

The public-interest action in South Africa: The transformative injunction of the South African *Constitution*

Abstract

The insertion of sec. 38 in the *Constitution of the Republic of South Africa*, 1996, has seen substantial broadening of standing opportunities for litigants since the advent of the country's constitutional dispensation. Amongst others, it has led to the development of public-interest litigation in terms of sec. 38(d), which is in line with the constitutional mandate of societal transformation. The full impact of the latter constitutional provision has recently been illustrated by the public and legal controversy surrounding the South African government's failure to arrest Sudanese President Omar Hassan Ahmed Al-Bashir while he was attending an AU summit in Johannesburg. The Southern African Litigation Centre's application to enforce the International Criminal Court's warrant of arrest against Al-Bashir was brought in the centre's own name, but was supplemented by public interest. Currently, however, there is neither case law nor legislation explicitly dealing with a pure public-interest action in South Africa, which leaves litigants and the judiciary without any guiding principles. Therefore, this article draws on the South African Law Commission's 1998 proposals on class and public-interest actions, as well as the substantial case law dealing with sec. 38(a) own-interest actions combined with a strong element of public interest, to formulate proposals on how 'public interest' as well as standing for public-interest litigants should be interpreted and determined.

1. Introduction

The advent of South Africa's constitutional dispensation created avenues in the civil process to gain access to justice that had not existed previously. One such avenue is the procedural mechanism of a public-interest action in terms of sec. 38(d) of the *Constitution of the Republic of South Africa*, 1996. In such an action, the action representative brings the action in the sole interest of the public. No direct or indirect interest in the action by the action representative is required. The impact of this is illustrated by the recent and seemingly ongoing public and legal controversy surrounding the South African government's failure to arrest Sudanese President Al-Bashir while he was attending an AU summit

in Johannesburg.¹ The Southern African Litigation Centre's application to enforce the International Criminal Court's warrant of arrest against Al-Bashir was brought in the centre's own name, but was supplemented by public interest.²

While there is neither case law nor any governing legislation concerning a pure public-interest action in South Africa, there is substantial case law and a large body of literature dealing with sec. 38(a) own-interest actions combined with a strong element of public interest. In this article, therefore, the authority on these actions will be applied analogically to establish the 'interest' standing requirement for the litigant in a representative public-interest action. This will be done by means of a literature overview and a parallel analysis of South African case law. The article will consider the ascendancy of public interest-litigation in the new South African dispensation, which underscores the constitutional parameters within which to achieve social justice. It will draw substantially on the Law Commission's 1998 report before contextualising 'public interest' in terms of the *Promotion of Administrative Justice Act*. Public-interest jurisprudence, and the guidance so far provided by our courts, is then discussed. The article will conclude with recommendations for the procedural requirements of a public-interest action.

2. Public-interest litigation – from *Dalrymple* to present

Substantial development of public-interest litigation has only occurred since the advent of the South African constitutional dispensation, and it is well documented in both literature and case law that its emergence points to the transformative nature and moral authority of the South African *Constitution*. Klaaren and colleagues reiterate this in stating that the *Constitution* provides a framework “for the large-scale transformation of the South African society through law”.³ One of the challenges of societal transformation through the application of judicial processes is that it must be achieved either by means of the existing common-law processes and rules or, in instances where these do not provide recourse, through the development of new processes and rules mandated by the *Constitution*.⁴ It follows, therefore, that the law of procedure itself is constantly adapted

1 For a general press background of the controversy, see Mudukuti (2015) and Cohen (2015).

2 *The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*, unreported, case number 27740/2015. <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africa/sudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/>, applicants' founding affidavit paras. 53-58 (accessed on 25 June 2016).

3 Klaaren, Dugard & Handmaker 2011:1.

4 Apart from sec. 38 of the *Constitution*, which provides that the remedy for breach of the rights in the Bill of Rights must be “appropriate”, sec. 172 (power of the court to declare laws and conduct constitutionally inconsistent, and to give orders that are “just and fair”), and sec. 8(3) (the injunction to apply the

and incrementally developed to provide relief against the overriding ideal of societal transformation.

One of the substantive mandates for societal transformation provided by the *Constitution* is the insertion of sec. 38, which has significantly broadened standing opportunities for litigants. Sec. 38 determines that a listed number of persons may approach a competent court “alleging that a right in the Bill of Rights has been infringed or threatened”.⁵ It falls beyond the scope of this study to speculate whether the drafters of the *Constitution* realised how far-reaching the impact of this provision would eventually be, generously affording standing to individuals and groups who had previously been excluded from the field of public-interest litigation, particularly relating to state conduct. Nevertheless, there is at present no better illustration of the impact of sec. 38 than the Al-Bashir controversy and the Southern African Litigation Centre’s subsequent application in the North Gauteng High Court. The respondents never contested the applicant’s standing to bring the application. However, it is contextually important to note the applicant’s formulation of the public interest in the Al-Bashir application, as it supplements the discussion of the judicial interpretation of public interest later in this article. It reads as follows:

It is also important to all South Africans that their government be compelled to abide by the law, both international and domestic. The rule of law is a founding value of South Africa and is enshrined in the Constitution.

When officials of the South African government fail to fulfil their legal obligations, particularly in such a serious and public matter as the instant case, it affects all South Africans equally, as it demonstrates an unjustifiable disregard for the law and an unjustifiable tolerance of war crimes and crimes against humanity.

The Applicant therefore also brings this case in the public interest.⁶

Before moving on to a reflection on the scholarly and judicial interpretation of public interest, a brief reference to the common law serves to set the scene.

In 1998, the South African Law Commission⁷ noted that actions in the public interest had previously been virtually unknown in the country. What could have been the reason for this? After all, Roman law contained the

common law, and develop it where necessary), the *Constitution* remains silent on what “appropriate relief” is.

5 These persons 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”.

6 *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development*: applicant’s founding affidavit paras. 56-58.

7 In terms of *Government Gazette* no. 16779, notice 1126 of 27 October 1995, the SA Law Commission published a draft bill, the “Public Interest and Class Action Act”.

action known as *actio popularis*, which existed solely for the benefit and in the interest of the public. In a description of the origin and content of the *actio popularis* in Roman law,⁸ Van der Vyver asserts that the action was defined in the *Corpus Iuris Civilis* as an action “which protects the rights of the party who brings it, as well as those of the people”. However, this popular action as contained in Roman law became obsolete in Roman-Dutch law – an occurrence that Judge Wessels explained in the 1910 Union judgement in *Dalrymple v Colonial Treasurer*.⁹

The *actio popularis*, it was argued, had disappeared because, as the Roman form of government transitioned into the (then) modern European form, it had become inconvenient and intolerable. The argument *ab inconvenienti* provides sufficient justification for the law as laid down in *Dalrymple*:

If one applicant is afforded the right to sue, every other taxpayer would be able to exercise a similar right. If applicants, who believe a public act has violated a statute, are entitled to sue once, they would be equally entitled to do so again and again. The courts might, therefore, be constantly engaged in inquiries into grievances regarding ministers’ public acts “at the instance of enthusiastic or hostile politicians”.¹⁰

In addition, government might be constantly hampered in executing its official duties.¹¹

Looking back on this reasoning adopted by the court in *Dalrymple*, that reasoning seems unsuited in a constitutional legal order, for two reasons. First, since then, South Africa’s governance model has changed from one of parliamentary supremacy to constitutional supremacy. The judge in *Dalrymple*, therefore, still reasoned within the context of the political/legal order at the time, where the executive, through parliament and through the exercise of legislative power, was supreme. Secondly, his reasoning relied on the inconvenience argument, namely that an over-eager litigating public would constantly hamper a state in carrying out its duties of governance, making it intolerable. This argument later evolved into the ‘floodgates’ opposition to an overly liberal approach to standing in public-interest litigation. Many years later, in *Democratic Alliance v The*

8 Van der Vyver 1978:191 *et seq.* Van der Vyver (1978:192) states that the *actiones populares* were of praetorian origin. In most cases, a penal character in terms of a fine could be claimed from the respondent. With reference to the *Digest* (47.23), which summarises the rules pertaining to the *actiones populares*, Van der Vyver cites the following features of this action: (a) If more than one person presented himself to institute proceedings, the praetor had to choose the most suitable plaintiff, but had to give preference to a plaintiff with a personal interest in the matter. (b) If a particular matter had been disposed of by way of a popular action, the respondent in a subsequent case could raise the defence of *res judicata*.

9 1910 TS 372.

10 *Dalrymple v Colonial Treasurer*:392.

11 *Dalrymple v Colonial Treasurer*:392.

Acting National Director of Public Prosecutions,¹² Judge Navsa responded to the ‘floodgates’ argument by wryly repeating a dictum in *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the RSA*, namely “that it may sometimes be necessary to open the floodgates in order to irrigate the arid ground below them”.¹³

Clearly, therefore, the reasoning adopted in *Dalrymple* can no longer be applied in a democratic and constitutional legal order – first, because all state conduct is now subject to the *Constitution*, the rule of law and judicial review¹⁴ and, secondly, because, in terms of sec. 38, anyone whose constitutionally enshrined rights are threatened or have been violated may approach a competent court and seek appropriate relief.

However, in light of the absence of governing legislation as well as a proper public-interest action to date, the parameters within which South African courts will judge a cause of action that purports to be in the public interest needs to be established. This is explored in the following sections, first with reference to the Law Commission’s 1998 recommendations, followed by the parallel judicial development that has occurred since these were made.

3. The Law Commission’s recommendations on public actions

In its 1998 report on the recognition of class and public-interest actions in South African law, called *Project 88*,¹⁵ along with a draft bill in this regard, the South African Law Commission expressed the view that litigation in the public interest would foster a new accommodating role for, as well as the moral authority of, South Africa’s judiciary.¹⁶ Lamentably, the South African Parliament never implemented the Commission’s proposals, and it has been left to the judiciary to incrementally develop the rules and procedures for class and public-interest actions.

3.1 Background, procedure and definition

The Commission proposed that a public and class-actions Act and accompanying regulations be promulgated “as a matter of urgency”.¹⁷ It was suggested that class actions and actions in the public interest should be treated as two distinct procedures, as they served different purposes, although the Commission recognised later in the report¹⁸ that the two were

12 2012 3 SA 486 SCA:par. 6.2.

13 1996 3 SA 1095 Tks:1106 D-G.

14 *Constitution of the Republic of South Africa*, 1996: ch. 1, sec. 1(c), 2; ch. 2, secs. 8(1), 8(3), 34, 38, 39; ch. 8, secs. 165, 167, 172.

15 <http://www.justice.gov.za/salrc/reports/-classact-1998aug.pdf> (accessed on 27 June 2016).

16 SA Law Commission 1998:23, par. 4.2.5.

17 SA Law Commission 1998:(v), par. 1.

18 SA Law Commission 1998:7, par. 2.4.1.

not always mutually exclusive and could overlap, to some extent. There would be instances where both the class action and the public-interest action would be appropriate. However, as they differ in essence, they would have to meet different requirements. The major difference between the two actions, the Commission argued, was the fact that a judgement in the former would attract a future plea of *res judicata*, whereas a judgement in a public-interest action would not. The Commission then added:

Any person should be able to institute action in a court claiming relief by way of a public interest action in the interest of the public generally or of any particular section thereof, irrespective of whether or not such person has any direct, indirect or personal interest in the relief claimed.¹⁹

To this end, it proposed the following procedure:

1. The person acting in the public interest should firstly identify and nominate a representative, with such person's consent, to represent the public interest in the matter concerned.
2. Then, the court should be approached, which first has to be satisfied that the contemplated action is a *bona fide* public-interest action. Once satisfied, the court appoints the proposed public-interest action representative, retaining the power to remove or replace the person on good cause shown.
3. If the relief sought in the public-interest action is of a mandatory nature, a defendant must be cited; if it is declaratory, this is not necessary.
4. The Supreme Court of Appeal, the Constitutional Court, the high courts, the Land Claims Court, the Labour Court as well as magistrate's courts should all be allowed to hear public-interest actions.
5. A court hearing a public-interest action should not make a cost order, nor require the public-interest action representative to set security for costs.²⁰

In outlining the need for, and international move towards the recognition of class and public-interest actions,²¹ the Commission proposed the following definition for the public-interest action:

Public interest action means an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interest. Judgment of the court in respect of a public interest action shall not

19 SA Law Commission 1998:(v), par. 4.

20 SA Law Commission 1998:(vi), par. 4-7.

21 SA Law Commission 1998:2, par. 1.2.2 *et seq.* The commission noted as follows: "The treatment of animals (involving practices such as vivisection; badly run circuses, zoos or rodeos; dog racing, dog or cock fighting), environmental issues and other matters call out for public interest actions. On current tests for standing, a sufficient and direct interest is required by any person desirous of preventing such practices. Such persons may be hard to find."

be binding (*res judicata*) on the persons in whose interest the action is brought.²²

A cursory reading of this definition is self-explanatory and invites hardly any comment. However, to the extent that pragmatism requires the public action to have some filtering mechanism in order to prevent overly zealous litigation, which is purportedly in the public interest, but, in fact, abuses court processes, it appears that the Commission may have intended the requirement for a suitable “representative” to act on behalf of the public as a way of limiting the matters that eventually do reach our courts.²³ As possibly an additional filtering mechanism, the Commission suggested, in terms of sec. 3(1) of the draft bill, that a court must be satisfied that it is proper for the action to proceed by way of public-interest action. In this regard, court approval was proposed, although some may regard this as less onerous than the certification process required for the class action that has subsequently been judicially established.²⁴

The Commission continued to address two²⁵ significant aspects that could help direct a court as to whether or not an action should proceed as a public-interest action. The first is for the court to differentiate between an action in the public interest and an own-interest action based on a public right. As the Commission pointed out, and by virtue of the doctrine of *stare decisis*, the outcome of the latter could consequently affect all other members of the public who have the same right, even though a single litigant acting in his/her own interest brought the action. For practical reasons, therefore, a litigant acting in his/her own interest (as long as this is supplemented by a demonstrable public interest) would be better advised to rely primarily on his/her own interest, instead of basing the action solely on public interest, as, according to the Commission’s recommendation, an action based solely on public interest would require prior court approval. This – along with the lack of governing legislation on public-interest actions – may very well be why no purely public-interest action has served before our courts as yet. This would also explain why all the judgements referred to under par. 5 below have been successfully brought in the personal-capacity interest, supplemented by a strong degree of public interest. The

22 SA Law Commission 1998:24, par. 4.3.4. Sec. 2(3) of the draft bill stipulates that the court may give directions “to the representative as to the appropriate person or persons to be as respondent”, while sec. 2(4) determines that “unless the court holds otherwise, judgment in a public interest action shall not be binding on the person or persons in whose interest the action is brought”.

23 The SA Law Commission referred to the person that brings a public-interest action as “the ideological plaintiff”.

24 With regard to notice and the plea of *res judicata*. The requirement for certification of a class action is addressed in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 SCA; *Children’s Resource Centre Trust v Pioneer Food (Pty) Ltd* (Legal Resources Centre as *amicus curiae*) 2013 1 All SA 648 SCA; *Children’s Resource Centre Trust, Mukkadam* 2013 2 SA 254 HHA; *Mukkadam v Pioneer Foods (Pty) Ltd* 2013 10 BCLR 1135 CC. See also Hurter 2006, 2008, and 2010.

25 SA Law Commission 1998:26, par. 4.5.

second significant aspect addressed by the Commission relates to the two different meanings that can be attached to the phrase 'public interest':

The phrase can firstly mean that it is in the public interest to have a particular matter raised and adjudicated. Secondly, it can mean that the effect of the successful outcome of the matter is that each and every member of the public or part thereof benefits therefrom.²⁶

Against this background, any future court called upon to approve an action as a public-interest action could very likely be guided first by the demonstration of a *prima facie* good chance of success with the action and, secondly, by a consideration of the potential effect of a successful judgement on the public.

3.2 Limitations

Certain limitations to a public-interest action were put forward to the Commission. It was, for example, proposed that the relief in terms thereof should be limited to claims of declaratory or interim relief.²⁷ It was also argued that the public-interest action was not suited to actions for damages, and that it should be subjected to a certification process. To this, the Commission responded as follows:

It will not open the doors of access to justice if public interest actions were subjected to complicated and costly procedures and requirements. The idea is to broaden standing by making it possible for a person not having a direct interest in the relief claimed to institute an action in the public interest. Public interest actions should therefore not be subjected to a certification process. On the other hand, the courts will be able to limit unmeritorious public interest actions by the requirement that the action be instituted in the interest of the public generally or of any particular section thereof and the presence of a suitably qualified representative.²⁸

This response encapsulates the normative reasoning behind the introduction of the public representative action into South African law. In essence, it is about access to justice and the courts and, therefore, is evidence of the transformational mandate that the *Constitution* calls for. This transformational mandate also includes numerous other considerations, such as the separation-of-powers doctrine, the realisation of socio-economic rights, as well as the possibilities of a transformative role for the South African judiciary. All of these have been the subject of extensive national and international scholarly scrutiny.²⁹

26 SA Law Commission 1998:26, par. 4.5.2.

27 The draft bill contains no limitations on the relief that could be attained through a public (or class) action.

28 SA Law Commission 1998:25, par. 4.4.4.

29 See, for example, Budlender, Marcus & Ferreira 2014; Chayes 1976; Dugard 2007; Dugger 2007; De Vos 2009; Fletcher 1982; Mojapelo 2013; Pieterse 2004.

One may also accept that the doctrine of justifiability will always serve as a filtering mechanism to discourage overly zealous litigation that is supposedly in the interest of the public.³⁰ In terms of this doctrine, three broad sets of rules and principles are identified, which fall under the requirements for standing, ripeness³¹ and mootness.³² Later in this article, I shall allude to the established common-law requirement for standing that still applies in constitutional litigation, namely that a dispute may not be ‘hypothetical’ or ‘academic’. This, it is submitted, will continue to serve as a necessary filter when a court is called upon to approve a future action being conducted as a public-interest action.

4. Defining “public interest” – setting the parameters: *PAJA* and the broadening of rights

As mentioned earlier, the South African government has unfortunately failed to implement the Law Commission’s extensive recommendations above. This has left the courts to devise their own devices in developing the rules for dealing with public-interest actions. Before I proceed to analyse how the judiciary has defined public interest thus far, two auxiliary matters are significant in setting the parameters for such a definition. The first is the *Promotion of Administrative Justice Act (PAJA)*³³ in relation to sec. 38 of the *Constitution*; the second relates to the broadening of the rights violations or threats that sec. 38 addresses.

4.1 *PAJA* and sec. 38 of the *Constitution*

A distinct group of litigants have emerged in South African constitutional litigation who, in citing their standing, rely on *PAJA* to seek redress for impugned state conduct. These litigants seek judicial relief in terms of sec. 33 of the *Constitution*, which guarantees just administrative action. Inevitably, the standing provisions of sec. 38 have arisen in these cases for judicial consideration and interpretation. In the *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* judgement,³⁴ Judge Cameron found as follows in this regard:

PAJA, which was enacted to realise section 33, confers a right to challenge a decision in the exercise of public power or the performance

30 See Currie & De Waal 2013:83 *et seq.*

31 Which, according to Currie & De Waal (2013:85), and with reference to *Dawood v Minister of Home Affairs* 2000 1 SA 997 C, relates to whether a court will “provide constitutional relief” based on the applicant showing that s/he faces an actual or imminent threat to a right.

32 Currie & De Waal (2013:87) state that “[a] case is moot and therefore not justiciable according to the Constitutional Court if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.”

33 *Promotion of Administrative Justice Act* 3/2000.

34 Unreported, case number CCT25/12 [2012] ZACC 28. <http://www.saflii.org> (accessed on 19 June 2016).

of a public function that “adversely affects the rights of any person and which has a direct, external legal effect”. PAJA provides that “any person” may institute proceedings for the judicial review of an administrative action. The wide standing provisions of section 38 were not expressly enacted as part of PAJA. Hoexter suggests that nothing much turns on this because “it seems clear that the provisions of section 38 ought to be read into the statute”. This is correct.

Standing, as a preliminary issue, must be separated from the merits of a case and has, according to Judge Cameron, two implications for the own-interest litigant.³⁵ This authority equally applies to a public-interest action. First, it establishes a buffer between the nature of the interest (that confers standing on the own-interest or public-interest representative litigant) and the merits of the case the litigant wishes to bring. Secondly, the Judge argued, this means that a litigant may be denied standing, even though this may result in an impugned decision going unopposed. He explained:

This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only “if the right remedy is sought by the right person in the right proceedings”. To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even where the applicant’s standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest. Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. *Something more must be shown*.³⁶

From this dictum, it appears that, similar to the own-interest litigant, the public-interest representative litigant may also be denied standing on the grounds that the wrong remedy is sought, or that the wrong person sought the remedy. At the same time, however, even though the litigant’s standing may be questionable, the interests of justice or the public interest may be so significant that a court in such circumstances will determine the merits and grant relief. This was well illustrated in the early South African Constitutional Court judgement of *Ferreira v Levin*³⁷ with regard to when a constitutional challenge may be brought.

In *Ferreira v Levin*, the public interest was to obtain legal certainty arising from *impugned legislation*,³⁸ which threatened the common-law right against self-incrimination. For this particular reason, it followed

35 *Giant Concerts*:18, par. 33.

36 *Giant Concerts*:19, paras. 34-35 (emphasis added).

37 *Ferreira v Levin and Vryenhoek v Powell* 1996 1 BCLR 1 CC.

38 Emphasis added.

that the constitutional challenge to the legislation was not ‘hypothetical’ or ‘academic’, but rather informed by – from the applicants’ perspective – a genuine fear of prosecution and – importantly, from the public’s perspective – the need to obtain legal certainty about the common-law right against self-incrimination, which was impugned as unconstitutional in sec. 417(2)(b) of the previous *Companies Act*.³⁹ This common-law principle for determining standing will, therefore, continue to act as catalyst in preventing unjustifiable cases from being brought to court.⁴⁰

On the question of when the constitutional challenge may be brought where a law is challenged, and its influence on standing, Judge O’Regan deviated from the majority judgement. It is submitted that her judgement laid down important considerations that courts will apply in future in approving a public-interest action, and displayed reasoning that is well aligned with Judge Cameron’s in *Giant Concerts*, where the judge required “something more” as a standing requirement for the own-interest litigant.⁴¹ It is only logical that this would be as much applicable to impugned state conduct as it is to impugned legislation. In O’Regan’s view, the applicants in *Ferreira v Levin* did not have standing to gain direct access to the Constitutional Court “acting in their own interest”, because there was nothing in the application before the court that indicated a threat of prosecution in which “compelled evidence” may be led against them.⁴² However, in the particular circumstances of the case, she held that the applicants’ standing derived from the fact that they were acting in the public interest.⁴³ She further held that the court would “be circumvent in affording applicant standing in terms of section 7(4)(b)(v)”, with possible determinant factors being (i) the existence of other, effective measures to bring the application (reflecting on whether the relief sought indeed fell within the exclusive jurisdiction of the Constitutional Court, warranting direct access to it); (ii) the nature of the relief sought; (iii) the question of whether the relief was of a general instead of particular nature; (iv) the range of persons or groups who may be directly or indirectly affected by a court order, and (v) the opportunity afforded to potentially affected persons or groups to make representations and present evidence to the court as *amicus curiae*. These factors needed to be considered in light of the facts and circumstances of each case.⁴⁴ In addition, she observed that, although the challenge to the validity of sec. 417(2)(b) of the *Companies Act* could possibly have been brought by a number of other persons, “a considerable delay may result if this Court were to wait for such challenge”.⁴⁵ In this

39 *Companies Act* 61/1973.

40 Burns & Beukes 2006:469 *et seq.*

41 See fn. 40.

42 *Ferreira v Levin*:119, par. 231.

43 *Ferreira v Levin*:120, par. 233.

44 *Ferreira v Levin*:120, par. 234.

45 *Ferreira v Levin*:121, par. 236. See also Du Plessis *et al* 2013:46. With reference to the judgement in *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004(4) SA125 (CC), the authors note the subsequent extension of the list of factors mentioned by Judge O’Reagan.

regard, it should be noted that the expediency line of reasoning adopted by Judge O'Regan supports the notion that a challenge may be brought as soon as an inconsistency between an impugned law and the *Constitution* has been established. Surely, this equally applies to impugned state conduct, as was confirmed by the reasoning adopted by Judge Cameron in *Giant Concerts*.⁴⁶

4.2 Rights/interest extension to all constitutional rights

Soon after the advent of the South African constitutional dispensation, the ambit of those rights that may be threatened or infringed in terms of sec. 38 (sec. 7(4) of the interim *Constitution*) was extended to include all constitutional rights, and not only those contained in the Bill of Rights. Constitutional Court President Chaskalson, when interpreting the then sec. 7(4) (the present sec. 38) of the *Constitution* with reference to sec. 98(2) (the present sec. 172) in *Ferreira v Levin*, found that the provisions of sec. 7(4) did not limit standing in constitutional challenges to only those rights set out in the then Chapter 3 (the present Chapter 2) of the *Constitution*:

The constitutionality of a law may be challenged on the basis that it is inconsistent with the provisions of the Constitution other than those contained in Chapter 3. Neither section 7(4) nor any other provisions of the Constitution denies to the applicants the right that a litigant has to seek a declaration of rights in respect of the validity of a law which directly affects his or her interests adversely.⁴⁷

In a similar vein, the Supreme Court of Appeal, in the context of class actions in the *Children's Resource Centre Trust* judgement,⁴⁸ held that class actions could be instituted with regard to rights beyond those contained in the *Constitution*.⁴⁹ There is no logical reason why a court, in approving a future public-interest representative action, would not decide the same. This, incidentally, is also what the South African Law Commission proposed, namely that "it would also be necessary to introduce class and public interest actions into non-constitutional areas of the law by way of legislation".⁵⁰

5. Public-interest considerations derived from jurisprudence in own-interest case law

Whilst Judge Wallis has dealt extensively with the class-action certification process in *Children's Resource Centre Trust*,⁵¹ no pure public-interest

46 See fn. 36.

47 *Ferreira v Levin*:99, par. 167.

48 *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 2 SA 213 SCA:par. 21.

49 See also De Vos 2013:370.

50 SA Law Commission 1998:11, par. 3.1.1.

51 2013 1 All SA 648 SCA.

action has served before our courts. Therefore, guidance must necessarily be obtained from cases where applicants sought relief in their own interest coupled with a public interest – similar to the Southern African Litigation Centre’s recent citation of their own interest along with the public’s interest in the Al-Bashir controversy.⁵²

Generally, standing has always been a preliminary procedural question as to whether the parties to litigation have the required standing or legal capacity to litigate.⁵³ The inquiry into standing in common law is, however, also a question of substance when it concerns the sufficiency and directness of a litigant’s interest in the proceedings.⁵⁴ That a litigant must have a direct and substantial interest in the right that is the subject matter of the litigation, and in the outcome of such litigation, has always formed part of South African common law.⁵⁵ This common-law requirement for a litigant always to have a direct interest in the action and its outcome was, however, deliberately changed with the enactment of sec. 38 of the *Constitution*.

The following paragraphs will, therefore, draw on case law where the applicants relied on a combination of own-interest litigation and an element of public-interest litigation provided for in terms of sec. 38(d) of the *Constitution*, in an attempt to reflect the courts’ understanding of the notion of public interest. The judgements in *Kruger v President of the Republic of South Africa*,⁵⁶ *Democratic Alliance v The Acting National Director of Public Prosecutions*,⁵⁷ *Southern African Litigation Centre v National Director of Public Prosecutions*,⁵⁸ and *Freedom under Law v Acting Chairperson: Judicial Service Commission*⁵⁹ highlighted the following principles, which, by analogy, may be applied by the courts as guidelines in determining whether an action should be certified as a public-interest representative action. In *Kruger*, the applicant was an attorney who specialised in personal-injury cases. The matter concerned the constitutional validity of two proclamations that had been issued by the President, the intention of which was to give effect to certain sections of the amendment *Act*, which would have, in turn, resulted in the amendment of a number of sections of the *Road Accident Fund Act*. The respondent objected to the applicant’s standing to bring the application. Judge Skweyia referred to Judge O’Regan’s reasoning in *Ferreira v Levin* to explain the need for a generous and expanded approach to standing in constitutional litigation.⁶⁰ In cases of a public character, the nexus between the plaintiff as victim of the harm

52 See fn. 2.

53 Harms *et al.* 1997:5.1.

54 Hurter 2010:410.

55 Harms *et al.* 1997:5.1.

56 2009 1 SA 417 CC.

57 2012 3 SA 486 SCA.

58 Unreported, case number 77150/09. <http://www.saflii.org/za/cases> (accessed on 20 June 2016).

59 2011 3 SA 549 SCA.

60 *Kruger*:427, par. 23.

as well as the beneficiary of the relief is not always that 'intimate'. Judge Skweyia said:

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 be quite diffuse or amorphous.

In affirming this view of a generous approach to standing, Judge Skweyia⁶¹ was 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". In *Kruger*, the applicant's demonstration of the central importance of the impugned proclamations in his field of work, as well as the need to obtain legal certainty for the proper administration of justice, was sufficient to clad this litigant – and would have been sufficient to clad the prospective public-interest representative litigant – with standing.

In *Democratic Alliance*, the court *a quo* held that the Democratic Alliance, a registered political party in South Africa, had no *locus standi* to ask the court to review a decision by the Acting Director of Public Prosecutions (the first respondent) to discontinue a prosecution against Mr Jacob Zuma (the third respondent). As a consequence, the court refused the Democratic Alliance's application to compel the handing over of the record that had informed the Prosecutions Director's decision.⁶² However, on appeal, Judge Navsa referred to the constitution of the Democratic Alliance, which recognised the 1996 South African *Constitution* as the sole foundation upon which an open society should be built, as well as to the need to "protect the people of South Africa from the concentration and abuse of power".⁶³ In summary, the Judge was satisfied that the Democratic Alliance had standing "to act in its own interests, as well as in the public interest, and is entitled to pursue that application to its conclusion".⁶⁴

In *Southern African Litigation Centre*, two non-governmental organisations applied for a review of a decision taken by the National Director of Public Prosecutions and others not to investigate alleged crimes against humanity that were said to have occurred in Zimbabwe in 2007, and were allegedly committed by Zimbabwean officials against Zimbabwean citizens.⁶⁵ The cause of action for the application was based on the principle of universal jurisdiction and its statutory recognition in South Africa in terms of the *Implementation of the Rome Statute of the International Criminal Court Act*.⁶⁶ A number of objections were unsuccessfully raised against the applicants' standing.⁶⁷ The applicants stated that they brought the application in their own interests (as

61 *Kruger*:428, par. 23.

62 *Democratic Alliance*:503, par. 41.

63 *Democratic Alliance*:503, par. 43.

64 *Democratic Alliance*:504, par. 44.

65 *Southern Litigation Centre*:6, paras. 8-13.

66 *Implementation of the Rome Statute of the International Criminal Court Act* 27/2002.

67 *Southern African Litigation Centre*:40, par. 12 and further.

provided for in sec. 38(a) of the *Constitution*); on behalf of the victims of torture in Zimbabwe, who cannot act in their own names (in terms of sec. 38(b) and (c) of the *Constitution*), as well as in the public interest (in terms of sec. 38(d) of the *Constitution*).⁶⁸ The international community universally condemns torture, and the applicants, therefore, contended that they have “an interest in the prohibition of torture and the apprehension of torturers”.⁶⁹ The essential content of the public interest involved in the application was that, without effective prosecution of torturers, there was a risk of “South Africa becoming a safe haven for torturers, who may travel here freely with impunity”.⁷⁰

Finally, *Freedom under Law* concerned the well-publicised debacle of Cape High Court Judge President Hlophe’s alleged attempts to influence certain judges of the Constitutional Court, the subsequent complaint to the Judicial Services Commission (JSE) by the Constitutional Court judges concerned, Judge Hlophe’s counter-complaint, and the JSE’s eventual dismissal of the complaint.⁷¹ The Supreme Court of Appeal was called upon to review the JSE’s decision. The applicants’ standing was contested. Acting Judge Streicher, who delivered the judgement and finding that the applicant did have standing, pointed out that the applicant’s mission, as a registered non-profit company, was “to promote democracy under law, advance the understanding and respect for the rule of law and the principle of legality, and secure and strengthen the independence of the judiciary”. He found no reason to doubt the applicants’ statement that they were acting in the public interest.⁷² The Judge minced no words in stating that every South African citizen had the rightful expectation to be served by courts that are independent and impartial.⁷³

6. Conclusion and recommendations

In the absence of litigation explicitly governing public-interest actions, and in light of the fact that no pure public-interest action has served before our courts as yet, this article drew substantially on the recommendations of the South African Law Commission as well as own-interest jurisprudence with a strong public-interest dimension, in order to propose guidelines on how public interest should be interpreted by our courts. Therefore, in line with, and extending on the recommendations of the Law Commission and the principles established in the abovementioned case law, the following are proposed:

1. It is recommended that the prospective litigants in a public-interest action bring a preliminary application to court, seeking the court’s approval for the action to proceed as a public-interest action. Such public interest may fall outside the ambit of the constitutional rights

68 *Southern African Litigation Centre*:41, par. 12.1

69 *Southern African Litigation Centre*:42, par. 12.1.

70 *Southern African Litigation Centre*:42, par. 12.1.

71 2011 3 SA 549 SCA.

72 *Freedom under Law*:556, par. 16.

73 *Freedom under Law*:557, par. 22.

enshrined in the Bill of Rights, as the Commission indeed proposed. At the same time, the applicants must convince the court of the nominated public representative's suitability, and obtain the court's approval for his/her appointment.

2. As to the timing of when a challenge should be brought, I propose that it can be brought to court as soon as a constitutional incompatibility is demonstrated. In this respect, there is no apparent reason for distinguishing between threats of violation and violations that have already occurred. As I have argued, this general principle applies as much to impugned legislation as it does to state conduct.
3. Prospective litigants and the courts should also be guided by the existence of other effective measures to bring the action and, in a case where direct access to the Constitutional Court is sought, a consideration of whether the relief sought indeed falls within the exclusive jurisdiction of the Constitutional Court.
4. The nature of the relief sought should serve as a further guiding factor. I earlier referred to the transformative nature and moral injunction of the South African *Constitution*. If the nature of the relief sought is consistent with the crafting of suitable remedies that foster the ideals and values of constitutional societal transformation, this will carry substantial weight towards court approval for a public-interest action.
5. A further consideration should be the range of persons or groups who may directly or indirectly be affected by a court order, and the nature of that effect. If the relief granted following a successful public-interest action has the potential of significantly transforming society and bolstering our constitutional legal order, this will be another significant consideration.
6. Finally, prospective litigants and the courts should have regard to the opportunity afforded to possibly affected persons or groups to make representations and present evidence to the court as *amicus curiae*.

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