GUIDE - CLASS ACTION LITIGATION IN SOUTH AFRICA
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Introduction

This is the first edition of our *Guide to Class Action Litigation in South Africa*. It is intended to provide a concise overview of the development of the law and procedural requirements of South African class action litigation as well as practical considerations for alternative methods of resolving a dispute that relates to a class action.

Class action litigation is relatively new to the South African legal landscape and Bowmans is acting in three of the four major class action claims in the country to date. Our team consists of a diverse group of lawyers who are actively contributing to the development of class action jurisprudence in South Africa.

This guide is not intended to serve as a substitute for legal advice. It also does not address class action litigation in other African jurisdictions.

If you need advice in connection with any South African class action litigation, please contact Adam Anderson. You will find Adam’s contact details and contact details of other partners in our South African class action litigation team at the end of this guide.

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Chris Todd
Head of Dispute Resolution

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Our Firm

We help our clients overcome legal complexity and unlock opportunity in Africa.

We have an enviable track record of providing legal services to the highest professional standards in Africa. We work for clients across numerous African jurisdictions on corporate, finance, competition, taxation, employment, technology and dispute resolution matters.

With eight offices in six African countries and over 400 specialist lawyers, we draw on our unique knowledge of the business and socio-political environment to advise clients on a wide range of legal issues.

Everywhere we work, we offer clients a service that uniquely blends expertise in the law, knowledge of the local market, and an understanding of their businesses. Our aim is to assist clients to achieve their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our expertise is frequently recognised by independent research organisations. Most recently, we won three IFLR Africa Awards (2021) including National Firm of the Year for South Africa and for Zambia. At the 2021 Africa Legal Awards, we won five practice awards, more than any other law firm. In the 2020 Dealmakers East Africa Awards we ranked first for number of M&A transactions among which was the East Africa Deal of the Year. In 2020, Mergermarket identified us as the number one legal adviser in Africa by number of completed deals.
Development of Class Action Litigation in South Africa

Prior to 1996, class action litigation was not recognised by South African law. Over the last two decades, the Constitutional Court and Supreme Court of Appeal have played a vital role in shaping class action litigation in the country, although the procedure for litigating a class action is still in its infancy stage.

The Constitution of the Republic of South Africa, 1996 (Constitution), provides the basis for class action jurisprudence in South Africa through Section 38(c) which provides that ‘anyone acting as a member of, or in the interests of, a group or class of persons’ has the right to approach a competent court to allege that a right in the Bill of Rights has been infringed or threatened.

In 2012, the Supreme Court of Appeal in Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others (Children's Resource Centre) extended class action litigation to include civil damages claims which fall outside the scope of the Bill of Rights, and established the criteria for certification of a class action in South Africa through Section 38(c) which provides that ‘anyone acting as a member of, or in the interests of, a group or class of persons’ has the right to approach a competent court to allege that a right in the Bill of Rights has been infringed or threatened.

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As South African class action jurisprudence is developed the number of claims has increased, and we expect this trend to continue going forward.
Procedural Mechanism for Bringing a Class Action in South Africa

Class actions follow a two stage process in South Africa. A certification application is the first stage. South African law requires that before a class action may be instituted the potential plaintiffs must obtain permission, from a court, resulting in certification of the class.

With no separate legislation regulating class actions, the civil procedure rules in the courts with jurisdiction over the relevant cause of action are used. This means that a class action founded on a competition law claim or an occupational diseases claim will both be heard in the High Court of South Africa and will be governed by the same rules and procedures.

CERTIFICATION APPLICATION

In the Children’s Resource Centre case, the Supreme Court of Appeal developed seven requirements for certify a class action in South Africa. In Mukaddam v Pioneer Foods (Pty) Ltd and Others, the Constitutional Court held that these were not in fact requirements but rather factors to be considered in deciding whether to certify a class action and that the overriding test is ‘the interests of justice.’ The Constitutional Court held that the power of a court to certify a class is discretionary and that in exercising its discretion a court must be guided by the principles identified in the Children’s Resource Centre case. This means that the seven factors are not a closed list and the absence of one factor does not automatically render a class action incapable of certification.

The ‘certification factors’ and these are:

- **Class is identifiable by objective criteria:** the proposed class should be defined with sufficient precision that a particular individual’s membership of the class can be objectively determined.
  
  Objectively identifying a class ensures that:
  
  - members of the class can be given proper notice;
  - members of the class are aware that they fall within the class and are therefore unable to institute litigation separately unless they are able to opt-out;
  - persons that can be bound by any judgment are properly identified; and
  - any judgment made in the class action is final and binding between the parties.

- **Cause of action raising a triable issue:** the person applying for certification of a class action must satisfy the court that (a) there is a case that is legally tenable; and (b) a prima facie case exists on the evidence.

- **Sufficient issues of fact or law are common to all members of the class:** the extent of commonality that is required from a South African law perspective is unclear as divergent views exist on this factor.
  
  In the Children’s Resource Centre case, the Supreme Court of Appeal favoured the approach adopted in the United States of America that ‘a claim must be of such a nature that it is capable of class-wide resolution’. In contrast, the High Court, in the case of Nkala and Others v Harmony Gold Mining Co Ltd and Others (the case commonly referred to as the Silicosis case), favoured the Canadian approach that ‘ensures the interests of justice predominate’ which adopts a lower threshold for establishing commonality than the approach of the Supreme Court of Appeal.

- **The relief sought or damages claimed flow from the cause of action:** the relief sought or damages claimed must be ascertainable and capable of determination. Although not dealt with in detail by our courts, some South African academics believe that determinability means that applicants seeking certification must make it clear, in the application for certification, how they propose to determine the relief in the class action.
  
  In the Silicosis case, the High Court allowed a two-stage class action where common issues were to be determined in the first stage and damages were to be quantified in the second stage. However, it remains to be seen whether this approach would be accepted by the Supreme Court of Appeal.

- **Allocability:** the class action should be the most appropriate means of allocating damages to members of the class.
  
  Appropriate mechanisms must exist and be proposed by the applicants to ensure that damages, if awarded, are allocated to members of the class in a particular manner.

- **Representation:** the proposed representatives of the proposed class must be suitable to conduct the action and represent the class. Class representatives do not need to be members of the class and the term ‘representatives of the class’ means that:
  
  - the plaintiffs who represent the class are appropriate; and
  - the legal representatives of the class are appropriate.

A class representative must:

- be suitable to assist the class in obtaining certification; and
- have the capacity to conduct the class action litigation.

A class representative is considered suitable to assist the class in obtaining certification provided that she does not have an interest that is in conflict with that of the class. In the Silicosis case, the High Court cautioned against finding a conflict too easily and held that a class representative must be found to have a serious conflict with other class members in order to be disqualified as a representative.

In the Children’s Resource Centre case it was held that a class representative will be regarded as having the capacity to conduct litigation on behalf of the class if:

- the representative has the time, inclination and means to procure the evidence that is necessary to conduct the litigation;
• the representative has access to lawyers who have the capacity to properly run the litigation;
• the representative has the financial means to conduct the litigation and, if not, details of how the litigation will be funded must be provided;
• the representative can show the basis on which the lawyers would be paid and if the litigation is funded on a contingency basis then details of the funding arrangements must be disclosed to ensure that there is no conflict between the lawyers and members of the class; and
• the court is satisfied that the litigation is not pursued by the lawyers for their own gain and is, in fact, in the genuine interests of the class.

**Appropriateness:** a class action should be the most appropriate means of determining the claims of the members of the class given the composition of the class and the nature of the proposed action.

The ‘interests of justice’ is the overarching factor that the courts will consider when deciding whether or not to grant an order certifying a class action. There is some debate over the applicability of the ‘interests of justice’ consideration in purely commercial matters, and this issue has not yet been definitively decided by the South African courts. In the case of *JPH Pretorius and Another v Transnet and Others* (Transnet case) a certification application relating to a class comprising thousands of pensioners was granted on the basis that it was in the interests of justice to do so.

In the absence of legislation regulating class action in South Africa, there is little guidance on dealing with ‘opt-in’ and ‘opt-out’ classes and currently each matter is dealt with on its own merits. An ‘opt-in’ class is one where members of an identified class are required to provide written consent to be included in the class action. By contrast an ‘opt-out class’ allows members of the identified class to choose to be excluded from the class through written notice after the certification process and during a prescribed notification period.

Without class action legislation, these principles will need to be developed over time. In the *Silicosis* case the court allowed for both ‘opt-in’ and ‘opt-out’ procedures at various stages of the litigation.

**Graphical representation of the certification application process:**

- **Notice of motion and founding affidavit**
  - 15 days
- **Answering affidavit**
  - 10 days
- **Replying affidavit**
  - 10 days
- **Heads of argument**
- **Applications**
  - Application dismissed
  - Appeal granted
  - Appeal denied
  - Class will appeal
  - End: no certification
  - Action proceedings
- **Notice of intention to oppose certification application**
  - 15 days
- **Decision not to oppose certification application**

4. (CCTV/2015) [2016] ZAGPPHC 352
TRIAL OF CLASS ACTION

Once a class has been certified, the matter will proceed by way of trial action before a single judge or panel of three judges in the High Court of South Africa in accordance with the Uniform Rules of the High Court regarding trial proceedings.

The trial is conducted in the same manner as any other High Court trial and is also subject to the same appeal mechanisms.

At the time of publication, the Transnet case is the only class action which has advanced past the exchange of pleadings stage after certification of the class action.
Prescription in South Africa

In South Africa, ‘prescription’ refers to the statutory time periods within which certain types of claims are required to be brought to court, failing which they will considered to be time-barred.

The prescription period (the time limit within which a claim must be brought) in ordinary commercial claims is three years after the cause of action arises. The three-year period starts running from the date on which the plaintiff is, or should reasonably be, aware of (a) the facts giving rise to the debt; and (b) the identity of the debtor.

INTERUPTION OF PRESCRIPTION

The interruption of prescription is dealt with in Sections 14 and 15 of the Prescription Act 68 of 1969 (Prescription Act). The running of prescription is interrupted in two situations.

The first is where there is an admission of liability by the debtor. The second is what is referred to as judicial interruption.

Judicial interruption is referred to in the Prescription Act as ‘the service on the debtor of any process whereby the creditor claims payment of the debt’. There are three elements necessary for prescription to be judicially interrupted: (a) service (b) of court process (c) in which payment is claimed.

PRACTICAL CONSIDERATIONS REGARDING PRESCRIPTION IN THE CLASS ACTION PROCESS

There are divergent opinions in the context of class actions on whether the service of a certification application satisfies the requirement that payment is claimed. This is because no claim for payment is made in a certification application. Rather, there is a request for the court to declare that a class action is a suitable means of claiming a debt or debts which are allegedly due to members of the class.

Given that a two stage process is necessary (certification of the class action and only thereafter institution of the class action itself) it is currently uncertain which stage is regarded as triggering the judicial interruption of prescription, and the point is yet to be decided by the courts. The commonly held view, however, is that a certification application does interrupt prescription.

First, it would likely not be considered to be in the interests of justice to permit a respondent in certification proceedings to effectively engineer the prescription of claims by delaying the certification application, thereby delaying the institution of the class action during the three-year prescription period.

Second, there are several reported cases in South Africa holding that the service of process which is a ‘necessary step’ for the creditor to claim a debt is sufficient to interrupt prescription. Although this has not been decided in the context of class actions specifically, it is likely that a court apply the same principle, and that a certification application will be regarded as a ‘necessary step’ for a class to claim the damages they allege they have suffered.

Third, Section 39(2) of the Constitution requires all courts to promote the spirit, purport and objects of the bill of rights when interpreting legislation. One of the rights contained in the Bill of Rights is the right of access to courts. The Constitutional Court has recently ruled that the Prescription Act must be interpreted in a manner least restrictive of the right of access to courts. It is likely that a court will regard the institution of a certification application as interrupting prescription to avoid limiting the right of access to courts by creating the opportunity for abuse by respondents described above.

5. Makate v Vodacom Ltd 2016 (4) SA 121 (CC)
Costs

SECURITY FOR COSTS

At common law, a litigant is entitled to request that the party instituting proceedings against it pay into escrow an amount of money as security for the costs to be incurred in defending the claim. This is most commonly used where a foreign party institutes proceedings against a local party, but it can also be used in other circumstances where there appears to be an inability on the part of the applicant/plaintiff to pay the respondent/defendant’s costs if he/she is ordered to do so.

Security for costs is requested by way of a notice to the court and the applicants. If the applicants dispute their liability to pay security, a court has a discretion to decide whether or not to order them to put up security. This procedure is not unique to class actions, and is dealt with in the Uniform Rules of Court.

In practice, an estimate is made of the taxed costs which will be incurred by the defending party, and that amount is then paid into escrow by the instituting party pending the determination of the case. Once the case has been finalised, and if a costs order is made in favour of the defending party, the funds in escrow are released to the defending party. Any surplus funds, or the entire amount if no costs order is made, is returned to the instituting party.

POTENTIAL RECOVERY OF COSTS

Regardless of whether or not security is furnished, the general approach of South African courts is that costs should follow the result. This means that in civil litigation an unsuccessful litigant will usually be ordered to pay the litigation costs of the successful litigant. The court does, however, retain a discretion whether to award costs in favour of either party.

This means that respondents in a class action may, if successful in opposing a certification application or in defending the main action, be entitled to recover costs from the applicants or plaintiffs, as the case may be. In litigation over constitutional rights the Constitutional Court has established what is referred to as the ‘Biowatch’ principle, which aims to shield unsuccessful litigants from adverse costs orders that might deter citizens, particularly indigent persons, from attempting to enforce constitutional rights.

Recently, there has been a growing trend of courts taking this principle into account in deciding costs orders even where two private parties are concerned, especially in circumstances where individuals litigate in the public interest against large corporations which are viewed by the courts as having deep pockets.

It follows that even if respondents are successful in opposing a certification application or defending a class action, there is no guarantee that they will be entitled to recover costs from the applicants or the plaintiffs, as the case may be.

There has been no judgment yet on how the costs of litigation may be shared among the members of a class and the position on this is currently uncertain.

Even where costs are awarded by the court, this does not mean that a successful party will be entitled to recover the actual legal fees incurred. Costs awarded by a court are assessed against a tariff set out in the Uniform Rules of Court. The tariff stipulates maximum amounts which are recoverable in respect of certain activities undertaken by attorneys and advocates, and the amounts recoverable are unlikely to match the actual cost of litigating.

6. Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC)
Funding of Class Action Litigation in South Africa

An application for certification of a class action must disclose the basis on which the plaintiffs’ lawyers will be paid to avoid any conflict of interest between the lawyers and members of the class.

THIRD-PARTY FUNDING

Third-party funding of claims is permitted in South Africa in certain justifiable circumstances. The South African principles regarding third-party funding were scrutinised in *Gold Fields Ltd and Others v Motley Rice LLC*. There, the court held that third-party funding is permissible if it ensures that indigent individual plaintiffs would be granted access to the courts thus ensuring access to justice.

In *PriceWaterhouse Coopers Inc and Others v National Potato Co-operative Ltd and Another*, the Supreme Court of Appeal recognised that certification and trial proceedings in class action litigation are separate from each other and that it is clear that financial gain does not accrue to litigants as a result of a successful certification application alone. Different considerations exist at the trial stage of a class action where a funder would receive a clear benefit if the action were to succeed.

Third party funding allows access to justice for otherwise disempowered litigants and it is an area of South African law that requires further development.

CONTINGENCY FEES

Contingency fees are allowed in South Africa provided the agreement complies with the provisions of the Contingency Fees Act 66 of 1997. This includes the requirement that the ‘success fee’ does not exceed the ‘normal fee’ by 100%, provided that in the case of claims sounding in money, the total amount of the success fee payable by the client to its legal practitioner may not exceed 25% of the total amount awarded or any amount obtained by the client as a result of the legal proceedings. This calculation does not include costs that have been awarded to the client.

The rules for discovery in class action litigation do not differ from normal action proceedings in South Africa and are governed by the Uniform Rules of the High Court of South Africa. In terms of these Rules, a party is required to disclose all documents, recordings and correspondence relevant to the litigation, provided that they are not privileged.

The concept of relevance for purposes of discovery is generally an elastic concept which is determined on a case by case basis depending on the claim itself and issues in dispute.
Remedies

South African law does not recognise the concept of punitive damages. Class action claim for damages is limited to claims for the actual losses suffered, with such losses required to be sufficiently closely linked to the conduct of the defendant. This differs from the position in many other jurisdictions.

As class action litigation is relatively new to South African law, there is much uncertainty about the manner in which a court will award and distribute damages to members of the class if a defendant is found to be liable for damages. At the date of publication of this guide, no distributions have been made in a class action in South Africa.

Options for Defendants to a Class Action

A defendant to a class action must consider the costs of litigating a class action and the challenges of finding witnesses and other evidence particularly in circumstances where claims relate to exposure over many years and where the defendant may no longer have access to records.

As in any civil litigation, a defendant in a class action may choose to defend the litigation in the court system, or may attempt to settle it using one or more ADR techniques.

When there are multiple defendants to a class action it is important to ensure that information is shared on a confidential and legally privileged basis and that attorneys are appointed separately to defend the litigation.

However, it is prudent to jointly appoint independent attorneys to facilitate a resolution of any differences among defendants, the development of a strategy for managing the class action litigation and settlement negotiations with the attorneys representing the class.

Alternative Dispute Resolution in Class Action Litigation

ARBITRATION

In South Africa, there have been no class actions referred to arbitration. It is conceivable that once a class has been certified with leave of the court to arbitrate, in order to arbitrate the class action, all litigants must agree that the matter will be resolved by arbitration and this would be done by way of a written arbitration agreement. An arbitrator or panel of arbitrators (as agreed among the parties) will adjudicate the dispute and make a ruling that is final and binding on all parties (unless a right of appeal is agreed).

MEDIATION

Unlike an arbitrator, a mediator does not make a ruling but rather facilitates a possible settlement among the parties. Mediation is only appropriate if the parties are willing to enter into bona fide negotiations for settlement.

The advantages of mediation include that it is a confidential and without prejudice process with no obligation to settle. Parties have an opportunity, through the mediation process, to assess the strengths and weaknesses of their cases. Mediation has a high success rate for settlement. There is, however, always the risk that the counter-party participates in the mediation in bad faith, wasting time and money while probing the strengths and weaknesses of their opponent’s case.

The Silicosis case is anticipated to be a pioneering precedent for class action litigation in South Africa and has been part-settled by mediation. The Silicosis case is a complex class action and is the first class that was certified and part-settled by mediation. At the time of publication of this guide, an application has been made for the settlement agreement to be approved by the court and made an order of court.

SETTLEMENT

Settlement negotiations are confidential until made an order of court.

Settlement saves legal costs and management resources and creates certainty. It is possible to have a dual litigation and settlement approach and use different lawyers for settlement and litigation negotiations.

The High Court’s decision in the Silicosis case held that a settlement agreement reached after the certification of a class action will only be valid once approved by the court. If the Contingency Fees Act is applicable to an agreement between the class action applicants/plaintiffs and their lawyers then that is another ground upon which judicial approval of the settlement would be required.
Reform

Despite the guidance provided by the Supreme Court of Appeal and Constitutional Court, which has mainly dealt with class action certification, South African courts are navigating the complexities of class action litigation with little local precedent for many aspects of this type of litigation.

With the likelihood of an increase in the volume of class action litigation in South Africa, dedicated class action legislation or procedural rules would be of great benefit to parties.

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