



ICLG

The International Comparative Legal Guide to:

Class & Group Actions 2019

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A practical cross-border insight into class and group actions work

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Blake, Cassels & Graydon LLP

Campos Ferreira, Sá Carneiro & Associados

Clayton Utz

Cliffe Dekker Hofmeyr

Clifford Chance

De Brauw Blackstone Westbroek N.V.

Eversheds Sutherland Ltd.

Fangda Partners

J. Sagar Associates

Lee and Li, Attorneys-at-Law

Mori Hamada & Matsumoto

Norton Rose Fulbright

Portolano Cavallo

Russell McVeagh

Squire Patton Boggs

Von Wobeser y Sierra, S.C.

WOLF THEISS





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Contributing Editors

Ian Dodds-Smith,
Dr. Adela Williams &
Tom Fox, Arnold & Porter

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Suzie Levy,
Caroline Collingwood

CEO

Dror Levy

Group Consulting Editor

Alan Falach

Publisher

Rory Smith

Published by

Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
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South Africa



Pieter Conradie



Anja Hofmeyr

Cliffe Dekker Hofmeyr

1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

South Africa has not yet promulgated class action legislation, as it is commonly known in the USA. The procedure for handling group or class-related claims is dealt with by the South African High Court Rules and the Constitution of the Republic of South Africa of 1996. There is no statutory definition of a class action that defines the requirements of a class action or what constitutes a class action. The procedure for the handling of class or group actions in South Africa is in a developing stage and judgments by the Supreme Court of Appeal and the Constitutional Court provide much needed guidance for the development of class actions in South Africa. Class actions were not recognised in terms of South African common law and prior to 1994, class actions were foreign to the legal landscape of South Africa. However, the Supreme Court of Appeal in the matter of *Children's Resources Centre Trust vs Pioneer Foods (Pty) Ltd. and Others* ("Children's Resources Centre Trust") commenced the process of laying down procedures for the certification of class actions. The requirements stipulated in the *Children's Resources Centre Trust* matter for the certification of a class action are as follows:

- The existence of a class identifiable by objective criteria.
- The existence of a cause of action raising a triable issue.
- There are issues of fact or law, or fact and law, common to the members of the class.
- The relief sought or damages claimed flow from a cause of action and are ascertainable and capable of determination.
- There is an appropriate procedure to allocate damages to class members.
- A representative has been proposed suitable to conduct the action and to represent the class.
- The class action has appropriate means to determine class members' claims in light of composition of the class and nature of the proposed action.

The Constitutional Court in *Mukaddan vs Pioneer Foods (Pty) Ltd. and Others* did not accept that the factors identified by the Supreme Court of Appeal in the *Children's Resources Centre Trust* case were requirements that have to be satisfied before a class action may be certified. The Constitutional Court held that the aforesaid

requirements must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The aforesaid requirements must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. During 2014, an application for the certification of a class in *Jl Bartosch vs Standard Bank of South Africa Ltd and others* 2014 JDR 1687 (ECP) was unsuccessful, among other reasons, because the applicants' papers were found to be based on conjecture and assertions. The applicant endeavoured to obtain a declaratory order that thousands of credit agreements concluded between consumers and credit providers were reckless as envisaged by section 80 of the National Credit Act. The High Court held that no cause of action was established in the papers. In the ground-breaking judgment of *Nkala & Others vs Harmony Gold Mining Co Ltd & Others* handed down during May 2016 ("the Silicosis case"), the certification of the class action was granted by the High Court and the judgment paved the way for between 17,000 and 500,000 mineworkers and former mineworkers suffering from silicosis and tuberculosis to sue the mining companies for damages. The judgment developed the common law to allow for the dependents of miners, who have passed away, to claim damages. It was found to be in the interest of justice to certify two classes, being the silicosis class and the tuberculosis class. The court found that the evidence of the miners would be similar and that such evidence would have to be repeated in each individual case in the event of separate cases. The court found that it would be neither economical nor affordable for the miners to bring actions in their individual capacities. All the evidence will be dealt with during one trial when the class action proceeds. This is the largest class action to ever be certified in South Africa. Although the defendant mining companies have applied for leave to appeal in respect of various aspects of the judgment, their application for leave to appeal was dismissed by the court *a quo*. The mining companies applied for special leave to appeal to the Supreme Court of Appeal but according to media reports the matter is in an advanced stage of settlement. Any final settlement agreement will have to be sanctioned by the High Court. One of the main grounds of the appeal was that the group of potential claimants certified as a class was too broad – the mining companies argued that the broad classes would make the litigation unmanageable and that the liability of each mining company will be very difficult to determine considering that the miners worked in different gold mines over a period of 50 years. Unfortunately, due to the said possible settlement of the matter, important legal principles relating to class actions will remain uncertain until the next class action is launched and determined by the courts in future.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

The above rules and procedures developed by the courts will apply to all areas of the law and claims class or group actions instituted. Competition law claims, for example, will also have to be instituted in the High Court. Further, with the most recent class action launched in South Africa in respect of the listeriosis outbreak (*Ngobeni & 9 Others vs Tiger Brands Ltd & Enterprise Foods (Pty) Ltd – Case No 12835/2018*), the risk of class actions relating to product liability, as provided for in terms of the Consumer Protection Act 68 of 2008, has been highlighted. The listeriosis outbreak led to nearly 200 deaths and more than 1,000 individuals became ill after consuming contaminated foods.

1.3 Does the procedure provide for the management of claims by means of class action (where the determination of one claim leads to the determination of the class), or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group, or by some other process?

Apart from the factors to be taken into account to determine whether a class action may be certified, no formal procedures have been prescribed in South Africa for the handling of class or group actions. In the *Silicosis* case, South Africa adopted international procedures and also accepted the basic principle that the outcome of one case does not automatically determine liability for the others in the group.

1.4 Is the procedure ‘opt-in’ or ‘opt-out’?

In the *Silicosis* case, the court granted the relief sought by the miners, allowing them to pursue the class action in two stages:

- firstly, to seek declaratory relief in respect of the mining companies’ liability on behalf of the classes as “opt-out” classes. The members of the first class will be bound by the judgment in the class action that applies to all members of the class unless they give notice that they wish to be excluded as a member of the class; and
- secondly, if successful at the first stage, to claim damages on an individual basis on behalf of the classes as “opt-in” classes.

The *Silicosis* case has now provided for procedures regarding “opt-in” or “opt-out” elections, and each matter will be dealt with on its own merits. Until there is legislation giving guidance, the “opt-in” or “opt-out” principle will have to be developed over time via case law, creating principles going forward.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

No, there is not.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

The issues of fact or law or both should be sufficiently common to all the members of the class so that they can be appropriately

determined in one action. The 2014 case of *JPH Pretorius* (representing 60,000 pensioners) *vs Transnet and Others* is a good example of a class action being certified and the 60,000 pensioners’ claims being similar. The application for certification was brought in terms of section 38(c) of the Constitution by representatives of members of the Transnet Benefit Fund and Pension Fund. The representatives sought to compel Transnet to pay a legacy debt of R80 billion dating back to the establishment of Transnet, to the pension funds. These funds were to provide benefits to pensioners and beneficiaries and the failure to redeem the debt had adversely affected the rights of the members of the class. The applicants were drawn from the poorest within society, old-age pensioners and those in need of statutory social assistance and who had the least chance of vindicating their rights through the ordinary legal process. As individuals, they were unable to finance the legal action given their meagre income in the form of pension monies. The common factor between the claimants was that they were “victims of official excess, bureaucratic misdirection and what they perceive as unlawful administrative methods”. The certification was granted in the interest of justice.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

In terms of section 38 of the Constitution, “anyone acting as a member of, or in the interest of, a group or class of persons” or “anyone acting in the public interest” may approach a court. Individual groups and/or representative bodies will therefore be entitled to bring the class actions. However, the court will have to approve of the class representative.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Yes, a court will make an order that the members of each class are to be notified of the action. Depending on the circumstances, this can be via mail, a publication in daily newspapers and dissemination by radio. Where appropriate, notices may be placed in prominent places and/or call centres can be maintained to answer questions and accept all “opt-out” members, for a period of time.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

Class/group actions are a fairly new phenomenon in South Africa, and since 2012, only a handful of applications for certification have been brought. The *Silicosis* case provided guidance in the absence of legislation to regulate class actions. There were also two cases regarding the distribution of bread in the Western Cape, where the Competition Commission found the bread industry guilty of engaging in anti-competitive conduct. Applicants approached the courts for the certification of a class and ultimately, the Constitutional Court granted the application. Most of the claims are delictual/tort damages claims. The Steinhoff accounting/financial and securities scandal resulted in a Dutch class action against the company,

Steinhoff International Holdings NV (“Steinhoff”). The possibility of a class action in South Africa against not only Steinhoff, but also against the directors of Steinhoff who were in control of managing the company affairs and are mostly based in South Africa, cannot be excluded. The National Environmental Management Act 107 of 1998 also provides relief to “any person or group of persons” in respect of environmental matters.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

The remedies available are any remedy available to any individual litigant in terms of South African law. These remedies will include monetary compensation and/or injunctive/declaratory relief.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

There is no specific procedure but whatever procedure is followed must be approved by the Court. For further information, see question 1.7 above.

2.2 Who is permitted to bring such claims e.g. public authorities, state-appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

See question 1.7 above. Should an organisation purport to act in the public interest, it would not require approval by the State, but the class representative must be approved by the court.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

There are prescribed circumstances where representative actions must be brought. See question 1.7 above.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

Injunctive/declaratory relief and/or monetary compensation are available. Ordinarily, injunctive relief will be granted on an interim basis pending a monetary claim to be instituted and finalised.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

South Africa does not have a jury system. In all matters, the trial will be heard by a judge or a panel of judges.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

The class action will be managed by a judge, who will be in control of the proceedings. Judges in the High Courts in South Africa conduct cases of all sorts. Some judges may handle more criminal cases than commercial cases, but that does not entail that judges in South Africa specialise in handling cases of a specific nature only.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a ‘cut-off’ date by which claimants must join the litigation?

It will be at the discretion of the judge hearing the application for the certification of a class to impose a “cut-off” date by which claimants must join the litigation. There are no specific rules in this regard.

3.4 Do the courts commonly select ‘test’ or ‘model’ cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Only time will tell – the handling of class/group actions and the procedures relating thereto are in a developmental phase.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

No, this has not yet been developed in South Africa.

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

The court has the power to appoint technical specialists to assist the judge and assess the evidence presented by the parties. The parties may also present expert evidence but must give notice and a summary of the expert evidence in terms of the High Court Rules to the opposite party prior to the date of the trial. Failure to present such summary of the expert evidence will result in the expert not being allowed to testify.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Depositions do not form part of the South African legal system, and the High Court Rules do not make provisions for depositions. Witness statements are not required in terms of the High Court Rules except where expert testimony, as referred to in question 3.6 above, is concerned.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

In terms of our discovery procedure, a party is obliged to make full disclosure of all documents, recordings and correspondence relevant to the case and make copies of same available to the other side. Usually by the time the first pre-trial meeting is held, the discovery procedure is completed. As is the case in the USA, discovery in South Africa does not include the taking of oral evidence and only relevant documents are discovered.

3.9 How long does it normally take to get to trial?

It depends in which legal jurisdiction the action was brought. On average, it takes approximately one to one-and-a-half years for a matter to be brought to trial (excluding the certification application).

3.10 What appeal options are available?

A party can appeal the judgment of a single judge in the High Court to a full bench (an appeal tribunal of three judges) in the High Court. However, leave to appeal is required from the single judge who handed down the judgment. If leave to appeal is not granted, special leave to appeal can be obtained from the Supreme Court of Appeal. A further appeal from the three judges in the High Court is available to the Supreme Court of Appeal, with a final appeal option to the Constitutional Court.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Yes, certain time limits do exist.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have discretion to disapply time limits?

In terms of the Prescription Act 68 of 1969, claims for damages must be instituted within three years from the date when the cause of action arose. There are exceptions, and the commencement of the running of prescription may be interrupted, i.e. when a claimant is a minor, insane, a person under curatorship or is prevented by a superior force including any law or any order of court from interrupting the running of prescription. The court does not have any discretion to interfere with the stipulations of the Prescription Act. The law of equity does not apply in South Africa.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Prescription will not commence to run in the event of the concealment of facts or a fraudulent act, preventing a claimant from having full knowledge of the facts on which his/her claim is based.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

Generally, damages can be recovered if caused by: the death of, or injury to, any persons; an illness of any person; any loss of, or physical damage to any property irrespective of whether it is movable or immovable; and any economic loss that results from the harm.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

No, they cannot.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

No. South African law does not recognise punitive damages.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

No. There is no maximum limit on the amount of damages recoverable, provided that the damages claimed from the respective parties are proven by the claimant. The damages may comprise of special damages (for instance, medical and hospital expenses) and general damages (pain and suffering).

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

Damages will be quantified on an individual basis. It is doubtful that in South Africa a procedure will be adopted in terms of which a global amount of damages is awarded to claimants, as punitive damages are not known in South Africa and individuals are required to prove their claims. Each claim may be different and the defences to each claim may also vary. In some instances, prescription may apply.

5.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required?

Generally, court approval is not a prerequisite for settlements to be entered into. However, to ensure that the settlement agreement is enforceable, it should be made an order of court and in the process the court is not entitled to interfere with the terms of the settlement, unless the court is of the view that the terms of the settlement are not in the public interest. The position in respect of class actions is different in that any settlement reached after the certification of the class action, is subject to and only valid once approved by the court. Regarding claims on behalf of children, such claims must be instituted and settled by the guardian of the child. The High Court, being the upper-guardian of all minors, will have to sanction the settlement agreement to ensure that the child's interests are protected.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; and/or (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

In South Africa, and in ordinary cases, costs should follow the event, i.e. the successful party is usually entitled to claim its costs from the unsuccessful party. Legal fees (legal costs reasonably incurred to prepare for the filing of pleadings and the trial, including all the fees and reasonable costs incurred by the attorney and counsel) and sheriff costs are recoverable, and the successful party is generally entitled to recover the court and legal fees on a party-and-party scale, as provided for in the High Court Rules. A party's bill of costs may be taxed (i.e. be determined by the taxing master) or agreed between the parties. In the event that an order to pay costs on a punitive scale (attorney-and-client costs) is granted by the court, the successful party will be entitled to recover more legal costs than the usual party-to-party scale provides for, subject to the discretion of the taxing master. There are no court fees in South Africa.

In constitutional cases where the public interest is at stake, it does not always follow that the successful party is awarded legal costs. In the past, the Constitutional Court has held that each party should pay his/her own costs in these kinds of cases. However, there seems to be a developing trend in asking for costs orders against the losing party, if the losing party has sufficient financial resources.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

There is no judgment yet as to how costs of litigation may be shared amongst the members of the group/class. In South Africa, a cost order will be made against the losing party on a joint and several basis. Only time will tell whether the same approach will be followed in class/group actions.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

Depending on the agreement between the members of the group/class, if a member discontinues a claim before the conclusion of the matter, such conduct may result in legal costs to be paid by such member to the representative acting on behalf of the group.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

At present, the courts do not accept the responsibility of managing costs incurred by parties and limiting the same with a cap. To make provision for a procedure to manage costs, the High Court Rules will have to be amended to cater for class/group actions specifically. As per question 6.1 above, the taxing master will assess the costs claimed from the unsuccessful party.

7 Funding

7.1 Is public funding e.g. legal aid, available?

Yes, public funding is available via institutions such as the Legal Aid Board, the Legal Resources Centre and certain Legal Aid Clinics.

7.2 If so, are there any restrictions on the availability of public funding?

Yes, a means test exists for the purpose of determining the indigence of an applicant for aid. In civil matters, the income and assets of the applicant and/or his/her spouse are both taken into account to qualify for aid. However, certain restrictions exist regarding the types of claims, and financial assistance is often not provided for monetary claims for damages based on contract and delict.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Contingency fees are allowed in South Africa. However, the "success fee" may not exceed the normal fee by more than 100%, provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner may not exceed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceeding concerned. For the purposes of calculating the excess, such amount may not include any costs.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

An agreement in terms of which a person provides a litigant with funds to prosecute an action in return for a share of the proceeds of the action is not considered to be contrary to public policy or void. Third-party funding is therefore permitted. Funding may be provided by way of any legitimate means. In the *Silicosis* case, the funder for the class action was not a cited party to the application for certification as a class. One of the gold mine defendants brought an application to seek an order that the funder be joined as a party so as to allow the gold mines to ask for an order for legal costs against the funder in the event of the class action not being successful. The court found that the funder was not in control of the litigation and the financial benefit was insufficient to justify a joinder of the funder as a party to the action.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

As stated above, the Constitution makes provision for actions to be instituted by representative bodies.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

See question 7.4 above. Champerty is allowed in South Africa.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

No, criminal proceedings cannot be used as a means of pursuing civil damages claims on behalf of a group or class.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Class/group actions are not determined in terms of alternative dispute resolution mechanisms.

8.5 Are statutory compensation schemes available e.g. for small claims?

Small claims can be instituted in the Small Claims Court, but such court has a very limited monetary jurisdiction, making it unsuitable for class/group actions.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

See question 8.4 above.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Claims can be brought by residents from other jurisdictions, but the claimant/s will have to satisfy the court that the court has jurisdiction to hear the matter.

9.2 Are there any changes in the law proposed to promote class/group actions in your jurisdiction?

Over the last two years, class actions have become more prevalent in South Africa and the Government may be obliged to pass laws in Parliament to ensure a sound development of this part of our law, which is considered to be an important tool in the hands of individuals who cannot afford to litigate against large companies.

**Pieter Conradie**

Cliffe Dekker Hofmeyr
1 Protea Place, Sandton
Johannesburg, 2196
South Africa

Tel: +27 11 562 1071
Email: pieter.conradie@cdhlegal.com
URL: www.cliffedekkerhofmeyr.com

Professional qualifications:

- B.A., LL.B., University of Johannesburg.

Pieter was admitted as an attorney in 1976 and then joined the Johannesburg Bar, practising as an advocate until 1980. Pieter became a partner in 1982. His practice areas include: commercial litigation; arbitration; product liability; regulatory work; telecommunications; dispute resolution; competition, construction and media law; corporate recovery; general litigation; and mine enquiries.

He has been the attorney for various large corporations in South Africa, representing them in the USA, UK and Europe. Resulting from the matters handled in New York, Pieter has gained extensive knowledge about the New York legal system, including class actions, punitive damages and jury trials.

Pieter's biography appears in, amongst others: *The Chambers Global Guide*; *The Legal Media Group Guide to the World's Leading Litigation Lawyers*; *The International Who's Who of Commercial Litigation and Product Liability Defence Lawyers*; and the *PLC Cross-border Dispute Resolution Handbook Volumes 1 & 2*. Pieter has also been named "Lawyer of the year" in Arbitration and Mediation in the 2017 edition of *The Best Lawyers in South Africa*.

**Anja Hofmeyr**

Cliffe Dekker Hofmeyr
1 Protea Place, Sandton
Johannesburg, 2196
South Africa

Tel: +27 11 562 1129
Email: anja.hofmeyr@cdhlegal.com
URL: www.cliffedekkerhofmeyr.com

Professional Qualifications:

- B.A., LL.B., University of Stellenbosch.
- LL.M. (Corporate Law), University of Pretoria.
- Dip (Telecommunications Law).
- Dip (Advanced Administrative Law).

Anja began her career as a candidate attorney with Hofmeyr Herbstein and Gihwala (now Cliffe Dekker Hofmeyr) in 2002. In 2004, she was appointed as an associate, and was again promoted to senior associate in 2005. In 2007, she became a director. Anja has extensive experience in commercial litigation in the telecommunications, energy, chemical, media and tobacco industries. She regularly advises on issues of a regulatory nature as well as product liability. Anja has also received training in the USA regarding defending class actions and has acted for clients in international actions launched in New York in both Federal and State Courts.

Memberships:

- Law Society of the Northern Provinces.

Languages:

- English and Afrikaans.



At Cliffe Dekker Hofmeyr (CDH) we believe the right partnership can lead to great things. The partnerships we cherish and value most are those we have forged through time and experience with our clients and, of course, our people.

We are a full service law firm – one of the largest business law firms in South Africa, with more than 350 lawyers and a track record spanning 165 years.

We are able to provide experienced legal support and an authentic knowledge-based and cost-effective legal service for clients looking to do business in key markets across Africa.

Our Africa practice brings together the resources and expertise of leading business law firms across the continent that have direct experience acting for governments, state agencies and multinational organisations. This combined experience across the continent produces an extensive African capability. We also partner with other professional disciplines such as audit, business consulting or corporate finance disciplines to provide a seamless and integrated solution for projects that have a multi-disciplinary dimension. We focus on a number of key sectors which are active and thriving in Africa, including M&A's, mining and minerals, telecommunications, energy, oil and gas, banking and finance, projects and infrastructure, hospitality and leisure and arbitration.

OUR SERVICE CAPABILITY

As a full service commercial law firm we provide a complete range of business legal services through our core practice areas:

- Competition.
- Corporate and Commercial.
- Dispute Resolution.
- Employment.
- Environmental.
- Finance and Banking.
- *Pro Bono* and Human Rights.
- Projects and Infrastructure.
- Real Estate.
- Tax and Exchange Control.
- Technology and Sourcing.
- Trusts and Estates.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Financial Services Disputes
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk