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The need and requirements for a class action in South African law with specific reference to the prerequisites for *locus standi in iudicio*

By

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Table of Contents

SUMMARY

This dissertation purports to set out the requirements for *locus standi* in terms of section 38 of the Constitution, specifically when it comes to procuring standing in matters brought by way of a class action. In order to answer the question it is also necessary to look at the need for a class action procedure in the South African civil procedural law as this explains the courts' expansive approach in granting members and representatives standing before a court, specifically in cases where the common law traditional rules of standing and joinder would not suffice.

Locus standi is concerned with the capability of an entity to be a participant in a matter before a court of law, having due regard to the applicability of the point in issue to the person of the litigant and its faculty to litigate. In accordance with common law prescriptions, *locus standi* of prospective litigants to obtain legal relief only accrues to those that have personally suffered harm or would suffer harm through the violation or threatened violation of their legally enforceable rights. In contrast to the above the procedural measures contained in section 38 of the Final Constitution of 1996 allow for representative actions to be brought on behalf of adversely affected parties where the *dominus litis* is not necessarily the violated party as well as the recipient of the fruits of successful adjudication.

Sections 38(c) and (d) of the Final Constitution of 1996 established *inter alia* class actions and public interest litigation by expanding the common law mandated categories of persons capable of instituting legal proceedings.

This dissertation researched the need for a procedural device such as the class action in a specific South African milieu characterised by inopportune social and economic circumstances. The class action is specifically engineered to accommodate large numbers of affected parties that do not need to be joined in

a traditional manner. Judicial recognition of the benefits of the class action from a South African point of view must necessarily take into account the social and economic circumstances of the members in whose favour the procedure are implemented. Apart from the procedural advantages, this particular process provides for a diminishing effect of factors such as low income, lack of legal knowledge, lack of funds for legal assistance and nominal pecuniary claims that prevent litigants from vindicating their rights and approaching the courts single handed.

The requirements for *locus standi* under the constitutional dispensation, with specific reference to the generous judicial approach to matters, specifically where fundamental rights are violated or threatened, were examined. It is submitted that these requirements will be of assistance when the citation of the parties is to be drafted.

In order to institute action in terms of one or more subsections, a prospective litigant need to show that a right enshrined in the Bill of Rights have been encroached upon as well as sufficient interest in the relief sought.

Some aspects related to *locus standi* but not necessary for procurement of standing were researched in order to contextualise the setting for the use of section 38 procedural measures. There are currently no formal requirements that litigating class or group members have to comply with. The lack of statutory regulatory sources has forced South African courts with inherent jurisdiction to create guidelines regarding the practical aspects of class action litigation. Unfortunately the judicial intervention in creating practical directives for prospective and current litigants to follow has not occurred without mishap.

Even though the question of whether the class action procedure is the suitable method to adjudicate the matter does not have a direct bearing on the standing of a party, it is an important aspect to consider when one evaluated possible courses of action. The correct procedure is invaluable when the court is asked

to grant parties leave to litigate in accordance with the class action procedure. From a procedural point of view, the court must assist in directing parties as to the preferred manner to proceed with the matter. It was found that the courts have mistakenly held that compliance with certain unique procedures specific to class actions is necessary in order to procure *locus standi.*

Even though an extended application of section 38(c) is favoured, any consideration thereof must take the express introduction by way of legislation into account that sets out the practical aspects of this mechanism. In the socio–economic state of affairs currently prevailing in South Africa, the high costs of legal assistance, countered with the complexity of procuring state provided legal aid, deters many a plaintiff to obtain civil justice. In this respect it can be said that the adjudicative approach of group action proceedings should accommodate a contextualized social setting. The goal is ultimately to expound a device suited and shaped to accommodate both the legal and extra–curial settings of South Africa.

The need and requirements for a class action in South African law with specific reference to the prerequisites for *locus standi in iudicio*

Chapter 1

Introduction

The perceptions of a society are exhibited in the legal system that is created and modified to function within that particular culture.[1] Whilst the functions and purposes of procedural law are varied, it is commonly accepted that the law of civil procedure is mandated to keep up with societal transformation and is required to adapt accordingly.[2]

The South African constitutional furtherance of civil procedural aspects of the law has been effected through the rights and guarantees enshrined in the Bill of Rights,[3] sections 34[4] and 38[5] of the Final Constitution being of specific

1 De Vos "Reflections on the introduction of a class action in South Africa" 1996 *TSAR* 639 at 655 and 656; Hurter "Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation" 2007 *TSAR* 240 at 240 and 241.

2 De Vos 1996 *TSAR* 639 at 655 and 656; Hurter 2007 *TSAR* 240 at 240 and 241.

3 De Vos "Civil procedural law and the constitution of 1996: an appraisal of procedural guarantees in civil proceedings" 1997 *TSAR* 444 at 445.

4 Section 34 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Final Constitution) provides: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

5 Section 38 of the Final Constitution (hereinafter referred to as section 38): "Enforcements of rights: Anyone listed in this section has the right to approach a competent court, alleging that a right in the bill of rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are – (a) anyone acting in their own interest; (b) anyone acting in behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or on the interest of, a

importance.[6] On par with the wants of the modern South African society,[7] the Interim[8] and Final Constitutions introduced civil mechanisms,[9] foreign to the South African common law,[10] in order to address matters that presented with peculiar procedural difficulties.[11]

In accordance with common law prescriptions, *locus standi* of prospective litigants to obtain legal relief generally only accrues to those who have personally suffered or would suffer harm through the violation or threatened violation of their legally enforceable rights.[12] The legal *personae* whose right(s)

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group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members."

6 De Vos 1997 *TSAR* 444 at 444 and 445 and see 449 where De Vos states that the notion and scope of the right to a fair trial include many other rights deliberately mentioned in the Bill of Rights, rendering the articulation of these rights moot. In this regard see also Rautenbach "General/Introduction to the Bill of Rights" in Naidu *et al* (eds) *Bill of Rights Compendium* (2010) 1A–225 who states that "section 38 is a *lex specialis vis-à-vis* section 34".

7 Hurter "Some thoughts on current developments relating to class actions in South African law as viewed against leading foreign jurisdictions" 2006 *CILSA* 485 at 488: "[C]ivil procedure has always reflected social changes in society, and since the world today requires an innovative civil procedural response to problems created by massafication, many view the class action as the appropriate response."

8 The Interim Constitution of the Republic of South Africa, 1993 (hereinafter referred to as the Interim Constitution).

9 Gericke "Can a class action be instituted for breach of contract?" 2009 *THRHR* 304 at 305. See also Boraine "Die belang van Permanent Secretary, Department of Welfare, EC v Ngxuza 2001 (4) SA 1184 (SCA) met betrekking tot die erkenning en ontwikkeling van klasaksies in die Suid-Afrikaanse reg" (unpublished case note LLM assignment (2002) on file with author) at 1 and 2.

10 Kok "Has the Supreme Court of Appeal recognized a general class action in South African Law?" 2003 *THRHR* 158 at 158.

11 *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at paragraphs 4 and 5. See also Gericke 2009 *THRHR* 304 at 305.

12 Currie & De Waal *The Bill of Rights Handbook* (2005) 80. See also Beck "*Locus standi in iudicio* or *ubi ius ibi remedium*" 1983 *SALJ* 278 at 281.

have been infringed would prospectively need to benefit from the relief claimed from the court.[13]

The procedural measures contained in section 38 were important statutory advancements in procuring *locus standi* for litigants and facilitating access to the courts.[14] The aforementioned section established *inter alia* class actions and public interest litigation by expanding the common law mandated categories of persons capable of instituting legal proceedings.[15] The manner of and motivation for the departure from common law principles are dealt with in chapters two and three.

The need and availability of the class action for prospective litigants are discussed along with a brief consideration of the main aspects of the progression of *locus standi in iudicio* in South Africa.

The debates on the extended application of section 38 to the adjudication of non-constitutional matters[16] are dealt with in chapter 3. The current position only allows for litigation based on rights enshrined in the Bill of Rights.[17] Some writers argue that the internal limitation on the availability of section 38 measures may be construed as applying to all matters unrelated to fundamental

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[13] Hurter "Class action: Failure to comply with guidelines laid down by courts ruled fatal" 2010 *TSAR* 409 at 409 and 410.

[14] Devenish "*Locus standi* revisited: Its historical evolution and present status in terms of section 38 of the South African Constitution" 2005 *De Jure* 28 at 50.

[15] Theophilopoulos *et al Fundamental Principles of Civil Procedure* (2006) 7 and 88. See also *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000 (12) BCLR 1322 (E) at 1337C–E where Froneman J concluded his judgement by stating that "our common law was poorer for not allowing the development of representative or class actions".

[16] Kok 2003 *THRHR* 158 at 162 and 163; Van Loggerenberg & Farlam *Erasmus Superior Court Practice* (2010) A2–5. See also Loots "Standing to enforce fundamental rights" 1994 *SAJHR* 49 at 49 on the application of section 7(4) of the Interim Constitution.

[17] See paragraph 3.3 *infra.*

rights,[18] whilst some argue for a "general class action".[19] Even though this dissertation is mainly concerned with standing in terms of section 38, it must be understood that a definite distinction must be made regarding the availability of class actions in various factual situations regarding fundamental and non-fundamental rights.[20] In the latter case, the common law procedural rules still infuse the mechanisms for judicial adjudication and are the main points of departure where *locus standi* in ordinary litigation is concerned.[21]

Apart from a general discussion of the characteristics and scope of standing in matters concerning fundamental rights, this dissertation also notes the recognised need for a regulated class action in South African law. Furthermore, the impact that the constitutional dispensation has had on the point *in limine litis*[22] of *locus standi*, namely the aspect of standing that a prospective litigant has to consider when civil action is envisaged,[23] is discussed. It is shown that many of the traditional considerations of *locus standi* have been expanded or disposed of in order to facilitate access to courts, albeit limited to specific categories of litigation.[24] Finally, chapter 4 examines the requirements that a prospective litigant has to comply with in order to have *locus standi in iudicio* to bring a class action. It is submitted that the aforementioned will be crucial in establishing standing and will be of assistance when drafting the citation of the parties.[25]

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[18] Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–5.

[19] Kok 2003 *THRHR* 158; Gericke 2009 *THRHR* 304.

[20] See paragraph 3.3 *infra.*

[21] Kok 2003 *THRHR* 158 at 159; Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–4 and A2–5.

[22] Ngcukaitobi "The evolution of standing rules in South Africa and their significance in promoting social justice" 2002 *SAJHR* 590 at 612.

[23] See chapter 2 *infra.*

[24] Devenish 2005 *De Jure* 28 at 50; Ngcukaitobi 2002 *SAJHR* 590 at 612.

[25] Cilliers *et al Herbstein & Van Winsen The Civil Practice of the High Courts in South Africa* (2009) 143.

Chapter 2

The application of the Bill of Rights and common law imperatives to *locus standi in iudicio*

2.1 Introduction
2.2 *Locus standi* and legal capacity in the pre-constitutional era
2.3 *Locus standi* and legal capacity in the post-constitutional era
2.4 Conclusion

2.1 Introduction

Locus standi[1] is generally concerned with the capability of an entity[2] to be a participant in a matter before a court of law, having due regard to the applicability of the point in issue to the person of the litigant and his or her faculty to litigate.[3] The former is regarded as the "interest" that the person has in both the proceedings before the court and the assistance sought through

[1] Theophilopoulos *et al Fundamental Principles of Civil Procedure* (2006) 87 state that the direct linguistic conversion of the phrase "*locus standi in iudicio*" is a "place to stand before a court". See also Cilliers *et al Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (2009) 143.

[2] An individual, juristic person or other entity as specified by legislation. See in this regard the discussion of the *locus standi* of parties in Cilliers *et al Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* from 142.

[3] Bray "*Locus standi* in environmental law" 1989 *CILSA* 33 at 34; Theophilopoulos *et al Fundamental Principles of Civil Procedure* 87 and 88.

judicial intervention[4] whilst the latter entails an individual or juristic person's ability to launch or defend legal actions.[5] An entity needs to claim risk to or violation of an identifiable and protectable right, which risk may be remedied by appropriate legal relief.[6]

All in all, the question is whether the appropriate litigant seeks a remedy from the judiciary.[7] Therefore it can be said that the details of the test for civil *locus standi* concerns a two-stage approach, namely an evaluation of the interest of a party in the litigation at hand as well as his or her legal capacity to enforce or defend claims in a civil court.[8] The discussion below focuses on the general features of *locus standi* in common law and broad constitutional context, even though this dissertation is mainly concerned with class actions as introduced by section 38(c) of the Final Constitution.[9]

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4 Devenish "*Locus standi* revisited: Its historical evolution and present status in terms of section 38 of the South African Constitution" 2005 *De Jure* 28 at 28.

5 Beck "*Locus Standi in Iudicio* or *Ubi Ius Ibi Remedium*" 1983 *SALJ* 278 at 282. See also Devenish 2005 *De Jure* 28 at 28 who only refers to the "right to sue or seek judicial redress".

6 Beck 1983 *SALJ* 278 at 280.

7 Currie & De Waal *The Bill of Rights Handbook* (2005) 80. See also Loots "Standing, Ripeness and Mootness" in Woolman *et al* (eds) *Constitutional Law of South Africa* (2009) 7-2.

8 Theophilopoulos *et al Fundamental Principles of Civil Procedure* 88. Devenish 2005 *De Jure* 28 at 28 and 29 draws a further distinction by stating that the ability to institute civil legal action should be regarded as "the capacity to sue" and the concern of the litigant in applying for a judicial order should be phrased as "*locus standi*", which would engage a query on both the legality of the cause of action and the considerations that warrant a particular litigant to approach the court for relief. See also Beck 1983 *SALJ* 278 who discusses the two elements as "*locus standi* in the first sense" and "*locus standi* in the second sense"respectively.

9 For purposes of this dissertation it should be noted that Cameron JA in *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at paragraph 13 and Van Loggerenberg & Farlam *Erasmus Superior Court Practice* (2010) A2–3 to A2–4 stated that section 7(4) of the Interim Constitution and section 38 of the Final Constitution (the so–called "standing provisions") are analogous and

2.2 *Locus standi* and legal capacity in the pre-constitutional era

At common law and in the pre-constitutional era, the qualified notion of interest[10] and legal capacity had a direct influence on a person's *locus standi*.[11] The litigant seeking judicial assistance had to be "personally adversely affected by the alleged wrong"[12] and no entity without legal capacity, whether it was based in common law or statute, could have proper standing *in iudicio*.[13]

Procedural exceptions were made for persons who lacked the necessary *locus standi* in this regard to be assisted in litigation.[14] Certain categories of persons were unable to enforce their rights or defend legal claims and in the premises intermittent provisions were incorporated into the rules of procedural law in order to facilitate litigation that affected them.[15] These adaptations provide for

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that law developed under the Interim Constitution is relevant to any discussion of its successor.

[10] *Beukes v Krugersdorp Transitional Local Council and Another* 1996 (3) SA 467 (W) at 473B-C.

[11] Theophilopoulos *et al Fundamental Principles of Civil Procedure* 89 to 90.

[12] Currie & De Waal *The Bill of Rights Handbook* 80. The court in *Beukes supra* note 10 at 473B-C specifically stated that "a litigant was in general required to have a direct and substantial interest in the right sought to be enforced". In this regard see also Loots in Woolman *et al* (eds) *Constitutional Law of South Africa* 7–2.

[13] Theophilopoulos *et al Fundamental Principles of Civil Procedure* 89 to 90.

[14] *Idem* 90 to 94; *Highveldridge Residents Concerned Party v Highveldridge TLC and Others* 2003 (1) BCLR 72 (T) at paragraph 19. The lack of legal capacity and subsequent lack of *locus standi* was *inter alia* based on matters such as the specific person's age, as stated by Searle JP in the matter of *Rescue Committee, Dutch Reformed Church v Martheze* 1926 CPD 298 at 299. On the other hand, Bray 1989 *CILSA* 33 at 34 states that "legal capacity" is, like "mental capacity and age", but one aspect to consider when the ability to litigate comes into play.

[15] Theophilopoulos *et al Fundamental Principles of Civil Procedure* 90 to 93. See also Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–17 and A2–19.

the excluded parties to be represented by specified natural persons in order to obtain legal relief.[16]

Representative actions such as the class action provided for by section 38 of the Final Constitution were not allowed at common law or in the pre-constitutional era.[17] A person could only represent another litigant who was remote of the legislative and common law provisions if the other person was or became a co-litigant through the use of a legitimate joinder procedure.[18]

2.3 *Locus standi* and legal capacity in the post-constitutional era

In contrast to the above, the South African judiciary developed trite procedural rules to provide for the widest possible protection in matters concerning chapter two constitutional rights.[19] From the outset it must be noted that the judicial approach to standing in terms of section 38, as well as to the interpretation and application thereof to specific factual situations, was liberal and not unjustifiably qualified.[20]

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[16] Theophilopoulos *et al Fundamental Principles of Civil Procedure* 90 to 93. See this source for a discussion of the various categories of persons that cannot institute litigation by themselves.

[17] Gericke "Can a class action be instituted for breach of contract?" 2009 *THRHR* 304 at 304. This does not include statutory and judicially mandated representative litigation or exceptions already introduced by the common law as discussed by Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–17.

[18] Gericke 2009 *THRHR* 304 at 304; Boraine "Die belang van Permanent Secretary, Department of Welfare, EC v Ngxuza 2001 (4) SA 1184 (SCA) met betrekking tot die erkenning en ontwikkeling van klasaksies in die Suid-Afrikaanse reg" (2002) Unpublished case note LLM assignment on file with author at 13.

[19] *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC) at paragraphs 229 and 231.

[20] *Highveldridge Residents Concerned Party supra* note 14 at paragraphs 13 and 14. See also Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–4 in this regard.

This is in stark contrast with the judicial methodology under the common law[21] and the initial alteration was brought about by the Interim Constitution, as noted by Cameron J in *Beukes v Krugersdorp Transitional Local Council and Another*.[22] In *Highveldridge Residents Concerned Party v Highveldridge TLC and Others*[23] Kruger AJ noted that the limited approach to standing under the common law was the rationale for the broad accommodation of persons and entities with standing in terms of the constitutional provisions and to successfully further the protection of fundamental rights. In accordance with the aforementioned, Currie and De Waal state that the constitutional approach to the furtherance of fundamental rights requires that a relaxed view is taken of traditional notions of standing.[24] Chaskalson P in *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others*[25] held that "[t]his court has adopted a purposive interpretation of the Constitution". In effect, all the traditional and statutory rules on *locus standi* may be disregarded when a factual situation lends itself to the use of section 38 provisions.[26]

This does not mean that the drafters of the Constitution did away with the concept of interest when considering whether a party has standing *in iudicio*, where section 38 mandates *locus standi* for specific litigants based on

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[21] *Highveldridge Residents Concerned Party supra* note 14 at paragraphs 13 and 14; Hurter "Class action: Failure to comply with guidelines laid down by courts ruled fatal" 2010 *TSAR* 409 at 410.

[22] *Supra* note 10 at 473B-E. The court at 474H-I accepted that "no unnecessary restrictions should be placed on the application of section 7(4)(b)(iv) . . . it should be read so as to avoid obstructions on its invocation".

[23] *Supra* note 14 at paragraph 13. See also *Beukes supra* note 10 at 474E-F where the notion of an expanded and unfettered approach to *locus standi* was extended to the attestation of a specific party's standing in a constitutional matter.

[24] *The Bill of Rights Handbook* 80. See also Loots in Woolman *et al* (eds) *Constitutional Law of South Africa* 7–2.

[25] *Supra* note 19 at paragraph 172.

[26] Currie & De Waal *The Bill of Rights Handbook* 81.

constitutionally entrenched fundamental rights.[27] The focus of the enquiry as to interest in the matter is on the individuals that will be affected by the order granted by the court, namely those on whose behalf the provisions of section 38 are implemented.[28] It must be noted that the "sufficient interest" does not need to be that of the representative.[29]

Devenish notes that the concept of interest is not qualified by the Final Constitution for purposes of procuring *locus standi* in terms of section 38(d).[30] Currie and De Waal also state that a precise analysis of "sufficient" has not been properly developed, but that it is assessed with reference to the beneficiary of the procedure in terms of section 38.[31]

This is better explained with reference to the differentiation made by Currie and De Waal between the party with section 38-related standing in a matter, the juristic person in context of their discussion, and the party affected by the infringement that forms the reason for approaching the courts.[32] Whilst a juristic person may litigate in a representative fashion for adjudication of an individual's rights, it does not need to (a) be affected by the infringement or (b) show that it

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[27] *Idem* 84. See also the *dictum* by Blignaut J in *ECAAR South Africa and Another v President of the Republic of South Africa and Others* [2007] 4 All SA 1125 (C) at paragraph 49 where the court stated that the absence of a real or perceived violation of rights directly affected the lack of standing *in iudicio*.

[28] Currie & De Waal *The Bill of Rights Handbook* 84 further discussed from 85 to 91.

[29] *Idem* 84. Beck 1983 *SALJ* 278 at 283 wrote from a common-law perspective regarding the notion of an entitlement to judicial respite as an "interest" in the matter. Beck argues that this point is moot as the only factor to be taken into consideration for approaching a court is the existing "right" that may be protected through legal adjudication. On the other hand, the court in *Ferreira supra* note 19 by Chaskalson P at paragraph 168 stated that section 7(4) of the interim Constitution does not require the individual whose rights have been violated to be the party before the court.

[30] 2005 *De Jure* 28 at 43.

[31] *The Bill of Rights Handbook* 85.

[32] *Idem* 38 and 39. See also Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–16.

can be a bearer of the violated right.[33] In *Beukes v Krugersdorp Transitional Local Council and Another*[34] Cameron J noted the opposing counsel's argument that those represented must have "a direct and substantial interest in the litigation", even though the workings of the Constitution absolve the representative before the court from having a traditional concern in the matter at hand.

In the matter of *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others*[35] Chaskalson P stated that it was the prerogative of the court to rule on the meaning of the term "interest" referred to in section 7(4) of the Interim Constitution. The court thereafter stated that the merits of the matter shed light on the presence or absence of the litigant's "sufficient interest".[36]

In *Highveldridge Residents Concerned Party v Highveldridge TLC and Others*[37] the court considered whether the commion law rules of *locus standi in iudicio* with reference to legal capacity could be harmonised with the expanded version of the Constitution. The matter turned on the *locus standi* of a voluntary association without legal personality or a constitution that mandated it to litigate "in its own name".[38]

Kruger AJ noted that some associations do not have the characteristics of a juristic person but stated that the common law rules must be developed as provided for by section 39 of the Constitution.[39] The court ruled that the

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[33] *The Bill of Rights Handbook* 38 and 39. The discussion involved the application of the provisions of section 8(4): "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person." See further *idem* 36 and 37.

[34] *Supra* note 10 at 473H-I.

[35] *Ferreira supra* note 19 at paragraph 168.

[36] *Ibid.*

[37] *Supra* note 14 at paragraphs 19 and 20.

[38] *Idem* at paragraph 8.

[39] *Idem* at paragraphs 20 and 25.

foundation of the association's standing is section 38 and not the common law considerations.[40] In the premises it was stated that the traditional requirements place an unacceptable confinement on voluntary associations seeking to vindicate fundamental rights.[41]

2.4 Conclusion

Locus standi in iudicio is partly the legally recognised capacity that prospective litigants require in order to appear before the judiciary and to have a matter resolved through legal intervention.[42] It is therefore a point *in limine litis* that both the prospective litigant and presiding officer will have to consider when a matter is brought to court[43] but can also be intricately linked with the merits[44] or "substantial law" applicable to the matter.[45] The enquiry, through an evaluation of the interest and legal personality of the prospective litigant, is mainly concerned with the suitability of the parties to the matter before the court.[46]

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[40] *Idem* at paragraphs 24 and 25. See in this regard the commentary of Loots on the application of Uniform Rule 14 in Woolman *et al* (eds) *Constitutional Law of South Africa* 7–12 to 7–13 and Hurter "Civil and Constitutional Procedure and Jurisdiction" 2007 *ASSAL* 141.

[41] *Highveldridge Residents Concerned Party supra* note 14 at paragraphs 24 and 25. See the discussion by Devenish 2005 *De Jure* 28 at 39, specifically the reference to the deciding point of the presiding officer's judgment, namely the expansion of the common law in order to bring it in line with the character and ideals of chapter two of the constitution. See also Cilliers *et al Herbstein & Van Winsen The Civil Practice in the High Courts of South Africa* (2009) 203 and Harms *Civil Procedure in the Superior Courts* (2010) A–52.

[42] Theophilopoulos *et al Fundamental Principles of Civil Procedure* 87 and 88; paragraph 2.1 *supra*.

[43] Bray 1989 *CILSA* 33 at 34; Ngcukaitobi "The evolution of standing rules in South Africa and their significance in promoting social justice" 2002 *SAJHR* 590 at 612.

[44] Bray 1989 *CILSA* 33 at 34; *ECAAR South Africa and Another supra* note 27 at paragraphs 39 and 49.

[45] Devenish 2005 *De Jure* 28 at 36.

[46] Ngukaitobi 2002 *SAJHR* 590 at 613; Theophilopoulos *et al Fundamental Principles of Civil Procedure* 87 and 88; paragraph 2.1 *supra.*

Even though the judiciary did not demand adherence to the strict traditional rules of standing, this does not mean that *locus standi* has become a term without boundaries.[47] The specific conditions for class actions are discussed in further detail in chapter 4.

The wide interpretation of the application of section 38 has shown a definite disregard for the common law foundations of and rationales for *locus standi.*[48] As is shown below, it seems that the factors for evaluating procedural mechanisms, especially with regard to adjudicating human rights, are not solely based on legal principles but also on constitutional, social and economic considerations.[49]

[47] Currie & De Waal *The Bill of Rights Handbook* 82. See also Harms *Civil Procedure in the Superior Courts* A–51 who quotes case law stating that the boundaries of the subsections of section 38 are yet to be elucidated upon; and Loots in Woolman *et al* (eds) *Constitutional Law of South Africa* 7–4.

[48] Paragraphs 2.2 and 2.3 *supra.*

[49] Gericke 2009 *THRHR* 304 at 305; *Highveldridge Residents Concerned Party supra* note 14 at paragraph 24; paragraph 3.2 *infra*.

Chapter 3

The structured introduction of the class action into the South African law of civil procedure

3.1 Introduction

Prior to the introduction of the Interim Constitution, the class action was not recognised in South African law.[1] The constitutional modification[2] of the "traditional individualistic" nature of the South African law of civil procedure[3] can be seen as an anticipated response to changing societal values.[4] Since the basic incorporation thereof through section 38(c), the call for formal regulatory devices such as legislation, court rules and practice directives for group action

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1 Van Loggerenberg & Farlam *Erasmus Superior Court Practice* (2010) A2–18; Kok "Has the Supreme Court of Appeal recognized a general class action in South African law?" 2003 *THRHR* 158 at 158 and 159.

2 *Ibid.* See also Harms *Civil Procedure in the Superior Courts* (2010) A–51.

3 De Vos "Reflections on the introduction of a class action in South Africa" 1996 *TSAR* 639 at 639 and 655.

4 *Idem* at 655 and 656; Hurter "Seeking truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation" 2007 *TSAR* 240 at 240. Hurter further states at 240 and 241 that "[c]hange cannot be successful if it does not truly reflect society's need and if sight is lost of what we want the role of civil litigation to be".

litigation has become a matured issue.[5] The lack of statutory regulatory sources[6] has forced South African courts with inherent jurisdiction to create guidelines regarding the practical aspects of class action litigation.[7]

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[5] See *inter alia Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000 (12) BCLR 1322 (E) at 1337E-G; The South African Law Commission, Project 88 *The recognition of class actions and public interest actions in South African law* (August 1998) at 11 paragraph 3.1; DeVos "The impact of the new constitution upon civil procedural law" 1995 *Stell LR* 34 at 46 [Interim Constitution]; De Vos 1996 *TSAR* 639 at 641; Hurter "Class action: Failure to comply with guidelines laid down by courts ruled fatal" 2010 *TSAR* 409 at 417; Harms *Civil Procedure in the Superior Courts* A-52; Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–22. See also Cilliers *et al Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* (2009) 199, more specifically at 201 where the authors state that "[a]ppropriate rules of court are necessary for class actions where the claim is monetary in nature, because the outcome of a class action binds all the members of the class". Note that the name of the South African Law Commission was changed to the South African Law Reform Commission by the substitution of various sections in the South African Law Commission Act 19 of 1973, now known as the South African Law Reform Commission Act, by the Judicial Matters Amendment Act 55 of 2002. See further http://0-www.justice.gov.za.innopac.up.ac.za/sa-lrc/about.html and http://0-www.justice.gov.za.innopac.up.ac.za/salrc/docs_gen/1973_19_-South%20African%20Law%20Reform%20Commission%20Act.pdf, visited on 16 November 2010. Reference will be made to the South African Law Commission as this was the name of the Commission at the time of the report of August 1998, Project 88.

[6] Cameron J in *Beukes v Krugersdorp Transitional Local Council and Another* 1996 (3) SA 467 (W) at 473E-H noted that not even the Interim Constitution set out procedures with which a litigant had to comply in order to litigate in terms of section 7(4)(b)(iv), but only the ambit within which the course of action may be implemented, i.e. it must involve "any valid constitutional ground". In fact, the court stated that meticulous compliance with formalities was unnecessary and diverged from the objectives of the Interim Constitution at 474G-I.

[7] *Ngxuza and Others supra* note 5 at 1336I-1337B; 1337E-G and the order from 1337G-1339B; Kok 2003 *THRHR* 158 at 162; Hurter 2010)*TSAR* 409 at 409. See further in this regard De Vos 1995 *Stell LR* 34 at 52 who states that "the introduction of a class action and a public interest action in South African law would also require drastic change on the part of the judiciary. South African judges . . . would have to abandon the passive role traditionally assigned to them, and adopt a more active role in order to exercise the functions of mediators and managers of these complex proceedings". See also Loots "Standing,

Unfortunately the judicial intervention in creating practical directives for prospective and current litigants has not occurred without mishap,[8] especially as the courts had to rely on *ad hoc* directives devised by peer or superior courts,[9] prospective bills as well as foreign models of group litigation for direction.[10] Although the discussion below deals mainly with the position in South Africa, reference to foreign jurisdictions is made on occasion.

3.2 The incentives for the introduction of the class action into South African law

The class action is a procedural method[11] specifically designed to facilitate mass litigation,[12] that is, where a number of prospective litigants' causes of action and the judicial assistance required are substantially the same.[13] This must be clearly contrasted with the position in foreign jurisdictions, where the court may on one distinct occasion be approached by a large number of

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Ripeness and Mootness" in Woolman *et al* (eds) *Constitutional Law of South Africa* (2009) 7–10.

[8] Hurter 2010 *TSAR* 409 at 409 and further. This was foreseen by the South African Law Commission, Project 88 at 15 paragraph 3.4. See also paragraph 4.2.2 *infra* and Harms *Civil Procedure in the Superior Courts* A–52.

[9] Hurter 2010 *TSAR* 409 at 409. See also Cilliers *et al Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* 200.

[10] *Ngxuza and Others supra* note 5 at 1336I-1337B. It is interesting to note that Froneman J also invited the parties to make submission as to the manner in which they would intend to bring this novel matter to its logical conclusion, specifically at 1337A-B. See also Hurter "The class action in South Africa: *Quo vadis*?" 2008 *De Jure* 293 at 294.

[11] De Vos 1996 *TSAR* 639 at 639.

[12] Hurter "Some thoughts on current developments relating to class actions in South African law as viewed against leading foreign jurisdictions" 2006 *CILSA* 485 at 488.

[13] The South African Law Commission, Project 88 at 33 paragraph 5.3.1. In this regard it is important to note the comments of Loots in Woolman *et al* (eds) *Constitutional Law of South Africa* 7–7 where the danger of this procedure is properly set out: "[W]here such a class action fails on the merits, members of the class will be prevented from taking the same issue to court themselves."

personae seeking judicial relief, but based on various individual grounds.[14] In the latter case, even though there is a shared purpose, the parties are linked through conventional procedural methods and not the mechanism of the class action itself.[15]

The South African Law Commission developed a class action as "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 which action is certified as a class action in terms of the act".[16] According to Hurter, the group action proceeding as seen from the procedure utilised in the United States, is a "*procedural device* only".[17]

The procedural incentive for incorporating group action proceedings into South African law is primarily that the phenomenon of group action proceedings is a manifestation of the social need for a mechanism to adjudicate and facilitate mass litigation.[18] It is a course of action to obtain legal relief for "many people in similar circumstances [who] . . . are unable to individually pursue their claims because they are poor, do not have access to lawyers and will have difficulty in obtaining legal aid".[19]

South Africa has followed the global example of introducing measures to advance access to justice in a tangible manner.[20] The judiciary has duly followed suit and expanded the conventional rules of standing accordingly.[21]

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[14] Hurter 2006 *CILSA* 485 at 486.

[15] *Idem* at 486 and 488. See also Hurter 2008 *De Jure* 293 at 293.

[16] The South African Law Commission, Project 88 at 33 paragraph 5.2.7.

[17] Hurter 2006 *CILSA* 485 at 488.

[18] De Vos 1996 *TSAR* 639 at 639 to 640; Gericke "Can a class action be instituted for breach of contract?" 2009 *THRHR* 304 at 305.

[19] *Ngxuza and Others supra* note 5 at 1331A-B.

[20] The South African Law Commission, Project 88 at 2 paragraph 1.2.2; De Bruin "Groepsgedingvoering – die voorstel van die Suid-Afrikaanse Regskommissie vir die sertifisering van 'n groepsgeding" 2003 *JJS* 133 at 134.

The applicability of the courses of action in section 38 is assessed with due regard to the prevailing socio-economic milieu of South Africa.[22] In *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another*;[23] *Permanent Secretary, Department of Welfare, EC v Ngxuza*[24] and *Highveldridge Residents Concerned Party v Highveldridge TLC and Others*[25] the presiding officers motivated their approval of the use of section 38 by referring to the economic deficiency and circumstantial weaknesses of those on whose behalf the litigation was brought.[26] The inability of the prejudiced parties to approach the court is due to social facts such as that they are "emotionally and intellectually unsophisticated and indigent".[27]

Section 38, therefore, grants procedural *locus standi* to new categories of prospective litigants as it states that "[a]nyone listed in this section has the right

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[21] See Chapter 2 *supra.* In this regard it must also be noted that "the law is a scarce resource in South Africa" – see Kok 2003 *THRHR* 158 at 163.

[22] *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at paragraphs 6, 11 and 12.

[23] *Ngxuza and Others supra* note 5 at 1329G-J, 1331A-C and 1337B-G.

[24] *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 22 at paragraphs 6 and 11.

[25] *Highveldridge Residents Concerned Party v Highveldridge TLC and Others* 2003 (1) BCLR 72 (T) at paragraph 27.

[26] See also in this regard the commentary of Devenish "*Locus standi* revisited: Its historical evolution and present status in terms of section 38 of the South African Constitution" 2005 *De Jure* 28 at 37, where the author connects the innovation of the various representative actions provided for in section 38 with the practical enforcement of human rights.

[27] *Ibid*. See in this regard the reference by Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–17 to the position in India in respect of the impact that of the lack of economic resources and communal disfavour have on judicial accessibility.

to approach a competent court".[28] The idea is that these measures will facilitate access to justice for those prejudiced by human rights violations.[29]

Hurter is of the opinion that the availability of a measure that facilitates litigation for a large number of participants will not necessarily improve access to judicial recourse.[30]

With specific reference to the *lacunae* filled by class actions regarding access to the courts, Van Loggerenberg and Farlam reflect on the barrier that the common law and court rules pose to prospective litigants, namely that it "only cover[s] parties with a legal interest in the subject-matter of the litigation".[31] They discuss this legal loophole that allowed administrations to avoid accountability under certain circumstances where there was notable collective harm but not necessarily adequate personal detriment.[32] Another deficiency is that the measures provided for in legislation and rules of court were only beneficial for specified litigants with specific causes of action arising from legislation.[33]

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[28] Section 38 of the Final Constitution; *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC) at paragraph 229. De Vos "Development in South African procedural law over the last fifty years" 2000 *Stell LR* 343 at 354 and 356.

[29] Hurter 2006 *CILSA* 485 at 503. See also De Bruin 2003 *JJS* 133 at 134 who states that the reality of a right is very much dependent on the existence of a procedural device to enforce it.

[30] Hurter 2006 *CILSA* 485 at 501. At 503 Hurter notes that the lack of legislation mandating class actions based on non–constitutional litigation is a constriction on standing.

[31] Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–18.

[32] *Idem* A2–18 and A2–19.

[33] *Idem* A2–19. De Bruin 2003 *JJS* 133 at 135 holds the view that the class action is not solely intended to facilitate access to courts. He notes that this action is in essence a means to adjudicate group rights. See in this regard the commentary of Malan "Perspektief op die regsbeskerming van kollektiwiteite" 2003 *THRHR* 67 and Malan "The deficiency of individual rights and the quest for community protection" 2008 *THRHR* 415 on the status of collective rights in South Africa.

In the socio-economic state of affairs currently prevailing in South Africa, the high costs of legal assistance and the complexity of procuring state provided legal aid, deter many a plaintiff from obtaining civil justice.[34] In this respect it can be said that the adjudicative approach of group action proceedings should accommodate a contextualised social setting.[35]

The distinguishing feature of class actions is the large number of parties that have a similar *causa* to litigate.[36] The traditional individualistic approach would result in multiple solitary actions against the defendant, matters joined by way of rule 10-joinder or being heard one by one in a court of law.[37] Though solitary actions are still optional (for example if a party opts out of participation in the class action[38]), the procedure would probably be less efficient than section 38 class action proceedings.[39] Hurter explains that "it would result in a repetition of actions with attendant wasted costs and overburdened court rolls, as well as inconsistent judgments which create legal uncertainty and even unfairness to parties".[40]

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[34] Gericke 2009 *THRHR* 304 at 305; *Highveldridge Residents Concerned Party supra* note 25 at paragraph 14.

[35] *Ngxuza and Others supra* note 5 at 1327H-J and 1329I-J. Froneman J at 1327I-J stated: "In my view it is necessary in this case, because of the *relatively new legal position* and *the changed social context* in which it is to be applied, to be open about one's own views of that context" [own emphasis]. See also Hurter 2007 *TSAR* 240 at 241 who states that "civil procedural law becomes the social instrument for the attainment of justice, and while justice cannot be perfect, a system of procedure must be just, that is, decisions that are arrived at must be correct in fact and law but must also protect the rights of the ordinary people. This is important since society's confidence in a particular system is the basis for the legitimacy of the courts and it enables the courts to rely on voluntary compliance with decisions."

[36] De Vos 1995 *Stell LR* 34 at 46.

[37] *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 22 at paragraph 4.

[38] De Vos 1996 *TSAR* 639 at 646.

[39] The South African Law Commission, Project 88 at 41 paragraph 5.6.5 – this is also one of the criteria that a court faced with a certification application will have to consider. See also Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–19 where reference is made to a discerning factor, namely the magnitude of the participants to a class action.

[40] Hurter 2006 *CILSA* 485 at 487.

Apart from the abovementioned point of departure that advances judicial prospects, a litigant-based approach would entail that private persons who suffer marginal damages could effectively approach the courts.[41] The separate quantifiable claims would be disproportionate to the expenses of litigation, rendering the pursuit of potential successful actions uneconomical.[42] In this regard the class action is tailor-made for multiple small claims to be brought as a combined and substantial claim.[43] An inequity furthered by civil litigation is the adverse distribution of power between litigants, be it between natural and juristic legal subjects or simply an inequality based on knowledge and finances.[44]

Whilst section 38 of the Final Constitution that governs the *locus standi* of a party approaching a court of law firmly establishes the notion of a class action,[45]

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[41] De Vos 1996 *TSAR* 639 at 655; Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–19. In this regard it must be clarified what can be inferred from the term marginal damages: Van Loggerenberg and Farlam at A2–19 refer to "the impact of the wrong on those interests". Cameron JA in *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 22 at paragraphs 5, 11 and 14 referred to the subject matter of the claims in a fiscal sense.

[42] *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 22 at paragraphs 5 and 14; Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–19.

[43] *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 22 at paragraphs 5 and 14; De Vos 1996 *TSAR* 639 at 645 and 655.

[44] *Ibid.* De Vos 1996 *TSAR* 639 at 655 notes that "[class actions] are a stabilizing factor in society because they provide an opportunity for voicing mass grievances in an orderly fashion . . . [and] an antidote to the social frustration which is inevitable when neither administrative agencies nor courts are able to protect the rights of citizens". It is interesting to note that Cameron JA in *Permanent Secretary* at paragraph 5 mentioned that the recurrent use of class actions in the United States of America has to do with "the complexity of modern social structures and the attendant costs of legal proceedings: 'Modern society seems increasingly to expose men to such group injuries which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive'".

[45] Ngcukaitobi "The evolution of standing rules in South Africa and their significance in promoting social justice" 2002 *SAJHR* 590 at 605. The applicable part of section 38 of the

the Uniform Rules of Court still provide for the traditional manner of joinder of parties and causes of action in terms of Rule 10.[46] The interrelation between these procedures were aptly summarised by the court in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*:[47] "Thus while the necessity for group action through joinder clearly exists, the conditions for it do not . . . What is needed, then, is something over and above the possibility of joinder."

As a class action is not a run of the mill procedure,[48] the use thereof is limited to the occurrence of a specific set of evaluated facts as determined by the court.[49] According to the courts, there are scenarios that are adequately suited for group action proceedings, especially when the socio-economic dispensation in South Africa is taken into account.[50] The extreme disproportion between the monthly

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Final Constitution provides as follows: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are . . . (c) anyone acting as a member of, or in the interest of, a group or class of persons."

46 Rule 10(1) of the Uniform Rules of Court is of specific interest here and provides as follows: "Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one actions against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of persons proposing to join as plaintiffs depends on the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing."

47 S*upra* note 22 at paragraph 4.

48 *Idem* at paragraph 22.

49 *Idem* at paragraph 16. See also Kok 2003 *THRHR* 158 at 163 who lists the elements that need to be present for a class action to be brought in accordance with the propositions of the South African Law Commission's Project 88: "(a) there is an identifiable class of persons; (b) a cause of action is disclosed; (c) there are issues of fact and law which are common to the class; (d) a suitable representative is available; (e) the interests of justice so requires; and (f) the class action as the appropriate method of proceeding with the action."

50 *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 22 at paragraph 11.

income of the prospective class members and the pecuniary value of their respective claims and legal fees were mentioned in order to substantiate the request to approach the court by way of group action.[51]

There are no formal legislative descriptions of the elements of the class action[52] and in order to fully grasp the context in which the class action is to function, one must have due regard to foreign models.[53] Most foreign jurisdictions have developed the procedural remedy of the group action proceeding to the point where it is regulated by legislation and rules of court.[54] De Vos describes the class action in accordance with the American trend as "a procedural device that

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[51] *Idem* at paragraphs 11, 12 and 14.

[52] Hurter 2006 *CILSA* 485 at 486 footnote 5. The interpretative South African law on group action proceedings is limited to case law (specifically *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 22) and draft legislation on public interest and class actions by the South African Law Commission, Project 88. See also the recommendations to prospective litigants by Hurter 2010 *TSAR* 406 at 417.

[53] *Ngxuza and Others supra* note 5 at 1331C-G and 1336I-1337B. In this regard Hurter 2006 *CILSA* 485 at 503 warns that foreign models cannot be used without proper recognition of the non–legal aspects that influence the procedures in both foreign and local jurisdictions. See the examples of comparative notes on class actions by The South African Law Commission Project 88; Hurter "Certification: the procedure, its role in class action proceedings in Ontario and the proposed South African certification procedure" 2000 *CILSA* 42; De Bruin 2003 *JJS* 133; Hurter 2006 *CILSA* 485. It is beyond the scope of this dissertation to engage in a complete comparative study. Hurter 2006 *CILSA* 485 at 500 to 501 further warns of incorporating foreign customs into practice through judicial prescriptions as it may not have the apposite result. The author notes that the intricate rules on American class actions have resulted in multiple technical litigation and suggests that this should be avoided as far as possible. It is submitted that this approach is sensible, specifically in the South African social context.

[54] Examples of foreign provisions are rule 23 of the Federal Rules of Civil Procedure (USA) (see Clermont *Concise Hornbooks Principles of Civil Procedure* (2005) from 387) and the Ontario Class Proceedings Act of 1992 (see Hurter 2000 *CILSA* 42). For a discussion of the European development of the class action see Hurter 2010 *TSAR* 409, specifically 413 to 416 and Hurter 2008 *De Jure* 293, specifically 294 to 300.

enables a large group of people, whose rights have been similarly infringed by a wrongdoer, to sue the defendant as a collective entity".[55]

3.3 The scope of section 38 with regard to the cause of action

In this regard it should be noted that there is an ongoing legal debate on the applicability of the section pertaining to class actions to non-constitutional matters.[56] This aspect does not have a bearing on the *personae* before the court, but the appropriateness of bringing the subject matter to the judiciary by way of a chosen procedure.[57] The question posed is whether section 38 and relevant case law can be extended to find application to the adjudication of non-constitutional matters.[58] Some writers argue that the internal limitation on the

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[55] De Vos 1996 *TSAR* 639 at 639.

[56] See in this regard De Vos 1995 *Stell LR* 34 at 46; Kok 2003 *THRHR* 158; Hurter 2006 CILSA 485; Gericke 2009 *THRHR* 304; Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–5. The discussion in this regard will centre on the applicability of section 38(c) to litigation not related to Bill of Rights litigation, as there are similar legislative provisions in other spheres of the law. For example, in *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and others* [2004] 1 All SA 636 (E) the court refers to section 32(1) of the National Environmental Management Act 107 of 1998, which has a provision similar to section 38: "32. Legal standing to enforce environmental laws (1) Any person *or group of persons* may seek appropriate relief (my emphasis) in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources – (a) in that person's or group of person's own interest; (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings; *(c) in the interest of or on behalf of a group or class of persons whose interests are affected;* (d) in the public interest; and (e) in the interest of protecting the environment" (my emphasis). See also the similar wording of section 4 of the Consumer Protection Act 68 of 2008.

[57] Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–5; Ngcukaitobi 2002 *SAJHR* 590 at 612 and 613.

[58] Kok 2003 *THRHR* 158 at 160 to 163; Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–5. De Vos 1995 *Stell LR* 34 at 46 recommends the same with regard to

availability of section 38 measures may be construed as applying to all matters unrelated to fundamental rights.[59] Hurter clearly states that the absence of the violation of a fundamental right renders the procedural remedies in section 38 inapplicable.[60] In the latter case, the common law procedural rules still infuse the mechanisms for judicial adjudication and are the main points of departure where *locus standi* in ordinary litigation is concerned.[61]

Kok bases the argument on the extended application of the class action to non-constitutional litigation on the absence of a defined fundamental right in the judgment of Cameron JA in *Permanent Secretary, Department of Welfare, Eastern Cape.*[62] In contrast, Hurter is of the opinion that the court would have expanded the application of section 38 explicitly if it intended to do so.[63] According to Van Loggerenberg and Farlam, the judiciary still leans towards a traditional narrow approach when confronted with matters not related to fundamental Chapter 2 rights.[64]

The South African Law Commission moved towards recognising a class action pertaining to any civil matter.[65] According to the Commission, the person currently approaching a court for legal relief not based on a violation of a

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class actions and states that the Interim Constitution provides for "an unrestricted public interest action to enforce any entrenched right".

59 Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–5.

60 Hurter 2010 *TSAR* 409 at 412. See also Loots in Woolman *et al* (eds) *Constitutional Law of South Africa* 7–13 and 7–14.

61 Kok 2003 THRHR 158 at 159; Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–4 and A2–5. See also Loots in Woolman *et al* (eds) *Constitutional Law of South Africa* 7–13.

62 Kok 2003 *THRHR* 158 at 161. This author also advances further arguments to the same effect.

63 Hurter 2006 *CILSA* 485 at 501 and 502.

64 Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–4. See *contra* the recommendation regarding associations made by Loots in Woolman *et al* (eds) *Constitutional Law of South Africa* 7–14 .

65 The South African Law Commission, Project 88 at 13 paragraph 3.3.3.

fundamental right still has to prove a common law interest in the matter at hand.[66] The call for a so-called "general class action" is *inter alia* based on the argument that a need exists for group action proceedings beyond the exclusive range of protection of fundamental rights.[67] A similar consideration is the improved recourse to judicial intervention[68] in the light of the social settings and daunting economic circumstances of people living in South Africa.[69]

In the absence of legislation other than the primary source of the class action, namely the Final Constitution, the limited number of cases brought by way of group action litigation concerned fundamental rights.[70] In *Beukes v Krugersdorp Transitional Local Council and Another*[71] Cameron J acknowledged that the tacit fundamental value of non-discrimination could be discerned from the documentation before the court.

It is also interesting to note the court's reliance on the *dictum* in *Ferreira v Levin NO and Others*,[72] specifically the reference that the adapted line of standing "would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled". This is further substantiated by Cameron J's conclusion that the aforementioned methodology of a tolerance towards

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66 *Idem* at 12 paragraph 3.2.1.

67 Gericke 2009 *THRHR* 304 at 310.

68 *Idem* at 315. The author mentions that the class action may very well be the sole opportunity for adjudication available to some persons.

69 De Vos "Civil procedural law and the constitution of 1996: an appraisal of procedural guarantess in civil proceedings" 1997 *TSAR* 444 at 452.

70 See *inter alia Beukes supra* note 6 (unfair discrimination); *Ngxuza and Others supra* note 5; *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 22 (social security/ unfair administrative practice). The matter in *Firstrand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 (2) SA 592 (C) at paragraphs 24 to 25 was rejected since no fundamental right was infringed. See also Loots in Woolman *et al* (eds) *Constitutional Law of South Africa* 7–8 to 7–10.

71 *Supra* note 6 at 474A-C.

72 *Idem* at 474D-E.

locus standi is applicable to the whole of the judiciary "called upon to adjudicate *constitutional claims*".[73]

The line of reasoning followed by O'Regan J in *Ferreira v Levin NO and Others*[74] in interpreting the scope of section 7(4) of the Interim Constitution centres on the function of the judiciary within a specific setting, more specifically a milieu changed by the Constitution. Again, even though the aforementioned case did not evolve around class actions *per se*, it summarises the court's approach to standing concisely: In the light of the changes wrought by the Constitution, the rules that governed *locus standi* prior to the introduction thereof should not be applied "in constitutional matters".[75] Traverso DJP clearly stated in *Firstrand Bank Ltd v Chaucer Publications (Pty) Ltd*[76] that the primary consideration when confronted with a class action is whether a fundamental right is under siege. In the premises, the court refused to allow standing due to *inter alia* the lack of infringement of the right to privacy.[77]

3.4 Conclusion

Gericke argues that the "recognition of the constitutional principles and values . . . will ensure that everyone may be afforded their day in court".[78] A charitable judicial approach to matters relating to standing has erupted in

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[73] *Idem* at 474E (my emphasis).

[74] *Ferreira supra* note 28 at paragraph 230. Devenish 2005 *De Jure* 28 at 41 concisely states that the Constitution has a particular framework in which it functions and accordingly influences the South African society. This adapted social milieu is to be the guideline when the Constitution is elucidated and put into practice.

[75] *Ibid*.

[76] *Supra* note 70 at paragraph 24.

[77] *Idem* at paragraphs 24 and 25; Hurter 2010 *TSAR* 409 at 412. The court further substantiated its approach by stating that this had a direct influence on the choice of procedure, resulting in the class action being the inappropriate procedural device in this instance – see Hurter 2010 *TSAR* 409 at 412.

[78] Gericke 2009 *THRHR* 304 at 315.

matters concerning the rights enshrined in the Bill of Rights[79] and even though there is talk of a general class action,[80] matters not concerning fundamental rights are still adjudicated in accordance with the common law principles of standing.[81] The particular socio-economic milieu in which the Constitution is purported to function, dictates the extent to which the courts are to put new procedural remedies into practice.[82] Whilst the Interim and Final Constitutions established class actions as formal relief in the South African law, litigants have to seek practical guidance from the judiciary in these matters.[83]

In light of the clear and concise wording of section 38 regarding the scope of the section and the diverse approaches of the judiciary to standing in ordinary and constitutional matters, it is difficult to see how a class action of general application can be acknowledged under the current applicable law.[84] Even though an extended application of section 38(c) is favoured,[85] any consideration thereof must take into account[86] the practical aspects of this mechanism expressly introduction by way of legislation.[87] The goal is ultimately to expound a device suited and shaped to accommodate both the legal and extra-curial settings of South Africa.[88]

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79 *Ferreira supra* note 70 at paragraph 229.

80 See paragraph 3.3 *supra.*

81 Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–4.

82 Hurter 2006 *CILSA* 485 at 492 and 493.

83 Hurter 2010 *TSAR* 409 at 409 and 417.

84 See paragraph 3.3 *supra*.

85 De Vos 1995 *Stell LR* 34 at 46; Hurter 2006 *CILSA* 485 at 503.

86 The South African Law Commission, Project 88 at 13 paragraph 3.3.3; Hurter 2006 *CILSA* 485 at 503.

87 De Vos 1995 *Stell LR* 34 at 46; Hurter 2006 *CILSA* 485 at 503.

88 Hurter 2006 *CILSA* 485 at 503.

Chapter 4

The requirements for *locus standi in iudicio* in class actions

4.1 Introduction

Subsections 38(c) to (e) of the Final Constitution provide for representative actions[1] to be brought on behalf of a number of individuals, be it members of a group affected by a particular event, members of the public or members of an association.[2] The class action discussed below shows a distinct departure from

[1] De Vos "The impact of the new constitution upon civil procedural law" 1995 *Stell LR* 34 at 46; Van Loggerenberg & Farlam *Erasmus Superior Court Practice* (2010) A2–21. See also Harms *Civil Procedure in the Superior Courts* (2010) A–51 and A–52.

[2] Section 38 of the Final Constitution provides as follows: "Enforcements of rights: Anyone listed in this section has the right to approach a competent court, alleging that a right in the bill of rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are – (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act

common law private litigation where the *dominus litis* was the prejudiced party as well as the recipient of the fruits of successful adjudication.[3]

Subsections (c) and (d) are closely linked and a prospective litigant must take various factors into account when deciding on a suitable method of approaching a court for relief in a representative manner.[4] From the onset it has to be noted that the chosen procedure will dictate the threshold that the *dominus litis* will have to cross in order to prove that he or she has the necessary *locus standi* to approach the court in this particular manner.[5]

Choosing the correct procedure is not always straightforward as section 38 does not provide guidelines for its application.[6] Some of the methods provided for in section 38 are relatively new forms of representative litigation[7] and there are issues that may be brought to court by way of any of these procedures.[8] In the

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in their own name; (c) anyone acting as a member of, or on the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members."

3 *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC) at paragraph 229.

4 Paragraph 4.2.4 *infra*; Currie & De Waal *The Bill of Rights Handbook* (2005) 85 to 91. It is beyond the scope of the research to look at the interrelationship between the different subsections. For further information on this aspect, see Loots "Standing, Ripeness and Mootness" in Woolman *et al* (eds) *Constitutional Law of South Africa* (2009) from 7–4.

5 Devenish "*Locus standi* revisited: Its historical evolution and present status in terms of section 38 of the South African Constitution" 2005 *De Jure* 28 at 38; *Ferreira supra* note 3 at paragraph 231.

6 *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000 (12) BCLR 1322 (E) at 1328C-D. Loots in Woolman *et al* (eds) *Constitutional Law of South Africa* 7–6, states for example that many litigants wrongly consider subsections 38(b) and (c) of the Final Constitution to be mutually exclusive in that the inability to litigate is transferred to members of a group or class: Section 38(b) and (c) may both be applicable to a single factual scenario.

7 *Ngxuza and Others supra* note 6 at 1327B-C and 1328F-G.

8 Gericke "Can a class action be instituted for breach of contract?" 2009 *THRHR* 304 at 306. See also *Ngxuza and Others supra* note 6 at 1333B-E, where Froneman J acknowledges

absence of statutory regulation, guidance is needed from the courts with regard to the appropriate course to follow.[9] An example is *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another*[10] where the initial action was instituted in terms of sections 38(b), (c) and (d) because the matter could be adjudicated either way.

The South African Law Commission proposed that, from a procedural point of view, class actions and public interest actions should be kept apart.[11] Absent class action members are obliged to abide by the order of the court whilst orders made in public interest litigation are not binding on the represented section of the public.[12] On the other hand, the Commission understood that from a contextual point of view, the substance of the issues may involve private individuals as well as the public sector.[13] This would cause several kinds of prospective litigants to have *locus standi* in terms of sections 38(c) and (d), resulting in both procedures being eligible for use.[14]

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standing in terms of section 3(b), (c) and (d) and *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at paragraph 2, where Cameron J states that the final decision was to proceed with a class action.

9 *Ngxuza and Others supra* note 6 at 1328C-D and 1337E-G.

10 *Idem* at 1333B-E. See also *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 8 at paragraphs 1 and 2 and *ECAAR South Africa and Another v President of the Republic of South Africa and Others* [2007] 4 All SA 1125 (C) at paragraphs 3 and 36.

11 The South African Law Commission, Project 88 *The recognition of class actions and public interest actions in South African law* (August 1998) at V (introduction) paragraph 2 and 8 paragraph 2.4.4.

12 *Ibid*.

13 *Idem* at 7 paragraph 2.4.1. Gericke 2009 *THRHR* 304 at 306 mentions a situation where a class action and a public interest action can be instituted on the same set of facts. In *Highveldridge Residents Concerned Party Highveldridge TLC and Others* 2003 (1) BCLR 72 (T) at paragraph 26 counsel advanced an argument where the matter at hand could be adjudicated as either a class action under section 38(c) or as an action brought by an association on behalf of its members under section 38(d). The court reserved a final opinion but also stated that the matter could be brought under section 38(b) as well.

14 *Ibid.*

The general setting of section 38 and its correlation with the common law regarding *locus standi* were discussed earlier.[15] In the premises, the focus below is on the specific procedural requirements for standing *in iudicio* in terms of section 38(c), as the area of class actions has many aspects and it is practically impossible to discuss them all within the scope of this dissertation.

For comparative purposes brief reference is made to the other subsections of section 38 as well as to correlating procedures in foreign jurisdictions. The rationale specific to the procedure under discussion is considered in order to contextualise the setting for *locus standi.* Unlike under the pre-constitutional dispensation, the courts must now constantly interpret and develop the law in accordance with the principles and ideals of the Bill of Rights.[16] This approach influenced the extent to which section 38 procedures were able to secure relief for litigants in a specific socio-economic milieu.[17]

4.2 Section 38(c): The procedural aspects of the class action

4.2.1 Introduction

As mentioned above the courts have developed practical directives pertaining to class actions[18] as the constitutional development of standing *in iudicio* resulted in difficulties for the judiciary in that the common law provisions were inadequate to regulate practical aspects of such litigation.[19] The lack of legislation[20] in this

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[15] See Chapter 2 *supra*.

[16] Devenish 2005 *De Jure* 28 at 39; section 39 of the Final Constitution.

[17] *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 8 specifically at paragraphs 11 to 13; *Ngxuza and Others supra* note 6 at 1323E-F and 1337D-F.

[18] Hurter "Class action: Failure to comply with guidelines laid down by courts ruled fatal" 2010 *TSAR* 409 at 409 and 417.

[19] *Ngxuza and Others supra* note 6 at 1337C-G.

regard must yet again be noted with reference to foreign provisions: In the United States, for example, a procedure dealing specifically with class actions for unincorporated associations has been developed as Rule 23.2 of the Federal Rules of Civil Procedure.[21] The gist of the discussion below focuses on procedural aspects relevant to standing.

4.2.2 Procuring standing in terms of section 38(c)

Van Loggerenberg and Farlam contend that the scope of section 38(c) is diverse: It allows for "representative proceedings" in the sense of litigation brought by a person removed from the cause of action and affected parties, as well as litigation instituted and managed by a person similarly affected than those of the defined group members.[22] It must, however, be kept in mind that the ability of a group member to institute action is not a factor in determining whether a representative, who has not suffered harm in the same sense that the class members have, may approach the court for relief.[23]

Two types of litigants who may approach the court are distinguished by the interest that the party has in the proceedings.[24] The litigants initiating and running the class action can either be a part of the defined group of adversely

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[20] *Ibid.* See in this regard *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 8 at paragraph 12 where Cameron JA stated that "[t]hough expressly creating that action the Constitution does not state how it is to be developed and implemented".

[21] Clermont *Concise Hornbooks Principles of Civil Procedure* (2005) from 387, but specifically at 392. See also Hurter "Civil and Constitutional Procedure and Jurisdiction" 2008 *ASSAL* at 139 and 140 who notes that the lack of uniform rules has resulted in the erroneous application of precedents.

[22] Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–20 and A2–21. See also Hurter 2010 *TSAR* 409 at 410 and Loots in Woolman *et al* (eds) *Constitutional Law of South Africa* (2009) 7–7.

[23] Hurter 2010 *TSAR* 409 at 412.

[24] Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–20 to A 2–22.

affected persons or represent the class members without qualifying as a class member.[25]

In respect of the matter of "interest" that comes into play, Van Loggerenberg and Farlam state that persons affiliated with the class do not have to allege "a legally recognized interest in the subject matter of the litigation" but that a "mutual interest" will suffice.[26] The representative party, according to these authors, must also show a dissimilar form of interest such as a moral obligation instead of a fiscal benefit.[27] Even though this dissertation is mainly concerned with *locus standi* in terms of section 38(c), another aspect to be considered when deciding between constitutional and traditional forms of action is the multiplicity of members of the class.[28] It can logically be deducted that the large number of group members could be the instigating factor for the class action.[29]

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[25] *Idem* A2–21. See in this regard also Loots in Woolman *et al* (eds) *Constitutional Law of South Africa* 7–4 who states that "[i]n *Van Rooyen & Others v The State Others*, Southwood J extended the reasoning in *Ferreira* to support the proposition that FC s 38 confers practically unlimited *locus standi in judicio* and that no limit is placed on the manner in which persons may approach the court". See in this regard Hurter "The class action in South Africa: *Quo vadis*?" 2008 *De Jure* 293 at 301 who states that there are currently no special legal criterion that the party litigating on behalf of others must adhere to in order to have *locus standi*.

[26] Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–21 to A2–22.

[27] *Idem* A2–21. For comparative and contextual purposes see A2–16. According to the authors, even though a party acting in terms of section 38(a) does not have to suffer a fundamental rights violation, he or she must allege "a sufficient interest in obtaining the remedy sought." This "sufficient interest" is defined as "any interest . . . which, at common law requires the joinder of a party". Ngcukaitobi "The evolution of standing rules in South Africa and their significance in promoting social justice" 2002 *SAJHR* 590 at 604 and 605 states that this "interest" relates to the person of the litigant and the relief sought, for example a person litigating as a trustee will be allowed standing in terms of section 38(a).

[28] The South African Law Commission, Project 88 at 41 paragraph 5.6.5.

[29] *Ibid*. The Commission proposes a numerical threshold to distinguish between the use of group proceedings and traditional methods of joinder: The relevant consideration will be the appropriateness of either procedure in relation to the matter before the court. This criterion presupposes knowledge of the purpose of group proceedings, i.e. to provide a measure

De Vos describes the inadequacies of safeguards under the conventional civil system with reference to "protection of collective interests".[30]

Locus standi is also a "factual question"[31] and the consideration thereof has now been influenced by a threshold of constitutionally prescribed assessments.[32] This introduces considerations regarding fundamental rights into the deliberation of the presiding officer.[33] The days of exclusive individualistic procedures dominating the field of civil litigation[34] have been replaced by a constitutional dispensation that acknowledges representative litigation.[35]

The *nexus* between the matter before the court and the rights enshrined in the Bill of Rights must be alleged by the party relying on section 38 as the basis for standing.[36] The judiciary has not specified the threshold of detail needed in class action proceedings to establish standing with regard to the alleged impairment of a fundamental right.[37] It has been suggested that information regarding the adversely affected parties do not need to be specifically provided, but that objective notice may be taken of an infringement.[38] On the other hand,

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when the customary procedure is not workable. See in this regard the South African Law Commission, Project 88 at 48 to 49 paragraphs 5.6.23 to 5.6.26].

30 De Vos "Reflections on the introduction of a class action in South Africa" 1996 *TSAR* 639 at 641.

31 *Ferreira supra* note 3 at paragraph 231. At the same time the court stated that "the facts necessary to establish standing should appear from the record before the court". See also paragraph 2.1 *supra.*

32 Ngcukaitobi "The evolution of standing rules in South Africa and their significance in promoting social justice" 2002 *SAJHR* 590 at 590 and 591. See also the full argument in this regard from 590 to 613.

33 *Ibid.*

34 De Vos 1996 *TSAR* 639 at 639 and 655.

35 *Ibid*; De Vos "The impact of the new Constitution upon civil procedural law" 1995 *Stell LR* 34 at 46; Van Loggerenberg & Farlam *Erasmus Superior Court Practice* (2010) A2–21.

36 Currie & De Waal *The Bill of Rights Handbook* 85.

37 Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–5.

38 *Idem* A2–5 to A2–6. See also Rautenbach "General/Introduction to the Bill of Rights" in Naidu *et al* (eds) *Bill of Rights Compendium* (2010) 1A–227 and 1A–228 pertaining to

in *Beukes v Krugersdorp Transitional Local Council and Another*[39] it was submitted in argument that a determination of the affected parties constituting the group or class is essential in order to establish their interest in the matter. The court also acknowledged that the Interim Constitution did not provide guidelines as to the formal requirements that litigating class or group members had to comply with.[40] In line with the framework of the Constitution, procedural requirements should not be unnecessarily qualified and the same applies to matters of an evidentiary nature.[41]

In order to rely on section 38, it is necessary to provide evidence regarding the violation or potential violation of a right.[42] The litigant alleging that a fundamental right is endangered must, however, provide sufficient information to clarify that the foundation of its reliance of section 38 is a fundamental right.[43]

It must, however, be kept in mind that even though the number of litigants is an important consideration when opting for a class action, other factual and legal aspects must be present in order to proceed as such.[44] This does not necessarily have a bearing on the *locus standi* of litigants in terms of section 38, but whether the class action is correctly implemented.[45] Currie and De Waal

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subsection 38(d): "[T]hey [the persons who approach a court] need only to allege that 'objectively speaking', the challenged rule or conduct is in breach of a right in the Bill of Rights, because objectively speaking the public will ordinarily have an interest in the infringement of rights generally, not particularly."

39 1996 (3) SA 467 (W) at 473H-J.

40 *Beukes supra* note 39 at 473E-F.

41 *Idem* at 474E-I.

42 Currie & De Waal *The Bill of Rights Handbook* 85.

43 *Ibid.*

44 The South African Law Commission, Project 88 at 40 and 41 paragraph 5.6, specifically at 5.6.1 to 5.6.3. This is referred to as "the criteria for certification", see also 40 to 41 paragraph 5.6.2 and 49 paragraph 5.6.27.

45 Hurter 2010 *TSAR* 409 at 412 to 413.

state that standing in terms of section 38 does not guarantee success in the action.[46]

It is interesting to note that the courts have held that compliance with certain unique procedures specific to class actions is necessary in order to procure *locus standi*.[47] The court in *Firstrand Bank Ltd v Chaucer Publications (Pty) Ltd*[48] held that the formalities prescribed in relevant case law had a direct bearing on a litigant's *locus standi*. Traverso DJP ruled that preliminary non-compliance, such as not notifying interested parties of the pending litigation, precluded standing in the particular matter.[49] Hurter argues that the judge wrongly required prior notification to affected members.[50] The procedural prescriptions were intended to find application only after permission had been granted to proceed with the matter as a class action.[51] The lack of *locus standi* cannot be based on non-compliance with these formalities.[52] It is submitted that the criticism against the judicial integration of the concept of standing and the formalities of the class action is sound.[53]

The procedures incorporated through subsections (c) and (d) are the main changes brought about by section 38, specifically in relation to the conventional South African milieu.[54] For comparative purposes, there is a brief discussion

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46 *The Bill of Rights Handbook* 85.

47 *Firstrand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 (2) SA 592 (C) at paragraphs 26 to 29; Hurter 2010 *TSAR* 409 at 412 and 413.

48 *Supra* note 47 at paragraph 26 to 29.

49 *Ibid.*

50 2010 *TSAR* 409 at 413.

51 *Ibid.*

52 *Idem* at 412 and 413.

53 *Ibid.* See also Hurter 2008 *ASSAL* 140. Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–23 are of the opinion that a litigant would be precluded from instituting action in terms of a class action if he or she has not alerted class members of the matter and their ability to opt out prior to approaching the court.

54 Devenish 2005 *De Jure* 28 at 46; De Vos "Developments in South African civil procedural law over the last fifty years" 2000 *Stell LR* 343 at 354.

below on the nature of the action in the public interest, after which the application of the two procedures is examined.

4.2.3 The appropriate procedural mechanism

The criteria for *locus standi* in terms of section 38 are an alleged violation of a chapter two fundamental right as well as a "sufficient" interest in relation to the participant envisaged by a particular subsection.[55] This does not necessarily mean that the matter will proceed to be adjudicated as a class action, should section 38(c) be of relevance, as the approval of the court must first be obtained.[56]

The Eastern Cape High Court proposed a formal application to court by any representative wishing to institute an action in a non-traditional fashion.[57] This was primarily suggested as a mechanism to avoid unfounded actions in terms of section 38.[58]

According to the South African Law Commission, the inherent capability of the class action proceeding to permit adjudication of "the rights and interests of

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[55] Currie & De Waal *The Bill of Rights Handbook* 84; Hurter 2010 *TSAR* 409 at 412.

[56] Hurter 2010 *TSAR* 409 at 413. See also *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 8 at paragraph 29, where Cameron JA stated that "the class action order is interlocutory". See in this regard the further aspects noted by Harms *Civil Procedure in the Superior Courts* A–52: "It will be necessary to approach the court for directions if someone wishes to institute a class action. In doing so, the applicant ought to show that – (a) there has been a contravention of a fundamental right protected by the Bill of Rights; (b) on the probabilities the breach has been of a general nature and not limited to the applicant; (c) the infringement is a justiciable issue; and (d) the applicant has standing to sue on his own behalf and on behalf of other persons whose rights are similarly affected." The aspect of justiciability is not dealt with in this dissertation due to limited space.

[57] *Ngxuza and Others supra* note 6 at 1332D-E. See also *Firstrand Bank Ltd supra* note 47 at paragraph 26.

[58] *Idem* at 1332D-E.

individuals *who are not parties to the litigation*" is its most distinctive aspect.[59] One of the main concerns regarding group action proceedings is that members not directly involved in the litigation may be bound to the judgment of the court, be it in their favour or not.[60]

A prospective litigant needs to be fully aware of and be advised by his or her legal representative of the "quintessential elements" of the class action.[61] It must be noted that these requirements have been described as necessary to bring and proceed with a class action.[62] The class action is a special procedure[63] that deviates from the tried and trusted notions of *locus standi.*[64] In the premises, obligatory preliminary procedural phases have been judicially incorporated into the law of civil procedure and must be adhered to before the court may adjudicate the true issue between the parties.[65]

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[59] The South African Law Commission, Project 88 at 47 paragraph 5.6.20 (my emphasis).

[60] Gericke 2009 *THRHR* 304 at 309. The possibility exists that some members will be bound to a judgment in a matter of which they did not have knowledge and in this regard the South African Law Commission, Project 88 at 54 paragraph 5.10.5, at 62 paragraph 5.11.8 and at 98 section 10(3) of the proposed draft legislation suggested that the court should have the discretionary ability to order that some members are not bound by the judgment due to the fact that the order may adversely affect them, specifically as they did not have knowledge of the action.

[61] *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 8 at paragraph 16.

[62] Gericke 2009 *THRHR* 304 at 309; *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 8 at paragraph 16.

[63] *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 8 at paragraph 22.

[64] Van Loggerenberg & Farlam *Erasmus Superior Court Practice* (2010) at A2–4.

[65] This was suggested by Froneman J in *Ngxuza and Others supra* note 6 at 1332B-J and reflected in the order at 1338A-G. See also Hurter "Certification: The procedure, its role in class action proceedings in Ontario and the proposed South African certification procedure" 2000 *CILSA* 42 from 42 and *FirstRand Bank Ltd supra* note 47 at paragraph 26. Hurter "Class action: Failure to comply with guidelines laid down by courts ruled fatal" 2010 *TSAR* 409 at 413 describes this as analogous to the "certification application in foreign jurisdictions".

These safeguards have been developed in anticipation of some adverse effects that the introduction of a class action might have on civil litigation, such as "the 'floodgates' objection, the 'classification' problem [and] the problem of *res judicata*".[66]

According to the South African Law Commission, specific aspects should also be dealt with and a specific set of pre-determined factors must be present before the court will grant the application.[67] It must be noted that the initial proposed list of factors includes a general, discretional deliberation which enables the court to take "all relevant circumstances" into account.[68]

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[66] *Ngxuza and Others supra* note 6 at 1332B-G. Note that Froneman J dealt with various perceived adverse effects that the introduction of a class action into South African law might have but for want of relevance only those pertaining to *locus standi* as identified by the court were included herein.

[67] Project 88 at 41 paragraph 5.6.3 states the fundamentals of the criterion as "numerosity, commonality, a preliminary merits test, the adequacy of representation, and superiority" and at 49 paragraph 5.6.27 lists the pre-determined factors as "(a) there is an identifiable class of persons; (b) a cause of action is disclosed; (c) there are issues of fact or law which are common to the class; (d) a suitable representative is available; (e) the interests of justice so require, and (f) the class action is the appropriate method of proceeding with the action". Theophilopoulos *et al Fundamental Principles of Civil Procedure* at 89 suggest a further point of evaluation, namely, that there should be an aspect of "legal" significance in proceeding with the matter by way of class action.

[68] The South African Law Commission, Project 88 at 40 and 41 paragraph 5.6.2. According to Hurter 2000 *CILSA* 42 at 43 to 44 the requirements for certification in Ontario and in terms of the 1992 Class Proceedings Act are: "(a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons who would be represented by the representative; (c) the claims or defences of the class members raise common issues; (d) the class proceeding is the preferable procedure for the resolution of the common issues; (e) there is a representative plaintiff who would fairly and adequately represent the interests of the class, has produced a working plan for advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and who does not have a conflicting interest with other class members on the common issues."

4.3 Section 38(d): The public interest action

4.3.1 Introduction

The concept of an action in the public interest brought by a concerned member of society was known to legal scholars long before the constitutional era, even though an action as such was not recognised in South Africa.[69] An action in the public interest is defined by the South African Law Commission as "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".[70] Devenish notes that the concept of interest is not qualified by the Final Constitution for purposes of procuring *locus standi*.[71]

The Constitution is the best legislative guideline for this type of action as public interest litigation is a new procedural mechanism introduced into South African law.[72] The use thereof under Roman law was severely qualified and the procedure was not used in practice to any further extent, causing it to become moot under the Roman-Dutch law.[73] References to common law provisions for guidance when interpreting the South African extended version of the *actio popularis* are therefore limited as they apply to burial places, communal roads and the forgery of a praetorian edict.[74]

Subsequently, the task of interpretation and further development of the constitutional provisions for a general public interest action falls on the

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[69] Devenish 2005 *De Jure* 28 at 29. According to Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–23 section 38(d) is not a "revival . . . of the obsolete Roman-law *actions populares*".

[70] Project 8 at V (introduction) paragraph 3.

[71] 2005 *De Jure* 28 at 43.

[72] *Ferreira supra* note 3 at paragraph 233.

[73] Devenish 2005 *De Jure* 28 at 29. See also *Ferreira supra* note 3 at paragraph 233.

[74] Devenish 2005 *De Jure* 28 at 29. For a further discussion see Bray "*Locus standi* in environmental law" 1989 *CILSA* 33 at 45 to 46.

judiciary.[75] The requirements for *locus standi* under section 38(d) are twofold:[76] firstly the representative requirement is that prospective action must be brought in good faith with the purpose to benefit the public, or a sector of the public[77] and secondly the query regarding "sufficient interest" centres on the public in that the relief sought must also benefit to the public sector.[78]

4.3.2 Deciding on a procedure: class action or public interest litigation

Gericke advances a factual example that may be brought by either a class action or an action in the public interest: The author differentiates between the parties whose interests are at stake which may include selected individuals as well as the general public.[79] This would open the door for either a class action or an action in the public interest to be instituted.[80] Currie and De Waal state that "it is clear that public-interest standing is an action on behalf of people on a basis wider than those in the class actions".[81]

Even though the South African Law Commission has suggested that public interest actions and class actions be separated as different processes,[82] the nature of the cause of action may force the integration of these two procedures.[83] Under subsection 38(c)[84] and (d)[85] a decision must be made as

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[75] *Ferreira supra* note 3 at paragraph 230 and 233.

[76] Theophilopoulos *et al Fundamental Principles of Civil Procedure* 89.

[77] The South African Law Commission, Project 88 at V (introduction) paragraph 4; Theophilopoulos *et al Fundamental Principles of Civil Procedure* 89.

[78] Ngcukaitobi 2002 *SAJHR* 590 at 609; Currie & De Waal *The Bill of Rights Handbook* 89; Theophilopoulos *et al Fundamental Principles of Civil Procedure* 89.

[79] 2009 *THRHR* 304 at 306.

[80] *Ibid*.

[81] *The Bill of Rights Handbook* 89 to 90.

[82] Project 88 at 8 paragraph 2.4.4.

[83] *Idem* at 7 paragraph 2.4.1. Specific reference is made to *inter alia* the areas of environmental and consumer protection law.

to whether the chosen procedure is adequate and whether a different and more appropriate course of action is available to adjudicate the matter.[86] The South African Law Commission specifically enumerated the "interest of justice" as a factor that a court faced with an application for certification must consider, the main concern being whether the class action is the suitable process to proceed with the matter.[87] In this regard it must be noted that the South African Law Commission considered a procedure similar to that of the certification procedure in class actions in public interest litigation.[88]

Cameron JA listed the procedural characteristics and guidelines in respect of class actions in *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others.*[89] In *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others*[90] O'Regan J clarified same for public interest actions:

> "Factors relevant in determining whether a person is genuinely acting in the public interest will include considerations such as: 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 arguments in court. These factors will need to be considered in the light of the facts and circumstances of each case."

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84 Boraine "Die belang van Permanent Secretary, Department of Welfare, EC v Ngxuza 2001 (4) SA 1184 (SCA) met betrekking tot die erkenning en ontwikkeling van klasaksies in die Suid-Afrikaanse reg" Unpublished case note LLM assignment (2002) on file with author 6 and 8.

85 Devenish 2005 *De Jure* 28 at 44.

86 The South African Law Commission, Project 88 at 40 and 41 paragraph 5.6.2; 49 paragraph 5.6.27; 41 paragraph 5.6.5.

87 *Idem* at 46 paragraph 5.6.16.

88 *Idem* at 7 paragraph 2.4.2.

89 *Supra* note 8 at paragraph 16.

90 *Supra* note 3 at paragraph 234.

The overlapping considerations seem to be *inter alia*: (a) the method should not be surpassed in efficiency by another procedural device;[91] and (b) a consideration of who the affected parties are.[92] It must be kept in mind that there is no provision that does not sanction the use of more than one procedure where different parties' interests are at stake.[93]

Apart from the query as to the beneficiaries of the remedy, an important consideration is whether the judgment is binding on the individual members of the public as public interest litigation orders are not *res judicata* as regards the represented parties whilst class actions are.[94] Whilst members of a class can simply enforce a court order, members of the public must avail themselves of the *stare decisis* doctrine.[95]

4.4 Conclusion

In terms of section 38, only five types of litigants are specified along with the defined subject matter, namely a violation or alleged violation of a chapter two right.[96] Section 38(c) authorises two types of litigants to approach the courts in a representative fashion.[97] A person may litigate in order to vindicate the interests of a group or class of persons and "on behalf of a group or class of

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91 *Ibid*; The South African Law Commission Project 88 at 48 to 49 paragraph 5.6.26. In this regard, litigants must still avail themselves of common law remedies as these may be the correct procedures in stead of group litigation – see *Firstrand Bank Ltd supra* note 47 at paragraphs 24 and 25; Hurter 2010 *TSAR* 409 at 412 and 417; The South African Law Commission, Project 88 at 41 paragraph 5.6.5.

92 Currie & De Waal *The Bill of Rights Handbook* 88 to 91.

93 Currie & De Waal *The Bill of Rights Handbook* 86.

94 The South African Law Commission, Project 88 at V (introduction) paragraphs 2 and 3.

95 *Idem* at 7 paragraph 2.3.2.

96 Section 38 of the Final Constitution.

97 Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–20 and A2–21. See also Hurter 2010 *TSAR* 409 at 410.

persons".[98] The determining question is whether the cause of action impacted on the plaintiff or applicant personally in concurrence with those forming part of the represented group.[99]

In order to institute an action in terms of one or more of the subsections, a prospective litigant has to show that a right enshrined in the Bill of Rights has been encroached upon as well as "sufficient interest" in the relief sought.[100] Although the aforementioned concern with the subject matter and remedy sought does not have to relate to the representative before the court, the representative must qualify as one of the types of litigants specified by section 38.[101]

In essence, the members of a class or group of persons that are to be represented through the mechanisms of the class action should have been affected correspondingly by a real or envisaged impairment of fundamental rights.[102] The merits and/or subsequent legal enquiry should similarly be related.[103] A single factual situation can give rise to both a class action and an action in the public interest.[104] In the premises the court must take various elements into account in order to ascertain whether the appropriate procedure was chosen.[105]

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[98] De Vos "The impact of the new constitution upon civil procedural law" 1995 *Stell LR* 34 at 46.

[99] Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–20 and A2–21. See also Hurter 2010 *TSAR* 409 at 410.

[100] Ngukaitobi 2002 *SAJHR* 590 at 604; Currie & De Waal *The Bill of Rights Handbook* 84.

[101] *Ibid*.

[102] Currie & De Waal *The Bill of Rights Handbook* 88.

[103] De Bruin "Groepsgedingvoering – die voorstel van die Suid–Afrikaanse Regskommissie vir die sertifisering van die groepsgeding" 2003 *JJS* 133 at 134.

[104] Gericke 2009 *THRHR* 304 at 306.

[105] Paragraph 4.3.2 *supra.*

Chapter 5

Conclusion

The aim of this dissertation is to set out the requirements for *locus standi* in terms of section 38 of the Final Constitution, specifically with regard to procuring standing in matters brought by way of a class action. In the premises it was necessary to consider the need for a class action procedure in the South African law of civil procedure.[1] The study showed the courts' expansive approach to granting members and representatives standing before a court, specifically in cases where the traditional common law rules of standing and joinder would not suffice.[2]

Locus standi is concerned with the capability of an entity to be a participant in a matter before a court of law, having due regard to the applicability of the point in issue to the person of the litigant and his or her faculty to litigate.[3] The former is regarded as the interest that the person has in both the proceedings before the court and the assistance sought through judicial intervention whilst the latter entails an individual or juristic person's ability to institute or defend legal actions.[4]

In accordance with common law prescriptions, the *locus standi* of prospective litigants to obtain legal relief only accrues to those who have "personally" suffered harm or would suffer harm through the violation or threatened violation of their legally enforceable rights.[5] The legal person whose rights have been infringed would prospectively need to benefit from the relief claimed from the

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1 See chapter 1 and paragraph 3.2 *supra*.

2 See Chapter 2 and paragraphs 3.2 and 4.2.2 *supra*.

3 See paragraph 2.1 *supra.*

4 *Ibid.*

5 See chapter 1 and paragraph 2.2 *supra*.

court.[6] In contrast, the procedural measures contained in section 38 of the Final Constitution allow for representative actions to be brought on behalf of adversely affected parties where the *dominus litis* is not necessarily the prejudiced party and the recipient of the fruits of successful adjudication.[7]

The above procedures were important statutory advancements in procuring *locus standi* for litigants who have the objective of facilitating access to the courts.[8] Sections 38(c) and (d) of the Final Constitution established *inter alia* class actions and public interest litigation by expanding the categories of persons capable of instituting legal proceedings recognised at common law.[9]

The class action is an efficient procedure where the traditional rules of joinder would not be as effective, specifically in light of economical considerations.[10] On the other hand, as stated in *Firstrand Bank Ltd v Chaucer Publications (Pty) Ltd*,[11] in some instances the class action is not the appropriate procedure for obtaining relief, especially where no fundamental right is at stake.

An additional aspect that needs to be borne in mind when litigation is considered is whether the correct procedure is used.[12] This does not only come into play when a decision is made regarding the correct subsection of section 38 to use, but also whether a fundamental right is infringed.[13] As the law currently stands, the wording of section 38 of the Final Constitution does not

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6 *Ibid.*

7 See paragraph 4.1 *supra.*

8 See chapter 1 and paragraph 3.2 *supra*.

9 *Ibid.*

10 See paragraph 3.2 *supra.*

11 Hurter "Class action: Failure to comply with guidelines laid down by courts ruled fatal" 2010 *TSAR* 409 at 412 and 417. See also paragraphs 3.3 and 4.2.3 *supra.*

12 See paragraphs 4.2.3; 4.3.2 and 4.4 *supra.*

13 See paragraphs 3.3; 4.2.2 and 4.3.2 *supra.*

allow a class action to be instituted on a ground other than the infringement or alleged infringement of a right in the Bill of Rights.[14]

Furthermore, research was done on the need for a procedural device such as the class action in a specific South African milieu characterised by inopportune social and economic circumstances.[15] In this regard, the class action is specifically engineered to accommodate large numbers of affected parties.[16] When considering the benefits of the class action from a South African point of view, regard must be had to the social and economic circumstances of the members in whose favour the procedure is implemented.[17]

Apart from procedural advantages, this particular process diminishes the effect of factors such as low income, lack of legal knowledge, lack of funds for legal assistance and nominal pecuniary claims that prevent litigants from vindicating their rights and approaching the courts single handedly.[18]

The requirements for *locus standi* under the constitutional dispensation, with specific reference to the generous judicial approach to matters, specifically where fundamental rights are violated or threatened, were examined.[19] It is submitted that these requirements will be of some assistance when the citation of the parties is drafted.[20]

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[14] See paragraph 3.3 *supra.*

[15] See paragraph 3.2 *supra.*

[16] De Vos "Reflections on the introduction of a class action in South Africa" 1996 *TSAR* 639 at 639 to 641. See also paragraph 3.2 *supra.*

[17] Devenish "*Locus standi* revisited: Its historical evolution and present status in terms of section 38 of the South African Constitution" 2005 *De Jure* 28 at 41; *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at paragraphs 11, 12 and 14. See also paragraph 3.2 *supra.*

[18] *Permanent Secretary Department of Welfare, Eastern Cape supra* note 17 at paragraphs 4, 5, 11 and 14. See also paragraph 3.2 *supra.*

[19] See paragraphs 3.3 and 4.2.2 *supra*.

[20] See chapter 1 *supra.*

Section 38(c) of the Final Constitution can be read as authorising two types of litigants to approach the court in a representative fashion,[21] that is, a person may litigate in order to vindicate the interests of a group or class of persons and on behalf of a group or class of persons.[22] The discerning question is whether the cause of action impacted on the plaintiff or applicant personally in concurrence with those forming part of the represented group.[23]

In order to institute action in terms of one or more subsections of section 38, a prospective litigant has to show that a right enshrined in the Bill of Rights has been encroached upon as well as "sufficient" interest in the relief sought.[24] Although the aforementioned concern with the subject matter and remedy sought does not have to relate to the representative before the court, the representative must fall under one of the types of litigants specified by section 38.[25] The boundaries of these subsections are not clearly demarcated and it has been submitted that provision is made for the unhindered standing of parties.[26]

It was found that in order to establish *locus standi* in respect of interest, the party before the court must show *inter alia* the following:

1. *Locus standi* is also a "factual question" and this must be clear from the merits pleaded.[27]

2. A *nexus* exists between the matter before the court and the rights enshrined in the Bill of Rights.[28] No minimum amount of detail needed to establish

[21] See paragraphs 4.2.2 and 4.4 *supra.*

[22] See paragraphs 3.2; 4.2.2 and 4.4 *supra.*

[23] See paragraphs 4.2.2 and 4.4 *supra.*

[24] See paragraphs 3.3; 4.2.2; 4.2.3 and 4.4 *supra.*

[25] *Ibid.* See also paragraphs 4.3 and 4.4 with regard to the interrelation between different subsections and the relevant requirements.

[26] Currie & De *Waal The Bill of Rights Handbook* (2005) 89; paragraph 4.2.2.

[27] See paragraph 2.3; 2.5 and 4.2.2 *supra.*

standing in this regard has been specified by the judiciary, but the relaxed approach of the judiciary towards *locus standi* may be of some assistance.[29] Violation of a fundamental right is specifically provided for in the wording of the section – in this regard it is difficult to see how a class action of so-called general application (not concerning fundamental rights) can be brought under section 38 of the Final Constitution.[30]

3. It is not necessary, in order to rely on section 38, to provide evidence regarding the violation or potential violation of a right.[31] The litigant alleging that a fundamental right is endangered must provide sufficient information to clarify that the foundation of its reliance of section 38 is a fundamental right.[32] It has been suggested that information regarding the adversely affected parties does not need to be specifically provided, but that objective notice may be taken of an infringement.[33] The relaxed approach to standing also relates to evidentiary matters regarding *locus standi.*[34]

Some aspects related to *locus standi* that are not necessary for procurement of standing were researched in order to contextualise the setting for the use of section 38 procedural measures.[35] There are currently no formal requirements that litigating class or group members have to comply with.[36] The absence of statutory regulation has forced South African courts with inherent jurisdiction to create guidelines regarding the practical aspects of class action litigation.[37]

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[28] See paragraphs 3.3 and 4.2.2 *supra.*

[29] See paragraphs 2.3; 3.3 and 4.2.2 *supra.*

[30] See paragraph 3.3 *supra.*

[31] See paragraph 4.2.2 *supra.*

[32] *Ibid.*

[33] *Ibid.*

[34] *Ibid.*

[35] See paragraphs 4.2.2 and 4.2.3 *supra.*

[36] See paragraph 4.2.2 *supra.*

[37] See paragraphs 3.1 and 3.3 *supra.*

Unfortunately the judicial intervention in creating practical directives for prospective and current litigants has not occurred without mishap.[38]

Even though the question as to whether the class action procedure is the suitable method to adjudicate the matter does not have a direct bearing on the standing of a party, it is an important aspect to take into acount when considering possible courses of action.[39]

Even though an extended application of section 38(c) is favoured, any consideration thereof must take into account the practical aspects of this mechanism that were introduced by way of legislation.[40] In the socio-economic state of affairs currently prevailing in South Africa, the high costs of legal assistance and the complexity of procuring state provided legal aid deter many a plaintiff from obtaining civil justice.[41] In this respect it can be said that the adjudicative approach of group action proceedings should accommodate a contextualised social setting.[42] The goal is ultimately to expound a device suited and shaped to accommodate both the legal and extra-curial settings of South Africa.[43]

According to O'Regan J *locus standi in iudicio* is a question of merits[44] and the consideration thereof has now been influenced by a threshold of constitutionally prescribed assessments.[45] This introduces considerations regarding

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38 *Ibid.*

39 See paragraphs 4.2.2 and 4.2.3 *supra.*

40 See paragraph 3.4 *supra.*

41 See paragraph 3.2 *supra.*

42 *Ibid.*

43 See paragraph 3.4 *supra.*

44 *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC) at paragraph 231; paragraph 4.2.2 *supra.*

45 Ngcukaitobi "The evolution of standing rules in South Africa and their significance in promoting social justice" 2002 *SAJHR* 590 at 590 and 591. See also paragraph 4.2.2 *supra*.

fundamental rights into the deliberation of the presiding officer.[46] The days of exclusive individualistic procedures dominating the field of civil litigation[47] have been replaced by a constitutional dispensation that acknowledges representative litigation.[48]

In the premises, the courts have developed civil procedural rules of *locus standi in iudicio.*[49] Having due regard to the purpose and ideals of the Constitution regarding access to the courts and the protection of fundamental rights, this is to be commended *with constitutional litigation in mind*.[50] When the class action is regarded from the constitutional perspective of protecting human rights,[51] there is, like Froneman J put it, no reason not to develop the law just because some problems are foreseeable.[52]

Where practical problems are foreseen, the courts should develop the law in manageable ways and provide guidelines as far as is possible.[53] As far as constitutional litigation is concerned, this is not a problem as the framework within which the courts are to function also guides litigants to some extent.[54] However, this does not mean that the implementation and construal of section 38 can proceed unfettered:[55] There is a specific legal and factual setting[56]

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46 *Ibid.*

47 De Vos 1996 *TSAR* 639 at 639 and 655; paragraph 4.2.2 *supra.*

48 *Ibid;* De Vos "The impact of the new Constitution upon civil procedural law" 1995 *Stell LR* 34 at 46; Van Loggerenberg & Farlam *Erasmus Superior Court Practice* (2010) A2–21.

49 See Chapter 2 *supra*, specifically paragraph 2.3.

50 See paragraphs 3.3 and 3.4 *supra.*

51 Van Loggerenberg & Farlam *Erasmus Superior Court Practice* A2–4; Ngcukaitobi 2002 *SAJHR* 590 at 603. See also paragraphs 2.3, 3.2 and 3.3 *supra.*

52 *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000 (12) BCLR 1322 (E) at 1331A-B.

53 *Ngxuza and Others supra* note 52 at 1337E-G.

54 Hurter 2010 *TSAR* 409 at 409 and 417. See *inter alia* paragraphs 2.3; 3.2; 3.3; 3.4 and 4.2 *supra.*

55 Ngukaitobi 2002 *SAJHR* 590 at 603. See also paragraph 4.2.2 *supra* and Currie & De Waal *The Bill of Rights Handbook* 82.

within which a scantily explained procedure is to be put into practice through judicial intervention.[57]

Though not extensively researched, the question remains as to the extent to which these rules can be implemented in ordinary litigation where human rights are not in issue.[58] In the light of the suggestion by the South African Law Commission to expand class actions and public interest litigation beyond the scope of fundamental rights[59] the question is whether some of the aspects discussed above will have bearing on legislation with similar provisions than section 38 of the Final Constitution.[60]

Various other common law principles may also be affected by the constitutional dispensation and further research is recommended.[61]

Different interpretations of the elements of *locus standi* for utilisation of the subsections of section 38 were considered and the class action procedure was used as point of reference. It was shown that a single factual scenario may give rise to any one of the procedures being eligible for use[62] and that, *inter alia*, the

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[56] *Ngxuza and Others supra* note 52 at 1329I-J. See paragraphs 2.3 and 3.3 *supra.*

[57] *Ngxuza and Others supra* note 52 at 1327I-1329 B.

[58] See paragraph 3.3 *supra.*

[59] *Ibid.*

[60] This aspect was not researched beyond the contents of section 32 of the National Environmental Management Act 107 of 1998 and section 4 of the Consumer Protection Act 68 of 2008. Further research is recommended in this regard.

[61] See for example the matter of jurisdiction, touched on in *inter alia Ngxuza and Others supra* note 52 and *Permanent Secretary, Department of Welfare, Eastern Cape supra* note 17. See the recommendations regarding prescription by The South African Law Commission, Project 88 *The recognition of class actions and public interest actions in South African law* (August 1998) at 30 paragraph 5.22. See also Hurter "Some thoughts on current developments relating to class actions in South African law as viewed against leading foreign jurisdictions" 2006 *CILSA* 485 at 499 and Harms *Civil Procedure in the Superior Courts* (2010) A–51.

[62] Gericke 2009 *THRHR* 304 at 306; see paragraphs 4.1 and 4.2.3 *supra.*

extent of the court order may differ for different parties connected to a single suit.[63]

It has been stated that "civil procedure has always reflected social changes in society, and since the world today requires an innovative civil procedural response to problems created by massafication, many view the class action as the appropriate response".[64] In *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another*[65] Froneman J concluded his judgment by stating that "our common law was poorer for not allowing the development of representative or class actions".

It seems as though the class action has been received with keenness[66] as being a major break from traditional principles and pre-constitutional stigma.[67] The judiciary has shown an eagerness to expand conventional principles[68] to accommodate a new social and constitutional setting.[69]

Unfortunately, the system is still fraught with uncertainties such as inconsistent judicial guidance regarding the practical considerations of standing.[70] Although the class action has long been anticipated,[71] the absence of legislative and consistent judicial guidelines unnecessarily complicates the procedure.[72] The impact of constitutionally favoured decisions on practical "behind-the-scenes" difficulties such as adverse cost orders is yet to be evaluated.[73] Hurter is of the

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[63] The South African Law Commission, Project 88 at V (introduction) paragraph 2; see paragraphs 4.2 and 4.3 *supra.*

[64] Hurter 2006 *CILSA* 485 at 488.

[65] *Supra* note 52 at 1337C-E.

[66] Hurter 2006 *CILSA* 485 at 503.

[67] De Vos 1996 *TSAR* 639 at 639.

[68] See chapter 2 *supra;* specifically paragraph 2.3.

[69] Devenish 2005 *De Jure* 28 at 41.

[70] See paragraph 4.2 *supra.*

[71] De Vos 1996 *TSAR* 639 at 639.

[72] Hurter 2010 *TSAR* 409 at 409, 412 and 417; paragraphs 3.1 and 3.4 *supra*.

[73] Currie & De Waal *The Bill of Rights Handbook* 91.

opinion that the availability of a measure that facilitates litigation for a large number of participants will not necessarily improve access to judicial recourse.[74]

Furthermore, the lack of legislation mandating class actions based on non-constitutional litigation is a constriction on standing.[75] It is thus submitted that legislation is still needed to facilitate the creation of a class action tailor-made for the South African milieu.[76]

[74] 2006 *CILSA* 485 at 501; paragraph 3.2 *supra.*

[75] Hurter 2006 *CILSA* 485 at 503; paragraph 3.2 *supra.*

[76] *Ibid.*

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