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The International Comparative Legal Guide to:

Class & Group Actions 2017

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

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South Africa

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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, and it is a novelty in the area of procedural law. 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 are significant leaps forward in South African jurisprudence on the development of class actions in South Africa. Common law in South Africa does not recognise class actions and, prior to 1994, a class action was foreign to South African law. The Supreme Court of Appeal in the matter of *Children's Resources Centre Trust versus Pioneer Foods (Pty) Ltd. and Others* 2013(2) SA213 (SCA) ("*Children's Resources Centre Trust*") commenced with the process of laying down procedures for certification of class actions. It has been accepted that class/group actions are possible to institute in South Africa and such class/group action must be certified. The requirements stipulated in the *Children's Resources Centre Trust* matter for the certification of a class action are as follows:

- Existence of class identifiable by objective criteria.
- Existence of cause of action raising triable issue.
- There are issues of fact, or law, or fact and law, common to members of the class.
- The relief or damages sought 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 latest development is that the Constitutional Court in *Mukaddan versus Pioneer Foods (Pty) Ltd. and Others* 2013(5) SA89 (CC) did not accept that the factors identified by the Supreme Court of Appeal in the *Children's Resources Centre Trust* case are requirements that have to be satisfied before a class action may be certified. The Constitutional Court said 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. In the historical judgment *Nkala & other mineworkers versus Harmony Gold Mining Company Ltd & other mining companies* handed down during May 2016 (*Silicosis* case), the certification of the class action was granted 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 dependants of miners who have passed away to claim for 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 was similar and that the evidence relevant to the miners would have to be repeated in each individual case in the event of separate cases. The court found that it would be neither economic nor affordable for miners to bring mine actions in individual capacities. The class action trial will therefore have to deal with all the evidence at once. This is the largest class action to ever be certified in South Africa. The gold mines applied for leave to appeal in respect of various aspects of the judgment. The application for leave to appeal was denied by the court *a quo* and, therefore, the gold mines had to apply for leave to appeal to the Supreme Court of Appeal. The ruling of the Supreme Court of Appeal is pending. One of the main grounds of appeal is that the group of potential claimants certified as a class was too broad. The gold mines argue that the broad classes would make the litigation unmanageable and that the liability of each gold mine will be very difficult to determine in view of the fact that the miners worked in different gold mines over a period of 50 years. During 2014 in the Eastern Cape High Court Division, an application for the certification of a class by *J I Bartosch versus various banks* was unsuccessful, among other reasons, because the applicants' papers were found to be based on conjecture and assertions. A cause of action was also not established in the papers. 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.

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.

These procedures laid down by the High Court will apply for all areas of the law and claims instituted. All claims in terms of which a cause of action can be pleaded will be governed by the same rules or procedures. Competition law claims, for example, will also have to be instituted in the High Court.

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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 factors to be taken into account to determine whether a class action may be certified, no procedures have been prescribed in South Africa for the handling of class or group actions. With 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 to pursue the class action in stages:

- firstly, to seek declaratory relief in respect of the respondents' liability on behalf of the classes as "opt-out" classes. The members of the first class would be bound by the judgment in the class action that applied to all members of the class unless they gave notice that they wished 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 laid down procedures regarding "opt-in" or "opt-out" elections, and each matter will be dealt with on its own merits. As there is no legislation giving guidance, the "opt-in" or "opt-out" principle will have to be developed over time and precedents created.

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 facts and the law of the case of each individual within the group will have to be similar. The issue of fact or law or both should be common to all the members of the class that can be appropriately determined in one action. The case of *JPH Pretorius* (representing 60,000 pensioners) *versus Transnet and Others*, where judgment was delivered on 31 July 2014, 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 debt of R80 billion dating from the establishment of Transnet. 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. What they had in common was that they were victims of bureaucratic misdirection and 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, the persons who may approach a court are "anyone acting as a member of, or in the interest of, a group or class of persons" or "anyone acting in the public interest". Individual groups and/or representative bodies will therefore be entitled to bring these actions. The court will have to approve 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 may make an order that the members of each class are to be notified of the action by way of: mail; publication in daily newspapers; and dissemination by radio, and where practicable, display a notice in prominent places, maintain a call centre for three months to answer questions, and to accept all "opt-out" members.

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 new phenomenon in South Africa, and since 2012, a handful of applications have been brought and are pending in the High Courts to advance to the certification process. At present, pending group/class actions mostly relate to damages claims by gold miners in silicosis-related matters. The *Silicosis* case will in future play a significant role regarding class actions and will be the main guidance in the absence of legislation to regulate class actions. There is also a matter relating to the distribution of bread in the Western Cape resulting from a Competition Commission complaint, where the Competition Commission found the bread industry to be guilty of engaging in anti-competitive conduct. Applicants approached the courts for the certification of a class and were successful in the Constitutional Court. Most of the claims are delictual/tort mass damages claims.

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 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?

No, South Africa does not. See question 1.7 above.

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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.

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?

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. Injunctive relief will, in normal circumstances, be granted on an interim basis pending the monetary claim to be instituted and finalised.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

In High Court matters, the trial is by a judge and Magistrate Court trials are by magistrates. South Africa does not have a jury system.

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 within 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, with the development of the handling of class/group actions and the procedures relating thereto, what the answer to this question will be.

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

No, there are not. This has not been developed in South Africa yet.

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 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 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 the summary of expert testimony as referred to in question 3.6 above prior to the trial.

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, tape recordings and correspondence relevant to the case and make copies of the same available to the other side. The discovery procedure is usually completed by the time the first pre-trial meeting is held, a few weeks before the trial commences. Discovery in South Africa does not include the taking of oral evidence as is the case in the USA.

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.

3.10 What appeal options are available?

From the judgment of a single judge, an appeal to an appeal tribunal of three judges sitting in the High Court is available. However, leave to appeal is required from the single judge. If leave to appeal is not granted, a petition to the Chief Justice of the Supreme Court of Appeal will have to be made to obtain leave to appeal. A further appeal from the three judges is available to the South African Supreme Court of Appeal or 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.

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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 is 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. Equity Law 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 its claim arises.

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 caused by: the death of, or injury to, any natural persons; an illness of any natural 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 be special damages and general damages.

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

Since the *Silicosis* case, 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, as punitive damages are not known in South Africa and, furthermore, individuals must prove their claims. Each claim may be different and defences raised 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?

Court approval is not a prerequisite for a settlement 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. Regarding claims on behalf of infants, such claims must be instituted by the guardian of the infant. The High Court, being the upper-guardian of all minors, will have to sanction the settlement agreement to ensure that the infant'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?

Legal fees and sheriff costs are recoverable on a party-to-party scale, which provides that the successful party is entitled to recover the court and legal fees in terms of the High Court Rules as per a taxed bill of costs, subject to the discretion of the taxing master.

In the event that an order to pay attorney and client costs is granted by the court, the successful party will be entitled to recover more legal costs than the party-to-party scale provides for, subject to the discretion of the taxing master. In the event that an order to pay attorney and client costs is granted, the successful party will be entitled to recover all 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. The South African legal position for legal costs is that, in ordinary cases, costs should follow the event. The successful party is ordinarily entitled to costs against the unsuccessful party. In constitutional cases where the public interest is at stake, it does not always follow that the successful party is awarded legal costs. The Constitutional Court has ordered in these kind of cases that each party pays their own costs even where the applicants were unsuccessful.

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 loser 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

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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?

Only time will tell whether the courts will accept the responsibility to manage the costs incurred by parties and limiting 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.

7 Funding

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

Yes, public funding is available by 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 indigents 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. Although perhaps available, it is doubtful that the institutions mentioned in question 7.1 above will accept class/group actions.

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. Such amount may not, for the purposes of calculating excess, include any costs.

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

In terms of a judgment in the South African Court of Appeal delivered in 2004, 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 was not 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 brought in 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 actions 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 to become 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, they cannot.

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

No, they are not.

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

Claims can be instituted in the Small Claims Court for a limited amount of compensation. It is doubtful that class/group actions will be accepted by the Small Claims Court.

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

The Small Claims Court will not be able to handle class/group actions and also does not cater for injunctive/declaratory relief.

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?

There are no changes proposed as yet.

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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.

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