

CLASS ACTIONS IN SOUTH AFRICA: A BRIEF OVERVIEW

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More than 28 years after the interim Constitution of the Republic of South Africa, 1993 ('interim Constitution'), first introduced the class action into South African law,¹ the mechanism can no longer be said to be in its infancy.² The class action must now be regarded as being an established part of South African law; a well-recognised procedural mechanism firmly situated within the South African civil justice system. This is reinforced by the significant increase in the incidence in the number of class actions in recent times,³ which is particularly pleasing given that the primary objective of the class action mechanism in a South African context is to facilitate access to justice.⁴

¹ Section 7(4)(b)(iv).

² As is indicated below, section 38(c) of the final Constitution of the Republic of South Africa, 1996 (the "Constitution"), authorises class actions to enforce constitutional rights.

³ T Broodryk "An Empirical Analysis of Class Actions in South Africa" (2020) 24 *Law, Democracy and Development* 54, 73: "if one compares the number of cases between 2000 and 2012 and the number of cases between 2013 and 2019, it becomes apparent that there was a significant (300 per cent) increase in the incidence of class actions from the first 13-year period to the next seven-year period". The latter article constitutes the first empirical analysis of the South African class action. See also the table at the end of this overview in which an updated survey of the class action landscape is presented. The most recent data paint a similar picture. It is arguable that there was a significant increase in the incidence of class actions following *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA), in which Wallis JA set out a clear procedural framework regulating class actions.

⁴ The South African Law Commission *The Recognition of Class Actions and Public Interest Actions in South African Law Report* Project 88 (1998) paras 1.3-1.4. See also the South African Law Commission *The Recognition of a Class Action in South African Law Working Paper* 57 Project 88 (1995) para 5.28 where it is stated that "[t]he whole purpose of class actions is to facilitate access to justice for the man on the street". See also *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzo* 2001 4 SA 1184 (SCA) para 1 where Cameron JA states that "[t]he law is a scarce resource in South Africa. This case shows that justice is even harder to come by. It concerns the ways in which the poorest in our country are to be permitted access to both". In *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 2 SA 254 (SCA) para 11 it is stated that "[t]he justification for recognising class actions is that without that procedural device claimants will be denied access to the courts". In *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC) para 29 Jafta J stated that "[a]ccess 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". See also T Broodryk "The South African class action v group action as an appropriate procedural device" (2019) 1 *Stell LR* 6-31 in which the author argues that access to justice should be the primary consideration that a certification court takes into account when determining whether class proceedings are appropriate.

Unfortunately, South Africa's legislature has not enacted legislation and/or court rules to regulate class actions.⁵ It has been left to the courts to develop the procedural framework within which class actions operate. Our courts should be commended for their role in this regard. However, several inconsistencies have arisen because of conflicting approaches by South African superior courts. This has proven to be the case, for example, in relation to the inconsistent approaches adopted by different divisions of the High Court of South Africa regarding the issue of whether it is necessary to certify Bill of Rights class actions.⁶ This does not lend itself to creating legal certainty insofar as the operation of the South African class action mechanism is concerned.⁷

Section 38(c) of the Constitution, South Africa's supreme law, recognises a class action to enforce rights contained in the Constitution, commonly referred to as Bill of Rights class actions; in other words, class actions in terms of which rights contained in the Bill of Rights are alleged to be threatened or infringed. However, it is also possible to institute class actions in South Africa where non-constitutional rights are threatened or infringed, as was confirmed in *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* ('*Children's Resource Centre Trust*').⁸ The latter case is significant because the Supreme Court of Appeal essentially set out a framework for the pursuance and adjudication of class actions in South Africa. Wallis JA held that, before a class action may be instituted, it must be certified.⁹ He also indicated certain certification requirements that must be considered by the court when deciding whether to certify a class action. These requirements are as follows:

1. There must be a class identifiable by objective criteria;
2. There must be a cause of action raising a triable issue;

⁵ Locally, several scholars have called for the introduction of legislation to regulate the class action. See *inter alia* W de Vos *Verteenwoordiging van Groepsbelange in die Siviele Proses* LLM dissertation RAU (1985); W de Vos "'n Groepsgeding in Suid-Afrika" (1985) 3 *TSAR* 296; W de Vos "'n Groepsgeding ('class action') as Middel ter Beskerming van Verbruikersbelange" (1989) *De Rebus* 373; E Hurter "Some thoughts on current developments relating to class actions in South African law as viewed against leading foreign jurisdictions" (2006) 39(3) *CILSA* 485; E Hurter "The class action in South Africa: Quo Vadis" (2008) 41(2) *De Jure* 293; E Gericke "Can class actions be instituted for breach of contract?" (2009) (2) *THRHR* 304; T Broodryk "The South African class action v group action as an appropriate procedural device" (2019) 1 *Stell LR* 6-31.

⁶ See T Broodryk "Class action certification and constitutional claims: the South African case" (2020) *Maastricht Journal of European and Comparative Law* 1-24.

⁷ 2.

⁸ 2013 1 All SA 648 (SCA).

⁹ However, uncertainty remains regarding whether Bill of Rights class actions must be certified. See Broodryk *Law, Democracy and Development* (2020) 54-85.

3. The right to relief must depend upon the determination of issues of fact, or law, or both, common to all members of the class;
4. The relief sought, or damages claimed, must flow from the cause of action and must be ascertainable and capable of determination;
5. Where the claim is for damages there must be an appropriate procedure for allocating the damages to the members of the class;
6. The proposed representative must be suitable to be permitted to conduct the action and to represent the class; and
7. Given the composition of the class and the nature of the proposed action, a class action must be the most appropriate means of determining the claims of class members.

In *Mukaddam v Pioneer Foods (Pty) Ltd*,¹⁰ the Constitutional Court reduced the abovementioned requirements to mere factors and indicated that the certification court's guiding criteria in deciding whether to certify a class action is 'the interests of justice'.¹¹

South African courts have thus developed appropriate class action procedural rules through their inherent jurisdiction embodied in section 173 of the Constitution.¹² Consequently, in *Mukaddam CC*, Froneman J stated the following in relation to the development of the common law by the Supreme Court of Appeal in *Children's Resource Centre Trust*:

"My understanding of the legal position flowing from this development is that courts are bound by the authoritative exposition of the development of the common law by the Supreme Court of Appeal – or by this Court, if it adds to or alters any feature of the development made by the Supreme Court of Appeal. Courts have no discretion under section 173 of the Constitution not to apply the common law as authoritatively articulated by the Supreme Court of Appeal or this Court. What they may do is to apply the developed law within the framework of their own process."¹³

¹⁰ *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 10 BCLR 1135 (CC) ("Mukaddam CC"). The decision of the Supreme Court of Appeal is reported as follows: *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 2 SA 254 (SCA).

¹¹ Para 47. According to W de Vos "Opt-in Class Action for Damages Vindicated by Constitutional Court: *Mukaddam v Pioneer Foods CCT 131/12*" (2013) 4 *TSAR* 757-765-766, relegating the requirements for a class action to mere 'factors' under the umbrella of 'the interests of justice' is questionable. He states that "[t]his flies in the face of the very nature of a class action and the position in the leading class action regimes. A class action is very different from an ordinary civil suit. For a class action to proceed as such certain essential requirements must be satisfied, otherwise it would be a travesty to call it a class action".

¹² C Plasket "South Africa" in D R Hensler, C Hodges & M Tulibacka (eds) *The Globalization of Class Actions* (2009) 256-261

List of South African class action certification decisions

This author has identified 19 cases, in total, where a South African superior court, sitting as a court of first instance, made a definitive pronouncement on whether the matter could proceed as a class action, and where it is clear from the judgment or order that the applicant(s) intended to frame the matter as a class action.¹⁴ The cases are listed in the table below.

No	Case name	Nature of issue(s)	Proceed as class action?	Opt-in / opt-out / bifurcated	Reason for non-certification
1.	<i>Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape</i> ¹⁵	Employee benefits: the applicants, all of whom had in the past received monthly disability grants, alleged that the respondents had suspended these grants in an unlawful manner and had done so to numerous other people in the Eastern Cape province.	Yes	Opt-out	n/a
2.	<i>FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd</i> ¹⁶	Constitutional rights: respondents published an article in which it was suggested that the applicant was guilty of involvement in a fraudulent scheme. The applicant averred that the article was defamatory.	No	n/a	The applicant failed to establish <i>locus standi</i> .
3.	<i>Trustees for the Time Being of the Children's Resource Centre Trust v Pioneer Foods (Pty) Limited</i> ¹⁷	Competition: ¹⁸ respondents had been found to have contravened the Competition Act 89 of 1998 regarding bread pricing and distribution and the Competition Commission had made rulings in this regard. The applicants, comprising consumers and distributors, applied to court for permission to	No	n/a	In the consumers' application, the court found that the applicants did not make out a sufficiently identifiable class, and that applicants' papers did not disclose a cause of action. In the distributors' application, the

¹³ *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 10 BCLR 1135 (CC) para 67.

¹⁴ This table depicts the position as at 1 October 2021.

¹⁵ 2001 (2) SA 209 (E).

¹⁶ 2008 (2) All SA 544 (C).

¹⁷ 2011 JDR 0498 (WCC).

¹⁸ D Unterhalter & A Coutsoudis "Class actions and causes of action" in M Du Plessis, J Oxenham, I Goodman, L Kelly and S Pudifin-Jones (eds) *Class action litigation in South Africa* (2017) 53.

		institute class actions against respondents for damages as result of the contraventions.			court was not satisfied that there were common questions of fact and law in respect of members of proposed class.
4.	<i>Magidiwana v President of the Republic of South Africa (No 1)</i> ¹⁹	Constitutional rights: the primary issue was whether the constitutional rights to access and to equality were infringed due to the conduct of the second and third respondents in refusing legal aid to the applicants.	Yes	Opt-out	n/a
5.	<i>Pretorius v Transnet Second Defined Benefit Fund</i> ²⁰	Employee benefits: applicants sought to compel Transnet (fourth respondent) and the state (fifth and sixth respondents) to pay a 'legacy debt' of R80 billion dating from the establishment of Transnet, to the funds (first and second respondent) in accordance with their alleged obligations.	Yes	Opt-out	n/a
6.	<i>Bartosch v Standard Bank of South Africa Limited</i> ²¹	Credit: applicant sought a declarator that thousands of credit agreements were reckless as envisaged by section 80 of the National Credit Act 34 of 2005.	No	n/a	The applicant did not disclose a cause of action raising a triable issue and the court did not have the necessary jurisdiction to adjudicate the matter.
7.	<i>Linkside v Minister of Basic Education</i> ²²	Constitutional rights: the application concerned the failure by the Eastern Cape Department of Basic Education to appoint educators in vacant posts at various public schools throughout the province,	Yes	Opt-in	n/a

¹⁹ 2014 (1) All SA 61 (GNP).

²⁰ 2014 (6) SA 77 (GP). Settlement reported at *Ex Parte: Pretorius and Others* (42355/2015) [2020] ZAGPPHC 438 (22 June 2020).

²¹ 2014 JDR 1687 (ECP).

²² Order (by agreement) by the High Court of South Africa, Eastern Cape Division, Grahamstown, dated 20 March 2014, under case number 3844/2013. A copy of the order is on file with the author.

		and the consequent violation of the right of the children at those schools to basic education as guaranteed by section 29 of the Constitution.			
8.	<i>Road Freight Association v Chief Fire Officer Emakhazeni</i> ²³	Municipal misconduct: application relates to the second respondent masquerading as a municipality, or a section of the municipality, exercising statutory powers reserved for a municipality by the Fire Brigade Services Act 99 of 1987, and by performing false 'emergency services' and then coercively exacting payment for such 'services' allegedly on behalf of the third respondent as municipality.	Yes	Opt-out	n/a
9.	<i>Nkala v Harmony Gold Mining Company Ltd and others (Treatment Action Campaign NPC and another as amici curiae)</i> ²⁴	Personal injury, delictual: the case concerned the attempts by the mineworkers employed in the gold mining industry, and their dependants, to obtain compensation as a result of the mineworkers having contracted silicosis or tuberculosis as a result of their employment on the mines.	Yes	Bifurcated	n/a
10.	<i>National Union of Metalworkers of South Africa v Oosthuizen</i> ²⁵	Employee benefits: matter pertains to legal action against trustees of an employees' trust. It provides for employees' shares in the employer company for which the trustees must subscribe and hold for the benefit of the employees. Various allegations of malfeasance are made, including that the trustees had concluded	No	n/a	The request for certification was made <i>ex post facto</i> , but the circumstances of the case did not justify the relaxation of the requirement of prior certification.

²³ 2015 JDR 1802 (GP).

²⁴ 2016 (3) All SA 233 (GJ). Settlement reported at: *Ex Parte Nkala* 2019 JDR 0059 (GJ).

²⁵ 2017 (6) SA 272 (GJ).

		a sale of the shares at a favourable price but failed to enforce specific performance by the purchaser.			
11.	<i>Solidarity v Government Employees Pension Fund</i> ²⁶	Employee benefits: the applicant sought an order granting it leave to institute a class action against the Government Employees Pension Fund (“GEPF”) on behalf of or as a representative of members of the GEPF, ex-spouses of members of the GEPF and dependants of deceased members of the GEPF who became entitled to payment of benefits after April 2015.	No	n/a	Class action could be oppressive and thus inconsistent with the interests of justice and Solidarity was found not to be a suitable person to represent the class.
12.	<i>Gqirana v Government Employees Pension Fund</i> ²⁷	Employee benefits: the applicants seek reimbursement and correct calculation of their benefits towards their contribution to the Ciskei Civil Servants Pension Fund since 1981 until 1996.	No	n/a	The applicants failed to attach draft particulars of claim to their papers and did not sufficiently disclose a cause of action.
13.	<i>Ngobeni v Tiger Brands Ltd</i> ²⁸	Personal injury, Consumer Protection Act 68 of 2008 and delictual: the applicants suffered harm in consequence of contracting an infection of <i>Listeria Monocytogenes</i> , by ingesting contaminated food products originating from or having passed through the Enterprise meat processing facility at Polokwane over the period 23 October 2016 to 3 September 2018.	Yes	Bifurcated	n/a
14.	<i>Grootboom v MEC: Department of</i>	Labour and employment: the applicants were, at various times, employed by School Governing	Yes	Opt-in	n/a

²⁶ 2018 JDR 0312 (GP).

²⁷ 2018 JDR 0199 (GP).

²⁸ Order (by agreement) by the High Court of South Africa, Gauteng Local Division, Johannesburg, dated 12 December 2018, under case number 12835/2018. A copy of the order is on file with the author.

	<i>Education, Eastern Cape Province</i> ²⁹	Bodies (“SGBs”) as teachers. They were employed by the SGBs because the respondents had not appointed teachers to posts on the teaching establishment of public schools as they should have done. The applicants alleged that they were paid a great deal less than they would have been paid if they had been employed by the second respondent, the Superintendent-General of the Department of Education in the provincial government.			
15.	<i>Sabie Chamber of Commerce and Tourism v Thaba Chweu Local Municipality; Resilient Properties Proprietary Limited v Eskom Holdings Soc Ltd</i> ³⁰	Constitutional rights: the applicants sought to have a decision taken by Eskom to terminate or interrupt the supply of electricity to their respective municipalities declared invalid and inconsistent with the Constitution.	No	n/a	List of names and numbers required to get the class action off the ground was not procured.
16.	<i>Tindleli and another v Government Employees Pension Fund</i> ³¹	Employee benefits: applicants claim damages sustained because they allegedly suffered prejudice due to the government’s mishandling of their exit from the Transkeian Government Service Pension Fund when they were incorporated into the respondent. Thousands of the former members of the Transkeian Government Service Pension Fund (the previous Fund), who contributed towards the previous fund from 1975 until 1996, are being affected by the government’s mishandling of their exit from the previous fund	No	n/a	Applicant failed to establish <i>locus standi</i> . Second point <i>in limine</i> regarding non-joinder also upheld.

²⁹ 2019 JDR 0018 (ECG).

³⁰ (2295/2017, 83581/2017) 2019 ZAGPPHC 112 (7 March 2019).

³¹ 2019 JDR 0977 (GP).

		when they were incorporated into the respondent on 1 May 1996.			
17.	<i>Vlok v Georgiou</i> ³²	Shareholders: Application for certification on behalf of investors who bought shares in one or more, of four separate property syndication companies, with claims against various directors and individuals involved in the property schemes that are based on buy-back agreements, alleged fraudulent and reckless dealings and misrepresentations.	Yes	Opt-in	n/a
18.	<i>De Bruyn v Steinhoff International Holdings N.V.</i> ³³	Shareholders: The Steinhoff (applicant) shareholders allege that the respondents failed to carry out their statutory and common law duties of care and that losses were suffered by the shareholders as a result thereof.	No	n/a	The application failed because the claims relied upon do not, in law, disclose a cause of action. The class action does not raise triable issues.
19.	<i>Stellenbosch University Law Clinic v Lifestyle Direct Group International (Pty) Ltd</i> ³⁴	Consumer law: The applicants seek the certification of class action to be instituted against the respondents in which they will seek to undo certain agreements which the respondents allegedly concluded with a multitude of consumers, to reverse various transactions concluded pursuant to such agreements and to compensate aggrieved consumers for the losses allegedly incurred as a	Yes	Opt-out	n/a

³² 2020 1 All SA 884 (GP).

³³ (29290/2018) [2020] ZAGPJHC 145 (26 June 2020).

³⁴ 2021 4 All SA 219 (WCC).

		consequence of a fraudulent scheme implemented by the respondents. The applicants also seek to interdict the respondents from conducting such scheme pending the final determination of the class action.			
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