

Litigating socio-economic rights through *amicus* briefs

Challenges and strategies

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The Constitution of South Africa (the Constitution) is characterised by its extensive commitment to socio-economic rights. The courts are mandated to translate these rights into enforceable legal claims, primarily by deciding on the constitutionality of any law or conduct. This includes deciding whether a given law, policy or conduct is consistent with socio-economic rights.

Civil society organisations and other human rights institutions have influenced the development of law and policy concerning socio-economic rights in many ways, including through litigation. One such organisation is the Community Law Centre

(CLC), through its Socio-Economic Rights Project, which has intervened in a number of public interest litigation cases. Due to the nature of CLC - being a research and academic institution without a litigation unit - litigating as an *amicus curiae* has been the only

feasible way of conducting public interest litigation advancing socio-economic rights.

This article draws on the experience of CLC to highlight some opportunities, strategies and challenges that litigating through *amicus* briefs presents.

Many of these insights will be drawn from the cases in which CLC has intervened.

Litigating through amicus briefs

Amicus curiae literally means “friend of the court”. The Rules of the South African Constitutional Court make provision for intervention in cases as an *amicus curiae* (rule 10). Any person interested in a case may be admitted as an *amicus* either on the basis of the written consent of all the parties concerned (rule 10(1)) or on the basis of an application to the Chief Justice (rule 10(4)). With regard to the latter, admission is entirely in the discretion of the Chief Justice.

The High Court Uniform Rules also make provision for *amicus curiae* interventions before the High Court in cases that raise constitutional issues (rule 16A). The Rules of the Supreme Court of Appeal, as well, allow for such intervention (rule 16).

In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), with reference to its own rules referred to above, the Constitutional Court pointed out that the principles governing the admission of an *amicus* in any given case are that, in addition to having an interest in the proceedings, the *amicus* must make submissions that are relevant to the proceedings and that raise new contentions that may be useful to the Court (para 9).

This approach has proved to be quite a useful way of using limited resources to achieve a greater impact on society or a given social group or community.

In the case of *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), the Court described an *amicus* in the following words:

An *amicus curiae* assists the court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the court’s decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court. It chooses the side it wishes to join, unless requested by the court to urge a particular position. An *amicus*, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs. Whether there may be circumstances calling for departure from this rule is not necessary to decide in this case. Suffice it to say that in the present case no such departure is warranted (para 63).

Subsequently, in the case of *In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC), the Constitutional Court clarified that the role of an *amicus* is “to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn” (para 5). An *amicus* therefore has a special duty “to provide cogent and helpful sub-

missions that assist the court” and “must not repeat arguments already made but must raise new contentions based on the data already before the court” (para 5; see also rule 10(7)). The Court added that it was inappropriate for an *amicus* to introduce new contentions based on fresh evidence (para 5).

CLC interventions

The CLC’s intervention in socio-economic rights cases as an *amicus curiae* is a means of contributing to developing jurisprudence on socio-economic rights that is responsive to the needs of the poor, homeless and landless. It acts in the interests of the broader society rather than of specific individuals, focusing on the broader implications of a case. This approach has proved to be quite a useful way of using limited resources to achieve a greater impact on society or a given social group or community.

Thus far, the CLC has intervened in seven socio-economic rights cases – five on housing rights and evictions, one on access to health care and the last on social security (old-age pension equalisation).

Socio-economic rights cases in which the CLC has intervened

- *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (Grootboom)
- *Minister of Health and Others v Treatment Action Campaign* 2002 (5) SA 721 (CC) (TAC)
- *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (8) BCLR 786 (CC) (Modderklip)

- *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (6) BCLR 643 (SCA) (*Rand Properties*)
- *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC) (*Olivia*)
- *Christian Roberts and Others v Minister for Social Development and Others* Case No: 32838/05 (High Court) (*Christian Roberts*)
- *Thubelisha Homes and Others v Various Occupants and Others* Case No: 13189/07 (CC) (*Thubelisha Homes*)

As noted above, the CLC's intervention in these cases was motivated by its commitment to the effective protection and enforcement of socio-economic rights by the courts, especially through the development of jurisprudence which is pro-poor and responsive to social and economic inequalities in South African society.

In these cases, the CLC intervened jointly with other organisations: in *Grootboom*, with the South African Human Rights Commission; in *TAC*, with the Institute for Democracy in South Africa; in *Modderklip*, with Nkuzi Development Association and the Programme for Land and Agrarian Studies at the University of the Western Cape; in *Rand Properties*, *Olivia* and *Thubelisha Homes*, with the Centre on Housing Rights and Evictions; and in *Christian Roberts*, with the Centre for Applied Legal Studies.

The role of the CLC and the partner organisations, in these cases was to provide the courts with insights on the interpretation of the rights in issue, drawing on international law and comparative

constitutional law and advancing viewpoints that highlighted the systematic problems raised by these cases.

Looking at *Grootboom* for instance, the *amici's* intervention was vital as it shifted the case from its narrow focus (the particular needs of the community - whether the government could provide housing to that community if they did not have housing) to the broader implications of the case. The important role of the *amici* in this case has been described by Justice Sachs in the following words:

This *amicus* intervention swung the debate dramatically. Most of the preceding arguments had failed to really look socio-economic rights in the eye. There had been technical arguments and attempts to frame the case in terms of children's rights but [the *amici*] forced us to consider what the nature of the obligations imposed by these rights was. Although we didn't accept the entire argument of the *amici*, this wasn't vital. What was important was the nature of the discourse. It was placing socio-economic rights at the centre of our thinking and doctrine (Sachs, 2007: 18-19).

This case concerned the right to have access to adequate housing for those faced with evictions, and children's right to shelter. The High Court had decided the case on the basis of children's right to shelter in section 28 of the Constitution. But the *amici* urged the Constitutional Court also to consider section 26 of the Constitution - the right of everyone to have access to adequate housing - in its analysis of

the state's housing policies. This shifted attention from considering a short-term solution to the case in issue through a negotiated settlement to a consideration of the broader implications of the issues at hand for others in the same position as the *Grootboom* community.

Challenges

Intervention in these cases has not been without challenges. These include non-compliance with, or ineffective or slow implementation of, court orders

handed down in successful litigation on socio-economic rights. For example, although there has been some progress in implementing the *Grootboom* case, municipalities have still not assessed their housing needs in terms of the Emergency Housing Programme. Moreover, Irene Grootboom, who initiated the case, recently died, eight years after the judgment, while still living in a shack waiting for formal housing.

Another challenge is the reluctance of the courts to grant supervisory orders, which adds to the difficulties in ensuring the effective enforcement of court orders. To be fair to the courts, the nature of socio-economic rights litigation presents challenges in formulating an appropriate remedy in a given case.

Generally, the enthusiasm of organisations that use litigation as a strategy is increasingly frustrated by the decrease in funding for public interest litigation, which makes it

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impossible to retain competent advocates and attorneys. Political pressure, coupled with animosity between the government and civil society organisations, is another inhibiting factor.

Strategies

The strategies that can be employed in ensuring effective socio-economic rights litigation include the following:

- The timing of a case is crucial. A case can be lost simply because it was not brought in the right political or social climate.
- It is important to look beyond individual victims to ensure that the ensuing judgment benefits other similarly situated persons.
- Focusing on what happens after the judgment is vital as this influences the kind of remedy one may seek from the court.
- Adopting a long-term strategy, for instance intervening in a series of cases on related issues, is advisable to address a systemic problem.
- Socio-economic rights litigation is particularly expensive as it entails an examination of wide-ranging and complex policies. Many organisations working on these rights cannot afford such legal expenses. Thus, *pro bono* litigation is critical to socio-economic rights cases.
- Choosing cases in which the state is not required to allocate more than minimal resources, or additional resources, is vital to winning a socio-economic rights case.
- An organisation should have expertise in the matter being litigated for a court to consider its position more seriously.
- For some cases, there might be a need to adopt broader political strategies (and a combination of strategies), such as litigation, social mobilisation and agitation, advocacy and public education. *TAC* is an example of a case in which litigation was combined with advocacy to achieve success.
- Cooperation between organisations with different areas of expertise and specialisation is an added advantage. As noted above, the *CLC* has always intervened together with other organisations with expertise in land policy and law, evictions, health matters, etc.

Conclusion

The enforcement of socio-economic rights is an ongoing process of struggle and engagement with different branches of government and civil society as a whole, which requires political will, responsiveness and commitment. Though litigation has been effective in enforcing socio-economic rights, it is certainly not a solution to all socio-economic wrongs and injustices. Civil society organisations and other institutions can most effectively influence the government and other parties to progressively implement socio-economic rights in such other ways as research, education and training, advocacy, monitoring and shadow reporting, naming and shaming, and social mobilisation. Furthermore, obtaining a positive judgment, particularly in relation to socio-economic rights, is only the first step, as ensuring effective implementation of the judgment is often a greater challenge.

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