



**Access to Justice in Namibia:  
Proposals for Improving Public Access to Courts**

# **ACCESS TO JUSTICE AS A HUMAN RIGHT**

**Paper No. 1**



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Access to justice is both an independent human right and a crucial means to enforce other substantive rights. Namibia has a progressive, modern constitution, guaranteeing an impressive set of rights for the individual. Yet without a realistic means to enforce those rights, substantive guarantees can far too easily become merely a set of empty promises.

The Constitution of Namibia guarantees access to justice. But some legal procedures limit the ability of individuals, particularly marginalised populations, to access the courts. In this series of papers, the Legal Assistance Centre examines several discrete access to justice issues, including examples from other jurisdictions and arguments put forward by government, civil society and academia. On the basis of this information, we propose reforms to improve access to justice in Namibia.

This series of papers on access to justice covers the following four topics:

- (1) access to justice as a human right
- (2) *locus standi* (standing to bring a legal action)
- (3) costs and contingency fees
- (4) *amicus curiae* participation.

The paper on access to justice as human right includes a brief summary of our recommendations on the other three topics.

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# PART A: ACCESS TO JUSTICE AS A HUMAN RIGHT

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Namibians have a right to effective, meaningful access to the courts under both domestic and international law.

**The Namibian Constitution guarantees access to justice to protect the fundamental rights and freedoms, to ensure administrative justice, to decide on criminal charges and to determine civil rights and obligations.**

**The right of access to the courts under international law takes several forms.** Some international instruments, such as the African Charter to Human and Peoples' Rights, expressly guarantee a right of access to the courts. Other international agreements, such as the International Covenant on Civil and Political Rights, guarantee the right to a "fair and public hearing", which has been interpreted to include a right to access the courts. Furthermore, many international covenants designed to promote specific substantive rights also require states to guarantee access to the courts as a means to enforce those rights.

**Thus access to justice serves a dual purpose: as a right in itself and as a means of enforcing other substantive rights.**

## **1. Access to justice in the Namibian Constitution**

**Article 5 of the Namibian Constitution provides that the Constitution's fundamental rights and freedoms are enforceable by the Courts.** More specifically, Article 25(2) provides that "[a]grieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom". Similarly, Article 18 provides that that "persons aggrieved" by the acts and decisions of administrative bodies and officials "have the right to seek redress before a competent Court or Tribunal".

**Under Article 12, "all people" are entitled to "a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law", not only in criminal cases but also in "the determination of their civil rights and obligations".** Note that this guarantee of access to the courts is not restricted to cases involving fundamental rights and freedoms, but applies in any determination of an individual's "civil rights and obligations". Thus the right of access to the courts is not only a means of protecting or enforcing other substantive rights. Rather, it is a substantive right in itself: the individual has the right to an "independent, impartial and competent court" for the determination of their rights.

**These articles must be read together with Article 10 of the Namibian Constitution, which provides that all persons "shall be equal before the law".** A legal system that effectively excludes significant portions of the population on the basis of their financial status arguably

contradicts this promise of equality before the law; rich people can use the courts and thus the law to protect and enforce their rights, while poorer people cannot.

**Other articles further bolster the right of access to the courts.** Article 80(2) of the Constitution grants the High Court original jurisdiction “to hear and adjudicate upon all civil disputes” – “including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder”. Furthermore, although the Constitution allows the state to derogate from some of its obligations during national emergencies, Article 24(3) expressly forbids both “derogation from or suspension of the fundamental or freedoms” guaranteed by Articles 5, 12 and 18 and “the denial of access by any persons to legal practitioners or a Court of law”.

### **Namibian Constitution Key provisions on access to justice**

#### **Article 5 Protection of Fundamental Rights and Freedoms**

The fundamental rights and freedoms enshrined in this Chapter... shall be enforceable by the Courts in the manner hereinafter prescribed.

#### **Article 12 Fair Trial**

(1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law...

#### **Article 18 Administrative Justice**

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

#### **Article 25 Enforcement of Fundamental Rights and Freedoms**

...(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom...

## **2. Access to justice in international law**

**In addition to direct constitutional guarantees of access to justice, Namibia has incorporated the access to justice requirements of various international instruments into its domestic law through Article 144 of the Constitution, which provides that “international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia”.**

### **African Charter on Human and People’s Rights**

**The African Charter on Human and People’s Rights contains the most explicit guarantee of access to the courts applicable to Namibia.** Article 7(1) of the African Charter provides, “Every individual shall have the right to have his cause heard...”. This right includes “the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force”. Namibia’s

ratification of the African Charter gives the government positive obligations not only to recognise the right of access to the courts, but also to “undertake to adopt legislative or other measures to give effect” to this right.<sup>1</sup>

**Article 7(1) must be read together with Article 3 of the African Charter, which provides that every individual “shall be entitled to equal protection of the law”.** As in the case of equality before the law under the Namibian Constitution, a legal system which fails to provide meaningful access to justice to everyone in society regardless of their financial position denies equal protection of the laws to some.

### **African Charter on Human and Peoples’ Rights, Article 7(1)**

Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

**In 2001, the African Commission on Human and Peoples’ Rights adopted a set of Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. The Principles and Guidelines expressly recognise the necessity of access to the courts to redress human rights violations:**

States must ensure, through adoption of national legislation, that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or non-governmental organization is entitled to bring an issue before judicial bodies for determination.

## **International Covenant on Civil and Political Rights**

**The International Covenant on Civil and Political Rights (“ICCPR”) guarantees the right of access to the courts.** Article 14 of the ICCPR provides:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

This substantive right is similar to that in Article 12 of the Namibian Constitution. Additionally, **Article 14 of the ICCPR expressly guarantees that “[a]ll persons shall be equal before the courts and tribunals”.** The provision may have been intended only to secure equal treatment when a person appears before a court. However, the treatment can hardly be considered equal if an entire segment of the citizenry is effectively denied access to the courts as means to secure and protect their rights.

## **Universal Declaration of Human Rights**

**Like the African Charter and the ICCPR, the Universal Declaration of Human Rights recognises access to justice and access to the courts as human rights in themselves.** Under Article 10, each individual has the right “in full equality to a fair and public hearing by an

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<sup>1</sup> African Charter on Human and Peoples’ Rights, Article 1: “The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.”

independent and impartial tribunal, in the determination of his rights and obligations”. Further, in terms of Article 8, an individual has the right to an effective remedy as determined by the courts for violations of “the fundamental rights granted him by the constitution or by law”.

Under international law, a declaration is technically considered “hortatory and aspirational, recommendatory rather than ... binding.” However, the Universal Declaration has developed a more significant legal status over time. The numerous references to the Universal Declaration as the “grand statement of the human rights movement” have led it to be considered as “relevant to norm formation and influential with respect to state behaviour”. Further, there are arguments that all or parts of the Declaration should be considered binding as customary international law or authoritative interpretations of the United Nations Charter.<sup>2</sup> To the extent that the Universal Declaration constitutes customary international law, it is binding on Namibia under Article 144 of the Constitution.<sup>3</sup>

**Although one might argue that a right to a fair and public hearing guarantees only regular procedures once a hearing has begun, jurisprudence from the European Court of Human Rights (ECHR) confirms that it includes a right of access to the courts.** Even though the Court’s decisions do not apply to Namibia, its interpretation of language identical to that in international agreements to which Namibia is a party provides strong interpretive weight.

The ECHR first addressed the question of access to the courts in 1975 in *Golder v United Kingdom*.<sup>4</sup> The applicant, a prisoner accused of assault by a prison officer, sent a letter to the Home Secretary requesting permission to consult a solicitor regarding a civil action for libel in respect of this allegation. The Home Secretary denied his request. The applicant brought a complaint before the European Commission of Human Rights contending that this denial violated his right to a fair and public hearing under the European Convention on Human Rights. Article 6(1) of this Convention provides that, “[i]n the determination of his civil rights and obligations ... , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. The Commission concluded that the Home Secretary’s denial did contravene the prisoner’s rights; the UK government disagreed with this opinion and referred the matter to the ECHR for a judgement on whether Article 6(1) guaranteed a right of access to the courts in order to institute a civil proceeding.

The Court first acknowledged that Article 6(1) “does not state a right of access to the courts or tribunals in express terms”.<sup>5</sup> However, it reasoned that the principle whereby a civil claim must be capable of being submitted to a judge and the principle which forbids the denial of justice are both universally recognised as fundamental principles of law, and found that Article 6(1) must be read in the light of these principles.<sup>6</sup> Further, the Court recognised that guaranteeing regular procedures once a lawsuit has begun would be meaningless if the Convention did not also guarantee the right to begin the lawsuit in the first place:

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<sup>2</sup> Henry J Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, Oxford: Oxford University Press, 2008 at 152; see also Yuji Iwasawa, “The domestic impact of international human rights standards: The Japanese experience” in Philip Alston & James Crawford, eds, *The Future of UN Human Rights Treaty Monitoring*, Cambridge: Cambridge University Press, 2000 at 249 (stating that “there is persuasive authority for the proposition that at least some provisions of the UDHR now represent customary international law” and citing numerous sources to that effect).

<sup>3</sup> “Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.” Namibian Constitution, Article 144.

<sup>4</sup> *Golder v United Kingdom*, 21 February 1975, §38, Series A no. 18.

<sup>5</sup> At §28.

<sup>6</sup> At §35.



It would be inconceivable, in the opinion of the Court, that Article [6(1)] should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.<sup>7</sup>

It therefore concluded that Article 6(1) guaranteed a right of access to the courts.

The ECHR emphasised in a subsequent case that Article 6(1) does not create new substantive rights that can be enforced through the courts, but that its guarantees “extend only to rights which can be said, at least on arguable grounds, to be recognised under domestic law”.<sup>8</sup> However, once domestic law recognises a substantive right, domestic courts may not establish procedural bars that prevent individuals from accessing the courts to enforce that right.<sup>9</sup>

**The right of access to courts is subject to some limitations.**<sup>10</sup> The ECHR has held that “these are permitted by implication since the right of access ‘by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals’”.<sup>11</sup> However, permissible limitations may not “restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired”.<sup>12</sup> Moreover, a limitation will violate the right of access to the court under Article 6(1) if it does not pursue a legitimate aim or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.<sup>13</sup>

Applying these principles, the Court held that a Hungarian ruling that shareholders lacked *locus standi* to sue for damages as a result of the wrongful liquidation of their company violated the rights of the shareholders under Article 6(1) because it did not strike a “fair balance” between the interests of the shareholders and the interests of the creditors.<sup>14</sup> In contrast, it held that German court decisions that German courts lacked jurisdiction to review seizures of German external assets that occurred after World War II did not violate the right of access to the courts of an individual seeking to recover seized family property: the restriction on jurisdiction was a necessary term in the international agreements that ended the post-war occupation of Germany and permitted German reunification.<sup>15</sup> The Court concluded that “the applicant’s interest in bringing litigation in the Federal Republic of Germany was not sufficient to outweigh the vital public interest in regaining sovereignty and unifying Germany”, that sovereignty and unification were legitimate ends, and that there was a reasonable relationship of proportionality between the ends and the means employed.<sup>16</sup>

**The ECHR has also held that excessive costs and fees that prevent individuals from pursuing litigation may violate Article 6(1).** In 1979, in the case of *Airey v Ireland*, the Court first recognised that Article 6(1) obligates the state to provide legal aid in civil cases when legal

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<sup>7</sup> Ibid.

<sup>8</sup> *Roche v United Kingdom* [GC], no. 32555/96, §117, ECHR 2005-X.

<sup>9</sup> See §119, where the Court emphasises “the necessity to maintain that procedural/substantive distinction: fine as it may be in a particular case, this distinction remains determinative of the applicability and, as appropriate, the scope of the guarantees of Article 6 of the Convention”.

<sup>10</sup> See *Golder v United Kingdom*, 21 February 1975, §38, Series A no.18 (“The Court considers . . . that the right of access to the courts is not absolute.”).

<sup>11</sup> *Ashingdane v United Kingdom*, 28 May 1985, §57, Series A no. 93 (quoting *Golder v United Kingdom* 21 February 1975, §38, Series A no.18).

<sup>12</sup> At §58.

<sup>13</sup> Ibid.

<sup>14</sup> *Ferenc Rózsa and István Rózsa v Hungary*, no 30789/05, §§12, 20-24, 28 May 2009.

<sup>15</sup> *Prince Hans-Adam II of Liechtenstein v Germany* [GC], no. 42527/98, §§52, 56-58, 69, ECHR 2001-VIII.

<sup>16</sup> At §69.

representation “proves indispensable for an effective access to court either because legal representation is rendered compulsory ... or by reason of the complexity of the procedure or of the case”.<sup>17</sup> The applicant in *Airey* sought a judicial decree of separation from her husband, which could only be obtained in the High Court, and had not been able to secure the services of a solicitor. Although it was possible for a petitioner to represent herself in the High Court, the ECHR found that all of the 255 petitioners for judicial decrees of separation brought in the preceding seven years had legal representation. Reasoning that the Convention was “intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”, the Court concluded that it was improbable that the petitioner would be able to present her own case and that her right to access the court had therefore been violated.<sup>18</sup> In so concluding, the Court rejected Ireland’s argument that “the alleged lack of access to court stems not from any act on the part of the authorities but solely from [the petitioner’s] personal circumstances, a matter for which Ireland cannot be held responsible under the Convention”.<sup>19</sup> Instead, it concluded that fulfilling the right of access to the courts required affirmative action by the state when legal representation was necessary but unavailable, and that Ireland’s failure to provide legal aid to the petitioner violated Article 6(1).<sup>20</sup> In addition, the ECHR has held in several cases that excessive court fees that prevent petitioners from bringing their cases to court violate the right of access to the courts under Article 6(1).<sup>21</sup>

## Other international conventions

**In addition to generally applicable rights of access to courts, Namibia has entered into international agreements that require states parties to provide effective remedies through courts or tribunals for the protection of specific substantive rights.**

For example, Article 6 of the **International Convention on the Elimination of All Forms of Racial Discrimination** (“CERD”) provides:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

In other words, Namibia’s obligation to protect its citizens’ right against racial discrimination includes an obligation to provide individuals with a means of seeking redress in a national court or tribunal for a violation of that right. Just as importantly, the “protection and remedies” provided by the courts must be “effective”. The theoretical existence of a remedy that most people cannot access would be insufficient.

By acceding to the **Convention on the Elimination of All Forms of Discrimination Against Women** (“CEDAW”), Namibia agreed to pursue a policy of eliminating discrimination against women, which includes a duty “to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”.<sup>22</sup> Again,

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<sup>17</sup> *Airey v Ireland*, 9 October 1979, §26, Series A no 32.

<sup>18</sup> At §24.

<sup>19</sup> At §25.

<sup>20</sup> At §§25-26.

<sup>21</sup> See, for example, *Jedamski and Jedamska v Poland*, no 73547/01, §66, 26 July 2005; *Weissman and Others v Romania*, no. 63945/00, §§38-40, ECHR 2006-VII (extracts).

<sup>22</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Article 2(c).

Namibia has an obligation to provide a court system that can be used effectively to prevent discrimination against women and seek redress.

The **Convention Against Torture** guarantees a right to redress for acts of torture. Article 14 requires States Parties to ensure that victims of torture are able to obtain redress via their legal systems and have “an enforceable right to fair and adequate compensation”, including full rehabilitation. If the victim dies, “his dependents shall be entitled to compensation”.

As a party to the **Protocol to the African Charter on the Rights of Women in Africa**, Namibia has undertaken not only to provide “appropriate remedies to any woman whose rights or freedoms ... have been violated” but also to “ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.”<sup>23</sup> Like the ICCPR and the African Charter, the Protocol provides for equality before the law and “the right to equal protection and benefit of the law”.<sup>24</sup> Yet the Protocol also recognises that equality before the law and equal protection both require substantive and effective access to the courts and legal services. Thus states parties have an obligation to ensure, amongst other things, “effective access by women to judicial and legal services, including legal aid” and “support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid”.<sup>25</sup>

The **Southern African Development Community (SADC) Protocol on Gender and Development** recognises access to justice both as a means of securing other rights and a right in itself that women must share on a basis of equality with men. The Protocol provides that States Parties must put in place measures that secure “equality in the treatment of women in judicial and quasi-judicial proceedings, or similar proceedings, including customary and traditional courts”; “equal legal status and capacity in civil and customary law”; “the provision of educational programmes to address gender bias and stereotypes and promote equality for women in the legal system”; and “accessible and affordable legal services for women.”<sup>26</sup> Although the Protocol has not yet come into force, Namibia has ratified the agreement and deposited its instrument of ratification with SADC.<sup>27</sup>

The **Convention on the Rights of Persons with Disabilities**, which Namibia has ratified, requires States Parties to “ensure effective access to justice for persons with disabilities on an equal basis with others”.<sup>28</sup> States Parties also undertake to provide “procedural and age-appropriate accommodations” and to “promote appropriate training for those working in the field of administration of justice”.<sup>29</sup>

Although it does not apply to Namibia, the **American Convention on Human Rights** further demonstrates that the right to access the courts has become an international norm. Article 8(1) provides that “[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal ... for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature”. Article 25(1) provides

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<sup>23</sup> Protocol to the African Charter on the Rights of Women in Africa, Article 25.

<sup>24</sup> Id, Article 8.

<sup>25</sup> Ibid.

<sup>26</sup> Southern African Development Community Protocol on Gender and Development, Article 7.

<sup>27</sup> See Southern African Development Community Protocol on Gender and Development, Article 40; Gender Links, Ratification Status of the SADC Protocol on Gender and Development, [www.genderlinks.org.za/article/ratification-of-the-sadc-protocol-on-gender-and-development-2011-02-2](http://www.genderlinks.org.za/article/ratification-of-the-sadc-protocol-on-gender-and-development-2011-02-2).

<sup>28</sup> Convention on the Rights of Persons with Disabilities, Article 13(1).

<sup>29</sup> Id, Article 13(1)-(2).

that everyone has a right to recourse “to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention”. A State Party undertakes to “ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state”; “develop the possibilities of judicial remedy”; and “ensure that the competent authorities shall enforce such remedies when granted”.<sup>30</sup>

### 3. Factors obstructing access to justice

Scholars discussing foreign legal systems have identified several factors that prevent marginalised populations from accessing the courts.

**First, many people do not know their rights, and therefore cannot recognise when their rights are violated.**<sup>31</sup> Traditional standing rules, however, assume that an individual will be able to recognise a violation of his or her rights and file a case to prevent the violation or seek redress. Such rules incorrectly presuppose that people are “conscious of their rights” and are able to file suits to combat violations.<sup>32</sup>

**Second, many low-income or marginalised populations fear court proceedings or do not know how to use the courts,** particularly if they perceive the courts as bastions protecting the rights of the privileged and the wealthy.<sup>33</sup>

**Third, the sheer expense of litigation keeps many potential plaintiffs out of court;** people struggling to survive cannot afford to spend the little money they have filing lawsuits.<sup>34</sup>

**Finally, physical distance to the courts may compound other barriers.** A person in a rural area whose rights are being violated may not be able to afford transport to town to file a lawsuit or the cost of staying there during the litigation.

**In combination, these factors exclude poor and uneducated people from using the courts to vindicate their rights.** As Cheryl Loots, a South African legal scholar, has recognised, “people whose fundamental rights are infringed may not practically be in a position to approach the court for relief. The reasons for this may be that the people affected are unsophisticated and impecunious, so that they do not know how to go about enforcing their rights and are not in a financial position to do so”.<sup>35</sup>

### 4. Conclusion

Overcoming all of these factors is a challenge. As a first step, the Legal Assistance Centre has identified several issues pertaining to access to justice which could be improved by means of law reform, judicial development of the common law and/or amendments to the rules of court:

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<sup>30</sup> American Convention on Human Rights, Article 25(2).

<sup>31</sup> Geoff Budlender, “The Accessibility of Administrative Justice,” 1993 *Acta Juridica* 128 at 131.

<sup>32</sup> SP Sathé, “Judicial Activism: The Indian Experience,” 6 *Washington University Journal of Law & Policy* 29 (2001) at 79.

<sup>33</sup> Geoff Budlender, “The Accessibility of Administrative Justice,” 1993 *Acta Juridica* 128 at 131; Cheryl Loots, “Standing to Enforce Fundamental Rights,” 10 *SAJHR* 49 (1994) at 49 (“Fear of the judicial process is another barrier. Litigation is so emotionally traumatic, time consuming and costly that most people are afraid to get involved in it.”).

<sup>34</sup> Kenneth E Scott, “Standing in the Supreme Court: A Functional Analysis,” 86 *Harvard Law Review*. 645 (1973) at 673.

<sup>35</sup> Cheryl Loots, “Standing to Enforce Fundamental Rights,” 10 *SAJHR* 49 (1994) at 49.

- (1) *locus standi* (standing to bring a legal action)
- (2) **costs and contingency fees** (the impact of the general rule that costs must be paid by the losing party, and mechanisms for financing legal representation)
- (3) ***amicus curiae* participation** (allowing submissions by a “friend of the court” who has an interest in the subject matter of the case, but is not actually a party to the dispute).

It is our view that reforms in respect of some of these areas could broaden opportunities for public interest litigation and for more meaningful enforcement of the Namibian Constitution.

**Improving access to justice should be an imperative for the Namibian legal system.** In addition to being an independent right, access to justice provides a means for people to protect and enforce other rights. A system that effectively excludes vulnerable portions of the population deprives them of a means of protecting their rights and interests. Further, it leads to substantive decisions that unfairly favour the wealthy and the powerful. Certainly, litigation is not the only means to enforce rights: public campaigns, education and outreach and the work of the Attorney-General and the Ombudsman all serve key roles in rights enforcement. But the courts are a key tool for keeping the political branches of government accountable to the rule of law. Without a legal means for citizens to ensure that the government fulfils its constitutional duties and respects the rights of individuals, Namibia’s progressive Constitution risks becoming merely a piece of paper covered with empty promises.

# PART B:

## **LOCUS STANDI: STANDING TO BRING A LEGAL ACTION**

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### **1. Introduction**

*Locus standi*, or ‘standing’, refers to whether a particular applicant is entitled to seek redress from the courts in respect of a particular issue. Because the rules of *locus standi* determine whether an individual can approach the courts to vindicate a right, they significantly affect an individual’s ability to enforce his or her substantive rights and to protect the rights of others. Narrow standing rules can prevent meaningful enforcement of constitutional rights and progressive legislation.

### **2. Namibia’s current law on standing**

Namibia’s current law on standing is very restrictive; it requires the applicant to demonstrate a direct and substantial interest in the subject matter and outcome of the application. This interest must be current and actual, as opposed to being abstract, academic, hypothetical or simply too remote.<sup>36</sup> The common law rules on standing also apply to standing to seek declaratory relief.<sup>37</sup> One of the major problems with these restrictive standing rules is that they can operate to insulate some rules from all challenges to their validity and constitutionality.

**The Namibian courts have recognised a few exceptions to the common law criteria on standing:** (1) where the interested individual cannot make the application himself and there is a good reason for the applicant to make the application on the other person’s behalf, such as in cases where the interested persons were in detention or vulnerable to reprisals,<sup>38</sup> (2) allowing a member of a group which a particular law was designed to protect to bring a suit regarding the law without showing actual damage;<sup>39</sup> and (3) in theory but noted only in *dicta* in Namibia to date, where a broadened approach to standing is necessary to curb an abuse of public power.<sup>40</sup>

**Articles 25(2) and 18 of the Namibian Constitution control standing in certain cases.** Article 25(2) specifies that “aggrieved persons” may approach the courts alleging a violation of a fundamental right or freedom, whilst Article 18 guarantees that “persons aggrieved” by the acts of administrative bodies and administrative officials shall have the right to seek redress. The Constitution does not define the term “aggrieved person”. **The Namibian courts initially interpreted standing under Articles 18 and 25 to be identical to standing under the**

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<sup>36</sup> *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 12.

<sup>37</sup> *Southern Engineering and Another v Council of the Municipality of Windhoek* 2011 (2) NR 385 (SC).

<sup>38</sup> *Wood and others v Ondangwa Tribal Authority* 1975 (2) SA 294 (A); *Vaatz v The Municipal Council of Windhoek* [2011] NAHC 178 (22 June 2011). See also *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13; *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at para 16.

<sup>39</sup> See *Macropulos v Mullinos* 1966 (1) SA 477 (W).

<sup>40</sup> *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13.

common law,<sup>41</sup> but the 2009 case of *Uffindell v Government of Namibia*<sup>42</sup> and several subsequent cases seem to point in the direction of a more liberal approach to standing in respect of constitutional issues. However, the question of whether constitutional standing is in fact broader than common law standing remains somewhat unclear.<sup>43</sup>

**In addition to standing under the common law and the Constitution, an applicant may have standing under the terms of a particular statute or rule, with recent Namibian legislation demonstrating a distinct trend towards liberalising standing.**<sup>44</sup>

**Class actions, where one or more plaintiffs litigate against a defendant not only on their own behalf but on behalf of other similarly-situated persons, do not exist in Namibia.** The Rules of the High Court contain a procedure for joinder, whereby any number of persons can be joined as plaintiffs or defendants, provided that their claims or defences depend on substantially the same questions of law or fact.<sup>45</sup> But joinder is inadequate as a means for access to justice by multiple individuals, because they will often be isolated and unknown to each other.

**Some government officials have special forms of standing.** Article 79(2) of the Constitution of Namibia authorises the Supreme Court to “deal with matters referred to it for decision by the Attorney-General under this Constitution” – but this avenue has been utilised only twice since Independence.<sup>46</sup> The Ombudsman also has the power to approach the courts, but only in respect of a specific complaint, including a complaint from an aggrieved person that a fundamental right or freedom guaranteed by the Constitution has been infringed or threatened.<sup>47</sup>

**Another aspect of standing is mootness – ie when a court declines to hear the merits of a case because judicial resolution of the dispute that once existed between the parties will no longer have a practical effect due to changed circumstances.**<sup>48</sup> This can be another stumbling block to the adjudication of issues which remain relevant to the public at large even if moot

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<sup>41</sup> *Kerry McNamara Architects Inc and others v Minister of Works, Transport & Communication and others* 2000 NR 1 (HC).

<sup>42</sup> *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC). <sup>42</sup> *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13; see *Dalrymple v Colonial Treasurer* 1910 TS 372, 378 (“[N]o man can claim damages in a civil action unless he has himself been injured. . . . And the rule applies to wrongful acts which affect the public, as well as to torts committed against private individuals.”).

<sup>42</sup> *Southern Engineering and Another v Council of the Municipality of Windhoek* 2011 (2) NR 385 (SC).

<sup>42</sup> *Wood and others v Ondangwa Tribal Authority* 1975 (2) SA 294 (A); *Vaatz v The Municipal Council of Windhoek* [2011] NAHC 178 (22 June 2011). See also *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13; *Trustco Insurance t/a Legal Shield Namibia and Another v Deed Registries Regulation Board and Others* 2011 (2) NR 726 (SC) at para 16.

<sup>42</sup> See *Macropulos v Mullinos* 1966 (1) SA 477 (W).

<sup>42</sup> *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) at para 13.

<sup>42</sup> *Kerry McNamara Architects Inc and others v Minister of Works, Transport & Communication and others* 2000 NR 1 (HC).

<sup>43</sup> In the unreported case of *Maletzky and others v Attorney General and others* [2010] NAHC 173 (HC), the Court rejected an applicant’s contention that “any person aggrieved by a violation of the fundamental right of another may approach the high court for an appropriate relief”. On the other hand, the *Uffindell* approach was followed in an even more recent unreported case, *Petroneft International Glencor Energu UK Ltd and Another v Minister of Mines and Energy and Others* [2011] NAHC 125. See also *Lameck and Another v President of Republic of Namibia and Others* at para 1 and *Trustco Insurance Limited t/a Legal Shield Namibia v Deeds Registries Regulation Board* SA 14/2010 at para 18.

<sup>44</sup> Combating of Domestic Violence Act 4 of 2003, section 4(2); Maintenance Act 9 of 2003, definition of “complainant” in section 1 read together with section 9; Liquor Act 6 of 1998, section 9(3); draft Child Care and Protection Bill, dated 12 January 2012, section 47(2).

<sup>45</sup> Rules of the High Court, Rule 10(1) and (3).

<sup>46</sup> In *Ex parte Attorney-General: In re Corporal Punishment* 1991 NR 178 (SC) and in *Ex parte Attorney-General: In re The Constitutional Relationship Between the Attorney-General and the Prosecutor-General* 1998 NR 282 (SC).

<sup>47</sup> Namibian Constitution, Article 25(2), Ombudsman Act 7 of 1990, section 5(1)(a)(ii)(dd)-(ee).

<sup>48</sup> The Namibian criteria on mootness are not entirely clear. For example, in *Namunjepo v Commanding Officer, Windhoek* 1999 NR 271 (SC), the Supreme Court decided a case where the particular relief sought in the case was no longer applicable, but the same legal issue remained relevant in a pending civil case between the same parties. In contrast, in *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011 (2) NR 469 (SC), the Supreme Court declined to address an issue which had become moot even though it was likely to arise again in other pending litigation between the same parties.

between the parties – especially in the case of a time-bound issue which is likely to recur, but because of its nature will likely be rendered moot before it can be resolved by the courts in any specific instance.

### 3. Common law standing and access to justice

**Narrow standing rules pose several serious problems in terms of access to justice.** Namibia’s current common law standing rules fail to recognise and account for the practical barriers that prevent low-income, poorly-educated and otherwise marginalised groups from accessing the courts. Rules of *locus standi* that favour the wealthy are likely to lead to substantive holdings that do the same, if only because the wealthy are able to access courts and obtain holdings which serve their interests whilst low-income litigants cannot. There are also instances where individuals fear standing alone to challenge a government law or action – or even a family issue with rights implications – meaning that restrictive standing rules may leave the legality of some laws or actions unchallenged.

The traditional standing requirement of a “direct and substantial interest” also creates two interrelated rule-of-law problems. First, this approach immunises some unlawful or unconstitutional conduct from judicial scrutiny because no individual has a sufficient interest to challenge it – such as where a law which is arguably unconstitutional affects the entire public, but does not harm the legal interest of any specific individual or entity. Second, common law standing rules developed to protect a narrow set of private law rights and thus fail to function properly in a legal context that imposes broader duties on the State. Broader forms of standing could provide a means for citizens and courts to ensure that the government functions accountably.

Existing common-law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous ... . [I]t is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation.

*Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at 229

**In other jurisdictions, various forms of public interest standing have proved to provide several advantages.** Litigation brought by an individual or organisation on behalf of third parties who are unable to access the courts has proven successful at protecting the rights of marginalised groups. Furthermore, forms of standing that permit cases to be brought on behalf of large numbers of similarly-situated individuals can lead to more effective protection of substantive rights by permitting the consolidation of resources and a continuity and centralisation of strategy. Broader standing mechanisms also advance the goals and values of a participatory democracy by permitting the participation and involvement of socially and economically disadvantaged individuals who may be unable to assert their rights through the political process.



## 4. Comparative law on standing

Various international tribunals have increasingly recognised the rights of individuals and organisations to approach them, even when their own rights have not been violated. Examples include the African Commission on Human and Peoples’ Rights, the Economic Community of West African States Community Court of Justice, the Common Market for Eastern and Southern Africa Court of Justice, the East African Court of Justice and the Inter-American Commission on Human Rights.

Other countries have adopted broader forms of standing generally, or in respect of some categories of issues (such as constitutional challenges). General examples include:

- **representative standing**, which permits an individual to bring an action on behalf of another individual or group;
- **organisational standing**, which permits an organisation to bring an action on behalf of its members;
- **class actions**, which permit large numbers of individuals with common issues to consolidate their claims or defences into a single action lead by a representative party; and
- **public interest standing**, where any member of the public can mount a legal challenge in respect of a general public harm without showing special injury.

The table below provides more specific examples.

COUNTRY	TYPES OF STANDING
South Africa	<p><b>Constitutional standing (Bill of Rights)</b></p> <p>a. anyone acting in their own interest; [<b>traditional standing</b>]</p> <p>b. anyone acting on behalf of another person who cannot act in their own name; [<b>representative standing</b>]</p> <p>c. anyone acting as a member of, or in the interest of, a group or class of persons; [<b>class actions</b>];</p> <p>d. anyone acting in the public interest; [<b>public interest standing</b>]</p> <p>e. an association acting in the interest of its members. [<b>organisational standing</b>]</p> <p><b>Common law standing</b> similar to Namibia, but apparently acquiring a broadened application in light of the underlying constitutional dispensation</p>
India	<p><b>Public interest standing</b> any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision</p> <p><b>Representative standing</b></p> <p><b>Class actions</b></p>
Canada	<p><b>Public interest standing</b> applicable in cases arising under the Constitution or other laws where the litigant raises a serious issue and a genuine interest in the issue, and there is no other reasonable and effective means of bringing the issue before the courts</p>
United Kingdom	<p><b>Broad general rules on standing</b> “sufficient interest in the matter to which the application relates”; no need to show a direct legal or financial interest, and the applicant does not need an interest that is unique, different from, or greater than, the interest of any other member of the public</p> <p><b>Taxpayer/ratepayer standing</b></p> <p><b>Organisational standing</b></p>

<b>Israel</b>	<b>Public interest standing</b> <b>Representative standing</b>
<b>Uganda</b>	<b>Public interest standing</b> <b>Representative standing</b>
<b>Kenya</b>	<b>Constitutional standing</b> <ul style="list-style-type: none"> <li>• standing to sue on one’s own behalf</li> <li>• representative standing</li> <li>• class actions</li> <li>• public interest standing</li> <li>• organisational standing</li> </ul>
<b>Tanzania</b>	<b>Public interest standing</b> where the petition is <i>bona fide</i> and evidently for the public good and where the Court can provide an effective remedy”
<b>Chile</b>	<b>Public interest standing on Constitutional issues</b> <i>accion de amparo</i> (a plaintiff alleging that a constitutional right has been violated may go directly to a court to enforce the right)
<b>Argentina</b>	<b>Public interest standing</b> <i>accion difusas</i> (diffuse, or people’s, legal action), based on constitutional protection for human rights and the principles of Roman Law which state that all citizens have duties to protect the public domain
<b>United States</b>	<b>Class actions</b> allowed under Federal Rule of Civil Procedure 23 if four criteria are met: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defences of the representative parties are typical of the claims or defences of the class; and (4) the representative parties will fairly and adequately protect the interests of the class
<b>Ontario</b>	<b>Class actions</b> useful example of statutory regulation of class action (Class Proceedings Act 1992)
<b>Zimbabwe</b>	<b>Constitutional standing</b> where a right has been, is being or is likely to be contravened in relation to the plaintiff himself or herself – with an exception to cover cases brought on behalf of a person who is detained. <b>Class actions</b> useful example of statutory regulation of class action (Class Actions Act 1999)

In South Africa, in the leading case of *Ngxuza and others v Permanent-Secretary, Department of Welfare, Eastern Cape and another*,<sup>49</sup> the Court addressed and dismissed several common concerns which apply to all forms of representative standing:

- (1) **“the ‘floodgates’ argument – that the courts will be engulfed by interfering busybodies rushing to court for spurious reasons”**: The Court noted that this is improbable, given the inhibiting effect of potential costs orders. Furthermore, this concern could be addressed by a procedural requirement that an applicant seek leave from the court before proceeding on a representative basis.
- (2) **“the ‘classification’ difficulty” – “the determination of a common interest sufficient to justify class or group or representative representation”, as opposed to a common**

<sup>49</sup> *Ngxuza and others v Permanent-Secretary, Department of Welfare, Eastern Cape and another* 2001 (2) SA 609 (E).

**interest which is “broad and vague”:** This concern could be also addressed by a procedural requirement that an applicant seek the court’s leave to proceed on behalf of the group in question, based on an assessment of the facts of the specific case at hand.

- (3) **“the ‘different circumstances’ argument” – the objection that a respondent might defend against different members of the represented class differently:** The Court concluded that this issue “does not really impinge on standing but relates to the merits of the representative claim”; the grant of representative standing does not imply that the respondent must mount a uniform defence to the claims of every member of the represented group.
- (4) **“the ‘res judicata’ difficulty-that some members of the group may not wish to associate themselves with the representative litigation”:** This concern can be addressed by requiring the representative party to give “sufficient notice to all affected” so that they may opt out of the action if they wish.
- (5) **“the ‘practical impossibility’ argument-that it is impossible for the Court to deal with cases involving thousands of people and that it would adversely affect public administration if scarce resources have to be used to defend such cases in Court”:** This is not a question that a court should be asking in determining standing; if a group’s rights have been violated, it is inappropriate “for either the judicial or administrative arms of government to say that it will be difficult to give them redress” and therefore deny them access to the courts. Administrative bodies can avoid such litigation by respecting the principle of legality, and if courts must act in new and innovative ways to accommodate such groups of people, “then so be it”.

## 5. Criticisms of public interest standing

**Despite the wide use of various forms of public interest standing across a variety of jurisdictions and legal systems, it nonetheless has its critics.**

Critics have argued that public interest litigation inevitably entails **judicial policy-making**, which lies outside the courts’ constitutional function and violates the separation of powers. However, limits on jurisdiction prevent courts from exceeding the judicial sphere. Furthermore, substantive law limits both the rights the courts can recognise and the nature of the relief they can grant; a court can legitimately craft policy only to implement or enforce a recognised legal right, and it must craft that policy to fit the shape and nature of the right itself. In addition, the legislature and executive can prevent judicial encroachment by fulfilling their constitutionally-mandated roles.

A second concern repeatedly is that broader standing will result in **floods of litigation brought by busybodies**, overwhelming the courts and preventing the proper allocation of judicial resources to private law cases. However, courts in judicial systems with robust public interest litigation have dismissed such concerns as being unrealistic, with the normal costs of litigation serving as a useful deterrent to frivolous litigants. Namibia can easily employ procedural mechanisms to limit any feared litigation flood, particularly by developing appropriate criteria for public interest standing. Furthermore, it must be remembered that public interest litigation can actually use judicial resources more efficiently than private litigation, by allowing for consolidation of cases with common issues.

Another concern is that representative forms of standing could violate **personal autonomy**; if a person's rights are violated, that person should have the right to decide whether or not to sue. But this concern fails to consider the political and social realities of many Namibians. Many marginalised citizens cannot, in practice, approach the courts due to expense, lack of education, ignorance of their rights, unfamiliarity with court systems, distance and bias – so that failure to approach the courts reflects this power imbalance rather than an individual choice not to assert legal rights. Personal autonomy can be safeguarded in representative forms of standing, by require plaintiffs to attempt to notify represented parties about the litigation and permit them to opt out if they choose, and by ensuring that representative parties are genuine and do their job adequately.

Another concern is that **representative standing may be insufficiently direct and concrete**. Critics contend that a personal stake in the litigation will ensure that the plaintiff hones the best, most effective arguments for his or her case, thereby allowing the court to make the best decision. But public interest standing usually comes into play where there is no other way to bring an issue before the court. Moreover, courts can ensure the best possible arguments by requiring that the public interest litigant demonstrate a genuine interest in the matter before the court and is appropriately placed to present the necessary legal and factual issues.

Critics of public interest standing have asserted that relying on litigation to advance a cause can actually **weaken popular movements** by channelling resources and energy away from community organising, public outreach and education and government advocacy. But strategy is a determination for social justice movements to make for themselves. The courts have no authority to decide what strategy best serves a movement, and questions about appropriate standing should not take this factor into account.

## RECOMMENDATIONS

- (1) **Constitutional standing**: The judicial development of a liberalised approach to constitutional standing in Namibia is welcomed, and we hope that subsequent jurisprudence will continue to develop this concept in a way that will promote access to justice for all Namibians.
- (2) **Mootness**: Namibian courts should consider developing doctrines that permit litigation to continue when a particular dispute has become moot, but the case addresses the legitimacy or constitutionality of laws or regulations that affect the rights of individuals beyond the particular parties to the dispute.
- (3) **Law reform on standing**: We recommend that Namibia introduce a statute to reform the common law on standing, so as to permit –
  - **representative standing** to litigate on behalf of another whose rights have been violated;
  - **public interest standing** to challenge government action that is illegal or unconstitutional even if no one has standing at common law; and
  - **class actions**, in which a number of actions with common issues, claims, or defences are consolidated to be litigated together.

# PART C: COSTS AND CONTINGENCY FEES

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## 1. Costs

Under current costs rules, costs generally ‘follow the event’, meaning that the losing party must pay at least a portion of the winning party’s costs. This approach can discourage access to justice in public interest cases and for low-income litigants. A low-income litigant will probably not be able to afford legal representation and may be discouraged from litigating, even with a valid claim, due to the risk of paying the opposing party’s costs. A system that essentially punishes parties who bring marginal cases can over-deter novel litigation, including most public interest litigation. **In practice, Namibian courts sometimes decline to require public interest plaintiffs to pay the defendants’ costs, but this is discretionary from case to case and does not take place at the outset of the litigation.**

**The current system of costs also embodies some inconsistencies:**

- In the Supreme Court, High Court and Magistrates’ Courts, the unsuccessful litigant is normally liable for at least some of the costs of the successful litigant. But in the Labour Court, where most cases involve workers on one side and financially more advantaged employers on the other, the normal rule is that each party bears its own costs. Both approaches could in some instances result in unfairness or discourage some persons from utilising the courts.
- In terms of the court rules, both *in forma pauperis* litigants in the High Court and *pro Deo* litigants in the Magistrates’ Courts can receive free legal representation but, if awarded costs, are entitled to recover their legal practitioner’s fees and other costs.<sup>50</sup> But if any other litigant is represented *pro bono* by a legal practitioner or an organisation such as the Legal Assistance Centre, case law holds that no fees or disbursements may be recovered even if this litigant is successful.<sup>51</sup>

The normal system of costs assumes that the potential benefits of litigation as well as the costs will accrue to the party bringing the litigation. In private litigation, this assumption usually holds true, but public interest cases by their very definition seek to benefit the public at large. However, even if the general social benefit of the litigation might outweigh its costs and risks, the potential private benefit resulting to any single, individual plaintiff may not be worth the risk. Relieving public interest litigants from the burden of costs awards recognises that elaboration on matters of public law, and particularly on constitutional issues, benefits all of society and that it is unfair to require a single litigant to bear the costs alone.

Several jurisdictions – including Canada, the UK and Australia – have adopted approaches to costs in public interest cases which attempt to ameliorate this problem. For example, in Canada, courts have awarded costs to *unsuccessful* public interest litigants acting against government,<sup>52</sup>

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<sup>50</sup> Rules of the High Court, Rule 41(7); Magistrates’ Court Rules, Rule 53(5)-(6).

<sup>51</sup> *Hameva and Another v Minister of Home Affairs, Namibia* 1996 NR 380 (SC). The issue was raised again in the 2005 case of *Uirab v Minister of Basic Education* Case No I 1257/2005 (High Court), without being definitively resolved.

<sup>52</sup> See, for example, *Singh v Canada (AG)* [1999] 4 FC 583.

or awarded full litigation costs to public interest litigants from government *in advance* of the case outcome.<sup>53</sup> In the UK, the courts can issue protective cost orders at the outset of a public interest case, capping the costs which will be payable by an unsuccessful party.<sup>54</sup> Case law in South Africa has developed special guidelines for costs awards in constitutional cases,<sup>55</sup> and courts have awarded costs including legal fees in cases where the successful litigant was represented *pro bono* (and so would otherwise not have been liable to pay these fees).<sup>56</sup>

## RECOMMENDATIONS

- (1) **Protective cost orders**: We suggest that Namibia introduce and regulate protective cost orders which provide at the outset of a public interest case that the plaintiff will not be required to pay costs even if that plaintiff ultimately loses. The effect of protective cost orders would be restricted to cases raising novel or controversial issues, where the public would benefit from having the issues resolved.
- (2) **Costs awards for *pro bono* representation**: We propose that a party who is represented *pro bono* should be able to recover costs in the same way as a paying client.

## 2. Contingency fees

Litigation can be very expensive. Some jurisdictions – such as the UK, South Africa and Australia – utilise “no win, no fee” arrangements. These can include **conditional fee agreements**, where the legal practitioner’s payment in the event of success is based on normal hourly rates often topped up with an extra “success fee”, or **contingency fee agreements**, where the legal practitioner in a successful case collects a percentage of the award rather than an hourly rate.

The UK allows conditional fee agreements in terms of the Courts and Legal Services Act 1990 (sections 58-58B), with the “uplift” or “success” fee capped at double the usual hourly rate. This is combined with a cap pegged to a set percentage of the damages award in certain categories of cases. The use of conditional fee agreements combined with “after-the event” insurance for legal fees has essentially replaced government-funded legal aid for personal injury claims in the UK. However, the use of such fee arrangements has also been criticised for leading to high-pressure marketing tactics; benefiting only high-value cases with strong chances of success; eating up the lion’s share of damages when coupled with expensive legal insurance premiums; and contributing to a “compensation culture” marked by an increase in frivolous claims and an excessively risk-adverse climate.

<sup>53</sup> The leading case is *British Columbia (Ministry of Forests) v Okanagan Indian* [2003] SCR 371; see also *Little Sisters Book & Art Emporium v Canada (Commissioner of Customs & Revenue)* [2007] 1 SCR 38.

<sup>54</sup> *R v Lord Chancellor Ex p. Child Poverty Action Group and R v DPP Ex p. Bull (for and on behalf of Amnesty International UK)* [1999] 1 WLR 347; *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600; *R (on the application of Compton) v Wiltshire Primary Care Trust (Compton )* [2008] EWCA Civ 749; *R (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209.

<sup>55</sup> The leading case is *Trustees, Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC).

<sup>56</sup> See, for example, *Zeman v Quickelberge and another* [2010] ZALC 122 and *Thusi v Minister of Home Affairs and Others* 2011 (2) SA 561 (KZP).

South Africa similarly allows conditional fees (confusingly termed “contingency fees”) with an uplift capped at double the normal hourly rate or 25% of the total damages award, whichever is lower. The Contingency Fees Act 66 of 1997 includes detailed requirements on the contents and procedures relating to such agreements. They are primarily used in Road Accident Fund claims and other personal injury cases, or in cases involving a large number of similar forms of government maladministration. It is alleged that repeated litigation in similar matters can lead to sloppy, assembly-line claims and exaggerated fees in relation to the work done. It is also alleged that this approach to fees had led to a mushrooming of medical malpractice claims, and higher settlements in such cases.

In Namibia, such agreements might improve access to justice for a certain segment of litigants who cannot afford attorneys and cannot run the risk of paying both their own legal practitioner’s fees and the opposing party’s costs if they lose. On the other hand, such agreements will do little for litigants in cases seeking declaratory orders or challenging the constitutionality of legislation, or in cases where the anticipated awards are too small to make such fees worthwhile. Such arrangements also introduce troubling ethical concerns regarding conflicts of interest between lawyers and their clients.

## **RECOMMENDATION**

**We do not recommend the adoption of conditional or contingency fee agreements.** However, should a move be made in this direction, we would suggest that only conditional fee agreements be allowed, and that the use of such agreements be regulated by a law which provides safeguards to protect clients and strict caps on “success fees”.

# PART D:

## **AMICUS CURIAE PARTICIPATION**

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**We propose that Namibia introduce court rules permitting and regulating the admission of *amici curiae* (“friends of the court”).** The term is used in different contexts, but here we refer to a non-party who submits arguments to the court.

**Court rulings often affect groups and interests beyond those of the specific parties to a case, who should be able to present relevant information to the court.** Drawing on example from other jurisdictions such as Canada, the United States and South Africa, the Namibian courts should introduce rules which will allow them to take advantage of *amicus* expertise whilst avoiding being overwhelmed by unnecessary and repetitive argument. With an overburdened court system and overworked judges, Namibia is likely to derive particular benefit from the admission of *amicus curiae*. **Although the admission of this type of *amicus* is not currently forbidden under Namibian court rules, the rules also do not provide for it and it appears to have been used only in a single case to date.**<sup>57</sup>

**Ideally, *amici curiae* help ensure that the court considers the best possible arguments and the full array of interests implicated in particular cases.** *Amici* can also permit the court to take advantage of specialised expertise on a particular subject matter, particularly on technical issues.

**The input of *amici curiae* can advance several important objectives.**

- It can provide **valuable information on relevant facts and case law** that the parties may not have considered or may have missed.
- It can investigate **new arguments** including the constitutional implications of an issue or the possible social, political, and economic consequences of a judicial decision.
- It can vindicate participatory democratic values by **allowing courts to listen to the opinions of all those whose interests are implicated by a potential decision.**

“The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court.”

*In re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) at para 5

**Specific provision for the admission of *amicus curiae* is necessary because existing rules allowing for intervention are insufficient to permit these advantages.** Intervention is restricted to parties with a “direct and substantial interest” in the subject of litigation, ie those with standing. The right of intervention can, at most, occasionally ensure that one or two additional parties will be able to protect their own narrow interests. Persons and groups with interests which will be affected by the case will in many cases lack standing to approach the court as parties, but could provide

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<sup>57</sup> *S v Zemburuka (1)* 2003 NR 112 (HC).



useful and pertinent input as *amici*. Admission of *amicus curiae* can be restricted to those with new and relevant information and arguments, to prevent the court from being overwhelmed by redundant input and busybodies.

## RECOMMENDATION

**We suggest that *amicus curiae* participation should be allowed in Namibia, governed by the following principles:**

- (1) *Amicus curiae* should be permitted in principle at both the High Court and the Supreme Court, and at trials, appeals and other judicial proceedings.
- (2) An *amicus curiae* should be admitted and allowed to make written submissions only with the leave of the court.
- (3) A potential *amicus* must demonstrate an interest in the proceedings.
- (4) An application for admission as *amicus curiae* should outline the submissions to be advanced, their relevance to the proceedings, and the reasons for believing that the submissions are likely to be useful to the court and different from those of the other parties to the proceedings. The court and the parties will evaluate the application in terms of the submission's relevance, usefulness, and likely difference from the arguments of the parties.
- (5) *Amici curiae* should be permitted to address all types of issues, not just constitutional questions.
- (6) An *amicus* should be permitted to raise issues or causes of action not raised by the parties only under extraordinary circumstances, and only with the court's express permission.
- (7) An *amicus* may offer oral argument in support of a party with that party's permission, or apply to the court for permission to present oral argument which does not support any of the parties. In either case, the court may fix or limit the time given to a particular *amicus* for oral argument, or the total time in which *amici* supporting a particular party to the case may present oral argument.
- (8) At the discretion of the court, an *amicus curiae* may introduce factual evidence that is of common cause or otherwise incontrovertible or is of an official, scientific, technical, or statistical nature such that the information can be easily verified. If an *amicus* wishes to introduce factual evidence, it must include this request in its application to the court. The application should outline the material to be introduced and its relevance to the proceedings; establish that it is one of the categories of permitted factual submissions; and that it will not unduly delay the proceedings.
- (9) Submissions from an *amicus* should be served on all parties to the litigation.
- (10) The rules should specify time-frames and limits on the length of *amicus* submissions.
- (11) The following government entities should be entitled to admission as *amici curiae* in a case as of right: Attorney-General, Prosecutor-General and Ombudsman.
- (12) An order for a party to pay costs may make provision for the payment of costs incurred as a result of the admission of *amici curiae*, but no order for costs may be made against an *amicus curiae*.