

AN ANALYSIS OF LOCUS STANDI IN PUBLIC INTEREST LITIGATION
WITH SPECIFIC REFERENCE TO ENVIRONMENTAL LAW; A
COMPARATIVE STUDY BETWEEN THE LAW OF SOUTH AFRICA AND
THE LAW OF THE UNITED STATES OF AMERICA

BY

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SUMMARY

The concept of standing in public interest litigation has not received much attention and analysis post South Africa's Constitutional era. This dissertation begins with a discussion of the jurisprudence of the South African courts in relation to *locus standi* since the early 1900s up until the year 1993. The purpose of the discussion is to illustrate the profound transformation the concept of standing in public interest litigation has undergone after the promulgation of the Constitution.

A comparison is then made with the legal position on this question with the United States of America, a country that has been dubbed as the most democratic and liberal in the world which has a Bill of Rights dating back some 200 years. The case law of the US Supreme Court is dealt with, followed by the most important trends of academic criticism of this case law.

This forms the basis of an informed comparison in relation to the question of *locus standi* between the two jurisdictions. It is argued towards the end that the *locus standi* dispensation in public interest litigation that has emerged in South Africa is the better of the two.

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CHAPTER 1

INTRODUCTION

The concept of *locus standi*¹ in public interest litigation in South Africa has undergone profound change in the course of its history. The most important change is that brought about by the provisions of section 38 of the Constitution.² These provisions have created the opportunity for legal disputes in the public interest to be litigated and for the courts to pronounce on matters in which the complainant need not have sustained personal damage or injury. Such an opportunity for the ventilation of disputes was considered extraordinary under the common law as extraordinary circumstances needed to be present for litigation in the public interest to ensue.

A discussion on the history and present status of *locus standi* in public interest litigation with reference to environmental law will be embarked on below. But first, it is important to define what is meant by the terms “public interest”, “the environment” and/or an “environmental right”. Rabie³ describes the term public interest as a vague concept which resists precise definition but says much of its vagueness disappears when it is applied in a specific context. He goes on further to state⁴ that the term “public interest” is sometimes used as a synonym for “general welfare”, the common good and even “national interest”.

¹ The terms “locus standi” and “standing” are used interchangeably throughout the dissertation.

² Constitution of the Republic of South Africa, 1996 hereinafter interchangeably referred to as “the Final Constitution”, “the South African Constitution” or “the Constitution”.

³ Rabie (1990) 2 *Stell LR* 219 at 220.

⁴ *Ibid* 221.

Loots⁵ describes an action in the public interest as one brought by a plaintiff who, in claiming the relief she seeks, is moved by a desire to benefit the public at large or a segment of the public. From these definitions, one can deduce that public interest litigation is concerned with rectifying certain legal wrongs for the benefit of the public at large. From this definition, one can further deduce that the element of an economic benefit plays a minimal role in public interest litigation and as such the litigant bringing this type of litigation may be seen almost as philanthropic in character.

In addition to the definition of litigation in the public interest, authors⁶ also draw a distinction between an action brought in the public interest and an action based on a public right which is brought in the litigant's own interest. In the latter case, the litigant is suitably placed to prove that she has *locus standi* to ask the court for redress. The primary intention of the litigant is to claim relief in her own interest but the result of the action or application necessarily affects the rights of others by virtue of the doctrine of judicial precedent.⁷

The "environment" has been recognised as a relational concept, denoting an interrelationship between man and his surroundings.⁸ There are different approaches that have been followed in defining the term,⁹ with the restrictive approach limiting its definition to nature and natural resources.¹⁰

⁵ Loots (1987) 104 *SALJ* 131 at 133.

⁶ *Ibid.* Also see van Reenen (1995) 2 *SAJELP* 121 at 122.

⁷ *Ibid.* van Reenen 123.

⁸ Fuggle and Rabie (1992) 84.

⁹ *Ibid.* 83 to 84, scholars have noted that there is no agreement on exactly what the concept "environment" encompasses, its meaning having been taken for granted by many legal commentators. In the past both an extensive and a limited approach have been given to the term and a variety of components have been identified in it. The term has since been defined in environmental framework legislation. It is submitted that for purposes of this dissertation it is not necessary to have an extensive discussion on the precise meaning of the term and I thus have limited the description of the term to a simplified basis.

¹⁰ See Van der Linde and Basson in Woolman *et al* (2009) (3) 50-12.

An environmental right on the other hand has been described as entailing two distinct notions, the right to a clean and healthy environment and the right to conservation of natural resources in order to sustain human existence.¹¹

The definition of the term environment and the description of the concept of an environmental right appear to entail that such an environment is for all those that live in it and that all such people are entitled to enforce such a right in their own individual interest and also in the public interest. However the analogy and conclusion drawn in the previous sentence may be viewed as being a simplistic one. This is owing to the fact that in the South African historical context, litigation in the public interest involving environmental rights had no place in the common law.

The common law has been described as incapable of meeting the challenge of the protection of the environment, since it protects only private rights and enforces private obligations. This then made it even more challenging for public interest litigation to be recognised in order to protect the environment in the interest of the public in general.¹² The common law requirements for *locus standi* in litigation in the public interest were particularly strict. Two criteria were applied to determine standing, namely whether the litigant had the necessary capacity to sue, and also had a legally recognised interest in the matter at issue.¹³

One of the reasons behind private individuals not being given leeway to pursue litigation in the public interest would be, as Baxter points out,¹⁴ that there is a general duty on public

¹¹ Lyster (1992) 109 *SALJ* 518.

¹² *Ibid* 520.

¹³ Baxter (1984) 644. See Chapter 2 below.

¹⁴ *Ibid*.

bodies to act in the public interest. Such a duty is what distinguishes public bodies from private entities. However, Baxter further states that it is simplistic to assume that the public interest is automatically represented by the public authority concerned merely because the latter has been established in order to further such public interest.

It is submitted that this statement is correct as South Africa's history in case law supports it. It was seldom that individuals were directly involved in legal relationships with the environment which was affected by administrative action. This made it even more difficult for individuals to pursue public interest litigation against public bodies in matters relating to the protection of the environment.¹⁵

Because public interest litigation in environmental law had no place in the common law prior to the promulgation of the South African Constitution, one would have to ask whether litigants wishing to enforce environmental rights were protected by other legislation. The Environmental Conservation Act¹⁶ ("ECA") was the first comprehensive environmental framework Act to adopt generic elements and definitions applicable to environmental law.¹⁷ However, the ECA in its final form still did not recognise an environmental right or entitlement. Such a right was provided for only in the last draft bill and was deleted from the final version of the Act.¹⁸

The Interim Constitution¹⁹ was the first legal instrument to pave the way for public interest litigation. Section 7(4)(b)(v) allowed persons who believed that a right in the Bill of Rights had been infringed, to apply to a court and claim competent relief. The persons who could

¹⁵ See Van Reenen in footnote 5 above, 122.

¹⁶ 73 of 1989.

¹⁷ Strydom & King (2009) 4.

¹⁸ Van der Linde and Basson in Woolman et al (2009) (3) 50-9.

¹⁹ The Constitution of the Republic of South Africa Act 200 of 1993, hereinafter referred to as "the Interim Constitution".

claim relief under the section included persons acting in the public interest. Furthermore, the Interim Constitution can also be said to be the first legal instrument by which members of the public could claim environmental rights. Section 29 provided that every person had the right to an environment which was not detrimental to her health or well-being.

The right to litigation in the public interest and the right to an environment which is not detrimental to one's health or well-being referred to in the previous paragraph are now contained in sections 38 and 24 of the Final Constitution respectively.

The National Environmental Management Act²⁰ ("NEMA") was enacted to give effect to the environmental right stipulated under section 24 of the Final Constitution. NEMA establishes procedures and institutions to facilitate and promote public participation in environmental governance. Furthermore, NEMA facilitates the enforcement of environmental laws by civil society.²¹ Section 32 grants standing to persons to sue in the public interest where there has been a breach of the Act or any provision of specific environmental management legislation.

At national level, there are thus currently 3 legislative mechanisms which afford protection to the environment. The first is the constitutional entrenchment of environmental rights under section 24 of the Final Constitution, the second is the environmental framework legislation under NEMA and the third is the specific environmental legislation that can cover a range of environmental matters.²²

The main focus of the dissertation will be to look at litigation in the public interest brought by private individuals or organisations against public bodies, with a focus on environmental

²⁰ 107 of 1998.

²¹ See Preamble.

²² Strydom & King 193.

law. The purpose of the discussion is to illustrate the evolution that the *locus standi* of litigants in public interest litigation has undergone and further to determine whether the courts have taken heed of the public interest litigant's plight that went unnoticed during the common law era. The public interest litigant's plight can be described as the courts failing to recognise such litigant's genuine interest in rectifying certain legal wrongs for the benefit of the public at large, without necessarily deriving an economic benefit in the outcome of the rectification.

The dissertation is structured as follows: In Chapter 2, I will discuss the points raised above with respect to the common law position by exploring the phases through which South African jurisprudence has passed in the course of the liberation of the issue of *locus standi* in public interest litigation as a whole. A focus on the type of litigant instituting the litigation along with the relief sought is included in order to illustrate how the common law failed to accommodate litigants who could not prove that their personal interests were at stake. The discussion will first review the cases decided in the early 20th century. This will serve as a frame of reference for matters affecting the issue of *locus standi* in public interest litigation. Secondly, the legal climate of the mid 20th century will be explored to show that the rules of standing were relaxed during the period in question. As stated above, public interest litigation, especially that concerning environmental law, was virtually unknown during the common law era. The case law discussed will thus encompass litigation of a general scope in which the *locus standi* of the litigant was disputed for the litigant's alleged failure to show a personal interest in the litigation in question.

The change brought about by the provisions of sections 24 and 38 of the South African Constitution as well as section 32 of NEMA will be considered in Chapter 3. It has been

stated that with these provisions, private environmental organisations should not struggle to establish standing in public interest litigation and that it has now become routine that such organisations institute such litigation without their standing being at issue.²³ This statement will be explored further in the chapter by looking at case law that has been brought under section 32 of NEMA.

Chapter 4 will be devoted to consideration of the judgments delivered by the United States of America's ("the US") Supreme Court in respect of prospective litigants who sought to institute proceedings relating to public interest disputes. The emphasis will also be on environmental law litigation. The selection of US jurisprudence to this discussion is due to the fact that that country has a Constitution as old as 200 years. The US has also been described as the most liberal and democratic nation in the world. With the US having these attributes, one would expect that its jurisprudence as to standing would be an advanced and generous one which could thus set an example to South African domestic law. The case law explored in the chapter will cover disputes involving rights afforded to parties under the Bill of Rights of the US Constitution with a further reference to litigation brought in an attempt to enforce environmental rights. The capacity of parties seeking to protect such rights as well as the relief sought by such parties will also be discussed.

Chapter 5 contains an overview of the case law discussed in the previous chapters. Furthermore, the case law of the US Supreme Court is compared with that of the courts in South Africa. In the comparison, it is argued and concluded that in a meagre 17 years since the advent of the Constitution, the South African courts have done a sterling job in interpreting and determining the future handling of public interest litigation disputes.

²³ Murombo (2010) 6/2 *LEAD* 171.



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CHAPTER 2

THE HISTORY OF LOCUS STANDI IN SOUTH AFRICA

1 Introduction

Before the promulgation of the Interim Constitution, South African courts had a restrictive attitude towards the issue of standing.¹ It was generally required under the common law that litigants had to comply with the two requirements for *locus standi*, namely, the necessary capacity to sue and a demonstrable legal interest in the matter at issue.²

The legal basis for the capacity requirement resides in the law of persons; for example minors are barred from entering into legal proceedings without the necessary representation and an association is barred from instituting legal proceedings without its constitution authorising it to do so. The requirements of capacity under the law of persons can thus be said to be relatively simple.

The second requirement, namely that of interest, tended to be more contentious and was subject to much litigation in the common law era. The litigant had to show that he or she had some degree of personal interest in the administrative action under challenge. Baxter³ notes that to establish standing, a litigant had to show the following:

- Some legal right or recognised interest was at stake;
- The right or interest was direct; and

¹ Loots in Woolman (2009) (1) 7-2.

² Baxter (1984) 644.

³ Ibid 652.

- The right or interest was personal (and possibly special).⁴

A party seeking to interdict a public official from breaching certain statutes could not succeed in being heard unless he had fulfilled all the requirements pertaining to the said remedy. A party had to prove that damage was caused by the conduct complained of. A party could thus not champion the interests of the public.

Going back to the 16th century, litigation in the public interest was permissible in Roman Dutch Law under the *actio popularis*. In terms of this action, any member of the public could sue in order to prevent certain violations of tombs or public highways and falsification of a praetorian edict.⁵ At best, the *actio popularis* could be described as being a popular action by which a right of the people was defended.⁶ The list of causes under which an *actio popularis* could be brought was however exhaustive.⁷ The principle thus remained, namely that there was no general action in the public interest. However, as set out below, the *actio popularis* fell into disuse in the same century and was therefore not taken up in South African law.

In light of the above, the common law position with regard to a party's standing on instituting court proceedings can be described as having been inflexible. South African law before 1993 generally required a litigant to possess sufficient personal interest in a matter in order to have *locus standi*.⁸ This meant that in public law, a person or group occupying a subservient position could not advocate the public interest in a dispute against the state

⁴ See footnote 2 above, 652.

⁵ Devenish (2005) 28 *De Jure* 29.

⁶ Gane (1957) 298.

⁷ Van der Vyver (1978) 3 *Acta Juridica* 191 at 192.

⁸ See footnote 5 above, 35.

administration (or any other organisation) without having a demonstrably direct or personal interest in the case.⁹

The sluggish progression of courts in South Africa towards relaxing the rules of *locus standi* will now be treated by tracking the decisions made from the early 1900s until the adoption, in the early mid-1990s, of sections 7 and 38 of the Interim and Final Constitutions respectively.

2 The courts' approach during the early 20th century

2.1 *Bagnall v The Colonial Government*¹⁰

This matter confirmed that the *actio popularis* was not taken up in South African law since it had fallen into disuse. The facts of the matter are briefly as follows: The plaintiff, a taxpayer, secretary to the Manufacturers' Association and interested in the observance and enforcement of the Customs Act,¹¹ had sought an interdict against the defendant to prevent that party from permitting large quantities of printed catalogues to be illegally imported into the Colony without payment of the duties, provided for in the Act. The plaintiff argued that his action was based on the *actio popularis* which should not be discountenanced as no other means existed to compel officers of the Crown to comply with their duties.

The court held that under South African law an action could be brought only by or on behalf of a person to whom a debt was owing or who had sustained damage by reason of an injury done to them or where their rights were infringed or threatened to be

⁹ Bray (1994) 57 *THRHR* 481.

¹⁰ (1907) 24 SC 470.

¹¹ No. 1 of 1906.

infringed.¹² Personal prosecution of popular actions in the public interest was not allowed,¹³ with the result that the court dismissed the plaintiff's action.

2.2 *Dalrymple and Others v Colonial Treasurer*¹⁴

The applicants, residents in and members of the Legislative Council of the Transvaal Colony, had applied for an interdict to prevent remuneration of members of the Legislative Council and the Legislative Assembly for sitting in an ordinary session whereas they had in fact attended an extraordinary one which was remunerated at a much lower rate than an ordinary session, as provided in terms of the Payment of Members of Parliament Act¹⁵ and the Audit and Exchequer Act.¹⁶

The argument for the applicants was that as taxpayers they had a clear right to ensure that public spending remained within legal bounds, and further that they had *locus standi* in virtue of being members of the Legislative Council.

On the issue of the relief requested, Innes J pointed out that, although in most cases the injuries against which interdicts were intended to guard were measurable in money, this was not always essential. The court pointed out that a person could hold a clear and important right which was not measurable in money. All the person had to show was that she had a clear legal right and an actual and continuing infringement of such a right.¹⁷

¹² See footnote 10 above, 477.

¹³ See footnote 10 above, 476.

¹⁴ 1910 TS 372.

¹⁵ 12 of 1907.

¹⁶ 14 of 1907.

¹⁷ See footnote 14 above, 377.

The court thus had to decide whether the applicants had a vested right in virtue of the breach of statute that entitled them to the protection afforded by an interdict. The court was quick to point out the general rule in South African law that a person could not sue for protection against a wrongful act unless the act constituted a breach of duty owed to him personally by the wrongdoer or unless the act caused him some damage in law. This rule was not only applicable in civil actions but was also applicable to wrongful acts affecting the public.¹⁸

The court held that it could not be said that every citizen had a right to defend and promote the good government of the country since that would mean that every citizen could insist on being heard in order to seek redress for every governmental act which was deemed against the law by all and sundry.

The court furthermore held that the only way in which the applicants could legitimately lodge their application was by way of an *actio popularis*; but then it confirmed the law laid down in *Bagnall* that, since the *actio popularis* was obsolete, such an action was not recognised in South African law and could not be entertained. The application for an interdict was accordingly dismissed.

2.3 *Patz v Greene & Co.*¹⁹

The requirement of having sustained personal damage in order to bring an action was consistently applied in South African law during the early 1900s. In this matter, Solomon J, quoting the matter of *Chamberlaine v Birkenhead Railway Co.*,²⁰ stated that a party bringing an action based on the infringement of some or other law had to show that she

¹⁸ See footnote 14 above, 379.

¹⁹ 1907 TS 427.

²⁰ 18 LJ.Ex. 494.

had suffered some special damage as a result of the infringement. So where a statute prohibited a particular act, no action could be brought by another person merely on the grounds that the act was prohibited by statute and such act also affected the public interest.

In the above matter the appellant, a licensed general dealer, had in the court *a quo* applied for an order restraining the respondents, who were in the same line of business as the appellant, from carrying on trade on the claim property on the grounds that trading on the said property was prohibited by law, and furthermore that the applicant had suffered great damage by reason of the illegal competition caused by the respondents' trade.

The respondents argued that the appellant had no grounds to bring the application for the interdict as the commission of an illegal act alone was not a sufficient ground for an interdict to be granted. Solomon J, although finding that the appellant had not clearly proved that he had been injured by the respondents' trade, held that where an act was expressly prohibited in the interest of a particular person the court would presume that such person had suffered a personal injury, and that any member of the public who had sustained demonstrable damage was entitled to this remedy if the prohibition was in the public interest.

2.4 *Director of Education, Transvaal v McCagie and Others*²¹

Applicants in litigation were not always refused standing in matters against public authorities, as long as an actual infringement of a right or the suffering of damage was shown. This was illustrated in the matter of *Director of Education, Transvaal v McCagie*

²¹ 1918 TS 616.

and Others. The applicants had in the court *a quo* succeeded in obtaining an order setting aside an appointment of two school principals made by the Director General of Education (“the Director General”) in two separate schools and after receiving a recommendation by the School Boards. The applicants were the unsuccessful candidates in the appointments. The applicants had sought an order declaring that the appointments made by the Director General were illegal as the appointees had not met the requirements of the teaching posts as advertised. One of the requirements was that the applicants for the vacancies had to be in possession of a university degree or other appropriate academic qualification.²² Neither of the two successful appointees had adduced proof of such qualification.

Counsel for the Director General argued that the applicants had not indicated which right of theirs had been invaded. Counsel further argued that the applicants had no *locus standi* as they had no rights under section 78 of the Education Act,²³ which was the statute that empowered the School Board to recommend the appointments in question to the Director General. The court, referring to the *Patz* matter discussed above, held that section 78 of the Education Act expressly dealt with candidates and their applications, as some of its provisions directly affected the position of the applicants. It was thus clear that the applicants had succeeded in proving that their rights under the statute had been affected and that they did have *locus standi* to bring the proceedings. The decision of the court *a quo* was accordingly upheld.

²² Ibid 620.

²³ 25 of 1907.

2.5 *O'Brien v Amm*²⁴

The principle that a party needed to have sustained personal damage as a precondition for *locus standi* in litigation proceedings, as held in the *Patz* matter above, received much dominance in the courts. Whether such dominance was justified is doubtful for reasons dealt with in the following discussion. In *O'Brien v Amm*, O'Brien, a medical practitioner registered under the Medical, Dental and Pharmacy Act,²⁵ was refused *locus standi* in bringing an application restraining Amm, a dental surgeon, from using the title "doctor" on the ground that doing so contravened section 33(3) of the same Act.²⁶ The court held that it had been laid down in a number of cases that it did not follow from the fact of a contravention of a section of the Act, that any person could approach a court to ask for a ruling restraining the perpetrator from continuing such contravention. The court found, rather oddly, that the provisions of the section were for the benefit of the public in general and not the interests of the medical profession. Applying the principles of the *Patz* matter in dismissing the application, the court held that O'Brien had not shown that he had suffered or was likely to suffer any form of damage as a result of Amm's conduct.

²⁴ 1935 WLD 68.

²⁵ 13 of 1928.

²⁶ The provisions of this section as cited in the judgment are as follows:

"No registered person shall take, use or publish in any way whatsoever any name, title, description or symbol indicating, or calculated to lead persons to infer, that he possesses any professional qualification which is not shown in the register in connection with his name."

3 The relaxation of locus standi rules during the mid 20th century

3.1 *Wood and Others v Ondangwa Tribal Authority and Another*²⁷

With the passage of time, however, the courts managed to relax the rules relating to standing, as was apparent in the matter of *Wood and Others v Ondangwa Tribal Authority and Another*. Although it cannot be said that the matter was decided solely for purposes of an action in the public interest, the court certainly adopted an evolved approach to the issue of *locus standi* in pronouncing its decision. Furthermore, although special circumstances existed for granting *locus standi* in this instance, it nevertheless set a precedent in its liberalisation of *locus standi* under the common law. In this matter Wood, a bishop of the Anglican Church, appealed against an order of the South West Africa Division dismissing his application for an interdict ordering the respondents to desist from meting out corporal punishment to members of his church who were suspected of being members or sympathisers of organisations known as the Democratic Co-Operative Development Party or the South-West Africa People's Organisation ("SWAPO"). The *court a quo* had held that an individual person was not entitled to institute an action in the interest of the general public. The basis of the *court a quo*'s refusal of the requested standing was that the appellant was acting in the public interest and that the *actio popularis* under Roman Dutch law was not recognised under South African law. The then Appellate Division held, however, that the appellants did have *locus standi*. The court was of the view that where the liberty of a person was at stake, the court should not narrowly construe such a person's interests. The court further held that it should be satisfied that the interested person on whose behalf the

²⁷ 1975 (2) SA 294 (A).

application was brought could not bring the application personally but would have done so if she could.²⁸

4 Case law towards the end of the 20th century

4.1 *Veriava and Others v President, SA Medical and Dental Council, and Others*²⁹

The *Wood* matter discussed in the previous paragraph set a liberal tone in the adjudication of disputes surrounding *locus standi*. In *Veriava and Others v President, SA Medical and Dental Council, and Others*, the court held that members of the medical profession had a real and direct interest in the prestige, status and dignity of their profession in the event of a complaint being lodged about conduct which was damaging to the profession and with which complaint the Medical, Dental and Supplementary Health Service Professions Act³⁰ (“the Medical and Dental Act”) had given the South African Medical and Dental Council (“the Council”) the powers to deal.

The matter concerned an application to review and set aside the decision of the Council’s Medical Committee of Preliminary Inquiry not to proceed with the investigation of complaints of improper and disgraceful conduct lodged by the applicants against two medical practitioners who were registered with the Council.³¹ The applicants were academic members of the medical profession as well as medical practitioners who were registered with the Council.³²

²⁸ Ibid, 311.

²⁹ 1985 (2) SA 293 (T).

³⁰ 56 of 1974, the succeeding legislation to the Medical Dental and Pharmacy Act as discussed in the *O’Brien* matter in paragraph 2.5 above. Also the predecessor-in-title to the Health Professions Act, 56 of 1974, as substituted by section 65 of the Medical, Dental and Supplementary Health Service Professions Amendment Act, 89 of 1997.

³¹ Interestingly enough, the conduct complained of related to the medical diagnosis and treatment of the late Steve Bantu Biko.

³² See footnote 29 above, 299.

Counsel for the respondent argued that the applicants lacked *locus standi* as they had failed to show that they had in fact suffered damage or injury. However, he conceded that if the Act was enacted in the interest of medical practitioners as a class of persons, damage to medical practitioners as a class of persons would be presumed. However, counsel for the respondent, in attempting to show that the applicants did not have *locus standi*, relied on *O'Brien* referred to above, where it was held that the provisions of the Medical Dental and Pharmacy Act were intended to benefit the public in general and not the interests of the medical profession.

The court, in finding in favour for the applicants, pointed out that the Medical and Dental Act was more comprehensive than its predecessor, the Medical, Dental and Pharmacy Act. Whilst it was true that the object of the Medical and Dental Act was to protect members of the public in their relationship with members of the medical profession, the Act also had the manifest object of protecting the medical profession.³³

The court, referring to the *McCague* matter discussed in paragraph 2.4 above, also held that where it appeared either from the reading of an enactment or from the enactment in conjunction with the surrounding circumstances, that the legislature had prohibited an act in the interest of any person or class of persons, then the intervention of the court could be sought by any such person to enforce the prohibition without proof of special damage.³⁴

³³ See footnote 29 above, 316.

³⁴ See footnote 29 above, 315.

4.2 *Milani and Another v South African Medical and Dental Council and Another*³⁵

Although the *Wood* and *Veriava* matters referred to above showed that the courts tended to adopt an increasingly liberal stance in *locus standi* disputes, they still required a direct and substantive interest on the part of the applicant. In *Milani and Another v South African Medical and Dental Council and Another*, the court reaffirmed the position that a party should have a direct and substantial interest in the subject matter of the suit.

In this case Milani and the South African Associated Health Service Professions Board (“the Board”) brought an application against the Council and the Minister of Health (“the Minister”) to seek a declaratory order to the effect that a rule of conduct made by the Council with the approval of the Minister was null and void. The rule in question defined what was considered by the Council to be improper and disgraceful conduct by a medical practitioner or dentist registered with the Council. The applicants’ concern was that the rule compromised practitioners’ right to practise their profession as it imposed a restriction on the right of association.

The Council and the Minister challenged the applicants’ *locus standi*. The relevant facts relating to standing were as follows: Milani, the first applicant, was a chiropractor and registered with the Board. The Board, the second applicant, was established in terms of the Associated Health Service Professions Act.³⁶ The Council, the first respondent, was established in terms of the Medical and Dental Act.³⁷ The Minister, the second respondent, was cited by reason of such interest as he might have had in the litigation.

³⁵ 1990 (1) SA 899 (T).

³⁶ 63 of 1982.

³⁷ See footnote 29 above.

The Council argued that the application and enforceability of the rule in question was limited to medical practitioners and it did not extend to persons who were not registered in terms of the Medical Act. The Council further argued that neither Milani nor the Board could be concerned with the disciplinary proceedings or any rules made under the Medical Act.

In dealing with the applicants' *locus standi*, the court held that the Council and the Board dealt with two totally separate disciplines. Each provided for the creation of a governing body, its aim and powers, the registration of practitioners and disciplinary proceedings et cetera. A common feature of the disciplines was that they assisted the promotion of national health in South Africa.³⁸ The court held that as the applicants were seeking a declaratory order they would have to show that they had a legal interest in the interpretation and validity of the rule. Milani could not show that the rule infringed his right to practise his profession; and the rights at issue in the application were not the concern of the applicants but of the medical practitioners registered with the Council. The application was therefore dismissed.

5 Discussion

As stated above, the harming of an interest under the common law used to bear critically on the recognition of *locus standi* by the courts. The question of standing was somehow viewed in isolation from the other merits in the matter. During the early years of the 20th century the courts seemed to pay scant regard to the public interest and the interests of justice. Consider for example the matter of *Dalrymple*, where the court actually held that the right to good government could not be claimed by every citizen without exception as that

³⁸ See footnote 35 above, 903.

would mean that every citizen could insist on being heard in order to seek redress for every governmental act deemed against the law by all and sundry. By relying on the applicant's lack of standing to sue, the administrative body could effectively prevent the court from testing its actions for legality.³⁹

It is submitted that in a sense the court conceded in the *Darymple* matter that the government had been contravening the law at the time but had chosen to dismiss the litigating party's request to adjudicate on the matter merely because that party lacked the requisite capacity to institute the legal proceedings.

The *Woods* case has been seen as the first breakthrough in litigation in the public interest under the common law, although the matter created an exception to representative litigation only where it could be shown that a party's liberty was at stake and that such party was unable to bring the proceedings personally but would do so if she were able to. The matter has also been described as the revival of the *actio popularis*. Loots⁴⁰ cautions against this analogy, stating that the term *actio popularis* has been so loosely used with respect to public interest actions that the impression is created that it was a general action available to any member of the public in respect of any matter which was in the public interest. The learned author, as stated above, emphasises that the list under which an *actio popularis* could be brought under Roman Dutch Law was very circumscribed and that there was certainly no general action in the public interest.⁴¹

The *Veriava* matter which followed the *Wood* decision in the 1980s can also be seen as a decision which showed that the courts were moving towards a more progressive approach

³⁹ Rabie (1976) IX *CILSA* 141 at 143.

⁴⁰ (1987) 104 *SALJ* 131 at 146.

⁴¹ For more on the *actio popularis* see Van der Vyver (1978) 3 *Acta Juridica* 191.

in matters which involved the public interest. Again, in the *Veriava* matter, special circumstances existed and the parties to the litigation were not haphazardly afforded *locus standi*. In applying the principles as laid down in *McCagie*, the court found that the applicants, as academic members of the profession and as medical practitioners registered with the Council, were protected by the Medical and Dental Act as the Act clearly showed that, apart from protecting members of the public, it further sought to protect the interest of medical professionals registered under the Act.

The courts made a distinction between the *O'Brein*, *Veriava* and *Milani* matters, all of which involved medical professionals as applicants in each of the proceedings. The courts also analysed the legislation on which the parties relied, which included the legislation which established and vested the Council with its powers and duties at different times. The courts, however, scrutinised the legislation under which the parties sought protection. In the *O'Brien* case, the court held that the intention of the legislation was to protect the interest of the general public rather than that of medical professionals which therefore meant that *locus standi* could not be awarded to the applicant as a medical professional. In the *Milani* matter the court held that the rights forming the subject of enquiry sought by the applicants were not for their benefit but were for the benefit of medical practitioners that were registered with the Council. However, it is doubted whether the courts' scrutiny in the two mentioned cases was justified. Looking at the merits of the two cases, it cannot be said that the respective applicants sought to engage in vexatious or frivolous litigation. On the contrary, it is patent that the applicants sought either to enforce compliance with the Council's governing legislation as in the *O'Brien* matter, or to question the validity of the ethical rules passed by the Council, as was evident in the *Milani* matter.

It is further submitted that, looking at the *O'Brien*, *McCagie*, *Veriava* and *Milani* judgments, the courts consistently leaned in favour of applying the enquiry to be followed when affording a litigant *locus standi* in the common law, namely, where it was evident that the common law had not afforded the parties *locus standi* to bring the proceedings, then it had to be determined whether there was a statute under which afforded the litigant some level of protection.

In the next chapter, the evolution brought about by the provisions of section 24 and 38 of the Final Constitution as well as section 32 of National Environmental Management Act to *locus standi* in public interest litigation is analysed.



CHAPTER 3

LOCUS STANDI UNDER THE SOUTH AFRICAN CONSTITUTION

1 Introduction

The Constitution has brought about a phenomenal change in respect of litigation toward the enforcement of environmental rights and in the public interest as a whole. On the aspect of environmental rights, it is submitted that section 24 of the Constitution seeks to address the shortcomings in the Environmental Conservation Act when it was first promulgated, namely to afford the public the right to environmental protection. In terms of section 24 of the Constitution, everyone has the right-

“(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

Through the word “everyone”, the section acknowledges that the right is to be enjoyed by all people in South Africa and encourages a relaxed approach to the rules of standing.¹

The Constitution goes further to minimise the challenges previously faced by public interest litigants by extending the rules of standing as framed under section 38 of the Constitution.

Section 38 expands *locus standi* far beyond the *locus standi* dispensation at common law.

¹ Van der Linde and Basson in Woolman (3) 50-10.

This extension is in accordance with the principle of constitutionalism.² Section 38 enumerates the criteria under which a person may be afforded standing. The provision reads as follows:

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

Furthermore the National Environmental Management Act (“NEMA”),³ which entered into force in 1998, is the current environmental framework act.⁴ It gives effect to section 24 of the Constitution and the National Environmental Management Policy of South Africa.⁵ NEMA further regulates the legal standing to enforce environmental laws, the institution of private prosecutions and criminal proceedings.⁶ The standing provisions as contained in section 32(1) of the NEMA can be described as a dovetail to the standing provisions contained in section 38 of the Constitution. Section 32(1) reads as follows:

² Yacoob J and Madlanga AJ in *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 934.

³ 107 of 1998.

⁴ The long title of NEMA provides for co-operative governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for coordinating environmental functions exercised by organs of state, and further provides for certain aspects of the administration and enforcement of other environmental management laws.

⁵ Van der Linde in *Strydom & King* 197.

⁶ *Ibid* 217.

32 Legal Standing to enforce environmental laws

- (1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of a specific environmental management Act, or any other statutory provision concerned with the protection of the environment or the use of natural resources –
- (a) in that person's group or group of persons' 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.”

At first blush, sections 24 and 38 of the Constitution, along with section 32(1) of NEMA, seem to be clear enough indicators of having addressed the preliminary hurdle previously faced by litigants in public interest litigation in matters pertaining to environmental law. If this is so then one would have to ask the question why time and energy has been invested in the present research. One would further have to ask the question of what became of the rationales given by the courts, both in South Africa and the United States of America, discussed below, for stifling or denying standing in public interest litigation in given circumstances. Below, I will discuss whether the rationales given by the South African courts in the common law era were justified and whether the standing provisions contained in the Constitution and NEMA respectively, have absolved the courts from delving into an in-depth inquiry as to the legitimacy of a public interest litigant's claim.

As Cameron J stated in the *Independent Electoral Commission* case, the issue of standing has been considered a complex issue of considerable importance which has not been sufficiently argued before the courts.⁷

The courts have justifiably been careful not to interpret the concept of standing too broadly. Reasons for such caution include, as with US jurisprudence (cf. chapter 4 below), the refusal to adjudicate abstract questions of law and the extension of the court's jurisdiction to matters not covered under section 38 of the Constitution.

Below, I will explore the cases that have come before the South African courts after the promulgation of the Constitution and NEMA. The case law discussed will not be restricted to public interest litigation pertaining to environmental law and will include other cases decided under section 38(d) of the Constitution in general. The reason for this choice can be found in the statement of Cameron J in the *Independent Electoral Commission* case referred to above, namely, the issue of standing has not been argued sufficiently before the courts. Furthermore, I consider the principles laid down by the courts in the remainder of the case law decided under section 38(d) to be of vital importance as they have served as a tool in informing the guidelines or the approach to be followed by the courts in deciding matters relating to public interest litigation. One such case is that of *Ferreira v Levin*⁸ discussed below. This case may be considered to be a milestone in setting the tone for the application of a broad interpretation to the issue of standing under the Constitution and the principles applied by the Constitutional Court in giving such a broad interpretation will be covered in the next section. The succeeding cases in which section 38 was raised as an

⁷ See footnote 2 above, 935 on the issue of whether a municipality acting in a representative capacity on behalf of its residents, may bring proceedings under section 38(c) against the appellant in the matter, the Independent Electoral Commission.

⁸ 1996 (1) SA 984 (CC).

issue will then be discussed with due attention to how the courts, in applying the broad interpretation of standing, sought to resolve the issue. This will be followed by a review of the current situation in South African courts to determine whether the stringent common law requirements pertaining to standing are still relevant and how the courts apply the principles brought out in the decision of *Ferreira*.

Lastly, the case law brought under section 32 of NEMA will be discussed in order to determine whether the sentiment expressed by Murombo, quoted in Chapter 1 above, is indeed the case and whether the plight of the public interest litigant in environmental law has indeed been met by the courts.

2 Case law

2.1 *Ferreira v Levin*

It is submitted that the matter of *Ferreira v Levin* is particularly instructive for matters of standing where actions are pursued in the public interest under our relatively new constitutional dispensation. The case of *Ferreira*, which primarily concerned the issue of the constitutionality of section 417 of the former Companies Act,⁹ provided rather an

⁹ 61 of 1973. Section 417 of the Companies Act deals with the summoning and examination of persons into the affairs of a company in winding up proceedings. Subsections 417(1) and 417(2)(b) state in part as follows:

‘417. Summoning and examination of persons as to the affairs of the company

- (1) In any winding-up of a company unable to pay its debts, the Master of the Court may, at any time after a winding-up order has been made, summon before him or it any director or office of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.
.....
- (2) (a)
- (b) Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may be used as evidence against him.”

interesting perspective on the circumstances under which parties could be afforded standing under section 7(4) of the Interim Constitution.

The standing provisions of section 7(4) of the Interim Constitution and section 38 of the Final Constitution, as was stated in by Yacoob J at 136 in *Lawyers for Human for Human Rights and Another* discussed below, “are for all practical purposes the same”. For the sake of completeness and ease of reference I shall quote the relevant provisions, which state as follows:

“7. Application

1.
2.
3.
- 4.

- a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.
- b) The relief referred to in paragraph (a) may be sought by-
 - i) a person acting in his or her own interest;
 - ii) an association acting in the interest of its members;
 - iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
 - iv) a person acting as a member of or in the interest of a group or class of persons; or
 - v) a person acting in the public interest.”

The facts of the matter are briefly as follows: in the winding-up of two companies that were unable to pay their debts, the applicants were summoned for examination under the provisions of section 417(1) and (2) of the then Companies Act. During their examination the applicants objected to being compelled by virtue of the provisions of section 417(2)(b) to provide answers to questions put to them which could incriminate them. The applicants’ application for a temporary interdict in the high court against the respondents was dismissed, but leave to appeal was granted and the court referred the

matter to the Constitutional Court in terms of section 102 of the Interim Constitution,¹⁰ that is, on the question whether section 417(2)(b) of the Companies Act was unconstitutional in that it compelled a person summoned to an enquiry to testify and produce documents, regardless of the fact that such a person had sought to invoke privilege against self-incrimination.¹¹ The difficulty that the applicants faced was that they had not yet been charged, nor was there any allegation on record to suggest that there was a risk that a prosecution could be instituted against them after they had given evidence at the section 417 enquiry, which evidence was self-incriminating.

Ackermann J, in his majority judgment,¹² had to decide on the issue of *locus standi*, whether the applicants, as examinees in invoking the right against self-incrimination under section 25(3), and in light of section 7(4) of the Interim Constitution, were acting in their own interest. He held that the issue that first had to be determined was whether an examinee who had previously been compelled under section 417(2)(b) of the Companies Act to give self-incriminating answers could, at her subsequent trial, successfully attack the introduction of such incriminating answers. The basis of such an attack was that section 417(2)(b) was in conflict with the safeguard against self-incrimination provided under section 25(3). Ackermann J held that it was clear from the

¹⁰ The relevant part of section 102 provides as follows:

“If, in any matter before a Provincial or Local Division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of s 98(2) and (3), the Provincial or Local Division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision.....”

¹¹ See footnote 8 above, 996.

¹² See footnote 8 above, see headnote at 987. The judgment of Ackermann J on the question of jurisdiction was concurred in by Chaskalson P. In turn the entire judgment of Chaskalson P was concurred in by Mahomed DP, Didcott J, Langa J, Madala J and Trengove AJ. On the question of standing, the judgment of Ackerman J was concurred in by Chaskalson P but for different reasons as discussed below. O’Regan J delivered a separate judgment holding that the applicants had standing to challenge the constitutionality of section 417(2)(b) in the public interest. Below, I shall discuss the separate judgments of Ackerman J, Chaskalson P and O’Regan J with respect to the different stances taken on the issue of the applicants’ standing.

wording of section 7(4)(a) that it applied only in instances where there was an actual infringement of a right contained in the Bill of Rights. However widely the framers (of the Interim Constitution) extended *locus standi* under section 7(4)(b), their intention did not include the pursuit of abstract questions of constitutionality in the courts.¹³ The right of the extension of *locus standi* was first qualified by the provisions of section 7(4)(a), namely that there must first be an infringement of or a threat to any right entrenched in the Bill of Rights. The provisions of section 7(4)(b), which indicated who could actually seek relief under subsection (a), did not in any way alter the infringement or threat requirement under the said subsection. The *locus standi* of all categories of persons under subsection 4(b) was thus qualified by subsection 4(a).¹⁴

Ackermann J held in light of this that it was a matter of pure speculation whether the applicants would ever be accused persons under section 25 of the Interim Constitution (now section 35 of the Final Constitution). Even if the applicants were subsequently prosecuted, their safeguard against self-incrimination would not be automatically infringed; rather such infringement would depend on whether the self-incriminating evidence given by them as examinees in a section 417 enquiry was tendered against them in an ensuing criminal trial. Ackermann J thus concluded that the applicants did not have standing under section 7(4) of the Interim Constitution as section 417(2)(b) of the Companies Act did not constitute an infringement of the rights contained in section

¹³ See footnote 8 above, 1009. The learned judge further held the only exceptions to abstract questions of constitutionality being pursued in the courts were to be found in sections 98(2)(d) and 101(3)(e) of the Interim Constitution, which sections respectively conferred jurisdiction on the Constitutional Court over any dispute over the constitutionality of any Bill before Parliament or a provincial legislature and, in the case of a Provincial or Local Division of the then Supreme Court, over any dispute as to the constitutionality of a Bill before a provincial legislature.

¹⁴ See footnote 8 above, 1010.

25(3) of the Interim Constitution. The applicants could thus not be afforded *locus standi* on the basis of an infringement of the rights safeguarded under section 25(3).

The applicants also relied on an infringement of their rights to freedom and security of a person and personal privacy as respectively entrenched in subsections 11(1)¹⁵ and 13.¹⁶ It is interesting to note that Ackermann J found that under these provisions, section 7(4)(a) did not present any difficulty to persons relying on the rights guaranteed under the said provisions, as the said rights were not limited to any category of persons nor restricted to any particular factual context. The reliance on these rights did not raise mere academic questions of law but rather questions that became justiciable the moment the applicants invoked such rights.¹⁷

The court afforded the applicants *locus standi* under section 11(1) and declared section 417(2)(b) unconstitutional only to the extent that any answer given to questions may thereafter be used in evidence against an examinee.

Chaskalson P, concurring with the majority view of Ackermann J but dissenting on the standing issue, held that the applicants did indeed have standing to enforce the criminal justice rights under section 25(3) of the Interim Constitution. He was of the view that the applicants' desire to secure a ruling on the constitutionality of section 417(2)(b) could

¹⁵ The subsection reads as follows:

“11. Freedom and security of the person

(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.”

¹⁶ Section 13 reads as follows:

“13. Privacy

Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.”

¹⁷ See footnote 8 above, 1011 to 1012.

not be characterised being hypothetical or merely academic. There was no doubt that the applicants had an interest in challenging the constitutionality of the section. Furthermore, if a conflict between section 25(3) of the interim Constitution and section 417(2)(b) invalidated section 417(2)(b) to the extent of the inconsistency, it would be highly technical to say that a witness called to a section 417 enquiry lacked standing to challenge the constitutionality of the section. A witness who genuinely feared prosecution if required to give incriminating answers could not be said to lack an interest in the decision regarding the constitutionality of the section.¹⁸

Chaskalson P acknowledged the objection to constitutional challenges brought by persons who had only a hypothetical or academic interest in the outcome of the litigation and the need to conserve scarce judicial resources and to apply such resources to real and not hypothetical issues. He however held that the applicants had a real and not hypothetical interest in the decision. Moreover the decision would not be academic but would be a decision which would affect all section 417 enquiries, and there was a pressing public interest that a decision on the matter be given as soon as possible. In addition to this, he held that he could not see a reason for adopting a narrow approach to the issue of standing in constitutional cases, and that a broad approach would be preferable as it would ensure that constitutional rights enjoyed a full measure of protection. Neither section 7(4) nor any other provision of the Constitution denied to the applicants the right that a litigant had to seek a declaration of rights in respect of the validity of a law which directly affected his or her interest adversely.¹⁹

¹⁸ See footnote 8 above, 1081.

¹⁹ See footnote 8 above, 1082.

In concurring with Chaskalson P on the broad interpretation that should be given to the issue of standing under the Constitution, O'Regan J held that access to courts in constitutional matters should not be precluded by the rules of standing which were developed in a different constitutional environment of the past in which a different model of adjudication had prevailed.²⁰ She cautioned however, that standing remained a factual question: in each case the applicants should demonstrate that they had the necessary interest in an infringement or threatened infringement of a right. The facts necessary to establish such standing would appear from the record before the court.

O'Regan J further held to good effect that, because of the special circumstances of the case under discussion, the applicants could rely on section 7(4)(b)(v) for *locus standi* to be afforded to them, as applicants acting in the public interest. Reference was made to the *actio popularis* as discussed in chapter 2 above. Although it never formed part of the South African law, this action narrowly circumscribed the causes of action which could be brought in the public interest. A right to act in the public interest under section 7(4)(b)(v) was the most obvious expansion of the ordinary rules of standing and the section needed to be interpreted in the light of the special role that the courts played in South Africa's constitutional democracy.²¹ O'Regan J went on to list the factors which were relevant in determining whether a party was genuinely acting in the public interest as the court would be circumspect in affording applicants standing by virtue of section 7(4)(b)(v). The factors were as follows:

²⁰ See footnote 8 above, 1104.

²¹ Ibid.

- Whether there was a reasonable and effective manner in which the challenge could be brought;
- The nature of the relief sought and the extent to which it was of general and prospective application;
- The range of persons or groups who could be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court.

These factors would of course have to be considered in light of the facts and circumstances of each case.²²

In light of the finding that the applicants had been acting in the public interest in terms of section 7(4)(a)(v), it followed that the applicants did not have to point to an infringement affecting a particular person. This conclusion proceeded from the notion that when acting in the public interest, the public would ordinarily have an interest in the infringement of rights generally and not particularly.²³

2.2 *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, And Another*²⁴

In the *Ferreira* matter, we have seen how the court recognised standing to the applicants by virtue of section 7(4)(b)(i) of the Interim Constitution, with Ackermann J

²² See footnote 8 above, 1104 to 1105.

²³ See footnote 8 above, 1105.

²⁴ 2001 (2) SA 609 (E). The matter was ultimately taken on appeal and was reported as *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA). I have restricted my discussion of the matter to the *a quo* judgment as in the matter before the SCA the applicants decided to proceed with a class action under subsection 38(c) with the result that the order as to the other bases of standing was not an issue before the SCA. See page 632 of the *a quo* judgment and page 1191 of the SCA judgment.

holding that the applicants were acting in their own interest. To the extent that their rights under section 11 were infringed, and O'Regan J held that the applicants were acting in the public interest under subsection 7(4)(b)(v). In the *Ngxuza a quo* judgment the applicants were held to have standing in terms of subsections 38(b), (c), and (d) to pursue their representative actions. The facts of the matter are briefly as follows: The applicants were a group of persons receiving social grants under social legislation. The grants were suspended or cancelled by the respondents. The applicants sought a declaration that the cancellation or suspension of their grants had been unlawful and claimed that the grants should be reinstated retrospectively. The court found in favour of the applicants on both the issue of standing and on the merits on the premise that there could be no proper justification for a restrictive approach to standing in public law litigation. The court further found that even though litigation such as that brought by the applicants usually faced the problem of proper representation, such a problem did not militate against a broad view of standing but rather required that there be safeguards to ensure the broadest and most effective representation and presentation.²⁵

The court rejected the arguments raised by respondents to public interest litigation and class actions namely: 1) the floodgates argument that the courts would be engulfed by interfering busybodies rushing to court for spurious reasons; 2) the classification difficulty, namely that the interest held in common by the applicants and those they sought to represent tended to be broad and vague; 3) the different circumstances argument, that seen from the respondents' side, the persons seeking relief had to be treated differently; and 4) the practical impossibility argument that it was impossible for

²⁵ Ibid, 619.

the courts to deal with cases involving thousands of people and that it would adversely affect the public administration if scarce resources had to be used to defend such cases in court.

In quashing the floodgates argument, the court referred to the case of *Wildlife Society of Southern Africa*²⁶ referred to in the discussion below. With respect to the classification problem, the court held that the applicants and those they sought to represent had one thing in common: namely that their social benefits were all allegedly discontinued in the same unlawful manner by the respondents. On the different circumstances argument, the court held that it was not a requirement relating to the standing of persons initiating such a claim that the defence opposed to a representative action should be uniform. On the argument of practical impossibility, the court held that if the administration had acted within the principle of legality the court would probably not have been faced with the kind of litigation that arose in the case under discussion.²⁷

It is instructive to note that the court accepted the respondents' submission that although the applicants were found to have standing under subsections 38(b) and (c), it did not necessarily flow from the contextual situation that it was in the public interest to grant the applicants standing under subsection 38(d). To that it added that there were cogent reasons for its decision, without actually giving those reasons. The court accepted the applicants' submission that the issue of standing in the public interest ultimately hinged on justiciability.²⁸ The court held in conclusion that in hindsight it appeared as though the common law was the poorer for not allowing the development

²⁶ 1996 (3) SA 1095 (Tks)

²⁷ See footnote 24 above, 624 to 625.

²⁸ Ibid.

of representative or class actions. The Constitution sought to rectify that deficiency in section 38, with the result that there was no reason to interpret the provision in a narrow or restricted manner. A flexible approach was required, making it easier for disadvantaged and poor people to approach the court on public issues to ensure that the public administration adhered to the fundamental constitutional principle of legality and that the exercise of public power had the requisite beneficial effect on the development of democracy in South Africa.²⁹

2.3 *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*³⁰

The standing principles laid down by O'Regan J in *Ferreira* above were also applied in *Lawyers for Human Rights v Minister of Home Affairs*. In that matter the first applicant was Lawyers for Human Rights, a juristic person which acted in the public interest in terms of section 38(d) of the Constitution.³¹ The second applicant was Ann Francis Eveleth, a foreign national who was arrested and detained without trial for some 7 days in terms of the Immigration Act,³² the successor to the Aliens Control Act.³³ These applicants instituted proceedings against the Minister of Home Affairs as the first respondent and the Director General of the Department of Home Affairs as the second respondent. The application attacked the constitutionality of certain provisions of section 34 of the Immigration Act. The section concerned the way in which illegal foreigners were to be removed from the country and how they were to be treated pending their removal or deportation. The applicants' attack was directed against subsections 34(1),

²⁹ See footnote 24 above, 629.

³⁰ 2004 (4) SA 125 (CC).

³¹ See paragraph 1 above.

³² 13 of 2002.

³³ 96 of 1991.

(2), (8), and (9). The high court dismissed the constitutional attack on subsections (1) and (9) but found that subsection 34(8) of the Immigration Act was arbitrary and that it infringed the right to freedom and security of the person as provided in section 12 of the Constitution. The court also found subsection 34(2) of the Immigration Act to be irreconcilable with the provisions of the Constitution as the person detained would not be released after 48 hours.

In delivering the majority judgment in the confirmatory proceedings in the Constitutional Court, Yacoob J held that in public interest matters the question was always whether the person bringing the proceedings was genuinely acting in the public interest. He further held that a distinction should be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and on the other hand, whether it was objectively speaking in the public interest to institute the proceedings concerned. Whilst it was not ordinarily in the public interest for proceedings to be brought in the abstract, there would be instances where it would be in the public interest even if there was no actual dispute. The factors listed by O'Regan J in *Ferreira* would have to be applied to determine whether it was truly in the public interest to institute the proceedings.³⁴

The following rights were allegedly infringed in this matter: the right to freedom and security of a person as provided under section 12 and the right of accused and detained persons as provided under section 35(2) of the Constitution.³⁵ The court held that the

³⁴ See footnote 30 above, 136.

³⁵ Section 35(2) provides as follows:

- (2) Everyone who is detained, including every sentenced prisoner, has the right-
 - (a) to be informed promptly of the reason for being detained;
 - (b) to choose, and to consult with, a legal practitioner, and to be informed of this right

issues to be decided were of immense public importance in that they concerned a delicate matter that had implications for the circumstances in and the extent to which the liberty of human beings was restricted.³⁶ Hundreds of vulnerable people could be detained unconstitutionally for short periods of time before their removal from the country without the constitutionality of the provisions of the Immigration Act being tested. It followed that it was in the public interest to institute the proceedings in light of this consideration. The court recognised the first applicant's commitment to a principal objective, which was to promote, uphold, foster, strengthen and enforce all human rights in the country including civil, political and socio-economic rights. The court therefore found that the first applicant was genuinely acting in the public interest and thus had standing.³⁷

Madala J noted in his concurring judgment that it was difficult to lay down hard and fast rules for the test of public interest standing because the words "in the public interest" were resistant to precise and objective definition. Each situation therefore required a

promptly;

- (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
- (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
- (f) to communicate with, and be visited by, that person's-
 - (i) spouse or partner;
 - (ii) next of kin;
 - (iii) chosen religious counsellor; and
 - (iv) chosen medical practitioner.

³⁶ See footnote 30 above, 137.

³⁷ Ibid. With respect to the second applicant, the court found that her involvement would have resulted only in a minimal increase in the costs of the proceedings and that there was therefore no need to determine whether she had standing.

thorough and careful consideration of the impact of the alleged violation upon the particular persons or group concerned.³⁸ Even though a matter could be moot, it did not necessarily constitute an absolute bar to its justiciability. The court had the discretionary power to decide issues on appeal even if they no longer presented existing or live controversies. The said discretionary power should be exercised explicitly to serve the interests of justice.

2.4 *Eagles Landing Body Corporate v Molewa NO and Others*³⁹

Whilst section 32 of NEMA offers a wide scope of standing to the inclusion of litigation in the public interest, this has not resulted in the courts foregoing the determination of a litigant's standing, where such a litigant claims to have instituted the litigation in the public interest under NEMA. The case under review did not concern the issue of litigation brought in the public interest. However, the court's judgment did outline that in determining whether a party has standing to institute proceedings, it had to consider whether the proceedings were in fact justiciable. In this matter, the applicant was the body corporate of a sectional title scheme situated on the bank of the Hartebeespoort dam ("the dam"). The applicant challenged the decisions of the first and second respondents, both being officials of the Department of Agriculture, Conservation and Environment of the North West Province ("the department"), to grant authorisation to the third respondent, a developer of a golfing estate on land situated on the banks of the dam, in respect of the construction of certain earthworks that it had undertaken on a section of a bank on the dam.

³⁸ See footnote 30 above, 150, citing Ackermann J in the matter of *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2002 (2) SA 1 (CC).

³⁹ 2003 (1) SA 412 (T).

The applicant, amongst others, sought a declaration that the authorisation granted by the officials of the department was *ultra vires* their competence in terms of section 22 of the ECA and a declaration that the construction of the earthworks was unlawful as it had taken place without the necessary authorisation in terms of section 22 the ECA.⁴⁰ The third respondent raised the applicant's lack of *locus standi* as a point *in limine*. The third respondent's basis for disputing the applicant's standing was that the applicant's establishment, functions and powers were regulated in terms of sections 36 to 39 of the Sectional Titles Act⁴¹ and as a result, the relief sought in the application had no bearing on the functions and operations of the sectional title scheme and was thus *ultra vires* the powers of the applicant. The third respondent further argued that the applicant had not brought the application as a result of its concern over the protection of the environment but had rather brought it to protect the commercial and personal interests of its members in that the construction of the earthworks resulted in the view of some of the property owners having been obstructed.

Another point that the court had to consider was whether the relief sought by the applicant would have any practical significance as the construction of the earthworks had already been completed at the time that the application was brought, i.e. whether the court was asked to adjudicate upon an abstract matter or on a question of law.

The court held that the words "any person" as contained in section 32(1) of NEMA were of wide and unrestricted import; there was no reason why such an import should be

⁴⁰ Section 22 of the ECA prohibits persons from undertaking activities identified in section 21(1) without a written authorisation issued by the Minister of Environmental Affairs and Tourism or by a competent authority or local authority which authority shall be designated by the Minister by notice in the Gazette. The listed activities in section 21(1) include land use and transformation.

⁴¹ 95 of 1986.

subject to a restrictive interpretation and that on the contrary, considerations of public policy favoured the wide ordinary interpretation. The body corporate was a legal person and as such, it could be classified as a person within the meaning of section 32(1). The court however refused to issue a declaratory order regarding the lawfulness of the authorisation granted by the officials of the department as the issue of such orders would have no practical effect and would be the product of an academic exercise. The application was accordingly dismissed.

2.5 *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others*⁴²

It must be noted that in as much as section 32(1) of NEMA offers a broad scope for standing, it would naturally be subject to potential abuse by litigants in vexatious proceedings. This potential abuse would also be worsened by section 32(2) of the same Act which gives the court a discretion not to award costs against a litigant that brings proceedings if the court is of the opinion that the litigant “acted reasonably out of a concern for the public interest or the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought”.

The abuse referred to above was apparent in the case under discussion. The applicant, an association not for gain, launched an application for review of the decision of the second respondent to grant the third respondent permission to construct an incinerator. The applicant was concerned about the levels of toxic chemicals that would be present in the waste to be incinerated. However, by the time the applicant had filed its replying affidavit, its application had become academic in the sense that its concerns regarding

⁴² 2005 (6) SA 123 (E).

chromium emissions had largely subsided. The applicant filed a replying affidavit merely for purposes of supporting the contention that no order as to costs should be made against it. The applicant subsequently withdrew its application without tendering to pay the respondents' costs. In its opposition to the respondents' application for a cost order to be made against it, the applicant relied on section 32(2) of NEMA. The court in awarding costs in favour of the respondents held that the applicant's conduct in launching the application had not been reasonable. The court further held that although the applicant had acted out of the best of motives arising out of its very real concern for the environment and in the public interest, it ought to have been aware that its concerns had already been met and that the application had therefore been unnecessary.⁴³

2.6 *All the Best Trading CC t/a Parkville Motors, and Others v S N Nayagar Property Development and Construction CC and Others*⁴⁴

I have questioned the implications of broadening the scope of standing under NEMA in light of the concerns previously raised by the South African and US courts, more especially as to the fear expressed regarding the opening the floodgates of litigation to busybodies. In *All the Best Trading CC*, the court surmised that the ECA may not be relied upon by a litigant to protect its own commercial interest in the guise of protecting the environmental interest. The application was accordingly dismissed for, amongst other reasons, the applicants' lack of *locus standi* on the ground that the applicants failed to demonstrate an interest to enforce compliance with the provisions of the ECA. The facts of the matter are briefly as follows: the applicants, all of which were petrol

⁴³ For more on cost orders awarded in terms of section 32 of NEMA, see *Hangklip Environmental Action Group v MEC for Agriculture, Environmental Affairs and Development Planning, Western Cape and Others* 2007 (6) SA 65 (C).

⁴⁴ 2005 (3) SA 396 (T).

service stations in White River, Mpumalanga Province, launched an urgent application praying for, amongst other relief, that the first, second and fourth respondents be interdicted from proceeding with any development or the taking of any steps to develop a filling station on a property in White River. The applicants further sought a declaratory order that the authorisation granted by the sixth respondent for the development of the filling station to be undertaken was null and void.

The court considered whether the respondents had acted unlawfully in their persistence to develop the site. The court further considered whether the applicants had *locus standi* as it was for the applicants to demonstrate their interest in enforcing compliance with the provisions of the ECA. The grounds upon which the applicants had asserted a direct and substantial interest in preventing the development of the filling station was that the applicants also owned filling stations along, or in the vicinity of the route on which the development was taking place.

The court held that the development of the filling station was a listed activity in terms of section 21(1) of the ECA. The respondents were duly granted authorisation to undertake the listed activity, i.e. to develop the filling station in the year 2001. The applicants did not seek to have the granting of the authorisation reviewed or have it set aside. The applicants had further failed to persuade the court that the respondents had acted unlawfully and as such they failed to make out a persuasive case to disturb the authorisation that was granted to the respondents by the relevant authority. The court thus found that the respondents did not act unlawfully in developing a filling station since they were lawfully authorised to do so.

With respect to the applicants' *locus standi*, the court held that the applicants' reliance upon the constitutional provisions was misplaced as there was nothing in the applicants' papers to indicate that their complaint was based on the violation of their constitutional right to a clean environment. The court in dismissing the application concluded that the applicants had failed to show that they had the requisite *locus standi* by virtue of the ECA to pursue the relief they claimed in the proceedings.

3 Discussion

From what has been discussed above, it is submitted that public interest litigation under section 38(d) of the Constitution has proved to focus on seeking to address certain wrongs committed by organs of state in exercising their powers in terms of legislation where such exercise leads to the infringement of the rights of ordinary citizens as contained in the Bill of Rights. It is further submitted that the standing threshold set by subsection 38(d), looked at in comparison to the remainder of the subsections of section 38 of the Constitution, is the most difficult to meet.

Firstly, the applicant has to show that he or she is acting in the public interest. Secondly, the applicant has to show that the public has a sufficient interest in the requested remedy. As was held in the *Lawyers for Human Rights* case discussed in subparagraph 2.3 above, a distinction must be made between the subjective position of the person or applicant claiming to be acting in the public interest on the one hand, and whether it was, objectively speaking, in the public interest for the particular proceedings to be brought. The rather cynical arguments against litigation in the public interest were addressed and rightly quashed in the *Ngxuza* matter, also discussed in subparagraph 2.2 above. The well-known litigation floodgates argument with respect to public interest

litigation was further aptly quashed in *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others*⁴⁵ The court held that it was sometimes “necessary to open the floodgates in order to irrigate the arid ground below them”.⁴⁶ The court added that the costs of then supreme court litigation were so exorbitant that it was highly unlikely that busybodies would indeed flood the courts with vexatious litigation. And even so an appropriate cost order would soon inhibit the said busybodies’ litigious ardour.

It is submitted that the term *locus standi* and its common law requirements still prevail and are relevant in the South African law as it stands, under the relatively new constitutional dispensation. This is clearly reflected in the interpretation clause as contained in section 39(2), which requires that courts to promote the spirit, object and purport of the Bill of Rights when developing the common law.

The *a quo* judgment of *Ngxuza* above, does not clearly reflect the court’s rationale for holding that the applicants had standing based on more than one of the provisions contained in subsection 38(a) to (d). In light of this it is submitted that an informing criterion on awarding standing to an applicant under one or more of the provisions contained in subsections 38(a) to (d) should be based on the nature of the relief that is sought by the applicant the ensuing litigation. As was seen in the *Ferreira* matter, the justices were in disagreement on the basis of the standing to be afforded to the applicants. It is submitted, however, that each of the rationales advanced by justices Ackermann, Chaskalson and O’Regan was sound under the circumstances. It is

⁴⁵ 1996 (3) SA 1095 (Tks).

⁴⁶ *Ibid*, 1106, Pickering J quoting Justice Kirby, President of the New South Wales Court of Appeal in the course of an address at the Tenth Anniversary Conference of the Legal Resources Centre.

instructive to note, however, that the minority judgment of O'Regan J and the factors listed therein with respect to determining whether a litigant was genuinely acting in the public interest, has been found in ensuing judgments of the Constitutional Court, notably in the *Lawyers for Human Rights* matter. It is further submitted that the difference in application of standing under the various subsections of section 38 in comparison with the facts of each case is a clear enough indication that the said section is flexible and all-embracing.

With respect to NEMA, it is submitted that section 32 of the Act is crafted to accommodate public interest litigants with a genuine interest in seeking to enforce the protection of the environment. It recognises the fact that more often than not, public interest litigants consist of non-profit organisations and, as with any litigation in the normal course, it would not be guaranteed that the organisation would secure the relief it seeks. Section 32(2) meets the public interest litigant halfway by giving the court a discretion not to award costs against such a litigant in the event that it does not secure the relief that it seeks. The provisions of this subsection are of course qualified by the words, “acted reasonably” and “made due efforts to use other means reasonably available”. This qualification thus prevents public interest litigant from hiding behind the remainder of the provisions of the subsection in the event of a failure to act reasonably. This is supported by judgment of *Wildlife and Environmental Society of South Africa* discussed in paragraph 2.5 above wherein a cost order was made against the applicant which was purportedly acting in the public interest.

It is also submitted that, notwithstanding the infancy of the broad standing provisions as provided for in NEMA, the courts have thus far succeeded in preventing any potential

abuse by litigants claiming to act in the public interest wherein they in fact seek to protect their own commercial interests, as was illustrated in the matter of *All the Best Trading CC* discussed above. From this matter, one can deduce that the capacity in which the litigant brings its claim along with the constitutional right that the litigant claims to have been infringed will weigh heavily on the court in deciding whether such a litigant genuinely has an interest in protecting the rights of the public. Lastly, the principles of justiciability and redressability still remain significant factors that are considered by the court in matters pertaining to public interest litigation. This was reflected in the matter of *Eagles Landing Body Corporate* wherein the court refused to grant the relief sought by the applicant on the grounds that such an order being granted would have no practical effect but would rather be the product of an academic exercise.



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CHAPTER 4

LITIGATION IN THE PUBLIC INTEREST UNDER THE LAW OF THE UNITED STATES OF AMERICA

1 Introduction

The issue of standing has been somewhat contentious amongst the cases decided in the Supreme Court of the United States of America (“the US”). Justice Rehnquist’s statement in delivering the opinion of the court in *Valley Forge Christian College v Americans United for Separation of Church and State Inc, et al*¹ deserves full quotation:

*“We need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it, nor when we say that this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition.”*²

This quotation is a synopsis of the difficulties encountered by the Supreme Court in the interpretation of Article III in matters pertaining to public interest litigation. A full exposition of Article III is given in paragraph 2 below.

Authors have described the concept of standing in the US law as a constitutional doctrine “riddled with confusion” and somewhat perplexing.³

At face value, standing in the US would seem to conform to the requirement(s) set for standing in South Africa under the common law, with the personal interest requirement

¹ 454 U.S. 464 1981.

² Ibid 475.

³ Guilds (1996) 1863.

taking precedence. However, as will be seen from the following discussion, it is doubted whether the Supreme Court has been successful in seeking to apply the requirements of standing to public interest litigation in a consistent and uniform manner.

First, I will look at the founding provision that regulates standing in the US courts, namely Article III of the US Constitution. This is followed by a discussion of the case law in which standing under Article III was canvassed. The nature of the case law first discussed relates to litigation by taxpayers wherein the issue of standing initially became contentious; then a discussion of the case law relating to environmentalist interest groups bringing actions in the public interest follows.

2 The US Constitution⁴

2.1 Article III of the US Constitution

Article III of the US Constitution vests the federal courts with their judicial power. Under Section 2 the judicial power of the courts extends to all cases arising under the US Constitution and the laws of the US. It also extends to disputes to which the federal government may be a party. It is described as the “cases and controversies” requirement.⁵ The relevant section of Article III reads as follows:

“Section 2. The Jurisdiction of the Federal Courts

Clause 1. The Bases of Federal Jurisdiction

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; - to all cases affecting ambassadors, other public ministers and consuls; - to all cases of admiralty and maritime jurisdiction; - to controversies to which the United States shall be a party; - to controversies between two or more States; -

⁴ Text of the United States Constitution of 1787, as amended. Referred to as “the US Constitution”.

⁵ Tribe (2000) 385.

between citizens of the same State claiming lands under grants of different States.”

The cases and controversies requirement subsumes three further constitutional requirements for standing, namely injury, causation and redressability. The validity of an injury claim depends on proof of an “injury-in-fact” that is a concrete and particularised injury. The requirement is further dependent on proof of a relationship between the injury sustained and the challenged conduct, and also on the likelihood that the plaintiff’s alleged injury will be redressed by a favourable decision.⁶

2.2 Prudential limitations

The standing requirement goes further in that the courts apply a set of “prudential principles” to the question of standing and controlling access to the courts. These principles are applied by the courts so that they will not have the burden of deciding “abstract questions of wide public significance”.⁷ The prudential principles are understood to encompass three sectors, namely the zone of interest, general grievances and the legal rights or interests of third parties.⁸

The zone of interest test is intended to establish standing in a state system and act as a filter to review applications. This test questions whether the legislature intended the agency to protect the party’s interests when taking the action at issue.⁹ The generalised grievance test basically applies to actions proceeding from injuries sustained collectively

⁶ See footnote 3 above, 1867.

⁷ See footnote 3 above, 1875.

⁸ See footnote 5 above, 387, citing the matter of *Valley Forge* cited in footnote 1 above.

⁹ Koch (2010) 651.

by the general public. The courts are more likely to reject standing based on such action.¹⁰

The third party standing test entails that, as a general rule, a party may not assert the constitutional rights of third parties. An exception under this rule is allowed where the litigant has suffered an injury-in-fact and therefore has a sufficiently concrete interest in the outcome of the issue in dispute. A further exception is allowed where the third party is hindered from protecting her own interests personally; and a third exception is allowed where the litigant has a close relationship with the third party.¹¹

3 Case law

3.1 *Commonwealth of Massachusetts v Melon, Secretary of the Treasury, et al.; in Equity, Frothingham v Melon, Secretary of the Treasury, et al.*¹²

The matter under review has been described as the originator of the confusion relating to the issue of standing as it had left uncertain the question of whether standing was a constitutional requirement or whether it was simply a matter of judicial self-restraint.¹³

The matter dealt with two actions combined into one, challenging the constitutionality of the Maternity Act,¹⁴ which dealt with the appropriation of federal funds. The Act regulated the apportionment of such funds amongst several States for purposes of reducing maternal and infant mortality and protecting the health of infants and their mothers. In return for the funds allocated to them, the States were required to comply

¹⁰ Ibid.

¹¹ See footnote 3 above, 1877; and footnote 6 above, 436.

¹² 262 US 447 1922.

¹³ Berger 78 *Yale L.J* 816 1968, also citing from the matter of *Flast v Cohen* discussed in paragraph 3.2 below.

¹⁴ Act of 1921, 24 Stat. 224.

with the provisions of the Maternity Act and with conditions imposed by the Federal Bureau. Allocated funds would be withheld in the event of non-compliance with the said provisions and conditions

The challengers of the Maternity Act were the State of Massachusetts and one Mrs Frothingham in her capacity as a taxpayer. Mrs Frothingham argued that she would suffer a direct injury as a result of the appropriation in that she would be subject to taxation to pay her proportionate part of the unauthorised payments. The State of Massachusetts argued that the effect of the Maternity Act would be to deprive its property, without due process of the law, under the guise of taxation. The State of Massachusetts asserted that the Maternity Act was an usurpation of power not granted to Congress by the US Constitution and an attempted exercise of the power of local self-government reserved to the States of the US by the Tenth Amendment.¹⁵ The State of Massachusetts thus alleged that it had been subjected to an encroachment on its rights and powers as a sovereign state, and by the same token, on the rights of its citizens. It further alleged that its constitutional rights had been infringed by the passage of the Maternity Act and by the imposition of an illegal and unconstitutional option either to yield to the federal government a part of its reserved rights or lose the share (of the appropriation) to which it would otherwise have been entitled.¹⁶

The State of Massachusetts also alleged that it had an interest in the matter for the following reasons: a) It was excluded from the benefit of the appropriations which were not general but were made for the benefit of certain states only; b) the revenue available

¹⁵ The Tenth Amendment of the US Constitution provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

¹⁶ See footnote 12 above, 479 to 480.

for state taxation was diminished by federal taxation which sought to execute an unconstitutional law; c) and as the representative of its citizens it had an interest in maintaining the suit because those citizens' rights were involved.¹⁷

The court held that adjudication of the State of Massachusetts' case did not fall within its jurisdiction as the matter had a political rather than a judicial character.¹⁸ It also did not have a right to pronounce on an abstract opinion concerning the constitutionality of State law.¹⁹ On the question whether the action could be brought by the State of Massachusetts as a representative of its citizens, the court held that since the citizens of Massachusetts were also the citizens of the US at large, the State of Massachusetts could not institute judicial proceedings as a "*parens patriae*" to protect citizens of the US from the operation of statutes of the US.²⁰

With respect to the case of Mrs Frothingham and her interest as a taxpayer, it was held that she had an abstract interest in the way in which public revenues were appropriated. Since revenue was collected from millions of US taxpayers and law enforcement required the expenditure of money, it would be untenable to contend that every taxpayer had a right to challenge a law as unconstitutional because its enforcement required the expenditure of public money which was in part raised by taxation.²¹

The court further held that the interest of a taxpayer in the monies of the Treasury, which monies were realised partly from taxation and partly from other sources, was shared with millions of others and was comparatively minute and indeterminable. The

¹⁷ See footnote 12 above, 471.

¹⁸ See footnote 12 above, 483.

¹⁹ See footnote 12 above, 484.

²⁰ See footnote 12 above, 485.

²¹ See footnote 12 above, 452.

court further held that the administration of any statute that was likely to produce the imposition of additional taxation on a vast number of taxpayers, the extent of whose several liability was indefinable and constantly changing, was a matter of public and not individual concern.²²

In dismissing the action the court held that a party challenging the constitutionality of a statute had to show not only that the statute was invalid, but that the result of the enforcing statute had been that the challenger had sustained some direct injury rather than suffering in some undefined way in common with people generally.²³

3.2 *Flast et al. v Cohen, Secretary of Health, Education, and Welfare*²⁴

In this matter the court had to decide whether the barrier to standing imposed on taxpayers in the *Frothingham* matter above could be lowered when the appellants as taxpayers attacked a federal statute on the ground that it violated the Establishment and Free Exercise Clause of the First Amendment. This clause provides for, amongst other freedoms, the freedom of religion. It prohibits the government from passing laws respecting an establishment of religion and/or prohibiting the free exercise thereof.

The appellants, basing their claim to standing solely on the basis that they were federal taxpayers, attacked the constitutionality of the federal government's expenditure of federal funds for the benefit of religious and sectarian schools under the Secondary Education Act ("the Education Act"),²⁵ and sought a declaration that such expenditure was unauthorised alternatively, it was unconstitutional. The appellants alleged that such

²² See footnote 12 above, 487.

²³ Footnote 12 above, 488.

²⁴ 392 US 83 1967.

²⁵ Act 1965, 79 Stat. 27, 20 USC.

expenditure constituted a law respecting an establishment of religion and it further constituted a compulsory taxation for religious purposes, thereby prohibiting the appellants from exercising their religion freely.

In determining the appellants' standing, the court deviated from the *Frothingham* decision, commenting that it caused confusion and had been the object of considerable criticism. The court had to deal with the criticism by deciding whether the *Frothingham* decision had simply imposed a rule of self-restraint that was not constitutionally mandated or whether the court had genuinely decided the issue of standing based on a constitutional rule.²⁶ The court decided that the decision had actually been made on both the position of judicial self-restraint and constitutional limitations. It noted quite succinctly, however, that the debates emanating from the *Frothingham* decision clearly warranted that the court reconsider the limitations imposed on standing to sue in courts, as well as the application of such limitations in dealing with taxpayer suits.²⁷ The court observed that justiciability was a qualifying term that should be applied to this requirement and concluded that the cases and controversies requirement related only to questions that were presented in an adversarial context and were capable of judicial resolution.

The court gave four instances in which questions to be adjudicated could be considered unjusticiable: when parties applied to the court to adjudicate only on a political question; or when they requested the court to provide an advisory opinion on the question to be adjudicated upon; or when the question to be adjudicated upon had been overtaken by

²⁶ See footnote 24 above, 92.

²⁷ See footnote 24 above, 94.

events; or when the parties did not have standing to maintain the action. The court placed special emphasis on the seeking of an advisory opinion, noting that this restriction on justiciability was the oldest and most consistent thread in the federal law of justiciability and also in keeping with the principle of separation of powers. The court acknowledged that the doctrine of justiciability was unclear in that it had become a blend of constitutional requirements and policy considerations.

The court rejected the government's argument that the constitutional scheme of the separation of powers presented an absolute bar to taxpayer suits challenging the validity of federal spending programmes. The government had further argued that it viewed such suits as no more than a mere disagreement by the taxpayer on how tax money was used.²⁸

The court held that a fundamental aspect of standing was that it focused on the party seeking to gain access to a court and not on the issues which that party wished to have adjudicated.²⁹

The court further held that Article III was not an absolute bar to actions by taxpayers challenging an alleged unconstitutional federal taxing and spending programme. In deciding whether as a taxpayer a party had sufficient stake in the outcome of the litigation, a nexus, if any, between the status asserted by the litigant and the claim brought for adjudication had to be established. Proof of such nexus depended on the taxpayer establishing a logical link between her status and the type of legislative enactment at issue.

²⁸ See footnote 24 above, 98.

²⁹ See footnote 24 above, 100.

In finding that the appellants did in fact have standing to institute the action, the court held that the Establishment Clause was designed as a specific safeguard against potential abuses of governmental power, and that the clause of the First Amendment operated as a specific constitutional limitation upon the exercise by Congress of its taxing and spending powers under Article I, section 8.

3.2 *Sierra Club v Morton, Secretary of the Interior, et al.*³⁰

This case was one of the first to be adjudicated upon by the Supreme Court on the aspect of rejecting an environmental interest group's capacity to institute review proceedings against an action of a state agency. The petitioner, Sierra Club, sought a declaratory judgment and an injunction to restrain federal officials from approving an extensive skiing development in the Mineral King Valley, nestled in the Sierra Nevada Mountains, California.³¹ The petitioner brought its action as a membership corporation with a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country. The petitioner invoked the judicial-review proceedings of the provisions of section 10 of the Administrative Procedure Act ("the APA"),³² the complaint, including amongst others, the violation by the Forest Service and Department of Interior of their own regulations by failing to hold sufficient public hearings on the proposed development.

³⁰ 405 US 727 1971.

³¹ Ibid, 728 to 729. Walt Disney Enterprises Inc. had been the successful bidder in the proposal and the proposed development included the construction of motels, restaurants, swimming pools, parking lots and other structures designed to accommodate 14 000 visitors daily.

³² 5 USC 702. The section provides that, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Whilst the court accepted that the petitioners could rely on the relevant section of the APA, as was held in the case of *Data Processing Service v Camp*,³³ the court held that the said case had not addressed the question of what had to be alleged by persons who claimed injury of a non-economic nature to interests that were widely shared.³⁴ Although the court took cognisance of the fact that aesthetic and environmental well-being, like economic well-being, were important to ingredients to the quality of life in society. The court also held that fact that environmental interests were shared by many rather than few did not make them less deserving of legal protection through the judicial process. The court was however of the view that the petitioner had failed to show that it would suffer an injury as an organisation or their individual members in particular if the proposed development went ahead. By failing to do this, the petitioner had failed to satisfy the injury-in-fact requirement as that test required more than an injury to a cognisable interest.³⁵

The court justified its decision of limiting a party's standing in judicial review proceedings only to instances where the party itself was adversely affected by the executive action, by holding that such a limitation did not seek to insulate executive action from judicial review. The court stated that the aim of the limitation was to prevent the court from being viewed as construing the APA to authorise judicial review at the

³³ 397 US 150 1969.

³⁴ See footnote 30 above, 734. The matter of *Data Processing* was of an economic nature in the sense that it involved the petitioners as the providers of data processing services to businesses generally, challenging a ruling by Comptroller of the Currency permitting national banks, which included the respondent, to make data processing services available to other banks and bank customers.

³⁵ See footnote 30 above, 734 to 735. See also at 739 wherein the court took cognisance of the fact that the petitioners were a large and long-established organisation with an historic commitment to the cause of protecting the country's natural heritage from man's depredations.

behest of organisations or individuals who sought no more than to vindicate their own value preferences through the judicial process.³⁶

3.3 *Lujan, Secretary of the Interior v Defenders of Wildlife et al.*³⁷

The stringent special-interest and injury-in-fact requirements in the US remained basically the same and continued to be applied by the US Supreme Court well into the late 20th Century.

In the matter of *Lujan*, the respondents challenged a rule promulgated for the purpose of interpreting section 7 of the Endangered Species Act (“the ESA”).³⁸ Section 7 of the ESA was enacted to protect species of animals against threats to their continued existence caused by man. The ESA instructed the Secretary of the Interior to promulgate by regulation, a list of those species that were either endangered or threatened under enumerated criteria, and also to define the critical habitat of such species.³⁹

A joint regulation was promulgated accordingly, stating that the obligations imposed by section 7(a)(2)⁴⁰ extended to actions taken in foreign nations (“the initial interpretation”). The following year, however, a joint regulation was promulgated under which section 7(a)(2) was re-interpreted to require consultation for actions taken only in the US and on the high seas (“the new regulation”).

³⁶ See footnote 30 above, 740.

³⁷ 504 US 555 1991.

³⁸ Act of 1973, 87 Stat. 892.

³⁹ See footnote 37 above, 558.

⁴⁰ *Ibid.* Section 7(a)(2) is quoted in the judgment to state as follows:

“Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.”

The respondents instituted an action against the Secretary of the Interior on two accounts: first they sought a declaratory judgment to the effect that the new regulation was in error as to the geographic scope entailed by the purpose of section 7(a)(2); and secondly they sought for an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation of section 7(a)(2).

The respondents argued that in essence sufficient grounds for an action could be shown by virtue of the respondents' manifest interest in studying or observing endangered animals anywhere on the globe, and that in fact such grounds for the award of standing extended to anyone with a special interest in such animals. The respondents claimed that their injury resided in the lack of consultation with respect to certain funded activities abroad, which was effectively bound to increase the rate of extinction of endangered and threatened species.⁴¹

The respondents provided affidavits by two of their members in support of their claim that they had been directly affected by the lack of funding for activities abroad. The members alleged that they had travelled to foreign countries and had observed endangered species there, and that they intended to return to the countries concerned and would thus suffer harm if the US carried out its intended withdrawal for the protection of endangered species.⁴²

The respondents based their claim to standing on what the court termed "the ecosystem nexus" which was a reference to the respondents' argument that any person who used

⁴¹ See footnote 37 above, 562.

⁴² See footnote 37 above, 563 and 564.

any part of a “contiguous ecosystem” that was adversely affected by a funded activity had standing even if the activity occurred at a remote location, outside the US.

The court went back to the doctrine of separation of powers and held that the US Constitution’s mechanism of maintaining such a separation depended largely upon the common understanding of what activities were appropriate to the legislature, executive and the courts respectively. The court further reaffirmed the three elements of standing which it held were an irreducible minimum, namely injury-in-fact, traceability and redressability.⁴³ When a plaintiff was the object of the action at issue it mattered little whether an act or omission caused him the alleged injury since a judgment preventing or requiring the action would redress it. However, much more was needed where a plaintiff’s asserted injury arose, as in the matter under discussion, from government’s allegedly unlawful regulation (or lack of regulation) of someone else. This was because causation and redressability ordinarily hinged on the response of the regulated third party to the government action. Although standing was not precluded where governmental action affected third parties, the detrimental effect was substantially more difficult to establish.⁴⁴

With respect to the affidavits filed by members of the respondents, the court held that these affidavits did not contain facts which showed how damage to the species would produce imminent injury to the members. The court further stated that its position had always been that past exposure to illegal conduct did not in itself show a present case

⁴³ See footnote 37 above, 560 and 561.

⁴⁴ See footnote 37 above, 562.

or controversy regarding injunctive relief if it was unaccompanied by any continuing, present adverse effects.⁴⁵

With respect to the respondents' contention that its members intended to return to the countries where the habitats of endangered species were located, the court was of the view that such "some day intentions" did not support a finding that satisfied the actual or imminent injury requirement unless a description was provided of concrete plans or any specification of when the "some day" would be.⁴⁶ Furthermore, the court was of the view that it went beyond the limit of sound reason to say that anyone who observed or worked with an endangered species anywhere in the world was appreciably harmed by a single project affecting some portion of that species with which that person no longer had a specific connection.⁴⁷

The court rejected the court of appeal's stance that the respondents had standing on the grounds that the Act's citizen's-suit provision conferred on all persons the right to file suit to challenge the Secretary's failure to follow the proper consultative procedure, notwithstanding the fact that no separate concrete injury flowing from that failure had been alleged by the respondents. Justice Kennedy noted in his concurring judgment that whilst the statute purported to join the US and any other government instrument or agency that was alleged to be in violation of any provisions of the chapter, such purport did not establish in its own right that any person had suffered an injury as a result of such alleged violation.⁴⁸

⁴⁵ See footnote 37 above, 564. Citing from the matter of *Los Angeles v Lyons* 461 US 95, 102 (1983).

⁴⁶ *Ibid.*

⁴⁷ See footnote 37 above, 567.

⁴⁸ See footnote 37 above, 580.

The court found that besides failing to show an injury factor, the respondents had also failed to demonstrate the factor of redressability and that this was the most obvious problem of the case. Instead of attacking the separate decisions to fund the particular projects which allegedly caused them harm, the respondents had chosen to challenge a more generalised level of governmental action, the validation of which would affect all overseas projects. In other words, the respondents' claim was based on a generalised grievance. The court reiterated its view as expressed in previous cases, namely that the assertion of a right to a particular kind of governmental conduct, which the government had violated by acting differently, was not sufficient in itself to satisfy the standing requirements of Article III.

The court held that vindicating the public interest was the function of Congress and the Chief Executive. To allow the public interest to be converted into an individual right by a statute denominating it as such and permitting all citizens to sue, regardless of whether they had suffered any concrete injury, would authorise Congress to transfer from the President of the US to the courts the Chief Executive's most important constitutional duty, which was to make sure that the laws were faithfully executed.⁴⁹

In dismissing the respondents' claim and stressing the need for individual rights to be infringed for standing to be afforded to parties in litigation, the court held that even in suits involving the government, the concrete injury requirement should remain.⁵⁰

It is interesting to note that in his concurring judgment, Justice Stevens agreed with the majority of the court's view that section 7(a)(2) of the ESA did not apply to activities in

⁴⁹ See footnote 37 above 577.

⁵⁰ See footnote 37 above, 578.

foreign countries. The justice disagreed with the majority of the court's view however, that the respondents lacked standing because the threatened injury to their interest was not imminent and that their injury was not redressable. He noted that a person who had visited the critical habitat of an endangered species had a professional interest in preserving the species and its habitat.

With respect to the majority court's view that the respondents had not suffered an injury-in-fact because they had not shown that the harm to the endangered species would produce imminent injury to them, the justice noted that the imminence of the respondents' injury should have been measured by the timing and likelihood of the threatened environmental harm rather than the time that might have elapsed between the present and the time when the individuals would visit the area.⁵¹

The justice further found that the likelihood of the respondents being injured by the destruction of the endangered species was not speculative. If the respondents were genuinely interested in the preservation of the endangered species and intended to study or observe such species in the future, their injury would occur as soon as the animals were destroyed. The only speculative consideration in the matter was whether the respondents' intent to study or observe the animals was genuine. It was sufficient to state that the affidavits produced by the respondents' members were sufficient evidence to dispel the notion that their claims to injury were speculative.⁵²

To add to Justice Stevens, point about the respondents' genuine intentions to study or observe the endangered species, Justice Blackmun noted in his dissenting judgment

⁵¹ See footnote 37 above, 583.

⁵² See footnote 37 above, 584.

that the majority's requirement of a description of concrete plans for the respondents to return to the sites of the endangered species and the court's quashing of the respondents' "some day intention" was nothing but an empty formality. The justice noted that there were no substantial barriers that prevented the respondents' members from simply purchasing flights tickets to return to the sites.⁵³ In support of the respondents' "ecosystem nexus" argument, the justice noted that many environmental injuries caused harm at a location that was distant from the area immediately affected by the challenged action. Furthermore, environmental plaintiffs were not subject to special constitutional standing obligations. Like other plaintiffs, they needed to show only that the action they were challenging had injured them, without necessarily showing that they happened to be physically near the location of the alleged wrong.⁵⁴

4 Discussion

The Article III requirements of standing under US jurisprudence are understood to be as follows: The courts' competence to adjudicate matters, that is its jurisdiction, is limited to "all cases, in law and equity arising under the Constitution" and to "controversies to which the US shall be a party". In order to determine whether an action brought by a party qualifies as either a case or controversy, the party concerned must be able to show that she has a stake in the conduct complained of and has in fact suffered an injury as a result of such conduct to the extent that the injury renders the action a case or a controversy.

Instead of simply requiring a party to litigation to suffer an injury as proof of a stake in the challenged action, the courts go further and place additional qualifiers to restrict a party's access to justice. The traceability and redressability requirements follow.

⁵³ See footnote 37 above, 592.

⁵⁴ See footnote 37 above, 595.

Looking at the cases discussed above, the injury-in-fact requirement as the first requirement receives more attention and scrutiny. Instead of requiring a party to show that she has suffered, is suffering, will suffer, or will continue to suffer injury as a result of the conduct complained of, the courts require that a party's injury be imminent.⁵⁵ The injury must also not be such that it is shared by the public in general because that would render the action at issue to be a generalised grievance.⁵⁶

The *Lujan* decision has been dubbed as the most important standing case since World War II and is said to have invalidated the large number of statutes in which Congress had attempted to use the citizen-suit device as a mechanism for controlling unlawfully inadequate enforcement of the law.⁵⁷ Furthermore, the re-emphasis of the injury-in-fact requirement by the Supreme Court has not only been viewed as a misinterpretation of the APA and Article III of the US Constitution but it has also been seen as a large-scale conceptual mistake as it, amongst other things, injects the common law conceptions of harm into the Constitution.⁵⁸

It is submitted that it is inconceivable that, regardless of whether the governmental action attacked is unlawful or not, the courts place stringent limitations on actions involving a generalised grievance simply because the injury claimed is purportedly suffered by the public at large. In the matter of *United States v Students Challenging Regulatory Agency Procedures (SCRACP)*,⁵⁹ Chief Justice Warren noted that “to deny standing to persons

⁵⁵ See *Lujan* as discussed above and the case of *Los Angeles v Lyons* in footnote 45 used in support.

⁵⁶ See *Frothingham, Sierra Club and Lujan* above.

⁵⁷ Sunstein 91 *Mich. L Rev.* 163 at 165.

⁵⁸ *Ibid* 167. See also Berger 78 *Yale L.J* 816 at 818.

⁵⁹ Together with *Aberdeen & Rockfish Co. et al v SCRAP et al*, both appeals from the United States District Court for the District of Columbia, 412 U.S 669 (1972). Here the public interest litigants were an unincorporated association formed by five law students whose objectives included the enhancement of the quality of the environment and the Environmental

who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody.” It is thus submitted that the reasons preferred by the court in the *Sierra Club* matter with respect to limiting judicial review of agency action under the APA only to those individuals that have a personal stake, cannot stand.

It is also noted from the cases discussed above that the interests of justice element does not feature in determining a party’s standing to bring an action. The courts have used the same concrete principles to adjudicate cases involving unique issues and rights sought. It is further submitted in concert with Justice Brennan in his dissenting opinion in *Valley Forge Christian College* quoted in the opening paragraph above, that Article III of the US Constitution was used by the Supreme Court as a shield against public interest litigation rather than as a means of extending itself to such litigation.

In addition, emphasis on the litigant rather than the cause of action is the black-letter law in standing jurisprudence.⁶⁰ The impression is conveyed, as US authors have noted, that standing is used as a means of avoiding issues, which if decided on merits, would create public resentment, sow confusion or generate significant amounts of additional litigation.⁶¹

It is acknowledged that the courts cannot randomly entertain matters of public interest regardless and they have to take measures to ensure that the “floodgates of litigation” are kept at bay. It is also acknowledged, as indicated in *Valley Forge Christian College*, that the courts cannot assume the character of college versions of debating forums, pronouncing on

Defence Fund. The litigants challenged the decision of the Interstate Commerce Commission (“the ICC”) to allow national railroads to implement a 2.5% surcharge on all freight rates pending the adoption of selective rate increases on a permanent basis. SCRAP’s main complaint was that the ICC’s decision was unlawful for failure to include a detailed environmental impact assessment in terms of the National Environmental Policy Act of 1969 42 USC 4332.

⁶⁰ See footnote 3 above, 1868.

⁶¹ See footnote 3 above, 1870.

abstract issues. However, with the exception of the *Flast*, the case law as discussed above creates the general sentiment that the external factors impinging on the determining of standing according to Article III take precedence over the underlying values of the US Constitution as contained in its Preamble.⁶² As Tribe⁶³ notes, regardless of the extent to which the court's method of analysing standing is deserving of criticism, the legitimacy of the overall result that the court has achieved presents a much more elusive target for negative comment. What must further be noted is the fact that Article III contains no explicit constitutional requirement of "standing" or "personal stake".⁶⁴ It is submitted that an interpretation of the words "cases" and "controversies" should be restricted for purposes of determining whether the litigation at hand is justiciable⁶⁵ and redressable, i.e. whether the prospective litigant has a cause of action in respect of which the court would be in a position to grant competent relief.

Jaffe⁶⁶ makes a compelling argument with respect to the Supreme Court's issue of separation of powers. The author argues that judges have the opportunity of solving a problem which other responsible lawmaking bodies have not been able to solve, often because of the obstruction of minorities or the indifference of the citizenry.⁶⁷ With respect to the sufficient interest requirement, Jaffe argues that the mere fact that a plaintiff would

⁶² The Preamble of the US Constitution reads as follows:

"WE THE PEOPLE of the United STATES, in order to form a more perfect Union, *establish justice*, insure domestic tranquility, provide for the common defence, *promote the general welfare*, and secure the blessing of liberty for the to ourselves and our posterity, do ordain and establish this CONSTITUTION for the United States of America." (Italic wording reflects added emphasis).

⁶³ See footnote 5 above, 391 to 392.

⁶⁴ Sunstein above 168 to 169.

⁶⁵ Ibid.

⁶⁶ Jaffe 116 *U.Pa L. Rev* 1033 1968.

⁶⁷ Ibid 1038.

invest the amount of money involved in the cost of litigation without getting a monetary profit in return is highly indicative that such a plaintiff has an exceptional kind of interest.

Unlike the South African Constitution discussed in the previous chapter, the US Constitution fails to enumerate the circumstances under which a party may bring an action to seek relief in the event of an infringement of the Bill of Rights. Instead the US Constitution limits the courts' jurisdiction to cases and controversies arising under the Constitution and the laws of the US. It is submitted that this is the main reason why there has been much confusion and despondency over decisions passed by the Supreme Court on this issue.

CHAPTER 5

A COMPARISON BETWEEN THE US CONSTITUTION AND THE SOUTH AFRICAN CONSTITUTION AND CONCLUSION

1 Introduction

A number of substantial differences on the issue of standing in public interest litigation may be found between the South African and the US constitutions. The US position on standing is based on Article III of the US Constitution. In terms of this article, a litigant must as a prerequisite, present a “case or controversy” so as to grant the court jurisdiction to adjudicate over the proceedings. The “case or controversy” requirement has by the Supreme Court’s own admission in *Valley Forge Christian College*, not been applied with great consistency and has created great confusion.

Although not apparent from the wording of Article III, the constitutional requirements for standing under US law entail three features, namely: injury, causation and redressability. The injury must be both concrete and particularised; there must be a relationship between the injury sustained and the challenged conduct; and there must be a likelihood that the plaintiff’s alleged injury will be redressed by a favourable decision.

The constitutional requirements for standing in the US go further by imposing prudential limitations on complaints involving the adjudication of grievances shared by the general public.

On the other hand, Section 38 of the South African Constitution clearly defines and enumerates the instances under which a party may be afforded standing to bring proceedings under Chapter 2 of the Constitution. Whilst the section contains qualifying factors, namely that there must be a right in the Bill of Rights which is threatened or has

been infringed, it cannot be said that such qualifying factors have created the confusion and criticism attributable under the US Constitution.

As stated in Chapter 4 above, at face value, the requirement(s) for standing in the US can be considered analogous to the corresponding requirements prevailing in South Africa under both the common law as well as the South African Constitution; a litigant having an interest in the proceedings, whether personal or otherwise, is the key element.

I will now compare the decided cases discussed under Chapters 3 and 4 and present a survey of the associated analogies and disparities.

2 A comparison of the case law

In first determining whether a party has standing to bring proceedings or, better still, whether a court has a case or controversy to adjudicate, the US courts will first look at whether the party instituting the litigation has in fact suffered an injury as alleged. Such an injury, as with section 38 of the South African Constitution, must be actual or imminent. The injury must further be concrete and particularised.

The US Supreme Court set the tone for the direct injury requirement in the *Frothingham* matter in which the court held that the applicant had to show that she had sustained some direct injury as a result of the enforcement of the Maternity Act under attack, and not merely that she suffered in some indefinite way in common with people generally. It is submitted that this is in contrast with the matter of *Patz v Green & Co.*, adjudicated under the South African common law, which recognised that where an act was expressly prohibited in the interests of a particular person the court would presume that such person had suffered a personal injury, but where the prohibition was in the public interest, any member of the

public who could prove that she had sustained damage was entitled to this remedy and thus had standing to institute the litigation.

In the US the direct injury requirement as laid down in *Frothingham* drew extensive academic and jurisprudential criticism. This was acknowledged by the Supreme Court in the matter of *Flast v Cohen*. The court in *Flast* decided that the decision in *Frothingham* had actually been informed by excessive judicial self-restraint that was not constitutionally mandated. However the court noted that it was clear that the debates emanating from the *Frothingham* decision had precipitated a fresh look at the limitations imposed upon standing to sue in courts and at the application of such limitations to taxpayer suits.

It is acknowledged that in both jurisdictions, standing limitations are placed, amongst other reasons, to prevent the court from adjudicating in matters that are not justiciable. In *Flast v Cohen*, the court clearly listed the instances under which a matter could be said to be no longer justiciable. This included an instance in which the court was asked to adjudicate upon a political question and when the question sought to be adjudicated upon had been overtaken by events. The court did however also acknowledge that the issue of justiciability was an unclear one and had become a blend of constitutional requirements and policy considerations.

In relation to what has been stated above, it is submitted that the South African judgment of Yacoob J in *Lawyers for Human Rights* addresses the US Supreme Court's defence of its stance against the adjudicating of generalised grievances and the application of prudential limitations. The Constitutional Court held in this instance that, whilst it was not ordinarily in the public interest for proceedings to be brought in the abstract, there were instances where it was indeed in the public interest to do so. The factors listed by O'Regan J in the

Ferreira matter would then come into play in order to determine whether there was a need for such proceedings to be instituted.

In the matter of *Sierra Club*, the US court refused to grant the applicant standing because it had failed to show that the organisation itself or its individual members would suffer an actual injury if the decision to allow the development in that case was upheld. This is despite the court acknowledging that the applicant was a large and long-established organisation with a historic commitment to the cause of protecting the country's environment. This is in contrast to the principle that the nature and intention of the applicant should be considered in determining whether it has standing, as laid out *Ferreira* and *Lawyers for Human Rights* above.

Furthermore, the US court's restriction of standing under the Administrative Procedure Act to individuals personally affected by an agency decision, to the exclusion of public interest groups, had the effect of protecting executive action from judicial review. In this instance, the principles as laid down in *Ferreira* in deciding whether a broad application to standing should be allowed are relevant. It is submitted that the petitioner in *Sierra Club* seeking for the court to review an agency's decision was the most effective remedy by which the challenge to the decision could be sought. It is further submitted that the nature of the relief sought, namely that of an interdict and declaratory order, was the most effective remedy that would have addressed the petitioner's grievance and put right the imminent harm that it faced.

3 Discussion

A marked difference that exists between the systems of the US and South Africa in so far as the issue of standing is concerned is that the US Supreme Court does not necessarily

recognise a general infringement suffered by all without applying prudential limitations. South African law on the other hand has recognised, even under the common law, that where an act was expressly prohibited in the interests of a particular person the court would presume that such person had suffered damage but that where the prohibition was in the public interest, any member of the public who could prove that he had sustained damage was entitled to this remedy.

The position of the US Supreme Court mentioned in the previous paragraph is addressed by Sunstein's sentiments in Chapter 4 above, wherein the author states that Article III contains no explicit constitutional requirement as to the words "standing" or "personal stake". It thus follows that there is no need for the US Supreme Court to apply such prudential limitations to general infringements suffered by all.

Furthermore, it is submitted that under US law too much emphasis is placed on the separation of powers in the sense that in principle, the courts do not interfere with the decisions and policies of Congress and the Executive. Furthermore, in the US case law discussed above, the element of the interest of justice does not feature in determining a party's standing with respect to a prospective action. The courts have used the same concrete principles in adjudicating cases involving the protection of rights sought in matters of a unique nature and matters pertaining to traditional issues involving personal infringement. This contrasts with the view held in *Ferreira* where considerations of the interests of justice and the facts and circumstances of each case were to be applied diligently in the broad interpretation of standing.

4 Conclusion

South African jurisprudence relating to standing has undergone a profound transformation. The South African Constitution can be viewed as having been the saving grace that has allowed parties to bring forth litigation in the public interest.

The cases dating back to the early 20th century reviewed in Chapter 2 reflect scant regard for litigation in the public interest and the interests of justice. The *Dalrymple* matter is a classic example and probably served as a deterrent to prospective litigants who would otherwise have sought to prevent the looting of public coffers in contravention of statutory provisions.

As Baxter points out in Chapter 1 above, the idea of relying on the public authorities to protect the public interest and further leaving it to the public authorities to faithfully execute its own laws is all too theoretical and simplistic. It is submitted that the purpose of founding legal instruments such as the Constitution of a country is to allow citizens the liberty of questioning the execution of those laws which the public power would claim to have faithfully executed for the benefit of all citizens.

As stated above, mention of the *actio popularis* in the cases discussed under Chapter 2 is of no moment as the courts out rightly and consistently declared that such an action had become obsolete in the 16th century and was not accommodated in South African law. It may well be argued however that there are similarities between the provisions of the *actio popularis* and section 38(d) of the South African Constitution. In both instances legal provision is made for a popular action and the rights under which such a popular action may be instituted are listed. Of course, it is quite clear that section 38 of the Constitution is

the more consequential of the two, given its development and broad application by the South African courts.

As is apparent from what has been stated above, the provisions contained in section 38 of the Constitution and section 32 of NEMA granting prospective public litigants standing are not without qualification. Although the sections provide that any party may approach the court for appropriate relief, a party still needs to prove that there has been an infringement of a right under the Bill of Rights. The courts have correctively addressed challenges such as litigants' ingeniously using the public interest provisions as a means of protecting their own commercial interests, by denying such litigants standing. The courts have also imposed cost orders against litigants who, although acting in the public interest, failed to take reasonable and diligent steps in ensuring that the relief that they sought was not moot or academic. The courts have also progressively moved away from the common law view that an economic interest is the main factor in determining a party's interest in proceedings. The courts have since recognised the public interest litigant's genuine interest in protecting the rights of the public, including the rights of minorities, by praying for relief that does not necessarily benefit the litigant directly.

Thus, the South African courts have succeeded in interpreting the South African Constitution which has been in existence for less than two decades, in favour of public interest litigants. It is submitted that this should serve as an example to the US Supreme Court, which has to date, fallen short of interpreting the US Constitution, which has been in existence for some 200 years, to be in favour of public interest litigation.

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