

## Class Actions in South Africa (2015 Update)

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### Current Status

The class action remains in its adolescence in South African law.<sup>1</sup> There is still no South African statute or rule that provides a procedural framework for the institution and regulation of class action proceedings. Not much has been done by the legislature to bring the necessary legal instrument into being. It has been left to the courts to develop appropriate procedural rules to give effect to class actions using their inherent jurisdiction as entrenched in section 173 of the Constitution of the Republic of South Africa, 1996 (“Constitution”).<sup>2</sup>

### Case Law

Section 38(c) of the Constitution makes express provision for class actions. In this regard, the Supreme Court of Appeal (“SCA”) in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*<sup>3</sup> (“*Ngxuza*”) confirmed that a class action may be used to enforce constitutional rights, despite the absence of a statute and court rules regulating such proceedings. More recently, the SCA in *Trustees for the time being of the Children’s Resource Centre Trust and others v Pioneer Food (Pty) Ltd and others (Legal Resources Centre as amicus curiae)*<sup>4</sup> (“*Children’s Resource Centre Trust*”) recognised a general class action; in other words, a class action outside the ambit of the Constitution that can be used to enforce non-constitutional rights.<sup>5</sup>

In the absence of legislation or rules that deal with class actions, the court in *Children’s Resource Centre Trust* provided guidance on the suggested approach to be adopted when dealing with class action proceedings in South Africa. This judgment effectively details key aspects of the law relating to class actions in South Africa. The SCA dealt with the circumstances when a class action may be instituted and the procedural requirements that must be satisfied before such proceedings may be instituted. In this regard, Wallis JA held that the first procedural step prior to the issuing of summons in class action proceedings is to apply to court to certify the process as a class action.<sup>6</sup> In other words a court must first be

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<sup>1</sup> N Kirby “South Africa” in P G Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* (2012) 378 382. South African law is, however, familiar with joinder of a number of potential plaintiffs as well as the notion of the representative plaintiff.

<sup>2</sup> C Plasket “South Africa” in D R Hensler, C Hodges & M Tulibacka (eds) *The Globalization of Class Actions* (2009) 256 261.

<sup>3</sup> 2001 4 SA 1184 (SCA).

<sup>4</sup> 2013 1 All SA 648 (SCA).

<sup>5</sup> See also *Mukaddam and others v Pioneer Foods (Pty) Ltd and others* 2013 2 SA 213 (SCA) para 4.

<sup>6</sup> Paras 23-25.

approached to grant leave for the matter to proceed as a class action. Should leave be granted for the matter to proceed as a class action, the court will issue appropriate directives as to how the class action will proceed. The class action trial then follows.<sup>7</sup> However, until a potential action is certified, it is not a class action. Wallis JA laid down the following elements, commonly referred to as the certification requirements, which should guide a court in making a certification decision:

- There must be a class, identifiable by objective criteria.
- There must be a cause of action raising a triable issue.
- There must be issues of fact and/or law common to all the members of the class.
- The relief sought or damages claimed must flow from the cause of action and must be ascertainable and capable of determination.
- If the claim is for damages there must be an appropriate procedure for allocating damages to the class members.
- The proposed representative must be suitable to be permitted to conduct the action and to represent the class.
- It must be shown that a class action is the most appropriate means of adjudicating the claims of the class members.<sup>8</sup>

Importantly, according to Wallis JA, these requirements overlap to some extent; for example, the composition of the class cannot be determined without considering the nature of the claim. Wallis JA added that the fact that there are issues common to a number of potential claimants may dictate that the class action is the most appropriate manner in which to proceed, but that it is not necessarily the case. He further held that a class action may be certified in respect of some issues, such as negligence in a mass personal injury claim, but leaving other issues, such as damages, to be resolved separately.<sup>9</sup>

In *Mukaddam v Pioneer Foods (Pty) Ltd and Others*<sup>10</sup> (“*Mukaddam CC*”), the Constitutional Court (“CC”) also dealt with the class action certification procedure, accepting for the most part the groundwork of the SCA in the *Children’s Resource Centre Trust*. Importantly, however, the CC held that, in considering an application for certification of class action

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<sup>7</sup> Hurter E “Class Action: Failure to Comply with Guidelines by Courts Ruled Fatal” (2010) 2 *TSAR* 409 413.

<sup>8</sup> Para 26.

<sup>9</sup> Para 26.

<sup>10</sup> 2013 (5) SA 89 (CC).

proceedings, a court should consider whether the interests of justice are served in permitting the class action to proceed.<sup>11</sup>

### Data

Unfortunately there are no such official statistics that are publicly available and there are no academics that I am aware of who have tabulated such data. I would estimate that, over the past several years, less than a handful of class action cases have been instituted in South African courts each year. At the same time, however, there has been a definite increase in the number of class actions instituted in South African courts over the past several years.

At present the development of the procedural framework within which the class action device operates is at the behest of our courts. It is, however, not ideal to devise *ad hoc* solutions to procedural complexities on a case by case basis.<sup>12</sup> Locally, several scholars have called for the introduction of specific class action legislation in South Africa.<sup>13</sup> The introduction of comprehensive legislation and court rules regulating class action suits in South Africa could ensure that development of class action procedure is not at the behest of our courts and could enable South Africa to follow in the footsteps of other countries with specific class action legislation.<sup>14</sup>

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<sup>11</sup> Paras 33-39. For criticism of the CC's judgment in *Mukaddam CC*, see for example W de Vos "Opt-In Class Action for Damages Vindicated by Constitutional Court 2013 4 *TSAR* 757 770, where he states as follows: "However, the main judgment's gloss introducing the 'guiding principle of the interests of justice', which is to be applied in all applications for certification, is to be regretted. It is submitted that this was not only unnecessary but may also lead to confusion. Moreover, the suggestion in the main judgment that there is no need for certification in the case of a class action to enforce constitutional rights against the state is unfortunate." See also N Ally and A Konstant "Difficulties in regulating class action litigation - is there a need to articulate the rules?" 2014 3 *De Rebus* 81.

<sup>12</sup> *Trustees for the time being of the Children's Resource Centre Trust and others v Pioneer Food (Pty) Ltd and others (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA) para 15.

<sup>13</sup> See *inter alia* W De Vos *Verteenwoordiging van Groepsbelange in die Siviele Proses* LLM dissertation RAU (1985); W De Vos "'n Groepsgeding in Suid-Afrika" (1985) 3 *TSAR* 296; W De Vos "'n Groepsgeding ('class action') as Middel ter Beskerming van Verbruikersbelange" (1989) *De Rebus* 373; De Vos (1996) *TSAR* 639; E Hurter "Some thoughts on current developments relating to class actions in South African law as viewed against leading foreign jurisdictions" (2006) 39(3) *CILSA* 485; E Hurter "The class action in South Africa: Quo Vadis" (2008) 41(2) *De Jure* 293; E Gericke "Can class actions be instituted for breach of contract?" (2009) (2) *THRHR* 304.

<sup>14</sup> F Cassim & O S Sibanda "The Consumer Protection Act and the Introduction of Collective Consumer Redress through Class Actions" (2012) 75 *THRHR* 586 587-588.