

An analysis of the Class Action in South Africa

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Submitted in partial fulfillment of the requirements for the degree

LLM

in the Faculty of Law
University of Pretoria

Under the supervision of
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2015

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Chapter 1: Introduction

1.1 Introduction

The class action is a procedural tool that enables a representative to institute an action against a defendant on behalf of a group of persons with the same or similar claims against such defendant. A class action device thereby enables a large group of people who have been wronged by something or someone, to join together and claim redress in a single action.

In recent times, the class action has become increasingly necessary to accommodate society's needs. De Vos¹ states that, given the way that society has developed, it is imperative that people are able to protect their rights, especially as there is an unequal relationship between individuals and the State. He highlights this by stating:²

“The mass-orientated society of today, dominated by organised capital and overseen by an all-powerful government, generates events that can cause harm to large numbers of people.”

This dissertation will set out various aspects relating to class actions and its development in South Africa. Chapter 2 will examine the impact of the Constitution of the Republic of South Africa³ (hereinafter the “Constitution”) on class action procedures. The class action was introduced in South Africa in order to fill *lacunae* in our law. A brief history of the legal position regarding *locus standi in iudicio (locus standi)* will be contrasted with the current legal position in South Africa. Initially, there was a very strict interpretation of *locus standi* and it was necessary for a prospective litigant to have a direct and substantial interest in a matter before approaching a court. This position has changed, however, as the Constitution now makes specific provision for the institution of a class action, which broadens the position regarding *locus standi* substantially.

Over the years, case law in South Africa has established certain principles relating to the interpretation and implementation of a class action. In chapter 3, such case law will be analysed and the academic debate regarding such case law will be discussed critically. As class action procedures are specifically provided for in the Constitution, but not regulated in terms of any law, case law has helped to develop class action procedure. Initially the courts were hesitant to allow a class action, but the courts have since recognised the importance of the right to access to justice and there is increased willingness to allow a class action in appropriate circumstances.

Chapter 4 will set out the requirements for instituting a class action as prescribed by case law. Case law has determined that before a party can

¹ De Vos “Reflections on the introduction of a class action in South Africa” (1996) (4) *TSAR* 641.

² *Ibid.*

³ Act 108 of 1996.

proceed with a class action, certification must be granted. Certification entails a process in which the parties show the court that they indeed have a case that should proceed by way of class action.

Foreign and international law can provide beneficial guidance to ensure a better understanding of the class action process. The class action process as it is in America and Canada will be discussed in Chapter 5, in as far as it may be advantageous for the interpretation and analysis of the class action in South Africa. The class action in America is unnecessarily complicated and it would be beneficial for us to rather follow the example of Canada, where a more general class action process is provided for.

1.2 Definitions

1.2.1 Definition of a class action

“‘Class action’ means 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, and which action is certified as a class action in terms of the Act.”⁴

Silver⁵ explains that a class action is:

“... a procedural device that expands a court’s jurisdiction, empowering it to enter a judgment that is binding upon everyone with covered claims. This includes claimants who, not being named as parties, would not ordinarily be bound. A class-wide judgment extinguishes the claims of all persons meeting the class definition rather, than just those of named parties and persons in privity with them, as is normally the case.”

1.2.2 Definition of a public interest action

A class action differs from a public interest action. The Law Commission states the following about public interest actions:

“‘Public interest action’ means an action instituted by a representative in the interests of the public generally, or in the interest of a section of the public, but not necessarily in the representative’s own interest. Judgment of the court in respect of a public interest action shall not be binding (*res judicata*) on the persons in whose interest the action is brought.”⁶

⁴ The South African Law Commission Project 88. “The Recognition of Class Actions and Public Interest Actions in South African Law”. August 1998.

⁵ Silver *Class Actions – Representative Proceedings* 5. Encyclopedia of Law and Economics. 194.

⁶ *Supra* note 4.

For purposes of this dissertation, the public interest action will not be discussed in great detail.

Chapter 2: The history and reception of the class action procedure in South African law

2.1 Introduction

Previously, there was no form of class action in South Africa's common law, and many people had no way to claim redress⁷ in certain circumstances. Standing, or *locus standi in iudicio (locus standi)*, refers to the right to bring an action to be heard in court, or to address the court on a matter before it.⁸ A direct translation of the Latin phrase would be "a place to stand before a court".⁹ The common law prescribed a very strict view of *locus standi*, whereby a party was required to have a direct and personal interest in a matter in order to be able to institute an action relating to that matter. The need for a procedural device such as the class action became increasingly necessary in South Africa as a result of changes that began to take place in society. The particularly strict common law view of *locus standi* became inadequate and there was a need for the common law to be adapted in order to provide for some form of group action.

With the abolition of Apartheid in 1994, many new laws have been enacted to promote and protect people's fundamental rights from grave injustice. The Bill of Rights was introduced and people were able to enforce the rights that were entrenched in the Bill.¹⁰ Both the Interim¹¹ and Final Constitution¹² made provision for class actions in a Constitutional framework. However, neither of these Acts set out the procedure that must be followed to give effect to such provisions.

In August 1998, the South African Law Commission published a report¹³ in which it: discussed the class action procedure as it is in South Africa today; made recommendations; and provided a Draft Bill to assist with the enforcement of class action procedures in the future. The aim of the Draft Bill is to make provision for instituting public interest actions and class actions and to regulate the implementation thereof.

We are currently facing a situation in which class actions are explicitly recognised in the Constitution, but the interpretation, regulation and control have not yet been determined or provided for in any legislation.

⁷ *First Rand Bank Ltd v Chaucer Publications (Pty) Ltd* (2) SA 592 (C).

⁸ <http://definitions.uslegal.com/l/locus-standi/> (22 March 2014).

⁹ Theophilopoulos *et al. Fundamental Principles of Civil Procedure*. (2006). 87.

¹⁰ The Bill of Rights is contained in Chapter Two of the Constitution and consists of Sections 7 through to 39.

¹¹ Section 7(a)(b) of the Interim Constitution of the Republic of South Africa, Act 200 of 1993.

¹² Section 38 of the Constitution of the Republic of South Africa, Act 108 of 1996.

¹³ *Supra* note 4.

2.2 Common Law Position

Common law is the law that has not been created by an Act or legislation and which could be described as law made by judges. The English and Roman-Dutch settlers brought their law with them to South Africa and, as a result, such law forms part of our common law. Common law is the law in place in South Africa unless statutory law replaces it, or new court decisions over-rule it.

The strict common law view of *locus standi* meant that only parties who were personally affected by an event were granted *locus standi* in respect of a matter.¹⁴ A person could only obtain *locus standi* if he / she had personally suffered harm or would suffer harm through violation or threatened violation of the person's legally enforceable rights.¹⁵ A personal, sufficient and direct interest in the subject matter was required.¹⁶ A direct interest means that it should not be too far removed and must be real or existing, as opposed to abstract or hypothetical.¹⁷ The test for *locus standi* involves a two-stage approach.¹⁸ Firstly, the interest the party may have in the matter is evaluated. Secondly, the question of whether or not the party has the legal capacity to enforce and defend a case is analysed.¹⁹

Rule 57 of the Uniform Rules of Court provides an exception to the principle of standing. According to this Rule, a *curator ad litem* can be appointed for people who cannot manage their own affairs. This curator is a representative who is appointed by the court and, as such will act in the best interests of someone who cannot act themselves during legal proceedings. Another exception to the principle of *locus standi* is that minors (children under the age of 18) can be represented by their parents or guardians in legal proceedings. The reason for this is that minors lack the capacity to act on their own.²⁰ However, even though these examples are exceptions to the principle of *locus standi*, they do not constitute a class action or public interest actions and are merely procedures in which a representative may assist somebody who is unable to represent themselves due to inability to act on their own behalf or due to the person's age.

¹⁴ Theophilopoulos *et al. Fundamental Principles of Civil Procedure* (2012) 2nd edition 101-102.

¹⁵ Currie & De Waal *The Bill of Rights Handbook* (2005) 80.

¹⁶ *Standard General Insurance Co v Gutman* 1981 2 SA 426 (C); *Christian League of Southern Africa v Rall* 1981 2 SA 821 (O); *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 3 SA 369 (A); *Cabinet for the Territory of South West Africa v Chikane* 1989 1 SA 349 (A).

¹⁷ *Jacobs en 'n Ander v Waks en Andere* 1992 1 SA 521 (A) at 533J-534D.

¹⁸ Theophilopoulos (2006) 88.

¹⁹ *Ibid.*

²⁰ Theophilopoulos (2012) 104.

This traditional view of *locus standi* was limited and restrictive. If we examine South Africa during the time when the common law predominated, there was less communication between people, as there was not the same technology that allows for the amount of communication that we enjoy today. Another important aspect of this earlier time was that people were less aware of their rights. And the need for a broader view of *locus standi* was less necessary than it is now, hence the strict interpretation given to it in our common law.

2.3 Joinder

The Uniform Rules of Court provide for a situation in which any number of persons can join as Plaintiffs in a single action, provided that their claims are based on substantially the same issues of fact or law.²¹ Where substantially the same questions of law or fact are present, these Rules provide that any number of defendants can be sued in a single action.²² Such proceedings are called 'joinder' proceedings.

Joinder proceedings are not suitable for large groups of people and, as such, were not an appropriate way for a large class of people to proceed. As a result of the unsuitability of joinder proceedings and the lack of any other form of redress for large groups of people, there was a need in South Africa for a class action procedure to be introduced into our law. The identity of all the potential members of the class must be known before the action is instituted, which makes joinder proceedings impractical and impossible in many circumstances.

2.4 The impact of the Constitution on the introduction of class action procedures into South African law

Albie Sachs aptly stated the following about constitutions:

*"It is no accident that constitutions usually come into being as a result of bad, rather than good, experiences. Their text or subject is almost invariably: 'never again'. In the case of South Africa, the new constitution arises out of the need to escape the profound humiliation and oppressions created by apartheid. Through the constitution, we affirm something from our dolorous history."*²³

²¹ Rule 10(1).

²² Rule 10(3).

²³ Sachs "The Constitution is Natural Justice" Writ Large in H. Corder and Mc Lennan (eds) Controlling Public Power (Dept of Public Law, UCT, Cape Town, 1995) 51.

The Constitution of the Republic of South Africa 1996²⁴ states the following in Section 38:

“Enforcement of rights. 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-

*...
(c) anyone acting as a member of, or in the interest of, a group or class of persons.”*

The introduction of this section into, firstly, the Interim Constitution, and later the Final Constitution, changed the position in South Africa significantly. In order to effectively protect the rights guaranteed in the Bill of Rights, the common law view of *locus standi* had to be relaxed.²⁵ Section 38 of the Constitution has broadened the court’s restrictive approach in respect of *locus standi* and a number of recent cases support this.²⁶

It is clear that the traditional model of civil litigation could not provide the redress necessary to help victims with claims resulting from the mass-orientated society of today.²⁷ As society has transformed, the need for class action has become increasingly necessary, in order to protect citizens. Following the introduction of the Constitution in South Africa, there has been increased awareness amongst South Africans of their rights and how to guard against the infringement of such rights.

In terms of Section 34 of the Constitution, everyone is guaranteed the right to access to court. Jafta J states the following about the right to access to courts:²⁸

“Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture, but also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes, so as to do justice between individuals and between private parties and the state.”

Justice is not attained if people are kept out of the courtroom because they cannot finance litigation and cannot have their proverbial ‘day in court’. In *Chief Lesapo v North West Agricultural Bank and Another*,²⁹ the right to access to court was discussed as being essential to keeping society in order, and it would require extreme circumstances to limit such right justifiably.

²⁴ Hereafter “The Constitution”.

²⁵ *Supra* note 15.

²⁶ See *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W), *Jacobs en ‘n Ander v Waks* 1992 1 SA 521 (A) and *Ferreira v Levin; Vryenhoek V Powell* 1996 1 SA 984 (CC).

²⁷ *Supra* note 1.

²⁸ *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) at 29.

²⁹ 2000 (1) SA 409 (CC) at 22.

The traditional common law view of *locus standi* did not accommodate the principle of promoting access to courts sufficiently, due to its restrictive nature. In order to give effect to the right to access to court, it is imperative that a class action procedure is provided for and is permissible in our law.

2.5 South African Law Commission

The South African Law Commission saw a need for some form of intervention and guidance on the subject of class actions and accordingly produced a comprehensive report about the topic.³⁰ The report contains draft legislation that was carefully created by a number of legal experts and writers and it serves as a good guideline for understanding class action procedures. The report is a useful tool to utilise pending the possible introduction of concrete legislation by the legislature in the future.

The Law Commission suggests that the fundamental principles of class actions should be introduced by an Act of Parliament, and that the procedures to be followed in instituting a class action should be set out in the rules of court.³¹ This should be done as speedily as possible in order to prevent a situation of legal uncertainty amongst legal practitioners, presiding officers and members of the public. The idea of introducing an Act of Parliament was also mentioned in the Law Commission's Working Paper,³² and the suggestion was not challenged or disputed.

If procedures to regulate class actions were introduced by an Act of Parliament as well as by rules of court, we would be able to create a uniform approach to dealing with class actions. There are, however, some reservations about having a court lay down the procedures to govern class actions. There is the possibility that a judge might only create precedent in respect of certain aspects of class actions and not others. This would mean that different judges might land up deciding different aspects of class actions and cause confusion or conflicting decisions. However, it is a lengthy time since class actions were first introduced in our Constitution and since the Law Commission made their recommendations, and we have seen absolutely no intervention from the legislature. Since class actions were introduced for the first time in the Interim Constitution, 20 years already passed and, surprisingly, no procedure has yet been decided on or introduced by the legislature.

³⁰ *Supra* note 4.

³¹ *Ibid.*

³² The Recognition of a Class Action in South African Law. 1995. (Working Paper).

2.6 Conclusion

Previously, South Africa followed the very strict traditional view of *locus standi*. This traditional model was not sufficient to accommodate South Africa's our needs and proved restrictive. The High Court Rules³³ provided for a joinder procedure whereby plaintiffs or defendants could join proceedings in which they had an interest. However, the joinder procedure fell short of being suitable for class actions. There are times when events may occur that could affect a large number of people, and the requirement of a direct and substantial interest may not be met. In such situations, the class action would be the only suitable remedy for people to enforce their rights.

The Constitution brought with it increased recognition and awareness of rights, and provided specifically for a class action in Section 38(c). The Constitution was, however, silent on how the new class action should be dealt with practically.

The Law Commission's report³⁴ attempted to assist us in understanding and interpreting Section 38(c). A great deal of research went into producing the draft legislation that the Commission deemed appropriate to govern the class action. It is a shame that this legislation has not been made an Act of Parliament, or at the very least, adapted by the legislature and then introduced as an Act of Parliament.

The Law Commission's draft is clear, coherent and comprehensive. Where so much work has already been done on drafting legislation, it would be illogical to simply ignore the draft and begin drafting from scratch. While the draft legislation may not be perfect, it is a valuable starting point. The most sensible thing would be for the legislature to amend the existing draft and make it more suitable to our needs. It is imperative that this legislation is drafted as soon as possible, in order to prevent confusion and uncertainty, and it will significantly reduce the drafting time if the legislature relies on the Law Commission's draft.

The recognition of the class action in the Constitution has been an important move away from common law and the traditional model of *locus standi*, which was simply not sufficient to enable class action to be prosecuted successfully in South Africa.

³³ Rule 10.

³⁴ *Supra* note 4.

Chapter 3: Developments in class action procedures through case law

3.1 Introduction

After the inclusion of class action in the Constitution,³⁵ a number of important cases have decided various aspects relating to the class action in South Africa.

There has been considerable academic debate regarding the interpretation of certain case law and certain aspects of Section 38(c). One of the most notable debates was regarding whether or not there was a general class action procedure available to us, or whether a class action could only be instituted for a Bill of Rights infringement.

As there has been no legislation enacted to regulate the class action, case law is fundamentally important for us. Without case law, we would only have the Constitution to provide for class actions, yet there is absolutely no guidance on how to implement the relevant section.

The High Court, the Supreme Court of Appeal and the Constitutional Court are granted power that enables them to protect and regulate their own process and develop the common law, bearing in mind the interests of justice.³⁶ Such power is critically important in a situation where we have no Acts, Regulations or practice directives governing the class action. This provision enables the courts to develop common law through case law, where necessary.

3.2 *Maluleke v MEC Health and Welfare, Northern Province*³⁷ (*Maluleke*)

In *Maluleke*, a narrow approach to the concept of standing was adopted by the court, as per Southwood J. There were seven different pieces of legislation that regulated social assistance, and this made it nearly impossible for the system and process of social assistance to function efficiently. The respondent decided to cancel all the social grants that it was paying to beneficiaries, until such time as up to date information was provided by all recipients of grants.

The applicant sought *locus standi* to act on behalf of 92 046 other people who also had their pensions stopped, but the court held that the Applicant could only represent the rest of the class in terms of section 38 of the Constitution.³⁸ The court found that the respondent's action did not amount to an infringement of a right in the Bill of Rights. It was held that there was no evidence that these beneficiaries constituted a class and such beneficiaries

³⁵ Section 38(c).

³⁶ Section 173 of the Constitution.

³⁷ 1999 4 SA 367 (T).

³⁸ *Supra* note 37 at 373E-H.

could have many different facts that apply to them and no additional common features.³⁹ However, having exactly the same facts as other members of the class is not required. All that is needed is a 'common nucleus of operative facts'. It was further held that a fundamental right was not infringed or threatened and the extended meaning of *locus standi* could not apply here. The court found that even if a fundamental right had been infringed, the extended meaning would not apply in these circumstances.

I respectfully disagree with the Judge and submit that he erred in the above findings. The court was presented with adequate evidence of a group of people constituting a class. This class was easily ascertainable and the court's finding that the group was only a class in the vaguest and broadest sense is surprising. It is too onerous to expect a class to be defined in exact terms. All members of the proposed class had a claim that arose from the respondent's decision to cancel their social grant payments and, accordingly, the claims arose from similar circumstances.

This judgment received a large amount of criticism for its formalistic and narrow approach to the concept of standing. The Supreme Court of Appeal fortunately over-turned this decision in the *Ngxuza Appeal* case.⁴⁰

3.3 *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another*⁴¹ (*Ngxuza*)

In *Ngxuza*, when faced with similar facts to those in *Maluleke*, the court chose rather to allow for a broader approach to the concept of standing. Impecunious litigants brought a class action in an attempt to have disability grants, which had been suspended without notice, reinstated retrospectively. The applicants sought to bring this action on behalf of other people who were also affected by the cessation of grant payment and requested the Department of Welfare to provide them with the names of every person who had been affected by the deprivation of the grant. The respondents averred that the applicants did not have *locus standi* and similarly did not have the right to the names of other affected people.

Contrary to the decision in *Maluleke*, it was held that the behaviour of the respondent in suspending grants without providing notice was contrary to the applicant's constitutional right to just administrative action in section 33 of the Constitution.⁴² The applicant's rights infringed *in casu* were furthermore socio-economic rights.⁴³ Section 27(1)(c) of the Bill of Rights provides for the right to social security, and thus the infringed right in *Ngxuza* is a fundamental right.

³⁹ *Supra* note 37 at 374 B-D.

⁴⁰ *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza* 2001 (4) SA 1184 (SCA).

⁴¹ 2001 (2) SA 609.

⁴² *Supra* note 41 at 622I-J and 623A-B.

⁴³ *Supra* note 41 at 622G-I and 626A.

The court was presented with evidence that other prospective applicants in a similar situation were unable to pursue their claims individually because they had no money, no access to lawyers and difficulty getting any form of legal aid.⁴⁴ It was therefore clear that the applicants could not act on their own behalf and, accordingly, a class action was the appropriate way to proceed.

The court held that the applicants were entitled to have their grants reinstated and thus could act on behalf of the other individuals who were also affected. The fact that these affected persons had to rely on grants and were destitute formed the foundation of the decision regarding *locus standi*.⁴⁵ The applicants were also entitled to receive the names of other affected people. The court held that using a flexible and liberal approach to class action would be necessary to address the needs of poor people seeking access to court.⁴⁶

Froneman AJ noted that in a constitutional state such as ours, exercising public power depends on the principle of legality and it is thus the task of the court to control the exercise of power so that this principle is adhered to.⁴⁷ The court considered the Constitution in its entirety to decide how best to apply it to the case at hand, as there was no precedent governing this situation.⁴⁸

The judgment examined section 38 of the Constitution and the change it has brought about was highlighted. Despite the fact that section 38 of the Constitution can cause some practical challenges, the court held that this was not sufficient justification for applying the section restrictively.⁴⁹ It was further pointed out that section 38 cannot be interpreted restrictively solely because our common law has a strict view of the requirements for *locus standi*.⁵⁰

Froneman AJ addressed a number of the potential problems that have been raised against class action. The court held that the possibility of unjustified litigation and people flooding to the courts to litigate could be hampered by forcing people to seek leave from the court before proceeding with a class action.⁵¹ With regard to classification and the possibility of people potentially having a vague common interest in the matter at hand, the court held that the common interest must relate to an alleged infringement of a fundamental right and that determining a common interest can be done at the certification stage.⁵² It was further held that it is important to provide notice to all potential members of a class, so that *res judicata* does not become a problem inherent to class action procedures.⁵³ In keeping with the wider interpretation of standing, it was held that none of the aforementioned issues were so huge as

⁴⁴ *Supra* note 41 at 622J-623.

⁴⁵ *Supra* note 41 at 621.

⁴⁶ *Supra* note 41 at 623B-C and 629F-G.

⁴⁷ *Supra* note 41 at 618.

⁴⁸ *Supra* note 41 at 620.

⁴⁹ *Supra* note 41 at 619.

⁵⁰ *Supra* note 41 at 619 A-D.

⁵¹ *Supra* note 41 at 624D-E.

⁵² *Supra* note 41 at 624F-G. This view is endorsed in *First Rand Bank Ltd v Chaucer Publications (Pty) Ltd* (2) SA 592 (C) at 599 at 26.

⁵³ *Supra* note 41 at 624H-J.

to deprive a litigant of their right to their day in court. Although the possibility could arise that these “dangers” become apparent, they are not significant enough to prevent the court from adopting a broader view of *locus standi*.⁵⁴ These potential problems should rather serve as a good reason to ensure that safeguards are put in place to guarantee the most effective class action litigation possible.⁵⁵ It is important to note that the court viewed these potential challenges as something that can aid us in being proactive and preventing them from happening, rather than a deterrent to bringing a class action to court. The court reasoned that if a clearly defined class has been wronged, the court’s role should be to find novel ways to help the class, rather than to deprive them of access to justice merely because a class action is potentially challenging to deal with.⁵⁶

Making access to court easier for destitute people is something that we have to strive to do, as the right to access to courts is entrenched in Section 34 of the Constitution. However, the novelty of class action proceedings should not be a bar to courts finding an efficient way to regulate proceedings.⁵⁷ The *Ngxuza* judgment should be applauded for the attempt it made to highlight the positive aspects of class action, and the potential the procedure has to promote access to justice to all people.

3.4 *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others*⁵⁸ (*Ngxuza Appeal*)

On appeal, it was alleged that *locus standi* to institute the class action was incorrectly granted by the court *a quo*, as the class was not defined properly, which made it challenging to give notice to the members. The appeal was dismissed and the decision of the High Court in *Ngxuza* was confirmed. The Supreme Court of Appeal highlighted the fact that *locus standi* must be interpreted generously and expansively.⁵⁹ This is in line with the role of the court to uphold the Constitution and ensure that Constitutional rights enjoy the full protection that they are entitled to.

Cameron JA stated the following about using the class action in *casu*:

“The situation seemed pattern-made for class proceedings. The class the applicants represent is drawn from the very poorest within our society - those in need of statutory social assistance. They also have the least chance of vindicating their rights through the legal process. Their individual claims are small ... They are scattered throughout the Eastern Cape Province, many of them in small towns and remote rural areas. What they have in common is that they are victims of official excess, bureaucratic misdirection and unlawful administrative

⁵⁴ *Supra* note 41 at 619 E.

⁵⁵ *Supra* note 41 at 619 F.

⁵⁶ *Supra* note 41 at 625 A-B.

⁵⁷ *Supra* note 41 at 629H-F.

⁵⁸ *Supra* note 40.

⁵⁹ *Supra* note 40 at 15. See *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC).

*methods.*⁶⁰

It was further held that the quintessential requirements to constitute a class were all present.⁶¹ These are:

- That the class is so numerous that joinder of all members would not be practical;
- That there are questions of law and fact that are common to the entire class;
- That the claims of the applicants representing the class are typical of the claims of the rest of the class;
- The applicants, through their legal representatives, will fairly and adequately protect the interests of the entire class.

The court is able to develop jurisdiction to the extent that it ensures fair and rational results, as was done in *Ngxuza*. Section 173 of the Constitution that refers to the courts' inherent power to protect and regulate their own process and to develop the common law in the interests of justice. Section 39(2) of the Constitution reminds the courts to promote the spirit, purport and object of the Bill of Rights whenever they develop the common law. These sections make it clear that the courts have an inherent jurisdiction to allow class action to proceed in the interests of justice, despite a lack of rules and statutes regulating class actions. The court is granted inherent jurisdiction to develop the common law for exactly a situation such as this, where a class action is allowed in our law, but no rules or regulations are created in order to assist with the implementation of the class action.

Notably, the court held that it could not agree with the reasoning of Southwood J in the *Maluleke* case and that, to the extent that it is inconsistent with the *Ngxuza* judgment, it must be over-ruled.⁶²

3.5 The introduction of a general class action

Kok feels strongly that the Supreme Court of Appeal in *Ngxuza* intended to provide for a general class action, which stretches further than only a Bill of Rights infringement.⁶³ He bases this view on the fact that the court did not state that it must be a constitutional right that was infringed in order for a class action to be appropriate. The court instead stated that the conduct of the defendants must be unlawful.⁶⁴ Kok believes that the word "unconstitutional" would have been used if the court had intended to limit a class action to a breach of Constitutional rights only.

⁶⁰ *Supra* note 40 at 11.

⁶¹ *Supra* note 40 at 16.

⁶² *Supra* note 40 at 19.

⁶³ Kok "Has the Supreme Court of Appeal recognized a general class action in South Africa? Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v *Ngxuza* 2001 10 BCLR 1039 (SCA)" (2003) (66) *THRHR* 158.

⁶⁴ Kok (2003) 161.

Hurter disagrees with Kok and notes that we need to be careful not to read more into the Supreme Court of Appeal's judgment than necessary.⁶⁵ De Vos similarly disagrees with Kok on this aspect and suggests that the judgment must be read in the context of the facts, as well as the judgment of the court of first instance.⁶⁶ In the *Ngxuza* case, the applicants sought to protect their Constitutional rights. Hence, this judgment would only be binding on cases presenting similar facts. He thus believes that judgment cannot be interpreted to include infringement of non-Constitutional rights and is limited to a Constitutional rights infringement only.⁶⁷

The mere fact that a general class action *should* have been provided for by the Supreme Court of Appeal does not mean that it was in fact provided for. I see no indication in the judgment that a general class action would succeed. *Ngxuza* dealt with a Constitutional right and we cannot presume that we can use this judgment to interpret dissimilar cases. It would be senseless to provide a class action only for the specific circumstance when a right entrenched in the Bill of Rights has been infringed. However, we cannot read more into the judgment than was intended, and I think it is clear that *Ngxuza* did not extend the ambit of the class action at that stage, even though it should have. However, there is now clarity on this aspect and a general class action has since been provided for.⁶⁸

3.6 *Children's Resource Trust Centre v Pioneer foods (Pty) Ltd*⁶⁹ (*Pioneer High Court case*)

The *Pioneer* case was brought to court after the Competition Commission received a complaint of an alleged bread cartel that was supposedly operating in the Western Cape province.⁷⁰ The three respondents were Pioneer Food (Pty) Ltd (Pioneer), Tiger Consumer Brands Limited (Tiger) and Premier Foods Limited (Premier). Premier sought, and was granted, corporate leniency because it admitted to, fixing bread prices together with the other respondents.⁷¹ The respondents were found to have contravened the Competition Act 89 of 1998.⁷² The respondents, inter alia, were found to have divided the market amongst themselves, fixed the selling price of bread, failed to allow customers to switch suppliers and fixed trading conditions. Premier co-operated with the Competition Commission and assisted in giving them honest answers regarding the incident, which subsequently led to a national

⁶⁵ Hurter "Some thoughts on current developments relating to class action in SA law, as viewed against leading foreign jurisdictions" (2006) *CILSA* 485 502.

⁶⁶ De Vos "Is a class action a 'classy act' to implement outside the ambit of the Constitution?" 2012 *TSAR* 751.

⁶⁷ *Ibid.*

⁶⁸ See note 93.

⁶⁹ *The Trustees for the Time Being for the Children's Resource Trust Centre v Pioneer foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* (25302/10, 25353/10) [2011] ZAWCHC 102 (7 April 2011).

⁷⁰ *Supra* note 69 at Par 12.

⁷¹ *Supra* note 69 at Par 12-14.

⁷² *Supra* note 69 at Par 18.

investigation. Pioneer and Tiger were both given considerable fines for contravention of the Competition Act.⁷³

Two applications were brought in the *Pioneer* case in the Western Cape High Court: one by bread consumers (the consumer application): and one by bread distributors (the distributor application). The *Children's Resource Trust Centre* case dealt with the consumer application, and nine applicants purported to act on behalf of all consumers of bread in the Western Cape. The *Mukaddam* case dealt with the distributor application and three Applicants purported to act on behalf of all bread distributors who were affected by the behaviour of the Respondents. The application was based on the infringement of two Constitutional rights. It was alleged that the actions of the Respondents had led to the right to sufficient food⁷⁴ and the right to basic nutrition⁷⁵ being infringed.

Van Zyl AJ heard both applications and dismissed both of them. The court endorsed the view in the Law Commission's Report with regard to when certification of a class may be granted.⁷⁶ These circumstances are when:

1. An identified class of persons exists;
2. There is a cause of action present;
3. There are issues of law or fact that are common to the entire class;
4. There is a suitable representative to act on behalf of the class;
5. The interests of justice so require;
6. The class action is an appropriate way to proceed in the circumstances.

In the consumer class, the court held that the applicants did not prove that an identified class of persons existed, and that there was no cause of action present. The class consisted of those whose Constitutional rights had been infringed as well as all consumers of bread who were prejudiced by the price fixing action of the respondents. Van Zyl AJ, however, decided that it would be almost impossible to sufficiently define this intended class properly so that people would know whether or not they formed part of the class.⁷⁷ He further pointed out that it was uncertain exactly when and where the price fixing took place, which added to the complexity of determining who formed part of the class.⁷⁸ He thus concluded that there was not an identifiable class of persons *in casu*.⁷⁹

The claim by the applicants was neither contractual nor delictual.⁸⁰ They Furthermore, they could not bring an action based on anti-competitive behaviour, as this is not specifically recognised in our law.⁸¹ The respondents

⁷³ *Supra* note 69 at 17 and 20.

⁷⁴ Section 27(1)(b).

⁷⁵ Section 28(10)(c).

⁷⁶ *Supra* note 4 at 49.

⁷⁷ *Supra* note 69 at 77.

⁷⁸ *Supra* note 69 at 78.

⁷⁹ *Supra* note 69 at 80.

⁸⁰ *Supra* note 69 at 87.

⁸¹ *Supra* note 69 at 87.

did not supply bread directly to consumers and thus there was no contractual obligation on the part of the respondents towards the applicants.⁸² Consequently, Van Zyl AJ found that no cause of action was established and the case was ultimately dismissed as a result.⁸³

In the distributor action, the applicants alleged that their right to section 22 of the Constitution was infringed. Section 22 of the Constitution provides the following:

“Every citizen has the right to choose their trade, occupation and profession freely. The practice of a trade, occupation or profession may be regulated by law.”

The court decided that this right was aimed at protecting individuals and not juristic persons, and thus the rights afforded to the Applicants by this section had not been infringed.⁸⁴ The court was furthermore not convinced that a class action was the appropriate forum to deal with the issues of fact and law present in this case.⁸⁵

It is interesting to note that Van Zyl AJ stated that Cameron JA’s comments seem to indicate that from as early on as the *Ngxuza* appeal case,⁸⁶ a general class action was in fact made available in our law.⁸⁷ The court did not have to deal with this aspect, however, and accordingly did not make a ruling in this regard.

If the matter had been found in the applicants’ favour, and compensation had been awarded by the court, the cost of distributing the compensation may well have been out of proportion to the amount each class member would receive. The applicants requested that all the damages awarded to the class be put into a trust for the benefit of all affected bread users who suffered as a result of the conduct of the respondents.⁸⁸ The actual damages suffered by the members of the class in this matter were nearly impossible to determine. It would have been difficult to determine how much bread each person had bought during the period that the price fixing took place and therefore almost impossible to quantify each person’s damages were they to receive some form of compensation. A method of coupons for bread being given out (ten bread coupons per person) would have been unsuitable. Where bread is the staple diet of many poverty-stricken people, such people would be affected more by an increase in bread prices.

⁸² *Supra* note 69 at 89-90.

⁸³ *Supra* note 69 at 92.

⁸⁴ *Supra* note 69 at 114-115.

⁸⁵ *Supra* note 69 at 120.

⁸⁶ *Supra* note 40 at 1191E.

⁸⁷ See par 3.5 *supra*.

⁸⁸ *Trustees for the Time Being for the Children’s Resource Trust Centre and Others v Pioneer Foods* 2013 (2) SA 213 (SCA) at 9.

3.7 *Children's Resource Trust Centre & Others v Pioneer Food (Pty) Ltd*⁸⁹ (*Pioneer Appeal case*)

In the appeal of the *Pioneer* case, the Supreme Court of Appeal, as per Wallis JA, started with the question of when a class action can be brought, as well as what procedural requirements must be satisfied to enable the class action to succeed.⁹⁰ The application to certify the consumer class was therefore referred back to the High Court for adjudication in order to narrow the definition of the class.

The court held that the true reason for the consumers bringing this class action was actually based on the right to access to court⁹¹ and it was unnecessary to base the claim on a right to sufficient food.⁹² The members of the consumer class consisted of poor people who would not be able to pursue their claims against the respondent individually, which would amount to a denial of the right of access to justice.

The court extended the ambit of section 38(c) of the Constitution and created a class action that is available even where the right infringed is not contained within the Bill of Rights. In this regard, the following was held:

*"In my judgment, it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate circumstances, merely because of the claimants' inability to point to the infringement of a right protected under the Bill of Rights. The procedural requirements that will be determined in relation to the one type of case can equally be applied in the other."*⁹³

The court confirmed that if a party wishes to bring a class action to court, it is essential for the party to first apply for certification of the class before pursuing the class action.⁹⁴ The certification of a class should be granted by the court, unless the court decides that the class action is legally untenable.⁹⁵

The court rejected the view of many academics⁹⁶ that we should wait for legislative intervention before we decide which requirements are needed in order for a class action to proceed.⁹⁷ The court commented that the regulation of class actions, as set out in the *Pioneer* case, was aimed at determining procedural requirements for instituting a class action, as well as determining

⁸⁹ *Supra* note 88.

⁹⁰ *Supra* note 88 at 1.

⁹¹ Section 34 of the Constitution.

⁹² *Supra* note 88 at 1.

⁹³ *Supra* note 88 at 21.

⁹⁴ *Supra* note 88 at 227A-B.

⁹⁵ *Supra* note 88 at 232A-C and 242B-D.

⁹⁶ For example, De Vos 2012 *TSAR* 755 "Is a class action a 'classy act' to implement outside the ambit of the Constitution?" states that legislative intervention is the best option and we should steer away from judge-made rules.

⁹⁷ *Supra* note 88 at 21.

the broad parameters within which a class action may be instituted.⁹⁸

In terms of Section 173 of the Constitution, the courts are given inherent power to protect and regulate their own process and to furthermore develop the common law in the interests of justice. Wallis JA expressed how judges are sometimes faced with a situation wherein they must devise *ad hoc* solutions to complex procedural matters as and when they occur and that the Pioneer case left the courts with no alternative but to do just that.⁹⁹ It is helpful that the Constitution grants the court this inherent power, as it can be of great help in developing the law relatively rapidly over time and when the need arises. It is not a judge's role to make policy choices that may remove any existing rights that a litigant may possess during the process of setting out procedural requirements for a class action, as this infringes on the doctrine of separation of powers and will encroach into the role assigned to the legislature.¹⁰⁰

Until the legislature has laid down its own requirements, we must follow the requirements laid down by the courts. It may so happen that when the legislature determines requirements for any class actions, they will adopt a completely different approach to the one determined by precedent. This possibility should not deter us from adopting the approach laid out by various judges. Even if the position subsequently changes, it is better for us to have some guidelines in the law regarding class action and application of these in South Africa, than to wait indefinitely for guidance.

3.8 *Mukaddam and Others v Pioneer Food (Pty) Ltd*¹⁰¹ (Mukaddam Supreme Court of Appeal case)

The application for certification of the distributors' claim was dismissed on appeal to the Supreme Court of Appeal. The case was once again based on section 22 of the Constitution, which the court held did not apply to juristic entities such as the distributors. The court indicated that where parties wish to certify opt-in class proceedings such as in *casu*, exceptional circumstances must exist for this to be done.¹⁰² The distributors did not provide any evidence that exceptional circumstances did indeed exist.

Another important requirement of a class action is that it must be shown that the right to access to justice will be infringed if the action does not proceed as a class. In this case, however, the court found that the prospective members of the class were all able to approach the court individually in order to pursue their claims.¹⁰³ Accordingly, the right to access to justice would not have been affected by not allowing the claim to proceed by way of a class action.

⁹⁸ *Supra* note 88 at 22.

⁹⁹ *Supra* note 88 at 15.

¹⁰⁰ *Supra* note 88 at 22.

¹⁰¹ 2013 (2) SA 254 (SCA).

¹⁰² *Supra* note 101 at 258F-G.

¹⁰³ *Supra* note 101 at 257G-H and 258A-G.

3.9 *Mukaddam v Pioneer Foods (Pty) Ltd and Others*¹⁰⁴ (Mukaddam Constitutional Court case)

In the Constitutional Court, the majority ordered that leave to appeal be granted, and that the orders in the *Mukaddam* High Court case and Appeal case be set aside.¹⁰⁵ It was held that: certification was necessary before instituting a class action; that the High Court applied the incorrect test when deciding on the matter of certification; and that it should have relied on the interests of justice in coming to its decision.¹⁰⁶ The Constitutional Court did not agree that “exceptional circumstances” must exist when bringing an opt-in class action, as this was not in line with the appeal brought by the consumers to the Supreme Court of Appeal.¹⁰⁷ Froneman J held that, during certification, it would be difficult to determine whether or not a claim was legally untenable and that this should only be determined at a later stage, once the class action has been instituted and all the facts are before the court.¹⁰⁸

The important change that this case brought about was that a class action is a useful tool to promote the interests of justice and, similarly, that the test for certification must be based on the interests of justice. The effect of this is that the requirements drafted by the South African Law Commission¹⁰⁹ can be taken into consideration by the court when determining certification, but are not considered the ultimate deciding factors.

3.10 Conclusion

The *Nqquza* case created much debate over whether or not there was a general class action available in South Africa. Kok¹¹⁰ believed that a class action could be brought for a non-Bill of Rights infringement, while Hurter¹¹¹ and De Vos¹¹² disagreed. It appears that for the first time, we have a definite answer from case law that a general class action will be recognised in South Africa, as determined in the Pioneer Appeal case: the Applicants in the Pioneer case brought their case on the basis that their Constitutional right to sufficient food, as guaranteed in Section 27(1)(b) of the Constitution, had been infringed. This was done to ensure that the matter could proceed as a class action, because there was uncertainty at that stage as to whether or not an infringement of a non-Bill of Rights right would be recognised as a class action. After much debate over the interpretations of the preceding case law, Wallis JA provided a clear and definite answer and extended the ambit of the class action beyond Bill of Rights infringements only. This decision was a step in the right direction, extending the scope of the class action, thereby making it more accessible and useful.

¹⁰⁴ 2013 (5) SA 89 (CC).

¹⁰⁵ *Supra* note 104 at 56.

¹⁰⁶ *Supra* note 104 at 104A-C.

¹⁰⁷ *Supra* note 104 at 105C-E.

¹⁰⁸ *Supra* note 104 at 111F-J.

¹⁰⁹ *Supra* note 4 at 49.

¹¹⁰ Kok (2003) 158.

¹¹¹ Hurter (2006) 502.

¹¹² *Supra* note 66.

The *Pioneer* case has been of crucial importance to us, as it has provided guidance on the requirements for bringing a class action in South Africa. It is now clear that before a prospective class action can proceed, it must first be certified.

Despite his initial hesitation regarding the matter of judge-made rules, De Vos stated after the *Pioneer* case that Wallis JA had allayed his skepticism and that he commended the judgment.¹¹³ He pointed out that since the Law Commission's report of 1998, the legislature has not taken any action and probably would not readily do so.¹¹⁴

¹¹³ De Vos "Judicial activism gives recognition to a general class action in South Africa." *TSAR* (2012) 2 372.

¹¹⁴ *Ibid.*

Chapter 4: The requirements for class actions as set out in the Pioneer case

4.1 Introduction

The Pioneer case set out the requirements to proceed with a class action, i.e.: the prospective class must first be certified; the class must be defined; there must be a cause of action giving rise to a triable issue; there must be common issues of law or fact; there must be a suitable representative to act on behalf of the class.

The Mukaddam Constitutional Court case¹¹⁵ determined that the interests of justice are the most important factor when considering the matter of certification. However, the requirements set out in the Pioneer case are still important guidelines for class action. Determining whether allowing or disallowing certification would be in the interests of justice, without any further guidelines, is complicated and will create challenges of its own. It is therefore useful to have regard to the requirements set out below, in order to provide greater understanding of the various important components of a class action.

4.2 Certification and decertification

4.2.1 Certification

Hurter¹¹⁶ describes certification as arguably the most important feature of a class action, because, if certification is granted, it might persuade the Defendant to settle, instead of face a huge claim against a large group of people.

Wallis JA stated in the Pioneer Appeal case that, before issuing summons, the Applicant must apply to court to have the action certified as a class action.¹¹⁷ This involves; defining the class; identifying common issues of law or fact; providing evidence regarding a valid cause of action; the presence of a suitable representative; determining that a class action is the appropriate way to proceed.¹¹⁸ This certification requirement is in line with what Froneman J suggested in *Ngxuza* in order to alleviate the floodgates of argument.¹¹⁹

Certification enables a defendant to show good reasons why the action should not proceed and may prevent defendants from merely settling due to fear of long and drawn-out litigation.¹²⁰ Certification is possibly the best way to

¹¹⁵ *Supra* note 104.

¹¹⁶ Hurter E "The class action in South Africa: Quo Vadis?" (2008) (41) *De Jure* 295.

¹¹⁷ *Supra* note 89 at 23.

¹¹⁸ *Ibid.*

¹¹⁹ *Supra* note 89 at 624 D-E.

¹²⁰ *Supra* note 89 at 24.

protect a defendant from the potential problems of defending an action that is reckless or without merit. Certification may have the desirable effect of quicker proceedings, which will reduce the cost of litigation and be in line with promoting access to courts, as provided for in Section 34 of the Constitution. Litigation is extremely expensive and simply unattainable for many South Africans. It is incredibly important that the cost of litigation is reduced as far as possible, so that access to courts becomes a reality for more people. It cannot be said that a legal system is functioning correctly if all members of society are not able to make use of the legal system and benefit from its existence.

The Law Commission¹²¹ recommends a two-stage approach to certification. This involves an initial stage wherein an application is brought to court, accompanied by an affidavit, requesting leave to proceed by way of a class action. The court will thereafter certify the action, if it deems it appropriate, and determine what procedure will be followed; thereafter, the case will proceed as a class action. This approach has been accepted by De Vos,¹²² who suggested that it was an approach more compatible with South African law than the general approach to a class action used in jurisdictions such as America.

4.2.2 Decertification

There is always a possibility that a case that once complied with all the requirements to be certified, ceases to comply. The Law Commission¹²³ recommends that decertification should be allowed in South Africa, and that a court should be allowed to order that an action no longer proceeds as a class action.

It is important to have a process of decertification because if a situation arises in which an action no longer fulfills the requirements of certification, it cannot proceed as a class action, if it lacks the fundamental criteria to be classified as a class action. If, for example, there was no longer a suitable representative to act on behalf of the class, it would probably not be necessary to decertify the class action, but rather to simply substitute the representative for another suitable individual. However, if a class action was no longer the most appropriate means of proceeding, it would be an appropriate instance for decertification to be considered the suitable way forward.

¹²¹ *Supra* note 4 at 39.

¹²² De Vos (1996) 645.

¹²³ *Supra* note 4 at 50.

4.3 Class definition

This requirement certainly does not mean that each individual member of the class needs to be identified.¹²⁴ All that is needed is a sufficient description of the class, so that by using objective criteria, the members of the class can be determined.¹²⁵ The parties would normally not have to be named as individual parties, but rather described in broader terms.

The class definition is important so that in opt-out¹²⁶ proceedings, potential litigants know if they are part of the class or not. It is imperative that people know if they can proceed with their own case against the same defendant, or if they fit into the class definition determined. Lastly, after the case, class members need to know if they are bound by the judgment that was handed down, because all members of the class will be bound by the judgment, regardless of whether it was favourable or not.¹²⁷

If potential litigants are not sure if they fall into the class definition or not, they might proceed with their own action unnecessarily, whilst unknowingly forming part of the class definition determined. It is essential for potential litigants to know whether or not they fall into a class definition, because if they wish to opt-out or opt-in, they will need to take the necessary steps to ensure this is done timeously to avoid being bound by a judgment where they failed to opt-out, or are not included in a judgment where they failed to opt-in.

Mulheron¹²⁸ is of the view that the purpose of a class definition is: to identify those with a claim; define the parameters of the action; and enable people to decide whether or not they want to opt-out or not.

While there is a potential risk of having an overly broad or narrowly defined class of people, the necessary guideline should be that, at all stages, it must be clear exactly who forms part of the class.¹²⁹

4.4 A cause of action giving rise to a triable issue

If an exception can be raised against a claim, then the case will be legally hopeless and cannot be certified.¹³⁰ To make a proper decision regarding the merits of a case, the Plaintiff's particulars of the claim should appear together with the application. The legal basis of the case should also be included in the

¹²⁴ *Supra* note 4 at 29.

¹²⁵ *Ibid.*

¹²⁶ With an opt-in class action, members are not part of the class until they choose to opt-in. With an opt-out class action, every member is included; if they wish to not be included, they should opt-out of the proceedings. It is for this reason that notice is so important, because members are bound by a decision of the court and cannot institute action at a later stage on a matter already decided on.

¹²⁷ *Supra* note 4 at 29.

¹²⁸ Mulheron (2004) *The Class Action in Common Law Legal Systems: A Comparative Perspective* Hart Publishing Ltd, 334-335.

¹²⁹ *Supra* note 4 at 34.

¹³⁰ *Supra* note 4 at 35.

founding affidavit.¹³¹ It must be decided whether or not there is a *prima facie* case, because if not, the case will be factually hopeless.¹³² The affidavits must set out all the evidence that the Applicant will rely on in order to prove his case.¹³³

4.5 Common issues of law or fact

Commonality does not require that every claim be identical to those of other members in the class.¹³⁴ All that is required is that there are common issues, so that the case can be decided in one class action.¹³⁵ The class action will not have to dispose of all the issues between the parties to enable the class action to be certified, and the parties could, for example, deal with the issue of damages individually and separately at a later stage.¹³⁶

4.6 A suitable representative

A suitable representative must be appointed to protect the interests of the class. Much of the success of a class action depends on the competence and enthusiasm of the class representative.¹³⁷ If an unenthusiastic or unmotivated representative acts on behalf of a class, it is unlikely that such a representative would put in sufficient time and effort required to see the case to its finality.

This notion of a representative is in line with the concept of an ideological plaintiff, as set out and suggested in the Working Paper of the Law Commission.¹³⁸ This idea was based on the fact that many litigants are destitute and uneducated and would be inadequate representatives of the class.¹³⁹ Many South Africans may be unaware of their rights or how to institute an action if they are aggrieved.

The Honourable Justice BR du Plessis does not support the concept of the ideological plaintiff and feels it erodes the difference between a class action and a public interest action.¹⁴⁰ He believes that simply getting someone to act on behalf of uneducated people, irrespective of what such people want, will not be successful. He says it is imperative that the court perceives that the representative has the support of the members of the class concerned, before allowing such representative to act on behalf of the class.¹⁴¹

¹³¹ *Supra* note 4 at 39.

¹³² *Supra* note 4 at 35.

¹³³ *Supra* note 4 at 43.

¹³⁴ *Supra* note 4 at 44.

¹³⁵ *Ibid.*

¹³⁶ *Supra* note 4 at 45.

¹³⁷ Hurter (2008) 295.

¹³⁸ The Recognition of a Class Action in South African Law. 1995. 57.

¹³⁹ *Supra* note 4 at 34.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

Another criticism given to the Law Commission was that lawyers who were only interested in making money themselves could mislead uneducated people with empty promises. To prevent this, the court should be convinced that, on the merits of the case, there is a probability of success.¹⁴²

De Vos agrees with Wallis JA as well as the Law Commission and believes that the ideological plaintiff is perfectly suited to the situation in South Africa, considering that there are a large number of South Africans who are ill-informed of their rights and who require the knowledge of other people to enforce and protect such rights.¹⁴³

While there is always the possibility of abuse of power by a representative, the ideological plaintiff could work especially well in South Africa. As long as the court has systems in place to ensure that the representative in question legitimately has the interests of the class in mind, as well as the necessary time and resources, the representative should not have to be a member of the class. Time and resources are a very important aspect, as even the best intentions to help can be fruitless, if the representative simply does not have the necessary skills, knowledge or time to assist the members of the class.

In practice, in the legal profession it is clear that many South Africans have absolutely no knowledge of the legal system and struggle to understand even the basics of law. This is attributed to the fact that there are many uneducated South Africans, who have never been afforded the opportunity to attend school and in many instances they are illiterate.

Perhaps one of the most important qualities of the representative would be good communication skills. The representative will be the voice of the class, and the class is unlikely to be successful if the representative cannot communicate effectively with other members of the class.

There should not be a conflict of interest between the representative and any member of the group. It might become tricky where a representative must deal with the conflicting wishes of different members of the class; however, a representative's main goal is to fight for the "common issue of fact or law" that are present in the particular class action.

De Vos supports the Commission's notion that it is an exaggeration to state that the ideological plaintiff will result in many frivolous claims and that the courts will become overwhelmed with litigation.¹⁴⁴ I agree that this notion seems far-fetched. The ideological plaintiff is merely a tool to assist members of a class who might be unequipped to represent themselves. The mere fact that the ideological plaintiff does not have to form part of the class does not necessarily mean that there will be a sudden influx of people wishing to represent classes in an action. Regardless of whether or not there is an ideological plaintiff, there is always the possibility that many frivolous claims

¹⁴² This criticism was advanced by Mr Conradie of Hofmeyr Attorneys. *Supra* note 4 at 35.

¹⁴³ *Supra* note 113 at 377.

¹⁴⁴ De Vos (1996) 645.

will be taken to court, and the process of certification could assist greatly in this regard.

Assigning the court with the task of deciding whether or not a representative is suitable will not be without its challenges. While members of the class will rely on the suitability of the representative, it is ultimately the attorney and advocate representing the class who must be the most knowledgeable. Bearing this in mind, it seems unlikely that a judge would find that a person is not a suitable representative based only on a lack of understanding of all the intricacies of the class action or the law.

The degree of legal knowledge required by the representative should not be too onerous. The enthusiasm and drive of the representative to protect the interests of the class adequately should count more than an extensive knowledge of the class action or the law.

4.7 Conclusion

The mere fact that we now have requirements necessary in order to bring a class action does not mean that the class action procedure will be without problems.

It is now clear that certification is a prerequisite to instituting a class action. It is possible that certification could be seen as an unnecessary step that only further complicates an already problematic class action procedure. However, certification will prevent problems further down the line, and it has the potential to eliminate the issue of frivolous action being brought to court.

Despite the fact that the determining factor for certification is now that it must be in the interests of justice to grant it, these requirements are still beneficial tools to guide us with a class action. As we have no promulgated acts relating to the determination of a class action, the South African Law Commission's reports, as well as case law, are the only guidance we currently have.

Chapter 5: A comparative study of the class action in America and Canada

5.1 Introduction

The Constitution states that, when interpreting the Bill of Rights, a court or tribunal must take note of international law and that it may take note of foreign law.¹⁴⁵ Since class action is provided for in the Bill of Rights,¹⁴⁶ it is important to take note of foreign and international law in respect of class action. Foreign jurisdictions are considerably more advanced than South Africa when it comes to class action and their implementation. With special reference to America and Canada, both countries have detailed legislation relating to class action, although it is not perfect.

As we are not the pioneers in class action, we have to rely heavily on foreign case law, legislation, articles and books to assist us with understanding class action. The Law Commission's Report¹⁴⁷ examined foreign law quite extensively, and has managed to make recommendations based on what has worked most effectively abroad. It is important for us to consider how other jurisdictions are dealing with class actions and learn from their success and mistakes.

5.2 America

In America, class action is very popular and commonplace. Class action is authorised by Rule 23(a) of the Federal Rules of Civil Proceedings, which does not define what a class action is, but discusses the requirements for one to be successfully instituted.

Federal Rule 23(a) states:

“(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.”

¹⁴⁵ Section 39 (b) and (c).

¹⁴⁶ Section 38 (c).

¹⁴⁷ *Supra* note 4.

These requirements for a class action to be instituted are often referred to colloquially as “numerosity, commonality, typicality and adequacy”.¹⁴⁸

Once these requirements are met, the next step is that the action must be classifiable into one of a further three groups, as prescribed by Rule 23(b).

The first group a class action can be classified into is that not using one would create a risk of inconsistent judgments. It is the very nature of human beings that we all differ remarkably from each other in the way that we think and interpret different situations and facts. Accordingly, presiding officers often provide conflicting decisions. In a large percentage of cases, a different presiding officer, who subsequently deals with a matter that is the same or similar to a previous one, might easily make a finding that conflicts with another decision. Secondly, final injunctive relief would be appropriate regarding the whole class. A thirdly, the class action is the most appropriate way forward. These three groups that the class action must fall into are extremely wide and will do little in the way of reducing cases from being certified.

The process of certification is therefore divided into two distinct stages.¹⁴⁹ The first stage involves satisfying the court that all the requirements of Rule 23(a) have been met. Secondly, it must be determined into which group in Rule 23(b) the class fits. Rule 23(c) deals with certification, and states that certification must be determined as soon as possible after instituting the action, and can be altered or changed at any time before final judgment. This relates to the process of so-called ‘decertification’.¹⁵⁰ Decertification is a useful tool available to a court to use when a class no longer fulfills the criteria for certification. However, it can provide some uncertainty in class action procedures, especially where judicial discretion is involved. Because an order for certification can be decertified, and is therefore not final, the courts would usually not be willing to grant leave to appeal; however, Federal Rule 23(f) allows a court to review orders relating to certification.

Certification is necessary in order to prove to the court that the class action is the most appropriate and beneficial way to proceed.¹⁵¹ Not every matter in the action has to proceed on a class basis, and some aspects of the matter, such as quantum of individual damages, can be heard separately, if necessary.¹⁵²

The Rule¹⁵³ furthermore requires that members of a specific class receive the best notice practicable under the circumstances, and where members can be individually ascertained with reasonable effort, such members should each receive individual notice. Such “best notice” would seem to include notice via mail, radio, television, telephone, adverts and email.

¹⁴⁸ Hurter (2008) 296.

¹⁴⁹ Hurter (2008) 295.

¹⁵⁰ See paragraph 4.2.2.

¹⁵¹ *Barnes v The American Tobacco Corporation* 161 F 3d 127 140 (3d Cir 1998).

¹⁵² Federal Rule 23(c)(4).

¹⁵³ Federal Rule 23(c)(2).

In America, “op-out” class proceedings are used, and members of the class who do not wish to be bound by the judgment are required to opt-out in the manner specified in that specific class action’s notice.¹⁵⁴ It is common practice for Americans to receive notice in the form of an email stating that if they used or bought a certain product in a certain time period, they may form part of a certain ‘class’ of people who have a potential case against a particular company. There is then the option for people to opt-out if they are not interested. In South Africa, this would be more effective than an opt-in class action. In our country there would be many people who had used or bought a certain product during a certain time period, but who do not have access to the Internet or media and would thus not be aware of the need to opt-in in such circumstances. Accordingly, they would lose out on any possible victory the rest of the class experienced.

It is interesting to note that the aspect of notice has not been elaborated on sufficiently in case law in South Africa, and for this reason it is important to examine foreign jurisdictions in this regard. The Law Commission advises that the proposed Act needs to state when, by whom, to whom and how notice should be given to members of the prospective class.¹⁵⁵ The report also states that the court should be able to decide what form¹⁵⁶ of notice needs to be provided to members of the class.

The Commission further recommends that when deciding whether or not to give notice, a court should look at factors such as the class size, the level of education prevalent in the class, the possibility of identifying all members of the class, the type of relief claimed, as well as the potential prejudice a party might face if bound by a decision from a case they did not know existed.¹⁵⁷ It is important to ensure that the cost of providing notice to parties is not unrealistically high in relation to the claim brought by the class.

A plaintiff in a class action in America only needs to prove that there is a “common nucleus of operative facts”.¹⁵⁸ The class only needs to be ascertainable or capable of being identified and no greater specificity is required.¹⁵⁹

If we re-examine the *Ngxuza* case,¹⁶⁰ paying close attention to the quintessential requirements of a class action,¹⁶¹ it is apparent that these

¹⁵⁴ Federal Rule 23(c) (2) (v) and (vi).

¹⁵⁵ *Supra* note 4 at vii.

¹⁵⁶ The ‘form’ of notice refers to opt-in, opt-out or no notice sent to the parties.

¹⁵⁷ *Supra* note 4 at 54.

¹⁵⁸ Wiechman, Baxter and McKinney “Mass tort action: is the tide turning?” 1997 *Defence Counsel Journal* 69.

¹⁵⁹ Quinlivan *Management problems of the class action under Rule 23(b)3*, in Wechsler *Prosecuting and Defending Stockholder Suits and Class Actions* (1973) 336.

¹⁶⁰ *Supra* note 40 at 16.

¹⁶¹ The class is so numerous that joinder of all members is impracticable; There are questions of law and fact common to the class; The claims of the applicants representing the class are typical of the claims of the rest; The applicants, through their legal representatives, will fairly and adequately protect the interests of the class.

requirements are almost identical to the way Federal Rule 23 is worded, which is a concern, given the criticism leveled against the American style class action.

The American class action is often criticised for being a process that is unmanageable¹⁶² and has been described as complex and technical.¹⁶³ America is responsible for a large amount of case law based on class action, due to the complicated Federal Rule 23, and we should try to avoid following the American class action example too closely.¹⁶⁴

5.3 Canada

The Quebec Code¹⁶⁵ defines a class action as a procedure enabling a member to sue without a mandate on behalf of every member of the class. The members do not have to be individually named and must merely be described in sufficient terms.¹⁶⁶

Understanding the class action in Canada requires an in-depth investigation into the law, case law and articles pertaining to each of the different provinces in Canada, because, to some extent, they all differ slightly in their approach to class actions. For purposes of this dissertation, I will only examine the situation that prevails in the province of Ontario.

The Ontario Law Reform Commission was tasked with investigating class action comprehensively, and in 1982 it delivered a 900-page report. For some time nothing was done to turn the recommendations made in this report into legislation. However, in 1992, the Class Proceedings Act, which took the report by the Ontario Law Reform Commission into consideration, was adopted. It has been 16 years and we are still in a position where no legislation has been implemented in South Africa that incorporates the recommendations made by the Law Commission in 1998. Comparatively, it took 10 years before the Class Proceedings Act was adopted in Ontario. This is simply another indication of how far behind we are in developing legislation to govern the class action.

The Class Proceedings Act (The Class Act) did not follow the American idea of different categories of class action,¹⁶⁷ and instead created a more general class action. Although the requirements for class action differ in various provinces in Canada, the certification process remains the same in all provinces.

¹⁶² Friedenthal Kane & Miller *Civil Procedure* (2ed 1993) 748.

¹⁶³ Hurter (2008) 295.

¹⁶⁴ Hurter (2006) 500.

¹⁶⁵ Article 999 of the Quebec Code.

¹⁶⁶ *Naken v General Motors of Canada Ltd* (91979) 92 DLR (3rd) 100 (Ontario Court of Appeal; (1983) 144 DLR (3rd) 385 (Supreme Court of Canada).

¹⁶⁷ Federal Rule 23(b).

The court will certify a class¹⁶⁸ if there is a cause of action, an identifiable class of two or more persons, there are common issues, class proceedings would be the preferable procedure and there is a suitable representative. The Court is allowed to make any appropriate order, whilst respecting the conduct of a class proceeding, so that it ensures proceedings that are quick and fair; for such purpose it may determine any appropriate terms that will be applicable to the parties involved.¹⁶⁹

Hurter¹⁷⁰ hopes that when drafting legislation to regulate class action, the legislature will follow the approach taken in Canada (where the procedure has turned out to be far more effective) and not the approach taken in America, where it is prone to problems. The fact that foreign jurisdictions are steering clear of the class action procedure used by America should indicate caution in using this procedure in South Africa.¹⁷¹ The Canadian model is less onerous than the American model and would be more in line with promoting the “spirit, purport and object of the Bill of Rights”.¹⁷²

5.4 Conclusion

The most useful contribution we can gain from examining class action in America is the use of the opt-out form of notice. In considering the circumstances specific to South Africa, this would be the best way to ensure that people are not prejudiced by being excluded from a class action due to simply not being aware of it. In a country where there are many illiterate and uneducated people, and where many people do not have proper access to food, housing and water, let alone the internet, an opt-out class action may be the least detrimental to its citizens. In a case where a class has an action against a big company, it would be especially necessary that the interests of indigent and illiterate citizens are protected, and it would be injudicious to expect such citizens to have the ability to opt-in, or else face possible prejudicial consequences.

America has a very complicated class action procedure and it would be unwise to follow their lead too closely with regard to any other aspects of a class action. The Canadian model of the class action is far less complicated than the American model. The Canadian Law Reform Commission rejected the approach whereby inflexible requirements are set down for certification, and this assists in making the class action procedure more accessible.¹⁷³ As each case can be very different and present its own unique challenges, the preferred approach would be one in which the presiding officer could intervene to ensure the matter is dealt with in the most effective manner.

¹⁶⁸ Section 5 of the Class Proceedings Act of 1992.

¹⁶⁹ Section 12 of The Class Proceedings Act of 1992.

¹⁷⁰ Hurter (2008) 303.

¹⁷¹ Hurter (2008) 302.

¹⁷² *Ibid.*

¹⁷³ Hurter (2008) 297.

The most important lesson that we can learn from Canada is that a less strict and more flexible approach proves to be more successful than the tedious approach adopted in America. When drafting legislation to govern class actions, it is hoped that the legislature bears in mind the approach taken in Canada, while still creating a class action procedure suited to South Africa, and in line with the aims of the Constitution.

Chapter 6: Conclusion

The aim of this dissertation is to examine the way in which the class action has developed in South Africa over the years. The introduction of the class action into our Constitution has been an important shift from the restrictive view of *locus standi* once observed in our common law to a much wider interpretation which allows people to approach the court on behalf of other people.

The rationale behind allowing class action in our changing society is sound. The class action, while essential in modern day society, is not without its challenges. The Pioneer case has provided excellent guidelines to assist the courts with dealing with class actions, but these guidelines will unfortunately not resolve every problem concomitant to class action.

The class action is an extremely powerful tool that South Africans can use to enforce their rights. There are numerous instances in which individuals could have insignificant claims that do not justify the high costs of litigation, but the collective effect of these claims is huge. The importance of the Constitutional right to access to justice has been highlighted and elaborated on in a number of recent cases. A large percentage of our population is uneducated and impecunious and this makes access to justice a reality for very few South Africans. The class action is a necessary device to assist in making access to justice attainable for large groups of poor people, who might otherwise have no redress.

The application of the class action within South Africa has proved challenging, as the Constitution did not provide any guidelines regulating the class action device. There has been an important shift from the initial case law regarding class action,¹⁷⁴ which adopted a very strict view of *locus standi*. In the Pioneer¹⁷⁵ case, the Constitutional Court created certainty that a general class action will now be recognised in the courts, and it is therefore not necessary to base the action on a breach of right entrenched within the Bill of Rights. It also became clear that certification was a necessary requirement before instituting a class action, and that the test for certification was in the interests of justice. The South African Law Commission provided guideline requirements for certification, which were endorsed in the Pioneer High Court case.¹⁷⁶ As certification must be granted if the interests of justice so dictate, it is not enough to deny certification based on certain of these requirements being absent from the class.

The South African Law Commission's draft legislation to regulate class action has been largely ignored. Accordingly, it has been left to the courts to determine how class action must be interpreted, which has resulted in conflicting decisions and some level of uncertainty. However, the position is now much clearer and the courts have indicated that the class action procedure should be welcomed as a necessary aid to the right to access to

¹⁷⁴ *Supra* note 37.

¹⁷⁵ *Supra* note 104.

¹⁷⁶ *Supra* note 40 at 16.

justice. While guidelines provided by a judge are helpful, we need detailed legislation to provide absolute certainty for litigants. It is unsettling that after so many years, and after the increase in the need and the occurrence of the class action procedure in South Africa, the legislature has not given class action the attention that it desperately needs.

Both Canada and America have well-established procedures and rules relating to class action. It is useful to analyse these foreign jurisdictions in an attempt to find procedures suited to South Africa. This could help us to avoid the difficulties experienced in different countries and learn from the mistakes of others. We need a class action device that is custom-made to fit the needs in South Africa, and not a procedure that is an arbitrary compilation of models from abroad.¹⁷⁷

Despite some of the uncertainties relating to class actions in South Africa, as well as the possible challenges that the class action device may bring, it is a step in the right direction away from the traditional model of *locus standi*, which is completely unsuitable for our current needs.

¹⁷⁷ Hurter (2008) 304.

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