

# COURTS AND THE POOR IN SOUTH AFRICA: A CRITIQUE OF SYSTEMIC JUDICIAL FAILURES TO ADVANCE TRANSFORMATIVE JUSTICE

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## ABSTRACT

Under apartheid the judiciary failed to meaningfully confront a racially-divided South Africa in which civil and political rights were denied to the majority of South Africans. The apartheid judiciary was able to rationalise a generalised failure to craft socially just rulings by claiming that law was distinct from morality. In the constitutional era judges are not afforded the luxury of amorality. The Constitution, which is an explicitly moral document, binds the judiciary (along with the legislature, the executive and all organs of state) to upholding constitutional values. The judiciary is expected to ‘promote the values that underlie an open and democratic society based on human dignity, equality and freedom’ and it is required always to ‘promote the spirit, purport and objects of the Bill of Rights’. How, then, has the post-apartheid judiciary dealt with the challenges of adjudication in an increasingly socio-economically divided society in which poverty is widespread and inequality is escalating? As an institution, the judiciary is found to have failed to advance transformative justice in critical systemic ways. Specifically, the judiciary has failed to improve access to legal representation for the poor (by not delineating a comprehensive right to legal representation at state expense in civil matters and under-utilising the *in forma pauperis* procedure in courts), and to promote public interest litigation (through maintaining a practice of wide discretion in awarding costs orders, including awarding costs against winning public interest organisations, and as a result of the Constitutional Court’s reticence to allow direct access, even for clear matters of public interest). Finally, the weak socio-economic rights record of the Constitutional Court has further diminished the capacity of the judiciary to act as an institutional voice for the poor.

We therefore ... adopt this Constitution as the supreme law of the Republic so as to – Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; ... Improve the quality of life of all citizens and free the potential of each person (Preamble, Constitution of the Republic of South Africa).<sup>1</sup>

## I INTRODUCTION

The South African judiciary has recently come under popular and political attack. As noted in the South African attorneys’ journal, *De Rebus*,

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<sup>1</sup> Constitution of the Republic of South Africa Act 108 of 1996 (Constitution).

recent months have seen a worrying upsurge of displays of public disrespect for constitutional values and institutions, such as the judiciary, by certain political, youth and trade union groupings, some of them closely aligned to the ruling party. Some have gone as far as to say that the President of the African National Congress, Jacob Zuma, cannot expect a fair trial from the present judiciary, which they describe as being ‘untransformed’.<sup>2</sup>

In this article I argue that, in critical respects, the judiciary *is* untransformed, but not primarily because it does not reflect the racial or gender (or other) make up of South African society. Rather, the judiciary is untransformed to the extent that it remains institutionally unresponsive to the problems of the poor and it fails to advance transformative justice. In short, the post-apartheid judiciary has collectively failed to act as an institutional voice for the poor. By this I mean that the courts in South Africa have not adequately realised their potential to promote socio-economic transformation in the interests of materially-disadvantaged South Africans.<sup>3</sup>

In seeking to expose the judiciary’s failures, I do not focus on individual judgments, of which there are notably good<sup>4</sup> and notably bad

2 Editorial ‘Lawyers, the Rule of Law and the Independence of the Judiciary’ (2008) March *De Rebus* <<http://www.derebus.org.za>>.

3 For an examination of how courts *can* actively contribute to socio-economic transformation and act as an institutional voice for the poor, see S Gloppen ‘Courts and Social Transformation: An Analytical Framework’ in R Gargarella, P Domingo & T Roux (eds) *Courts and Social Transformation in New Democracies* (2006) 35. It should be noted that my argument for the South African judiciary to assume a more decisively transformative role in society is an ideological one, which, although based on an interpretation of the Constitution’s goals and its vision for the judiciary, is not shared by all legal commentators.

4 For example, one recent ruling that stands out for its progressive approach to the realisation of socio-economic rights for the poor is Tsoka J’s judgment in *Mazibuko v City of Johannesburg* 2008 (4) SA 471 (W) (*Mazibuko*) – an application that challenged the lawfulness and constitutionality of prepayment water meters and the sufficiency of the City of Johannesburg’s free basic water policy in Phiri (Soweto). In a courageous, yet formally-solid, judgment, Tsoka J set aside the decision by the City of Johannesburg alternatively Johannesburg Water (Pty) Ltd ‘to limit [the] free basic water supply to 25 litres per person per day or 6 kilolitres per household per month’ (para 183.1). In addition, he found the prepayment water system in Phiri to be ‘unconstitutional and unlawful’ (para 183.4) because, *inter alia*, it violates ‘the provisions of s 33 of the Constitution read with the provisions of PAJA [the Promotion of Administrative Justice Act 3 of 2000]’ (para 92) in that it does not provide the same procedural protections prior to disconnection that are afforded by conventional credit-metered water systems. In a strident criticism of the City’s ‘intimidatory and presumptive’ (para 110) targeting of the ‘poor and predominantly Black area’ of Phiri (para 94) for the installation of prepayment meters, Tsoka J found the City to have impermissibly discriminated on the basis of colour: ‘The underlying basis for the introduction of the prepayment meters seems to me, to be credit control. If this is true, I am unable to understand why this credit control measure is only suitable in the historically poor black areas and not the historically rich white areas’ (para 154) ... ‘it is therefore inescapable that the introduction of the prepayment meters discriminates on the basis of colour’ (para 155). Moreover, having clarified that the City was obligated ‘to ensure that every person has both physical and economic access to water’ (para 41), Tsoka J found the insufficient free basic water allocation to poverty-stricken households to amount to a denial of the right of access to water, which perpetuates ‘the decades long poverty, deprivation, want and undignified existence of the recent past’ and is ‘unconstitutional and unlawful’ (para 160). The City was ordered to provide each applicant and all other similarly placed residents in Phiri with a ‘free basic water supply of 50 litres per person per day’ and the option of a credit-metered water supply ‘installed at the Cost of the City of Johannesburg’ (para 183.5).

examples,<sup>5</sup> or individual judges or courts. Rather, I examine systemic judicial failures to advance transformative justice.<sup>6</sup> I mention specific judgments and courts only to the extent that they indicate institutionally-problematic approaches. The purpose of this article is to highlight continued barriers to accessing justice over which the judiciary has some control, and to encourage the judiciary as a whole to actively counteract such barriers in all its adjudication.

## II ACCESS TO LEGAL REPRESENTATION FOR THE POOR

The first hurdle a poor person must overcome in any justice system is accessing that system. Access to justice means more than mere physical access to courts – it incorporates the ability to be effectively heard. In South Africa, the normal difficulties of accessing justice are exacerbated by gross inequalities, the high cost of legal services and the remoteness of the law from most people's lives. Such socio-economic adversity dictates the need for a comprehensive system of legal assistance for poor people, to allow their issues to be adequately articulated and to promote parity in the legal process. Without legal representation, already disadvantaged people are further disempowered when confronted with complex legal issues and proceedings. They risk an inequitable decision, particularly where the matter involves a socio-economic power imbalance (for example a dispute between a landlord and a tenant), and where the other side has legal representation.

While, for the most part, poor people facing serious criminal charges do receive legal representation at state expense (mainly through the Legal Aid

5 A recent example of a judgment that fails to develop the law in accordance with 'the spirit, purport and objects of the Bill of Rights' is Jordaan J's ruling in *Tswelopele Non-Profit Organisation v City of Tshwane Municipality* (unreported case no 11322/2006 in the Transvaal Provincial Division). In this urgent application, the judge ruled that the mandament van spolie was not available to approximately 100 people who had been forcibly and illegally evicted from shacks in Pretoria. Jordaan J based this decision (and his dismissal of the application) on the reasoning that the mandament is a remedy to restore possession, and not a means of reparation – and that it could not be granted to the applicants because possession of the shacks could not be restored (since the shacks had been destroyed). Albeit 14 months later, the Supreme Court of Appeal subsequently upheld an appeal against the decision, ruling that it was open to the judge in the court a quo to have developed the mandament van spolie in line with the Constitution, and that official conduct that violates rights should always attract a reparative remedy, whether or not the remedy is indirectly applied through the common law. In the circumstances, the Supreme Court of Appeal considered it unnecessary to develop the common law, holding that the breach of a constitutional right of access to housing (s 26 of the Constitution) created an obligation on the City to restore possession of the land and the shacks to the appellants and ordered that this be done (*Tswelopele Non-Profit Organisation v City of Tshwane Municipality* 2007 (6) SA 511 (SCA)).

6 In order to do so, I take the conceptual liberty of analysing the judiciary as one homogenous institution. In reality there are obviously differences in the approach of different judges and different courts. Nevertheless, I argue that there are critical systemic failures that warrant my collective approach to the judiciary.

Board), this is not the case for civil litigation, which is the focus of this article.<sup>7</sup> Further research is necessary to ascertain the extent to which poor litigants in civil matters are unrepresented and to analyse the effect on outcomes of having legal representation in civil matters (ie the extent to which having a lawyer in civil matters increases the chance of a favourable outcome). However, anecdotal evidence from legal practitioners confirms my own observations that poor litigants are often not represented in civil matters, and that not having legal representation increases the likelihood of an adverse outcome.<sup>8</sup> Although too limited to offer statistically representative findings, a 2006 Centre for Applied Legal Studies (CALS) pilot study examining court experiences in Mandelaville informal settlement (outside Johannesburg), found a significant correlation between being represented in a civil matter and winning,<sup>9</sup> pointing to the importance of providing free legal assistance to poor litigants.

In light of the injustices of the past, some of which related to a conservative legal order and an inability for the majority of South Africans to access justice, it follows that it should be a fundamental preoccupation of the post-apartheid judiciary to secure legal representation for poor litigants. Yet, as an institution, the judiciary has done little to address the problem of the unrepresented poor from a systemic perspective.<sup>10</sup> It is obviously unfair to place the full burden of blame on the judiciary. The judiciary (correctly) is neither able to force the private legal profession to provide more pro bono legal assistance, nor to capacitate the Legal Aid Board to provide legal representation for poor people in all civil matters. However, there are two critical ways in which the judiciary could have meaningfully advanced access to justice for the poor, and they have not. First, the judiciary should have prioritised delineating a comprehensive right to legal representation at state expense for all matters (whether criminal or civil). Second, the judiciary should have been actively involved in strengthening and promoting the courts' internal system for securing legal representation to the poor – in forma pauperis.

7 Civil litigation encompasses many constitutional matters including socio-economic rights-related cases. I do not suggest that legal representation at state expense should not be provided for criminal matters. Rather, I suggest that it should be provided for civil matters too. Although most civil matters do not carry the penalty of imprisonment (with the notable exception of contempt of court), many civil matters relate to unequal power relations and directly impact on attempts to advance socio-economic transformation. These include gender relations (divorce, custody, maintenance, estates), access to land (restitution, communal land), access to housing (evictions) and access to other developmental and socio-economic rights.

8 The link between having no legal representation and losing in civil matters is clearly apparent in evictions cases where, for example, unopposed eviction applications (typically such applications are unopposed precisely because poor people cannot secure legal representation and they are too disempowered to oppose such applications without legal assistance) are commonly granted by judges.

9 J Dugard, M Ntuli, P Tucker & C Cooper 'Access to Justice for the Poor: A Supply-Side Review of Legal Assistance Options and a Demand-Side Survey of Litigation Experiences in Mandelaville Informal Settlement' CALS Research Report (forthcoming 2009).

10 I do not include in my criticism of the judiciary's failure to systemically advance access to justice, individual judge's ad hoc attempts to remedy specific unrepresented clients through referrals to the Legal Aid Board or to Law Societies etc.

**(a) Failure to delineate a comprehensive right to legal representation at state expense in civil matters<sup>11</sup>**

In recognition of the facts that legal representation lies at the core of access to justice and that poor people are unlikely to be able to afford lawyers' fees, s 35(3)(g) of the South African Constitution gives accused persons the right to a legal practitioner at state expense, 'if substantial injustice would otherwise result'. Yet, with the exception of children,<sup>12</sup> there is no explicit right to legal representation at state expense in civil cases, including non-criminal constitutional matters. However, as I discuss below, there are compelling arguments to interpret s 34's right to a 'fair public hearing' as implying a right to legal representation at state expense using the same caveat as s 35(3)(g)'s 'if substantial injustice would otherwise result'.

In the context of criminal cases, the Constitutional Court has gone some way towards clarifying the parameters of the term 'if substantial injustice would otherwise result'. The fourth judgment ever handed down by the Court, *S v Vermaas; S v Du Plessis*,<sup>13</sup> took the form of a consolidated referral of two criminal cases from the Transvaal Provincial Division of the High Court in which the accused both ran out of money in the course of the proceedings and sought to rely on the right to legal representation at state expense in s 25(3)(e) of the interim Constitution.<sup>14</sup> The two trial judges independently decided that the accused were not entitled to rely on s 25(3)(e) because the trials had commenced prior to the interim Constitution taking effect. Nevertheless, both judges suspended the trials and referred the possible application of the right to legal representation at state expense to the Constitutional Court in case it might take a different view.

Yet, the Constitutional Court did not take a different view, holding that the interpretation of s 25(3)(e)'s qualification – 'where substantial injustice would otherwise result' – was within the concurrent jurisdiction of the Appellate Division (later named the Supreme Court of Appeal) and, as such, had been incorrectly referred to the Constitutional Court.<sup>15</sup> The Constitutional Court furthermore declined to answer the substantive question put to it, remitting the two

11 The first part of this section draws on an earlier analysis of the right to legal representation at state expense published as J Dugard & T Roux 'The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995-2004' in R Gargarella, P Domingo & T Roux (eds) *Courts and Social Transformation in New Democracies* (2006) 107, 109-111.

12 Section 28(1)(h) of the Constitution.

13 *S v Vermaas; S v Du Plessis* 1995 (3) SA 292 (CC).

14 The interim Constitution of the Republic of South Africa Act 200 of 1993 was a transitional arrangement, which was replaced by the Constitution in 1996. Like the qualification in s 35(3)(g) of the Constitution, the right to legal representation in the interim Constitution, too, was qualified by the phrase, 'where substantial injustice would otherwise result' (s 25(3)(e) of the interim Constitution).

15 *Vermaas* (note 13 above) para 12. Under the interim Constitution the Constitutional Court was inserted into the existing judicial structure at the same level as the Appellate Division, both as divisions of the Supreme Court with concurrent jurisdiction, neither being able to hear appeals from the other.

cases back to their respective trial courts.<sup>16</sup> However, despite such avoidance, in the *Vermaas* judgment the Constitutional Court did venture to establish some guidelines for trial courts considering whether to order the state to pay for an accused person's defence. These are the need to assess 'the accused person's aptitude or ineptitude to fend for himself or herself', as well as to reference being made to the 'ramifications [of the decision to grant legal representation] and their complexity or simplicity ... how grave the consequences of a conviction may look, and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be "substantial injustice"'.<sup>17</sup> Simply put, in *Vermaas* the Constitutional Court established that, to assess if 'substantial injustice' would result from the failure to provide legal representation at state expense in a criminal case, a court should take into account the complexity of the case, the accused person's ability to fend for her/himself and the gravity of the possible consequences of a conviction.<sup>18</sup> The Court further expressed its concern about the steps that the state had thus far taken to put in place 'mechanisms that are adequate for the enforcement of the right [to legal representation]'.<sup>19</sup>

Turning to civil cases, Geoff Budlender has persuasively argued that the alteration of the wording of the relevant section on civil trials as between the interim Constitution (s 22) and the Constitution (s 34), has had the effect of constitutionalising a right to legal representation in civil cases. To explain this train of logic, it is necessary to summarise *Bernstein v Bester*,<sup>20</sup> in which s 22 of the interim Constitution, which guaranteed 'the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum', came before the Constitutional Court. In *Bernstein*, the Constitutional Court contrasted this s 22 provision with the guarantee of a 'fair and public hearing' in article 6(1) of the European Convention on Human Rights (ECHR).<sup>21</sup> It held that, while article 6(1) of the ECHR constitutionalises the right to a fair civil trial (in European member states), the use of clearly different wording in s 22 indicated that the framers of South Africa's interim Constitution 'deliberately elected not to constitutionalise the right to a fair civil trial', meaning that, in contrast to the ECHR, South Africa's interim Constitution did not guarantee a right to a fair civil trial.<sup>22</sup> Yet, for the Constitution, the framers reverted to the ECHR wording, including in s 34's formulation the right to have a 'fair public hearing'. The fact that s 34 of the Constitution follows the formulation in the ECHR prompts Budlender

16 The intermediate question whether the rights in the interim Constitution applied to pending cases was settled in *S v Mhlungu* 1995 (3) SA 867 (CC), a decision handed down in between the referral of the two High Court cases to the Constitutional Court and its decision in *Vermaas* (note 13 above).

17 *Vermaas* (note 13 above) para 15.

18 G Budlender 'Access to Courts' (2004) 121 *SALJ* 339, 342.

19 *Vermaas* (note 13 above) para 16.

20 *Bernstein v Bester* 1996 (2) SA 751 (CC).

21 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) CETS no 005 (1950).

22 *Bernstein* (note 20 above) para 106.

to argue: 'it is difficult to avoid the conclusion that this constitutionalises the right to a fair civil trial' in South Africa.<sup>23</sup>

Critical to an interpretation of the right to a fair civil trial, the European Court of Human Rights clarified in *Airey v Ireland*<sup>24</sup> that the right of access to a fair civil trial includes the right to be able to place one's case effectively before a court, which in many circumstances will require the assistance of a lawyer. In the context of assessing whether Mrs Airey's right of access to court (implicit in the guaranteed right to 'a fair and public hearing') had been breached by virtue of her not being able to afford legal representation to obtain a degree of judicial separation from her husband (divorce not being permissible in Ireland), the Court reasoned:

The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective ... This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial ... It must therefore be ascertained whether Mrs Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and effectively.<sup>25</sup>

In coming to its conclusion that Mrs Airey's inability to afford legal representation in the absence of legal aid in Ireland had violated her right of access to court, the Court assessed a number of factors not dissimilar to the guidelines suggested by the South African Constitutional Court in *Vermaas*, including the complexity of the case.<sup>26</sup> The South African Land Claims Court<sup>27</sup> in *Nkuzi Development Association v Government of the Republic of South Africa*<sup>28</sup> seems to support this interpretation, of the right to a fair hearing involving an assessment of the right to legal representation at state expense, in certain circumstances. Considering the question of whether 'persons who have a right to security of tenure in terms of the Extension of Security of Tenure Act (ESTA)<sup>29</sup> and the Land Reform (Labour Tenants) Act<sup>30</sup> and whose tenure is threatened or has been infringed, have a right to legal representation or legal aid at State expense under certain conditions',<sup>31</sup> the Land Claims Court found:

There is no logical basis for distinguishing between criminal and civil matters. The issues in civil matters are equally complex and the laws and procedures difficult to understand. Failure by a judicial officer to inform these litigants of their rights, how to exercise them and where to obtain assistance may result in a miscarriage of justice.<sup>32</sup>

23 Budlender (note 18 above) 342.

24 *Airey v Ireland* 32 Eur Ct HR Ser A (1979).

25 Ibid para 24.

26 Ibid.

27 The Land Claims Court is a specialist court with the same status as the High Court, which was established in 1996 to have jurisdiction over the Restitution of Land Rights Act 22 of 1994, the Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997.

28 *Nkuzi Development Association v Government of the Republic of South Africa* 2002 (2) SA 733 (LCC).

29 Extension of Security of Tenure Act 62 of 1997.

30 Land Reform (Labour Tenants) Act 3 of 1996.

31 *Nkuzi* (note 28 above) para 1.

32 Ibid para 11.



It concluded that the people concerned 'have a right to legal representation or legal aid at state expense ...',<sup>33</sup> and it declared that the state was under a duty to 'provide such legal representation or legal aid through mechanisms selected by it'.<sup>34</sup> The Land Claims Court further ordered the Minister of Justice and the Minister of Land Affairs to 'take all reasonable measures to give effect to this order, so that people in all parts of the country who have rights as set out in this order, are able to exercise those rights effectively'.<sup>35</sup>

It is noteworthy that, in deriving a right to legal representation in certain circumstances, presumably from s 34's 'guarantee of a "fair public hearing"',<sup>36</sup> the Land Claims Court used s 35(3)(g)'s caveat of 'if substantial injustice would otherwise result',<sup>37</sup> which does not seem to be an unreasonable extension of the criminal case logic. Indeed, in his Heads of Argument in the Land Claims Court case *The Richtersveld Community and The Government of the Republic of South Africa*,<sup>38</sup> Geoff Budlender argues that

the fact that an element expressly required for a fair criminal trial has not been expressly required for a fair civil trial, does not mean that it is by implication excluded in civil trials ... Just as, in a criminal trial, the right to a fair trial is broader than the list of specific rights set out in the Constitution.<sup>39</sup>

Taking this further, in assessing if substantial injustice would otherwise result in the context of civil trials, Budlender suggests supplementing the list of factors to be considered as established by the Constitutional Court in *Vermaas*, with the issue of 'equality of arms'.<sup>40</sup> By this he means that one of the factors that should be considered when assessing if 'substantial injustice' would result if legal representation is not provided at state expense, is the extent to which the opponent is represented and if this will place any party at a substantial disadvantage.

Ultimately, whenever any issue of legal representation for a civil matter comes to being tested, as is the case for criminal matters, it should occur on a case-by-case basis, grounded in reality. As defined by the Court in *Airey*, in the context of Europe, so, in South Africa, rights are not legal fictions, and they are meaningless if they are not rendered practicable and effective. As argued by Budlender:

Access to court therefore means more than the legal right to bring a case before a court. It includes the ability to achieve this. In order to be able to bring his or her case before a court, a

33 Ibid para 1.1.

34 Ibid para 12, Order para 1.2.

35 Ibid para 12, Order para 2.

36 S Ellmann 'Weighing and Implementing the Right to Counsel' (2004) 121 *SALJ* 318, 319.

37 *Nkuzi* (note 28 above), at para 12, Order at para 1.1. The paragraph reads: 'the persons ... have a right to legal representation or legal aid at State expense if substantial injustice would otherwise result, and if they cannot reasonably afford the cost thereof from their own resources'.

38 Applicant's Heads of Argument, *The Richtersveld Community v The Government of the Republic of South Africa* (unreported LCC case no 63/05). The government settled the matter after the case had been argued and before judgment in order not to set a jurisprudential precedent regarding the right to legal assistance at state expense (email to author from Geoff Budlender, 3 July 2006).

39 *Nkuzi* (note 28 above) para 53, including footnote 26.

40 Budlender (note 18 above) 344.



prospective litigant must have knowledge of the applicable law; must be able to identify that she or he may be able to obtain a remedy from a court; must have some knowledge about what to do in order to achieve access; and must have the necessary skills to be about to initiate the case and present it to the court. In South Africa the prevailing levels of poverty and illiteracy have the result that many people are simply unable to place their problems effectively before the courts.<sup>41</sup>

Alongside the constitutional argument for a right to legal representation at state expense if substantial injustice would otherwise result, there are other statutory references, which clearly place a responsibility on the state to provide legal representation in civil matters. These statutory provisions relating to legal representation at state expense clearly indicate Parliament's recognition of the fact that legal aid for civil cases is essential to protect the vulnerable and the marginalised and to promote socio-economic transformation. In recognition of the importance of advancing legal access to labour, s 149 of the Labour Relations Act provides:

- (1) If asked, the Commission may assist an employee or employer who is a party to a dispute –
  - (a) together with the Legal Aid Board, to arrange for advice or assistance by a legal practitioner;
  - (b) together with the Legal Aid Board, to arrange for a legal practitioner –
    - (i) to attempt to avoid or settle any proceedings being instituted ...;
    - (ii) to attempt to settle any proceedings instituted ...;
    - (iii) to institute on behalf of the employee or employer any proceedings in terms of this Act;
    - (iv) to defend or oppose on behalf of the employee or employer any proceedings instituted against the employee or employer in terms of this act.<sup>42</sup>

Recognising the apartheid legacy of dispossession of land and evictions, the Restitution of Land Rights Act provides that 'where a party cannot afford to pay for legal representation itself, the Chief Land Claims Commissioner may take steps to arrange legal representation for such party, either through the state legal aid system or, if necessary, at the expense of the Commission'.<sup>43</sup> And the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act provides that a notice of eviction proceedings must 'state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid'.<sup>44</sup> Finally, the Mental Healthcare Act provides that 'an indigent mental healthcare user is entitled to legal aid provided by the State in respect of any proceedings instituted or conducted in terms of this Act subject to any condition fixed in terms of Section 3(d) of the Legal Aid Act 22 of 1969'.<sup>45</sup> However, notwithstanding such legislation and several helpful judgments, 15 years into South Africa's democracy, there is still no clarity from the judiciary on whether there is a comprehensive right to

41 Ibid 341.

42 Section 149 of the Labour Relations Act 66 of 1995.

43 Section 29(2) of the Restitution of Land Rights Act 22 of 1994.

44 Section 4(5)(d) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

45 Section 15(2) of the Mental Healthcare Act 17 of 2000.

legal representation at state expense in civil matters. The result is that many poor people are unable to secure representation and their access to justice is severely compromised.

**(b) Under-utilisation by judges of the in forma pauperis procedure<sup>46</sup>**

With the exception of the Constitutional Court, the applicable court rules for the various levels of courts all make provision for any unrepresented litigant in civil proceedings who cannot afford legal fees to lodge an application to apply for the court to appoint legal representation on a pro bono basis.<sup>47</sup> However, despite holding much potential to facilitate poor people's access to justice, this in forma pauperis system appears to be chronically under-utilised by judges.

The applicable rules provide that a person wishing to bring or defend a matter in forma pauperis must apply to the relevant registrar (in the High Court or Supreme Court of Appeal) or clerk (in the Magistrates' Court).<sup>48</sup> Pursuing the High Court process, if it appears to the registrar that the applicant fulfils the conditions of the means test for assistance, she/he must refer the applicant to an attorney and must at the same time inform the local society of advocates of the application and referral.<sup>49</sup> The referral by the registrar should occur to attorneys on a roster, in rotation.<sup>50</sup> The referred attorney is responsible for determining whether the application should be granted, and must enquire into the applicant's means and the merits of the application.<sup>51</sup> In assessing the applicant's means, the attorney must determine whether or not, excepting household goods, wearing apparel and tools of trade, the applicant is possessed of property to the amount of R10 000 or will within a reasonable time be able to provide such sum from her/his earnings.<sup>52</sup> If the attorney is satisfied that the matter is one in which she/he may act properly in forma pauperis, she/he shall request the society of advocates to nominate an advocate who is willing and able to act, and the advocate must then act in the matter.<sup>53</sup> Once an attorney and advocate have been appointed, the following must be lodged on behalf of the applicant:

46 This section is based on J Dugard & C Cooper 'CALS Submission on the Draft Legal Services Charter to the Department of Justice and Constitutional Development' (30 January 2007) <<http://web.wits.ac.za/Academic/Centres/CALS/AccessToJustice/>>.

47 Supreme Court of Appeal Rules Rule 15, Uniform Rules of Court (pertaining to High Courts) Rule 40, and Magistrates' Courts Rules of Court Rule 53, as collated in Juta's Statutes Editors (2006) *The Supreme Court Act and the Magistrates' Courts Act and Rules* (6ed). In the Supreme Court of Appeal and High Courts the programme is called in forma pauperis, whereas in the Magistrates' Courts Rule 53 refers to pro deo applicants, however the import is the same and the programmes are discussed using the in forma pauperis label.

48 Rule 40(1)(a) of the Uniform Rules of Court.

49 Ibid.

50 Rule 40(4) of the Uniform Rules of Court.

51 Rule 40(1)(b) of the Uniform Rules of Court.

52 Rule 40(2)(a) of the Uniform Rules of Court.

53 Rule 40(1)(b) of the Uniform Rules of Court.

- an affidavit setting out the applicant's financial position and the fact that the applicant meets the requirements of the means test;<sup>54</sup>
- a statement signed by the advocate and the attorney that, being satisfied that the applicant is unable to pay fees, they are acting pro bono in the proceedings;<sup>55</sup>
- a certificate of *probabilis causa* issued by counsel in the matter.<sup>56</sup>

The registrar must then issue all process and accept all documents in the proceedings without charging the litigant a fee,<sup>57</sup> and the advocate and attorney are then obliged to act for free in the proceedings.<sup>58</sup> In effect, this means that anyone who meets the means test and has a meritorious civil matter has a right to litigate in *forma pauperis* and should be represented pro bono as such.

The same conditions apply in the Magistrates' Courts, except that in these courts, the clerk must be satisfied that the person making the application has 'a *prima facie* right of action or of defence and is not possessed of means sufficient to enable him to pay the costs of the action, court fees and sheriff's charges and will not be able within a reasonable time to provide such sums from his earnings'.<sup>59</sup>

Taken at face value, this system appears to provide a reliable mechanism for poor litigants in civil matters to be provided with pro bono legal representation. However, the reality is that very few litigants ever make it to the registrar to apply for in *forma pauperis* representation. Further research is necessary to determine the precise numbers of cases forwarded through the in *forma pauperis* system, but informal discussions with several Johannesburg lawyers suggest that either none or only one or two cases are forwarded to them each year via the in *forma pauperis* system. For example, at one of South Africa's biggest law firms (with 200 practicing attorneys), the head of the pro bono unit (who deals with all in *forma pauperis* requests for the firm) only receives two or three cases in this way each year, meaning that in *forma pauperis* work forms only a 'very small part of the firm's pro bono work'.<sup>60</sup> Of most concern, in the context of the role of the judiciary, is the low number of in *forma pauperis* referrals by judges. In interviews with ten judges of the High Court (Witwatersrand Local Division) conducted by CALS in early 2007, all judges commented that they seldom, if ever, refer poor applicants/defendants to the in *forma pauperis* procedure.<sup>61</sup> The main reason given for the lack of referral was the complexity and length of the processes.<sup>62</sup> However, even if laborious, in *forma pauperis* has the potential to be a critical source of systemic free legal representation to the poor (because the mechanism is dispersed across

54 Rule 40(2)(a) of the Uniform Rules of Court.

55 Rule 40(2)(b) of the Uniform Rules of Court.

56 Rule 40(2)(c) of the Uniform Rules of Court.

57 *Ibid.*

58 Rule 40(5) of the Uniform Rules of Court.

59 Rule 53(4) of the Magistrates' Courts Rules of Court.

60 Email to author from partner at the law firm (22 June 2006).

61 Dugard & Cooper (note 46 above) 9.

62 *Ibid.*

all courts). Moreover, unlike the other (limited) legal assistance options for civil matters, there are no exclusions on the subject matter.<sup>63</sup> Given the extent to which poor people in civil cases (particularly those who find themselves on the receiving end of litigation) go unrepresented, efforts should be made to reinvigorate the system.

Indeed, notwithstanding judicial concerns over the complexity of the *in forma pauperis* procedures, it is unclear why there is such a severe disconnect between judges and registrars, and why there is so little advancement of the *in forma pauperis* system by the judiciary. This is all the more troubling given that the relevant rules delineate *in forma pauperis* as a right, rather than an indulgence<sup>64</sup> and, as recognised by registrars, anyone who files an application and meets the means test and merit criteria will receive *pro bono* legal representation. With so many poor litigants being turned away from the courts and/or losing civil cases unnecessarily, it is worrying that so few judges make use of the system to cure the everyday problem of unrepresented poor clients in civil matters. If the underlying reason for the low number of referrals by judges is the complexity of the *in forma pauperis* procedures, judges should push for the system to be reformed and the procedures to be simplified. To date there has been no concerted effort on the part of the judiciary to advance systems such as *in forma pauperis* to provide a comprehensive legal representation net for the poor.

The judiciary's failure to conclusively define a comprehensive right to legal representation at state expense, along with the apparent chronic under-utilisation of the *in forma pauperis* procedure, has exacerbated the difficulty of poor people in having their cases heard in court. Although the judiciary cannot remedy all aspects of access to justice (for example, the judiciary has little influence over the Legal Aid Board's mandate or the private legal profession's contribution to *pro bono* assistance), their failure to systematically minimise barriers of access where they do have authority is disappointing. The judiciary's shortcomings in this respect contribute to a reality in which the law remains beyond the reach of the majority of South Africans. In the words of Mark Heywood, executive director of the AIDS Law Project, 'whilst the law in South Africa has proved that it can be used for the poor, it is rarely being

63 For example, the Wits Law Clinic may not take on civil matters related to drawing up wills or other testamentary writing; the administration or liquidation or distribution of the estate of any deceased or insolvent person, mentally ill person or any other person under any other legal disability; the judicial management or the liquidation of a company; the transfer or mortgaging of immovable property; or the lodging or processing of claims under the Motor Vehicle Accidents Fund Act 8 of 1993. And, although civil cases account for approximately 13 per cent of its caseload (interview with Patrick Hundermark, Legal Development Executive of the Legal Aid Board, 27 June 2006), the Legal Aid Board places similar restrictions on the kind of civil matters taken.

64 Carole Cooper has argued convincingly – against commentary in *Erasmus Superior Court Practice* Revision service 29 (30 November 2007) B1-303 – that there is nothing in the relevant rules to hold that leave to sue or defend *in forma pauperis* is an indulgence. Rather, as Cooper points out, the rules provide that if the applicant meets the means test and if the matter has merit, then the applicant is bound to provide *pro bono* legal representation and the applicable attorney is bound to take the case on an *in forma pauperis* basis (C Cooper 'The *in forma pauperis* Procedure' (2007) Unpublished research paper, CALS).

used independently by the poor'.<sup>65</sup> If the poor are rarely able to independently access the courts for non-criminal matters, what has been the judiciary's approach to facilitating access to organisations that act in the public interest?

### III PUBLIC INTEREST LITIGATION

While public interest litigation can be undertaken by individuals, and many of the systemic problems raised here apply to such litigation, I focus this analysis on public interest litigation conducted by *public interest organisations*.<sup>66</sup> I do so because, in the absence of being able to independently access legal representation (and therefore to engage effectively in *any* litigation, whether public interest or not), public interest litigation organisations provide a critical vehicle for poor people to access courts, albeit indirectly.

Public interest organisations, which range from specialist legal organisations (such as CALS, the AIDS Law Project and the Women's Legal Centre), to specialist thematic organisations (such as Biowatch South Africa, the Open Democracy Advice Centre and the Freedom of Expression Institute), provide a critical voice for poor people, even where their litigation does not directly represent poor clients. Not only do such organisations provide one of the few remaining ways for poor people to access legal representation (and, concomitantly, the courts) but also, by implication, any public interest matter which concerns the poor, who constitute the majority of the population. For this reason, it is essential for the judiciary to do all in its power to promote public interest litigation – or at the least to minimise systemic barriers. However, the judiciary has failed to do so, on two institutional fronts. First, the courts continue to view the awarding of costs orders as an issue over which they have wide discretion, which means that organisations litigating constitutional matters in the public interest risk having costs orders awarded against them. Second, although formally allowed, the Constitutional Court persists in dissuading direct access even where matters are in the public interest. These factors, which add significantly to the cost of litigating in the public interest (whether through adding to the risk of adverse costs orders or the long time required to see a matter through the normal judicial course), discourage many public interest organisations from taking up litigation.

#### (a) Costs orders

While the general rule in litigation is that costs should follow the result – in other words, that 'the successful party should be given his costs'<sup>67</sup> – this is at the judge's discretion and there is usually an exception made for public interest matters. Because of the devastating consequences to public inter-

65 M Heywood 'Health and Law: Using the Law to Protect and Fulfil Human Rights; Using Human Rights to Health to Strengthen the Law' (2007) Paper presented at the Law and Society Conference, Berlin (25-28 July 2007) 19.

66 By public interest organisations I mean those non-governmental organisations that engage in public interest litigation, however infrequently.

67 *Erasmus Superior Court Practice* Revision service 29 (30 November 2007) E12-6.

est organisations of adverse costs orders, this is a critical exception for the judiciary to adhere to. If, as a result of judicial uncertainty on the principle, there is even a possibility of receiving an adverse costs order in the event of losing a case, many potential litigants will be discouraged from raising matters at all. For many public interest organisations, even one adverse costs order could easily bankrupt them – an unacceptable price for pursuing litigation aimed at developing South African constitutionalism in the public interest.

There is a commendable body of jurisprudence suggesting that, where a matter raises important constitutional issues and is not frivolous, spurious or vexatious, it would not be appropriate to require applicants to pay the costs.<sup>68</sup> However, while having made several positive pronouncements to confirm this position,<sup>69</sup> the Constitutional Court appears to continue to regard this principle as secondary to the more traditionally accepted principle that costs should be awarded at the discretion of the judge.<sup>70</sup> In this respect it seems that the Court's 'pronouncements on costs are no more than examples of the exercise of its own discretion' and are not regarded as binding.<sup>71</sup>

As illustrated in the *Biowatch* case, the continued acceptance of a wide discretion to judges, without reference to Constitutional Court pronouncements on costs as binding, can have grave consequences for public interest organisations. The *Biowatch* case concerns the right of South Africans to access information, as set out in s 32 of the Constitution. Although, in this matter, *Biowatch* was not directly representing poor clients, the issues it raised (access to information and the safety of food-crops) are in the public interest and do impact on the poor. The matter showcases the courts' problematic approach to the issue of costs orders, and it highlights the dangers of not having a systematically binding methodology for dealing with costs orders in public interest litigation.

68 See for example *Rail Commuters Action Group v Transnet Ltd. t/a Metrorail* 2005 (2) SA 359 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); *In OVS Vereeniging vir Staatsondersteunde Skole v Premier Province of the Free State* 1998 (3) SA 692 (CC); *ANC v Minister of Local Government and Housing, KwaZulu-Natal* 1998 (3) SA 1 (CC); *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC); *Ferreira v Levin NO* 1996 (1) SA 984 (CC); and *Vryenhoek v Powell NO* 1996 (2) SA 621 (CC).

69 For example, in *Pretoria City Council v Walker* the Constitutional Court stressed that it would not be appropriate to award costs against the respondent, who had 'invoked a constitutional provision', which, although inappropriate was not 'vexatious' (1998 (2) SA 363 (CC) para 98). And, in *ANC v Minister of Local Government and Housing, KwaZulu-Natal*, while dismissing the appeal on the merits, the Constitutional Court did not award costs against the appellants (the African National Congress and Jacob Zuma) because 'the issues raised by the appellants were genuine constitutional questions which raised matters of broad concern within the province of KwaZulu-Natal' and the litigation was not 'spurious or frivolous' (1998 (3) SA 1 (CC) para 34).

70 T Makhalemele & R Sorensen 'Costs in Public Interest Litigation: The *Biowatch* case' (August 2005) *De Rebus* 41, 42.

71 *Ibid.*

(i) *The Biowatch case*

On 17 July 2000 Biowatch South Africa (Biowatch) – a non-governmental organisation focused on monitoring and researching Genetically Modified Organisms (GMOs), and promoting biological diversity and sustainable livelihoods – submitted its first request to the Department of Agriculture for information about how permitting decisions for genetically modified crops are made. Between July 2000 and 26 February 2001 Biowatch made three further requests for information, but it received inadequate responses to all requests.<sup>72</sup> The information requested included:

- access to a selection of risk assessments;
- information on legislation governing field trial licenses before the implementation of the Genetically Modified Organisms Act 15 of 1997 (GMO Act);
- a list of what permits had been granted;
- permission to inspect permits granted;
- permission to inspect records regarding compliance with public participation provisions of the GMO Act;
- details about pending applications for permits for GM crops, exact coordinated field trials and crops approved for commercial release.

In August 2002, following the failure of repeated requests for information, Biowatch served court papers on the Department of Agriculture, citing the Registrar for Genetic Resources, the Executive Council for Genetic Resources and the Minister of Agriculture as respondents. In February 2003 Monsanto South Africa (Pty) Ltd. (a diversified biotechnology component of the United States-based GM seed and chemical corporation) applied to join the court proceedings as a co-respondent, citing their direct and substantial interest in the subject matter as grounds. Subsequently two other companies – Stoneville Pedigreed Seed Company and Delta and Pine Land Company, which distribute Monsanto GM seed, applied to intervene as co-respondents. The South African Open Democracy Advice Centre (ODAC) joined proceedings as *amicus curiae* to advance arguments in support of Biowatch's constitutional right of access to information.

In the initial case in the Pretoria High Court – *The Trustees for the Time Being of the Biowatch Trust v The Registrar of Genetic Resources and Others*<sup>73</sup> (*Biowatch*) – Biowatch sought access to 11 different categories of information about the regulation of GM foods. The purpose of the application, as with the prior requests for information, was to compel the Department of Agriculture to reveal details about GM crops in South Africa to establish whether the

72 It is important to note – in connection with the Court's subsequent criticisms of the format of Biowatch's requests – that all four requests for information were made between the date of promulgation of the Promotion of Access to Information Act 2 of 2000 (PAIA) and the date it came into effect. This meant that when it made the requests for information, Biowatch did not have a procedural precedent to follow.

73 Case no 23005/2002 unreported.



health and environmental risks of the GM crops had been properly assessed by the Department before it granted the requisite permits.

In his judgment of 23 February 2005 (handed down on 24 February 2005), Dunn AJ found Biowatch had established a clear right to most of the information it had requested,<sup>74</sup> that 'Biowatch had no alternative remedy to enforce its rights' and that the Registrar's failure to grant Biowatch access to the information constituted a continuing infringement of its rights under s 32(1)(a) of the Constitution.<sup>75</sup> Throughout the ruling the judge also reaffirmed the public interest component of Biowatch's application and he chastised the Department of Agriculture for adopting a 'passive role' in response to Biowatch's requests.<sup>76</sup> For these reasons, the Registrar of Genetic Resources (within the Department of Agriculture) was ordered to make the applicable information available to Biowatch by 30 April 2005. Yet – notwithstanding Biowatch's 'clear right' to the information and the Registrar's 'continued infringement of Biowatch's rights under s 32(1)(a) of the Constitution'<sup>77</sup> – Dunn AJ departed from 'the general rule in litigation that the costs should follow the result', deciding not to grant Biowatch a costs order and instead ordering Biowatch to pay Monsanto's costs.<sup>78</sup> The judge's basis for awarding costs against Biowatch was 'the manner in which some of its requests for information were formulated, as well as the manner in which the relief claimed in the notice of motion was formulated'.<sup>79</sup>

However, in awarding costs against a substantially successful applicant, the Court's rationale seems materially flawed. First, in accepting that Biowatch was raising a constitutional principle in the public interest, the judge should have considered Constitutional Court jurisprudence regarding the awarding of costs orders in constitutional matters. Had he taken Constitutional Court pronouncements on costs orders as binding precedent, he is unlikely to have awarded costs against Biowatch. Second, it is hard to understand the judge's preoccupation with the imprecision of the requests given his accurate finding that 'requests for information under section 32 of the Constitution – or for that matter under PAIA – would not always have knowledge of the precise description of the record in which the information is sought, is contained'.<sup>80</sup> Moreover, as correctly understood by the judge, notwithstanding any imprecision in the requests, the Registrar never stated, either in his answering affidavit or in any of his responses to Biowatch, that 'he had any difficulty in ascertaining precisely what information Biowatch was looking for' and that:

74 In terms of the order, Biowatch was granted access to seven out of the 11 categories of information sought and partial access to an eighth category of information.

75 *The Trustees for the Time Being of the Biowatch Trust v The Registrar of Genetic Resources* (Pretoria High Court case no 23005/2002 unreported) para 66.

76 Ibid para 43.

77 Ibid para 66.

78 Ibid para 68.

79 Ibid.

80 Ibid para 43.

if he had any doubt about the nature and or validity of Biowatch's requests he was, in my view, enjoined to establish precisely what it was seeking and to assist it in its endeavours to achieve that ... If, after having engaged Biowatch, he had any doubt about the bona fides of its requests and that he genuinely opined that it was vexatious and oppressive or unintelligible he could and should have refused it on that ground. The fact that he did not do so is rather significant.<sup>81</sup>

I suggest that, in exercising his discretion to ignore the general costs rule, the judge erred. According to Erasmus, 'a court should not be astute to deprive a successful litigant of any of his costs ... the successful party should not be ordered to pay the costs of the unsuccessful party except where the conduct of the successful party has been the cause of all the costs of the proceedings'.<sup>82</sup> In respect of the latter, it is notable that Monsanto, which was awarded a costs order, elected to join the proceedings to oppose Biowatch's application against the Department of Agriculture. Monsanto argued that it had joined the proceedings to protect confidential business and trade related information. However, Biowatch had made it clear that it did not require the release of information protected in law as confidential. Moreover, if Monsanto joined because it was unsure what information Biowatch was requesting, it could have averted litigation through dialogue with Biowatch, which Monsanto did not do. Monsanto's elective joinder, along with the judge's finding that Biowatch had no choice but to approach the court in the face of the Registrar's passivity in response to its requests, raises serious questions about the degree of discretion afforded to judges in awarding costs orders. The possibility for such wide discretion to produce inequitable and potentially devastating results is all the more serious given the practice of higher courts, as evidenced in the *Biowatch* appeal, to defer to the court a quo's decision when it comes to appeals against costs orders.

On 23 April 2007, having been granted leave to appeal on 23 June 2005, Biowatch appealed against the costs order given in favour of Monsanto, as well as the failure to grant a costs order against the Department of Agriculture. The appeal was heard before a full bench of the Pretoria High Court. The judgment of 14 June 2007 was disappointing in its slavish deference to the discretion exercised by the court a quo. In his majority judgment, while finding that in the court a quo's ruling, Dunn AJ had 'dealt very cryptically with the issue of costs',<sup>83</sup> Mynhardt J dismissed the appeal on the basis that Biowatch had not succeeded in showing that the court a quo 'had not exercised its discretion judicially in making the two costs orders'.<sup>84</sup> Biowatch was consequently ordered to pay the costs of the first, second, third and fourth respondents, a cost which would force Biowatch into liquidation.

81 Ibid.

82 Erasmus *Superior Court Practice* Revision service 29 (30 November 2007) E12-9 to E12-10.

83 *The Trustees for the Time Being of the Biowatch Trust v The Registrar of Genetic Resources* (Pretoria High Court appeal case no A831/2005 unreported) para 14.

84 Ibid para 37.

In August 2008, having failed in an application for leave to appeal (against the costs order) directly to the Constitutional Court,<sup>85</sup> Biowatch applied for leave to appeal to the Supreme Court of Appeal. This application, too, failed (it was dismissed with costs), prompting Biowatch to again approach the Constitutional Court with an application for leave to appeal in October 2008. This application was granted and the Constitutional Court hearing was set down for 17 February 2008. It is hoped that, should the Court grant leave to appeal this time, such appeal will go some way towards clarifying the position of costs orders in the context of public interest litigation. However, it is unfortunate that the Court declined to hear the appeal directly. In doing so, it sidestepped an opportunity to establish with finality whether its own statements on the constitutional importance of awarding costs are binding or merely dicta, and exposed Biowatch to additional costs and further adverse costs orders.<sup>86</sup>

As witnessed in *Biowatch*, the current practices of wide discretion to judges in awarding costs orders and of deference to a lower court's decisions on costs orders means that iniquitous decisions, with devastating consequences, can go unchecked. And, although decisions relating to costs orders will not necessarily be followed by subsequent courts, such decisions are likely to have a widespread and longstanding deterrent effect on future public interest litigation. The few non-governmental organisations that engage in public interest litigation have a vital role to play in advancing South Africa's constitutional order. Their task will be rendered all but impossible if they fear having costs orders awarded against them even where they raise important constitutional matters in the public interest.

In the wake of the *Biowatch* case, I argue that, to the extent that public interest organisations raise constitutional rights-related matters, there should be very narrowly-defined judicial discretion about awarding costs against such organisations. This discretion should be limited to a decision about whether a matter is vexatious or frivolous (I suggest that if the court has already found the matter to raise a constitutional issue in the public interest, it is highly unlikely the matter could be found to be spurious or vexatious), and only in the light of Constitutional Court decisions on the subject, which should be regarded as binding. As recognised by the Court in *Motsepe v Commissioner for Inland Revenue*, it is sometimes necessary for a higher court to overturn a costs order of a lower court, especially where such an order would have a 'chilling effect' on parties asserting their constitutional rights.<sup>87</sup> Similarly, the need for a principled approach to awarding costs orders in constitutional litigation was stressed in one of the first Constitutional Court judgments, *Ferreira v Levin NO*:

85 In its order of 15 July 2008, the Constitutional Court found that 'it is not in the interests of justice for the Court to hear the application for leave to appeal at this stage' (*The Trustees for the Time Being of the Biowatch Trust v The Registrar of Genetic Resources* unreported case no CCT 37/08).

86 The Constitutional Court's reluctance to hear matters unless as the court of last instance is discussed further in part III (b), albeit in the context of direct access (as opposed to direct appeal).

87 *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC) para 30.

One can think off-hand of at least one reason why this general rule [that the costs follow the results] might not apply to constitutional litigation, namely, that it could have a chilling effect on litigants, other than the wealthiest, desirous of enforcing their constitutional rights. It might also not apply where the constitutionality of a statute is challenged, a matter which would usually be one of public interest.<sup>88</sup>

Given this appreciation, it is regrettable that the Constitutional Court has not been more decisive in establishing binding rules pertaining to the awarding of costs orders in public interest litigation. Had the Court done so, this might promote the uptake of public interest litigation throughout the court system. Having failed on this front, how has the Court fared in encouraging public interest litigation via the direct access mechanism?

### (b) Direct access to the Constitutional Court in the public interest

In 2006 I wrote an article about the Constitutional Court's 'pro-poor' record,<sup>89</sup> arguing that the Constitutional Court had not always functioned as an institutional voice for the poor – evident in the relatively low number of cases brought by poor people as a percentage of the total number of cases in which decisions are handed down by the Court.<sup>90</sup> I suggested that one way in which the Court could live up to its transformative promise of functioning as an institutional voice for the poor was to utilise the direct access mechanism to allow constitutional matters to be brought directly to it by poor people who have been unable to secure legal representation.<sup>91</sup> I pointed out that in its first decade (1995-2006), the Constitutional Court had interpreted its rules overwhelmingly restrictively,<sup>92</sup> to only grant direct access in eight instances,<sup>93</sup> and never to allow an 'off the

88 *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 155.

89 J Dugard 'Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court' (2006) 22 *SAJHR* 261.

90 Out of the 24 cases in which judgments were handed down in the course of 2005, the applicant/appellant was poor (by any objective South African standard) in only three cases (ibid 275).

91 Section 167(6)(a) of the Constitution provides that 'National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court – (a) to bring a matter directly to the Constitutional Court'.

92 The applicable Constitutional Court Rule (Rule 17(1) of the 1995 Rules, succeeded by Rule 18 of the 2003 Rules <<http://www.constitutionalcourt.org.za/site/thecourt/rulesofthecourt.htm>> allowing direct access has been restrictively interpreted to refuse applicants for direct access on the grounds of finding non-compliance with the following criteria: 'exceptional circumstances', 'urgency' and 'public importance'; as well as under the evolving principle that 'this Court should ordinarily not deal with matters as both a Court of first and as one of last resort'.

93 I excluded the leave to appeal applications that were disguised as direct access applications. The eight instances are: *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); *S v Dladla* (heard with *S v Dladla*; *S v Joubert*; *S v Schietekat*) 1999 (4) SA 623 (CC); *Moseneke v The Master* 2001 (2) SA 18 (CC); *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC); *Minister of Home Affairs v National Institute for Crime prevention and the Re-integration of Offenders (NICRO)* 2005 (3) SA 280 (CC); *Bhe v Magistrate Khayelitsha* (heard together with *Shibi v Sithole*; *South African Human Rights Commission v President Republic of South Africa*) 2005 (1) SA 580 (CC); *Mkontwana v Nelson Mandela Metropolitan Municipality* (heard together with *Biset v Minister of Provincial Affairs and Constitutional Development*; *Transfer Rights Action Campaign v MEC for Local Government and Housing in the Province of Gauteng*) 2005 (1) SA 530 (CC); and *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC).

street' complaint by a poor person to be heard.<sup>94</sup> Indeed, as I had observed – while spending two weeks in the Registry conducting archival research during February 2005 – poor people who came to the Constitutional Court Registry window to seek justice were sent away with a copy of the Constitutional Court rules, regardless of whether their complaint raised substantive constitutional issues. Such severe gate keeping occurred in the context of a low caseload,<sup>95</sup> which suggested to me that the Court could hear a number of direct access cases each year, if these were appropriately screened for raising constitutional issues in the public interest. I concluded that the Constitutional Court's practice of restricting its roll rather than actively facilitating direct access by the poor meant that – in contrast with the Constitutional Court of Costa Rica (*'Sala Constitucional'* of the Supreme Court, located in San Jose), which accepts any kind of direct claim (called *amparo*) written in any form, and considers around 17 000 *amparo* cases each year<sup>96</sup> – the Constitutional Court risked becoming an elite institution, increasingly inaccessible to the poor.

In the two years since I wrote the article, the Constitutional Court has not changed its practice of avoiding direct access.<sup>97</sup> I still maintain that direct access is a potentially powerful mechanism for facilitating constitutional matters to be heard that otherwise would not make it through the normal judicial hierarchy. And I still believe that, in order to become relevant to the majority of South Africans, the Constitutional Court needs to reverse its stance on direct access, energetically promoting it rather than discouraging it. However, I have subsequently refined my argument. Taking into account the criticism that granting direct access to the Court to unrepresented poor litigants might not be the optimal way for constitutional matters to be effectively dealt with, I suggest a pivotal role for public interest organisations in facilitating such direct access. I envisage that this could work in two ways, to the benefit both of affording greater access to justice to the poor and to the development of South Africa's socio-economic rights jurisprudence.

First, an appropriately-staffed Constitutional Court Registry office (perhaps using volunteers or interns who have undergone a relevant training course) should scan complaints from poor people approaching the Registry window

94 The granting of direct access in these eight cases appears to have been motivated by the need to remedy some procedural defect in the circumstances around which the case came before the Court or to attach what served as an essentially amicus-type intervention by a relevant interest group to an existing matter.

95 Between February 1995 and January 2006 the Constitutional Court delivered 254 written judgments, averaging 23 per year (with a low of 14 in 1995 and a high of 34 in 2002). This is a low roll compared with other constitutional or apex courts.

96 Email communication with Professor Bruce Wilson, University of Central Florida, Orlando, Florida, 1 October 2008.

97 I am not aware of any applications for direct access being granted between January 2006 and January 2008 (other than applications that were actually based on the Constitutional Court's exclusive jurisdiction, as set out in s 167(4) of the Constitution). The practice of denying direct access continues to impact negatively on the profile of cases the Constitutional Court hears. Only one socio-economic rights-based judgment was handed down in this period (*Olivia Road*), and there were few poor litigants raising civil matters (although there were a handful of civil cases brought in the interests of the poor by public interest organisations including the Union of Refugee Women).

for substantive constitutional matters. Where such matters are identified, the staff member (in consultation with senior Constitutional Court Registry staff) should proceed with a formal process of referring the matter to a relevant public interest organisation, requesting the organisation to represent the applicant in a direct access application to the Constitutional Court.<sup>98</sup> Second, the Constitutional Court should actively encourage public interest organisations wishing to take up their own constitutional matters (or such matters on behalf of poor people or in the public interest) by allowing them to utilise the direct access route. If public interest organisations with relevant cases could bypass the normal judicial hierarchy,<sup>99</sup> this would greatly reduce the costs and time involved in litigating for them, and it is likely to encourage more organisations to take up public interest litigation. Regardless of whether such public interest legal assistance avenues are pursued, it might anyway be necessary for the Constitutional Court to rethink its style of adjudication in the interest of significantly increasing its case-load. In this regard, the Constitutional Court might consider the practice of the Costa Rican Constitutional Court, which – in order to consider 17 000 *amparo* cases per year – makes extensive use of *leterados* (trained legal clerks) to screen direct access applications for merit, and typically hands down very concise rulings.<sup>100</sup>

On a number of occasions I have heard Constitutional Court judges bemoan the absence of socio-economic rights cases coming before them.<sup>101</sup> Yet, the Court has done little to address systemic access-related obstacles in the interests of poor people. Specifically, the Court has not delineated a comprehensive right of access to justice at state expense for civil/constitutional matters, it has failed to pronounce decisively on costs orders in the context of public interest litigation, and it has failed to utilise its own direct access mechanism in the public interest. As a consequence, the Court remains a relatively non-accessible institution and it loses countless opportunities to develop constitutional law in the interests of the poor. As detailed below, the Court's weak socio-economic rights record has further undermined the promise of transformative justice.

#### IV THE CONSTITUTIONAL COURT'S WEAK APPROACH TO SOCIO-ECONOMIC RIGHTS

In parts II and III I have analysed some of the systemic barriers to poor people, as well as pro-poor issues, being heard in court. I have argued that, as an institution, the judiciary has failed to consciously break down these barriers

98 The Constitutional Court could, perhaps, raise a fund to assist public interest organisations to take up such litigation. If the litigation can proceed on a direct access basis, the costs of litigating will be substantially reduced compared with proceeding through the normal judicial hierarchy.

99 In the normal course, a constitutional matter is first heard in the High Court, then it is usually appealed to the Supreme Court of Appeal, before reaching the Constitutional Court (it is possible to apply for leave to appeal directly from the High Court to the Constitutional Court, however, such applications are often dismissed). The process can take years and the cost can be exorbitant.

100 Note 97 above.

101 I have heard two Constitutional Court judges speak specifically about their wish to see a case come before them about 'school children still being taught under trees'.



in the interests of advancing transformative justice. In part IV I outline how the Constitutional Court's weak approach to socio-economic rights has stifled much of the potential energy to litigate socio-economic rights.

Much has been written about the Constitutional Court's weak approach to socio-economic rights adjudication and the dampening effect this has had on the number of related cases coming before the Court, as well as how this has been detrimental to the development of socio-economic rights jurisprudence generally.<sup>102</sup> As of April 2008, only six substantive socio-economic rights cases have come before the Constitutional Court since its establishment in 1995,<sup>103</sup> two on health-care rights (*Soobramoney v Minister of Health, Province of KwaZulu-Natal* 1998 (1) SA 765, and *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC)); three on housing rights (*Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), and *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 (3) SA 208 (CC)); and one on social assistance rights (*Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) – although this case is not strictly a socio-economic rights case as it was more about the right to equality than about the right to social assistance per se). Some socio-economic rights have never been adjudicated at Constitutional Court level, including the rights of access to sufficient food and water (s 27(1)(b) of the Constitution) and to education (s 29 of the Constitution).

To a large extent, the paucity of socio-economic rights cases having come before the Constitutional Court relates to the obstacles of access set out in parts II and III above. The barriers to poor people accessing courts independently (no comprehensive right to legal representation at state expense in civil matters and non-referral of cases to the in forma pauperis system of securing pro bono representation), combined with the prohibitive costs for public interest organisations wishing to take up poor people's issues (related to the risk of having an adverse costs order and the inability to take constitutional cases directly to the Constitutional Court), mean that very few socio-economic rights-related cases are taken up at all, and fewer still make it all the way to that Court.

Another reason for the low number of socio-economic rights cases relates to how the Constitutional Court has approached the few socio-economic rights cases that it has heard. I have previously written about two of these specific disincentives with Theunis Roux.<sup>104</sup> First, we argued that the Court's decision to

102 D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' (2002) 118 *SALJ* 484; D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1; S Liebenberg 'The Interpretation of Socio-Economic Rights' in M Chaskalson et al *Constitutional Law of South Africa* 2 ed (2004); M Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 383; and Dugard & Roux (note 11 above).

103 I classify a 'substantive socio-economic rights case' by whether the ratio of the decision was linked to a cause of action founded on any of the socio-economic rights in the Constitution.

104 Dugard & Roux (note 11 above).



adopt a reasonableness standard of review, instead of a more robust rights-based/violations-related standard (including a minimum core content approach),<sup>105</sup> has ‘the potential to diminish the capacity of the Court to function as an institutional voice for the poor since it requires expert understanding of complex policy and budgetary issues, making it all but impossible for poor people to bring [socio-economic] rights cases without extensive technical and financial support’.<sup>106</sup> Second, we argued that the kinds of ‘conventional and somewhat limited relief’<sup>107</sup> pursued by the Constitutional Court in socio-economic rights cases acted as a further deterrent to poor people opting for *litigation* as a means of enforcing their socio-economic rights (as opposed to direct protest, political action etc). We noted that – despite s 172(1) of the Constitution providing that ‘[w]hen deciding a constitutional matter within its power, a court – (b) may make any order that is just and equitable’ – the Constitutional Court has always opted to provide programmatic/policy relief rather than providing direct relief to the affected individuals, and it has failed to utilise structural interdicts or to set itself up as an institution with oversight over the enforcement of its socio-economic rights judgments.<sup>108</sup> This has meant that the few litigants who have brought socio-economic rights claims to the Constitutional Court have not secured any direct benefits from the litigation, a further disincentive to future litigants. Indeed, our prediction in 2006 that the Court’s approach to socio-economic rights cases had ‘the potential to diminish the capacity of the Court to function as an institutional voice for the

105 In *Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (*Grootboom*), the Constitutional Court appeared to reject the minimum core content argument advanced by the amicus curiae, and instead focused on a narrow interpretation of the state’s obligations vis-à-vis socio-economic rights in which the standard of review was not whether or not a particular right had been violated but ‘whether the legislative and other measures taken by the state are reasonable’ in the context of the ‘state’s available means’ (para 41). Thankfully, however, the minimum core argument has been recently revived by Tsoka J. At paragraph 131 of the *Mazibuko* judgment, Tsoka J points out that the Constitutional Court had not outright rejected the minimum core content approach in *Grootboom*. Rather, according to Tsoka, the Constitutional Court had highlighted the problems facing a court in interpreting a minimum core when it did not have sufficient information before it. As stated by Tsoka J: ‘The difficulties presented by the determination of the core minimum do not amount to a rejection of that principle. The learned Judge [Yacoob J] did not reject the core minimum as part of our law’ (para 131 *Mazibuko*, note 5 above).

106 Dugard & Roux (note 11 above) 116. There is another troubling consequence of the Constitutional Court having adopted the weak and overly-deferential reasonableness test – it has entrenched a perception among the executive that judges may not review socio-economic rights-related policy. This attitude was recently revealed in the unscripted comments of Amos Maseko, Executive Mayor of the City of Johannesburg, at a press conference on 15 May 2008 at which he announced the City’s intention to appeal the *Mazibuko* judgment. Attacking Tsoka J directly, Maseko warned: ‘Judges must limit their role to what they are supposed to do. If they want to run the country they must join political parties and contest elections. In that way they can assume responsibilities above their powers’ (reported in the *Sowetan* and *Business Day* of 15 May 2008).

107 K Pillay ‘Addressing Poverty through the Courts: How Have we Fared in the First Decade of Democracy?’ Paper presented at a conference ‘Celebrating a Decade of Democracy’, Durban (23–25 January 2004) 7.

108 In *Grootboom*, the Constitutional Court did remark in passing that the South African Human Rights Commission (which appeared as amicus curiae in the case) should ‘monitor and report’ on the state’s progress in complying with the judgment (note 106 above, para 97). However, the Court did not incorporate this oversight function in its order and, as a consequence, when the Commission attempted to report back to the Court on the ongoing intolerable conditions still prevailing in the claimant community, the Court refused to engage with it.

poor' proved problematically accurate. In the two years since writing the chapter, only one socio-economic rights case has come before the Court – *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 (3) SA 208 (CC) – and the matter relates to a twice-previously adjudicated right – the right to have access to adequate housing (s 26 of the Constitution).

Finally, I would like to highlight one further disappointing characteristic of the Constitutional Court's socio-economic rights record – the Court's practice of not grasping opportunities to pronounce on potentially transformative issues unless it has to. The Constitutional Court has all along adopted a cautious adjudication style, which Iain Currie (following Cass Sunstein) has referred to as one of 'judicious avoidance'.<sup>109</sup> This style of adjudication is characterised by a 'reluctance on the part of the Court to pronounce on any issue that does not have to be decided for the purposes of settling the case'.<sup>110</sup> This practice resulted in the Court passing over the opportunity presented in *Vermaas* to delineate a comprehensive right to legal representation at state expense (an opportunity that has not again arisen in the Court's subsequent cases and one that could have greatly contributed to advancing transformative justice). Judicious avoidance has also had a deadening effect on socio-economic rights jurisprudence. It has, for example, resulted in the Constitutional Court's most recent socio-economic rights judgment adding very little to the jurisprudence. In *Olivia Road*, the Constitutional Court sat on an appeal from the Supreme Court of Appeal on the nature of the state's obligations towards 67 000 desperately poor people facing eviction from buildings in the inner city of Johannesburg in terms of the City's urban regeneration strategy. By the time the dispute reached the Constitutional Court, an obligation to provide at least temporary alternative shelter had been conceded. The remaining issues over which the parties sought clarification from the Court included:

- Whether the right of access to adequate housing, as guaranteed by s 26 of the Constitution, requires a consideration of location in the provision of alternative accommodation (ie what weight should be attached to the benefits poor people facing eviction derive from their present location);
- Whether or not, in failing to make any provision for the poor in its inner city housing plans, the City of Johannesburg's housing policy was unconstitutional;
- Whether a 1977 law (the National Building Standards and Building Regulations Act 103 of 1977) – which gave a local authority the right to evict occupiers of buildings it considered to be unsafe without considering the availability of alternative accommodation) was inconsistent with the Constitution.

Choosing to avoid these issues, the Constitutional Court focused instead on establishing the requirement for a local authority to meaningfully engage with

109 See I Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138, drawing on C Sunstein *Legal Reasoning and Political Conflict* (1996).

110 Dugard & Roux (note 11 above) 110.

occupiers facing eviction. Finding that the City of Johannesburg had failed to make an effort to engage with the occupiers at any time before proceedings for their eviction were brought, the Court ruled that the subsequent eviction was unlawful. However, while a welcome innovation, the concept of meaningful engagement does not provide poor people with any concrete protections against eviction, nor does it help to delineate the right to housing. In refusing to decide on the issues outlined above, which were squarely placed before the Court, the Court missed an important opportunity to develop the right to housing jurisprudence beyond its decision in *Grootboom*. By so doing, the Court failed to tackle the policies and practices at the core of the vulnerability of poor people living in locations earmarked for commercial development and it failed to establish critical rights-based safeguards for extremely vulnerable groupings, despite having all the material before it to do so.

#### IV CONCLUSION

As highlighted in this article, the post-apartheid judiciary has not yet done enough to recognise systemic adversity and to do what it can institutionally to alleviate such adversity. The barriers outlined in part II militate against poor people bringing non-criminal matters to court independently. And, as set out in part III, the potential for public interest organisations to litigate in the public interest has not been appropriately encouraged by the judiciary. Finally, as examined in part IV, the Constitutional Court's weak approach to the adjudication of socio-economic rights has acted as a disincentive to further litigation.

Without wishing to undermine the independence of the judiciary, which remains a critical component of the judiciary's ability to coherently advance the interests of the poor, I do suggest that the judiciary's failure to advance transformative justice has contributed to the current predicament in which it remains institutionally remote from the majority of South Africans' lives. As evidence of the inaccessibility of courts, a recent Human Sciences Research Council survey on attitudes to public institutions has found a gradual erosion of public trust in the courts since 2004, with only 49 per cent of respondents having trust in the courts in 2007 compared with 58 per cent in 2004.<sup>111</sup>

The judiciary is one of the critical institutions of the post-apartheid order. It needs to play a much more decisive role in social and economic transformation. To gain public trust and to become more accountable to the core values of the Constitution, the judiciary needs to much more consciously incorporate into every decision an understanding of structural inequality and historical injustice, as well as sensitivity towards the lives of the poor. If the judiciary does not adapt to the demands of becoming an institutional voice for the poor, it will continue to lose legitimacy and recede further away from the lives of the majority of South Africans.

111 B Roberts 'Between Trust and Scepticism: Public Confidence in Institutions' 6 *Human Sciences Research Council Social Attitudes Survey* (2008) 10.