



LEGAL ASSISTANCE CENTRE
Fighting for human rights in Namibia since 1988



Pro Bono

INFORMATION ABOUT NAMIBIA'S LAW

What is public interest litigation and how can it make a difference in asserting people's human rights in Namibia?

Public interest litigation is court action that seeks to secure human and constitutional rights, particularly where the rights violations affect socio-economically disadvantaged or marginalised individuals or groups. It can be used to challenge legislation, arbitrary state action, or failures or omissions on the part of the state to meet obligations such as the provision of adequate health care and education.

Public interest litigation has also been used to address actions by private individuals that have public implications, such as ethnic or gender-based discrimination. It often takes place in conjunction with broader social and political actions, such as public protests, lobbying or other forms of advocacy.

Public interest litigation can result in broad social impact, change and mobilisation around human rights interests. Thus, it forms part of a broader narrative of realising societal change through the legal system.

At independence, Namibia's constitutional democracy heralded the dawn of a new era of human rights protection in the country. With the inclusion of the Bill of Rights in its Constitution to protect the fundamental human rights and freedoms of all Namibians, Namibia has taken a decisive step in breaking with the history of human rights abuses suffered by many Namibians under colonial and apartheid rule. The Namibian Constitution has created a legal environment conducive to public interest litigation that can give meaningful content to the rights and freedoms the Constitution guarantees.

Several key judgments have been handed down by Namibian courts over the years that have confirmed the protection of rights of representation under the Constitution. For example, in the *Mwilima* case, the Supreme Court ruled that government has a constitutional obligation to provide legal representation where the lack of such representation might result in the denial of the right to a fair trial.

However, after more than 30 years of constitutional democracy, two key factors remain stacked against public interest litigation.

The first limitation is Namibia's restrictive rules on who has the necessary standing to bring a case to court. Under the existing rules, a person can approach a court for assistance only if he or she has a direct and substantial interest in the case. In other words, a person can come to court only to protect his or her own rights and not the rights of someone else.

Strict rules on who can bring cases to court are intended to make sure that courts base their decisions on relevant arguments from persons who are directly affected by an issue, and to discourage frivolous cases that could waste the courts' limited resources.

But the restrictive rules often prevent socio-economically disadvantaged, vulnerable or marginalised individuals or groups from accessing the courts at all.

For example, women who are victims of discriminatory customary law practices may be reluctant to approach a court on their own because of fear of victimisation or because of social or family pressures. But the current approach does not allow anyone else to act on their behalf.

Another example of how the standing rules' narrow interpretation works against the public interest is where a law which is arguably unconstitutional affects the entire public, but does not harm the legal interests of any specific individual or entity sufficiently to give them a basis to challenge the law in court.

For instance, suppose that the government or a private company took some step that had a negative impact on the environment, such as exploring for oil in an environmentally sensitive area. While this action might harm the public generally, it is possible that no particular individual would be directly and specifically affected. This could mean that no one would be able to challenge actions that harmed the environment.

A convincing argument for the relaxation of the standing rules to accommodate environmental protection against the damaging practices of mining was made in the 2008 case of *Namib Plains Farming and Tourism v Valencia Uranium*. Here, the farm owners sought to stop the mining company from abstracting huge amounts of water from this very arid area for its mining activities..

The farm owners asserted that someone "needs to speak on behalf of the environment", arguing that the enormous water usage would harm the farm owner's farming and tourism practices as well as causing irreparable harm to the environment. Both the High Court and the Supreme Court decided the case without considering the issue of standing, but the Supreme Court agreed that standing in environmental cases is an important matter which has not yet been fully explored by the Namibian courts.

The issue of standing was raised again in the ongoing *Jan Tsumib* case which involves the restoration of the Hai||om community's ancestral land rights over Etosha National Park from where they were evicted from in the 1950s by the South African Administration. The eight applicants in that case asked the Court to relax the rules on standing to that they could assert their constitutional rights through a representative action on behalf of the Hai||om people. Their concern was that the rights of the Hai||om people would remain unprotected if this approach was not allowed. The High Court dismissed the application, leaving the restrictive rules on standing once again intact. (An appeal to the Supreme Court on this issue is still pending.)

An obvious solution in such scenarios would be to relax Namibia's current standing rules. Countries such as South Africa, Kenya, Canada and India have all expanded their rules on standing over the years, to allow for class actions or representative standing. This allows individuals or organisations to bring court cases on behalf of other individuals or groups whose rights have been violated, in instances where some barrier (such as poverty or marginalisation) prevents those persons from acting on their own.

In 2014, Namibia's Law Reform and Development Commission brought out a report with some convincing arguments for the reform of Namibia's rules on standing. However, the recommendations in this report have not yet led to any law reforms.

The second limitation on public interest litigation is that legal representation in Namibia remains so expensive that the majority of our population cannot afford it. Not being able to access courts has severe consequences for Namibians who want to assert their fundamental human rights and freedoms. Namibia's legal fraternity is yet to develop a meaningful pro bono culture where they take on cases without charging the client.

The Legal Assistance Centre is the main source of public interest representation for marginalised and indigent persons, but it has limited resources and is dependent on shrinking donor support. While the

Mwilima case discussed above has clarified the right to free legal representation, the bulk of the state's legal aid programme goes towards defending persons accused of crimes. Thus, the fundamental rights and freedoms of many Namibians might never be realised without the work of public interest law firms such as the LAC. But the LAC's efforts alone are not enough.

Changing the rules on standing to facilitate a more effective public interest litigation process as well as getting Namibia's legal fraternity on board to do more public interest cases would be two key steps forward in realising and protecting the fundamental human rights guaranteed by the Namibian Constitution.

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