

The Current State of Class Actions in South Africa

Lecture to students at NMMU: 1 August, 2016

Introduction

[1] This presentation covers the following topics:

[1.1] What is a class action?

[1.2] What is its origin in other notable jurisdictions?

[1.3] What is its origin in South Africa?

[1.4] The bread class action certification cases.

[1.5] The elements of a class action.

[1.6] Certification: developing the common law; weighing evidence in certification proceedings; need for and terms of certification, including opting in and opting out; appealability; and prescription.

[1.7] Managing a class action: case management; representation; contingency fees; bifurcation; trusts; settlements.

[1.8] What have we achieved?

What is a class action?

[2] *“A class action is a collective lawsuit in which an individual person or persons are confirmed by the court to bring and resolve the claims of ‘others similarly situated’ in a single proceeding.”*¹ This is a crisp enough definition² to work with, before we dip into the more complex facets of this novel, at least for us on these shores, procedural device.

[3] First, it is necessary to get some rather basic issues out of the way, and some other basic concepts lined up. When we speak of class actions we are not concerned with the relationship between State and individual in their capacities as such; specifically, we are not concerned with criminal law. We are concerned with civil law. A class action may

¹ The International Comparative Legal Guide to: Class & Group Actions 2015, 7th ed, Global Legal Group Ltd, 2014, ch 28, p 190. It must not be thought that as against the case of the single plaintiff stands only what is loosely referred to as a “class action”. Paul G Karlsodt (Ed), World Class Actions, Oxford University Press 2012, at p xxxviii of his introduction remarks: *“... the procedures available in different countries for resolving multiple parties’ claims are extremely varied. The procedural mechanisms for resolving group claims or disputes vary, as does the subject matter to which those procedures might apply. Some countries have multiparty or representative action procedures that apply just in certain areas of the law, such as securities, antitrust, or consumer protection. Others have generally applicable procedural rules that permit multiparty or representative actions in a wide range of subject matter.”* In this presentation reference will be made to “class actions”, intending thereby, unless the context disallows it, to refer to instances where individual class members are not actually joined as litigants in the suit.

² For a considerably expanded definition by a common law lawyer, see Rachel Mulheron, The Class Action in Common Law Legal Systems: A Comparative Perspective, Oxford-Portland Oregon, 2004, at p 1.

conceivably involve an action against the State concerning the exercise of its public power, either through the PAJA³ or legality portal; but still civil and not criminal law.

- [4] Second, we are not concerned with non-mainstream dispute resolution fora, such as statutory arbitrations or mediations, or private arbitrations or mediations. We are instead concerned with the mainstream dispute resolution fora of the civil legal system, being the courts of the land.
- [5] Third, we are not concerned with substantive law or legal rules or principles; rather, we are concerned with formal or adjectival law and principles. In pedestrian language, we are concerned with how to bring cases to courts in order to enforce substantive law rights and obligations. Class actions therefore do not introduce new causes of actions; they simply avail the recognised ones to persons who represent groups of people who in turn become permitted to benefit from the upside of a successful class action but suffer from the downside of one lost.
- [6] So how does this procedural device present? First, as in any civil suit, there is a plaintiff.⁴ But in the class action the plaintiff, who need not be but usually is a member of the class, aka “the ideological plaintiff”, will have been certified by the court to represent the class. The class is defined in the class certification order, in a definition that will not identify the class members by name but by defining characteristic; e.g. all the dependants of all those who were on missing flight MH 370. So the plaintiff is a representative plaintiff, in a sense comparable to the guardian litigating on behalf of a ward, or the liquidator on behalf of an insolvent corporation.
- [7] Second, there is a class. This is a group of individuals each of whom complies with the defined characteristic, but none of whom is a litigant. In theory, they could all have decided instead to have joined as litigants in their own right under the rules of court, but typically the class is so big that this is impractical.
- [8] Third, the consequences of a class action result are appropriately unique. The upside of being a class member is that a positive result in the litigation⁵ may be taken up by each class member; the downside is that a negative result is *res judicata*.⁶ From the defendant’s perspective *res judicata* also has important relevance: persons who never associated themselves with the litigation and who, in the event, are not content with the result, may not sue the defendant afresh, simply because they fall within the class definition.
- [9] Fourth, a class may be certified as either of the opt-in or the opt-out type, and may also be certified as a bifurcated or hybrid version. In the opt-out type, a person who qualifies belongs to the class without more until s/he decides to decline, and conveys her/his decision

³ The Promotion of Administrative Justice Act 3 of 2002.

⁴ There may be more than one, a few, but the principle is the same.

⁵ Whether by judgment or settlement – 95% of class actions in the USA settle.

⁶ A negative costs order against the representative plaintiff does not affect the class member. This has led some commentators to remark that there is an uneasy dichotomy between class members’ immunity from costs and representative litigants’ liability for it; compare *Mulheron op cit*, at p 370 who comments here on the position in Australia. In the US, the general rule is that each side pays his/her own attorney, irrespective of the outcome. In class action litigation, statutes are now providing for fee-shifting rules whereby a successful plaintiff may recover costs; *Karlsgodt op cit*, p 21.

appropriately.⁷ In the opt-in type, a person who qualifies does not belong to the class until s/he accepts, and conveys her/his decision accordingly.⁸

[10] In the bifurcated or hybrid version, the class certification may apply only to one part of the suit, say to the so-called merits. The remaining elements of the cause of action, say the quantum, are then deferred to individual actions, to be pursued at the initiative of each member of the successful class action, now armed with the notional positive judgment rendered in the class action.

[11] Once certified, the class action then progresses as any other, at least in theory. In many jurisdictions, also in ours, however, active case management is triggered. This process is represented by an appointed case management judge⁹ whose ultimate function is to usher the case along to its final conclusion. The case management judge plays an oversight role during the process, and finally upon positive resolution; s/he ensures that appropriate systems are in place to ensure fair distribution of the proceeds, not only among the class members but also to pay legal fees.¹⁰

[12] Importantly, what class actions are able to achieve, by dint of the collaboration of class size and contingency fee arrangements on the plaintiffs' side, is a levelling of the playing fields of the economics of litigation.¹¹ This feeds into access to justice, in this country in the form of access to courts under s.34 of the Constitution.

What is its origin in other notable jurisdictions?¹²

[13] The USA is credited with being the home of the class action.¹³ The provision in widespread use until recently was USA federal rule 23¹⁴ (1966), preceded by a federal rule of 1938. Since twice amended, in its latest form FRCP 23 provides as follows (emphasis supplied):

“Rule 23 – Class Actions

(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;

⁷ S/he is then free to hoe his/her own row, and res judicata of the class action result does not bind him/her.

⁸ S/he then becomes a class member with the identified upsides and downsides.

⁹ Usually not the judge who will hear the matter.

¹⁰ Often legal fees would be subject to the Contingency Fees Act 66 of 1997, in terms of which certain minima steps must be complied with before the legal representatives may be compensated; see ss. 3 & 4. See also Mojapelo, DJP in *Gold Fields Ltd and Others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company and Others*, 2015 (4) SA 299 (GJ).

¹¹ Karlsgodt, op cit, p xxxv. As he points out, there are those who contend that the large fees often earned by American lawyers have ensured for class actions a bad name; others stress the access to justice value it affords.

¹² This section is mainly lifted from Karlsgodt and Mulheron, op cit, although notable contributions have been sourced from the www. Mulheron's work focusses specifically on three jurisdictions, being the Australian federal class action regime, the Canadian provincial class action regime in Ontario, and the United States federal class action regime under federal rule 23. For current purposes the US, the UK and Australia will be identified.

¹³ Mulheron, op cit, p 9, fn 52.

¹⁴ US Federal Rules of Civil Procedure (FRCP) 23. It was rewritten effective 1 December 2007, and again effective 1 December 2009.

(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.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action."

[14]US multiparty litigation often does not involve class actions compliant with this rule, but instead are simply mass tort actions in which a number of individual plaintiffs join in one comprehensive suit. This is often because the individual discrepancies in the plaintiffs' claims fail to meet the commonality and predominance requirements underscored above. So for example claims against tobacco and asbestos companies are typically mass tort actions, not class actions.

[15]In the UK, neither Scotland nor Northern Ireland has procedures for collective actions in the sense here discussed. Although England and Wales have had a representative action for some time, this has not been popular as courts have interpreted the rule so narrowly that it was seldom used. Some advance is said to have been made by the introduction of the group

litigation order (GLO), which provides for a case management system in complex multiparty litigation.

[16] There is also specific provision for class actions in specialised areas such as consumer protection statutes, and competition law.¹⁵ But there is no generalised class action procedure, certainly not as widely applied as in the US.

[17] Class actions were introduced in Australia in 1976 and have since become increasingly popular.¹⁶ The entry threshold is lower than in the US, since there is no requirement for prior certification, nor that common issues predominate over individual issues.¹⁷ Moreover, in Australia there is an active market for litigation funding and, after the prohibition against champerty was abolished here,¹⁸ some of its funding corporations have even invested in the local jurisdiction.¹⁹

What is its origin in South Africa?

[18] Class actions were first introduced in our law with the advent of constitutionalism. S.38 of the Constitution provides as follows (emphasis supplied):

“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 –

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

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

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.”

[19] This provision for class actions thus expressly refers only to the protection of constitutional rights. The relationship between this section and s.34, Access to courts, is discussed below, as also the extrapolation of this section to causes of action not founded on “*a right in the Bill of Rights.*” First it is necessary to focus on a different milestone contribution in the second half of the nineties which gave the impetus for a push towards a generalised class action.

[20] This was the work of the South African Law Commission’s Project 88, “*The Recognition of Class Actions and Public Interest Actions in South African Law*”, which reported in August 1998. The SALC conducted wide-ranging international research of class actions, examined

¹⁵ Karlsgodt, op cit, pp 178 to 185.

¹⁶ Karlsgodt, op cit, p 392.

¹⁷ Ibid.

¹⁸ Price Waterhouse Coopers Inc and Others v National Potato Co-Operative Ltd, 2004 (6) SA 66 (SCA).

¹⁹ Price Waterhouse Coopers Inc and Others v IMF (Australia) Ltd and Another, 2013 (6) SA 216 (GNP). (Ultimately the investment was bad; PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd and Another, [2015] 2 All SA 403 (SCA)).

the need for a general class action in our law, proposed detailed requirements for class actions locally, and produced a bill, “*To make provision for the institution of public interest and class actions; and to provide for matters connected therewith*”.

[21]The anticipated legislation did not eventuate. Academics and some leading cases set about whetting lawyers’ collective appetite for an opportunity to persuade a court of appeal jurisdiction to exercise its s.173 inherent power to fashion a generalised class action where the legislature had not. Among the academics the torchbearers included Malan,²⁰ De Vos,²¹ Hurter,²² and (in his professorial role) Judge Plasket.²³

[22]The leading cases in this timeframe included the two judgments delivered a quo and on appeal in *Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuza and others*,²⁴ in both instances by judges since appointed to the Constitutional Court.

The bread class action certification cases.

[23]These cases are pertinent to our discussion, because they expressly extended, for the first time, the availability of class actions to substantive rights founded other than directly on the Bill of Rights. In broad terms, what had happened was that bread producers had been found guilty by the relevant tribunals of cartel conduct prohibited under the Competition Act 89 of 1998. Consumers at two levels alleged prejudice: the distributors, represented by Mr Mukaddam, and the retail consumers, represented by the Trustees of the Children’s Resource Centre.

[24]Their urgent application to the Western Cape High Court for class certification was dismissed. On appeal to the Supreme Court of Appeal, their appeals were argued together before the same bench. Mr Mukaddam lost but the Children’s Resource Centre won.²⁵ Mr Mukaddam appealed to the Constitutional Court, and won there.²⁶

[25]It is convenient to begin with Children’s Resource Centre. Wallis, JA for the court arrived at four relevant conclusions. The first was that the class action entitlement under s.38 of the Constitution was not limited to actions based on a right in the Bill of Rights being infringed or threatened; it would be “*irrational*” if that were so, he held.

²⁰ FR Malan, ‘Siviele Proses, Verbruikersbeskerming en Kollektiewe Optrede’ 1982 TSAR 1. The author has since retired from the SCA.

²¹ Wouter de Vos, ‘Reflections on the Introduction of a Class Action in South Africa’ 1996 TSAR 639; ‘Is a Class Action a Classy Act to Implement Outside the Ambit of the Constitution?’ 2012 TSAR 737; and *post hoc*, ‘Judicial Activism Gives Recognition to a General Class Action in South Africa’, 2013 TSAR 370. De Vos also did an LLM at the then RAU (now UJ) in 1984 on the topic, ‘Verteenwoordiging van Groepsbelange in die Siviele Proses.’

²² Estelle Hurter ‘The Draft Legislation Concerning Public Interest Actions and Class Actions: the Answer to all Class Ills?’ (1997) 30 CILSA 304, 305; ‘Certification: the procedure, its role in class action proceedings in Ontario and the proposed South African certification procedure’ (2000) 33 CILSA 43; ‘Some thoughts on current developments relating to class actions in South African law as viewed against leading foreign jurisdictions’, (2006) 39 CILSA 485.

²³(2009) 62 The Annals of the American Academy of Political and Social Science, titled ‘Representative Standing in South African Law’. The latter represented a comprehensive analysis of standing in Administrative Law, but particularly with reference to s.38 of the Constitution and, in that context, class actions. Others included De Bruin (2003) “Groepsgedingvoering – Die Voorstel van die Suid-Afrikaanse Regskommissie vir die Sertifisering van ’n Groepsgeding” 28(1) TRW 133.

²⁴ 2001 (4) SA 1039 (SCA), paras 21-27; as well as the judgment a quo reported at 2001 (2) SA 609 (E).

²⁵ *Children’s Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA).

²⁶ *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC).

[26]Second, the appellants need not have tried to bring their case under s.27(1)(b)(the right, entrenched in the Bill of Rights, to access to sufficient food and water), not only because their cause of action need not have rested on an infringement of a right protected in the Bill of Rights at all, but also because, in any event, in their case they would have no access to the courts were it not by means of a class action. Therefore the right to access to courts entrenched under s.34 was in any event implicated.

[27]Third, a prospective class representative ought first to apply to court for class certification before s/he would have the right to litigate on behalf of a class. And fourth, the learned judge laid down that, generally, a successful class certification application must show: (1)the existence of a class identifiable by objective criteria;²⁷ (2) a cause of action raising a triable issue;²⁸ (3)that the right to relief depends on the determination of issues of fact, or law, or both, common to all members of the class; (4)that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination; (5) that where the claim is for damages, there is an appropriate procedure for allocating the damages to the class members; (6) that the proposed representative is suitable to conduct the action and to represent the class;²⁹ and (7) whether, given the composition of the class and the nature of the proposed action, a class action is the most appropriate means of determining the claims of class members.

[28]In the Supreme Court of Appeal the three issues that absorbed large parts of the debate were whether the court should lay down requirements for a general class action or leave it to the legislature to do so; the sustainability of the appellants' cause of action; and the quantification of alleged damages. On the first issue the court seemed set on itself acting and not waiting for the legislature. On the second issue the court was not persuaded by the respondents' submission that the only permissible cause of action flowing from their cartel conduct was one which specifically followed on from the provisions of the Competition Act, and so availed only the specific complainants and not consumers generally.

[29]On the third issue the court was disinclined to succumb to cy pres-type damages and referred the matter back to the court a quo, in effect sending the appellants back to the drawing board on this issue.

[30]When Mukaddam got to the Constitutional Court, that court stressed that s.173 of the Constitution is constrained by the interests of justice. That being so, class certification too must be constrained and guided by that principle; the factors listed by Children's Resource Trust are relevant factors, but none in itself decisive.

[31]For the rest, the Constitutional Court decided that, despite the scope for interfering in the procedural discretion of a lower court being as narrow as the discretion itself, in this matter it was obliged to interfere in the Supreme Court of Appeal's refusal in Mukaddam to certify the bread distributors' class. It held that in Mukaddam the Supreme Court of Appeal, "... *did*

²⁷ This requires that an applicant must define the class with enough precision for a class member to be identified upon objective consideration.

²⁸ The threshold applied here is low. Wallis, JA likened it to the test in civil attachments to found jurisdiction, and to an affidavit resisting summary judgment.

²⁹ The representative plaintiff may, but need not, be a member of the class. The representative must have the capacity to conduct the litigation. This includes the ability to procure evidence, to finance the litigation and to access lawyers. The payment arrangement with the lawyers must be disclosed.

*not act judicially in exercising its s 173 discretion, or based the exercise of that discretion on wrong principles of law, or a misdirection on the material facts.*³⁰

[32] Since Children’s Resource Centre and Mukaddam a full court of the Gauteng Local Division, presided over by Mojapelo DJP,³¹ relying on these principles, has now in *Nkala and Others v Harmony Gold Mining Co and Others* issued a comprehensive certification order in a mammoth³² class action, concerning gold mines’ alleged liability for silicosis and tuberculosis of their employees over a substantial period of time.³³

[33] *Nkala* is a comprehensive judgment;³⁴ it dealt with most current aspects of class actions and applied them to the facts; and, in addition, developed the common law relating to the transmissibility of general damages for pain and suffering before *litis contestatio*. Before *Nkala*, general damages were not transmissible then; after *Nkala* it now is. On this latter issue, the court split but only to limited degree. This issue is now on appeal.

The elements of a class action.

[34] Looking back then the development of the principle of a general class action has been given a clear jurisprudential footing. It is a procedural device, fashioned by the courts by means of the power afforded under s.173 of the Constitution, and warranted by the need to realise rights founded both directly in the Constitution (access to courts) and indirectly so, in the common law.

[35] Having established the general class action, the Supreme Court of Appeal and the Constitutional Court also nudged it along its procedural way by leaving it up to the various high courts to decide how best to merge its application with the Uniform Rules of Court and the practice directives of the particular high court division concerned.

[36] Substantively, the seven guidelines of Children’s Resource Centre will no doubt form the building blocks of founding affidavits in the certification applications to come. Provided the overarching “interests of justice” lodestar will remain the *vade mecum*, these seven guidelines will be the factors to which practitioners will justifiably turn to advise their clients and to draft their papers. They are mentioned earlier, but it might be of assistance to touch again on them here.

[37] The class definition. This circumscribes the requirements for class membership. It will be borne in mind that in an opt-out system the class member never steps up to the plate until the end. S/he will likely sit at a distance, observing the goings-on of a litigation which is

³⁰ At [48], following its own judgment in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*, 2007 (1) SA 523 (CC). There it held at [41]: “*Therefore the question for this Court is not whether we would have permitted radio and television broadcasting of the appeal in the circumstances of this case, but whether the Supreme Court of Appeal did not act judicially in exercising its s 173 discretion, or based the exercise of that discretion on wrong principles of law, or a misdirection on the material facts. As Cloete J formulated the test more laconically in Bookworks, the question is whether the Court committed some ‘demonstrable blunder’ or reached an ‘unjustifiable conclusion’.*”

³¹ The Deputy Judge President, now my boss, was a member of the SALC at the time of its seminal project, and also wrote the judgment in *Motley Rice*, supra.

³² There were 69 applicants and 32 respondents, included within which were all the major gold miners in the country. Some counts reckon that the two classes, silicosis and TB, could aggregate 500 000. The court itself said, “*Its magnitude and the range of legal representatives involved is unprecedented.*” (at [9]).

³³ *Nkala and Others v Harmony Gold Mining Company Limited and Others* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) [2016] ZAGPJHC 97 (13 May 2016).

³⁴ It is, like *Mukaddam* and *Children’s Resource Centre*, a must read.

being driven in her/his interest. The class member need not even know of the litigation at the initial stages. The class member only becomes interested in the matter when the case is resolved, either through settlement or judgment.

[38] If the settlement or judgment is favourable, the class member may be interested to step forward, prove compliance with the class requirements, and cash in. Or the class member, knowledgeable or ignorant about the case outcome, may through disinterest simply allow the entire affair to slip away. Such a non possumus attitude will likely be particularly apposite when the settlement or the judgment goes against the class.

[39] As these scenarios will tell, the class member's entitlement to share is determined by class membership and, since there is no membership card, by the objective defining characteristics that imprint the notional mark of membership on the individual concerned. So they have to be plain, clear, and determinable.

[40] The upside of a wide class definition to a defendant who anticipates an adverse judgment, is that fewer persons fall outside the definition, and so the exposure to future litigation arising from the same set of facts is limited. The downside of a wide definition to that defendant, is that there are many class members who are entitled to share in the judgment, thereby increasing the financial burden.

[41] The upside of a narrow definition to a defendant who anticipates an adverse judgment, is that the financial burden is contained. But the downside of a narrow definition to that defendant, is that other persons who do not fall within that narrow definition, are not bound by the judgment, and may sue the defendant in any event.

[42] A triable issue. As already indicated, the threshold is low. Its precise level is the function of a balancing act between two competing principles. On the one hand, there is the principle that any person is entitled³⁵ to cause a summons to be issued against another person, even if the cause of action is bad in law.³⁶ So on this argument, the cause of action which the class representative wishes to pursue ought not to be vulnerable to attack until exception; and even then there is, at worst, a procedural entitlement to (attempt to) fix it.

[43] Yet on the other hand, a class certification order has real procedural advantages for a class representative. A class having been constituted by the court order, the class representative is now empowered to embark on litigation for many thousands, perhaps even millions, of class members. That puts the class representative in a considerably strong bargaining position vis-à-vis the defendant. A court ought to be astute before shackling a defendant with such a burden, particularly if it is sought merely to secure a tactical stronghold, if in truth there is no case whatever to meet.

[44] So the notion of a "triable" case was presented by the presiding judge³⁷ in Children's Resource Centre to the parties as a *via media*. The concept was designed to convey something less exacting than a *prima facie* case. Indeed, so guarded was the court that it expressly left leeway for a respondent in a certification application to argue that even if in law the case put up by a class applicant were "triable", there was in fact no evidence at all to back it up. In those cases a court ought to decline certification.

³⁵ Subject to exceptions such as vexatious litigants, declared by a court as such in terms of s.2(1) of the Vexatious Proceedings Act 3 of 1956.

³⁶ The earliest opportunity that there is to trip up a bad case is at exception stage.

³⁷ Nugent, JA.

- [45]Common issues of fact or law. In a sense, this feature is the stuff that drives class actions. Bear in mind that the ultimate settlement or judgment has the quality that it binds all class members, like it or not; the issue is *res judicata*. It should therefore be self-evident that the issues that are resolved by settlement or determined by court should be issues of fact or law that affect every class member.
- [46]That statement is simple enough as far as it goes. But how many of the issues that potentially arise in individual cases should be common to class members? Consider the following hypothetical: the passengers of a particular flight are all, through negligent error of airport personnel, boarded on a wrong flight. In consequence they miss their scheduled flight. All feel wronged and wish to join in litigation against the airport company to claim compensation for the loss each has suffered.
- [47]Is there sufficient commonality? Wallis, JA imported Scalia, J who said in *Wal-Mart*³⁸ that the claims of all the potential class members: *“must depend upon a common contention. . . . That common contention, moreover, must be of such a nature that it must be capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”*
- [48]Wallis JA also quoted from *Hollick v Toronto (City)*³⁹ where McLachlin CJC said that *“an issue will be common only where its resolution is necessary to the resolution of each class member's claim Further, an issue will not be common in the requisite sense unless the issue is a substantial . . . ingredient of each of the class members' claims.”*⁴⁰
- [49]This led Wallis JA himself to say (emphasis supplied): *“But the question in respect of any class or subclass is always whether there are common issues that can be determined that will dispose of all or a significant part of the claims by the members of the class or subclass.”*⁴¹
- [50]So, on this test, in our example, will a court determining whether or not the airports company was negligent, dispose of *“all or a significant part”* of the individual claims of each class member? The answer lies stuck away not so much in the number of elements of the cause of action that will feature anyway in the claim of each class member, had they each launched a claim against the airports company.
- [51]Rather, the answer lies in the word *“part”*. What *“part”* of the potential individual claim of each potential class member will be determined jointly for all if a class action were certified? On the ratio decidendi of Wallis JA, either the whole of the claims, or a significant part of the claims, must be so determined. In our example the individual vagaries of each potential claimant's claim is likely to differ significantly, making commonality a suspect qualifier for class certification.
- [52]But it must not be thought that even Wallis JA himself considered that a potential separation of issues under rule 33(4) would destroy commonality: the learned judge said: *“That highlights the point that the class action does not have to dispose of every aspect of the claim in order to obtain certification. It might in an appropriate case be restricted to the primary issue of liability, leaving quantum to be dealt with by individual claimants.”*⁴²

³⁸ *Wal-Mart Stores Inc, Petitioner v Betty Dukes et al* 131 S Ct 2541 at 2550.

³⁹ 2001 SCC 68 ([2001] 3 SCR 158; 205 DLR (4th) 19).

⁴⁰ At para 18.

⁴¹ At [45].

⁴² *Ibid.*

- [53] So, could an astute applicant for certification in our example overcome strong resistance on the basis of absence of commonality by applying for a separation, and asking for a certification for purposes of a declaratur only in respect of liability? Perhaps. But the applicant might still be met by an argument that foreseeability of harm is as individualised as harm itself; and if foreseeability were also separated, the ambit of the potential declaratur that remains would be meaningless.
- [54] In this context too respondents argue that there is the spectre of an applicant applying for certification only on the basis of a thin veneer of law point commonality. The debate about the extent of the commonality required is then often foreclosed by the proposition that the alternative is no access, a no-go area. That proposition is often offered as the complete answer to any attempt to raise the threshold of qualification for class certification.
- [55] When however access to justice and poverty are mutually exclusive and not complimentary, the applicants' postulated response is a legitimate riposte. But does it mean there are then no barriers at all? In my view not.
- [56] In the end result, the court cannot avoid having to decide how best, and how most effectively, if at all, class certification will advance the litigation which comes before it. It may be that in one case the litigation will not be advanced significantly enough by an order that would, in another, similar, case have the opposite effect.
- [57] This challenge involves, in my view, a relook at the hurdle rate of the merits requirement. If a case is unmeritorious, a court should not allow the huge machinery that starts up in consequence of a class certification to be engaged.
- [58] The relief/damages are ascertainable. This issue assumed particular significance in Children's Resource Centre because of the nature of the relief there claimed. The bread consumers had all, it will be remembered, overpaid for their daily bread as a result of the sterilisation of competition by cartel conduct over a number of years. But in some instances consumers bought few breads; and even those who bought many breads would not have been able to tally up significant claims. The individual claims were small. Yet the cartel conduct was egregious and the class representatives felt justifiably wronged on behalf of the class members.
- [59] So they proposed that the respondents paid the aggregate amount of the overcharge, which could be calculated on an overall percentage basis, to an institution which would apply it to community and school feeding schemes. The court was concerned by the lack of a meaningful relationship between the wronged consumers and the ultimate beneficiaries, and the respondents argued that the claim therefore had assumed a punitive character.
- [60] The court bought into this argument, and disallowed this concept.⁴³ The matter was left for the legislature to take further, if it were so inclined. For now then at least the standard rules of loss apply: actually suffered, foreseeable and quantifiable.
- [61] Allocation of damages to class members. This point follows from the earlier one. The proposed class mechanism must ensure that the benefit of the proceedings actually reaches the class members that eventually step forward. Often this will not be a problem; but in many cases in other jurisdictions the spoils of victory have languished unclaimed in some trust fund, resulting in yet more litigation to obtain directions from a court as to an appropriate manner of disposing with money that belonged to no-one.

⁴³ At [81] to [85].

[62]Suitable class representative. The issue here is that the class representative is no agent acting for a principal. S/he acts on his/her own, instructs lawyers on his/her own, makes decisions concerning the litigation, settles the case, and so on. Although the class representative actually “represents” the class, as the very designation conveys, there is in fact no physical class that can be consulted from whom to receive a mandate.

[63] The representative therefor acts in a fiduciary capacity and needs to be reliable. But apart from probity issues, there are also issues of capacity. The court in Children’s Resource Centre raised, with respect, pertinent issues in this regard: *“First, has the representative the time, the inclination and the means to procure the evidence necessary to conduct the litigation? Second, has the representative the financial means to conduct the litigation and, if not, how is it going to be financed? This will involve making some assessment of the likely costs. Third, does the representative have access to lawyers who have the capacity to run the litigation properly? This will require some consideration of the likely magnitude of the case and the resources involved in dealing with it. Fourth, on what basis are those lawyers going to be funded? Fifth, if the litigation is to be funded on a contingency fee basis, details of the funding arrangements must be disclosed to ensure that they do not give rise to a conflict between the lawyers and the members of the class. The court must also be satisfied that the litigation is not being pursued at the instance of the lawyers for their own gain rather than in the genuine interests of class members, as the risk of conflicts of interest is inherent in that situation.”*

[64] These matters are all drivers for the consideration that the representative be appropriately qualified.⁴⁴

[65] A class action is the most appropriate means of determining the claims of class members. This issue presupposes that the potential class members have a choice between class action and individual action. Of course, class members always have a choice, because they may elect to opt out or opt in, depending on the system determined for the class. But often class members have no choice for reasons socio-economical, and litigation by way of class action may be the only way in which they are able to bring their cause to a court.

[66] Where there is a true and real choice in the matter, a court should guard against the class action procedure being employed merely as an economic lever to force a defendant into an unfair bargaining position. That does not serve the interests of justice, the very leitmotif for class certification.

Certification: developing the common law; weighing evidence in certification proceedings; need for and terms of certification, including opting in and opting out; appealability; and prescription.

[67] Having referred to the elements of a class action, it is appropriate now to turn to some aspects associated with the application itself. The requirement⁴⁵ for a certification process was an instance of the high court protecting and regulating its own process under s.173 of the Constitution. But s.173 is also the constitutional mandate for *developing the common law*.

⁴⁴ The appointment of more than representative may address concerns, particularly if one of them is an institution which is answerable to the FSB.

[68] In developing our law of class actions, the Supreme Court of Appeal not only regulated its own process; it also developed the common law.⁴⁶ The point that is worth making in the present context is that the jurisprudence relating the development of the common law remains what it was before.

[69] The Constitutional Court has held⁴⁷ in this regard that the development of the common law, likewise empowered under s.173, is driven by the interests of justice. And what the interests of justice require must be determined on a case by case basis. The power to develop the common law is to be used “sparingly”, else there would be “legal uncertainty and chaos”.⁴⁸

[70] The way in which courts should approach this endeavour was described as follows by the Constitutional Court in *DE v RH* (emphasis supplied):⁴⁹ “[16] Without doubt it is open to courts to develop the common law. This is a power they have always had. Today the power must be exercised in accordance with the provisions of section 39(2) of the Constitution which requires that common law be developed in a manner that promotes the spirit, purport and objects of the Bill of Rights. This entails developing the common law in accordance with extant public policy. In *Du Plessis Kentridge AJ* quoted the case of *Salituro* with approval: ‘Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the [J]udiciary to change the law. . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The [J]udiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.’⁵⁰

[71] The next issue concerns the way a court goes about *weighing evidence in a certification application*. It was alluded to earlier, but it is worth referring to here to underscore the entitlement of a respondent who is faced with what might appear to be a glib assertion of a triable case. Wallis, JA expressly held⁵¹ that this “does not preclude the court from looking at the evidence on behalf of the person resisting certification, where that evidence is undisputed or indisputable or where it demonstrates that the factual allegations on behalf of the applicant are false or incapable of being established. That is not an invitation to weigh the probabilities at the certification stage. It is merely a recognition that the court should not shut its eyes to unchallenged evidence in deciding a certification application.”

[72] The *need for certification*, contrary to the Australian practice, is accepted by all round locally.⁵² The issue concerning the arguments for and against *opting in and opting out*

⁴⁶ The common law did not authorise class actions; see eg. *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T) at 373G-374B. *Baxter Administrative Law (Juta & Co Ltd, 1984)* at 671-672 thought that it at least enabled class actions.

⁴⁷ *Molaudzi v S*, [2015] ZACC 20 (25 June 2015).

⁴⁸ See too *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another*, [2015] ZACC 12 (12 May 2015) at [47].

⁴⁹ [2015] ZACC 18 (19 June 2015).

⁵⁰ See also *H v Fetal Assessment Centre*, 2015 (2) SA 193 (CC) at [11] to [16]; *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited*, 2015 (3) SA 479 (CC) at [57] to [58].

⁵¹ At [41].

⁵² ⁵² In *Nkala* the amici curiae argued a proposition that was expressly left open in *Mukaddam*, namely whether certification was a necessary prerequisite when the substantive right sought to be enforced was a right entrenched in the Bill of Rights. The *Nkala* court rejected the proposition that in those cases certification was unnecessary (at [38]).

receives an added dimension when it is considered that if a potential class member may opt in, s/he may as well join as a litigant in the proceedings: why then have a class action at all?

[73]In the opt-in scenario potential members who qualify in terms of the definition must take a timeous positive step to notify the class lawyers; they must opt in to be able to share in a successful judgment. If they do not, they are not members, and will not share in a successful judgment. But they then remain free to sue the defendant on their own, or even ask a court to certify a new class.

[74]In the second, opt-out, scenario, all members who fall within the definition are automatically class members, and share automatically in a successful judgment. All they need to do to be able to share is to prove that they fall within the class definition. If they do not want to form part of the class of members who will all be bound by the judgment, they must opt out. They do that by taking a timeous positive step to notify the class lawyers of their opting out.

[75]In the nature of things, the opt-in scenario would result in a smaller class than the opt-out scenario. Certification applicants therefore push for the latter and oppose the former. The considerations that may sway a court on this issue might include the presence or absence of language barriers and communication infrastructure. Often people in rural areas do not have access to internet or appropriate professional advice so as to assist in making informed choices.

[76]The issue of *appealability* of a class certification application has also been authoritatively decided by the Nkala court. That court held, in response to the application for leave to appeal, that the certification of a class action is not appealable.⁵³ The dismissal of a certification application is, self-evidently, appealable, as was held in Children's Resource Centre.

[77]*Prescription* can also be disposed of briskly. Children's Resource Centre held that the service of the class action certification application should constitute service of process claiming payment of a debt for purposes of s.15(1) of the Prescription Act 68 of 1969.⁵⁴

Managing a class action: case management; representation; contingency fees; bifurcation; trusts; settlements.

[78]Once a class has been certified and the trial process is underway, the management of the case falls under the responsibility of the management structure of the high court concerned. In many divisions there will be a *case management* system and so a case management judge may be appointed for the matter.

[79]The important challenge is to avoid the very size of the matter grinding it to a halt. This can easily happen with multiple interlocutories, discovery and further particulars. Inevitably sensible pretrial agreements may lead to chopping up the case into bite-sized bits under rule 33(4). This may involve selecting prototype plaintiffs and running those cases on the basis that their result binds the rest.

[80]In that process it is important that the *class representative* is available and able to make decisions and instruct lawyers in accordance with them. Such a representative will require the ability to respond to the challenges that have been identified above, including

⁵³ Apparently leave to appeal was also refused on this basis in Pretorius and Another v Transnet Second Defined Benefit Fund and Others 2014 (6) SA 77 (GP), but I have not been able to confirm this.

⁵⁴ At [89].

specifically the ability to raise finances to run the case. In this context a local phenomenon has been the participation of lawyers from foreign jurisdictions on the basis of being consultants. They bring with them skills in this type of litigation, but they also bring increased financial burdens for the case.

[81] *Contingency fee* agreements with local lawyers are often, but not always, struck. The legislative prescripts for their scrutiny by courts are extant and are enforced.

[82] In Children's Resource Centre the court expressly envisaged a *bifurcated* process by means of a so-called merits-quantum split, as was accordingly sought and granted in Nkala. That implies that a class is certified for the one part of the case, but that that part does not lead to a money judgment. The money judgment might only come when damages are proved in a quite separate, individual, action in which the then plaintiff, armed with a class action judgment, would have to prove his/her claim in the ordinary way.

[83] Since the court will keep oversight over the ultimate settlement or judgment,⁵⁵ it is likely that a court order will exact the creation of a *trust*, as now often happens when large amounts are paid to some classes of plaintiffs. Often a financial institution will be one of the trustees. Provision will have to be made for the disposal of excess, unclaimed, moneys that are not distributed in the predicted way to class members.

What have we achieved?

[84] Our courts have certainly made great strides in developing an important facet of procedural law. They now have to give practical embodiment to the concept of a litigation class in a manner that will serve the interests of justice.

[85] Access to courts by individuals for whom the concept will have had no real meaning before, is an essential goal of this new procedure. The challenge is to progress a class action to its finality, by settlement or judgment, in a manner that allows class members and defendants alike to retain respect for the rule of law and its standard bearer, the justice system.

[86] The process of levelling the economic playing fields should not result in abuse of the system. Abuse has occurred in other jurisdictions, and it has resulted in reputational damage which is difficult to redress. From our vantage point, of having seen other jurisdictions evolve their class action jurisprudence before we have tackled ours, we now have the benefit of adjusting our procedures precipitously.

Willem van der Linde
Johannesburg
18 July 2016

⁵⁵ Laid down by the Nkala court at [39].