# Costs of Three Cups of Tea: Is Affordable Justice Possible?

Philip Machanick

*Department of Computer Science, Rhodes University, Makhanda, South Africa*

p.machanick@ru.ac.za

https://orcid.org/0000-0001-6648-7032

**Abstract**

I argued in a Constitutional Court case during Covid, in which my costs were minimal as the proceedings were virtual. That led me to wondering how justice could be affordable to all. More recently, I was a litigant in the Electoral Court of South Africa where the applicants were unrepresented and won our case, if with higher costs. Questions arising out of why these processes were relatively affordable leads me to a proposal for a Rights Court of South Africa, that would make litigation for basic rights accessible to all. The model I propose draws on the strong points of the Electoral Court: nimble processes and a strong association with a Chapter 9 institution, that in this case would be the South African Human Rights Commission (HRC). This Rights Court would replace the Equality Court by a specialist standalone court with concurrent jurisdiction with the High Court but simpler, more nimble processes aimed at quick results on rights violations. The HRC would use this new court as its primary vehicle for litigating all violations of the Bill of Rights and the streamlined processes of this court would make for rapid restitution, while not overwhelming the HRC with costs.

Keywords: affordable justice; Bill of Rights; Constitution of the Republic of South Africa; South African Human Rights Commission; Rights Court

## 1. Introduction

South Africa has a number of specialist courts with varying jurisdictional models. The Equality Court of South Africa (from here on, Equality Court), is established specifically to hear matters related to Equality issues defined by Section 9 of the

Constitution of the Republic of South Africa (Constitution from here on), and all High Courts and Magistrates Courts double as Equality Courts. While a court can be approached as an Equality Court, the Equality Court does not have exclusive jurisdiction over Section 9 rights[1]. Given that the Equality Courts have a rather slow work rate – on average, 2.2 cases decided annually in the years 2019 to 2023[2], including none in some years, that has me wondering if something is missing as there are numerous rights violations in South Africa[3,4,5] – with a lot written about addressing systemic violations and not much done[6] leading to a perception that rights only exist on

[1] Established by Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000.

[2] Cases decided in the relevant years are listed at https://www.saflii.org/za/cases/ZAEQC/ – 5 in 2019, none in 2020 and 2023, 2 in 2021 and 4 in 2022 for a total of 11 over 5 years.

[3] Schimmel N. Commentary–The State of Human Rights in South Africa Approaching 30 Years of Post-Apartheid Democracy: Successes, Failures, and Prospects. *World Affairs*. 2023 Dec;186(4):1019-25. https://doi.org/10.1177/00438200231187411

[4] Shahaboonin F, David OO, Van Wyk A. Historic spatial inequality and poverty along racial lines in South Africa. *International Journal of Economics and Financial Issues*. 2023;13(1):102. https://doi.org/10.32479/ijefi.13803

[5] Dawood Q, Seedat-Khan M. The unforgiving work environment of Black African women domestic workers in a post-apartheid South Africa. *Development in Practice*. 2023 Feb 17;33(2):168-79. https://doi.org/10.1080/09614524.2022.2115977

[6] Plagerson S. Mainstreaming poverty, inequality and social exclusion: A systematic assessment of public policy in South Africa. *Development Southern Africa*. 2023 Jan 2;40(1):191-207. https://doi.org/10.1080/0376835X.2021.1993793

paper[7]. In any case, Section 9 by no means encompasses them all. Specific rights enumerated are covered in the Bill or Rights by Sections 9–35 and while some may be covered by ordinary court processes such as Section 34 Access to courts and Section 35 Arrested, detained and accused persons, there is plenty of scope to litigate other rights far beyond Section 9. Hence my interest in making such rights more accessible.

On 20 August 2021, I argued in the Constitutional Court of South Africa – ConCourt from here on – against delaying the local government elections beyond the constitutionally-mandated deadline. I was able to take part in what would usually be an extremely expensive form of litigation at almost no cost. Other than printing my 9-page founding affidavit, which was required to have it commissioned, I had almost no costs. As I was waiting my turn to argue, my predecessor after a dramatic presentation imperiously demanded "Costs of three Council!" What was I to do? Ask for costs of three cups of tea? That was all that I had spent that day in excess of my usual daily costs.

It was a particular set of circumstances that made this extremely low-cost litigation possible. Yet generally, litigation, especially where it comes to constitutional rights, is very expensive. To elites, spending a few hundred thousand (in South African rand terms) on lawyers may be affordable; the odd million here or there and – as the saying goes – it starts to look like real money. On the other hand, big business and government are not so sharply constrained by affordability. Though there are some

[7] Tait K, Taylor WK. The Possibility of Rights Claims-Making in Court: Looking Back on Twenty-Five Years of Social Rights Constitutionalism in South Africa. *Law & Social Inquiry*. 2023 Aug;48(3):1023-52. https://doi.org/10.1017/lsi.2022.63

defences against this asymmetry such as the courts frowning on the SLAPP[8] strategy and the protection of *Biowatch*[9] against adverse costs orders when litigating for constitutional rights, the balance is still very much against the individual and small civic organizations – particularly where the poor litigate, whether individually or collectively.

More recently, I was an applicant in a case before the Electoral Court of South Africa – from here on, the Electoral Court – in which the first applicant, who has no legal qualifications, with the assistance of some friendly legal professionals, did the bulk of the work. Our costs were higher than in my ConCourt case for two reasons. The Electoral Court has very short timelines and requires that all respondents be served before they issue a case number; this required same-day service, which is very expensive. By contrast, for my Concourt case, all service was by email. The other big expense was sending hard copy to the court; without this, we would have done everything electronically. What was refreshing and different about the Electoral Court is that it is not only relatively nimble as courts go – by 23 May 2024, they had already published 17 judgements since the start of the year, some of which combined multiple cases – but they do not stand on ceremony. Their judgements are designed to get to the heart of the matter and move on.

Contrast the expeditious flow of cases through the Electoral Court with the low rate of cases adjudicated by the Equality Court and its narrow focus. That leads to the

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[8] Strategic Litigation Against Public Participation: recognized as an abuse of process in *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* (CCT 66/21) [2022] ZACC 37

[9] *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14 (3 June 2009)

question: would another kind of court focused on human rights, drawing on my case studies presented here, be a useful addition?

In the remainder of this paper, I expand on my lessons from arguing in the ConCourt. I then examine the approach used in the Electoral Court to reduce delay. From this start I synthesise a possible approach to a Rights Court of South Africa. I conclude by summarising my case for a new court that would make justice affordable even for those who would struggle to pay for 3 cups of tea.

## 2. My Foray into the ConCourt

When the Independent Electoral Commission of South Africa (IEC) approached the ConCourt to seek permission to delay the 2021 local government elections beyond the constitutionally-permitted deadline, I was concerned that it was doing so on the basis of uninterrogated science. Much though retired Deputy Chief Justice Dikgang Moseneke is highly regarded in legal circles, I was concerned that his report[10] had misinterpreted scientific evidence; the members of the enquiry were all drawn from the IEC and from the legal profession[11].

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[10] Dikgang Moseneke. *A Report to the Electoral Commission of South Africa in terms of Section 14(4) read with Section 5(2)(a) of the Electoral Commission Act*. Online: https://www.elections.org.za/freeandfair/Live/20210720%20A%20REPORT%20TO%20THE%20ELECTORAL%20COMMISSION%20OF%20SOUTH%20AFRICA%20IN%20TERMS%20OF%20SECTION%2014(4)%20READ%20WITH%20SECTION%205(2)(a)%20OF%20THE%20ELECTORAL%20COMMISSION%20ACT%20(Final%20edits%20-%2020210726).pdf; accessed 23 May 2024

[11] Moseneke, op cit: paragraph [11].

Since the IEC had approached the ConCourt as the court of first and last instance, factual argument is not part of the mix; the fact that the enquiry itself only had scientists as sources of testimony meant that there was no in-depth interrogation of the meaning of the science. While I am not an epidemiologist, having published only one paper in that field, my work in bioinformatics, which is at the boundary of computer science and life sciences, equips me to assess such evidence better than a person with a purely legal background. I therefore sought a way to join the case.

At the time, I was temporarily the leader of a small local party called Makana Independent New Deal (MIND) that was registered to contest the local elections in the Makana municipality. At the time, it seemed that MIND was on the way out so I used my standing as its leader – without risk to an electoral cause if it all went wrong – to join the case as an intervenor. Once I had a foot in the door, I could see how others who knew the court's rules were navigating them and could follow suit. In a case where there were fewer respondents or intervenors, this would have been harder. All documents were shared by email and accumulated using Dropbox – all of which was dead easy for me with no cost. The hearing was held using Zoom, again easy and at no cost for me.

Once in, I studied the Constitution in detail with a view to making constitutional arguments; while a small army of constitutional lawyers was involved, a little out of the box thinking could be of assistance – though I was not so arrogant as to expect to make a major impact outside of interrogating the scientific arguments. Nonetheless, I put to the court that our Constitution, properly read, means "black lives matter and poor lives

matter" as its restitution requirements go beyond a static reading of rights[12]. The implication of this is that if government is failing to deliver for the poor then elections become even more urgent. I used the example of the July 2021 insurrection as an indication that delaying elections would not stop political activity and that the evidence around the world is that Covid-safe elections could be run. As compared with out-of-control riotous protests, elections would be safer; rules such as distancing and masking could be enforced.

The court however only seemed interested in my scientific input, which was quoted, if without attribution, in the majority opinion[13]:

> *As one of the parties aptly put it, the scientific evidence was shrouded in uncertainty, not because the experts did not know what they were talking about but because they did.*

Even if the ConCourt justices showed little interest in my constitutional ruminations, my part in the case nonetheless set me to thinking: if access was this easy in this one instance, why is that not generally the case?

In practical terms, if access was too easy, the ConCourt would be overwhelmed with cases. However, the ConCourt is not the only access route to constitutional rights. Any court can make a finding on constitutionality. For example, the Promotion of Administrative Justice Act 3 of 2000 as amended gives effect to the Section 33 constitutional right to just administrative action. In Section 7(1) judicial review of

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[12] Albertyn C. (In) equality and the South African Constitution. *Development Southern Africa*. 2019 Nov 2;36(6):751-66. https://doi.org/10.1080/0376835X.2019.1660860

[13] *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs and Others* (CCT 245/21) [2021] ZACC 29: paragraph 225

administrative action is required to be instituted within 180 days. Nonetheless Section 9(1)(*a*) provides for relaxing this time limit and the courts must necessarily be lenient (though with reasonable limits with respect to the rights of the respondents) in granting condonation, given that failure to do so would impugn a constitutional right[14]. Anyone making a Section 9(1)(*a*) argument is supported by their Section 33 constitutional right.

Indeed, the duty of lower courts to interpret constitutionality was emphasized in some of the very earliest ConCourt judgements[15]. And this is as it should be as Section 2 of the Constitution asserts the supremacy of the constitution. This being the case, what is the actual problem? Access to the ConCourt is not in itself the gatekeeper to access to rights. Fortunate though I was to stumble on circumstances where I could stroll (virtually) into the ConCourt without major costs, that is not the real problem, as constitutional rights should be accessible without reaching the ConCourt.

## 3. A Slow but Fruitful Introduction to the Electoral Court and Lessons Learned

In the 1 November 2021 elections, I became a candidate for another local party, Makana Citizens Front, that contested the council in Makana Local Municipality. We were surprisingly successful, scoring 18.1%, making us the second-biggest voting bloc. We only won proportional-representation seats (PR) and our 5 PR councillors entered council determined to make a difference. But that is where the trouble started: one of our staunchest supporters turned on us and hijacked the council PR seats.

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[14] Michael Kabai. Running out the clock: When to condone an unreasonable delay, *De Rebus*, 2020 (Aug) DR 23

[15] Webb H. The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law. *U. Pa. J. Const. L.* 1998;1:205–283.

It seemed as if we should have a straightforward case as the Makana Speaker had sworn in new councillors while we were still disputing our removal by a very dubious disciplinary case conducted by people with no standing to do so. But that is where the problem of access to justice kicked in. Because our opposition had connived behind the scenes to swear in their councillors while we believed we were still in the process of challenging their actions, our income was cut before we could hire legal representation. We all know of and admire dramatic cases won by public-interest lawyers, of which I can cite a few examples[16,17,18]. But we do not hear about all the other cases where no free or inexpensive legal representation was forthcoming, precisely because those cases do not exist. The ousted Makana Citizens Front PR councillors sadly found out why, as obtaining representation without the means to pay is not easy. Several advocates looked at our case and were not interested in helping us, sometimes sitting on our brief for months. One said he would take it if we put down a deposit of R250,000 and that was just the start; he warned that if it went to trial expenses could mount, depending on the number of witnesses called and we could lose with an adverse costs order. R250,000 is far more than costs of 3 cups of tea; even this starting amount was out of reach for a movement mostly of the poor.

Through all of this, we were never advised to approach the Electoral Court. When eventually we did get this advice, things changed. We wrote to the IEC

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[16] *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (3491/2021) [2022] ZAECMKHC 55

[17] *Unemployed Peoples Movement v Premier for the Province of the Eastern Cape and Others* (553/2019) [2020] ZAECGHC 47

[18] *Mlungwana and Others v S and Another* (CCT32/18) [2018] ZACC 45

demanding that they review their decision to remove us and, when they declined, we approached the Electoral Court. The first applicant, Lungile Mxube, did most of the work though it was helpful to get support from legal professionals on some of the technical issues such as the court rules. We hoped that our timing – the final group of respondents was served on 18 December 2023 – would miss the pre-election rush. Unfortunately, unbeknownst to us, the Electoral Court was already mired in cases, including one with hundreds of respondents[19] related to parties' failure to furnish audits[20]. Nonetheless, we went through the usual rounds of answering and replying affidavits expeditiously; the timeline was as follows:

- 14 December 2023 – first respondents served
- 18 December 2023 – remaining respondents served
- 20 December 2023 – founding papers filed
- 10 January 2024 – respondents directed to file answering affidavits by 12 January; applicants replying affidavits by 16 January
- 19 January: applicants directed to file 6 copies of paginated hard copy to the court
- 23 January: final late papers filed electronically
- 26 January final paginated file delivered to court
- 26 February Applicants directed to file Heads of Argument by 29 February 16:00; respondents by 4 March, 16:00

[19] *Electoral Commission of South Africa v African Independent Congress and others* (0011/23EC) [2024] ZAEC 11 (10 May 2024) – this case has the extraordinary number of 492 respondents.

[20] Required by the Political Party Funding Act 6 of 2018.

- 13 May 2024: judgement handed down[21]

Elapsed time of approximately 5 months for a final judgment is extraordinarily nimble by High Court standards; this is in fact relatively slow for the Electoral Court as they decided the matter on Section 20(2A) of the Electoral Commission Act 51 of 1996 (as amended) that gives the court jurisdiction over internal party disputes. This section does not invoke the most rapid timelines that are applicable to reviewing IEC decisions.

Another peculiarity of the Electoral Court is that it is not subject to appeal[22]; that does not however preclude appeal to the ConCourt[23]. The value of this provision is that matters do not drag on, though the overriding concept of constitutionality still means that any matter wrongly decided can be taken on review. An implicit assumption of this provision is that the Electoral Court is primarily about taking decisions of others on review so though it has concurrent jurisdiction with the High Court, it is in some sense acting as an appeal court.

Aside from rapidity, what else did we learn from using the Electoral Court? Despite strict timelines in their Directives, they did not stand on ceremony and make an issue of late filings – even where condonation applications were not made by some of the respondents, their late affidavits were still accepted. As a court that is primarily

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[21] *Mxube and Others v The Electoral Commission of South Africa and Others* (0012/23EC) [2024] ZAEC 15 (13 May 2024)

[22] Electoral Act No 73 of 1998: "Section 96. Jurisdiction and powers of Electoral Court.-(1) The Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review."

[23] For example, Liberal Party v The Electoral Commission and Others (CCT 10/04) [2004] ZACC 1, Paragraph [13].

about access to constitutional rights – mostly Section 19 political rights – it is reluctant to award costs. Even in our case, where the respondents who hijacked the seats ignored the court, usually a recipe for punitive costs, no costs were awarded.

Another thing about our case was that, notwithstanding over 300 pages of pleadings, the court sidestepped issues that went beyond the immediate right being restored – in our case, in effect only upholding our Section 19(3)(*b*) right "to stand for public office and, if elected, to hold office." The court did not touch on issues of administrative justice or restitution; though it mused about why the Municipality may have opposed awarding damages, it did not make an order, instead concluding:

> *A claim for such an order is, in any event, better dealt with in an action for damages in which all related issues, including the quantum of such damages and exactly who is liable for the loss, can be fully ventilated.*[24]

What can we learn in general from this matter? A court that addresses rights issues can be nimble, neither overly legalistic nor technical in its approach and arrive at crisp, useful judgments[25]. It is also noteworthy that the court *de facto* if not *de jure* is the judicial arm of the IEC. The constitutional explanation for its existence is the constitutional basis for the IEC as a Chapter 9 institution that makes it bound by Section 181(2), which requires *inter alia* that such institutions "must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice." Nothing could be more partisan than an electoral dispute or internal dispute within a party, so the IEC, rather than being drawn into this, needs to refer such matters to a

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[24] *Mxube op cit*. paragraph [15].

[25] Though not always correct; they were for example overruled in *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and Others* (CCT97/24) [2024] ZACC 6

court. The ordinary High Court is too slow to resolve such issues especially in the heat of an election, where the Electoral Timetable[26] ticks on inexorably.

## 4. Towards a Rights Court

There are several lessons that I draw from these experiences. The first is that access to rights need not be over-complex, time-consuming and pettifogging. The second is that a specialist court can streamline processes immensely. The third is that a Chapter 9 institution can be supported by a specialist court, that absolves if from becoming embroiled in partisan issues, while it nonetheless creates a path to resolving rights violations. I start from lessons from the ConCourt example, then from the Electoral Court example and end with a synthesis of these lessons into a proposal for a specialist Rights Court.

The ConCourt has a reputation of being expensive to approach. Legal professionals tell me of cases where printing alone amounts to tens of thousands of rand as a copy must be made for all justices and all parties. At the start of the case related to postponing the 2021 local elections, there was one Applicant (the IEC) and eleven respondents representing all levels of government and the South African Local Government Association, for a total of 12 parties. By the time we reached the end, there were in addition eight intervenors and four amici, for an overall total 24 parties. If everyone had to make copies for everyone else, printing costs alone would have been a major impost. On top of that, it is customary to use experienced and therefore expensive Counsel supported by attorneys, correspondents, etc. so costs mount very fast. My own intervention, by contrast, was ludicrously inexpensive. My time is free because I am not

[26] Mandated in Section 20 of the Electoral Act No. 73, 1998.

an expert; that would be a poor starting point for approaching the apex court on a different mission. But if there is a straightforward situation of a rights violation, would the approach I used of studying the processes others used to meet the rules be so difficult without a top constitutional lawyer in tow? Do the courts really need to hear every case in person, and with hard copy supplied to the bench and all participants?

The Electoral Court is an interesting beast. Unlike the Labour Courts, it does not have exclusive jurisdiction[27]; electoral issues and intraparty disputes can be and are decided in the High Court. There are pluses and minuses: the High Court can ventilate all issues[28] but the Electoral Court, as we have seen, sticks to reviewing IEC decisions and resolving internal disputes such as leadership. Indeed, in our case, the Electoral Court took the view that the IEC has no role in checking whether councillors have been validly removed, whereas a High Court judgement has ruled the opposite – that at least a basic enquiry should be done by both the IEC and the municipality to ensure that internal processes, appeals, etc. have been exhausted[29].

Equality Courts are a different in that they are an alternative role for the High Court but also all Magistrates Courts can function as an Equality Court, making them easier to approach; their primary focus is Section 9 rights in the Constitution, headed

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[27] A labour matter may be heard in the High Court if there is another side to it such as contractual entitlements, as accepted by Lowe J (though the applicant lost): *Benyon v Rhodes University and Another* (5351/2016) [2016] ZAECGHC 161

[28] *Mogashoa v African National Congress and Others* (138/04) [2006] ZANWHC 35 comprehensively deals with unlawful removal of councillors and mayors, including awarding backpay.

[29] *Van Niekerk and Others v Nelson Mandela Bay Municipality and Others* (2452/2022) [2022] ZAECQBHC 31, paragraph [34].

"Equality". However, the Equality Courts only cover one section of the Bill of Rights, a whole chapter of the constitution covering Sections 7-39 (including limits to rights).

The High Court is expensive to approach and has a cumbersome two-stage process to accommodate urgency, with interim and final interdicts. Approaching the High Court as an Equality Court reduces the rigidity of the rules and approaching the Magistrates Court is even easier. But even so, Equality cases are competing for the attention of a busy court roll and the Equality Court only covers one section of the Bill of Rights. So why is something more like the Electoral Court not possible to create for cases that require rapid resolution and that would be accessible to the poor? If there are clear and obvious rights violations, why should litigating restitution be difficult and expensive?

My proposal then is a Rights Court that should have branches in accessible places around the country that is approachable remotely through electronic filing and that makes human rights legal aid available to potential litigants. All cases should address a simple rights and restitution question. As with the Makana Citizens Front case, the court should be willing to make a partial restitution if a matter gets too complex to decide quickly. Such courts, unlike the Equality Courts, should be specialised in rights matters and with rules designed for speedy resolution. The final part of the puzzle is to configure the Rights Court as the judicial arm of the South African Human Rights Commission (HRC), adding this new court as a tool to achieve the HRC's purpose. The HRC is the appropriate Chapter 9 institution as other rights-oriented Chapter 9 institutions are either specifically mandated to pass on rights

violations to them[30] or, by virtue of having no litigation power of their own, may do so as the need arises[31].

The entire Bill of Rights in the Constitution surely should have equal status and be equally easy to access. Sections 9 and 19 are covered, respectively, by the Equality Court and the Electoral Court. While the Electoral Court is extremely active and expeditious in its judgments particularly in the lead-up to elections, the Equality Court has a low number of decided cases. In 2023 and 2020, it decided none. In 2022, it decided 4; in 2021 it decided 2 and in 2019, it decided 5. Over the past 5 complete years at time of writing, the Equality Court decided on average 2.2 cases per year. By contrast, over the same period, the Electoral Court had 20 decisions, for an average of 4 per year, with 17 at time of writing in 2024 (excluded from the average since this is an incomplete year).

While the Electoral Court's activity is driven by the election cycle, it is nonetheless more active than the Equality Court, particularly as the Equality Court is rendered more approachable through being accessible through every High Court and Magistrate's court. What is the difference? The Electoral Court has a clear relationship to the IEC whereas the Equality Court stands alone.

My remedy? Expand the remit of the Equality Court to the entire Bill of Rights, make it a standalone court like the Electoral Court and ally it with the relevant Chapter 9 institution, in this case, the South African Human Rights Commission (HRC). This new court would be the South African Rights Court (Rights Court, for short).

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[30] Section 11 (*e*)(ii)(*bb*) of the Commission for Gender Equality Act 39 of 1996.

[31] The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act No 19 of 2002 contains no provision for taking legal action.

The HRC is empowered under Section 13(3)(*a*) of its enabling Act[32] to assist complainants who may need to litigate with financial support or under 13(3)(*b*) to litigate in its own name or on behalf of others. All that is needed is the necessary amendment to this Act to create a Rights Court, specific to hearing such matters. This could be as short as a few of paragraphs naming the court, specifying its jurisdiction as that of the High Court over matters specific to the Bill of Rights and allowing the Court to make its own rules, consistent with expeditious judgments. Other rights-oriented bodies including the Commission for Gender Equality could have the new court added to their specific mandate but, if the court's rules are open enough, this is not necessary.

## 5. Conclusion

A Rights Court would be a relatively straightforward addition to the court system in South Africa. It would be one more specialist type of court; in fact, it could replace one of the existing specialist courts and render its function more approachable. For it to be effective it would need to be properly resourced but if its focus is quick gains, its processes need not be lengthy or expensive.

Like the Electoral Court, it could have rules designed to be nimble, though the detail would not have to be tied to the exigencies of the Electoral Timetable, as is the case for the Electoral Court. Even so, for rights violations, there is good cause for rapid resolution. Also, like the Electoral Court, the Rights Court could focus on core rights violations and leave more complicated questions such as the quantum of damages to another forum.

[32] South African Human Rights Commission Act 40 of 2013.

Like the Equality Court, its focus would be on the Bill of Rights, but the entire gamut of rights, not just one section. It would subsume the role of the Equality Court and should replace it. Unlike the Equality Court, its matters would not have to compete with the normal court roll and its judges would be specialists in rights matters.

Like the Electoral Court, the new court would have an allied Chapter 9 institution. But unlike the Electoral Court, the Chapter 9 institution most relevant here, the HRC, could be a litigant for rights or support litigants while not itself generally being a respondent – except in cases where it was accused of being remiss in its duties. The involvement of the HRC is particularly important as it can litigate for the indigent – even those for whom three cups of tea are a major expense. Coupling this capacity with a more accessible court means that such litigation is less likely to overwhelm the capacity of the HRC than pursuing such cases through the High Court. The endpoint may be a fairly narrow win, but such narrow wins may give public-interest litigators an indication of bigger issues worth fighting.

Overall, my proposal streamlines access to rights and should make litigating more accessible, especially to the poor. And that surely is a deeply fundamental goal of a restitution-oriented constitution.

*The author reports there are no competing interests to declare.*