



An overview: rights-related cases in the constitutional court

A study to assess the impact of the Constitutional Court and the Supreme Court of Appeal on society and the lived experiences of all South Africans, placed many aspects of our judicial system in the spotlight. *Narnia Bohler-Muller, Johan Viljoen and Marie Wentzel* report back on their analysis of constitution court statistics, collected for the years 2009 to 2013.

The Constitutional Court (CC) of South Africa has had a profound impact on the interpretation, protection and enforcement of the principles contained in the constitution (1996). Human rights are given clear prominence, and feature in the constitution preamble with its stated intention of establishing ‘a society based on democratic values, social justice and fundamental human rights’. Human rights are underpinned by the constitutional values of ‘human dignity, the achievement of equality, and the advancement of human rights and freedoms’. Spelt out in detail, political, civil, cultural, environmental and socioeconomic rights occupy 35 sections in chapter 2 of the constitution.

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Strong rights-based track record

In South Africa, constitutional rights feature strongly in public and private discourse, with no hesitation to test the provisions, implications and limitations of the Bill of Rights by the state, communities and individuals. This was reflected in the CC’s attention to rights-based cases, which comprised 49.8% (124 cases) of the 249 cases the court passed judgment on between 2006 and 2013. The remaining cases dealt with provisions found in other chapters of the constitution.

Using statistics, the authors constructed a table (Table 1) that portrays the types of rights-based cases adjudicated for the period 2006 to 2013. An analysis of these data provides interesting trends, and an indication of how the adjudication of rights-related cases has evolved over time.

Rights-based cases that dominated since 2006 included the right to equality (16 cases), dignity (15 cases), property (15 cases), a fair trial (14 cases), housing (14 cases), and just administrative action (14 cases).

The number of rights-based cases that remained fairly consistent throughout the duration of the period under review included those dealing with the right to equality, dignity and the right to property. The right to equality included the right to sexual orientation that led to, among others, the recognition of same-sex marriages many years before countries such as the US caught up.

Other-rights cases either increased in number, such as housing (with 2013 as exception), or decreased, such as the right to just administrative action. The housing cases mostly focused on the right not to be evicted. It seems there was a lack of implementation in this area, causing the increased number of cases dealing with the right to housing.

Categories of rights-based cases that featured prominently in the earlier part of the review period (2006–2009), but had not been referred to the CC during the latter part of the review (2010–2013), were the right to a healthy environment, the right to freedom and occupation, the right to remedy, and the right to sufficient water. This may suggest a trend of the government increasingly honouring its constitutional mandate to citizen’s rights in these areas, for example, paying more attention to a healthy environment within the context of sustainable development.

The right to basic education [saw] a notable increase in cases in 2013.

Cases that featured more predominantly in the latter part of the period under review included the right to education, freedom of assembly, and freedom of association. The right to basic education in particular drew attention, with a notable increase in cases in 2013. Some commentators argue that nearly all legal disputes related to education in the past two decades seem to have been between provincial education departments and school governing bodies or teachers.

Interviews conducted as part of this study with former CC judges, sitting Supreme Court of Appeal (SCA) judges, advocates, attorneys and academics, revealed key views on why some rights (e.g. the right to food) were less litigated – or not litigated at all:

- The universal principles and approaches set out in earlier cases may have served to render litigation less necessary, or at least premature.

- Litigation tended to be a last resort. Because of the separation of powers doctrine, the CC wanted to see that concerted efforts had been made to engage with the parties.
- Litigation was complex and required careful planning; solid, convincing research; patient engagement with the responsible authorities, and careful timing. Undue haste could set back the cause by many years.
- Rights were often litigated in the lower courts, but because cases often did not reach the apex courts, the public might be less aware of them.
- Funding for NGOs and public interest litigation firms began drying up after the financial crisis of 2008.

The CC has continued to engage with rights-based matters over the years since its inception in 1995. It is generally accepted that social justice and transformation have been at the heart of judgments, although some believe the courts could adopt a more activist-based approach and push for a quicker pace of transformation where the state is lagging behind, while others feel comfortable with the wisdom and caution exercised by the CC in its adjudication of human rights within in the context of a constitutional democracy. ■

Table 1: Rights cases heard by the Constitutional Court for the period 2006–2013

Right	Section	2006	2007	2008	2009	2010	2011	2012	2013	Total
Access to court	34	1	5	2	2	1	1	-	-	12
Access to information	32	-	-	-	1	-	-	1	-	2
Children	28	-	2	-	2	-	1	2	2	9
Dignity	10	3	2	2	-	1	3	1	3	15
Education	29	-	-	-	1	-	1	-	3	5
Environment	24	-	2	-	-	-	-	-	-	2
Equality	9	3	2	4	1	2	1	-	3	16
Fair trial	35	3	2	3	1	-	2	1	2	14
Freedom of assembly, demonstration, picket and petition	17	-	-	-	-	-	-	1	1	2
Freedom of association	18	-	-	-	-	-	-	-	1	1
Freedom of expression	16	1	2	1	1	-	2	1	2	10
Freedom of trade, occupation	22	1	-	-	-	-	-	-	-	1
Freedom and security	12	3	2	1	-	3	1	1	2	13
Healthcare	27	-	-	-	-	1	-	1	-	2
Housing	26	-	-	1	4	-	5	3	1	14
Just administrative action	33	2	4	2	3	2	-	1	1	14
Labour relations	23	-	3	1	-	-	1	1	-	6
Life	11	1	-	-	-	-	-	1	-	2
Political	19	1	-	-	3	-	-	1	-	5
Privacy	14	1	1	-	-	-	-	-	3	5
Property	25	3	3	1	1	2	1	2	2	15
Remedy	38	-	-	-	-	1	-	-	-	1
Water	27	-	-	-	1	-	-	-	-	1
Total		23	30	18	21	13	19	18	26	

Source: HSRC 2015

Authors: Professor Narnia Bohler-Muller, deputy executive director, Democracy, Governance and Service Delivery (DGSD) programme, HSRC; Johan Viljoen, senior researcher, DGSD, HSRC, and Marie Wentzel, chief researcher, DGSD, HSRC.

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