

CAN A CLASS ACTION BE INSTITUTED FOR BREACH OF CONTRACT?

1 Introduction

The class action was an unknown procedure in South African litigation until 1993 (*Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA); *Maluleke v MEC, Health and Welfare, Northern Province* 1999 4 SA 367 (T); *Lifestyle Amusement Centre (Pty) Ltd v The Minister of Justice* 1995 1 BCLR 104 (C)). Traditionally a litigant had to show a sufficient and direct interest in a case and could only litigate on behalf of other parties who were formally joined in terms of the procedural law of that specific forum (see *Standard General Insurance Co v Gutman NO* 1981 2 SA 426 (C); *Christian*

League of Southern Africa v Rall 1981 2 SA 821(O); Loots “*Locus standi* to claim relief in the public interest in matters involving the enforcement of legislation” 1987 SALJ 131–148 and Kok “Has the Supreme Court of Appeal recognised a general class action in South African law?” 2003 THRHR 158). The first case in which a South African court soundly denounced the idea of an action in the public interest was *Bagnall v The Colonial Government* 1907 24 SC 470. In support of their argument, counsel referred to the *actiones populares* of Roman law where a private individual could bring an action to court for the people. The court found that the *actio popularis* (a means of social control) had become wholly obsolete in Dutch law and was never received into South African law (see also *Wood v Ondangwa Tribal Authority* 1975 2 SA 294 (A) 310D; and Loots 1987 SALJ 133). Fairly recently, the South African Law Reform Commission (hereafter the “Commission”) addressed this issue and proposed the introduction of a class action over the whole spectrum of civil litigation (see *The recognition of a class action in South African law* Working Paper 57, Project 88 (1995) (hereafter Working paper, which was followed by *The recognition of class actions and public interest actions in South African law* Report, Project 88 (1998) hereafter Report). Procedural experts such as Loots (1987 SALJ 131) and De Vos (“Reflections on the introduction of a class action in South Africa” 1996 TSAR 639) became convinced that South African society needed an effective remedy to protect group interests in the form of a class action in the American mould. This view supports the context of a new open dispensation in South Africa with regard to the Bill of Rights. The South African common law and the courts have not as yet dealt with an application for a class action for breach of contract. The traditional position of individual civil litigation with regard to the law of contract remains unaltered by the fundamental right to a class action.

2 The role of class actions in post-apartheid South Africa

The majority of South Africans are in a poor position to seek legal redress. The costs and technicalities of the legal procedures, including the principles permitting and ensuring joinder and adequate notice, may unduly complicate the attainment of justice (*Permanent Secretary* paras 11–12; *Soobramoney v Minister of Health, KwaZulu Natal* 1998 1 SA 765 (CC) para 8; Kalven and Rosenfield “The contemporary function of class suit” 1941 *Univ of Chicago LR* 684–686). It is in this regard that appropriate relief was created by the interim and the final Constitution by including the express entitlement for “anyone” asserting a right in the Bill of Rights, to litigate as a member of a group or class, or in the interest of those sharing a common interest (see *Permanent Secretary* 1185J–1186A, s 7(4) of the interim Constitution 1993; s 38 of the final Constitution 1996 and Loots “Standing to enforce fundamental rights” 1994 SAJHR 49).

De Vos (1996 TSAR 639) explains a class action according to the American model as “a procedural device that enables a large group of people whose rights have been similarly infringed by a wrongdoer, to sue the defendant as a collective entity”. One or more of the group members could initiate the action as a representative party on behalf of the whole group, without the need to join all the members (*Report* vi para 9). If the plaintiff has met certain requirements and if he or she would be able to represent the interests of the absent members of the class adequately, the court will allow the action to proceed as a class action (*Dalrymple v Colonial Treasurer* 1910 TS 372; *United Watch and Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 4 SA 409 (C); *Padi v Botha NO* 1996 3 SA 732

(W) and De Vos 1996 TSAR 639). The order of the court at the end of the proceedings will be for the benefit of all the members based on the *res judicata* rule (see Report 8 para 2). All the members will be bound by the judgment (see the decision of the US Supreme Court in *Philips Petroleum Co v Shutts et al* 472 US 797 (1985)). The class action is especially suited for consumer protection in the context of American litigation while the public interest action is useful for the enforcement of civil and environmental rights. In South Africa, the Commission found that these are two different but not mutually-exclusive procedures that overlap to some extent because there is no definite dividing line between them (see Report 7 para 2 4 1 and authorities cited in fn 22 and 23). In some cases civil rights, consumer interests and environmental protection issues may be of such public importance that the interests of the class or group represent the interest of the public at large. Consequently, either a class action or a public interest action can be instituted (*ibid*; *Ahmadiyya AIL (South Africa) v Muslim Judicial Council (Cape)* 1983 4 SA 855 (C); *Society for the Prevention of Cruelty to Animals, Standerton v Nel* 1988 4 SA 42 (W); *Matukane v Potgietersrus Laerskool* 1996 3 SA 215 (T) and *Wildlife Society v Minister of Environmental Affairs* 1996 3 SA 1095 (TkSC) 1105A–C).

In the context of South African law, a class action could be viewed as an extension of the traditional common-law principles of *locus standi* and the *audi alteram partem* rule. As Loots (1987 SALJ 131 144) remarks, “[l]ocus standi depends not only on the existence of a right but, more important, on a right of action”. First, a litigating party has to prove legal capacity to sue or be sued and second, to prove a sufficient direct interest in the case to claim the relief which he or she seeks in terms of the principle of *locus standi*. The *audi alteram partem* principle ensures that the plaintiff as well as the defender class action group receive proper notice of the hearing, the nature of the other party’s case and the *iusta causa* of the case in order to enforce their right to a fair hearing, as well as an opportunity to present their respective cases to the court (Theophilopoulos *et al* *Fundamental principles of civil procedure* (2006) 2–3 87–88). The principles regarding *locus standi* were enforced by the Appellate Division in 1907 and 1917 respectively, by means of two rules that became known as the *Patz* and the *Madrassa* rules. First, the court should address the decision as to the availability of the remedy and secondly to the plaintiff’s *locus standi* (*Patz v Greene & Co* 1907 24 SC 470; *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718; and Loots 1987 SALJ 139).

In *Lifestyle Amusement* the applicants contended that if one of the “class of interested persons” consisting of some 2 000 casino owners established jurisdiction, it would be sufficient to clothe the remaining 1 999 applicants with *locus standi*. It furthermore forms an integral part of the foundation laid down by the legislator to assist the courts in the development of the common law (see s 38(c) of the final Constitution of 1996 (hereafter the “Constitution”) which provides for “anyone acting as a member of, or in the interest of a group or class of persons”). It is clear in this regard that section 7 of the interim Constitution 1993 (hereafter the “interim Constitution”) and sections 39(2) and 173 of the Constitution allow for a class action in the Bill of Rights litigation. Section 39(2) states: “When interpreting any legislation, and when developing the common law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” Section 173 regulates the administration of justice and the inherent power of the High Courts and states that “[t]he Constitutional Court, Supreme Court of Appeal and the High Courts have the inherent power to regulate their

own process and to develop the common law, taking into account the interests of justice". The Constitution guarantees the principle of a fair hearing in section 34 based on the right "to have any dispute resolved by the application of law decided in a fair public hearing before a court".

The first introduction of the class action became possible at the dawning of the interim Constitution of 1993 (s 7) and was consequently established in the final Constitution of 1996 in section 38(c) (De Vos 1996 *TSAR* 639). An application for leave to institute a class action or a public action could succeed if the following requirements are being met in conjunction with section 38(c) of the Constitution. Anyone alleging that a right in the Bill of Rights has been infringed or threatened has the right to approach a competent court. The court may grant 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; and
- (d) an association acting in the interest of its members.

In addition to the extensive research done on the viability of the protection of group interests by De Vos, the Commission has indeed recognised the need for an action to protect the public's interest apart from the class action, namely the public interest action or the group action. In *Working paper* 13 para 3 1, the Commission distinguished the following general differences between a class action and a public interest action:

"Public actions comprise law suits which seek to vindicate important social values that affect numerous individuals and entities, whereas class actions claim specific relief on behalf of class members. Public actions are particularly suited to the claiming of declaratory and injunctive relief, whereas class actions are suited to claims for damage and specific performance."

However, the Commission indicated the following essential differences between a class action and a public interest action in *Report* 8 para 2 4 3:

Public interest action	Class action
1 Any person, irrespective of whether or not he or she has a direct interest in the relief claimed, may institute the action.	1 Any person whether a member of the class or not, may apply for leave to institute the action as a class action.
2 The action must be identified as a public interest action.	2 The action must be certified as a class action in order to proceed as a class action.
3 The court appoints a representative to prosecute the action.	3 The court appoints a representative to prosecute the action.
4	4 The court may determine its own procedures.
5	5 Some form of notice to absent members is usually required.

continued

Public interest action	Class action
6	6 The court may determine the common issues and give judgment on them.
7 Judgment is not <i>res judicata</i> against all interest parties. The doctrine of <i>stare decisis</i> makes public interest actions effective.	7 Judgment is <i>res judicata</i> against all class members who have not opted out.

Accordingly, the Commission recommended that the two actions should be treated as two separate and distinct procedures, each serving a different purpose and each having to comply with different requirements. The Commission has recommended the “urgent” introduction of class and public interest actions into non-constitutional areas of the law by means of an act of Parliament and that it should not be left “only to the courts to develop the necessary principles and guidelines” (*Report 11 para 3 1 1*).

As Cameron JA aptly remarked in *Permanent Secretary* 1190I: “The law is a scarce resource in South Africa [and] this case shows that justice is even harder to come by.” It is therefore suggested that a specific class of people who share the same common facts and legal issues may take an action to court on behalf of an identifiable group of people. A suitable representative who belongs to this specific class of plaintiffs acts as the representative of the specific class. The class action serves a specific purpose in terms of justice and is brought to court by means of a specific civil process.

3 Case law on the class action in South Africa

In *Wood v Ondangwa Tribal Authority* 1975 2 SA 294 (A) church leaders were allowed to claim an interdict in the interest of a large, vaguely-defined group of church members. This group of people feared an unjust trial and consequent illegal imprisonment on account of their political affiliations. Although the court took an understanding view of the financial and practical burdens of the group by allowing the applicants to represent their interests, it missed the opportunity for judicial reform of the doctrine of standing (Loots “Standing to enforce fundamental rights” 1994 *SAJHR* 49 51). However, the court explicitly mentioned the need to adopt a liberal attitude towards standing with regard to a threat of illegal deprivation of liberty (310G). Another unreported case worth mentioning before the interim Constitution liberalised the standing rule is *National Education Crisis Committee v State President of the Republic of South Africa* case no 16376/86 (W). *In casu* the court refused to extend the principle of standing beyond its narrow limits and was not even prepared to accept that black school children had a right to education and were prejudiced by regulations concerning the conditions of admission to their schools. Fortunately, the restrictive traditional common-law position has been amended by sections 7(4) and 32(a) of the interim Constitution.

The applicants in *Permanent Secretary*, currently the leading case on class actions, were the recipients of social disability grants under social legislation. Their complaint was that the Department of Welfare in the Eastern Cape Provincial Government unilaterally and without notice terminated their grants. They also alleged that the Department of Welfare did the same to tens of thousands of

other people (1184). The *crux* of the case remains the adequacy of the representation, which would be decisive of the question whether the action qualifies as a class action or not (De Vos 1996 *TSAR* 646). In this regard the Commission recommend the following (*Report* 5 4 15):

“The person commencing the class action or the person appointed as representative in the class action need not be a member of the class. Since the quality of the representative may be relevant, only suitable persons should be appointed as representatives. The Act should accordingly provide that the person who brings the application for certification may request the court to appoint him or her, or any other suitable person (with that person’s prior consent), to be the representative. Before the court appoints the representative, it must be satisfied that the contemplated action is a bona fide class action. The Act should further provide that the court may dismiss a representative on good cause shown.”

Since the matter of *res judicata* applies to all members who are not excluded from the class action, it remains important and fair to leave the option to join the class or not, open to all with an interest in the matter. With regard to adequate notice the Commission “proposes a flexible regime in terms of which the judge should have a wide discretion in regard to the giving of notice” (De Vos 1996 *TSAR* 648). In the proposed bill it is provided that:

- “8(1) The court which certifies an action may give directions to the representative with regard to –
- (a) The giving of notice of the action to the members or potential members of the class concerned;
 - (b) The form which such notice should take;
 - (c) The way in which such notice is to be communicated to the members of the class” (*Report* 94).

The four applicants in *Permanent Secretary* were afforded the relief asked for, namely, the reinstatement of their grants, leave to institute representative class action and public interest proceedings against the provincial authorities with the help of the Legal Resources Centre in their personal capacities as the four quint-essential requirements of a class action were present, namely:

- “(1) The class was so numerous that joinder of all its members would be impractical;
- (2) There were questions of law and fact common to the class;
- (3) The claims of the respondents representing the class were typical of the claims of the rest; and
- (4) The respondents through their legal representatives (the LRC) would fairly and adequately protect the interests of the class” (1197G/H–1198A/B para 16).

The most important feature of the class action was that all the members of the class, although not formally and individually joined, benefited from the litigation and were bound by the outcome unless they excluded themselves through prescribed procedures (1192G/H para 4).

According to Kok (2003 *THRHR* 160) the *Permanent Secretary* judgment may indicate “that the Supreme Court of Appeal intended to create a general class action in South African law, and not only in terms of the Bill of Rights-related cases”. Cameron JA strongly voiced his dismay regarding the exploitation of the litigants by the Eastern Cape Province Department of Welfare. He stated as follows:

“[T]his is no ordinary litigation. It is a class action. It is an innovation expressly mandated by the Constitution. Paragraph 12 furthermore states that the Constitution

does not indicate how [a class action] is to be developed and implemented, however he continues [that it is being left] to the Courts, which s 39(2) enjoins to promote the spirit, purport and objects of the Bill of Rights when developing the common law, and upon which s 173 confers inherent power to develop the common law, taking into account the interests of justice" (para 22).

Insofar as opposing judgments in *Lifestyle* and *Maluleke* may "frown" upon the availability of a class action and the criteria for constituting and defining a class for the purpose of the class action in the South African context, these judgments "were inconsistent with this judgement" and as such overruled by Cameron JA in *Permanent Secretary*. "Perhaps the Supreme Court of Appeal also rejected the Court's insistence in the *Maluleke* case that a right in the Bill of Rights must be infringed as an essential requirement of a class action" (Kok 2003 *THRHR* 162). I agree with Kok's view "that to accept that the Supreme Court of Appeal has not extended a class action beyond Bill of Rights litigation would unnecessarily limit access to justice", although the matter *in casu* was based strictly on the prerequisite of an infringement of a right in the Bill of Rights (*idem* 163).

The time has come to accept the need for the courts to allow a general *bona fide* class action for breach of contract beyond the restrictive constitutional limitation of standing. The Commission's recommendations based on extensive research regarding the principles underlying a class action were incorporated in the draft Bill on public interest and class actions. The implementation of the draft bill as an Act of Parliament and the necessary procedures provided by the rules of court deserve the immediate attention at the highest level of Parliament to broaden access to justice and widen the scope of section 38(c) and (d) of the Constitution as a matter of urgency.

Internationally, class actions and public actions contribute to the global movement of improving people's access to justice and "are used outside the scope of constitutional law where a number of people have similar claims or defences" (*Report 2* para 1 2 3). The Commission and De Vos refer to the contributions of Cappelletti *Access to justice and the welfare state* (1981), *The judicial process in comparative law* (1989); Homburger "Private suits in the public interest in the United States of America" 1974 *Buffalo LR* 343; and Yaezell "From group litigation to class action" 1980 *UCLA LR* 514) in this regard (*Report 2* para 1 2 2 and 6 para 2 2 1; De Vos 1996 *TSAR* 640 fn 6 and 641 fn 14). Cappelletti *Judicial process* 304 describes the changing needs regarding traditional common-law principles of standing and a fair hearing as "the members of the class [who] will have a better 'day in court' if representative litigation is allowed than if not, since as a rule, they would simply be unable to go to court individually" (see also De Vos 1996 *TSAR* 654).

Other instances where the common law currently applies in South Africa without the intervention of litigation are claims arising from transactions concluded by consumers or arising from some other common factor affecting a class, such as the treatment of neonatal patients who contracted infections and died as a result of negligent nursing care. The implementation of a class action for breach of contract would ensure that justice prevails in such cases. The consumer needs protection by means of a collective remedy against personal damage, fatal injury claims and damage to property (see *Report 2* para 1 2 3).

4 A general class action as a remedy for a breach of contract

South African farmers have contracted with ESCOM for the supply of electricity. Could a general class action become an option for litigation to claim damages in

terms of a possible breach of contract by ESCOM where ESCOM does not meet its contractual obligations? If the farmers on the other hand should refuse to pay their electricity bills and be sued by the supplier they could designate a group of farmers, or an agricultural association, or a trade union like Solidarity, to represent the class of individuals as a “defendant class action” (see *Report 9* para 2 5 1). The farmers are an identifiable class of persons. A representative of this class of farmers could be available to institute a class action in a fair and adequate way. The appropriate method of proceeding with the class action is via an application to the high court or any court designated by the minister (*idem* 30 para 4 8 1). The cause of action is a breach of contract by the defendant, a “powerful” supplier of electricity. Damages (relief) claimed as a result of breach of contract involved is substantially similar in respect of all the farmers (members of the class). The main issues of fact and the law are thus common to this class. The interests of justice require and are served by the class action as an appropriate method of proceeding with an action (*idem* 38 para 5 4 15).

A class action would also benefit the bereaved parents of the 22 neonates who died in the Mahatma Ghandi Memorial Hospital in KwaZulu-Natal in 2005 of the bacterial *klebsiella pneumoniae* infection, due to the negligence of the hospital staff and officials. Minutes of meetings held by Health Department officials showed that they were well aware of the presence of *klebsiella* in Mahatma Gandhi’s neonatal ward in December 2002. The bacteria were found in intravenous glucose preparations used for multiple dosing. Unopened vials of the same medication were sterile. The nursery was found to lack proper hand-washing facilities and to be overcrowded and understaffed. Reinforcement of hand hygiene and a ban on the multiple dosing of medicines stopped the outbreak. In conclusion, this outbreak resulted from a combination of factors amongst which lack of hand hygiene and a ban on the multiple dosing of an intravenous glucose preparation were most significant (Moodley *et al* “Intravenous glucose preparation as source of an outbreak of extended-spectrum beta-lactamase-producing *klebsiella pneumoniae* infections in the neonatal unit of a regional hospital in KwaZulu-Natal” 2005 *SAMJ* 861–864). As neonates are at high risk of attracting *klebsiella pneumoniae*, infection control policies and procedures should be strictly followed to prevent such outbreaks. Clean hands are the most important factor in preventing the spread of pathogens and antibiotic resistance in healthcare settings and this has “been common knowledge since the mid-19th century” based on the experiences of well known physicians like Semmelweis and Lister (<http://www.hospitalmanagement.net/features/features/641> (accessed 7 June 2008)), as well as the pioneer of nursing, Florence Nightingale (<http://www.fordham.edu/halsall/mod.nightingale-rural.html> (accessed 7 June 2008)). The ideological plaintiff would be the ideal “person” to conduct a single *bona fide* class action in circumstances where the plaintiffs have a common ground to sue the Minister of Health for breach of contract, especially in cases where they represent a large percentage of the South African population who are unsophisticated and poorly educated people unable to enforce their common-law rights (see *Report 34* para 5 4 1). A class action has been organised by a Durban-based NGO, Voice (Victim Outreach and Information Centre), which has collected confidential laboratory blood reports allegedly showing that *klebsiella* caused the deaths of 110 babies at this hospital since early 2003 (*The Independent on Saturday* 22 July 2006 1).

Examples of claims arising from transactions concluded by consumers are *bona fide* claims by purchasers of defective goods or services for damage to

property or financial loss, professional negligence claims, for example, by shareholders against a company (see ss 252 and 266 of the Companies Act 61 of 1973) or its auditors for disseminating information. All these members of a specific class would benefit from the enactment of the Commission's draft bill on public interest and class actions with regard to breach of contract claims to enforce an appropriate remedy.

The Commission declined to accept the Canadian and American example of a class representative action based on self-interest and suggested the concept of the ideological plaintiff for the following reasons (see De Vos 1996 *TSAR* 644; *Working paper* 29 para 5 3):

- (a) In matters which affect poorly educated, unsophisticated communities it will be difficult to find a member of such a class to initiate a class action.
- (b) Redress sought in the interest of such communities will most likely be at the instance of some charitable organisation or individual.
- (c) In view of such a "Good Samaritan" the need to find a willing and able member of such a group to act as a suitable representative would indeed not be sensible and worthwhile. Such a volunteer would neither be able to serve his own interests nor that of his class, as a pretence would be kept up under the instructions of the concerned individual or the organisation.
- (d) It is therefore desirable to adhere to the suggestions of the Law Commission in this respect and opt for the adequate representative to act in an ethical and honest manner as the ideological plaintiff.

Developments regarding the class action in European countries such as France, Germany and the Netherlands reflect the tendency to subscribe to the ideological plaintiff. The American form of class action is unknown in the European context (Murray "Litigating the Nazi labor claims: The path not taken" 2002 43 *Harvard Int LJ* 503 fn 131). Organisations such as associations and societies are ready to play an important role in the context of public interest actions and class actions, especially in the field of consumer protection and environmental issues. Executive members could thus, as ideological plaintiffs, initiate a class action on behalf of an affected group of consumers or members of the public, without necessarily belonging to the affected group (De Vos 1996 *TSAR* 644).

Multi-party litigation in England proceeds on the basis of a group litigation order that consolidates claims for the purpose of efficient case management without designating one claimant as the representative of the others (Walker "Crossborder class actions: A view from across the border" 2004 *Michigan State LR* 766).

In 1982, the Supreme Court of India created access to justice by scrapping the traditional rule of standing which deprived the disadvantaged and the poor of enforcing their rights. (See the discussion of the leading Supreme Court case *SP Gupta v Union of India* 1982 2 SCR 365 520, AIR 1982 SC 149 189 in this regard by Loots 1994 *SAJHR* 49 50.) Bhagwati CJ held:

"[A]ny member of the public could approach the court for relief where a legal wrong or legal injury had been caused to a person or class or persons by reason of violation of any constitutional right or legal right and such person or class of persons was unable to approach the court personally because of poverty, helplessness, disability, or social or economically disadvantaged position."

Although the class action has long been a topic of legal debate in America, a new battleground has emerged on the field of class action waiver in mandatory

arbitration clauses in American contracts and litigation. Recently, would-be defendants have taken to drastic measures by further insulating themselves from liability by contractually restricting potential plaintiffs' use of a powerful legitimate procedural tool in arbitration, namely the class action. Mandatory arbitration clauses are to be found in a myriad of consumer contracts, from cell phone bills to credit card statements, serving as a notice that the consumer has waived his right to litigate any claim that might arise from the transaction with the company (Rice "Enforceable or not? Class action waivers in mandatory arbitration clauses and the need for a judicial standard" 2008 *Houston LR* 216–219). American courts have overwhelmingly embraced the mandatory arbitration clause, upholding it even in unenforceable contracts or in contracts induced by fraud. The question which remains unanswered by the Supreme Court needs to be settled once and for all: Is this total ban on class actions in mandatory arbitration clauses unenforceable?

5 A class action based on a claim for damages against the public sector

Could the parents of the *klebsiella* neonates succeed with a class action for damages based on breach of contract due to an existing contractual relationship between a provincial hospital and a patient? Where a constitutional right exists, one could argue that a contractual relationship is not intended with regard to primary health care services. This is not necessarily true for secondary and tertiary level services (Carstens and Pearmain *Foundational principles of South African medical law* (2007) 396–397). According to the authors, sections 29(2) and 30(1) of the KwaZulu-Natal Health Act (N 4 in PG 5560 of 13 September 2000) are probably unconstitutional as they "seek to narrow the constitutional right of access to health care services to purely primary health care services because the KZN Department of Health [does] not only provide primary health care services but services on a secondary and tertiary level in many of its hospitals" (396–397). It does not necessarily follow that a contract arises every time a public health care provider renders a service to a patient. The existence of a contract depends on the intention of the parties and whether conscious consensus has been reached on the obligations and rights envisaged by the parties (*idem* 406).

However, the existence of obligations on the basis of constitutional and administrative law to render health care services to a patient may preclude an inference of the existence of a contractual relationship between them (*idem* 406–407). The plaintiff can choose the basis of a claim for damages when the circumstances support both a claim in support of the law of contract, the law of delict or even based on the criminal law. In some cases, the courts have denied the existence of a contractual relationship and granted damages on alternative causes of action, such as a claim in delict arising from the failure to apply reasonable skill and care in the treatment of patients by treating them negligently, with the resultant liability of the defendant based on vicarious liability due to the actions of an employee, performed within the course and scope of his employment with his principal (*Mtewa v Minister of Health* 1989 3 SA 600 (D) 601–602). I agree with the authors that the law must be considered holistically: "People do not operate businesses or fulfil public functions in terms of only one particular area of the law. Health care services contain elements of constitutional, statutory and common law and reflect obligations and options along all the relevant legal disciplines" (Carstens and Pearmain 409–410). There is therefore no need for a contract between the state and the patient in this regard, as their relationship

is governed by sufficient legislation such as the Health Act 63 of 1977, the National Health Act 61 of 2003, although not fully effective, and the Promotion of Administrative Justice Act 3 of 2000.

6 Conclusion

A lesson can be learnt from the American consumer protection legislation. On the one hand the courts favour a freedom of contract policy, which leads to economic and legal certainty and predictability in the marketplace. On the other hand, bargaining inequity could leave the consumer helpless during a dispute where consensus between the parties to an arbitration clause could bereave the consumer of the right to institute a class action (Sternlight and Jensen "Using arbitration to eliminate consumer class actions: Efficient business practice or unconscionable abuse?" 2004 *Law and Contemporary Problems* 75). The need for a general class action via an act of Parliament would allow the protection of consumers who find it hard to pay for products and even harder to reach the price of justice, while arbitration clauses that prohibit the use of a class action should be "handled with care" by contractual parties.

Kok (2003 *THRHR* 163) is of the opinion that on a narrow reading of *Permanent Secretary*, a class action based on the *actio iniuriarum* could probably be brought by consumers who suffered physical and psychological trauma based on the use of a harmful product if their right to dignity has been infringed. On the same facts, a class action for patrimonial damages based on the *lex Aquilia* would probably fail for the consumers as an infringement of a right in the Bill of Rights has not taken place (*ibid*).

I am of the opinion that the *actio iniuriarum* could just as well be applied by the bereaved parents of babies who were allegedly incinerated before they could be buried by their parents and families, suffering physical and psychological trauma as a result of the *klebsiella* deaths and inhumane treatment experienced at the Mahatma Gandhi Hospital's neonatal ward (*The Independent on Saturday* 22 July 2006 1). In terms of section 24(1) of the Constitution, everyone has the right to an environment that is not harmful to their health or well-being. This right is the key aspect of the international right to health as reflected in the Constitution of the WHO, which recognises the right to health as "the enjoyment of the highest attainable standard of health [being one] of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition" (Constitution of the World Health Organization, Basic Documents, Official Document No 240 (1991)). It is evident in view of the foregoing that the maintenance of an adequate standard of health services in state hospitals is incorporated in the right to "an environment that is not harmful to their health or well-being" (s 24 of the Constitution 1996), although not expressly provided for in the wording of the Constitution. On the same facts, a class action for patrimonial damages based on the *lex Aquilia* could probably succeed as an infringement of a right in the Bill of Rights has indeed occurred by not adhering to the basic standards of health care in a state hospital.

The law portrays its value and significance in the way that it becomes a means to an end and can therefore never be an end in itself. Success and efficiency depends on the application of legal principles within a specific context (Carstens and Pearmain v). The recognition and compilation of a body of law such as the institution of a general class action for breach of contract within the common-law context would be of considerable value to a class of persons whose only

access to justice is via a class action. The South African Law Commission has completed research on the class action and a Bill on class and public interest actions awaits enactment by Parliament. The enactment of this Bill will further underlie the recognition of the constitutional principles and values which will ensure that everyone may be afforded their day in court. It is therefore regrettable that at present no general class action for breach of contract in terms of the South African common law is recognised by our courts, despite the delay in the enactment of the Bill and the Court's constitutional power to broaden the options of applicants by allowing a general class action beyond the scope of the Constitution as a matter of urgency.

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