

A strategic evaluation of public interest litigation in South Africa



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Introduction

1. We were asked by The Atlantic Philanthropies to conduct an evaluation of public interest litigation in South Africa to determine, primarily, which combination of strategies has been most effective in advancing social change, and the relationship of litigation to other aspects of social mobilisation.
2. In order to fulfil this brief, we conducted an extensive evaluation of public interest litigation in South Africa, looking both at recent trends in public interest litigation as well the public interest litigation conducted prior to the advent of democracy in South Africa. This included:
 - 2.1. considering various helpful materials and information made available to us by Gerald Kraak at The Atlantic Philanthropie;
 - 2.2. conducting a written survey of a wide variety of South African public interest litigation organisations;
 - 2.3. conducting interviews with a range of key activists, lawyers and judges; and
 - 2.4. making use of secondary sources on public interest litigation in South Africa and internationally.
3. A list of the organisations and individuals with which we engaged, via the written survey and/or personal interviews, appears as Annexure A to this report. In order to ensure that the views of the organisations and individuals concerned could be robustly expressed, we undertook that comments made to us in the course of the evaluation would not be attributed to particular respondents. We have adhered to that undertaking in this report.

4. We have structured this report into five sections:

Section 1 – Changing trends in the South African public interest litigation environment

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

Section 2 – Three Case studies of South African public interest litigation

This section involves a discussion of three particularly important case studies of recent public interest litigation that provide support for many of the conclusions we reach later in this report. The three case studies are:

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

Section 3 – Four key strategies for social mobilisation

This section deals with strategies that should be used in conjunction with public interest litigation for it to achieve maximum success in advancing social change. We identify three key strategies to be used:

- Conducting public information campaigns to achieve rights awareness;
- Providing advice and assistance outside litigation to assist persons 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.

The fourth strategy, to be used in conjunction with these three, is public interest litigation.

Section 4 – Seven factors essential to ensuring that public interest litigation succeeds and achieves maximum social change

This section focusses on the factors that should generally be present in order to ensure that public interest litigation succeeds, and achieves maximum social change. We have identified seven such factors:

- Proper organisations of clients;
- Overall long-term strategy;
- Co-ordination and information sharing;
- Timing;
- Research;
- Characterisation; and
- Follow-up.

Section 5 – Summary of findings



The poverty of informal settlements compromises the life chances of a generation of children. The Constitution enshrines a number of socio-economic rights, such as shelter, food, education and health. Since the mid-1990s social movements, NPOs and public interest law firms have increasingly sought to access these, to counter the worst effects of poverty
Pic: supplied by Legal Resource Centre

Changing trends in the South African public interest litigation environment

5. As an important starting point, our evaluation canvassed the evolution of the South African public interest litigation environment. In this regard, respondents were asked to distinguish between three main periods:
 - 5.1. Prior to 1994;
 - 5.2. Between 1994 and 2000; and
 - 5.3. After 2000.

THE PERIOD PRIOR TO 1994

6. In respect of the period prior to 1994, 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.
7. Nevertheless, and notwithstanding this repressive political climate, the South African government displayed a paradoxical attitude to the role of law and the judiciary. Despite its flagrant violation of human rights, the government purported to hold the judiciary in the highest esteem and professed respect for the rule of law. This attitude, combined with the government's attempts to use the law to entrench apartheid policy, ironically created opportunities for public interest lawyers to exploit gaps in the system.
8. Moreover, given the importance of the issue and the interest of the international community and foreign donors, there was a great deal of funding available to engage in public interest litigation. Consequently, groups like the Legal Resources Centre and Lawyers for Human Rights – as well as various firms – engaged in a great deal of successful public interest litigation, focussing 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.

9. 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 focussed and motivated public interest litigation.

THE PERIOD BETWEEN 1994 AND 2000

10. Unsurprisingly, 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. Respondents emphasised the following issues in relation to the 1994 to 2000 period.
11. The coming into force of the Interim Constitution in 1993, followed by the “final” Constitution in 1997, 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, this ought to have been the high point for public interest litigation, particularly public interest litigation leading to social change.
12. However, notwithstanding this, and without wishing to discount the importance of a number of crucial constitutional victories during this period – for example the decisions striking down the death penalty and the criminalisation of sodomy – respondents stressed that the reality faced by many public interest organisations was one of uncertainty and flux during this period.
13. This was partly because there were relatively few lawyers who were well versed in the new Constitution and 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



Above:
Justices of the Constitutional Court (2005), from left to right: current Deputy Chief Justice, Dikgang Moseneke; Johann van der Westhuizen; Tholie Madala; Sandile Ncgobo; Zac Yacoob (standing); Thembile Skewyiye, (standing) Albie Sachs; current Chief Justice, Pius Langa; former Chief Justice Arthur Chaskalson; Kate O'Regan; Yvonne Mgoro

Below:
The chamber of the Constitutional Court
Pics: Oscar Guterrez

be brought to the Constitutional Court, the mechanisms that should be used to do so and the likely responses of the court.

14. Combined with this was the fact that many of the persons who had been active and developed substantial skills in the public interest litigation sphere left the sector during this period, often to work for the government in order to assist it in the early days of democracy. Whilst this was unsurprising and indeed was plainly necessary, the exodus of public interest litigators and social activists necessitated the development of a new generation to replace them.
15. This, combined 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, meant that much of the constitutional jurisprudence of this early period focussed 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, KwaZulu-Natal* 1998 (1) SA 765 (CC). 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 the government’s policy did not violate the right to health care.
16. Indeed, where public interest litigation went beyond issues of criminal law, it often focussed on defending human rights gains – for example defending attacks on abortion laws – rather than attacking government policies or legislation.

THE PERIOD AFTER 2000 AND THE CHALLENGES OF THE CURRENT ENVIRONMENT

17. The period since 2000 has seen a major shift in the nature of public interest litigation. The litigation in question has tended to focus to a far greater degree on socio-economic rights and has, in many ways, been ground-breaking.
18. A question raised by The Atlantic Philanthropies in this regard was whether socio-economic rights presently received sufficient attention in the South African public interest litigation environment.
 - 18.1. All respondents agreed that there had been an increase (some termed it a “significant” increase) in socio-economic rights litigation in recent years. Nevertheless, virtually all respondents also emphasised that this was still insufficient and that there was an inadequate focus on socio-economic rights litigation given how critical these are to addressing the persistent concerns of poor and marginalised South African people.
 - 18.2. The inadequacies identified by the respondents in the socio-economic rights litigation that had taken place included:
 - 18.2.1. A focus on certain socio-economic rights – for example housing, health care and land – to the exclusion of others which have not yet been addressed;
 - 18.2.2. Inadequate attention being given to considering new issues that could have been the subject of public interest litigation; and
 - 18.2.3. Insufficient monitoring, awareness-raising and related lobbying and advocacy initiatives.
 - 18.3. Respondents emphasised that the limited attention on socio-economic rights was often due to the inability of communities that were the victims of such violations

to access courts and lawyers who could assist them in fighting for their rights. These comments make clear that there are insufficient community or other non-governmental organisations actively involved in dealing with socio-economic rights. We address possible solutions to these challenges later in this report.

- 18.4. Participants 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.”

- 18.5. However, participants also cautioned against too strongly seeking to separate one area of public interest litigation from another. Thus, while it was possible to have organisations focussing 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.

- 18.6. This view was expressed even by participants engaged in specialised litigation organisations on a narrow issue. 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



The Kliptown informal settlement, Soweto, is typical of many in South Africa, though in this one, one essential service, latrines, has been provided
Pic: Helen Macdonald

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.”

- 18.7. We endorse the need for high-quality public interest litigation organisations that operate across different areas. As we demonstrate in Section 2 of this report, the examples of the Grootboom and Treatment Action Campaign cases make clear that there is a massive overlap between different kinds of cases. While Grootboom was notionally only about the right to housing, it would be far more difficult to succeed in TAC had Grootboom not already been decided.
19. Respondents emphasised three major challenges presently facing the South African public interest litigation environment in general. These were:
- 19.1. Lack of funding;
 - 19.2. Lack of experienced, skilled staff; and
 - 19.3. The attitude of the government.
20. We address each of these in turn.

Funding

21. 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.”

22. 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.”

23. Similar sentiments arose in a number of responses. However, the views expressed – at least in respect of the resources available to the state – need to be carefully qualified, in our view. Whilst it is true that, as a whole, the public interest litigation area might be underresourced and underskilled relative to the state, there are a core number of public interest litigation organisations that perform extraordinarily well and indeed seem to outdo the state consistently. The Treatment Action Campaign would be one obvious example.
24. In general terms though, it cannot be doubted that a lack of funding is a major issue in respect of public interest litigation in South Africa at present. This is notwithstanding the sterling work done by The Atlantic Philanthropies – mentioned by

both grantees and non-grantees surveyed. As a result of this lack of funding, there are relatively few public interest litigation organisations in South Africa at present. These organisations generally tend to be stretched to capacity, with little or no capacity to collaborate, or to think long-term and strategically.

25. There are presently moves afoot to resolve this difficulty by enlisting the support of private legal practitioners, via the establishment of ProBono.Org – a public interest clearinghouse. However, this valuable initiative is plainly in its very early stages and is unlikely to fully resolve the problem of lack of resources currently facing public interest organisations.
26. A related issue that The Atlantic Philanthropies asked us to evaluate related to whether, if The Atlantic Philanthropies reduced funding to the public interest litigation environment, other funders would step in. In respect of the organisations surveyed that receive funding from The Atlantic Philanthropies, it appears that virtually none of them rely on only The Atlantic Philanthropies for funding support. Instead, a variety of funders are used.
27. Notwithstanding this, all respondents made clear that, if The Atlantic Philanthropies was to reduce its funding of public interest litigation in South Africa, there would almost certainly not be other funders that could step into its place, at least not satisfactorily.
28. Respondents pointed particularly to the fact that other funders – for example the Foundation for Human Rights and the Legal Aid Board – only funded matters on a case-by-case basis. Moreover, the Legal Aid Board funded primarily criminal matters and provided only very limited funding for civil litigation. It is essential for other funding models to support the public interest litigation sector in general and encourage the growth and development of this sector.
29. Consequently, the view expressed was that, if The Atlantic



Lawyer Stuart Wilson from the Centre for Applied Legal Studies (CALs), a public interest NPO at the University of the Witwatersrand, consults with tenants facing eviction from tenements in the Johannesburg inner city. CALs has successfully used litigation to prevent evictions of homeless people
Pic: Jurgen Schadeberg

Philanthropies was to exit the area, it would create a substantial gap. A number of respondents emphasised the critical role that The Atlantic Philanthropies had 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.

30. The current 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, all the more so, to do so in a manner which produces lasting social change.
31. This point emerges powerfully from the work of Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (1998).
 - 31.1. Epp studied in detail the growth of civil rights in four jurisdictions: the United States, Britain, India and Canada. He concludes that the most significant determinant of the development of the “rights revolution” is the existence of adequately resourced “support structures” for legal mobilisation – namely rights-advocacy organisations and rights-advocacy lawyers.
 - 31.2. 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.” (at page 197)
 - 31.3. 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 such 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 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.” (at page 205)

- 31.4. Thus Epp concludes that even though India 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 United States and Britain.
- 31.5. This is to be contrasted with the example of Britain, which has witnessed such a rights revolution notwithstanding it appearing to be an inhospitable environment for such a revolution to occur.
32. 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 many progressive judges, this will be insufficient to achieve the fulfilment of rights unless there is proper funding and assistance for support structures.



September 2007: residents from Khutsong, Gauteng province demonstrate outside the Constitutional Court against the government's re-zoning of their community into the much poorer province of North West. The community feared deterioration of the quality of municipal services. On the 13 June 2008, the court ruled against them on their petition to remain part of Gauteng
Pic: Antonio Muchave

33. The only issue that Epp doesn't sufficiently interrogate, in our view, is precisely what strategies such rights-advocacy organisations and rights-advocacy lawyers should use in order to achieve lasting social change. It is to that issue that sections 3 and 4 of this report are devoted.

Lack of experienced, skilled staff

34. Linked to the problem of funding and financial resources was a second difficulty emphasised by a number of respondents. This was the difficulty in recruiting and retaining quality staff, particularly staff members 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 organisations being unable to attract or retain sufficient persons in light of competition from private law firms, the government and the corporate sector.
35. As a respondent commented:
- “There is definitely a sense that the international funding environment is drying up so public interest organisations are operating with fewer human and financial resources which impact on our ability to effectively run cases or run fewer cases.”**
36. Another 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. So sustainability within this sector is a major threat to growth in this field.”**
37. Organisations also stressed that there was – in general – a lack of co-operation from the Bar and that a handful of practitioners carried the vast bulk of the pro bono work.



2007: Para-legal advice officers affiliated to the Association of University Legal Aid Institutions (AULAI) attend a training workshop to update their knowledge of new legislation
Pic: AULAI

“We often have to find counsel willing to act pro bono. Our sense is that you get a better deal from counsel when you are able to pay albeit at public interest rates. In general, one wants to avoid a situation where there are only a few dominant counsel that take on pro bono matters because they can afford to. In such an instance these counsel take on less matters and only the high profiled matters. For a human rights culture to take root as part of a legal consciousness there should be many more ‘human rights cases’ and counsel doing this work. Socio-economic rights cases are complex and require research, time and strategy; even where public interest litigation organisations are well-placed to do this it is essential that funders understand this.”

Attitude of the government

38. Some respondents also raised another obstacle to effective public interest litigation – the attitude of the government.
39. In addition to the difficulty of getting the government to comply with court orders, respondents emphasised 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 that would allow proper jurisprudence to be built.
40. 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 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.”



Helen MacDonald and her adopted son Neo: in 2002 the Constitutional Court ruled that gay and lesbian couples had the same rights as heterosexuals to adopt children and to start families
Pic: Heather Robertson

Three Case studies of public interest litigation

41. We have considered a large number of examples of public interest litigation in reaching our conclusions set out in the following sections. We refer to a number of these cases in due course.
42. Nevertheless, it appeared to us that a number of our conclusions are demonstrated particularly strongly by three prominent examples of public interest litigation that have taken place in South Africa over the past ten years. The success and failures involved in these three examples demonstrate helpfully the basis for and nature of our conclusions.
43. We therefore considered it appropriate to include in this section of this report a discussion of each of these examples, as case studies of public interest litigation. Though we touch on the lessons provided by each example here, we develop our conclusions in more detail in the following sections.
44. The three case studies we have chosen are:
 - 44.1. The National Coalition for Gay and Lesbian Equality case on the criminalisation of sodomy and subsequent litigation concerning gay and lesbian rights;
 - 44.2. The Grootboom case on the right to housing; and
 - 44.3. The Treatment Action Campaign case on treatment to prevent mother-to-child transmission (MTCT or PMTCT) of HIV/AIDS.
45. We consider this choice particularly appropriate given that the issue of the perceived contrast in outcomes for social change between the Grootboom case and the TAC merited a specific mention in our brief from The Atlantic Philanthropies.



January 2008: Zackie Achmat (right), chair of the Treatment Action Campaign, marries partner Dali Weyers at a civil ceremony in Lakeside, Muizenberg. In 2006 the Constitutional Court instructed the state to recognise same-sex marriages
Pic: Esa Alexander

THE NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY CASE ON THE CRIMINALISATION OF SODOMY AND SUBSEQUENT LITIGATION CONCERNING GAY AND LESBIAN RIGHTS

46. Perhaps the most ambitious and extensive public litigation programme embarked on by a particular interest group in South Africa in the democratic era is that undertaken by gay and lesbian groups.
47. Initially, the litigation was undertaken by the National Coalition for Gay and Lesbian Equality (“the Coalition”), an umbrella body that included among its members more than 70 organisations and associations representing gay, lesbian, bisexual and transgendered 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 Gay and Lesbian Equality Project.
48. The scale of this litigation has been unparalleled. In the last ten years, no fewer than seven separate matters on gay and lesbian issues have 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, all seven judgments were unanimous on the merits. The single dissenting judgment issued related to what constituted an appropriate remedy – not to the merits.
49. With the benefit of hindsight, these results may appear obvious and predictable given that Section 9(3) 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.
50. The starting point, of course, was persuading the drafters of the



Gay Pride, Johannesburg 2007: the Constitutional Court has conferred full citizenship on the country's gay and lesbian community since the advent of democracy is a series of rulings that demolished apartheid-era criminalisation of homosexuality while also conferring new rights enshrined in the Constitution adopted in 1995
Pic: Nadine Hutton

1993 and 1996 Constitutions 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 jurisdictions and the variety of issues vying for attention during the constitutional drafting process.

51. The gay and lesbian rights cases make clear that the successes of the litigation in this sector depended substantially on the mobilisation and advocacy strategies adopted by gays and lesbians from the outset – at the stage of constitutional development. This included political pressure brought to bear by African National Congress (ANC) members belonging to or sympathetic to the gay and lesbian cause, creating public awareness around gay and lesbian issues and a substantial academic discourse on this issue. These strategies meant that when the litigation began, those involved did not need to rely on skilful legal argument or litigation strategy 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 due to the political victory that had been achieved.
52. Following this political victory, in 1998 the first public interest case on gay and lesbian issues was brought by the Coalition. This was the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) in which the Constitutional Court confirmed the High Court’s decision to declare unconstitutional statutory and common law criminal prohibitions on sodomy.
53. The fact that the sodomy case was the opening chapter of South Africa’s public interest litigation on gay and lesbian issues was not accidental.
 - 53.1. The criminal law prohibiting sodomy was regarded by many persons as a great affront to the dignity of gays and lesbians and was plainly a vestige of apartheid-era attitudes toward 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.



**2000: The late Minister of Justice Dullar Omar opposed the decriminalisation of sodomy, forcing the National Coalition for Gay and Lesbian Equality to go to the Constitutional Court. The court ruled against the government in 1998
Pic: Luck Morojane**

- 53.2. Moreover, there were clear precedents in foreign jurisdictions for court decisions striking down the criminalisation of sodomy – for example *Dudgeon v United Kingdom* (1982) 4 EHRR 149 and *Norris v Republic of Ireland* (1991) 13 EHRR 186.
- 53.3. Thus, while it was clear that the case still presented its difficulties – difficulties that were added to when 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 Coalition chose this as its first case.
54. The Coalition's expectations proved entirely justified. In a comprehensive and extensive judgment, the Constitutional Court unanimously struck down a series of 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 persons irrespective of sexual orientation.
55. 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 rather than the challenge to the criminalisation of sodomy.

- 55.1. 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 Coalition.
- 55.2. The Coalition 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 Coalition explained the danger 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.
- 55.3. 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 Coalition or had it 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.
- 55.4. 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 at that stage, the issue is open to some considerable doubt.

56. Instead, the Coalition was able to proceed with its sodomy case and obtain the ringing judgment to which we have already referred. This led to a series of later cases brought by the Coalition, or by gay and lesbian individuals.
57. The next case brought by the Coalition was *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).
 - 57.1. That 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.
 - 57.2. The case was a significant advancement 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.
 - 57.3. 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.
 - 57.4. 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 in the words “or same-sex life partner” into the legislation after the word “spouse”. This was to have significant effects in the future.

58. In the years after the immigration decision, a series of three cases were brought by gay and lesbian individuals seeking to achieve equality in specific areas. All were successful.
- 58.1. In *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), a lesbian High Court judge challenged the constitutional validity of statutes and regulations which provided that judges' spouses could obtain a series of pension and other benefits from the state and thereby excluded 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.
- 58.2. In *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC), 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, the 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.
- 58.3. In *J & Another v Director-General, Department of Home Affairs* 2003 (5) SA 621 (CC), 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.



Above:
Judge Kathy Satchwell, left, won an application for her partner, Lesley Carnelley, to receive the same financial benefits as heterosexual couples. Her victory was part of a progression of court battles that ended in the Constitutional Court in March 2005
Pic: Muntu Vilakazi. 3/3/05. © Sunday Times

Below:
Former High Court judge Anna-Marie de Vos (left) and her long-time partner, sculptor Suzanne du Toit, at their wedding in George (2007)
Pic: The Herald

59. In light of all of these victories, it rapidly became clear that the principal issue on which legal finality had not 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.
60. Crucially from a litigation strategy perspective, there was a 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* 2004 (1) SA 359 (SCA) to develop the common law of delict by extending the spouse’s action for loss of support to partners in permanent same-sex life relationships.
61. Initially, however, it was not the Coalition 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*.
 - 61.1. In its original form, that case was not without its difficulties. Indeed it originally 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 and omitted also to attack the Marriage Act which would, in any event, prevent gays and lesbians from getting married.
 - 61.2. 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 Coalition, which had great experience in litigating in these kinds of matters and access to the top constitutional lawyers.

- 61.3. Nevertheless, on appeal, the case gave rise to a Supreme Court of Appeal judgment in *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA) holding that the common law definition of marriage which excluded gay and lesbian partners was unconstitutional.
- 61.4. However, while the 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.
- 61.5. However, by that stage, the Gay and Lesbian Equality Project, effectively a successor to the Coalition, 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 a credible organisation demonstrating that this was a widely held view among numbers of gays and lesbians.
- 61.6. 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* 2006 (1) SA 524 (CC) that it was unconstitutional for the common law and legislation to prohibit same-sex marriage. The only dissent related to the appropriate remedy with one judge (O'Regan J) suggesting that the declaration of invalidity should take effect immediately while other judges suggested that it should take place



2007: Demonstration in favour of gay marriage: after a protracted campaign by LGBTI groups, Parliament voted the Civil Unions Bill into law, in December 2007, recognising same-sex marriages and giving legal force to the Constitutional Court ruling
Pic: Nadine Hutton

over a longer term to allow Parliament to correct the defect itself.

- 61.7. That all ten sitting judges of the court, including some who can legitimately be described as relatively morally conservative, could reach this decision unanimously is remarkable. It must be attributed in significant degree, in our view, to the careful litigation strategy embarked on by the Coalition over the proceeding eight years. That 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 but follow through to the logical conclusion that same-sex marriage (in one form or another) was necessary.
62. 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 of that order.
- 62.1. This was a difficult process. Public hearings held on the bill produced vigorous public dissent on this issue, and some members of Parliament were apparently deeply uncomfortable with the suggestion that gay marriage should be allowed.
- 62.2. 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 the union "marriage".
- 62.3. The Act is certainly not perfect and certain members of the gay and lesbian community have significant objections to it. What cannot be doubted, however, is that there is a massive advance on many countries in

the world in that it confers virtually all the benefits of marriage on same-sex couples.

63. In our view, the litigation of the Coalition, its successors and individual gays and lesbians provides a virtual blueprint regarding successful public interest litigation in terms of achieving legal change. When, in Section 4 of this report, we set out the seven factors essential for success in public interest litigation, virtually all of them were present in this campaign. They include particularly:
 - 63.1. The presence of a well-organised client who was a repeat player in constitutional litigation;
 - 63.2. An overall long-term strategy to achieve a goal step by step;
 - 63.3. 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
 - 63.4. An impeccable sense of timing.
64. 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.
65. On the one hand, the social change resulting from the litigation is obvious. Gays and lesbians have experienced massive tangible benefits – they can have sex lawfully, have immigration rights, can adopt children, derive pension and inheritance benefits, and enter into civil unions.
66. On the other hand, there is a massive gulf between this legal recognition and the attitude of many ordinary South Africans on these issues. As one respondent 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 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.”

67. The respondent emphasised this point repeatedly throughout its engagement with us:

“A growing gap exists between our Constitution, our law and public opinion ... The translation of techno-legal 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.”

68. The gay and lesbian litigation example thus demonstrates a key issue dealt with in this report: 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.
69. This is demonstrated partly by the Civil Unions Act. If there had been greater public support for gay marriage at the time it 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 Unions 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 Unions Act and which is of concern to many in the gay and lesbian community.

THE GROOTBOOM CASE ON THE RIGHT TO HOUSING

70. The second case study we have selected is perhaps the best known of South Africa’s cases on socio-economic rights: *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).
71. In some ways, the Grootboom case could not present a greater contrast with the gay and lesbian litigation already discussed. While the gay and lesbian litigation took place on the basis of a carefully formulated strategy over eight years and multiple cases, the Grootboom litigation was a single case, brought under circumstances of great urgency to deal with people in a truly desperate situation.
72. 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 of Grootboom have generally been insufficiently considered.
73. It is necessary at this stage properly to sketch these facts, circumstances and outcomes in order to place the Grootboom litigation in proper perspective and adequately draw lessons from it for this report. This is particularly so given that our brief made explicitly clear that one of the issues The Atlantic Philanthropies sought our input on was the reasons for the difference in outcome in Grootboom and TAC.



March 2004: Irene Grootboom: in 1998 the Constitutional Court ruled that the Cape Town local authorities had a constitutional obligation to provide shelter to homeless people. The case was brought by the Legal Resources Centre representing Irene Grootboom and 900 others
Pic: Ambrose Peters

Background

74. The Grootboom case arose in 1998 in the Wallacedene area, where approximately 4 000 residents lived. Almost all the residents lived in informal housing/shacks and in appalling conditions. More than a quarter had no income at all and more than two-thirds earned less than R500 a month (\$75). There was no water, sewage or refuse removal and only five per cent of the shacks had electricity. Most of the shacks were extremely small.
75. In September 1998, heavy winter rainfall had left part of the Wallacedene area waterlogged. In a particular section, the water lay as much as a foot deep in the shacks, causing repeated illnesses and worsening the already terrible conditions. This section was known as Mooi Trap (“step carefully”) because of all the water. Given the at least seven-year housing waiting list, the residents faced the prospect of remaining in intolerable conditions for an indefinite period. As a result, some of the residents of this section moved out of Wallacedene and erected their shacks on vacant land nearby that was privately owned and that had been earmarked for low-cost housing. These residents 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 subsequently served on them. The total of 390 adults and 510 children who ultimately moved to this land named it “New Rust” meaning “new rest”. These 900 people were to become known as the Grootboom community.
76. 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 Magistrates’ Court. The Grootboom community did not have a lawyer and was not represented at the hearing. The residents 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 at Wallacedene had now been occupied by other people.

77. 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 asking him to represent the community.

The community's response to the eviction proceedings

78. With the community having finally been given a lawyer, there was a need for an important strategic decision. What would the community's response be to the eviction proceedings? 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 have launched proceedings against the municipality or other levels of government arguing that their constitutional rights were not being upheld. They chose to do neither. Instead they reached an agreement that they would vacate the land by 19 May 1999. The agreement also provided that there would be a mediation between the community and the municipality and that the municipality would conduct a study in an attempt to identify other land that the community could occupy temporarily or permanently.
79. This decision is intriguing and warrants close attention. There were two main reasons for it.
- 79.1. First, 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 judgment, stated that "nor is it clear whether the eviction was in accordance with the provisions of the Prevention of Illegal Evictions Act". In retrospect there was, at least, an arguable case that the 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.

- 79.2. Second, Apollos took the view that the mediation and municipality study 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 has been mentioned, the community was of the view that this was impossible because the space they had previously occupied at Wallacedene had now been occupied by other people.
80. The decision taken by Apollos and the community makes it clear 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 a sympathetic municipality. There was certainly no suggestion at this stage that the law or the Constitution could or should be used against the municipality. Indeed, they were relying on the goodwill of the municipality and to do so would have been potentially very damaging to their chances of being allocated other land by the municipality, on whose goodwill they were depending.
81. 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, 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 described it, the eviction:

“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.”

82. The community was now truly homeless. There was no space for them to return to 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

83. A week after the community had been evicted, Apollos wrote to the 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 the 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 hall in question could only house 80 people who were not allowed to stay there at night.
84. 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.”

85. 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 included 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 terrible conditions, just as the Grootboom community had – to our knowledge there had been little or no litigation by communities claiming this right.
86. 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 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?
87. It appears that there were three key factors: the community had legal representation, the unusually high level of community organisation and the role of politics.
- 87.1. 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, who drafted the



The Grootboom informal settlement today
Pic: supplied by Legal Resource Centre

court papers and who secured the advocates to argue the case. Without his involvement, the litigation would not have occurred.

- 87.2. The presence of Apollos also relates to the second factor – the high level of organisation of the community. When the community first met Apollos during the eviction hearings, he had to deal with more than 150 adults simultaneously. He refused to do this and insisted that the community elect a five-person committee to deal with him. They did so 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 was not a practising lawyer.
- 87.3. It is the third factor, the role of politics, which is the most intriguing.
- 87.3.1. It is not discussed at all in the Constitutional Court judgment of the case, nor in the court record, that prior to launching the court application, the community tried to take the matter into their own hands. A few days after being evicted on to the sports field, the community organised a march to the offices of the 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.
- 87.3.2. Though the members of the municipality were unmoved by the community's actions, they did respond in one way that was to prove important. They phoned a prominent ANC provincial politician and asked him to sort the

situation out. He immediately held discussions with the community leaders and with Apollos and Neewat.

- 87.3.3. However, far from sorting the situation out, 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 opposition party which controlled the relevant province and municipality, was not serving the community adequately. This was particularly so because the 1999 national and provincial elections were at that point only a couple of weeks away.
88. This political backdrop to the case is important for a number of reasons.
- 88.1. First, it points to the fact, again, that neither Apollos nor the community was intent on legal action. The community was intent on using popular pressure and Apollos was following his clients' instructions and had therefore not instituted legal proceedings. It was only the intervention of the ANC provincial leadership that led to the court action.
- 88.2. Second, 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.
- 88.3. Third, and most importantly, it suggests that the demand of rights would not have happened in the same way had this not been a case of the community and its attorney being strong ANC supporters and therefore being pitted against the NNP-run local municipality. This is a point

that has to be borne carefully in mind for future public interest litigation.

The High Court proceedings

89. Ultimately though, and whatever the initial political intentions, the litigation was launched against all three levels of government involved in providing housing – the local and provincial governments controlled by the NNP, and the national government controlled by the ANC. The attack focussed only on the provision of housing or shelter to the 900 applicants – not to any broader group.
90. A few days after the urgent application had been lodged, a judge of the Cape High Court 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 had to be provided for the children in the community hall, as well as for one parent of each child who required supervision.
91. The High Court ultimately concluded that given the pressing demands and scarce resources that the state faced, it had not breached its obligations under the right to housing in terms of Section 26 of the Constitution, especially because that section explicitly referred to the “available resources” of the state. However, it also concluded 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 provide it.
92. 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 – an argument that was undoubtedly greatly assisted by having literally hundreds of community members in court, including children and babies. Faced with this scene 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.

93. 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. They 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 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

94. Before this could be done, however, the government unsurprisingly 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 and the Community Law Centre intervened in the Constitutional Court as amici curiae, represented by the Legal Resources Centre (LRC).
95. When the case was heard before the Constitutional Court and when the court ultimately delivered its judgment, it turned out that a fundamental shift occurred from the original narrow case to a far broader cause.
96. First, the Constitutional Court proved extremely reluctant to follow the High Court approach and decide the case on the basis of the children's rights involved.
- 96.1. This was partly because it would mean that in this case and future cases, 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 court. With this concern in mind, the court hearing and judgment focussed on the Section 26 right to housing instead of the Section 28 children's right to shelter.

- 96.2. 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.
 - 96.3. The space for the 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 the government 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.
97. Second, the case shifted away from the particular needs of the Grootboom community.
- 97.1. At the start of the court hearing, the 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". This was not an offer of settlement and the community accepted the offer without prejudice.
 - 97.2. As an aside, though the offer was not one of settlement, this illustrates how easily the government might have used the narrow claim of the particular group of plaintiffs



2003: Eldorado Park, near Johannesburg: “Red Ants”, guards hired by the municipal authorities, break down shelters and evict residents from an “illegal” informal settlement
Pic: Nadine Hutton

to thwart the precedent-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.

- 97.3. Nevertheless the offer had a significant effect. Suddenly it seemed far less important for the 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.
 - 97.4. This was exacerbated by the decision not to have any of the community members in court. 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.
98. Thirdly, again at the instance of the LRC, the focus of the legal arguments became whether the precise parameters and contours of the 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 the government could afford to supply it to them.
99. These shifts had a profound effect on the outcome of the case. In its judgment:
- 99.1. The court reversed the Cape High Court’s ruling on both issues before it by finding a violation of the Section 26 right to housing, but not a violation of the Section 28 children’s right to shelter.
 - 99.2. The court 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.

99.3. Despite finding a violation of Section 26, the court did not give a tangible remedial order to the community. Instead it issued a declaratory order explaining that the government’s policy generally was a breach of the Section 26 right to housing. 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.”

The effect of the LRC intervention

100. 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 focussed on the government programme to the potential exclusion of individual relief.

101. However, had it not been for the intervention of the LRC, in our view 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 the government's humanitarian offer. The critical role of the LRC's intervention has recently been emphasised by Justice Albie Sachs. As he explains:

“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.”

Albie Sachs, “Concluding Comments on the Panel Discussion” in ESR Review, vol 8, no 1, May 2007

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

103. Thus for all the blunt arguments made by the 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 where government was distributing houses to thousands of poor people, but had not reached these plaintiffs yet.

104. What the LRC's intervention managed to do was analyse the government's programme with a sophistication and nuance that was lacking in the plaintiffs' case. It emphasised the size and scope of the government's housing programme, but argued that it suffered from a crucial flaw. This was that it was an "all or nothing" policy – while poor people got proper houses under the policy, they got nothing at all while waiting on the inordinately long waiting list, a wait that often took years. The LRC argued that in addition to its housing programme, the Constitution required the 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.
105. Though a number of the LRC's legal submissions were ultimately rejected, its approach to and analysis of the government's programme proved to be the core around which the judgment was based. In particular, it looked at the government's policies and showed that the 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.
106. Without the LRC's intervention and approach, it is quite possible that Grootboom would have had to go the way of *Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC)*. As discussed above, 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 the government's policy did not violate the right to health care.
107. A loss in Grootboom following the loss in *Soobramoney* would have been potentially devastating to future socio-economic rights litigation in South Africa.

Outcomes of the case for the Grootboom community

108. As has been discussed above, at the hearing of the case before the Constitutional Court, the 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; basic sanitation, water and refuse services”. The Grootboom community accepted the offer. The court’s judgment referred to this offer and its acceptance, but gave the community no additional relief.
109. But even this offer, which had been initiated by the government and should have been relatively simple to implement, took months to be put in place. The offer was made on 11 May 2000. Four months later, and with the court’s judgment still pending, nothing had been done to fulfil this offer. 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.
110. Over the next few months, the offer was gradually implemented. The community continued to live on the Wallacedene sports field in their shacks, while the government put in place the temporary and then permanent sanitation and water services required by the offer and urgent order. Also as per the urgent order, the government paid over an amount of R200 000 (\$30 000) for the purposes of obtaining materials to make the community shacks waterproof. At the insistence of the community, these materials were bought and distributed by Julian Apollos, ensuring that the community got substantial value for the money, rather than letting the government buy the materials themselves.
111. Though the government had taken months to comply with the terms of the offer and urgent order and though there was some disagreement about whether every aspect of the order had been complied with, it is clear that generally the terms of the offer and order were fulfilled by the government.

112. However, it is equally clear that, despite this, the majority of the Grootboom community continues to live in appalling conditions to this day and many are deeply disillusioned with the legal processes involved in the case. As community leader Lucky Gwaza put it in a newspaper article published a few years ago:

“After the court case, we were very, very happy as a community because they gave us many, many promises, but we see nothing happened except the toilets and the taps.”

113. Quoted in the same article, community member Bukiwe Fukutha put it even more bluntly:

“The court’s ruling has nothing to do with housing and everything to do with creating work for lawyers.”

114. The community’s disillusionment seems to stem mainly from its perception that the court victory meant that they would ultimately be getting actual housing, rather than some temporary form of shelter. Though the community was very pleased with the temporary offer made by the government and celebrated when it was fulfilled, they continued to feel frustrated that they had not yet been accommodated in the government’s formal housing programme. This frustration is understandable. In the community’s view, and even in the view of the arguments 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 be to provide the necessary housing.

115. The reality, however, is that nothing in the court’s judgment suggested that formal housing for the community was on the immediate horizon. Rather the court’s judgment focusses on the far narrower violation that took place because the 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 the government’s formal housing programme was a “major achievement” in which a “significant number of houses [have] been built” even though it also found that the housing programme was having, at best, a small effect on the massive housing backlog facing South Africa.

116. It is difficult properly to assess the community's over-inflated expectations and consequent disillusionment. The expectations seem to have resulted at least partly from a lack of clear communication between the lawyer and his clients about the likely and actual outcomes of the case. This was notwithstanding the community's organisational structure that was developed and referred to earlier.
117. The community's position appeared to have been weakened further by the fact that they no longer had effective legal representation. A few months after the case concluded, Julian Apollos merged his two-man law firm with the larger firm that represented the Oostenberg municipality in the case. There is no other law firm in the closest town. This has meant that recently, when the Grootboom community wanted to consider bringing another action against the government, it had no lawyer to represent them. The organisational structure of the community has also been significantly weakened. When the LRC recently attempted to assist the community to negotiate with the government, there seemed to be a lack of effective leadership in the community which made the process extremely difficult.

Broader outcomes

118. Despite the community's feeling of disillusionment, it must be stressed that the Grootboom case has had a significant and tangible effect in a number of broader respects.
119. First, the decision significantly affected the government's housing policy.
- 119.1. Initially and disappointingly, the decision appeared to be having very little effect on the government's housing policy. Grootboom held that what the Constitution required was a short-term emergency relief policy for all people who find themselves in desperate circumstances, but there was initially no sign of the government putting such a policy in place.

- 119.2. However, in August 2003, three years after the decision was given, national and provincial governments finally did approve such a policy of short-term emergency relief 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.”

- 119.3. This emergency relief policy explicitly acknowledges that it was devised and accepted as a direct result of the Grootboom decision and aims to meet what Grootboom laid down as the constitutional requirements of the right to housing.
- 119.4. Whether or not this policy means that everyone in desperate need will actually receive relief from the government remains to be seen, but it does vastly increase the possibility of such people obtaining assistance. And, of course, now that the government has committed itself to this policy, it should be far easier for community lawyers to argue that not only are people entitled to such relief, but that such relief is within the government’s financial and other resources.

120. Second, 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, a number of court decisions have held that the absence of an effective Grootboom-type programme of emergency relief might preclude evictions being granted at all because people would be left in desperate circumstances. Though this matter has not been finally resolved (a pending matter before the Constitutional Court should result in it being determined) whatever the outcome there can be no question that South African courts have massively departed from previous case law on evictions and Grootboom is an obvious driving force. This impact is likely to be felt very strongly by people on the ground, because in effect it gives them security of tenure that they would not otherwise have had.
121. Third, the decision has impacted significantly on the government’s attitude to socio-economic rights and socio-economic rights cases. It looms large as an indication that where the government fails to act reasonably, it will be taken to court and defeated. It is for this reason that, according to a number of respondents, the government has begun factoring these issues into its budget-making processes and has become 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 (and continue to have) misgivings about the decision. But, because they recognise that it is good law and will be enforced against them in court, they take it into account.
122. Lastly, there can be no doubt that the Grootboom decision has 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.
- 122.1. In 2002, two years later, the Constitutional Court repeatedly relied on Grootboom in deciding the TAC case. This case, which we deal with as the third case study, was an enormously important and controversial case

dealing with the provision of drugs for the prevention of mother-to-child transmission of HIV/AIDS.

- 122.2. Given the government's vociferous defense of its AIDS policy and the public attention and controversy that the 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 decision relatively easy, at least as to whether there had been a violation of the Constitution. Without Grootboom, the TAC case would have been far more difficult to launch and decide and, in the words of one respondent, "may not have happened at all when it did".
- 122.3. The approach in Grootboom and the principles it laid down has also had a substantial effect in a number of socio-economic rights cases that have been brought subsequently on issues such as social grants, education and others. By holding that socio-economic rights are enforceable and by insisting on subjecting all government socio-economic rights policies to a rigorous "reasonableness" standard, Grootboom has made possible many future cases to ensure that the government is acting appropriately to achieve the progressive realisation of the socio-economic rights enshrined in the Constitution.
- 122.4. Thus, ironically, whatever the limits of Grootboom for social change in the Grootboom community, it presents a remarkable and valuable victory that has and will continue to play a key role in achieving tangible social change for other plaintiffs in a variety of areas.

Lesson to be learnt

123. The lessons to be learnt from Grootboom really permeate this entire report. We deal with these issues in detail below. Suffice to say at this point that Grootboom demonstrates that:
- 123.1. Awareness of rights is an absolute precondition if communities are to enforce their rights in a manner that leads to social change.
 - 123.2. Similarly, 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 the national and international law at play.
 - 123.3. However, these two facets are by themselves likely insufficient. What is necessary is for the communities to become socially mobilised, structurally organised and actively involved. This includes using political pressure wherever possible.
124. 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.



HIV positive mother and HIV negative child: provision of Nevirapine during her pregnancy prevented her child from contracting the disease while in the womb
Pic: Helen MacDonald

THE TREATMENT ACTION CAMPAIGN CASE ON THE PREVENTION OF MOTHER-TO-CHILD TRANSMISSION OF HIV/AIDS

125. 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 earlier case studies we have dealt with, in the TAC case we have the advantage of a full write-up of the background, strategies and outcomes of the case, written by someone directly involved in it.
126. The piece, “Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health” in (2003) 19 SAJHR 278 – 315, was written by Mark Heywood, head of the AIDS Law Project and national secretary of the Treatment Action Campaign.
127. In what follows, rather than attempting to re-state the facts relating to the Treatment Action Campaign case in our own words, we have instead made extensive use of Heywood’s piece.

Introduction

128. For pregnant women with HIV, there is a 30 per cent risk that the child will be infected with HIV, mostly during the birth and breast-feeding period. This issue was extremely important in South Africa given that, by 1998, it was estimated that up to 70 000 children were born every year with HIV and there were already signs that rising infant mortality was being caused by HIV. Most of these children live short, painful lives, with HIV infection carrying a terrible toll for both parents and children.
129. However, one of the earliest and most enduring breakthroughs in the AIDS epidemic was the discovery in 1994 that use of the antiretroviral drug AZT could dramatically reduce the risk of mother-to-child HIV transmission (MTCT). However, it was realised that this would be of limited efficacy outside 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 for shorter and simpler antiretroviral 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.

130. It was with the aim of securing the benefits of these breakthroughs in medical science for parents who were HIV positive that, as early as 1997, various 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 pressure the government to implement the “steps to be taken to prevent peri-natal transmission of HIV” listed in the 1994 AIDS plan. These included offering HIV testing at antenatal clinics on a voluntary basis and conducting research into methods of preventing peri-natal transmission such as “short course AZT” and “non-nucleoside reverse transcriptase inhibitors”.
131. The campaign received renewed impetus in December 1998 when the TAC was founded and set as one of its primary objectives a demand that the 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 ministers of health, demonstrations, the drafting of memoranda, a 50 000 person petition to the president and a campaign that targeted pharmaceutical companies to reduce the prices of essential antiretroviral medicines, particularly AZT.
132. Initially demands for a policy and plan on MTCT received a relatively sympathetic ear from the 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 led to a joint statement that the price of



A sister of the Msunduzi Hospice comforts a man dying of AIDS at his home outside Pietermaritzburg, KwaZulu-Natal province
Pic: Henner Frankenfeld / PictureNET Africa

AZT was the major barrier to a MTCT programme and a promise that:

“Government 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.”

133. At this point, it appeared that the TAC’s MTCT campaign would primarily target manufacturers of antiretroviral medicines to force them to reduce their prices. However, an unanticipated and unfortunate diversion revealed itself in late 1999.
134. This was the advent of AIDS denial in South Africa. Since the mid-1990s, there has been a small group of scientists who had developed a thesis that HIV has 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 USA in the late 1970s and early 1980s, and thereafter antiretroviral medicines. This group (often referred to as “AIDS dissidents”) has argued that, rather than helping to restore the immune system, antiretroviral 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 mis-described as HIV-related in order to create markets for first-world drugs, particularly antiretrovirals.
135. When the TAC launched legal action to demand broader access to Nevirapine in 2001, none of the affidavits filed by government officials made reference to these “dissident” views on antiretroviral 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 has been apparent between the president and AIDS denialists and seemed to be the primary reason for the delays in establishing an MTCT programme.

136. The fact that such a relationship existed was first signalled in October 1999, in a speech by President Thabo 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”. The president informed the NCOP that he had instructed the Minister of Health to launch a probe into the safety of AZT and that, until it was complete, it would not be used in South Africa.
137. From this point onwards, progress with implementation of a national programme to prevent mother-to-child HIV transmission was derailed. Two 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”. As a result, she instructed the Medicines Control Council (MCC) to review the use of AZT.
138. On 5 April 2000, Minister of Health Dr Tshabalala-Msimang made a speech to Parliament that had all the hallmarks of “dissentese”. Raising 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 antiretroviral 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 MTCT. Tshabalala-Msimang remained steadfast in opposition to AZT, stating that the government would never use AZT in the prevention of MTCT.

The government's choice of Nevirapine

139. An important development occurred in July 1999 when the first results of a drug trial run in Uganda and known as the HIVNET 012, testing the efficacy of a single dose of a different drug – Nevirapine – in reducing MTCT, were released. The results showed that Nevirapine had similar efficacy to AZT but was achieved with a much less complex regimen.
140. 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 of the trial of this drug.
141. In answer to the growing pressure from the TAC, Nevirapine was now offered as the 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 policy on MTCT was reduced and 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 not well received by clinicians working on MTCT who felt that the TAC had "let the government off the hook" over MTCT.
142. As the preliminary results of the SAINT study supported the use of Nevirapine and 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.
143. 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, the government declined an offer from Boehringer Ingelheim, the manufacturer of Nevirapine, for

a “free” supply of the drug for five years and reacted coolly to a preliminary announcement of the SAINT results. It took the intervention of former president Nelson Mandela to quell the storm. In his closing speech at the conference, he called for widespread interventions to prevent MTCT.

144. In response to these developments, the TAC publicly re-instated 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 campaigns had already made government policy on MTCT a matter of national concern and had achieved wide support. At the International AIDS Conference, the TAC seriously considered bringing an urgent High Court application 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 the prevention of MTCT. AZT was registered, but it was felt that the greater cost of this medicine, together with a more complicated drug regimen (AZT must be taken daily from 36 weeks of pregnancy) made successful litigation more difficult. The TAC’s legal counsel cautioned against commencing litigation before Nevirapine was registered.
145. This was 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 option for the TAC but to continue the campaign, but also to delay the litigation. Pressure was now turned to the MCC to speed up the registration of the drug and on the government to clarify its programme.
146. 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, MinMEC (a committee of the national minister of



The coffin industry has boomed in South Africa since the advent of the HIV/AIDS pandemic in the late 1980s. There are more than a thousand deaths a day and in 2008 a quarter of the population is infected with HIV
Pic: Henner Frankenfeld

health and the nine provincial MECs for health (members of the executive committees) 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.”

147. 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, knew of the potential effects of Nevirapine and wanted to take the drug, if she gave birth at a place other than a pilot site, she was not allowed to use the drug.
148. In April 2002, after substantial delays apparently due to significant political interference, the MCC finally formally registered Nevirapine for the prevention of intrapartum transmission.
149. This removed the last obstacle to legal action. The TAC decided that both morally and politically it had no option other than to launch a case against the government. 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

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

151. Throughout this period, the denialists' AIDS policy was under fierce attack and the policy on Nevirapine – being essentially a manifestation of the president's AIDS policy – was fiercely defended. There also appeared to be political interference in the case – particularly apparent in pressure brought to bear on the South African Human Rights Commission to withdraw its application to enter as *amicus curiae* in the case in support of the TAC.
152. The TAC, however, was prepared for the politics that surrounded the case. It believed that the MTCT policy was based upon 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/AIDS in the private and public sector” .This allows it to take legal action to enforce any right that is explicitly recognised in the 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”.
153. 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.
154. However, support within the TAC for a litigation strategy could not be taken for granted. Internally numerous workshops were conducted with the TAC volunteers to explain the case. Externally, and among some of TAC's main allies, particularly the Congress of South African Trade Unions (COSATU), there was a reluctance publicly to endorse taking “our” government to court. The right of civil society to use litigation to claim and enforce rights had to be argued in meetings and workshops



Crossroads, Cape Town, 2007: former state president Nelson Mandela engages with HIV-positive children
Pic: Ruvan Boshoff

against those who considered it “disloyal” or “unpatriotic”. Although COSATU welcomed each judgment in the TAC’s favour, it never openly supported the litigation.

155. 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 court before the hearing on Nevirapine commenced. For the two days of the hearing, the court was packed with people wearing TAC’s trademark “HIV-Positive” T-shirt, health professionals and journalists, listening intently to the evolution of the argument.
156. The urgency of the case seemed to be understood by Judge 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 the government’s arguments:
- “There 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.”**
- Botha declared that “a countrywide MTCT programme is an ineluctable obligation of the state”.*
157. The High Court’s order was bold and original. It instructed the 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 the government to develop “an effective comprehensive national programme to prevent or reduce MTCT” 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 the government but also of a number of legal academics, one of whom declared it



Durban, March 2002: a demonstration was organised by the Treatment Action Campaign demanding that HIV-positive mothers be treated with the highly effective anti-AIDS drug, Nevirapine, to prevent the virus being passed on to their unborn children
Pic: Richard Shorey



February 2008: President Thabo Mbeki opens Parliament in Cape Town. Mbeki's AIDS denialism has held up the public health system's roll-out of ARVs to treat people with HIV/AIDS. Mbeki's stance has forced NPOs to take the government to court on numerous occasions and has contributed to the rising rate of deaths from AIDS
Pic: Trevor Samson

a case of “when judges go too far”. The accusation now arose that the High Court had breached the principle of separation of powers between judiciary and executive by interfering in health policy and ordering the 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”.

The political and legal unravelling of the government’s case

158. 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”.

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 an MTCT 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”.

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

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

160. However, once again falling foul of public opinion and her own department – which had initially claimed that the Gauteng rollout 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, his programme continued. By October 2002, he was in a position to announce that Nevirapine was available at 70 per cent of all health facilities in Gauteng province.
161. During this period, politics and law developed an interesting dialectic. The pressure of the ongoing legal action forced the 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 the government. At its national executive committee 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 ten lives a day during the period in which legal processes around the appeal took place – approximately six months. Outside and inside the court, the TAC argued that this approach was validated by developments in the political arena, such as Mbeki’s “State of the Nation” address and the extension of the programme in Gauteng and KwaZulu-Natal.
162. On 1 March 2002, demonstrations took place at the Pretoria High Court during the hearing of the 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, drawing attention to the TAC’s

argument that up to ten lives a day could be saved by execution of orders 1 and 2, which “is not denied” by the government.

163. Inexplicably, the 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 the 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.
164. In the days immediately before the hearing, the government had taken advantage of the decision by Boehringer Ingelheim to withdraw its application to the US Food & Drug Administration for the registration of Nevirapine for preventing intrapartum HIV transmission. Inside (and outside) court, the 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 the government pilot sites.
165. During this time, it seemed as if sensible legal advice to the government was the last thing driving its case. It was as if a nerve has 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, the 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 by the Constitutional Court.



Cape Town, 2007: A Treatment Action Campaign demonstration: the TAC has held the government's feet to the fire, through a combination of on-the-ground mobilisation, innovative advocacy and litigation
Pic: Treatment Action Campaign

166. In the court of public opinion, the government's various appeals were lambasted by political cartoonists and newspaper editorials. They were also a failure of legal strategy. Although the legal issues 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 MTCT policy. The result was that the 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.
167. During the hearing, the Constitutional Court judges appeared to be at a loss as to why the government was so fiercely opposed to the execution order. Not surprisingly, on 4 April 2002 the Constitutional Court refused the government leave to appeal against the order of execution.

Constitutional advocacy on the streets and in court

168. On 17 April 2002 – two weeks before the main appeal hearing in the Constitutional Court – the Cabinet took South Africa and the world by surprise by releasing a statement on HIV/AIDS that, among other things, promised “a universal rollout plan to be completed as soon as possible, in preparation for the post-December 2002 period”. For the first time, the Cabinet publicly acknowledged that antiretroviral drug treatments:
- “could help improve the conditions of people living with AIDS if administered at certain stages in the progression of the condition, in accordance with international standards”.**
169. 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.

170. On 2 May 2002, the Constitutional Court was filled with activists, doctors, nurses and the media. Three months later, on 5 July 2002, the judgments in the TAC case and related matters were handed down.
171. Unanimously, the Constitutional Court decided that the government's policy had not met its 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 the government to amend 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". Without contradicting the High Court, the court stopped short of setting time frames for the government on the basis that it accepted the bona fides of commitments made by the government whose policy was no longer as rigid as it was when proceedings commenced. Instead, it ordered the 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 judgment 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 of 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.”

172. 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 the government’s conduct in the case, a supervisory order was both justified and necessary. They argued that such an order would make it easier to monitor and oversee compliance.

Conclusion and Follow-up

173. The judgment of the Constitutional Court did not end the disputes over the provision of MTCT services. After it was handed down, pressure continued to be necessary to ensure provinces complied with the court order. The TAC held meetings with MECs in the three least compliant provinces, the Director-General of the Health Department and the Deputy-President of South Africa.
174. 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 2002, an email was received from a doctor in Limpopo Province saying



2002: Former president Nelson Mandela shows solidarity with Zackie Achmat, chair of the Treatment Action Campaign. At the time Achmat had full-blown AIDS but was refusing to take antiretrovirals until they were accessible to all through the public health service
Pic: Treatment Action Campaign

that the Provincial Health Department had “at long last” given “permission for the implementation of the PMTCT programme. I think this was due to pressure from the TAC/courts initiative came from their side this time and they seem to be in quite a hurry to get the programme up and running.”

175. As we discuss in the remainder of this report, the TAC case demonstrates almost perfectly how to combine social mobilisation on the one hand, with litigation on the other. It is without doubt a shining example as to how litigation – when run properly and as part of a series of broader strategies – can achieve social change.

176. 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 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 TAC 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 focusses attention on improving on the state’s MTCT prevention programme.”

Berger adds that:

“Had 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.”



HIV positive mother and child
Pic: supplied Treatment Action Campaign

Four key strategies for social change

177. Drawing from the three case studies mentioned as well as our evaluation as whole, we have concluded that for public interest litigation to achieve maximum success in advancing social change and achieving social mobilisation, it must take place in combination with three other strategies. These are:

177.1. Conducting public information campaigns to achieve rights awareness;

177.2. Providing advice and assistance to persons in claiming their rights; and

177.3. Making use of social mobilisation and advocacy to ensure that communities are actively involved in asserting rights inside and outside the legal environment.

178. We do not suggest that it is essential that a single organisation itself be integrally involved in each of these four strategies. Indeed, often this is not possible and we readily accept that there is a vital role to be played by specialist litigation organisations.

179. However, it is critical that if particular organisations do not themselves engage in the three other strategies mentioned, they should at least operate together with other organisations that do engage in these other strategies. As one respondent 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.”

STRATEGY 1 – PUBLIC INFORMATION

180. A public information campaign that informs ordinary people of their rights is an essential component of any effort to achieve social mobilisation on rights issues.



October 2003: The right to education is enshrined in the Constitution. Sisters Manoko and Elizabeth Dolo were unable to attend school near Mokopane in Limpopo province because their mother could not afford school fees for all her seven children. In some parts of the country, NPOs have now managed to secure a waiver of schools fees by taking legal action
Pic: Sydney Seshibedi

181. When asked about the major obstacles to using the law to achieve social change, virtually every respondent 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.”**
182. 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.”**
183. 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. A number of respondents suggested that, somewhat surprisingly, even certain well-organised bodies, such as some trade unions, are currently 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.
184. The need for public information is brought home forcefully by the example of the Grootboom case. In Grootboom, 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 be available to assist them in preventing the eviction.

As a result, they did not even seek legal advice of their own accord – let alone make adequate use of the legal rights that they had.

185. 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.

185.1. For example, one respondent emphasised that although the South African Schools Act provides substantial protection for children whose parents have not paid their school fees, the majority of families who have had their children threatened or sent home from school due to unpaid fees do not know they have any legal recourse.

185.2. Another example is the fact that some municipalities have “indigency policies” that allow poor persons to obtain free or reduced rate municipal services, such as electricity and water. 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 indigency policies remain in by-laws only, with poor people having their electricity and water cut off due to non-payment.

186. The kind of public information required is demonstrated by the TAC example. The TAC has engaged in extensive public information campaigns, both directed at its own members and the general public, explaining what the rights of HIV-positive persons 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.

187. Such strategies are crucial for ensuring the success of public interest litigation. If ordinary persons do not understand and

buy in to the litigation, those conducting the public interest litigation are unable to obtain the required information to launch a successful litigation and are unlikely to generate substantial support from ordinary persons in which in turn plays an important role in perceptions of the litigation by courts, the public and the government.

188. Moreover, where the litigation succeeds, it is essential that people are aware of the success in order to pursue their rights, to transform the victory into concrete progress on the ground, and to inform the public interest organisation if the victory, for whatever reason, is not leading to tangible social change on the ground.

STRATEGY 2 - ADVICE AND ASSISTANCE

189. Once people are aware of their rights, it is critical that a strategy enabling them to claim these rights is developed.
190. 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 persons are enabled to claim their rights.
191. Instead, it is essential that there are intermediary organisations which enable people to claim their rights, through giving advice, directing them to the 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.
192. The need for such “advice centres” is made clear by the efforts of public interest organisations under apartheid. A number of respondents emphasised the important role played by “advice offices” in this period. This meant that organisations such as the Black Sash, which did not undertake litigation, could nevertheless provide legal assistance to large numbers of people and channel cases that required litigation to members in private practice.



2007: Bloemhof, North West province: an advice office affiliated to the Association of University Legal Aid Institutions (AULAI). It serves a largely poor, rural community
Pic: AULAI

193. The difficulty is that, with a few notable exceptions, such advice offices have now dwindled. This means that either poor people must access fully fledged lawyers or, for the most part, they are left without any legal advice at all. As one respondent explained:

“Access to litigation options remains very limited, and the linkages between frontline remedial options (i.e. advice centres) and equipped legal service practitioners remain acutely limited.”

194. The advice centres in question need not be staffed by lawyers. Many of the issues raised may not even need legal advice. In many instances persons 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.

195. 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.”

196. However, it is also important that the centres either be staffed by paralegals or at least have persons sufficiently trained to see what legal routes are available. This would assist in ensuring access to justice given that, at present, there is no government system for legal aid in civil cases due to the fact that the Legal Aid Board focusses almost entirely on criminal matters.

197. It was for this reason that had the Grootboom community not been referred by the magistrate to Julian Appollos, they would likely have been left unrepresented and entirely unable to resist the eviction. While the magistrate’s actions in this regard must of course be applauded, he was under no duty to refer. This demonstrates the valuable role to be played by providing advice and assistance to persons wishing to assert their rights.

198. The advice centres could thus play a fundamentally important role in, where necessary, referring persons to litigation organisations. In doing so they would provide an essential feeding ground for future litigation – by identifying the core issues that are affecting large numbers of ordinary persons most seriously. This allows public interest litigation to be effectively designed and targeted to achieve maximum impact, and also provides a wide range of possible plaintiffs/applicants to participate in the litigation and sustain the factual contentions necessary to make the litigation successful.
199. Equally importantly, such advice centres can 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 victory on social grants in the Constitutional Court is meaningless if there are advice centres to disseminate the news of the victory and, where necessary, to write letters reminding the relevant department of the decision and its effect. The advice and assistance strategy is therefore essential, if we are to avoid having jurisprudentially important cases that have little practical impact on the ground.
200. As one respondent explained, 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, LRC and other free legal services. But the major problem is access.”**



2007: North West province: a rural legal advice office affiliated to the Association of University Legal Aid Institutions (AULAI)
Pic: AULAI

STRATEGY 3 - SOCIAL MOBILISATION AND ADVOCACY

201. It is clear from our evaluation that rights generally are most effectively asserted by social movements. This point is well-demonstrated by the three case studies to which we have referred, as well as other examples, and is a view shared by virtually every respondent in our evaluation.
202. Importantly, it appears that this conclusion is not limited to South Africa. Instead, the comparative foreign experience demonstrates the same trend, a point emphasised by Geoff Budlender in his piece “Using the South African Constitution as a Mechanism for Addressing Poverty” (unpublished, 2000) on which we draw here.
- 202.1 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 P.N. 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.”**
- Quoted in Jeremy Cooper “Public Interest Law Revisited” (1999) 25 Commonwealth Law Bulletin 15 at 140*
- 202.2 The same point is made even more forcefully by an Indian public interest litigation activist:

“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.”

Vasudha Dhagamwar quoted in Jeremy Cooper “Public Interest Law Revisited” (1999) 25 Commonwealth Law Bulletin 15 at 139

202.3

Indeed, it must be recognised that 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.”

Richard Abel “Law Without Politics: Legal Aid Under Advanced Capitalism” (1985) 32 UCLA Law Review 474 at 496-7

203. Almost precisely the same view is expressed by a respondent in this evaluation:

“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.”

204. Major debates around these issues took place in South Africa within the labour movement in the 1980s. As is made clear by the relative unwillingness of COSATU to actively support the TAC case, an issue discussed in Section 2, it appears that the suspicion held of law in this regard has not entirely dissipated.

205. 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 the rights. Even when there is litigation which results in a major breakthrough, there has to be organisation to ensure that it is properly implemented.

206. 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 mobilisation and 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 the formal and informal political process as well as public pressure.

207. As Geoff Budlender explains, what is needed is some form of social movement :

“to 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.”

Geoff Budlender, “Using the South African Constitution as a Mechanism for Addressing Poverty” (unpublished, 2000)

208. This is made particularly clear by the TAC case as it set out in detail in Section 2 of this report. The TAC saw its litigation as one facet of its much bigger political fight over the availability of AIDS drugs and 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 the government.

209. Geoff Budlender makes this point concisely and convincingly:
“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 judgment 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.”

Geoff Budlender “A Paper Dog With Real Teeth” Mail & Guardian 12 July 2002

210. It is not only organisations on the scale of the TAC that have succeeded in using social mobilisation effectively, with litigation as one component of a much larger overall plan. Over the past two years, a group of artisanal (subsistence) fishermen have been placed under grave threat by the enactment of the Marine Living Resources Act 18 of 1998 and related fishing quotas.

210.1 In response, they embarked on a range of advocacy and lobbying activities including numerous letters

and memoranda to the ministry and Presidency, meetings with officials, marches on Parliament, the chaining of leaders to the gates of Parliament, a hunger strike and vigil, and building strong alliances with other stakeholders in civil society.

210.2 In addition, litigation attacking the relevant policies was launched against the Minister of Environmental Affairs and Tourism.

210.3 The litigation was ultimately settled out of court on terms favourable to the fishermen, but social mobilisation was key to this outcome.

211. These examples should be contrasted with the Grootboom case and the gay and lesbian litigation.

212. In the Grootboom case, there was initially active social mobilisation and protest.

212.1 As is set out in more detail in Section 2 of this report, a few days after being evicted, the community organised a march to the offices of the 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.

212.2 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.

- 212.3 The weak and temporary nature of the social mobilisation in the Grootboom case is, regrettably, symptomatic of a lack of mobilisation in the land and housing sectors more generally. As one respondent explained of the land sector:
- “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.”**
- 212.4. This may well explain why the land and housing cases brought thus far under the Constitution have all related to individual communities, often faced with an immediate threat of eviction. This in stark contrast to the careful strategy of the TAC.
213. In respect of the gay and lesbian litigation, the National Coalition 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, though it was revived to some extent briefly by the gay marriage case and its aftermath.
- 213..1 However, respondents in the gay and lesbian sector made clear to us that the 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.

213.2 As one respondent 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 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.”

213.3 The respondent continued:

“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 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.”

213.4 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 other litigation strategy of which we are aware – this is not sufficient to compensate for the lack of social mobilisation.

214. The lack of mobilisation is even more stark in other areas – particularly and unsurprisingly 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, for example: *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) and *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).
215. These were landmark and path-breaking judgments which held the state accountable and awarded substantial damages. But as one respondent asked, “Where has this had any impact on the way in which ordinary women are treated in general or by the state in particular?” While the judgments and monetary damages may have vindicated the rights of the individual women concerned, they appear to have little impact on this broader scale.
216. The same lesson appears from litigation under apartheid. Though the legal and political environment was substantially different from the present, an examination of Rick Abel’s excellent work *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (1995) makes 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.
217. The lesson in our view is clear – it is the combination of social mobilisation and litigation that has the greatest potential to alter laws and policies. These are complementary strategies. As one respondent urged:
- “Civil society in South Africa could make greater use of a combination of strategies for social change that includes litigation as one key component, and that might even involve using litigation as an entry point for large-scale mobilisation.”**

218. We have some doubts, however, about this latter suggestion that litigation can be used as an entry point for large-scale mobilisation.
219. On the one hand, there can be no question that the TAC case vastly increased the public profile of the TAC and assisted in widening the mobilisation process. Nevertheless, it is important to bear in mind that, at least on a smaller level, the TAC used a model of mobilise first, litigation second.
220. Moreover, another respondent doubted that litigation could produce mobilisation:
- “Litigation can only catalyse mobilisation that is already taking place, it cannot create a movement where there was none.”**
221. While much will depend on the specific circumstances of the organisation, community and cause at issue, 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.
- 221.1 In Grootboom, as is described in more detail in Section 2 of this report, the community’s decision to embark on legal action only occurred when the prominent ANC provincial politician became involved and supported such a course, thinking it would assist the ANC to embarrass the NNP. Until then litigation was not on the agenda – even though the community was now legally represented.
- 221.2 This suggests strongly that the litigation may not have happened in the same way or 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.
222. A similar issue is raised by the TAC case. There, as Heywood explains, there was considerable reluctance on the part of COSATU to identify with litigation against the government:

“[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.” (at page 300)

223. Together with the problem of lack of access to legal assistance, these tendencies may go some way to explaining the very limited litigation by poor communities against the government, particularly given that all three spheres of government are in most areas ANC-controlled.
224. While the loyalty of various communities to the ANC is unsurprising, 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

225. 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. This position, in different guises, was supported by all respondents. 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.
226. Recently, however, even this starting point has proved controversial in certain parts of the world, particularly the United States. 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?* (1991).
227. This is not the place for a detailed debate over the correctness of Rosenberg's views and, even more critically, the extent of their applicability in a South African context.
228. Such a debate would be particularly unnecessary because, in truth, virtually no one has suggested that public interest litigation can never bring about social change. Even Rosenberg himself, arguably the leading critic of attempts to achieve social change via litigation, makes clear that his argument is far more limited than this:

“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 contribute very much to producing significant social reform.”

*Gerald Rosenberg, “Knowledge and Desire: Thinking about Courts and Social Change” in Schultz (ed) *Leveraging the Law: Using the Courts to Achieve Social Change* (1998) at 255*



2007: Braamfontein, Johannesburg: the light towers of the Constitutional Court rise above the barbed wire fortifications of Section Four, at the Johannesburg Fort, an apartheid-era jail where common-law and political prisoners were held. The court was built adjacent to the former prison to symbolise the triumph of democracy over apartheid and of a commitment to human rights over oppression

Pic: Gerald Kraak

229. In the South African context, little point would be served in debating whether litigation only serves to influence social change, rather than produce or achieve it. In any event, these are matters almost invariably incapable of empirical proof. The correct approach, we submit, is that of Berger:
- “We will most likely never know with certainty the extent to which TAC was responsible for these momentous developments regarding HIV/AIDS treatment. One can only reflect on the strong evidence that undoubtedly points in the direction of significant influence. But even if one were to recognise the decision as a watershed, what is also clear is that – in and of itself – the judgment did not result directly in a sustainable policy shift. While it certainly helped to strengthen the organisational profile of the TAC as a key role player of substance, it simply laid the foundation for further advocacy, campaign work, mobilisation and litigation” (emphasis added)**
230. Thus, the true debate is not over whether litigation can produce social change, but in conjunction with which other strategies and in what manner this is most likely to occur.
231. We have already identified and addressed the three strategies that should optimally be used together with litigation in order to achieve social change:
- 231.1 Conducting public information campaigns to achieve rights awareness;
 - 231.2 Providing advice and assistance outside of litigation to assist persons in claiming their rights; and
 - 231.3 Making use of social mobilisation and advocacy to ensure that communities are actively involved in asserting rights inside and outside the legal environment.
232. What remains to be considered then is in what manner litigation is most likely to achieve social change. In particular, it is critical that the litigation be properly conceptualised, run and followed up.

233. In this regard the evaluation has allowed us to identify seven factors that are essential to ensuring that public interest litigation succeeds and achieves maximum social impact. These are:
- 233.1 Proper organisations of clients;
 - 233.2 Overall long-term strategy;
 - 233.3 Co-ordination and information sharing;
 - 233.4 Timing;
 - 233.5 Research;
 - 233.6 Characterisation; and
 - 233.7 Follow-up
234. We deal with each of these seven factors in Section 4 of this report. Suffice it to say, however, that unsurprisingly our assessment is that where public interest litigation takes place in combination with the three strategies set out above, these seven factors are far more likely to be present than where public interest litigation is seen as a strategy and end in itself.



2007: Action by civil society, including the use of litigation, has seen essential services provided to the poor in informal settlements – here potable water is available to residents of the Grootboom informal settlement, near Cape Town
Pic: supplied Legal Resources Centre

Seven factors essential to ensuring that public interest litigation succeeds and achieves maximum social change

FACTOR 1 – PROPER ORGANISATIONS OF CLIENTS

235. An important point that arises for consideration is which types of clients lead to the most successful public interest litigation? In our view, the ideal public interest client has two characteristics:
- 235.1 First, generally speaking, public interest litigation is likely to achieve greater social change when the client is an organisation with a direct interest in the matters being litigated, rather than, for example, a few disparate individuals.
- 235.2 Second, 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.
236. With regard to the first issue, we have already touched on one example of litigation that, while achieving impact for the individual concerned, has apparently not had any lasting social impact. These are the women’s rights cases mentioned earlier – *Carmichele v Minister of Safety and Security* and *Another 2001 (4) SA 938 (CC)* and *K v Minister of Safety and Security 2005 (6) SA 419 (CC)*.
237. The difficulty, of course, is that the 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, 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.

238. A good example of this issue is the Grootboom case. Until the LRC became involved in representing the amici, the case focussed 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, focussing 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.
239. The LRC's intervention shifted the focus from the narrow case to the 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 declaring that the housing policy in the entire Western Cape Province failed to comply with the Constitution. We deal with the effect of declaratory orders below, but for present purposes it suffices to say that the Grootboom order, if used properly by organisations such as the South African Human Rights Commission, could have provided an ideal springboard for achieving substantial social change. This was only made possible by the LRC's intervention broadening the focus of the case.
240. Even where an individual litigant seeks to bring a case with a broader goal in mind, the narrowness of his or her direct interest can undermine these efforts.
- 240.1 This is because, faced with a settlement proposal that would resolve the immediate and individual concern, most clients (and their lawyers, who are ethically obliged



Above:

April 2000: A young illegal immigrant lies on a baggage rail while a policeman patrols in a cramped train compartment on the deportation train to Mozambique. Every Wednesday the Department of Home Affairs, together with the SAPS Border Police, repatriate scores of immigrants from Zimbabwe and Mozambique from the Lindela Detention Centre outside Johannesburg. On this trip only 503 of the approximately 965 deportees arrived at their destination. The rest jumped out the train, allegedly with police complicity.

Below

2008: A Zimbabwean refugee makes it through the barbed wire fence which forms the border between South Africa and Zimbabwe

Pics: Nadine Hutton

to act in their interests) will have little option but to accept the settlement proposal, thus putting paid to the case and meaning the broader cause cannot be furthered.

- 240.2 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 all refugee matters.
- 240.3 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 a recent refugee case *Tafira v Ngozwane*, run by the Wits Law Clinic, dealing with the unlawfulness of procedures in place at Refugee Reception Offices.
- 240.3.1 In that 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 the systemic problems.

- 240.3.2. This meant that although the government conceded the individual relief very early on, the case proceeded to obtain a full judgment in favour of the applicants, together with granting the general relief.
- 240.4. Such a tactic 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. But nevertheless, this represents a valuable tactic to consider.
241. A final point to be considered on the organisational nature of clients is that it is not always necessary that such organisations must represent all those affected. Coalitions of different organisations can work just as well.
- 241.1 What is critical, however, is that the relevant organisation or organisations 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.
- 241.2 The National Coalition for Gay and Lesbian Equality, discussed in Section 2, presents an excellent example of this. If the Coalition hadn't had the necessary legitimacy to persuade the foreign gay couple to allow the Coalition's litigation strategy to run its course, that strategy could have been severely undermined.
242. 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 instructions and direction to legal representatives, combined with proper follow-up after the



May 2008: NPOs protest against gender-related violence and child abuse outside Parliament and call for tougher implementation of legislation on children's rights
Pic: Paul Hofman

litigation. In other words, public interest litigation – like other forms of litigation – should ideally be run by clients, not by lawyers.

243. Regrettably, but unsurprisingly, this has generally not been the case. As Berger explains:

“By definition, 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.”

244. In addition to the exception of the TAC cited by Berger, the National Coalition cases represent another important exception, albeit outside the socio-economic rights context. In both the TAC and National Coalition, active organisations played a vital and central role in conceptualising, running and following up the litigation.
245. The problem is that where litigation is run primarily by lawyers, it runs a substantially greater risk of producing a case and judgment that is removed from the reality on the ground and 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.
246. It is notable, for example, 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 reduced somewhat once litigation was under way – a regular difficulty – this community organisation was important in getting the litigation off the ground.
247. A similar example is provided by Berger in respect of another case concerning poor persons seeking to obtain security of

tenure – President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC). 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.”

248. In this regard, a key difficulty is relative lack of appropriate organisations presently operating in South African civil society that can take on this role as active clients. As one respondent put it:

“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.”



Current Chief Justice of South Africa, Pius Langa
Pic: Oscar Guterrez

FACTOR 2 – OVERALL LONG-TERM STRATEGY

249. 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. The earlier cases thus act as vital building blocks for the more complex and difficult later cases.
250. 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 the courts.
251. The concepts of “one shotters” and “repeat players” comes from a famous article of Marc Galanter “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974) *Law and Society Review* 95.
- 251.1 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 advantage that they develop specialised expertise, and enjoy economies of scale and low start-up costs in litigation.
- 251.2 Moreover, and critically, repeat players need not seek to achieve their goals immediately 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.
252. Though Galanter’s article was not focussing on public interest organisations, it applies with at least equal force to them. Indeed, his theories demonstrate precisely why, as Budlender puts it:

“Public interest law centres can often ‘punch above their weight’ - the impact of their work can be far beyond the size of the organisations.”

253. The best example of such a repeat-player in the South African public interest sector is the National Coalition. As Section 2 of this report 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 Coalition cases, it was the Coalition strategy of easier cases first, more difficult cases later that allowed this to succeed.
254. This should be contrasted with the effect of a case like *Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC)*.
- 254.1 That 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.
- 254.2 Though one cannot blame Mr Soobramoney – who died shortly after judgment was delivered – the fact of the matter is that, as Berger explains, Soobramoney shows what can happen when the “wrong” cases are litigated.
255. The failure in *Soobramoney* not only appears to have discouraged socio-economic rights litigation, but also led to a perception that cases seeking actual medical treatment would not be able to succeed. Though the losses in *Soobramoney* have been painstakingly clawed back via *Grootboom*, *TAC* and other High Court litigation, it is plain that by running the wrong case, the broader cause was undermined.

256. A repeat player NGO, 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.

FACTOR 3 – CO-ORDINATION AND INFORMATION SHARING

257. An interesting issue emerging from this evaluation 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.
258. Nevertheless, it raises the concern that if there is insufficient co-ordination and information 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.
259. An example of what can go wrong in this context is the case of *Hoffmann v South African Airways 2001 (1) SA 1 (CC)*.
- 259.1 That case concerned the practice of South African Airways' refusal to employ HIV-positive persons as cabin attendants. Hoffmann was a Legal Resources Centre case.
- 259.2 However, at around the same time, the AIDS Law Project was litigating precisely the same issue for another cabin attendant in *A v South African Airways (Pty) Ltd*.
- 259.3 The difficulty was that although Hoffman was the case to first reach the Constitutional Court, it appeared to lack certain important medical evidence on the transmission, progression and



Former Chief Justice of South Africa, Arthur Chaskalson, who stepped down in 2005 and who presided over some of the Constitutional Court's most path-breaking judgments
Pic: Helen MacDonald

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.

259.4 Ultimately, the difficulty was avoided when the Aids Law Project applied to be an amicus in the Hoffman case and successfully sought 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 AIDS Law Project.

259.5 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 AIDS Law Project had not intervened and if the Constitutional Court had held that the absence of the medical evidence meant that the discrimination against Hoffman 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.

260 It is therefore crucial that there be proper information sharing and co-ordination among different organisations. This is particularly the case in an area like refugee law where there are a large number of organisations undertaking litigation on similar issues throughout the country simultaneously. Such information sharing and co-ordination can take place via regular meetings, or alternatively even via a general internet site with frequent updating of pending cases and useful materials.

FACTOR 4 - TIMING

261. Timing is an essential element in any public interest litigation that is to have meaningful impact. The litigation should not commence until and unless the climate is right and until 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.
262. 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 persons 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 organisation has repeatedly sought to engage with government to achieve a solution but that this has not resulted.
263. In this regard, TAC provides an ideal example of launching litigation at the right time. As 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 state expense. Simply put, litigation came onto the agenda when all other options had been exhausted.” (emphasis added)**
264. TAC 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 to take place and yet where attempts to achieve social change via the political route appear to have failed.

265. This is in line with the approach of the 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.”

Quoted in Heymann and Liebman, Social Responsibilities of Lawyers (1988)

266. There are many reasons for this approach of using litigation to achieve social change only when the political route has failed. Prime among them is that this affords the organisation and cause two separate opportunities to achieve their 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 might the litigation fail, but if this took place, the chances of reviving a political victory would be generally be substantially reduced.
267. This is made clear by two current examples in the children’s rights sector:
- 267.1 A group of NGOs have been considering bringing a test case regarding corporal punishment in the home – the idea being to ask the court to strike down the defence of reasonable chastisement. However, at the same time there has been lobbying of government officials and members of parliament seeking to have a provision banning corporal punishment in the home included in the forthcoming Children’s Act. If such an effort succeeds, it will no longer be necessary to litigate. If the clauses are rejected by Parliament, as now appears to be a possibility, then litigation can still be contemplated.

- 267.2 A similar situation exists with regard to life imprisonment of children. While the Child Justice Bill proposed that life imprisonment be outlawed, the portfolio committee chairperson ordered that section be deleted. The bill is now in limbo. Child rights organisations are now waiting to see which direction the bill takes, but if it fails to outlaw life imprisonment of children, the litigation will proceed.
268. Other considerations favouring using the political route first include:
- 268.1 The chances of succeeding in the litigation are substantially increased if government has had an opportunity to resolve the issue, but has failed to do so without justification;
- 268.2 It conserves the limited political capital that courts have by only asking them to come into conflict with the government when absolutely necessary; and
- 268.3 It ensures that the primary focus of the organisation – mobilising its members to achieve change – is not overrun by litigation becoming the primary issue.
269. It should be noted, however, that deciding to bring litigation at the right time is often easier said than done. The discussion of TAC in Section 2 of this report makes clear that at various points very difficult decisions had to be made. Prime among these was the decision not to proceed with the litigation when the government appeared to be making some progress, and later the decision to follow counsel's advice that the litigation would likely not succeed unless and until the Medicines Control Council 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.

FACTOR 5 – RESEARCH

270. A critical, and often neglected, facet of successful public interest litigation is the need for detailed research in advance of and during the litigation. We conclude that two different types of such research are needed: legal research and factual research.
271. 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 law and international law which is often not easily accessible, but which can play a pivotal role.
272. 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 involved in running such litigation must have access to such research capabilities – either within their own organisation or via alliances with other organisations. An excellent example of this is again TAC where careful affidavits were procured from a range of doctors and experts.
273. 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 respondent 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

274. A substantial component of any successful case is the “characterisation debate”. This is particularly the case given that a particular case – especially when in the public eye – might be viewed and perceived in multiple ways by courts and the public.

275. A particularly good example is the case of Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another 2006 (1) SA 1 (SCA). That case concerned the right of an Afrikaans language school (with largely white pupils) to refuse to admit various English-speaking pupils (all of whom were black).
276. 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 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.”**
277. It is thus extremely important for those involved in public interest litigation to demonstrate to both courts and the public 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 there are countless real people being affected on a daily basis.

FACTOR 7 – FOLLOW-UP

278. 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 the litigation.
279. Most critically, this involves ensuring that a victory in the litigation 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 who were not directly involved in the litigation at all. It also involves identifying the extent to which the litigation has had limited success and which issues therefore need to be focussed on in further litigation or advocacy campaigns.

280. This need for proper follow-up is well explained by one respondent:

“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 the government to compel it to make concrete changes.”

281. The views of this respondent, which were shared by many others, also make clear that in follow-up, as in litigation, it is the combination of strategies that is likely to be most successful.

281.1 Trying to rectify the government’s noncompliance 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 the government. Most of all, however, there is a significant difficulty in getting any compliance out of a government opponent that is recalcitrant and does not want to respond.

281.2 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, the government will have no option but to comply.

282. This is what occurred in the case of *N and Others v Government of Republic of South Africa and Others (No 1) 2006 (6) SA 543 (D)* and the sequels thereto. In those cases, the applicants successfully obtained an order requiring the state to provide HIV/AIDS drugs for HIV-positive prisoners at the Westville Prison. Despite the 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.
283. 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 the government by the parents of both sets of learners resulted in compliance with the order granted.
284. 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 already discussed in Section 2 of this report, *Grootboom* is an example of this much broader trend.
285. The importance of social mobilisation and advocacy in the follow-up process is particularly well illustrated by the response of a respondent 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



South Africa's prisons are overcrowded, violent and unsanitary institutions, where all, but especially young offenders, are at risk of sexual violence and HIV infection. NPOs working in the field have brought a number of court actions against the Department of Correctional Services to implement constitutional safeguards due to inmates under law
Pic: Nadine Hutton

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, even [despite refugee information networks] in different 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.”

286. It should be noted that there are some cases which do not require 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 respondent did, that civil and political cases generally require no follow-up whereas socio-economic rights cases do.

286.1 This is demonstrated by the aftermath of the Constitutional Court’s decision to invalidate the death penalty in *S v Makwanyane and Another* 1995 (3) SA 391 (CC). 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 hadn’t been carried out, took inordinate time and effort. Indeed, it took three further judgments from the Constitutional Court (in *Sibiya and Others v Director of Public Prosecutions, Johannesburg, and Others* 2005 (5) SA 315 (CC) and its sequels), a structural interdict and a ten-year delay before this occurred.

- 286.2 Similarly in *Nkuzi Development Association v Government of the Republic of South Africa and Another* 2002 (2) SA 733 (LCC), a decision which upheld a right to legal representation in certain eviction cases, it was only after tenacious follow-up and pressure on the government that the Department of Land Affairs and Department of Justice began to implement the judgment.
- 286.3 Thus in cases involving classic civil and political rights – the death penalty and the right to legal representation – extensive follow-up was required for the judgments to be effective.
287. A final issue on the question of follow-up is the relationship between follow-up and the remedies issued by courts. Increasingly in the last few years – and substantially in response to the Constitutional Court’s refusal to grant more than a declaratory order in *Grootboom* – there has been 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:
- 287.1 Mandatory orders – directing the government to take certain defined steps, often within specified timeframes; and
- 287.2 Supervisory orders – requiring the government to report back to litigants and/or the court as to the steps taken in fulfilment of the order.
- 287.3 Often mandatory and supervisory orders have been sought in conjunction with one another.
288. It is now beyond doubt that South African courts have the power to grant such orders, as the Constitutional Court made emphatically clear in *TAC*. Such orders have also now been granted in a number of cases. It is equally clear to us that such orders can play a potentially valuable role in assisting litigants to enforce judgments.



September, 2006: Trustees of The Atlantic Philanthropies visit the Western Cape regional offices of the Treatment Action Campaign in Khayelitsha
Pic: Helen MacDonald

289. The question of what order is appropriate for any specific case depends on the circumstances of that case, including the attitude of the government. This is a point well made in K Roach & G Budlender “Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?” (2005) SALJ 325. Roach and Budlender 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.
290. However, a point made powerfully to us by one respondent 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.
- 290.1 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.
- 290.2 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.
291. In this regard, declaratory orders appear to have been written off by numerous organisations, including some respondents, substantially on the basis that the decision in *Grootboom* – which involved a declaratory order – has failed to produce any or adequate social change.
- 291.1 However, it appears that the blame in this regard cannot be laid exclusively at the door of the declaratory order issued by the Constitutional Court.

291.2 Indeed, in paragraph 97 of its judgment in *Grootboom*, the court emphasised the role of the Human Rights Commission in monitoring the 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.”

291.3 Regrettably this came to naught. Though the Commission did issue some reports on the progress of the government, it seems to have construed its role extremely narrowly – as focussing only on the *Grootboom* community and not the effects of the order in general – and had little, if any, effect on the government's response to the judgment. The Commission's approach and the court's refusal to give a more powerful supervisory remedy has been forcefully criticised.

292. There is no reason that a declaratory order granted by a court – provided that it is sufficiently specific as to the government's obligations – cannot be properly enforced, followed up and used as a basis for social change.

293. Thus, while public interest litigants should continue to push for mandatory and supervisory 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.



Doors open on to the isolation cells at Section Four of the Johannesburg Fort – an apartheid-era prison where common law and political prisoners were held. Walter Sisulu, ANC 1963 treason trialist was held here, as was Tsietshi Mashinini, leader of the 1976 Soweto Student uprising
Pic: Gerald Kraak

Summary of findings

294. Our key findings in this report may be divided into three parts.
295. In Section 1 of this report we identified the key challenges facing the public interest litigation environment in South Africa.
- 295.1 We have concluded that the major challenge facing the public interest litigation environment in South Africa is a lack of funding and resources. This challenge is also substantially responsible for the second major challenge, that is the inability of public interest organisations to attract and retain sufficient numbers of quality personnel.
- 295.2 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.
- 295.3 Given the massive inequality and poverty continuing to face South Africa, we are concerned that if organisations engaged in this work do not receive sufficient support, there is a danger that the gains of the last few years will be undermined.
296. In Section 3 of this report, we identified four strategies that should be used in combination in order to achieve social change.
- 296.1. **The first is public information.** Public information campaigns that inform ordinary people of their rights are an essential component of any effort to achieve social mobilisation 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 the public interest litigation are unlikely to be able to obtain the required information to launch the successful litigation, to generate substantial support from ordinary persons which plays an important role in perceptions of the litigation by courts, the public and the government, or to transform any litigation victory into concrete progress on the ground.

296.2

The second is advice and assistance in order to enable people to claim their rights. It is essential that there are intermediary organisations which enable people to claim their rights, through giving advice, directing them to the 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 persons most seriously. It thus allows public interest litigation to be designed effectively and targeted to achieve 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 in the case.

296.3

The third is social mobilisation and advocacy. It is clear from our evaluation that rights generally are most effective when they are 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 around them, make use of political pressure, engage in litigation where necessary, and monitor and enforce favourable laws and orders by the courts.

296.4 **The fourth is public interest 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, it 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.

296.5 We do not suggest that it is essential that a single organisation is itself integrally involved in each of these four strategies. Indeed, often this is not possible and we readily accept that there is a vital role to be played by organisations consisting of litigation specialists. However, it is critical that if such organisations do not themselves engage in the three other strategies mentioned, they must at least operate with other organisations that do engage in these other strategies.

297. In Section 4 of this report, we concluded that in order to achieve social change via litigation, it is critical that the litigation be properly conceptualised, run and followed up. In this regard we identified seven factors that are essential to ensuring that public interest litigation succeeds and achieves maximum social change.

297.1 **Proper organisations of clients.** While public interest litigation can be run on behalf of a few disparate individual clients, we conclude that this is generally 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 with a direct interest in the matters being litigated, rather than, for example, a few disparate individuals. Moreover, public interest litigation is likely to achieve greater social change when the client plays an active and engaged role – rather than allowing legal representatives to make key decisions without proper client input.

297.2 **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. 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. 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 the courts.

297.3 **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.

- 297.4 **Timing.** Timing is an essential element in any public interest litigation that is to have meaningful impact. The litigation should not commence until and unless the climate is right and until 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 persons involved – courts will tend to be far more receptive and sympathetic where it can be demonstrated that the organisation has repeatedly sought to engage with the government to achieve a solution but that none has been achieved.
- 297.5 **Research.** A critical, and often neglected, facet of successful public interest litigation is the need for detailed research in advance of, and during, the litigation. Legal research, including using foreign law 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 such research capabilities – either within their own organisation or via alliances with other organisations.
- 297.6 **Characterisation.** A substantial component of any successful case is the “characterisation debate” – ensuring that the 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 courts and the public. It is thus critical 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 there are countless real people being affected on a daily basis.

297.7 **Follow-up.** Perhaps the most critical factor of all in ensuring that public interest litigation has the maximum social impact is the need for proper follow-up after the litigation. This mainly involves ensuring that the victory in the litigation can be translated into practical benefits for a large number of people on the ground, including those who were not directly involved in the litigation at all. 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.

298. South Africa's Constitution is one of the most progressive in the world. It includes powerful and far-reaching provisions, including those related 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 Dennis Davis points out:

“A failure by successful litigants to benefit from constitutional litigation of this kind 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.”

Dennis Davis, “Adjudicating the Socio-economic Rights in the South African Constitution: Towards ‘Deference Lite’”? (2006) 22 SAJHR 301 at 314

ANNEXURE A

ORGANISATIONS AND INDIVIDUALS PARTICIPATING VIA PERSONAL INTERVIEW OR QUESTIONNAIRE

Zackie Achmat, deputy chairperson of the Treatment Action Campaign

Geoff Budlender, practising advocate and former national director of the Legal Resources Centre

Arthur Chaskalson, former Chief Justice of South Africa and formerly founder of the Legal Resources Centre

Matthew Chaskalson, practising advocate

Adila Hassim, acting head of the AIDS Law Project

Pius Langa, Chief Justice of South Africa

Janet Love, national director of the Legal Resources Centre

Wim Trengove SC, practising senior advocate and previously director of the Legal Resources Centre Constitutional Litigation Unit

Black Sash Trust

Centre for Applied Legal Studies, University of the Witwatersrand

Centre for Child Law, University of Pretoria

Centre for Criminal Justice

Education and Training Unit

Freedom of Expression Instituted Law Clinic

Human Rights Watch

Lawyers for Human Rights

OUT-Lesbian / Gay / Bisexual / Transgender Well-being

ProBono.Org

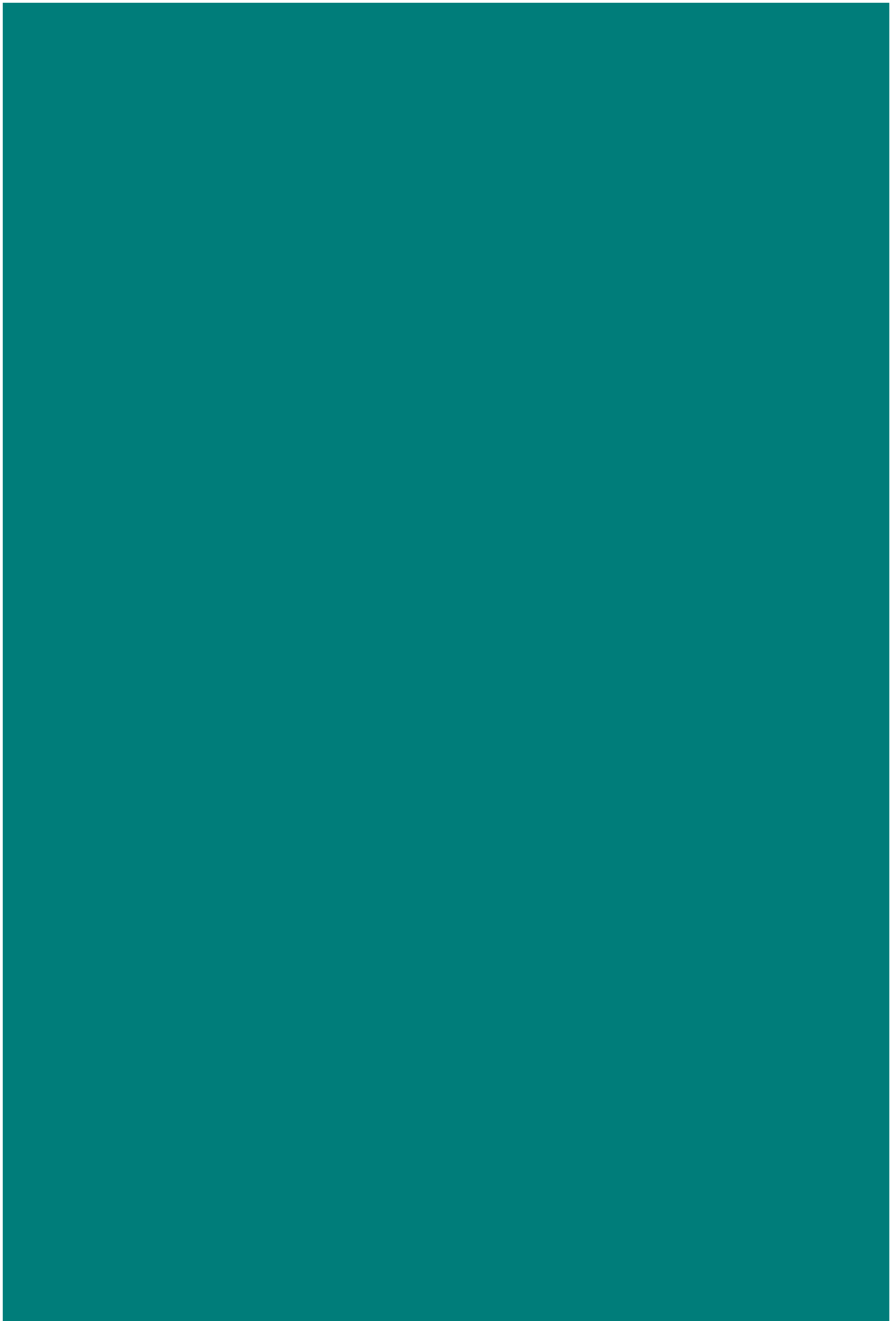
Programme for Land and Agrarian Studies, School of Government, University of the Western Cape

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



Biographies

Gilbert Marcus

is a senior advocate at the Johannesburg Bar and a specialist in human rights and constitutional law. He is one of the country'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.

Steven Budlender

is an advocate at the Johannesburg Bar and specialises in constitutional and public interest law. After completing his law degree he served as law clerk to Arthur Chaskalson, former Chief Justice of South Africa.

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