

Chapter 7

Standing, Ripeness and Mootness

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7.1 Introduction

This chapter deals with three issues that may present a barrier to adjudication of the merits of a dispute: standing, mootness and ripeness. These issues, which all concern the procedural justiciability of a claim, need to be distinguished from various other issues that go to substantive justiciability.

Whereas procedural justiciability concerns the identity of the person bringing the claim and the timing of the claim, substantive justiciability concerns the subject matter of the claim, and whether it is competent for the courts to decide claims of that sort. There are some issues that are not appropriately decided by the courts at all: For example, whether a foreign state should be recognized or not. Such decisions are clearly the prerogative of the executive, and their justiciability is typically dealt with in terms of a political question doctrine, or some other doctrine falling under the more general doctrine of separation of powers.¹

In the case of procedural justiciability, by contrast, the merits of the dispute are appropriate for resolution by the court, but there is an alleged procedural barrier to those merits being heard. Such procedural barriers include: whether the plaintiff has standing to claim the relief; whether the dispute is ripe for resolution; and whether the dispute has been resolved and the issue is therefore moot.

In general, the requirement of procedural justiciability is based upon the principle that it is not the function of the courts to determine academic or hypothetical issues. This is a principle to which our courts still adhere.² However, where it is in the public interest that an issue be decided, there is an increasing trend towards regarding such issues as non-academic and, accordingly, justiciable.³

7.2 Standing

(a) The concept of standing

The concept of standing is concerned with whether a person who approaches the court is a proper party to present the matter in issue to the court for adjudication.⁴ The word 'standing' has been referred to as 'a metaphor used to designate a

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1 See *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2001 (2) SA 609 (E), 626G-H, 2000 (12) BCLR 1322 (E). Froneman J wrote: 'The nature and extent of a Court's assessment of the justiciability of a constitutional issue is, I think, intimately related to the extent to which it judges that those issues can adequately and better be dealt with by other democratic means.' Froneman J expressed the opinion that the position in South Africa is very different from the position in the United States of America because our Bill of Rights specifically recognizes socio-economic rights. *Ibid* at 625I-626B.

2 See *Zantsi v Council of State, Ciskei & Others* 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC) at para 7; *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) ('*Ferreira*') at paras 164-165.

3 *Port Elizabeth Municipality v Prut NO & Another* 1996 (4) SA 318 (E), 325E-F, 1996 (9) BCLR 1240 (E); *Ferreira* (supra) at para 164; *Van Rooyen & Others v The State & Others* 2001 (4) SA 396 (T), 422C-424I, 2001 (9) BCLR 915 (T).

4 Adolf Homburger 'Private Suits in the Public Interest in the United States of America' (1974) 23 *Buffalo LR* 343, 388.

proper party to a court action.⁵ An inquiry into standing should thus focus on the party who brings the matter before the court, not on the issues to be adjudicated.⁶ Doctrines of standing have assumed increasing importance in public law because often the party who brings a public-law issue before the court does so, not for personal gain, but out of a sense of conviction that public authorities — or some other non-state actor — should not be allowed to act unlawfully. Such 'ideological plaintiffs' or 'non-Hohfeldian plaintiffs' claim relief in the public interest or in the interest of a section of the public whose rights have, allegedly, been adversely affected by the wrong complained of.⁷

(b) Standing in South African law before 1994

Before the introduction of the Interim Constitution in 1994 South African courts adopted a restrictive attitude towards the issue of standing. They required a person who approached the court for relief both to have a personal interest in the matter and to have been adversely affected by the wrong alleged.⁸ A plaintiff or applicant could not approach a court on the basis that the defendant or respondent was doing something contrary to the law and that the public interest demanded that the court grant appropriate relief.⁹ A plaintiff or applicant who lacked a personal interest would have no '*locus standi*', or 'standing', to be before the court.

Wood & Others v Ondangwa Tribal Authority & Another constitutes a notable exception to this general rule.¹⁰ In *Wood*, the Appellate Division allowed church leaders to seek an interdict in the interest of a large, vaguely defined group of persons who feared that they would be illegally arrested, tried and subjected to

5 Marla E Mansfield 'Standing and Ripeness Revisited: The Supreme Court's Hypothetical Barriers' (1992) 68 *North Dakota LR* 1, 6, citing Steven L Winter 'The Metaphor of Standing and the Problem of Self-Governance' (1988) 40 *Stanford LR* 1371.

6 Gene R Nichol Jr 'Rethinking Standing' (1984) 72 *California LR* 68, 85.

7 Louis L Jaffe 'The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff' (1968) 116 *University of Pennsylvania LR* 1033. Hohfeld postulated a plaintiff who would be seeking a determination that he had a right, a privilege, an immunity or a power. See Wesley N Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale LJ* 16.

8 *Bagnall v The Colonial Government* (1907) 24 SC 470 ('*Bagnall*'); *Patz v Greene & Co* 1907 TS 427, 433–435 ('*Patz*'); *Director of Education v McCagie & Others* 1918 AD 616, 621–2, 631 ('*McCagie*'); *Cabinet for the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A), 3891 ('*Cabinet for the Transitional Government*'); *Shifidi v Administrator-General for South West Africa & Others* 1989 (4) SA (SWA) 631, 637 D-F ('*Shifidi*'); *Milani & another v South African Medical and Dental Council & another* 1990 (1) SA 899 (T), 902D–903G; *Waks en Andere v Jacobs en 'n Ander* 1990 (1) SA 913 (T), 917B–919C; *Natal Fresh Produce Growers' Association & Others v Agroserve (Pty) Ltd & Others* 1990 (4) SA 749 (N), 758G–759D. As to what constitutes sufficient interest, see *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A); *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1998 (2) SA 1115 (SCA), 1998 (6) BCLR 671 (SCA).

9 *Bagnall* (supra) at 470; *Patz* (supra) at 433; *Dalrymple & others v Colonial Treasurer* 1910 TS 372, 386; *McCagie* (supra) at 621, 627; *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd* 1933 AD 87, 101; *Von Molkte v Costa Areosa (Pty) Ltd* 1975 (1) SA 255 (C), 259A–C; *Wood & Others v Ondangwa Tribal Authority & another* 1975 (2) SA 294 (A), 310F; *Cabinet for the Transitional Government* (supra) at 3871–389A.

10 1975 (2) SA 294 (A) ('*Wood*').

summary punishment on account of their political affiliations. The court took into account that it would be impractical to expect the people under threat, many of

whom were tribesmen living far from the seat of the court, to approach the court themselves. This decision could have been used by the courts as precedent to justify the relaxation of the traditional rule against representative standing. Instead, the Appellate Division limited its application to matters involving violations of life, liberty or physical integrity.¹¹

(c) Standing under the Final Constitution

FC s 38 provides:

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,¹² 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.¹³

11 *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O), 826-7; *Ahmadiyya Anjuman Ihaati-Islam Lahore (South Africa) & Another v Muslim Judicial Council (Cape) & Others* 1983 (4) SA 855 (C), 864E-F; *National Education Crisis Committee v State President of the Republic of South Africa* Case No 16736/86 (Unreported, 9 September 1986, Witwatersrand Local Division) as discussed in Cheryl Loots 'Keeping *Locus Standi* in Chains' (1987) 3 SAJHR 66, 69; *National Union of Mineworkers v Free State Consolidated Gold Mines (Operations) Ltd* 1989 (1) SA 409 (O), 413-4 (Misrepresents *Wood* as relaxing standing only for the purpose of the *actio de libero homine exhibendo*.) See also *Marievale Consolidated Mines Ltd v President of the Industrial Court & Others* 1986 (2) SA 485 (T), 492A (Counsel requested the court to apply the *Wood* doctrine, but the court found it unnecessary to do so as it held that the applicant had standing on other grounds.)

12 As to what constitutes appropriate relief, see M Bishop 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9. See also *Gerber v Voorsitter: Komitee oor Amnestie van die Kommissie vir Waarheid en Versoening* 1998 (2) SA 599 (T) (Court held that, in applying FC s 38, the nature of the remedy is not important.)

13 IC s 7(4) contained similar provisions and read as follows:

- (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

These provisions alter radically the common-law rules of standing and the courts have accepted that such a generous approach to standing is appropriate

for the purpose of the enforcement of the fundamental rights found in Chapter 2.¹⁴ The Constitutional Court issued an early directive to this effect in *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others*.¹⁵ In *Van Rooyen & Others v The State & Others*, Southwood J extended the reasoning in *Ferreira* to support of the proposition that FC s 38 confers practically unlimited *locus standi in judicio* and that no limit is placed on the manner in which persons may approach the court.¹⁶ The Constitutional Court has not yet endorsed Southwood J's conclusions. In *Independent Electoral Commission v Langeberg Municipality*, the Constitutional Court stated that there is, presently, no clarity as to the outer reaches of FC ss 38(a)-(e).¹⁷

(i) Anyone acting in their own interest

This provision appears to reflect the common-law rule that relief may be claimed by a person acting in his or her own interest. However, in *Van Huyssteen v Minister of Environmental Affairs and Tourism* Farlam J held that the term 'interest' was 'wide enough' to include the interest of a trustee in maintaining the value of a property. The court seemed to assume that the interest referred to in FC s 38(a) could be broader than that interest referred to at common law.¹⁸

In *Ferreira v Levin NO & Others* Ackermann J took the view that the interest referred to in the corresponding provision of the Interim Constitution — IC s 7(4) — must relate to the vindication of a constitutional right of the applicant and not of some other person.¹⁹ A majority of the court disagreed. Chaskalson P found that although the person must act in his or her own interest, that person did not need to be the person whose constitutional right had been infringed.²⁰ While it remained for

(v) a person acting in the public interest.'

14 *Beukes v Krugersdorp Transitional Local Council & Another* 1996 (3) SA 467 (W), 474B-J; *McCarthy & Others v Constantia Property Owners' Association & Others* 1999 (4) SA 847 (C), 855B-F; *Dawood and Another v Minister of Home Affairs & Others* 2000 (1) SA 997 (C), 1028J-1030B; *Coetzee v Comitis & Others* 2001 (1) SA 1254 (C), 2001 (4) BCLR 323 (C) at paras 17.1-18.4.

15 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) ('*Ferreira*') at para 165.

16 2001 (4) SA 396 (T), 232G-I, 2001 (9) BCLR 995 (T) ('*Van Rooyen*').

17 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) at para 15.

18 1996 (1) SA 283 (C), 301G-H, 1995 (9) BCLR 1191 (C). See also *Ferreira* (supra) at para 165 (Chaskalson P); *Bafokeng Tribe v Impala Platinum Ltd & Others* 1999 (3) SA 517 (B), 549E-551A, 1998 (11) BCLR 1373 (B); and *National and Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government & Another* 1999 (1) SA 701 (O), 704A-E.

19 *Ferreira* (supra) at para 38. *Ibid* at para 226 (O'Regan J, dissenting, rejects Ackermann J's narrow construction.)

20 *Ibid* at paras 163-8.

the Constitutional Court to decide what constituted a 'sufficient interest', Chalkalson P wrote that the Court would adopt a broad approach to the question of standing: 'This would be consistent with the mandate given to [the] Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.'²¹

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Port Elizabeth Municipality v Prut NO & Another illustrates the proposition that the interest referred to need not relate to a constitutional right of the applicant, but may relate to a constitutional right of some other person.²² The applicant municipality sought an order declaring that its differential treatment of white ratepayers black ratepayers in terms of the Black Local Authorities Act did not constitute unfair discrimination. The court held that the municipality had an interest in obtaining a declaratory order as to whether its conduct infringed the rights of the ratepayers.²³

These dicta make it clear that a party can litigate in his, her or its own interest even where it is not that party's constitutional right that has been infringed. This principle was relied upon by the court in a matter in which the foreign homosexual partners of South African citizens challenged a statute that infringed the constitutional rights of their South African partners.²⁴ Relying on the objective theory of unconstitutionality, the court held that 'a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person.'²⁵

Several recent cases evince this relationship between a broad approach to standing and the objective theory of unconstitutionality. In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others* the court held that an applicant who had been charged, and might be convicted, in terms of a statutory provision had a direct interest in challenging the validity of that provision.²⁶ In *National and Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government, & Another*, an unsuccessful tenderer established that it had had a sufficient interest to apply for the review of the decision awarding the tender in terms of the constitutional right to just administrative action.²⁷ In *Eisenberg &*

21 Ibid at para 165. See also *Van Rooyen* (supra) at 422D-424I.

22 1996 (4) SA 318 (E), 1996 (9) BCLR 1240 (E).

23 Ibid at 324H-325J.

24 *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC).

25 Ibid at para 29.

26 2002 (6) SA 370 (W).

27 1999 (1) SA 701 (O). Cf *Vulindlela Furniture Manufacturers (Pty) Ltd v MEC, Department of Education and Culture, Eastern Cape, & Others* 1998 (4) SA 908 (TK) (Held that the applicant did not have *locus standi* to compel the provincial government to insist on fulfilment of the terms and conditions of a contract by fellow successful tenderers.)

Associates v Minister of Home Affairs a firm of attorneys which practised exclusively in the field of immigration law was deemed to possess *locus standi* to apply for a declaration of invalidity in respect of Regulations that allegedly did not comply with the notice and comment provisions of s 7 of the Immigration Act.²⁸

(ii) Anyone acting on behalf of another person who cannot act in their own name.

This provision makes the decision in *Wood v Ondangwa Tribal Authority* applicable to the enforcement of all the rights guaranteed in Chapter 2. The *Wood* doctrine is no longer limited to situations in which life and liberty are endangered. The applicant is, however, still obliged to spell out why the person whose rights are affected is not able to approach the court personally and must allege that the person would have done so had he or she been in a position to do so.²⁹

In *Wood*, the court determined that it would be impractical for all the people who feared that their rights would be infringed to approach the court themselves, particularly when they were resident about 800 kilometres from the seat of the court and lived in an environment in which legal assistance was not easily procured.³⁰ The facts of *Wood* support the conclusion that standing should be allowed under FC s 38(b) where the party affected fears that she may be victimized by launching an action in her own name.³¹

Some courts tend to confuse the provisions of FC s 38(b) and FC s 38(c). In a number of cases in which the applicant clearly acted in the interest of a group or class of persons, the courts nevertheless considered whether the individual members of that group or class of persons were unable to act in their own names. In *Maluleke v MEC, Health and Welfare, Northern Province* Southwood J, referring to FC s 38(b), concluded that the applicant did not have *locus standi* because there was no evidence that the persons on behalf of whom the applicant claimed the relief could not act in their own names.³² With respect, the Judge erred. In view of the fact that the applicant was acting in the interests of 'some 92 000 beneficiaries', the applicable section was FC s 38(c). FC s 38(c) is not constrained by a requirement that the members of the group or class not be able to act in their own names.

That the domain of cases covered by FC s 38(b) overlaps with the domain of cases covered by FC s 38(c) is born out by *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council & Others*.³³ In *Highveldridge Residents*,

28 2003 (5) SA 281 (CC), 2003 (8) BCLR 838 (CC) at para 28.

29 See *Wood* (supra) at 311G.

30 Ibid at 313C-D.

31 Jacques R De Ville *Judicial Review of Administrative Action in South Africa* (2003) 424; Geoff Budlender 'The Accessibility of Administrative Justice' in T W Bennet & Hugh Corder *Administrative Law Reform* (1993) 128, 131.

32 1999 (4) SA 367 (T), 374A-C ('*Maluleke*').

33 2002 (6) SA 66 (T), 2003 (1) BCLR 72 (T) ('*Highveldridge Residents*').

the applicant association instituted proceedings on behalf of the residents of a township, in the public interest and in the interest of its members. The *Highveldridge Residents* court held that the association had also established *locus standi* in terms of FC s 38(b), since it was evident that the people affected by the alleged unlawful action were indigent and therefore unable individually to pursue their claims.³⁴

(iii) Anyone acting as a member of, or in the interest of, a group or class of persons

This subsection introduces the class action into South African law. The essence of a class action, or representative action as it is known in many countries, is that one person may bring an action in the interest of a class of persons all having the same cause of action.³⁵ In other jurisdictions the representative plaintiff must be a member of the class. She must share the same cause of action and she must have the same interest as the other members of the class.³⁶ The use of the words 'acting as a member of or in the interest of' in FC s 38(c), however, makes it clear that the representative plaintiff may be an ideological plaintiff and is not required to be pursuing an 'own interest'. Indeed, the courts have gone so far as to hold that a government authority may claim relief in the interest of members of the public whose rights are being infringed. In *Minister of Health and Welfare v Woodcarb (Pty) Ltd & Another*, the court held that the Minister of Health and Welfare could seek an interdict to prevent continued pollution of the atmosphere on the grounds that the pollution impaired the right of members of the public under IC s 29 to 'an environment not detrimental to health or well-being'.³⁷

In other jurisdictions, a judgment in a class action is generally binding on the members of the class.³⁸ A public interest action, which seeks to benefit the group in whose interest it is brought, is not binding on the members of the class.³⁹ The

34 Ibid at para 27.

35 Representative actions have their origin in the seventeenth-century English Courts of Chancery. The Courts of Chancery developed a representative action to allow a single person to bring or to defend an action on behalf of all persons with a common interest. See Adolf Homburger 'State Class Actions and the Federal Rules' (1971) 71 *Columbia LR* 609-11; Stephen C Yeazell *From Medieval Group Litigation to the Modern Class Action* (1987) 132.

36 In the United States, Rule 23(a) of the Federal Rules of Civil Procedure provides that '[o]ne or more members of a class may sue or be sued as representative parties on behalf of all.' The Ontario Class Proceedings Act provides in s 2(1) that '[o]ne or more members of a class of persons may commence a proceeding in court on behalf of the members of the class.' The Quebec Civil Code also refers to a member instituting a class action in article 1002.

37 1996 (3) SA 155 (N). See also *Bafokeng Tribe v Impala Platinum Ltd & Others* 1999 (3) SA 517 (B), 1998 (11) BCLR 1373 (B)(Friedman J held that a tribe could rely on FC s 38(c) to sue in the interest of its members.)

38 The application of the *res judicata* principle to class actions was examined in detail by the Ontario Law Reform Commission in its *Report on Class Actions* (1982)(*Ontario LRC Report on Class Actions*) 753-70.

39 See Adolf Homburger 'Private Suits in the Public Interest in the United States of America' (1974) 23 *Buffalo LR* 243, 288.

concept of an action being binding upon persons not party to the action, in the sense that it will be *res judicata* against them, is foreign to South African lawyers.⁴⁰ It is important to realize that where such a class action fails on the merits, members of the class will be prevented from taking the same issue to court themselves. For this reason due process requires that class members be given notice of the action and have the opportunity to exclude themselves from the

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class if they could be prejudiced by a decision given in the matter.⁴¹ If a judgment is to have a binding effect on the members of the class, the court should consider whether notice to the class members is necessary and what type of notice is appropriate. Notice requirements will, some day, be regulated by legislation.⁴² In many instances, say where there is a successful outcome in a challenge to legislation, notice is not particularly critical: the protection of rights will be achieved by a public interest action and the benefits automatically accrue to the group or class of persons in whose interest the action is brought. Where the action is of this nature, notice need not be given to the members of the group or class since an adverse judgment on the merits will not bar them from approaching the court on the same issue.⁴³

Some early attempts to utilize the class action provision of the Interim Constitution failed.⁴⁴ It was, however, successfully invoked in *Beukes v Krugersdorp Transitional Local Council & Another*. In *Beukes* a white ratepayer raised a constitutional challenge to the levying by local authorities of 'flat rate' charges in black townships in contrast with higher 'user-based' charges levied in formerly white areas.⁴⁵ The applicant brought the application in his own interest and as a member of or in the interest of a group or class of persons — 'literally thousands' of other ratepayers within the jurisdiction of the Transitional Local Council. The names, addresses, telephone numbers and signatures of 120 of the persons on whose behalf the applicant purported to act were listed on a form appended to the application and contained the authorization of the signatories for the applicant to act on their behalf. The respondent objected to the procedure adopted on the grounds, *inter alia*, that none of the persons listed had deposed to an application in support of the application and that the group had not been accurately defined. In an enlightened

40 The representative action of English law, which was the predecessor of the modern class action, was received into other Anglo-American legal systems, but not into South African law. The reason is that it was a procedure of courts of equity and the law of equity never became part of South African law.

41 See *Ontario LRC Report on Class Actions* (supra) at 467-518 (Comprehensive analysis of notice requirements.)

42 See South African Law Reform Commission *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (1998) Project 88 ('SALC Report on Class Actions').

43 The operation of *stare decisis* will, however, deter repeated attempts to litigate the same issues.

44 See *Matiso v Commanding Officer, Port Elizabeth Prison, & Another* 1994 (3) SA 899 (E), 1994 (3) BCLR 80 (E); *Lifestyle Amusement Centre (Pty) Ltd & Others v The Minister of Justice & Others* 1995 (1) BCLR 104 (C).

45 1996 (3) SA 467 (W) ('*Beukes*').

judgment, Cameron J, adopting the broad approach to standing advocated by Chaskalson P in *Ferreira v Levin & Others*,⁴⁶ held that it would run counter to the spirit and purport of the Interim Constitution to require that persons, who identify themselves as members of a group or class as a member of whom and in whose interest a litigant acts, should be obliged to reiterate with formalistic precision the complaint with which they associate themselves, or to require that they attest to their status or that they put in affidavits joining in the litigation.⁴⁷

Not all judgments demonstrate such discernment. In *Maluleke v MEC, Health and Welfare, Northern Province*, Southwood J held that an applicant seeking an order setting aside the decision of a welfare authority suspending payment of her own pension — and payment of the pensions of some 92 000 other beneficiaries — could succeed only with regard to her own pension. He reasoned that, under FC s 38(c), the applicant must allege that a right in the Bill of Rights has been infringed or threatened and that it was difficult to imagine how the suspension of payment of pensions could be an infringement of a right in the Bill of Rights. This decision was severely criticized⁴⁸ and subsequently overruled by the Supreme Court of Appeal.⁴⁹

In a similar matter, *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government*, it was held that the applicants did have standing to bring an application on behalf of a large number of persons whose social welfare grants had been cancelled by welfare authorities without compliance with the requirements of procedural fairness.⁵⁰ Froneman J had no doubt that the suspension of the payment of social benefits without affording the beneficiaries a hearing was an infringement of the constitutional right to just administrative action and that a class action was therefore competent in terms of FC s 38(c).⁵¹ The learned judge explained the importance of social context in this type of matter and offered a number of solutions to some of the procedural problems presented by class action litigation in the absence of a well-developed set of court rules. He suggested that leave must be sought from the court to proceed on a representative basis before actually embarking on that road.⁵² The *Ngxuza I* court made an order granting the applicants leave to pursue a class action and ordered the respondent to provide information

46 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 165.

47 *Beukes* (supra) at 474G-I. See also *City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn (Vrygrond Development) & Others* 2003 (6) SA 140 (C), 149H-J, 2003 (8) BCLR 878 (C).

48 Clive Plasket 'Standing Welfare Rights and Administrative Justice: *Maluleke v MEC Health and Welfare Northern Province*' (2000) 117 SALJ 652.

49 *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA) ('*Ngxuza II*') at para 19.

50 2001 (2) SA 609 (E), 2000 (12) BCLR 1322 (E) ('*Ngxuza I*').

51 *Ibid* at 622F-J.

52 *Ibid* at 624D-J.

concerning the members of the class to the applicant. This order provides a useful departure point for those initiating class actions.⁵³

The respondent in *Ngxuza I* took the decision to grant the applicants leave to institute a class action on appeal to the Supreme Court of Appeal. Cameron JA, writing for the appeal court, delivered a scathing attack on the strategies employed by the welfare authority to try to avoid being held accountable for its unlawful action. *Ngxuza II* held that the circumstances of the case — 'unlawful conduct by a party against a disparate body of claimants lacking access to individualised legal services, with small claims unsuitable for, if not impractical of, enforcement in isolation — should have led to the conclusion, in short order, that the applicants' assertion of authority to institute class action proceedings was unassailable.'⁵⁴ The

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Court held that the quintessential requirements for a class action were satisfied in that the class was so numerous that joinder of all its members was impracticable and that there were questions of law and fact common to the class. It also found that the applicants, through their legal representatives, the Legal Resources Centre, would fairly and adequately protect the interests of the class.⁵⁵ On the issue of territorial jurisdiction, the Supreme Court of Appeal held that the Final Constitution requires adjustment of rules relating to the jurisdiction of courts along sensible and practical lines to ensure the efficacy of the class action mechanism.⁵⁶

The decisions in *Ngxuza I* and *II* go a long way towards providing guidelines on the circumstances in which a class action is appropriate and the procedures which should be followed. Class action rules would further facilitate this kind of litigation. In August 1998 the South African Law Commission published a report on its research into class actions and public interest actions and recommended the enactment of both enabling legislation and court rules.⁵⁷ Unfortunately, neither an act nor court rules has been forthcoming. An act would extend the power of the courts to hear class actions beyond claims for enforcement of constitutional rights. While no act is necessary for the enforcement of constitutional rights, because FC s 38 provides the courts with clear authority to entertain class actions, court rules would provide procedural guidelines both for litigants and the courts. Such rules are particularly necessary because while Magistrates' Courts are given jurisdiction to hear class actions in terms of the Promotion of Access to Information Act⁵⁸ ('PAIA'), the Promotion of Administrative Justice Act⁵⁹ ('PAJA'), and the Promotion of Equality and

53 Ibid at 629I-631D.

54 *Ngxusa II* (supra) at paras 14-15.

55 *Ngxusa II* (supra) at para 16.

56 Ibid at paras 20-7.

57 *SALC Report on Class Actions* (supra) at 1.

58 Act 2 of 2000.

59 Act 3 of 2000

Prevention of Unfair Discrimination Act⁶⁰ ('PEPUDA'), they do not have the inherent jurisdiction to develop rules of procedure. South Africa's neighbour Zimbabwe has enacted such class action legislation.⁶¹

In developing class actions, South African courts have drawn on the practice and the experience of this type of litigation in other countries.⁶² The complexities of class actions are explored in the Working Paper that preceded the Law Commission's Report.⁶³ An excellent comparative overview of class actions is to be found in the Ontario Law Reform Commission's *Report on Class Actions*.

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(iv) Anyone acting in the public interest

The provision in FC s 38(d) that 'anyone acting in the public interest' may approach a competent court for relief is, potentially, the most far-reaching of the five grounds on which standing may be granted to persons seeking to enforce the rights guaranteed in Chapter 2. On its face, this provision appears to introduce an unrestricted public interest action. The actual extent to which standing is unrestricted in terms of this clause, of course, will depend upon the way in which the courts interpret the words 'in the public interest'. Our courts would do well to follow the generous approach adopted by the Supreme Court of India. It regards any constitutional challenge to legislation or governmental action to be in the public interest, and on this basis allows any citizen to bring such a matter before the court.⁶⁴ A similarly liberal rule of standing in constitutional matters has been developed by the Canadian Supreme Court. It has held that a person who is not directly affected by legislation may challenge it, provided that there is a serious issue to be tried in which that person has a genuine interest as a citizen, and there is no other reasonable and effective manner in which the issue may be brought before the court.⁶⁵ Given that both of these liberal rules of standing have been developed in the absence of a provision equivalent to FC s 38(d), it would be anomalous were South African courts to adopt a more restrictive interpretation.

In *Ferreira v Levin NO & Others*, O'Regan J was the only justice to reach the issue of *locus standi* to claim relief in the public interest. She identified IC s 7(4)(v) (which is virtually identical to FC s 38(d)) as 'the provision in which the expansion of the ordinary rules of standing is most obvious',⁶⁶ and said that the Court should require

60 Act 4 of 2000.

61 See *Petho v Minister of Home Affairs, Zimbabwe, & Another* 2003 (3) SA 131 (ZS).

62 See *Ngxuza II* (supra) at fn 5.

63 South African Law Commission *The Recognition of a Class Action in South African Law* Working Paper 57 (1995).

64 See Cheryl Loots 'Standing to Enforce Fundamental Rights' (1994) 10 *SAJHR* 49, 50 ('Standing').

65 *Minister of Justice of Canada v Borowski* 130 DLR (3d) 588, [1981] 2 SCR 575. See Loots 'Standing' (supra) at 55 (Discussion of this and other Canadian cases on standing.)

66 *Ferreira* (supra) at para 233.

an applicant 'to show that he or she is genuinely acting in the public interest'. She elaborated on this requirement as follows:

Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.⁶⁷

In *Port Elizabeth Municipality v Prut NO & Another*, the Eastern Cape High Court held that a municipality was acting in the public interest, as well as in its own interest, by requesting an order declaring that its differential treatment of ratepayers did not constitute unfair discrimination within the meaning of IC s 8(2). Referring to the broad approach to standing adopted by Chaskalson P in *Ferreira v Levin*,⁶⁸ Melunsky J held that a court should be slow to refuse to exercise

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its jurisdiction in terms of IC s 7(4) where a decision would be in the public interest and where it may put an end to similar disputes.⁶⁹

In *Van Rooyen & Others v The State & Others*, a magistrate and the Association of Regional Magistrates of South Africa were held by the High Court to have *locus standi* in terms of FC s 38(d) to attack the validity of legislation which they contended undermined the independence of the magistrates' courts guaranteed by the Final Constitution.⁷⁰ Southwood J held that it was clearly in the public interest that the issue of the independence of the courts should be addressed and resolved.⁷¹

(v) An association acting in the interest of its members

The provision in FC s 38(e) that an association acting in the interest of its members may seek relief is important because, before 1994, there were a number of cases in which the courts had not allowed associations to claim such relief.⁷² In *South African Association of Personal Injury Lawyers v Heath & Others*, FC s 38(e) was applied in granting the applicant association *locus standi* to challenge the constitutionality of

67 Ibid at para 234.

68 Ibid at paras 164-165.

69 *Port Elizabeth* (supra) at 325E-F.

70 2001 (4) SA 396 (T), 424H, 2001 (9) BCLR 995 (T).

71 This matter went on to the Constitutional Court for confirmation of the declaration of invalidity and on appeal, but *locus standi* was not in issue before the Constitutional Court. See *Van Rooyen & Others v The State & Others (General Council of the Bar Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC).

72 *Ahmadiyya Anjuman Ihaati-Islam Lahore (South Africa) & Another v Muslim Judicial Council (Cape) & Others* 1983 (4) SA 855 (C), 864E-F; *South African Optometric Association v Frames Distributors (Pty) Ltd* 1985 (3) SA 100 (O), 103F-105C; *Natal Fresh Produce Growers' Association & Others v Agroservice (Pty) Ltd & Others* 1990 (4) SA 749 (N), 758G-759D.

search and seizure provisions that threatened to infringe the constitutional rights of its members.⁷³

While FC s 38(e) clearly enables an association to act as a representative of its members, in two cases it has been relied upon by courts to deal with a challenge to the capacity of an unincorporated association to litigate in its own name. In *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council & Others* — in which the applicant association sought relief in the interests of the residents of a township — the association's *locus standi* was challenged on the basis that, as an unincorporated association which did not have the attributes of a *universitas*, it did not have the capacity to sue.⁷⁴ The court held that the Final Constitution's expanded standing provisions indicated that the common-law restrictions on the standing of voluntary associations could not apply without qualification to associations seeking redress for alleged infringements of fundamental rights. This decision gives effect to the directive in FC s 39(2) that, in

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developing the common law, courts must promote the spirit, purport and objectives of the Bill of Rights.⁷⁵ A similar approach to the capacity of a voluntary association to claim relief in the interests of a vulnerable constituency was adopted in *Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others (No 1)*. The *Rail Commuter* Court held that 'to restrict voluntary associations in the way that they are restricted by common-law requirements would be contrary to the ideal of a vibrant and thriving civil society which actively participates in the evolvment and development of a rights culture pursuant to the rights enshrined in the Bill of Rights.'⁷⁶ While this liberal attitude is a welcome indication of the commitment of the courts to the promotion of access to justice and the development of the common law, these findings were not strictly speaking necessary since Uniform Rule 14 permits such an association the procedural convenience of litigating in its own name.

(d) The wider effect of FC s 38

It is important to note that the extended standing provisions of FC s 38 apply only with regard to actions claiming relief in respect of the infringement of a right entrenched in Chapter 2. In all other matters the common-law rules of standing continue to apply. Over time, the common-law rules should be liberalized in view of the FC s 39(2) requirement that courts should have due regard to the spirit, purport and objects of the Bill of Rights in the interpretation of any legislation and the

73 2000 (10) BCLR 1131 (T). *Locus standi* was not in issue when this matter subsequently came before the Constitutional Court. See *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC).

74 2002 (6) SA 66 (T), 2003 (1) BCLR 72 (T) ('*Highveldridge*').

75 The argument considered by the court in paragraph 26 of the judgment is, with respect, without any merit and exhibits a great deal of conceptual confusion. Counsel submitted that if the court found that the association had no capacity to sue, then its members would still constitute a 'group of people' who would have standing in terms of FC s 38(c). FC s 38(c) does not give standing to a group of people – it gives standing to an applicant who represents the interests of a group of people.

76 2003 (5) SA 518 (C), 556, 2003 (3) BCLR 288, 318–9 (C) ('*Rail Commuter*') quoting *Highveldridge* (supra) at para 24.

development of the common law or customary law. This has already begun to happen. In *Wildlife Society of Southern African & Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa & Others*, Pickering J adopted an extremely expansive approach to standing, expressing the opinion that, even at common law, an environmental conservation association should have *locus standi* to apply for an order compelling the state to enforce a conservation statute.⁷⁷

In contrast to the decision in *Wildlife Society*, an extremely restrictive approach to the right of an association to represent the interests of its members was adopted by Pickering J in *Congress of Traditional Leaders of South Africa v Minister for Local Government, Eastern Cape, & Others*.⁷⁸ The applicant association applied for

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an order declaring certain legislation relating to local government unconstitutional and therefore invalid. The court held that the applicant's essential complaint was that the legislation deprived traditional leaders of powers, derived from earlier legislation, that were, in some sense, entrenched in substantive provisions of the Interim Constitution.⁷⁹ Despite the fact that the application involved a constitutional issue, the court held that the association did not have *locus standi* to represent the interests of the traditional leaders because there was no claim based upon an alleged infringement of the Bill of Rights, and the Bill's standing provisions therefore did not apply. While it is correct that the constitutional standing provisions apply only in respect of infringements of the Bill of Rights, it is submitted that the court should have followed the line of cases in which courts have allowed associations to represent their members.⁸⁰

The development of the common law in the direction of a more liberalized notion of standing is apparent from the decisions in *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council & Others* and *Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others (No 1)*. In these cases it was held that the restrictive common-law attitude to the capacity of unincorporated voluntary associations to sue was not appropriate when such associations sought to enforce the specific provisions of and general values manifest in the Bill of Rights.⁸¹ In both cases the courts referred to FC s 38 in support of the decision to liberalize the common-law rules.

7.3 Ripeness

(a) The concept of ripeness

77 1996 (3) SA 1095 (Tk) 1996 (9) BCLR 1221 (Tk) ('*Wildlife Society*').

78 1996 (2) SA 898 (Tk) ('*Congress of Traditional Leaders*'). It is interesting to compare the restrictive approach to *locus standi* in this matter with the expansive approach to *locus standi* adopted by the same judge in *Wildlife Society of Southern*. See § 7.2(c)(iii) infra.

79 *Congress of Traditional Leaders* (supra) at 902A–C.

80 See § 7.2(c)(v) supra.

81 See § 7.2(c)(v) supra.

The doctrine of ripeness prevents a party from approaching a court before that party has been subject to prejudice, or the real threat of prejudice, as a result of the legislation or conduct challenged.

This doctrine is well developed in American law.⁸² The United States Supreme

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Court has held that the rationale behind the ripeness requirement is to enable courts to avoid becoming entangled in abstract disagreements with other branches of government.⁸³ It has also described the ripeness inquiry as a 'threshold' determination designed to measure whether the 'actual controversy' requirement of Article III of the US Constitution has been met.⁸⁴ In deciding whether to apply the doctrine as a bar to consideration of the merits of a case the courts have taken into account 'the hardship to the parties of withholding court consideration.'⁸⁵

(b) Ripeness in South African law before 1994

The doctrine of ripeness was employed by South African courts as long ago as 1906 in *African Political Organization and the British Indian Association v Johannesburg Municipality*.⁸⁶ The plaintiffs sought an order declaring *ultra vires* a regulation in terms of which persons of colour were prohibited from traveling on the municipal tramway service. The court dismissed the application on the grounds that there was no allegation that any of the persons represented by the plaintiff associations had been refused access to the tramcars operated by the respondent. The inequity which results from the application of the doctrine in circumstances such as this is that people aggrieved by the legislation are required first to break the law or subject themselves to the indignity of being refused access to the facility concerned before the court will allow them to challenge the validity of the legislation.

Not all South African courts adopted this attitude. In *Transvaal Coal Owners Association v Board of Control* Gregorowski J reasoned as follows:

82 See Lawrence H Tribe *American Constitutional Law* (2nd Edition, 1988) 77–82; *United Public Workers v Mitchell* (1947) 330 US 75 (an example of the application of the doctrine of ripeness in a matter in which federal employees challenging a statute which banned them from being involved in political activities were denied relief because they had not yet violated the statute). See also *Laird v Tatum* (1972) 408 US 1. (The same principle applies where an administrative practice, programme or policy is challenged as being unconstitutional. Anti-war activists who challenged a programme of surveillance of civilians by the United States Army were refused declaratory and injunctive relief because they had not yet suffered any injury in consequence of the surveillance and could assert no more than a fear that the army might someday misuse the information gathered to their detriment. In a dissenting judgment, Justice Douglas said that a person in the position of the applicants (respondents in the appeal) should not have to wait until he loses his job or until his reputation is defamed before he is entitled to sue because that would in effect immunize from judicial scrutiny the alleged unconstitutional conduct.)

83 *Abbott Laboratories v Gardner* 387 US 136, 148 (1967) ('*Abbot Laboratories*').

84 See Gene R Nichol Jr 'Ripeness and the Constitution' (1987) 54 *University of Chicago LR* 153, 163.

85 *Pacific Gas & Electric Co v State Energy Resources Conservation and Development Commission* 461 US 190, 201 (1983), quoting *Abbott Laboratories* (supra) at 149.

86 1906 TS 962. See also *Rossouw v Minister of Mines and Minister of Justice* 1928 TPD 741, 747.

It is perfectly true that usually the court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed. But this is quite a different matter. Here the applicants are condemned to do certain things or to abstain from doing certain things which otherwise they are at perfect liberty to do or to abstain from doing. If they contravene the order they are liable to fine and imprisonment. If the order is invalid their right and freedom of action are infringed, and it is not at all convincing to say you must first contravene the order and render yourself liable to fine and imprisonment, and then only can you test the validity of the order, and have it decided whether you are liable to the penalty or not.⁸⁷

The courts in *Gool v Minister of Justice*⁸⁸ and *Afdelingsraad van Swartland v Administrateur, Kaap* reached similar conclusions.⁸⁹ Baxter suggests that the criterion by which ripeness is to be measured is whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not.⁹⁰

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In *Cabinet of the Transitional Government for the Territory of South West Africa v Eins*, the Appellate Division ostensibly refused consideration on the merits because the applicant lacked *locus standi*. In fact it applied the doctrine of ripeness.⁹¹ Eins applied for an order declaring legislation invalid in terms of the South West Africa Constitution Act 39 of 1968. The legislation at issue was an Act passed by the Legislative Assembly, which authorized the Transitional Cabinet to prohibit certain persons from being within the territory or order them to be removed from the territory if it had reason to believe that such persons endangered, or were likely to endanger, the security of the territory or its inhabitants or the maintenance of public order, or that such persons engendered, or were likely to engender, a feeling of hostility between members of the different population groups of the territory.⁹² The persons who could be prohibited or removed in terms of this legislation were persons who were not born in the territory and were not rendering service in the defence force or employed by the government.⁹³ Eins alleged that he was one of thousands of people who were permanent residents of South West Africa, but who were not born in the territory and could, therefore, be prohibited from being in the territory or be removed from the territory in terms of the Act. It was submitted that the Act deprived Eins, and obviously others in his position, of the fundamental right to reside in South West Africa — which was guaranteed by the Constitution — and supplanted such right with a licence revocable at the discretion of the Cabinet of the Transitional

87 1921 TPD 447, 452.

88 1955 (2) SA 682 (C).

89 1983 (3) SA 469 (C).

90 Lawrence Baxter *Administrative Law* (1984) 720.

91 1988 (3) SA 369 (A) ('*Cabinet of the Transitional Government*').

92 Residence of Certain Persons in South West Africa Regulation Act 33 of 1985, s 9 ('Residence Act').

93 Residence Act, s 9(1)(a).

Government of South West Africa.⁹⁴ The court of first instance declared the Act to be unconstitutional, invalid and unenforceable for want of compliance with the Bill of Fundamental Rights incorporated in the South West Africa Legislative and Executive Authority Establishment Proclamation⁹⁵ and enacted in terms of s 38 of the South West Africa Constitution Act.⁹⁶ On appeal, the Appellate Division refused to consider the merits of the application. It held that Eins had no *locus standi* to claim the relief because there was no evidence that any action had been taken against him, or that the Cabinet intended to take any action against him in terms of the Act. *Cabinet of the Transitional Government* offers a classic example of the blurring of the doctrines of standing and ripeness.⁹⁷

(c) Ripeness under the Final Constitution

Ripeness is usually said to be at issue when the person bringing the action has not yet been affected by the unlawfulness of which he complains. The term may also, however, be used where alternative remedies have not been exhausted, or an issue can be resolved without recourse to the Final Constitution.

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(i) Ripeness qua premature action

Ripeness *qua* premature action was first dealt with by the Constitutional Court in *Ferreira v Levin NO & Others*. The applicants challenged the examination process in s 417(2)(b) of the Companies Act as an infringement of their fair trial rights. The section obliged them to give potentially incriminating answers that could be used in a future criminal proceeding. A minority of the *Ferreira* Court was of the view that the challenge was too hypothetical to be heard under IC s 7(4)(b)(i) because there was no evidence that the applicants were likely to face criminal charges.⁹⁸ However, for the majority of the *Ferreira* Court, ripeness was not an issue because the applicants were faced with an immediate demand to give potentially incriminating answers to the examiner's questions, and they faced imprisonment if they refused to provide these answers. The applicants could not, in those circumstances, be expected to expose themselves to prosecution under the statute before they were afforded an opportunity to challenge its constitutionality.⁹⁹

Ripeness could have been raised in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others*. The applicants, who sought to have an immigration law declared invalid, had never applied for an immigration

94 *Cabinet of the Transitional Government* (supra) at 386G-I.

95 R101 of 1985.

96 Act 39 of 1968.

97 See Cheryl Loots 'Standing to Enforce Fundamental Rights' (1994) 10 *SAJHR* 49.

98 *Ferreira* (supra) at para 41 (Ackermann J), at paras 199 and 205 (Kriegler J), and at paras 231-232 (O'Regan J). O'Regan J nevertheless found that the public interest in determining the constitutionality of the section rendered the issue ripe for hearing and afforded the applicants standing under IC s 7(4)(b)(v). *Ibid* at paras 233-237.

99 *Ibid* at paras 162-164.

permit under the impugned provision and had therefore not had action taken against them.¹⁰⁰ The state's argument on ripeness was, however, put in the form of an allegation that if the applicants had made the application, they may have been granted the permit, and this would have resolved the matter without resort to a constitutional challenge.¹⁰¹

The wording of both FC s 38 and IC s 7(4) indicate that the drafters intended that procedural barriers should not stand in the way of courts deciding constitutional issues. Where there is a real threat of a constitutional irregularity, a court should be prepared to hear the matter at the instance of any plaintiff who brings the issue before it. In *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza*, Cameron JA expressed disapproval of the conduct of the respondent, who had raised 'every stratagem and device and obstruction, every legal argument and non-argument that it thought lay to hand' including contradictory arguments as to ripeness and mootness.¹⁰²

(ii) Failure to exhaust other remedies

Many constitutional claims involve judicial review of administrative action. The common-law principle that before claiming judicial review a party should first

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exhaust internal remedies¹⁰³ is now embodied in s 7(2)(a) of the Promotion of Administrative Justice Act ('PAJA').¹⁰⁴ Where a party who claims judicial review of an administrative action has failed to exhaust internal remedies, the point may be taken that the matter is not ripe for hearing. At common law, a court had the discretion as to whether to uphold such an argument.¹⁰⁵ Section 7(2)(c) of PAJA now provides that a court or tribunal may 'in exceptional circumstances' exempt a person from the obligation to exhaust internal remedies if this is deemed to be 'in the interests of justice'.¹⁰⁶

(iii) Matters that can be resolved without reaching the constitutional issues

100 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) ('*NCGLE II*') at paras 21-26.

101 See § 7.3(c)(iii) *infra*.

102 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA) at para 14.

103 See Baxter (*supra*) at 720; Yvonne Burns *Administrative Law under the 1996 Constitution* (2nd Edition, 2003) 290; Jacques De Ville *Judicial Review of Administrative Action in South Africa* (2003) 464; Cora Hoexter *The New Constitutional and Administrative Law* (2002) 303; Marius Wiechers *Administrative Law* (translated by Gretchen Carpenter) (1985) 270.

104 Act 3 of 2000.

105 See Baxter (*supra*) at 720; Burns (*supra*) at 290; De Ville (*supra*) at 464; Hoexter (*supra*) at 303; Wiechers (*supra*) at 270.

106 See Hoexter (*supra*) at 304-305; Iain Currie & Jonathan Klaaren *The Promotion of Administrative Justice Act Benchbook* (2002) 182-183.

In *NCGLE II*, the Constitutional Court held that '[t]he concept of ripeness also embraces the general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'¹⁰⁷ This principle was first enunciated by Kentridge AJ in *S v Mhlungu & Others*.¹⁰⁸ In *Zantsi v Council of State, Ciskei*, the Court added the corollary that only where a compelling reason to do so exists should a court deviate from this principle.¹⁰⁹ If a putative constitutional issue is deemed not to be ripe, then the lack of ripeness applies only to the constitutional issue, not to the case as a whole.

7.4 Mootness

(a) The concept of mootness

While the 'ripeness' doctrine is concerned with cases that are brought too early, the 'mootness' doctrine is relevant to cases that are brought or heard too late because the issues underlying the dispute have, in some way, been resolved. A case is moot and therefore not justiciable if it no longer presents an existing or live controversy or the prejudice, or threat of prejudice, to the plaintiff no longer exists. Part of what underlies this doctrine is the notion that the courts should

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avoid giving advisory opinions on abstract propositions of law.¹¹⁰

A classic example of mootness in American jurisprudence is *DeFunis v Odegaard*.¹¹¹ DeFunis was denied admission as a first-year law student at the University of Washington Law School. He challenged this decision, contending that the procedures and criteria employed by the Law School Admission Committee discriminated against him on account of his race in violation of the equal protection clause of the Fourteenth Amendment. The trial court granted a mandatory injunction commanding the law school to admit him. It did. On appeal this judgment was reversed by the Washington Supreme Court. DeFunis then petitioned the United States Supreme Court for a writ of *certiorari*. The writ resulted in a stay of the judgment of the Washington Supreme Court pending the final disposition of the case. By the time the matter came before the United States Supreme Court, DeFunis had registered for his final quarter in law school. The Supreme Court held that it could not, consistent with the case and controversy requirement of Article III, consider the substantive constitutional issues raised by the parties because DeFunis would complete his law school studies regardless of the decision of the court. Justice Brennan, in dissent, highlighted the unfortunate effect of a finding of mootness on a matter that engages issues of public interest:

107 *NCGLE II* (supra) at para 21. See Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* (4th Edition, 2001) 66–70.

108 1995 (3) SA 867 (CC), 895E, 1995 (7) BCLR 793 (CC) at para 59.

109 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC) at para 4. See also *S v Bequiot* 1997 (2) SA 887 (CC), 1996 (12) BCLR 1588 (CC) at paras 12–3; and *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC) ('*Dlamini*') at para 27.

110 *NCGLE II* (supra) at para 21 fn 18.

111 (1974) 416 US 312.

The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities, as evidenced by the filing of twenty-six *amicus curiae* briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately again to this court.

In certain circumstances, American courts have exercised their discretion to decide a case seemingly moot where the result of refusing to decide the issues would create a situation 'capable of repetition, yet evading review'.¹¹² In *Roe v Wade*, a pregnant woman's class action challenging the constitutionality of state anti-abortion statutes reached the Supreme Court only *post partum*.¹¹³ The *Roe* Court observed that '[p]regnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us.'¹¹⁴ The *Roe* Court also took into account that the term of pregnancy is shorter than the period of gestation required for a matter to work its way up to the United States Supreme Court; review would never be possible if the court were to insist upon the plaintiff still being pregnant.

In *Minister of Justice of Canada v Borowski*, a challenge to anti-abortion legislation was disposed of on the basis that it had become moot.¹¹⁵ The plaintiff's standing

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to bring suit had initially been recognized by the Supreme Court of Canada and the case had proceeded to its merits. But, after the case had been decided by the Saskatchewan Court of Appeal, and leave had been granted to appeal to the Supreme Court of Canada, all of the abortion provisions of the relevant Criminal Code were struck down in another matter.¹¹⁶ Nevertheless, the claimant, Mr Borowski, wanted to continue his proceedings on the basis that non-therapeutic abortions as well as therapeutic abortions were now permitted. The Supreme Court of Canada refused to hear the matter. It held that there was no longer a live controversy to resolve because the conditions that gave rise to Mr Borowski's appeal had disappeared.

In the very same year, the Canadian Supreme Court exercised its discretion to decide another abortion case despite the fact that it had become moot. In *Tremblay v Daigle*, the plaintiff relied on the constitutional right to life of a foetus to claim an injunction against his girlfriend to restrain her from having an abortion.¹¹⁷ By the time the case was argued, the defendant had had the abortion. The *Tremblay* Court denied the request for an injunction. It exercised its discretion to decide the case because it believed that it was important to remove the threat of such injunctive proceedings in the interest of other pregnant women. Hogg indicates that the

112 See *Tribe American Constitutional Law* (*supra*) at 84.

113 410 US 113 (1973).

114 *Ibid* at 125.

115 (1981) 130 DLR (3rd) 588, [1981] 2 SCR 575 ('*Borowski*').

116 *R v Morgentaler (No 2)* (1988) 44 DLR (4th) 385, [1988] 1 SCR 30.

117 (1989) 62 DLR (4th) 634, [1989] 2 SCR 530.

Canadian Supreme Court has more often than not exercised its discretion to decide issues that have become moot where it is persuaded that there is a serious legal question to be decided and that the question, despite its mootness, would be properly argued on both sides.¹¹⁸

(b) Mootness in South African law before 1994

The doctrine of mootness does not appear to have been applied in South African law prior to the advent of the Interim Constitution.¹¹⁹ One explanation for this may be that even where an issue had become moot, the court usually decided the merits for the purpose of determining which party was to pay the costs.

(c) Mootness under the Final Constitution

The Constitutional Court has held that mootness will be a possible bar to relief 'in the absence of any remaining triable issue.'¹²⁰ Mootness is particularly likely to be a bar to relief where the constitutional issue is not merely moot as between the parties but is also moot relative to society at large, and no considerations of compelling public interest require the court to reach a decision.¹²¹ Where it

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is in the public interest that the constitutionality of legislation should be determined, an argument that the matter is moot is less likely to succeed.¹²² Where there are conflicting High Court decisions, the need to resolve the conflict may persuade the Supreme Court of Appeal or Constitutional Court to hear the matter.¹²³

In 1997, s 21A was introduced into the Supreme Court Act to give the Supreme Court of Appeal or any High Court sitting as a court of appeal the discretion to dismiss an appeal if the circumstances are such that the order it might give will have no practical effect or results.¹²⁴ In *Premier, Provinsie Mmpumulanga en 'n Ander v Groblerdalse Stadsraad* Olivier JA held that the effect of this section was to eliminate the use of such vague concepts of 'abstract', 'academic' or 'hypothetical' as criteria for the exercise of the power of a court of appeal not to hear an appeal.¹²⁵ Instead, the court held, s 21A imposes a positive test: Will the judgment or order have a

118 Peter W Hogg *Constitutional Law of Canada* (3rd Edition, 1992) § 56.3(c).

119 The principle that the court will not decide academic issues which will not have binding effect on the parties is, however, well established in South African law. See *Masuku & Another v State President & Others* 1994 (4) SA 374, 380I (T) applying *Ex parte Nell* 1963 (1) SA 754 (A), 760B-C.

120 *Dlamini* (supra) at paras 27 and 32.

121 See *President of the Ordinary Court Martial NO v Freedom of Expression Institute* 1999 (4) SA 682 (CC), 1999 (11) BCLR 1219 (CC)('FXI').

122 See *S v Manamela* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC).

123 See *Western Cape Education Department & Another v George* 1998 (3) SA 77 (SCA), 84D-E ('George').

124 Act 59 of 1959. The amendment was enacted in 1993, but came into operation only on 14 February 1997.

practical effect or result? In *Western Cape Education Department & Another v George*, Howie JA assumed, without deciding, that the practical effect or result referred to in s 21A is not restricted to the position *inter partes*, but that it was wide enough to include a practical effect or result in some other respect, such as a matter of wide public interest or urgency, or to resolve conflicting High Court decisions.¹²⁶

There is no provision similar to s 21A of the Supreme Court Act applicable to the Constitutional Court. However, in *President of the Ordinary Court Martial NO v Freedom of Expression Institute*, the Constitutional Court held that it had the discretion to exercise its power in terms of FC s 172(2) to confirm an order of another court declaring legislation to be invalid when the matter in issue had become moot. In exercising its discretion, the *FXI* Court stated that it would consider whether any order it may make would have any practical effect, either on the parties or on others.¹²⁷ This rule has been held to be equally applicable to appeals to the Constitutional Court.¹²⁸

In *Independent Electoral Commission v Langeberg Municipality*, the Court held that its discretion must be exercised according to the interests of justice and that relevant factors may include the practical effect that any possible order may have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced.¹²⁹ The *Langeberg* Court made it clear, however, that the fact that it had exercised its discretion in favour of hearing one moot argument did not mean that it would be obliged to reach a finding with respect to other moot issues.¹³⁰

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The first case in which the Constitutional Court refused to hear a matter on the ground that the issue had become moot was *J T Publishing (Pty) Ltd & Another v Minister of Safety and Security & Others*.¹³¹ In *J T Publishing*, the Court declined on appeal to make an order declaring the Publications Act¹³² and the Indecent or Obscene Photographic Matter Act¹³³ unconstitutional because, after the application had been dismissed in the Supreme Court (now the High Court), legislation was tabled to repeal the two impugned laws. By the time the Constitutional Court gave

125 1998 (2) SA 1136 (SCA), 114D-F.

126 *George* (supra) at 83E-F and 84D-E.

127 *FXI* (supra) at para 16. In *FXI* and in *Janse van Rensburg NO & Another v Minister of Trade and Industry NNO & Another*, the Constitutional Court declined to confirm the order of invalidity of a statutory provision on the ground that the issue had become moot. 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC).

128 *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) ('*Langeberg*') at para 9.

129 *Ibid* at para 11.

130 *Ibid*.

131 1997 (3) SA 514 (CC), 1996 (12) BCLR 1599 (CC) ('*JT Publishing*').

132 Act 42 of 1974.

its judgment on appeal this legislation had been passed by Parliament as the Films and Publications Act¹³⁴— although it had not yet been brought into effect by the President. The Constitutional Court refused to grant the order sought by the applicant, because, as Didcott J wrote:

[T]here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become. The repeal of the Publications Act has disposed altogether of the question pertaining to that. And any aspect of the one about the Indecent or Obscene Photographic Matter Act which our previous decision on it did not answer finally has been foreclosed by its repeal in turn. I therefore conclude that we should decline at this stage to grant a declaratory order on either topic.¹³⁵

It is interesting to note that IC s 102(8) specifically provided that if any division of the Supreme Court disposed of a matter in which a constitutional issue had been raised and such court was of the opinion that the constitutional issue was of such public importance that a ruling should be given thereon, it could, notwithstanding the fact that the matter had been disposed of,¹³⁶ refer such issue to the Constitutional Court for decision. This provision highlighted the distinction between mootness as to parties and mootness relative to society at large. Where a decision on an issue had implications for the public or members thereof, the Constitutional Court could decide the issue despite the fact that it was moot with regard to the parties. There is no similar provision in the Final Constitution.

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7.5 Delineating the doctrines of standing, ripeness and mootness

It seems clear that the standing doctrine should be concerned with *which person* may raise a particular issue, whereas the ripeness and mootness doctrines are concerned with *when* issues may be raised. However, the dividing lines between the doctrines are often fuzzy. In a decision that turns on ripeness or mootness, the court will often hold that the plaintiff has no standing.¹³⁷ In *City of Los Angeles v Lyons*, a plaintiff who had been choked to unconsciousness by an officer of the Los Angeles Police Department sought an injunction against the police department's alleged

133 Act 37 of 1967.

134 Act 65 of 1996.

135 *J T Publishing* (supra) at para 17. The case illustrates the dangers of concluding prematurely that a matter has become moot. The decision of the Constitutional Court was handed down on 21 November 1996. In January 1998, the Films and Publications Act had still not been brought into operation. Thus the 'moribund and futureless provisions' which the Constitutional Court chose not to declare invalid continued to authorize unconstitutional censorship for more than a year after the Court had decided that their validity was a moot issue.

136 As to the meaning of the expression 'disposes of a matter', see *Du Plessis & Others v De Klerk & Another*. 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) at paras 26–28.

137 *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) (Discussed at § 7.2(a) supra).

practice of applying unnecessary and life-threatening chokeholds.¹³⁸ The *Lyons* Court held that the plaintiff lacked the standing to request such relief. It has been suggested that the effect of this decision is that the standing doctrine has displaced the more flexible doctrine of mootness as the preferred hurdle in litigation predicated on past injuries.¹³⁹ The doctrine of mootness is more flexible because a court retains the discretion to hear a case which is moot, a finding that the plaintiff does not have standing will be an absolute bar to the matter being heard.

The fact that FC s 38 virtually precludes any opportunity for a court to refuse to hear a matter on the grounds that the plaintiff does not have standing may be advanced as a reason for retaining the doctrines of ripeness and mootness. However, while there is undoubtedly great advantage to be had in the retention of all three doctrines in their most flexible form, the courts should never exercise their discretion against hearing a matter if there is any public benefit to be derived from a decision being made.

138 461 US 95 (1983).

139 Richard H Fallon Jr 'Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of *Lyons*' (1984) 59 *New York University LR* 1, 6. See also Gene R Nichol 'Ripeness and the Constitution' (1987) 54 *University of Chicago LR* 153, 172.