provincial

<sup>138</sup> *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* [2009] ZACC 33; 2010 (4) BCLR 312 (CC).

*It was on appeal to the Constitutional Court that it became clear that there were significant problems with the manner in which the Nokotyana case was conceptualised and formulated.*

government as a respondent in the proceedings before the High Court. The Constitutional Court was therefore forced to take the very unusual step of remedying this failure of its own accord by joining the provincial MEC for Local Government and Housing as second respondent, as well as national government officials as further respondents.

Secondly, the remedy sought and the arguments advanced by the applicants changed substantially on appeal to the Constitutional Court. The applicants had not challenged the sanitation policy of the Municipality in the High Court. Instead, they sought to proceed to the Constitutional Court relying directly on the constitutional right to housing. Because of this, the High Court did not consider any evidence regarding the reasonableness of the sanitation policy, and government respondents were not called upon to defend the policy in the High Court. This put the Constitutional Court in an impossible position, requiring it to sit as a court of first and final instance on factual matters that ought to have been considered in the courts below.

Thirdly, the problems were exacerbated by the applicants' unsuccessful attempt

to introduce controversial new evidence before the Constitutional Court. The new evidence addressed, among other things:

- the extent of sanitation provision in townships across the country;
- the negative consequences of poor sanitation on health, the economy and education;
- the link between water, HIV and AIDS; and
- the costs of providing latrines.

Because of the late attempt to introduce this new evidence, none of the respondents had the opportunity to respond to it.

Lastly, at the Constitutional Court hearing, counsel for the applicants took an extravagant line, urging the Court to overturn its socio-economic rights jurisprudence on the basis that the Grootboom and TAC judgments were clearly wrong, and to adopt the minimum core approach<sup>139</sup> to socio-economic rights.

Despite all of this, on the morning of the hearing, the Chief Justice encouraged the parties to discuss a possible settlement. The Gauteng

provincial government duly made a settlement offer in terms of which it would subsidise the Municipality's sanitation provision, resulting in the provision of sanitation at a level of one toilet for every four families (compared to the one for every 10 that was being offered by the Municipality). The terms of this agreement would have ensured that the residents of the Harry Gwala settlement were substantially better off, and that the quality of sanitation in the settlement would have been markedly improved. The applicants' representatives, however, turned down the settlement offer.

The matter proceeded and the appeal was unequivocally dismissed. Far from overturning Grootboom and TAC, as the counsel for the applicants had urged, the Constitutional Court did not consider that the applicants had made even an arguable case. The applicants' direct reliance on several constitutional provisions was held to be "vague and insufficiently specified".<sup>140</sup> The Court did not pronounce on the reasonableness of the Municipality's newly adopted policy, as it was held to be inappropriate to consider a case so fundamentally changed on appeal.

<sup>139</sup> The minimum core approach is explained above in the context of the Mazibuko case study.

<sup>140</sup> *Ibid.*



However, the Court did order provincial government to take a decision on the Municipality's application for the upgrade of the settlement within 14 months of its judgment. Again, it is worth emphasising that the applicants did not seek this relief and that it was only made possible by the Court going out of its way and joining the province as a respondent.

The sequel to the Court's ruling is that slow progress has been made towards upgrading the settlement. In 2011, provincial government ultimately took the decision required by the court order. It concluded that the settlement should be upgraded *in situ* and developed.

However, at the time of writing, such upgrading and development had not yet occurred. It appears that this is a consequence of disagreement over precisely what form the development should take. In particular, the plan currently proposed by the province would accommodate only 400 stands, meaning that 800 households would not be accommodated. The situation is complicated further by disputes regarding the practical suitability of certain land which could potentially be

used for the development.

We understand that discussions around potential solutions are still ongoing. What does seem clear is that the development of the settlement for at least 400 stands will occur.

## Lessons

Three main lessons emerge from the Nokotyana matter.

### Awareness of existing precedents

The first lesson is about the importance of designing and arguing a case with full awareness of the Constitutional Court's existing precedents and the difficulties of overturning recent and repeatedly affirmed precedents.

Litigators must live in the real world. Academic debates are important and valuable, but there is little point in being outraged about the Court's approach to minimum core and trying repeatedly to overturn it, when there is no possibility of that occurring and when it is unnecessary.

In general, successful public interest litigation involves taking the existing jurisprudence as a starting point and

seeking to change it only when strictly necessary. We suggest that trying to overturn settled precedent should only be attempted as a last resort when there are no other options available for the litigation to succeed. Litigators should be mindful of how enormously difficult it will be to persuade a court to change its mind.

The insistence on a minimum core approach in the Nokotyana case was all the more surprising and unnecessary because there was an easier route for success to be achieved, namely to bring an application to court compelling the Gauteng province to render a decision on the possible *in situ* upgrade of the informal settlement and, if the decision went against the applicants, to consider reviewing that decision on administrative and constitutional law grounds.

Though the Constitutional Court eventually gave an order compelling a decision by provincial government, this was due to the Court trying to find a way to assist the applicants despite the fact that their representatives had not sought such an order.

This point is especially important in light of the Court's judgment in

*The Nokotyana case demonstrates the importance of designing and arguing a case with full awareness of the Constitutional Court's existing precedents and the difficulties of overturning recent and repeatedly affirmed precedents.*

the Mazibuko case. There, the Court unequivocally laid down a range of situations in which the positive obligations arising from socio-economic rights would be enforced by the courts. It is worth repeating these situations:

*If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From Grootboom it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions as in Treatment Action Campaign No 2, the court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.<sup>141</sup>*

Whatever misgivings organisations and litigators may hold about the Mazibuko

decision, they must now contend where possible that their case falls within one of these situations. Doing so avoids or reduces the risk of government relying on Mazibuko as a defence, because litigants can argue that these are the very situations in which the Court has made it clear that it will enforce the positive obligations concerned.

It is true that the judgment states that this is not a closed list and that the obligations will be enforced in "at least"<sup>142</sup> these ways. But if applicants cannot bring themselves within one of these categories, they will likely need a particularly compelling set of facts to succeed, coupled with a cogent argument to explain why their case does not fall foul of the Mazibuko principles.

### **Properly forming a case and placing the evidence before the court**

Secondly, the Nokotyana case also demonstrates the importance of properly conceiving a case and ensuring that all the required evidence is placed before the appropriate court at the appropriate stage.

Ordinarily, new and controversial

evidence cannot be introduced for the first time on appeal. For this reason, litigators must be extraordinarily careful to ensure that their case is properly conceived from the start of litigation, as it will rarely be possible to provide essential evidence for the first time on appeal.

Former Justice Richard Goldstone points out that the same mistake was made in the Grootboom case:

*For the first time on appeal before the Constitutional Court, counsel sought to rely on the approach of the United Nations Committee on Economic, Social, and Cultural Rights that socioeconomic rights contain a 'minimum core'. [...] There was no evidence at all on the record that would have enabled the Court to begin a consideration of an appropriate minimum core for the provision of housing or access to housing in the South African context.<sup>143</sup>*

### **The risk of rejecting reasonable settlement offers**

As a third and final lesson, the Nokotyana case shows the risk of

<sup>141</sup> *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28 *op.cit.*, paragraph 67.

<sup>142</sup> *Ibid.*

<sup>143</sup> Richard Goldstone, *Foreword*, in Gauri & Brinks (eds) *op.cit.*, page xii.



Toilet protest in Cape Town in 2010, organised by the Social Justice Coalition.

Photograph: Justin van Zyl & Social Justice Coalition ©



litigants seeking full vindication and, in doing so, rejecting settlement offers that might be better than what could realistically be achieved via a court judgment.

The decision to reject the settlement offer made at the doors of the Constitutional Court was plainly incorrect. By that stage, it ought to have been clear that the odds of the applicants obtaining substantive relief from the Court were slim.

The offer would have given the applicants immediate relief in respect of sanitation. Moreover, it would not have precluded the applicants from requesting, if needs be compelling, the province to make a decision on the *in situ* upgrade within a specific time. In other words, there was no real downside.

Yet, the offer was rejected. It was only by virtue of the Constitutional Court's determination to assist the applicants – despite the inherently flawed nature of the case – that the applicants ended up with any relief at all.

## Litigation on the right to basic education

The right to basic education was included in Section 32(a) of South Africa's interim Constitution, which came into force in April 1994. It was then also included in Section 29(1) (a) of South Africa's final Constitution which came into effect in February 1997. Section 29(1) provides:

*Everyone has the right—*

*(a) to a basic education, including adult basic education; and*

*(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.<sup>144</sup>*

Despite this and despite the severe challenges facing many learners and schools throughout the country, there was no meaningful litigation around government's positive obligations to provide basic education until 2010. Those education cases that did reach

the Constitutional Court dealt with, for example, school language policies,<sup>145</sup> religious<sup>146</sup> and cultural practices,<sup>147</sup> and with the obligations of a private landowner (a trust) in relation to a school situated on its land.<sup>148</sup>

However, since 2010 this situation has changed markedly. A number of skilled legal and advocacy organisations have engaged in a series of pieces of litigation dealing with a wide range of aspects of government's positive obligations in terms of the right to basic education.

In this section, we consider four main examples of such litigation and lessons emerging from these. We do so in part by drawing on reports done by the organisations involved in the litigation.<sup>149</sup>

<sup>145</sup> *Head of Department: Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* [2009] ZACC 32; 2010 (2) SA 415 (CC).

<sup>146</sup> *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757 (CC).

<sup>147</sup> *MEC for Education: KwaZulu-Natal & Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC).

<sup>148</sup> *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. & Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC).

<sup>149</sup> Notably: Faranaaz Veriava, *The 2012 Limpopo Textbook Crisis: A study in rights-based advocacy, the raising of rights consciousness and governance*, Section 27: September 2013; Legal Resources Centre, *Ready to Learn: A legal resource for realising the right to education*, 1<sup>st</sup> Edition, Legal Resources Centre: 2013; and Equal Education campaign materials and statements ([www.equaleducation.org.za](http://www.equaleducation.org.za)).

<sup>144</sup> *Constitution of the Republic of South Africa op.cit.*

*Despite Section 29(1)(a) of the Constitution, which provides everyone with the right to a basic education, and despite the severe challenges facing many learners and schools throughout the country, there was no meaningful litigation around government's positive obligations to provide basic education until 2010.*

## Background

Many of the problems that beset the South African education system today are a direct consequence of apartheid and its use of education as a tool of oppression. As the rest of society, the education system was segregated along racial lines, with schools for children classified as white far better resourced, and with inferior curricula prescribed at schools for children classified as black, Indian or coloured. Although these policies have long been abolished, their legacy is reflected in the state of historically disadvantaged schools today. As then Justice Kate O'Regan put it in 2008:

*[...] although the law no longer compels racially separate institutions, social realities by and large still do.<sup>150</sup>*

The problems faced by the education system are manifold. In 2012, in an open letter to the Minister of Basic Education penned by a number of public interest organisations, the following issues were highlighted:

- *the appalling state of school infrastructure at township and rural schools across the country, especially*

*in regards to sanitation;*

- *the lack of norms and standards for school infrastructure;*
- *the critical shortage of desks and chairs in schools throughout the nation;*
- *the failure to combat the rise of sexual violence and corporal punishment in schools;*
- *the non-delivery of workbooks and textbooks to thousands of learners across the country;*
- *the lack of access to libraries, particularly where this means that home language texts cannot be accessed;*
- *the failure to revise the national policy on learner pregnancies;*
- *inadequate public school funding and the placement of schools in inappropriate quintiles,<sup>151</sup> directly impacting the school's [sic] funding;*
- *the failure to provide learner transport in accordance with policy;*
- *the failure to issue norms and*

*standards regarding admission policy;*

- *the delivery of education related services to children being interrupted through problems with tenders;*
- *the lack of any discernable success in the Department's section 100(1)(b)<sup>152</sup> intervention in Limpopo and the Eastern Cape, where substantial problems remain in school nutrition, scholar transport, and textbook delivery;*
- *the failure to implement the 2012 post provisioning in the Eastern Cape, leaving many schools without enough educators; and*
- *the lack of a pro-poor teacher post-provisioning scheme, meaning a failure to draw quality teaching into township and rural schools, and the lack of training, support and accountability for teachers in these schools.<sup>153</sup>*

**It is not immediately clear to what**

<sup>150</sup> MEC for Education: KwaZulu-Natal & Others v Pillay op.cit., paragraph 24.

<sup>151</sup> The quintile system divides all government schools into five quintiles, with quintile 1 schools being the poorest and quintile 5 schools the least poor. Lower quintile schools qualify for higher levels of state funding than higher quintile schools. The latter are expected to raise significant funding through the charging of school fees.

<sup>152</sup> Refers to Section 100(1)(b) of the Constitution, which gives national government the right to assume direct responsibility for a provincial-level constitutional obligation, if a province fails to deliver on it.

<sup>153</sup> Open Letter to the Minister of Basic Education and the Director General of the Department of Basic Education from Centre for Child Law, CALS, EE, EE Law Centre, Section 27 and LRC, www.equaleducation.org.za: 25 June 2012.



Bomvini Senior Primary School,  
Libode, Eastern Cape.

Photograph: Equal Education ©

extent these problems result from resource constraints, lack of human capacity, lack of political will or even active political obstruction – or some combination thereof. In terms of litigation, the causes of a particular problem will have a bearing on the manner in which the matter is approached and the relief that is sought to remedy it.

In considering the cases that follow, a significant feature is the fact that Section 29(1)(a) of the Constitution deals with the right to basic education differently from provisions on rights of access to housing, water, food and social security. This was addressed by the Constitutional Court in the *Juma Musjid* case. This case concerned the eviction by a private landowner (a trust) of a school on its property. However, the Court – particularly after encouragement from two *amici curiae* – nevertheless pronounced emphatically on the nature of the positive obligations resting on government in this regard:

*It is important, for the purpose of this judgment, to understand the nature of the right to “a basic education” under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There*

*is no internal limitation requiring that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures”. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. This right is therefore distinct from the right to “further education” provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education “progressively available and accessible.”<sup>154</sup>*

## The mud schools case

In 2010, the LRC launched proceedings on behalf of the Centre for Child Law (CCL) and seven schools in the Eastern Cape to compel government to rebuild South Africa’s ‘mud schools’.

The case was ideal in that speeches and policy documents by government officials themselves conceded that

the conditions at these schools were unacceptable and constituted a breach of the state’s duties under the Constitution. Yet, despite repeated requests for assistance, the schools received no help.

Using government’s 2005 school district profiles, the LRC identified the worst-off mud schools and visited 20 of them in July 2009. Comprehensive interviews with teachers and school governing bodies at each school were conducted and a decision was taken to assist seven schools in litigation against the state for failing to provide the schools with adequate and safe infrastructure, sufficient desks and chairs, and potable water.

The seven applicant schools were located in one of the poorest areas in South Africa, around the towns of Libode and Ngqeleni in the Nyandeni Local Municipality/Oliver Tambo District Municipality in the Eastern Cape. The parents of the learners were predominantly indigent. Six of the seven schools had been placed by government in quintile 1 (the quintile representing the poorest schools). The schools were constructed of mud, cinder blocks and branches and were among the most under-resourced in the

<sup>154</sup> *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. & Others op.cit.*, paragraph 37.

*The mud schools case was ideal in that speeches and policy documents by government officials themselves conceded that the conditions at the schools concerned were unacceptable and constituted a breach of the state's duties under the Constitution.*

country. The structures were unstable, doing very little to protect students and teachers from the elements and (to the extent that they were even useable) they were massively overcrowded. All of the seven schools also faced a severe lack of desks and chairs, and adequate access to potable water. They relied on tanks to catch rainwater but this meant that during the dry winter months there was no water available at the schools. Learners were forced to get water from streams 1-2km away and the water was often not suitable for drinking.

The applicants, including the CCL (which played the role of an institutional applicant in the public interest) argued that these conditions were unsafe and prevented effective teaching and learning. As such, they constituted a breach of the state's duties under the Constitution. Despite this, it appeared that national and provincial government did not have plans in place to remedy the conditions at these seven schools. The repeated written and verbal pleas by the schools for assistance fell on deaf ears – no responses were received from government, and the schools remained unaware as to whether the conditions would be addressed in the future, and if so, when.

It was also clear from the Eastern Cape Department of Education's own documents that the budget allocated for school infrastructure was "totally inadequate",<sup>155</sup> and the province had placed a moratorium on infrastructure projects for the foreseeable future.

While at one point it was suggested by some members of the legal team that this was the ideal case to establish the minimum core approach<sup>156</sup> as part of South African law, it was ultimately agreed that such an approach would be both unhelpful and counterproductive. Instead, given that the founding papers were drafted and filed prior to the decision in *Juma Musjid*, the case was built to demonstrate that government's failure to provide proper school infrastructure was unreasonable, in line with the *Grootboom* and *TAC* precedents. The papers were replete with vivid details of the appalling conditions under which the learners concerned had to seek education, coupled with the repeated failure by government to remedy or plan to

remedy these problems.

The application focused on the seven applicant schools and the need to remedy their situation. The idea was to begin with these seven schools and establish a precedent regarding government's duties in this regard. Consequently, the applicants sought an order that:

- declared unconstitutional and unlawful the failure of national and provincial government to provide the schools with proper facilities, furniture and access to water, as well as the failure to develop a plan to do so;
- directed the national and provincial education departments, in consultation with the seven schools, to formulate a plan to provide the schools with proper facilities and adequate access to potable water;
- directed the national and provincial education departments to provide the schools with sufficient desks and chairs; and that
- required the respondents to file reports on affidavit with the court and the applicants' attorneys at least every three months, setting out the progress that had been made pursuant to the other orders.

<sup>155</sup> Ann Marie Skelton on behalf of the Centre for Child Law and others, *Founding Affidavit*, Eastern Cape High Court in Bhisho, paragraph 22.4.

<sup>156</sup> The minimum core approach is explained above in the context of the *Mazibuko* case study.



March for school libraries in  
Cape Town organised by Equal  
Education, 21 March 2010.

Photograph: Equal Education ©



After the founding papers had been filed, the respondents endeavoured on a number of occasions to avoid filing an answering affidavit. They did so both by taking technical points and then by repeatedly calling for settlement discussions. The applicants, however, were anxious that engaging in settlement discussions before the respondents had committed to a version on oath would be disadvantageous. They therefore insisted that the respondents file an answering affidavit before any settlement discussions took place. This ultimately proved a decisive moment because the answering affidavit that was eventually filed essentially disclosed no defence of substance.

Against this backdrop, the parties then engaged in negotiations and settled the matter without a court hearing. The terms of the agreement constituted a resounding success for the applicants. Government agreed to provide both temporary and permanent infrastructural relief to the seven mud schools. Relief took the form of mobile classrooms, desks and chairs, and access to water in the interim, to be followed by the construction of permanent classrooms from 31 May 2011. An even greater success was national

government's commitment (recorded in the agreement) to allocate R8.2 billion to rebuild inadequate school structures across the country – with R6.26 billion of this amount earmarked for the rebuilding of schools in the Eastern Cape. Government's programme became known as the Accelerated Schools Infrastructure Development Initiative.

Implementation of this initiative has commenced and although the LRC has reported various delays, substantial progress appears to have been made. By the end of 2013, reconstruction of the seven applicant schools had neared completion, replacement/construction of more than 90 other schools had commenced, and approximately 200 'mud schools' had received temporary pre-fabricated classrooms.

In 2014, as part of the follow-up effort, the LRC and the CCL launched a 'mud schools 2' case. This case is far narrower in its aims. It seeks an order compelling government to make full disclosure of its school infrastructure plans so that schools and relevant NGOs can consider them and make representations, as well as urgent relief for some schools with particularly dire infrastructural needs. At the time of

finalising this publication, the case had not yet been heard.

## Binding minimum norms and standards

EE (Equal Education) is a Cape Town-based social movement which seeks to remedy inequalities in education. It was formed in 2008 and sees itself as a 'grass-roots response to this inequality'. As Brad Brockman, its General Secretary, has explained:

*The way in which we approach the problem is primarily through community organising. What that means is really to organise the people who are most affected by this inequality, which are children who attend schools in townships [...] and very poor rural schools.*

*[T]hese students and parents become members of the organisation and the organisation acts like a vehicle which organises [...] shares and educates students and parents about the education system, inequality within the education system and how it is structured, how it is perpetuated and also explains to them about law, activism and history, and how – through coming together, through [...]*

*In March 2012, Equal Education and two public schools in the Eastern Cape instituted legal proceedings to compel the Minister of Basic Education to publish binding minimum norms and standards for school infrastructure in South Africa.*

*research, through organising, through using campaigns, through using litigation, one can actually achieve change within individual schools and across the education system.*

*The principle of organising is really to start where people are at, and to take up the issues that they can understand, that affect them and that they want to act to change, and use that as a basis to build and develop more consciousness of education equality, and what are all the different factors which go into creating this particular system.<sup>157</sup>*

In March 2012, EE and two public schools in the Eastern Cape instituted legal proceedings to compel the Minister of Basic Education to publish binding minimum norms and standards for school infrastructure in South Africa. Represented by the LRC, the applicants argued that the unacceptable conditions in many public schools violate the constitutional rights of learners, as the conditions prevent effective learning and teaching and pose a real risk to the health and safety of learners.

<sup>157</sup> Transcribed from the audio version of the discussion on *Social Mobilization and Strategic Litigation for Equal Education in South Africa*, [www.opensocietyfoundations.org/events](http://www.opensocietyfoundations.org/events): 5 June 2014.

Legal action was brought in response to the gross inadequacy of infrastructure in schools across the country. The Department of Basic Education's *National Education Infrastructure Management System Reports*, published in May 2011, highlight the pervasiveness of these conditions. Of the 24 793 public ordinary schools in the country:

- over 3 500 did not have electricity;
- more than 2 400 had no water supply;
- over 900 did not have any ablution facilities, while 11 450 schools were still using pit latrines; and
- more than 2 700 schools had no fencing at all.<sup>158</sup>

The applicants took the view that establishing binding standards which stipulate the structures and facilities that each school must have was a necessary step to improving these conditions, for three reasons:

- Binding regulations provide government with a clear legal standard and a mechanism to meet its constitutional obligations. The standard clarifies what constitutes an adequate education and ensures

<sup>158</sup> Department of Basic Education, *NEIMS (National Education Infrastructure Management System) Reports*, May 2011.

that the demands of equality are met. Government can use the standards to guide its infrastructure planning and its spending priorities.

- Binding norms and standards provide learners, parents, teachers and civil society organisations with a clear indication of what they are entitled to. Communities are able to measure the performance of government against a clear standard and hold it accountable to that standard.
- Binding standards are tools of top-down accountability. They enable the Minister to set a clear policy framework with defined and measurable targets. Provincial education departments are thereby given a definite goal to work towards and a legal standard to which they are bound.<sup>159</sup>

Long before legal action was instituted, however, EE had launched an extensive and powerful political campaign on these issues. The norms and standards campaign arose out of EE's national campaign for school libraries, which was launched in 2009. In May 2010, in a letter responding to EE about

<sup>159</sup> Email communication circulated by EE on 8 August 2013.



school libraries, the Minister of Basic Education, Angie Motshekga, wrote that government's response to the issue of libraries would be to adopt a national school infrastructure policy, and norms and standards for school infrastructure. It was at that stage that EE started looking into norms and standards and discovered a comprehensive draft released by former Minister of Education,<sup>160</sup> Naledi Pandor, in 2008. EE came to realise the value and power of having norms and standards which would establish a legally binding, minimum standard for school infrastructure, and which would in the long term also address the lack of libraries.

EE consequently shifted the focus of its campaign and advocacy work to norms and standards. In mid-2010, the Minister of Basic Education indicated both formally and in engagements with EE that norms and standards would be adopted by 1 April 2011. On 21 March 2011, EE organised 20 000 protestors in a march to Parliament – EE's first

public action in the campaign – as a 'reminder' to the Minister to make good on her promise. Even after the march, the Minister and her officials reassured EE that the norms and standards were on their way.

From EE's perspective, non-binding guidelines were unacceptable, and it decided to resort to legal action as it became increasingly clear that the Minister had no intention of prescribing binding regulations. Hence, in March 2012, an application was launched in the Bhisho High Court.

The application included affidavits from 26 schools that gave vivid, personal accounts of the dreadful conditions experienced by learners. They also emphasised how government's failures impact most harshly on the poorest schools in the country.

In conjunction with its application to court, EE intensified its public campaign. It organised a number of marches, put out advertisements in newspapers and on radio, distributed posters and pamphlets, and arranged for protestors to camp outside the High Court for the duration of the hearing, which was scheduled for 20 November 2012.

On the eve of the hearing, the Minister capitulated and a settlement agreement was entered into. In terms of the agreement (dated 19 November 2012), the Minister undertook to publish a draft set of regulations for comment by 15 January 2013 and adopt binding standards by 15 May 2013. In the event of non-compliance with any of the terms of the undertaking, the agreement provided that the applicants were entitled to approach the High Court on an expedited basis for appropriate relief.

Draft guidelines were published within the specified time frame. In response to a relatively weak and unsatisfactory draft, EE and a number of other organisations submitted comprehensive comments. This followed EE organising public workshops on the draft in five provinces – the Western Cape, Eastern Cape, KwaZulu-Natal, Limpopo and Gauteng – to inform poor rural and township communities about the draft and enable them to give their input in the public participation process. More than 500 individual comments arose from these workshops, which were submitted together with EE's official submission.

Much to the chagrin of all involved, the Minister missed the 15 May 2013 deadline for final publication and

<sup>160</sup> Until May 2009, South Africa had one national Ministry and Department of Education. Following elections in May 2009, however, the national education portfolio was split in two, with a Ministry and Department of Basic Education and a Ministry and Department of Higher Education and Training.

*Equal Education's campaign proved to be an outstanding success. On 29 November 2013, the Minister of Basic Education complied with the court order and published legally binding minimum norms and standards for school infrastructure, stipulating among other things that all schools must have access to sufficient water, electricity and sanitation.*

insisted on an extension of six months. Her reasons for the extension were unconvincing and lacked legal or practical basis. Hence, EE approached the Bhisho High Court for an order to convert the 19 November 2012 agreement into a court order.

Before the matter reached the Court, EE intensified the public pressure on the Minister – for example, via the very effective videos we have referred to in Chapter 1.<sup>161</sup> On 17 June 2013, EE held mass marches in Pretoria and Cape Town, and on 18 June 2013, it held another in Bhisho. Following this mass action and the publicity it generated, the Department of Basic Education released its extraordinary (and baseless) public statement that:

*[...] to suddenly see a group of white adults organizing black African children with half-truths can only be opportunistic, patronizing and simply dishonest to say the least.*<sup>162</sup>

There was widespread condemnation of the statement, which in fact generated

more support for EE and led the Deputy Minister of Basic Education to convene an extraordinary meeting between EE, the Minister, Deputy Minister and provincial education MECs shortly thereafter.

Following agreement between the parties, the Court then ordered the Minister to issue a revised draft for comment by 12 September 2013 and to promulgate final binding regulations by 30 November 2013.

Despite its success in court, however, EE persisted with its public campaign to maintain political pressure on the Minister.

Ultimately, the campaign proved to be an outstanding success. On 29 November 2013, the Minister complied with the court order and published legally binding minimum norms and standards for school infrastructure.<sup>163</sup> These provide that all schools must have access to sufficient water, electricity, sanitation, safe classrooms with a maximum of 40 learners, internet, security, and thereafter libraries,

computer and science laboratories, and recreational facilities. They also provide time frames for implementation, ranging from three to 17 years (based on the type of services or resources needed) and require provincial education departments to report annually on progress in implementing the norms and standards.

While certainly not perfect, the published norms and standards are a vast improvement on previous versions and will provide a powerful tool for bettering the conditions at South African schools.

## The Limpopo textbook case

While both of the cases referred to above garnered significant public and media attention, it is fair to say that the case which caused the greatest public reaction and outrage was the Limpopo textbook case.<sup>164</sup>

In this case, the applicants – including Section27 (formerly the ALP) – challenged government's protracted failure to deliver textbooks to schools

<sup>161</sup> *Build the Future* and *#FixOurSchools: Norms & Standards for School Infrastructure Now!* (both available on YouTube), as well as *Equal Education's Campaign to Build the Future* (available at [www.atlanticphilanthropies.org](http://www.atlanticphilanthropies.org)).

<sup>162</sup> *Equal Education is disingenuous: Minister Motshekga op.cit.*

<sup>163</sup> Department of Basic Education, *South African Schools Act (84/1996): Regulations relating to minimum uniform norms and standards for public school infrastructure*, Government Gazette, Vol. 581, No. 37081, 29 November 2013.

<sup>164</sup> *Section27 & Others v Minister of Basic Education & Another* [2012] ZAGPPHC 114; 2013 (2) SA 40 (GNP).





in the Limpopo province for the 2012 academic year. The case was marred by failed negotiations, unfulfilled promises and the flagrant disregard of court orders. Ultimately, the applicants were able to secure the timely delivery of textbooks for the 2013 academic year and the implementation of a catch-up programme for the 2012 academic year.

The case began in January 2012. Having been alerted to the issue by media reports, Section27 initiated an investigation into textbook deliveries. It made visits to a number of schools in Limpopo during February 2012 and found that none had received textbooks. Section27 then sent enquiries to the Department of Basic Education and met with the head of the departmental intervention team that had taken control of the provincial education department in Limpopo. Section27's concerns were noted and it was given an undertaking that deliveries would be completed by mid-April 2012 at the latest.

What followed was a string of broken promises and missed deadlines by the Department. Follow-up visits to Limpopo schools in late April confirmed that deliveries had still not been made. CALS, representing the

applicants, sent letters to the provincial education department and the national Department of Basic Education, demanding delivery by 2 May 2012. Government's failure to meet this deadline spurred Section27 to resort to legal action. Together with two co-applicants (a secondary school and a mother of two primary school learners, all of whom had not received any textbooks for the 2012 academic year), it launched an urgent application in the Pretoria High Court.

The relief sought by the applicants was carefully crafted. It only requested the delivery of textbooks to those learners who were most severely impacted – learners in Grades R, 1, 2, 3 and 10, who had just started a new curriculum. Further, the applicants requested that government develop a catch-up plan for the Grade 10 learners to regain ground lost in the months when they did not have textbooks. Finally, the applicants requested a supervisory order to monitor the implementation of the relief sought.

The High Court handed down judgment on 17 May 2012, granting all aspects of the relief sought by the applicants. It noted that textbooks are an:

*[...] essential component of the right to basic education [and that their provision] is inextricably linked to the fulfilment of the right.<sup>165</sup>*

The Court ordered that a catch-up plan be developed immediately and that government commence delivery of textbooks urgently, completing it by no later than 15 June 2012.

The judgment received widespread media coverage and was heralded as a victory for the rights of learners. Despite this, the Department of Basic Education failed to meet the 15 June deadline. A number of schools reported that they had not received textbooks or any information from the Department regarding future deliveries. In addition, many principals and teachers reported that they had been threatened with disciplinary action if they reported the non-delivery.

At this point, Section27 was faced with the choice of whether or not to launch contempt of court proceedings. It decided against doing so on the ground that its aim was not to embarrass the Department, but to ensure the delivery of textbooks to Limpopo schools.

<sup>165</sup> *Section27 & Others v Minister of Basic Education & Another op.cit.*, paragraph 25.

*It is fair to say that the case which caused the greatest public reaction and outrage was the Limpopo textbook case, where the applicants – including Section27 – challenged government's protracted failure to deliver textbooks to schools in the Limpopo province.*

The antagonistic nature of contempt proceedings would undoubtedly end all prospects of co-operation with the Department, which was necessary to secure delivery.<sup>166</sup> Instead, Section27 entered into negotiations with the Department on 21 June 2012 and extracted a new deadline (27 June 2012) which was made an order of court by consent of the parties on 5 July 2012.

Again, however, the state failed to comply with the court order. While the Department reported on 28 June 2012 that delivery had neared completion, Section27 received reports of substantial non-delivery from a number of schools. The progress reports submitted by the state were also riddled with inconsistencies. Given these inconsistencies, the parties agreed to appoint an independent verification team to assess the true state of delivery. Professor Mary Metcalfe (former MEC for Education in Gauteng) and her team confirmed that, by 27 June 2012, there was substantial non-delivery of both textbooks and catch-up plans to schools. The team also reported that orders for books had only been placed with the publishers in the first week of

June 2012.<sup>167</sup>

The pattern of undertakings by the Department, unfulfilled promises and unaddressed concerns continued. As a result, Section27 launched a second application to the Pretoria High Court in September 2012. It sought a declaratory order that the Department had failed to comply with the court orders of 17 May and 5 July 2012 (the settlement agreement), and a mandatory order directing government to deliver textbooks for the 2012 and 2013 academic years within specified timelines (agreed by the parties) and develop catch-up plans in terms of the previous order. It also sought a supervisory order regarding the delivery of 2013 textbooks and, finally, a punitive costs order against the Minister of Basic Education. On 4 October 2012, Judge Kollapen handed down judgment and issued the declaratory and mandatory orders sought. However, the Court declined to make a punitive costs order.<sup>168</sup>

Although the litigation failed to achieve delivery of textbooks in Limpopo for the 2012 academic year, it had

a dramatic impact on improving deliveries for the 2013 academic year. In addition, the litigation caused a media furore that focused the public's attention on the deeper problems that gave rise to the failed deliveries and put the inadequacy of education into the public domain in a remarkable manner. Concerns were raised about potential corruption in the award of the tender to EduSolutions (the textbook provider) and about general dysfunction and corruption in the Limpopo education department. The intense media scrutiny and criticism led President Jacob Zuma to appoint a task team to investigate the causes of the delays. Regrettably, however, even this did not fully resolve the problem of non-delivery of textbooks in Limpopo.

One of the positive effects of the initial litigation though was the formation of Basic Education for All (BEFA), a community-based organisation dedicated to promoting and protecting the right to basic education in Limpopo. In early 2014, BEFA and 22 school governing bodies launched an application in the High Court for further relief on the textbook issue. On 5 May 2014, the High Court upheld

<sup>166</sup> Veriava *op.cit.*, page 30.

<sup>167</sup> Veriava *op.cit.*, page 22.

<sup>168</sup> Veriava *op.cit.*, pages 25-27.



the application.<sup>169</sup> The order granted included the following relief:

*1. It is declared that the content of the right to basic education in s 29(1)(a) of the Constitution includes:*

*1.1. the right of every learner at a public school as contemplated in the Schools Act, 84 of 1996, in Limpopo to be provided with every textbook prescribed for that learner's grade;*

*1.2. the right of every such learner to be provided with every such textbook before the teaching of the curriculum for which such textbook is prescribed is due to commence.*

*2. It is declared that the non-delivery to certain of such learners of certain textbooks prescribed for such learners' grades in the 2014 academic year before the teaching of the curricula for which such textbooks were prescribed was due to commence was a violation of such learners' rights to a basic education in s 29(1)(a) of the Constitution and of their rights to equality and dignity in ss 9 and 10 respectively of the Constitution.<sup>170</sup>*

The court order also noted

<sup>169</sup> *Basic Education for All & Others v Minister of Basic Education & Others* [2014] ZAGPPHC 566; 2014 (4) SA 274 (GP).

<sup>170</sup> *Ibid.*

undertakings by the respondents to deliver textbooks by various dates in May and June 2014 and directed the respondents to affidavits setting out various steps taken with regard to the delivery of textbooks for both the 2014 and 2015 academic years.

The respondents then sought leave to appeal to the Constitutional Court against this judgment. At the time of writing, the Court had not decided whether to grant such leave to appeal.

## Teacher vacancies in the Eastern Cape

A protracted problem facing the education system in the Eastern Cape has been vacant teacher posts at various schools across the province. These vacancies mean that learners are left without the necessary teachers, or that schools are themselves forced to employ temporary teachers with their own limited resources in circumstances where government is legally responsible for doing so.

The problem is not, however, that there are too few teachers in the Eastern Cape – indeed, there is a surplus of teachers – but that the provincial Department

of Education has been unwilling or unable to move these surplus teachers (or 'teachers in excess') to the schools where they are actually required. This is so even though the Department has formally recognised that these schools require the teachers concerned.

The process that is meant to resolve this problem is called 'post-provisioning'. It is the process whereby a provincial department of education decides how many teaching posts each public school in the province is entitled to, appoints teachers to these posts and pays them. Over a decade of ineffective post-provisioning has had the result that some schools have more teachers than necessary, while others have too few.

Thus, in 2012, there were more than 4 000 vacant teacher posts and at the same time over 7 000 surplus teachers in the Eastern Cape.

The provincial Department of Education's failure to move surplus teachers placed many schools in a position of severe financial strain. In 2011 and 2012, many fee-paying schools were forced to step into the shoes of government and appoint educators with their own funds as a stop-gap measure. However, these

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funds were soon depleted. Schools were brought to the brink of bankruptcy by their attempts to mitigate the provincial Department's failure to pay educators.

No-fee schools (the poorest schools in the province) were placed in an intolerable position because they were unable to pay their government-appointed teachers. As a result, teachers across the Eastern Cape were left to stay at home, unpaid, or to work for as little as a bus fare, and hundreds of learners were left without instruction, particularly in vital subjects such as mathematics and sciences.<sup>171</sup>

However, the disastrous consequences extended beyond the lack of teachers. Because many schools were financially crippled by their attempts to pay teachers, they were unable to fund critical facilities and resources such as nutrition programmes (which provided a meal per day for school children), textbooks, stationary, infrastructure and school transport schemes.

Litigation was instituted when a number of schools approached the LRC to seek assistance. The LRC sent

a letter requesting that the provincial Department take steps to remedy the situation immediately. On 31 May 2012, having received no satisfactory response, the LRC (acting on behalf of the CCL and various school governing bodies) launched an application in the Grahamstown High Court. The relief sought was as follows:

- The Minister of Basic Education or the head of the provincial Department of Education was to fill all the vacant posts with permanent appointments within three months of the order. In the interim, teachers were to be appointed to vacant posts on a temporary basis within one month of the order.
- The salaries of all teachers that were appointed were to be paid from the day on which they assumed duty.
- Recognising the need to monitor compliance, the applicants sought a supervisory order requiring the provincial Department to report on its progress.

The LRC's past experience with the Department suggested that the terms of the application would be accepted and a settlement agreement reached. As a consequence, the LRC was relatively

bold in its claims.<sup>172</sup>

As predicted, the LRC's terms were largely accepted by the respondents and were made an order of court on 3 August 2012. The only issue that remained in contention was the appointment of non-educator posts, which became the subject of a court hearing and a judgment in the High Court in favour of the applicants.<sup>173</sup>

In the months that followed, the provincial Department passed a budget that made provision for the posts and made progress in appointing and paying some temporary teachers. However, it failed to appoint and remunerate educators on a permanent basis, as required by the court order. The Department raised no legal defence for its inaction. Rather, the reports that it submitted made it clear that the non-compliance was a result of incompetence, inefficiency and trade union resistance.

Meanwhile, the situation in the Eastern Cape worsened. By 2013, the number of vacant teacher posts had risen to

<sup>171</sup> Sarah Sephton on behalf of the Governing Body of Linkside High School in Port Elizabeth and others, *Founding Affidavit*, Eastern Cape High Court in Grahamstown, paragraph 103 and 113.

<sup>172</sup> Legal Resources Centre, *Ready to Learn op.cit.*, page 66.

<sup>173</sup> *The Centre for Child Law & Others v Minister of Basic Education & Others* [2012] ZACGHC 60; 2013 (3) SA 183 (ECG).





Photograph: United Nations  
Educational, Scientific and  
Cultural Organization/  
Darryl Evans ©

more than 8 400, and schools remained in a position of financial peril due to the Department's failure to pay teachers. This occurred despite the active efforts of the LRC to assist the Department in achieving compliance with the court order. From the date of the first court order, the LRC maintained a constant stream of communication with the Department, informing it of the circumstances in schools, warning it of anticipated violations, and advising it on the scope of the court order.<sup>174</sup> Given the lack of responsiveness from the Department and its flagrant disregard of the court order, the LRC and the CCL felt that they had no option but to return to court.

In strategising for the second round of litigation, the LRC and the CCL recognised that this was an unusual situation. The Department would almost certainly have no legal defence at all and, moreover, was likely to again settle at the doors of the court. However, the Department would then likely fail to comply with the resultant order. As is explained by the LRC:

*As it is in the game of chess, successful litigation requires planning several*

*moves ahead. [...] A case has to be built on the basis that it may be contested in court, while at the same time recognising that the Eastern Cape Department of Education will likely – if its track record is anything to go by — agree to the LRC's terms which will then be made an order of court.*

*Then, over and above the usual considerations requisite for building a robust case, experience has shown that measures must be built into one's case in anticipation that the Department will fail to comply with the court order. In crafting these measures, the LRC has had to ensure that they are forceful without being inflexible. Furthermore, given the myriad of potential ways a party may find themselves in breach, the LRC has had to craft ways to coerce compliance while reserving scope to facilitate its continued constructive involvement in the matter.<sup>175</sup>*

The LRC and the CCL took the view that a second order against the government would be futile if it was granted in the same terms as the first. It was clear from the provincial Department's behaviour to date that

the threat of a contempt of court order would not provide sufficient incentive for it to act.

Consequently, the LRC and the CCL worked to formulate a new order that did not rely on positive action from the Department to achieve the desired result. Rather, the proposed order put in place a number of default consequences that would be triggered if government failed to take positive steps. In other words, the proposed order was formulated to shift the onus onto the Department – the desired result would be achieved even if the Department failed to act.<sup>176</sup>

The new approach consisted of two phases. The first phase concerned the appointment of teachers on a temporary basis, and the second the appointment of teachers on a permanent basis.

In respect of the first phase, the LRC consulted with a selection of schools and compiled a list of over 140 candidates for appointment as temporary teachers. Thereafter, a settlement agreement was reached with the respondents for the temporary appointment of specific teachers to named schools. Importantly,

<sup>174</sup> Legal Resources Centre, *Ready to Learn op.cit.*, page 67.

<sup>175</sup> Legal Resources Centre, *Ready to Learn op.cit.*, page 65.

<sup>176</sup> *Ibid.*

*Although effective relief has been obtained for a significant number of schools in the Eastern Cape, the problem of teacher post-provisioning persists and on a scale that makes it hard to use traditional forms of litigation to address it. Accordingly, in 2014, the Legal Resources Centre brought an application seeking certification from the court for an 'opt-in' class action.*

the agreement stipulated that the Department would remunerate the appointees from the date that they assumed duty. The agreement was made an order of court on 7 March 2013.

The Department failed, however, to pay the teachers appointed by the agreed deadline. Given the terms of the order, the LRC was able to apply to court for the payment of the teachers' salaries. The effect was that the respondents were liable for an ascertainable debt, which was enforceable in terms of the State Liability Act 20 of 1957. This effectively meant that state assets could be attached to satisfy the debt. The threat of execution on state assets was sufficient incentive to spur the Department into action. It made the requested payments.<sup>177</sup>

A similar approach was adopted in the second phase (the appointment of teachers on a permanent basis). Lists of permanent appointees were compiled, a settlement agreement was reached regarding their appointment and remuneration, and the agreement was made an order of court on 6 June 2013. In addition, schools that still had vacant posts were given the power to advertise,

shortlist, interview and recommend candidates for appointment. If the Department failed to decide on recommendations within a specified period of time, the candidates would be deemed to be appointed.<sup>178</sup> The second court order also provided that, should the Department fail to pay salaries, they would be declared an ascertainable debt, executable in terms of the State Liability Act. Hence, in the event of non-payment, there was no need for the LRC to return to court for such a declaration.<sup>179</sup>

The orders obtained have provided effective relief for a significant number of schools in the Eastern Cape. However, the problem of teacher vacancies and the failure to implement post-provisioning remains a very serious one. Moreover, the scale of the problem is so significant that it made it hard to use traditional forms of litigation to address it.

Accordingly, in 2014, the LRC brought a fresh application in which it sought immediate relief for some schools, but more importantly, certification from the court for an 'opt-in' class action. This took advantage of recent developments

in South African law which made clear that the use of class actions was permissible.<sup>180</sup> The relief sought in this class action involves both the repayment of schools for the amounts they have paid to temporary teachers and the appointment (if necessary, on a deemed basis) of temporary teachers to remaining vacancies.

The advantage of this opt-in class action – the first of its kind in South Africa – is that it created a way for the LRC to publicise the litigation to the various schools potentially affected, and produced an efficient way for the LRC to act on their behalf and claim relief for them, despite the magnitude of the problem. The High Court duly granted the certification order on an unopposed basis, and since then 90 schools have opted into the class action. At the time of writing, the merits of the class action had not yet been determined.

## Lessons

A number of useful lessons emerge from these four examples of litigation on the right to basic education.

<sup>177</sup> Legal Resources Centre, *Ready to Learn op.cit.*, page 68.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*

<sup>180</sup> This is discussed in more detail in Chapter 5.



Child walking to school in a village outside Mthatha in the Eastern Cape.

### The benefits of an incremental approach

The first lesson is about the advantages of an incremental approach. In the education litigation cases above, although the right to basic education is immediately realisable, civil society organisations have opted to take an incremental approach to litigation and have used the standard of ‘adequacy’. This incremental approach is evident in the choice of cases that have been brought. The first cases thus dealt with the poorest of the poor and most vulnerable.

The schools chosen for the mud schools case, for example, are situated in the Eastern Cape (one of the country’s poorest provinces) and were among the worst-off schools in the province. There was little doubt that the court would find in favour of the applicants when faced with the dire conditions at these schools.

Similarly, the norms and standards case dealt with the absolute minimum standards required for teaching and learning, including access to potable water, functioning toilets, buildings that protect students from the elements, and classrooms that contain desks and chairs.

Thus, the approach has been to give content to the right to basic education by gradually building it up from the absolute minimum. This has the advantages of the minimum core approach – it provides clear content to the right and gives communities and courts a definite standard against which to measure government’s performance. However, unlike the minimum core, it does not risk stagnating or becoming fixed. The minimum standard will rise with every new case that is brought and won.

Moreover, by forcing government itself to set the minimum requirements, the norms and standards case avoided the repeated refrain from the courts that judges are not well placed to set such standards. This was a far more effective way of proceeding than, for example, asking the courts for broad systemic infrastructural relief on an unrealistic scale.

Litigating parties have used the standard of adequacy when assessing the constitutionality of government’s provision of education. The standard of adequacy is arguably more fixed than that of reasonableness. This is particularly true if one takes the approach described above. While

reasonableness shifts constantly, depending on the circumstances of a particular case and government’s resources at the time, adequacy represents a defined threshold that has been developed through case law. At present, an adequate education is constituted by instruction in a school with safe infrastructure, sanitation, potable water, sufficient security, textbooks, and a permanent teacher (among other things). This standard is immediately realisable, in line with the wording of Section 29(1)(a) of the Constitution.

### The advantages of narrow litigation

A second lesson concerns the advantages of narrowly-focused litigation. Each of the cases described above takes on a specific issue, provides extensive evidence regarding that issue and seeks a clear order in relation thereto. In our view, there are a number of strategic shortcomings in pursuing a contrasting, overly broad relief:

- Courts will be reluctant to grant sweeping and vaguely defined orders for fear that they might intrude into the policy-making domain of the legislature and executive.

*Although the right to basic education is immediately realisable, civil society organisations have opted to take an incremental approach to litigation and have used the standard of 'adequacy'. Their approach has been to give content to the right to basic education by gradually building it up from the absolute minimum.*

- By seeking too much too early, the applicants risk a refusal and thereby creation of a negative precedent that will close off litigation on certain issues in the future.
- A broad order does not give clear guidance to government officials as to the steps that they should take. An order in specific terms increases the likelihood of compliance when the state's failures were caused by the incapacity, incompetence or inattention of officials. The same holds true when failures result from active political opposition or a lack of political will. A clear and specific order removes the space for uncooperative government officials to delay or avoid acting.
- The magnitude of the issues addressed and the relief claimed would make a supervisory order a daunting prospect for any court.
- Communities will be unable to monitor the implementation of an order made in broad, ill-defined terms.

In particular, it must be emphasised that a case that aims to attain everything is at risk of achieving nothing.

It is for this reason that we have to record our concerns about the strategy

informing the ongoing litigation in *Pease v Government of South Africa*.<sup>181</sup> This case is brought against the national government, as well as the MEC for Education in each province. The applicants, an education specialist and the Progressive Principals Association, claim that the respondents have breached their duties under no less than 12 different Sections in the Constitution by failing to:

- equip the majority of learners in South African schools with sufficient literacy and numeracy skills to attain functional literacy;
- deliver textbooks and learning materials timeously, in appropriate quantities and in appropriate languages;
- address teacher absenteeism, lack of professionalism and lack of training;
- promote and provide mother-tongue education; and
- make available comprehensive early childhood development programmes to children under five years of age.

The applicants seek an order that national government must:

*[...] take all such steps, including urgent and interim steps, as may be necessary to address reasonably and responsively each and every failure and/or omission [as listed above] by taking reasonable and accountable steps to remedy the conditions [referred to above].*<sup>182</sup>

In addition, the applicants seek a supervisory order whereby government would report to the court on the steps that it has taken and the progress that it has made.

At the time of writing, the matter had been argued in the High Court, but no judgment had yet been delivered. We therefore express no view on the merits of this case.

However, the strategy underlying the litigation appears to us to be seriously questionable. In view of the difficulty of persuading courts to even make narrow, precise orders and then to get government to properly implement them, we have doubts about the effectiveness of this approach.

<sup>181</sup> *Pease & Another v Government of South Africa & Others*, Western Cape High Court, Case No. 18904/13.

<sup>182</sup> *Notice of Motion, Pease & Another v Government of South Africa & Others*, Western Cape High Court, Case No. 18904/13, paragraph 3.





Photograph: Annalisa Burrello ©

## Building a record

A third lesson is the significance of building a record, as illustrated by the mud schools and Limpopo textbook cases. In the latter, for example, Section 27 took steps to create a record of correspondence showing:

- attempts to resolve the dispute prior to resorting to litigation;
- the history of misrepresentation and unfulfilled promises by government; and
- government's lack of responsiveness to the queries and concerns raised by communities.

A record of this nature significantly increases the likelihood that a court will intervene and issue a mandatory order directing government to take specific action.

## Close ties with affected communities

The fourth lesson relates to the maintenance of a close connection with the communities affected by the litigation, which is vital for gathering information and for monitoring compliance. EE's approach in the norms and standards case is a shining example of this.

Also, in the Limpopo textbook case, Section 27 relied on reports from schools, teachers and parent members of school governing bodies to monitor compliance with court orders. Without such careful and attentive monitoring, the continued lack of delivery would have gone unnoticed and the issue would not have been pursued.<sup>183</sup>

Likewise, in the mud schools case, the LRC and the CCL worked with the relevant schools and communities to enumerate the needs of the schools and formulate petitions to be signed by members of the communities.<sup>184</sup>

## The significance of public mobilisation

A fifth lesson centres on the importance of public mobilisation. Public interest litigation is most effective when it is only one part of an overall campaign. This is demonstrated most emphatically by the norms and standards case.

Similarly, public interest litigation must (where possible) successfully marshal the support of the general public through media and other strategies. This is especially the case on an issue

such as lack of access to education for poor children, where public support is virtually guaranteed provided that the public understands the nature of the case. This is demonstrated by each of the four cases above. All of the organisations involved have spent time and effort to ensure that the media understands and reports on their cases – even where, as in the teacher post-provisioning case, the issues are technical and need to be simplified in order to attract public attention.

## The use of creative remedies

The sixth lesson is also illustrated well by the teacher post-provisioning case, namely the value of flexibility and willingness to make short-term concessions in the name of long-term gains, and the use of creative remedies.

In this case, the different approach taken in the second round of litigation required the applicants to narrow the scope of their case. Rather than applying for relief for all schools in the Eastern Cape, the applicants narrowed their focus to secure the appointment of teachers at a specified list of schools. This concession paid dividends later. Having won the relief with regard to

<sup>183</sup> Veriava *op.cit.*, page 36.

<sup>184</sup> Legal Resources Centre, *Ready to Learn op.cit.*, page 19.



Iqonce High School (shack school) in King William's Town, Eastern Cape.

Photograph: Equal Education ©

specific schools in the first phase, the LRC and the CCL were able to expand the relief sought to a wider group of schools in the second phase. Hence, in the second phase they sought (and won) an order giving schools the power to permanently appoint candidates to teaching positions if the provincial Department of Education had failed to make a decision on the schools' recommendations.

Moreover, the repeated non-compliance with court orders led the parties involved to develop creative remedies designed to fit the anticipated state response, rather than the overly blunt mechanism of contempt proceedings. For example, the use in the Limpopo textbook case of an independent verification mechanism was extremely effective, as was the approach of relying on deemed appointments and the right

to attach state property in the teacher post-provisioning case.

### Knowing when and how to accept settlement

A final important lesson that emerges from these education litigation examples is that public interest litigants must know when to accept settlement offers to achieve their aims. This is demonstrated most emphatically by the mud schools case. While this case had initially been built in the hope that it would achieve a binding legal precedent on the state's duties in relation to the right to basic education, the matter was ultimately settled. The decision by the litigants to settle was undoubtedly correct. The terms of the settlement agreement were far more extensive than they could ever have hoped to obtain from a court order. The absence of a

reasoned judgment – while regrettable – could never justify proceeding with the litigation.

However, the education litigation cases also demonstrate the need for litigants to be tactically astute when settlement prospects arise. The decision in the mud schools case to refuse to entertain settlement discussions until an answering affidavit was filed was an important one, as it altered the approach of the parties to settlement. Equally critical was the repeated decision by the litigants in the teacher post-provisioning case to ask for very extensive relief which anticipated eventual non-compliance by the state. This approach meant that practical results were achieved from the litigation – even in the face of apparently intransigent respondents.

# Chapter 3:

## Four key strategies for using rights to achieve social change

# Four key strategies for using rights to achieve social change

**One of the main questions Atlantic raised with us was which combination of strategies has been most effective in using rights to achieve social change, as well as the relationship of public interest litigation to various aspects of social mobilisation. In this regard, we understand social change to refer simply to whether rights have been used to produce a tangible and sustainable impact on the ground for those who ought to benefit from them.**

**D**rawing on the case studies presented in Chapter 2, as well as our evaluation as a whole, we conclude that for public interest litigation to achieve maximum success in advancing social change, it ought to take place in combination with three other strategies. These are:

- conducting public information campaigns to achieve rights awareness;
- providing advice and assistance to people in claiming their rights; and
- making use of social mobilisation and advocacy to ensure that communities are actively involved in asserting rights inside and outside the legal environment.

We do not suggest that it is essential that a single organisation itself be integrally involved in each of these

four strategies (litigation being the fourth strategy). Indeed, often this is not possible and we readily accept that specialist litigation organisations frequently have a vital role to play. As one of our respondents put it:

*The 'successful' combination is not a paint-by-numbers one, but very much depends on the issue. However, the history of social change has proven many times over that a single action strategy – whether litigation on its own, or activism on its own, will always fail.*

Indeed, as the Rural Women's Action Research Programme has correctly explained, these strategic processes should not be directed by lawyers as 'experts' or outsiders:

*[I]t is our experience that in order to successfully achieve social change, these strategic processes need to be framed by the initiatives and actions of community members and leaders, not by 'experts'. These processes may indeed require support from 'expert' partners, but the terms of the interaction should be governed by a frame and agenda that is set by the community. This approach increases*



Sisters Manoko and Elizabeth Dolo pictured in 2003. They were unable to attend school near Mokopane in Limpopo because their mother could not afford school fees for all her seven children.

Photograph: Sydney Seshibedi ©



*the likelihood that the interaction and its outcome will constitute best practice.*<sup>185</sup>

A similar conclusion is reached by Lucie White and Jeremy Perelman after considering four case studies regarding economic and social rights in different parts of Africa. In respect of those involved, they conclude that:

*[these activists] are among a new generation of social justice activists who have seized upon human rights values, language, and tactics to challenge the realities of extreme poverty. All in this new generation share a striking similarity in how they do their work. Although embracing human rights values, they reject traditional notions of human rights practice as a top-down, lawyer-driven, professional "game". Each of these advocates has understood human rights activism as political practice.*<sup>186</sup>

## Strategy 1 – public information

A public information campaign that informs ordinary people of their rights is an essential component of any effort to achieve social change on rights issues.

When asked about the major obstacles to using the law to achieve social change, virtually all our respondents identified lack of knowledge about rights as the primary obstacle. As one respondent explained:

*Few of the poor and marginalised (especially those in rural areas that lack access to information and communication technology) are aware of their rights, know the law, or have been informed that the law may be able to help change their situation.*

Another respondent made the same point with regard to expanding the use of socio-economic rights:

*The first step necessary to achieve this expansion is the creation of a system wherein the people know their rights and begin to assert them.*

*This empowerment of the citizenry will necessitate capacity-building of grassroots organisations, so that these groups may develop the skills needed to educate people about their rights and assist them in situations where their rights are being violated.*

A public information campaign is valuable in itself in terms of changing attitudes and empowering individuals, but it is also essential if people are to understand the role that law and legal rights can play in achieving social change. Somewhat surprisingly, a number of respondents suggested that even certain well-organised civil society bodies are insufficiently aware or persuaded of the role that legal rights could play in assisting them to achieve their goals. In respect of ordinary citizens and communities, the lack of knowledge is far more severe.

The need for public information is brought home forcefully by the example of the Grootboom case. There, until the Magistrate of his own accord referred the community to a lawyer, they apparently had no idea that they had legal rights which might assist them in preventing eviction. As a result, they did not seek legal advice, let alone make adequate use of the legal rights that they had.

<sup>185</sup> Aninka Claassens, Monica de Souza, Mazibuko Jara & Dee Smythe, *Advancing the Human Rights of the Rural Poor: Building Resources for Local Activism, Strategic Litigation and Law Reform*, unpublished: June 2011, page 23.

<sup>186</sup> Lucie E White & Jeremy Perelman (eds), *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty*, Stanford University Press: 2010, page 3.

*A public information campaign that informs ordinary people of their rights is an essential component of any effort to achieve social change on rights issues.*

This is true of many areas of South African life where statutes or the Constitution confer rights on people, but they are unaware of these rights and therefore cannot make use of them. This is so even when the rights are explicit and contained in legislation.

For example, one respondent emphasised that although the South African Schools Act 84 of 1996 provides substantial protection for children whose parents have not paid school fees, the majority of families who have had their children threatened or sent home from school due to unpaid fees do not know that they have any legal recourse.

Another example is the fact that some municipalities have indigent persons policies that allow poor people to obtain free or reduced-rate municipal services such as electricity and water. Generally, however, the municipalities appear to have made no effort to alert consumers to this and, as a result, consumers are simply unaware of this route as an option. The indigent persons policies remain in by-laws only, with poor people having their electricity and water cut off due to non-payment.

The kind of public information required is demonstrated by the TAC example. The TAC engaged in extensive public

information campaigns, both directed at its own members and the general public, explaining what the rights of HIV-positive individuals are. Moreover, as the case study discussion demonstrates, this public information campaign continued even after the litigation had been launched, with numerous workshops conducted by TAC volunteers to explain the case.

Similarly, in the case on norms and standards for school infrastructure, EE engaged in a sustained public information and protest campaign. This included leading school children and supporters in a number of marches, going door-to-door in communities to explain the issues and garner support, taking out full page adverts in newspapers, putting adverts on radio, releasing an animated video explaining the campaign, and organising a 'Ten Days of Action' project in schools (filling each day with a different activity to draw attention to the campaign such as the production of a play to inform learners about the case). As EE's General Secretary, Brad Brockman, has explained, however, this is not always easy:

*We made a very conscious effort to keep our members involved and to give*

*them a say in terms of the campaign, including when we decided to actually go to court. So, by the time we actually made the decision to go to court, we had actually been campaigning for about two years. And by that time our members were ready and they agreed and felt it was time to take the Minister to court. [...]*

*[I]n the middle of 2013 [the Minister of Basic Education] asked for an extension to adopt norms and standards, and we took that to the membership, and we asked the membership how they felt about that particular request – and overwhelmingly they said that we shouldn't give the Minister an extension. As the leadership of the organisation, we consulted with them, but in actual fact we decided to give the Minister a limited extension.*

*[O]n the one hand we were informed by what the members felt, but also we felt very strongly together with our lawyers [...] that if we didn't give the Minister this extension and if the matter were to go to court, the judges may be very sympathetic to what the Minister was saying. [W]e might even get in a situation where the judge gives [the Minister] a much longer extension than we would have given [...] and agreed to in the first place. So,*

Parents in Shallcross, near Durban, protesting against the imposition of school fees in November 2006.

Photograph: Abhi Indrarajan ©



*that created a lot of tension within the organisation. It was important for us to consult and also important for us afterwards to explain our particular choice. And, in the end, I think we made the right choice.<sup>187</sup>*

Nevertheless, such public information strategies are crucial in increasing the likelihood of public interest litigation succeeding. If ordinary people do not understand and buy into the litigation, those conducting it are unable to obtain the required information to launch litigation and are unlikely to generate substantial support from ordinary people, which in turn plays an important role in perceptions of the litigation by courts, the public and government.

Moreover, where litigation succeeds, it is essential that people are aware of the success in order to pursue their rights and transform the victory into concrete progress on the ground, or in order to inform the public interest organisations involved if the victory, for whatever reason, is not leading to tangible social change on the ground.

## Strategy 2 – advice and assistance

Once people are aware of their rights, it is critical that a strategy enabling people to claim these rights is developed.

Of course, all public interest litigation is notionally about enabling people to claim their rights. However, we conclude that something beyond this – and separate from it – is necessary. Litigation cannot and should not be the only way in which people are enabled to claim their rights.

Instead, it is essential that there are intermediary organisations which support people to claim their rights, through 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 be done successfully without necessarily engaging in litigation.

The need for such advice centres is made clear by the efforts of public

interest organisations under apartheid. A number of our respondents emphasised the important role played by advice offices in this period. This meant that organisations such as the Black Sash, which did not itself undertake litigation, could nevertheless provide legal assistance to large numbers of people and channel cases that required litigation to lawyers in private practice.

The end of apartheid, however, saw the dwindling of such advice centres. This was highly problematic as it meant that indigent people either had to access fully fledged lawyers or, for the most part, were left without any legal advice at all.

As one respondent explained, reflecting on the situation in the mid-2000s and in answer to the question of how poor and marginalised communities have used the law to access rights and services:

*They have used the law very effectively when they have access to advice offices, the LRC and other free legal services. But the major problem is access.*

There have since been substantial efforts to repair this situation. As mentioned earlier, ProBono.Org was established in

<sup>187</sup> Transcribed from the audio version of the discussion on *Social Mobilization and Strategic Litigation for Equal Education in South Africa* op.cit.

*It is essential that there are intermediary organisations which support people to claim their rights, through 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 be done successfully without necessarily engaging in litigation.*

2006 to facilitate legal *pro bono* support to the poor by law firms and private practitioners. This was followed in 2007 by the launch of the National Alliance for the Development of Community Advice Offices (NADCAO) – an alliance of NGOs and donors seeking to strengthen the community advice office sector and broaden access to justice. Recently, LASA has also begun to increase its involvement in civil cases and has struck a co-operation agreement with NADCAO involving legal back-up services by LASA to community advice offices, and referrals from these offices to LASA's Justice Centres and Satellite Offices. In sum, while there is undoubtedly always more that can be done, these developments are important in enabling people to claim their rights.

It bears emphasis that community-based advice centres need not be staffed by lawyers. Many of the issues raised by clients may not even need legal advice. In many instances, people simply do not know where to go to claim a service from a particular government department or do not know the services to which they are entitled. Proper advice on these issues could mean a significant change in people's lives,

without a lawyer's letter ever being written – let alone litigation being launched. As one respondent who runs such advice centres explained:

*Of the 10 000 cases we see per year, only a small portion require the assistance of a pro bono attorney. Still fewer form part of test cases seeking to change the law.*

However, it is important that advice centres either be staffed by paralegals or at least have staff who are sufficiently trained to see what legal routes are available. This is demonstrated by the Grootboom case. Had the Grootboom community not been referred by the Magistrate to Julian Apollos, they would likely have been left unrepresented and entirely unable to resist the eviction. This demonstrates the valuable role of advice and support to people wishing to assert their rights.

Advice centres thus play a fundamentally important role, for example, in referring people to litigation organisations. In doing so, they provide an essential feeding ground for future litigation – by identifying the core or most serious issues that are affecting large numbers of ordinary people. This allows public interest litigation to

be effectively designed and targeted to achieve maximum impact. It also provides a wide range of possible applicants to participate in litigation and sustains the factual contentions necessary to make such litigation successful.

Equally important, advice centres play a crucial role in ensuring that a substantial victory in a landmark case actually translates into tangible benefits far beyond those directly involved in the case. A socio-economic rights victory in the Constitutional Court is meaningless if the news of this is not disseminated and acted upon – for example, by writing letters reminding the relevant department of the Court's decision and its effect. An advice and assistance strategy is therefore essential, if we are to avoid having jurisprudentially important cases that have little practical impact on the ground.





Farmworkers are among the most vulnerable, and community advice offices often play an important role in enforcing their rights.

## Strategy 3 – social mobilisation and advocacy

It is clear from our study that rights generally are most effectively asserted by social movements. This point is well demonstrated by the case studies in Chapter 2 as well as other examples, and is a view shared by virtually all of our respondents.

Importantly, it appears that this conclusion is not limited to South Africa. Instead, comparative foreign experience demonstrates the same trend, a point emphasised by Geoff Budlender in his paper from 2000, *Using the South African Constitution as a Mechanism for Addressing Poverty*, on which we draw here.

The view that litigation by itself is generally insufficient to produce social change and that social mobilisation is essential has been particularly forcefully expressed in the Indian context. As former Chief Justice PN Bhagwati of the Supreme Court of India expresses it:

*We must always remember that social action litigation is a necessary and valuable ally in the cause of the poor, but it cannot be a substitute for the organisation of the poor, development of community self-reliance and establishment of effective organisational structures through which the poor can combat exploitation and injustice, protect and defend their interests, and secure their rights and entitlements.*<sup>188</sup>

The same point is made even more forcefully by Indian public interest litigation activist, Vasudha Dhagamwar:

*For the downtrodden of the world, we secure their rights by law, exactly as though they had the same privileged background as we, and then, outside the courtroom we leave them to their separate ways [...] Their grim, hostile world, which recedes while we are present, returns with a vengeance. This is why our legal victories turn out to be pyrrhic and dangerous to the poor. There is a real danger if legal activists continue to interfere haphazardly, on a short term, case-wise basis with the lives of the downtrodden. It is time we learn that it is not enough to expose*

*the innumerable and appalling social evils through the courts and the media. We must link up with social activists who alone can provide them with ground support.*<sup>189</sup>

## Potential tension between litigation and social mobilisation and advocacy

The use of litigation may even distract from and undermine other activities of a social movement which seek to enforce rights. As Richard Abel explains:

*The legal representation of similarly situated individuals, even when it takes the form of a "class" action, tends to substitute for, rather than foster, organisation [...] The inescapable conclusions, however reluctant we may be to draw them, are that the clientele of legal aid does not lend itself to organisation, and that the offer of legal assistance actually may undermine collective action.*<sup>190</sup>

<sup>189</sup> Cooper *op.cit.*, page 139.

<sup>188</sup> Quoted from Jeremy Cooper, *Public interest law revisited*, in *Commonwealth Law Bulletin*. Vol. 25, Issue 1: 1999, page 140.

<sup>190</sup> Richard L. Abel, *Law without Politics: Legal Aid under Advanced Capitalism*, in *UCLA Law Review*, Vol. 32: 1985, pages 496–497.

*Public interest litigation achieves maximum social impact when it complements and assists other advocacy strategies, including efforts to achieve social change via formal and informal political processes as well as public pressure.*

Almost precisely the same view was expressed by one of our respondents:

*The potential exists for litigation and mobilisation to be in tension, if recourse to the courts leads to resources being devoted only to litigation, at the expense of other strategies, leading to demobilisation. This can also involve lawyers and intellectuals taking the lead in devising strategies and making key decisions, at the expense of decision-making by communities or their representatives. This danger needs to be guarded against.*

The scepticism of NGOs with regard to the use of litigation is relatively widespread and ultimately not surprising. In the context of the Mazibuko case, for example, one respondent explained that the APF was initially resistant to being associated with litigation and engaged in extensive conversations and deliberations about the ‘turn to the courts’. Even organisations that have litigated in their own names remain cautious on this score. As EE has explained:

*One of the dangers [...] that you face when deciding to take a campaign case to court is that you then get a process pretty much stuck in the court*

*system. [This is] one of the reasons why you have to be quite careful and think about when it is that you choose to take on strategic litigation, because you in essence are now taking away certain space within which to engage and ultimately get potentially stuck in what could be a long, drawn-out court process. [This] is again a caution to any of us when making these decisions.<sup>191</sup>*

What all of this makes clear is that making use of litigation can never suffice as an alternative to or substitute for proper social mobilisation on rights issues. Rights have to be asserted both outside and inside the courts. Laws and policies have to be developed in a manner which has proper regard to rights. Even when litigation results in a major breakthrough, there has to be organisation to ensure that it is properly implemented.

It is therefore critical that public interest litigation be seen as merely one facet – albeit an important one – of broader, more varied efforts to achieve social change. In particular, public interest

litigation achieves maximum social impact when it complements and assists other advocacy strategies, including efforts to achieve social change via formal and informal political processes as well as public pressure. As Geoff Budlender explains, there is a need for social movements that:

*[...] identify issues, mobilise support around them, place pressure on the political system, use the legal system as a means of achieving this, and monitor and enforce favourable laws and orders by the courts. The best legal work supports the development of this sort of social movement.<sup>192</sup>*

## Successful mobilisation in practice

The proper relationship between mobilisation and litigation is demonstrated by a number of South African examples. Some of these examples demonstrate how, skilfully managed, litigation can contribute as one aspect of a broader mobilisation process. Other examples demonstrate

<sup>191</sup> Transcribed from the audio version of the discussion on *Social Mobilization and Strategic Litigation for Equal Education in South Africa* op.cit.

<sup>192</sup> Geoff Budlender, *Using the South African Constitution as a Mechanism for Addressing Poverty*, unpublished: 2000.

Protest against 'corrective rape'  
in East London in May 2011,  
organised by the Eastern Cape  
LGBTI Organisation.

Photograph: Zamanguni  
Mzimela ©



the negative consequences that result when this is not done.

An especially good example of combining mobilisation and litigation is that of the TAC case. The TAC saw litigation as one facet of a much bigger political fight over the availability of HIV and AIDS drugs. For years before the case commenced, the TAC had been engaging in substantial social mobilisation of its members and the broader public in an effort to put pressure on government. Geoff Budlender makes this point:

*The TAC built a strong alliance with key pillars of civil society – trade unions, churches and media. It built a genuine social movement and showed how the Constitution, which represents the best ideals and values of our country, can be a powerful tool for holding government to those ideals and values.*

*In some ways, the final judgement of the Constitutional Court was simply the conclusion of a battle that the TAC had already won outside the courts, but with the skilful use of the courts as part of a broader struggle.<sup>193</sup>*

<sup>193</sup> Geoff Budlender in *A paper dog with real teeth*, Mail & Guardian: 12 July 2002.

Other examples of successful political and social mobilisation emerge in the litigation around the right to education.

During the Limpopo textbook litigation, for example, Section27 launched an extensive media campaign that put pressure on government respondents to act. The organisation relied on both traditional and social media platforms. Section27 thus released press statements, held press conferences, wrote opinion pieces and provided updates via social media. The political pressure resulted in government interventions beyond those sought in the litigation, including the appointment by President Zuma of a task team to investigate the causes of delayed deliveries.

Similarly, in the norms and standards case, EE used its public campaign to build grass-roots support for the movement. As a result, there was significant pressure brought to bear on the Minister of Basic Education to uphold her commitment to publish binding minimum norms and standards for school infrastructure. Moreover, EE grew its support base significantly and gained momentum for its other education campaigns.

The Grootboom case also presents an important example. In this case, there was initially active social mobilisation and protest.

A few days after being evicted, the community organised a march to the offices of the Oostenberg Municipality, forced their way into a council meeting and demanded that something be done about their plight. This ultimately did not secure them any assistance – although it did put them in contact with the ANC politician who later encouraged them to launch the court action.

However, once the litigation began, the social mobilisation appeared to dissipate, with the community relying largely on the legal process to resolve the dispute. This had a number of negative effects, including that by the time judgment was handed down, the community was no longer in a strong position actively to assert and enforce its rights.

The weak and temporary nature of the social mobilisation in the Grootboom case was, regrettably, symptomatic of a lack of mobilisation in the land and housing sectors more generally. As one of our respondents explained of the

land sector in 2007:

*The key weakness in South Africa's land sector to date has clearly been the lack of an organised political constituency in rural society, articulating a powerful rural voice able to counter the persistent urban bias in the country's politics and economics. Land sector NGOs have consistently advocated pro-poor policies and greater levels of state investment in rural areas, but their reach is limited and their impact on policy has been uneven and often very limited. Rural social movements pushing for fundamental change did not emerge on any scale in the 1990s, and an attempt in 1999 to foster such a movement, undertaken by an alliance of NGOs under the umbrella of the Rural Development Initiative, came to naught.*

This may well explain why, by 2007, the land and housing cases brought under the Constitution had all related to individual communities often faced with an immediate threat of eviction. This was in stark contrast to the careful strategy of the TAC, for example.

Thankfully, this situation has begun to change. Increasingly, significant efforts are being made to engage in social mobilisation strategies, particularly among rural communities. The careful and sustained efforts to resist the negative effects of the Communal Land Rights Act 11 of 2004 are good examples, ultimately ending in a victory in the Constitutional Court in *Tongoane v Minister of Agriculture and Land Affairs*,<sup>194</sup> albeit only on procedural grounds.

It is important to understand, however, that the effect of this victory went far beyond merely setting aside the legislation on procedural grounds:

*Court victories are often important in illuminating for poor people that victories against powerful actors – such as the state – are possible and within their grasp. This is critically important in contexts where the power of the state has previously seemed impregnable. The impact works both ways in the sense that often state officials are disproportionately disheartened by losing cases. In this sense the symbolic impact of victories and successes may be disproportionate to the narrow focus of the issue being litigated. This changed perception of the balance of power builds confidence and inspires people to engage actively in struggles for change – including non-legal on-the-ground struggles. Success breeds confidence which is important in and of itself in processes of local struggle. [...]*

*Despite the generally limited scope of the content dealt with in judgments, the symbolic impact of a court victory often goes beyond that which is contained in the judge's final decision. The recent constitutional court case of *Tongoane* [...] is illustrative of this point. Judgment was delivered in favour of the applicants and the Communal Land Rights Act 11 of 2004 was declared unconstitutional in its entirety. However, judgment was delivered only in respect of procedural irregularities in the parliamentary drafting of the Act, not in respect of more substantive arguments put forward by the applicants about the content of the Act. Despite this, the applicants (and other persons*

*similarly placed) regard the judgment as a symbolic victory which precludes the inclusion of any of the opposed provisions' content in future versions of the Act.*<sup>195</sup>

Equally important and impressive were extensive efforts to oppose the Traditional Courts Bill.<sup>196</sup> These efforts resulted in the Bill notionally 'lapsing' in Parliament in February 2014 – but it is quite clear that it was the extensive organised resistance to the Bill that produced this result. As explained by Nomboniso Gasa from the Centre for Law and Society, which has been actively involved in many of these campaigns:

*Who killed the [Traditional Courts Bill]? The people who took great risks and refused to be hoodwinked into believing that the bill was about their culture, custom and affirmation of traditional leadership. These are the people who travelled to hearings again and again, thirsty, without travel money, and relied on the help of others. [...]*

*To go with the story that "the [Traditional Courts Bill] lapsed" is to deny the courage of these people in face of great humiliation and intimidation in some of the public hearings, including in Parliament. They are South Africans who live in the "back of beyond", who are often blurred in national consciousness. Despite being told in public hearings, "Tata, asithethi ngezikhazelo zakho phatsi kwentlalo yeNkosi" (Father, we are not speaking about your complaints about your chief here), they were not deterred. They continued to*

<sup>194</sup> *Tongoane & Others v National Minister of Agriculture and Land Affairs & Others* [2010] ZACC 10; 2010 (6) SA 214 (CC).

<sup>195</sup> Claassens et al. op.cit., pages 23-24.

<sup>196</sup> *Traditional Courts Bill* [B1-2012], formerly [B15-2008].





Photograph: War on Want ©

*give their reasons for rejecting the bill. They know their customs and live in these communities.<sup>197</sup>*

Turning to the gay and lesbian litigation, the NCGLE was initially very active and effective at lobbying at a political level and at ensuring a public presence – for example, at the court hearings that took place in the sodomy matter. This public presence waned over time, although it was revived to some extent briefly by the gay marriage case and its aftermath.

However, our respondents in the gay and lesbian sector made clear to us that a lack of social mobilisation and public engagement on gay and lesbian issues was a major problem for the sector, notwithstanding the string of emphatic court victories. As one respondent explained:

*Litigation strategies must be coupled with community-based activism and popularisation of legal advocacy to allow a deepening of public engagement with the issue of socio-economic rights. Rights are not only won through the courts, for they are only as lasting and meaningful as the*

*extent to which they can be accessed. In our sector, an over-reliance of legal means to facilitate social change has meant that we now have a large gap between the policy and the personal reality, on a range of rights issues. [...] The LGBT sector has largely won its gains through the courts, with little engagement with affected constituencies or the broader public. The disparity that exists between law change and the practical outcomes this will affect is glaring. Implementation is key and the human factor mediates here, so unless we engage with the social attitudes and perceptions that make up this human factor, the effects of law in action will be limited. Administrative barriers are key here, and civil society organisations and service providers have a critical role to play.*

It is thus clear that even in the gay and lesbian litigation – which we have argued was as carefully thought out and well run as any of which we are aware – a solid litigation strategy was not sufficient to compensate for a lack of social mobilisation.

The lack of mobilisation is even starker in other areas – particularly and not

surprisingly those involving individual litigants. Thus, for example, there have been a series of decisions by the courts in favour of individual women who have been subjected to violence and abuse by the police or due to state inaction such as in *Carmichele v Minister of Safety and Security*,<sup>198</sup> and *K v Minister of Safety and Security*.<sup>199</sup>

These were landmark and groundbreaking judgments which held the state accountable and awarded substantial damages – but as one of our respondents asked:

*[W]here has this had any impact on the way in which ordinary women are treated in general or by the state in particular?*

While these judgments and monetary damages awarded may have vindicated the rights of the individual women concerned, they appear to have had little impact on a broader scale.

The same emerges from litigation under apartheid. Though the legal and political environment was substantially different to the present, an examination of Richard Abel's excellent book *Politics*

<sup>197</sup> Nomboniso Gasa in *Who killed the Traditional Courts Bill*, Sunday Independent: 2 March 2014.

<sup>198</sup> *Carmichele v Minister of Safety and Security & Another* [2001] ZACC 22; 2001 (4) SA 938 (CC).

<sup>199</sup> *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC).

*A lack of social mobilisation and public engagement on gay and lesbian issues was a major problem for the sector, notwithstanding the string of emphatic court victories.*

by *Other Means: Law in the Struggle Against Apartheid, 1980-1994*<sup>200</sup> makes it clear that legal work under apartheid was most likely to be successful in an enduring way when it was supported by political or social movements or organisations, to the extent then possible.

The lesson in our view is clear – it is the combination of complementary social mobilisation and litigation strategies that has the greatest potential to alter laws and policies.

## Litigation as an entry-point for mobilisation?

One respondent suggested to us that one could successfully use litigation as an entry point for large-scale mobilisation. While this may occur in unusual cases, we doubt that it is likely to be successful in general.

For example, there can be no question that the TAC case vastly increased the public profile of the TAC and assisted in widening its existing mobilisation process. Nevertheless, it is important

to bear in mind that – at least initially – the TAC used a model of ‘mobilisation first, litigation second’. As another respondent put it:

*[...] litigation can only catalyse mobilisation that is already taking place, it cannot create a movement where there was none.*

While much will depend on the specific circumstances of the organisation, community and cause involved, we are of the view that for many communities and organisations, until there is sufficient mobilisation, litigation will not even be a possible option. This is demonstrated by the Grootboom example.

In the Grootboom case, the community’s decision to embark on legal action only occurred when a prominent provincial ANC politician became involved and supported such a course, thinking it would assist the ANC to embarrass the NNP. Until that point, litigation was not on the agenda – even though the community was now legally represented.

This strongly suggests that the litigation may not have happened in the same way or even at all had the community (generally strong ANC supporters) not

been spurred on by the ANC politician and had the primary target not been the NNP-run local municipality.

A similar issue is raised by the TAC case where, as Heywood explains:

*[t]here was reluctance publicly to endorse taking ‘our’ government to court. Therefore the right of civil society to use litigation to claim and enforce rights had to be argued in meetings and workshops against those who considered it ‘disloyal’ or ‘unpatriotic.’ Although COSATU welcomed each judgment in TAC’s favour, it never openly supported the litigation.*<sup>201</sup>

Indeed, these concerns may well have been exacerbated by the fact that, over the past five years, opposition political parties have turned to the courts with increasing frequency in an effort to challenge government conduct and a range of laws. This has prompted Judge Dennis Davis to remark that:

*[t]here is a danger in South Africa [...] of the politicisation of the judiciary, drawing the judiciary into every and all political disputes, as if there is no other forum to deal with a political impasse relating to policy, or disputes which*

<sup>200</sup> Abel, *Politics by Other Means: Law in the Struggle Against Apartheid 1980-1994* op.cit.

<sup>201</sup> Heywood op.cit., page 300.

Treatment Action Campaign community outreach in the Buhle Park township in south-eastern Johannesburg, February 2011.

Photograph: Luckyboy Mkhondwane & Treatment Action Campaign ©



*clearly carry polycentric consequences beyond the scope of adjudication.*<sup>202</sup>

Whatever the origin of the concerns, they may in part go some way in explaining the relatively limited litigation by poor communities against government, particularly given that all three spheres of government are in most areas ANC-controlled.

While the loyalty of various communities to the ANC is not surprising, it strongly supports the argument that at least some degree of social mobilisation of communities is essential before litigation can even be placed on the table as a viable option.

## Strategy 4 – Litigation

The final of our four proposed strategies is that of litigation. While we have repeatedly stressed that successful litigation must not be seen as an end in itself, it can play a pivotal role when

used in combination with the three strategies set out above.

The advantages of using litigation as a complement to the three other strategies are well explained by the Rural Women's Action Research Programme:

*This approach to litigation is attractive because it implicitly acknowledges the systemic disadvantages suffered by many communities in South Africa, and incorporates mobilisation and other community-based strategies into the litigation process so that community members themselves (in partnering with lawyers) can be empowered to overcome these disadvantages. In the words of two 'community lawyers' from the USA: "In this model, rather than saviors or gatekeepers, lawyers are tacticians in the struggle for change. We call it community lawyering".<sup>203</sup> And later: "... fundamentally we believe that lawyers are most effective when they assist those most impacted by marginalization and oppression to lead their own fights for justice".<sup>204</sup>*

All our respondents, in different guises, supported the proposition that, properly used, public interest litigation enables poor or marginalised groups to achieve impact and success that would often not be available to them if they were limited only to the three strategies set out above.

At some stage, however, even this starting point has proved controversial in certain parts of the world, particularly in the US. In the 1990s, a furious academic debate took place over whether litigation could produce social change, sparked by Gerald Rosenberg's work *The Hollow Hope: Can Courts Bring About Social Change?*<sup>205</sup> However, even Rosenberg does not contend that litigation can never produce social change. As he explains:

*Courts influence events all the time. The claim The Hollow Hope makes is that only under certain specified conditions can courts further significant social reform. Without the presence of those decisions, court influence will still be felt, but it won't*

<sup>202</sup> Mazibuko, *Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly & Others* (21990/2012) [2012] ZAWCHC 189; 2013 (4) SA 243 (WCC).

<sup>203</sup> Purvi Shah & Charles Elsesser, *Purvi & Chuck: Community Lawyering*, 1 June 2010 (available at [www.organizingupgrade.com](http://www.organizingupgrade.com)).

<sup>204</sup> Claassens et al. *op.cit.*, page 20.

<sup>205</sup> Rosenberg *op.cit.* (1<sup>st</sup> Edition, University of Chicago Press: 1991).





2007: The light towers of the Constitutional Court rise above the barbed wire fortification of Section Four at the Johannesburg Fort (an apartheid-era prison).

Photograph: Gerald Kraak ©

*contribute very much to producing significant social reform.*<sup>206</sup>

This is not the place for a detailed debate over the correctness of Rosenberg's arguments and views and, even more critically, the extent of their applicability in a South African context. Such a debate would be particularly unnecessary because, in truth, virtually no one seriously contends that public interest litigation is inherently incapable of bringing about social change.

Moreover, even a brief consideration

of the practical consequences of the case studies discussed in Chapter 2 demonstrate the social change that can result from public interest litigation. These consequences include:

- Millions of people are now on ARVs and countless babies have been saved.
- Learners have been given access to textbooks, teachers and proper school infrastructure.
- Poor people have obtained increased security of tenure.
- Gay and lesbian couples are now able to get married, adopt children, and receive pension and inheritance benefits from their partner.

This does not suggest, of course, that the litigation has produced a radical reordering of our society. It does make clear, however, that public interest litigation can, when used appropriately, produce social change as we have defined it above – that is, a tangible and sustainable impact on the ground for those who ought to benefit from the rights concerned.

The real question, therefore, is in which circumstances and in conjunction with which other strategies such social change is most likely to occur.

<sup>206</sup> Gerald Rosenberg, *Knowledge and Desire: Thinking about Courts and Social Change*, in David A Schultz (ed), *Leveraging the Law: Using the Courts to Achieve Social Change*, 1<sup>st</sup> Edition, Peter Lang Publishing Inc., New York: 1998, page 255.



## Chapter 4:

Seven factors to maximise  
the prospect of ensuring  
that public interest  
litigation succeeds and  
achieves social change

# Seven factors to maximise the prospect of ensuring that public interest litigation succeeds and achieves social change

**What remains to be considered is in which manner litigation is most likely to succeed and achieve social change. In this chapter, we set out seven factors which we consider critical in this regard. In particular, it is vital that litigation be properly conceptualised, run and followed up.**

**T**he seven factors identified and addressed in this chapter are:

- proper organisation of clients;
- overall long-term strategy;
- co-ordination and information-sharing;
- timing;
- research;
- characterisation; and
- follow-up.

Somewhat unsurprisingly, our assessment is that where public interest litigation takes place in combination with the first three strategies set out in the preceding chapter, these seven factors are far more likely to be present than where public interest litigation is seen as a strategy and an end in itself.

Before we discuss each of these seven factors in turn, we make two points.

The first is to recognise that litigation can be either proactive or defensive. In the former case, the parties and their advisers are able to control the litigation. In the latter, the public

interest component may arise by way of a defence, or even the intervention of an *amicus curiae*. The approach we advance applies to both proactive and defensive litigation, but is certainly of easier application to the former.

The second point is that we have noted the criticism by Jackie Dugard and Malcolm Langford of the use of the seven factors following the 2008 report. They conclude:

*[Our] examination of Mazibuko and Joseph has indicated the complexity of the causal connection between public interest litigation and both successful judicial outcome and maximal social impact. Regarding successful judicial outcome, while various factors are relevant in specific cases (particularly retrospectively), the litigation process is too unpredictable to rely on any pre-conceived formula. As Mazibuko has shown, you can tick all the conventional boxes and still lose in court. Or, as Joseph has shown, you can sometimes win in court without ticking all the boxes.*

*This is not to imply that there are not better or worse ways to do public interest litigation. Clearly, the more immersed in the area you are litigating the better. As with any kind*

A young illegal immigrant on the deportation train from South Africa to Mozambique in 2000.

Photograph: Nadine Hutton ©



*of litigation, this includes conducting ongoing research, coordinating with stakeholders and learning from being a repeat player. In this respect, there is mounting evidence that civic action requires long-term strategic thinking based on thorough contextual and structural analyses. These are habits worth acquiring. However, as evidenced in Mazibuko, such factors might not be enough to ensure a successful judicial outcome. Judicial outcome depends ultimately on the judges themselves. In this regard, studying trends and patterns might offer some clues as to how judges might adjudicate. However, in the case of the South African Constitutional Court, particularly in relation to socio-economic rights claims such as those pursued in Mazibuko and Joseph, the Court's jurisprudence is still too sparse and inconclusive to provide concrete direction.<sup>207</sup>*

**We disagree with the assessment that Mazibuko ticked all the boxes while**

Joseph did not.<sup>208</sup> However, the more critical point is that, in setting out these seven factors, we do not purport to provide a mathematical formula for success in litigation. Nor could we ever do so. Litigation is subject to so many variables that outcomes are never certain.

This is not to say, though, that litigation can or should be reduced to a lottery. Every day, lawyers provide advice based on their reasonable prediction of how the highest court would decide the issue in question. That advice presupposes a measure of consistency and continuity in the legal system based on a system

<sup>208</sup> To provide two examples:

Dugard and Langford conclude that Mazibuko fully met the timing factor because all attempted political engagement had failed by the time of the launch of the litigation. However, a number of our respondents disagreed. They emphasised that the first case on access to water should not have been one brought on behalf of people with access to running water in their homes, and that political engagement in relation to the City of Johannesburg's indigence measures regarding water had not occurred at all.

Dugard and Langford contend that the characterisation factor in Joseph was only partially satisfied because the applicants characterised the case as a 'right to housing' case and the Constitutional Court then sidestepped that characterisation. That is not correct. The applicants were at pains to avoid characterising the case as a right to housing case and repeatedly emphasised that the case was about administrative justice and procedural fairness, a characterisation that was ultimately accepted by the Court.

of precedent and rules of evidence and procedure. Advancing a litigation strategy is, in principle, no different.

This does not mean that courts will inevitably decide matters in a particular way. It means only that it makes sense to adopt a litigation strategy that has the best prospects of succeeding and to do so in a way that maximises the social change which will likely result.

Against this backdrop, we turn to the seven factors concerned.

## Factor 1 – proper organisation of clients

An important point that arises for consideration is which types of clients are most likely to lead to the most successful public interest litigation? In our view, the ideal public interest client has two characteristics:

- Firstly, generally speaking, public interest litigation is likely to

<sup>207</sup> Dugard & Langford *op.cit.*, page 63.

*Litigation is likely to achieve greater social change when the client is a collective entity with a direct interest in the matters being litigated.*

achieve greater social change when the client is a collective entity (organisation or movement) with a direct interest in the matters being litigated, rather than, for example, a few disparate individuals.

- Secondly, 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.

## Individual or collective clients

With regard to the first issue, we have already touched on examples of litigation that, while achieving impact for the individuals concerned, have apparently not had any lasting social impact. These are the women's rights cases mentioned earlier – Carmichele v Minister of Safety and Security, and K v Minister of Safety and Security.

The difficulty, of course, is that an individual litigant generally has an individual and narrow interest. He or she (or they in the case of a community) wishes to achieve an award of damages or avoid eviction, for

example, but there is often no greater cause at stake that is being asserted. As a result, the conceptualisation of the case, the scope of the legal debate and any remedy awarded tends to be narrow and individualistic, thus reducing the prospects of achieving social change.

A good example of this is the Grootboom case. Until the LRC became involved in representing the *amici*, the case focused exclusively on the position of the Grootboom community and whether they should receive housing or shelter. Had the LRC not intervened, and even if the Grootboom community had succeeded, it is very likely that the result would have been a narrow judgment and order, focusing only on the community's limited circumstances and affording them some narrow relief. As a result, while they may have achieved success, the broad effect and prospects for social change would have been minimal.

The LRC's intervention shifted the focus from a narrow case to a broader cause. It resulted in a judgment setting out principles and precedent far beyond the narrow circumstances of the Grootboom community and gave a broad declaratory order stating that the housing policy in the entire Western

Cape province failed to comply with the Constitution. We deal with the effect of declaratory orders later in this chapter, but for present purposes suffice it to say that the Grootboom order, if used properly by organisations such as the SAHRC, could have provided an ideal springboard for achieving substantial social change. This situation was only made possible by the LRC's intervention, broadening the focus of the case.

Some of the litigation that has been undertaken on behalf of individually detained asylum seekers and refugees demonstrates the same point. As Roni Amit explains, in respect of various court victories – including in the Supreme Court of Appeal:

*[...] while the individual on whose behalf the cases was brought generally obtained some relief, similarly situated asylum seekers and refugees have continued to confront the same illegal practices.<sup>209</sup>*

This is not, of course, to deny the importance of vindicating the individual rights of those who have

<sup>209</sup> Roni Amit, *Winning Isn't Everything: Courts, Context and Barriers to Effecting Change Through Public Interest Litigation*, in South African Journal on Human Rights, Vol. 27, Part 1: 2011, page 16.



Tents at a refugee camp in Midrand, Gauteng in 2008. A wave of rioting and xenophobic violence swept through South Africa in May 2008.

Photograph:  
NJR ZA/www.wikimedia.org ©



been unlawfully detained, but it points to the difficulty of obtaining systemic relief and producing meaningful social change when cases are only brought on an individual basis.

In response to this difficulty, LHR has recently launched litigation as an institutional litigant seeking to challenge the constitutionality of certain provisions of the Immigration Act 13 of 2002 on the basis that they fail to adequately safeguard the rights of detainees. It is hoped that this will produce greater systemic benefits to those affected.

Even where an individual litigant does seek to bring a case with a broader goal in mind, the narrowness of his or her direct interest can undermine these efforts. Faced with a settlement proposal that would resolve the immediate and individual concern, most clients (and their lawyers who are ethically obliged to act in their interests) will have little option but to accept the settlement proposal, thus putting paid to the case and meaning that the broader cause cannot be furthered.

Indeed, this has become an almost inevitable tactic of certain government departments. Faced with the prospect

of an adverse judgment or order that may have negative implications, certain departments tend to litigate vigorously – taking every technical point imaginable – until shortly before the matter is to go to court. Then, a few days before the court hearing or even on the day of the hearing on the steps of the court, a settlement offer is made to resolve the position of the individual litigants. This offer, if accepted, means that there is not even a precedent set because no judgment is issued, let alone a broad remedial order granted. This tactic is particularly frequently used by the Department of Home Affairs in dealing with refugee matters.

However, where individual clients truly seek to act in the public interest as well, tactics can be devised to minimise this risk. This is demonstrated by the case of *Tafira v Ngozwane*<sup>210</sup> run by the Wits Law Clinic and dealing with the unlawfulness of procedures in place at refugee reception offices.

In this case, the seven individual applicants – all of whom were seeking refugee status – made clear that they acted in their own interest in reviewing and setting aside the unlawful decisions

made in respect of them, but also used South Africa's broad standing provisions to act in the public interest in seeking wide-ranging general relief consisting of declaratory and mandatory orders in order to resolve systemic problems.

This meant that although government conceded the individual relief very early on, the case proceeded to obtain a full judgment in favour of the applicants, together with granting of the general relief.

Another tactic is to take on a mix of clients, representing individuals who are directly affected by the offending law or practice as well as one or more organisations that represent the public interest in the matter. This allows public interest litigators to accept a settlement for the benefit of the individuals, while continuing to litigate for the broader relief on behalf of the organisations. This strategy was employed in the school infrastructure norms and standards case discussed in Chapter 2.

The case was brought on behalf of two schools and EE. Both schools had suffered serious infrastructural damage caused by severe weather storms and fire. Consequently, the relief sought was split into two parts – the first seeking

<sup>210</sup> *Tafira v Ngozwane* [2006] ZAGPHC 136.

emergency relief for the two schools and the second relating to the failure by the Minister of Basic Education to make regulations prescribing minimum norms and standards for school infrastructure applicable to all public schools in South Africa.

After a settlement agreement was entered into on 19 November 2012, the Minister fulfilled her obligations in relation to the two applicant schools, thus providing sufficient classrooms, security fencing, toilets, water and furniture. However, the case did not end there. When the Minister failed to publish final regulations by the agreed deadline, EE and the LRC returned to court to pursue the second part of the relief.

Hence, the inclusion of an institutional applicant like EE was crucial for the continuation of the case and the attainment of broader relief. However, the importance of including the two schools as applicants must not be underestimated. Their inclusion allowed the LRC to place specific and concrete evidence before the court. This evidence painted a vivid and personal account of the severe hardship and indignity experienced by learners and teachers as a result of inadequate infrastructure. This, in turn, set the tone and created the context for argument on the broader question of national regulations for school infrastructure.

Such tactics, however, will not always be successful. Government departments often seek to settle the case as a whole by agreeing to the individual relief, only if the general relief is abandoned. Nevertheless, this represents a valuable tactic to consider.

A final point to be considered on

the organisational nature of clients is that it is not always necessary for organisations to represent all those affected. Coalitions of different organisations can work just as well. What is critical, however, is that the relevant organisations or movements must be respected as legitimate and credible by as many people involved as possible. Without this legitimacy, it is difficult for organisations to properly co-ordinate and plan litigation as there is always a risk of other, potentially damaging, litigation being brought simultaneously on similar issues.

The NCGLE presents an excellent example of this: If the Coalition had not had the necessary legitimacy to persuade the foreign gay couple to allow the Coalition's litigation strategy to run its course, the strategy could have been severely undermined.

## Involved clients

The second aspect of client organisation is that public interest litigation generally works best and achieves maximum social impact when it involves clients who are well organised and able to provide proper instruction and direction to legal representatives, combined with proper follow-up after the litigation. In other words, public interest litigation – like other forms of litigation – should ideally be run by clients, not by lawyers.

Regrettably, but unsurprisingly, this has generally not been the case. As Jonathan Berger explained in 2007:

*Many claims for [socio-economic] benefits at state expense are the domain of the poor and the marginalised. As such, it is not surprising that much of the litigation*

*conducted on behalf of rights claimants is conducted with little of their input insofar as lawyering is concerned. While a few notable exceptions – such as TAC – may exist, the bulk of cases analysed follow this trend to a greater or lesser extent.*<sup>211</sup>

Increasingly, however, there are important exceptions to this approach. Apart from the TAC case cited by Berger and the NCGLE cases, EE now provides an ideal example of community organisations playing a vital and central role in conceptualising, running and following up litigation.

Where litigation is led primarily by lawyers, it runs a substantially greater risk of producing a case and a judgment that is removed from the reality on the ground and that does not achieve tangible social change. Even with the best intentions in the world, lawyers generally see things from a legal perspective first, in contrast with clients who want to see an impact on their lives or those of their constituencies.

On the other hand, for instance, it is notable that for all the difficulties of the Grootboom case, one of the key factors that allowed the litigation to succeed as much as it did was the high degree of organisation in the community. Though the role played by the community appears to have waned somewhat once litigation was underway – a regular difficulty – the Grootboom community's level of organisation was important in getting the litigation off the ground.

A similar example is provided by Berger in respect of another case concerning a poor community seeking to obtain

<sup>211</sup> Berger *op.cit.*, page 88.

'We Are Watching' march in Cape Town in 2009 organised by the Treatment Action Campaign and the AIDS and Rights Alliance for Southern Africa. The march was part of a campaign to challenge irresponsible government spending in light of health priorities.

Photograph: Samantha Reinders & Treatment Action Campaign ©



security of tenure – President of the Republic of South Africa v Modderklip Boerdery.<sup>212</sup> As Berger explains:

*[This is] an interesting example of how a small firm – led by a larger-than-life, tenacious attorney – collaborated with the residents of the informal settlement: the disciplined Gabon community. It confirms what many litigators understand that large groups of people cannot be well-represented unless they are well-organised, able to take decisive action and resilient to undue pressure. Making use of an outdoor 'community office' where meetings were held, the community took decisions on the basis of consensus-building and inclusivity. For their part, the lawyers provided free legal services all the way to the Constitutional Court. To date, they continue to assist as the community successfully asserts its claims to free basic municipal services.<sup>213</sup>*

In this regard, a key difficulty is the relative lack of appropriate organisations presently operating in South African civil society that can take

on this role as active clients. As one of our respondents put it in 2007:

*The major obstacle post-2000 is the lack of mobilisation and organisation at the community level. It may sound alarmist, but at some levels it will be correct to talk of the collapse of civil society.*

Since then, the founding of organisations such as EE, the Social Justice Coalition and others has been an important step in redressing this problem. However, given the focused substantive areas in which these organisations operate, this issue remains a cause for concern.

One final point should be made with regard to the ideal client: credibility with the court is crucial.

This is perhaps best demonstrated by the recent case of Teddy Bear Clinic,<sup>214</sup> which concerned a constitutional challenge to a statute criminalising consensual sexual behaviour between children under the age of 16.

In this case, the two applicants were the

Teddy Bear Clinic for Abused Children and RAPCAN.<sup>215</sup> They were challenging a statute which was ostensibly enacted for the protection of vulnerable children, but which the applicants contended was in fact deeply harmful to those children.

In this regard, it was of considerable importance that the applicants had a stellar track record in protecting the kinds of children involved. As the Constitutional Court remarked:

*Both applicants have over twenty years' experience in attempting to curb the scourge of sexual abuse of children, and in dealing with its consequences.<sup>216</sup>*

By contrast, with regard to the Mazibuko case, one of our respondents speculated that including the APF as a co-applicant would have undermined the credibility of the case in view of the fact that the APF had already had an interdict granted against it for vandalising PPMs.

<sup>212</sup> *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC).

<sup>213</sup> Berger *op.cit.*, page 89.

<sup>214</sup> *Teddy Bear Clinic for Abused Children & Another v Minister of Justice and Constitutional Development & Another op.cit.*

<sup>215</sup> Resources Aimed at the Prevention of Child Abuse and Neglect.

<sup>216</sup> *Teddy Bear Clinic for Abused Children & Another v Minister of Justice and Constitutional Development & Another op.cit.*, paragraph 6.



*It is critical that organisations seeking to utilise public interest litigation to achieve social impact do not attempt to rely on 'one-shot' success. Rather, 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 court.*

## Factor 2 – overall long-term strategy

Where public interest litigation achieves maximum social impact, it 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. Earlier cases thus act as vital building blocks for more complex and difficult later cases.

We therefore conclude that it is critical that organisations seeking to utilise public interest litigation to achieve social impact do not attempt to rely on 'one-shot' success. Rather, 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 court.

The concepts of 'one-shotters' and 'repeat players' come from a famous article by Marc Galanter entitled *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*.<sup>217</sup>

In this article, Galanter demonstrated the advantages which repeat players have in litigation over one-shotters. Parties that repeatedly litigate in the same area have the advantages of developing specialised expertise and enjoying economies of scale as well as low start-up costs.

Moreover, and critically, repeat players need not seek to achieve their goals immediately and in every piece of litigation. Rather, they can develop long-term litigation strategies aimed at maximising the achievement of their long-term goals in an incremental fashion.

Though Galanter's article was not focusing on public interest organisations, it applies with at least equal force to them. Indeed, his theories demonstrate precisely why, as Geoff Budlender puts it:

*[p]ublic interest law centres can often 'punch above their weight' – the impact of their work can be far beyond the size of the organisations.*<sup>218</sup>

The best example of such a repeat player in the South African public interest

sector was the NCGLE. As Chapter 2 makes clear, the Coalition adopted a long-term incremental strategy which, ultimately, resulted in massive success – a string of seven unanimous victories from the Constitutional Court. Though not all of those cases were NCGLE cases, it was the Coalition's strategy of 'easier cases first, more difficult cases later' that allowed this success.

Another repeat player is the handful of NGOs (collectively) that have engaged in incremental litigation in the education cases covered in Chapter 2. They have taken on a number of narrow issues in a series of cases, which together have gradually given content to the right to basic education.

This should be contrasted with the effect of the Soobramoney case, for example. As noted in Chapter 1, this was the Constitutional Court's first judgment on socio-economic rights, in which it refused an application brought by a severely ill man who needed renal dialysis treatment but did not qualify in terms of the criteria set out by the state. The problem was that these criteria were almost entirely beyond reproach and had been developed in order to deal with the limited availability of medical equipment and staff.

<sup>217</sup> Published in *Law & Society Review*, Vol. 9, No. 1, Autumn: 1974, pages 95-160.

<sup>218</sup> Geoff Budlender, *Access to Justice: Lessons from South Africa's Land Reform Programme*, American Bar Foundation: undated, page 8.





Photograph: Wired Communications ©

Though one cannot blame Mr Soobramoney – who died shortly after judgment was delivered – the fact of the matter is that, as Jonathan Berger explains, the Soobramoney case shows what can happen when the ‘wrong’ cases are litigated.<sup>219</sup>

The failure of the Soobramoney case not only appears to have discouraged socio-economic rights litigation, but it also led to a perception that cases seeking actual medical treatment would not be able to succeed. Though the losses in the Soobramoney case were painstakingly ‘clawed back’ via Grootboom, TAC and other High Court litigation, it is plain that running the wrong case undermines the broader cause.

A repeat-player organisation, properly advised, would have made the agonising, but ultimately correct, decision that running the Soobramoney case would set back the cause of achieving social change and should not occur.

The education cases in Chapter 2 demonstrate the same point. The decision by the LRC and EE to litigate to compel the issuing of norms and

standards plainly involved viewing the problems of school infrastructure as a long-term problem. They resisted the urge to bring one massive case seeking to resolve infrastructural problems in one shot. Instead, they viewed the litigation as only the first step in a much longer process. This was plainly realistic and the correct approach.

Similarly, we referred earlier to the litigation being initiated by LHR to challenge the detention provisions of the Immigration Act 13 of 2002. This constitutional challenge was only instituted after painstakingly laying the groundwork over a number of years by bringing case after case to free individual detainees. The founding papers from LHR place great emphasis on the fact that even after succeeding in 136 separate cases (involving 167 clients), the problems of unlawful detention still persist. It is hoped that this will demonstrate compellingly to the Constitutional Court the need for a systemic solution.

Two last points should be made about the advantages of repeat players.

The first is that if they perform successfully, they tend to have great credibility with the courts. Perhaps

the best example of this is the CCL, a highly-skilled organisation which both litigates in its own name and represents clients. Over the last ten years, the Centre has not only carefully implemented a strategy to develop the jurisprudence on children’s rights, but in doing so, it has built an outstanding reputation in the courts as having both expertise in and a practical approach to children’s rights. This is a substantial advantage for the Centre when it litigates cases.

The second point is that an organisation’s repeated involvement in specialised areas allows it to identify both the core issues that require litigation and the ideal cases to do so.

This is demonstrated in the context of litigation around the Promotion of Access to Information Act 2 of 2000 (PAIA). Two of the organisations most actively engaged in PAIA requests are the South African History Archive (SAHA) in respect of public bodies, and the Centre for Environmental Rights (CER) in respect of mainly private bodies. They have each engaged in or are in the process of engaging in litigation which seeks to remedy key obstacles to PAIA requests being properly dealt with. The potential effect

<sup>219</sup> Berger *op.cit.*, page 82.

*If they perform successfully, repeat players tend to have great credibility with the courts. Also, an organisation's repeated involvement in specialised areas allows it to identify both the core issues that require litigation and the ideal cases to do so.*

of this could be significant, as was demonstrated by the recent success of the CER in requiring Eskom, without litigation, to provide under PAIA a report indicating the number of deaths caused by air pollution from Eskom.<sup>220</sup>

## Factor 3 – co-ordination and information-sharing

An interesting issue emerging from this study is that in virtually any given area of public interest litigation there are multiple organisations with similar aims all seeking to achieve success via litigation. This is both unsurprising and desirable given that many organisations are operating in different parts of the country.

Nevertheless, it raises the concern that if there is insufficient co-ordination

and information-sharing among these organisations, there is a real danger that resources will not be used effectively and, even more damaging, viable cases will be undermined by other conflicting cases being brought by other organisations simultaneously or beforehand.

An example of what can go wrong in this context is the case of *Hoffmann v South African Airways*.<sup>221</sup> This case concerned the practice of South African Airways to refuse to employ HIV-positive individuals as cabin attendants. The case was litigated by the LRC.

However, at around the same time, the ALP was litigating precisely the same issue for another cabin attendant in *A v South African Airways*.<sup>222</sup>

The difficulty was that although the *Hoffmann* case was the first to reach the Constitutional Court, it appeared to lack certain important medical evidence on the transmission, progression and treatment of HIV, as well as the ability of people with HIV to be vaccinated against yellow fever, an important issue in the case. In contrast, the case of *A*

*v South African Airways* contained precisely such evidence.

Ultimately, the difficulty was avoided when the ALP applied to be an *amicus* in the *Hoffmann* case and successfully sought to place the relevant evidence before the Constitutional Court. The Court ruled in favour of *Hoffmann*, relying substantially on the evidence from the ALP.

The case thus ended in a victory for all concerned. However, it demonstrates the danger of insufficient co-ordination among public interest litigation organisations. If the ALP had not intervened and if the Constitutional Court had held that the absence of the necessary medical evidence meant that the discrimination against *Hoffmann* was justified, this would have represented a major setback for organisations in this sector. It could also have irreparably damaged the *A v South African Airways* case, even though the relevant evidence was available.

It is therefore crucial that there be proper information-sharing and co-ordination among different organisations. We appreciate that this is not always easy when organisations find themselves competing for

<sup>220</sup> *How Eskom's coal kills*, Mail & Guardian: 20 June 2014.

<sup>221</sup> *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC).

<sup>222</sup> *A v South African Airways (Pty) Ltd*, Labour Court, Case No. J1916/99.

Arthur Chaskalson, President of the Constitutional Court from 1994 to 2001 and Chief Justice of South Africa from 2001 to 2005, presided over some of the Constitutional Court's most groundbreaking judgments.

Photograph: Helen MacDonald ©



funding from the same funders. However, some funders have now actively emphasised the need for their grantees to work together with other organisations in certain areas. Provided that this does not impede effective progress, and provided that the mode of co-ordination is flexible rather than formalistic, this is a welcome development.

Happily, since the 2008 report, there has been a significant increase in information-sharing and co-ordination in different areas. For example:

- For the last four years, a number of key public interest organisations have jointly organised an annual 'Public Interest Law Gathering'. This gathering allows public interest litigators and others to meet and discuss a wide range of issues, including in sessions devoted to specific areas of public interest litigation. It is also a very effective mechanism of getting law students engaged in public interest issues.
- The Socio-Economic Rights Institute of South Africa, arguably the leading public interest organisation in the country in the area of housing litigation, has co-ordinated a series of quarterly

meetings around evictions, alternative accommodation and related issues. These have included other key players in this area.

- In July 2014, four organisations – Section27, EE, the EE Law Centre and the LRC – jointly hosted a conference on the now enacted *Norms and Standards for School Infrastructure*.

## Factor 4 – 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 damaging 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 very helpful to be able to demonstrate that court action has

not been the first (or at least not the first and only) port of call for the parties 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 achieve a solution, but that this has not resulted.

In this regard, the TAC case provides an ideal example of launching litigation at the right time. As Jonathan Berger explains:

*Timing played a crucial factor in TAC, which was launched only after a long four-year history of engagement on the specific issue. In addition, it built on the organisation's previous work to reduce ARV medicine prices, as well as scientific developments regarding the proven efficacy of a simple and affordable MTCT prevention intervention. Equally important, the TAC did not act until it had given the state a reasonable opportunity to explain why – in the face of the available evidence – it continued to refuse to permit the use of ARV medicines for MTCT prevention outside of a limited number of 'pilot' sites, let alone to provide the medicines at*

*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.*

*state expense. Simply put, litigation came onto the agenda when all other options had been exhausted.* [emphasis added]<sup>223</sup>

The TAC case demonstrates that public interest litigation cannot and should not be the starting point and exclusive strategy for an organisation wishing to achieve social change. Rather, it should be used carefully where a process of social mobilisation has begun, and yet where attempts to achieve social change via the political route appear to have failed.

This is in line with the approach of well-known American lawyer and law professor Gary Bellow:

*The worst thing a lawyer can do is to take an issue that could be won by political organisation and win it in the courts.*<sup>224</sup>

There are many reasons for only using litigation to achieve social change once the political route has failed. Prime among them is that this approach affords two separate opportunities to achieve goals. Provided there is real possibility of progress on the political

front, it would be highly risky to abandon this option and rely purely on litigation instead. Not only may the litigation fail, but if this took place, the chances of reviving a political victory would generally be substantially reduced. Other considerations favouring using the political route first include:

- The chances of succeeding in litigation are substantially increased if government has had an opportunity to resolve the issue, but has failed to do so without justification.
- It conserves the limited political capital that courts have by only asking them to come into conflict with government when absolutely necessary.
- It ensures that the primary focus of an organisation or movement – mobilising members and supporters to achieve change – is not overrun by litigation taking centre stage.

The approach of the LRC and EE regarding the norms and standards litigation is a particularly good example of the correct approach – pursuing the political route vigorously and only turning to litigation when it is quite clear that the political route has failed.

It should be noted, however, that deciding to bring litigation at the right time is often easier said than done. In the TAC case, for instance, very difficult decisions had to be made at various points – notably the decision not to proceed with litigation when government appeared to be making some progress, and later the decision to follow counsel's advice that litigation would likely not succeed unless and until the MCC registered Nevirapine for use to prevent MTCT. These decisions were agonising given the lives at stake and provoked criticism from some of the TAC's allies. Nevertheless, with hindsight, they were absolutely correct. Had the case been run any sooner and then lost, that would have been the end of the matter – there would have been no way of recovering.

## Factor 5 – research

A critical but often neglected facet of successful public interest litigation is the need for detailed research in advance of and during litigation. We

<sup>223</sup> Berger *op.cit.*, page 87.

<sup>224</sup> Quoted from Philip B Heymann & Lance Liebman, *Social Responsibilities of Lawyers*, Foundation Press: 1988, page 24.



A Treatment Action Campaign demonstration in Cape Town in 2007.

Photograph: Treatment Action Campaign ©



conclude that two different types of research are needed: legal research and factual research.

The legal research is essential if public interest litigation is to be given a proper theoretical foundation. It involves a particular emphasis on making use of foreign and international law, which is often not easily accessible but can play a pivotal role.

The need for access to proper factual research is just as acute. Particularly in cases on socio-economic rights, many of the factual issues will be highly specialised and complicated, involving statistical, medical, social science or other information. Those engaged in running such litigation must have access to relevant research capabilities – either within their own organisation or via alliances with other organisations. An excellent example of this is the Limpopo textbook litigation initiated by Section27, where expert evidence was adduced to demonstrate how critical it was that learners had proper access to textbooks if they were to receive a meaningful education.

At present, in the South African public interest litigation environment, there appears to be a relative absence of

appropriate organisations engaged in such research. In this regard, one of our respondents stressed the need for funding of:

*[...] multidisciplinary and multiskilled organisations to have capacity to do socio-economic research as well as legal research and litigation.*

## Factor 6 – characterisation

A substantial component of any successful case is the ‘characterisation debate’. This is particularly important given that any case – especially when in the public eye – might be viewed and perceived in multiple ways by the courts and by the public.

A particularly good example in this regard is the case of *Minister of Education, Western Cape v Governing Body, Mikro Primary School*.<sup>225</sup> This case concerned the right of an Afrikaans language school (with largely white learners) to refuse to admit various

English-speaking learners (all of whom were black).

While the case could be seen as being about language rights (the issue the courts ultimately held as being implicated) there was a real risk of the school’s approach being seen to be motivated by racism instead. Thus, as Jonathan Berger explains:

*The importance of public opinion was well-understood in Mikro. Much time was spent by the litigants trying to win the media over, with a key spokesperson deliberately making himself available for more than just answering questions. This approach seems to have borne fruit – an initially hostile mainstream media warmed to the school’s position over time. This was crucial given the perception that the school’s conduct was racially motivated – a big and powerful white school refusing to admit small and weak black children.*<sup>226</sup>

It is thus extremely important for those involved in public interest litigation to demonstrate to both the courts and the public that the issues at stake are critical, that the assertion of fundamental rights is being used to

<sup>225</sup> *Minister of Education, Western Cape, & Others v Governing Body, Mikro Primary School, & Another* [2005] ZASCA 66; 2006 (1) SA 1 (SCA).

<sup>226</sup> Berger *op.cit.*, page 91.

redress unfairness and inequality rather than to perpetuate it, and that there are numerous, real people being affected on a daily basis.

Moreover, there are often multiple ways of presenting a case.

In Joseph, for example, the applicants were alive to the fact that contending that access to electricity formed part of the right of access to housing was a significant bridge to cross. For that reason, the case was primarily characterised as being about administrative justice and procedural fairness – not the right to housing. Thus, the heads of argument in the Constitutional Court characterised the crisp issue before the Court as being:

*[I]s it lawful for the respondents to disconnect the electricity supply to a residence without complying with the recognised components of the right to procedural fairness as envisaged by the PAJA and the Constitution in respect of the residents affected and without even considering their circumstances?*<sup>227</sup>

While the applicants did refer to the right to housing in their heads of argument (along with their right to dignity and their contractual rights), this was only for the purpose of satisfying the requirement that, to be administrative action, the decision had to adversely affect the rights of the residents. Indeed they were at pains to limit the emphasis on the right to housing, meaning that this issue took up only two pages of the heads of argument.

Ultimately, the Court accepted this characterisation by upholding the

contentions based on administrative justice and declining to decide whether the right to housing was implicated at all.

Similarly, in Teddy Bear Clinic, the applicants had to choose between two ways of characterising the case. The first was to contend that the provisions in the statute they were challenging were unconstitutional because they would violate the autonomy rights of children. The second was to contend that the provisions were unconstitutional because they caused damage to precisely the very vulnerable children that they were meant to protect.

While the applicants ran both arguments, they placed considerably greater emphasis on the latter issue. This was due to the strong jurisprudence that had already been developed by the applicants' attorneys (the CCL) around the protection of children and also because it was felt that the Constitutional Court would find this argument less controversial.

The Court ultimately upheld both arguments, but plainly accepted the characterisation of the issue proposed by the applicants, as appears from the beginning of its judgment:

*Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that is necessary for their positive growth and development. Indeed, this Court has recognised that children merit special protection through legislation that guards and enforces their rights and liberties. We must be careful, however, to ensure that, in attempting to guide and protect children, our interventions do not*

*expose them to harsh circumstances which can only have adverse effects on their development. [...]*

*At the outset it is important to emphasise what this case is not about. It is not about whether children should or should not engage in sexual conduct. It is also not about whether Parliament may set a minimum age for consensual sexual conduct. Rather, we are concerned with a far narrower issue: whether it is constitutionally permissible for children to be subject to criminal sanctions in order to deter early sexual intimacy and combat the risks associated therewith.*<sup>228</sup>

## Factor 7 – follow-up

Perhaps the most critical factor of all in ensuring that public interest litigation achieves maximum social change is the issue of proper follow-up after litigation.

## Compliance and assessment

Most critically, follow-up involves ensuring that a litigation victory is put into effect by the relevant government departments, thus translating the legal success into practical benefits for a large number of people on the ground, including those not directly involved in the litigation. It also involves identifying the extent to which the litigation has had limited success, and which issues therefore need attention in further

<sup>227</sup> Applicants' Heads of Argument, *Joseph & Others v City of Johannesburg & Others* op.cit.

<sup>228</sup> *Teddy Bear Clinic for Abused Children & Another v Minister of Justice and Constitutional Development & Another* op.cit., paragraphs 1 and 3.



litigation or advocacy campaigns. This need for proper follow-up is well explained by one of our respondents:

*The ability of litigation to effect real social change depends in large part on the government's willingness to respect and implement the court's judgments. By raising awareness and mobilising the public around an issue, civil society groups can bring enough pressure on government to compel it to make concrete changes.*

The views of this respondent, which were shared by many others, also make it clear that in follow-up, as in litigation, a combination of strategies is likely to be most successful.

Trying to rectify government's non-compliance with a court order by using only legal mechanisms – contempt of court proceedings, court inspections, more detailed orders – can succeed but faces significant difficulties. Among these is the fact that many courts are (correctly) slow to use their limited political capital to threaten government officials with incarceration, as well as obstacles arising from the State Liability Act 20 of 1957, which limits actions that can be taken against government. Most of all, however, there is significant

difficulty in getting any compliance out of a government opponent that is recalcitrant and does not want to respond.

In contrast, using public pressure and mobilisation – combined where necessary with further legal mechanisms – has a far higher likelihood of success, because if the pressure is effective, government will have no option but to comply.

This is what occurred in the case of *N v Government of Republic of South Africa*<sup>229</sup> and the sequels thereto. In these cases, the applicants successfully obtained an order requiring the state to provide ARV treatment for HIV-positive prisoners at the Westville Prison in Durban. Despite government's deeply hostile attitude on the issue, as Berger points out:

*[...] persistent follow-up and skilful media and legal work has resulted in significant – albeit insufficient – compliance [with court orders].*<sup>230</sup>

The same is true of pressure brought to bear on the state in the Mikro case concerning language rights in schools,

to which we have already referred.

There, pressure placed on government by the parents of both sets of learners resulted in compliance with the order granted.

Similarly, in the Limpopo textbook case, Section 27 decided against proceeding with a contempt application, even though grounds for contempt existed. Section 27 reasoned that the highly adversarial and antagonistic contempt proceedings would eliminate any possibility of co-operation with government officials. It weighed up the strategic advantage of the court officially recognising the recalcitrance of government, and the potential media and social mobilisation that would result, against the benefit that would be gained from co-operation. It concluded that co-operation was more valuable. Ultimately, the overwhelming media attention and public pressure pushed unresponsive government officials into complying with the court orders.

This can be contrasted with a range of other cases in which effective follow-up was not present, and as a result, substantial legal victories either produced no effect on the ground or took years to do so. As discussed in Chapter 2, the Grootboom case is an

<sup>229</sup> *N & Others v Government of Republic of South Africa & Others* (No. 1) 2006 (6) SA 543 (D).

<sup>230</sup> Berger *op.cit.*, page 77.

*Perhaps the most critical factor of all in ensuring that public interest litigation achieves maximum social change is proper follow-up. This involves ensuring that a litigation victory is put into effect by the relevant government departments, and identifying the extent to which the litigation has had limited success, and which issues therefore need attention in further litigation or advocacy campaigns.*

example of this much broader trend.

The importance of social mobilisation and advocacy in the follow-up process is particularly well illustrated by one of our respondents in the refugee sector:

*In the use of litigation as a catalyst for social change, it is necessary to have strong representative organisations on the ground to ensure implementation of the gains made through litigation.*

*However, [in the refugee sector, the] ability to ensure ongoing monitoring of the actions of the Department of Home Affairs has been circumscribed by the weakness of refugee and migrant organisations in the country.*

*Refugee communities, in particular, often embody many of the divisions that led them to flee their countries in the first place. Much of their time is also devoted to securing their own individual survival and access to documentation rather than striving for the protection of the rights of asylum seekers and refugees as a group.*

*Moreover, asylum seekers and refugees are an extremely vulnerable group who often refrain from engaging in active advocacy activities for fear that this will affect decisions on their asylum claims or lead them to be arrested by law*

*enforcement authorities.*

*Thus, [despite refugee information networks] in Johannesburg, Cape Town and Durban [...] the lack of strong refugee-run organisations limits the ability to ensure that the Department of Home Affairs and other law enforcement authorities actively implement court orders and decisions.*

It should be noted that there are some cases which do not require a great deal of follow-up – in other words, obtaining the judgment has a sufficient effect on its own. However, it would be a mistake in our view to conclude, as one of our respondents did, that civil and political cases generally require no follow-up whereas socio-economic rights cases do.

This is demonstrated by the aftermath of the Constitutional Court's decision to invalidate the death penalty in *S v Makwanyane*.<sup>231</sup> Virtually everyone took the view that the Constitutional Court order removing the death penalty from the statute books would be the end of the matter. However, the process of substituting sentences for those sentenced to death prior to 1995 where these sentences had not been carried out, took inordinate time and effort.

<sup>231</sup> *S v Makwanyane & Another* [1995] ZACC 3; 1995 (3) SA 391 (CC).

Indeed, it took three further judgments from the Constitutional Court (in *Sibiya v Director of Public Prosecutions, Johannesburg*<sup>232</sup> and its sequels), a structural interdict and a 10-year delay before this occurred.

Similarly, in *Nkuzi Development Association v Government of the Republic of South Africa*<sup>233</sup> – a decision which upheld a right to legal representation in certain eviction cases – it was only after tenacious follow-up and pressure on government that the Department of Land Affairs and the Department of Justice began to implement the judgment.

Thus, in cases involving a classic civil or political right – the death penalty and the right to legal representation – extensive follow-up was also required for the judgments to be effective.

## Remedy

A final issue on the question of follow-up is the relationship between follow-up and the remedies issued by courts. Following

<sup>232</sup> *Sibiya & Others v Director of Public Prosecutions, Johannesburg, & Others* [2005] ZACC 6; 2005 (5) SA 315 (CC).

<sup>233</sup> *Nkuzi Development Association v Government of the Republic of South Africa & Another* [2002] ZACC 20; 2002 (2) SA 733 (LCC).





Photograph: Section27 ©

the Constitutional Court's refusal to grant more than a declaratory order in the Grootboom case, for instance, there was a groundswell of academic opinion and litigation efforts seeking to obtain more creative and/or intrusive orders from courts. Generally, the orders sought fall into two categories, often sought together:

- mandatory orders – directing government to take certain defined steps, often within specified time frames; and
- supervisory orders – requiring government to report back to litigants and/or the court as to the steps taken in fulfilment of an order.

Since the decision in the TAC case, it has been beyond doubt that South African courts have the power to grant such orders. The courts also appear to be shedding their reluctance to grant these types of orders in practice. This is demonstrated, for example, by the Constitutional Court's recent decision to grant a supervisory order in the context of an extensive tender dispute which had the potential to affect millions of people on social grants.<sup>234</sup>

<sup>234</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others (No. 2)* [2014] ZACC 12; 2014 (6) BCLR 641 (CC).

Perhaps in response, there has also recently been an increasing willingness on the part of public interest organisations to consider more creative remedies. This is demonstrated particularly by the teacher post-provisioning litigation discussed in Chapter 2. There, the remedies sought included the deemed appointment of educators, orders allowing the attachment of state property, and now (in the pending class action) even the appointment of a special master to manage the distribution of funds if the class action succeeds.

The question of which order is appropriate in any specific case depends on the circumstances of that case, including the attitude of government. This is a point well made by Kent Roach and Geoff Budlender,<sup>235</sup> who seek to distinguish between three types of government respondents – those that are 'inattentive', those that are 'incompetent' and those that are 'intransigent' – and set out their views on which remedies are appropriate in each case.

However, a point made powerfully to

<sup>235</sup> Kent Roach & Geoff Budlender, *Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?*, in *South African Law Journal*, Vol. 122: 2005, pages 325-351.

us by one of our respondents was that while the use of innovative and wide-ranging remedial powers by the courts is important in terms of 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.

Even an order that combines both mandatory and supervisory elements will likely achieve little in the way of social change and will be rendered meaningless if the organisations involved fail to properly follow up and enforce it, ideally via a combination of legal and political pressure.

By contrast, a declaratory order need not be seen as inherently ineffective. Properly used, it too can form the basis for a sustained and effective campaign of legal and political follow-up.

In this regard, declaratory orders appear to have been written off by numerous organisations, including by some of our respondents, substantially on the basis that the decision in the Grootboom case – which involved a declaratory order – has failed to produce any or adequate social change.

However, it appears that the blame in



Bomvini Senior Primary School in Libode, Eastern Cape.

Photograph: Equal Education ©

this regard cannot be laid exclusively at the door of the declaratory order issued by the Constitutional Court.

Indeed, in its judgment in *Grootboom*, the Court emphasised the role of the SAHRC in monitoring government's compliance with the judgment:

*The Human Rights Commission is an amicus in this case. Section 184 [...] of the Constitution places a duty on the Commission to 'monitor and assess the observance of human rights in the Republic' [and gives it] the power to investigate and to report on the observance of human rights [and] to take steps to secure appropriate redress where human rights have been violated. Counsel for the Commission indicated during the argument that the Commission had the duty and was prepared to monitor and report on the*

*compliance by the state of its Section 26 obligations. In the circumstances, the Commission will monitor and, if necessary, report in terms of these powers on the efforts made by the state to comply with its Section 26 obligations in accordance with this judgment.*<sup>236</sup>

Regrettably, this came to naught. Though the SAHRC did issue some reports on the progress of government, it seems to have construed its role as an extremely narrow one – focusing only on the *Grootboom* community and not on the effects of the order in general – and its monitoring had little, if any, effect on government's response to the judgment. The Commission's approach and the Court's refusal to give a more

<sup>236</sup> *Government of the Republic of South Africa & Others v Grootboom & Others op.cit.*, paragraph 97.

powerful supervisory remedy have been forcefully criticised.<sup>237</sup>

There is no reason that a declaratory order granted by a court – provided that it is sufficiently specific as to government's obligations – cannot be properly enforced, followed up and used as a basis for social change.

Thus, while public interest litigants should continue to push for mandatory, supervisory and creative orders in appropriate cases to assist in achieving tangible results, and while courts should be prepared to grant such orders in appropriate circumstances, the particular remedy granted can never become an excuse for a failure to engage in proper follow-up.

<sup>237</sup> See for example: Kameshni Pillay, *Implementing Grootboom: Supervision needed*, in *ESR Review*, Vol. 3, No. 1: July 2002, pages 16-18.

# Chapter 5:

## Procedural mechanisms which promote effective public interest litigation

# Procedural mechanisms which promote effective public interest litigation

When presenting the 2008 report to public interest litigators in other jurisdictions, we were struck by the fact that the South African public interest litigation environment is, from a procedural point of view, a very generous one.

This chapter therefore considers three procedural mechanisms in place in South Africa which promote effective public interest litigation. This is important for two reasons.

Firstly, for foreign readers in jurisdictions with less generous procedural regimes, it provides an insight into possible procedural reforms to be suggested to promote effective public interest litigation in their jurisdictions.

Secondly, for South African as well as foreign readers, it seeks to consider how to take full advantage of these mechanisms when designing and engaging in public interest litigation.

The three procedural mechanisms we deal with are:

- broad rules of standing;
- a protective costs regime; and
- significant opportunities for interventions by *amicus curiae*.

## Broad rules of standing

Under common law prior to 1994, the courts took a restrictive approach to standing. A person approaching a court for relief was required to establish a personal and direct interest in the relief sought.

However, this position was changed radically in 1994 when a supreme Constitution and a justiciable Bill of Rights were enacted. Standing cases concerning the Bill of Rights are now governed by Section 38 (enforcement of rights) of the Constitution, which provides:

*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 interest; and

(e) an association acting in the interest of its members.<sup>238</sup>

The Constitutional Court has emphasised that this introduces a:

*[...] radical departure from the common law in relation to standing.*<sup>239</sup>

The standing requirements of this Section are as broad as in any other country of which we are aware.

That this is entirely appropriate in the context of constitutional litigation has been made clear by the Constitutional Court:

*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 directly 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 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.*<sup>240</sup>

In determining whether an applicant is acting in the public interest, the courts have taken into account a range of factors, including:

- 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;
- the range of persons or groups who may be directly or indirectly affected by any order made by the courts and the opportunity that those persons or groups have had to present evidence and argument to the courts;
- whether the case is brought as an abstract challenge or live case;
- the degree of vulnerability of the people affected; and
- the nature of the right said to be infringed as well as the consequences of the infringement of the right.<sup>241</sup>

<sup>238</sup> Constitution of the Republic of South Africa op.cit., Section 38.

<sup>239</sup> *Kruger v President of the Republic of South Africa & Others* [2008] ZACC 17; 2009 (1) SA 417 (CC), paragraph 22.

<sup>240</sup> *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* [1995] ZACC 13;

1996 (1) SA 984 (CC), paragraph 229, later endorsed by the full Court in *Kruger v President of the Republic of South Africa & Others* op.cit., paragraph 23.

<sup>241</sup> *Lawyers for Human Rights & Other v Minister of Home Affairs & Other* [2004] ZACC 12; 2004 (4) SA 125 (CC), paragraphs 16-18.

*There is no doubt that the broad standing provisions contained in the Constitution and the generous way in which they have been applied have facilitated effective public interest litigation and allowed important matters to reach the courts.*

## The effect of broad standing provisions

There is no doubt that these broad standing provisions and the generous way in which they have been applied have facilitated effective public interest litigation and allowed important matters to reach the courts.

This is demonstrated, for example, by the large number of cases which have been brought by institutional litigants acting in either the public interest or on behalf of a group of people affected. In many of those cases, finding individual applicants to bring the cases would have potentially proved very difficult.

For example, in the NCGLE litigation, it might have been possible to find a gay rights activist who was willing to admit to committing a crime in order to demonstrate his interest in challenging the laws criminalising sodomy. However, this would have been far more difficult to achieve, for instance, in the Teddy Bear Clinic case mentioned earlier, where it would have been necessary to have a child (or his/her parents or guardians) admit to committing a crime by engaging in various forms of sexual acts.

The difficulties that would arise with strict standing requirements are also demonstrated by the case of *Centre for Child Law v Minister of Justice*<sup>242</sup> – a challenge to statutory provisions which imposed a system of minimum sentences on child offenders. There, the broad standing provisions meant that government was forced to abandon its technical objection that there was no individual child before the court who was complaining about a sentence against him or her. The Constitutional Court was emphatic that this was the appropriate approach:

*[I]n this Court the Minister did not persist with his challenge to the Centre's legal standing, or with the contention that the issues were purely academic. That approach was in my view correct. Although the Centre did not act on behalf of (or join) any particular child sentenced under the statute as amended, its provisions are clearly intended to have immediate effect on its promulgation. So the prospect of children being sentenced under the challenged provisions was immediate, and the issue anything but abstract or academic. The Centre's*

*stated focus is children's rights, and in this case it has standing to protect them. It was thus entitled to take up the cudgels. To have required the Centre to augment its standing by waiting for a child to be sentenced under the new provisions would, in my view, have been an exercise in needless formalism.*<sup>243</sup>

Even in the TAC case, it might have been very difficult to find an individual to act as an applicant who satisfied the common law test for standing if applied strictly. While countless HIV-positive pregnant women were of course affected by government's policy and while some might have been willing to act as applicants, there is the obvious problem that they would all have given birth by the time the case had made its way to the Constitutional Court. This would have led to absurd and unnecessary debates about whether those women still had the necessary legal interest to proceed with the case in their own interests, and whether that interest extended to those women seeking a declaration that the policy was invalid as a whole – or merely that they themselves were entitled to Nevirapine.

<sup>242</sup> *Centre for Child Law v Minister for Justice and Constitutional Development & Others* [2009] ZACC 18; 2009 (6) SA 632 (CC).

<sup>243</sup> *Centre for Child Law v Minister for Justice and Constitutional Development & Others op.cit.*, paragraph 11.



This demonstrates that the broad standing provisions are often particularly important where government conduct (as opposed to law) is being challenged. Thus, in the Limpopo textbook case, for instance, the absence of broad standing provisions may have prevented vindication of the rights of the learners concerned. Section 27 would then have been precluded from participating as a litigant, and only schools or learners themselves could have litigated. In respect of these learners or schools, they would not have had a sufficient direct interest in the provision of textbooks to other schools or learners – meaning that the bulk of the schools and learners in Limpopo would have received no relief.

Similarly, there are some instances of unlawful or unconstitutional government conduct which do not affect any person in particular. In those situations, strict standing requirements might prevent the issues being litigated at all. Examples of this include the following cases:

- *Glenister*<sup>244</sup> where a businessman successfully challenged laws which disbanded the Scorpions (a specialist

corruption-fighting body);

- *Justice Alliance of South Africa*<sup>245</sup> where three NGOs successfully challenged the validity of a law allowing the President to extend the term of office of the Chief Justice;
- *Democratic Alliance*<sup>246</sup> where a political party successfully challenged the appointment of the National Director of Public Prosecutions; and
- *Kruger*<sup>247</sup> where an attorney successfully challenged unlawful conduct by the President in bringing into force certain amendments to the Road Accident Fund Act 56 of 1996.

What is particularly notable is that some of these cases relied on provisions of the Constitution lying outside the Bill of Rights, meaning that the standing provisions in Section 38 did not apply. Nevertheless, in the *Kruger* case the Constitutional Court made it clear that even in such situations it was appropriate to adopt a broad approach to standing:

*Section 38 [...] is not of direct*

*application in this case as it does not concern a challenge based on a right in chapter 2 of the Constitution. Nevertheless, in my view, we should adopt a generous approach to standing in this case. In so doing, I am mindful of the fact that constitutional litigation is of particular importance in our country where we have a large number of people who have had scant educational opportunities and who may not be aware of their rights. Such an approach to standing will facilitate the protection of the Constitution.*

*Mr Kruger asserts locus standi on two grounds: a direct and personal interest and as a person acting in the public interest. Although Mr Kruger may not have established standing on either basis under the restricted rules of standing operative at common law, I am persuaded that an expanded understanding of what constitutes a direct and personal interest should be adopted in this case.*<sup>248</sup>

Thus, there is no doubt that broad standing provisions are critical tools in promoting access to justice and the vindication of rights.

<sup>244</sup> *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6; 2011 (3) SA 347 (CC).

<sup>245</sup> *Justice Alliance of South Africa v President of Republic of South Africa & Others* [2011] ZACC 23; 2011 (5) SA 388 (CC).

<sup>246</sup> *Democratic Alliance v President of South Africa & Others* [2012] ZACC 24; 2013 (1) SA 248 (CC).

<sup>247</sup> *Kruger v President of the Republic of South Africa & Others op.cit.*

<sup>248</sup> *Kruger v President of the Republic of South Africa & Others op.cit.*, paragraphs 23-24.

*Broad standing provisions are often particularly important where government conduct (as opposed to law) is being challenged.*

## Class actions

Until recently, the one provision of Section 38 that had received little judicial attention was Section 38(c), entitling someone to approach a court:

*[...] acting as a member of, or in the interest of, a group or class of persons.*<sup>249</sup>

Common law in South Africa did not allow for class actions, and prior to 1994 class actions were entirely foreign to South African law. In 1998, the South African Law Commission published a draft bill on public interest and class actions.<sup>250</sup> It was intended to allow for and regulate class actions. However, the bill was never enacted, despite the Commission's recommendation that the bill and the necessary rules of court be enacted as a matter of urgency.

Prior to 2012, the leading case on class actions was *Ngxuza*.<sup>251</sup> The applicants in this case were recipients of social

grants which were unlawfully cancelled, without notice, without reasons, and without giving them the opportunity to be heard. Both the High Court and the Supreme Court of Appeal upheld the right of the applicants to proceed by way of a class action. However, the case only dealt with class actions in the context of the Bill of Rights – and not common law – and did not spark much reliance on the class action procedure.

This situation changed in 2012 and 2013 when two cases dealing with class actions reached the Supreme Court of Appeal and the Constitutional Court. Both cases arose from breaches of the Competition Act 89 of 1998 by bread manufacturers. This led to applications seeking certification of two classes – a class of bread consumers and a class of bread distributors.

In the *Children's Resource Centre* case,<sup>252</sup> dealing with the application of the bread consumers, the Supreme Court of Appeal for the first time recognised that opt-out class actions were sustainable in South African law for Bill of Rights claims and for ordinary common-law claims. An opt-out class action is one where members of the

class must be given the opportunity to choose to be excluded from the class.

The Court held that:

*[...] it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate circumstances, merely because of the claimants' inability to point to the infringement of a right protected under the Bill of Rights. The procedural requirements that will be determined in relation to the one type of case can equally easily be applied in the other. Class actions are a particularly appropriate way in which to vindicate some types of constitutional rights, but they are equally useful in the context of mass personal injury cases or consumer litigation.*<sup>253</sup>

The Court went on to confirm that class actions would first have to be certified by a court, and then laid down the requirements for such certification.<sup>254</sup>

However, in the companion case of *Mukaddam*,<sup>255</sup> the Supreme Court of

<sup>249</sup> *Constitution of the Republic of South Africa op.cit.*, Section 38(c).

<sup>250</sup> *Project 88 – The Recognition of Class Actions and Public Interest Actions in South African Law*, South African Law Commission: August 1998.

<sup>251</sup> *Ngxuza & Others v Permanent Secretary, Department of Welfare, Eastern Cape, & Another* 2001 (2) SA 609 (E); and *Permanent Secretary, Department of Welfare, Eastern Cape, & Another v Ngxuza & Others* [2001] ZASCA 85; 2001 (4) SA 1184 (SCA).

<sup>252</sup> *Children's Resource Centre Trust v Pioneer Food* [2012] ZASCA 182; 2013 (2) SA 213 (SCA).

<sup>253</sup> *Children's Resource Centre Trust v Pioneer Food op.cit.*, paragraph 21.

<sup>254</sup> *Children's Resource Centre Trust v Pioneer Food op.cit.*, paragraph 26.

<sup>255</sup> *Mukaddam & Others v Pioneer Food (Pty) Ltd & Others* [2012] ZASCA 183; 2013 (2) SA 254 (SCA).



'One Billion Rising' protest  
against rape at Wits University in  
Johannesburg, February 2013.

Photograph: Gay and Lesbian  
Memory in Action ©



Appeal, largely rejected opt-in class actions, requiring that exceptional circumstances had to be shown for such a class action to be permitted. An opt-in class action is one where members of the class are required to join the class.

This was overturned on appeal to the Constitutional Court, which held that:

- The certification requirements delineated by the Supreme Court of Appeal were largely appropriate provided that they were flexibly applied.<sup>256</sup>
- However, the requirement of certification had no application at all to class actions in which the enforcement of rights entrenched in the Bill of Rights was sought against the state.<sup>257</sup>
- There was also no reason to limit opt-in class actions only to cases involving exceptional circumstances.<sup>258</sup>

It is too soon and beyond the scope of this publication to discuss in detail the effect of these judgments. Suffice it to

say that there are now two substantial applications for certification of a class action pending in the courts – one involving claims against gold mining companies by miners who have contracted silicosis, and another involving claims by pensioners against transport and logistics parastatal Transnet's pension fund.

## How the different grounds of standing fit together

The recognition of the availability of class actions by the highest courts and the provision of much-needed certainty as to how this occurs raises a key question: Is this likely to alter the manner in which public interest litigation should take place, and if so, how?

In our view, the availability of class actions is an important and welcome change for public interest litigation. However, in the majority of cases, it will not be necessary to rely on class actions.

This is demonstrated by considering to what extent the cases covered in Chapter 2 might have been run differently had it been clear that the class action route was available. In the

vast majority of the cases – NCGLE, Grootboom, TAC, Mazibuko, Joseph and Nokotyana – we consider that using the class action route would not have provided any material advantage. These cases were brought either on behalf of the individual applicants or communities involved, or as cases in the public interest. There was no respect in which this approach constrained the applications.

We therefore consider that in most public interest litigation cases, the appropriate route will be to continue to rely on Sections 38(a), (b) and (d) of the Constitution – that is, where the applicants act in their own interest, in the interests of others who cannot do so, and in the public interest. We emphasise that there is no reason that these three grounds of standing cannot be pleaded simultaneously, as was done in various of the cases considered.

It seems to us that class actions come to the fore in a relatively narrow category of cases, namely where the aim is to seek specific relief, including awards of damages, in respect of large numbers of unnamed individuals or entities.

This is demonstrated by the teacher post-provisioning case study in

<sup>256</sup> *Mukaddam v Pioneer Foods (Pty) Ltd & Others* [2013] ZACC 23; 2013 (5) SA 89 (CC), paragraphs 34–39.

<sup>257</sup> *Mukaddam v Pioneer Foods (Pty) Ltd & Others op.cit.*, paragraphs 40–41.

<sup>258</sup> *Mukaddam v Pioneer Foods (Pty) Ltd & Others op.cit.*, paragraph 55.

Chapter 2. There, the initial cases were brought without any use being made of the class action procedure. While they obtained effective relief for many learners and schools, it became clear that further litigation would have to take place, which would be very difficult to manage given:

- the large number of schools involved, many of which were not in communication with the LRC;
- the fact that each school's individual circumstances varied materially (for instance, how many vacant teacher posts and how much had been spent by the school governing body on paying temporary teachers); and
- the fact that it seemed unrealistic to expect that a blanket order compelling the provincial education department to fill all vacant teacher posts would ever be implemented.

In this context, the use of an opt-in class action proved ideal as it had the following advantages:

- It provided a mechanism whereby the litigation could be launched without all affected schools being on board.
- The notice requirements of a class action provided a helpful way of attracting the attention of the schools concerned.
- The opt-in procedures allowed the schools to join the litigation and place their own information before the court.
- If the case succeeds on the merits, the 90 schools that have opted in will each have discrete orders in their favour entitling them to have their specific number of vacant teacher posts filled (whether via deemed appointments or otherwise) and to claim fixed

amounts from the provincial education department as repayment for the payments made to temporary teachers. The prospects of such orders being implemented are far greater than if there had been a blanket order compelling the provincial department to fill all vacant teacher posts.

We thus consider the teacher post-provisioning case to be an ideal example of the role that can be played by class actions in bringing about effective public interest litigation. This is in addition to the more traditional use of class actions for claims for damages against wrongdoers such as in the miner silicosis case we mentioned above.

## A protective costs regime

A second procedural respect in which the South African legal system promotes public interest litigation concerns costs awards.

The ordinary and almost invariable approach is that costs follow results. This means that the losing litigant is required to pay the taxed costs of the successful litigant. While taxed costs normally only amount to approximately 40% of the actual costs, this can obviously still be a very sizeable figure – especially where the litigation has gone through multiple courts.

For this reason, the prospects of an adverse costs award would ordinarily constitute a significant disincentive to public interest litigation. Given the unpredictability of litigation, there are

very few cases where one can be certain of winning, and an adverse costs order on a sufficient scale could bankrupt the individual or organisation concerned.

From the outset, the Constitutional Court has been alive to the potential chilling effect of adverse costs orders and therefore developed an approach to guard against it. However, it was in the *Biowatch* matter<sup>259</sup> that the Court most comprehensively and emphatically laid down the proper approach to costs in constitutional matters. The Court articulated four principles of importance.

Firstly, the Court held that:

*[...] as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs.*<sup>260</sup>

This would generally only be departed from where the litigation was:

*[...] frivolous or vexatious [or where there was] conduct on the part of the litigant that deserves censure.*<sup>261</sup>

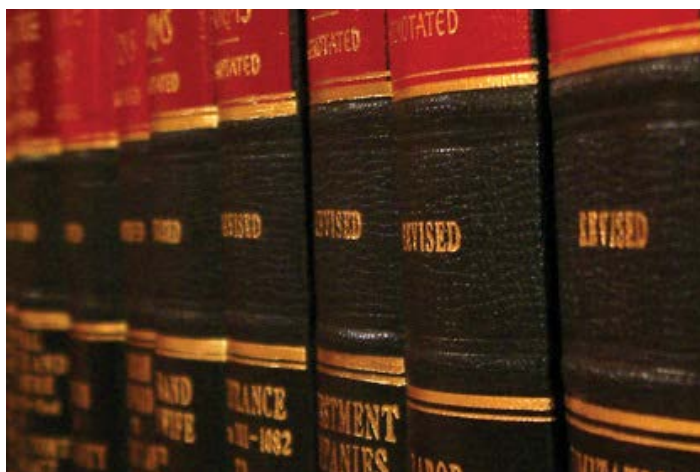
In the absence of such circumstances, the ordinary order should be that there is no order as to costs.

Secondly, and equally important, the Court confirmed that where the litigant asserting constitutional rights succeeded, the state should be directed to pay the costs. This is important because it ultimately increases the ability and likelihood of public interest organisations bringing litigation. This is not only because they receive costs awards when successful, but also because it makes it easier for them to

<sup>259</sup> *Biowatch Trust v Registrar Genetic Resources & Others* [2009] ZACC 14; 2009 (6) SA 232 (CC).

<sup>260</sup> *Biowatch Trust v Registrar Genetic Resources & Others op.cit.*, paragraph 21.

<sup>261</sup> *Ibid.*



persuade counsel to take cases on the basis of a 'no-win, no-fee' arrangement.

The effect of these two rules taken together is that, in general, if government loses, it is required to pay the costs; and if government wins, each party pays its own costs.

The Constitutional Court articulated the need for this approach as follows:

*The rationale for this general rule is three-fold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations.*

*Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door.<sup>262</sup>*

Thirdly, the Court held that this approach applied even where the litigation between a private party and the state also involved other private respondents:

*The fact that more than one private party is involved in the proceedings does not mean [...] that the litigation should be characterised as being between the private parties. In essence*

*the dispute turns on whether the governmental agencies have failed adequately to fulfil their constitutional and statutory responsibilities. Essentially, therefore, these matters involve litigation between a private party and the state, with radiating impact on other private parties. In general terms costs awards in these matters should be governed by the over-arching principle of not discouraging the pursuit of constitutional claims, irrespective of the number of private parties seeking to support or oppose the state's posture in the litigation.<sup>263</sup>*

Lastly, the Court stressed that this approach applied irrespective of whether the litigant asserting constitutional rights was a public interest litigant or not. It held that:

*Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration*

<sup>262</sup> *Biowatch Trust v Registrar Genetic Resources & Others op.cit.*, paragraph 23.

<sup>263</sup> *Biowatch Trust v Registrar Genetic Resources & Others op.cit.*, paragraph 28.

*From the outset, the Constitutional Court has been alive to the potential chilling effect of adverse costs orders and therefore developed an approach to guard against it.*

*in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.*<sup>264</sup>

The costs regime laid down in *Biowatch* has been of significant importance in promoting public interest litigation. Prior to this decision, there was considerable anxiety – especially among institutions litigating in the public interest – about the prospect of an adverse costs order being made against them. There can be little doubt that this had a very real and chilling effect on public interest litigation, and either prevented or impeded some of this litigation from occurring.

Moreover, there has been no suggestion of which we are aware that the costs regime articulated in *Biowatch* has produced a spate of baseless constitutional litigation.

Regrettably, the one cost issue on which the Constitutional Court has been somewhat inconsistent is the question of costs in constitutional litigation between private parties, where there is no state involvement. This is a difficult area because often both parties are

asserting constitutional rights – even though one party might be extremely well resourced (such as a mining company) and the other not (such as an environmental NGO). In disputes between private parties, the Court characterises its approach as generally having costs follow the result in such cases, save for exceptional cases.<sup>265</sup>

However, discerning in advance what those exceptional circumstances might be is not always easy – meaning, unfortunately, that the risk of an adverse costs order continues to figure as a major worry for a public interest litigant trying to decide whether to embark on a case against a private litigant. The Court has made clear that it will consider:

*[...] the extent to which the pursuit of public interest litigation could be unduly chilled by an adverse costs order [and] the broader implications of most constitutional litigation.*<sup>266</sup>

The potential unpredictability of this, however, remains a cause for concern.

## Significant opportunities for interventions by *amici curiae*

The term *amicus curiae* can have a variety of meanings. Traditionally, the most common form of *amicus curiae* is a person who appears at the request of the court to represent an unrepresented party or interest.

Another form of *amicus* is demonstrated where the court requests counsel to appear before it to advise or assist it on difficult or novel questions of law which arise in the matter, or (less commonly) where a person asks leave to intervene for this purpose. In such cases, the *amicus curiae* does not represent a particular interest or point of view.

A third common type of *amicus curiae* is the Law Society or Bar Council in an application for the admission of a legal practitioner. The professional body makes submissions to the court, not to

<sup>264</sup> *Biowatch Trust v Registrar Genetic Resources & Others op.cit.*, paragraph 16.

<sup>265</sup> *Bothma v Els* [2009] ZACC 27; 2010 (2) SA 622 (CC), paragraphs 91-99.

<sup>266</sup> *Ibid.*





Children playing in portable toilet.  
Photograph: Social Justice Coalition ©

represent the interests of the professional body's members, but to assist and advise the court in promoting the interests of the administration of justice.

However, in the new constitutional order of South Africa, a new form of *amicus curiae* has been introduced, namely a non-party which contends for a particular position which it has itself chosen.<sup>267</sup> The Constitutional Court has emphasised the importance of this role:

*[T]he role of an amicus [...] is very closely linked to the protection of our constitutional values and the rights enshrined in the Bill of Rights. [...] [A]lthough friends of the court played a variety of roles at common law, the new Rule was specifically intended to facilitate the role of amici in promoting and protecting the public interest. In these cases, amici play an important role first, by ensuring that courts consider a wide range of options and are well informed; and second, by increasing access to the courts by creating space for interested non-parties to provide input on important public interest matters, particularly those relating to constitutional issues.*

<sup>267</sup> Ibid.

As this Court has noted:

*"The role of an amicus is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court."*

*The role of a friend of the court can, therefore, be characterised as one that assists the courts in effectively promoting and protecting the rights enshrined in our Constitution.*<sup>268</sup>

The rules of the High Court, the Supreme Court of Appeal and the Constitutional Court contain specific procedures for the admission of *amici curiae*. These procedures also permit *amici curiae* to seek to adduce evidence before the court.<sup>269</sup>

The Constitutional Court has expressed caution about the admission of *amici*

<sup>268</sup> *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp & Others* [2012] ZACC 25; 2013 (2) SA 620 (CC), paragraphs 26-27.

<sup>269</sup> *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp & Others op.cit.*, paragraphs 28-34.

*curiae* in criminal matters,<sup>270</sup> but even this approach is subject to exceptions, as is demonstrated by the intervention of *amici* in various criminal cases.<sup>271</sup>

There is no question that the intervention of *amici curiae* has played a critical role in a number of public interest cases. In what follows, we focus on a largely unexplored question in the South African context – what different roles can an *amicus curiae* play in assisting public interest litigation?

## The radical outlier role

A particularly frequent form of *amicus* intervention is to run an argument that supports the relief sought by the main public interest litigant, but that is (perhaps significantly) more radical, progressive and/or far-reaching than the arguments of the main litigant.

This can have substantial benefits for the main litigant. If the more radical *amicus* argument succeeds, then the

<sup>270</sup> *Ex Parte Institute for Security Studies, In re S v Basson* [2005] ZACC 4; 2006 (6) SA 195 (CC), paragraph 15.

<sup>271</sup> See for example: *Masiya v Director of Public Prosecutions & Another* [2007] ZACC 9; 2007 (5) SA 30 (CC); and *S v Vilakazi* [2008] ZASCA 87; 2012 (6) SA 353 (SCA).

*In the new constitutional order of South Africa, a new form of amicus curiae has been introduced, namely a non-party which contends for a particular position which it has itself chosen.*

case will almost certainly succeed and will likely be even more far-reaching than the main litigant may have hoped.

However, even if the court rejects or declines to decide the argument raised by the *amicus*, the intervention may still have substantial benefit for the main litigant. This is because an *amicus* intervention of this sort will often change the nature and dynamics of the debate before the court and, in doing so, cast the arguments raised by the main litigant in a more palatable light.

An excellent example of this is the TAC's Constitutional Court case. In this case, there was an intervention by three *amici*. Two of these *amici* were the CLC and the Institute for Democracy in Africa (IDASA). They sought to intervene on the question of the proper approach to socio-economic rights.

The Constitutional Court had previously decided in *Grootboom* that in adjudicating socio-economic rights challenges to government programmes, the relevant standard would be reasonableness. The TAC was content to rely on this standard.

However, the CLC and IDASA took a more radical line. They contended that the Constitution required and

permitted a minimum core approach to socio-economic rights. This meant that in respect of certain key aspects of socio-economic rights – the minimum core – it was not sufficient for government to merely say that they had a reasonable programme in place. Rather, where an individual lacked access to his or her minimum core socio-economic rights, he or she could claim that his or her rights had been violated. The *amici* were in effect suggesting that the Court's existing jurisprudence on socio-economic rights was inadequate and would not give full effect to the Constitution.

The argument of the CLC and IDASA was ultimately rejected by the Constitutional Court in its judgment. Nevertheless, for a brief but crucial part of the hearing, this argument held centre stage. Whereas government was seeking to debate whether the socio-economic rights were properly justiciable at all and whether the Court could go beyond a mere declaratory order, the intervention of the *amici* changed this debate. It meant that – contrary to the arguments of government that the TAC was running a radical, unprecedented case – the arguments of the TAC now seemed far

more measured and limited.

The Court could thus feel quite comfortable that, in adopting the arguments and relief contended for by the TAC, it was doing no more than follow a middle ground consistent with previous jurisprudence.

While it is difficult to assess precisely the extent to which the intervention of the *amici* affected the Court, it is clear that the intervention certainly helped the TAC, even though the arguments of the *amici* were rejected.

There have been various other examples of this type of radical *amicus* approach.

In the Pillay case,<sup>272</sup> for example, the Constitutional Court was faced with an argument by a Hindu learner that a school decision to preclude her wearing a nose stud breached the right to equality because it unfairly discriminated against her. Two *amici* intervened – the Natal Tamil Vedic Society and the Freedom of Expression Institute. They contended that, in addition to breaching her right to equality, the decision breached her rights to freedom of culture and freedom of expression. The Court

<sup>272</sup> *MEC for Education: KwaZulu-Natal & Others v Pillay op.cit.*

Indigent parents and caregivers often ask community advice offices to help them access child support grants.

Photograph: United Nations ©



ultimately declined to decide the contentions of the *amici*, finding it unnecessary in light of its decision to uphold the main equality contention of the applicant.

The Biowatch decision on costs is a further example. Two *amici* – the CCL and LHR – intervened and contended that public interest litigants deserve special protection against adverse costs orders. A further *amicus* – CALS – intervened and contended that environmental rights litigants deserved special protection against adverse costs orders. Ultimately, the Court rejected these arguments. However, the arguments plainly changed the debate regarding the matter and, in the end, the Court applied the same generous standard that the *amici* had asked for to all matters in which a constitutional right was asserted in good faith – no matter the nature of the litigant or the particular right at issue.

There is only one note of caution that should be sounded. An *amicus* must ensure that it does not end up preventing future viable cases on an issue by running the argument too soon as an *amicus* intervention. Before taking the radical outlier position, the *amicus* needs to be reasonably sure that:

- there is unlikely to be a better case in the near future to run the argument – for example, the TAC or Biowatch cases; or that
- the *amicus* will likely be able to persuade the court to either uphold its contentions or leave them open for another day – for example, the Pillay case.

## Providing a route through

A second and different role that can be played by an *amicus* is that of providing a court with a route through a case filled with difficult factual or legal issues or where the existing arguments do not get to grips with the issues. In this type of intervention, the *amicus* does not run a more radical argument than the main litigant. Rather, it uses its position to stand back and adopt a bird's eye view in order to offer the court an appropriate route to decide the case.

Perhaps the best example of this is the role of the *amici* (the SAHRC and the CLC, represented by the LRC) in the Grootboom case. It was the intervention of the LRC that demonstrated to the Constitutional Court that it could and should decide

the case in the applicants' favour on the right of access to adequate housing (Section 26 of the Constitution), which was qualified in various respects including a reasonableness standard, instead of on children's right to shelter (Section 28), which was unqualified. This was critical as it was quite clear that the Constitutional Court did not want to decide the case on a Section 28 basis, because it was anxious about the repercussions in future.

Had it not been for the intervention of the *amici*, it appears quite possible, and even likely, that the Grootboom case might have been lost and not produced any binding precedent in favour of the right to housing or right to shelter.

Moreover, the LRC's intervention managed to analyse government's housing programme with a sophistication and nuance that was lacking in the plaintiffs' case. Though a number of the LRC's legal submissions were ultimately rejected, its approach to and analysis of government's housing programme proved to be the core around which the judgment was based.

A further example is the matter of *S v M*<sup>273</sup>. This matter concerned an

<sup>273</sup> *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC).

*A particularly frequent form of amicus intervention is to run an argument that supports the relief sought by the main public interest litigant, but that is (perhaps significantly) more radical, progressive and/or far-reaching than the arguments of the main litigant.*

appeal by a divorced mother of three children aged 16, 12 and 8 years against a sentence of four years' imprisonment on charges of fraud. While the applicant's arguments relied on the effect that the sentence would have on her children, it took an *amicus* intervention by the CCL to analyse the case and provide the Constitutional Court with a route to decide it. It was the *amicus* that demonstrated to the Court that:

- the matter had to be dealt with as one of children's rights – not the rights of the applicant;
- international law made it clear that children's rights had to be taken into account; and that
- requiring the consideration of children's rights in sentencing did not mean being soft on crime.

This intervention had a profound impact on the Court. Indeed, the need for the intervention is highlighted by the fact that it was the Court itself that prompted it. The Chief Justice directed the Registrar to serve a copy of the directions setting the matter down for hearing on the CCL.

Much as in the Grootboom case, it was the sophisticated, nuanced argument

of the *amicus* that demonstrated to the Court how the law could accommodate the facts in question, without undermining general legal principles in future cases, in this case regarding sentencing.

A more recent example is the matter of *Allpay*,<sup>274</sup> which was about the lawfulness of a massive tender award concerning the administration and disbursement of social grants. The case was immensely complicated at the level of fact and law, and had potentially massive ramifications for the millions of beneficiaries receiving social grants, and for future tender cases.

The case ultimately saw two different *amici curiae* intervening and adopting contrasting positions in an effort to find a route through for the Constitutional Court. Corruption Watch intervened to deal with the relevant legal principles, expressing concern that the Court should espouse principles of administrative law and remedy which protected procurement processes

and combatted corruption. The CCL intervened to focus on the question of remedy and the negative ramifications for beneficiaries if the tender was set aside. A full discussion of the case is beyond the scope of this publication, but the Court's judgment made it plain that both *amici* interventions had a significant effect.

## Filling a gap

The first two types of *amicus* interventions we have dealt with concerned attempts by *amici* to reshape or redirect the case as a whole. There are, however, other more limited *amicus* interventions that are no less effective and can often be crucial to the success of a case.

For example, an *amicus* intervention can often cover an issue that the main litigant has not covered at all and may be unable to cover. Often the issue presented by the *amicus* in this way is primarily a legal one.

It happens quite frequently, for instance, that the main litigant has not covered the foreign and international law dimensions of a case. In cases like *S v M* mentioned above and *Grootboom*, this was done by the *amici*.

<sup>274</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); and *Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others* (No. 2) *op.cit.*



Protest against gender-related violence and child abuse outside Parliament in Cape Town, May 2008.

Photograph: Paul Hofman ©



The same approach applies to South African legal issues which have received inadequate emphasis. In the TAC case, for example, the focus of the main litigant was the right to health care. An effective *amicus* intervention, however, was brought by the Cotlands Baby Sanctuary, focusing on children's rights and the effect on children.

On other occasions, the gap filled by the *amicus* is to demonstrate at a practical level the effect of a judgment or provision. A good example in this regard is the case of *Brümmer v Minister of Social Development*.<sup>275</sup>

This case concerned a challenge to the constitutionality of the Promotion of Access to Information Act of 2000, which provided that where a request for access to information is refused, the requester must approach a court within 30 days to challenge that decision. This provision was challenged by a journalist as violating the rights of access to information and access to courts.

While the journalist's case was well presented and persuasive, it did not manage to convey fully the practical effect that the 30-day time period had

on requesters, and why even reading in a condonation provision would not solve the problem.

This gap was filled by an *amicus* intervention by SAHA. The *amicus* intervention demonstrated that due to the complexities involved, even an organisation like SAHA – which specialises in access to information – had not once managed to approach a court within the 30-day time period. It also demonstrated that even a condonation provision would not solve the problem as it would have a chilling effect on the running of such litigation.

There is no question that SAHA's intervention substantially strengthened the main litigant's case. The Constitutional Court's judgment described SAHA's account of the practical difficulties caused by the time bar as:

*[...] illuminating [...] If an NGO faces these difficulties in meeting the 30-day limit, I think it is fair to expect that individuals will have even greater difficulty in complying with this time limit.*<sup>276</sup>

The Court struck down the time bar as

an unjustifiable limitation of the right of access to courts, and the submissions of SAHA made a significant contribution in persuading it to make this order.

A further example is the Biowatch case referred to earlier, concerning the awarding of costs against litigants asserting constitutional rights. While we have already discussed the substantive arguments made by the *amici* (the CCL, LHR and CALS) in this case, their intervention served an earlier and arguably more important purpose: To demonstrate to the Constitutional Court that the Biowatch matter did not merely concern an adverse costs award against one organisation but was, in fact, having a chilling effect on the entire public interest litigation arena.

The purpose was to assist in persuading the Court that this was indeed a matter where it was appropriate to hear an appeal on costs alone, despite the general reluctance of courts to do so. It was for this reason that the *amici* interventions were launched at a very early stage – prior to the Court even deciding whether to set the matter down.

Finally, although an *amicus* is largely prevented from adducing further

<sup>275</sup> *Brümmer v Minister of Social Development & Others* [2009] ZACC 21; 2009 (6) SA 323 (CC).

<sup>276</sup> *Brümmer v Minister of Social Development & Others op.cit.*, paragraphs 53-54.



Photograph:  
Treatment Action Campaign ©

evidence, there are exceptions to this rule. There are some unusual occasions where an *amicus* can fill the gap in respect of missing evidence. An example of this is the case of *Hoffmann v South African Airways* mentioned earlier.

As noted, this case concerned the practice of South African Airways to refuse to employ HIV-positive individuals as cabin attendants. When the case reached the Constitutional Court, it appeared to lack certain important medical evidence on the transmission, progression and

treatment of HIV, as well as the ability of people with HIV to be vaccinated against yellow fever, an important issue in the case.

This evidence had been adduced in a different lower court matter, *A v South African Airways*, and the attorneys in this matter – the ALP – successfully applied to be an *amicus* in the *Hoffmann* case and to place the relevant evidence before the Constitutional Court. Ultimately, the Constitutional Court ruled in favour of *Hoffmann*, relying substantially on the evidence from the ALP.

## In sum

An *amicus* intervention can be brought in at least three ways – playing the radical outlier role, providing a route through or filling a gap. In many cases, there are overlaps between the three with the *amicus* fulfilling more than one of these functions.

On some occasions, the *amicus* interventions above were run after consultation with the main litigant. On other occasions, this did not occur. While one cannot be prescriptive on this score, it is worth bearing in mind that *amicus* interventions can hinder as much as they can help. In particular, it may be the case that the main litigant has given careful consideration to the possible range of arguments and has declined to run some of them for practical or strategic reasons.

Therefore, before any public interest organisation seeks to intervene in a case as an *amicus*, we are of the view that there should at least be a full and frank exchange of views between the potential *amicus* and the main litigant as to the advantages and disadvantages of such an intervention.

# Chapter 6:

## Summary of findings

# Summary of findings

Our key findings may be divided into four parts:

- the main challenges facing the public interest litigation environment in South Africa;
- four strategies that should be used in combination in order to use rights to achieve social change;
- seven factors that are critical to maximising the prospect that public interest litigation succeeds and achieves social change; and
- three procedural mechanisms which promote effective public interest litigation in South Africa.

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

We concluded 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. As we have indicated, 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, we are concerned 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 3**, on the basis of the case studies presented in Chapter 2 as well as other examples, we identified 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



Isolation cells at Section Four at the Johannesburg Fort (an apartheid-era prison). ANC 1963 treason trialist Walter Sisulu, and leader of the 1976 Soweto Uprising Tsitsi Mashinini were held here.

Photograph: Gerald Kraak ©



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 our 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.

We 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 we accept that 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** we concluded that in order to achieve social change via litigation, it is critical that litigation be properly conceptualised, run and followed up. In this regard, we identified 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, we 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

*South Africa's Constitution is one of the most progressive in the world. 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.*

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 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** we identified 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, we 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.





Former President Nelson Mandela engaging with HIV-positive children in Crossroads, Cape Town, in 2007.

Photograph: Ruvan Boshoff ©

## 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.<sup>277</sup>*

<sup>277</sup> 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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# Appendices

# Appendix A

## **Constitution of the Republic of South Africa 108 of 1996, Chapter 2 (Bill of Rights, Sections 7-39)**

### **7 Rights**

(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

### **8 Application**

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) 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.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

## 9 Equality

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

## 10 Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

## 11 Life

Everyone has the right to life.

## 12 Freedom and security of the person

- (1) Everyone has the right to freedom and security of the person, which includes the right—
  - (a) not to be deprived of freedom arbitrarily or without just cause;
  - (b) not to be detained without trial;
  - (c) to be free from all forms of violence from either public or private sources;
  - (d) not to be tortured in any way; and
  - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right—
  - (a) to make decisions concerning reproduction;
  - (b) to security in and control over their body; and
  - (c) not to be subjected to medical or scientific experiments without their informed consent.

## 13 Slavery, servitude and forced labour

No one may be subjected to slavery, servitude or forced labour.

## 14 Privacy

Everyone has the right to privacy, which includes the right not to have—

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

## 15 Freedom of religion, belief and opinion

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that—

- (a) those observances follow rules made by the appropriate public authorities;
- (b) they are conducted on an equitable basis; and
- (c) attendance at them is free and voluntary.

(3)(a) This section does not prevent legislation recognising—

- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
- (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

## 16 Freedom of expression

(1) Everyone has the right to freedom of expression, which includes—

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to—

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

## 17 Assembly, demonstration, picket and petition

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

## 18 Freedom of association

Everyone has the right to freedom of association.



## 19 Political rights

- (1) Every citizen is free to make political choices, which includes the right—
  - (a) to form a political party;
  - (b) to participate in the activities of, or recruit members for, a political party; and
  - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right—
  - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
  - (b) to stand for public office and, if elected, to hold office.

## 20 Citizenship

No citizen may be deprived of citizenship.

## 21 Freedom of movement and residence

- (1) Everyone has the right to freedom of movement.
- (2) Everyone has the right to leave the Republic.
- (3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.
- (4) Every citizen has the right to a passport.

## 22 Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

## 23 Labour relations

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right—
  - (a) to form and join a trade union;
  - (b) to participate in the activities and programmes of a trade union; and
  - (c) to strike.
- (3) Every employer has the right—
  - (a) to form and join an employers' organisation; and
  - (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right—
  - (a) to determine its own administration, programmes and activities;
  - (b) to organise; and
  - (c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).

## 24 Environment

Everyone has the right—

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation; and
  - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

## 25 Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

- (a) for a public purpose or in the public interest; and
- (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

(4) For the purposes of this section—

- (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
- (b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6).

## 26 Housing

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

## 27 Health care, food, water and social security

(1) Everyone has the right to have access to—

- (a) health care services, including reproductive health care;
- (b) sufficient food and water; and
- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

## 28 Children

(1) Every child has the right—

- (a) to a name and a nationality from birth;
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;

- (d) to be protected from maltreatment, neglect, abuse or degradation;
  - (e) to be protected from exploitative labour practices;
  - (f) not to be required or permitted to perform work or provide services that—
    - (i) are inappropriate for a person of that child's age; or
    - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
  - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
    - (i) kept separately from detained persons over the age of 18 years; and
    - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
  - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
  - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section 'child' means a person under the age of 18 years.

## 29 Education

- (1) Everyone has the right—
- (a) to a basic education, including adult basic education; and
  - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—
- (a) equity;
  - (b) practicability; and
  - (c) the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—
- (a) do not discriminate on the basis of race;
  - (b) are registered with the state; and
  - (c) maintain standards that are not inferior to standards at comparable public educational institutions.



(4) Subsection (3) does not preclude state subsidies for independent educational institutions.

### 30 Language and culture

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

### 31 Cultural, religious and linguistic communities

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

### 32 Access to information

(1) Everyone has the right of access to—

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

### 33 Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.

### 34 Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

### 35 Arrested, detained and accused persons

- (1) Everyone who is arrested for allegedly committing an offence has the right—
- (a) to remain silent;
  - (b) to be informed promptly—
    - (i) of the right to remain silent; and
    - (ii) of the consequences of not remaining silent;
  - (c) not to be compelled to make any confession or admission that could be used in evidence against that person;
  - (d) to be brought before a court as soon as reasonably possible, but not later than—
    - (i) 48 hours after the arrest; or
    - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
  - (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
  - (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.
- (2) Everyone who is detained, including every sentenced prisoner, has the right—
- (a) to be informed promptly of the reason for being detained;
  - (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
  - (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
  - (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
  - (f) to communicate with, and be visited by, that person's—
    - (i) spouse or partner;
    - (ii) next of kin;
    - (iii) chosen religious counsellor; and
    - (iv) chosen medical practitioner.
- (3) Every accused person has a right to a fair trial, which includes the right—
- (a) to be informed of the charge with sufficient detail to answer it;
  - (b) to have adequate time and facilities to prepare a defence;
  - (c) to a public trial before an ordinary court;
  - (d) to have their trial begin and conclude without unreasonable delay;
  - (e) to be present when being tried;

- (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
  - (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
  - (i) to adduce and challenge evidence;
  - (j) not to be compelled to give self-incriminating evidence;
  - (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
  - (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
  - (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
  - (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
  - (o) of appeal to, or review by, a higher court.
- (4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.
- (5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

### 36 Limitation of rights

- (1) The rights in the Bill of Rights may be limited only in terms of 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, taking into account all relevant factors, including—
- (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

### 37 States of emergency

- (1) A state of emergency may be declared only in terms of an Act of Parliament, and only when—
- (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

- (b) the declaration is necessary to restore peace and order.

### 38 Enforcement of rights

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 interest; and
- (e) an association acting in the interest of its members.

### 39 Interpretation of Bill of Rights

- (1) When interpreting the Bill of Rights, a court, tribunal or forum—
  - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.
- (2) When 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.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.



# Appendix B

## Organisations & individuals participating via personal interview or questionnaire\*

**Black Sash Trust**

**Centre for Applied Legal Studies,**  
University of the Witwatersrand

**Centre for Criminal Justice,**  
University of KwaZulu-Natal

**Education and Training Unit**

**Freedom of Expression Institute  
Law Clinic**

**Human Rights Watch**

**Lawyers for Human Rights**

**OUT LGBT Well-being**

**PLAAS - Institute for Poverty,  
Land and Agrarian Studies,**  
University of the Western Cape

**ProBono.Org**

**Rhodes University Legal Aid  
Clinic**

**Rural Legal Trust**

**Socio-Economic Rights Project  
of the Community Law Centre,**  
University of the Western Cape

**South African History Archive**

**Zackie Achmat**, co-founder of the  
Treatment Action Campaign

**Brad Brockman**, General Secretary  
of Equal Education

**Geoff Budlender SC**, practising  
Advocate and former National  
Director of the Legal Resources  
Centre

**Edwin Cameron**, Constitutional  
Court Justice

**Arthur Chaskalson**, former Chief  
Justice of South Africa and former  
National Director of the Legal  
Resources Centre

**Matthew Chaskalson SC**, practising  
Advocate

**Jackie Dugard**, co-founder of the  
Socio-Economic Rights Institute of  
South Africa

**Adila Hassim**, practising Advocate  
and co-founder of Section27

**Kallie Kriel**, Chief Executive Officer  
of AfriForum

**Pius Langa**, former Chief Justice of  
South Africa

**Janet Love**, National Director of the  
Legal Resources Centre

**Kate O'Regan**, former  
Constitutional Court Justice

**Ann Skelton**, Director of the Centre  
for Child Law

**Wim Trengove SC**, practising  
Advocate and former Director  
of the Legal Resources Centre's  
Constitutional Litigation Unit

**Stuart Wilson**, practising Advocate  
and co-founder of the Socio-  
Economic Rights Institute of South  
Africa

\* This list includes the respondents for both the 2008 report and this publication. Some were respondents on both occasions. One City of Johannesburg official agreed to be interviewed on the basis that his identity would be kept confidential.



Bill of Rights on the wall of the remains of the old prison in Durban.

Photograph: Jan Speed/Norad Bistandsaktuelt/www.flickr.com ©

Back page photographs:  
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# Public interest litigation and social change in South Africa:

## Strategies, tactics and lessons



### Biographies

#### Steven Budlender

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.

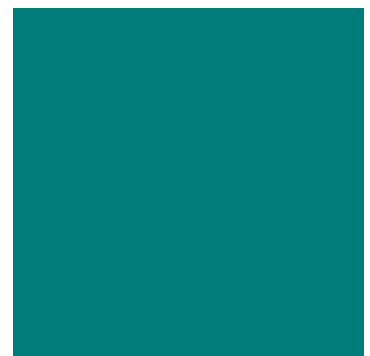
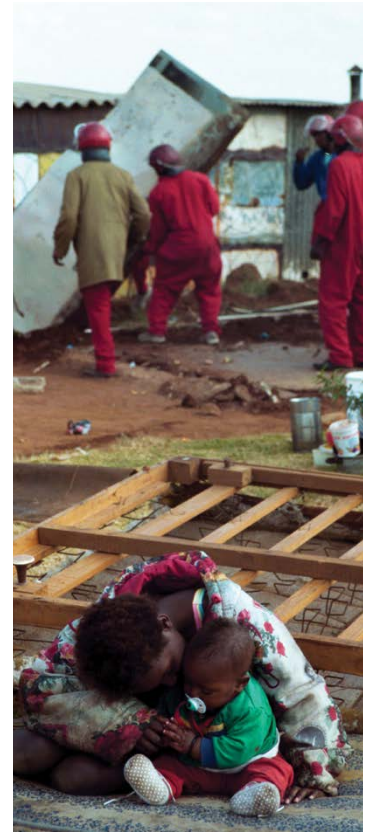
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