

**Product liability class actions in terms of the Consumer Protection Act 68 of 2008**

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**by**

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## CHAPTER 1: INTRODUCTION

### 1.1 Overview and motivation

For many years it was impossible to bring an action on behalf of a large group of people in South Africa as class actions did not form part of the South African common law.<sup>1</sup> This was due to the concept attached to *locus standi* in our law, where an action should be instituted by the one who suffered harm and could not be instituted on behalf of others who suffered harm.<sup>2</sup>

Thereafter, for a few years it was only possible to bring a class action in South Africa in terms of section 38 of the Constitution, and only where a constitutional right has been infringed.<sup>3</sup> This meant that a somewhat narrow approach to standing remained as consumer claims could hardly fit into this category, except perhaps in exceptional circumstances.<sup>4</sup> In a possible product liability scenario where there are a large amount of very small claims which would not warrant the cost of litigation, the only way of recourse for consumers would be by means of a class action, to avoid a substantial amount of claims for which each consumer would incur costs.<sup>5</sup>

Following the international trend, the Consumer Protection Act 68 of 2008<sup>6</sup> now provides more protection for consumers and in particular has introduced strict liability for suppliers.<sup>7</sup> It is submitted that provisions of the CPA have introduced a shift in the burden of proof as it is no longer required of consumer to prove fault or negligence on the part of the supplier in order to claim damages.<sup>8</sup> Instead, consumers need only show that there is a causal link between a defective product and harm that they have suffered.<sup>9</sup> Accordingly, consumers may now collectively institute an action where harm was suffered due to defective products. According to Levenstein, examples of such class actions to be brought under the CPA could include motor vehicle recalls, defective pharmaceutical products or smoking diseases where harm was caused by the cigarettes or tobacco

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<sup>1</sup> *Firststrand Bank Ltd v Chauncer Publications (Pty) Ltd* 2008 (2) SA 592.

<sup>2</sup> Murphy 1.

<sup>3</sup> Bregman 1.

<sup>4</sup> Murphy 1.

<sup>5</sup> Project 88 (1998) 6.

<sup>6</sup> Consumer Protection Act 68 of 2008 hereinafter referred to as the CPA .

<sup>7</sup> Levenstein 1.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

products.<sup>10</sup> This could further impact on the costs of products where manufacturers of potentially dangerous goods may be faced with the costs of research on their products as well as the cost of litigation.<sup>11</sup>

Unfortunately there are no clear procedural guidelines with regards to product liability class actions in South Africa, as yet. Most lawyers would not try to bring a class action while there are no clear guidelines, on the proceedings, and therefore uncertainty of the prospects of success.<sup>12</sup> Such difficulties may have caused the absence of product liability class actions in South Africa to date, even though legislation such as the CPA now provides for it in some form.<sup>13</sup>

When considering the development of class actions in foreign jurisdictions it is important to consider that the Federal Rules of Civil Procedure<sup>14</sup> in the USA (hereinafter the USA), (specifically Federal Rule 23) already impacted on class actions brought in terms of the Constitution in South Africa.<sup>15</sup> Further it is of interest to consider the fact that class actions in other parts of the world seem to be steering away from the style of class action brought in the USA in terms of “opting out” guidelines.<sup>16</sup> The European style of class action seems to follow the “opt in” trend rather than the “opt out” trend, due to the possibility existing of Plaintiffs’ attorneys pressuring members of a class into expensive settlements.<sup>17</sup> It should be of interest to consider which style of class action should be applicable in South African law.

It is inevitable that class actions in terms of product liability will be instituted in South Africa in the near future. De Vos similarly notes that class actions brought under legislation other than under the Constitution “are a must in this day and age”.<sup>18</sup> It is therefore necessary to understand the process and the pitfalls by looking at other jurisdictions and thereafter to provide a guideline by examining which guidelines may be followed for the implication of such class actions in South Africa. The writer further notes

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<sup>10</sup> Levenstein 1.

<sup>11</sup> *Ibid.*

<sup>12</sup> Murphy 1.

<sup>13</sup> *Ibid.*

<sup>14</sup> Bregman 2: “The SCA indicated that the requirements for a class action contained in Rule 23(a) of the US Federal Rules of Civil Procedure (the Federal Rules) were applicable in South Africa (certainly insofar as “Constitutional” based class actions are concerned).”.

<sup>15</sup> Bregman 2.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> De Vos (2012) 1.

that the South African Law Reform Commission which proposed the introduction of class actions in South Africa, used the American model for guidance and adopted certain ideas from Ontario (Canada).<sup>19</sup>

In terms of section 2(2) of the CPA, appropriate foreign and international law must be considered in the interpretation of the CPA. It is therefore essential to consider appropriate foreign law where class actions are implemented in terms of similarly drafted legislation. Seeing as the American and Canadian models were used as guidelines when class actions were introduced into South African law, the developments in those jurisdictions will be the most appropriate for a comparative analysis in terms of this study.

## **1.2 Research objective**

The objective of this study is to examine the various consequences of the manner in which product liability class actions may be implemented in South Africa in terms of the provisions of the CPA and to provide substantive and procedural guidelines for such implementation.

Such a study can be done by taking into account the way in which similar actions have been implemented in foreign jurisdictions from which South African guidelines have developed, with similar Consumer Protection legislation to that which is legislated in South Africa, and taking into account the way in which class actions have been implemented thus far in South Africa in terms of the Constitution.

## **1.3 Outline: Structural overview and research aims**

In terms of a broad outline, the following approach will be followed in order to investigate the abovementioned research objective in this study. Firstly the current position of class actions instituted in terms of the Constitution should be examined in order to outline the process and purpose of instituting such an action as well as the limitations of instituting such an action in terms of the Constitution. Within this context the clearer understanding of the current and past position can be gained which could shed light on the future of class actions in terms of the CPA. This will include relevant case law.

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<sup>19</sup> Project 88 (1998) 6.



On the basis of this background investigation, an analysis on the relevant provisions of the CPA and its application to class actions and specifically product liability class actions, are then conducted. The scope and application of the CPA to class actions will be examined in order to establish how a product liability class action may be brought under the CPA and will include a discussion of the relevant definitions in terms of section 1 of the CPA. Relevant sections in terms of the CPA and the Constitution will be critically discussed. Particular attention will be paid to section 4 of the CPA, together with section 76(1)(c) and section 61 which together provides for class actions in terms of product liability.

Thereafter a comparative study will be conducted in order to compare two foreign jurisdictions, namely Ontario in Canada and the application of Federal Rule 23 in the USA, with similarly legislated consumer protection law, in terms of which class actions have been implemented with that of the legal system and consumer protection law in terms of class actions in South Africa.

Having examined the successes and pitfalls experienced by the particular foreign jurisdictions in terms of the implementation of class actions in consumer protection law, a clearer picture will be gained pertaining to the practicalities of enforcement of these provisions. Together with the difficulties in the current South African system the application of the pitfalls experienced by the particular foreign jurisdictions will lead to a new understanding of the practical goals and objectives that should be set in this regard.

It is also important to consider to what extent the Federal Rules of Civil Procedure<sup>20</sup> of the USA may apply to class actions brought under the CPA seeing as the Supreme Court of Appeal indicated that the Federal Rules of Civil Procedure are applicable to class actions brought in terms of the Constitution.<sup>21</sup>

Thereafter a conclusion will be drawn as to the efficiency of the current application of product liability class actions in terms of the CPA in South Africa, as well as proposed guidelines as to how such actions can be brought before the South African courts and what the pitfalls and benefits of this newly legislated opportunity are.

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<sup>20</sup> Bregman 2

<sup>21</sup> *Ibid.*

Throughout this outline the following questions will be examined in this study, forming a basis of research aims:

1. Whether the “opt in” - or “opt out” procedure is most suitable to South African class actions in terms of product liability, and how this could successfully be implemented;
2. How the certification step should be approached effectively in terms of product liability class actions in South Africa;
3. Which methods of funding or alternatives could be considered in terms of product liability class actions in South Africa; and
4. How quantum of damages could be determined in terms of an award in a product liability class action in South Africa.

To set out in slightly more detail what the focus of the different chapters will be, Chapter 2 will examine the various definitions of a “class action” in terms of South African law and in particular in the context of the Constitution. Thereafter the historical position of class actions will be briefly examined in order to understand what the current legislation in terms of which a class action can be brought before the courts, has progressed from. This chapter will then go on to examine class actions in terms of the Constitution more closely. This background is important as the Constitution is the only legislation in South Africa in terms of which a class action in terms of product liability could be brought before the courts until it was provided for in terms of the CPA. It is therefore possible that the courts may draw from these guidelines in order to develop the implementation of class actions on a procedural level. The guidelines which have been set for class actions in terms of the Constitution will further be examined by discussing relevant case law, and whether a class action in terms of product liability may succeed along similar procedural lines as those enforcing constitutional rights.

Chapter 3 will firstly outline the scope and application of the CPA. This chapter will also discuss the practicality and benefits of the implementation of product liability class actions in terms of the CPA as well as the future prospects of implementation thereof in South Africa.

Chapter 4 will then examine the substantive and procedural guidelines by which class actions were accordingly implemented in the chosen foreign comparative jurisdictions, namely Ontario in Canada and the USA. This chapter will therefore firstly examine the implementation of class actions in these foreign jurisdictions from a substantive perspective. The similarities and differences in the South African position of class actions and that of the USA's and Canada's legislation will be pointed out. It is thereafter equally important to examine the procedural differences between the jurisdictions as these foreign jurisdictions may offer the key to efficient implementation of class actions in South Africa.

Chapter 5 will then summarise the application of all the findings to the class actions in South Africa and provide suggestions as to the manner in which product liability class actions may be implemented in South Africa. The chapter will be concluded by summarising the findings of this study, including how the objectives have been met.

#### **1.4 Methodology**

This study is conducted using the combined research methods of theoretical critical analysis and comparative analysis. The reason for this is that a sound theoretical understanding of class actions is needed in order to analyse the past position of class actions prior to the implementation of the CPA, and specifically in terms of product liability, and its application to this specific field can be fully understood. It is necessary to closely examine two foreign jurisdictions which have similar consumer protection law provisions and in which such class actions have become increasingly popular. This will be done by means of comparative analysis in order to gain a better understanding of where this branch of the law may be headed in South Africa. Similarly it is beneficial to examine the foreign jurisdictions from which South African guidelines in terms of class actions have stemmed and which our courts have referred to (in the *Ngxuza*-case<sup>22</sup>), namely that of the USA and Canada.

#### **1.5 Limitations**

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<sup>22</sup> *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 623.

The research is conducted under certain limitations and restrictions. Firstly, although the provisions of the CPA and specifically the provisions relating to the institution of class actions and product liability are fully in force and applicable at present, the CPA is still relatively new to many consumers and businesses (suppliers) alike and a product liability class action has not been implemented in South Africa at the time of submission of this research. Although limited research material is available on the subject and in particular no case law is available to date related to the CPA and class actions, the lack of readily available research material substantiates the significance of the research in this study.

The third limitation is merely the constraint in terms of time and amount of content which is restricted. This limitation renders full international comparison of class actions and consumer protection law internationally impractical for the purpose of this study and therefore falls beyond the scope of this study.

## **CHAPTER 2: CLASS ACTIONS IN TERMS OF THE CONSTITUTION OF SOUTH AFRICA**

### **2.1 Introduction**

In South Africa the 1993 Interim Constitution not only introduced the Bill of Rights but also opened the doors to the possibility of instituting a class action for the first time in South Africa, as one of the ways in which the rights provided for in the Bill of Rights can be enforced.<sup>23</sup> In this regard the Constitution of 1996 followed in the footsteps of the Interim Constitution.<sup>23</sup>

In terms of section 38 of the Constitution, a litigant may claim standing before a court in terms of five different categories, one of which is “persons acting as a member of a group or class of persons”.<sup>24</sup> There is however no reason why a litigant may not claim standing before a court in terms of more than one category or even bring different challenges under different categories.<sup>25</sup>

Many litigants have approached the courts on behalf of a group or class of persons, in terms of section 38 of the Constitution. Even though the procedure of such an action on behalf of an affected class of persons is not yet regulated by specific legislation in our law, the courts have given guidelines in terms of the applications which have been brought before them.<sup>26</sup>

### **2.2 Defining class actions in terms of the Constitution**

When the South African Law Reform Commission proposed the introduction of class actions in South Africa in 1995, it used the American model for guidance and adopted certain ideas from Ontario (Canada).<sup>27</sup>

A class action can be defined as “...a device by which a single plaintiff may pursue an action on behalf of all persons with a common interest in the subject matter of the suit. The ruling of the court will bind all class members.”, which is the definition used by the

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<sup>23</sup> De Vos W (2012) 738.

<sup>24</sup> S38(c) of the Constitution of the Republic of South Africa.

<sup>25</sup> Currie & De Waal 88.

<sup>26</sup> Hurter (2010) 409.

<sup>27</sup> De Vos W (1996) 639.

South African Law Reform Commission.<sup>28</sup> This points out that other parties who are in a similar position could benefit from the action taken by a single plaintiff.<sup>29</sup> The most unique feature of a class action so defined, is that the other parties who will be bound by the outcome of the litigation are never formally joined to the proceedings.<sup>30</sup>

In contrast, the South African Law Reform Commission in Project 88, further differentiated a class action from a public interest action, by explaining that a public interest action is where a plaintiff claims relief due to a desire for the public or a part of the public to benefit, for example an action instituted for the treatment of animals.<sup>31</sup> It was further pointed out that although the two actions are different, they can overlap to some extent, and that in some instances either one could serve as an appropriate action.<sup>32</sup>

De Vos defines a class action as a procedure that enables “a large group of people, whose rights have been similarly infringed by a wrongdoer, to sue the defendant as a collective entity.”<sup>33</sup> De Vos further explains that the members of the group approaching the court, do not have to form an organisational unit but that these members merely indicate to the court that they represent a whole group.<sup>34</sup> The court must approve this by granting leave for the action to proceed on behalf of the affected group.<sup>35</sup> De Vos’ definition points out not only that the affected class of persons will be bound by the outcome of the litigation, but in addition that there are certain considerations which the court must take into account before the court will grant leave for an action to proceed in terms of *locus standi* of a class action.

Bregman further gives a simplified definition for a class action as “an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class.”<sup>36</sup>

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<sup>28</sup> Project 88 (1998) 6.

<sup>29</sup> Currie & De Waal 88.

<sup>30</sup> *Ibid.*

<sup>31</sup> Project 88 (1998) 6.

<sup>32</sup> Project 88 (1998) 7.

<sup>33</sup> De Vos W (1996) 639.

<sup>34</sup> Bregman 2.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

### 2.3 Historical position of class actions in terms of South African law

Traditionally, before the introduction of the Interim Constitution in South Africa, the concept of a class action was not known in South African law and the manner by which it is now defined<sup>37</sup> fell within the American concept of a class action.<sup>38</sup>

The concept of a class action originates from the idea of a representative action which originated from the equity practice in England.<sup>39</sup> The distinction between law and equity was however, never used in South African courts because it forms part of substantive law rather than procedural law and substantive law in South African courts continued to be from Roman-Dutch origin.<sup>40</sup> In order to benefit from the outcome of litigation a litigant in South African courts therefore always had to be formally joined as a party to an action,<sup>41</sup>

### 2.4 *Locus standi* in terms of section 38 of the Constitution

Section 38 of the Constitution provides for different ways by which the Bill of Rights may be enforced. In terms of this, section 38 gives the following guidance to approaching a court:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- a) anyone acting in their own interest;
- b) anyone acting on behalf of another person who cannot act in their own name;
- c) anyone acting as a member of, or in the interest of, a group or class of persons;
- d) anyone acting in the public interest; and
- e) an association acting in the interest of its members.”<sup>42</sup>

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<sup>37</sup> In 2.2 above.

<sup>38</sup> De Vos W (2012) 738.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Idem* 739.

<sup>41</sup> De Vos W (2012) 739.

<sup>42</sup> S38 of the Constitution of the Republic of South Africa.

It is therefore clear when studying section 38 of the Constitution that it can be used to enforce all the rights in the Bill of Rights of the Constitution, including traditional human rights<sup>43</sup> and socio-economic rights, but that it is confined to the enforcement of the rights in the Bill of Rights.<sup>44</sup> It is therefore not possible to use the mechanism for instituting a class action outlined by section 38 of the Constitution for litigation or enforcement of rights provided for by other legislation. The opportunity provided for implementing a class action in terms of the Constitution can therefore not be extended to enforcing rights in terms of consumer protection, and specifically in terms of product liability.<sup>45</sup>

There has been some debate as to the extent to which section 38 of the Constitution applies to natural and juristic persons in order to enforce various rights. In the case of *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA 1996*<sup>46</sup>, the Constitutional Court rejected the argument that the fundamental rights in the Bill of Rights applied only to natural persons and that it would be diminished in the extent it applies to natural persons if also applied to juristic persons.<sup>47</sup> The Constitutional Court found that many universally accepted fundamental rights can only be fully recognised if afforded to both juristic and natural persons.<sup>48</sup> The court further explained that the Constitution recognises that not all rights will be of application to juristic persons and that a court may determine if a particular right is available to a specific person such as a juristic person, or not.<sup>49</sup>

It is important to take into consideration that the Constitution has a very generous approach to legal standing.<sup>50</sup> In order to enforce a right in terms of section 38 of the Constitution a juristic person must simply show that a fundamental right has been infringed or threatened (this need not be one of its own rights), and that it is acting in the interest of a group or class of persons.<sup>51</sup> This would therefore mean that a juristic person could approach the court on behalf of an affected class of persons where any

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<sup>43</sup> For example civil and political rights and freedoms (such as, the right to life, to vote, and freedom of speech).

<sup>44</sup> De Vos W (2012) 739.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA 1996*, 1996 10 BCLR 1253 (CC) 1256.

<sup>47</sup> Freedman & Pugsley Volume 5 (4), par 3.

<sup>48</sup> De Vos W (2012) 738.

<sup>49</sup> *Ibid.*

<sup>50</sup> Freedman & Pugsley Volume 5 (4), par 5.

<sup>51</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA 1996*, 1996 10 BCLR 1253 (CC) 1256.



fundamental constitutional right of the group or class has been infringed or threatened, which is indeed a wide and generous approach.

## 2.5 Certification and defining a class

Hurter notes that certification can be seen as the most important step of a class action and the purpose of this step is to ensure that class proceedings are appropriate.<sup>52</sup> Although there is no formal legal framework to guide us through this procedure in South Africa, a number of clear guidelines have emerged through the direction of the courts.<sup>53</sup>

In order to institute a class action in terms of the Constitution, a class must be defined, which requires the litigating party to specify and identify the class.<sup>54</sup> In this regard the leading case law in terms of class actions implemented in terms of the Constitution, namely the case of *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*<sup>55</sup>, as well as *Children's Resource Centre Trust v Pioneer Food*<sup>56</sup> should be considered.<sup>57</sup>

In the case of *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*<sup>58</sup>, the individual applicants' welfare grants were suspended by the Department of Welfare as they had challenged a decision of the Eastern Cape administration.<sup>59</sup> The applicants' welfare grants were suspended without notice.<sup>60</sup> The suspension was an attempt of the Department of Welfare to stop fraudulent claims in the manner of stopping all claims without notice, until each recipient had re-registered.<sup>61</sup> In this manner these suspensions affected all the recipients of a welfare grant from the Department of Welfare in the Eastern Cape, and not only the individual applicants in this case.<sup>62</sup> The applicants could therefore identify a class of affected persons and ask for relief for the entire class.<sup>63</sup> One

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<sup>52</sup> Hurter (2008) 295.

<sup>53</sup> Hurter (2008) 301.

<sup>54</sup> Currie & De Waal 88.

<sup>55</sup> *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609.

<sup>56</sup> *Children's Resource Centre Trust v Pioneer Food* 2012 ZASCA 182.

<sup>57</sup> S 38 of the Constitution of the Republic of South Africa.

<sup>58</sup> *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609.

<sup>59</sup> *Idem* 610.

<sup>60</sup> De Vos W (2012) 739.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> Currie & De Waal 88.

of the questions before the court was whether the applicants could indeed take action on behalf of an entire affected class in terms of section 38(c) of the Constitution.<sup>64</sup>

In answering this question Froneman J ruled that section 38 of the Constitution should not be interpreted restrictively.<sup>65</sup> The judge considered the constitutional framework as a whole, in view of the lack of an applicable binding precedent, and assessed the situation against the background view that the group or class of persons affected should have the right to lawful, reasonable and fair administrative action and that public administration must be governed by the values set out in the Constitution.<sup>66</sup>

According to De Vos, Froneman J who delivered the judgment deserves credit for his ground-breaking approach regarding the use of a class action in this case.<sup>67</sup> Although the applicants were seeking relief on behalf of an entire affected class of persons, the applicants did not know the identity of the whole class, but the class could be identified on the basis that the respondent did have the details of all affected persons who would form part of this class, as they knew whose benefits they had suspended<sup>68</sup> The court defined the class as anyone in the whole of the Eastern Cape Province whose disability grants had been suspended by the Eastern Cape Government between specified dates, and gave an order permitting the applicants to litigate on behalf of the whole affected class.<sup>69</sup>

The court summarised the arguments against the institution of class actions in the following five categories:<sup>70</sup>

- a) “The ‘floodgates’ argument – that the courts will be engulfed by interfering busybodies rushing to court for spurious reasons;
- b) the ‘classification’ difficulty – that often the common interest of the applicants and those they seek to represent will be broad and vague;
- c) the ‘different circumstances’ argument – that seen from the respondents’ side the persons seeking relief must be treated differently;

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<sup>64</sup> De Vos W (2012) 748.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 618.

<sup>69</sup> *Currie & De Waal* 88.

<sup>70</sup> *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 623.

- d) the '*res judicata*' difficulty – that some members of the group may not wish to associate themselves with the representative litigation and
- e) The 'practical impossibility' argument – that it is impossible for the courts to deal with cases involving thousands of people and that it would adversely affect the public administration if scarce resources have to be used to defend such cases in court."<sup>71</sup>

The court dealt with and rejected each of these arguments in turn. In terms of the first objection regarding the “floodgates” which may be opened, the court noted the improbability of this happening and added that it may be a good idea to curtail this possibility by adding procedural requirements that leave of the High Court may be required in order to proceed with a class action.<sup>72</sup> The judge added that there is currently no such a requirement or directive in our law but that he was hopeful that there would be in future.<sup>73</sup>

In terms of the second argument relating to classification, the court noted that it is important that the common interest must relate to the alleged infringement of a fundamental right, which was indeed established in this case.<sup>74</sup>

The court found that the third argument relating to “different circumstances” is one which did not really relate to the issue of standing but rather the merits of the claim and accordingly even where there was a sufficiently clear common interest in the rights of the class which have been infringed, the option was still available to the defendant to raise different defences to the claims of the applicants.<sup>75</sup> Froneman J was clear in his judgment that there is no requirement where a claim is brought by means of a class action, that the defence must be uniform.<sup>76</sup>

In terms of the argument related to *res judicata* the court once again held that sufficient procedural requirements could regulate and eliminate this problem.<sup>77</sup> As an example of such a requirement the court felt that this could be done by the representing party giving

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 624.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Currie & De Waal* 88.

<sup>77</sup> *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 624.

sufficient notice to all of the affected group so that they may disassociate themselves should they so wish.<sup>78</sup>

The last argument of “practical impossibility” did address the issue of standing in terms of class actions, and Froneman J found that where there was a sufficiently defined class of persons who have been wronged and held that “it is no answer for either the judicial or administrative arms of government to say that it will be difficult to give them redress. If it means the Courts will have to act in new and innovative ways to accommodate them, then so be it.”<sup>79</sup> This comment clearly shows the courts favourable attitude towards class actions and the necessary changes that needs to be brought about to accommodate class actions in South Africa.

The statement above was taken one step further and confirmed on appeal by Cameron JA in stating that the Constitution left it to the courts to develop and implement the class action provisions and that the common law would be developed in this way to promote the spirit, purport and object of the Bill of Rights.<sup>80</sup>

Froneman J's innovative and fair underlying approach was that the administrative difficulty of giving a large group or class which have been wronged relief, should be no excuse, and in this manner he overcame the arguments against the practicality of class actions in the judgment.<sup>81</sup>

When the decision was taken on appeal, the SCA confirmed that the litigation was tailor-made for a class action.<sup>82</sup> The SCA further described a suit tailor-made for a class action as a case where there is a “large and disparate class of claimants, all poor and lacking in ‘protective and assertive armour’ without access to individualised legal services and each with a relatively small monetary claim unsuitable for individual enforcement.”<sup>83</sup>

According to Cameron JA who delivered the SCA judgment, this order should not have been subject to any appeal.<sup>84</sup> One of the grounds of appeal was that the order of the

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<sup>78</sup> *Ibid.*

<sup>79</sup> *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 625.

<sup>80</sup> *De Vos W* (2012) 750.

<sup>81</sup> *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 624.

<sup>82</sup> *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) par 10.

<sup>83</sup> *Idem* par 17.

<sup>84</sup> *Idem* par 7.

court *a quo* did not adequately define the class.<sup>85</sup> The SCA found that the class was clearly defined in that:

- a) “the class is so numerous that joinder of all its members is impracticable;
- b) there are questions of law and fact common to the class;
- c) the claims of the applicants representing the class are typical of the claims of the rest and
- d) the applicants through their legal representatives, the Legal Resources Centre, will fairly and adequately protect the interests of the class.”<sup>86</sup>

The SCA further labelled these guidelines as the “quintessential requisites for a class action”.<sup>87</sup>

It is therefore clear that where a class action is brought in terms of the Constitution of South Africa, an affected class or group may be defined where the class is large enough that joinder will not be practical. In other words a class action is not suited to replace a situation in our law where joinder could still be used effectively, but is merely suited to situations where the administrative burden of joining all affected persons to the litigation will render the process impractical and inefficient.

Upon further interpretation of the guidelines of the SCA for defining a class,<sup>88</sup> it is apparent that the question of law as well as the relevant facts have to be common to the whole class. Therefore the class of persons can only be defined where the whole group were affected by the same factual situation, and not a similar factual situation where the same question of law may apply.

The last two guidelines provided by the SCA for defining a class, placed the emphasis on the litigants who brought the application before a court and noted that it should be apparent that the applicants would fairly and adequately protect the interests of the class

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<sup>85</sup> *Idem* par 5.

<sup>86</sup> *Idem* par 21.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

and that their claims were typical of those of the rest of the class.<sup>89</sup> In other words a factual similarity is required in the claim being similar to those of the rest of the class and in addition there is a requirement where the subjective intention of the applicants is considered, as an additional protection to the class, in that it must be apparent that the litigants will fairly and adequately protect the interests of the class.

According to De Vos, the *Ngxuza*-case has definitely developed the common law in terms of class actions and it stands as clear authority that a class action may be implemented in order to enforce constitutional rights although it is still uncertain whether the same can be said of non-constitutional rights.<sup>90</sup>

Similarly, the case of the *Children's Resource Centre Trust v Pioneer Food*<sup>91</sup> has entrenched some of the principles for which a foundation was laid in the *Ngxuza*-case, in that the SCA held that before a class action may proceed it must be certified, and the court gave some additional guidelines in terms of certification which could guide courts in the process.<sup>92</sup>

After the *Ngxuza*-case judgment, there was still some doubt as to whether a class action can be used to enforce non-constitutional rights, or rights falling outside the Bill of Rights of the Constitution.<sup>93</sup> In 2012 the SCA in the *Pioneer Foods SCA*-case, gave recognition to the fact that class actions may be certified in South African law, for issues other than constitutional issues, thereby recognizing a class for general damages.<sup>94</sup>

Briefly, the facts in this case in the High Court, were that large well-known bread producing organisations (the respondents) were accused of contraventions of the Competition Act 89 of 1998 and in particular Pioneer Foods was found guilty of anti-competitive conduct by the Competition Tribunal.<sup>95</sup> As a result the applicants in this case therefore wanted to bring a class action with regards to damages suffered as a result of

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<sup>89</sup> *Ibid.*

<sup>90</sup> De Vos W (2012) 751.

<sup>91</sup> *Children's Resource Centre Trust v Pioneer Food* 2012 ZASCA 182.

<sup>92</sup> *Children's Resource Centre Trust v Pioneer Food* 2012 ZASCA 182, par 26.

<sup>93</sup> De Vos W "Judicial activism gives recognition to a general class action in South Africa" 2013 TSAR 370.

<sup>94</sup> De Vos W "Judicial activism gives recognition to a general class action in South Africa" 2013 TSAR 370.

<sup>95</sup> *The Trustees For The Time Being of The Children's Resource Centre Trust v Pioneer Foods (Pty) Limited* 2011 JDR 0498 (WCC) par 2 – 5.

the bread producers' contravening conduct.<sup>96</sup> In particular an application was brought by non-governmental organisations, individuals and COSATU who wanted to bring a class actions on behalf of the consumers of bread (the Consumer Application<sup>97</sup>).<sup>97</sup> Another application was brought by distributors to form a class representing distributors which were affected (the Distributor Application<sup>98</sup>).<sup>99</sup> Both the consumer Application and the Distributor Application were dismissed by the High Court, and the judge concluded that no identifiable class had been established, nor had a cause of action been set out.<sup>100</sup>

The SCA found that in this case it was necessary for the court to step in and develop the common law in the interests of justice, while the legislature has not yet set out the correct processes for defining and certifying a class in these circumstances.<sup>101</sup> De Vos points out that the lack of legislation was therefore not seen as an impediment to give a large class access to justice in the circumstances of this case.<sup>102</sup> In the Judgment Wallis JA specifically said, "The legislature will be free to make its own determination when it turns its attention to the matter and in doing so it may adopt an approach different from ours. In the meantime the courts must prescribe appropriate procedures to enable litigants to pursue claims by this means."<sup>103</sup>

The SCA therefore gave guidelines in terms of certification.<sup>104</sup> The SCA noted that the High Court should be asked at the outset of a possible class action to certify a class action. The SCA further found that in doing so the court should consider, whether there is an objectively identifiable class; whether there is a valid cause of action which can be identified and relief sought must flow from this cause of action; whether there are common issues of fact or law or both; which can be dealt with appropriately in one action; whether the representative is suitable and has no conflicting interests; and whether a class action is the most appropriate procedure for the proceeding.<sup>105</sup> The SCA emphasised the importance of certification and of defining a class prior to instituting

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<sup>96</sup> *The Trustees For The Time Being of The Children's Resource Centre Trust v Pioneer Foods (Pty) Limited* 2011 JDR 0498 (WCC) par 2 – 5.

<sup>97</sup> De Vos W "Judicial activism gives recognition to a general class action in South Africa" 2013 TSAR 371.

<sup>98</sup> Imraahn Ismail Mukaddam v Pioneer Foods (Pty) Ltd and others (25353/10) 2011 ZAWHC 102

<sup>99</sup> De Vos W "Judicial activism gives recognition to a general class action in South Africa" 2013 TSAR 371.

<sup>100</sup> De Vos W "Judicial activism gives recognition to a general class action in South Africa" 2013 TSAR 372.

<sup>101</sup> *Children's Resource Centre Trust v Pioneer Food* 2012 ZASCA 182, par 15.

<sup>102</sup> De Vos W "Judicial activism gives recognition to a general class action in South Africa" 2013 TSAR 370.

<sup>103</sup> *Children's Resource Centre Trust v Pioneer Food* 2012 ZASCA 182 par 21.

<sup>104</sup> *Children's Resource Centre Trust v Pioneer Food* 2012 ZASCA 182 par 23.

<sup>105</sup> *Ibid.*

action and noted that this is required in most jurisdictions around the world.<sup>106</sup> There must also be appropriate procedures for eventually distributing damages to the members of the class set out at certification.<sup>107</sup>

Wallis JA further expanded on the importance of the certification procedure.<sup>108</sup> The judge in fact gave six reasons as to why certification is so important in a class action proceeding.<sup>109</sup> The first reason is the fact that certification should grant the representative of a class the necessary authority to proceed on behalf of a class.<sup>110</sup> Secondly, the judge pointed out that class actions could impact on the rights of others and it is the court's duty to take this into consideration at the certification step.<sup>111</sup> Thirdly, the judge interestingly remarked that certification is also an opportunity for a defendant to win a case without merit and avoid costly litigation if there is reason for the class not to be certified.<sup>112</sup> The fourth reason mentioned is that certification gives the court a form of control over proceedings, as well as over certain salient issues (class definition, commonality and appropriateness) as the fifth reason.<sup>113</sup> The final reason which the judge gave is that class proceedings in Australia which did not require certification lead to longer delays and increased costs as opposed to those that did.<sup>114</sup>

This case further gave the court (the SCA) an opportunity to give some guidance with regards to defining a class, determining whether there is a valid cause of action, common issues of fact or law and the representative which will briefly be outlined here.<sup>115</sup>

Wallis JA was of the opinion that in order to define a class it is not necessarily necessary to identify all the members but that the test should instead be whether a class action is the most appropriate procedure for the claim, as long as identification of members is possible for the purpose of serving notice.<sup>116</sup>

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<sup>106</sup> *Children's Resource Centre Trust v Pioneer Food* 2012 ZASCA 182 par 24.

<sup>107</sup> *Idem* 23.

<sup>108</sup> *Children's Resource Centre Trust v Pioneer Food* 2012 ZASCA 182 par 24.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Children's Resource Centre Trust v Pioneer Food* 2012 ZASCA 182 par 24.

<sup>114</sup> *Ibid.*

<sup>115</sup> De Vos W "Judicial activism gives recognition to a general class action in South Africa" 2013 TSAR 377.

<sup>116</sup> *Children's Resource Centre Trust v Pioneer Food* 2012 ZASCA 182 par 26.



The SCA also gave guidance to determine whether a case has a valid underlying cause of action, to prevent the certification of a “hopeless” case.<sup>117</sup> Wallis JA said that such would be the case if a case is legally untenable or if it is advanced in the absence of supporting evidence, and therefore the test would be whether an exception could be raised against the claim.<sup>118</sup> In order for the court to be able to make this assessment an applicant applying for certification must set out in the founding affidavit the evidence available to support the cause of action as well as any evidence that may still become available.<sup>119</sup>

In addition to that the court gave new procedural certification guidelines to be followed in order to assist the court in assessing the cause of action.<sup>120</sup> Applicants applying for certification of a class must attach the Plaintiff’s particulars of claim to the application, as well as the applicant’s founding affidavit which must include the legal basis of the proposed class action.<sup>121</sup>

With regards to common issues of fact and law, the SCA gave an interesting and rather lenient guideline indicating that there must be common issues of fact or law, or both fact and law in the class that could be determined by one action.<sup>122</sup>

Wallis JA also gave guidance with regards to the representative plaintiff and noted that in South Africa a representative plaintiff of a class may be an ideological plaintiff such as a non-governmental organisation or a public interest law firm which itself has no claim, other than in the USA for example where a representative plaintiff must also be a member of the class with a claim similar to that of the rest of the class.<sup>123</sup> Hurter notes that a class representative has an important role as the driver of the litigation and that the representative contributes largely to the success of the class action by manner of dedication and competence.<sup>124</sup>

In this SCA judgment the court referred the matter in the *Children’s Resource Centre* case back to the high court for determination because the court held that the cause of

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<sup>117</sup> Children’s Resource Centre Trust v Pioneer Food 2012 ZASCA 182 par 35.

<sup>118</sup> Children’s Resource Centre Trust v Pioneer Food 2012 ZASCA 182 par 35-36.

<sup>119</sup> Children’s Resource Centre Trust v Pioneer Food 2012 ZASCA 182 par 43.

<sup>120</sup> Children’s Resource Centre Trust v Pioneer Food 2012 ZASCA 182 par 39.

<sup>121</sup> *Ibid.*

<sup>122</sup> Children’s Resource Centre Trust v Pioneer Food 2012 ZASCA 182 par 44.

<sup>123</sup> De Vos W “*Judicial activism gives recognition to a general class action in South Africa*” 2013 TSAR 377.

<sup>124</sup> Hurter (2008) 295.

action was possibly valid but Wallis JA mentioned because of the novelty and complexity of the issues involved, and the fact that these issues were raised for the first time on appeal, it would be best suited for the High Court to reconsider all the facts given the principles now laid down by the SCA in terms of class actions.<sup>125</sup>

Wallis JA commented on a proposition with regards to damages, that the money be donated to charitable initiatives and found that that would not be suitable means for compensating the consumers who had suffered loss.<sup>126</sup> Instead, Wallis JA felt that damages suffered by consumers could be calculated on an aggregate basis and perhaps an enforced price reduction for a period of time could be applied.<sup>127</sup>

De Vos comments that the *Pioneer Foods SCA*-case shows that our “mass-oriented society” does create the need for a remedy where a class can approach a court and that the SCA should be commended for providing us with guidelines in this judgment.<sup>128</sup>

The *Mukkadam*-case<sup>129</sup> relates to the *Pioneer Foods SCA*-case in that it forms part of the Distributor Application<sup>130</sup> mentioned above which was dismissed by the High Court and taken on appeal to the SCA and later to the Constitutional Court. It is therefore remarkable that in this case the Constitutional Court gave guidance with regards to class actions and the certification process. In this case the applicants were seeking relief in the form of a class action on behalf of almost 100 distributors of bread who had suffered damages due to the conduct of the respondents which the Competition Tribunal had found to be a contravention.<sup>131</sup> The Distributor Application had initially also been dismissed in the High Court and was then heard separately from the Consumer Application in the SCA. Other than the Consumer Application of the *Pioneer Foods SCA*-case which had just been discussed, the Distributor Application was dismissed on appeal and was therefore taken on appeal to the Constitutional Court and finally upheld the appeal.<sup>132</sup>

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<sup>125</sup> Children’s Resource Centre Trust v Pioneer Food 2012 ZASCA 182 par 75.

<sup>126</sup> Children’s Resource Centre Trust v Pioneer Food 2012 ZASCA 182 par 86.

<sup>127</sup> *Ibid.*

<sup>128</sup> De Vos W “*Judicial activism gives recognition to a general class action in South Africa*” 2013 TSAR 380.

<sup>129</sup> Imraahn Ismail Mukaddam v Pioneer Foods (Pty) Ltd and others (25353/10) 2011 ZAWHC 102.

<sup>130</sup> *Ibid.*

<sup>131</sup> De Vos W “*Opt-in class action for damages vindicated by constitutional court*” 2012 TSAR 757.

<sup>132</sup> *Ibid.*

In the *Mukadam*-case the Constitutional Court confirmed the SCA judgment of the *Pioneer Foods SCA*-case and gave further additional guidance with regards to certification.<sup>133</sup> The Constitutional Court in the *Mukadam*-case also assessed whether the High Court and SCA applied the correct test for certification, and underlined the importance of the certification process as well as the importance of class actions.<sup>134</sup> The Constitutional Court emphasised that certification must be seen as forming part of the process of justice instead of becoming a barrier to it.<sup>135</sup> The Constitutional Court noted that the requirements for certification laid down in the *Pioneer Foods SCA*-case, must always be applied within the interests of justice, and that a court should not refuse certification where only one of the requirements are not met, if it would still be in the interests of justice to do so.<sup>136</sup>

De Vos is of the opinion that where a court is simply required to apply the criteria previously set out in order to determine whether a class action could be certified, a court should not need to consider the interests of justice in addition to that as this may lead to confusion, but should instead take it into consideration where it has to consider a new or novel issue for where there are no clear guidelines as yet.<sup>137</sup>

This Constitutional Court judgement did however come with a caveat given by Jafta J that what is said about certification in the judgment does not apply to class actions related to the Bill of Rights where recourse is sought against the State and that such instances should be continued to be governed by Section 38 of the Constitution.<sup>138</sup> De Vos is of the opinion that this could create a misunderstanding as the same considerations usually apply even in a class action enforcing Constitutional rights against the State, but De Vos points out that the Court perhaps rather intended to indicate that there are important procedural differences between class actions and public interest actions.<sup>139</sup>

The Constitutional Court found that the High Court in this case was incorrect in refusing certification, and also found that the SCA was incorrect in following an approach different to that which it had followed in the *Pioneer Foods SCA*-case and found that accordingly if

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<sup>133</sup> *Ibid.*

<sup>134</sup> *Mukaddam v Pioneer Foods (Pty) Ltd and others* 2013 (5) SA 89 (CC) par 27 and 38.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Mukaddam v Pioneer Foods (Pty) Ltd and others* 2013 (5) SA 89 (CC) par 35.

<sup>137</sup> De Vos W “*Opt-in class action for damages vindicated by constitutional court*” 2012 TSAR 765.

<sup>138</sup> *Mukaddam v Pioneer Foods (Pty) Ltd and others* 2013 (5) SA 89 (CC) par 40.

<sup>139</sup> De Vos W “*Opt-in class action for damages vindicated by constitutional court*” 2012 TSAR 767.

the same principles had been applied it should have found that there potentially was a valid cause of action.<sup>140</sup>

The orders of the High Court and SCA were set aside and the matter was remitted to the High Court to be dealt with based on the facts, in light of the guidance which had now been provided.<sup>141</sup>

This Constitutional Court judgment has potentially paved the way for class actions against organisations found guilty of other offences such as a contravention of the Competition Act 89 of 1998.

Canada and the USA make use of the certification step and each jurisdiction has its own requirements which must be met in order to pass the certification step which will be discussed below.<sup>142</sup>

## 2.6 “Opting out” in terms of a class action

In the *Mukaddam*-case the Constitutional Court found that the SCA erred in finding that applicant’s in “opt in” class actions need to show “exceptional circumstances” and that it would therefore be harder to pass the certification test than for an “opt out” class action.<sup>143</sup> The court did however not elaborate further on this issue.<sup>144</sup>

Currie & de Waal mention that the outcome of litigation in terms of a class action will bind all the members of the affected class or group, unless these individuals want to “opt out” of the litigation and follow the prescribed procedures in terms thereof.<sup>145</sup> Heffernan further explains that the “opt out” mechanism has certain benefits to its alternative which is the “opting in” mechanism, because it produces larger classes and it prevents the accidental exclusion of members of a potential class which is very possible when members have to “opt in” to a class.<sup>146</sup>

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<sup>140</sup> *Mukaddam v Pioneer Foods (Pty) Ltd and others* 2013 (5) SA 89 (CC) par 49, 52, 53.

<sup>141</sup> De Vos W “*Opt-in class action for damages vindicated by constitutional court*” 2012 TSAR 764.

<sup>142</sup> Hurter (2008) 295.

<sup>143</sup> *Mukaddam v Pioneer Foods (Pty) Ltd and others* 2013 (5) SA 89 (CC) par 49, 52, 53.

<sup>144</sup> De Vos W “*Opt-in class action for damages vindicated by constitutional court*” 2012 TSAR 768.

<sup>145</sup> Currie & De Waal 88.

<sup>146</sup> Heffernan 4.

In an “opt out” mechanism, the members of a class who did not indicate that they do not wish to form part of it, will automatically become members of the class once the class action has passed the certification step.<sup>147</sup> This means that they will be bound to any order of court regarding the class action and will similarly be bound to a settlement which is made an order of court in the class action, if they do not choose to “opt out” within the time frame provided.<sup>148</sup>

In the alternative, “opt in” mechanism members are required to agree to join into the class before they become members.<sup>149</sup> This is similar to the multi-party litigation which is well established in the United Kingdom,<sup>150</sup> and would lean more towards the process of joinder in South Africa. Heffernan states that a true “opt in” class action runs the risk of becoming nothing more than a form of joinder.<sup>151</sup> It is submitted that an added factor will probably be that fewer members decide to “opt in”, which will make such an action seem unsuitable to a larger class action because the potential for a large class may be untapped as few may be willing to commit by specifically “opting in”.

The court *a quo* in the *Ngxuza*-case ordered that the applicants distribute information about the class action publicly, through the media and through notices so that individuals who form part of the affected class have an opportunity to “opt out” of the litigation if they so wish.<sup>152</sup> Where the issue of *res judicata* was raised, the court had found that sufficient procedural requirements could regulate and eliminate this problem.<sup>153</sup>

The court felt that by giving sufficient notice to the whole of the affected group (that they may disassociate themselves should they so wish) the problem that some members of the group may not wish to associate themselves with the representative litigation or be bound by such an order, could be solved.<sup>154</sup>

The South African Law Reform Commission recommends that a court which approves a class action for certification should give the necessary guidance with regards to notice of the action to members of a class and should include details such as what form the notice

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<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> *Idem* 5.

<sup>150</sup> *Ibid.*

<sup>151</sup> Heffernan 4.

<sup>152</sup> *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 613.

<sup>153</sup> *Idem* 624.

<sup>154</sup> *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 625.

should take, whether it should give class members the right to “opt in” or “opt out” and how it should be communicated.<sup>155</sup> It is noted in the report that while the “opt out” procedure is favoured for South African legislative purposes, it recommends that an “opt in” option should be included in future draft legislation.<sup>156</sup>

In the case of *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd*<sup>157</sup> the issue of “opting out” was considered in more detail. In this case FirstRand Bank applied for an interdict against a publisher of Noseweek Magazine as it had published a series of articles which contained certain defamatory allegations and had threatened to publish the names of certain of FirstRand Bank’s clients in connection with these articles.<sup>158</sup> FirstRand Bank approached the court on the basis of a class action, to protect its own interests as well as that of a class, being their clients, to protect the right of privacy in the Constitution.<sup>159</sup>

The court found that while FirstRand Bank launched an application stating that it was in the interests of protection of its clients’ right to privacy, the intention of bringing the application before the court was that of prevention of defamation and that the application failed on the issue of *locus standi* seeing as each client could have brought an application before court for an interdict preventing the publication of defamatory material.<sup>160</sup> This view is criticised by Hurter, in saying that the court in this case based its views on the guidelines given by Froneman J in the *Ngxuza*-case, but that in the *Ngxuza*-case a two-step approach was followed which is much more in line with class action procedures of other international jurisdictions.<sup>161</sup> In the *Ngxuza*-case the first step of the two-step approach was leave given by the court to proceed with the matter as a class action, which can be seen as a certification process.<sup>162</sup> The second step was the issuing of appropriate directives, where the court managed the running of the class action by giving an order such as the “opt out” notice to be issued.<sup>163</sup> Hurter argues that although the court in the *FirstRand*-case correctly applied the first step of the two-step approach, it erred in having the “opt out” notice form part of the certification step, in requiring an “opt out” notice prior

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<sup>155</sup> Project 88 (1998) 54.

<sup>156</sup> Project 88 (1998) 59.

<sup>157</sup> *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 (2) SA 592 (C) par 28.

<sup>158</sup> *Idem par 3.*

<sup>159</sup> Currie & De Waal 88.

<sup>160</sup> Hurter (2010) 412.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> Hurter (2010) 412.

to certification and therefore the impression was created that the applicant failed in *locus standi* of a class action in that the applicant failed to comply with the requirements set out in the *Ngxuza*-case.<sup>164</sup> The writer further adds that in the *FirstRand*-case, it was unnecessary to consider whether the applicant's client had an opportunity to apply individually for an interdict before the court, seeing as section 38 of the Constitution does not require an affected class to be unable to bring an action for them to be included in an affected class and that the real requirement is whether a right in the Bill of Rights had been infringed.<sup>165</sup> In the *FirstRand*-case it is clear that no right to privacy had been infringed and this should have been sufficient reason why the court did not need to enquire further into the two-step approach followed in the *Ngxuza*-case, and would certainly not have had to consider whether an "opt out" notice had been issued.<sup>166</sup>

Hurter further explains that participation in an action by any member of the affected class is a choice.<sup>167</sup> The choice can only be made after certification of the class because it is only at this point that an individual forming part of a class will be in a position to decide whether to participate and whether it would want to be bound by the decision of the court or not.<sup>168</sup> Hurter makes the point that if such an "opt out" notice had to be issued before the court is approached by an applicant on behalf of an affected class, the incorrect impression would be created at the time of certification that participation in such a class action is no longer a choice but that any member of the class would now be bound by the judgment.<sup>169</sup>

It is therefore clear that an "opt out" notice is not a requirement before bringing a class action before a court and that "opting out" is a process which takes place after the application has been brought before a court and the court has given leave for the application to proceed on behalf of an affected class. The individuals who form part of that class will then be able to make an informed decision as to whether they would like to be bound by the decision which the court had made.

## 2.7 Conclusion

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<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> Hurter (2010) 413.

<sup>167</sup> *Ibid.*

<sup>168</sup> Currie & De Waal 88.

<sup>169</sup> (2010) 412.

The concept of the institution of class actions has been established in South Africa in terms of the Constitution. There is not yet a clear outline of the process for instituting such an action in terms of the Constitution, however the courts have given certain guidelines in terms of which class actions have been instituted. The courts and the applicants do however not always adhere strictly to these guidelines as they have not yet been formalised in the form of legislation or another legislative guideline.

Litigation suitable for a class action was described by the SCA as a scenario where there is a “large and disparate class of claimants, all poor and lacking in ‘protective and assertive armour’ without access to individualised legal services and each with a relatively small monetary claim unsuitable for individual enforcement”.<sup>170</sup> The SCA has in this manner described when a class action will be suitable and in addition given clear prerequisites for a class in a class action where constitutional rights are enforced. The court *a quo* in the same matter had set out a two-step approach which is most likely to be followed by courts in litigation involving a class action. This two-step approach involves as a first step, the certification process where the court gives leave that the action may proceed by means of a class action, and as a second step being the issuing of appropriate directives, where the court manages the running of the class action.

As was recommended by the court in the *Ngxuza*-case, the court in the *Pioneer Foods SCA*-case further formalised the requirement of certification prior to hearing the merits of a class action, and gave further procedural guidelines in the absence of legislative guidelines.<sup>171</sup>

In the *Pioneer Foods SCA*-case the court further confirmed that the test for defining a class should be whether a class action would be the most appropriate procedure to adjudicate the claims and that each member need not be identified.<sup>172</sup>

It is also clear that where a claim is brought by means of a class action, there is no requirement that the defence must be uniform, even though it is a requirement for the formation of a class that the legal question must be uniform, in fact and in law.

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<sup>170</sup> Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza 2001 (4) SA 1184 (SCA) par 17.

<sup>171</sup> Children’s Resource Centre Trust v Pioneer Food 2012 ZASCA 182.

<sup>172</sup> Children’s Resource Centre Trust v Pioneer Food 2012 ZASCA 182 par 21.



It is of interest that even a juristic person may bring a claim on behalf of an affected class if the juristic person can show that a fundamental right of the class has been infringed and that it is acting in the interest of the affected class.

In assessing the manner in which class actions have been implemented in terms of the Constitution and the guidelines which have been given by the courts, it is important to note that the Constitution still has a very generous approach to legal standing and the guidelines given by the courts have further been generous, and even gone as far as to say that the courts will have to act in new and innovative ways to accommodate class actions where rights of a class have been infringed and redress is needed, to overcome administrative difficulties where a large group have been wronged.<sup>173</sup>

Hurter came to the conclusion in 2008 that class actions in South Africa are being dealt with and developed by the courts at present due to the absence of a current formal procedural framework, and today this is still the case.<sup>174</sup>

In terms of the class action cases which have been heard before the courts and the guidelines which have been set, there seems to be scope for class actions in terms of other legislation in South Africa, particularly in terms of the CPA.

It is still uncertain whether other class action may succeed along similar procedural lines as those enforcing constitutional rights. However taking into account the current guidelines given by the courts and the manner in which class actions have succeeded to enforce constitutional rights and the manner in which the courts have been generous towards standing in terms of a class action, there certainly seems to be scope for the implementation of non-constitutional class actions along similar procedures. In particular in the *Pioneer Foods SCA*-case the SCA left the door open for class actions which fall outside of Constitutional rights and the court officially gave recognition to the fact that such class actions may be certified in terms of South African law.

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<sup>173</sup> See par 2.5 above.

<sup>174</sup> Hurter (2008) 294.

## CHAPTER 3: PRODUCT LIABILITY CLASS ACTIONS IN TERMS OF THE CPA

### 3.1 Introduction

Although the wording of section 38 of the Constitution indicates that it can be used to enforce all the rights in the Bill of Rights of the Constitution, but that it is confined to the enforcement of the rights in the Bill of Rights, the view that class actions can only be implemented in terms of the Constitution has recently been questioned.<sup>175</sup>

De Vos mentions that it is still not quite clear whether non-constitutional rights (such as that of product liability) may be enforced by means of a class action in the South African courts.<sup>176</sup> However it is clear that the CPA aims to protect consumers by providing enhanced consumer rights.<sup>177</sup> The CPA provides consumers with the fundamental right to fair value, good quality and safety<sup>178</sup> which include the right to enforce liability against suppliers for damage caused by goods in terms of section 61.<sup>179</sup> It seems that section 61 introduces strict product liability where the CPA is applicable.

This chapter will firstly outline the scope and application of the CPA. Thereafter an analysis on the relevant provisions of the CPA and other relevant legislation and the application thereof to class actions and product liability will follow. The scope and application of the CPA regarding class actions will be examined in order to establish how a class action in terms of product liability may be brought under the CPA and which sections are relevant.

Particular attention will be given to section 4 and section 5(5) of the CPA, together with section 76(1)(c) and section 61 of the CPA which together provide for class actions in terms of product liability under the CPA. The effect of class actions in terms of the aforementioned provisions is also relevant regarding the suppliers' strict liability (section 61 CPA).

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<sup>175</sup> De Vos W (2012) 740.

<sup>176</sup> *Idem* 748.

<sup>177</sup> Katzew & Mushariwa 1.

<sup>178</sup> Chapter 2, Part H CPA.

<sup>179</sup> CPA.

### 3.2 Provisions of the CPA relevant to class actions

A survey was carried out in 2004 by the Department of Trade and Industry, to establish which issues were often faced by South African consumers.<sup>180</sup> After this research had been conducted an Act was drafted to protect South African consumers from many of these issues. This Act is the CPA and it was finally implemented on 31 March 2011.<sup>181</sup>

The CPA specifically aims to protect the economic interests of consumers and to protect consumers against goods and services that could be harmful to them.<sup>182</sup> It also aims to make it possible for consumers to form groups for support and for their protection.<sup>183</sup>

The CPA broadly applies to transactions in South Africa, between a consumer (which could be an individual, a franchisee or small or medium sized juristic person) even when the supplier is not in South Africa, which has not been excluded from the CPA, and took place after 31 March 2011, in the normal course of business of the supplier.<sup>184</sup> The CPA would in these circumstances be applicable to a juristic person as a consumer, where the juristic person has an annual turnover or asset value of less than R2 million at the time that the transaction takes place.<sup>185</sup>

It should be noted however that the CPA does apply to goods supplied after 24 April 2010 which may be harmful to individuals or property, which means that consumers could have a valid claim for harm caused by goods bought even prior to the implementation of the CPA.<sup>186</sup>

Certain types of transactions are specifically excluded from the CPA, such as transactions related to insurance, financial services, pension funds, collective investment schemes, security services, employment contracts, credit agreements and municipalities.<sup>187</sup> It is also important to note that the CPA does not apply where there is a private sale between two or more consumers or where goods or services are supplied to the state or to a

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<sup>180</sup> Opperman & Lake ix.

<sup>181</sup> *Ibid.*

<sup>182</sup> Opperman & Lake 1.

<sup>183</sup> *Ibid.*

<sup>184</sup> Opperman & Lake 2.

<sup>185</sup> *Ibid.*

<sup>186</sup> Opperman & Lake 5.

<sup>187</sup> Opperman & Lake 3.

juristic person with an annual turnover or asset value of R2 million rand or more at the time of the transaction.<sup>188</sup>

De Vos points out that it is a pity that the CPA did not expand on a procedural framework for the proceedings of class actions and that section 4(1)(c) of the CPA which provides for class actions, to a great extent mirrors the provisions of the Constitution providing for class actions.<sup>189</sup> Section 4(1) allows the a list of persons to approach a court if it can be alleged that a consumer's rights have been infringed, impaired or threatened or that prohibited conduct has occurred.<sup>190</sup> In such circumstances, a person acting on his or her own behalf may approach the court, as well as an authorised person acting on behalf of another person who cannot act in his or her own name,<sup>191</sup> In addition a person acting as a member of, or in the interest of, a group or class of affected persons and a person acting in the public interest, with leave of the court, as the case may be may approach a court in these circumstances, as may an association acting in the interest of its members.<sup>192</sup>

It may further be of importance that the CPA defines a supplier as a person or an entity who markets goods or services, irrespective of whether the supplier resides or has its principal office within or outside the Republic; operates on a for-profit basis or otherwise; is an individual, company, close corporation, partnership, trust, organ of state, an entity owned or directed by an organ of state, a person contracted or licensed by an organ of state or is a public-private partnership; or is required or licensed in terms of any public regulation to make the supply of the particular goods or services available.<sup>193</sup>

It is specifically recognised in the CPA that a supplier may also be an organ of state or an entity which is owned by the state.<sup>194</sup>

A "consumer" is defined in section 1 of the Act as follows:

- a) "a person to whom goods or services are marketed in the ordinary course of a supplier's business;

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<sup>188</sup> *Idem 4.*

<sup>189</sup> De Vos W (2012) 754.

<sup>190</sup> S4(1) CPA.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*

<sup>193</sup> S4(2) CPA.

<sup>194</sup> Sharrock (2010) Vol 22 3 299.

- b) a person who has entered into a transaction (other than one that is exempt from the Act) with a supplier in the ordinary course of that supplier's business;
- c) if the context so requires or permits, a user of goods or a recipient or beneficiary of services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services;
- d) a franchisee in terms of a franchise agreement."<sup>195</sup>

"Goods" in terms of the CPA includes a legal interest in land, as well as gas water and electricity. It is therefore very widely defined.<sup>196</sup> The definition of "supply" in relation to goods, includes selling, renting, exchanging and hiring, in the ordinary course of business for consideration.<sup>197</sup> "Consideration" can be seen as anything of value given and accepted in exchange for goods and services.<sup>198</sup> "The ordinary course of business" is not defined but, according to Sharrock, it is clear from the definition of "consumer" that this phrase relates to the ordinary course of business of the particular supplier in question.<sup>199</sup> Therefore a once-off supply of a good which is not usually supplied by a particular supplier will not fall within the scope of this Act.

The CPA therefore gives the court power to deal with situations where consumer rights have been infringed upon, where for example harm was caused to a consumer due to the supply of a defective product, and to award damages against a supplier in such a situation, possibly for harm caused to a group or class of persons. Van Eeden specifically notes that a court may in terms of the CPA award damages for collective harm suffered to be paid on any terms or conditions that the court considers just.<sup>200</sup> Further the CPA places a burden on a court where a matter is brought before it in relation to the CPA, to develop the common law as may be necessary to improve the realisation and enjoyment of consumer rights generally, to promote the spirit and purposes of the CPA and to make appropriate orders to give practical effect to the consumer's right of access to redress and to promote the realisation by consumers of their rights in terms of the CPA.<sup>201</sup>

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<sup>195</sup> S1 CPA.

<sup>196</sup> Sharrock (2010) Vol 22 3 301.

<sup>197</sup> Sharrock (2010) Vol 22 3 301.

<sup>198</sup> S1 CPA.

<sup>199</sup> *Ibid.*

<sup>200</sup> Van Eden 455.

<sup>201</sup> S4 CPA.

It is of further importance to consider the definition used in the CPA for purposes of defining a consumer. The broad definition of a “consumer” includes a person to whom particular goods or services are marketed, or who has entered into a transaction with a supplier in the ordinary course of the supplier’s business. However the definition then broadens even further to include a user of goods, or recipient or beneficiary of services, irrespective of whether the user, recipient or beneficiary was a party to a transaction.<sup>202</sup> This definition is further broadened in terms of section 61 governing product liability in the CPA, in terms of which any user has a claim even where the CPA did not apply to the initial transaction.

### 3.3 Product liability in terms of the CPA

Section 61 of the CPA deals with liability for damage which is caused by goods.<sup>203</sup> Section 61 states that a producer, importer, distributor or retailer of hazardous, unsafe or defective goods that cause death, injury or illness of any person or loss of, or physical damage to, any moveable or immovable property, or any further resultant economic loss, may be held liable.<sup>204</sup> Any of these parties may also be held liable for failing to provide consumers with adequate instructions or warnings regarding the use of the goods.<sup>205,206</sup>

It is important to note that the application of section 61 is to all users of goods, even where the sale of the goods did not fall within the scope of the CPA, except to the extent that liability is excluded in section 61(4).<sup>207</sup> Section 61(4) excludes liability for goods where the harm that resulted was due to compliance with a public regulation, the scenario where the goods were not unsafe or defective at the time that they were being supplied or where it would be unreasonable to expect the retailer or distributor to have discovered that the goods were unsafe or defective when supplying them.

Section 5(5) of the CPA creates additional liability in terms of section 60 and section 61, for persons which would otherwise be exempt from the application of the CPA.<sup>208</sup> This section states that “If any goods are supplied within the Republic to any person in terms

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<sup>202</sup> Katzew & Mushariwa 1.

<sup>203</sup> S61 CPA.

<sup>204</sup> S61(1) CPA.

<sup>205</sup> S61(1)(c) CPA.

<sup>206</sup> S61(5) CPA.

<sup>207</sup> S61(1) CPA.

<sup>208</sup> S5(5) CPA.

of a transaction that is exempt from the application of this Act, those goods, and the importer or producer and retailer of those goods, respectively, are nevertheless subject to sections 60 and 61.”<sup>209</sup> This clearly creates liability which could be of great importance with regards to class actions in terms of the CPA, in that where goods are supplied within South Africa, in terms of a transaction which would normally be exempt from the CPA, the importer, producer, distributor and retailer thereof would still be subject to provisions on safety monitoring and product liability and could therefore still be subject to such class actions in terms of the CPA.<sup>210</sup>

Section 61 further includes a list of defences which suppliers may raise against liability in terms of this section.<sup>211</sup> Briefly these include the fact that a defect existed due to compliance with another law, that the defect did not exist when the product was supplied, and that harm resulted from compliance with instructions from the supplier supplying goods to the next party in the supply chain.<sup>212</sup>

In terms of prescription, a claim in terms of section 61 of the CPA will prescribe and the supplier will no longer be liable if the claim was brought more than three years after the death or injury of the person, or the earliest time that relevant knowledge was held of such illness or damage to property, or three years after the last date they suffered any economic loss.<sup>213</sup>

It is important to note, for the purpose of this study, that section 61 of the CPA does make provision for a class of consumers who were harmed by the same goods to claim in terms of a class action for damages.<sup>214</sup> Opperman & Lake add that this implies that there is a greater risk for suppliers that such claims will be instituted.<sup>215</sup>

The CPA does however lack procedural guidelines relating to the implementation of class actions. In this regard it may be useful to consider guidance from another relevant

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<sup>209</sup> *Ibid.*

<sup>210</sup> S5(5) CPA.

<sup>211</sup> S61(4) CPA.

<sup>212</sup> *Ibid.*

<sup>213</sup> S61(4)(d) CPA.

<sup>214</sup> Opperman & Lake 137.

<sup>215</sup> *Ibid.*

jurisdiction, because as Cassim & Sibanda point out, it is dangerous to have promulgated legislation containing class action provisions which are not accompanied by guidelines.<sup>216</sup>

The provisions of the CPA which deals with product liability should therefore be considered in detail as it could easily lead to the implementation of class actions. The section which deals with strict product liability and thereby provides protection for consumers in terms thereof is section 61.<sup>217</sup> Neethling & Potgieter have conducted in-depth research in terms of product liability as well as the radical law reform which the CPA has brought about in this regard.<sup>218</sup>

In terms of our common law the general position regarding product liability is that whoever suffers loss must bear the consequences which is commonly described by the phrase “the loss lies where it falls”.<sup>219</sup> Further, in terms of common law, for a party to institute such a claim of damages the plaintiff would have to prove fault and wrongful conduct on the part of the defendant.<sup>220</sup> Neethling, Potgieter & Visser also note that prior to the CPA the courts viewed product liability, and more specifically, manufacturer’s liability as falling within the Aquilian action, which meant that all the elements of a delict had to be present in order for a manufacturer to be liable for a consumer suffering damages due to faulty or defective products.<sup>221</sup> The elements of a delict are the act, wrongfulness, fault, causation and damage.<sup>222</sup> Neethling, Potgieter & Visser are of the view that despite strict liability for damage caused by a defective product having been introduced by the CPA, the common law position also remains in force.<sup>223</sup> The common law position will be of application where a defective product causes pure economic loss and the CPA does not apply to the consumer, for example.<sup>224</sup> Neethling, Potgieter & Visser add that this field of law is yet in its infancy in South Africa and that it is essential therefore to consider comparative law.<sup>225</sup>

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<sup>216</sup> Cassim & Sibanda 604.

<sup>217</sup> Katzew & Mushariwa 1.

<sup>218</sup> Neethling & Potgieter 808.

<sup>219</sup> Melville 24.

<sup>220</sup> *Ibid.*

<sup>221</sup> Neethling, Potgieter & Visser 2006 292.

<sup>222</sup> Neethling, Potgieter & Visser 2015 22.

<sup>223</sup> *Idem* 339.

<sup>224</sup> *Ibid.*

<sup>225</sup> Neethling, Potgieter & Visser 2015 336.



According to Melville the courts have in the past been cautious not to accommodate claims for damages which would cause liability to extend too far.<sup>226</sup> An example of this caution is the principle of privity of contract, which the courts were reluctant to interfere with where there was a contractual relationship between the consumer and the supplier.<sup>227</sup> This principle was illustrated in the case of *Wagener v Pharmacare*<sup>228</sup> where a patient was partially paralysed after he received local anaesthetic, and had no claim since there was no direct contractual link between the parties involved and the patient could not prove negligence and as a result had no claim.<sup>229</sup> A similar situation occurred in the case of *Cuttings v Pharmacare*.<sup>230</sup> The SCA held that the manufacturer could not be liable if no fault could be shown.<sup>231</sup> This scenario served as illustration of how difficult it is for a consumer to prove fault by means of intention or negligence because a consumer would not often have much knowledge of the production or manufacturing process of a product.<sup>232</sup>

It is therefore remarkable that section 61 of the CPA is worded in such a manner that liability is created for supplying goods which are unsafe, defective, hazardous, mechanically unsound or accompanied by inadequate user instructions or warnings.<sup>233</sup> It is further remarkable that consumers need not prove negligence, but only a causal link, in order to allege liability in terms of this section, and that the section is worded in such a way that more extensive damages can be claimed in terms of the CPA than what was the position in terms of common law.<sup>234</sup>

According to Neethling, Potgieter & Visser the common law position remains in force in terms of the CPA and in addition the CPA has introduced strict liability (where proving the element of fault is not required) for damage caused by defective products in section 61.<sup>235</sup> Neethling & Potgieter note that the USA's legal development in the field of strict product

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<sup>226</sup> Melville 91..

<sup>227</sup> *Ibid*

<sup>228</sup> *Wagener v Pharmacare* 2003 (2) All SA 167 (SCA).

<sup>229</sup> Katzew & Mushariwa 4.

<sup>230</sup> *Ibid*.

<sup>231</sup> *Ibid*.

<sup>232</sup> *Ibid*.

<sup>233</sup> Melville 26.

<sup>234</sup> *Ibid*.

<sup>235</sup> Neethling, Potgieter & Visser 2015 336.

liability could offer a starting point for the future development of product liability and the acceptance of strict manufacturer's liability in our law.<sup>236</sup>

Naudé explains that in terms of section 61 a consumer has a claim when they are able to show the existence of a “hazard”, an “unsafe characteristic” or a “failure” or a “defect” as defined in the CPA.<sup>237</sup>

Van Eeden notes the vast extent of the application of section 61 of the CPA, in that it applies to every transaction occurring within the Republic of South Africa, except those which are excluded in terms of section 5.<sup>238</sup> In addition, in terms of application Van Eeden notes that if the CPA applies to a transaction, it applies irrespective of whether the goods or services are offered or supplied together with other goods or services which may for example be exempt, which widens the scope of application.<sup>239</sup>

Further it is noteworthy in terms of section 61 that liability is created not only for a manufacturer but producers, importers, distributors and retailers can be held liable for product liability in terms of this section.<sup>240</sup> Consumers can claim for hazardous or defective goods that caused injury, illness or death of a person or loss or physical damage to moveable or immovable property, as well as economic loss resulting from such damage.<sup>241</sup> Van Eeden further notes that even though the CPA does not apply to certain transactions where goods are supplied to a juristic person with a turnover which falls over the threshold value in terms of section 6, liability in terms of sections 60 and 61 are not excluded.<sup>242</sup>

The CPA distinguishes between a manufacturing defect, a design defect and defective warnings.<sup>243</sup> Consumers can claim for harm which was caused due to a lack of adequate end-user instructions or warnings for the use of goods.<sup>244</sup> Naudé notes that when a supplier complies with section 55(6) in that a product is supplied with an adequate warning that goods are supplied in a specified condition, this does not directly affect the

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<sup>236</sup> Neethling, Potgieter & Visser 2015 336.

<sup>237</sup> Naudé 336.

<sup>238</sup> Van Eden 373.

<sup>239</sup> *Ibid.*

<sup>240</sup> Opperman 135.

<sup>241</sup> Katzew & Mushariwa 10.

<sup>242</sup> Van Eden 373.

<sup>243</sup> *Ibid.*

<sup>244</sup> S61(1) CPA.

possibility of a claim under section 61, and that it only renders section 55(2) (right to receive good quality goods) inapplicable.<sup>245</sup> Naudé further explains that a section 61 sets its own requirements for liability in terms of section 61 and that it therefore operates independently of section 55(6). However Naudé argues that a product with a sufficient warning could possibly indirectly affect a claim in terms of section 61 where a consumer wants to prove a “defect”, seeing as the definition of a defect in the CPA includes a reasonable expectations test.<sup>246</sup> It therefore follows that a suitable warning or specification in terms of section 55(6) could make it more difficult to prove the existence of a “defect” in terms of the CPA.<sup>247</sup>

As briefly noted above, section 61 applies to all users of goods even if the CPA does not apply to the transaction with which goods were sold.<sup>248</sup> Opperman & Lake explain that this means that even where goods were sold by one company to another and the CPA wouldn’t normally apply, the end user of the product would still be able to claim for harm caused, in terms of this section.<sup>249</sup>

Section 61 does list certain exclusions and therefore there are defences which suppliers can raise to a claim in terms of this section. In summary, these defences include the scenario where the unsafe product characteristic existed only because of compliance with another law, where the unsafe product characteristic did not exist when the product was supplied, and where the harm resulted from compliance with instructions in the supply chain.<sup>248</sup> Liability does also not arise in terms of this section where the claim for damages is brought more than three years after the death or injury of the person, or the earliest time the person had knowledge of the facts of the harm caused, or the last date that the person suffered economic loss from the harm.<sup>250</sup>

Section 61 certainly allows for a claim of damages in terms of a class action, even in respect of a transaction where a producer, distributor or retailer of a product would otherwise be exempt from the CPA,<sup>251</sup> which implies that it will be less costly and more

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<sup>245</sup> Naudé 336.

<sup>246</sup> Naudé 345.

<sup>247</sup> *Ibid.*

<sup>248</sup> Opperman 136.

<sup>249</sup> *Ibid.*

<sup>250</sup> S61(4) CPA.

<sup>251</sup> S5(5) CPA.

accessible for consumers to be able to claim in terms of this section, and that accordingly there is a greater risk for suppliers.<sup>252</sup>

### 3.4 Implementation of class actions for non-constitutional rights

Even though the *Ngxuza*-case has clearly given some guidance as to the implementation of class actions with regards to constitutional rights, there are various views as to whether this case could also be used as authority for the enforcement of non-constitutional rights such as the rights to fair value, good quality and safety by means of a class action.

De Vos is of the view that the *Ngxuza*-case does not give any such authority as the court did not specifically give any such guidance in the judgment and that an inference to this effect cannot be drawn simply because the court failed to mention that it is a prerequisite for a constitutional right to have been infringed.<sup>253</sup>

De Vos further notes that Hurter is similarly of the view that one cannot read in a judgment by analysing that which was not noted by the court.<sup>254</sup> De Vos remarks that even though this was not mentioned by Cameron JA on appeal, the judgment should be read within the context and facts which were raised in the court *a quo*.<sup>255</sup> De Vos concludes that as a judgment can only be binding to cases with similar facts, there is no way in which the judgment of Cameron JA can be applied or extended to cases where non-constitutional rights were infringed.<sup>256</sup>

Kok on the other hand, feels that Cameron's judgement on the appeal of the *Ngxuza*-case could form a platform for future class actions where rights other than constitutional rights are infringed as it was not specifically held that there is a prerequisite that it is a constitutional right which must be infringed.<sup>257</sup>

Even though De Vos concludes that the judgment in the *Ngxuza*-case does not lean itself towards aiding in the development of class actions for purposes other than constitutional rights, De Vos does mention that the *Pioneer Foods*-case<sup>258</sup> is important in this

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<sup>252</sup> Opperman 137.

<sup>253</sup> De Vos W (2012) 751.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

<sup>257</sup> Kok 158.

<sup>258</sup> *Competition Commission v Pioneer Foods (Pty) Ltd 2010 ZACT 9*

development of class actions as the court in this case had accepted that the applicants had standing before the court even though the court did not have to decide on the issue.<sup>259</sup> As noted above, the case of *Children's Resource Centre Trust v Pioneer Food* has entrenched some of the principles for which a foundation was laid in the *Ngxuza-case*, in that the SCA confirmed that class actions may be certified in South African law, for issues other than constitutional issues.<sup>260</sup>

In the *Pioneer Foods*-case the High Court had to deal with the concept of damages for non-constitutional rights as unlawful conduct was alleged which did not fall within the bill of rights.<sup>261</sup>

A brief description of the facts in the *Pioneer Foods*-case in the High Court (as it has also been outlined in 2.5 above) is that the Competition Commission investigated a cartel complaint and found that three of the primary bread producers of South Africa were guilty of contraventions of the Competition Act. Premier foods, one of the respondents applied for leniency and upon being granted leniency, disclosed to the Competition Commission that, together with Pioneer and Tiger a cartel had been formed where the selling price of bread had been fixed.<sup>262</sup> Tiger later negotiated a consent agreement with the Competition Commission and therefore the case proceeded only against Pioneer Foods.<sup>262</sup> Pioneer was later found to be in contravention of the Competition Act and was ordered to pay an administrative penalty of approximately R195 million Rand.<sup>263</sup>

In the context of Pioneer being found guilty of a contravention of the Competition Act and being found guilty of fixing the price of bread, The Trustees for the Time being of the Children's Resource Centre Trust and Imraahn Ismail Mukaddam each brought an application for class action certification against the respondents in the light of the findings of the Competition Tribunal.<sup>264</sup>

The one application was brought against the bread producers on behalf of the consumers of bread in South Africa (the Consumer Application) and the other application being

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<sup>259</sup> De Vos W (2012) 753.

<sup>260</sup> De Vos W "Judicial activism gives recognition to a general class action in South Africa" 2013 TSAR 370.

<sup>261</sup> De Vos W (2012) 752.

<sup>262</sup> *The Trustees For The Time Being of The Children's Resource Centre Trust v Pioneer Foods (Pty) Limited* 2011 JDR 0498 (WCC) par 67 – 93.

<sup>263</sup> Naudé 336.

<sup>264</sup> Mongalo & Nyembezi 367.

brought on behalf of the distributors of bread in South Africa (the Distributor Application), respectively.<sup>265</sup>

The applications in the case were based mainly on the infringement of constitutional rights, and therefore dealt with in 2.5 above. However what is of special importance is that the founding affidavits made provision for the event that it is found that there is no infringement of constitutional rights, in which case the applicants alleged that the conduct of the bread manufacturers was unlawful and that it had caused them prejudice.<sup>266</sup> In this manner the applicants had actually brought a class action in the alternative, on non-constitutional grounds. It is a pity that the High Court did not give guidance on the question of whether the applicants in this case had standing to bring a class action before the court based on non-constitutional rights. Van Zyl AJ seemed to accept that the applicants had standing to bring the class action but did not find it necessary to make a decision in this regard.<sup>267</sup> Although the SCA confirmed that class actions may be certified in South African law, for issues other than constitutional issues, the court did not give further guidance in this regard.<sup>268</sup> The SCA further rejected the suggestion in academic writing that we have to await guidance through the legislation before determining requirements for instituting class actions for issues in general.<sup>269</sup>

### 3.4.1 Approaching a court with regards to a class action for product liability

In addition to the provisions in the Constitution allowing for a class action to be brought before a court, a class action can be brought before a court in terms of section 4(1)(c) of the CPA.<sup>270</sup> This section provides an opportunity for a person who is acting as a member of a class of affected persons, or acting in the interest of a class of affected persons, to approach a court or the consumer tribunal or commission, where it can be alleged that the class' rights have been infringed in terms of the CPA.<sup>271</sup> Van Eeden notes that there is has long since been a recognised need in South African law for class actions, particularly in terms of consumer claims, which has now been addressed by the CPA.<sup>272</sup>

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<sup>265</sup> Melville 26.

<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*

<sup>268</sup> *Children's Resource Centre Trust v Pioneer Food* 2012 ZASCA 182 par 21.

<sup>269</sup> *Ibid.*

<sup>270</sup> S4(1) CPA.

<sup>271</sup> *Ibid.*

<sup>272</sup> Van Eden 454.

Section 69(d) of the CPA is an obstacle for a consumer or interested person in the process of approaching a court. In terms of this section a court may only be approached when all other remedies in terms of national legislation have been exhausted.<sup>273</sup> Sharrock points out that the “other remedies” referred to in this section, which can be followed for relief in terms of the CPA, include referring the matter to an alternative dispute resolution agent, making a complaint to the National Consumer Commission, referring the matter to a provincial consumer court with jurisdiction over the matter and referring the matter to the National Consumer Tribunal.

According to Sharrock section 69(d) somewhat conflicts with section 52(1)(b) which allows a court the right of intervention if there is no other remedy provided by the CPA which would be “sufficient to correct the relevant unfairness”. According to Sharrock this is an important point as it is not clear at present when a consumer may ask for relief from a court in terms of the CPA.<sup>274</sup>

Section 173 of the Constitution of 1996 gives higher courts, including the SCA, Constitutional Court and High Court, “inherent power to protect and regulate their own process and develop the common law, taking into account the interests of justice.” Nothing prevents courts from hearing class actions.<sup>275</sup>

In addition it should be noted that section 61 of the CPA specifically states that nothing in the section limits the authority of a court to assess whether any harm has been proven and adequately mitigated, nor to determine the economic loss suffered or the value of a claim.<sup>276</sup> Section 61 in itself is therefore worded in such a manner that a procedure providing for direct access to a court should be considered and should perhaps be provided for separately in the CPA in future.

Cassim & Sibanda submit that it is desirable for a court to determine the quantum of the award of damages. This was also suggested by the South African Law Reform Commission which suggested that an aggregate method of establishing the quantum of damages could be used.<sup>277</sup> The South African Law Reform Commission’s report explains

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<sup>273</sup> Sharrock (2010) Vol 22 3 324.

<sup>274</sup> Sharrock (2010) Vol 22 3 324.

<sup>275</sup> Cassim & Sibanda 595.

<sup>276</sup> S61(5) CPA.

<sup>277</sup> Cassim & Sibanda 603.

by example of a consumer class action claim, that the court may be able to calculate the total amount which defendants are liable for but may not be able to divide this accurately between members of a class.<sup>278</sup> The South African Law Reform Commission therefore recommended that a court may make either aggregate assessments or individual assessments in determining the amount of damages and that a court may appoint a commissioner to assist in this regard.<sup>279</sup> However the recommendation was also made that a court should give directions with regards to distribution and that legislation should deal expressly with monetary awards and the disposal of any undistributed residue which may remain.<sup>280</sup>

The CPA does not give any guidance with regards to costs of class actions and the reward thereof. With regards to costs the South African Law Reform Commission suggested that the general rule should apply, namely costs would follow the suit.<sup>281</sup> This may however be impractical in the case of class actions, or may lead to reluctance for a person to act in the interest of a class of person for fear of failure and large legal costs. The South African Law Reform Commission further suggested that members of a class that choose to “opt-in” may be ordered to contribute towards costs or provide security for costs.<sup>282</sup>

Contrary to the recommendations of the South African Law Reform Commission, the class action provisions of the CPA have largely left it to the courts to determine substantive and procedural guidelines in this regard.<sup>283</sup>

Provision for direct access to a court in terms of section 61 and for purposes of class actions in general in terms of the CPA, could aid the development of procedural and substantive guidelines for class actions as these could be developed by the courts and precedents could then be set in terms of costs and the award of damages. Direct access to a court as an alternative procedure instead of where other methods have been exhausted, will in no way deprive consumers of a cost effective, consumer friendly procedure and could in fact aid consumers in establishing these guidelines. An additional

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<sup>278</sup> Project 88 (1998) 65.

<sup>279</sup> *Ibid.*

<sup>280</sup> Project 88 (1998) 66.

<sup>281</sup> *Idem* 604.

<sup>282</sup> Project 88 (1998) 72.

<sup>283</sup> Cassim & Sibanda 569.



consideration is that a class action in terms of the CPA could be brought by any interested party on behalf of an affected class. Such an interested party could even include a juristic person. In such a case establishing the necessary guidelines and procedure would be of more value to consumers in general than the alternative saving of costs by exhausting other methods, as suggested by section 69(d), before going to a court.

### 3.5 Identifiable class

It is remarkable that the judge, Van Zyl AJ, in the *Pioneer Foods*-case, followed the guidelines which were set out in the South African Law Reform Commission's report which serves as a guideline for legislation to be promulgated to regulate class actions.<sup>284</sup> This report, set out a list of five items as provisional criteria for certification.<sup>285</sup> The criteria includes the evidence of the existence of an identifiable class, the existence of a prima facie cause of action, issues of fact or law common to the claims or defences of individual members of the class, the availability of a suitable representative to represent interests of the class and whether a class action would be the appropriate way to proceed.<sup>286</sup> Van Zyl AJ placed emphasis on the guideline which requires the court to consider whether there was an identifiable class of persons and whether a cause of action was disclosed.<sup>287</sup>

With regard to identifying a class of persons, the court found that the applicants failed to establish an identifiable class of persons.<sup>288</sup> Van Zyl AJ mentioned that it would just be nearly impossible to define the class for the purposes of this class action, so that members of this class would have a sufficient opportunity to "opt out".<sup>289</sup> If this could not be done the certification requirement could not be met and consequently the class action could not proceed. Van Zyl AJ further explained in his judgment that a class of bread consumers would include corporate entities and juristic persons whose rights had not been infringed upon.<sup>290</sup>

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<sup>284</sup> De Vos W (2012) 752.

<sup>285</sup> Project 88 (1998) 41.

<sup>286</sup> *Ibid.*

<sup>287</sup> De Vos W (2012) 752.

<sup>288</sup> *The Trustees For The Time Being of The Children's Resource Centre Trust v Pioneer Foods (Pty) Limited* 2011 JDR 0498 (WCC) par 67 – 93.

<sup>289</sup> The Consumer Protection Act 68 of 2008 Section 61(1)

<sup>290</sup> *The Trustees For The Time Being of The Children's Resource Centre Trust v Pioneer Foods (Pty) Limited* 2011 JDR 0498 (WCC) par 77

Mongalo & Nyembezi argue that Van Zyl AJ wrongly concluded that the class could not properly be defined and they note that Van Zyl AJ gave the reason of difficulty to define the periods of damages as one of the reasons, but they feel that he disregarded the fact that the periods during which the alleged damages arose corresponded very well with the time at which the respondents colluded with regard to their price fixing agreements.<sup>291</sup> and <sup>292</sup> Mongalo & Nyembezi further argue that in light of the facts before the court the court could have arrived at a definition of a class which would identify the affected persons and then enable members of the group to decide whether they would like to “opt out”.<sup>293</sup> It could however be argued to the contrary that it is not up to the court to expand on and argue the applicant’s case by creating that which was not brought before it.

The fact is however that the class was indeed so broadly defined that it may also be noted that Van Zyl AJ asked counsel before him whether there would be any objection to him hearing the case seeing as he may also fall into the class of persons as a bread consumer who could have been prejudicially affected.<sup>294</sup> There was however no objection from counsel in this regard.<sup>295</sup>

This case does shed some light on the position for class actions for product liability based and other rights falling outside of the bill of rights.<sup>296</sup> Since no relief was granted in the *Pioneer Foods*-case in the court *a quo* or at the SCA which referred the matter back to the High Court, it cannot currently serve as authority for how a class action can brought in this regard but there is certainly a guideline towards the possibility of bringing such an action seeing as Van Zyl AJ accepted standing before the court outside of the Bill of Rights.

The SCA however found that the court *a quo* had indeed erred in failing to identify a class and used the opportunity to give guidance in this regard, as set out in 2.5 above.<sup>297</sup> Wallis JA found that it was not a requirement to define a class, to be able to identify all members but instead emphasis should be placed on whether a class action is the most appropriate

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<sup>291</sup> Mongalo & Nyembezi 367.

<sup>292</sup> *Idem* 371.

<sup>293</sup> *Idem* 372.

<sup>294</sup> *The Trustees For The Time Being of The Children’s Resource Centre Trust v Pioneer Foods (Pty) Limited* 2011 JDR 0498 (WCC) par 81.

<sup>295</sup> Opperman 137.

<sup>296</sup> De Vos W (2012) 754.

<sup>297</sup> *Children’s Resource Centre Trust v Pioneer Food* 2012 ZASCA 182 par 29.

procedure to follow.<sup>298</sup> The SCA found that if it were indeed possible to identify all members of a class it may become questionable as to whether joinder would be equally suitable or more suitable.<sup>299</sup>

The reasons regarding certification for rejection of the applicants' claim in the *Pioneer Foods*-case in the High Court would however not be problematic where a class action for product liability could be brought in terms of the CPA, seeing as there would in that case be a claim similar to that found in contract or delict for damages and that such a claim could very well be brought on behalf of a clearly identifiable class of consumers.

There has however unfortunately not been guidance to other possible issues in bringing a class action in a clearly non-constitutional matter before the court, such as how to give notice to absent class members and how to deal with proof of the damages of individual members of a class.<sup>296</sup> Cassim & Sibanda submit that consumers should be able to choose between an "opt in" and "opt out" notice.<sup>300</sup>

De Vos mentions that it would more than likely be impractical in today's business world to bring an action on behalf of each and every affected consumer to sue a wrongdoer as there are so often scenarios where we deal with mass production and mass supply of goods and services and a class action for product liability would be the only way to effectively provide access to justice for groups of victims, of for example, defective goods.<sup>301</sup>

### 3.6 Cause of Action

The South African Law Reform Commission's 1998 report pointed out that with regards to a preliminary merits test, a court should not have to consider the actual merits of a case but must consider whether a class action would generally be the best suited procedure to a certain facts.<sup>302</sup> The report did however also refer to the court taking the interests of justice into account, which was also recently noted by the Constitutional Court as discussed in 2.5 above.<sup>303</sup> Where Van Zyl AJ considered the question in the *Pioneer*

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<sup>298</sup> Children's Resource Centre Trust v Pioneer Food 2012 ZASCA 182 par 29.

<sup>299</sup> *Ibid.*

<sup>300</sup> Cassim & Sibanda 603.

<sup>301</sup> De Vos W (2012) 756.

<sup>302</sup> Project 99 (1998) 43.

<sup>303</sup> Project 99 (1998) 47.

*Foods High Court*-judgment, posed by the South African Law Reform Commission's 1998 report, of whether the cause of action was disclosed and sufficiently established before the court it was purely found that there was no contractual basis for the applicants' claim. There could be no contractual relationship in this case as the consumers never purchased the product directly from any of the respondents.<sup>304</sup> The court further held that there was also no claim based on delict.<sup>305</sup> Van Zyl AJ therefore found that such a cause of action could not be properly disclosed on the facts before him.<sup>306</sup>

In this regard Mongalo & Nyembezi argue that Van Zyl AJ erred in concluding that a cause of action could only be sustained in class action proceedings if the cause of action relates to a contractual or delictual claim.<sup>307</sup> In this regard, counsel for the applicants listed the following three factors which should be considered in determining whether a statutory duty gave could give rise to a delictual action:<sup>308</sup>

- a) "Whether the statute was intended to provide a civil remedy;
- b) whether the plaintiff was a person for whose benefit and protection the duty was imposed; and
- c) whether the kind of harm and the manner of occurrence fell within the protective range of the duty."<sup>309</sup>

Van Zyl AJ did not dispute that these factors ought to be considered in order to determine whether a statutory duty can give rise to a delictual action.<sup>310</sup> These factors should therefore be kept in mind where a class action can be brought in terms of legislation such as the CPA.

Van Zyl AJ noted in his judgment that he did not regard the provisions of Section 65 of the Competition Act to have created a relative cause of action in this instance.<sup>311</sup> However

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<sup>304</sup> *Idem* 753.

<sup>305</sup> Cassim & Sibanda 603.

<sup>306</sup> *The Trustees For The Time Being of The Children's Resource Centre Trust v Pioneer Foods (Pty) Limited* 2011 JDR 0498 (WCC) par 67 - 93

<sup>307</sup> Mongalo & Nyembezi 373.

<sup>308</sup> *Ibid.*

<sup>309</sup> These factors were argued with reference to LAWSA Vol 8 Part 1 par 74.

<sup>310</sup> *The Trustees For The Time Being of The Children's Resource Centre Trust v Pioneer Foods (Pty) Limited* 2011 JDR 0498 (WCC) par 67 – 93.

<sup>311</sup> *The Trustees For The Time Being of The Children's Resource Centre Trust v Pioneer Foods (Pty) Limited* 2011 JDR 0498 (WCC) par 87.

having regard to the factors above argued by counsel and accepted by Van Zyl AJ, and section 4(1)(c) of the CPA discussed above, it can easily be argued before a court that this statute does intend to provide a civil remedy. The application of the other two factors would depend on the facts of such a case, but in order to satisfy them in light of the CPA, all that would be required would be for a consumer under this Act to have suffered harm by a supplier of goods or services.

In contrast, the SCA judgement which followed in the *Pioneer Foods SCA*-case which confirmed that a valid cause of action is a requirement for certification and the SCA further gave the guideline that a valid cause of action would be one to which an exception cannot be raised.<sup>312</sup> The SCA confirmed that the High Court had indeed erred in this regard, and gave guidance as to establishing a cause of action set out in more detail in 2.5 above. Briefly the SCA found that the test for a valid cause of action should simply be whether an exception could be raised against the claim and that in order for the court to establish this, evidence in support is necessary.<sup>313</sup> The court therefore referred the matter back to the High Court for determination based upon the guidelines now provided but held that there was a possibility that the cause of action was indeed valid.<sup>314</sup>

Any consumer in terms of the CPA would comfortably satisfy the requirements set out above, as the duties imposed by the CPA are mainly for the purpose of the protection of consumers because the CPA aims to provide efficient protection for consumers who are subject to exploitation in the marketplace.

### **3.7 Other current legislative provisions draft legislation and legislative proposals regarding class actions in South Africa**

Before provision was made in South African legislation for class actions, collective redress was partly possible although the provisions which allowed for this were found in different pieces of legislation.<sup>315</sup>

The Public Interest and Class Actions Bill, which was largely based on S38 of the Constitution, was published by the Law Reform Commission during 1998.<sup>316</sup> It is

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<sup>312</sup> See 2.5 above.

<sup>313</sup> *Children's Resource Centre Trust v Pioneer Food* 2012 ZASCA 182 par 43.

<sup>314</sup> *Children's Resource Centre Trust v Pioneer Food* 2012 ZASCA 182 par 75.

<sup>315</sup> Cassim & Sibanda 607.

unfortunate that this bill was never promulgated as it would have shed light on the procedural requirements for class actions in South Africa.<sup>317</sup> These include provisions such as the provisions on joinder as in sections 41 and 42 of the Magistrates' Courts Act and High Court Rule 10(1).<sup>318</sup> Similarly to the position in CPA, these rules are unlimited in the number of plaintiffs which could be joined as long as they have the same interest.<sup>319</sup> In addition High Court Rule 11 provides for the consolidation of separate actions by means an application to the court.<sup>320</sup> These provisions were therefore a start in South African law to the prevention of multiplicity of actions and costs, although they did not afford the rights and benefits which the CPA provides for consumers as the process would still be lengthy and relatively costly in terms of these court rules.

As stated above, in the *Pioneer Foods*-case in the High Court, Van Zyl AJ followed the guidelines which were set out in the South African Law Reform Commission's report, as a guideline to the court regarding class actions.<sup>321</sup> In the report the South African Law Reform Commission also discussed the numerosity, commonality, preliminary merits, adequacy of representation and superiority as forming the basis or underlying elements which together make up the certification criteria implemented by the courts as guidance for future class actions, as discussed above in 2.5.<sup>322</sup>

With regards to numerosity the South African Law Reform Commission's view is that a group or class need not consist of a specified number of litigants, but that it should be more practical to use a class action than any other procedural mechanism such as joinder, and that numerosity should be one of the considerations in determining whether that is the case.<sup>323</sup>

With regards to preliminary merits, as discussed in 3.6 above, the South African Law Reform Commission indicated that it should fall outside the scope of the certification test for the court to determine and consider the merits of the case.<sup>324</sup>

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<sup>316</sup> *Idem* 603.

<sup>317</sup> *Idem* 592.

<sup>318</sup> *Idem* 592.

<sup>319</sup> *Idem* 594.

<sup>320</sup> *The Trustees For The Time Being of The Children's Resource Centre Trust v Pioneer Foods (Pty) Limited* 2011 JDR 0498 (WCC) par 67 – 93.

<sup>321</sup> De Vos W (2012) 752.

<sup>322</sup> Project 88 (1998) 41.

<sup>323</sup> Project 88 (1998) 43.

<sup>324</sup> See 3.6 above.

As far as commonality is concerned, the South African Law Reform Commission's report indicated that there should be questions of fact or law common to the class.<sup>325</sup> This requirement has further been developed by the courts and was discussed in 2.5 above.

The South African Law Reform Commission's report also laid down the foundation accepted by our courts with regards to suitable representatives, and that the representative must be able to fairly and adequately represent the class and that there must be no conflict of interests as confirmed by our courts in 2.5 above.<sup>326</sup>

The principle of superiority in the South African Law Reform Commission's report confirms that a class action is the most suitable procedural alternative to a certain set of facts and circumstances.<sup>327</sup>

Together these underlying principles form the basis for the requirements for certification to be applied by the courts.<sup>328</sup>

The South African Law Reform Commission also created a draft bill based on the findings of their research which makes the Legislator's role much easier and which the courts have been able to refer to for guidance in this regard.<sup>329</sup>

The fact that the court in the *Pioneer Foods*-case considered whether there was an identifiable class of persons and whether a cause of action was disclosed, according to these guidelines.<sup>330</sup> This serves to show that legislation in this regard is indeed required as the courts are seeking some guidelines in the implementation of class actions and this need will increase as non-constitutional class actions increase.

### **3.8 The future of product liability class actions in terms of the CPA**

It is noted that class actions, however necessary, are seen as a threat to businesses, especially large businesses, by critics.<sup>331</sup> However De Vos' view that in today's "mass-oriented" society, there is a need for class actions which can no longer be ignored, is

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<sup>325</sup> Project 88 (1998) 70.

<sup>326</sup> Project 88 (1998) 49.

<sup>327</sup> *Ibid.*

<sup>328</sup> Project 88 (1998) 50.

<sup>329</sup> Project 88 (1998) 89.

<sup>330</sup> Cassim & Sibanda 603.

<sup>331</sup> De Vos W (2012) 756.

favoured in my opinion, seeing as the one of the aims of the CPA is to provide efficient protection for consumers.<sup>332</sup>

Activities such as mass production, importation and mass supply of goods to large groups of consumers could cause situations where harm can be caused to many consumers by the same wrongful act or the same supplier. In these instances a product liability class action would be necessary and perhaps the only effective manner in which to grant access to justice effectively to a whole affected group or class.

In the *Pioneer Foods*-case, Van Zyl AJ found there to be difficulty in defining a class as no contractual relationship could be found in this case, seeing as the consumers never purchased the product directly from any of the respondents and therefore no contractual relationship could be established.<sup>333</sup> However as far as class actions in terms of the CPA are concerned, this is not likely to be a hurdle as the definition of a consumer as discussed above, a user of goods, or recipient or beneficiary of services, irrespective of whether the user, recipient or beneficiary was a party to a transaction. A contractual relationship in this regard is in any event no longer a requirement where a cause of action is defined, and when a product liability class action is brought in terms of the CPA it can be brought on behalf of any affected group of end-users.<sup>334</sup>

Further in terms of the widened product liability provisions provided for in Section 61 of the CPA a consumer or a group or class of consumers may now allege liability without having to prove negligence. Before the implementation of the CPA, negligence had to be proved where defective goods, for example, were produced, where as a consumer now need only prove that there is a causal link between the harm suffered and the defective product.<sup>335</sup> According to Katzew & Mushariwa it is anticipated that there could be many parties caught in this widened net of liability.<sup>336</sup> From the perspective of a class action, it may be even easier to prove the causal link required, as it could be easier to prove that a large group of consumers were affected similarly by a defective product or inadequate

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<sup>332</sup> CPA.

<sup>333</sup> *The Trustees For The Time Being of The Children's Resource Centre Trust v Pioneer Foods (Pty) Limited* 2011 JDR 0498 (WCC) par 67 – 93.

<sup>334</sup> S4(1)(c) CPA.

<sup>335</sup> Cassim & Sibanda 595.

<sup>336</sup> Katzew & Mushariwa (2012) 1.



user instructions, for example, than to prove that one consumer suffered harm for that reason.

Levenstein is of the opinion that there is no doubt that consumers will soon join forces in targeting suppliers selling defective products.<sup>337</sup> Levenstein further notes that class actions may soon become a more popular form of litigation seeing as the Law Society has approved lawyers acting on a contingency basis and seeing as there is a reduction in litigation costs due to the costs being shared.<sup>338</sup>

Katzew & Mushariwa are further of the opinion that the newly widened net of liability will create the need for a new additional type of insurance, namely product liability insurance.<sup>339</sup> The concern is raised that such precautionary measures could affect the market and raise costs of products and services.<sup>340</sup> Jacobs *et al* shares this view.<sup>341</sup> Jacobs *et al specifically* notes that "...class actions may have major and adverse implications on suppliers' finances and public image. Suppliers therefore need sufficient liability insurance."<sup>342</sup> The outcome may therefore not be in line with the first goal of the CPA which is to "promote and advance the social and economic welfare of consumers in South Africa."<sup>343</sup>

In addition to the newly widened net of liability suppliers may also be faced with claims which could be of a higher amount than before the CPA came into effect, due to the fact that class actions can now be instituted by any member of, or in the interest of a class of affected persons, and where the action succeeds all members of the group or class will benefit.<sup>344</sup>

In his commentary on the judgement of *Children's Resource Centre Trust v Pioneer Food*<sup>345</sup> De Vos notes that class actions are viewed as a serious threat to many businesses, and that according to critics class actions have the potential to destroy

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<sup>337</sup> Levenstein (2012) 2.

<sup>338</sup> These factors were argued with reference to LAWSA Vol 8 Part 1 par 74.

<sup>339</sup> Katzew & Mushariwa (2012) 1.

<sup>340</sup> Mongalo & Nyembezi 373.

<sup>341</sup> Jacobs *et al* 306/508.

<sup>342</sup> *Ibid.*

<sup>343</sup> Cassim & Sibanda 595.

<sup>344</sup> Katzew & Mushariwa (2012) 8.

<sup>345</sup> *Children's Resource Centre Trust v Pioneer Food* 2012 ZASCA 182.

enterprises, since this judgment officially recognized the use of class actions in South Africa outside the ambit of the Constitution.<sup>346</sup>

The chief economist at Investment Solutions, Christ Hart said that while class actions have a positive purpose they may need to be closely monitored in order to avoid abuse and ward off exploitation.<sup>347</sup>

The secretary general of Advocates for Transformation recently commented stating that the general view of our courts has been to encourage class actions and that it is expected that the appeal of the *Pioneer Foods*-case may set a legal precedent in this regard.<sup>348</sup>

Finally it should be kept in mind that strict product liability and possible class actions enforcing these rights could have an effect on the economy, where there may be more hesitance in the field of product development.<sup>349</sup> These developments in the law could possibly have a different effect on different industries and may be more debilitating for some than for others.

### 3.9 Conclusion

In addition to a class action which can be brought before a court in terms of the Constitution, the CPA allows for a class action in terms of a similar provision, if other alternative remedies have been exhausted or a court intervenes if there is no other remedy provided by the CPA which would be sufficient to correct the relevant unfairness.

Although the *Pioneer Foods*-case cannot currently serve as authority for how a class action can be brought outside of the bill of rights, there is certainly a guideline towards the possibility of bringing such an action and the future appeal of this case may still establish a foundation for such class actions, which would in turn make the process easier for class actions to be brought in terms of the CPA.

The reasons for rejection of the applicants' claim in the *Pioneer Foods*-case cannot be considered as a hurdle as far as a class action for product liability brought in terms of the CPA is concerned, as the requirements regarding certification should be easy to meet in

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<sup>346</sup> De Vos W "Judicial activism gives recognition to a general class action in South Africa" 2013 TSAR 374.

<sup>347</sup> Cassim & Sibanda 603.

<sup>348</sup> Bauer 1.

<sup>349</sup> Katzew & Mushariwa (2012) 11.

such a claim, as long as the facts and legal question are uniform throughout the class, and it is not a merely similar set of facts with the same question of law. A supplier would however not need to provide a uniform defence, even on the same set facts.

In addition, where a class action in terms of the CPA and especially in terms of product liability, is brought before a court, proving the required causal link, will hardly amount to a hurdle as it would be easier to show that a large group of consumers were affected similarly by a defective product or inadequate user instructions, for example, than to prove that one consumer suffered harm for that reason.

In today's business world it would inevitably be impractical to bring an action on behalf of each affected consumer, to sue a supplier where many consumers have been harmed by the same product or service, and a class action would be the only effective way to achieve justice in such a scenario. Seeing as the web of product liability has been expanded to include distributors and importers in terms of the CPA, and the consumer need only prove a causal link between the harm and the defective product, the burden for implementation of a class action, defining a class and alleging liability is considerably lightened which could lead to an easy solution for a group of exploited consumers who have for example suffered due to defective or unsafe goods or even harm caused by inadequate end-user instructions.

With class actions bound to increase in the near future in South Africa, product liability could become a new threat to companies' profits.<sup>350</sup> This can be seen from the pay-outs which had to be made in the USA for class action claims related to product liability.<sup>337</sup> These costs together with reputation damage which accompanies such claims could be detrimental to even a supplier and should therefore be seriously considered.<sup>337</sup> Although the courts have been cautious in South Africa regarding product liability claims in the past, such claims can now easily be brought within the framework of the CPA.

Apart from being able to institute a class action more easily, the CPA has considerably lowered the required burden of proof, particularly in relation to product liability class actions, and it simultaneously has the effect of increasing the risk to suppliers, not only

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<sup>350</sup> Levenstein (2012) 2.

due to the lowered burden of proof but due to the possible consequences of a successful class action where a whole class of affected persons will benefit from a claim brought by for example, one affected person, or by one juristic person in the interest of an affected class.

However as noted above, the SCA thinks the theory of the “floodgates” being opened in terms of class actions, improbable, and further felt that difficulty of dealing with the administrative burden should be no excuse for not giving a large group or class which have been wronged relief. This thinking pattern should then surely also be applied in the case of class actions related to product liability and therefore the South African legal system should not fear the probable future increase of class actions but instead welcome the opportunity. It is however probable that the newly widened net of liability will create the need for product liability insurance, which could possibly in turn, affect the market and raise costs of products and services.

The types of claims which could possibly arise from the CPA in terms of product liability class actions, include motor vehicle recalls, defective pharmaceutical products, smoking diseases and even damage caused by power surges.<sup>337</sup>

It is of interest that even it is specifically recognised in the CPA that a supplier may also be an organ of state or an entity which is owned by the state and therefore a class action for product liability could even be brought against the state if the requirements are met.

The framework has definitely been set for class actions to be brought before a court in South Africa in terms of the CPA, the CPA does not stipulate or prescribe the correct procedure to follow when instituting a class action for non-constitutional rights such as those for the purpose of product liability. It may therefore be useful to conduct a comparative analysis in order to establish how this has been dealt with in another relevant jurisdiction.

## CHAPTER 4: COMPARATIVE STUDY

### 4.1 Introduction

Van Wyk points out that a global trend has been followed in South Africa to advance access to justice, and that the introduction of class actions to the South African legal system has been part of this trend.<sup>351</sup> It is therefore important to consider the global trend further and in particular to consider how other similar foreign jurisdictions have developed this trend in terms of the implementation of class actions.

Van Wyk further notes that in South African legislation there is no formal description of the different elements of class actions and that in order to fully examine how class actions function it is necessary to consider a foreign jurisdiction in which these elements have been developed within context.<sup>352</sup>

It is however important to consider that each foreign jurisdiction will have its own non-legal aspects which influence the procedures and framework for class actions in that jurisdiction.<sup>353</sup>

As discussed under delineations and limitations in the introductory chapter, a full international comparative study of class actions fall beyond the scope of this study and therefore this study will be limited to the examination of one specific foreign jurisdiction.

### 4.2 Selected Jurisdictions

Hurter points out that the South African Law Reform Commission used certain examples and notes on class action proceedings from the jurisdiction of Ontario in Canada as well as aspects from American class actions, in considering class actions in terms of South African law.<sup>354</sup>

Hurter however warns that American class actions have intricate rules which has resulted in litigation and this this is accordingly not a suitable jurisdiction to turn to for guidance, as

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<sup>351</sup> Van Wyk (2010) 17.

<sup>352</sup> Van Wyk (2010) 23.

<sup>353</sup> Hurter (2006) 503.

<sup>354</sup> *Ibid.*

these kinds of rules should be avoided in our legal system.<sup>355</sup> Further, due to these intricate rules, American class actions have often been criticized for being “unmanageable”.<sup>356</sup> The American class action system has in many ways developed procedurally in a manner unrelated to the basic South African class action procedure, however it may be of value to consider certain aspects of these developments.

Hurter points out that a good example for South Africa, of similar foreign provisions related to class actions is the Ontario Class Proceedings Act of 1992 (see Hurter 2000 CILSA 42).<sup>357</sup> Canadian class actions, specifically in Ontario, have had many more years of development than that of South African law.

Byers & Lang explain that nearly all Canadian provincial jurisdictions have enacted specific but different legislation, which governs the procedural aspects and oversight of class proceedings claims, but that most provincial class action legislation is modelled on either the legislative schemes of the statutes in either Ontario or British Columbia, which are generally similar with some subtle differences.<sup>358</sup>

Rodrigue points out that most product liability class actions in terms of Canadian law are instituted in Ontario, and therefore this chapter will specifically focus on the legislative process in the province of Ontario in Canada in examining class actions and more specifically product liability class actions within the foreign jurisdiction.<sup>359</sup>

Ontario further follows a model of “opting out” in terms of class actions which is similar to that of South Africa, whereas other Canadian jurisdictions, such as British Columbia, Newfoundland, and New Brunswick follow a mixture of “opting in” and “opting out” procedures, depending on whether the members of the class are resident within the jurisdiction.<sup>360</sup>

This chapter will therefore examine the outline and characteristics of class actions in terms of Canadian law, as well as the basis of class actions in the USA, in order to assess how these developments can be implemented or assist and to gain clarity on the

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<sup>355</sup> Hurter (2006) 500.

<sup>356</sup> Hurter (2006) CILSA 489.

<sup>357</sup> Hurter (2006) CILSA 500.

<sup>358</sup> Byers 3.

<sup>359</sup> Rodrigue (2012) 1.

<sup>360</sup> Byers 3.

subject in terms of South African law. It is important to examine the procedural differences between the jurisdictions as these foreign jurisdictions may offer the key to efficient implementation of class actions in South Africa.

### 4.3 USA (Federal Rule 23)

When the South African Law Reform Commission proposed the introduction of class actions in South Africa, it partly used the US system as a basis for guidance in this regard.<sup>361</sup> Hurter also notes that Federal Rule 23 class actions have over the years formed the basis of class actions in most jurisdictions.<sup>362</sup> Hurter mentions that the US model under Federal Rule 23 is a technical and complicated procedure.<sup>363</sup> It is therefore important to consider the basis of class actions in the USA, particularly Federal Rule 23 in the consideration of class actions in foreign jurisdictions.

The federal court system in the USA provides for collective action procedures, and most of the states have structured their proceedings accordingly, which is why it is important to focus on Federal Rule 23.<sup>364</sup>

#### 4.3.1 Certification

Certification plays an important role within Federal Rule 23 and it is therefore important to pass the certification step as soon as possible because there are certain consequences in terms of settlement and “opting out”, once a class is certified.<sup>365</sup>

In order to pass the certification step, the plaintiffs in a class action must prove that they have satisfied each of the elements in Rule 23(a), which McClure & Stokes suggest is a relatively easy threshold to pass.<sup>366</sup> The elements which must be proved are the following:

- i The class is so numerous that joinder of all members is impracticable;
- ii there are questions of law or fact common to the class;

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<sup>361</sup> De Vos W (1996) 639.

<sup>362</sup> Hurter (2008) 294.

<sup>363</sup> Hurter (2008) 295.

<sup>364</sup> McClure & Stokes 1.1.

<sup>365</sup> *Ibid.*.

<sup>366</sup> *Ibid.*.

- iii the claims or defences of the representative parties are typical of the claims or defences of the class; and
- iv the representative parties will fairly and adequately protect the interests of the class.<sup>367</sup>

In order to prove that claims or defences of the representative parties are typical of the claims or defences of the class, the plaintiffs have to prove that the evidence to the claims of class representative will be the similar to that of the other members of the class.<sup>368</sup>

McClure & Stokes give some examples where a class representative may be subject to defences which would not be applicable to the rest of the class and in such a case this requirement would not be passed.<sup>369</sup> In a product liability action for example a plaintiff may be subject to a defence such as product id or the failure to mitigate damages, which may not necessarily be applicable to the rest of the class.<sup>370</sup>

In order for the fourth requirement to be passed, namely that the class will be fairly represented, the plaintiffs must prove that the representative will “zealously protect the rights of the class members and does not have inherent conflicts of interest with the class members.”<sup>371</sup> An example of this is a scenario where some of the plaintiffs want immediate payment of damages and some do not, because some are currently suffering from a condition such as asbestos poisoning and other plaintiffs may in the future suffer from that condition but are presently injury free.<sup>372</sup>

Apart from the basic requirements in Federal Rule 23(a), Federal Rule 23(b) further contains three subsections, and a class action must fall into one of these categories in order to pass the certification step.<sup>373</sup> Federal Rule 23(b)(1) regulates the exceptional circumstances where there could be a risk of contradictory or incompatible judgments against the same defendant if it were not for the class action, 23(b)(2) regulates class actions for declaratory relief where the same outcome would satisfy the entire class and

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<sup>367</sup> Rule 23.

<sup>368</sup> McClure & Stokes 1.1.

<sup>369</sup> *Ibid.*

<sup>370</sup> *Ibid.*

<sup>371</sup> *Ibid.*

<sup>372</sup> *Ibid.*

<sup>373</sup> *Ibid.*



23(b)(3) regulates class actions for damages.<sup>374</sup> Claims for damages could differ vastly between plaintiffs and would therefore not always be suitable for a class action, which is why 23(b)(3) contains additional assurances, namely that “the questions of fact or law will predominate over any questions affecting only individual class members,” and that representation in the form of a class action would be the best procedure for fair resolution.<sup>375</sup> One of these additional assurances must be present in order to pass the certification step.<sup>376</sup>

Members of a class would know whether they form part of a class because a definition has to be created for a class during the certification process and this is usually formed from objective references.<sup>377</sup>

In terms of Federal Rule 23, a class action may be brought before a court by an individual, an association and a representative, whether a private representative or a government representative, if the requirements set out above, in terms of Federal Rule 23 can be met.<sup>378</sup> However, members of an association must have standing to bring the claim and that association must be the proper party to do so in a representative capacity.<sup>379</sup>

Under Federal Rule 23 it is therefore important that a certification decision be made early on in the proceedings, seeing as this decision impacts on different aspects of the case, such as “opting out”, settlements and future appeals.<sup>380</sup> “Opting out”, and quantum of damages will be further discussed below, but in terms of future appeals, there is provision for a discretionary appeal to the Circuit court of Appeals, once the certification step has been passed.<sup>381</sup>

#### 4.3.2 “Opting Out”

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<sup>374</sup> *Ibid.*

<sup>375</sup> McClure & Stokes 1.1.

<sup>376</sup> Hurter (2008) 296.

<sup>377</sup> *Idem* 3.3.

<sup>378</sup> *Idem* 1.7.

<sup>379</sup> *Idem* 2.1.

<sup>380</sup> *Idem* 1.1.

<sup>381</sup> *Ibid.*

Heffernan notes that the “opt out” procedures have been part of USA class actions since 1966 and have become a one of the typical characteristics of USA class actions.<sup>382</sup>

Under Federal Rule 23, plaintiffs are awarded the opportunity to “opt out” in class actions where damages are involved, after the certification decision has been made, and usually this is communicated together with the notice of certification being served.<sup>383</sup> Therefore in cases of claims for damages, where monetary relief is claimed, plaintiffs will normally have an opportunity to “opt out” before the merits of the matter have been decided.<sup>384</sup>

Normally a deadline would be used for “opting in” or “opting out”, depending which would apply.<sup>385</sup>

“Opting out” forms a defined function in class actions seeing as this step in the procedure defines the actual membership of the action as opposed to the potential or estimated membership.<sup>386</sup>

There are instances in US class actions, where the opportunity to “opt out” do not form part of the proceedings, however this is not included in Federal Rule 23 and is instead included in Federal Rule 23(b)(2).<sup>387</sup> These class actions where “opting out” is not an option involve pure declaratory or injunctive relief.<sup>388</sup> In situations where a class action typically involves both monetary and injunctive relief, the “opt out” procedures still apply, as the courts made in clear in the case of *Wal-Mart Stores Inc v Dukes*<sup>389</sup> that in any class action where monetary relief is claimed, there must be an opportunity for members of a class to “opt out”.

Briefly, the facts of this case, were that a female employee of Wal-Mart claimed that there was gender discrimination in the workplace and that she was accordingly not promoted.<sup>390</sup> During the class action which was subsequently brought, 1.6 million women who were employed at Wal-Mart and who were previously employed at Wal-Mart, were represented on the basis of alleged gender discrimination in remuneration and promotion

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<sup>382</sup> Heffernan 4.

<sup>383</sup> McClure & Stokes 1.1.

<sup>384</sup> McClure & Stokes 1.4.

<sup>385</sup> *Idem* 3.3.

<sup>386</sup> Heffernan 4.

<sup>387</sup> McClure & Stokes 1.4.

<sup>388</sup> *Ibid.*

<sup>389</sup> *Wal-Mart Stores Inc v Dukes* 131 Ct. 2541, 2558.

<sup>390</sup> *Ibid.*

practices at Wal-Mart stores.<sup>391</sup> The court agreed to determine the question of whether a class action seeking injunctive relief under Federal rule 23(b)(2) could also claim monetary damages.<sup>392</sup> Although the court ruled that this class could not be certified in this form, it further held that plaintiffs must be granted an opportunity to “opt out” where monetary relief is claimed.<sup>393</sup>

In a class action where the plaintiffs will be offered to opportunity to “opt out”, the court must approve the manner in which notice will be given to the class.<sup>394</sup> Examples of forms of notice would be email, mail, the internet or media such as television and radio, depending on the size and nature of the class.<sup>395</sup>

### 4.3.3 Discovery

The process of discovery varies in the USA, seeing as different federal and state courts often deal with disclosure of documentary evidence in varied and different ways, however a compulsory pre-trial conference is becoming more common where discovery and other timing and expectations are discussed and determined.<sup>396</sup>

### 4.3.4 Settlement

Once a class action has been certified under the requirements of Federal Rule 23, a settlement must be approved by the court at a fairness hearing so that the court can consider whether it is fair and whether other relief should be considered.<sup>397</sup> The court may at such a hearing approve or reject the proposed settlement but may not make amendments to the settlement that has been proposed.<sup>398</sup> At such a hearing any member of a class is afforded the opportunity to object if he or she believes that a settlement is not fair or is not reasonable.<sup>399</sup>

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<sup>391</sup> *Ibid.*

<sup>392</sup> *Ibid.*

<sup>393</sup> *Ibid.*

<sup>394</sup> McClure & Stokes 1.8.

<sup>395</sup> *Idem* 1.8.

<sup>396</sup> *Idem* 3.8.

<sup>397</sup> *Idem* 1.1.

<sup>398</sup> *Idem* 5.6.

<sup>399</sup> *Idem* 1.1.

In some instances a settlement is calculated according to a formula, taking into account each member's claim. In other instances a settlement amount is simply proportionally divided between members of a class.<sup>400</sup>

An important practice to note here, is that there can be an incentive payment in a settlement for the representatives of a class, even though this is still somewhat controversial.<sup>401</sup>

Morabito notes that in the USA, class actions are most frequently resolved by means of settlement.<sup>402</sup>

The possibility of settlement in a Federal Rule 23 class action is also a reason for making provision for "opting out", where monetary relief is claimed, so that members of a class do not have to be bound by a settlement or a class decision if they wish to "opt out" and preserve their individual claims, at an early stage.<sup>403</sup>

However members of a class also have a right to object to a settlement before it is made an order, and Morabito notes that the reaction of a class towards a settlement is one of the considerations which a judge should take into consideration in order to decide whether it is fair before making it an order.<sup>404</sup>

#### 4.3.5 Remedies

The type of remedy available would of course depend on the nature of the claim.<sup>405</sup> Claims involving punitive damages are generally less suitable for class actions as the claims themselves usually involve specific individualised facts.<sup>406</sup> Certain statutes in this jurisdiction limit damages or penalties available for certain types of claims, and the constitution itself limits punitive damages that can be awarded to a class.<sup>407</sup>

Typically in a class action in the USA damages will be awarded to members of a class proportionally to the loss which each member has suffered. When there is one amount or

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<sup>400</sup> *Idem* 5.5.

<sup>401</sup> *Ibid.*

<sup>402</sup> Morabito 3.

<sup>403</sup> McClure & Stokes 3.10.

<sup>404</sup> Morabito 4.

<sup>405</sup> McClure & Stokes 5.1.

<sup>406</sup> *Ibid.*

<sup>407</sup> McClure & Stokes 5.4.

fund awarded to a class as a whole, (such as in a settlement,) the amount must be apportioned, and typically each member of the class then has to prove their claim or the loss they incurred.<sup>408</sup>

#### 4.3.6 Appeal

It is often possible to ask the federal courts for permission to appeal a certification decision, and provision is made for this process, at the discretion of the courts.<sup>409</sup>

Morabito points out that after a USA class action certification decision, a member of a class may seek permission to file an appeal even when the class representatives are not willing or cannot do so.<sup>410</sup> Morabito further points out that unfortunately, Federal Rule 23 does not deal with the process of such appeals.<sup>411</sup> Although members of a class in the USA are not required to drive the litigation there are measures that exist to protect their interests and one of these is their ability to file appeals.<sup>412</sup> Morabito notes that in the USA a constitutional right of adequacy of representation comes into play, which is the right that members of a class can rely on if a class representative fails to file an appeal when an order was made which were not in the best interests of all members of a class.<sup>413</sup>

#### 4.3.7 Costs and Funding

Heffernan states that the success of the implementation of class action procedures in any jurisdiction may depend on the availability of funding and the methods by which fees are allocated.<sup>414</sup>

There is no provision in law specific to class actions in the USA, which requires the losing party to pay the legal costs of the other, however generally in USA courts, costs are awarded to the prevailing party.<sup>415</sup> There must be a contractual basis in order for fees to be shifted to another party, and courts normally do this according to a “lodestar”

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<sup>408</sup> *Ibid.*

<sup>409</sup> McClure & Stokes 3.10.

<sup>410</sup> Morabito 1.

<sup>411</sup> *Ibid.*

<sup>412</sup> Morabito 2.

<sup>413</sup> *Idem* 3.

<sup>414</sup> Heffernan 6.

<sup>415</sup> McClure & Stokes 6.1.

calculation, which is a reasonable amount of hours at a reasonable hourly rate, except where this is capped by statute.<sup>416</sup>

Class members who are not representative of the class, cannot be forced to pay costs, merely because they fall within a class.<sup>417</sup> It is for this reason that the representatives alone are held responsible for the legal costs, although the legal representatives usually cover the costs out of a recovery.<sup>418</sup> Contingency fee arrangements are however permissible.<sup>419</sup>

Costs are typically not capped and rather assessed at the end of the proceedings.<sup>420</sup> The costs recoverable by the prevailing party, are often set out in statute and sometimes statutes limit the fees of legal counsel for a specific claim.<sup>421</sup>

In the USA funding is not available for class actions, and third parties cannot fund litigation, except for the fact where a legal professional takes a claim on a pro bono basis.<sup>422</sup>

#### **4.3.8 Product liability**

McClure & Stokes make a conservative estimate by saying that there are thousands of class actions brought every year in the USA, and that these are largely dominated by securities, antitrust, employment, consumer protection and product liability litigation actions.<sup>423</sup>

An alternative specific to product liability class actions in the USA, is a specific method of coordination of pre-trial processes such as discovery over many jurisdictions, which is commonly known as multi-district litigation proceedings.<sup>424</sup> A panel of judges will typically consider whether these proceedings apply to a specific class action by considering the number of common questions, and weighing factors such as costs and convenience and

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<sup>416</sup> *Idem* 7.3.

<sup>417</sup> McClure & Stokes 6.2.

<sup>418</sup> *Ibid.*

<sup>419</sup> McClure & Stokes 7.3.

<sup>420</sup> McClure & Stokes 6.4.

<sup>421</sup> *Ibid.*

<sup>422</sup> McClure & Stokes 7.1.

<sup>423</sup> *Idem* 1.9.

<sup>424</sup> McClure & Stokes 1.1.

efficiency.<sup>425</sup> If it is decided by the panel that these proceedings should apply, then all the related cases filed at courts all over the country will be transferred to the multi-district litigation court.<sup>426</sup> Many states in the USA have joinder rules which make it possible for claims to be joined together in a single action and if there are 100 or more such claims these can be joined in a federal court.<sup>427</sup>

This is a very interesting solution to the challenges of a multi-jurisdictional country with different statutory application, however it would not be applicable to the South African product liability class actions.

Further certain states in the USA make specific provision in statutes for collective class actions related to consumer protection, which would to a large extent include product liability.<sup>428</sup>

It should also be noted that in the USA, that state has been trying to cut down on the possibilities for potential abuse in class actions.<sup>429</sup> As part of thereof, a consumer's product liability claims cannot be brought by a professional claimant purchasing the rights, with the goal of making a profit in the USA.<sup>430</sup> Further the US Congress has passed laws to limit the potential for abuse in class actions such as CAFA (Class Action Fairness Act, 2005), which lead to further specific limitations in federal and state courts.<sup>431</sup>

#### **4.4 Outline of class actions in Canada (Ontario)**

In the jurisdiction of Ontario a similar procedure is followed, to that of the current outline for class actions in terms of South African legislation.<sup>432</sup> The Canadian class actions in general are however less intricate than class actions in the USA because certain certification requirements were rejected by the Canadian Law Reform Commission.<sup>433</sup>

In Ontario, as in South Africa, a class action commences where a Plaintiff requests a court to issue what is called a "Statement of Claim" or a "Notice of Application" which is

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<sup>425</sup> *Ibid.*

<sup>426</sup> *Ibid.*

<sup>427</sup> *Ibid.*

<sup>428</sup> McClure & Stokes 1.2.

<sup>429</sup> *Idem* 9.2.

<sup>430</sup> *Idem* 8.2.

<sup>431</sup> *Ibid.*

<sup>432</sup> Sutton 1.

<sup>433</sup> Hurter (2008) 297.

issued by the court and served on the Defendants.<sup>434</sup> The title of these pleadings which commence the action must indicate “Proceedings under the *Class Proceedings Act, 1992*”.<sup>435</sup> In Ontario there are certain time periods for serving the notice which can be extended with the consent of both parties.<sup>436</sup> The Defendant has to serve a notice of defence within 20 days if served in Ontario, or 40 days if served elsewhere in Canada or in the USA or 60 days if served outside of this area entirely.<sup>437</sup> Thereafter the plaintiff has 10 days to once again reply.<sup>438</sup>

Where a few different class actions have been initiated in Ontario or in different provincial jurisdictions in Canada, which are related, a motion may be used to determine which of the actions will proceed and which will be stayed.<sup>439</sup>

It is interesting to note that the jurisdiction of Ontario makes provision for pre-certification determinations of law which may be made by the judge managing the case before the commencement of certification proceedings.<sup>440</sup> Prior to certification a defendant may wish to defend the action instituted by the class, on certain grounds.<sup>441</sup> If such an attack is successful costs are reduced and no time is wasted on the certification procedure.<sup>442</sup>

Where it seems obvious to a defendant that a plaintiff’s claim is particularly weak, the defendant may, prior to certification, bring a motion to strike off the statement of claim or to bring a motion for summary judgment to dismiss the action.<sup>443</sup>

Related proceedings which may be initiated by the defendant as a counterclaim could include, a claim against the plaintiff, a cross-claim against another co-defendant or a third party claim for contribution or indemnification where a third party may have been at fault.<sup>444</sup>

Harrison *et al* explains that it is interesting to note that a motion for summary judgment can be brought if the evidence can establish that there is no genuine issue which requires

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<sup>434</sup> *Ibid.*

<sup>435</sup> Rodrigue (2012) 1

<sup>436</sup> Harrison, Martineau & Hosseini 24.

<sup>437</sup> *Ibid.*

<sup>438</sup> *Ibid.*

<sup>439</sup> Sutton 1.

<sup>440</sup> Byers 7.

<sup>441</sup> *Ibid.*

<sup>442</sup> *Ibid.*

<sup>443</sup> Sutton 1.

<sup>444</sup> Harrison, Martineau & Hosseini 24.



a trial which will be decided upon the papers filed of everything which the parties would like to rely on during the trial.<sup>445</sup> In the case of product liability actions, where technical claims could require expert evidence, summary judgment could be granted in favour of the defendant where such evidence was not included at this early stage.<sup>446</sup> Experts are generally treated as witnesses, as opposed to being an advisor to the court, and may be examined by any party if the case proceeds to trial, given that the expert's report must be served on the opposing parties beforehand.<sup>447</sup>

#### 4.4.1 Certification

In order to institute a class action in Ontario, an application must be made to court to have the proceeding "certified", by a representative plaintiff who acts on behalf of the proposed class.<sup>448</sup>

The class action can be brought by an individual, but it is not clear whether a representative body may bring a class action proceeding on behalf of a class in the jurisdiction of Ontario.<sup>449</sup> In terms of Ontario's Class Proceedings Act, it is however possible for any legal person to act as a class representative.<sup>450</sup> In other Canadian provinces a representative body may bring a class action proceeding if a class would otherwise suffer serious prejudice.<sup>451</sup> Courts take an approach similar to that of the certification process in considering whether a class action brought by a representative body would be appropriate.<sup>452</sup> The court considers the cause of action, the common issues, whether the class is being represented in a fair manner and whether a representative action is preferable to an action being brought by an individual on behalf of a class.<sup>453</sup>

A class action in Ontario must pass the certification step in order to move forward, which consists of two phases.<sup>454</sup> First, the court must determine whether the case is appropriate

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<sup>445</sup> *Ibid.*

<sup>446</sup> *Ibid.*

<sup>447</sup> Harrison, Martineau & Hosseini 26.

<sup>448</sup> Byers 3.

<sup>449</sup> Byers 4.

<sup>450</sup> Harrison, Martineau & Hosseini Harrison, Martineau & Hosseini 24.

<sup>451</sup> *Ibid.*

<sup>452</sup> Byers 5.

<sup>453</sup> *Ibid.*

<sup>454</sup> Sutton 1.

for a class action.<sup>455</sup> When the first phase is passed favourably, the court can proceed to the second phase.<sup>456</sup> If the first phase is not passed and the court does not find that the case is appropriate for a class action, the plaintiff cannot assert the claim on behalf of a class.<sup>457</sup>

During the second phase of the certification step, the court must determine the scope of the Certification Order.<sup>458</sup> This means that *inter alia*, the following must be set out by the plaintiff: the representative plaintiff, the class description, the common issues must be identified, procedure for “opting out”, and the general plan for proceeding.<sup>459</sup>

Section 5(1) of the Class Proceedings Act in Ontario<sup>460</sup> outlines these requirements for certification in more detail. There is a five-part test which has to be met in order to pass this phase.<sup>461</sup> The courts will certify a class action if the following requirements are met:

- a) the pleadings or the notice of application discloses a cause of action;
- b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- c) the claims or defences of the class members raise common issues;
- d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- e) there is a representative plaintiff or defendant who:
  - i. would fairly and adequately represent the interests of the class.
  - ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

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<sup>455</sup> *Ibid.*

<sup>456</sup> *Ibid.*

<sup>457</sup> *Ibid.*

<sup>458</sup> *Ibid.*

<sup>459</sup> Sutton 1.

<sup>460</sup> Class Proceedings Act, section 5(1) (1992) Ontario.

<sup>461</sup> Byers 3.

- iii. does not have, on the common issues for the class, an interest in conflict with the interests of other class members.”<sup>462</sup>

In terms of the Class Proceedings Act of Ontario section 5(1)(b), there is therefore the requirement that a representative Plaintiff has to establish an identifiable class of at least two or more persons in order to achieve class proceeding certification, that the class must be identifiable and that the class must share ascertainable characteristics.<sup>463</sup> According to Byers & Lang, the court will be less favourable towards the certification of the class action, the fewer members there are in the class because in those cases there may be other alternatives to class action, such as the procedure of joinder.<sup>464</sup>

Byers & Lang explain that a class must be defined in such a way that those who are members will be entitled to the relevant rights, and therefore they must be identifiable.<sup>465</sup> The class may therefore not be defined too broadly and must be related to the issues of the claim and not the merits of the case.

In terms of section 5(1)I of the Class Proceedings Act of Ontario, the members of the class must raise common issues.<sup>466</sup> Byers & Lang point out the importance of this, in describing the common issues of members of a class as the “driving rationale” and the “critical component” in class actions.<sup>467</sup> In order to pass the certification step, common issues must be present within the class but these issues do not have to establish liability.<sup>468</sup> Byers & Lang see the criteria of common issues as an indicator that a class action will be the best way to advance the claims of the members of the class and that it is therefore the most preferable procedure.<sup>469</sup>

The Supreme Court of Canada has established grounds for determining whether common issues are present, in the case of *Western Shopping Centres v Dutton*.<sup>470</sup> In this case the

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<sup>462</sup> Class Proceedings Act, section 5(1) (1992) Ontario.

<sup>463</sup> Byers 3.

<sup>464</sup> *Ibid.*

<sup>465</sup> Byers 6.

<sup>466</sup> Class Proceedings Act, Section 5(1) (1992) Ontario.

<sup>467</sup> Byers 6.

<sup>468</sup> *Ibid.*

<sup>469</sup> *Ibid.*

<sup>470</sup> *Western Shopping Centres v Dutton* (2001) 2 S.C.R. 534 Saakname in italics???

Supreme Court of Canada set out useful grounds for determining whether the claims of class members raise common issues.<sup>471</sup>

Claims of class members do not need to be exactly the same, but must share a “substantial common ingredient”, in the issues that must be resolved.<sup>472</sup> The court further defined a common issue as an issue of which the resolution is necessary to resolve each member of the class’ claim.<sup>473</sup>

The court further gave guidance in that it isn’t necessary for members of the class to be placed in the exact same situation in terms of the defendant and that it is also not necessary for common issues to dominate non-common issues between members of the same class.<sup>474</sup> However due to the definition of a common issue given by the court, success for one class member would mean success for all, which is a further test given by the court, so that even though success would be shared, this may not necessary be shared to the same extent to common and non-common issues.<sup>475</sup> However where members of a class have conflicting interests, a class action should not be allowed.<sup>476</sup>

The court pointed out that the underlying question is whether granting certification for a class action on the point of common issues, will avoid duplication of facts or legal analysis of the courts.<sup>477</sup>

Byers & Lang state that all Canadian provinces except Quebec define common issues in the following manner:

- a) “common but not necessarily identical issues of fact; or
- b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.”<sup>478</sup>

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<sup>471</sup> Byers 4.

<sup>472</sup> *Ibid.*

<sup>473</sup> *Western Shopping Centres v Dutton* (2001) 2 S.C.R. 548.

<sup>474</sup> *Ibid.*

<sup>475</sup> *Western Shopping Centres v Dutton* (2001) 2 S.C.R. 549.

<sup>476</sup> *Idem* 548.

<sup>477</sup> *Idem* 550.

<sup>478</sup> Byers 4.

In determining whether common issues are present in terms of a class action, the court may also consider factors such as judicial economy and alternative procedural routes that may be a more speedy solution.<sup>479</sup>

Byers & Lang note that where a class action seems to require of the court to assess damages on an individualistic basis, it may reduce the chances of the court granting certification favourably.<sup>480</sup>

Rodrigue points out that during the certification step in Ontario, the courts have various tools at their disposal and a few options to consider instead of simply denying certification.<sup>481</sup> This makes the certification step a somewhat more flexible process.<sup>482</sup> Some of these options include allowing plaintiffs to amend their pleadings, to certify only some of the plaintiffs' claims, or to amend an order allowing certification.<sup>483</sup>

#### 4.4.2 “Opting out”

During this phase in Ontario, members of a class who do not wish to participate in the proceedings, may “opt out” of a class action.<sup>484</sup> If a member of a class does not choose to “opt out”, the judgment will bind them, however if a member does choose to “opt out” they will not be bound and will not be entitled to the benefits which may come from the judgment, but may individually claim against the defendants in their own action.<sup>485</sup>

Once the certification hurdle has been passed, the representative plaintiff must provide a notice to the members of the class.<sup>486</sup> This notice is usually provided in terms of a notice order by the court which sets out how the notice must be given to members of the class.<sup>487</sup> The courts consider certain requirements in determining this, such as the cost, the number of members and the nature of the relief sought.<sup>488</sup> Options which the court may consider include, for example, giving notice by mail directly to each member or

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<sup>479</sup> *Ibid.*

<sup>480</sup> Byers 7.

<sup>481</sup> Rodrigue (2012) 1.

<sup>482</sup> *Ibid.*

<sup>483</sup> *Ibid.*

<sup>484</sup> Sutton 1.

<sup>485</sup> Byers 4.

<sup>486</sup> *Idem* 5.

<sup>487</sup> *Western Shopping Centres v Dutton* (2001) 2 S.C.R. 548.

<sup>488</sup> *Ibid.*

publication in mass media.<sup>489</sup> The notice provided after certification has been granted is often the first time members of a class become aware of the class action and must therefore be drafted carefully in an informative way explaining rights and duties of the members of a class.<sup>490</sup>

In Ontario, this notice must also include information regarding the common issues which are to be determined during the class action proceeding as well as the time frame for “opting out” of the class action.<sup>491</sup>

#### 4.4.3 Discovery and documentary evidence

The process of discovery follows after the certification step in Ontario, includes the exchange of documents between parties, as well as various pre-trial motions and procedures which may be required.<sup>492</sup> This step includes oral discovery and documentary discovery.<sup>493</sup>

Documentary discovery, as in South Africa, commences after pleadings have closed, and the general requirements for discovery of documents are that they must be discovered when in the control or possession of the party who discovers them, with the exception of documents subject to privilege.<sup>494</sup> The rules of civil procedure in Ontario have been adapted to allow for e-discovery where there are large volumes of documents, especially since “documents” is defined broadly and includes electronic files.<sup>495</sup>

Oral discovery, includes the opportunity for any adverse party to question one representative of each party under oath.<sup>496</sup> Where questions cannot be answered, an undertaking may be given to provide the information later in writing.<sup>497</sup>

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<sup>489</sup> *Ibid.*

<sup>490</sup> *Ibid.*

<sup>491</sup> Byers 5.

<sup>492</sup> Sutton 1.

<sup>493</sup> Harrison, Martineau & Hosseini 24.

<sup>494</sup> Byers 7.

<sup>495</sup> Harrison, Martineau & Hosseini 24.

<sup>496</sup> *Ibid.*

<sup>497</sup> *Ibid.*

Prior to certification there is no obligation to provide a full list of documents, except for documents relevant to the issues of certification.<sup>498</sup>

#### 4.4.4 Common issues trial

Once a proceeding is “certified” as a class action, it proceeds to the common issues trial, which will be based on evidence.<sup>499</sup>

In this phase the importance of the certification phase is once again reflected in that the trial of the common issues is based on the common issues which were stipulated in the Certification Order.<sup>500</sup>

In the jurisdiction of Ontario, the proceedings are generally held before a single judge (as opposed to a jury) in the form of a trial.<sup>501</sup> The court plays the most important role in the proceedings, which are dictated by legislation.<sup>502</sup> Counsel will conduct the examination in court unless a party chooses not to be represented.<sup>503</sup> There is usually public access to the documents filed and to the courtroom and the judge may question parties and witnesses.<sup>504</sup>

In Ontario (but not in all Canadian jurisdictions) there is a segment of the bench devoted to class actions alone.<sup>505</sup> The judge which dealt with the certification step, may not preside the trial of common issues, unless both parties consent to this.<sup>506</sup>

An interesting point raised by Byers & Lang is the fact that it is possible to bring a “test” case as an individual claim before the court, to test the merits of the action without the complication of an actual class action.<sup>507</sup> The representative may depending on the outcome of the “test” case decide whether or not to institute a class action or may consider changes such as narrowing some of the issues.<sup>508</sup>

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<sup>498</sup> Byers 7.

<sup>499</sup> *Idem* 5.

<sup>500</sup> Sutton 1.

<sup>501</sup> Byers 6.

<sup>502</sup> *Ibid.*

<sup>503</sup> Harrison, Martineau & Hosseini 24.

<sup>504</sup> *Ibid.*

<sup>505</sup> Byers 6.

<sup>506</sup> *Ibid.*

<sup>507</sup> Byers 7.

<sup>508</sup> *Ibid.*

Harrison *et al* note that a trial in Ontario will typically consist of the following phases:

- a) “Opening statements by the parties;
- b) direct examination and cross-examination of the plaintiff’s witnesses;
- c) direct examination and cross-examination of the defendant’s witnesses; and
- d) closing statements.”<sup>509</sup>

#### 4.4.5 Settlement

Byers & Lang note that it normally takes several years for a class action procedure to progress all the way through trial, but that most class actions settle before the trial stage and that it is actually rare for a class action to proceed to trial in Ontario.<sup>510</sup>

Harrison *et al* can be quoted on the following: “Although product liability class actions have been described as the ‘quintessential’ class action, few have progressed past the certification or authorisation stage to trial of the merits as most cases settle after the certification or authorisation stage.”<sup>511</sup> Wasted time and costs is therefore also a problem in the jurisdiction of Ontario and in Canada as a whole. An example of this is the case of *Andersen v St Jude Medical Inc*,<sup>512</sup> (a medical device product liability claim) the class action was instituted in 2001 and 12 years later there has still been no conclusion, as the case progressed through trial and was finally dismissed by the court, to which the representative plaintiff appealed.<sup>513</sup>

Court approval is required for settlement of a class action which has commenced, and this approval will be granted if the court finds the settlement fair and reasonable to all parties involved.<sup>514</sup> A settlement notice must be distributed in a similar manner to the certification notice to all members of the class, announcing the settlement and members of the class may then choose whether to “opt out” of the settlement.<sup>515</sup>

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<sup>509</sup> Harrison, Martineau & Hosseini 24.

<sup>510</sup> Byers 7.

<sup>511</sup> Harrison, Martineau & Hosseini 24.

<sup>512</sup> *Andersen v St Jude Medical, Inc*, 2012 ONSC 3660.

<sup>513</sup> Harrison, Martineau & Hosseini 24.

<sup>514</sup> Byers 8.

<sup>515</sup> *Ibid.*



Blyers & Lang note that in considering whether a settlement is fair and reasonable, a court must consider the following factors:

- a) “likelihood of recovery or success;
- b) amount or nature of discovery evidence;
- c) settlement terms and conditions;
- d) recommendation and experience of counsel;
- e) future expense and likely duration of litigation;
- f) recommendation of neutral parties, if any;
- g) number of objectors and nature of objections;
- h) presence of good faith and the absence of collusion;
- i) degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and
- j) information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.”<sup>516</sup>

#### **4.4.6 Individual issues hearing**

The class action will proceed to an individual issues hearing phase if there was no settlement and no dismissal as outcome at the common issues trial.<sup>517</sup>

Separate hearings are held after the common issues trial, in order to deal with issues specific to each class member, such as causation or damages or both.<sup>518</sup> Individual damages are for example, assessed and addressed in this phase, through individual

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<sup>516</sup> Byers 8.

<sup>517</sup> Byers 3.

<sup>518</sup> Harrison, Martineau & Hosseini 24.

hearings.<sup>519</sup> An alternative to separate trials or individual hearings in this phase may be alternative dispute resolution sessions.<sup>520</sup>

#### 4.4.7 Remedies

In the jurisdiction of Ontario, the remedies that may be ordered by the court in terms of a class action are not limited. Options which the plaintiffs may seek include monetary relief, declaratory orders or injunctive relief.<sup>521</sup>

##### 4.4.7.1 Damages

Legislation in the jurisdiction of Ontario does provide for aggregate damages to be determined, which Byers & Lang describe as an increasingly common request in class actions.<sup>522</sup>

Members of a product liability class actions are entitled to claim compensatory damages for pecuniary (past or future financial or material loss) and non-pecuniary losses (pain and suffering, loss of life expectation, etc.).<sup>523</sup>

Punitive damages may also be claimed in a class action, but usually only in exceptional circumstances of malicious conduct by the defendant, and are only awarded after other compensatory damages have been determined.<sup>524</sup> Even so, when awarded, they are awarded modestly.<sup>525</sup> Harrison *et al* explains that this is because fault usually amounts to inadvertent negligence, rather than malevolent actions.<sup>526</sup> In product liability cases specifically, punitive damages have only really been applicable where it could be proved that a manufacturer was extremely careless and in this manner breached the Canadian Consumer Protection Act.<sup>527</sup>

##### 4.4.7.2 Quantification of damages

Pecuniary losses can be claimed even when they cannot be precisely calculated and can include claims such as loss of profit, repair costs or medical expenses.<sup>528</sup> The aim here, in

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<sup>519</sup> Sutton 1.

<sup>520</sup> Byers 3.

<sup>521</sup> Byers 5.

<sup>522</sup> *Ibid.*

<sup>523</sup> Harrison, Martineau & Hosseini 27.

<sup>524</sup> Byers 7.

<sup>525</sup> *Ibid.*

<sup>526</sup> Harrison, Martineau & Hosseini 27.

<sup>527</sup> Byers 7.

calculating pecuniary loss, is as in South Africa, is to place the plaintiff back in the position in which he was beforehand.<sup>528</sup>

The award of non-pecuniary losses have been capped by the Supreme Court of Canada, with a strict limitation which today sits at about C\$343 000.<sup>529</sup>

Damages can be quantified by various methods for a class action.<sup>530</sup> For example, monetary award can be awarded to members of a class proportionally, damages can be assessed individually for each class member after a general finding of liability (although this could reduce the chances to certification, could be costly and time consuming), or the court could require individual actions to be brought to determine individual subsequent issues of liability.<sup>531</sup> Court may also allow defendants to pay a percentage of profits or revenue as compensation.<sup>532</sup>

#### 4.4.8 Options for appeal

There are provincial, territorial and federal courts in Canada.<sup>533</sup> The federal courts' jurisdiction is limited to certain matters specified by legislation, but include certain specialised fields such as intellectual property, competition law, admiralty and taxation. Appeals from the federal courts, are heard by the Federal Court of Appeal.<sup>534</sup>

In each Canadian province, as in Ontario, there is a Superior Court which has inherent jurisdiction for most civil matters (except where excluded by statute).<sup>535</sup> In Ontario, claims of C\$50,000 or less may appeal only to the divisional court, from where they may appeal with leave to the court of appeal, and from there, to the Supreme Court.<sup>536</sup>

From the Federal Courts of Appeal, the provincial and territorial courts Superior courts, all appeals are heard by the Supreme court of Canada, which is the ultimate court of appeal in the country.<sup>537</sup>

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<sup>528</sup> Harrison, Martineau & Hosseini 27.

<sup>529</sup> *Ibid.*

<sup>530</sup> Byers 7.

<sup>531</sup> *Ibid.*

<sup>532</sup> Harrison, Martineau & Hosseini 24.

<sup>533</sup> *Ibid.*

<sup>534</sup> Byers 7.

<sup>535</sup> *Ibid.*

<sup>536</sup> Harrison, Martineau & Hosseini 30.

<sup>537</sup> Byers 7.

The representative plaintiff (or another individual with leave of the court) may appeal to the certification order, as well as the judgment to the common issues trial or any other monetary relief judgment, but there is no right to appeal to an order granting individual claims.<sup>538</sup> Where the court has refused to grant certification, there is an automatic right to appeal, but in order for a party to appeal to the court granting certification, leave of the court must be obtained.<sup>539</sup>

#### 4.4.9 Prescription

Prescription runs against individual claims as per the normal rules of civil litigation, and this prescription is suspended for individual members who form part of a class when a class action commences, and resumes if for example, the certification is not granted by the court, the proceeding is dismissed, the member opts out of the proceeding, an amendment is made during certification which excludes the member, or if the class proceeding is settled.<sup>540</sup>

#### 4.4.10 Costs

In terms of costs the general litigation rules in terms of which the “loser” pays applies equally to class actions.<sup>541</sup> Due to the nature of a class action all members of a class cannot be held responsible for costs where they did not choose to “opt in”. In Ontario, the general rule is that the representative plaintiff will be responsible for adverse costs, but the representative plaintiff is usually indemnified by counsel.<sup>541</sup> Individual members will be liable for costs arising from individual issues hearings and individual claims.<sup>541</sup>

Where damages are favourably awarded to a class in proportion to their claims, after a general finding of liability, counsel for the class may apply for an order of an agreement in terms of which the legal costs are distributed across the class in proportion to their award.<sup>542</sup> Where the court approves such an agreement, the court will also determine the amount to be paid towards counsel.<sup>543</sup> This becomes more tricky where damages are awarded on an individual basis and not to a class in proportion to their claims, in which

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<sup>538</sup> *Ibid.*

<sup>539</sup> Byers 5.

<sup>540</sup> *Idem* 7.

<sup>541</sup> *Idem* 9.

<sup>542</sup> Byers 7.

<sup>543</sup> *Ibid.*

case the legal costs can only be collected from the members of the class after all claims have been decided.<sup>544</sup> Where a member of class decides to discontinue their claim, the member will not be responsible for legal costs.<sup>545</sup> As a consequence, the costs will have to be shared by fewer members.

Contingency fee arrangements are also permitted in Ontario, when approved by the court.<sup>546</sup>

#### 4.4.11 Funding

In Ontario, as in South Africa, there have been concerns regarding the access to justice and the costly procedure of a class action.<sup>547</sup> Here the government has created funds to assist class actions, such as the Class Proceedings Fund which provides a form of disbursement support for plaintiffs, instead of simply providing legal costs.<sup>548</sup> In addition the fund helps defendants to pay legal costs awarded to the “loser” where judgment was in favour of a class of plaintiffs.<sup>549</sup> Harrison *et al* however argue that funding is usually not readily available to class actions related to product liability claims.<sup>550</sup>

The courts have held that third party funding is also permitted in terms of a class action when approved by the court beforehand.<sup>551</sup> Courts in Ontario have of late been approving third party funding for class actions, but in doing so they have been examining the terms of the agreements for funding.<sup>552</sup> The courts seem to require that the plaintiffs should remain in control of the litigation and settlement process.<sup>553</sup>

According to Byers & Lang third party funding through case law in the past often means that the third party finances the litigation and thereafter receives a percentage of the damages if the action is successful.<sup>554</sup>

#### 4.4.12 Alternative methods of dispute resolution

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<sup>544</sup> *Ibid.*

<sup>545</sup> *Ibid.*

<sup>546</sup> Byers 9.

<sup>547</sup> *Andersen v St Jude Medical, Inc*, 2012 ONSC 3660.

<sup>548</sup> *Ibid.*

<sup>549</sup> *Ibid.*

<sup>550</sup> Harrison, Martineau & Hosseini 24.

<sup>551</sup> *Andersen v St Jude Medical, Inc*, 2012 ONSC 3662.

<sup>552</sup> Harrison, Martineau & Hosseini 27.

<sup>553</sup> *Idem* 24.

<sup>554</sup> *Andersen v St Jude Medical, Inc*, 2012 ONSC 3660.

Byers & Lang state that courts have identified the following alternatives to class actions, to save costs, as class actions may not always be the most suitable solution:

- a) “Intervention by non-parties;
- b) Appointment of a single judge to manage two or more cases;
- c) Consolidation of cases;
- d) Determination of issues before trial;
- e) Representation orders;
- f) Test cases;
- g) Settlement and
- h) Referral to an ombudsperson.”<sup>555</sup>

#### **4.5 Product liability class actions in Ontario**

Byers & Lang name product liability law as one of the types of law which is more conducive to class proceedings than others, and therefore product liability legislation often provide for class actions as a remedy.<sup>556</sup>

##### **4.5.1 Product liability legislation in Ontario**

There are several statutes that govern product liability and act as a legal warranty of quality in Ontario and throughout Canada, such as the Canada Consumer Product Safety Act (CCPSA), the Canada Consumer Protection Act and certain industry sectors such as food and drugs, which are regulated separately by the federal government and provincial governments.<sup>557</sup>

The CCPSA’s objective is to protect consumers from products which are unsafe and defective, although “consumer products” in this sense excludes products that are governed by other federal legislation, such as food, drugs, natural health products,

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<sup>555</sup> Byers 10.

<sup>556</sup> *Ibid* 10.

<sup>557</sup> Harrison, Martineau & Hosseini 27.

medical devices, cosmetics, pest control products, animal feed, seeds, fertilisers, explosives, firearms, ammunition, automotive industry, aeroplanes, ships and animals.<sup>558</sup>

The CCPSA does not provide individuals with a remedy but provides for product recalls which could very well result in product liability class actions.<sup>559</sup> Harrison *et al* notes that many class actions have in the past originated from a product recall where a defect had been identified. In terms of the CCPSA, there is also a possibility of criminal liability for a company's directors, officer's or agents, which can include imprisonment or fines of up to C\$5 million. Criminal liability is also a possibility in terms of the Criminal Code of Canada, the Competition Act, the Hazardous Products Act, the Food and Drugs Act and the Consumer Packaging and Labelling Act which contain provisions concerning many different products and in terms of which there are many different regulatory product standard requirements.

The consumer protection legislation as a whole in Canada protects consumers with regard to safety of goods, labelling, and misleading advertising.

#### 4.5.2 Product liability class actions in Ontario

Rodrigue highlights the importance of class actions in the jurisdiction of Ontario by stating that it is by grouping claims into a class action, and only by proceeding in this manner that claimants can ever pursue a claim for damages suffered against large companies.<sup>560</sup> Harrison *et al* adds to this in saying that product liability law is well established in Canada and in Ontario as a manner of compensating those who have suffered damages due to a defect in a product, whether in the manufacture, design or distribution.<sup>561</sup>

Rodrigue is further of the opinion that product liability cases are very well suited for certification within this jurisdiction.<sup>562</sup> The reasons for this is firstly, that these cases in Ontario share a common core which relates to whether the product is defective, and secondly, share a common element as to the knowledge of the defendant related to this defect.<sup>563</sup>

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<sup>558</sup> *Ibid.*

<sup>559</sup> *Ibid.*

<sup>560</sup> Rodrigue (2012) 1.

<sup>561</sup> Harrison, Martineau & Hosseini 30.

<sup>562</sup> Rodrigue (2012) 1.

<sup>563</sup> *Ibid.*

Rodrigue notes that almost all product liability cases proceed as class actions and that such actions exist in all the Canadian provinces but that most of the class action activity occurs in Ontario.<sup>564</sup>

In Canada, class actions are a developed part of the legal system and over three hundred new class actions are filed annually of which about a hundred would be purely in the pharmaceutical sector.<sup>565</sup> The vast majority of these instituted actions easily pass the certification step and only one pharmaceutical class action has been denied certification in Ontario since 1992.<sup>566</sup> It must further be kept in mind that most Canadian class actions settle, and that out of all these Canadian pharmaceutical class actions, only one trial has ever been held.<sup>567</sup> Rodrigue is however of the opinion that the trend is changing and more product liability trials are expected in the future.<sup>568</sup>

In the jurisdiction of Ontario, the certification of a product liability class action is seen as an important step to promoting access to justice and the courts are expected to consider and exhaust many options before denying certification outright for a product liability class action.<sup>569</sup> However in order to pass the certification step in that jurisdiction it is important that the plaintiffs must be able to show some common basis in fact, as well as the other certification criteria as set out by the Class Proceedings Act above.<sup>570</sup>

Recent developments in Product Liability class actions such as in the case of *Arora v Whirlpool*,<sup>571</sup> suggests that the trend may have changed to a position where the courts apply greater scrutiny to, and in more cases refusing, certification.<sup>572</sup>

In the *Whirlpool*-case<sup>573</sup> a class action was formed because certain models of Whirlpool washing machines seemed to accumulate mould and other toxins inside the washing machines, which could cause damages in the form of repair costs, discarded clothing due to foul odour and health problems in consumers.<sup>574</sup> The plaintiffs alleged that Whirlpool

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<sup>564</sup> Rodrigue (2012) 2.

<sup>565</sup> *Idem* 5.

<sup>566</sup> *Ibid.*

<sup>567</sup> *Ibid.*

<sup>568</sup> *Ibid.*

<sup>569</sup> Rodrigue (2012) 1.

<sup>570</sup> *Ibid.*

<sup>571</sup> *Arora v Whirlpool Canada* 2012 ONSC 4642.

<sup>572</sup> Rodrigue (2012) 5.

<sup>573</sup> *Arora v Whirlpool Canada* 2012 ONSC 4642.

<sup>574</sup> *Idem* 4643.



was negligent in the design of the washing machines and negligently failed to warn consumers of the design defects.<sup>575</sup> The Plaintiffs further alleged that Whirlpool breached a warranty and that Whirlpool's failure to disclose the defects is a misrepresentation.<sup>576</sup> The court dismissed certification and held that the pleadings failed to disclose a reasonable cause of action because the plaintiffs did not ask the court to correct defects in material or workmanship but rather alleged that there was a defect in the design.<sup>577</sup> The court found that Whirlpool's warranty did not cover design defects and expressly excluded implied warranties.<sup>578</sup>

Prior to this decision, and in particular prior to 2012, product liability class proceedings (in particular medical product liability class proceedings) had been seen as a plaintiff-friendly case type, where certification was almost assured for plaintiffs instituting a class action against manufacturers and distributors of allegedly defective products.<sup>579</sup> Rodrigue is however of the opinion that despite this development in Canadian case law, it is not a given that product liability class actions such as negligence actions for economic loss for non-dangerous products are excluded.<sup>580</sup>

Further in terms of product liability proceedings, a class action has been instituted against the large tobacco companies, (*Cecilia LeTourneau v JTI-MacDonald Corp, Imperial Tobacco Canada Limited, Rothmans Benson and Hedges Inc.*)<sup>581</sup>, for 17.8 billion Dollars.<sup>582</sup> The plaintiffs claimed that tobacco companies had known for decades that their products are harmful and addictive.<sup>583</sup> The question in this trial is now whether the companies adequately warned smokers of the dangers of cigarettes. This was the first time that tobacco companies had gone to trial in a civil suit in Canada.<sup>584</sup> This class action was however certified, whereas the first product liability class action which was brought in Canada against tobacco companies (*Caputo et al v Imperial Tobacco et al.*<sup>585</sup>) in 1995 did

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<sup>575</sup> *Ibid.*

<sup>576</sup> *Arora v Whirlpool Canada* 2012 ONSC 4643.

<sup>577</sup> *Idem* 4646.

<sup>578</sup> *Ibid.*

<sup>579</sup> Eizenga, Ishai I & Schatz (2013) 2.

<sup>580</sup> Rodrigue (2012) 1.

<sup>581</sup> *Cecilia Letourneau v. JTI-Macdonald Corp, Imperial Tobacco Canada Ltd., and Rothmans, Benson & Hedges Inc.*, District of Montreal, PQ No. 500-06-000070-983 (2012).

<sup>582</sup> Howells (2012) 198.

<sup>583</sup> *Ibid.*

<sup>584</sup> Reuters (2012) 1.

<sup>585</sup> *Caputo et al v imperial Tobacco Ltd, Rothmans, Benson & Hedges Inc. and RJR-Macdonald Inc.* 1995, Statement of claim, Ontario Court, General Divison. File No. 95-CU-82186 5.

not pass the certification hurdle due to it being too broad to meet the class action criteria and for not having a workable litigation plan.<sup>586</sup> Product liability class action certification has therefore already come a long way in terms of defining the procedure as well as the requirements. It is interesting to note that the judge however in the 1995 case commented that although certification was denied the plaintiffs' lawyers would not be liable for costs because, "Access to justice and other laudable goals of the CPA (Class Proceedings Act 1992) will only be served as long as there are counsel willing to take risks in order to advance the cause of plaintiffs of modest means or modest claims."<sup>587</sup>

Seeing as the issue was already raised by Levenstein<sup>588</sup> that examples of product liability class actions to be brought in terms of the South African CPA could easily include smoking diseases where harm was caused, this Canadian case serves to substantiate the argument as a prime example of the opportunities which already exist in terms of South African legislation but have not yet been utilised purely due to a lack of certainty regarding procedural implementation.

In the jurisdiction of Ontario, class actions, specifically product liability class actions, are much further developed (since their inception was in 1992) than in South Africa, even though the legal framework of Ontario is not as lenient as that of the CPA in the South African legislation, and the burden on the Plaintiff is somewhat higher in the jurisdiction of Ontario.

#### **4.6 Key trends of class actions in foreign jurisdiction of Ontario**

Rodrigue has identified several key trends in Canada's class actions.<sup>589</sup> The first is that there has been a generally low threshold for leave to grant certification in Canada.<sup>590</sup> This has been discussed in more detail above, but it is interesting to note that it is mentioned as a trend.

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<sup>586</sup> Howells (2012) 198

<sup>587</sup> *Caputo et al v imperial Tobacco Ltd, Rothmans, Benson & Hedges Inc. and RJR-Macdonald Inc.* 1995, Statement of claim, Ontario Court, General Division. File No. 95-CU-82186 7.

<sup>588</sup> Levenstein 1.

<sup>589</sup> Rodrigue (2012) 11.

<sup>590</sup> *Ibid.*

The second trend noted by Rodrigue, is that it is possible for global classes to be formed in terms of Canadian class actions, and that all the plaintiffs or defendants need not necessarily reside within Canada.<sup>591</sup>

Rodrigue notes that there is a third trend which is the participation of third party investors.<sup>592</sup> This has also been discussed in more detail above, but it is interesting to note that Rodrigue points out as an example of this, the Sino-Forest class action which was funded by two large pension plans.<sup>593</sup> In this case it was alleged that the Sino-Forest Corporation publically reported misleading statements about its financial affairs.<sup>594</sup>

Another interesting trend pointed out by Harrison *et al*, is the use of restitutionary remedies, such as unjust enrichment and disgorgement in accordance with the theory of the “waiver of tort”.<sup>595</sup> According to Harrison *et al*, this has been noted as a familiar issue in most class actions dealing with product liability in Ontario in recent years.<sup>596</sup> There has been debate in recent years on whether “waiver of tort” can exist as an independent cause of action or whether it is dependent on proving that an underlying tort does exist.<sup>597</sup> The argument is that if “waiver of tort” is an independent action, the plaintiff thereby relinquishes the right to recover damages by tort and instead sues on the basis of restitution, alleging that the defendant has benefitted from wrongful conduct, irrespective of whether the plaintiff suffered damages.<sup>598</sup> Harrison *et al* remarked that the doctrine has not yet been fully tested by the courts as it has only been addressed at pleadings where the court has held that it can only determine the issue where a full record of facts will be available.<sup>599</sup> In the case of *Andersen v St Jude Medical*,<sup>600</sup> it was anticipated that the Ontario Superior court would finally give some clarity on the doctrine, but instead the court found that the plaintiff had not fully established wrongdoing and dismissed the action.<sup>601</sup>

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<sup>591</sup> *Ibid.*

<sup>592</sup> *Ibid.*

<sup>593</sup> *Ibid.*

<sup>594</sup> *The Trustees of the Labourers' Pension Fund of Central & eastern Canada v Sino-Forest Corporation* 2012 ONSC 2937.

<sup>595</sup> Harrison, Martineau & Hosseini 27.

<sup>596</sup> Harrison, Martineau & Hosseini 24.

<sup>597</sup> *Ibid.*

<sup>598</sup> Harrison, Martineau & Hosseini 27.

<sup>599</sup> *Idem* 24.

<sup>600</sup> *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660.

<sup>601</sup> *Idem* 3662.

## 4.7 Conclusion

After examining the relative trends and legislation in the selected jurisdictions, it can be concluded that the introduction of class actions to the South African legal system has indeed been part of the global trend to advance access to justice. The introduction of product liability class actions in South Africa, as seems to be the global trend, will undoubtedly further this global trend.

Having considered class actions within each foreign jurisdiction's unique framework, it can be concluded that there are indeed many similarities to the manner in which class actions have been implemented thus far in South Africa, and that there are several instances where we may look toward these selected foreign jurisdictions for guidance in the way forward. The following concluding chapter will outline the possible application of these principles to South Africa, and will also leave us with some suggestions regarding the way forward.

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS TAKING INTO ACCOUNT COMPARATIVE RESEARCH

### 5.1 Introduction: Possible application of principles to South African class actions

Seeing as class actions have been developing in the jurisdiction of Ontario, as well as in the US, for many years, we should take note of these developments which have aided them in these foreign jurisdictions and may therefore be of use to us. The following part of this chapter therefore highlights interesting observations in terms of the comparative study of the selected foreign jurisdictions, which are in line with the key objectives of this research and applies those observations to the current position in South Africa, so as to make suggestions for possible improvement. Each of the research objectives are addressed here in turn.

#### 5.1.1 Application of foreign “opting out” procedures to South Africa

“Opting out” is an important procedural step in all of the foreign jurisdictions considered and forms an important part of defining the membership of a class, instead of simply having a potential membership.<sup>602</sup>

The alternative to the “opting out” mechanism is the “opting in” mechanism, however the “opt out” procedure seems to be the more popular procedural choice in the jurisdictions considered because it produces larger classes and it prevents the accidental exclusion of members of a potential class which is very possible when members have to “opt in” to a class.<sup>603</sup> “Opting out” therefore promotes access to justice.

Similar to the developments and recommendations which we have seen in South African class actions<sup>604</sup>, the jurisdiction of Ontario, as well as Federal Rule 23 in the USA, makes use of the “opt out” system, which means that a judgment will bind all members of a class unless those members specifically choose to “opt out”.<sup>605</sup> This therefore creates the need for notification regarding the class action.

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<sup>602</sup> See 4.3.2 above.

<sup>603</sup> See 2.6 above.

<sup>604</sup> Currie & De Waal 88.

<sup>605</sup> Byers 4.

In the jurisdiction of Ontario as well as in the USA, the representative plaintiff must set out the procedure for “opting out”, which must be approved by the court.<sup>606</sup> This will include the notice making members of a class aware of the class action and the fact that they have the right to “opt out”. The considerations to take into account in such a case have not quite been formulated by South African courts, and it may therefore be useful to consider that in Ontario courts considered the cost, the number of members and the nature of the relief sought to determine how the notice should be served on a class.<sup>607</sup> In a large class action it may therefore for example, not be viable to give notice by mail to each member of a class but rather to publish a notification in mass media. The unique circumstances such as reliability of mail delivery and whether members may reside in rural areas in South Africa, should also be taken into consideration.

It is also important to note that the content of such a notice should provide members with the information necessary to make an informed decision on whether they would like to “opt out” or not. As in Ontario, an “opt out” notice in South Africa should therefore contain the time frame for “opting out” as well as the issues common to the class which are to be determined during the class action.<sup>608</sup>

These procedural steps in Ontario tie in well with Hurter’s recommendations and the conclusion drawn in paragraph 2.6 above. Although it has not yet been clarified which approach South African courts are adopting, it makes sense when considering the procedures followed in Ontario as well as Federal Rule 23, that the choice to “opt out” of a class action can only be made after the certification process, and therefore such an “opt out” notice should be released to members or to the public, after the certification step has been passed, otherwise the impression could be created that members of a class have no choice in participation, even before certification issues have been decided.<sup>609</sup> As explained in 4.3.2 above, in terms of Federal Rule 23, the courts in the USA have to approve the notification and medium used, in order to see that all relevant factors are considered and that it is suitable to the class. The same procedure should be applicable to South Africa.

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<sup>606</sup> Sutton 1.

<sup>607</sup> *Western Shopping Centres v Dutton* 2001 2 S.C.R. 548.

<sup>608</sup> Byers 5.

<sup>609</sup> Hurter (2010) 412.

Following the guidelines as set out in Ontario, and the process followed in the USA under Federal Rule 23, which seems to tie in well with the current situation in South Africa, it is therefore clear that an “opt out” notice should be a process which takes place after the application has been brought before a court and the court has given leave for the application to proceed on behalf of an affected class. It is also clear from the USA guidance, that it is important to have an “opt out” process in place, especially where monetary relief is sought which will bind all the plaintiffs.

South Africa however still lacks guidance in terms of “opting in” or out in terms of class actions in a non-constitutional matters before the court, and it has also been submitted as a suggestion that consumers should be able to choose between an “opt in” and “opt out” notice,<sup>610</sup> although it makes sense to suggest, as the courts have found in the USA (and as set out in 4.3.2 above), that provision should be made for consumers to “opt out” where they may be bound by a judgment where monetary relief is claimed, and could affect individual members of the class financially.

### **5.1.2 Application of certification procedures to South Africa**

In South Africa, the certification step has been recognised as an important step to promoting access to justice and this is a similarity to the jurisdiction of Ontario as well as Federal Rule 23.<sup>611</sup>

A class action in Ontario, and in the USA under Federal Rule 23, must as in South Africa, pass the certification step in order to move forward,<sup>612</sup> and <sup>613</sup> and similarly, in all three jurisdictions the merits need not be considered in order to pass the certification step.<sup>614</sup>

Another similarity in terms of the Class Proceedings Act of Ontario, a representative Plaintiff has to establish an identifiable class of at least two persons in order to pass the certification step.<sup>615</sup> In South Africa, the courts have remarked in terms of Constitutional class actions that an affected class or group may be defined where the class is large

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<sup>610</sup> Cassim & Sibanda 603, see 3.5 above.

<sup>611</sup> See 2.5 above.

<sup>612</sup> Sutton 1.

<sup>613</sup> McClure & Stokes 1.1.

<sup>614</sup> Sutton 1.

<sup>615</sup> See 4.4.1 above.

enough that joinder will not be practical.<sup>616</sup> Although not clearly spelled out, this may therefore be slightly more limiting than Ontario due to the fact that South African courts may not be willing to certify a class where joinder could still be used effectively.<sup>617</sup> The courts did however give some clear guidance as to the certification step and emphasised the importance thereof in South Africa, as a tool to provide the courts with increased control while leading to decreased costs and fewer delays at a later stage.<sup>618</sup> Similarly, in the USA, this is further defined by the fact that in order to pass the certification step, a class must be defined as being so numerous that joinder of all members is “impracticable”.<sup>619</sup> This leans towards the guidance so far given by the South African courts, and may mean that in South Africa as in the USA the certification step will not be passed where joinder could instead practically be used as an alternative.

Another similarity found both in South Africa and Ontario, is that the class which is being established must be identifiable in order to pass certification. It has been explained that a class must be defined in such a way that those who are members will be entitled to the relevant rights, and therefore they must be identifiable.<sup>620</sup> The class may therefore not be defined too broadly and must be related to the issues of the claim and not the merits of the case. In South African constitutional class actions, this aspect had also featured and the argument of practical impossibility to define a class had been addressed, where the courts found that such difficulties in terms of practicality should not hinder justice.<sup>621</sup> The requirement does however stand in South Africa, seeing as difficulty has been experienced in identifying a class which did lead to the inability to pass the certification hurdle.<sup>622</sup> Although all members of a class need not be identified individually in order to define a class, it may be necessary to be able to identify them for notification purposes.<sup>623</sup>

Recent developments in Product Liability class actions such as in the case of *Arora v Whirlpool*,<sup>624</sup> suggests that the trend may have changed to a position where the courts apply greater scrutiny to, and in more cases refusing, certification.<sup>625</sup>

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<sup>616</sup> See 2.5 above.

<sup>617</sup> Byers 3.

<sup>618</sup> See 2.5 above.

<sup>619</sup> Federal Rule 23.

<sup>620</sup> Byers 6.

<sup>621</sup> See 2.5 above.

<sup>622</sup> See 3.5 above.

<sup>623</sup> See 2.5 above.

<sup>624</sup> *Arora v Whirlpool Canada* 2012 ONSC 4642.



Further, when a class is being established in Ontario there must be ascertainable characteristics common to the class, in order to pass the certification step, although these issues do not have to establish liability at this stage.<sup>626</sup> In Ontario this has been described as the critical component of class actions. This is similar in terms of Constitutional class actions in South Africa, where a fundamental constitutional right has been infringed or threatened.<sup>627</sup> In terms of the guidelines which have till now been given by the SCA for defining a class, either the question of law or the facts, or questions of both fact and law, have to be common to the whole class.<sup>628</sup> In terms of these guidelines the entire class had to be affected by the same factual situation and not merely a similar factual situation where the same question of law finds application.<sup>629</sup> In the USA, in terms of Federal Rule 23, the same requirement is applicable, namely that there must be questions of law or fact which is common to the class in order for the class to be certified.<sup>630</sup>

In terms of product liability class actions in South Africa, given the current guidance, the situation is therefore similar to that of the USA rather than that of that Ontario, in that the facts or legal question must be uniform throughout the class, and that there must be a causal link, even though a supplier would however not need to provide a uniform defence, even on the same set facts.<sup>631</sup>

In Ontario courts have defined common issues in terms of three groups of similarity and in determining whether common issues are present in terms of a class action, the court may also consider factors such as judicial economy and alternative procedural routes that may be a more speedy solution.<sup>632</sup>

The Supreme Court of Canada has set out useful grounds for determining whether the claims of class members raise common issues.<sup>633</sup> Briefly, in terms of these grounds which have been discussed, a common issue may be seen as an issue which when resolved, would solve the issue of each member in the class, even the common issue need not

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<sup>625</sup> Rodrigue (2012) 5.

<sup>626</sup> Byers 3.

<sup>627</sup> See 2.5 above.

<sup>628</sup> See 2.5 above

<sup>629</sup> See 2.4 above.

<sup>630</sup> See 4.3.1 above.

<sup>631</sup> See 3.9 above.

<sup>632</sup> See 4.4.1 above.

<sup>633</sup> See 4.4.1 above.

dominate the issues which are not common.<sup>634</sup> If any conflicting interests are present however, certification will not be passed.

Further of interest between the jurisdictions is the comparison in the allowance for a representative to bring an action on behalf of an affected group or class. In Ontario, the class action can be brought by an individual, but it is not quite clear whether a representative body may bring a class action proceeding on behalf of a class.<sup>635</sup> In other Canadian provinces a representative body may bring a class action proceeding if a class would otherwise suffer serious prejudice.<sup>636</sup> In the USA under Federal Rule 23, and individual, association, private representative or government representative may bring a class action proceeding.<sup>637</sup> Federal 23 states as one of the requirements for certification that the representative will fairly and adequately protect the interests of the class.<sup>638</sup> In order for a representative to be seen as adequate, the court must be sure that the rights of the class will “zealously” be protected and that there will be no conflict of interest between the members and the representative.<sup>639</sup> Similarly, in South Africa the legislation and the courts have provided some guidance. In terms of Constitutional class actions section 38 of the Constitution clearly lists the persons who may approach the court, amongst which is listed “anyone acting as a member of, or in the interest of, a group or class of persons” which is therefore a rather lenient definition.<sup>640</sup> Therefore in South African Constitutional class actions, even a juristic person may bring a claim on behalf of an affected class if it is acting in the interest of a the affected class.<sup>641</sup> The courts have also give procedural guidance which confirms that a class representative will be given authority to act on behalf of a class by means of certification.<sup>642</sup> Equally, in terms of class actions brought under the CPA in South Africa, any interested party, including a juristic person, may bring such a class action on behalf of an affected class.<sup>643</sup> This definitely broadens the possibilities considerably, in comparison to those of Ontario or under Federal Rule 23. Interestingly, in the USA it is required that the representative must be a

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<sup>634</sup> See 4.4.1 above.

<sup>635</sup> Byers 4.

<sup>636</sup> See 4.4.1 above.

<sup>637</sup> See 4.3.1 above.

<sup>638</sup> See 4.3.1 above.

<sup>639</sup> McClure & Stokes 1.1.

<sup>640</sup> See 2.2 above.

<sup>641</sup> See 2.7 above.

<sup>642</sup> See 2.5 above.

<sup>643</sup> See 3.4.1 above.

member of the class and must himself or herself have a claim typical to those of the class.<sup>644</sup> This is not the case in South Africa and guidance from the courts have pointed out that the representative of a class may be an ideological plaintiff such as a non-governmental organisation or a public interest law firm which itself has no claim.<sup>645</sup>

When certification has been passed in Ontario, the representative plaintiff must provide a notice to the members of the class.<sup>646</sup> The court usually determines how this notice must be conveyed (after considering certain factors) to the members of a class by way of a court order.<sup>647</sup> Similarly, in the USA, the court would also determine how such a notice must be conveyed, although the notice is only a requirement in cases where monetary relief is claimed and otherwise optional.<sup>648</sup> The situation is similar to that of Ontario in South Africa where courts have ordered an “opt out” notice to be distributed in Constitutional class action matters. South African courts could however take note of the considerations which courts in Ontario have applied in order to determine which type of media would be most suitable to convey the message.<sup>649</sup> In Ontario the “opt out” notice must be drafted in an informative manner, must contain the time frame for “opting out” of the class, the rights and duties of each member of the class and must include information regarding the common issues which are to be determined.<sup>650</sup> These guidelines may be useful considerations in South Africa.

In terms of certification provisions, Ontario’s Class Proceedings Act could rightly be seen as a guideline for the certification step in terms of our CPA section 4(1) which provides the opportunity for such class actions to be instituted.

Ontario Class Proceedings Act	South Africa CPA
The Class Proceedings Act in Ontario <sup>651</sup> outlines requirements for certification in this jurisdiction. The courts will certify a class action if the following requirements	In terms of section 4(1) of the CPA a list of persons can approach a court if it can be alleged that a consumer’s rights have been infringed, impaired or threatened or that

<sup>644</sup> See 2.5 above.

<sup>645</sup> See 2.5 above.

<sup>646</sup> See 4.4.2 above.

<sup>647</sup> See 4.4.2 above.

<sup>648</sup> See 4.3.2 above.

<sup>649</sup> See 4.4.2 above.

<sup>650</sup> See 4.4.2 above.

<sup>651</sup> Class Proceedings Act, (1992) Ontario.

<p>are met:</p> <p>a) “the pleadings or the notice of application discloses a cause of action;</p> <p>b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;</p> <p>c) the claims or defences of the class members raise common issues;</p> <p>d) a class proceeding would be the preferable procedure for the resolution of the common issues; and</p> <p>e) there is a representative plaintiff or defendant who,</p> <p style="padding-left: 20px;">i. would fairly and adequately represent the interests of the class,</p> <p style="padding-left: 20px;">ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and</p> <p style="padding-left: 20px;">iii. does not have, on the common issues for the class, an interest in conflict with the interests of other class members.</p>	<p>prohibited conduct has occurred. The list reads as follows:</p> <p>a) A person acting on his or her own behalf;</p> <p>b) An authorised person acting on behalf of another person who cannot act in his or her own name;</p> <p>c) A person acting as a member of, or in the interest of, a group or class of affected persons;</p> <p>d) A person acting in the public interest, with leave of the court, as the case may be and</p> <p>e) An association acting in the interest of its members.<sup>652</sup></p>
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Seeing as, in terms of legislated certification guidelines in product liability class actions, South Africa could benefit from the more detailed legislated guidelines in other jurisdictions, a further comparison can be made between the certification guidelines in Ontario and those in terms of Rule 23 which have been discussed above:

<p>Ontario Class Proceedings Act:</p>	<p>USA Federal Rule 23:<sup>653</sup></p>
<p>The Class Proceedings Act in Ontario<sup>654</sup> outlines requirements for certification in this jurisdiction. The courts will certify a class action if the following requirements are met:</p>	<p>In order to pass the certification step, the plaintiffs in a class action must prove that they have satisfied each of the elements in Rule 23(a).</p> <p>The elements which must be proved are the</p>

<sup>652</sup> De Vos W (2012) 740.

<sup>653</sup> See 4.3.1 above.

<sup>654</sup> Class Proceedings Act, (1992) Ontario section 5(1).

<p>a) “The pleadings or the notice of application discloses a cause of action;</p> <p>b) There is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;</p> <p>c) The claims or defences of the class members raise common issues;</p> <p>d) A class proceeding would be the preferable procedure for the resolution of the common issues; and</p> <p>e) There is a representative plaintiff or defendant who,</p> <p>i. Would fairly and adequately represent the interests of the class,</p> <p>ii. Has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and</p> <p>iii. Does not have, on the common issues for the class, an interest in conflict with the interests of other class members.”</p>	<p>following:</p> <p>i. “The class is so numerous that joinder of all members is impracticable;</p> <p>ii. There are questions of law or fact common to the class;</p> <p>iii. The claims or defences of the representative parties are typical of the claims or defences of the class; and</p> <p>iv. The representative parties will fairly and adequately protect the interests of the class.”<sup>655</sup></p> <p>Federal Rule 23(b) further contains three subsections, and a class action must fall into one of these categories in order to pass the certification step:</p> <p>i. Federal Rule 23(b)(1) applies where there could be a risk of contradictory or incompatible judgments against the same defendant if it were not for the class action;</p> <p>ii. 23(b)(2) applies to class actions for declaratory relief where the same outcome would satisfy the entire class; and</p> <p>iii. 23(b)(3) regulates class actions for damages.<sup>656</sup></p>
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When visually comparing the certification requirements of the two foreign jurisdictions, it is clear that the jurisdiction of Ontario has somewhat clearer and more defined certification requirements even though the underlying principles of the requirements are the same.

The certification guidelines provided by the Ontario Class Proceedings Act could therefore possibly be seen as the most useful guideline, containing the kinds of detailed guidelines which South African law is still lacking with regards to the implementation steps of class actions, particularly product liability class actions, such as the implementation of the certification process.

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<sup>655</sup> Federal Rule 23.  
<sup>656</sup> *Ibid.*

As part of the recognition of the importance of promoting access to justice, the jurisdiction of Ontario as well as Federal Rule 23 step have adopted a somewhat more flexible approach in the certification step than what we have envisaged so far in terms of South African class actions, even though the CPA allows a wider approach in terms of representation of a class.

In South Africa we should keep in mind that there are options which a court can consider instead of simply denying certification. In Ontario for example, courts have the option of allowing plaintiffs to amend their pleadings prior to certification, to certify only some of the group or class of plaintiffs' claims, or to amend an order allowing certification.<sup>657</sup> It is especially important to implement such a practical approach in a jurisdiction in which class actions are developing and are at an infancy stage, and implementation of such alternatives should therefore be an important consideration for South African courts.

### **5.1.3 Application of the principles of funding and other considerations to save costs**

Class actions are a lengthy process and where South African courts are involved, this could mean a costly process. It is therefore important to consider methods of funding class actions. Further the implementation of class actions under the CPA and in order to support product liability litigation as a whole, may depend on the methods chosen for the allocation of legal fees and expenses among different parties, as well as the funding available for class actions.<sup>658</sup>

One of the ultimate goals in making use of the procedure of class actions, is to save costs. Morabito points out that this is seen as an advantage to class actions in the USA.<sup>659</sup> A class action is seen as an avoidance of the duplication of judicial processes, which ultimately has an economic benefit, and also distributes the litigation costs in order to create easier access to justice for members of a class who would otherwise perhaps not even have had the opportunity of instituting an action on their own.<sup>660</sup>

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<sup>657</sup> Rodrigue (2012) 1.

<sup>658</sup> See 4.3.7 above.

<sup>659</sup> Morabito 1.

<sup>660</sup> *Ibid.*

In Ontario, there has been similar concerns regarding the costly nature of such proceedings and the fact that it could inhibit access to justice.<sup>661</sup> In the USA, there is no public funding for class actions, and third parties are not allowed fund class actions.<sup>662</sup> The government in Ontario on the other hand, has created funds to assist class actions, aiding in disbursement support for plaintiffs, and aiding the defendant in the payment of legal costs. This may not necessarily be the most practical approach for class actions in South Africa. The courts in Ontario have however also allowed third party funding, even where the third party receives a percentage of damages awarded if the action was successful.<sup>663</sup> This has not been viewed in negative light in Ontario due to the fact that the third party promotes a means of access to justice.

In South Africa, there has not yet been any clear guidance in this regard, although the South African Law Reform Commission suggested that the general rule should apply in terms of cost awards, and that therefore it is most likely costs would follow the suit, which is also the common practice in the USA.<sup>664</sup> The CPA has however not shed any light on the matter of cost awards either and it is therefore up to the courts to create clear guidelines. It may therefore once again be useful to look at the guidance provided by the courts in Ontario.

Heffernan argues that applying the conventional litigation methods regarding cost allocation where the unsuccessful party covers the litigation costs of the other may be oversimplified in the case of class actions, which tend to be a lot more complicated and expansive than ordinary litigation.<sup>665</sup> Heffernan makes a valid argument here that where a representative plaintiff alone runs the risk of being liable for all the legal costs of both parties, for the entire class action, the huge financial risk could impede the development of class actions as representative plaintiffs may be unwilling to take the risk.<sup>666</sup>

In terms of funding, it is however possible for any interested party to bring a class action on behalf of an affected class, in terms of the CPA.<sup>667</sup> In my opinion, this could imply that

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<sup>661</sup> See 4.4.11 above.

<sup>662</sup> See 4.3.7 above.

<sup>663</sup> See 4.4.1 above.

<sup>664</sup> See 3.4 above.

<sup>665</sup> Heffernan 6.

<sup>666</sup> *Ibid.*

<sup>667</sup> See 3.4 above.

third party funding is therefore a possibility in terms of product liability class actions in South Africa.

In South Africa it may however not be practical to award legal costs to the plaintiffs should a class action fail, seeing as it may cause reluctance for a person to act in the interests of a class of persons for fear of failure and large legal costs, or if costs are to be awarded to members of the class themselves, it may in my opinion cause reluctance to participate in the first instance and incentive to “opt out”. In the USA, members of a class are never responsible for costs if they are not the representative members.<sup>668</sup> It is therefore clear that in South Africa, members of a class should not be held responsible for costs where they did not choose to “opt in”. A fund established by the government for this purpose, as in Ontario would be an ideal from the consumer’s perspective but may be a currently rather unrealistic one in South Africa.

Further it is the general rule in Ontario as in the USA, in terms of cost awards that the representative plaintiff will be responsible for adverse costs, but the representative plaintiff is usually indemnified by counsel in this regard.<sup>669</sup> This may be problematic in terms of South African class actions due to the fact that plaintiffs’ lawyers may be hesitant to take on class action matters if there is a risk of costs being awarded if the action does not succeed.

Another interesting finding is that where damages are favourably awarded to a class in proportion to their claims in Ontario, counsel for the class may apply for an order of an agreement in terms of which the legal costs are distributed across the class in proportion to their award.<sup>670</sup> In the USA on the other hand, there must be a contractual basis in order for fees to be shifted to another party (usually recovered by the prevailing party), and this is normally done by taking into account a reasonable amount of hours at a reasonable hourly rate.<sup>671</sup> Whether this method could practically be applied in South Africa remains debatable. It may become problematic where damages are not awarded to a class proportionate to their claims, and the consideration would then be whether counsel’s legal costs should still be paid in proportions equal to that of the award or to their claims. The

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<sup>668</sup> See 4.3.7 above.

<sup>669</sup> See 3.4 above.

<sup>670</sup> See 3.4 above.

<sup>671</sup> See 4.3.7 above.



principle that the prevailing party can recover costs, does however exist in South African courts, and may equally be applied in class action cases.

Where there are further individual issues hearings in Ontario, after the certification step has passed, individual members are liable for costs arising from individual issues hearings and individual claims.<sup>672</sup> This seems to be a fair approach and may be suitable to South Africa.

Further alternative methods of dispute resolution should be considered in terms of class actions in order to save costs. In South Africa, courts have identified the following alternatives to class actions, to save costs<sup>673</sup>:

- a) Intervention by non-parties;
- b) Appointment of a single judge to manage two or more cases;
- c) Consolidation of cases;
- d) Determination of issues before trial;
- e) Representation orders;
- f) Test cases;
- g) Settlement and
- h) Referral to an ombudsperson.<sup>674</sup>

In the USA, mediation and other non-binding forms of dispute resolution are also options which are available to a class, however in order to enter into arbitration the parties would have to have had a previous agreement which makes provision for arbitration.<sup>675</sup>

Another interesting alternative mentioned above is that of a test case. In the jurisdiction of Ontario it is possible to bring a “test” case as an individual claim before the court, to test the merits of the action in order to decide whether or not to institute a class action on a

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<sup>672</sup> See 3.4 above.

<sup>673</sup> See 4.4.12 above.

<sup>674</sup> *Ibid.*

<sup>675</sup> McClure & Stokes 8.4.

certain set of facts.<sup>676</sup> It is however debatable whether this would in fact save costs if applied in South Africa, seeing as it may duplicate costs if the representative does decide to bring the actual action before the court after the test case proceeding.

Another cost saving method is the provision for pre-certification determinations in Ontario, where a defendant may wish to defend the action instituted by the class prior to certification, which could save costs if the defence proves to be successful. This could be a valuable cost saving consideration for South African product liability class actions.

Out of all of these alternatives which could be considered for South African class actions, the alternative which would probably aid the most in cost saving, would be early settlement. This would not encourage the procedural development of class actions in South Africa, but seeing as most cases in both the USA and in Ontario settle before the trial ends, this should still realistically be considered as a goal in South African class actions.<sup>677</sup>

In a manner similar to that in which an “opting out” notice is considered in Ontario, the courts in Ontario have provided detailed guidelines in terms of the procedure for settlement.<sup>678</sup> The South African courts should consider these factors, and encourage settlement. In particular it could be useful to apply the idea of a settlement notice, should a product liability case settle, which would be distributed in a similar manner to the manner in which the “opt out” notice was distributed, to all members of the class.<sup>679</sup> The courts in Ontario have further identified a specified list of factors to determine whether a settlement is fair and reasonable, before such a settlement is to be made a court order.<sup>680</sup> It may be equally useful for South African courts to identify and consider such factors, which are the following:

- a) likelihood of recovery or success;
- b) amount or nature of discovery evidence;
- c) settlement terms and conditions;

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<sup>676</sup> See 4.4.2 above.

<sup>677</sup> See 4.3.6 above.

<sup>678</sup> See 4.5 above.

<sup>679</sup> *Ibid.*

<sup>680</sup> *Ibid.*

- d) recommendation and experience of counsel;
- e) future expense and likely duration of litigation;
- f) recommendation of neutral parties, if any;
- g) number of objectors and nature of objections;
- h) presence of good faith and the absence of collusion;
- i) degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and
- j) information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.”<sup>681</sup>

#### **5.1.4 Application of award and remedies in product liability class actions in South Africa**

In the jurisdiction of Ontario, the remedies that may be ordered by the court in terms of a class action are not limited. Legislation in both jurisdictions provide for aggregate damages to be determined, which Byers & Lang describe as an increasingly common request in class actions.

Further in both foreign jurisdictions damages can be quantified by various methods for a class action such as proportional award or individual assessment.

In all the jurisdictions considered in this study, the plaintiffs may typically seek relief in the form of monetary relief, declaratory orders or injunctive relief, and the type of relief claimed will once again depend on the type of claim.<sup>682 683</sup> Typically, as stated with regard to USA class actions, but probably applicable to all jurisdictions, claims involving punitive damages are generally less suitable for class actions as these types of claims often involve individualised facts.<sup>684</sup> In Ontario punitive damages may only be claimed in a class action in exceptional cases and are only awarded after other compensatory

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<sup>681</sup> Byers 8, see 4.5 above.

<sup>682</sup> See 4.4.7 above.

<sup>683</sup> See 4.3.5 above.

<sup>684</sup> See 4.3.5 above.

damages have been determined.<sup>685</sup> Punitive damages should therefore not play a large role in South African class actions, however, proportional award, even in the case of settlements seems to be the generally accepted method which will also apply well to South Africa.

In South Africa, and as permitted by the legislation in Ontario, it may also be a good idea for aggregate damages to be determined in a class, which could also potentially save costs and time. Members of a product liability class action in South Africa, should in my opinion, as in Ontario be entitled to claim compensatory damages for pecuniary (past or future financial or material loss) and non-pecuniary losses (pain and suffering, loss of life expectation, etc.)<sup>686</sup> Restitutionary remedies have been common in product liability class actions in foreign jurisdictions for many years, often on a proportional basis (proportional to the loss which each member has suffered, as is the common application in the USA).<sup>687</sup> Another idea introduced by the South African courts in order for consumers to be compensated by a supplier of consumer goods such as bread, is for the product to be offered at a calculated discount for a specific period of time.<sup>688</sup>

It may be of value to take the following additional factors into consideration in terms of procedural application, seeing as the legal framework of Ontario in terms of Product Liability law seems not to be as lenient as that of the CPA in the South African legislation, and the burden on the Plaintiff is somewhat reduced in South Africa, which opens up the legislation to more opportunities regarding product liability class actions.

### **5.1.5 Other procedural application to South Africa**

#### **5.1.5.1 Similarity of proceedings**

In the jurisdiction of Ontario, the court proceedings are generally held very similar to that in South Africa and a trial is held before a single judge (as opposed to a jury) who may question parties and witnesses.<sup>689</sup> <sup>690</sup> In comparison, in the USA, the trial can be held before either a judge or a jury depending on the nature of the claims, as the right to be

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<sup>685</sup> See 4.4.7 above.

<sup>686</sup> *Ibid.*

<sup>687</sup> See 4.10 above.

<sup>688</sup> See 2.5 above.

<sup>689</sup> Byers 6.

<sup>690</sup> Harrison, Martineau & Hosseini 24.

heard before a jury cannot be excluded for certain types of claims. In the USA, arbitration can also not be excluded for class actions.<sup>691</sup>

#### **5.1.5.2` Discovery**

In Ontario procedures have been adapted to allow for e-discovery where there are large volumes of documents, and provision is also made for oral discovery.<sup>692</sup> In the USA different state and federal courts apply different procedures but provision has been made for e-discovery and a pre-trial conference often determines how this should be handled. These principles all seem to fit in well with general rules of civil procedure in South Africa.

#### **5.1.5.3 Timing**

In Ontario most class actions settle before the trial stage but when they do proceed to the trial stage, it normally takes several years for a class action procedure to progress all the way through trial.<sup>693694</sup> In the USA timing varies greatly depending on the state and court in which the trial is to proceed<sup>695</sup>, so in this aspect once again Ontario seems to be a closer fit to the procedural situation in South Africa.

It may be somewhat unrealistic to expect the procedural time lag in South Africa to disappear, if jurisdictions where the processes have been refined, such as Ontario, still struggle with similar challenges. In order to prevent wasted time and costs it is probably a good idea to encourage settlement.

#### **5.1.5.4 Settlement**

In the USA as well as in Ontario, a settlement must be approved by the court at a fairness hearing so that the court can consider whether it is fair once a class action has been certified.<sup>696</sup> Although there may be different methods of calculating settlement amounts in different jurisdictions and different courts, the basic principles remains the same, and should similarly apply to South Africa. A class action settlement must be considered by

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<sup>691</sup> McClure & Stokes 3.2.

<sup>692</sup> Harrison, Martineau & Hosseini 24.

<sup>693</sup> See 4.4.3 above.

<sup>694</sup> Byers 7.

<sup>695</sup> McClure & Stokes 3.9

<sup>696</sup> See 4.3.5 and 4.4.5 above.

the court to ensure that it is fair towards all members of a class and not simply to the representative plaintiffs.

### 5.1.6 Options for Appeal

In Ontario as in South Africa, the representative plaintiff may appeal to the certification order, as well as the judgment to the common issues trial or any other monetary relief judgment, but there is no right to appeal to an order granting individual claims.<sup>697</sup> Similarly in the USA class actions the certification decision may be taken on appeal at the discretion of the courts.<sup>698</sup>

In the USA it is interesting to note that even though members of a class were not involved in the litigation, all members of a class have a right to apply for leave to appeal where an order has been made which was adverse to some members of a class, and the class representative failed to file an appeal.<sup>699</sup> This process may very well in future find application in South Africa as well.

In Ontario however, unlike the USA, there is an automatic right to appeal where certification has been refused.<sup>700</sup> In South Africa this is likely to be governed in terms of the standard rules of civil procedure and it is unlikely that an exception such as an automatic right of appeal would be made for the certification decision of product liability class actions.

## 5.2 Conclusion

In South Africa we have familiarised ourselves with the institution of class actions in terms of the Constitution as set out in Chapter 2, and even though we do not yet have a clear procedural legislative outline, certain guidelines and outlines of the procedures have been established by the courts. We have also observed as outlined in Chapter 3, that there is certainly current guidance by the courts towards the possibility of bringing a class action in terms of the CPA, The time is now ripe to expand these guidelines to class actions

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<sup>697</sup> Byers 7.

<sup>698</sup> See 4.3.6 above.

<sup>699</sup> *Ibid.*

<sup>700</sup> *Ibid.*

brought under the CPA, particularly product liability class actions, and for guidance in this regard we have looked at the guidance of foreign jurisdictions.

In the jurisdiction of Ontario, class actions, specifically product liability class actions, are much further developed than in South Africa, even though the legal framework in terms of product liability class actions in Ontario is not as lenient as that of the CPA in the South African legislation, and the burden on the Plaintiff seems to be somewhat more weighted in the jurisdiction of Ontario. In the USA, even though the certification procedure seems somewhat more refined under Federal Rule 23, class actions are still largely impacted by the state specific statutes which is further defined by the type of claim brought before the court. It would therefore be safe to say that Ontario provides us with a better and more realistic comparative example for South African courts than the situation in the USA.

The legal framework in terms of product liability class actions in Ontario does not seem as lenient towards consumers as that of the CPA in South Africa, in that in South African consumers need only show that there is a causal link between a defective product and harm that they have suffered.<sup>701</sup> In Ontario in addition to showing that the product is defective, an additional element is required, namely the knowledge of the defendant related to this defect.<sup>702</sup> The CPA there requires a very low burden of proof in terms of a product liability class action which has the effect of creating a greater risk for all suppliers in the supply chain.

In South Africa it is clear that the courts prefer following a two-step approach in class actions, with the certification process being the first step, and the court gives leave that the action may proceed by means of a class action. In terms of certification a similar initial step is followed in both foreign jurisdictions and leave of the court has to be obtained in order to proceed by means of a class action, in both foreign jurisdictions observed in this study. During the second step of this process, the court then manages the running of the class action.

Even in terms of a product liability class action, leave of the court to proceed with a class action should therefore become a formalised requirement.

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<sup>701</sup> See 1.1 and 3.3 above.

<sup>702</sup> See 4.5.2 above.

It is also clear that in South Africa, where a claim is brought by means of a class action there is no requirement that the defence must be uniform. In other words a supplier defending a product liability class action, would not need to provide a uniform defence, to each member of the class. However though it is a requirement for the formation of a class that the facts and the legal question must be uniform in fact and in law. In other words, it cannot be the same legal question with a different set of fact throughout the class. This ties in with the similar requirements in the USA that questions of fact and law which are similar to those of the class, must prevail over individual facts, and that plaintiffs have to prove that the evidence to the claims of class representative will be the similar to that of the other members of the class, which takes this requirement a step further than the current trend in South Africa. It would in my opinion, be best not to complicate these initial certification requirements in South African class action procedure, seeing as a lot of costs and time could be wasted without considering the actual facts of the case.

In terms of certification it is important for courts to consider other alternatives to denying certification which could instead help to develop class actions in South Africa along the more suitable lines of approach. Ontario in particular have developed such alternatives, as discussed in 5.1.2 above, such as allowing plaintiffs to amend their pleadings prior to certification, to certify only some of the group or class of plaintiffs' claims, or to amend an order allowing certification. In my opinion such considerations could be valuable in the development of South African class actions, where the processes are still being developed and plaintiffs may not get it right in the first instance. This practice can also assist in preventing unnecessary costs and time which could be wasted.

In considering the foreign comparison of class actions in terms of the "opt out" procedures, it would be recommended for South African courts to follow the strict two step approach, so that all members of a class have an option to "opt out" once the certification step has been passed and an "opt out" notification must then be distributed in a manner specified by the court given the circumstances of the class action. The "opt out" approach will continue to be the most beneficial approach for members of a class in South Africa, where they may be entitled to receive benefits which they often would not have been aware of if an "opt in" approach had been followed. There has however been no clear guidance to date in terms of "opting in" or out regarding class actions which are not



related to Constitutional matters, even though guidance has been given by the courts that the burden of certification should not be higher for one than for the other.<sup>703</sup>

In terms of certification proceedings, in Ontario the courts may be slightly more lenient and may be willing to consider alternatives in order to aid in certification. The current guidance in South Africa has been that a class must be large enough so that joinder (and alternatives to class actions) will not be practical. There are however sufficient similarities between the two jurisdictions that South Africa may benefit from the advanced recommendations which have been made by courts in Ontario. In the USA the certification requirements at first glance seem similar to those of Ontario, if not slightly more lenient due to the fact that the requirements set out are less detailed. However, product liability actions could be difficult to certify in the USA seeing as plaintiffs may be subject to a defence such as product id or the failure to mitigate damages, which may not necessarily be applicable to the rest of the class, in which case it will be deemed not suitable for a class action.<sup>704</sup> Regarding the certification issue and in particular with regard to defining whether there are sufficient common issues linking members of a class, South Africa only has general guidelines given by the courts whereas in Ontario more specific guidelines have been established, in terms of which the main question is whether granting certification for a class action on the point of common issues, will avoid duplication of facts or legal analysis of the courts.<sup>705</sup>

In considering a class action being brought on behalf of a class or group, the South African legislation seems to be ahead of the guidelines in Ontario, or at least more lenient, in that a class action both in terms of the CPA and the Constitution may be brought by a juristic person. In Ontario it is not yet clear whether a representative body may bring a class action proceeding on behalf of a class. In the USA on the other hand the requirements are slightly more restrictive than in South Africa, seeing that a class action may be brought by an interested association or a representative, however, such an association must have standing to bring the claim and the association must be the proper party to do so in a representative capacity.<sup>706</sup> Also interesting to note is that in the USA consumer claims may not be brought by those who would typically have the goal to profit

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<sup>703</sup> See 2.6 above.

<sup>704</sup> See 4.3.1 above.

<sup>705</sup> See 4.4.1 above.

<sup>706</sup> See 4.3.1 above.

off them<sup>707</sup>, however an incentive payment in settlements may be accepted by representatives of a class.<sup>708</sup> Similarly it would probably be a good idea to exclude the possibility of buying profitable claims from consumers in South Africa. It is doubtful whether incentive payments for representatives in settlements could be allowed in South Africa. This could increase the incentive for becoming a class representative in South Africa, but may encourage settlements which are not equally fair to all members of a class.

Seeing as in South Africa, provision is made for a juristic person to bring a claim on behalf of an affected class the burden of being able to institute a class action is lowered. This, together with the CPA's lowered burden of proof required by the CPA (lower than the burden of proof required in the product liability class actions of any of the foreign jurisdictions), could have the effect of increasing the risk of liability to suppliers. However, as discussed above, the SCA indicated that it is improbable that the "floodgates" would be opened, and further given guidance to the fact that these factors (and other administrative burdens) cannot become an excuse for not affording a large group which have been wronged, some relief. There is however a possibility that these combined factors could create a new market for product liability insurance, which could cause an increase in costs for suppliers in products and services where there are likely to be liability issues.

In Ontario, there is an opportunity to institute related proceedings as a counterclaim by the defendant or a cross-claim against another co-defendant or a third party claim for contribution or indemnification where a third party may have been at fault.<sup>709</sup> In terms of the CPA class actions will probably be more simplified in this regard, as the CPA creates liability for the manufacturer, producer, importers, distributors and retailers, in terms of the consumer.<sup>710</sup> This should therefore have the effect of reducing the complication of cross-claims as all of these parties could potentially be directly involved in the class action.

The courts in Ontario have provided many guidelines and factors which may be taken into consideration in South Africa, due to the great similarities of the jurisdictions. Examples where such guidance is applicable would be the procedure of an "opt out" notice, the

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<sup>707</sup> See 4.3.8 above.

<sup>708</sup> See 4.3.3 above.

<sup>709</sup> Harrison, Martineau & Hosseini 24.

<sup>710</sup> See 3.3 above.

content of the notice as well as factors to consider in determining whether a settlement is reasonable.

The USA courts also consider an “opt out” notice, as well as a settlement before it can be agreed upon, even though the courts may not vary the contents thereof they may decide whether it is reasonable at a hearing where members of a class may object. Settlement is therefore encouraged as long as it is not unfair to members of a class. It is therefore important for South African courts to similarly encourage settlement seeing as it could be a key cost saving method, and to possibly determine the fairness thereof.

In terms of class action funding, third party funding in terms of the CPA may be the most practical method to apply in South Africa, if such a third party may receive a percentage of the damages awarded if the class action should succeed. This promotes access to justice but simultaneously this could potentially open up the flood gates to third party litigators who choose a cause purely for financial gain. Another alternative would be for the government to establish funds for the purpose of access to justice in terms of class actions, however this may not be a priority in South Africa. The USA is not a helpful jurisdiction in this regard as there is no provision for alternative funding methods in that foreign jurisdiction.

The question of the award of legal costs in South African product liability class actions remain questionable, however the best possible alternative seems to be for legal counsel to ask the court to apportion legal costs between members of a class where a class action succeeded, possibly proportional to percentage of award. However where a class action fails, the plaintiffs may be responsible for adverse costs, and in Ontario as in the USA, the representative plaintiffs are usually indemnified by counsel in this regard. In the USA in particular, the common principle is for the costs to be recovered by the prevailing party,<sup>711</sup> Where a third party juristic person institutes a class action on behalf of a class, such a third party may have to bear the risk, in order for legal counsel to be willing to take on such a class action. Other plausible alternatives for South African product liability class actions could possibly be third party funding, or contingency fees which as in the USA would be recovered by the prevailing party.

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<sup>711</sup> See 4.3.7 above.

The SCA had described a scenario suitable to class actions as an instance where there is a “large and disparate class of claimants, all poor and lacking in ‘protective and assertive armour’ without access to individualised legal services and each with a relatively small monetary claim unsuitable for individual enforcement.”<sup>712</sup> It is now clear that such a situation includes the scenario of a potential product liability class actions where a large number of claimants would be without access to legal services in their individual capacity, but together would have access to justice by means of a class action in line with the CPA in South Africa.

In today’s consumer driven world it would make much more sense to bring an action on behalf of each affected consumer by means of a class action in order to achieve justice, where for example, consumers have been harmed by the same product or service.

In South Africa, even compared to foreign jurisdictions, the burden for implementation of a product liability class action has been considerably lightened due to the lightened burden of alleging liability. In fact, proving the required causal link, will hardly amount to a hurdle as it may actually be easier to show that a large group of consumers were affected similarly by a defective product or inadequate user instructions, for example, than to prove that one consumer suffered harm for that reason. The lightened burden is mainly attributed, as discussed above, by distributors and importers being included as those sharing in liability in terms of the CPA, and the fact that the consumer need only prove a causal link between the harm and the defective product.

South African companies may need to consider these factors in future business, seeing as reputational damage as well as the possible cost awards which could result from product liability class actions, could be detrimental, even to a large organisation. In the past South African organisations may not have been well aware of these risks, seeing as the courts were seemingly careful in assessing product liability claims. However it will now be much easier to bring such claims under the scope of the CPA, which could be particularly effective when brought in the form of a class action and could include claims for damages caused by defective pharmaceutical products or power surges, as two simple examples. Further, as discussed above in Chapter 3, such claims could even be brought against an organ of state.

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<sup>712</sup> See par 2.7 above.

The initial framework has already been set for product liability class actions to be brought in terms of the CPA in South Africa, and it has been further defined in this study by considering the practices and procedures which have been acceptable in terms of class actions brought in terms of the Constitution in South Africa, as well as class actions brought in two foreign jurisdictions which have played an important role in the development in terms of our procedural development. In most instances our procedural development of class actions have been in line with that of the US and even more so, in line with the developments of Ontario.

In terms of class actions implemented in terms of the Constitution a generous approach has been followed by the courts, and that same generous approach is likely to be followed in terms of product liability class actions in the interests of justice, where a large group of people have suffered.

It is now time for us to colour the dotted lines of this framework by bringing product liability class actions before the courts in terms of the CPA of South Africa, in line with the procedures of the foreign jurisdictions, so that it will become evident how effective relief can be obtained for all members of a class, and similarly, how important it is for a supply chain as defined in the CPA, to be aware of such liabilities.

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<sup>i</sup> *The Trustees For The Time Being of The Children's Resource Centre Trust v Pioneer Foods (Pty) Limited* 2011 JDR 0498 (WCC) par 2 – 5.