

The judicial application of the “interest” requirement for standing in constitutional cases: “A radical and deliberate departure from common law”

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OPSOMMING

Die Geregtelike Toepassing van die Vereiste van “Belang” met Betrekking tot Verskyningsbevoegdheid in Grondwetlike Sake: “’n Radikale en Doelbewuste Afwyking van die Gemene Reg”

Hierdie artikel ondersoek die geregtelike toepassing van die vereistes vir verskyningsbevoegdheid (*locus standi*) in grondwetlike aangeleenthede sedert die aanvang van die grondwetlike era in Suid-Afrika. In die lig van die parlement se betreurenswaardige versuim om die aanbevelings van die Suid-Afrikaanse Regskommissie met betrekking tot klas- en openbare aksies te implementeer, moes die land se howe stapsgewys hul eie sekerheid rakende die vereistes en vertolking van verskyningsbevoegdheid skep. In die vorige Westminster-staatsmodel is verskyningsbevoegdheid beperk tot litigante wat ’n direkte, beduidende belang by die saak en by die gewenste regsverligting kon toon. Hierdie streng benadering tot verskyningsbevoegdheid was gegrond op vrese dat ’n liberaler aanslag die sluise van litigasie sou oopmaak, wat op sy beurt openbare administrasie sou bemoeilik. Die aanvaarding van die Grondwet van 1996, en artikel 38 in die besonder, het egter ’n era van groot verandering in die bepalinge oor verskyningsbevoegdheid ingelui. Dit blyk duidelik uit presedentereg sedertdien. Aan die hand van ’n bespreking van die waterskeidingsaak *Ferreira v Levin*, die *Giant Concerts*-aangeleentheid, die *Tulip Diamonds*-saak en etlike ander onlangse uitsprake, bied hierdie artikel ’n uitstippeling van die howe se stelselmatige vertolking en toepassing van artikel 38 met betrekking tot die vereistes vir verskyningsbevoegdheid in grondwetlike aangeleenthede. Dit word eerstens vinnig duidelik dat daar, in teenstelling met destyds, nou van howe verwag word om ’n ruim benadering tot verskyningsbevoegdheid in grondwetlike litigasie te volg en só te verseker dat die regte in die Handves van Regte sowel as elders in die Grondwet verwerklik word. Tweedens blyk dit dat litigante wat in eie belang optree, verkieslik ook “iets meer” as blote eie belang moet bewys; ’n groter openbare belang wat met die Grondwet strook. Sodanige groter openbare belang sluit onder meer in die behoefte aan groter regsekerheid vir behoorlike regspleging, die belang om te verseker dat openbare mag ingevolge grondwetlike en regsvoorskrifte uitgeoefen word, en die behoefte om die onafhanklikheid van die regbank te verseker en te versterk. Die derde en finale gevolgtrekking van hierdie navorsing is dat artikel 38 van die Grondwet inderdaad ’n radikale en doelbewuste afwyking van die gemene reg behels, en dat die Grondwet self ’n juiste en doeltreffende raamwerk bied vir ’n hof om grondwetlike verskyningsbevoegdheidsvereistes te bepaal. Laastens word die nie

implementering van die Suid Afrikaanse Regskommissie se konsep wetsontwerp vir openbare-en klasaksies betreur omdat regsrekerheid reeds 'n geruime tyd gelede oor kwessies van *locus standi* verkry kon gewees het.

1 Introduction

This article examines the judicial application and development of standing in constitutional actions since the advent of the constitutional era in South Africa. In the face of Parliament's lamentable failure to act on the recommendations of the South African Law Commission (SALC) pertaining to class and public actions, the task of the country's courts has been a challenging one, as described by Wallis JA with reference to class actions:¹

We are thus confronted with a situation where the class action is given express constitutional recognition, but nothing has been done to regulate it. The courts must therefore address the issue in the exercise of their inherent power to protect and regulate their own process and to develop the common law in the interests of justice.

This dictum is of course as much applicable to all the other categories of litigants that are mentioned in section 38 of the Constitution, as well as litigants in non-constitutional matters – class actions. Was it not for the regrettable failure of Parliament to implement legislation pursuant to the SALC's proposals, litigation in regard to standing could have been avoided.

In *Ferreira v Levin*,² O'Regan J described the courts' "new" role in a constitutional democracy as follows:

This role requires that access to courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact.

1 *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 2 SA 213 (SCA) par 223[15 + 16] C-F. In this case, the Supreme Court of Appeal referred an application back to the court *a quo* because the action (an ordinary class action not related to section 38) was not properly certified as a class action. Had the draft Bill on Class and Public Interest Litigation proposed by the SALC been promulgated by parliament, legal certainty would have existed as the proposed draft Bill extensively provides for the certification process. (The proposals made by the SALC are discussed infra par 3). Significantly, Wallis JA's certification requirements for class actions, are essentially those that were proposed by the SALC.

2 *Ferreira v Levin* and *Vryenhoek v Powell* 1996 1 BCLR 1 (CC).

As the SALC’s proposed draft Bill on public interest and class actions³ has not been implemented, the courts have had to develop standing in a constitutional context in an incremental fashion. It has meant a “radical and deliberate departure from common law” rules on standing, in line with the Constitution.⁴ Thus, against the backdrop of the number of judgments and significant parts of judgments that have dealt with standing in recent times, particularly the “interest” requirement for standing, this article evaluates the judicial application of this requirement in constitutional litigation, and concludes that, in the absence of statutory guidance, the courts themselves have recently provided useful legal certainty in this regard.

Before moving on to the judicial application of the requirements for standing in South Africa’s constitutional dispensation, however, it is apt first to refer briefly to the pre-constitutional position in cases where a direct or indirect public interest was at stake. It is further useful to then refer to the proposals of the South African Law Reform Commission (SALRC), before discussing recent case law.

2 A Brief Reference to the Common-Law and Pre-Constitutional Judicial Application of Standing in Public Interest Actions

In Roman-Dutch law, the “popular action” or *actio popularis* associated with Roman law disappeared. In the matter of *Dabrymple v Colonial Treasurer*,⁵ Wessels J explained its disappearance by referring to the “inconvenience” of the action and the possibilities it created for every second person to sue ministers “at the instance of enthusiastic or hostile politicians”.⁶ The judgment was a classic example of the courts’ reasoning behind limiting standing in litigation where the public interest may have been directly or indirectly at stake, for fear that it would result in “floodgate” litigation, which would in turn, hamper public administration.

The only exception to the rule that required a direct and substantial interest to establish standing was in terms of the *interdictum de libero homine exhibendo*, which was the equivalent of the English writ of *habeas corpus*. The interdict was perceived as an *actio popularis* on the grounds

3 SALC Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law (1998) (including the Commission’s proposed draft Bill on public interest and class actions). See <http://www.ii.org/za/other/zalc/report> (accessed 2012-07-23). Since 1998, the SA DoJCD has failed to act to promulgate the proposed legislation.

4 Per Van der Westhuizen J in *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* 2013 (2) SACR 433 (CC) 455 [29].

5 1910 TS 372.

6 *Idem* 392.

that it could be instituted by anyone.⁷ In *Wood v Odangwa Tribal Authority*,⁸ this remnant of the *actio popularis* was used as authority to grant three appellants an interdict against the then South West African tribal authorities to prevent them from continuing with their illegal mistreatment of members of certain groups. None of the appellants themselves had been subjected to this treatment and/or imprisoned.

On the contested standing of the appellants, Rumpff CJ⁹ found that although, in Roman-Dutch law, no private person could proceed with the popular action, it was clear that the interdict *de libero homine exhibendo* remained part of our law.¹⁰ He found that the interest of the person who applied for this interdict “should not be narrowly construed”,¹¹ because “illegal deprivation of liberty is a threat to the very foundation of a society based on law and order”.¹²

*Bamford v Minister of Community Development and State Auxiliary Services*¹³ was a rare matter in which the applicant alleged to have been acting purely in the public’s interest. The applicant was a member of Parliament for the Groote Schuur constituency, and was a permanent resident of Rondebosch, Cape Town. He instituted an action for a permanent interdict restraining the respondent from erecting houses on the Groote Schuur Estate at Rondebosch, which, he claimed, was in contravention of the Rhodes’ Will (Groote Schuur Devolution) Act,¹⁴ the provisions of which provided for the continued preservation of access to the park for the benefit of the public. The respondent contested the applicant’s standing to bring the application, on the grounds that the applicant did not allege that he himself had ever used the right of access to the park, or intended to do so, and relied on the judgment in *Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd.*¹⁵ To Watermeyer JP, however, the facts in *Roodepoort-Maraiburg*,¹⁶ in which the court was confronted with illegal occupation of property by persons

7 Van der Vyver “*Actiones Populares* and the Problem of Standing in Roman, Roman-Dutch, South African and American Law” 1978 *AJ* 193. It is presumed that women and children could only apply for the interdict if the detainee was related to them. If several persons presented themselves to the *praetor* as potential applicant, the *praetor* had to choose the most suitable based on who had the greatest interest, as well as the relationship between the potential applicants and the detainee.

8 1975 2 SA 294 (A).

9 *Idem* par 310D.

10 Par 310E.

11 Par 310F.

12 Par 310G.

13 1981 3 SA 1054 (C).

14 9 of 1910.

15 *Idem* n 13 par 1059G. The respondent relied on the following passage in the judgment: “It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage, some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen’s subjects by the infringement of the law”.

16 1933 AD 87[92].

in contravention of apartheid legislation, were distinct from those in *Bamford v Minister of Community Safety*.¹⁷ Whereas *Roodepoort-Maraisburg* was concerned with an Act that statutorily prohibited certain actions, in *Bamford*, the court had to deal with a statutory provision that conferred a right of access in favour of all members of the public, a right framed positively, which would allow any member of the public, without proof of special damages, to seek relief from unlawful interference with that right.¹⁸

At least one academic commentator¹⁹ found this distinction “irrelevant”, with particular reference to the settled general rule applied in the *Roodepoort-Maraisburg* matter, namely the need “to prevent the courts being inundated by actions brought by persons who have no real connection with the matter”.²⁰ This argument of course strongly resembled the reason why the popular action had disappeared as articulated by Wessels J in the *Dalrymple* matter.²¹

With the promulgation of section 38 of the South African Constitution, it was clear that the Constitution contemplated a radical departure from common law requirements for standing and the SALC was tasked to make recommendations. A brief synopsis of those proposals follows below. These have lamentably not been followed by Parliament, leaving the courts with the unenviable task to incrementally develop these themselves.

3 Recommendations by the SALC on Public Interest and Class Actions

The SALC²² took note that, in the past, actions in public interest were virtually unknown in South Africa. It further noted that, despite the opportunity afforded by *Wood*,²³ “the South African courts have not even allowed organisations to claim relief on behalf of their members, insisting that the individual members must approach the court themselves”.²⁴ The Commission proposed the introduction of legislation that would introduce class and public interest actions.

17 1059[G]-1060[B].

18 Par 1059H & 1060A.

19 Beck “*Locus standi in iudicio* or *ubi ius ibi remedium*” 1983 SALJ 286.

20 *Ibid.*

21 *Supra* n 5 par 392.

22 1998 *Project 88: The Recognition of Class Actions and Public Interest Actions in South African Law* <http://www.ii.org/za/other/zalc/report> (accessed 2012-07-23).

23 1975 (2) SA 294 (A).

24 SALC 22 at 4.2.3. This observation was made with reference to cases such as *Ahmadiyya Anjuman Ihaati-Islam Lahore (South Africa) and another v Muslim Judicial Council (Cape) and others* 1985 4 SA 855 (C), *South African Optometric Association v Frames Distributors (Pty) Ltd* 1985 3 SA 100 (O) *Natal Fresh Produce Growers' Association and others v Agroserve (Pty) Ltd and others* 1990 4 SA 749 (N).

3 1 Class Actions

The following definition of a class action was proposed:

... an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and certified as a class action in terms of section 6 of this Act.²⁵

Section 6 provided for a certification process.²⁶ In deciding whether to certify an action as a class action, it allows a court to take into account: (a) Evidence in support of the existence of “an identifiable class of persons”; (b) the existence of a *prima facie* cause of action; (c) issues of fact or law common to the claims or defences of individual members of the class; (d) the availability of a suitable representative for the class of persons; (e) the interests of justice; and (f) whether, having regard to all relevant circumstances, a class action was appropriate.²⁷ In section 6, the court is authorised to withdraw certification at any time before judgment, if the criteria set out are no longer met.²⁸ Furthermore, in terms of section 7, the court must appoint one or more representative of the class,²⁹ and can at any time before judgment *mero motu* or on application, remove a representative, and appoint a suitable substitute.³⁰ Sections 8 and 9 respectively make extensive provision for notice to members of the class,³¹ and the procedure to be followed in a class action.³² Significantly, section 10(3) provides that a judgment of the court would be binding on all members of the class unless the court, on consideration of the section 8(2)-listed factors was convinced that the class action did not come to the attention of all members.³³

3 2 Public Interest Actions

The SALC proposed that the term “public interest action” be defined as:

Public interest action means an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative’s own interest. Judgment of the court in respect of a public interest action shall not be binding (*res judicata*) on the persons in whose interest the action is brought.³⁴

25 SALC 89 s 1.

26 SALC 92 s 6(1).

27 *Idem* s 6(2).

28 *Idem* s 6(3).

29 SALC 93 s 7(1).

30 *Idem* s 7(5).

31 SALC 94.

32 SALC 95.

33 SALC 96.

34 SALC (v) 3. Section 2(3) of the Commission’s proposed draft Bill stipulates that the court may give directions “to the representative as to the appropriate person or persons to be served as respondents”, and section 2(4) determines that “unless the court holds otherwise, judgment in a public interest action shall not be binding on the person or persons in whose interest the action is brought”.

Despite certain limitations on bringing public interest actions that were proposed to the Commission,³⁵ the Commission responded that it would be contrary to the spirit and purport of section 38 of the Constitution to subject public interest actions to “costly procedures and requirements”. The Commission was clear on the fact that it ought to be possible for a person, not having a direct interest in the relief claimed, to institute an action in the public interest. No certification process was to be required. However, courts would be able to limit unmeritorious public interest actions by the requirement that the action be instituted in the interest of the public, be it a section of the public or the public as a whole and on condition of the presence of a suitably qualified representative.³⁶

There can be little doubt that the proposals of the SALC were sensible and extensively provided for a number of issues of standing that have subsequently arisen in litigation, as is discussed below.

4 The Broadening of Standing in Actions of a Public Nature in the South African Constitutional Context

Generally, standing has always been a preliminary procedural question as to whether the parties to litigation have the required standing or legal capacity to litigate.³⁷ The inquiry into standing is however also a question of substance as far as the sufficiency and directness of a litigant’s interest in the proceedings are concerned.

The common-law requirements for legal standing have been substantially broadened by section 38 of the Constitution of the Republic of South Africa.³⁸ A listed number of persons may approach a competent court “alleging that a right in the Bill of Rights has been infringed or threatened”. In the absence of legislation implementing section 38, as proposed by the SALC, sole reliance on the Constitution, provides the framework against which the infringement of constitutional rights, and thus the development of legal standing, is measured. This has been the courts’ endeavour as is discussed below.

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

36 SALC 25 at 4.4.4. Later on, the Commission refers to the person who brings a public interest action as “the ideological plaintiff” (27 at 4.6 *et seq*). Such a plaintiff, according to the Commission, ought to be “suitably qualified” or “genuine” in his or her efforts to represent the public interest.

37 Harms *Civil Procedure in the Supreme Court* (1997) 5.1.

38 1996.

5 *Ferreira v Levin* with Reference to Standing in a Constitutional Context

A key judgment by the Constitutional Court with regard to standing in a constitutional context, was that of *Ferreira v Levin*,³⁹ in which Chaskalson P, writing for the majority, made a number of significant findings contextual to this article. It will be recalled that in this case, the inconsistency of section 417 of the Companies Act⁴⁰ with the Constitution was at issue. The right against giving self-incriminating evidence during winding-up proceedings of companies was asserted for the reason that such evidence was allowed to be used in subsequent criminal proceedings against the examinee. None of the litigants that brought the challenge had faced criminal charges, and only faced the possibility of having to give evidence in winding-up processes that could later be used against them in criminal proceedings. Their *locus standi* to challenge the impugned section of the Companies Act was attacked on the basis that they had insufficient interest in the relief that was sought. It is the standing issue that is further discussed. Chaskalson P found that “a person has standing to challenge the validity of that law in our courts” in instances where that person’s rights are directly affected in “a manner adverse to such person” – requirements that the applicants in *Ferreira v Levin* met.⁴¹ This implies that the mere possibility of criminal charges was sufficient. Secondly, in respect of the question as to “when” the challenge may be made when it concerned the constitutional validity of a law, he argued that it could be made as soon as a clear conflict between the law and the Constitution was established.⁴² I agree with this contention, particularly where a broader public interest is demonstrated. In *Ferreira v Levin*, that public interest was to obtain legal certainty arising from impugned legislation that threatened the common-law right against self-incrimination. For this particular reason, it followed that the constitutional challenge in *Ferreira v Levin* was therefore not “hypothetical” or “academic”, but rather informed by, from the applicants’ perspective, a genuine fear of prosecution and, importantly, from the public’s perspective, by the need to obtain legal certainty about the common-law right against self-incrimination, which was impugned as unconstitutional in section 417(2)(b) of the Companies Act.⁴³ This common-law principle for determining standing, will therefore continue to act as catalyst in preventing unjustifiable cases from being brought to court.⁴⁴

In constitutional cases, Chaskalson P continued, the courts should adopt a broad, not narrow approach to standing. Such an approach

39 *Ferreira v Levin* and *Vryenhoek v Powell* 1996 1 BCLR 1 (CC).

40 61 of 1973.

41 Par 97[162].

42 Par 97[165].

43 61 of 1973.

44 Burns & Beukes *Administrative Law under the 1996 Constitution* (2006) 469 *et seq.*

would be consistent with the courts’ mandate to ensure that constitutional rights come to fruition.⁴⁵ As far as the interpretation of section 7(4) of the Interim Constitution, (section 38 of the Constitution) was concerned, Chaskalson P, with reference to section 98(2) of the Interim Constitution (section 172 of the final Constitution), found that the provisions of section 7(4) did not limit standing in constitutional challenges to only those rights set out in chapter 3 of the Interim Constitution (chapter 2 of the Constitution):

The constitutionality of a law may be challenged on the basis that it is inconsistent with the provisions of the Constitution other than those contained in Chapter 3. Neither section 7(4) nor any other provisions of the Constitution denies to the applicants the right that a litigant has to seek a declaration of rights in respect of the validity of a law which directly affects his or her interests adversely.⁴⁶

On the question of “when” the constitutional challenge may be brought where a law is challenged, and its influence on standing, O’Regan J deviated from the majority judgment. In her view, the applicants in *Ferreira v Levin* did not have standing for direct access to the Constitutional Court “acting in their own interest”, as there was nothing in the application before the court that indicated a threat of prosecution in which “compelled evidence” may be led against them.⁴⁷ However, in the particular circumstances of the case, she held that the applicants’ standing derived from the fact that they were acting in the public interest.⁴⁸ She further held that “this court will be circumvent in affording applicant standing in terms of section 7(4)(b)(v)”, and that possible determinant factors were the existence of other and effective measures to bring the application; the nature of the relief sought; the extent to which the relief was of “general and prospective application”; the range of persons or groups who may directly or indirectly be affected by a court order, and the opportunity afforded to possibly affected persons or groups to make representations and present evidence to the court. These factors needed to be considered in light of the facts and circumstances of each case.⁴⁹ O’Regan J further observed that although the challenge to the validity of section 417(2)(b) of the Companies Act possibly could have been brought by a number of other persons, “a considerable delay may result if this Court were to wait for such challenge”.⁵⁰ In my view, this “expediency” line of reasoning adopted by O’Regan J supported Chaskalson P on the question of “when” a challenge may be brought, namely as soon as an inconsistency between an impugned law and the Constitution has been established. Other relevant factors for consideration, according to O’Regan J, were the fact that the relief sought in *Ferreira v Levin* fell under the exclusive jurisdiction of the

45 Par 98[166].

46 Par 99[167].

47 Par 119[231].

48 Par 120[233].

49 Par 120[234].

50 Par 121[236].

Constitutional Court (leave to have direct access to the Constitutional Court to challenge an impugned law); that the relief was of a general, instead of a particular, nature and that adequate notice had been given to a wide range of individuals and organisations, who submitted *amicus curiae* briefs to the court.⁵¹

6 The Judicial Application of the “Interest” Requirement for Standing in Constitutional Cases

The rationale for adopting section 38 of the Constitution could not have been expressed in more lucid terms than those used by Cameron JA, as he then was, in the matter of *Permanent Secretary v Ngxuza*.⁵² Having successfully obtained the reinstatement of their disability grants, the three applicants in the matter sought to institute representative class action and public-interest proceedings on behalf of tens of thousands of Eastern Cape grantees in terms of section 38(b), (c) and (d) of the Constitution.⁵³ The court *a quo* granted them leave to proceed and they subsequently decided to institute a class action under section 38(c). In this judgment, which dealt with the appeal against the court *a quo*'s leave to appeal, Cameron JA noted as follows:⁵⁴

The class action was until 1994 unknown to our law, where the individual litigant's personal and direct interest in litigation defined the boundaries of the court's powers in it. If a claimant wished to participate in existing court proceedings, he or she had to become formally associated with them by compliance with the formalities of joinder.

Because of so many South Africans' "poor position to seek legal redress", the technicalities of legal procedures, and the need for the opportunity to attain justice, both the interim and final Constitution "created the express entitlement that 'anyone' asserting a right in the Bill of Rights could litigate", as was made possible by sections 7(4) and 38 of the interim and final Constitution respectively.⁵⁵ Cameron JA described government's response to the valid claims of social grantees as an example of how no government in a constitutional dispensation should respond: Public administration in whatever form, he said, had to be "conducted on the basis that people's needs must be responded to".⁵⁶

Against this backdrop, I now turn to recent case law that has dealt specifically with the own-interest category of litigants (section 38(a)) in order to ascertain exactly how far the courts have been prepared to go in

51 Par 121[237].

52 *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA).

53 Par 1191[1] C-D.

54 Par 1192[4] G-H.

55 Par 1194[6] B-C.

56 Par 1197[15] C-D.

granting standing to litigants in constitutional cases. To contextualise, I will first indicate the synergy between the Promotion of Administrative Justice Act⁵⁷ and section 38 of the Constitution, and will then elaborate on the judicial principles for own-interest standing in constitutional cases.

7 The Synergy Between the Promotion of Administrative Justice Act and Section 38 of the Constitution

A distinct group of litigants are emerging in South African constitutional litigation who invoke the Promotion of Administrative Justice Act (hereinafter PAJA) to seek relief for impugned public administration in terms of section 33 of the Constitution. In such cases, the standing-related provisions of section 38 inevitably arise for judicial consideration and interpretation. In his judgment in the matter of *Giant Concerts CC v Rinaldo Investments (Pty) Ltd*,⁵⁸ Cameron J found as follows:

PAJA, which was enacted to realise section 33, confers a right to challenge a decision in the exercise of public power or the performance of a public function that ‘adversely affects the rights of any person and which has a direct, external legal effect’. PAJA provides that ‘any person’ may institute proceedings for the judicial review of an administrative action. The wide standing provisions of section 38 were not expressly enacted as part of PAJA. Hoexter suggests that nothing much turns on this because ‘it seems clear that the provisions of Section 38 ought to be read into the statute’. This is correct.

Standing, as a preliminary issue, is separated from the merits of a case and has, according to Cameron J, two implications for the own-interest litigant.⁵⁹ Firstly, it “insulates” the:

... nature of the interest that confers standing on the own-interest litigant from the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.

Secondly, according to the court:

[i]t means that an own-interest litigant may be denied standing even though the result could be that the unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only ‘if the right remedy is

57 3 of 2000.

58 As yet unreported, case CCT25/12 2012 ZACC 28. See <http://www.saflii.org> (accessed 2013-06-19).

59 Par 18[33].

sought by the right person in the right proceedings'. To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even where the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest. Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown.⁶⁰

The reasoning by Cameron J here was similar to O'Regan's thinking in *Ferreira v Levin* referred to above, where, although she found pure "own interest" lacking in that particular case, the broader public's interest and the grounds of expediency demanded that the matter be heard and be dealt with by the Constitutional Court.⁶¹

But what "more" must be demonstrated for standing by the own-interest litigator?⁶² The *Giant Concerts* matter cited above, provides a sound departure point for an exploration of the judicial principles in this regard.

8 Establishing the Judicial Principles for Own-Interest Standing in Constitutional Cases: The *Giant Concerts* Matter

In answering the question as to how much "more" the own-interest litigant must establish for purposes of standing in constitutional cases, the court in the *Giant Concerts* case referred to the matters *Ferreira v Levin*, *Minister of Home Affairs v Eisenberg & Associates*,⁶³ and *Kruger v President of Republic of South Africa*,⁶⁴ and highlighted the following four principles:

- (a) With reference to *Ferreira v Levin*,⁶⁵ it was established that "own interest standing does not require that a litigant must be the person whose constitutional right has been infringed or threatened", but that the person concerned "should make the challenge in his or her own interest". This clearly referred to two aspects. Firstly, at that stage, there had not yet been any infringement of the right against self-incrimination in *Ferreira v Levin*, but secondly, if left unchallenged, the stipulations of section 417(1)(b) of the Companies Act had the

60 Par 19[34-35].

61 Refer to discussion under par5 above.

62 See Cameron's *dictum* quoted *supra*.

63 *In Re Eisenberg & Associates v Minister of Home Affairs* 2003 ZACC 10; 2003 5 SA 281 (CC); 2003 5 BCLR 838 (CC).

64 2008 ZACC 17; 2009 1 BCLR 268 (CC).

65 *Supra* n 41 par 20[37].

*potential*⁶⁶ to directly affect the applicants’ rights, and thereby their interest.

- (b) With reference to *Minister of Home Affairs v Eisenberg*,⁶⁷ where a challenge was brought against immigration law regulations that had been published without following the prescribed process of inviting public comment, it was established that a law firm had own-interest standing to bring a constitutional challenge, and “had an interest as a member of the public in asserting the right that it claimed to have and had standing to raise that issue in its own interest”.⁶⁸
- (c) With reference to *Kruger v President of Republic of South Africa*,⁶⁹ it was established that certain uncertainties about proclamations “had negatively affected his [the attorney’s] ability to understand and engage with the legislative scheme on which his clients relied for compensation, making him less able to manage his clients ‘affairs’”.
- (d) Still with reference to *Kruger v President of Republic of South Africa*,⁷⁰ it was established that practitioners who asserted personal standing in challenging legislation had to demonstrate that bringing the challenge was in the interest of the administration of justice, addressing the need to bring legal certainty. Sole reliance on pure financial interest was not enough.⁷¹

I will next deal with the *Tulip Diamonds* case,⁷² in which an own-interest applicant was found to be lacking the “something more” requirement for standing that Cameron J established in the *Giant Concerts* matter. The different approaches followed by the Supreme Court of Appeal and the Constitutional Court in determining standing are notable. In my view, the approach followed by Van der Westhuizen J in the Constitutional Court encapsulates the reason why the own-interest category of claimants was established in terms of section 38(a) of the Constitution.

9 Applying the Principles: The *Tulip Diamonds* Matter

Both the Supreme Court of Appeal and the Constitutional Court agreed that the applicant, Tulip Diamonds, a foreign company conducting business in Dubai, United Arab Emirates, (a foreign company with interests in South Africa) had standing to bring an application for an interdict to protect its interests in the South African courts. However, as far as demonstrating a protectable interest derived from a vested right

66 Own emphasis.

67 *Supra* n 41 par 21[21].

68 Par 21[38].

69 Par 22[39].

70 Par 22[40].

71 Par 23[40].

72 *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* 2013 (2) SACR 443 (CC).

was concerned, both courts dismissed Tulip's appeals, and found it to lack standing.

The facts of the case were as follows:⁷³ Tulip imported diamonds from countries such as Angola and the Congo to Dubai, from where it exported the stones to various countries. A South African company referred to as "Brinks", served as Tulip's courier service to transport the diamonds to Dubai. As such, Brinks was in possession of a number of documents pertaining to its dealings with Tulip. A Belgian client of Tulip's, Omega Diamonds, was placed under investigation in Belgium for tax-related issues. It was suspected that Omega under-declared the value of diamonds imported from Dubai. In its investigations, the Belgian authorities came across the invoices issued by Brinks, and subsequently requested the South African authorities, in terms of the Cooperation in Criminal Matters Act,⁷⁴ to gather certain evidence from Brinks. Included in the Belgian request to the South African authorities was the request "to seize and take copy of all relevant documents (including invoices, Kimberley certificates, packing lists [and] shipment dockets)".⁷⁵ The South African authorities acceded to the request and issued a subpoena against Brinks. Tulip heard about the subpoena and, after an exchange of letters between the legal representatives of the two companies, successfully applied for an interdict in the South Gauteng High Court restraining Brinks from producing the listed documents, pending an application by Tulip to review the decisions taken by the Director-General, the Minister, and the Magistrate who issued the subpoena. The High Court held that because Tulip was a foreign company with no South African presence, it lacked standing, and the review application was dismissed.

9 1 The Supreme Court of Appeal Judgment

In its appeal to the Supreme Court of Appeal, Tulip contended that it had a substantial interest in the subject matter of the litigation based on its right to confidentiality in the documents held by Brinks,⁷⁶ and argued that it had standing in a South African court to protect that right. The court⁷⁷ reiterated the common-law requirement for legal standing, namely proof of a sufficient and direct interest in proceedings to warrant a litigant's title to prosecute the claim asserted. Moreover, the court found that the court *a quo*'s finding of non-standing was based on a faulty premise created by the judgments in *Lawyers for Human Rights v Minister Home Affairs*⁷⁸ and *Kaunda v President of the RSA*,⁷⁹ amongst others. Those cases were distinguishable from the *Tulip Diamonds* matter in that

73 447[2-16].

74 75 of 1996.

75 *Supra* n 56 par 39[81].

76 *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* 810/2011 ZASCA 111 par [3].

77 *Idem* par [13].

78 2004 4 SA 125 (CC).

79 2005 4 SA 235 (CC).

they had dealt with the definition of the class of beneficiaries of the rights in the Bill of Rights. They did not deal with standing *per se*, as in the *Tulip Diamonds* case, and there was no bar against the standing of a foreign litigant with a “protectable interest” in a South African court.⁸⁰

However, because Tulip did not demonstrate that it had a direct and substantial interest in the right that was the subject matter of the litigation, namely the right to confidential treatment of the information contained in the documents held by Brinks, the court found that Tulip lacked standing. Significantly, once this finding was made, the Supreme Court of Appeal did not deal with the merits of the case, while the Constitutional Court – on authority of *Giant Concerts* – did.

9 2 The Constitutional Court Judgment

In an analysis of Tulip’s standing, or lack thereof, the majority judgment of the Constitutional Court, delivered by Van der Westhuizen J, proceeded from the basis that because the review application was brought in terms of PAJA, and the terms of section 38 of the Constitution ought to have been included in and read into the PAJA, the meaning and definition ascribed to the phrase “adversely affects” in the PAJA had to be considered in the context of standing as well.⁸¹

The court found that where a litigant sought to vindicate “a right promised in the Bill of Rights”, as Tulip did, the starting point had to be section 38 of the Constitution. This was so, because section 38 was “a deliberate and radical departure from common law”. Moreover, the court said that this approach was “precise and efficient”, and that “constitutional standing is broader than traditional common-law standing”.⁸² It made substantial reference to the judgment in *Giant Concerts*,⁸³ and stated as follows:⁸⁴

To succeed, Tulip must establish both components of own-interest standing: interest and direct effect. As discussed in *Giant Concerts*, Tulip must demonstrate that its interests are more than hypothetical or academic. It must also show that its interests and the direct effect are not unsubstantiated. Mere allegations, without more, are not sufficient to prove the elements of own-interest standing.

9 2 1 The Alleged Interest Derived From a Right

On what “interest” derived from vested rights did Tulip rely? In its founding papers, Tulip stated that South Africa’s accession to the Belgian authorities’ request to seize the documents in Brinks’ possession would materially infringe upon Tulip’s “proprietary rights in its confidential

80 *Idem* n 59 par [14].

81 *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* 93/12 2013 ZACC par 15[27-29].

82 *Idem* par 16[29].

83 Discussed in paragraph 7 *supra*.

84 65 par 18[31].

business information ...”.⁸⁵ This line of reasoning was extended in argument before the Constitutional Court, where this interest was described as “informational privacy”, which included a right to “informational self-determination”. As Tulip was the subject of the information contained in the documents to be seized, it was argued that Tulip was entitled to determine with whom such information could be shared.⁸⁶

9 2 1 1 The Interest Derived From the Right to Privacy

The court was swift in dealing with Tulip’s reliance on the right to privacy in the documents to be seized. It pointed out that juristic persons were not the bearers of human dignity, and that, for this reason, their rights to privacy could hardly be “as intense” as those of human beings.⁸⁷ In addition, no facts indicated that there was an infringement upon Tulip’s privacy rights, either subjectively or as “an objectively reasonable expectation”.

9 2 1 2 The Interest Derived from the Right to Confidentiality

Next, Tulip relied on interest based on its right to confidentiality in the documents to be seized. However, this claim also did not assist Tulip in establishing standing, because: (a) It was not shown that a general duty of confidentiality existed between principal and courier in South African law; and (b) There was no contract between Tulip and Brinks that created a mutual confidentiality obligation.⁸⁸ The court, in my view, correctly, observed as follows:

There may be remedies for breaches of confidentiality between immediate parties in private law, but that does not translate without more into a legally protectable interest in preventing the disclosure of information sought in respect of an investigation of a third person, as in the case here.⁸⁹

9 2 1 3 The Interest Derived From the Right of Ownership of the Documents

Van der Westhuizen J interpreted Tulip’s final reliance on interest deriving from its alleged right of ownership of the documents held by Brinks as a claim based on the contents of the documents rather than the documents themselves.⁹⁰ However, Tulip failed to lay any basis for its ownership of the contents of the documents. The fact that the documents might have mentioned Tulip was no indication of ownership.⁹¹

85 Par 18[32].

86 Par 18-19[33].

87 Par 19[35].

88 Par 20[37].

89 Par 23[43].

90 Par 20[38].

91 Par 21[39].

9 2 2 “Direct Infringement” of Interest, on the Assumption that there is Interest

The line of reasoning next followed by Van der Westhuizen J in addressing the “second leg” of the inquiry into standing followed the authority of Cameron J in the *Giant Concerts* case discussed earlier.

Reason would have dictated that, once the court made the finding that there was no interest derived from any right, there could be no “direct infringement”. However, the court for the moment assumed that the purported interests did exist. As noted before,⁹² the court in the *Giant Concerts* matter did say that:

... there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even where the applicant’s standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.

Van der Westhuizen J thus proceeded on this basis. In finding that *Tulip* did not demonstrate any direct effect on any of its interests, the consideration of that (potential) effect, according to the court, needed not to be contemplated “in the abstract” in this case.⁹³ On the assumption that *Tulip* did have an interest that could potentially have been affected, the court found that “there is nothing to show that ownership of the documents will be lost or that a breach of confidentiality will potentially affect *Tulip* in some demonstrable way”.⁹⁴

10 Own Interest Combined With the “Other” Interests Provided for in Section 38 of the Constitution

In closing, I will refer to a few cases where the applicants relied on a combination of own-interest litigation and litigation based on the other “interests” provided for in terms of section 38 of the Constitution. If, in addition to own interest, a litigant is able to demonstrate a broader public interest, the chances of obtaining legal relief in constitutional cases increases substantially.

In *Kruger v President of the RSA*,⁹⁵ the applicant was an attorney who specialised in personal-injury cases. The matter concerned the constitutional validity of two proclamations that had been issued by the President and that intended to give effect to certain sections of the Amendment Act that would have resulted in the amendment of a number of sections of the Road Accident Fund Act.⁹⁶ The respondent

92 Under par 7.

93 *Supra* n 64 par 21[41].

94 Par 22[42].

95 2009 1 SA 417 (CC).

96 *Idem* par 421[3] E&F.

objected to the applicant's standing to bring the application. Skweyiya J, with reference to O'Regan J in *Ferreira v Levin*, explained the need for a generous and expanded approach to standing in constitutional litigation.⁹⁷ In cases of a public nature, the *nexus* between the plaintiff as victim of harm as well as beneficiary of relief is not always that "intimate". Skweyiya J said: "The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may be quite diffuse or amorphous". In affirming the view of a generous approach to standing, Skweyiya J⁹⁸ was mindful of the fact that "constitutional litigation is of particular importance in our country where we have a large number of people who have had scant educational opportunities and who may not be aware of their rights". *In casu*, the applicant's demonstration of the central importance of the impugned proclamations in his field of work, as well as the need to obtain legal certainty for the proper administration of justice, was sufficient to clad him with standing.

In *Democratic Alliance v The Acting National Director of Public Prosecutions*,⁹⁹ the court *a quo* held that the Democratic Alliance, a registered political party in South Africa, had no standing to ask the court to review a decision by the first respondent to discontinue prosecution of the third respondent. As a consequence, the court refused the Democratic Alliance's application that would have compelled the handing-over of the record that had informed the first respondent's aforementioned decision.

In his judgment, Navsa JA referred to the constitution of the Democratic Alliance, which recognised the 1996 South African Constitution as the "only foundation" on which "an open opportunity society can be built", and the necessity to "protect the people of South Africa from the concentration and abuse of power".¹⁰⁰ It was accepted on behalf of the third respondent that all political parties in the national parliament of South Africa subscribed, swore or affirmed faithfulness to the country and its Constitution, and therefore, that "all political parties participating in Parliament must necessarily have an interest in ensuring that public power is exercised in accordance with constitutional and legal precepts and that the rule of law is upheld".¹⁰¹ In summary, Navsa JA found that the DA had standing "to act in its own interests, as well as in

97 Par 427[23] G.

98 Par 428[23] C&D.

99 2012 3 SA 486 (SCA).

100 *Idem* par 503[43].

101 Par 503[44]. See also the judgment in *Bio Energy Afrika Free State (Edms) Bpk v Freedom Front Plus* 2012 2 SA 88 (FB) par 92[10]-[17], where the court held that the Freedom Front Plus – a political party who challenged the legality of the conduct of an organ of state in transferring public property to a private party in contravention of the relevant statutory provisions, and sought to have the transaction set aside – had standing on the grounds that it was acting in the public interest as well as in the interests of its supporters, who were residents and ratepayers of the concerned area of the local authority's jurisdiction.

the public interest, and is entitled to pursue that application to its conclusion”.¹⁰²

In *Southern African Litigation Centre v National Director of Public Prosecutions*,¹⁰³ two non-governmental organisations applied for a review of a decision taken by the National Director of Public Prosecutions not to investigate alleged crimes against humanity that were said to have occurred in Zimbabwe in 2007, and were allegedly committed by Zimbabwean officials against Zimbabwean citizens. The *causa* of the application was based on the principle of universal jurisdiction, and its statutory recognition in South Africa in terms of the Implementation of the Rome Statute of the International Criminal Court Act.¹⁰⁴ A number of objections against the applicants’ standing were unsuccessfully raised.¹⁰⁵ The applicants stated that they had brought the application in their own interests, as provided for in section 38(a) – on behalf of the victims of torture in Zimbabwe, who could not act in their own names, and therefore, in terms of section 38(b) and (c) of the Constitution – as well as in the public interest, in terms of section 38(d) of the Constitution. Torture is universally condemned by the international community, and the applicants therefore contended that they had “an interest in the prohibition of torture and the apprehension of torturers”.¹⁰⁶ The essential content of the “public interest” of the application was that, without effective prosecution of torturers, there was a risk of “South Africa becoming a safe haven for torturers, who may travel here freely with impunity”.¹⁰⁷

The court reiterated the need for a broad approach to standing in constitutional matters, as referred to in *Ferreira v Levin*,¹⁰⁸ and, because of the magnitude of the crisis in Zimbabwe:

... SALC [the Southern African Litigation Centre] was accordantly not barred from bringing an application in its own interest, namely an interest in ensuring investigations and prosecutions of those suspected of having committed crimes against humanity.¹⁰⁹

*Freedom under Law v Acting Chairperson: Judicial Service Commission*¹¹⁰ concerned the well-publicised debacle about Hlophe JP’s alleged attempts to influence certain judges of the Constitutional Court, the subsequent complaint to the Judicial Service Commission by the Constitutional Court judges concerned, the counter-complaint by Hlophe JP, and the Commission’s dismissal of the complaint. The Supreme Court

102 Par 504[44].

103 Unreported, case number 77150/09 (NGHC). See <http://www.saflii.org/za/cases> (accessed 2012-07-20).

104 27 of 2002.

105 *Supra* n 86 par 40(12–60).

106 Par 42(12.1).

107 Par 42(12.1).

108 See discussion *supra*.

109 *Supra* n 86 par 51(23).

110 2011 3 SA 549 (SCA) par 549.

of Appeal was called upon to review the Commission's decision. Hlophe JP contended that the applicant, Freedom under Law, lacked standing. Streicher JA, who delivered the judgment and finding that the applicant did indeed have standing, pointed out that the mission of the applicant, as a registered non-profit company, was "to promote democracy under law, advance the understanding and respect for the rule of law and the principle of legality, and secure and strengthen the independence of the judiciary".¹¹¹ He found no reason to doubt the applicant's statement that it was acting in the public interest. Furthermore, he found that "every South African citizen has an interest to be served by judges who are fit for judicial office, and by courts which are independent and impartial".¹¹² The Commission was reminded of its duty to properly and lawfully deal with complaints.

11 Conclusion

Before I draw some specific conclusions with regard to the South African law on standing in constitutional cases, it is opportune to remind ourselves that in the previous South African Westminster model of parliamentary supremacy, no court of law was competent to inquire into or pronounce upon the validity of an Act of Parliament. In direct contrast to the present constitutional democracy. That position meant that courts simply did not have the power of judicial review by which the legality of Acts of Parliament and of the exercise of state power could be determined. Under the Westminster model of state, courts attempted to discern the intent of Parliament, and confined themselves to the interpretation of legislation based on the intent of the legislator. To a great extent, courts merely determined what the law was, while very little was left to judges' own convictions about justice.

The strict requirements for standing in South Africa's previous legal dispensation, and the importance of a litigant showing a "direct and substantial interest" in the subject matter as well as in the relief claimed in actions where the public interest may have been directly or indirectly at stake, were illustrated in paragraph 2. This strict judicial application of standing requirements was based on the fear that a too liberal approach to standing would result in "floodgate" litigation, which would in turn hamper public administration.

By necessary implication, the adoption of the 1996 South African Constitution introduced an era of monumental change in constitutional standing provisions, the extent of which is reflected in South African case law. *Ferreira v Levin* was a seminal judgment in this regard. Not only did it rule that courts were expected to follow a generous approach to standing in constitutional litigation so as to ensure that rights contained in the Bill of Rights came to fruition, but extended that to other rights also

111 *Supra* par 556[16] B-C.

112 Par 557[22] D,E-F.

contained in the Constitution. The applicants in *Ferreira v Levin* did not have to wait until their rights against self-incrimination were infringed or threatened by their potentially incriminating answers in company liquidation inquiries, but were able to bring their challenge to court as soon as an inconsistency was established between the impugned law and the Constitution. The common-law requirement for standing, namely that the subject matter and relief should not be hypothetical or academic, including in constitutional challenges, was retained and gainfully applied in *Ferreira v Levin* so as to ensure that unjustifiable cases are not brought to court.

I proceeded to demonstrate the synergy between the PAJA and section 38 of the Constitution. Cameron J’s judgment in the *Giant Concerts* matter established this synergy, and was substantial as precedent to an inquiry into the requirements for standing for the own-interest litigant. His judgment, namely that even though the standing of a litigant may be questionable, courts were nevertheless expected to investigate and determine the merits of a constitutional challenge on the presumption that a protectable interest did exist, was evidence of the generosity of the Constitution in allowing us to ensure that constitutional rights and principles came to fruition. He correctly based his judgment on “the interests of justice under the Constitution”,¹¹³ and the broader concerns of accountability and responsiveness by the judiciary. In addressing the question of the “something more” that the own-interest litigant is required to establish, Cameron J clearly had in mind a broader public interest consonant with the Constitution.

When bringing constitutional challenges, the own-interest litigant will be well-advised not only to establish his or her own interest and how it is or may be affected, but also a broader public interest in the relief that is sought. From the case law discussed under paragraph 10, it appears that this broader public interest could include: (a) The need to obtain legal certainty for the proper administration of justice; (b) an interest in ensuring that public power is exercised in accordance with constitutional and legal prescripts; (c) the need for the rule of law to be upheld; (d) an interest in preventing South Africa from becoming a safe haven for international criminals; (e) an interest in the promotion of democracy under law; (f) an interest in advancing an understanding and respect for the rule of law and the principle of legality; and (g) the need to secure and strengthen the independence of the judiciary.

The Constitutional Court judgment in the *Tulip Diamonds* case confirmed that section 38 was a radical and deliberate departure from common law, and that the Constitution itself provided a “precise and efficient”¹¹⁴ framework for a court to inquire into constitutional standing, which inquiry should always have section 38 as starting point.

113 See discussion under par 7.

114 See discussion under par 8.

The judgment by Van der Westhuizen J certainly attested to this and was in all respects consonant with the Constitution.

This undoubtedly augers well for greater legal certainty on the matter of legal standing in constitutional litigation. It has also been demonstrated that much of the incremental development of standing requirements by our courts reflect the proposals made by the SALC in the draft Bill for public interest and class actions, the non-promulgation of which is, as Wallis JA states, lamentable.