STANDING, CLASS ACTIOINS AND THE RIGHT OF ACCESS TO JUSTICE

(Draft)

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1. INTRODUCTION

On the twentieth anniversary of the adoption of the Constitution in South Africa, it is important to reflect on the areas in which our law has developed, how is has developed, and where there is still room for development in light of the values underlying the Constitution.

The rules of standing allow certain cases to reach a court for adjudication, and keep other cases out. Standing and the rules governing who may approach a court, and the type of matter that may be brought, has constitutional significance because it ultimately determines who has access to justice. A court may refuse to hear a matter on the basis of standing, thereby avoiding the need to explain its disinclination to hear certain matters.

The enactment of section 38 of the Constitution significantly altered the laws governing standing. For the first time, persons were allowed to approach a court to assert rights on behalf of or in the interest of other persons, and the provision specifically sanctioned persons to approach a court acting as a member of or in the interests of a group or class of persons.

Despite the introduction of the broader rules of standing in section 28 of the Constitution twenty years ago, very few class actions have been instituted in South Africa and no class action has been prosecuted to finality. The law of class actions has, until recently, been an area of uncertainty and scepticism. However, there have been some recent developments in the area of class actions and the courts are slowly clarifying the rules and procedures to be followed when bringing a class action.

The introduction of the class action to South African law is to be welcomed. In a developing nation, such as South Africa, where the majority of the population has little if any access to justice (and where litigation is costly and time consuming), class actions are a useful and appropriate mechanism to ensure the proper realisation of the right of access to justice contained in section 34 of the Constitution for large groups of people who are marginalised members of society.

2. THE CLASS ACTION

A class action, or representative action is a legal procedure which allows the claims (or parts of claims) of a number of persons to be brought against the same defendant/s in a single law suit. One or more persons (class representative) institutes an action on their own behalf, and on behalf of the other persons (the class) who have a claim arising out of the same or a similar alleged wrong as the class representative alleges. The class representative's claim shares questions of law and fact with the claims of the other class members (common issues). Only the class representative is a party to the action and the other members of the class are described in the class definition.[1]

A judgment in a class action does not make the rest of the members of the class a party to the proceedings. However, the members of the class are bound by any court order made on the common issues, be it in their favour or not. Accordingly, the doctrine of *res judicata* applies and where a class action fails on the merits, the members of the class are precluded from approaching a court to adjudicate the same cause of action on an individual basis.[2]

The primary advantage of a class action suit is that it fosters both judicial economy and social utility. The courts are protected from having to entertain numerous claims relating to the same cause of action; and individual plaintiffs whose claims may be too small to pursue individually, or who would otherwise not have access to justice (for a variety of reasons, including of poverty, illiteracy, or lack of access to legal representation) have the opportunity to be represented in court and have their claim (or a part thereof) adjudicated.[3]

When a class action is instituted, the identity of all other members of the class may not be known to the class representative. Accordingly, due process requires that adequate notice be given to all potential members of the class so that they are aware of the class action and that they may be bound by the outcome thereof. The form and content of such notice will vary, depending on the nature of the class action and the position of the members of the class in society.[4]

Apart from informing class members of the class action, the notice given to all class members must include information about how a class member can include or exclude herself from the

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[1] Mulheron R *The Class Action in Common Law Legal Systems: A Comparative Perspective 3* quoted by Wallis JA in *Children's Resource Centre Trust & Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) (*Bread Consumer SCA Appeal*) at 224B-E.

[2] C Loots 'Standing, Ripeness and Mootness' in Woolman S and Bishop M (ed) *Constitutional Law of South Africa* 2 ed (2004) 7-7. See also South African Law Commissions *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* (1998) Project 88 (SALC Report on Class Actions).

[3] SALC Report on Class Actions op cit note 2 at 2.3.1.

[4] C Loots op cit note 2 at 7-7. See also the SALC Report on Class Actions which recommends that the requirements for giving notice to the class be included in an Act governing class actions and public interest litigation.

action, should they wish to do so (thereby agreeing to be bound by any judgment on the common issues or not). The class definition will determine who falls within the class and it is, therefore, crucial that persons are able to determine objectively whether they fall within the class with reference to the class definition.

The way in which class members are bound by a judgment in a class action depends on whether it is an opt-in or opt-out class action. An opt-in class action is one where only those members of the class who specifically "opt-in", or indicate (in a prescribed manner, for example, by contacting the legal representatives of the class) that they will be bound by any judgment in the class action. In an opt-out class action, all class members are bound by any judgment unless they specifically opt-out of being bound thereby.

Prior to 1994, the concept of persons benefitting from and being bound by a judgment in a matter to which they have not been formally joined was completely foreign to South African law. The representative action of English law, a procedure of courts of equity, which is the predecessor to the modern class action, was received into many Anglo-American legal systems. However, as the law of equity never became part of South African law, the representative action was never received into South African law in the pre-constitutional dispensation.[5]

3.1 STANDING IN THE PRE- CONSTITUTIONAL DISPENSATION

Standing or *locus standi* is the concept which concerns whether a person who approaches a court for the adjudication of a matter is the proper party to do so.[6] Before the enactment of the Interim Constitution in 1993, the standing was governed by the common law. The courts had a restrictive attitude towards standing and only a person who had a personal interest in a matter and who had been adversely affected by the alleged wrong could approach a court for relief.[7] The common law rules of standing, accordingly, only accommodated the adjudication of private disputes between

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[5] C Loots op cit note 2 at 7-7. Class actions have, however, been a part of many jurisdictions (including *inter alia*, the United States of America, Canada, Australia, Sweden and India) for decades. The United States of America is considered to be the country of origin of the modern class action and it introduced Federal Rule 23(a) of the Federal Rules of Civil Procedure in the 1940's. Federal Rule 23(a) provides:
"One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class."

[6] C Loots op cit note 2 at 7-1.

[7] C Loots op cit note 2 at 7-2.

persons who were directly affected by the alleged wrong.[8] When discussing the old order rules governing standing, the Constitutional Court, O'Regan J in *Ferreira v Levin No & Others; Vryenhoek and Others v Powell NO and Others*[9] noted that:

> *"Existing common law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief."*

The individual litigant's personal and direct interest in a matter defined the court's powers in relation to the parties seeking to have issues adjudicated by a court. A claimant wishing to participate in proceedings which had already been instituted between other parties could only become formally associated with the litigation by applying to be joined to such proceedings. Rule 10 of the Uniform Rules of Court allows for both plaintiffs and defendants to be joined to proceedings involving the same cause of action.[10] The rules of joinder come to the aid of parties

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[8] The only exception to this rule was sanctioned by the Appellate Division in *Wood & Others v Ondanwa Tribal Authority & Another* 1975 (2) SA 294 (A). The court allowed a group of church leaders to seek an interdict on behalf of a large group of persons who were in fear of being illegally arrested, tried and put to death for their political affiliations. An early example of public litigation during apartheid South Africa, the court ensured that the decision had very limited application to matters involving violations of life, liberty or physical integrity only to ensure that it could not be used as a precedent to relax the traditional common law rules of standing. See generally C Loots op cit note 2 at 7-2 to 7-3.

[9] *Ferreira v Levin No & Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (*Ferreira v Levin*) at 1103E-G.

[10] Rule 10 of the Uniform Rules of Court published under GN R48 12 January 1965 (as amended) provides:

> "(1) Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.
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> (2) A plaintiff may join several causes of action in the same action.
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> (3) Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.
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> (4) In any action in which any causes of action or parties have been joined in accordance with this rule, the court at the conclusion of the trial shall give such judgment in favour of such of the parties as shall be entitled to relief or grant absolution from the instance, and shall make such order as to costs as shall to it seem to be just, provided that without limiting the discretion of the court in any way-

with an interest in a matter, or where there has been a mis- or non-joinder of certain defendants. However, they do not contemplate (or accommodate) a class action where, at the commencement of proceedings, the identity of all of the potential members of the class are not known, making it impossible (let alone wholly impractical) to join all members of the class to the proceedings.

In addition to the rules of joinder, Rule 11 of the Uniform Rules of Court allows for the consolidation of actions where separate actions have been instituted, and it appears to the court convenient to consolidate.[11] Actions may be consolidated where many plaintiffs have instituted proceedings for the adjudication of individual actions involving similar (if not the same) cause of action. However, a judgment in a consolidated action is only binding on the parties thereto and is not automatically binding on all other plaintiffs with similar claims. The consolidation of actions, therefore, is of little help to large groups of persons who have little access to justice and whose rights have been violated, or who have suffered harm from a similar cause.

(a) the court may order that any plaintiff who is unsuccessful shall be liable to any other party, whether plaintiff or defendant, for any costs occasioned by his joining in the action as plaintiff;

(b) if judgment is given in favour of any defendant or if any defendant is absolved from the instance, the court may order:
(i) the plaintiff to pay such defendant's costs, or
(ii) the unsuccessful defendants to pay the costs of the successful defendant jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful defendants pays more than his pro rata share of the costs of the successful defendant, he shall be entitled to recover from the other unsuccessful defendants their pro rata share of such excess, and the court may further order that, if the successful defendant is unable to recover the whole or any part of his costs from the unsuccessful defendants, he shall be entitled to recover from the plaintiff such part of his costs as he cannot recover from the unsuccessful defendants;

(c) if judgment is given in favour of the plaintiff against more than one of the defendants, the court may order those defendants against whom it gives judgment to pay the plaintiff's costs jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful defendants pays more than his pro rata share of the costs of the plaintiff he shall be entitled to recover from the other unsuccessful defendants their pro rata share of such excess.

(5) Where there has been a joinder of causes of action or of parties, the court may on the application of any party at any time order that separate trials be held either in respect of some or all of the causes of action or some or all of the parties; and the court may on such application make such order as to it seems meet."

[11] Rule 11 of the Uniform Rules of Court published under GN R48 12 January 1965 (as amended) provides:
"Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon-

(a) the said actions shall proceed as one action;
(b) the provision of rule 10 shall *mutatis mutandis* apply with regard to the action so consolidated; and

(c) the court may make any order which to it seems meet with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions."

3.2 STANDING IN THE POST-CONSTITUTIONAL DISPENSATION

The enactment of the Interim Constitution introduced significant changes to the laws governing standing in South African law. Section 7(4) of the Interim Constitution provided that:

> *"(4) (a)When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.*
>
> *(b) The relief referred to in paragraph (a) may be sought by- (i) a person acting in his or her own interest;*
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> *(ii) an association acting in the interest of its members;*
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> *(iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;*
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> *(iv) a person acting as a member of or in the interest of a group or class of persons; or*
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> *(v) a person acting in the public interest."*

Section 38 of the Final Constitution (Constitution) provides:

> *"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 –*
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> *(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 interests 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."*

Sections 7(4) of the Interim Constitution and, finally, section 38 of the Constitution represent a clear departure from the old order common law rules governing standing and it allows for disputes to be brought to court for adjudication by persons who may not necessarily have a personal and direct interest in a matter. It marks the advent of the possibility of bringing public interest litigation and class actions in South Africa.

Public interest litigation is brought by a representative in the interest of the public generally, but not necessarily in the representative's interest. An order of court made in public interest litigation is not binding (*res judicata*) on the persons in whose interest the litigation is brought. In contrast to public interest litigation, a class action is brought by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially

similar in respect of all members of the class. As mentioned previously, and the main distinguishing feature between public interest litigation and a class action, is that a court order made in a class action is binding on all members of the class.[12]

In the following dictum of Chaskalson P in *Ferreira v Levin No & Others; Vryenhoek and Others v Powell NO and Others*,[13] the Constitutional Court found that a broad approach should be adopted towards the interpretation of the standing provisions in the Constitution:

> *"[i]t is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled."*

In discussing the shortcomings of the rules of joinder, Cameron JA highlighted the advantages of the class action mechanism from a procedural perspective. He stated that:

> *"[t]he class action cuts thought all these complexities. The issue between the members of the class and the defendant is tried once. The judgment binds all and the benefits of its ruling accrue to all. The procedure has particular utility where a large group of plaintiffs each has a small claim that may be difficult or impossible to pursue individually."*[14]

Traditionally, and in many other jurisdictions, a representative plaintiff in a class action must be a member of the class, share the same cause of action as the other members, and have the same interest as the other members of the class.[15] However, the inclusion of the words "*or in the interests of*" in section 38(c) of the Constitution allows persons or organisations to act as the representative plaintiff in a class action, thereby broadening the concept of standing to include persons who are not necessarily pursuing the action in their own interest.[16]

4 THE SOUTH AFRICAN CONTEXT

Apart from the procedural convenience of class actions which allow multiple claims to be determined in one action, they also assist in 'levelling the playing field' for poor or economically less powerful individuals who would not ordinarily have the resources to instruct an attorney. Such persons are at a significant disadvantage when litigating against well-resourced corporations

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[12] C Loots op cit note 2 at 7-7. This is confirmed in the recommendations made by the SALC in its Report on Class Actions op cit note 2. The report and recommendations contained therein are discussed at paragraph 5 below.

[13] *Ferreira v Levin* op cit note 9 at 1082G-H.

[14] *Permanent Secretary, Department of Welfare, Eastern Cape. And Another v Ngxuza & Others* 2001 (4) SA 1184 (SCA) (*Ngxuza II*) at 1193C-E.

[15] C Loots op cit note 2 at 7-7. For example, see Federal Rule 23(a)(3) and (4) of the Federal Rules of Civil Procedure in the United States of America. The text of Federal Rule 23(a) is in footnote 5.

[16] C Loots op cit note 2 at 7-7.

which can afford premier legal representation. However, when claims are brought together in a class action, the aggregate value of the claims may be enough to allow for the instruction of equally skilled legal representation.[17]

The South African population comprises many large groups of people who are, for various reasons, marginalised members of society. These people live in primarily rural areas with little (if any) access to justice.

Section 34 of the Constitution guarantees everyone the right of access to justice. It provides:

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

However, the section 34 right of access to justice is of little use to a potential litigant who has a small claim that would not be worth pursuing on an individual basis, or who seeks the enforcement of a right but who cannot afford to instruct an attorney. The inclusion of class actions as an option for the enforcement of rights in terms of section 38 of the Constitution significantly enhances a poor litigant's right of access to justice. Class action allow multiple claims to be prosecuted in one action; and they allow a representative to act on behalf of the members of a class of persons suffering the same harm.

The link between class actions and their potential to enhance individual rights, particularly in poor countries, was discussed by the Supreme Court of India in *S P Gupta And Others v President of India And Others*.[18] The court noted that the rules of standing need to be relaxed to allow for class actions and other representative actions because the law is an important tool in bringing about socio-economic change, particularly when a country is engaged in national reconstruction. However, as the court noted, increased focus on rights in favour of large sections of society:

> *"is not to say that individual rights have ceased to have a vital place in our society but it is recognised that these rights are practicably meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible to all."*[19]

5 SOUTH AFRICAN LAW COMMISSION: THE RECOGNITION OF CLASS ACTION AND PUBLIC INTEREST ACTIONS IN SOUTH AFRICAN LAW

[17] J C Alexander *An Introduction to Class Action Procedure in the United States* at 1.

[18] (1982) 2 SCR 385

[19] At para 19.

Relatively soon after the promulgation of the Final Constitution, the South African Law Commission (SALC) published a working paper on the Recognition of Class Actions and Public Interest Actions in South African Law (SALC Report on Class Actions). The primary recommendation made by the SALC was that an Act of Parliament should be introduced to set out the principles underlying public interest actions and class actions.[20] The SALC recommended that the legislation be introduced "to ensure a balance between the opening of the doors of access to justice to the masses and flooding the gates with inappropriate or vexatious litigation."[21] Steps have not been taken to legislate in the area of class actions,[22] but the report provided a good starting point for the law of class actions in South Africa and it has been relied upon by practitioners and the courts in prosecuting and adjudicating class actions in South Africa.

The SALC proposed that a class be defined as:

"an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and which action is certified as a class action in terms of the Act."[23]

The report recommended *inter alia* the following:

- A preliminary application for class certification should be brought requesting leave from the court to institute class action proceedings. Applicants bringing certification proceedings should request directions from the court regarding procedure and the courts should have a wide discretion to determine its own powers.[24]
- A list of requirements to be met in order for certification to be granted.[25]

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[20] The rationale for introducing legislation for class actions is to bring class actions into non-constitutional areas of the law. SALC Report on Class Actions op cit note 2 at 3.1.1.

[21] SALC Report on Class Actions op cit note 2 at 3.5.1.

[22] This, despite the SALC's concern that, in the absence of legislation, the development of class actions would be left to the courts which may take place haphazardly or not at all. In the decision of the SCA in the *Bread Consumer SCA Appeal* op cit note 1, the court noted at 223C-D that:

> "The South African Law Commission, in line with many other jurisdictions to which we have been referred, proposed that the procedures applicable to class actions be prescribed by statute, and to that end prepared a draft Bill. However, Parliament has not yet acted on its recommendations or those of a judicial commission of enquiry which made a similar recommendation. Academic voices over many years have likewise not been heard."

[23] SALC Report on Class Actions op cit note 2.

[24] This is in line with the Constitutional Court pronouncements on section 173 of the Constitution in *Mukaddam And Others v Pioneer Food (Pty) Ltd And Others* 2013 (5) SA 89 (CC) (*Bread Distributor CC Appeal*) at 98G-99A which is discussed at paragraph 6.8 below.

[25] The list is as follows:

(a) there is an identifiable class of persons;
(b) a cause of action is disclosed;
(c) there are issues of fact or law which are common to the class;
(d) a suitable representative is available;
(e) the interests of justice so requires; and
(f) the class action is the appropriate method of proceeding with the action.

- The Act should contain provisions governing how notice should be given to the class and the courts should have the discretion to certify either opt-in or opt-out classes.
- Common issues should be decided together and issues which require individual determination should be decided individually.
- The courts may determine the amount of damages to be awarded on the basis of either an aggregate or individual assessment.
- The courts should approve all settlements, discontinuances or abandonment of any class action.
- Decisions to certify a class should not be appealed, but decisions not to certify should be subject to appeal.[26]
- The certification of an action as a class action should suspend limitation periods for all class members until the member opts out, the member is excluded from the class, or the action is decertified, dismissed, abandoned, discontinued or settled.[27]

6 CLASS ACTIONS IN SOUTH AFRICA

Since the promulgation of the constitutional provisions sanctioning class actions, no class action has been prosecuted to a final conclusion. The courts have, however, entertained some matters where parties have sought to act as representatives of, or in the interest of a class of persons. There have also been some recent decisions in applications for class certification. As a result of these judgments, the jurisprudence around the South African class action is slowly developing.[28]

The list was relied upon by the courts in the application for certification in *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2001 (2) SA 609 (E) (*Ngxuza I*) and *Ngxuza II* op cit note 14 which are discussed at paragraphs 6.3 and 6.4 below.

[26] The rationale being that a decision to certify is not final in effect, as the class action may be prosecuted. However, a decision not to certify has a final effect on the prospect of prosecuting a class action on behalf of a class. Note that in *Ngxuza I* op cit note 25, the state appealed the High Court's decision to certify the class. *Ngxuza I* is discussed at paragraph 6.3 below.

[27] The rationale being twofold: (a) due to the fact that any court or other decisions taken in a class action will be binding on all members of the class, the court should have the final say if the class representatives elect not to proceed with the class action for whatever reason; and (b) so as to interrupt prescription, for example, and prevent class members from having to institute individual actions to preserve their claims. SALC Report on Class Actions at 5.22.

[28] In the decision of the Supreme Court of Appeal (SCA) in the *Bread Consumer SCA Appeal* op cit note 1 at 223D-E, the court noted that:

> "The utility of a class action in certain circumstances is clear. We are thus confronted with a situation where the class action is given express constitutional recognition, but nothing has been done to regulate it. The courts must therefore address the issue in the exercise of their inherent power to protect and regulate their own process and to develop the common law in the interests of justice."

6.1 *BEUKES V KRUGERSDORP TRANSITIONAL LOCAL COUNCIL & ANOTHER*

The issue of standing arose in *Beukes v Krugersdorp Transitional Local Council & Another*[29] (*Beukes*) by way of a constitutional challenge to the charge of different rates to residents based on their race. Beukes, a white ratepayer, sought to challenge the procedure of levying different taxes according to the area in which ratepayers resided on the basis that it amounted to unfair discrimination.[30] The taxes in black townships were levied on a 'flat rate', whereas those in a formerly white area were levied on a higher, 'user-based' basis. Beukes raised the challenge in his own interest, but also as a member or in the interest of a group or class of persons in terms of section 7(4)(b)(iv) of the Interim Constitution (the predecessor to section 38(c) of the Final Constitution).[31] The other ratepayers within the relevant local authority on whose behalf Beukes purported to act had filled in their names, addresses, telephone numbers and signatures of a list which was attached to the application. The respondent objected to Beukes' attempt to act on behalf of a broader group or class of persons on the basis that the class had not been accurately defined and that the members thereof had not deposed to any affidavits in support of the application.

The court, per Cameron J, dismissed the respondent's objection on the basis that, to do so, would be to ignore the spirit and purport of the Interim Constitution. Cameron J endorsed the view of Chaskalson P in *Ferreira v Levine & Others*[32] that the courts should adopt a broad approach towards standing to ensure that constitutional rights enjoy the full measure of protection to which they are entitled.[33] The court found further that the founding papers contained sufficient description of the members of the class which Beukes purported to represent. It would, accordingly be contrary to the constitutional obligation of adopting a broad approach to standing to require the other members of the class to attest to their status as members of the class and to the complaint with which they associated themselves.[34]

The decision in *Beukes* is one of the first decisions in the post constitutional era which allowed a person to act in his own interest, but also in the interest of a broader class of persons with a similar complaint.

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[29] 1996 (3) SA 467 (W).
[30] In terms of section 8 of the Interim Constitution.
[31] The text of section 7(4)(b) of the Interim is quoted in full in paragraph 3.2 above.
[32] *Ferreira v Levin* op cit note 9.
[33] *Beukes* op cit note 29 at 474B-I.
[34] *Beukes* cit note 29 at 474E-F, Cameron J found that:

> *"It seems to me further that a broad approach should be taken not only to who qualifies as having standing under s 7(4)(b), but to how that standing may be evidenced."*

6.2 *MALULEKE V MEC, HEALTH AND WELFARE, NORTHERN PROVINCE*

The court in *Maluleke v MEC, Health and Welfare, Northern Province*[35] (*Maluleke*) did not adopt the broad approach to standing taken by Cameron J in *Beukes*.

The applicant in *Maluleke* approached the court on her own behalf to set aside the respondent's decision to suspend payment of her old age pension. The decision to suspend pension payments had been taken by the MEC as part of a process to root out people who were receiving pensions to which they were not entitled. The applicant also sought to represent a class of 90 000 other pensioners whose pension payments had also been suspended. The court, per Southwood J, accepted that the applicant had standing to approach the court for relief on her own behalf, but it refused to allow her to act on behalf of the class. It found that neither the rules of court, nor the common law, allowed for class actions, and that the only basis on which the applicant could approach the court on behalf of the class would be to do so in terms of section 38 of the Constitution.[36]

In determining whether the applicant's claim fell within the ambit of section 38 of the Constitution, the court found that the suspension of payment of a pension did not infringe a right in the Bill of Rights. The court found further that there was nothing to suggest that the other pensioners' whose pension had also been suspended could not approach the court for relief in their own names (in terms of section 38(b)), that there was no commonality amongst the other affected pensioners to justify the treatment as a class (in terms of section 38(c)), that the other pensioners were not aware of the litigation being ostensibly conducted on their behalf; and that it would not be in the public interest to deal with the matter *en masse* (in terms of section 38(d)).[37]

The court's attitude in refusing to allow Maluleke to represent a class of persons is reminiscent of the pre-constitutional formalistic and narrow approach to standing. There were clear advantages to allowing the matter to proceed on a class basis: the class in *Maluleke* was relatively easily definable, the class members' complaint arose out of similar facts, and the court could have adjourned proceedings directing that notice be given to all other pensioners similarly placed to the applicant and advise them of their rights *vis a vis* the litigation.

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[35] 1999 (4) SA 367 (T).
[36] *Maluleke* op cit note 35 at 373E-H.
[37] *Maluleke* op cit note 35 at 373I-J and 374A-F.

The court's narrow interpretation of section 38 of the Constitution created a significant barrier to access to justice for the other pensioners who were affected by the MEC's decision. The judgment was criticised[38] and eventually overturned by the SCA in *Ngxuza II*.[39]

6.3 *NGXUZA V SECRETARY, DEPARTMENT OF WELFARE, EASTERN CAPE PROVINCIAL GOVERNMENT* (*NGXUZA I*)

Faced with a similar issue to that which was raised in *Maluleke* regarding a decision to suspend the payment of social welfare grants, the court in *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government* (*Ngxuza I*)[40] opted to interpret the constitutional provisions on standing in an appropriately broad manner so as to give proper effect to the right of access to justice and other fundamental values of the Constitution.

The applicants sought two declaratory orders: that the cancellation or suspension of grants was unlawful; and that the grants be reinstated retrospectively.

Based on the findings of the Constitutional Court in *Ferreira v Levin NO & Others*[41] and of the High Court in *Beukes*, the court found that the spirit and purport of the Constitution require a broad approach to standing under section 38 of the Constitution. In stark contrast to the decision in *Maluleke*, Froneman J found that the suspension of social grants without a proper hearing was a clear violation of the right to just administrative action contained in section 33 of the Constitution.[42] Accordingly, the court found that the applicants had standing to represent the members of an opt-out class of persons whose social welfare grants had been unlawfully cancelled and that it was appropriate for the matter to be brought as a class action in terms of section 38(c) of the Constitution.[43]

Froneman J's judgment makes the important correlation between class actions and access to justice. The other members of the class in *Ngxuza I* had little hope of approaching a court for relief in their own name, which made it wholly appropriate to allow the applicants to represent the class members.

In a laudable effort to assuage the sceptics, the judgment in *Ngxuza I* raises and deals with the 'practical objections' which are often put up to discourage class actions. The court

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[38] See generally Plasket C *Representative Standing in South African Law* p 17.

[39] *Ngxuza II* op cit note 14 at 1200B-D. The judgment of Cameron JA in *Ngxuza II* is discussed in more detail at paragraph 6.4 below.

[40]. *Ngxuza I* op cit note 25.

[41] *Ferreira v Levin* op cit note 9.

[42] Froneman J distinguished *Ngxuza I* from *Maluleke* on the basis that on the evidence before him, the applicants were unable to pursue their claims individually and in their own names due to their poverty and limited access to legal representation. *Ngxuza I* op cit note 27 at 622I-J and 623A-B.

[43] *Ngxuza I* op cit note 25 at 619D-J and 619A-E and at 633G-J.

reasoned that the following five practical objections to class actions do not justify the imposition of a general bar to class actions:[44]

(1)The 'floodgates' argument – that the courts will be "engulfed by interfering busybodies rushing to court for spurious reasons"[45] – is not a valid objection, as it is unlikely to happen. Unjustified litigation can be curtailed by requiring parties to seek leave from the High Court to proceed on a class basis prior to instituting any class action.[46]

(2)The 'classification' problem relates to the difficulty in determining a common interest between the applicants and the rest of the class that they seek to represent. Froneman J suggested that the determination of the common interest would be made at the certification stage. Further, whether a common interest exists will depend on the facts of each case.[47]

(3)The objection that each applicant and/or class member has his or her own particular circumstances and, accordingly, needs to be treated differently, has little substance. Froneman J noted that if the applicants prove the existence of a common interest, it is up to the defendants to raise any and all defences to the claim which they face. The fact that the applicants allege the violation of a common interest does not mean that the defence thereto needs to be uniform.[48]

(4)The problem of *res judicata* is easily addressed by the notification requirement and ensuring that all potential members of the class are properly notified of the class action of their options in terms of either opting-in or out thereof.[49]

(5)The objection that class actions would be practically impossible for the courts to handle cannot be sustained. A constitutionally sanctioned right to bring a class action cannot be denied on the basis of judicial or administrative shortcomings. If necessary, the courts will have to develop ways to accommodate class action litigation.[50]

Froneman J's judgment in *Ngxuza 1* represents an important shift in the development of the procedures and jurisprudence around class actions in South Africa. For the first time, a court made certification a requirement for class actions. More importantly, the court emphasised the

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[44] *Ngxuza I* op cit note 25 at 623H-J.
[45] *Ngxuza I* op cit note 25 at 623H-I.
[46] *Ngxuza I* op cit note 25 at 624A-F. This is the first indication that class certification proceedings will be a requirement for class actions since the SALC recommended in the SALC Report on Class Actions that a "preliminary application should be brought before court requesting leave to institute or defend an action as a class action."
[47] *Ngxuza I* op cit note 25 at 624E-G.
[48] *Ngxuza I* op cit note 25 at 624G-I.
[49] *Ngxuza I* op cit note 25 at 624H-J.
[50] For example, when certification proceedings and/or class actions are instituted, a Judge or appropriately qualified clerk could be appointed to manage the case including the filing of pleadings, setting of schedules and timelines, and liaising with the parties.

convenience and advantage of using the class action mechanism to enhance access to justice for those who would otherwise have none.

6.4 *PERMANENT SECRETARY, DEPARTMENT OF WELFARE, EASTERN CAPE. AND ANOTHER V NGXUZA & OTHERS* 2001 (4) SA 1184 (SCA) (*NGXUZA II*)

The decision in *Ngxuza I* was taken on appeal and the SCA confirmed the decision of Froneman J. The primary ground of appeal on which the state relied was that the order of the High Court did not adequately define the class.

In dismissing the state's argument that the decision of the High Court did not adequately define the class, Cameron JA set out, for the first time in a judgment of a South African court, the requirements for the institution of class action litigation. He held that the class definition was sufficiently clear in that:

> *"(1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants through their legal representatives . . . will fairly and adequately protect the interests of the class. The quintessential requisites for a class action are therefore present."*[51]

In his judgment, Cameron JA acknowledges and emphasises that, when interpreting the provisions of the constitution (and, in particular, the right to enforce the rights in the Bill of Rights on behalf of a class of persons in section 38(c) of the Constitution), it is crucial to do so with the circumstances of "persons who are most lacking in protective and assertive armour"[52] in mind.

6.5 *CHILDREN'S RESOURCE CENTRE TRUST AND OTHERS V PIONEER FOOD (PTY) LTD AND OTHERS (BREAD CLASS ACTION)*

The application for certification in the bread class action came about as a result of various investigations carried out by the Competition Commission into an alleged bread cartel in the Western Cape where three bread producers (Pioneer Foods (Pty) Ltd, Tiger Consumer Brands Ltd and Premier Foods Limited) (producers) had agreed to *inter alia*, fix the selling price of bread in the Western Cape.

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[51] *Ngxuza II* op cit note 14 at 1197G-I and 1198 A-B. In *Ngxua I*, there were common issues of both law and fact to the class. However, it is not a requirement that both are present, there may be common questions of either law or fact to the class to justify the class action.

[52] *Ngxuza II* op cit note 14 at 1195H-I and 1996A.

In November 2010, two applications for class certification were brought in the Western Cape High Court to certify two opt-out classes respectively. The first application one sought to certify a class of the consumers of bread in the Western Cape who were affected by the fixing of bread prices (consumer class), and the second sought to certify a class of the independent distributors of bread who were affected by the price fixing (distributor class).[53] Once certified, the class representative would pursue damages claims on based on the unlawful actions of the producers in contravention of the Competition Act.[54]

The High Court acknowledged that the decisions in *Ngxuza I* and *II* contained indications that standing to bring class actions in class actions which do not involve the infringement of a right in the Bill of Rights should become part of the law. However, as that issue was not argued before him, Van Zyl AJ did not make a decision in that regard and 'accepted' that the applicants had standing to bring a class action for damages.[55]

With regard to the consumer class, the High Court found that the applicants had not made out a case for an identifiable class of persons. The class definition for the consumer class was too broad: members of the public who may qualify as members of the class would not be able to decide whether to opt-in or out of the class; nor was it clear during what time periods and in what areas of the country the alleged unlawful acts of the producers affected the price of bread.[56]

The court found further that, with regard to the cause of action in the consumer class application, there is no claim for consumers based on anti-competitive behaviour in our law and that, as the producers did not supply them with bread directly, the producers did not owe the consumers any sort of contractual, fiduciary or statutory obligations. The court accordingly found that the applicants in the consumer class had not disclosed a cause of action.[57]

The distributor applicants sought to certify a class of producers on the basis of a violation of their right to freedom of trade, occupation and profession caused by the producers' alleged unlawful conduct. The court found that juristic entities do not enjoy the protections contained in section 22 of the constitution, nor could a juristic entity be found to have infringed any section

[53] The applications were brought on an urgent basis because the section 65 Certificates (which are required to be filed with the Registrar of the court in which proceedings are instituted pursuant to findings made or agreements reached in proceedings before the Competition Commission or Tribunal) were received just prior to the date on which the claims for damages would have prescribed. The two applications were heard together in the High Court and one judgment was handed down.

[54] 89 of 1998.

[55] *The Trustees for the Time Being for the Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others, Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others* (25302/10, 25353/10) [2011] ZAWCHC 102 (7 April 2011) at paras 36 to 39 (*Bread class action*).

[56] *Bread Class Action* op cit note 55 at paragraphs 76 to 80 and 84.

[57] *Bread Class Action* op cit note 55 at paragraphs 86 to 93.

22 rights.[58] The court found further that each of the applicants in the distributor application had different causes of action against some, and not necessarily all of the producers. Accordingly, there were no common issues of fact and law between the distributors and the various producers with whom they had dealt.[59]

6.6 *CHILDREN'S RESOURCE CENTRE TRUST & OTHERS V PIONEER FOOD (PTY) LTD AND OTHERS* 2013 (2) SA 213 (SCA) (*BREAD CONSUMER SCA APPEAL*)

On appeal to the SCA, the court was concerned with two primary issues in respect of the consumer class: when a class action may be brought and what procedural requirements should be satisfied before it is instituted.

The applicants' papers in the consumer appeal had been amended since the High Court proceedings. In the SCA, they sought the certification of two classes: one class of all persons who purchased bread from the producers in the Western Cape, and a second class of all persons who purchased bread from the producers in Gauteng, the Free State, North-West or Mpumalanga province. They alleged that all members of the proposed classes who bought the producers' products during the period in question suffered damages as a result of the unlawful conduct of the producers. In order to bring the class action squarely within section 38(c) of the Constitution, the applicants alleged that the producers' conduct infringed their right to sufficient food in terms of section 27(1)(b) of the constitution.[60]

The SCA, per Wallis JA, found that it was unnecessary for the applicants to base their claim on section 27(1)(b) of the Constitution. He found that the members of the class are generally poor and that any claims that they may have against the producers would not be large enough for them to be pursued individually. Accordingly, if the claims could not be pursued on a class basis, they would not be able to be pursued at all, which would amount to a violation of the class members' right of access to justice in terms of section 34 of the Constitution. Accordingly, Wallis JA held that, subject to the applicants being able to satisfy the other requirements for a class action, they had a right to proceed on a class basis.[61]

The court held further that class actions are a particularly appropriate way of vindicating constitutional rights, but that they are also a useful mechanism in mass personal injury cases or consumer litigation.[62] The judgment of the SCA introduced a significant development in that (at

[58] *Bread Class Action* op cit note 55 at paragraphs 110 to 116.
[59] *Bread Class Action* op cit note 55 at paragraph 120.
[60] *Bread Consumer SCA Appeal* op cit note 1 from 219F-J to 220A-J generally.
[61] *Bread Consumer SCA Appeal* op cit note 1 at 225C-G.
[62] *Bread Consumer SCA Appeal* op cit note 1 at 226A-D.

least until the time when legislation to the contrary is promulgated, if at all)[63] it extended the application of section 38(c) of the Constitution to class actions where there is no allegation of a violation of a right in the Bill of Rights.

Wallis JA also confirmed that it is a requirement in our law that parties wishing to bring a class action must seek certification of a class prior to the institution of the class action.[64] He noted that most jurisdictions, barring Australia, require certification prior to instituting a class action or at an early stage in proceedings. He gave five reasons why certification is desirable:

> *"First, in the absence of certification, the representative has no right to proceed, unlike litigation brought in a person's own interests. Second, in view of the potential impact of the litigation on the rights of others it is necessary for the court to ensure at the outset that those interests are properly protected and represented. Third, certification enables the defendant to show at an early stage why the action should not proceed. This is important in circumstances where the mere threat of lengthy and costly litigation may be used to induce a settlement even though the case lacks merit. Fourth, certification enables the court to oversee the procedural aspects of the litigation, such as notice and discovery, from the outset. Fifth, the literature on class actions suggests that, if the issues surrounding class actions, such as the definition of the class, the existence of a prima facie case, the commonality of issues and the appropriateness of the representative are dealt with and disposed of at the certification stage, it facilitates the conduct of the litigation, eliminates the need for interlocutory procedures and may hasten settlement."*[65]

Wallis JA endorsed the list of elements of a class action set out by Cameron JA in *Ngxuza II*.[66] He also noted that those elements are similar to those contained in Federal Rule 23(a) of the Federal Rules of Civil Procedure in the United States of America which allows for class actions where: the large number of class members makes it impractical to join all of them, there are common issues of fact and law to the class, the claims of the class representatives are typical of those of the rest of the class, and the class representatives will represent the class fairly and adequately.[67]

Wallis JA held that the class definition must allow for individuals to be able to determine whether they are members of the class objectively, by examining their situation in light of the class definition. This is important for three reasons: first, it affects the way in which the class is notified of the class action (as potential members who need to either opt-in or –out of a class action need to be able to determine whether they fall within the class); secondly, members of the

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[63] See Wallis JA's caveat discussed in *Bread Consumer SCA Appeal* op cit note 1 at 226D-H.
[64] *Bread Consumer SCA Appeal* op cit note 1 at 227A-B.
[65] *Bread Consumer SCA Appeal* op cit note 1 at 227B-F.
[66] *Bread Consumer SCA Appeal* op cit note 1 at 228G-I.
[67] *Bread Consumer SCA Appeal* op cit note 1 at 229A-C. The wording of Federal Rule 23(a) is contained in footnote 5.

class need to know that they may commence proceeding against the defendant/s in the class action; and thirdly, it is essential in order to be able to identify who will be bound by the judgment.[68] Of utmost importance in defining the class is:

> *"whether the class is sufficiently identified that it is possible to determine at all stages of the proceedings whether a particular person is a member of the class."*[69]

On the facts before him, Wallis JA found that, in the absence of sufficient evidence, the second class definition was too broad (it included persons who were not injured by the alleged conduct of the producers) and there was no commonality amongst the claims.[70]

The SCA found that the test to determine whether a class action concerns a cause of action raising a triable issue is whether the case is advanced on a basis that is legally tenable, and whether there is credible evidence to support it.[71] Accordingly, the court found that a set of draft Particulars of Claim must form part of the papers in an application for class certification, and that a court faced with such an application, should grant certification unless it is clear that the claim is not legally tenable.[72]

As a result of the amendments made to the applicants' papers, the court found that it was not appropriate for the SCA to determine the complex and novel issues raised therein as the court of first instance, as they had not been argued in and considered by the High Court.[73] Wallis JA concluded that the damages claim advanced by the first class of consumers in the Western Cape applicants' was not legally untenable: the class definition was too broad but there were grounds to believe it was capable of a narrower definition (after the filing of full answering and replying affidavits, as well as a set of Draft Particulars of Claim).[74] The application for certification of the first class of plaintiffs was accordingly referred back to the High Court.[75]

The court held that the element of commonality (that there are common issues of fact or law or both to all class members) does not require that every claim advanced in the class action has to be identical. Wallis JA affirmed the finding of Scalia J in *Wal-Mart Stores, Inc, Petitioner v Betty Dukes et al*[76] that, in order to satisfy the element of commonality, the claims:

> "*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*

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[68] *Bread Consumer SCA Appeal* op cit note 1 at 222E-H.
[69] *Bread Consumer SCA Appeal* op cit note 1 at 231F.
[70] *Bread Consumer SCA Appeal* op cit note 1 at 240D-G.
[71] *Bread Consumer SCA Appeal* op cit note 1 at 232A-C and 242B-D..
[72] *Bread Consumer SCA Appeal* op cit note 1 at 234C-E.
[73] *Bread Consumer SCA Appeal* op cit note 1 at 247D-G.
[74] *Bread Consumer SCA Appeal* op cit note 1 at 252C-E.
[75] It is still pending in the High Court.
[76] 131 S Ct 2541 at p 2551.

of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

An important observation made by Wallis JA which relates to the element of commonality is that a class action does not need to be dispositive of all aspects of a claim in order for it to be suitable for certification.[77] In class actions concerning mass personal injury claims, and depending on the cause of action, whilst liability may be determined on a class basis, it is highly unlikely that each individual's quantum can be decided on a class basis. However, as Wallis JA suggests, the inability of deciding all issues on a class basis should not be a barrier to certification.

When it comes to the class representative/s, the SCA found that, as section 38(c) allows for persons to act "*in the interest of* a group or class of persons," the class representatives' claims need not strictly be typical of those of the class. There cannot, however, be any conflicts of interest between the class representative/s and the other members of the class.[78] Further, the class representative/s must have capacity to conduct the litigation on behalf of the class.[79]

6.7 *MUKADDAM AND OTHERS V PIONEER FOOD (PTY) LTD AND OTHERS 2013 (2) SA 254 (SCA)* (*BREAD DISTRIBUTOR SCA APPEAL*)

On appeal to the SCA, the distributors sought the certification of an opt-in class of distributors who:

"*would have directly suffered a reduction in gross profit margin as a result of the respondents' unlawful conduct and to this extent suffered a common fate in the reduction of gross profit."*[80]

The distributors based their case on section 22 of the Constitution, as they had done in the High Court. However, the SCA, per Nugent JA, adopted a broader view to the basis of the claim as being section 22, read with the Competition Act and the common law.[81] Despite the court's broad interpretation of the basis of the claim, it dismissed the application for certification because it found that the distributors had no claim on any of the bases.

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[77] *Bread Consumer SCA Appeal* op cit note 1 at 237B-D.

[78] *Bread Consumer SCA Appeal* op cit note 1 at 237D-I. A conflict of interest arises where the purpose of the class action is to enrich the class representative. The court's concern in this regard echoes the recommendation of the SALC that before appointing a class representative, a court must be satisfied that the class action is *bona fide* and is genuinely being pursued in the interests of the members of the class. See the SALC Report on Class Actions op cit note 2.

[79] *Bread Consumer SCA Appeal* op cit note 1 at 237D-I. The requirement that the class representative have capacity to conduct the litigation on behalf of the class is important because if the class action is unsuccessful, all of the class members' claims are destroyed.

[80] *Mukaddam And Others v Pioneer Food (Pty) LTD And Others* 2013 (2) SA 254 (SCA) (*Bread Distributor SCA Appeal*) at 256D.

[81] *Bread Distributor SCA Appeal* op cit note 80.

The court reasoned that there was no evidence that, but for the alleged unlawful conduct of the producers, the distributors would have paid less for their products. The constitutional basis could not succeed because the right guaranteed in section 22 of the Constitution does not extend to juristic entities. The claim based on the Competition Act was dismissed because that Act is aimed at protecting consumers from anti-competitive behaviour: it is not designed to protect a corporation's profits. Finally, the delictual claim was also found to be legally untenable because the distributors had not put sufficient evidence or argument to suggest that public policy calls for a claim for pure economic loss suffered by the distributors. [82]

The SCA dismissed the distributor appeal on two further bases. It found that the distributors failed to show that, in the absence of pursuing the claims on a class basis, they would otherwise be denied access to courts: there was nothing precluding them from approaching court in their own names.[83] Secondly, the court expressed its view that, due to the risk of plaintiffs seeking to certify opt-in class actions to avoid potential personal adverse costs orders, opt-in classes should only be certified in exceptional circumstances and the distributors had not shown that any existed.[84]

6.8 *MUKADDAM V PIONEER FOODS (PTY) LTD & OTHERS* 2013 (5) SA 89 (CC) (*BREAD DISTRIBUTOR CC APPEAL*)

The distributors took their application on appeal to the Constitutional Court. The primary issue for determination before the Constitutional Court was whether the test applied by the SCA for certification was correct.

The Constitutional Court, per Jafta J, discussed the fundamental importance of the right of access to justice in section 34 of the Constitution to our democratic order, and the need for courts to invoke the inherent power bestowed on them in terms of section 173 of the Constitution to "protect and regulate their own process, and to develop the common law, taking into account the interests of justice."[85] The court reasoned that the right under section 34 needs to be exercised in compliance with the procedures contained in the rules governing a particular

[82] *Bread Distributor SCA Appeal* op cit note 80 at 256H-J and 257A-G.
[83] *Bread Distributor SCA Appeal* op cit note 80 at 257G-H and 258A-G.
[84] *Bread Distributor SCA Appeal* op cit note 80 at 258F-G.
[85] Section 173 of the Constitution provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

court's process. However, that said, the rules of court should always be "used as tools to facilitate access to courts rather than hindering it."[86]

Jafta J found that the guiding principle in the exercise of powers in section 173 of the Constitution is the interests of justice. Therefore, the court held that the interests of justice is the standard to apply in adjudicating applications for class certification.[87]

The court held that the requirements for certification as laid down by Wallis JA in the SCA[88] should be considered as factors relevant to the determination of whether it is in the interests of justice to certify a class: they are not to be considered as conditions precedent that must be present in order for an application for class certification to succeed.[89]

In a marked departure from the cautious and relatively formalistic approach to class actions taken by the High Court and the SCA, the Constitutional Court finally pronounced on the need for certification prior to instituting class actions proceedings and held that:

> *"Courts must embrace class actions as one of the tools available to litigants for placing disputes before them. However, it is appropriate that the courts should retain control over class actions. Permitting a class action in some cases may, as the Supreme Court of Appeal has observed in this case, be oppressive and as a result inconsistent with the interests of justice. It is therefore necessary for courts to be able to keep out of the justice system class actions which hinder, instead of advance, the interests of justice. In this way prior certification will serve as an instrument of justice rather than a barrier to it."*

The court in the *Bread Distributor CC Appeal* left two questions open: what procedure is to be followed when litigants wish to certify classes involving the enforcement of rights against

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[86] *Bread Distributor CC Appeal* op cit note 24 at 98F-G.

[87] *Distributor' CC Appeal* op cit note 24 at 99C-D. The SALC Report on Class Actions (at 5.6.10 to 5.6.16) discussed the interests of justice as a separate criterion to be met in order to certify a class, but it was in the context of section 102(1) of the Interim Constitution and referrals of matters within the exclusive jurisdiction of the Constitutional Court to that court.

[88] Walls JA held (at 226H-227B, 228B-E and 229C-E in the *Bread Consumer SCA Appeal* op cit note 1 that when faced with an application for class certification, a court must be satisfied that the following factors are present before certifying the class:

(1) the existence of a class identifiable by objective criteria;
(2) a cause of action raising a triable issue;
(3) that the right to relief depends on the determination of issues of fact, or B 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;
(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.

[89] *Bread Distributor CC Appeal* op cit note 24 at 99D-F.

the state[90] and whether it is necessary to bring certification proceedings when enforcing a right in the Bill of Rights against a private litigant.[91]

The Constitutional Court ultimately upheld the distributors' appeal and ordered that the matter be remitted to the High Court for adjudication in light of its judgment. It found that the High Court had to adjudicate novel issues without any guidelines. When the application for certification came before the High Court, the interests-of-justice standard had not been established and the court applied the incorrect test.[92] The court found further that there was no compelling reason for the SCA's adoption of a different approach to the distributors' appeal to that which it adopted in the consumers' appeal.[93] Finally, the court held that the SCA erred in adding a requirement of exceptional circumstances for opt-in classes, as the requirement is at variance with the test it applied to the consumers' appeal.[94]

In a separate concurring judgment, Froneman J (with Skweyiya J concurring) discussed the producers' arguments against certifying the class on the basis that it would be complex and difficult to prove unlawfulness and legal causation.[95] Froneman J found that, at the early stage of certification, it would be premature to decide whether the distributors had a legally tenable claim. Those issues should be left for full examination and consideration once the class action has been instituted.[96]

7 CLASS ACTIONS IN SOUTH AFRICA: CURRENT STATUS

At the time of writing, the Constitutional Court's judgment in the *Bread Distributor CC Appeal* is the authority on class actions in South Africa. It has provided some clarity and guidance on certification proceedings in class actions. The court encouraged courts to 'embrace' class actions as they can be a useful mechanism to enhance access to justice in terms of section 34 of the Constitution.

It is clear that plaintiffs wishing to bring a class action need to apply for class certification prior to instituting the action, although, when plaintiffs seek to bring a class action to enforce rights against private individuals and the state, it is not altogether clear whether

[90] *Bread Distributor' CC Appeal* op cit note 24 at 100G-H. Jafta J noted, in this regard, that "[p]roceedings against the state assume a public character which necessarily widens the reach of orders issued to cover persons who were not privy to a particular litigation." In a separate judgment, Mhlantla AJ agrees with the main judgment, subject to the reservation that certification should be required in all class actions, regardless of whether they seek to enforce a right in the Bill of Rights against the state or a private person.
[91] *Bread Distributor' CC Appeal* op cit note 24 at 101A-B.
[92] *Bread Distributor' CC Appeal* op cit note 24 at 104A-C.
[93] *Bread Distributor' CC Appeal* op cit note 24 at 104G-I.
[94] *Bread Distributor' CC Appeal* op cit note 24 at 105C-E.
[95] *Bread Distributor' CC Appeal* op cit note 24 at 111D-F.
[96] Separate concurring judgment of Froneman J in the *Bread Distributor CC Appeal* op cit note 24 at 111F-J.

certification is (or will be) required. Further, whilst the High Courts and SCA had relied upon a list of requirements for a class action, the Constitutional Court has made it clear that the test to determine whether certification is granted is the interests of justice.

The Constitutional Court set a relatively low threshold for certification in the *Bread Distributor CC Appeal*. A court faced with an application for class certification needs to look at whether it is in the interests of justice to grant certification. It can obviously have regard to and consider the 'requirements' for certification originally suggested by the SALC, and relied upon by the courts in subsequent decisions,[97] but it is not bound to deny certification where a requirement has not been met. Further, as Froneman J made clear in his separate judgment, the court in certification proceedings should not concern itself with issues which are destined to be determined at the trial stage of the class action. It is not the certifying court's role to decide whether the applicants have a legally tenable case. Complex issues of causation and lawfulness are for the plaintiffs to prove at the trial. Similarly, the defendants may raise any and all appropriate defences to the claims levelled against them at the trial. In making the interests of justice the overall standard to be met when certifying a class, the Constitutional Court has stuck an appropriate balance between allowing class actions to enhance the right of access to justice, and using them to promote interests, other than the best interests of the class members.

There are some areas when it comes to navigating the waters of class action litigation, particularly in the context of the right of access to justice. They include:

- The effect of the institution of certification proceedings on prescription of the class members' claims.[98]
- The concept of commonality: the degree to which the issues of fact and/or law must be common to the class members.[99]
- Case management and how South African courts are to handle class actions.
- The funding of class action litigation.[100]

[97] The list is set out in footnote 25.

[98] In an obiter statement in the *Bread Consumer SCA Appeal*, Wallis JA indicated that there may be grounds on which it would be justified to find that the institution of certification proceedings interrupts prescription. He stated that:

"If, as we now hold, an application for certification is the first necessary step in proceedings to pursue a class action there is much to be said for the proposition that, for purposes of prescription, service of the application for certification would be service of process claiming payment of the debt for the purposes of s 15(1) of the Prescription Act. Such an interpretation would be supported by cases where the institution of similar necessary preliminary proceedings have been held to constitute the bringing or commencement of suit for various purposes."

[99] There is some discussion of the commonality requirement in the *Bread Consumer SCA Appeal*, but the Constitutional Court did not deal with it at all.

8 CONCLUSION

The new provisions on standing introduced by section 38 of the Constitution (particularly the right to approach court in the interest of a class of persons in section 38(c)) represent a significant development in the laws governing the types of matters that may be brought to court and who may bring them. The development is wholly in line with the new constitutional dispensation in South Africa and class actions are slowly gaining increasing attention in our courts.

The legislation recommended by the SALC to govern class actions has not been promulgated and, as a result, the early development of the laws of class actions is being done in the courts. Whilst there may have been some resistance to allowing persons to approach court in the interest of a class of persons, the Constitutional Court's decision in the *Bread Distributor CC Appeal* makes it clear that class actions should be embraced by our courts. The court found that a class must be certified prior to instituting a class action and that the test to determine whether a class should be certified is whether it is in the interests of justice to do so. Importantly, the court made it clear that class actions are an important part of the realisation of the right of access to justice.

We are at an early stage in the development of our laws of class actions and we have lots to learn from the experience of foreign jurisdictions about this type of litigation. We have the opportunity to carve out the laws and procedures on class actions which best suit the South African context, in particular. It is important that future developments in this area of our law maintain a focus on the need to protect and enhance the right of access to justice and the courts should ensure that the mechanism is used in appropriate circumstances where judicial economy will be served.

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[100] The fees that attorneys who work on contingency in South Africa are allowed to charge are strictly regulated by the Contingency Fees Act 66 of 1997. The Contingency Fees Act provides that attorneys are entitled to recover the lesser amount between double their normal fee or 25% of the amount awarded to the client. Class action litigation is expensive and time consuming and there are few (if any) attorneys who are able to undertake such lengthy and expensive litigation against well-resourced corporations without financial support. Foreign law firms may enter into fee sharing arrangements with local attorneys to assist with the funding of class action litigation. In the silicosis class action,* there is an application pending to join a US law firm (which has entered into a fee sharing arrangement with an attorney representing the applicants) to the certification proceedings for purposes of pursuing an adverse costs order against the firm (in the event that such an order is made). Should the application succeed, it could result in a chilling effect on the foreign funding of class action litigation in South Africa, let alone on the procedural and substantial advantages of class action litigation.

* Certification proceedings in the silicosis class action have been instituted and are pending against the South African gold mining industry. The applicants seek to certify a class of gold mineworkers with silicosis (and the dependants of those who have died as a result of silicosis) who worked on the South African gold mines. At the time of writing, the applicants have filed replying papers in the application for certification.