FEATURE

The High Calling of Public Interest Representatives in South African Bill of Rights Litigation

Kathryn de Villiers

Introduction

The introduction of public interest standing in the Constitution of South Africa, 1996, was a welcome departure from the strict rules of standing under the common law. By doing away with the direct interest requirement, section 38(d) of the Constitution makes provision for anyone to approach a court seeking relief in the public interest for an infringement or threatened infringement of a right in the Bill of Rights.

Public interest standing thus holds great potential for constitutional democracy: for holding the state accountable for its obligations to the people of South Africa, for vindicating the rights of those who are disadvantaged by their socio-economic circumstances and for securing access to justice for all. However, to act in the public interest is a high calling, and shouldering the burden of representing the public interest requires true social conscience, as the relief of public interest proceedings is not enjoyed purely by the litigant, in the event that he or she derives any benefit at all.

For these reasons, it is important to investigate who may invoke public interest standing in South African Bill of Rights litigation and to analyse what these applicants' roles entail.

The development of section 38(d) of the Constitution

Soon after the interim Constitution came into effect, the South African Law Commission (SALC) began investigating the need to introduce legislation to deal with public interest suits. In 1998, the SALC explicitly recommended legislation regulating actions brought in the public interest to prevent public interest standing from being developed haphazardly or not at all. This was proposed in the form of recommendations and a bill. However, the bill was not passed and the development of public interest standing in South Africa over the past 20-odd years has remained the responsibility of the judiciary.

...Constitution makes provision for anyone to approach a court seeking relief in the public interest for an infringement or threatened infringement of a right in the Bill of Rights.

Despite the absence of promulgated legislation to give content to section 38(d), the courts have developed public interest standing consistently and, in so doing, have generally evaded the fears of the SALC. The landmark Constitutional Court judgments of Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (Ferreira 1996) and Lawyers for Human Rights and Another v Minister of Home Affairs and Another (Lawyers for Human Rights 2004) currently still provide relatively clear guidance, and have most recently been confirmed by the Constitutional Court in Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others (Freedom of Religion 2019).

However, one particular recommendation made by the SALC in respect of public interest matters that has not yet been addressed adequately by the courts in South Africa pertains to the need for, and role of, appropriate public interest representatives.

The test for an appropriate public interest representative

(a) Objective inquiry into actual or threatened rights infringement

According to the SALC's recommendations, section 38(d) of the Constitution entitles any person or organisation to launch an action in the public interest. Applicants need not have any direct, indirect or personal interest in the relief they seek. The SALC recommended further that the person claiming relief should identify the action as one being brought in the public interest and nominate a suitable person to act as a public representative in the matter.

The courts have since confirmed that an applicant approaching the courts in terms of section 38(d) need only show an infringement or threat to a right in the Bill of Rights in order to claim relief in the public interest. In Lawyers for Human Rights, the Constitutional Court noted that South Africans are increasingly aware of their constitutional rights and infringements thereof. In theory, therefore, it should not be difficult for a prospective public interest applicant to prove the objective requirement for invoking public interest standing.

(b) Subjective inquiry into genuineness of applicant

The objective requirement for public interest standing must be complemented by a subjective inquiry into the genuineness of the applicant. Essential to the nature of public interest standing is that applicants must be motivated primarily by a desire to benefit the public – whether at large or in part – and not themselves. To determine whether an applicant is acting genuinely in the public interest, South African courts have been given considerations to take into account in view of the facts and circumstances of each case. These were laid down by O'Regan J in her minority judgment in Ferreira. The list was later confirmed and lengthened by the majority in Lawyers for Human Rights, as well as a minority judgment by Madala J. Factors relevant to determining whether a person is genuinely acting in the public interest have again been confirmed recently in the unanimous decision by the Court in Freedom of Religion.

The consolidated – but not closed – list of considerations includes 'whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court' (Ferreira, para 234); 'the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right' (Lawyers for Human Rights, para 18); and 'the egregiousness of the conduct complained of' (Lawyers for Human Rights, para 73).

O'Regan J referred to the factors that she originally proposed in Ferreira as 'considerations', while Madala J uses the comparable term 'guidelines' when adding to the list later in Lawyers for Human Rights. These choices of wording indicate the flexibility in the approach to section 38(d) taken by the courts. However, at the same time, O'Regan's judgment warns that courts must be

'circumspect' in affording public interest standing. This displays the courts' commitment to ensuring nevertheless that matters brought in the public interest be treated with care.

Appointment of a suitably qualified representative of the vox populi

The vox populi – or voice of the people – is naturally inherent to the concept of public interest standing. Anyone representing the public interest in court when alleging that a right in the Bill of Rights has been infringed or threatened is, by implication, speaking on behalf of the public. Thus, when considering the role of the public interest litigant, it is undoubtedly desirable to have the most representative of litigants before the courts (Binch 2002: 384).

Whilst the ground of public interest standing has many merits, the words 'in the public interest' are difficult to define objectively and will depend on the impact of the alleged violation. What is clear, however, is that the public will ordinarily have an interest in the objective breach of a right in the Bill of Rights. This is supported by section 7(1) of the Constitution, which states that the Bill of Rights 'enshrines the rights of all people in our country'. Whether or not the public then has a sufficient interest in the particular relief sought will be up to the public interest litigant to prove.

The SALC recommends that the public interest applicant be the one to nominate a representative in the matter once obtaining the nominee's consent. The representative may be the applicant him- or herself or another person or organisation. Cote and Van Garderen note that institutional applicants (such as NGOs) usually represent the public interest in South Africa (Cote and Van Garderen 2011: 174). The authors argue that, unlike most individuals, these institutional applicants are able to prevent cases from being lost if clients are no longer able or willing to continue.
The representative can be appointed by the court after the court is satisfied that the action is a bona fide public interest action. Should he or she later appear not to be an appropriate representative, the SALC recommends that the representative should be removed and replaced by the court either mero motu or on good cause shown by an interested party. This is possible at any time before judgment is handed down, and presents a way of safeguarding the public interest. It is worth noting that the SALC speaks of the appointment of a 'suitably qualified' representative by the court, a requirement intended to limit unmeritorious public interest actions. Such a person might not be easy to find. This qualification raises the question of whether courts are in a position to exercise the power of appointment exclusively. Although the SALC does not provide detail, it can be assumed that the public interest applicant will have to provide reasons for his or her choice of nominee for representative.

Adequate representation of the voices of affected persons

As mentioned, the notion of a suitably qualified public interest representative has not yet been adequately expanded upon by the SALC, the courts or literature on the subject since the introduction of section 38(d). Although on the face of it the term 'suitably qualified' may refer to abilities, experience or resources of the representative, it is submitted that this needs to be understood more broadly in the context of public interest standing and access to justice.

Currently, there is no requirement that those acting in the public interest must have engaged with those they represent in court. There is consequently a risk – even a reality (Binch 2002: 384) – that those whose rights are directly affected by a given case brought in the public interest will not be given a meaningful opportunity to be heard or participate in the litigation and will be forced to accept consequences without having been involved in the process determining those consequences. However, due to the potentially large impact of judgments handed down in litigation in the public interest, as well as the fact that the representative represents the vox populi in these matters, it is submitted that such persons or organisations cannot be considered suitably qualified if they do not speak on behalf of all people affected by the infringement of rights in a particular case.

In Lawyers for Human Rights, the court acknowledged that the 'illegal foreigners' detained at ports under various provisions of the Immigration Act 13 of 2002 may well have been deported within a matter of days. This afforded the applicant organisation very little time to engage with the victims. In this regard, the public interest dictated that the constitutionality of the impugned provisions be challenged as soon as possible to prevent further rights violations.

However, the second applicant in Lawyers for Human Rights was a certain Ann Francis Eveleth, who was an American land activist and spokesperson for the National Land Committee. Eveleth had been arrested illegally at the World Summit on Sustainable Development and detained for failing to renew her residency permit, and was as such a suitably qualified representative for the 'illegal foreigners' in the Constitutional Court (Independent Online 2002). Yacoob J did not mention this in his majority judgment and instead permitted her involvement because it would have a minimal impact on the cost of proceedings.

Madala J, in his minority judgment, did make reference to the suitability of the second applicant to the proceedings, however, by stating that she had been illegally arrested and detained without trial under the repealed Aliens Control Act 96 of 1991. It is submitted that Madala J's reasoning shows greater understanding of the importance of having a suitably qualified representative in public interest cases, especially if time is limited and opportunities for meaningful interaction are few.

In the Freedom of Religion decision, the Constitutional Court recognised the impact that its judgment, which dealt with the constitutionality of the common law right of parents to chastise their children moderately and reasonably, would have on almost all parents and children in South Africa. However, none of the parties in the High Court proceedings either wanted to, or were able to, challenge the matter in the Constitutional Court. Freedom of Religion South Africa (FORSA), a non-profit organisation and amicus curiae in the court a quo, consequently relied on section 38(d) of the Constitution to assume that responsibility.
In a unanimous judgment, the Court acknowledged its uncertainty about whether or not to grant public interest standing to FORSA given the change it sought in its role in the matter at hand. In its deliberations, the Court used the considerations laid down in Ferreira and Lawyers for Human Rights as its point of departure and duly granted standing to FORSA under section 38(d), primarily because it was the only way put to the Court to challenge the declaration of invalidity.

However, in view of the fact that the SALC's recommendation pertaining to the need for an appropriate public interest representative in public interest matters has not yet been addressed by the courts, and that this case presented an opportunity for the Court to give further content to public interest standing in a matter in which the rights of vast numbers of South Africans were affected by the judgment, it is disappointing that the Court did not unpack the significance of the role of public interest representatives in its decision to grant standing.

The only engagement with FORSA's suitability as a public interest representative related to the fact that, as a former amicus curiae, it was familiar with the issues that it sought to raise – in addition to which a footnote acknowledged that its objectives include the advancement freedom of religion in South Africa through public awareness, lobbying and research.

The right to approach courts in the public interest is the widest ground of standing available in South Africa. No longer must potential litigants prove a personal interest in the relief they seek in such cases: their rights need not have been affected at all. This creates great potential for anyone to seek access to justice on behalf of those who cannot.

This relaxed approach to locus standi permits litigants to act on behalf of sections of the public whose human rights have been infringed, whether or not the victims are aware of these violations or able to approach the court for relief themselves. Conversely, however, public interest standing enables litigants to represent people without any prior engagement and can result in mala fide applicants wasting judicial resources.

The two-legged threshold test for public interest standing developed by the courts entails an inquiry into the subjective position of the party claiming to

act in the public interest, as well as proof that it is objectively in the public interest for the matter to be brought before the court.

Whilst it is true that South African courts now adopt a broad approach to the procedural requirement of standing, judges nevertheless need to apply their minds to the two-legged threshold test in order to prevent applicants from pretending that actions are being brought in the public interest with a private, political or profit motive.

Despite the SALC's recommendations that public interest standing be granted specifically to suitably qualified representatives, this consideration has not yet been given content by the courts in the determination of genuineness of applicants invoking standing under section 38(d) of the Constitution. The remaining challenge facing South African courts will be to ensure that the disenfranchised are given a voice in public interest cases with outcomes that affect them directly, so as to be faithful to the public interest.

Conclusion

This could be achieved by requiring public interest applicants to nominate representatives who will act on behalf of the public on court approval, as suggested by the SALC. It is also recommended that courts should require proof of engagement between public interest representatives and those they represent, especially (and at least) those with a material interest in the outcome of the case.

Finally, it is submitted that the courts must continue to be cautious in granting public interest standing, especially because of the potentially wide-reaching effects of such judgments. The reasons given by the courts in decisions as to whether or not to grant public interest standing, particularly pertaining to the suitability of the applicant relying on section 38(d) to seek relief in the public interest, are imperative if this area of the law is to develop in a way that prevents potential abuse of this broad ground of standing and truly ensures access to justice for all.

Kathryn de Villiers is a Stellenbosch University LLM graduate and is currently a pupil at the Cape Bar Society of Advocates. *She acknowledges Prof Sandra Liebenberg and Prof Bradley Slade for their insightful contributions to the article.*

References

Independent Online (2002) 'Foreign nationals "held for months"'. Available at http://bit.ly/3acY0Pd

Binch R (2002) 'The mere busybody: Autonomy, equality and standing' Alberta Law Review 40

Constitution of the Republic of South Africa, 1996

Cote D and Van Garderen J (2011) 'Challenges to public interest litigation in South Africa: External and internal challenges to determining the public interest' South African Journal on Human Rights 27

De Villiers K H (2018) 'Public interest standing in Bill of Rights litigation under the South African Constitution: Lessons from India'. LLM thesis, University of Stellenbosch Public Interest Actions and Class Actions Act (draft) in GN 1126 GG 16779 of 27-10-1995

South African Law Commission Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law R 8/1998

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 1 SA 984 (CC)

Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others (CCT320/17) [2019] ZACC 34; 2019 (11) BCLR 1321 (CC); 2020 (1) SA 1 (CC); 2020 (1) SACR 113 (CC) (18 September 2019)

Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2004 4 SA 125 (CC)

It is also recommended that courts should require proof of engagement between public interest representatives and those they represent...