

Developing a Structure for the Adjudication of Class Actions in South Africa

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DECLARATION

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SUMMARY

This dissertation is concerned with class actions within the context of South African civil procedural law. There is currently no South African statute or court rule that provides a procedural framework for the institution and regulation of class actions. Our courts have been required to develop the appropriate class action procedural rules using their inherent jurisdiction as entrenched in section 173 of the Constitution of the Republic of South Africa, 1996. This was done in *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA), which effectively details key aspects of the law relating to class actions in South Africa.

However, various ambiguities, inconsistencies and problems remain. In this regard, South African case law on class action procedure has not yet been subjected to a comprehensive and critical analysis in order to provide answers to a number of vital questions. These include the following:

- i) when is a class action, as opposed to joinder, the appropriate procedural device to be utilised to adjudicate a claim and when is it appropriate to use the opt-in, as opposed to the opt-out, class action regime?;
- ii) when, if ever, should notice of a class action be given to class members and when would individual notice to each class member be required, or would some form of general notice to the class suffice?;
- iii) what is the approach that our courts should follow and what are the devices that they could utilise to determine damages in personal injury class actions?; and,
- iv) how should a class action be managed and what should the role of the courts be in this regard?

Ultimately, the purpose of the dissertation is to assist in developing a structure that could facilitate the adjudication of class actions in South Africa. This inevitably entails interpreting the South African class action procedure as expounded by our courts and, given the novelty of the procedure, constantly seeking guidance from the class action regimes of prominent foreign jurisdictions, most notably Australia, Ontario and the United States.

OPSOMMING

Die verhandeling bespreek groepsgedinge in die konteks van die Suid-Afrikaanse siviele prosesreg. Daar bestaan tans geen Suid-Afrikaanse wetgewing of hofreëls wat voorsiening maak vir 'n prosedure wat die instel en regulering van groepsgedinge aanspreek nie. Die verantwoordelikheid om toepaslike prosedurele reëls te ontwikkel ten einde effek te gee aan groepsgedinge berus, in wese, tans by die howe op grond van hul inherente jurisdiksie, soos vervat in artikel 173 van die Grondwet van die Republiek van Suid Afrika, 1996. Hierdie verantwoordelikheid is deels nagekom in *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA), wat sleutelaspekte van die Suid-Afrikaanse reg rakende groepsgedinge uiteensit.

Oorblywende dubbelsinnighede, inkonsekwentehede en probleme is egter steeds nie aangespreek nie. Kortom, Suid Afrikaanse regspraak oor groepsgedinge is nog nie onderworpe gestel aan 'n omvattende en kritiese ontleding ten einde antwoorde te vind ten opsigte van 'n aantal sleutelvrae nie. Hierdie vrae sluit die volgende in:

- i) wanneer is 'n groepsgeding, in plaas van voeging, die toepaslike prosedurele meganisme om eise te bereg en wanneer is dit toepaslik om die intree, eerder as die uittree, groepsgeding-prosedure te gebruik?;
- ii) wanneer, indien ooit, moet kennis van 'n groepsgeding aan groepslede gegee word en wanneer word individuele kennisgewing aan elke groepslid vereis, of onder watter omstandighede sal algemene kennis aan die klas as 'n geheel voldoende wees?;
- iii) wat is die benadering wat ons howe behoort te volg en wat is die meganismes wat aangewend kan word om skadevergoeding te bepaal in geval van persoonlike besering groepsgedinge?;
- iv) hoe moet 'n groepsgeding bestuur word en wat behoort die howe se rol te wees in hierdie verband?

In hoofsaak is die doel van die verhandeling om by te dra tot die ontwikkeling van 'n struktuur wat die beregtiging van groepsgedinge in Suid-Afrika kan fasiliteer. Dit behels onvermydelik dat die Suid-Afrikaanse groepsgeding-prosedure, soos uiteengesit deur ons howe, geïnterpreteer word en, gegewe die nuutheid van die prosedure, om deurlopend te

steun op die groepsgeleding-stelsels van prominente buitelandse jurisdiksies, veral die van Australië, Ontario en die Verenigde State van Amerika.

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LIST OF ABBREVIATIONS

ADRJ	Australasian Dispute Resolution Journal
Am J Comp L	American Journal of Comparative Law
BC Indus & Com L Rev	Boston College Industrial and Commercial Law Review
Can Bus LJ	Canadian Business Law Journal
Cardozo J Conflict Resol	Cardozo Journal of Conflict Resolution
Cath U L Rev	Catholic University Law Review
CILSA	Comparative and International Law Journal of Southern Africa
Colum L Rev	Columbia Law Review
Def Counsel J	Defense Counsel Journal
Duke J Comp & Int'l L	Duke Journal of Comparative and International Law
Harv L Rev	Harvard Law Review
ILSA Journal of Int'l and Comp Law	ILSA Journal of International and Comparative Law
J Civ L Stud	Journal of Civil Law Studies
Jones L Rev	Jones Law Review
LAWSA	Law of South Africa
La L Rev	Louisiana Law Review
Loy A L Rev	Loyola of Los Angeles Law Review
Miss C L Rev	Mississippi College Law Review
Neb L Rev	Nebraska Law Review
Ohio St J on Disp Resol	Ohio State Journal on Dispute Resolution
PELJ / PER	Potchefstroom Electronic Law Journal
Rev Litig	The Review of Litigation Law Journal
SALJ	South African Law Journal
Sw J Int'l L	Southwestern Journal of International Law
Tex Int'l LJ	Texas International Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law
Tort & Ins LJ	Tort and Insurance Law Journal

TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law
Tul J Int'l & Comp L	Tulane Journal of International and Comparative Law
U Brit Colum L Rev	University of British Columbia Law Review
U Chi L Rev	University of Chicago Law Review
UCLA Law Review	University of California, Los Angeles Law Review
U Ill L Rev	University of Illinois Law Review
UMKC L Rev	University of Missouri-Kansas City Law Review
UNSW Law Journal	The University of New South Wales Law Journal
VA L Rev	Virginia Law Review
Wash & Lee L Rev	Washington and Lee Law Review
Windsor YB Access Just	Windsor Yearbook of Access to Justice
W St U L Rev	Western State University Law Review
Yale L J	Yale Law Journal
ZZP Int	Zeitschrift für Zivilprozess International

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CHAPTER ONE: INTRODUCTION

1 1 Historical and comparative overview and the development of class actions

Although class actions were first recognised in South Africa more than 20 years ago in the Interim Constitution of the Republic of South Africa, 1993 (“Interim Constitution”),¹ it is an area of South African law that still remains largely unregulated by statute or court rules. Legislative inaction has compelled the judiciary to step in and, through case law, to develop a structure for the adjudication of class actions. Our courts should be commended for developing the existing framework within which class actions operate and for giving substance to what could otherwise conceivably have been perceived as an illusory dispute resolution mechanism. The role that our courts have played in this regard is significant given the increase in recent times in the incidence of class actions. Most recently, the South Gauteng Division of the High Court of South Africa certified the first South African mass personal injury class action of *Nkala v Harmony Gold Mining Company Limited*,² a watershed case insofar as our class action landscape is concerned. Our class action law is therefore currently in a state of flux; it is trying to shape and position itself within our civil justice system. As part of this developmental process, our courts have not been able to address all the problems, contradictions and inconsistencies associated with the introduction and development of a South African class action mechanism. This study aims to address some of them.

This chapter commences with providing a definition of class actions and briefly mentioning the overarching goals of class actions. The class action goals constitute prominent considerations throughout the dissertation. Thereafter, the chapter provides an historical overview of the origin of class actions. The position in selected foreign jurisdictions is then considered and, for the most part, consideration is given to the American federal class action, the Canadian provincial model of Ontario and the Australian federal regime. The class action regimes in the aforementioned jurisdictions are generally regarded as the leaders in the field of class action litigation.³ The chapter

¹ Section 7(4)(b)(iv).

² (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016).

³ According to D L Bassett “The Future of International Class Actions” (2011) 18 *Sw J Int'l L* 21 22-24, more than a decade ago the only countries outside the United States with class action procedures were Australia and Canada and, despite the frequently articulated desire to avoid the potential pitfalls of the American class

further considers the origin and historical development of class actions in South Africa before concluding with a brief exposition of the problems that this study aims to address.

1 1 1 General overview and the position in selected foreign jurisdictions

The following definition of a ‘class action’ was endorsed by the Supreme Court of Appeal (SCA) in *Trustees for the time being of the Children’s Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)*⁴ (“*Children’s Resource Centre Trust*”):

“A class action is a legal procedure which enables the claims (or parts of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons (‘representative plaintiff’) may sue on his or her own behalf and on behalf of a number of other persons (‘the class’) who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff (‘common issues’). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.”⁵

Class actions, as defined above, are aimed at improving access to justice and judicial economy as well as modifying behaviour⁶ by deterring similar future wrongdoing.⁷ Access

action, the class action or class-action-like procedures adopted in other countries often tend to include components of the American class action.

⁴ 2013 1 All SA 648 (SCA).

⁵ R Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 3, quoted with approval in *Trustees for the time being of the Children’s Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA) para 16. The South African Law Commission *The Recognition of Class Actions and Public Interest Actions in South African Law Report Project 88* (1998) para 5.2.7 proposes the following definition of a “class action”: “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”.

⁶ In *Western Canadian Shopping Centres v Dutton* (2001) 2 S.C.R. 534 para 29, the Supreme Court of Canada described the class action goal of behaviour modification as follows: “[C]lass actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the

to justice is generally regarded as the most important as many potentially meritorious claims of middle and low-income individuals are never brought to court because of the high costs of litigation.⁸ Essentially, the class action device enables the adjudication of such claims and thus promotes access to justice.

With the above in mind, the origin and historical development of the class action mechanism will now be considered. The origin of the class action in common-law systems can be traced to the ‘bill of peace’ that originated in seventeenth-century English Chancery Courts.⁹ The English Chancery Courts developed the ‘bill of peace’ as a procedural device to enable representative parties to petition the courts to aggregate multiple claims in a

public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation”.

⁷ These purposes are well-established in foreign law. For example, in *Western Canadian Shopping Centres v Dutton* (2001) 2 S.C.R. 534 paras 27-29, the Canadian Supreme Court held that the legitimate ends achieved by collective redress are access to justice, judicial economy and deterrence of antisocial behaviour. The Australian Law Reform Commission *Grouped Proceedings in the Federal Court* Report No 46 (1988) para 2 essentially provides that the objectives of the class action procedure in Australia are to improve access to justice, court efficiency and the efficiency of the legal system and to reduce the cost of legal proceedings.

⁸ V Morabito “Ideological Plaintiffs and Class Actions – an Australian Perspective” (2000-2001) 34 *U Brit Colum L Rev* 459 502. See also G M Zakaib & J M Martin “International Class Actions in the Canadian Context: Standing, Funding, Enforceability and Trial” (2012) 79 *Def Counsel J* 296 300-301.

⁹ G C Lilly “Modeling Class Actions: The Representative Suit as an Analytic Tool” (2014) 81 *Neb L Rev* 1008 1013. See also Z Chafee *Some Problems of Equity* (1950) 157-164; W de Vos “Is a Class Action a ‘Classy Act’ to Implement Outside the Ambit of the Constitution?” (2012) 4 *TSAR* 737 738; E Hurter “Some Thoughts on Current Developments relating to Class Actions in South African Law as viewed against Leading Foreign Jurisdictions” (2006) *CILSA* 39(3) 485 fn 5. According to Professor Yeazell, however, the origin of the class action can be traced to twelfth century ‘medieval group litigation’. In this regard, see S C Yeazell *From Medieval Group Litigation to the Modern Class Action* (1987). See also N M Pastor “Equity and Settlement Class Actions: Can There Be Justice For All in *Ortiz v. Fibreboard*” (2000) 49(3) *American University Law Review* 773 781 where, referring to Yeazell, Pastor states “[m]anorial, royal and ecclesiastical courts used group litigation to meet varying social needs of the medieval culture that were primarily political or religious in nature and often involved multiple litigants. For example, courts used group litigation to address issues arising from social obligations or privileges accorded to different rural groups, parishes, and guilds within the hierarchical-structured medieval community”.

single equity proceeding, with the ‘class’ being bound by the court’s judgment.¹⁰ The bill of peace was used when the parties to a dispute were so numerous that it would create manageability problems¹¹ and when all the parties shared a common interest in the issues. This type of representative action was believed to be more efficient than trying each case individually,¹² and more consistent with equity’s goal of doing complete justice.¹³ Initially, the bill of peace was available only in equity; however, in 1873 when law and equity in England combined, class actions for damages were permitted.¹⁴ Pastor states the following regarding the bill of peace:

“The English Courts of Chancery, as courts of equity, used the ‘bill of peace’ to permit representative parties of larger groups of litigants with a joint interest to aggregate their claims and bring a collective action before the court. The ‘bill of peace’ served two primary and equitable goals: (1) to reduce multiple, and sometimes unnecessary, litigation, and (2) to enable individuals to litigate claims as a group that would be too difficult to litigate individually. Eventually, due process issues relating to group litigation emerged. This emergence paralleled the shift in society ‘from a rural, customary, agricultural world to one that is urban, *individualistic*, entrepreneurial-capitalistic.’ To address such concerns, Chancellors scrutinized the representation of a group of litigants more closely. In particular, they required litigants to tender an explanation for litigating jointly rather than separately. Despite these due process issues, Chancellors continued to grant permission for group litigation, often justifying the aggregation of claims because of its suitability and efficiency. Thus, the face of group litigation changed and evolved into the current form of the modern-day class action. Along with this evolution, however, came increasing concerns over adequate representation and notice that often conflicted with the goals of expediency and equity.”¹⁵

Class actions were therefore essentially adopted by equity courts to avoid the technical requirements of the law courts that all persons who may be affected by a judgment be

¹⁰ M D Hausfeld, G C Rausser, G J Macartney, M P Lehmann & S S Gosselin “Antitrust Class Proceedings – Then and Now” in J Langenfeld (ed) *The Law and Economics of Class Actions* (2014) 77 80.

¹¹ Chapters five and six below will consider in more detail the manageability of class actions.

¹² Chapter four below will *inter alia* consider whether damages in mass personal injury class actions should be determined individually.

¹³ K L Hall, J W Ely & J B Grossman (eds) *The Oxford Companion to the Supreme Court of the United States* 2 ed (2005) 182.

¹⁴ J S Allee, T V H Mayer and R W Patryk *Product Liability* (2005) §17.02.

¹⁵ Pastor (2000) *American University Law Review* 784-785.

named as parties and be given notice.¹⁶ In *Ortiz v Fibreboard Corporation*¹⁷ (“*Ortiz*”), the United States Supreme Court referred to the necessary parties rule in equity and stated the following regarding the origin of the class action and the development of rule 23 of the American Federal Rules of Civil Procedure (“Federal Rules”):

“Although representative suits have been recognized in various forms since the earliest days of English law, class actions as we recognize them today developed as an exception to the formal rigidity of the necessary parties rule in equity, as well as from the bill of peace, an equitable device for combining multiple suits. The necessary parties rule in equity mandated that ‘all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be’ but because that rule would at times unfairly deny recovery to the party before the court, equity developed exceptions, among them one to cover situations ‘where the parties are very numerous, and the court perceives, that it would be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole...’ From these roots, modern class action practice emerged...”

As mentioned, this dissertation will consider the class action regimes of Australia, Ontario and the United States. Apart from being regarded as the leaders in the field of class action litigation,¹⁸ their systems of civil procedure are also of common law origin and the adversary system of litigation is a characteristic of all of them. The basic principles that underlie these systems are similar.¹⁹ These jurisdictions all trace their origins to the unwritten practices of English Chancery. Today, however, class actions in these jurisdictions are largely creatures of statute and rule.²⁰

¹⁶ L J Tornquist “*Roadmap to Illinois Class Actions*” (1974) 5 *Loy U Chi L J* 45 45. Chapter three below will consider notice of class actions.

¹⁷ 527 US 815 832 (1999).

¹⁸ Bassett (2011) *Sw J Int'l L* 22-24.

¹⁹ W de Vos “*n Groepsgeeding in Suid-Afrika*” (1985) 3 *TSAR* 296 304. E Hurter “Class Action: Failure to Comply with Guidelines by Courts Ruled Fatal” (2010) 2 *TSAR* 409 413 states that the class action is effectively an American phenomenon and that other Anglo-America jurisdictions that have opted for formal class action devices have been influenced by the American class action. According to Hurter, it is clear that South African class action developments mirror this trend.

²⁰ R B Marcin “Searching for the Origin of Class Action” (1974) 23 *Cath U L Rev* 515 517.

The American class action is regulated by a comprehensive court rule that deals with class actions at a federal level.²¹ In Canada, the Ontario Class Proceedings Act of 1992 (“Ontario Act”), which is based largely on a comprehensive report delivered by the Ontario Law Reform Commission in 1982 and the recommendations contained therein, deals comprehensively with all aspects relating to class actions in Ontario.²² The Ontario Act provides for a general class action and it regulates similar matters as provided for in rule 23 of the Federal Rules, but it does so in much more detail. The United States and Ontario regarded the common law rule on representative actions as inadequate to deal with the current complex nature of class actions.²³

Class action reform at federal level in Australia followed a similar path compared to Ontario. The Federal Court of Australia Act of 1976 (“Federal Court Act”) regulates Australian class proceedings in detail.²⁴ An important difference between the Australian class action regime and the class action procedures of America and Ontario is that the Australian ‘representative proceeding’²⁵ does not contain a certification process, which is one of the striking features of class action proceedings in the United States and Ontario.²⁶

²¹ Rule 23 of the Federal Rules of Civil Procedure and the Class Action Fairness Act of 2005 govern class actions in federal courts. Rule 23 makes provision for three categories of class actions: rule 23(b)(1) provides for two types of so-called ‘prejudice’ class actions; rule 23(b)(2) provides for declaratory and injunctive relief; and rule 23(b)(3) provides for the opt-out damage class action. The most important of these categories are class actions to obtain declaratory or injunctive relief and actions for damages. According to R H Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 4 ed (2012) 75, most class actions are brought and certified under rules 23(b)(2) and 23(b)(3). Rule 23(b)(1) is used less frequently. Further, according to C Hodges *The Reform of Class and Representative Actions in European Legal Systems: a New Framework for Collective Redress in Europe* (2008) 135, the majority of the rules that regulate class actions in America are based on an opt-out rather than an opt-in mechanism. Appendix A contains rule 23 of the Federal Rules.

²² According to Y Martineau & A Lang “Canada” in P G Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* (2012) 56 57, with the exception of the province of Quebec, which is a civil law jurisdiction, all Canadian provinces and territories are common law jurisdictions. Appendix C contains the Ontario Class Proceedings Act, 1992.

²³ De Vos (2012) *TSAR* 744.

²⁴ Appendix B contains the relevant provisions of the Federal Court of Australia Act of 1976.

²⁵ According to S S Clark, J Kellam & L Cook “Australia” in P G Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* (2012) 392 406, ‘class action’ sometimes refers to a more general procedure than the ‘representative action’ procedure that had existed previously, but the two terms are often used interchangeably.

²⁶ De Vos (2012) *TSAR* 744-745. See also Clark *et al* “Australia” in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 411.

A further technical difference is the Federal Court Act's requirement of a group of '7 or more persons' compared to the requirement in the Ontario Act of 'a class of two or more persons'.²⁷ Apart from these differences, the general features of the two systems show many similarities; for example, both follow the American model by allowing class actions for damages.²⁸

1 1 2 The development of a South African class action

The representative action of the common law was never received into South African law. This is because the distinction drawn in English law between 'law' (administered in the common law courts) and 'equity' (administered in the Chancery Courts),²⁹ was never accepted into South African law. Roman-Dutch substantive law did not suffer the same fate at the hands of the British reformers as procedural law and, accordingly, there was no need to incorporate this distinction or to establish a court of law and a court of equity, respectively.³⁰ Instead, a single court was established in the Cape, following the introduction of the First and Second Charters of Justice of 1827 and 1834 respectively.³¹

As stated earlier, the first time class actions were recognised in South African law was in the Interim Constitution. It enabled the utilisation of a class action as a means to enforce rights entrenched in the Bill of Rights.³² The Interim Constitution was followed, in 1995, by a Working Paper on class actions prepared by the South African Law Commission ("SALC").³³ The Working Paper contained various recommendations, including the

²⁷ Section 33C(1)(a) of the Federal Court of Australia Act of 1976 and section 5(1)(b) of the Class Proceedings Act, 1992, S.O. 1992, c. 6.

²⁸ De Vos (2012) *TSAR* 737 745.

²⁹ S C Yeazell "From Group Litigation to Class Action" (1980) 27 *UCLA Law Review* 514 522, 1067.

³⁰ H J Erasmus "Historical foundations of the South African law of Civil Procedure" (1991) 108 *SALJ* 265 269; See also H J Erasmus "The Interaction of Substantive Law and Procedure" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 141 147.

³¹ De Vos (2012) *TSAR* 738.

³² Section 7(4) of the Interim Constitution became section 38 of the (final) Constitution of the Republic of South Africa, 1996.

³³ South African Law Commission *The Recognition of a Class Action in South African Law Working Paper* 57 Project 88 (1995). At the time it was known as the South African Law Commission. It became the South African Law Reform Commission in 2002.

proposed introduction of a class action over the whole spectrum of civil litigation.³⁴ In 1998, with reference to the recommendations contained in the Working Paper, the SALC published its final report, which *inter alia* recommended that the principles underlying class actions should be introduced by an Act of Parliament and the necessary procedures by rules of court.³⁵

Section 38(c) of the Constitution of the Republic of South Africa, 1996 (“Constitution”) provides as follows:

“38. Enforcement of rights - Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are- ... (c) anyone acting as a member of, or in the interest of, a group or class of persons...;”

Section 38(c) clearly makes provision for class actions within the confines of the Constitution.³⁶ This means that class action proceedings instituted in terms of section 38 may only be used to enforce rights entrenched in the Bill of Rights. This is the case even in the absence of legislation and court rules that regulate class actions in South Africa. The Supreme Court of Appeal in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*³⁷ (“*Ngxuza*”) confirmed that, notwithstanding the absence of class action legislation and court rules, it is possible to use class proceedings to enforce constitutional rights.

Section 38(c) cannot be utilised in the absence of an allegation that a right contained in the Bill of Rights has been threatened or infringed. However, South African law at present also allows class actions to enforce non-constitutional rights. In other words, it is also possible to institute a class action to enforce rights not contained in the Constitution, such as a

³⁴ See summary of recommendations at iv – v. In preparing the Working Paper, the SALC primarily used the American class action model as a guiding principle but also gave consideration to the class action model of Ontario.

³⁵ The South African Law Commission *The Recognition of Class Actions and Public Interest Actions in South African Law Report* Project 88 (1998) para 5.6.5.

³⁶ 2001 4 SA 1184 (SCA). Unlike rule 23 of the Federal Rules, section 38 of the Constitution does not set out a procedural framework in terms of which a class action is to be conducted.

³⁷ 2001 4 SA 1184 (SCA).

claim for damages where no constitutional right was infringed.³⁸ As De Vos indicates, the distinction between class actions to enforce constitutional rights and class actions to enforce non-constitutional rights is not always clear. The cases often do not all fall neatly into either of these two categories simply because the plaintiffs sometimes rely on the infringement of both constitutional and non-constitutional rights.³⁹

The *Children's Resource Centre Trust* case is authority for the recognition of a class action outside the ambit of the Constitution.⁴⁰ The Supreme Court of Appeal dealt with the circumstances when a class action may be instituted and the procedural requirements that must be satisfied before such proceedings may be instituted. In this regard, Wallis JA held that the first procedural step prior to the issuing of summons is to apply to court to certify the process as a class action.⁴¹ In other words, in class action proceedings, a court must first be approached to grant leave for the matter to proceed as a class action.⁴² Should leave be granted for the matter to proceed as a class action, the court, as the judicial manager of the proceedings, would issue appropriate directives as to how the class action will proceed. The class action trial then follows.⁴³ However, until a potential action is certified, it is not a class action.

Wallis JA laid down the following elements, commonly referred to as the certification requirements, which should guide a court in making its decision regarding the certification of a class action:

³⁸ W de Vos "Judicial Activism Gives Recognition to a General Class Action in South Africa" (2013) 2 *TSAR* 370 372.

³⁹ De Vos (2012) *TSAR* 747.

⁴⁰ Para 21.

⁴¹ Paras 23-25.

⁴² According to V Morabito & J Caruana "Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia" (2013) 61 *Am J Comp L* 579 580-582, certification of class actions is an important part of those class action regimes that currently regulate class actions in American federal district courts and in ten Canadian jurisdictions. Australia, however, does not require court certification. According to the author, the only other contemporary class action regime that does not employ the certification device operates in Sweden. Sweden uses an opt-in regime. Australia, however, also employs opt-out devices like Ontario and the United States and thus provides a more useful and relevant case study than Sweden.

⁴³ Hurter (2010) *TSAR* 409 413.

- There must be a class, identifiable by objective criteria.
- There must be a cause of action raising a triable issue.
- There must be issues of fact and/or law common to all the members of the class.
- The relief sought or damages claimed must flow from the cause of action and must be ascertainable and capable of determination.
- If the claim is for damages, there must be an appropriate procedure for allocating damages to the class members.
- The proposed representative must be suitable to be permitted to conduct the action and to represent the class.
- It must be shown that a class action is the most appropriate means of adjudicating the claims of the class members.⁴⁴

Importantly, according to Wallis JA, the above requirements overlap to some extent; for instance, it is not possible to determine class composition without considering the nature of the claim. Wallis JA added that a class action may be appropriate where the class members share common issues, but that it is not necessarily the case. He further held that it is conceivable that a class action could be certified in respect of some issues, such as negligence in a mass personal injury claim, with the result that other issues, such as damages, would need to be resolved separately.⁴⁵

In *Mukaddam v Pioneer Foods (Pty) Ltd*⁴⁶ (“*Mukaddam CC*”), Jafta J referred to section 173 of the Constitution and confirmed the power of our superior courts to protect and regulate their own processes and, where necessary, to develop the common law to give effect to the interests of justice. Jafta J held that the interests of justice should be our courts’ guiding consideration when considering class action certification applications.⁴⁷

Regarding the certification ‘requirements’ mentioned in *Children’s Resource Centre Trust*, Jafta J stated as follows:

“In *Children’s Resource Centre*...the Supreme Court of Appeal laid down requirements for certification. These requirements must serve as factors to be taken into account in determining

⁴⁴ Para 26.

⁴⁵ Para 26.

⁴⁶ 2013 10 BCLR 1135 (CC).

⁴⁷ Paras 33-34.

where the interests of justice lie in a particular case. They must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise.”⁴⁸

In other words, according to the Constitutional Court in *Mukaddam CC*, the certification ‘requirements’ laid down in *Children’s Resource Centre Trust* should be treated as a set of relevant ‘factors’ that have to be taken into account when determining whether or not the class action should be certified. A court is also not limited to considering these factors and may consider other relevant factors not mentioned by Wallis JA.⁴⁹ Further, in examining the prevalence or absence of each or all of the above-mentioned factors, the court’s certification decision should be informed by the interests of justice.⁵⁰

Unlike the position in the selected foreign jurisdictions, there is no South African statute or court rule that regulates class actions. Our courts have been required to develop appropriate class action procedural rules through their inherent jurisdiction embodied in section 173 of the Constitution.⁵¹ Consequently, in *Mukaddam CC*, Froneman J stated the following in relation to the development of the common law by the Supreme Court of Appeal in *Children’s Resource Centre Trust*:

“My understanding of the legal position flowing from this development is that courts are bound by the authoritative exposition of the development of the common law by the Supreme Court of Appeal – or by this Court, if it adds to or alters any feature of the development made by the Supreme Court of Appeal. Courts have no discretion under section 173 of the Constitution not to apply the common law as authoritatively articulated by the Supreme Court of Appeal or this

⁴⁸ Para 35.

⁴⁹ *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC) para 47. According to W de Vos “Opt-in Class Action for Damages Vindicated by Constitutional Court: *Mukaddam v Pioneer Foods CCT 131/12*” (2013) 4 *TSAR* 757 765-766, relegating the requirements for a class action to mere ‘factors’ under the umbrella of ‘the interests of justice’ is questionable. He states that “[t]his flies in the face of the very nature of a class action and the position in the leading class action regimes. A class action is very different from an ordinary civil suit. For a class action to proceed as such certain essential requirements must be satisfied, otherwise it would be a travesty to call it a class action”.

⁵⁰ *Nkala v Harmony Gold Mining Company Limited* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016) para 32.

⁵¹ C Plasket “South Africa” in D R Hensler, C Hodges & M Tulibacka (eds) *The Globalization of Class Actions* (2009) 256 261.

Court. What they may do is to apply the developed law within the framework of their own process. Their decision not to allow certification may be set aside on appeal only if there was a material misdirection of fact or law. I see no reason to deviate from this approach here.”⁵²

1 2 Problem statement

It is apparent from what has been set out above that the class action is in its infancy in South African law.⁵³ In the absence of legislation or rules that deal with class actions, the court in *Children’s Resource Centre Trust* was required to provide guidance on the suggested approach to be adopted when dealing with class proceedings in South Africa. This judgment effectively details key aspects of the law relating to class actions in South Africa. However, various ambiguities, inconsistencies and problems remain. In this regard, South African case law on class action procedure has not yet been subjected to a comprehensive and critical analysis in order to provide answers to a number of vital questions. These include the following:

- i) when is a class action, as opposed to joinder, the appropriate procedural device to be utilised to adjudicate a claim and when is it appropriate to use the opt-in, as opposed to the opt-out, class action regime?;
- ii) when, if ever, should notice of a class action be given to class members and when would individual notice to each class member be required, or would some form of general notice to the class suffice?;
- iii) what is the approach that our courts should follow and what are the devices that they could utilise to determine damages in personal injury class actions?; and,
- iv) how should a class action be managed and what should the role of the courts be in this regard?

The SALC did consider some of the above-mentioned issues in its working paper and final report;⁵⁴ however, the SALC’s recommendations, taking into account that the final report

⁵² Para 67.

⁵³ N Kirby “South Africa” in P G Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* (2012) 378 382. South African law does allow for joinder of plaintiffs and it is familiar with the notion of the representative plaintiff.

⁵⁴ See South African Law Commission *The Recognition of Class Actions Report* and South African Law Commission *The Recognition of a Class Action in South African Law Working Paper 57*.

was delivered in 1998, do not reflect later developments in class action law, both local and foreign. Further, where the SALC did consider these issues, it was done relatively briefly. This dissertation will consider these issues in much more detail and, given the novelty of the procedure, it will do so with reference to the approaches of the selected foreign jurisdictions.

Ultimately, the purpose of the dissertation is to assist in developing a structure that could facilitate the adjudication of class actions in South Africa regarding the key areas identified above. At present, the development of the procedural framework within which the class action device operates is left entirely to our courts' discretion. It is, however, not necessarily ideal to employ an *ad hoc* approach in respect of procedural problems that arise on a case-by-case basis.⁵⁵ A haphazard developmental approach to the regulation of class actions could potentially result in an inconsistent approach by the various divisions of the High Court of South Africa.⁵⁶ In this regard, certain contradictions, inconsistencies and problems with the approaches of our courts in class actions to date will be considered throughout the dissertation.

According to Karlsgodt, there are, in addition to the European Union, 38 jurisdictions recognising some form of class action procedure. He states that most of these jurisdictions regulate class actions by specially designed legislation or court rules.⁵⁷ Locally, several scholars have called for specific class action legislation to be introduced in South Africa,⁵⁸

⁵⁵ *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA) para 15.

⁵⁶ G Saumier "Competing Class Actions across Canada: Still at the Starting Gate After Canada Post V Lepine?" (2009) 48 *Can Bus LJ* 462 463. For example, Ontario allows certification of a resident and non-resident class on an opt-out basis and, as the number of provinces allowing class actions increased, the risk of competing and potentially overlapping actions grew and eventually materialised. This has led to inconsistent results.

⁵⁷ P G Karlsgodt "United States" in P G Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* (2012).

⁵⁸ See *inter alia* W de Vos *Verteenwoordiging van Groepsbelange in die Siviele Proses* LLM dissertation RAU (1985); W de Vos "'n Groepsgeding in Suid-Afrika" (1985) 3 *TSAR* 296; W de Vos "'n Groepsgeding ('class action') as Middel ter Beskerming van Verbruikersbelange" (1989) *De Rebus* 373; De Vos (1996) *TSAR* 639; E Hurter "Some thoughts on current developments relating to class actions in South African law as viewed against leading foreign jurisdictions" (2006) 39(3) *CILSA* 485; E Hurter "The class action in South Africa: Quo Vadis" (2008) 41(2) *De Jure* 293; E Gericke "Can class actions be instituted for breach of contract?" (2009) (2) *THRHR* 304.

which could ensure that development of class action procedure does not depend entirely on our courts, and which could enable South Africa to follow in the footsteps of other countries with specific class action legislation.⁵⁹ For example, Walker states that “[t]he sequential introduction of legislation into the various Canadian jurisdictions has enabled the provincial legislators to learn from the experience in other provinces and to refine the existing models for their own legislation”.⁶⁰ A similar approach should be followed in South Africa where guidance is sought from the experiences of the selected foreign jurisdictions in order to develop and refine our own class action legislation.

The dissertation is divided into six chapters. This chapter provides an introduction and contains a brief historical and comparative exposition of the development of the class action as well as an indication of the issues that the dissertation seeks to address. Chapter two considers what test our courts should apply and what factors they should consider when determining the appropriateness of a class action as opposed to joinder. It also considers when, if at all, the identifiability of class members will preclude the certification of a class action. The chapter further considers when, if at all, it is appropriate to use the opt-in class action regime as opposed to the opt-out class action regime.

Chapter three, in turn, deals with the issue of notice of the class action to members of the class in the context of the opt-out class action, on the one hand, and the opt-in class action, on the other. In respect of each class action regime, consideration is given to whether notice of the class action is required and, if so, whether individual notice to each class member is required, or whether some form of general notice to the class of the class action would suffice. In the context of the opt-out class action, the chapter also considers whether class members would be prejudiced if, as a result of not having been provided with (proper) notice, they fail to opt out of the class action. The chapter concludes by considering the role of the court in protecting the interests of absent class members.

Our courts have not properly considered the approach to be followed when determining damages in mass personal injury class actions. It is accordingly unclear what approach our courts will follow, specifically what device(s), if any, they will utilise to determine

⁵⁹ F Cassim & O S Sibanda “The Consumer Protection Act and the Introduction of Collective Consumer Redress through Class Actions” (2012) 75 *THRHR* 586 587-588.

⁶⁰ J Walker *Class Proceedings in Canada - Report for the 18th Congress of the International Academy of Comparative Law* (2010) 1.

damages in a mass personal injury class action. Chapter four accordingly evaluates certain alternative methods to determine damages in mass personal injury class actions in view of the existing procedural framework developed by our courts, with specific regard to the approaches followed by the selected foreign jurisdictions in this regard.

Because of the management difficulties generally encountered in class action litigation, effective judicial management is considered increasingly important for the efficient functioning of class actions.⁶¹ As class action litigation is traditionally more complex than other kinds of litigation, it requires greater administration and management of the case.⁶² The importance of managing class actions effectively is evidenced by the fact that manageability problems could potentially result in the termination of a class action.⁶³ Chapter five considers what the role of our courts should be in order to manage class actions effectively. It also evaluates court-annexed mediation as a tool that our courts could utilise to assist it in managing, and possibly resolving, class actions.

The sixth and final chapter summarises and reflects on the findings reached and recommendations made in respect of the analysis conducted regarding the above-mentioned research questions. It further attempts to integrate and synthesize these findings and recommendations and to indicate their implications for future legal development.

⁶¹ C Piché “Judging Fairness in Class Action Settlements” (2010) 28 *Windsor YB Access Just* 111 121. C S Diver “The Judge as Political Powerbroker: Superintending Structural Changes in Public Institutions” (1979) 65 *VA L Rev* 43 45 states that the “transformation in the character of litigation necessarily transforms the judge’s role as well”.

⁶² According to Karlsgodt “United States” in *World Class Actions: A Guide to Group and Representative Actions around the Globe* 44, a tool that is regarded as useful in managing class action proceedings in the United States is to require the submission of a trial plan. The trial plan sets out the claim(s), the relief, the witnesses and evidence that will be used to prove the plaintiffs’ claims at the trial. See also Piché (2010) *Windsor YB Access Just* 117.

⁶³ In the United States, a class action will not be maintained if there is proof that it would indeed be unmanageable (due to *inter alia* the size of the class, the giving of notice and the distribution of damages) since it would then not be superior to other methods of adjudication as required by rule 23(b)(3). For example, in *Eisen v Carlisle and Jacquelin* 417 US 156 (1974) the size of the class and related issues such as notice to absent members and the distribution of an aggregate reward to class members caused serious doubt about the viability of the case.

CHAPTER TWO: CLASS ACTION AS AN APPROPRIATE PROCEDURAL DEVICE AND THE OPT-IN REGIME COMPARED TO THE OPT-OUT REGIME

2 1 Introduction

As mentioned,¹ the certification requirements stated in the judgment of Wallis JA in *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)*² (“*Children's Resource Centre Trust*”) include that there must be a class, identifiable by objective criteria, and it must be shown that a class action is the most appropriate means of adjudicating the claims of the class members.³ A proper class definition *inter alia* enables the court to determine how notification to the putative class members should take place, to decide who does not form part of the class and may accordingly institute individual actions, and to establish who will be bound by the court's order.⁴ The requirement that a class action must be appropriate is, according to Erasmus and Van Loggerenberg, aimed at ensuring that only claims that cannot feasibly be instituted as ordinary actions with multiple plaintiffs are brought as class actions.⁵

In *Children's Resource Centre Trust*, after having listed the certification requirements,⁶ Wallis JA proceeded to deal selectively with some of the requirements in more detail. He did not consider separately the certification requirement that a class action must be shown to be the most appropriate means of determining class members' claims. Instead, he essentially dealt with this requirement in the context of the first certification requirement, namely that there must be a class, identifiable by objective criteria. In this regard, Wallis JA mentioned *obiter* that:

¹ See chapter one above.

² 2013 1 All SA 648 (SCA).

³ Para 26.

⁴ H J Erasmus & D E van Loggerenberg *Erasmus: Superior Court Practice* (RS 41 2013) A2-23.

⁵ A2-25.

⁶ Para 26.

“In defining the class it is not necessary to identify all the members of the class. Indeed, if that were possible, there would be a question whether a class action was necessary, as joinder under Uniform Rule 10 would be permissible. It is, however, necessary that the class be defined with sufficient precision that a particular individual’s membership can be objectively determined by examining their situation in the light of the class definition.”⁷

It can be inferred from the above comments of Wallis JA that, where all the claimants are identifiable,⁸ they may need to be joined as plaintiffs to the proceedings. A class action may therefore not be the appropriate procedural device to be utilised in such circumstances. Wallis JA does, however, clearly fall short of saying that a class action may never be used if the claimants are all personally identifiable. In fact, Wallis JA does mention that there is a measure of overlap between the certification requirements⁹ and he also refers to the circumstances when a class action may be instituted in South Africa,¹⁰ such as where the class is large, where the class members are poor, and where the claims are not large enough for it to be pursued separately.¹¹

As mentioned, Wallis JA did not expressly deal with the certification requirement that a class action must be shown to be the most appropriate means of determining class members’ claims. He also stated that it is unnecessary to identify all the class members, otherwise the necessity of a class action would be questionable. It accordingly remains unclear when, if at all, the identifiability of class members will preclude the certification of a class action. Moreover, it is unclear what the test is our courts must apply and what factors they must consider to determine the appropriateness of a class action.

In *Mukaddam v Pioneer Foods (Pty) Ltd*¹² (“*Mukaddam SCA*”) the class action had been framed in an opt-in manner. This meant that the class would have been confined to individuals who took the necessary steps to opt into the class action. Nugent JA held that a class action was not suitable in *casu*. He held that once the class is confined to claimants who choose positively to advance their claims and are required to come forward for that purpose, he can see no reason why they are not capable of doing so in their own names –

⁷ Para 29.

⁸ In the sense that the individual claimants can be named and specified.

⁹ Para 26.

¹⁰ Paras 19-22.

¹¹ Para 19.

¹² 2013 2 SA 254 (SCA).

they do not need a representative to do so on their behalf. He then stated that the court rules make specific provision for multiple plaintiffs to join in one action.¹³ The court in *Mukkadam SCA* therefore found, at the expense of the opt-in class action regime, joinder to be the more appropriate procedural device.

A potential problem evidenced by the approach of the court in *Mukaddam SCA* is that where, for example, the individual claimants are poor, uneducated and lack access to resources, or where the class is large, joinder may in fact be cumbersome and inappropriate, even though all the claimants are personally identifiable.¹⁴ This potential problem is significant in that a court ordering joinder in such circumstances could potentially undermine the rationale underpinning the incorporation of the class action mechanism into South African law namely, access to justice.¹⁵

¹³ Para 12. Rule 10(1) of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa allows joinder of multiple plaintiffs in a single action and provides that:

“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.”

¹⁴ According to Erasmus & van Loggerenberg *Erasmus: Superior Court Practice* A2-21, the traditional rules governing joinder may be impractical where the claimants comprise a large group and/or all the potential claimants have not yet been identified.

¹⁵ The South African Law Commission *The Recognition of Class Actions and Public Interest Actions in South African Law Report* Project 88 (1998) paras 1.3-1.4. See also the South African Law Commission *The Recognition of a Class Action in South African Law Working Paper* 57 Project 88 (1995) para 5.28 where it is stated that “[t]he whole purpose of class actions is to facilitate access to justice for the man on the street”. See also *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 4 SA 1184 (SCA) para 1 where Cameron JA states that “[t]he law is a scarce resource in South Africa. This case shows that justice is even harder to come by. It concerns the ways in which the poorest in our country are to be permitted access to both”. In *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 2 SA 254 (SCA) para 11 it is stated that “[t]he justification for recognising class actions is that without that procedural device claimants will be denied access to the courts”. In *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC) para 29 Jafta J stated that “[a]ccess to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved”.

The primary difficulties associated with joinder is that it is a cumbersome and costly process. An interested party is required to file an application¹⁶ in terms of which the party's direct and substantial interest in the matter is set out and in terms of which the court is requested to join the party to the proceedings. Joinder is a costly procedure, since the interested party is generally required to make use of legal representation to bring the application. Cameron JA, in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*¹⁷ ("Ngxuza"), referred to the difficulties associated with joinder and held as follows in this regard:

"It is precisely because so many in our country are in a 'poor position to seek legal redress', and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice, that both the interim Constitution and the Constitution created the express entitlement that 'anyone' asserting a right in the Bill of Rights could litigate 'as a member of, or in the interest of, a group or class of persons'".¹⁸

The law in the foreign jurisdictions that will be considered in this study relating to the circumstances when a class action should be used rather than joinder is comprehensively dealt with in statute, supplemented by an extensive body of case law. However, as we have seen,¹⁹ the position in South Africa is essentially as set out in the *Children's Resource Centre Trust, Mukaddam SCA and Mukaddam v Pioneer Foods (Pty) Ltd*²⁰ ("*Mukaddam CC*") cases. The court in *Mukaddam CC* did not deal with the comments of the Supreme Court of Appeal on joinder. This chapter accordingly, and especially in the light of the experiences of foreign jurisdictions, considers what test our courts should apply and what factors they should consider when determining the appropriateness of a class action compared to joinder. It also considers when, if at all, the identifiability of class members will preclude the certification of a class action.

In the context of an opt-in class action, the class members who choose to opt into the class action will be identifiable.²¹ By suggesting that joinder is the appropriate procedural

¹⁶ Notice of motion supported by affidavit(s).

¹⁷ 2001 4 SA 1184 (SCA).

¹⁸ Para 6.

¹⁹ See chapter one above.

²⁰ 2013 10 BCLR 1135 (CC).

²¹ In *Nkala v Harmony Gold Mining Company Limited* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016) para 88, Mojapelo DJP, referring to the bifurcated proceedings

device where all the claimants are identifiable, the court in *Mukaddam SCA* essentially questioned the viability of the opt-in regime of class action litigation. This chapter accordingly further considers when, if at all, it is appropriate to use the opt-in class action regime as opposed to the opt-out class action regime.

2 2 Class action as an appropriate procedural device compared to joinder

2 2 1 American federal class action

The threshold requirements for certification of a class action are contained in rule 23(a) of the American Federal Rules of Civil Procedure (“Federal Rules”), which appear in Appendix A. These certification requirements are generally referred to as numerosity, commonality, typicality, and adequacy of representation.²² The relevant certification requirement that merits consideration in the context of the class action as an appropriate procedural device compared to joinder, is the numerosity requirement contained in rule 23(a)(1) of the Federal Rules.

As mentioned, rule 23(a)(1) provides that a court may certify a class only if it “is so numerous that joinder of all members is impracticable”. Where joinder is found to be practicable, there will be no need for a class action.²³ According to Anderson and Trask, the numerosity requirement does not merely require consideration of the number of putative class members. They state that consideration must also be given to “whether aggregating the claims of the known class members would be feasible without a class action”.²⁴ They accordingly propose using feasibility, in addition to the number of putative class members, as the key considerations in determining whether joinder is impracticable and hence whether the numerosity requirement is met.

that would follow upon his certification of the class action, held that “the second stage of this bifurcated process involves the invocation of the opt-in method of identifying the total number of mineworkers who form part of the class action. This means that at the conclusion of the opt-in process the names and details of all the mineworkers who claim rights of membership to the classes will be known. There will be no need for them to issue summonses. The mining companies are already before court. All they will then need to know is who exactly the plaintiffs are”.

²² P G Karlsgodt “United States” in P G Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* (2012) 22.

²³ R H Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 4 ed (2012) 39.

²⁴ B Anderson & A Trask *Class Action Playbook* (2014) 25-26.

The numerosity requirement does not require a claimant to identify the exact number of class members. However, the claimant would need to show that there is a sufficiently large number of people in the class to meet the rule 23 burden. It has been suggested that, while there is no magic number for satisfying numerosity, most courts will allow a class action to proceed if the class consists of at least 40 members.²⁵ Further, it is generally accepted that “when class size reaches substantial proportions...the impracticability requirement and hence the numerosity requirement is usually satisfied by the numbers alone”.²⁶ In other words, the bigger the class, the more likely it is that joinder is impracticable.

Regarding the feasibility consideration, class proceedings may be appropriate where joinder is possible but not necessarily feasible.²⁷ Ultimately, it would seem that, if joinder is possible but would needlessly complicate the litigation of the case, then class action proceedings may be appropriate.²⁸ However, impracticability does not mean impossibility.²⁹ In this regard, in *Eggleston v Chicago Journeymen Plumbers’ Local Union No. 130, U.A.*³⁰ it was held that:

“[O]rdinarily it is not difficult to ascertain if a class approach would be useful to avoid the practical problems of trying to join many named plaintiffs or otherwise clog the docket with numerous individual suits. Except for the class approach many might never receive any redress for the wrong done them.”³¹

In addition to having to satisfy the requirements for certification, including the numerosity requirement, each class action must satisfy the requirements of either rules 23(b)(1), 23(b)(2), or 23(b)(3).³² Rule 23(b)(3) pertains to the opt-out damages class action and specifically requires that a court assesses whether class action proceedings is “superior to

²⁵ 26.

²⁶ M H Greer *A Practitioner’s Guide to Class Actions* (2010) 58.

²⁷ Anderson & Trask *Class Action Playbook* 26-27.

²⁸ 26-27.

²⁹ In *Robidoux v Celani* 987 F.2d 931, 935-936, the court held that “the district court in the present case, in concluding that numerosity was lacking because plaintiffs had not shown the class to be so large that joinder was ‘impossible’, applied the wrong standard”.

³⁰ 657 F.2d 890, 895 (7th Cir. 1981).

³¹ Greer *Practitioner’s Guide to Class Actions* 60.

³² See Appendix A.

other available methods for fair and efficient adjudication of the controversy”. The superiority requirement “reflects a broad policy of economy in the use of society’s difference-settling machinery”.³³ Rule 23(b)(3)(A)-(D) lists four factors that must be considered by a court in making this assessment:

- “(A) the class members’ interests in individually controlling the prosecution or defence of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.”

In *Lake v First Nationwide Bank*³⁴ it was held that, in performing the superiority analysis, the court must consider the “inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually”. Specifically, the manageability requirement in rule 23(b)(3)(D) “encompass[es] the whole range of practical problems that may render the class action format inappropriate for a particular suit”.³⁵ It entails that a court focuses on the advantages of a class action compared to alternative forms of dispute resolution which may be available to the claimants, such as litigation through joinder. In *re Managed Care Litigation*³⁶ it was held that this consideration “requires the Court to determine whether there is a better method of handling the controversy other than through the class action mechanism”. In *Carnegie v Mutual Saving Life Insurance Company*³⁷ it was held that, where management problems may result in class proceedings being less fair and efficient than other dispute resolution methods, then a class action would be improper.³⁸

³³ *Berley v Dreyfus & Co.*, 43 F.R.D 397, 398 (S.D.N.Y. 1967).

³⁴ 156 FRD 615, 625 (E.d.Pa. 1994).

³⁵ *Eisen v Carlisle & Jacquelin*, 417 U.S 156, 164 (1974).

³⁶ 209 F.R.D 678, 692 (S.D. Fla. 2002).

³⁷ No. CV-99-S-3292-NE, 2002 U.S. Dist. LEXIS 21396, at 76-77 (N.D. Ala. Nov. 1, 2002).

³⁸ See, for example, *Klay v Humana, Inc* 382 F3d 1214 (11th Circuit 2004), where it was held that “the district court acted well within its discretion in concluding that it would be better to handle this case as a class action instead of clogging the federal courts with innumerable individual suits litigating the same issues repeatedly. The defendants have failed to point to any specific management problems – aside from the obvious ones that are intrinsic in large class actions – that would render a class action impracticable in this case”.

Manageability, as required by rule 23(b)(3)(D), becomes an important consideration where the administrative costs incurred in managing the class action will consume the award made in favour of the plaintiff class.³⁹ A further factor to be considered in the context of manageability is the difficulty associated with notifying a significant percentage of the class – this may count against possible certification.⁴⁰

Although courts are reluctant to certify classes whose members would be difficult to communicate with or to identify, the sheer size of the class would not necessarily result in the denial of certification.⁴¹ Further, although certification generally should not be denied solely on the ground that class members would have to prove their damages on an individualised basis, potential difficulty in calculating damages may be a factor in assessing manageability.⁴² Further factors considered in determining superiority include whether an alternative regulatory mechanism exists and whether a class action would achieve significant judicial efficiencies.⁴³

2 2 2 Australia

In order to determine what test our courts should apply and what factors they should consider when determining the appropriateness of a class action compared to joinder, it may also be worth considering the approach of the Australian federal class action regime in this regard. The Australian approach may also be relevant to determining when, if at all, the identifiability of class members will preclude the certification of a class action.

In Australia's federal class action regime, unlike the American class action regime, there is no certification procedure.⁴⁴ However, in order to commence a class action in Australia, three threshold requirements must be satisfied, namely:

- At least seven persons must have claims against the same person;
- The claims must arise out of the same, similar or related circumstances; and

³⁹ Anderson & Trask *Class Action Playbook* 62.

⁴⁰ See chapter three below regarding notice of class actions.

⁴¹ Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 131.

⁴² See chapter four below regarding the determination of damages in personal injury class actions.

⁴³ Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 132.

⁴⁴ The Supreme Courts of Victoria and New South Wales have class action regimes which largely mirror the Australian Federal Court class action regime.

- The claims must give rise to at least one substantial common issue of law or fact.⁴⁵

In terms of section 33H of the Federal Court of Australia Act of 1976 (“Federal Court Act”),⁴⁶ an application commencing a representative proceeding⁴⁷ must describe or otherwise identify the group members to whom the proceeding relates. It must also specify the nature of the claims made, the relief claimed as well as the questions of law or fact common to the group members’ claims.⁴⁸ It is, however, unnecessary to name or specify the number of group members.⁴⁹

Once a representative proceeding has been instituted, it will continue unless the respondent applies to the court for an order terminating it.⁵⁰ Thus, unlike the South African and American class action regimes, where the party bringing the action must prove that certain requirements are met before certification is granted, it is up to the respondent to raise non-compliance with them. Such a termination order may be granted notwithstanding compliance with the above-mentioned threshold requirements. In this regard, the Federal Court is empowered in terms of sections 33L, 33M and 33N of the Federal Court Act to order the discontinuance of a representative proceeding under Part IVA where:

- in terms of section 33L, it appears likely to the court at any stage of a representative proceeding that there are less than seven group members;
- in terms of section 33M, “(a) the relief claimed in a representative proceeding is or includes payment of money to group members (otherwise than in respect of costs); and (b) on application by the respondent, the court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the respondent of identifying the group members and distributing to them the amounts

⁴⁵ Section 33C of the Federal Court of Australia Act 1976 (Cth); V Morabito “Australia” in D R Hensler, C Hodges & M Tulibacka (eds) *The Globalization of Class Actions* (2009) 320 322.

⁴⁶ See Appendix B.

⁴⁷ S S Clark, J Kellam & L Cook “Australia” in P G Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* (2012) 392 406.

⁴⁸ Section 33H(1).

⁴⁹ Section 33H(2).

⁵⁰ Clark *et al* “Australia” in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 411.

ordered to be paid to them would be excessive having regard to the likely total of those amounts”; or

- in terms of section 33N, it is satisfied that it is in the interests of justice to do so for one or more of the reasons specified in section 33N(1)(a)-(d).⁵¹

Section 33N provides that a respondent may apply to court for an order, or the court may decide *mero motu*, that the proceedings under Part IVA be discontinued where it is satisfied that it is in the interests of justice to do so because:

“(a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or

(b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or

(c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or

(d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.”

In terms of section 33N, the first issue that a court must decide is whether one of the conditions in paragraphs (1)(a)-(d) has been satisfied, which involves comparing the representative proceeding to other available alternatives, such as joinder. If another alternative is available, the court must then consider whether, due to the existence and appropriateness of that alternative, it is in the interests of justice to grant an order terminating the representative proceeding.⁵²

As mentioned, section 33N(1)(b) provides that a respondent can apply to court for an order to discontinue proceedings where all the relief sought can be obtained by means of a

⁵¹ See Appendix B.

⁵² Clark *et al* “Australia” in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 414-415. See also, for example, *McLean v Nicholson* 2002 172 FLR 90 at paras 7,12 where the court held that section 33N(1)(b) clearly applied to the facts of the case and that joinder was a suitable alternative to the representative proceedings.

proceeding other than a representative proceeding.⁵³ Although the same relief can generally be obtained by instituting individualised proceedings, it may, for example, be that class members are unidentifiable, that the class is numerous and that individual proceedings are not feasible, or that it would be too costly to pursue individualised proceedings. In such circumstances, it is unlikely that a court would order the discontinuance of class proceedings in terms of section 33N(1)(b).⁵⁴

Further, in terms of section 33N(1)(c), if the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members, the court can also order its discontinuance. In *Wong v Silkfield Pty Ltd*,⁵⁵ Spender J held that:

“Ultimately, if because of the extent of non-common issues, representative proceedings in the assessment of the court are not the preferable means of dealing efficiently and effectively with the claims, the court will no doubt terminate the representative nature of the proceedings...”

Similarly, in *Hall v Australian Finance Direct Ltd*,⁵⁶ Hollingworth J of the Supreme Court of Victoria held that “[t]he fact that a proceeding will at some stage involve an examination of numerous individual contracts or transactions has not prevented courts from allowing the common issues to be determined in [a] group proceeding”.⁵⁷ Hollingworth J cautioned against exercising the court’s power under section 33N before, at least, the utility of the class action regime has been exhausted by a resolution of the common issues.⁵⁸

Representative proceedings can also be discontinued in terms of section 33N(1)(d) where it is otherwise inappropriate that the claims be pursued by means of a representative proceeding. It has been suggested that the power to order that the matter does not proceed as a class action where it is ‘otherwise inappropriate’ is very broad and that there will usually be many competing issues to consider. In this regard: “costs, availability of relief, the size of the group, the period of time over which the breaches occurred, delays,

⁵³ In *McLean v Nicholson* 2002 172 FLR 90 it was held that section 33N(1)(b) clearly applied insofar as the relief sought could be obtained by litigation through joinder. The court considered the fact that there were only ten (identifiable) plaintiffs and that such a procedure would therefore not be unfeasible.

⁵⁴ P Cashman *Class Action Law and Practice* (2007) 311-312.

⁵⁵ 1998 ATPR 41-613, 40, 726 approved in *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 33.

⁵⁶ 2005 VSC 306.

⁵⁷ Para 50.

⁵⁸ Para 52.

and the nature of the causes of action, might make it inappropriate to pursue the claims by way of class action proceedings”.⁵⁹

Even if the criteria specified in section 33N(1)(a)-(d) are satisfied, the court must nevertheless be satisfied that it is in the interests of justice to make an order that the representative proceeding be terminated.⁶⁰ In *Bright v Femcare Limited*⁶¹ (“*Femcare*”), Finkelstein J held that:

“Whether or not it is in the interests of justice to make such an order has to be weighed against the public interest in the administration of justice that favours class actions. That requires one to consider the principal objects of the class action procedure. They are: (1) To promote the efficient use of court time and the parties’ resources by eliminating the need to separately try the same issue; (2) To provide a remedy in favour of persons who may not have the funds to bring a separate action, or who may not bring an action because the cost of litigation is disproportionate to the value of the claim; and (3) To protect defendants from multiple suits and the risk of inconsistent findings.”⁶²

Should a court make an order in terms of sections 33L, 33M, or 33N, discontinuing the representative proceeding, the representative party may continue it against the respondent on his or her own behalf.⁶³ In addition, any person who was a class member for the purpose of the representative proceeding, may apply to court for an order joining him or her as an applicant to the proceeding.⁶⁴

There are various similarities and differences between the threshold requirements in section 33C of the Federal Court Act and the certification requirements contained in rule 23 of the Federal Rules.⁶⁵ Although section 33C does not require it to be impracticable to join class members, the requirements of numerosity and commonality are conceptually

⁵⁹ Cashman *Class Action Law and Practice* 321.

⁶⁰ 321.

⁶¹ 2002 FCAFC 243; 195 ALR 574.

⁶² Para 152. For example, in *Huang v Minister of State for Immigration & Multicultural Affairs* (1997) 50 ALD 134, the potential for denying group members access to justice, insofar as separate individual proceedings were time barred, was held to be the decisive factor in permitting the class action to continue.

⁶³ Section 33P(a).

⁶⁴ Section 33P(b). See also Cashman *Class Action Law and Practice* 323.

⁶⁵ D Grave, K Adams & J Betts *Class Actions in Australia* (2012) 128.

similar to subsections 33C(1)(a) and (c). There is no requirement in section 33C similar to the typicality requirement contained in rule 23. The adequacy-requirement is also not embodied in section 33C, but it has been suggested that this requirement is similar to section 33T which permits the court to substitute a representative party if they are unable to adequately represent the interests of group members.⁶⁶

According to Grave, Adams and Betts, the tendency of Australian courts has been not to place too much reliance on American case law regarding its certification requirements for guidance as to the proper interpretation of the threshold requirements under section 33C of the Federal Court Act. This is essentially the result of statutory differences between rule 23 and section 33C and the increasing body of Australian jurisprudence available to provide direct guidance on interpretation related questions.⁶⁷

Some debate exists as to whether a formal certification mechanism should be introduced into Part IVA of the Federal Court Act. It has been suggested that, because the Australian federal class action regime lacks a certification phase, it is more ‘plaintiff-friendly’ compared to the American class action regime.⁶⁸ However, this suggestion should be approached with caution as there are a number of complexities involved in the comparison of the positions in Australia and the United States, including *inter alia* that: Part IVA of the Federal Court Act affords to Australian courts broad powers to terminate proceedings, even when commenced in accordance with the requirements of section 33C; and, the rules regulating the awarding of costs of litigation in Australia are different to those in the United States – the Australian ‘loser pays’ costs convention, which does not exist in the United States, generally discourages the commencement of representative proceedings. Given the significant differences in the development of the common law in each jurisdiction regarding the respective commencement criteria and the distinct economic, social and legal environments within which each regime operates, there is little

⁶⁶ 130.

⁶⁷ In *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, the High Court cautioned that it was “unprofitable and difficult” to make a precise comparison between a class action commenced under rule 23 and its Australian equivalent.

⁶⁸ Grave *et al Class Actions in Australia* 130. Unlike the requirement in rule 23(b)(3) that common issues predominate over individual issues, all that is required under section 33C is a single common issue of law or fact.

utility in a comparison of the ‘friendliness’ of environments for plaintiffs beyond a broad comparison of the terms of the respective legislation.⁶⁹

2 2 3 Ontario

The approach in Ontario is also relevant to establishing the test that our courts should use to determine the appropriateness of class proceedings. In Ontario, similar to South Africa and the United States but unlike Australia, a class action cannot be commenced without certification by a court.⁷⁰ Section 5(1) of the Ontario Act provides that a class action should be certified where the following criteria are met:

- “(a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who:
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.”

In *Hollick v Toronto (City)*⁷¹ (“*Hollick*”), it was held that section 5(1)(d) merits consideration of whether the proposed class action would be a “fair and manageable method” to advance the plaintiffs’ claims, taking into account the importance of the common issues in relation to the claims as a whole. To determine whether the proposed class action would be a fair and manageable method of advancing the plaintiffs’ claims, the court must consider whether, if the proposed common issues are resolved, it would advance the

⁶⁹ *Grave et al Class Actions in Australia* 131.

⁷⁰ H M Rosenberg & J Kalajdzic “Certification” in J Walker & G D Watson (eds) *Class Actions in Canada: Cases, Notes, and Materials* (2014) 55 55.

⁷¹ 2001 3 SCR 158.

action in a significant way.⁷² Importantly, the court must also consider alternatives to, and justifications for, class proceedings to determine whether it is the most appropriate way of dealing with the class members' claim(s). Such an alternative would, for example, include joinder.⁷³ The court also held that "the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification".⁷⁴

In *Markson v MBNA Canada Bank*⁷⁵ Rosenberg JA summarised the principles applicable to determining whether a class action is the preferable procedure as follows:

- "(1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
- (2) 'Preferable' is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and,
- (3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole."⁷⁶

According to Rosenberg JA, the preferability inquiry does not entail conducting separate inquiries in respect of each of the above-mentioned principles. To the contrary, "the inquiry into the questions of judicial economy, access to justice and behaviour modification can only be answered by considering the context, the other available procedures and, in short, whether a class proceeding is a fair, efficient and manageable method of advancing the claim".⁷⁷

⁷² Para 32.

⁷³ See, for example, *Hollick v Toronto (City)* 2001 3 SCR 158 para 28 where the court referred to the preferability of class proceedings compared "to other procedures such as joinder..."

⁷⁴ Paras 27-32.

⁷⁵ 2007 ONCA 334, 85 OR (3d) 321.

⁷⁶ Para 69.

⁷⁷ Para 70. See also *AIC Limited v Fischer* 2013 SCC 69 para 79.

In *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP*⁷⁸ (“*Excalibur*”), Perell J concluded that, on the facts, joinder was the preferable procedure compared to a class action.⁷⁹ In arriving at this conclusion, he held that it is relatively easy to satisfy the preferable procedure criterion and that, *in casu*, apart from failing to show that a class action was necessary to overcome any barriers to access to justice, a class action was not necessary to achieve judicial economy or to effect behaviour modification.⁸⁰

Recently, in *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP*⁸¹ (“*Excalibur ODC*”), the Ontario Divisional Court upheld the ruling of Perell J. It was argued that Perell J incorrectly found that joinder was the preferable procedure, as the respondent did not raise joinder in their submissions in the certification application. In response to this argument, Lederer J held that “[j]oinder is not simply an alternative, it is the default position in considering whether a class proceeding is or is not the preferable procedure”.⁸² It was found that Perell J had not imposed joinder on the plaintiff, but had simply pointed out that joinder “would provide effective redress for Excalibur and... other investors could join the action as co-plaintiffs”.⁸³ In her dissent, Sachs J held that it could not be assumed that joinder was an available alternative as there was no evidence before Perell J that: the other identified class members would be prepared to assume the burdens, risks and responsibilities of commencing their own claims; the investors would be able to or would want to retain the same legal representative; or, the respondent would retain the same legal representative to defend these actions.⁸⁴

In agreeing with Perell J’s finding that joinder was the preferable procedure, Lederer J made the following observation regarding the necessity of class proceedings:

“A class action occupies an unusual place in our civil justice system. Typically, litigation is between two (or more) identified parties. There is a *lis inter partes*. The parties play an immediate role and take a direct responsibility for the carriage of the action. A class action is directed by more public concerns: access to justice, behaviour modification and judicial

⁷⁸ 2007 ONCA 334, 85 OR (3d) 321.

⁷⁹ Para 218.

⁸⁰ Para 217.

⁸¹ 2015 ONSC 1634.

⁸² Para 13.

⁸³ Para 13.

⁸⁴ Para 79.

economy. These broader concerns are the purpose behind the process. They change the role of the immediate parties and the general purpose of litigation, which is to resolve disputes between members of our society. We should be careful to use class proceedings when they are needed, not just because they can be made to apply and appear convenient. The decision of Mr. Justice Perell, where it considers the preferable procedure, reflects this concern. He found that in this case, the action can be carried forward in a way that does not impinge on any of the three underlying policy concerns and without the added procedural requirements of a class proceeding. It may be, as the report of the Law Reform Commission suggested, that joinder will not always be an appropriate means of proceeding; that does not mean it never is. In this case, the motion judge found it both viable and appropriate. It can do the job.”⁸⁵

In view of the above, it can be concluded that the point of departure in Ontario law to determine whether a class action is the preferable procedure is to ascertain whether it represents a fair, efficient and manageable procedure that is preferable to any alternative method of resolving the claims. This is measured with regard to the underlying policy objectives of access to justice, behaviour modification and judicial economy and the extent to which certification furthers those objectives. In considering an alternative to a class action, the court should examine whether that option could provide suitable procedural protections and effective redress for the claims being made.⁸⁶

Specifically, it appears that courts should continue to apply the preferable procedure criteria set out in *AIC Limited v Fischer*⁸⁷ (“*AIC*”). This entails that courts “focus on the underlying purpose and nature of the alternative proceeding as compared with the class proceeding” and that they “assess the capacity of the alternative procedure to adequately resolve the claims raised by the class members”.⁸⁸ Sachs J for the minority stated that Perell J failed to follow *AIC* and that, if he had properly conducted the access to justice analysis detailed in *AIC*, he would not have concluded that joinder was the preferable procedure.⁸⁹ However, Lederer J held that Perell J had in fact applied the preferable procedure criteria set out in *AIC*:

⁸⁵ Para 26.

⁸⁶ Para 10.

⁸⁷ 2013 SCC 69.

⁸⁸ Para 79.

⁸⁹ Para 78.

“Counsel for the plaintiff expressed concern that, in considering whether a class proceeding was the preferable procedure, Mr. Justice Perell was required, and failed, to consider five questions identified in *AIC Limited v. Fischer* to be answered when considering whether alternatives to a class action would achieve access to justice. They are listed by Mr. Justice Perell in his reasons. Each is considered by him, albeit not under a listed heading or within a discrete paragraph. However, these questions are not to be ‘...considered in isolation or in a specific order, but should inform the overall comparative analysis’. In the decision of Mr. Justice Perell, some are specifically dealt with and the answers to others are infused as part of and found throughout the discussion of the preferable procedure criterion.”⁹⁰

Accordingly, the fact that the majority of the Ontario Divisional Court upheld the ruling of Perell J is relevant insofar as it provides insight into the interpretation and application of the preferable procedure requirement by Ontario courts. Perell J, in applying the preferable procedure requirement, essentially found that joinder was preferable because there were no significant economic, psychological or social barriers to individual actions. The applicants failed to show that there was a ‘genuine need’ for the common issues to be resolved on a class-wide basis. In this regard, Perell J emphasised that the proposed representative plaintiff had a claim of almost \$1 million that would justify taking on the litigation risk – it did not genuinely need a class action to obtain access to justice; the class members were all known and were all ‘accredited investors’ with a net worth of at least \$1 million or two years of \$200,000 plus income – they were not without resources to litigate; there was enough money at stake to warrant a contingency fee arrangement even without a class action; a class action would achieve only modest judicial economy over individual actions or the joinder of claims; there were no psychological or social barriers to bring individual claims; while a class action would be manageable, it would also be more procedurally cumbersome and protracted than a regular action; behaviour modification was not needed beyond the behaviour modification that comes from a regular tort action.⁹¹ In this regard, Lederer J held that:

“Joinder can respond to the issues without the additional steps (certification motion, identification of common issues and separation to deal with individual issues) that accompany a class proceeding. There is no reason to suggest that it cannot accommodate the needs of all those who wish to take part, each with an eye to the nature and value of their involvement. ‘A

⁹⁰ Para 23.

⁹¹ Para 209.

common procedural barrier is that there is no other procedure [other than a class proceeding] to afford meaningful redress.’ Here there is joinder.”⁹²

The founding papers in an application for certification of a class action in Ontario should, in view of the above, address the availability of joinder as an alternative to the class action, with regard to the considerations set out above. In particular, respondents should consider addressing *inter alia* the availability of joinder as an available alternative to the class action and the relative ‘necessity’ of the class proceeding as a mechanism for pursuing the claims at issue, all within the framework detailed by the court in *AIC*.

2 2 4 South Africa

As we have seen, the law in the foreign jurisdictions referred to above regarding the circumstances when a class action, rather than joinder, should be utilised is, for the most part, comprehensively dealt with in statute and court rules, supplemented by an extensive body of case law. The approach of our courts in determining the appropriateness of a class action, in the absence of legislation and court rules regulating the issue, will be considered in more detail below.

2 2 4 1 Joinder as an alternative

Before considering the approach of our courts to determining the appropriateness of a class action, a brief note on joinder may be appropriate. The joinder of defendants is defined in rule 10(3) of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (“Uniform Rules”):

“Several defendants may be sued in one action... 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.”⁹³

⁹² Para 25.

⁹³ See *Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd* 2015 2 SA 322 (GJ) para 4.

Under the common law a number of defendants may be joined whenever convenience so requires.⁹⁴ In this regard, Caney J in *Anderson v Gordik Organisation*⁹⁵ held that joinder may be justified even if the person joined is not a necessary party⁹⁶ and accepted that the court could, in a proper case, permit joinder purely on the grounds of convenience especially in order to save costs or to avoid multiplicity of actions.⁹⁷ In such a case, the right of relief of the party sought to be joined to the proceedings must be dependant upon determining substantially the same question of law or fact.⁹⁸ This common-law power is complemented by rule 10(1) of the Uniform Rules which allows joinder on the grounds of convenience under certain circumstances. In *Vitorakis v Wolf*⁹⁹ it was held that “our modern rules of court are so explicit on this point that there is now hardly anything left of the basic common-law approach to joinder and intervention”.¹⁰⁰ However in *Rabinowitz NNO v Ned-Equity Insurance Co Ltd*¹⁰¹ the court held that the rules were not intended to be exhaustive of the cases in which a party may be joined and that the court could still exercise its common-law power to allow joinder whenever convenience so requires.¹⁰² Victor J, in *Fluxmans Incorporated v Lithos Corporation of SA*,¹⁰³ held that:

“Parties may only be joined as a matter of necessity and not convenience. It is only necessary if the parties sought to be joined would be prejudicially affected by the judgment of the court in the proceedings. See *Judicial Service Commission and Another v Cape Bar Council and another* 2013 (1) SA 170 (SCA) at par [12] where the court held that: ‘It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of

⁹⁴ See *Van der Lith v Alberts* 1944 TPD 17. In *McIndoe and others (in their capacities as joint liquidators of G&D Shoes (Pvt) Ltd and Belmont Leather (Pvt) Ltd) v Royce Shoes (Pty) Ltd* 2000 3 All SA 19 (W) 24, where it was held that “convenience may, depending on the circumstances, constitute a separate ground to hold that it was competent for the plaintiffs to join forces but the considerations in support of convenience should be clearly circumscribed or at least arise by inference from the facts alleged in the particulars of claim”.

⁹⁵ 1962 2 SA 68 (D).

⁹⁶ 70D-E.

⁹⁷ 72-72.

⁹⁸ AC Cilliers, C Loots & C Nel *Herbstein & Van Winsen Civil Practice of the High Courts of South Africa* 5 ed (2009) 211-212.

⁹⁹ 1973 4 All SA 109 (W).

¹⁰⁰ 112.

¹⁰¹ 1980 3 All SA 694 (W).

¹⁰² 697.

¹⁰³ (No 2) 2012 2 SA 322 (GJ) para 5.

convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one.”

In *Shake's Multi-Save Supermarket CC v Haffejee; In re: Shake's Multi-Save Supermarket CC v Haffejee*¹⁰⁴ (“*Shakes*”), an application of joinder was opposed by arguing that joinder of parties on the basis of convenience is no longer possible.¹⁰⁵ Reliance was placed on the above comment of Victor J. In *Shakes*, Landman J held as follows:

“In my view, the grammatical construction of the dictum of the Supreme Court of Appeal in the Judicial Service Commission judgment does not support the proposition. The court also made it clear that it was not concerned with joinder as a matter of convenience and that a plea of non-joinder can only be sustained if a person, who is not party to the action, has a direct and substantial interest which may be prejudicially affected by the judgment of the court in the proceedings in question. If the court in *Fluxman Incorporated* meant to say that parties may only be joined as a matter of necessity I would respectfully disagree. It is competent for the plaintiff to seek to join the Close Corporation on the grounds of convenience.”¹⁰⁶

As is evident from the above, an alternative to joinder on the basis of convenience is that parties may be joined on the basis of necessity because the party who is sought to be joined has a direct and substantial interest in the matter.¹⁰⁷ Where it is apparent that there is another party with a direct and substantial interest in the matter, the court has no discretion to allow the matter to proceed without joinder. This is because of the principle of *audi alteram partem*; interested parties should be afforded an opportunity to be heard before an order is made that will affect them.¹⁰⁸ However, where the court is satisfied that there has been waiver of a right to be joined, joinder of necessity can effectively be circumvented.

¹⁰⁴ (413/12) 2015 ZANWHC 48 (21 August 2015).

¹⁰⁵ Para 3.

¹⁰⁶ Para 4.

¹⁰⁷ Joinder of necessity is not governed by the court rules. Guidance must be sought from case law as to when joinder of parties is necessary.

¹⁰⁸ *Cilliers et al Civil Practice of the High Courts of South Africa* 208.

A direct and substantial interest has been held to be “an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation”.¹⁰⁹ It is a legal interest in the subject matter and the outcome of the litigation, excluding an indirect commercial interest. The possibility of such an interest is sufficient, and it is not necessary for the court to determine that it does in fact exist.¹¹⁰ In the absence of a direct and substantial interest, a court has a discretion to order joinder on the basis of convenience.¹¹¹

In order to show that a class action is the most appropriate means to adjudicate class members’ claims, the appropriateness of joinder as an alternative would also need to be considered. The above exposition of joinder of necessity and convenience will accordingly become relevant when considering the South African position regarding the assessment of the appropriateness of class proceedings set out below.

2 2 4 2 Class action objectives

In *Ngxuza*, Cameron JA held that the primary feature of class actions is that, although they are not formally and individually joined, class members benefit from, and are bound by, the outcome of the class action, unless they opt out.¹¹² He referred to the fact that, until 1994, if a claimant wanted to participate in existing court proceedings, he or she had to comply with the formalities of joinder.¹¹³ Cameron JA accordingly dealt with the differences between joinder and a class action and the circumstances where a class action would be more appropriate than litigating through joinder. It is worth repeating what Cameron JA held in this regard:

“The difficulties the traditional approach to participation in legal process create are well described in an analysis that appeared after the class action was nationally regularised in the United States through a Federal Rule of Court more than 60 years ago:

¹⁰⁹ *Bohlokong Black Taxi Association v Interstate Bus Lines (Pty) Ltd* 1997 4 SA 635 (O) 644A-B.

¹¹⁰ Cilliers *et al Civil Practice of the High Courts of South Africa* 217-218.

¹¹¹ 219.

¹¹² Para 4. Or, unless they have not opted into the class action.

¹¹³ Para 4.

'The cardinal difficulty with joinder...is that it presupposes the prospective plaintiffs advancing *en masse* on the courts. In most situations, such spontaneity cannot arise either because the various parties who have the common interest are isolated, scattered and utter strangers to each other. Thus, while the necessity for group action through joinder clearly exists, the conditions for it do not. It may not be enough for society simply to set up courts and wait for litigants to bring their complaints – they may never come. What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it.' [H Kalven & M Rosenfield "The Contemporary Function of Class Suit" (1941) *University of Chicago Law Review* 684 687-688]

The class action cuts through 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...The reason the procedure is invoked so frequently lies in the complexity of modern social structures and the attendant cost of legal proceedings:

'Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all.' [H Kalven & M Rosenfield "The Contemporary Function of Class Suit" (1941) *University of Chicago Law Review* 684 686]"¹¹⁴

In *Excalibur ODC*, Sachs J referred to the frailties of joinder as an alternative procedure as recognised by the Ontario Law Reform Commission.¹¹⁵ She stated that joinder will not be of much assistance to individuals with small claims, especially insofar as individual litigants will generally be liable for the costs pertaining to their legal representation whether the action succeeds or fails. And if it fails, they may also be liable for the defendant's costs. Further, according to Sachs J, "[i]f the victims of a mass wrong are a less than cohesive group, all are unlikely to be joined in one action...the result will be a multiplicity of

¹¹⁴ Paras 4-5.

¹¹⁵ Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982) 82-86.

proceedings, with the concomitant risk of inconsistent verdicts, additional expense for the parties and a greater burden on the courts”.¹¹⁶

According to Cameron JA, because there are so many poor individuals in South Africa who do not have the necessary resources to litigate, and because there are technicalities associated with joinder, the attainment of justice could be unduly complicated.¹¹⁷ He did not comment on the identifiability of class members and its impact on the appropriateness of class proceedings. Cameron JA attached significant weight to access to justice as a consideration in deciding the appropriateness of a class action compared to joinder. He held that the needs of the types of individuals referred to above “who are most lacking in protective and assertive armour” should inform our understanding of the provisions of the Constitution of the Republic of South Africa, 1996 (“Constitution”), and that “it is against the background of their constitutional entitlements” that the class action provision in the Bill of Rights must be interpreted.¹¹⁸ Cameron JA emphasised that, although there is no legislative framework which regulates class actions in South Africa, section 39(2) of the Constitution enjoins the courts to promote the spirit, purport and objects of the Bill of Rights when developing the common law, and upon which section 173 confers inherent power to develop the common law, taking the interests of justice into account.¹¹⁹

In *Pretorius v Transnet Second Defined Benefit Fund*¹²⁰ (“*Pretorius*”), Makgoba J referred to *Ngxuza* and confirmed the finding of the Supreme Court of Appeal that the courts are enjoined by section 39(1)(a) of the Constitution to interpret the Bill of Rights so as to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom” and, in terms of subsection (2), to develop the common law so as to “promote the spirit, purport and objects of the Bill of Rights”.¹²¹ With reference to sections 39(2) and 173 of the Constitution, Makgoba J held that the provisions regarding a class action must be interpreted “generously and expansively, consistent with the mandate given to the courts to uphold the Constitution, thus ensuring that the rights in the

¹¹⁶ Para 89.

¹¹⁷ Para 6.

¹¹⁸ Para 12.

¹¹⁹ Para 12.

¹²⁰ 2014 6 SA 77 (GP).

¹²¹ Para 24.

Constitution enjoy the full measure of protection to which they are entitled”.¹²² In relation to assessing the appropriateness of class proceedings, Makgoba J held as follows:

“The situation in the present case seems pattern-made for class proceedings. This is so in that the class the applicants represent in this case is drawn from the very poorest within our society (old pensioners), those in need of statutory social assistance. They also have the least chance of vindicating their rights through the ordinary legal process. As individuals they are unable to finance a legal action, given their meagre income in the form of pension moneys. What they have in common is that they are victims of official excess, bureaucratic misdirection and what they perceive as unlawful administrative methods.”¹²³

The primary consideration taken into account by Makgoba J in deciding whether a class action is the most appropriate means of adjudicating the claims of the class members was access to justice. Specifically, Makgoba J considered the ability of individual class members to seek legal redress by means of joinder and whether, through joinder, they would be able to vindicate their rights.¹²⁴

Makgoba J did not refer to the comments of Wallis JA in *Children’s Resource Centre Trust* or Nugent JA in *Mukaddam SCA* on the issue of joinder.¹²⁵ He did, however, refer to *Ngxuza* and accordingly attributed significant weight to the impact of the claimants’ social and financial circumstances on their ability to vindicate their rights through a class action as opposed to some other mechanism, such as joinder. Accordingly, the court in *Pretorius*, as was the case in *Ngxuza*, attached significant weight to the claimants’ constitutional right of access to justice. However, the courts in *Ngxuza* and *Pretorius* did not provide guidance regarding the test that our courts should apply, and the factors that they should consider, when determining the appropriateness of a class action, compared to joinder. They also did not indicate when, if at all, the identifiability of class members will preclude class certification.

¹²² Para 27.

¹²³ Para 26.

¹²⁴ Para 26.

¹²⁵ The court in *Mukaddam CC* did not deal with the comments of Nugent JA in *Mukaddam SCA* on joinder.

2 2 4 3 Identifiability of class members

The *Ngxuza* and *Pretorius* judgments differ significantly from the *Mukaddam SCA* judgment in respect of the courts' approach to determining when a class action is the most appropriate means of adjudicating class members' claims, as opposed to joinder. The identifiability of class members appears to be the key consideration which the court in *Mukaddam SCA* took into account to determine whether a class action is the appropriate means for adjudicating class members' claims. Accordingly, where the individual class members are all identifiable, regardless of *inter alia* their financial means, the size of their individual claims and the size of the class, they may need to be joined as plaintiffs to the proceedings. A class action may therefore not be the appropriate procedural device to be utilised in such circumstances. However, where for example the individual class members are not in a financial position to vindicate their rights through ordinary litigation, where the class is numerous, or where the individual claims of class members are small, joinder may be costly, cumbersome and inappropriate. Requiring joinder in such circumstances may deprive class members of their right to access to justice. In other words, the fact that class members are identifiable should not necessarily mean that a class action is not the appropriate mechanism to adjudicate class members' claims. There are other considerations that must be taken into account in making this determination. These considerations will be dealt with in more detail below.

Hurter states that the approach adopted by the court in *Ngxuza* conforms to the view in foreign jurisdictions that the class should merely be ascertainable or identifiable and not require greater specificity. She states that "it would therefore be safe to say that in SA it will not be required that the identity of each member be known, but that it would be sufficient if it can be determined in some manner whether a person is a member of the class or group or not".¹²⁶

It has been suggested in the context of the American class action that, while a class does not need to be ascertainable, if the plaintiff can identify each individual class member by name, the class may not be too numerous for joinder to be impracticable.¹²⁷ However, the approach of the United States in this regard is that the identifiability of individual class

¹²⁶ E Hurter "The class action in South Africa: Quo Vadis" (2008) 41(2) *De Jure* 293 302.

¹²⁷ Anderson & Trask *Class Action Playbook* 27.

members will *form part* of the assessment of the impracticability of joinder – it is not the only consideration in determining practicability of joinder compared to class proceedings.¹²⁸ There are other relevant factors to consider, such as the geographical dispersion of class members. The more geographically dispersed the class is, the more difficult it would be to require joinder of individual class members. In other words, if the class is limited to a specific geographical territory, it is more likely that joinder would be feasible.¹²⁹ Even where all the class members are identifiable, joinder is also likely to be impracticable where each class member's claim is small or when the class members are poor, uneducated or lack the resources that are necessary to pursue their claims individually. In such circumstances, the class members are unlikely to litigate unless a class is certified, thus making joinder in the absence of a class all but impossible.¹³⁰ Consideration will also be given to the ability and potential willingness of class members to institute individual actions.¹³¹ The facts of the specific case may also indicate other reasons why joinder is impracticable.

In respect of representative proceedings in Australia, it is important to bear in mind that simply satisfying one of the requirements in section 33N is insufficient for the purpose of seeking the discontinuance of the representative proceeding. For example, where a court is of the view that the costs that would be incurred if the proceeding were to be continued as a representative proceeding, are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding, or where all the relief sought could be obtained by means of litigation through joinder,¹³² the court would also need to be convinced that it is in the interest of justice to grant the order discontinuing the representative proceeding.¹³³

It would appear that the relevant considerations in determining the practicability of joinder and the superiority of class proceedings in the context of the American class action are similar to the considerations that are relevant in determining the appropriateness of representative proceedings in the context of the Australian Federal Court Act. For

¹²⁸ Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 40.

¹²⁹ Anderson & Trask *Class Action Playbook* 27.

¹³⁰ Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 41-42.

¹³¹ Greer *Practitioner's Guide to Class Actions* 60-61.

¹³² Section 33N(a) of the Federal Court of Australia Act of 1976.

¹³³ Section 33N of the Federal Court of Australia Act of 1976.

example, considering whether the representative proceeding will provide an efficient and effective means of dealing with the claims of group members¹³⁴ also forms part of the American impracticability and superiority inquiries.¹³⁵ At the very least, in both these class action regimes there is no room for concluding that joinder is practicable or appropriate solely on the basis that all the individual class members are identifiable.¹³⁶ The same applies in respect of the class action regime of Ontario – the identifiability of all the class members does not necessarily exclude a class action as the preferable procedure.¹³⁷ In view of these considerations, it therefore does not appear to be the case that, where the class members are all identifiable, joinder is necessarily the most appropriate adjudication mechanism. There are other relevant considerations that should be taken into account in conducting the appropriateness-inquiry. These considerations will be dealt with in more detail below.

2 2 4 4 Access to justice

It is apparent from the approaches of the selected foreign jurisdictions that the class action objectives constitute important considerations when determining the appropriateness of a class action, compared to joinder. In the United States, the court in *Safran v United Steelworkers of America AFL-CIO*¹³⁸ held that the “numerosity requirement reflects the general theory behind class action lawsuits which is to permit a large group of individuals whose interests are sufficiently related to bring one lawsuit, instead of many lawsuits, so as to conserve judicial resources and increase judicial access”.¹³⁹ As has been mentioned, in *Femcare* Finkelstein J for the Federal Court of Australia held that whether or not it is in the interests of justice to make an order that the representative proceeding be terminated

¹³⁴ Section 33N(c) of the Federal Court of Australia Act of 1976.

¹³⁵ For example, rule 23(b)(3) requires that a class action be superior to other methods for fair and efficient resolution of the conflict.

¹³⁶ N Kirby “South Africa” in P G Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* 378 412; Greer *Practitioner’s Guide to Class Actions* 58; Anderson & Trask *Class Action Playbook* 26; and section 33H(2) of the Federal Court of Australia Act of 1976.

¹³⁷ In *Keatley Surveying Inc v Teranet Inc* 2014 ONSC 1677, Sachs J held that a plaintiff is only required to propose a class definition that provides for an identifiable class of two or more people – a plaintiff is not required to establish the actual existence of two or more potential class members.

¹³⁸ 132 FRD 397 (WD Pa 1989).

¹³⁹ 401.

requires consideration of the principal objects of the class action.¹⁴⁰ Similarly, in the context of class proceedings in Ontario, the court in *Hollick* held that the class action objectives should constitute the lens through which the preferability inquiry should be conducted.¹⁴¹ In *Excalibur*, the Ontario Supreme Court, regarding the preferability inquiry, referred with approval to *AIC*:¹⁴²

“The preferability analysis must be conducted through the lens of judicial economy, behaviour modification and access to justice. Justice Cromwell for the Court stated that access to justice has both a procedural and substantive dimension. The procedural aspect focusses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established. In *AIC Limited v. Fischer*, Justice Cromwell pointed out that when considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiffs' claims and to do so in a manner that accords suitable procedural rights. He said that there are five questions to be answered when considering whether alternatives to a class action will achieve access to justice: (1) Are there economic, psychological, social, or procedural barriers to access to justice in the case? (2) What is the potential of the class proceeding to address those barriers? (3) What are the alternatives to class proceedings? (4) To what extent do the alternatives address the relevant barriers? (5) How do the two proceedings compare?”¹⁴³

Hurter suggests that for a class action to be successful in the South African context, it needs to be uniquely South African “and cannot be the product of selective and haphazard adaptations of foreign solutions. It should be borne in mind that such solutions evolved in response to practice specific needs and are therefore not necessarily applicable to our situation, or may come with undesirable baggage”.¹⁴⁴

It is submitted that our courts' point of departure in determining whether a class action is the appropriate mechanism to adjudicate claimants' claims should also be the principal objectives of a class action. This entails determining, with reference to the facts of the specific case, whether a class action is necessary to achieve access to justice, whether it

¹⁴⁰ Para 152.

¹⁴¹ Paras 27-32.

¹⁴² 2013 SCC 69 paras 24-38.

¹⁴³ Paras 196-200.

¹⁴⁴ Hurter (2008) *De Jure* 303-304.

is necessary to achieve judicial economy and/or whether it is necessary to effect behaviour modification. However, it is submitted that, in South Africa, access to justice should be the primary consideration when assessing the appropriateness of class proceedings compared to joinder, as was the case in *Ngxuza* and *Pretorius*. Section 34 of the Constitution enshrines the right of access to courts and states that “[e]veryone 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”. The Constitution also recognises the values of human dignity and the advancement of human rights, and requires the State to respect, protect, promote, and fulfil the rights recognised in the Constitution.

In *Road Accident Fund v Mdeyide*¹⁴⁵ (“*Mdeyide*”), the Constitutional Court held that:

“The fundamental right of access to courts is essential for constitutional democracy under the rule of law. In order to enforce one's rights under the Constitution, legislation and the common law, everyone must be able to have a dispute that can be resolved by the application of law, decided by a court. The right of access to courts is thus protected in the Constitution”.¹⁴⁶

The *Mdeyide* case dealt with the limitation of the right of access to courts as provided for in section 34 of the Constitution by section 23(1) of the Road Accident Fund Act 59 of 1996, which limitation pertains to the imposition of a time limit with regard to claims for compensation against the Road Accident Fund. In determining the reasonableness and justifiability of the limitation, the Constitutional Court held that:

“Socio-economic conditions in South Africa are of course highly relevant in considering the reasonableness and justifiability of a limitation of the present kind. In a society where the workings of the legal system remain largely unfamiliar to many citizens, due care must be taken that rights are adequately protected as far as possible”.¹⁴⁷

The court¹⁴⁸ referred to *Mohlomi v Minister of Defence*¹⁴⁹ where Didcott J referred to:

¹⁴⁵ 2011 2 SA 26 (CC).

¹⁴⁶ Para 1.

¹⁴⁷ Para 70.

¹⁴⁸ Para 70.

¹⁴⁹ 1997 1 SA 124 (CC).

“[T]he background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons”.¹⁵⁰

Giving priority to those who are particularly vulnerable, in particular because of historical and socio-economic factors, is constitutionally required.¹⁵¹ Cameron JA, in *Ngxuza*, mentioned that the needs of these types of individuals should inform our understanding of the Constitution’s provisions and that it is against the background of their constitutional entitlements that section 38 should be interpreted. He emphasised that section 39(2) of the Constitution enjoins the courts to promote the spirit, purport and object of the Bill of Rights when developing the common law. This is amplified by section 173 conferring an inherent power upon the courts to develop the common law, taking the interests of justice into account.¹⁵²

It is against the above background that it is submitted that our courts’ primary consideration in determining the appropriateness of class proceedings should be class members’ right to access to justice.¹⁵³ For example, where the individual claimants are unable to litigate individually through joinder because they are drawn from the poorest portion of our society, access to justice dictates that a court should allow the matter to proceed as a class action. This ensures that the claimants’ financial and social circumstances do not serve to constitute a barrier to access to justice.¹⁵⁴

As mentioned, the test in *AIC* essentially entails conducting the preferability analysis through the lens of judicial economy, behaviour modification and access to justice, and

¹⁵⁰ Para 14. See also *Thusi v Minister of Home Affairs and 71 Other Cases* 2011 2 SA 561 (KZP) para 104; *S v Khanyile* 1988 3 SA 795 (N) 813A–B.

¹⁵¹ *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) paras 8-9. See also *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 25, where it was held that “[r]ights also need to be interpreted and understood in their social and historical context”.

¹⁵² Para 12.

¹⁵³ See fn 15 above.

¹⁵⁴ 1997 1 SA 124 (CC) para 14.

considering whether the class action alternative will achieve access to justice. This *inter alia* entails determining whether there are economic, psychological, social, or procedural barriers to access to justice in the case.¹⁵⁵ It is proposed that a test similar to the one formulated in *AIC* be applied by our courts to determine whether a class action is appropriate to adjudicate class members' claims.

It is suggested that our courts, when determining the appropriateness of a class action, compared to joinder, firstly consider whether certification of a class action is necessary to achieve access to justice.¹⁵⁶ In *AIC* it was held that “[a] class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered”.¹⁵⁷ To determine whether certification is necessary to achieve access to justice, it must be determined whether there are any potential barriers to access to justice, the existence of which can effectively be addressed by certification of a class action.¹⁵⁸ Possible barriers to access to justice include the geographical dispersion of class members; the inability of claimants to engage in individualised litigation; and, the difficulties associated with requiring litigation through joinder. These potential barriers are

¹⁵⁵ 2013 SCC 69 paras 24-38.

¹⁵⁶ For example, in *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP* 2007 ONCA 334, 85 OR (3d) 321 para 217 Perell J held that it was not shown that “a class action is necessary to overcome any barriers to access to justice”.

¹⁵⁷ Para 26.

¹⁵⁸ In the Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982) 121 it is stated that class actions can help overcome barriers to access to justice and may accordingly perform an important function in society. In *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP* 2007 ONCA 334, 85 OR (3d) 321 para 217 Perell J concluded that, on the facts, joinder was the preferable procedure *inter alia* because it was not shown that a “class action is necessary to overcome any barriers to access to justice”. In *AIC Limited v Fischer* 2013 SCC 69 paras 24-38 it was held that a court must consider whether there are barriers to access to justice in the given case. In Ministry of the Attorney General, British Columbia, *Consultation Document: Class Action Litigation for British Columbia* (1994) 8 it was held that “the opt out model is the more effective means to ensure that the barriers to justice, which class actions are intended to overcome, are reduced”. See also Alberta Law Reform Institute *Class Actions* (2000) Final Report No. 85 97; South African Law Commission *The Recognition of Class Actions Report* para 5.11; and, *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 4 SA 1184 (SCA) paras 4-6 where Cameron JA held that society cannot simply set up courts and wait for litigants to bring their complaints as barriers may exist that preclude their participation in litigious proceedings; hence, the need for class proceedings.

similar to those referred to by the United States Court of Appeals for the Second Circuit in *Robidoux v Celani*¹⁵⁹ where it was held that, when determining the practicability of joinder, “[r]elevant considerations include judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members”.¹⁶⁰

The geographical dispersion of class members should be taken into consideration as a potential barrier to access to justice. As mentioned, the more geographically dispersed the class members are, the less likely it is that they will engage in individualised litigation and the more impractical it is to join those class members.¹⁶¹ In such circumstances, a class action is likely to be more appropriate than joinder as a mechanism to adjudicate class members’ claims.¹⁶²

The inability of claimants to engage in individualised litigation is a further potential barrier to access to justice. This barrier entails consideration of various factors which may contribute to, or result in, the claimants’ inability to institute and pursue individual suits, such as whether the class members are poor and whether they lack resources.¹⁶³ The poorer the individual class members are, the more likely it is that they would be unable to litigate in the absence of certification of the class action.¹⁶⁴ A lack of resources and the

¹⁵⁹ 987 F.2d 931.

¹⁶⁰ 936.

¹⁶¹ See, for example, *Dameron v Sinai Hosp. of Baltimore, Inc.*, 595 F. Supp 1404, 1408 (D Md 1984), *aff’d in part and rev’d in part* 815 F.2d 975 (4th Cir. 1987); *In re Southeast Hotel Properties Limited Partnership Investor Litig.*, 151 F.R.D. 597, 601 (WDNC 1993). *United Brotherhood of Carpenters and Joiners of America Local 899 v Phoenix Associates, Inc.*, 152 F.R.D. 518, 522 (SD W Va 1994).

¹⁶² According to Anderson & Trask *Class Action Playbook* 27, if the class is limited to a specific geographical territory it is likely that joinder would be feasible.

¹⁶³ See South African Law Commission *The Recognition of a Class Action in South African Law Working Paper 57* para 5.25, where it is stated that a large portion of South African society is poor, illiterate and ignorant because they have not received a quality education and that the need to ensure that such people benefit from class actions is greater in South Africa than in certain other foreign jurisdictions.

¹⁶⁴ In *Lake v First Nationwide Bank* 156 FRD 615, 625 (E.d.Pa. 1994) it was held that, in performing the superiority analysis in terms of rule 23(b)(3) of the Federal Rules, the court must consider the “inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually”. Similarly, according to Cameron JA in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA) para 6, because there are so many

inability of class members to meet the costs of legal representation generally means that litigation through joinder would be too expensive.¹⁶⁵ It is therefore likely that, in such circumstances, a court would conclude that a class action is appropriate.¹⁶⁶ Other relevant factors that our courts should consider that may contribute to the inability of claimants to engage in individualised litigation include:

“[I]gnorance of the availability of substantive legal rights (Ontario Law Reform Commission, *Report on Class Actions*, vol. I (1982) (‘OLRC Report’), at p. 127), ignorance of the fact that significant injuries have occurred (OLRC Report, at pp. 127-28), limited language skills (see e.g. Rubenstein, at § 4:65), elderly age of the claimants (see e.g. *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.)), frail emotional or physical state of the claimants (see e.g. *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184), fear of reprisals by the defendant (OLRC Report, at p. 128; see e.g. *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.J.)), or alienation from the legal system as a result of negative experiences with it (OLRC Report, at pp. 128-29)...”¹⁶⁷

There may also be procedural hurdles that could deprive claimants of access to justice. It has been mentioned above that the primary difficulties associated with joinder is that it is a cumbersome and costly process. In *Ngxuza*, Cameron JA also referred to the

poor individuals in South Africa who do not have the necessary resources to litigate, the attainment of justice could be unduly complicated. See also M Nyenti “Access to Justice in the South African Social Security System: Towards a Conceptual Approach” (2013) 4 *De Jure* 901 914 where he states that “[o]ne of the factors restricting the right of access to courts in South Africa is the long distances that many people have to travel in order to access the courts and related services”.

¹⁶⁵ See *Gold Fields Limited and Others v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited and Others* 2015 4 SA 299 (GJ) para 55, where Mojapelo DJP held that “[t]he positive impact of litigation funding agreements that no one can deny is that such agreements promote access to justice. The importance is elevated a step higher where the funded litigant is one who, because of poverty and lack of resources, would otherwise not have been able to litigate...”

¹⁶⁶ In *Robidoux v Celani* 987 F.2d 931 936 it was held that “the potential class members are distributed over the entire area of Vermont. They are also economically disadvantaged, making individual suits difficult to pursue...Thus, the district court abused its discretion in determining that the class was not so numerous that joinder of all members would be impracticable”.

¹⁶⁷ 2013 SCC 69 para 27. See also Nyenti (2013) *De Jure* 914, where he states that “knowledge of rights is a prerequisite to access to justice”.

technicalities in legal procedure, including joinder, as a possible barrier to access to justice.¹⁶⁸

Our courts should accordingly consider, on the facts of the case, whether certification of a class action is necessary to overcome the above-mentioned barriers and to achieve access to justice.¹⁶⁹

2 2 4 5 Practical considerations

However, it is submitted that simply considering potential barriers to access to justice and determining whether certification is necessary to overcome those barriers, is insufficient to assess the appropriateness of a class action. Although access to justice, informed by the above-mentioned factors, should constitute the primary consideration, the courts' assessment should further be informed by practical considerations that are otherwise relevant to determining the appropriateness of class actions compared to joinder.¹⁷⁰

Our courts should also consider the judicial economy that would arise if the multiplicity of actions were avoided as well as the necessity of class proceedings to effect behaviour modification. Achieving judicial economy would entail joining together a number of lawsuits that would otherwise have been brought separately.¹⁷¹ Behaviour modification would entail

¹⁶⁸ Para 6. In *Eggleston v Chicago Journeymen Plumbers' Local Union No. 130*, U.A. 657 F.2d 890, 895 (7th Cir. 1981), regarding the American feasibility consideration, the court held that “[o]rdinarily it is not difficult to ascertain if a class approach would be useful to avoid the practical problems of trying to join many named plaintiffs or otherwise clog the docket with numerous individual suits. Except for the class approach many might never receive any redress for the wrong done them”. See also Kirby “South Africa” in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 386; *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 4 SA 1184 (SCA) paras 4-6.

¹⁶⁹ In *Robidoux v Celani* 987 F.2d 931 936 it was held that the “[d]etermination of practicability depends on all the circumstances surrounding a case...”

¹⁷⁰ See *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 4 SA 1184 (SCA) para 16.

¹⁷¹ See, for example, the approach in Ontario as set out in *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP* 2007 ONCA 334, 85 OR (3d) 321 para 217 where Perell J held that it was not shown that “a class action is necessary to overcome any barriers to access to justice. In the case at bar, a class action is not necessary to achieve behaviour modification and a class action would not be particularly helpful in providing judicial economy.” See also *Hollick v Toronto (City)* 2001 3 SCR 158 paras 27-32; *Markson v MBNA Canada Bank* 2007 ONCA 334, 85 OR (3d) 321 paras 69-70; *Excalibur Special Opportunities LP v*

detering potential defendants, who may otherwise have assumed that their minor wrongs would not result in litigation, from similar future wrongdoing.¹⁷²

Apart from considering judicial economy and behaviour modification, it is further proposed that the courts should also consider any other practical consideration that may be relevant when determining the appropriateness of class proceedings. Such considerations could typically include the manageability of the class action;¹⁷³ whether the class members' claims are large enough to warrant being pursued separately;¹⁷⁴ and, the importance of the common issues in relation to the claims as a whole. The manageability of the class action entails taking into account *inter alia* the size of the class,¹⁷⁵ the identifiability of class

Schwartz Levitsky Feldman LLP 2015 ONSC 1634 para 26; *AIC Limited v Fischer* 2013 SCC 69 paras 24-38. In *Bright v Femcare Limited* 2002 FCAFC 243; 195 ALR 574 para 152, Finkelstein J, for the Federal Court of Australia, held that whether or not it is in the interests of justice to make an order that the representative proceeding be terminated, requires consideration of the principal objects of the class action procedure. See also South African Law Commission *The Recognition of Class Actions Report* para 5.11.3.

¹⁷² *Western Canadian Shopping Centres v Dutton* (2001) 2 S.C.R. 534 para 29. See also R Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 6.

¹⁷³ For the type of considerations that could typically inform the manageability of the class action see, for example, Anderson & Trask *Class Action Playbook* 62; *Eisen v Carlisle & Jacquelin*, 417 U.S 156, 164 (1974); *Carnegie v Mutual Saving Life Insurance Company* No. CV-99-S-3292-NE, 2002 U.S. Dist. Lexis 21396, 76-77 (N.D. Ala. Nov. 1, 2002); *Hollick v Toronto (City)* 2001 3 SCR 158 para 32; *Markson v MBNA Canada Bank* 2007 ONCA 334, 85 OR (3d) 321 paras 69-70; and, *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP* 2007 ONCA 334, 85 OR (3d) 321 para 217.

¹⁷⁴ In *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA) para 19, Wallis JA mentions considerations that are relevant to determining the appropriateness of class proceedings compared to joinder, including considering whether the claims are large enough to warrant being pursued separately. See also *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA) paras 4-5.

¹⁷⁵ Regarding the numerosity requirement contained in rule 23 of the Federal Rules, the bigger the class the more likely it is that joinder would be impracticable. According to Greer *A Practitioner's Guide to Class Actions* 58, it is generally accepted that "when class size reaches substantial proportions...the impracticability requirement and hence the numerosity requirement is usually satisfied by the numbers alone". See also Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 131 where it is stated that, although courts are reluctant to certify classes whose members would be difficult to communicate with or identify, the sheer size of the class would not necessarily result in the denial of certification. Regarding section 33N(1)(d) of the Federal Court of Australia Act of 1976, representative proceedings can be discontinued where it is "otherwise inappropriate that the claims be pursued by means of a representative proceeding". According to Cashman *Class Action Law and Practice* 321, the size of the class is a relevant consideration to determine whether it is 'otherwise inappropriate'. In *Nkala v Harmony Gold Mining Company*

members¹⁷⁶ and the extent of the non-common issues that would require individualised adjudication.¹⁷⁷ The weight given to each of these factors should vary in proportion to those factors that form part of the access to justice consideration. For example, although the class members are identifiable, if the individual claimants are poor and therefore unable to litigate through joinder, a court should not find that the fact that they are identifiable makes joinder the appropriate means for adjudicating the claimants' claims. Extensive provision needs to be made for individuals who are not in a social or financial position to seek legal redress.¹⁷⁸

Importantly, as part of the practical considerations referred to above, a court would need to consider the manageability of class proceedings. Judicial management is considered to be increasingly important for the effective functioning of civil litigation in general, and of the class action system in particular.¹⁷⁹ Moreover, as class action litigation is traditionally more complex than other kinds of litigation, it requires greater administration and management of the case.¹⁸⁰ Where manageability problems occur during the course of class proceedings, they could potentially result in the termination of the class action.¹⁸¹

Limited (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016) para 52 Mojapelo DJP held that “[w]hat we have here is that the sizes of the two classes may be very large but that does not make the class definition overbroad or the class action trial unmanageable”.

¹⁷⁶ According to Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 40, the approach of the United States is that the identifiability of individual class members will form part of the assessment of the impracticability of joinder. It is not the only consideration in determining the practicability of joinder compared to class actions. In *Keatley Surveying Inc v Teranet Inc* 2014 ONSC 1677, Sachs J held that, in Ontario, a plaintiff is only required to propose a class definition that provides for an identifiable class of two or more people – a plaintiff is not required to establish the actual existence of two or more potential class members. See also Kirby “South Africa” in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 378 412; Greer *Practitioner’s Guide to Class Actions* 58; Anderson & Trask *Class Action Playbook* 26; and section 33H(2) of the Federal Court of Australia Act of 1976.

¹⁷⁷ Chapter five below considers whether individual issues such as causation and damages, may render a class action unmanageable.

¹⁷⁸ See *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 4 SA 1184 (SCA) paras 4-5.

¹⁷⁹ C Piché “Judging Fairness in Class Action Settlements” (2010) 28 *Windsor YB Access Just* 111 121.

¹⁸⁰ According to Karlsgodt “United States” in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 44, a tool that is regarded as useful in managing class action proceedings in the United States is to require the submission of a trial plan – a document that sets out the claim(s), the relief, the witnesses and evidence that will be used to prove the plaintiffs’ claims at the trial. See also Piché (2010) *Windsor YB Access Just* 117.

The South African Law Commission (“SALC”) has recommended that, because class actions are complex and the right and obligations of absent class members are determined, our courts should be more active in managing class actions compared to ordinary litigation.¹⁸² It accordingly proposed that “the courts should be given broad general management powers exercisable either on the application of a party or class member or on the court’s own motion”.¹⁸³

Although the draft legislation proposed by the SALC does not expressly incorporate the manageability of class actions as a factor to be considered at the certification stage, it will no doubt play a role in the context of other questions. For example, it would be relevant in deciding whether a class action would be the appropriate method of adjudicating class members’ claims.¹⁸⁴ If a class action would turn out to be unmanageable, it is unlikely that class proceedings would be regarded as appropriate.

2 2 4 6 Summary

Following *Children’s Resource Centre Trust* and *Mukaddam SCA* it remains unclear what test our courts must apply to determine the appropriateness of a class action and what factors they must consider to make this determination. The court in *Mukaddam SCA* erred in its approach to assessing the appropriateness of a class action by essentially concluding that, where all the individual class members are identifiable, joinder is more appropriate. It has been shown why such a conclusion could be problematic.

The approaches of the foreign jurisdictions referred to above have effectively been to assess the appropriateness of class actions with regard to the principal advantages of the class action. It is submitted that our courts should adopt a similar approach. The approach of our courts in assessing appropriateness should, however, be tailored to meet the needs and demands of our society. It is accordingly suggested that, in making this assessment, our courts should attach significant weight to access to justice, due to the constitutional

¹⁸¹ In *Eisen v Carlisle and Jacquelin* 417 US 156 (1974) the enormity of the class and related issues such as notice to absent members and the distribution of an aggregate award to class members caused serious doubt about the viability of the case.

¹⁸² South African Law Commission *The Recognition of Class Actions Report* para 5.9.2.

¹⁸³ Para 5.9.4.

¹⁸⁴ De Vos (1996) TSAR 649-650.

prominence of this principle, as well as the importance of responding to acute social needs. Specifically, our courts should consider possible barriers to access to justice to determine whether certification is necessary. Furthermore, our courts should consider whether certification is necessary to achieve judicial economy and behaviour modification. Finally, the courts should also determine whether it would otherwise be inappropriate to allow the class proceedings to continue by considering *inter alia* the manageability of the class action; the importance of the common issues in relation to the claims as a whole; and whether the class members' claims are large enough to warrant being pursued separately. However, it is submitted that the access to justice consideration should, in a South African context and upon considering all the circumstances surrounding the case, be attributed more weight than those factors that form part of the aforementioned supplementary inquiry.

2 3 Opt-in class action regime

As mentioned, Nugent JA in *Mukaddam SCA* held that, once the class is confined to claimants who choose positively to advance their claims and are required to come forward for that purpose (i.e. who choose to 'opt-in'), he can see no reason why they are not capable of doing so in their own names through joinder – they do not need a representative to do so on their behalf.¹⁸⁵ By suggesting that joinder is the appropriate procedural device where all the claimants are identifiable, Nugent JA clearly questioned the viability of the opt-in regime of class action litigation. Nugent JA also held that the opt-in class action regime can only be utilised in exceptional circumstances.¹⁸⁶ As exceptional circumstances were not proved, he found that a class action was not the most appropriate way to pursue the claims.¹⁸⁷

The court in *Mukaddam CC* held that the Supreme Court of Appeal in *Mukaddam SCA* was wrong to find that an applicant in an opt-in class action is required to show exceptional circumstances. Although the court did not provide reasons for its disagreement with the

¹⁸⁵ Para 12.

¹⁸⁶ If the effect of Nugent JA's comment that joinder is appropriate where all the class members are identifiable is to negate the need for a South African opt-in class action regime, then Nugent JA seemingly contradicts himself by requiring that exceptional circumstances must be proved before the opt-in procedure can be used.

¹⁸⁷ Paras 11, 14.

finding of the Supreme Court of Appeal in this regard, the fact of the matter is that, as our law stands at the moment, there is no need to prove exceptional circumstances to be able to utilise the opt-in procedure.

The SALC recommended that courts should have a discretion to make opt-in, opt-out or no notice orders.¹⁸⁸ The approach of the court in *Mukaddam SCA* regarding the opt-in class action regime, as mentioned above, contradicts this recommendation. It also complicates the issue of notice in class action proceedings.¹⁸⁹ This part of the study will accordingly consider the nature and status of the opt-in class action compared to the opt-out class action and, in view of Nugent JA's comments, when, if at all, the opt-in procedure should be utilised rather than the opt-out procedure.¹⁹⁰

It may be worthwhile, in view of the above, to revisit the distinction between the opt-in and opt-out class action regimes. As mentioned,¹⁹¹ in an opt-out class action, individuals who fall within the class definition are automatically included in the class unless an individual affirmatively requests exclusion from the class. In other words, class members are provided with an opportunity to opt out if they do not wish to be part of the class action.¹⁹² Class members who do not opt out are bound by the outcome of the class action.¹⁹³ Class members who choose to opt out are at liberty to pursue individual claims against the defendant.

In an opt-in class action, individual class members who fall within the class definition must affirmatively request inclusion to form part of the class action. Class members who do not opt into the class action are not bound by its outcome and they will accordingly be at liberty to pursue individual claims against the defendant. Naturally, they will also forfeit the opportunity to share in the benefits obtained by the class in the event of a favourable judgment.

¹⁸⁸ South African Law Commission *The Recognition of Class Actions Report* para 5.10.24.

¹⁸⁹ See chapter three below regarding notice of class actions.

¹⁹⁰ The Constitutional Court in *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC) did not properly engage with these issues.

¹⁹¹ See chapter one above.

¹⁹² See, for example, section 9 of the Class Proceedings Act, 1992, S.O. 1992, c. 6.

¹⁹³ See, for example, section 27(3) of the Class Proceedings Act, 1992, S.O. 1992, c. 6.

Support for the opt-out regime is essentially based on the view that the opt-in requirement could undermine one of the primary purposes of class action litigation, which is to facilitate access to justice.¹⁹⁴ It has also been argued that the opt-in regime presupposes that failing to opt in is the result of a properly contemplated decision by the individual class member not to participate in the class action. However, this is not necessarily always the case, especially in South Africa where the existence of financial and social barriers could result in a failure to opt in. Such a requirement could accordingly defeat the primary purpose of class actions, namely access to justice, especially where there are small individual claims involved.¹⁹⁵

Conversely, support for the opt-in regime is essentially premised on the belief that individuals who are unaware of the litigation should not be bound by its outcome. In other words, in the absence of proper notice of the class proceedings, one should not be bound by the judgment of the court in the matter.¹⁹⁶ Proponents of the opt-in regime further argue *inter alia* that it makes it easier for class members to assess¹⁹⁷ whether they are being adequately represented in the proceedings, since they are required to act positively to join in and benefit from the class action. It may also have the effect of reducing the costs associated with the litigation and result in increased efficiency, which is beneficial for all interested parties.¹⁹⁸

Before considering the nature and status of the opt-in class action compared to the opt-out class action in further detail and when, if at all, the opt-in procedure should be utilised rather than the opt-out procedure, the approaches of foreign jurisdictions will first be considered.

¹⁹⁴ South African Law Commission *The Recognition of Class Actions Report* para 5.11.3.

¹⁹⁵ Para 5.11.

¹⁹⁶ See chapter three below regarding notice of class actions.

¹⁹⁷ Compared to the opt-out regime.

¹⁹⁸ South African Law Commission *The Recognition of Class Actions Report* para 5.11.

2 3 Opt-in class action regime

2 3 1 The approaches of foreign jurisdictions

The opt-out class action regime is undoubtedly universally more popular than the opt-in class action regime. The opt-in class action regime is, however, utilised in a limited number of foreign jurisdictions, such as the group litigation regime in Sweden and the Group Litigation Order under the Civil Procedure Rules in England and Wales. Further examples of jurisdictions employing an opt-in class action regime are Germany, specifically in the context of certain securities cases, and Denmark where a new class-action provision allowing for opt-in class actions was recently enacted.¹⁹⁹

Ontario subscribes to the opt-out class action regime.²⁰⁰ In the Ontario Law Reform Commission Report on Class Actions²⁰¹ consideration was given to the perceived disadvantages of the opt-in class action regime, specifically to the reason why an opt-in class action scenario generally results in a smaller class than in the case where class members are permitted to opt out.²⁰² The Ontario Commission confirmed that there is disagreement regarding the conclusions that should be drawn from a failure by individuals to opt into a class action. On the one hand, it has been argued that a failure to opt in reflects disinterest in the class action claim. It has, conversely, been argued that the failure to opt in arises from a variety of factors, other than the lack of interest on the part of putative class members, which may result in the size of the class being reduced in an arbitrary and inappropriate manner. Such factors, according to the Ontario Commission, include fear of involvement in the legal process, concern over the amount of legal costs, fear of sanction from employers or others who may be in a position to retaliate, or the

¹⁹⁹ See also V Morabito "Judicial Supervision of Individual Settlements with Class Members in Australia, Canada and the United States" 38 (2003) *Tex Int'l L J* 663 671.

²⁰⁰ Section 9 of the Class Proceedings Act, 1992, S.O. 1992, c. 6. See also J Walker *Class Proceedings in Canada - Report for the 18th Congress of the International Academy of Comparative Law* (2010) 5.

²⁰¹ Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982).

²⁰² 467-492.

demands of everyday life.²⁰³ These factors may prevent a class member from taking the steps necessary to opt in.²⁰⁴

The Ontario Commission further found that the necessity to give notice to class members that they must opt into the class action creates difficulties that may result in the exclusion of class members who are not necessarily indifferent to the harm done to them. In many class actions, the identity of class members is initially unknown and, accordingly, notification that they must opt in if they wish to participate in the class action presents a serious problem. To the extent that class members do not receive this information, an opt-in requirement may exclude individuals who never had a real opportunity to express interest in the suit. Even where class members can be located, they may not appreciate the significance of a notice and may fail to read it. They may also experience problems understanding its content. Further, according to the Ontario Commission, even if class members understand the notice, they may be unsure whether the class action applies to them.²⁰⁵

The Ontario Commission concluded that low response rates by class members who are required to opt in may be attributable to problems of the sort described above and not necessarily to any general lack of interest in class actions. It stated that it is important to provide increased access to the courts for persons who wish to pursue existing remedies but are unable to do so. It also found that, irrespective of the claims' merits, economic, social and psychological barriers may prevent them from being individually litigated. Class actions can help overcome such barriers and, by providing increased access to the courts, may perform an important function in society.²⁰⁶ The Ontario Commission accordingly endorsed the opt-out class action regime for *inter alia* the reasons set out above.²⁰⁷

²⁰³ Regardless of whether such concerns are ill-founded.

²⁰⁴ Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982) 132.

²⁰⁵ 132-133. This problem does, however, seem to be more prominent in the context of the opt-out regime of class action litigation where, according to Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 131, courts are reluctant to certify classes whose members would be difficult to communicate with or identify. See also chapter three below in which *inter alia* the problems associated with opt-out notice are discussed.

²⁰⁶ 121.

²⁰⁷ The Ontario Commission's support for the opt-out regime also lends credence to the submission previously made herein that the access to justice consideration is of crucial importance when determining whether class proceedings are appropriate.

In Australia, the issue as to whether it should adopt an opt-in or opt-out class action model was subject to extensive debate prior the enforcement of Part IVA of the Federal Court Act.²⁰⁸ The opt-out model is now embodied in Part IVA of the Federal Court Act, Part 4A of the Supreme Court Act²⁰⁹ and Part 10 of the Civil Procedure Act.²¹⁰ The Australian Law Reform Commission (“ALRC”) previously recommended that, “[s]ubject to the provision of appropriate protection, it should be possible to commence a group member’s proceeding without first obtaining consent of that group member”, i.e. opt-out class action proceedings should be possible and are indeed preferable.²¹¹ When the Federal Court of Australia Amendment Bill 1991 (Cth) was debated in the House of Representatives, the Attorney General made the following comment which effectively echoes the view of the Ontario Commission referred to above, in that significant weight was attached to the exclusionary effect of the opt-in class action regime in respect of potential class members and the consequential deprivation of their right to access to justice:

“The Government believes that an opt out procedure is preferable on both grounds of equity and efficiency. It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceedings. It also achieves the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group to pursue his or her claim separately.”²¹²

The approach followed by the foreign jurisdictions discussed above is therefore to reject the opt-in class action regime insofar as it arbitrarily reduces the size of potential classes at the expense of putative class members’ right of access to justice. For example, the Ontario Commission held that:

“In our view, the incorporation of an opt in requirement...would be fundamentally inconsistent with the access to justice rationale that we have endorsed as a basic justification for an expanded class action procedure in Ontario...Since we believe that the meaning of silence is equivocal, and does not necessarily indicate indifference or lack of interest, class members

²⁰⁸ 1976 (Cth).

²⁰⁹ 1986 (Vic).

²¹⁰ 2005 (NSW).

²¹¹ Grouped Proceedings in the Federal Court, Report No 46 (1988) 98-130.

²¹² Australia House of Representatives, Debates (14 November 1991) 3175.

should not be denied whatever benefits are secured by the class action by failing to act at this stage of the proceedings...²¹³

Similarly, it has been stated that “the opt out model is the more effective means to ensure that the barriers to justice, which class actions are intended to overcome, are reduced”.²¹⁴ Hensler states that “[i]n consumer class actions involving small individual losses, requiring class members to opt in would lead to smaller classes that would likely obtain smaller aggregate settlements...The social science research on active versus passive assent suggests that minority and low-income individuals might be disproportionately affected by an opt-in requirement, a worrisome possibility”.²¹⁵

In its report on class actions, the Alberta Law Reform Institute lists various perceived advantages and disadvantages of both the opt-in and opt-out class action regimes.²¹⁶ It provides that the general advantages of opting out include enhancing access to justice, in that class members are automatically included as part of the class; that class members retain the choice to opt out of the proceedings for whatever reason; and that class members who opt out can pursue individualised litigation.²¹⁷ The disadvantages of opting out include that class members may not receive notice of the class proceedings; that class members who do not opt out are bound by the outcome of the proceedings whether or not they want to be; that the class proceedings may attract claimants who do not want to be part of the proceedings or would not otherwise have litigated; and that opting out operates in violation of the freedom of the individual to choose whether or not to institute proceedings.²¹⁸

Arguments for opting in include that a class member will be bound by the result only if he or she intends to be bound thereto; that all class members who stand to benefit will have shown some interest in the litigation; that the outcome will not be binding upon individuals who do not have knowledge of the lawsuit; that opting in is consistent with the general

²¹³ Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982) 484-485.

²¹⁴ Ministry of the Attorney General, British Columbia, *Consultation Document: Class Action Litigation for British Columbia* (1994) 8.

²¹⁵ D R Hensler *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (2000) 476.

²¹⁶ Alberta Law Reform Institute *Class Actions* (2000) Final Report No. 85.

²¹⁷ 95.

²¹⁸ 96.

position in respect of ordinary procedures for commencing legal proceedings; and, that persons who do not opt in can litigate their claims outside the ambit of the class action.²¹⁹ Arguments against opting in include that the potential class members who do not choose to opt in may not know of the class proceedings; that opting in may deny access to justice to potential class members who fail to opt in because of economic, psychological and social barriers; and that, a class action is essentially a permissive joinder device if it is available only to those people who choose to sue together.²²⁰

It is apparent from the above that the choice between the opt-in and opt-out class action regimes is a difficult one and one that has been subject to debate. Our courts have also not provided sufficient guidance on this issue. The following part of this chapter accordingly considers, with regard to the approaches of the foreign jurisdictions referred to above, whether there is room for the opt-in class action regime in South African law and when, if at all, the opt-in procedure should be utilised rather than the opt-out procedure.

2 3 2 Possible approaches in South African law

As mentioned, the SALC recommended that the court should provide directions as to the procedure to be followed as part of the certification process and that the court should have a wide discretion to determine its own procedures. Further, the court should possess broad general management powers, exercisable either on the application of a party or on the court's own motion. The SALC proposed that legislation should be adopted regulating class actions in South Africa and that the legislation should deal with the questions of when, by whom, to whom, and how notice should be given. As a general rule, according to the SALC, notice to class members and prospective class members should always be given and the court should retain a discretion to make opt-in, opt-out or no notice orders. The court should, in all cases, consider whether notice of the certification application should be given to all persons eligible to elect to join the class.²²¹

²¹⁹ 96.

²²⁰ 97. The Federal Rules distinguish between compulsory or necessary joinder and permissive joinder. Necessary joinder entails that parties or claims must be added to the litigation in order for it to proceed. Permissive joinder occurs when the parties or claims are permitted to be added to the litigation. If the parties or claims are not added, the court will still allow the lawsuit to proceed.

²²¹ Vii.

It is apparent from the above that the SALC clearly envisaged that circumstances may arise where it would be preferable to require members to opt into class proceedings. To establish the basis for the SALC's recommendation that the court should retain a discretion to make opt-in, opt-out or no notice orders, it is necessary to consider the SALC's Working Paper. In the Working Paper, the SALC stated that provision should be made for opt-in notice in limited situations because there may be circumstances where class members with substantial claims would be severely prejudiced if the class action fails because it was not effectively prosecuted. A judgment in such circumstances would render the individual claims *res judicata*, therefore preventing further litigation on the same issue. It is therefore important to ensure that class members know of the class action if they are to be bound by the outcome.²²² Therefore, according to the SALC, circumstances may indeed arise that justify use of the opt-in, rather than the opt-out, procedure.

As mentioned, in an opt-in class action, individual class members who fall within the class definition must, upon receiving the opt-in notice, opt into the class action to form part thereof. Class members who do not opt into the class action, whether it is because they did not receive notice or whether they did receive notice but consciously chose not to opt into the class action, are not bound by its outcome and they will accordingly be at liberty to pursue individual claims against the defendant. Naturally, they will also forfeit the opportunity to share in the benefits obtained by the class in the event of a favourable judgment.

According to the SALC, the advantage of opt-in notice is that there is certainty as to who the members of the class are and what the aggregate value of the claims is. The defendant is thus in a better position to make a well-reasoned judgment as to his or her liability in order to decide whether to make a settlement offer.²²³ The fact that the opt-in procedure is nothing more than a permissive joinder device is not a problem. Litigation through joinder is made possible by our court rules; however, there is a point at which joinder becomes cumbersome. The SALC states that "it becomes cumbersome when there are more than four or five plaintiffs and extremely cumbersome when there are more than about ten".²²⁴ Claimants who opt in will be in much the same position as plaintiffs who

²²² South African Law Commission *The Recognition of a Class Action in South African Law Working Paper* 57 para 5.32.

²²³ Para 5.24.

²²⁴ Para 5.24.

join in an action, except that the representative will conduct the action on their behalf. The actual management of the action is likely to be simpler and less cumbersome than where a large number of plaintiffs are joined.²²⁵ The SALC accordingly found that there are circumstances where joinder, although possible, would not be appropriate and that, in such cases, the opt-in procedure may be the appropriate means of adjudicating class members' claims.

The SALC recommended that the courts may require that opt-in notice be given, but stated that it would be an exception rather than the rule. According to the SALC it is obvious why the opt-out procedure is preferable. Similar to the findings of the Ontario Commission, the SALC attached significant weight to financial and social barriers, the existence of which may preclude participation in class proceedings by potential class members. The SALC considered the fact that a large portion of our society is poor, illiterate and uninformed because they have not been properly educated. It is therefore important to ensure that this portion of society benefits from class actions, probably more so than in certain other foreign jurisdictions. Accordingly, the SALC recommended that courts should only order that opt-in notice be given where there is a possibility that class members may be severely prejudiced. Prejudice in this context entails being bound by a judgment without having knowledge of the class action.²²⁶ The SALC uses the following example: an airplane crash where a large number of people suffer damage,²²⁷ and where the individual claims are sufficiently large to make it probable that the claimants would enforce their own claims. In such a scenario, according to the SALC, the claimants should not be bound by a judgment unless they have expressly consented to be bound.²²⁸

From the above example it can be inferred that the SALC appears to have envisaged that the opt-in procedure should be used in circumstances where the size of the class would be much more limited compared to where an opt-out procedure would typically be used, the individual class members would be identifiable as, for example, with the survivors of an airplane accident and, importantly, each class member would have a substantial individual claim. De Vos states that the opt-in regime of class action litigation caters especially for

²²⁵ Para 5.24.

²²⁶ See also chapter three below regarding notice of class actions.

²²⁷ Chapter four below will consider certain procedural devices that courts can use to determine damages in mass personal injury class actions.

²²⁸ Para 5.25.

those circumstances where the members of the class have substantial individual claims. He argues that, since the judgment in a class action has *res judicata* effect on all the class members, except those who have been excluded, it is important that class members with such claims should be apprised of the action and given the option to associate themselves with it. Otherwise they could be severely prejudiced if a class action fails due to mismanagement.²²⁹

In *Mukaddam SCA*, Nugent JA held that the fact “[t]hat the plaintiffs might be numerous – in this case it is said that there might be 100, although there is no reason to think that all will join – is in itself no reason to preclude a joint action. Perhaps there will be more paper – though even that is not necessarily true – but that is no more than administrative inconvenience...”²³⁰ The court footnoted this comment with the following statement: “In the United States a class action is not competent if all the claimants can be joined. Rule 23(a) of the Federal Rules of Civil Procedure require a party seeking certification to demonstrate, amongst other things, that ‘the class is so numerous that joinder is impracticable’”.²³¹

The above-mentioned comments of Nugent JA are problematic in various respects. It is not the case in the United States that, where joinder of all the claimants is possible, class proceedings are not appropriate. American class proceedings may be appropriate where joinder is possible but not necessarily feasible.²³² If joinder is possible but would needlessly complicate the litigation of the case, then class action proceedings may be appropriate.²³³ Impracticability of joinder does not entail impossibility.²³⁴ Accordingly, the identifiability of individual class members will form part of the assessment of the impracticability of joinder – it is not the only consideration in determining practicability of joinder compared to class proceedings.²³⁵

²²⁹ De Vos (1996) 4 *TSAR* 647-648.

²³⁰ Para 13.

²³¹ Para 13.

²³² Anderson & Trask *Class Action Playbook* 26-27.

²³³ 26-27.

²³⁴ See *Robidoux v Celani* 987 F.2d 931 935-936.

²³⁵ Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 40.

It further appears that Nugent JA did not give proper consideration to the judgment of Cameron JA in *Ngxuza* where he held that joinder presupposes that prospective plaintiffs will approach courts *en masse*, but that this often fails to materialise insofar as the “various parties who have the common interest are isolated, scattered and utter strangers to each other”.²³⁶ In such circumstances, the conditions for group action through joinder do not exist. According to Cameron JA, society cannot simply set up courts and wait for litigants to bring their complaints as barriers may exist that preclude their participation in litigious proceedings; hence, the need for class proceedings.²³⁷ Simply stating that a numerous class consisting of approximately 100 claimants is insufficient to preclude litigation through joinder – or stated differently, that joinder is possible where the class consists of 100 claimants – does not take account of the practicalities associated with joinder or the benefits of a class action. Such an approach disregards the considerations that are relevant in determining the appropriateness of class proceedings as a means of adjudicating the claims of class members.

*Linkside v Minister of Basic Education*²³⁸ (“*Linkside*”) serves as a fitting example and evidences what the SALC and De Vos had in mind when stating that circumstances may arise where use of the opt-in procedure is both necessary and justifiable. *Linkside* is the first South African opt-in class action. A class action was instituted in the Eastern Cape High Court, Grahamstown, against the Minister of Basic Education, the Director-General of the National Department of Basic Education, the MEC, Department of Basic Education in the Eastern Cape Province and the Head of Department for Basic Education in the Eastern Cape Province seeking an order directing the respondents to appoint educators permanently to allocated vacant substantive posts and to reimburse schools that were forced to pay educators whom the State was required to pay. The class action was instituted on behalf of all public schools registered as such in the Eastern Cape whose vacant substantive posts were not filled on a permanent basis and who were forced to pay educators whom the State was required to pay. The schools were afforded the opportunity to opt into the class action by sending a written notice to the legal representatives of the class.²³⁹ The opt-in class action was consented to by the Department of Basic Education.

²³⁶ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA) paras 4-5.

²³⁷ Paras 4-5.

²³⁸ (3844/2014) 2014 ZAECHC 111 (17 December 2014).

²³⁹ The written notice in terms of which class members opted into the class action had to set out a list of substantive vacancies on the 2014 post establishment at the school concerned and the payments made by the

The case was subsequently settled in terms of which the Eastern Cape Basic Education Department was ordered to pay R81-million to the schools that opted into the class action. In *Linkside*, the number of class members who opted in were limited to 90, all of whom were identifiable, and the claims of the individual class members were large enough to make it likely that they would litigate independently in the absence of a class action. In this regard, the differences between *Linkside* and other South African class action cases, including *Ngxuza*, *Children's Resource Centre Trust* and *Mukaddam SCA*, are obvious.²⁴⁰ For example, in *Ngxuza* Cameron JA states that:

“The situation seemed pattern-made for class proceedings ... *Their individual claims are small: the value of the social assistance they receive ... would secure them hardly a single hour's consultation at current rates with most urban lawyers. They are scattered throughout the Eastern Cape Province, many of them in small towns and remote rural areas ...*” (own emphasis).²⁴¹

He further refers to “[t]he circumstances of this particular case – unlawful conduct by a party against a *disparate body of claimants lacking access to individualised legal services, with small claims unsuitable for if not incapable of enforcement in isolation...*” (own emphasis).²⁴²

In *Children's Resource Centre Trust*, Wallis JA held that “[t]he class of people on whose behalf the appellants seek to pursue claims ... is *both large and in general poor. Any claims they may have against the respondents are not large enough to warrant their being pursued separately...*” (own emphasis).²⁴³

Because the judgment has a *res judicata* effect on all class members other than those who have been excluded, the class members in *Linkside* should not be bound by a judgment unless they have been apprised of the action and given the option to associate themselves

school to educators in permanent posts (together with proof of such payments) and which have not been reimbursed by the Department of Basic Education.

²⁴⁰ Rather unsurprisingly, the majority of South African class actions pertain to the purported vindication of certain socio-economic rights, as was the case in the *Ngxuza*, *Children's Resource Centre Trust* and *Mukaddam* judgments.

²⁴¹ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA) para 11.

²⁴² Para 14.

²⁴³ Para 16.

with it. The more targeted opt-in mechanism was accordingly preferable, otherwise the putative class members could be severely prejudiced if the class action failed due to mismanagement.

As we have seen, according to the Ontario Commission, it is questionable whether it is necessary to protect the interests of individuals with large claims from any prejudice that might ensue if the class action was not prosecuted skilfully. The Ontario Commission stated that, where a class member wanted to institute proceedings independently, he or she would be free to do so by opting out of the class action.²⁴⁴ However, the possibility exists that the opt-out notice may not come to the attention of the class member, that the class member consequently fails to opt out of the class action, and that an unsuccessful outcome of such action due to mismanagement would be binding on the class member. The opt-in regime, with its individualised notice, is accordingly preferable in the circumstances.²⁴⁵

The purpose of affording to the court a discretion to choose between the type of class action procedure to be followed is *inter alia* to determine, with reference to the facts of the specific case, whether ordering that the opt-in procedure be utilised would have the effect of potentially denying people a legal remedy simply because they may fail to comprehend the opt-in requirement, may be fearful of taking action, or may otherwise be precluded from opting into the class action. Therefore, when considering the potential utilisation of the opt-in regime rather than the opt-out regime, this discretion should operate to protect those individuals who may be excluded from the class proceedings by virtue of the nature of opt-in proceedings.

Linkside reinforces the submission that there is scope in South African law for the opt-in class action regime, coupled with the discretion of our courts to make opt-in, opt-out or no-notice orders. The finding in *Mukaddam SCA* that joinder is appropriate where the class members are identifiable, effectively obviates the need for the opt-in class action regime. It appears that Nugent JA subscribed to the view that the opt-in procedure is nothing more

²⁴⁴ Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982) 485.

²⁴⁵ According to the Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982) 469, where the opt-in procedure is followed, individual notice should be sent to identifiable class members. See chapter three below regarding notice of class actions.

than a permissive joinder device. This cannot be correct. As mentioned, there are circumstances where the class members are identifiable but where joinder is nonetheless cumbersome and unfeasible.²⁴⁶ A preferable approach is accordingly one in terms of which our courts are afforded a discretion to choose, with regard to the circumstances of each case, whether to require opt-in, opt-out or no-notice at all.²⁴⁷

2 4 *Nkala v Harmony Gold Mining Company*

Before concluding, it may be worthwhile to briefly comment on *Nkala v Harmony Gold Mining Company Limited*²⁴⁸ (“*Nkala*”), where the South-Gauteng division of the High Court of South Africa dealt with the issue of the appropriateness of class actions as a certification-factor. In *Nkala*, Mojapelo DJP held as follows in this regard:

“[W]e hold that once it has been established that there are sufficient common issues whose determination would advance the cases of all individual mineworkers, then there is no need for the court to engage in the exercise of examining whether these common issues outweigh the non-common ones. In such a case it has to be in the interests of justice that a class action be certified. Articulated differently, once the determination on whether there are sufficient common issues to warrant a class action is made, the question of the most appropriate way to proceed would almost certainly fall away.”²⁴⁹

Mojapelo DJP appears to have largely based the certification decision on the likelihood that determining the common issues would advance the individual mineworkers’ cases.²⁵⁰ He found that, following upon receipt of the common evidence, the determination of the common issues would move the litigation forward.²⁵¹ If there are sufficient common issues to warrant certification, then it would be in the interests of justice that the court certifies a class action.²⁵²

²⁴⁶ South African Law Commission *The Recognition of a Class Action in South African Law Working Paper* 57 para 5.25.

²⁴⁷ See chapter three below regarding notice of class actions.

²⁴⁸ (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016).

²⁴⁹ Para 110.

²⁵⁰ Para 110.

²⁵¹ Para 99.

²⁵² Paras 99, 110, 121.

He further stated that Wallis JA in *Children's Resource Centre Trust* did not find that the requirement that a class action must be the appropriate means of determining the claims of class members is one that must be satisfied before certification succeeds. To reach this conclusion, Mojapelo DJP referred to Wallis JA's comment that there is an overlap between the certification requirements and that "[t]he fact that there are issues common to a number of potential claimants may dictate that a class action is the most appropriate manner in which to proceed, but that is not necessarily the case".²⁵³ Mojapelo DJP correctly held that the Supreme Court of Appeal "left it at that" and held that a court therefore does not need to inquire into the appropriateness of class proceedings before deciding whether to certify the class action.²⁵⁴

Wallis JA clearly listed as a separate certification requirement "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".²⁵⁵ He held that "[w]ithout excluding the possibility of there being other issues that require consideration, it suffices for our purposes to say that a court faced with an application for certification of a class action must consider the [certification] factors...and be satisfied that they are present before granting certification".²⁵⁶ Accordingly, the Supreme Court of Appeal did not suggest that a court would only need to consider *some* of the factors; rather, the court expressly found that a class action could not be certified unless each of these factors is present.

Further, in *Mukaddam CC*, the court found that the requirements listed by Wallis JA "must serve as factors to be taken into account in determining where the interests of justice lie in a particular case...The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise".²⁵⁷ It is submitted that the finding by the Constitutional Court should not be construed to mean that a court does not need to consider all the certification factors listed by Wallis JA before deciding whether

²⁵³ *Nkala v Harmony Gold Mining Company Limited* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016) para 111, referring to *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA) para 26.

²⁵⁴ Para 111.

²⁵⁵ Para 26.

²⁵⁶ Para 28.

²⁵⁷ Para 35.

to certify a class action. Rather, it should be interpreted to mean that, after having inquired into the presence of each of the factors listed by the Supreme Court of Appeal in *Children's Resource Centre Trust*, a court may decide to certify a class action even if one of the factors is absent or has not been complied with. In other words, a court should at least inquire into the appropriateness of class proceedings in the circumstances. Such an approach is reinforced by Makgoba J's finding in *Pretorius v Transnet Second Defined Benefit Fund*²⁵⁸ that "the Constitutional Court endorsed the approach set out by the Supreme Court of Appeal and in addition thereto the Constitutional Court laid down the principle applicable for certification, to wit, the interests-of-justice principle".²⁵⁹ Therefore, considering *all* the certification-factors, a court should consider whether it would be in the interests of justice to certify the class action. However, Mojapelo DJP failed to do so.

By not considering the appropriateness of class proceedings, a court may fail to take into account factors that may operate against the certification of a class action, notwithstanding the existence of common issues that, if determined, would advance class members' claims. In this regard, it is unclear what, according to Mojapelo DJP, the court's approach would be in circumstances where there are common issues the determination of which would advance class members' claims, but certification of the class action would give rise to manageability concerns. For example, what about those cases where a court is of the view that it would be problematic to notify a significant percentage of the class, or where class members would have to prove causation and damages on an individualised basis? In other words, what about the practical difficulties that may result in class proceedings being inappropriate for a particular suit?²⁶⁰ It cannot be that such considerations should be discarded solely because there are common issues and the determination of these issues would advance class members' claims. With respect, it would be untenable for our courts to overlook the (in)appropriateness of class proceedings in such circumstances.

Consider also, for example, the collapse of a bridge where five individuals, all of whom reside in the same area, are injured. These individuals would have common issues that, if determined, would advance their claims. According to Mojapelo DJP, a class action would be certified and no further questions would need to be asked as to the appropriateness of class proceedings. However, it is likely that, in such circumstances, joinder would be

²⁵⁸ 2014 6 SA 77 (GP).

²⁵⁹ Para 23.

²⁶⁰ *Eisen v Carlisle & Jacquelin* 417 U.S 156, 164 (1974).

possible and would not needlessly complicate the litigation of the case. The class is small, the individual claimants are likely to litigate individually if a class action is not certified and the class members are not geographically dispersed. Essentially, joinder of parties in terms of the court rules would be practical and appropriate. Conversely, class proceedings would be inappropriate. However, the consequence of the above-mentioned approach of Mojapelo DJP is effectively to render superfluous the joinder provisions and to require certification of the class action in such circumstances. It does not take account of alternative, feasible, methods of adjudication, compared to class proceedings, even though such alternatives may also be in the interests of justice. Mojapelo DJP's approach is also at odds with the above-mentioned approaches of the selected foreign jurisdictions, especially Ontario and the United States. Both jurisdictions require some degree of investigation into the suitability of class proceedings in addition to the existence of common issues of fact or law.²⁶¹

It is, with respect, difficult to comprehend how the court in *Nkala* could conclude that the appropriateness of a class action did not have to be considered before deciding whether to certify the proceedings. It is also difficult to conceive of circumstances where a class action should be utilised notwithstanding the existence of more appropriate alternatives. In other words, if there is another device available that is more appropriate than a class action in the circumstances, why would such a device not be utilised at the expense of class proceedings? The question is relevant even where determination of the common issues may advance class members' claims. It is accordingly not possible to agree with the finding by Mojapelo DJP that the existence of common issues that, if determined, would advance class members' claims, means that a court would not have to consider the appropriateness of class proceedings, including alternatives thereto.

Notwithstanding the above, Mojapelo DJP nevertheless proceeds to consider the issue of "what the most appropriate way to receive the common evidence and to resolve the common issues"²⁶² is, and whether there are viable alternatives to class proceedings in the circumstances.²⁶³ He states that the respondents failed to provide an alternative to class proceedings that "would be best suited for the receipt of a substantial amount of very focussed evidence of a common nature and the determination of common legal

²⁶¹ See 2 2 1 – 2 2 3 above.

²⁶² Para 112.

²⁶³ See paras 101-115.

issues...”²⁶⁴ Further, the respondents “do not disown the possibility that they would bring evidence common to all the claims of the mineworkers whether in a class action or in numerous individual actions”.²⁶⁵ In *Nkala*, Mojapelo DJP accordingly held as follows regarding the appropriateness of class proceedings:

“[T]he institution of hundreds of thousands of separate individual hearings is not more appropriate than the proposed class action to resolve the disputes between the mineworkers and the mining companies. This is so even if the proposed class action only resolves some of the disputes between them. Accordingly, we conclude that the proposed class action is the most appropriate way for this matter to proceed.”²⁶⁶

Mojapelo DJP appears to conflate the certification requirement that there must be common issues of fact or law and that a class action should be found to be the appropriate method to adjudicate class members’ claims. Wallis JA, in *Children’s Resource Centre Trust*, held that for the purpose of certification, it would not have to be shown that the class action would dispose of every aspect of the claim. According to Wallis JA, the question is whether “there are common issues that can be determined that will dispose of all or a significant part of the claims by the members of the class or sub-class”.²⁶⁷ This appears to be the criteria that Mojapelo DJP utilised in *Nkala* to decide on the appropriateness of class proceedings. However, as discussed above, the appropriateness inquiry constitutes a separate certification requirement that entails taking into account other relevant factors, such as the existence of appropriate alternative methods of adjudication and the objectives and manageability of class proceedings. It may therefore be that, despite the existence of common issues, class proceedings may be otherwise inappropriate. Hence the suggestion by Wallis JA that “[t]he fact that there are issues common to a number of potential claimants may dictate that a class action is the most appropriate manner in which to proceed, but that is not necessarily the case”.²⁶⁸

²⁶⁴ Para 113.

²⁶⁵ Para 114.

²⁶⁶ Para 115.

²⁶⁷ Para 45.

²⁶⁸ *Nkala v Harmony Gold Mining Company Limited* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016) para 111, referring to *Trustees for the time being of the Children’s Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA) para 26.

The above-mentioned conflation by Mojapelo DJP of Wallis JA's certification requirements may also explain why, rather unconnectedly, a majority of the factors that are relevant to determining the appropriateness of class proceedings compared to other methods of adjudication are scattered throughout his judgment. For example, he does consider the class action objectives of access to justice²⁶⁹ and judicial economy²⁷⁰ and the manageability of class proceedings.²⁷¹ Ultimately, Mojapelo DJP may have reached the correct conclusion by certifying the class action. However, the formula that he used to reach this conclusion is, for the above reasons, questionable to say the least. His approach does not lend itself to creating legal certainty and judicial uniformity insofar as the above issues are concerned. It is accordingly suggested that, to provide certainty and clarity in this regard, it is necessary for our legislature, supplemented by a developing body of case law, to regulate class actions by *inter alia* separating and unpacking the different certification requirements, including the appropriateness-requirement along the terms proposed above.

2 5 Suggested approach to assessing the appropriateness of a class action and determining when to use an opt-in class action

A central theme in this chapter has been the importance of access to justice and how it could serve as the foundation for the incorporation of the class action into South African law. It is essentially against this background that a court should decide on the appropriateness of class proceedings as a means of adjudicating the claims of class members.

Our courts' assessment should be aimed at establishing whether certification of a class action is necessary to achieve access to justice. This includes giving consideration to whether any possible barriers exist and whether certification is necessary to overcome such barriers. Further, the appropriateness inquiry entails determining whether a class action is necessary to achieve judicial economy and behaviour modification. Finally, the court should consider any other relevant factor that may assist it in determining whether class proceedings are otherwise appropriate.

²⁶⁹ See, for example, paras 104-108.

²⁷⁰ See, for example, paras 34, 98, 141.

²⁷¹ See, for example, paras 33, 52, 86-87, 224.

In the light of these considerations it is suggested that, when a court is required to determine whether a class action is the most appropriate means of adjudicating class members' claims, the court should adopt the following test. The test takes account of the experiences of foreign jurisdictions and the South African class action experience to date, and it requires a court to balance various considerations. The court should:

1. determine whether certification of a class action is necessary to achieve access to justice. This entails considering whether there are any potential barriers to such access, the existence of which could be effectively addressed by certification of a class action. The following factors may be considered in this regard:
 - 1.1. the geographical dispersion of class members;
 - 1.2. the inability of class members to engage in individualised litigation; and
 - 1.3. the difficulties associated with litigation through joinder;
2. determine whether a class action is necessary to achieve the judicial economy arising from the avoidance of a multiplicity of actions;
3. determine whether a class action is necessary to achieve behaviour modification; and
4. take all the surrounding circumstances into account and consider any other relevant factor that may assist it in determining whether a class action is otherwise appropriate, including:
 - 4.1. the manageability of the class action;
 - 4.2. the importance of the common issues in relation to the claims as a whole; and
 - 4.3. whether the class members' claims are large enough to warrant being pursued separately.

The manageability of the class action under 4.1 above requires taking into account *inter alia* the identifiability of class members, the size of the class and the extent of the non-common issues that would require individualised adjudication. Moreover, determining whether it is 'otherwise appropriate' to certify a class action in terms of 4 above entails taking all circumstances surrounding the case into account.²⁷² In other words, the manageability of the class action under 4.1 should not be the only or even dominant consideration taken into account in assessing the appropriateness of class proceedings, as opposed to other mechanisms such as joinder, as a means of adjudicating the claims of

²⁷² W de Vos "Opt-in class action for damages vindicated by Constitutional Court" (2013) 4 *TSAR* 757 762-763.

class members. Rather, a holistic, common sense and pragmatic approach needs to be adopted where the assessment is made, having regard to all the circumstances of the case. It is further recommended that, to promote legal certainty, consistency and uniformity in respect of the approaches of our superior courts, legislation should be adopted to regulate our courts' assessment of class proceedings' appropriateness as set out above

The above-mentioned observations do not detract from the fact that the identifiability of class members is important as it essentially informs the court's decision regarding how notification to potential class members should take place, to decide who forms part of the class and may accordingly institute individual actions, and to establish who will be bound by the court's order.²⁷³ This is significant in that, in class proceedings, once a final judgment or settlement is reached, the claims of members of the class are *res judicata*. Without a proper class definition, a large number of people may be deprived of their right to seek legal relief for a violation of their rights without having been provided with a fair opportunity to exercise a real choice as to whether to associate themselves with the class action. This would not only undermine their right of access to justice, but would be contrary to the best traditions of public interest litigation which is to give poor people a meaningful voice in litigation that affects them.²⁷⁴

The choice between opt-in and opt-out procedures is equally important insofar as the exercise of the choice may similarly have the effect of excluding a large number of people from the class proceedings. Specifically in the context of the opt-in procedure where claimants are required to actively, rather than passively, join the class proceedings, it is likely that the class would be smaller in size compared to where the opt-out procedure is utilised, potentially infringing upon the right of access to justice of the excluded class members.

However, this does not necessarily mean that there is no choice to be made between opt-in and opt-out class actions – it may be that the circumstances of the case are such that the opt-in procedure is indeed preferable to the opt-out procedure. As was the case in

²⁷³ Erasmus & van Loggerenberg *Erasmus: Superior Court Practice* A2-23.

²⁷⁴ S Liebenberg "From the Crucible of the Eastern Cape: New Legal Tools for the Poor" (2014) 28 *Speculum Juris* 1 4.

Linkside, this may occur where the court is confronted with a relatively small group²⁷⁵ of individual claimants each of whom is identifiable and especially where each claimant has a substantial individual claim. In this regard, the court should assess whether the size of the claimants' individual claims is such that it is unlikely that they would, in the absence of class proceedings, litigate independently. If it is likely that they would litigate independently, then those claimants should be given an opportunity to opt into the proceedings.

If, in such a case, the opt-out procedure, rather than the opt-in procedure, is utilised, it may be prejudicial to individuals who have no knowledge of the class proceedings but who are bound by its outcome.²⁷⁶ For if the opt-in procedure is followed, and an individual is not given notice, then the class action judgment would not be binding upon that individual and he or she would be at liberty to pursue individualised litigation. The primary advantage of providing the court with judicial discretion to choose between requiring opt-in, opt-out and no-notice orders, is that it enables the court to decide, with reference to the circumstances of the particular case, which procedure would be most suited to the overall disposition of the case.²⁷⁷

²⁷⁵ That is nevertheless large enough to render joinder in terms of the court rules cumbersome and unfeasible.

²⁷⁶ See chapter three below regarding notice of class actions.

²⁷⁷ Alberta Law Reform Institute *Class Actions* (2000) Final Report No. 85. See chapter three regarding notice of class actions.

CHAPTER THREE: NOTICE OF CLASS ACTIONS

3 1 Introduction

Notice to class members in class action proceedings is important in various respects. Most significantly, it informs class members of the class action so that they are in a position to choose to participate in the class action. Notification at a later stage, after the trial has commenced, may also be required, for example, as the court may direct.¹ The issue of notice is also important in the light of the *audi alteram partem* principle and the doctrine of *res judicata*. Apart from being an important issue, notice is also very complicated, especially in circumstances where the class is large, and it comprises individuals who are poor, illiterate and often without access to the resources that are required to bring the action to their attention. The method employed in giving notice and the accompanying costs could raise complex issues that may even threaten the continuation of a class action.²

As mentioned in chapter two, the South African Law Commission (“SALC”) recommended that courts should have a discretion to make opt-in, opt-out or no notice orders.³ The Supreme Court of Appeal in *Trustees for the time being of the Children’s Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)*⁴ (“*Children’s Resource Centre Trust*”) provided guidelines regarding the certification process but, as the court refused to grant leave to the applicants to proceed with a class action, the court did not deal with other complex issues, such as notice to absent class members. Notice to class members was not discussed separately as a class action certification requirement. In the absence of statutory or court guidance regarding notice in class actions, it is unclear

¹ N Kirby “South Africa” in P G Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* (2012) 378 384.

² W de Vos “Judicial Activism Gives Recognition to a General Class Action in South Africa: *Children’s Resource Centre Trust v Pioneer Foods* (50/12) [2012] ZASCA 182” (2013) TSAR 370 378.

³ The South African Law Commission *The Recognition of Class Actions and Public Interest Actions in South African Law Report* Project 88 (1998) para 5.10.24.

⁴ 2013 1 All SA 648 (SCA).

whether and in what circumstances notice to class members is required, what the form of the notice should be and what its nature, scope, ambit and contents should entail.⁵

This chapter considers the issue of notice of the class action to class members in the context of the opt-out class action, on the one hand, and the opt-in class action, on the other. In respect of each class action regime, consideration is given to whether notice of the class action is required and, if so, whether individual notice to each class member is required, or whether some form of general notice would suffice. In the context of the opt-out class action, the chapter also considers whether class members would be prejudiced if, as a result of not having been provided with (proper) notice, they fail to opt out of the class action. The chapter concludes by considering the role of the court in protecting the interests of absent class members.

3 2 Notice in the context of the opt-out class action regime

3 2 1 Notice affording an opportunity to opt out of the class action generally required

The point of departure to determine whether notice of the class action and of class members' right to opt out thereof is required, is section 34 of the Constitution of the Republic of South African, 1996 ("Constitution"). Section 34 guarantees the right of access to courts by providing that "[e]veryone 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".

In *Mukaddam v Pioneer Foods (Pty) Ltd*⁶ ("*Mukaddam CC*"), the Constitutional Court explained the importance of the right of access to courts:

"Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the state. Our courts are

⁵ Kirby "South Africa" in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 384.

⁶ 2013 10 BCLR 1135 (CC).

mandated to review the exercise of any power by State functionaries, from the lowest to the highest ranking officials.”⁷

In *De Beer NO v North-Central Local Council and South-Central Local Council*⁸ (“*De Beer*”), the Constitutional Court considered whether a municipal rate collection procedure permitted in the Greater Durban Metropolitan Area by section 105 of the Durban Extended Powers Consolidated Ordinance No. 18 of 1976 (Natal), infringed the fair hearing requirement of section 34, because its provisions concerning notice of the hearing to affected people were allegedly deficient. The court considered the scope of the fair hearing component of section 34⁹ and held as follows:

“This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. *That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected.* Rules of courts make provision for this. They are not, however, an exclusive standard of reasonableness. There is no reason why legislation should not provide for other reasonable ways of giving notice to an affected party. If it does, it meets the notice requirements of section 34.”¹⁰ (own emphasis).

It is trite that fairness in civil proceedings includes the principle of *audi alteram partem* – as is evidenced by the above quoted passage in *De Beer* – the principle that persons affected by a decision should be given a fair hearing by the decision-maker prior to the making of the decision.¹¹ In the context of the opt-out class action regime, unless a class member has given notice to opt out, the judgment will have a *res judicata* effect on all the class

⁷ Para 29. See also *Chief Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC).

⁸ 2002 1 SA 429 (CC).

⁹ Para 10.

¹⁰ Para 11.

¹¹ I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 673.

members. In other words, where the class member does not opt-out of the class action, the class action judgment will be binding upon him or her. This means that the class member will not be able to litigate independently from the class action; he or she would be deprived of the opportunity to seek independent judicial enforcement of his or her claim. According to the SALC, “[i]n these circumstances it is important to ensure that the claimants have knowledge of the action and the way in which it is being prosecuted if they are to be bound by it”.¹² And, in the explanatory notes to the Draft Bill, it further states that “[i]t is very important that the members or potential members of the class be informed and be kept informed of all aspects related to the class action as the judgment in a class action is binding (*res judicata*) on them”.¹³

Accordingly, it seems fair to conclude that the general point of departure in the context of the opt-out class action regime should be that, in accordance with the principle of *audi alteram partem* and the doctrine of *res judicata*, class members should receive notice of the proceedings in terms of which they are *inter alia* informed of their opt-out right.

3 2 2 Circumstances where notice to opt-out is not required

In recommending that our courts should have a discretion to make opt-in, opt-out or no notice orders,¹⁴ the SALC expressly recognised that circumstances may arise where a court can order that no notice of the opt-out class action be given to class members. Therefore, although the general rule is that class members should receive notice of the class action, circumstances may arise in the context of an opt-out class action where no notice may be required by the court. This appears to be contrary to what has been stated above regarding the reasons for generally requiring that individual notice of opt-out class actions be given to class members. The effect of the court not requiring that notice of the opt-out class action be given to the class members is that they will be bound by a judgment given in an action of which they are likely to have no knowledge at all.¹⁵

¹² South African Law Commission *The Recognition of a Class Action in South African Law Working Paper 57* Project 88 (1995) para 5.23. See the discussion under 3 2 4 below regarding possible prejudice to be suffered by class members who fail to opt out of the class action as a result of (improper) notice.

¹³ 102 (comment in respect of section 8(3)).

¹⁴ South African Law Commission *The Recognition of Class Actions Report* para 5.10.24.

¹⁵ South African Law Commission *The Recognition of a Class Action in South African Law Working Paper 57* para 5.22.

The Ontario Commission stated that it is not necessarily problematic that class members would be bound by a judgment given in an action of which they are likely to have no knowledge at all. The circumstances where it would not be problematic to order that no notice be given to class members include: (i) cases in which individual class members would be affected by the judgment notwithstanding withdrawal; (ii) cases in which the right to opt out would be unimportant because the claims were not sufficiently large to justify the expense of independent litigation; (iii) where the court is of the view that the individual interests are outweighed by the desirability of securing a broad binding effect for the judgment; or, (iv) where the individual interests are outweighed by the public interest in achieving judicial economy and consistency of judgments.¹⁶ These circumstances warrant more detailed consideration.

Firstly, according to the Ontario Commission, there may be instances in which individual class members would be affected by the class action judgment notwithstanding their withdrawal from the class action. The Ontario Commission referred with approval to rule 23 of the American Federal Rules of Civil Procedure (“Federal Rules”) insofar as it does not extend an opt-out right to class members in class actions where injunctive or declaratory relief is sought. This is because the class members may be affected by the judgment regardless of whether they opt out of the class action. Where injunctive relief is sought, class members would clearly be affected by the court order. It may also be, depending on the nature of the declaratory relief sought, that the class members would be affected by the court order even though some of them have opted out of the class action. The Ontario Commission referred to the following example in this regard: where a court makes an order declaring a legislative provision *ultra vires* – in such circumstances, a class member would be affected by the court order regardless of whether the member has opted out of the class action. In such circumstances, therefore, no notice to opt out of the class action would have to be given to class members.¹⁷ The opt-out right would be illusory.

Secondly, according to the Ontario Commission, no notice to opt out of the class action would have to be given to class members where the right to opt out would be unimportant because the claims are not sufficiently large to justify the expense of independent

¹⁶ Para 5.22.

¹⁷ Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982) 486-487.

litigation. In this regard, the Ontario Commission stated that “[w]hen claims of class members are not individually recoverable, by definition, it would not be economically feasible for them to sue the defendant independently”.¹⁸ The institution of an individual action in such circumstances is, according to the Ontario Commission, only theoretical and the right to opt out amounts to nothing more than a “gratuitous gesture”.¹⁹ The amounts of the class members’ individual claims are accordingly relevant to determine whether notice of the class action would have to be given to class members.²⁰

Thirdly, the Ontario Commission stated that, where the court is of the view that the individuals’ interests in opting out of the class action are outweighed by the desirability of securing a broad binding effect for the judgment, no notice of the class action would have to be given to class members. In addition, where the individuals’ interests are outweighed by the public interest in achieving judicial economy and consistency of judgments, the Ontario Commission was of the view that no notice of the class action would have to be given to the class members.²¹ The Ontario Commission did not provide examples of circumstances where the individuals’ interests in opting out of the class action are outweighed by the desirability of securing a broad binding effect for the judgment or where the individuals’ interests are outweighed by the public interest in achieving judicial economy and consistency of judgments.

Section 20(2) of the Draft Bill proposed by the Ontario Commission essentially lists the above circumstances as factors that should be considered by a court in deciding whether class members should be given notice to opt out of the class action. These factors therefore effectively constitute the criteria that a court must take into account to make the above-mentioned determination. The Ontario Class Proceedings Act of 1992 (“Ontario Act”), enacted subsequent to the report issued by the Ontario Commission, requires that notice of certification of a class action be given by the representative party to the class members but that the court may dispense with notice if, having regard to certain factors listed in section 17 the Ontario Act, the court considers it appropriate to do so. These factors are:

¹⁸ 486.

¹⁹ 486.

²⁰ 486.

²¹ 487-488.

1. The cost of giving notice;
2. The nature of the relief sought;
3. The size of the individual claims of the class members;
4. The number of class members;
5. The places of residence of class members; and
6. Any other relevant matter.²²

The Ontario Act accordingly does not expressly legislate specific circumstances where no notice to opt out of the class action should be given. However, the factors listed in section 17 above are clearly indicative and appear to have taken account of some of the circumstances mentioned by the Ontario Commission in its report where it is envisaged that no notice would be required.

In its Working Paper, although the SALC favoured the approach of the Ontario Commission, it recommended that the court's discretion be "extended by providing a choice between an opt-in notice (in limited circumstances), an opt-out notice, and no notice at all". It recommended that the certifying court should provide directions regarding the giving of notice, including whether notice of the action should be given to the class members and, if so, the form of the notice, whether it should afford a right to opt in or to opt out, and how it should be communicated to the class.²³ It further recommended that, when deciding whether notice should be given to the class members and, if so, what the appropriate directions would be, the court should take into account the following factors:

1. The extent to which class members may be prejudiced by being bound by a judgment given in an action which may not have come to their attention;
2. The size of the class;
3. The probable general level of education and understanding of class members;
4. The possibility of identifying members of the class;
5. The type of relief claimed;
6. Where the claim is for monetary relief, the size of each class member's claim;
7. The likelihood of class members enforcing their claims individually; and
8. Any other relevant factor.²⁴

²² Section 17(3).

²³ Para 6.34.

²⁴ Para 6.35.

It is apparent from the Working Paper that the SALC envisaged that circumstances may exist where no notice of the class action may be required. The SALC proposed that the above-mentioned factors be taken into consideration to assist courts in making this determination. In its subsequent Report, the SALC recommended, as part of the Draft Bill, the adoption of the following clause that deals with notice in class actions:

“Notice in class actions

8. (1) The court which certifies an action as a class action may give directions to the representative with regard to -
- (a) the giving of notice of the action to the members or potential members of the class concerned;
 - (b) the form which such notice should take;
 - (c) the way in which such notice is to be communicated to the members of the class.
- (2) In considering the question whether notice should be given to the members of a class and, if so, what directions are appropriate in respect thereof, the court shall take into account -
- (a) the extent to which the members of the class might be prejudiced by being bound by a judgment given in an action which may not have come to their attention;
 - (b) the potential size of the class;
 - (c) the general level of education and development of the members of the class;
 - (d) the ease with which members of the class can be identified;
 - (e) the type of relief claimed;
 - (f) where monetary relief is claimed, the amount of the claim of each member of the class;
 - (g) the difficulties likely to be encountered by members of the class in enforcing their actions individually;
 - (h) any other relevant factor.
- (3) The court may -
- (a) require from those members of the class who do not wish to be bound by the judgment written notice of their exclusion as members of the class;
 - (b) require from those members of the class who wish to be bound by the judgment written notice of their inclusion as members of the class; or
 - (c) order that no notice to members of the class is necessary.”²⁵

The SALC therefore clearly favours a discretionary approach in terms of which a court can decide whether notice of a class action to class members is required. According to the SALC, it is likely that notice would be required where class members’ claims are monetary

²⁵ South African Law Commission *The Recognition of Class Actions Report 94*.

in nature; however, it would not necessarily be required for all such claims. For example, where the individual claims are small and the class is numerous, the court may decide that notice of the class action to the class members is unnecessary.²⁶

The factors to be considered in terms of section 8(2) of the Draft Bill in determining *inter alia* whether notice of the class action would have to be given to class members are substantially similar to the factors mentioned in the Working Paper, with minor variations. One such variation is the recommendation in the Working Paper that a court should consider the likelihood of class members enforcing their claims individually, compared to the recommendation in the Report that a court should consider the difficulties likely to be encountered by class members in enforcing their actions individually. The Report's recommendation clearly takes the recommendation in the Working Paper even further. The SALC is not simply concerned with the likelihood of claims being enforced individually; rather, the SALC proposes that the primary consideration in this regard should be the difficulties that a class member would encounter if he or she pursues it individually.

This variation is insignificant insofar as the Report's consideration presupposes a willingness amongst class members to enforce their claims individually – the court is expected to go further than simply considering the likelihood of individual litigation by considering whether it would be practically feasible. Where, for example, there would be various practical difficulties associated with independent enforcement of class members' claims, a court may exercise its discretion to order that no notice of the class action would have to be given as individual enforcement may be unfeasible and therefore unlikely. There are, however, other factors that a court should take into account in making this determination as mentioned above – this factor does not operate in isolation. The proposed subsection 2(h) enables a court to take into consideration any other factor that may be relevant to determine whether notice of the action should be given to class members. This would include factors not listed in subsection (2).

The factors that are listed in section 17(3) of the Ontario Act are also substantially similar to those proposed by the SALC in section 8(2). Both list class size, the nature of the relief sought and the size of the individual class members' claims. The Ontario Act refers to the

²⁶ South African Law Commission *The Recognition of a Class Action in South African Law Working Paper 57* para 5.18.

cost of giving notice and the places of residence of class members, whereas section 8(2) fails to do so. The SALC refers to the possible prejudice class members would suffer as a result of being bound by a judgment that has not come to their attention; class members' general level of education and development; whether class members are easily identifiable; and the difficulties likely to be encountered by members of the class in enforcing their actions individually – these factors are not referred to in the Ontario Act. The aforementioned dissimilarity is, however, immaterial as section 17(3) of the Ontario Act and the proposed section 8(2) of the Draft Bill make provision for consideration of any other relevant factors.

It is extremely difficult to categorise and legislate various situations where notice of a class action and of class members' right to opt out thereof should not be required. This is because the factors may, at the same time, operate both in favour of and against the giving of notice. For example, one cannot simply say that, where the potential size of the class is very large,²⁷ notice would not be required.²⁸ It may be that, notwithstanding the size of the class, the class members' individual claims are sufficiently large so as to justify the expense of independent litigation.²⁹ In such circumstances, in exercising its judicial discretion, the court may decide to direct that notice of the class action and of class members' right to opt out thereof should be given to class members.

However, as the factors do serve to indicate circumstances where it may be possible that no notice would need to be given, the court should consider them in exercising its discretion. For example, if the class members would not be prejudiced by being bound to a judgment given in the class action;³⁰ or where the class is very large,³¹ the monetary relief claimed by each individual class member is small, and the class members cannot be easily identified,³² the court may order that notice of the class action and of the class members' right to opt out is not required. There is also clearly an overlap between the above-mentioned factors – for example, the difficulties likely to be encountered by class

²⁷ Section 8(2)(b).

²⁸ Because it may, for example, be too expensive.

²⁹ Section 8(2)(f).

³⁰ Section 8(2)(a). See the discussion under 3.2.4 below regarding possible prejudice to be suffered by class members who fail to opt out of the class action as a result of (improper) notice.

³¹ Section 8(2)(b).

³² Section 8(2)(f).

members in enforcing their actions individually³³ may be attributable to the general level of education and development of the members of the class.³⁴ A consideration of the relevant circumstances of the class action case, including factors not expressly referred to in the proposed section 8(2), such as the costs associated with the giving of notice, is accordingly required by the court in exercising its discretion.

3 2 3 General or individual notice to opt-out?

3 2 3 1 Introduction

It has been concluded above that the point of departure for issuing notice of an opt-out class action to class members should be that notice of the members' right to opt out should be given. This position should only be departed from in a limited number of circumstances. The reason for this approach is premised upon the principle of *audi alteram partem* and the doctrine of *res judicata*. Class members should be notified of the class action and of their right to opt out. This is because the class members have a right not to be bound by a court order without having been afforded an opportunity to state their cases.

The question now arises how notice should be effected. As the class action judgment would have a binding (*res judicata*) effect on all members who have failed to opt out of the class, it stands to reason that individual notice of the class action should be required as a first port of call. This would ensure that the class members are aware of the class action and that they could choose whether they want to form a part of the action or whether they want to opt-out thereof.

However, does the point of departure that individual notice of an opt-out class action should be given to class members constitute an *absolute* requirement? Stated differently, is it permissible for a court to require general notice where the likelihood exists that certain class members may not become aware of the notice and therefore fail to opt out of the class action? The risk in giving general, as opposed to individual, notice is obvious – class members who did not receive notice and who, consequently, failed to opt out would be

³³ Section 8(2)(g).

³⁴ Section 8(2)(c).

bound by the court decision and would be precluded from enforcing their claims individually outside the scope of the class action.

3 2 3 2 Approaches of foreign jurisdictions

In order to determine whether the notion that individual notice of an opt-out class action should be given to class members constitutes an *absolute* requirement, it may be instructive to consider the approaches of foreign jurisdictions in this regard. These approaches will then be compared to the South African position insofar as individualised notice *vis-à-vis* general notice is concerned. A consideration of the approaches of these foreign jurisdictions will also assist in determining, in the absence of individualised notice, what steps would have to be taken to ensure that class members are aware of the class action and of their right to opt out.

Unlike the categories of class actions contained in rules 23(b)(1) and (2) of the Federal Rules, which generally are not subject to notice of certification or a right to opt out,³⁵ class actions certified under rule 23(b)(3) are subject to specific notice and opt-out requirements.³⁶ Rule 23(b)(3) therefore affords due process protections through the requirement of notice and the opportunity to opt out of the class action.³⁷ Rule 23(c)(2) of the Federal Rules specifically provides that the “court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort”.³⁸ Any form of notice deemed

³⁵ The only notice expressly required by rule 23 for (b)(1) and (b)(2) classes is notice of a proposed settlement pursuant to rule 23(e).

³⁶ R H Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 4 ed (2012) 193.

³⁷ L S Mullenix “Re-Interpreting American Class Action Procedure: The United States Supreme Court Speaks” (2000) 5 *ZZP Int* 337 342-343. Rule 23(b)(1) and (b)(2) classes are known as ‘mandatory’ classes because a judgment is binding on all class members – no class member may opt out and rule 23 does not require notice in such actions. The rationale for the absence of these due process protections for rule 23(b)(1) and (b)(2) classes is based on the members having the same or similar interests and are not pursuing individual damage claims. In the latter circumstances, some class members may have a high interest in opting-out of the class action to pursue individual monetary recovery.

³⁸ According to P G Karlsgodt “United States” in P G Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* (2012) 33, the “best notice practicable” requirement can be satisfied by a variety of methods, although notice by regular first-class US mail has been recognised as a preferred method when the mail is reasonably likely to be delivered to the class members.

necessary by the certifying judge must conform to the requirements of rule 23(c)(2)(B) which requires that the notice informs class members of the nature of the action, the definition of the class, the claims alleged and the class member's right to appear in or to opt out of the action. The notice must also state, in plain language, the binding effect of the class action judgment.

In *Mullane v Cent Hanover Bank & Trust Co*³⁹ (“*Mullane*”) it was held that due process requires that notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pending action and afford them an opportunity to present their objections”.⁴⁰ According to *Mullane*, due process does not mandate individual notice in all situations; the “practicalities and peculiarities” can be weighed in determining what constitutes adequate notice.⁴¹ However, in *Eisen v Carlisle & Jacquelin*⁴² (“*Eisen*”) the United States Supreme Court held that, because the names and addresses of the absent class members were easily ascertainable, they had to be given individual notice.⁴³ Accordingly, individual notices had to be sent to all class members who could be identified with reasonable effort. The costs of the notices had to be borne by the representative plaintiff(s), although this requirement would effectively prevent the class action from proceeding.⁴⁴ *Eisen* accordingly established a stricter standard for notice than what was

³⁹ 339 US 306, 315 (1950).

⁴⁰ 314.

⁴¹ 314-315.

⁴² 417 US 156 (1974).

⁴³ 175. The district court found that, out of a prospective class of six million individuals and institutions, about 2,250,000 could be identified by name and address. However, the court found that the cost of mailing notices to all of these individuals and institutions would be prohibitive; it therefore sanctioned a combination of individual notices and publication of notice in the Wall Street Journal and other newspapers. The court held that the plaintiffs were likely to prevail in the case and therefore most of the notice costs had to be borne by the defendants.

⁴⁴ The Supreme Court held that the combination of individual and public notice did not satisfy rule 23(2)(b)'s requirements and that there was no basis in law for the district court's preliminary decision on the merits and imposing costs on the defendant. See, however, for example, *In re “Agent Orange” Product Liability Litigation* 818 F2d 145, 167-168, 175 (2nd Cir 1987) where it was held that notice through announcements in national publications and on radio and television were acceptable where members of the class could not be located through reasonable means.

previously required to ensure due process.⁴⁵ The court imposed such an onerous notice requirement that it effectively denied the class members access to justice.

Requiring that individual notice be given to each class member is probably in accordance with a literal interpretation of rule 23(c)(2). However, it has been argued that it could not have been the intention of the drafters of the rule to set up such an impractical requirement; otherwise, the costs associated with individual notice could potentially result in the termination of the class action.⁴⁶ This is exactly what happened in *Eisen* where two and a quarter million members of the class of about six million small investors on the New York stock exchange could be identified through reasonable effort. Although the costs of individual notice would have amounted to \$225 000, the Supreme Court insisted upon such notice to all these members. The court also ordered the plaintiff to pay the total amount, which effectively ended the class action. The stringent notice provisions often associated with opt-out class actions has accordingly caused serious problems.⁴⁷

It has been submitted that rule 23 cannot be regarded as a clear command of absolute individual notice to all identifiable class members regardless of other circumstances. Such a requirement seems “inconsistent with the spirit of Rule 23”.⁴⁸ The court in *Eisen* recognised that *Mullane* permitted notice by publication, but concluded that publication was not sufficient when names and addresses are known.⁴⁹ Therefore, although *Eisen* required individual notice to identifiable class members, notice by publication, including *via* the Internet, appears to be permissible when the class is so large that its members cannot

⁴⁵ See also *Phillips Petroleum Co v Shutts* 472 US 797 (1985) where it was held that, in the context of rule 23(b)(3), due process dictates that an absent plaintiff should be provided with an opportunity to opt out of the class action.

⁴⁶ W de Vos “Reflections on the Introduction of a Class Action in South Africa” (1996) 4 *TSAR* 639 647.

⁴⁷ J B Weinstein *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices* (1995) 136. In “Class Actions--Notice and Manageability (*Eisen v Carlisle & Jacquelin*)” (2012) 48 *St John's Law Review* 355 360, it was stated that “[a] literal reading of rule 23 supports this holding. However...such a reading makes rule 23 more stringent than is constitutionally mandated. In view of the emasculating effects of this strict construction, a holding that rule 23 notice requirements are equivalent to the constitutional mandates may have been more efficacious”.

⁴⁸ *St John's Law Review* (2012) 361.

⁴⁹ 361.

be identified.⁵⁰ A case in point is *In Re “Agent Orange” Products Liability Litigation*⁵¹ where it was held that notice through announcements in national publications and on radio and television was acceptable where members of the class could not be located through reasonable means.⁵²

The situation in Ontario differs from that in the United States. Whereas Federal Rule 23 favours individual notice, the Ontario Act allows notice by any means that the court considers appropriate and it specifically authorises notice by publication. Section 17 describes various forms of notice that may be approved by the court as well as the factors the court should consider when determining the form and extent of notice. Section 5(1)(e) of the Ontario Act provides that the plaintiff must produce a ‘workable plan’ for disseminating notice to class members.

For the reasons below, it is proposed that the approach adopted in South Africa should be more closely aligned to the approach of Ontario where the court exercises a discretion having regard to various factors, rather than the approach of the United States where individual notice must be given where class members are reasonably identifiable.

3 2 3 3 Individual notice absolutely required?

The problem with always requiring individual notice to class members is that, although it is preferable, circumstances may arise where such notice is simply not feasible or possible. For example, it may not be feasible to require that individual notice be given to class members where the class is very large⁵³ and the costs associated with the issuing of the notice are so excessive that it may result in the discontinuance of the class action.⁵⁴ It may further be impossible to issue individual notice where, for example, the class members are unidentifiable.⁵⁵ For instance, in *Children’s Resource Centre Trust* the putative class

⁵⁰ L Silberman “The Vicissitudes of the American Class Action — With a Comparative Eye” (1999) 7 *Tul J Int’l & Comp L* 201 212.

⁵¹ 818 F.2d 145, 167-168. 175 (2d Cir. 1987).

⁵² Silberman (1999) *Tul J Int’l & Comp L* 212.

⁵³ Section 8(2)(b) of the Draft Bill proposed by the South African Law Commission.

⁵⁴ See the discussion under 3 2 4 below regarding possible prejudice to be suffered by class members who fail to opt out of the class action as a result of (improper) notice – it includes a discussion on class members’ potential liability for costs.

⁵⁵ Section 8(2)(d) of the Draft Bill proposed by the South African Law Commission.

consisted of more than one million individuals – giving notice to each individual class member would probably have been impossible. In these circumstances, it may therefore be necessary to limit class members' right to be heard by requiring that notice be given generally to the class and that class members would not need to be notified individually of the class action and of their right to opt out. In this regard, De Vos states that:

“In appropriate circumstances... the judge might decide that it would not be necessary to notify all members of the class or that notice by means of publication in the media, instead of personal notice, would suffice. Lest some might argue that lack of (proper) notice would impinge upon the notion of due process of law, I should add that the requirement of adequate representation ensures that the interests of the absent members are protected.”⁵⁶

It may be worth restating that the *sui generis* nature of class actions are evidenced by the fact that the rights and interests of non-parties are determined. It is therefore important to ensure that their interests are adequately protected. One possible way is through the certification requirement that the class representative adequately represents the interests of the class.⁵⁷ What this means is that a court must be satisfied as to the suitability of the proposed representative to conduct the action and to represent the class.⁵⁸ In this regard, the Supreme Court of Appeal in *Children's Resource Centre Trust* held that a court must be satisfied that the class representative does not have a “conflict of interest with the class members and that the representative must have the capacity to litigate properly on behalf of the class”.⁵⁹ The court held that, where the litigation is aimed at enriching the class representatives or to serve the interests of individuals other than the class members, a conflict of interest would arise. The capacity-inquiry is important because unsuccessful litigation would have the effect of destroying the claims. In this regard, the Supreme Court of Appeal required that a court must be addressed on the following issues in the certification application:

⁵⁶ De Vos (1996) TSAR 648.

⁵⁷ South African Law Commission *The Recognition of Class Actions Report* para 5.6.20. See also the discussion under 3 2 5 below regarding the role of the judge to protect the interests of absent class members.

⁵⁸ *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd and Legal Resources Centre as amicus curiae* 2013 1 All SA 648 (SCA) para 26.

⁵⁹ Para 47.

1. Whether the representative has the time, the inclination and the means to procure the evidence necessary to conduct the litigation.
2. Whether the representative has the financial means to conduct the litigation. If the representative does not have the necessary financial means, the application must address the way in which the litigation will be financed.
3. Whether the representative has access to legal representation with the capacity to effectively conduct the litigation. This will require considering the likely magnitude of the case and the resources involved.
4. How the legal representatives will be funded. If a contingency fee arrangement is made, the details of the arrangement must be disclosed to ensure that it does not give rise to a conflict of interest.
5. Whether the litigation is pursued at the behest, and for the benefit, of the legal representatives, or in the genuine interests of class members. It is for this reason that in other jurisdictions the court's approval of any settlement is required. Whilst this issue did not arise in *Children's Resource Centre Trust*, the court held that some similar requirement would need to be imposed when that situation does arise.⁶⁰ In *Nkala v Harmony Gold Mining Company Limited*⁶¹ ("Nkala"), Mojapelo DJP held that "such approval is obligatory as the provisions of the *Contingency Fees Act 66 of 1997* ('CFA') are applicable. We hold that it is in any event correct that any settlement agreement reached after certification of the class action should be subject to the approval of the court and that it should only be valid once approved by the court. This is to ensure that the settlement reached is fair, reasonable, adequate and that it protects the interests of the class".⁶²

Should the court be satisfied that the class representative does not have a conflict of interest with the class members and that the representative has the requisite capacity to litigate properly on behalf of the class, the class members would be regarded as being adequately represented.

According to the SALC, adequacy of representation needs to be balanced against the need for individual notice. A strict interpretation of the right to a fair trial in the context of class actions requires that notice be given to all the individual class members who may be

⁶⁰ Paras 46-48. See also *Pretorius v Transnet Second Defined Benefit Fund* 2014 6 SA 77 (GP) para 21.

⁶¹ (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016).

⁶² Para 39.

affected by the judgment. Referring to De Vos,⁶³ the SALC stated that the reason for requiring that individual notice be given to class members is that a binding class action judgment would operate unfairly in respect of those class members who did not receive individual notice of the proceedings and, therefore, were unable to litigate their own claims.⁶⁴ However, according to De Vos, class members' right to be heard may be limited provided it is fully guaranteed by the representative party. The representative of the class would effectively function as the conduit of absent class members, which means that absent class members would still be 'heard'. De Vos is of the view that our courts should follow a lenient approach by emphasising the importance of adequate representation rather than insisting on individual notice to all members of a class.⁶⁵

If our class action mechanism is to be successful – if success is to be measured against the attainment of the class action objectives – then individual notice simply cannot be required in all circumstances. Although individual notice is preferable, circumstances may arise where it is not feasible or possible. For the purposes of class certification all that is necessary is that the class be objectively defined. It is not necessary to know the precise identities of class members. In *Children's Resource Centre Trust*, it was expressly stated that it is not a certification requirement that the individual identities of the class members must be known.⁶⁶ Such circumstances should not signify the termination of opt-out class actions; rather, compliance with the 'adequacy of representation' certification requirement means that the class members' interests are sufficiently protected by the class representative. Therefore, the class members' right to be heard can justifiably be limited by not requiring that individual notice of the opt-out class action be given to them.

If individual notice of the opt-out class action were an absolute requirement from which derogation is impermissible, it would undermine the primary purpose of the class action, which is to facilitate access to justice.⁶⁷ Class members, who may comprise the poorest portion of our society and who are confronted with financial, psychological and social barriers, would be denied access to justice and deprived of the opportunity to share in the fruits of a favourable class action judgment. This is especially the case in South Africa

⁶³ De Vos (1996) TSAR 654.

⁶⁴ South African Law Commission *The Recognition of Class Actions Report* para 5.10.5.

⁶⁵ De Vos (1996) TSAR 654-655.

⁶⁶ Para 29.

⁶⁷ South African Law Commission *The Recognition of Class Actions Report* para 5.11.3.

where a large percentage of our society is illiterate, uninformed and impoverished because they are not properly educated – it is important to ensure that benefits flowing from class actions accrue to these individuals. Requiring individual notice when it would be impossible or unfeasible would also defeat a further purpose of the class action mechanism, which is to avoid a multiplicity of actions on the same or similar issues; this may, in turn, result in inconsistency in court decisions. The right to a fair trial as entrenched in section 34 of the Constitution can therefore, in the context of notice of the class action and of class members' right to opt out thereof, justifiably be limited, having specific regard to adequacy of representation as a certification requirement and to the overall purpose of the class action mechanism.

An example of a South African class action case where individual notice to class members was not required is *Pretorius v Transnet Second Defined Benefit Fund*⁶⁸ (“*Pretorius*”). There were potentially class members who would be bound by the class action court order because they did not receive individual notice of the class action.⁶⁹ This did not prevent the court from certifying the class action.⁷⁰ The court made the following order regarding notice of the class action:

“6. That the first and second applicants be and are hereby ordered to give notice to members of the first and second respondents of the class action to be instituted by the applicants by one publication in the following newspapers with a national spread in the language indicated therewith:

- (i) *Sunday Times* in English;
- (ii) *Rapport* in Afrikaans;
- (iii) *City Press* in Xhosa and Zulu;
- (iv) *Sowetan* in Setswana/Sesotho and Zulu; and

⁶⁸ 2014 6 SA 77 (GP).

⁶⁹ In *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA) para 29, the extent of the court's mentioning of class action notice was that it is necessary for the class to be defined with sufficient precision that an individual's membership can be objectively determined by examining their situation in the light of the class definition and that this is important *inter alia* because it affects the manner in which notice is given to members of the class. Our class action case law makes little, if any, further reference to the issue of notice.

⁷⁰ It is not apparent at first glance, but the 'members of the first and second respondents' referred to in the order are the absent class members.

by one publication in the following newspapers with a regional spread in the languages indicated therewith:

- (i) *Beeld* in Afrikaans and English;
- (ii) *Die Burger* in Afrikaans and English;
- (iii) *Volksblad* in Afrikaans; and
- (iv) *Natal Mercury* in English.

7. That the third respondent, insofar as it may be necessary and practicable, be directed to assist the applicants in order to give notice to the members of the first and second respondents by way of notices at pension paypoints of the envisaged class action to be instituted by the first and second applicants.

8. That the publication of the class action in the newspapers and notices at pension pay points shall include:

- (i) A summary of the relief sought against the respective respondents by the applicants;
- (ii) full details of the attorneys of record acting on behalf of the applicants; and
- (iii) an advisory notice that:
 - (a) Any member of the first or second respondent has the option to opt out of the proceedings envisaged on their behalf within 60 days from date of the publication of the notice in the printed media set out above; and
 - (b) that such members electing to opt out of the proceedings should file such election within 60 days with the first and second applicants' attorneys of record of such publication, failing which such member shall be bound by the decision of the court.⁷¹

The *Nkala-case*⁷² is a further instance where the South Gauteng Division of the High Court of South Africa found that individual notice was not required and that general notice would suffice. Mojapelo DJP held that, “[i]n our view, the notices, as they stand, are sufficient and so too are the processes that will be set in motion to advertise them. They are designed to ensure that they are brought to the attention of the maximum number of mineworkers possible”.⁷³

It is therefore apparent that individual notice is not an absolute requirement in South African class action litigation. The question that arises is, in the absence of individualised notice, what steps would need to be taken to ensure that class members are potentially aware of the class action and of their right to opt out. The *Pretorius* case provides one

⁷¹ 88.

⁷² (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016).

⁷³ Para 168.

possible alternative way to giving notice to class members.

3 2 3 4 Suggested approach to giving general notice

Where the court exercises its discretion and orders that general notice, as opposed to individualised notice, should be given, the question that arises is what steps would need to be taken to ensure that class members are potentially aware of the class action and of their right to opt out. It may be instructive to revisit the *De Beer* case in this regard. In *De Beer*, it was held that the first requirement for a fair hearing is that reasonable notice of the hearing must be given to an affected person. In assessing reasonableness, consideration must be given to the circumstances of the case in light of the purpose of the notice requirement, namely to bring relevant information about the claim and the hearing to the attention of anyone affected by it.⁷⁴ The court also held that:

“The hearing itself must also be fair. It can be fair in relation to notice only if the court has a discretion not to grant the order or to require further notice to be given if fairness demands that it be done. The court must, in addition, have the power to investigate whether it is reasonably possible to bring the notice to the attention of the affected person if it is clear that fairness requires an investigation of that kind.”⁷⁵

Other factors that the Constitutional Court in *De Beer* deemed relevant to the assessment of the reasonableness of notice were the nature of the order that could be made as a result of the hearing and the gravity of its consequences.⁷⁶

The part of the judgment in *De Beer* that relates to notice in the context of the right to a fair hearing is equally applicable to notice in the context of class actions. This is borne out by the judgment in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*⁷⁷ (“*Ngxuza (HC)*”). In *Ngxuza (HC)*, one of the terms of the order as agreed between the parties to the dispute pertained to notice:

⁷⁴ Para 13. See also *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 2 SA 254 (SCA) para 2, where it was held that the object of publication was to give members of the class the opportunity if they wished to opt out of the proceedings envisaged on their behalf.

⁷⁵ Para 14.

⁷⁶ Para 15.

⁷⁷ 2001 2 SA 609 (E).

“That the Eastern Cape Welfare Department (‘the Department’) is to give notice by way of the print and electronic media, constituency offices, welfare offices, advice offices, traditional leaders and at all pay points at which social grants are paid to beneficiaries, calling upon persons whose disability grants were terminated between 1 March 1996 and 28 September 2000 to present themselves at the time and place specified in the relevant notice to be interviewed and, if necessary, to be medically examined with the view to determining whether or not such person qualifies to receive a disability grant;”⁷⁸

The court in *Ngxuza (HC)* had to determine *inter alia* whether the respondents properly complied with the above term of the agreed order. The applicants submitted that class members were not given proper notice to present themselves at a specified time and place as required by the order. The process followed by the respondents was accordingly alleged to be insufficient and the process had to be redone in a more specific and detailed manner.

The respondents conceded that they did not fully comply with the court order regarding notice, but submitted that there had been substantial compliance.⁷⁹ Although the court did not refer to *De Beer*, the court effectively had to decide whether substantial compliance amounts to reasonable notice to class members. The court held that, although the respondents did not give proper notice through the media as set out in the original order, they had taken “elaborate and, judging by response, reasonably effective measures to make the process known”.⁸⁰ The court stated, however, that the possibility remained that many of those affected might not have heard or known of the review process. On the evidence of the respondents, 8459 persons did not come forward to have themselves examined. Their names and the pay points where their names were listed were known. The court, in line with the above-quoted passage in *De Beer* regarding the requirement that the hearing must be fair, ordered that a further attempt be made to give these persons proper notice of the review process and afforded the respondents the opportunity to suggest the most effective way of giving further notice and for the applicants to comment thereon.⁸¹

⁷⁸ 3.

⁷⁹ 6-7.

⁸⁰ 10.

⁸¹ 10-11. This is similar to the ‘workable plan’ requirement in the Class Proceedings Act, 1992, S.O. 1992, c. 6.

It is apparent from *De Beer* that reasonable notice is required, that is a reasonable attempt should be made to ensure that the class members are aware of the class action and of their right to opt out. The question that arises then is what constitutes reasonable notice of opt-out class action proceedings. Stated differently, in what circumstances would a court be of the view that reasonable steps have been taken to bring the class action to the attention of the affected persons, i.e. the class members?

Generally, the rules of court make provision for what constitutes reasonable notice but, according to *De Beer*, such rules do not provide an exclusive standard of reasonableness. In the absence of court rules that make provision for notice of class actions, reasonableness will have to be assessed based on the circumstances of each case. This assessment should take place in light of the purpose of the notice requirement, namely to bring relevant information about the claim and the hearing to the attention of anyone affected by it. The assessment will be made by the court through the exercise of its inherent jurisdiction.

In *Mukaddam CC*, the court held that it is common practice in our courts that procedural requirements are applied flexibly. For example, our courts may condone non-compliance with enacted rules if it would be in the interests of justice. The court further held that, to exercise the right of access to courts, certain defined procedures must be followed to enable adjudication of the dispute. These procedures are set out in the court rules. The Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa (“Uniform Rules”) regulate the form and process of the different divisions of the High Court of South Africa. The Supreme Court of Appeal and the Constitutional Court have their own rules. The court rules should advance access to justice, rather than hinder it. Accordingly, courts are not created for rules; rather, rules are made for courts.⁸² The primary function of court rules is to attain justice. However, circumstances not provided for in court rules may arise and, in such circumstances, the proper approach would be to ask the court for guidance.⁸³

⁸² *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC) para 32.

⁸³ Paras 31-33. Section 173 of the Constitution provides that “[t]he 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”.

Our superior courts accordingly have a discretion to decide on the appropriate notice-scheme with regard to the circumstances of each case before it. There may be circumstances, for example, where the class is so numerous that individual notice is simply not feasible or possible. In those circumstances, a court may decide that reasonableness dictates the giving of notice through, for example, publication in the media. It is submitted that this discretion should be exercised by taking account of the factors mentioned by the SALC in section 8(2) of the Draft Bill in deciding whether individual or general notice is required in the circumstances and, if general notice will suffice, what steps must be taken to bring the notice to the class members' attention. The SALC referred to *De Vos* who is in favour of such a discretionary approach and is of the view that courts would then be able to devise appropriate notice schemes for each class action according to the circumstances surrounding each given case.⁸⁴

Ultimately, it has to be considered whether the notice scheme of a particular class action would potentially infringe upon the fairness requirement of section 34. Is the notice-scheme determined by the court reasonably capable of bringing the class action to the attention of the class members? Is it reasonably probable that the class members would in the ordinary course become aware of the class action after the notice-scheme has been executed?⁸⁵ It is undesirable, if not impossible, to try to determine the requirements of reasonableness in the abstract. The reasonableness of notice must be assessed on its own merits with reference to the circumstances of the case.⁸⁶

In the Access to Justice Report, Lord Woolf stated the following regarding a discretionary approach of the sort referred to above:

“In a multi-party action where there are many claims, each of which is small, there is little to recommend in a rule making notice to each potential claimant mandatory. The costs of identifying potential claimants, and preparing and sending the notice, will make the litigation as a whole uneconomic. In any event, where such claimants receive the notice and choose to opt out, they will receive nothing. Because, with small claims it is uneconomic for them to litigate individually, they will almost invariably remain members of the group. In the United States, in small claims group actions, very few of the tens of thousands – in some cases millions – of

⁸⁴ South African Law Commission *The Recognition of Class Actions Report* para 5.10.21.

⁸⁵ *De Beer NO v North-Central Local Council and South-Central Local Council* 2002 1 SA 429 (CC) para 20.

⁸⁶ Para 13.

potentially claimants actually notified choose to opt out. Accordingly, courts must have the discretion to dispense with notice enabling parties to opt out having regard to factors such as the cost, the nature of the relief, the size of individual claims, the number of members of a group, the chances that members will wish to opt out and so on... Yet even if the court decides that notice must be given to members of a group, it should have a discretion as to how this is to be done – individual notification, advertising, media broadcast, notification to a sample group, or a combination of means, or different means for different members of the group. In each case the court must take into account the likely cost and benefit before deciding on the course of action.”⁸⁷

It is submitted that a discretionary notice regime appears to be superior to other notice regimes, even if it may result in certain class members being unaware of the class action. Ultimately, it is the most appropriate way to achieve the access to justice goal of class actions.⁸⁸

3 2 4 The relationship between prejudice due to being bound by a judgement and the notice-requirement in opt-out class actions

3 2 4 1 Introduction

The SALC envisaged that, in circumstances where the class members have significant individual claims so that it is probable that they would enforce their claims in the absence of the class action, the court should order opt-in notice (as opposed to opt-out notice or no notice at all). In its Report, the SALC made the following statement regarding the circumstances where a court should order that opt-in notice be given to class members:

“It is recommended that the court should order opt-in notice only where the court is of the opinion that the class members may be significantly prejudiced by the fact that they will be bound by a judgment given in an action which may not have come to their notice. The kind of case in which it is envisaged that there would be significant prejudice would be for instance where a large number of people suffer damages as a result of the same incident, such as an airplane crash. Where the individual claims are sufficiently large to make it probable that they

⁸⁷ Lord Woolf *Access to Justice* (Final Report, 1996) 236-237.

⁸⁸ Victorian Attorney General's Law Reform Advisory Council *Class Actions in Victoria: Time for a New Approach* (Report, 1997) 53.

would enforce their own claims then they should not be bound by a judgment unless they have expressly consented to be so bound.”⁸⁹

Does this mean that class members in an opt-out class action, where such members usually have small individual claims, would not suffer significant prejudice if they were bound by a judgment given in an action that did not come to their notice? If they would not suffer any prejudice, the question arises whether it is at all necessary to give notice to class members of the class action and of their right to opt out thereof? In answering these questions, it may be worthwhile, as a point of departure, to consider the principle of *res judicata* in more detail. This will assist in determining, firstly, who is bound by the judgment of the court in an opt-out class action and, secondly, what the possible prejudice is that individuals may suffer if, because they did not receive notice of the class action, they failed to opt out and are consequently bound by the court’s decision. Finally, it can then be determined whether it is necessary to issue notice to class members in an opt-out class action in circumstances where class members’ individual claims are insignificant and it is unlikely that they would litigate independently to enforce their claims in the absence of a class action.

3 2 4 2 Res judicata

According to the SALC, the court’s judgment in class actions should generally be binding upon all the members of the class. This means that, if any of the class members institute subsequent proceedings against the defendant(s) regarding the same issues, the action should be dismissed based on a plea by the defendant(s) of *res judicata*. In other words, the defendant raises an objection arguing that the proceedings are precluded by judgment in the class action.⁹⁰

In *Bafokeng Tribe v Impala Platinum Ltd*,⁹¹ the court followed *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk*⁹² in stating the following regarding the requirements that must be met to succeed with a plea of *res judicata*:

⁸⁹ South African Law Commission *The Recognition of a Class Action in South African Law Working Paper 57* para 5.25.

⁹⁰ South African Law Commission *The Recognition of Class Actions Report* para 5.11.4.

⁹¹ 1999 3 SA 517 (B) 566.

⁹² 1995 1 SA 653 (SCA).

“From the foregoing analysis I find that the essentials of the *exceptio res judicata* are threefold, namely that the previous judgment was given in an action or application by a competent court (1) between the same parties, (2) based on the same cause of action (*ex eadem petendi causa*), (3) with respect to the same subject matter, or thing (*de eadem re*). (2) and (3) are not immutable requirements of *res judicata*. The subject matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same. However where there is a likelihood of a litigant being denied access to the courts in a second action, and to prevent injustice it is necessary that the said essentials of the threefold test be applied. Conversely in order to ensure overall fairness (2) or (3) above may be relaxed. A court must have regard to the object of the *exceptio res judicata* that it was introduced with the endeavour of putting a limit to needless litigation, and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions. This principle must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties.”

Does the requirement that the subsequent dispute must be between the ‘same parties’ exclude the class members who, unlike the representative plaintiff, are usually not identified as individual parties?⁹³ It has been stated that this requirement should not be interpreted narrowly to include only the identical individuals who were the actual parties to the initial proceedings in which the judgment, which is raised as *res judicata*, was given. Rather:

“[T]hey include persons who are in law identified with those who were parties to the proceedings. Persons who are deemed to be the same as the persons who were engaged in the earlier proceedings in which the judgment was given all derive their interest in the latter proceedings from the parties to the earlier proceedings. The requirement that the persons in the earlier and later proceedings must be the same does not mean that the person who raises the *exceptio* must necessarily have been the defendant in the earlier proceedings, nor that the party against whom it is raised must have been the plaintiff in the earlier proceedings.”⁹⁴

In *Children’s Resource Centre Trust*,⁹⁵ the Supreme Court of Appeal referred to Silver who states that the class action is:

⁹³ See 1 1 1 above.

⁹⁴ Joubert (ed) *The Law of South Africa* vol 9 637.

⁹⁵ Para 17.

“[A] procedural device that expands a court’s jurisdiction, empowering it to enter a judgment that is binding upon everyone with covered claims. This includes claimants who, not being named as parties, would not ordinarily be bound. A classwide judgment extinguishes the claims of all persons meeting the class definition rather than just those of named parties and persons in privity with them, as normally is the case. Judges and scholars sometimes treat the class action as a procedure for joining absent claimants to a lawsuit rather than as one that permits a court to treat a named party as standing in judgment on behalf of them. This is a mistake...Class members neither start out as parties nor become parties when a class is certified.”⁹⁶

Class members who fail to opt out of the class action would clearly be bound by the judgment of the court in the action by virtue of the judgment being *res judicata* in respect of these members. However, where the class members opt out of the class action, they would be entitled to litigate their claims independently. If this is the case, then the next question is what possible prejudice individuals could suffer if they failed to opt out because they did not receive notice of the class action, and are bound by the court’s decision?

3 2 4 3 Nature of prejudice

It is conceivable that, where the individual claims are large, class members who fail to opt out because of the absence of (proper) notice may suffer prejudice.⁹⁷ This is because the likelihood exists that the individual class members would, in the absence of the class action, have litigated individually to enforce their claims. The absence of notice in such circumstances deprives class members of the choice not to participate in the class proceedings. It is, however, unlikely that the opt-out class action mechanism would be utilised in circumstances where the class members’ individual claims are large enough to justify the expense of independent litigation. In the Working Paper, the SALC stated that provision should be made for opt-in notice in limited situations because there may be circumstances where class members have substantial claims and they may be prejudiced if the class action fails or is not prosecuted effectively. In such a case, the judgment would be *res judicata* in respect of the individual class members’ claims and it is therefore important to ensure that the claimants have knowledge of the class action.⁹⁸ It is difficult to

⁹⁶ C Silver “Class Actions – Representative Proceedings” in B Bouckaert and G de Geest (eds) *Encyclopaedia of Law and Economics* 194.

⁹⁷ Where this part of chapter three refers to the absence of notice, it includes the giving of improper notice.

⁹⁸ South African Law Commission *The Recognition of a Class Action in South African Law Working Paper 57* para 5.32.

conceive of circumstances where the opt-out mechanism would be used where the class members' claims are so large that they justify the expense of independent litigation. It is generally more likely that a court would order that opt-in notice be given in such circumstances.

Where the class members' individual claims are small and it is therefore unlikely that they would have litigated in the absence of the class action, it is difficult to conceive of any real prejudice that would be suffered by class members by virtue of the application of the *res judicata* doctrine. The first and foremost objective of the class action mechanism is to afford greater access to justice. Litigation has become so expensive that claims of modest amounts and, at times, even those of significant amounts, are not economically feasible to pursue on an individual basis. In class action terminology, these are referred to as 'individually non-viable claims'.⁹⁹ Therefore, where one is dealing with individually non-viable claims where it is unlikely that the individual class members would litigate their claims on an individual basis, the mere fact that the judgment would be binding upon these class members does not mean that it would be to the prejudice of the class members. In fact, the class members are afforded the opportunity to share in the fruits of a favourable class action judgment in circumstances where they would otherwise probably not have had their rights vindicated in a court of law. Especially in the South African context, the existence of social, psychological and financial barriers may mean that, but for the class action, individual class members would not have enforced their claims independently. Therefore, the fact that the judgment is *res judicata* in respect of the class members who failed to opt out of the class action as a result of the absence of notice, does not necessarily mean that those class members would suffer prejudice as a result thereof.

This brings to bear the question of any other prejudice that class members would suffer if they do not receive notice? This question is significant because, if no real prejudice would be suffered in the context of the opt-out class action if notice were not given, it is unclear why class members would need to be given notice of the class action at all. Stated differently, if class members are not prejudiced by not receiving notice of the class action and of their opt-out right, why is it necessary for notice to be given, taking into account *inter alia* the administrative and financial burdens to be shouldered by the representative plaintiff(s) in this regard?

⁹⁹ G D Watson "Class Actions: the Canadian Experience" (2001) 11 *Duke J Comp & Int'l L* 269 269.

Another conceivable prejudice to be suffered where class members fail to opt out of the class action by virtue of the absence of notice is the possibility that they may be held liable for costs. If this is indeed possible, then it follows that class members should receive (individual) notice of the class action and of their right to opt out. According to the Ontario Commission:

“In our view, the question of costs is the single most important issue this Commission has considered in designing an expanded class action procedure for Ontario. As we shall explain later, the matter of costs will not merely affect the efficacy of class actions, but in fact will determine whether this procedure will be utilized at all.”¹⁰⁰

Generally speaking, the court cannot order a person who is not a party before it to pay costs.¹⁰¹ Applying this general rule to the definition of a ‘class action’,¹⁰² it is apparent that class members, insofar as they are not parties to the dispute, cannot be ordered to pay costs. This rule does not apply in relation to the representative plaintiff who is indeed a party to the dispute and can accordingly be held liable for costs. It is therefore possible for a court to decide that where, for example, the class action fails, the representative plaintiff(s) should be held liable for the defendant’s costs. However, in such circumstances the class members other than the class representative cannot be held liable for costs. The SALC prepared the table below to broadly illustrate the effect of the application of the general rule in class actions that costs follow the event.¹⁰³ The table illustrates that, unless there is an arrangement to the contrary, the class members should have no entitlement to, or liability for the expenses of, the class action.¹⁰⁴

¹⁰⁰ Ontario Law Reform Commission *Report on Class Actions* 647.

¹⁰¹ A C Cilliers, C Loots & C Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) 952. See, for example, *Lasersohn v Olivier* 1962 1 All SA 338 (T) 340 where it was held that “it is logical that if a person is not before the court then you cannot make an order against such a person”.

¹⁰² See 1 1 1 above.

¹⁰³ The South African Law Commission *The Recognition of Class Actions Report* para 5.17.1 – table taken from Scottish Law Commission *Multi-Party Actions: Court Proceedings and Funding* (Discussion Paper No 98) November 1994 241.

¹⁰⁴ Para 5.17.1.

Result of action	Representative	Other members of the class	Defendants
Action succeeds (Class wins)	Entitled to party and party costs from the defendant(s) Liable for own attorney's fees on attorney client scale	Entitlement: none Liability: None	Entitlement: none Liable for (a) own attorney's fees on the attorney client scale and (b) the representative's costs on the party and party scale
Action fails (Class loses)	Entitlement: none Liable for (a) own attorney's fees on the attorney client scale and (b) the costs of the defendant on the party and party scale	Entitlement: none Liability: None	Entitled to party and party costs from the representative Liable for own attorney's fees on attorney client scale

Costs will ordinarily not be payable by class members. It would be very difficult, if not impossible, to recover costs from each class member, especially where the class consists of thousands of members. It would also defeat the primary purpose of class actions – to facilitate access to justice – if class members would prefer to opt out of class proceedings rather than to be held liable for costs. In Ontario and the United States, class members are not liable for costs except where they incur costs in the assessment of their individual claims. A further recommendation of the Ontario Law Reform Commission was that only the representative plaintiff – not the class members – “should be liable for costs associated with the certification hearing, the common questions stage of a class action or on an interlocutory motion”.¹⁰⁵ It has accordingly been recommended that, except for the representative party, class members should generally not be held liable for costs.¹⁰⁶

It is therefore apparent that, in the context of the opt-out class action, class members will generally not be held liable for costs. The same cannot be said in respect of opt-in class

¹⁰⁵ Ontario Law Reform Commission *Report on Class Actions* 749.

¹⁰⁶ See, for example, the Manitoba Law Reform Commission *Class Proceedings* (1999) 76.

actions. The Working Paper of the SALC provides as follows regarding the liability of class members for costs in the context of an opt-in class action:

“In addition, it is recommended that where a court orders opt-in notice it should be able to direct that the notice require persons who opt-in to undertake to pay a contribution towards costs and, where necessary, to contribute towards providing security for costs. This would be appropriate where the members of the class are perceived to be persons who would be able to afford such a contribution and where their claims are sufficiently large to make it likely that they would have pursued them on their own in the absence of the class action. This complements the recommendation that a permissive joinder type of class action should be available and provides the court and the parties with an even wider range of options to consider in order to find an appropriate solution to the costs problem.”¹⁰⁷

Section 11(2)(b) of the Draft Bill proposed by the SALC relates to costs and reinforces the SALC’s recommendation that class members who opt into the class action can be held liable for costs. It provides as follows:

“Costs

11. (1) In a class action the court shall not order the representative to provide security for costs unless special circumstances apply.

(2) The court may –

(a) authorize a class action and appoint the representative subject to the rendering or making available of legal aid by the Legal Aid Board;

(b) order those members of the class who elected to give written notice in terms of section 8(3)(b) to contribute towards costs and, where appropriate, to provide security for costs.”

If, in the absence of an agreement to the contrary, class members in the context of the opt-out class action cannot be expected to contribute to costs – although it may be possible for class members in an opt-in class action to be liable for costs – then the costs-issue amounts to nothing more than an immaterial risk. In other words, if class members fail to opt out of the class action because they have not received (individual) notice and it is unlikely that they would have litigated in the absence of a class action, there is no real prejudice that the class members would suffer. To the contrary, they could only stand to benefit from a favourable class action judgment – an unfavourable judgment would not

¹⁰⁷ South African Law Commission *The Recognition of a Class Action in South African Law Working Paper* 57 para 5.51.

affect the class members' financial or social position in any way. The fact that the judgment is binding upon them would not operate to the class members' prejudice nor would the class members be exposed to liability for costs. Why then do these individuals have to be given notice at all?

From a practical perspective, class members would suffer prejudice if they do not know of the class action and are accordingly not in a position to claim the benefit of a favourable judgment. It is from this perspective that it is submitted that notice of the class action would need to be given to class members at some point in the course of the class proceedings. However, does such notice necessarily need to be given at the certification stage in terms of which class members are afforded an opportunity to opt out of the class action? It has been suggested that it may be possible to do away with the problems presented by notice and the *res judicata* principle by providing that a judgment or settlement would be binding only on those who come forward to claim a benefit after judgment has been given or a settlement made. This means that class members can wait and see – they do not need to commit themselves to the class action – and only come forward where a favourable judgment has been given or settlement reached. According to the SALC, this is problematic where the class members who seek to benefit are expected to contribute towards costs at commencement of the action. However, as mentioned above, class members in an opt-out class action will infrequently, if ever, be required to contribute to costs. This concern is applicable to the opt-in class action where class members may need to contribute to costs; however, in such circumstances, class members cannot simply sit back and wait for judgment to be rendered – they need to opt in to share in the fruits of the judgment.¹⁰⁸

Where, however, the class representative will carry the cost-burden – the class members will accordingly not be expected to contribute to costs – the SALC suggests that class members only have to be given notice of the class action and of their right to claim a benefit in terms of a judgment or settlement once the favourable judgment is given or settlement is reached.¹⁰⁹ Therefore, in the event of an unsuccessful judgment, no notice of the class action would have to be given to putative class members. Further, the effect would be that an unsuccessful judgment would not be *res judicata* against the class

¹⁰⁸ Para 5.27.

¹⁰⁹ Para 5.27.

members and a successful judgment or settlement would be *res judicata* only against those who claimed in terms of it.¹¹⁰

Such an approach appears to operate unfairly in respect of the defendant(s) to the class action. A key advantage of a class action from the defendant's perspective is that, once an issue has been litigated, it cannot be faced with further actions of the same nature. According to the SALC, this is not a legitimate advantage for the defendant to have. The whole purpose of class actions is to facilitate access to justice for the average person – according to the SALC there is no reason why the defendant(s) should be placed in a more advantageous position than it would be at common law, in terms of which it could individually be sued by every person adversely affected.

The SALC suggests that a multiplicity of actions would be avoided as the *stare decisis* principle would ensure that an unsuccessful class action would discourage other similarly placed persons from litigating, while a successful class action judgment would, in all likelihood, significantly reduce the number of separate actions that are brought.¹¹¹

Furthermore, in the context of the opt-out class action where the class members generally have economically non-viable claims making it unlikely that they would enforce their claims independently, it is submitted that the risk of a multiplicity of actions is insignificant. This is because, even if the class action is successful, it does not necessarily mean that all the individuals who opted out of the class action¹¹² would enforce their claims independently. Further, financial, psychological and social barriers may prevent such class members from instituting action outside the ambit of the class action. It may simply not be worth litigating individually if the prospect of a favourable judgment does not justify the expenses to be incurred in pursuing the matter litigiously.

¹¹⁰ Para 5.28. In *Cooper v Federal Reserve Bank of Richmond* 467 US 867, 874 (1984), the US Supreme Court stated that “[t]here is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation”. See also South African Law Commission *The Recognition of Class Actions Report* para 2.4.3 where it is stated that the “judgment is *res judicata* against all class members who have not opted out”.

¹¹¹ Para 5.28.

¹¹² By choosing not to share in the fruits of a favourable class action judgment.

Accordingly, if an approach is followed where class members could opt in only once a favourable judgment has been rendered, or settlement concluded, the putative class members would have a few options at their disposal. If the class action is successful, class members could opt in and the judgment or settlement would be *res judicata* against them. Alternatively, although it is unlikely, class members could choose not to opt into the class action with the result that the favourable judgment, or settlement, is not binding upon them.

Where the defendant succeeded in defending the class action it is, for obvious reasons, unlikely that any of the individual class members would opt into the class action. In fact, it may even be unnecessary to give notice to the class members of the unsuccessful class action. This is an appealing aspect of such an approach insofar as the costs and administrative burden associated with giving notice to class members would be circumvented. The unsuccessful outcome would not be binding on the class members – the class members would be free to litigate independently in respect of the same matter, against the same party. It has been mentioned above that, because opt-out class actions generally entail economically non-viable claims and the class members generally comprise individuals who are poor and lack access to resources, it is submitted that it is highly unlikely in such circumstances that the individual class members would pursue independent litigation. The doctrine of *stare decisis* would also discourage it.

However, there does not seem to be anything that would prevent the class members from instituting class proceedings *de novo* against the defendant. It is especially from this perspective that the SALC's proposal becomes perturbing – the doctrine of *stare decisis* would not prevent class members from instituting class proceedings afresh in an attempt to force the defendant into a settlement of the dispute. Such proceedings could be instituted under the pretense of arguing that the original judgment was incorrect and that it is therefore not binding upon the court. It is further unlikely that the court would be able to refuse certification of the class action based on judicial precedent – it is not a relevant consideration at that stage of the class proceedings. It is accordingly submitted that caution should be exercised by our courts in respect of the approach suggested by the SALC that the unsuccessful judgment should not be binding upon the class members – it may operate unfairly towards the defendant and it may result in an abuse of court process. It is a questionable and unsupportable approach.

3 2 5 Increased judicial supervision to protect absent parties

An important factor to consider in the context of class members' right to individual notice is the responsibility of class action judges to protect the interests of absent class members. Judicial management is considered increasingly important for the effective functioning of civil litigation in general and of the class action system in particular.¹¹³ Moreover, as class action litigation is traditionally more complex than other kinds of litigation, it requires greater administration and management of the case.¹¹⁴ Where manageability problems occur during the course of class action proceedings, they could potentially result in the termination of the class action.¹¹⁵

Trial judges in Australia possess extensive managerial powers. For example, a judge has the power to discontinue a class action and to substitute the representative plaintiff who does not adequately represent class members' interests. Further, the court also has to give its approval before a class action can be settled or discontinued and before settlement of the representative plaintiff's individual claim can take place.¹¹⁶

Rule 23 of the Federal Rules contains various provisions governing the trial court's powers, obligations and discretion in managing class actions.¹¹⁷ Rule 23(b)(3) specifically provides that the court at the certification stage must consider "the difficulties likely to be encountered in the management of a class action".¹¹⁸ These difficulties include matters such as the size of the class, notice to class members, the presentation of evidence and

¹¹³ C Piché "Judging Fairness in Class Action Settlements" (2010) 28 *Windsor YB Access Just* 111 121.

¹¹⁴ According to Karlsgodt "United States" in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 44, a tool that is regarded as useful in managing class action proceedings in the United States is to require the submission of a trial plan – a document that sets out the claim(s), the relief, the witnesses and evidence that will be used to prove the plaintiffs' claims at the trial. See also Piché (2010) *Windsor YB Access Just* 117.

¹¹⁵ In *Eisen v Carlisle and Jacquelin* 417 US 156 (1974) the enormity of the class and related issues such as notice to absent members and the distribution of an aggregate reward to class members caused serious doubt about the viability of the case.

¹¹⁶ V Morabito "Australia" in D R Hensler C Hodges & M Tulibacka (eds) *The Globalization of Class Actions* (2009) 320 323.

¹¹⁷ Karlsgodt "United States" in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 35.

¹¹⁸ Rule 23(b)(3)(D).

the assessment and distribution of damages, as discussed above. Further, rule 23(c) provides courts with managerial authority over class actions.¹¹⁹ Rule 23(e) requires that proposed settlements be approved by a judge. Judges also approve the final settlement, review objections by class members and play a role in approving the adequacy of the class representative and class counsel.¹²⁰

In Ontario, case management is widely used in class actions and mandated specifically by the Ontario Act.¹²¹ Courts use their powers in case management to prevent this complex form of litigation from becoming too cumbersome and to protect the interests of class members.¹²²

The SALC has recommended that, because of the complexity of class actions and the fact that it entails the determination of rights and obligations of absent class members, courts should actively manage the conduct of class actions, more so than they would do in ordinary civil litigation.¹²³ They accordingly proposed that “the courts should be given broad general management powers exercisable either on the application of a party or class member or on the court’s own motion”.¹²⁴ Although the draft legislation proposed by the SALC does not expressly incorporate the manageability of class actions as a factor to be considered at the certification stage, it would no doubt play a role in the context of other questions. For example, it would be relevant in deciding whether a class action would be the appropriate method of proceeding in a given case.¹²⁵

¹¹⁹ Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 25.

¹²⁰ J Brewster “A Kick in the Class: Giving Class Members a Voice in Class Action Settlements” (2013) 41 *W St U L Rev* 1 11.

¹²¹ See, for example, section 12 of the Class Proceedings Act, 1992, S.O. 1992, c. 6. titled “Court may determine conduct of proceeding”.

¹²² J Kalajdzic, W A Bogart & I Matthews “Canada” in D R Hensler, C Hodges & M Tulibacka (eds) *The Globalization of Class Actions* (2009) 46.

¹²³ South African Law Commission *The Recognition of Class Actions Report* para 5.9.2.

¹²⁴ Para 5.9.4.

¹²⁵ De Vos (1996) *TSAR* 649-650. A consideration of this question in the context of the manageability of class actions is, however, also potentially problematic in that the approach of our courts in determining when a class action, compared to joinder, is the appropriate procedural device to be utilised for the adjudication of a claim, has been largely inadequate.

However, our courts have not dealt with the issue of the manageability of class actions as a possible factor to be considered during certification. It accordingly merits consideration in this study, which is undertaken in chapter five.

It is further necessary, specifically in the context of class action litigation, that the role of judges be reconsidered to ensure that they become more actively involved in the management of the class action, in part to protect absent class parties. The increasing size and complexity of class action lawsuits necessitate a more 'hands on' management approach. As such, class-action judges must become actively involved in the litigation.¹²⁶ It is accordingly likely that the role of judges would need to be redefined.¹²⁷

Class actions involve judgments against absent class members – in other words, the interests of individuals not before the court may be affected by the judgment of the court. Class action litigation is fundamentally different from any other form of litigation in the sense that it is representational in nature. The result is that there are concerns regarding class members' right to a fair trial, as mentioned above. These concerns do not arise during ordinary litigation because the individuals are generally present at court and represent their own interests. Class members are generally not present at court and do not represent their own interests. Their interests are represented through the class representative and the class legal representatives. Foreign jurisdictions have for some time considered the issue of due process protections of absent class members who will be bound by the class judgment.

The general view adopted by foreign jurisdictions to address the due-process concerns regarding absent class members who are bound by the class action judgment, is that class action judges should seek to protect such members by closely monitoring adequacy of representation, and by ensuring that the outcome will promote their interests. For example, judges should reject proposed settlements that concern class members who are not adequately represented.¹²⁸ In fact, it has been stated that adequacy of representation is the most crucial requirement of Federal Rule 23, since the judgment in a class action

¹²⁶ C Piché "The Cultural Analysis of Class Action Law" (2009) 2 *J Civ L Stud* 101 128.

¹²⁷ Piché (2010) *Windsor YB Access Just* 130.

¹²⁸ Piché (2010) *Windsor YB Access Just* 147-151. See also the comments of Wallis JA in *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA) paras 46-48.

conclusively determines the rights of absent class members.¹²⁹ Class action judges accordingly have a crucial role to fulfill in this regard.

According to Piché, the revised role of judges in the class action context entails a departure from their traditional role in litigation, thus becoming more actively involved in the prosecution of the class action, in part to protect absent class parties.¹³⁰ The judge in class action litigation is required to exercise judicial power and authority in ways not required in non-class litigation.¹³¹ This role is not limited to ensuring that class members are adequately represented. Scrutinizing adequacy of representation is only a component of the court's responsibility to protect absent class members' interests. For example, the notice provisions contained in Federal Rule 23 involve judges supervising, reviewing and approving notice to be sent to the absent class members at various stages of the progression of a class action. These provisions considerably extend the scope of the court's involvement in the notice problem. The judicial scrutiny entails reviewing the content and format of the proposed notice, in order to ensure that any proposed notice conforms to the constitutional due process and rule requirements for adequate and fair notice to class members.¹³² It is submitted that the court's assessment of compliance with the class action certification requirements must be informed by the consideration of absent class members' interests. Effective exercise of the court's function in protecting absentees depends upon a comprehensive overview of the class and its diversity of interests.¹³³

In the Working Paper it is recommended that a court, when certifying a class action, should be responsible for formally appointing the class representative, that it should describe the class with as much particularity as is possible and that it should give directions as to the procedure to be followed. Further, the court should have the discretion

¹²⁹ Note "Conflicts in Class actions and Protection of Absent Class Members" (1981-1982) 91 *Yale L J* 590 594.

¹³⁰ Piché (2009) *J Civ L Stud* 128-130.

¹³¹ L S Mullenix "Should Mississippi Adopt a Class-Action Rule – Balancing the Equities: Ten Considerations That Mississippi Rulemakers Ought to Take into Account in Evaluating Whether to Adopt a State Class-action Rule" (2004-2005) 24 *Miss C L Rev* 217 241.

¹³² 245.

¹³³ Note (1981-1982) *Yale L J* 595. *Hansberry v Lee* 311 US 32 42-45 (1940): interests of party not before court must be adequately represented to bind absentees by judgment; *Gonzales v Cassidy* 474 F2d 67, 68 (5th Cir 1973): judgment in class action not *res judicata* for absentees unless they are adequately represented.

that would enable it to devise its own procedures on the issuing of its directions.¹³⁴ In the Report, the SALC states that courts should, as a matter of fact, be more active in managing class actions compared to ordinary actions as a result of the complexity of class actions, and the fact that the rights and obligations of absent class members are being determined. It is accordingly recommended that “[t]he courts should be given broad general management powers exercisable either on the application of a party or class member or on the court’s own motion”.¹³⁵

It is apparent from the SALC’s recommendation that it did not intend to limit the court’s responsibility to protect the interests of absent class members by enabling a court to only inquire into one of the certification requirements, namely adequacy of representation. It is submitted that the court’s responsibility extends beyond this requirement and covers all the certification requirements provided for in *Children’s Resource Centre Trust* as well as any other issue raised by a party to the class action or by a class member or on the court’s own motion. The interests of absent class members should be a prominent consideration in the exercise of the court’s discretion when determining whether it should require opt-out notice, opt-in notice or no notice at all.

For example, one would only need to go as far as the first factor listed in subsection (8)(2)(a) of the Draft Bill proposed by the SALC – the extent to which the members of the class might be prejudiced by being bound by a judgment given in an action which may not have come to their attention – to appreciate that the interests of absent class members are of crucial importance in determining whether notice should be given and, if notice is required, whether individual notice is required or whether general notice would suffice. This discretion is a judicial one; in other words, it is discretion that the court must exercise and it must do so *inter alia* with regard to the interests of absent class members.

The view that our courts should follow a lenient approach by emphasising the importance of adequacy of representation, rather than by insisting on individual notice to all members of a class, is accordingly reinforced by the active managerial role that judges are expected to fulfil to protect the interests of absent class members. Therefore, the argument that a lack of (proper) notice impinges upon class members’ right to a fair trial, should be viewed

¹³⁴ South African Law Commission *The Recognition of a Class Action in South African Law Working Paper* 57 para 6.36.

¹³⁵ South African Law Commission *The Recognition of Class Actions Report* para 5.9.1-5.9.4.

against adequacy of representation as a certification requirement and, moreover, against the courts' overall role in managing the class action and protecting the interests of absent class members.

3 3 Opt-in notice

Notice of the class action to class members should always be given in the context of the opt-in class action regime. Notice of an opt-in class action is not simply the general point of departure as is the case with an opt-out class action; it is an *absolute* requirement. The reason for always, without derogation, requiring that notice of opt-in class action proceedings be given to putative class members is, simply stated, that if no notice is given to putative class members, those class members would be unaware of the class action and therefore unable to opt into the class action. In reality, the class would be non-existent should notice of the opt-in class action not be given to putative class members. For class actions to operate effectively, it is important that potential class members are made aware of the class action so that they can choose whether they want to participate in the class action. The importance of notice of an opt-in class action is also underlined by one of the objectives of the class action mechanism, namely the attainment of judicial economy. Failure to give notice of an opt-in class action would, in all likelihood, result in a multiplicity of actions and the class action would fail to contribute to the efficiency of our courts and the consistency of judgments rendered by it.

For the same reasons it is submitted that class members should be given individual notice of their right to opt into the class action. In the opt-in class action, the size of the class is generally much smaller compared to the size of the class in an opt-out class action. The identities of class members are usually known or are ascertainable as, for example, was the case in *Linkside*.¹³⁶ When the SALC stated that provision should be made for opt-in notice in limited situations, it effectively supports the giving of individual notice to ensure that the putative class members know of the class action and of the way in which it is being prosecuted.¹³⁷

¹³⁶ See G Cumming and M Freudenthal *Civil Procedure in EU Competition Cases before the English and Dutch Courts* (2010) 92.

¹³⁷ South African Law Commission *The Recognition of a Class Action in South African Law Working Paper 57* para 5.32.

Furthermore, proponents of the opt-in regime argue that it enables class members to better assess¹³⁸ whether they are being adequately represented in the proceedings, in that they are forced to show some minimal interest in the litigation in order to benefit from it. Individual notice of the class action to class members appears to be the only option in this regard. Similarly, the possible effect of the opt-in class action of reducing the costs associated with the litigation and increasing efficiency, which is beneficial for all interested parties,¹³⁹ would only be optimised if all class members were individually informed of their right to opt into the class action.¹⁴⁰ It also brings with it the advantage that there is certainty as to who the members of the class are and what the aggregate value of the claims is. The defendant is thus in a better position to make a well-reasoned judgment as to its liability in order to decide whether to make a settlement offer.¹⁴¹

The suggested approach to be adopted in the context of notice of an opt-in class action is one that appears to be closely aligned with the notice requirement in terms of rule 23(c)(2) of the American Federal Rules, although this rule operates in the context of an opt-out class action. In other words, the court should direct, in the context of our opt-in class action, the best form of notice that would, in the circumstances, be practicable. This includes giving individual notice to all members who can be identified by employing reasonable effort. Where class members have yet to be identified but could be identified through reasonable effort, such class members should be identified and provided with individual notice. It is difficult to imagine circumstances where, in a situation where it is envisaged that the opt-in mechanism would be utilised,¹⁴² the identities of class members would be unknown and be unascertainable through employing reasonable effort. However, in such circumstances, by adopting a requirement akin to rule 23(c)(2), our courts could direct that the best notice that is practicable under the circumstances be given so that those class members have a reasonable prospect of receiving notice of the opt-in class action. Accordingly, the court retains a discretion to order that general notice of class members' right to opt into the class action be given. This should, however, be the exception rather than the rule for the reasons proffered above.

¹³⁸ Compared to the opt-out regime.

¹³⁹ South African Law Commission *The Recognition of Class Actions Report* para 5.11.

¹⁴⁰ 96.

¹⁴¹ Para 5.24.

¹⁴² See chapter two above.

3 4 Proof of notice

Although notice of the class action should generally be given to class members, there is still uncertainty as to how the notification requirement would practically be satisfied. Our courts have not yet considered whether notice of the class action would be effective when, for example, it is dispatched to class members, when it reaches the class members, or when it is conveyed to the minds of the class members.

In the realm of the common law of contract, specifically in the context of notice of cancellation due to breach of contract, it has been suggested that notice would only be effective once the party in breach actually becomes aware of the decision to cancel.¹⁴³ In other words, in terms of this subjective approach, anything less than actual notice would not suffice.

However, statute may dictate otherwise. For example, sections 129(1) and 130 of the National Credit Act 34 of 2005 essentially provide that a debtor is entitled to delivery of a written notice before a credit provider may effectively institute and continue with legal proceedings against the debtor. Until recently, uncertainty existed as to how the notice requirement would need to be satisfied. In *Sebola v Standard Bank of South Africa Ltd*,¹⁴⁴ the Constitutional Court held that, although it was insufficient for the credit provider merely to prove dispatch of notice, actual knowledge of the notice by the consumer was also not required.¹⁴⁵ The Constitutional Court held that the most reasonable course of action would be to focus on whether the debtor received the notice.¹⁴⁶

Requiring proof that notice of class proceedings has been conveyed to the minds of class members may not be practical or feasible in the context of an opt-out class action where, for example, the class is numerous – it may be too costly and there may be class members who are unidentifiable. Proof that notice has reached class members may, for the same reasons, be just as problematic. It is likely that our courts would conclude in such circumstances that the notice requirement is satisfied where it can be shown that notice has been dispatched to class members. This would, for example, enable our courts to

¹⁴³ *Swart v Vosloo* 1965 1 SA 100 (A) 105F-G.

¹⁴⁴ 2012 5 SA 142 (CC).

¹⁴⁵ Paras 49 and 74.

¹⁴⁶ Para 87.

order that notice be given through publication in a newspaper circulated in the area where the class members reside.

The situation may differ in the context of an opt-in class action where it may be possible or feasible to require proof that class members have received notice of the class action or that it has been conveyed to the minds of the class members. This is because, as has been mentioned above, it is generally the case that the size of the class in an opt-in class action is smaller compared to the size of the class in an opt-out class action and the class members are generally identifiable. The individual claims in an opt-in class action are also typically much larger than the individual claims in an opt-out class action. It could therefore be argued that it is necessary for the class representative in an opt-in class action to show something more than mere proof of having dispatched notice of the class action to class members.

It is submitted that it would be important to the proper functioning of the class action mechanism that any future South African class action legislation makes provision for showing compliance with the notification requirement insofar as notice of the class action to class members is concerned. Although it is an issue that falls outside the scope of this dissertation, it is nevertheless a crucial one as it could defeat a class action notwithstanding initial certification.

CHAPTER FOUR: INDIVIDUAL ISSUES AND THE CLASS ACTION MECHANISM: DETERMINING DAMAGES IN MASS PERSONAL INJURY CLASS ACTIONS

4 1 Introduction

A further potentially significant issue that has not yet been subjected to a comprehensive and critical analysis is the approach to be followed when determining damages in mass personal injury class actions. Our courts have not considered this issue, and it is unclear what approach they will follow, specifically what device(s), if any, they will utilise to determine damages in these actions. To address this problem, certain alternative methods to determining damages in mass personal injury class actions will be evaluated in view of the existing procedural framework developed by our courts, with specific reference to the approaches followed by the selected foreign jurisdictions. Conducting such an analysis may be useful to assist in developing a structure that could facilitate the adjudication of class actions in South Africa in regard to a number of key areas.¹

This chapter commences by considering whether the fact that there are certain issues which may need to be determined individually precludes the use of the class action mechanism as a means to adjudicate class members' claims. For example, in a mass personal injury class action it is generally the case that the quantum of each class member's damages is an issue that would need to be determined individually. The approaches of Australia, Ontario and the United States will be considered regarding their use of the class action mechanism where there are issues that would need to be determined individually and, thereafter, the position in South Africa will be analysed.

This chapter further considers possible methods that could be utilised to determine damages in the context of mass personal injury class actions. Wallis JA in *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)*² ("*Children's Resource Centre Trust*") listed as a certification requirement that the relief sought or damages claimed must be ascertainable

¹ See chapter one above.

² 2013 1 All SA 648 (SCA).

and capable of determination.³ As mentioned, in a mass personal injury class action, the quantum of each class member's damages is typically an individual issue. The problem in a mass personal injury class action is that, if the class is numerous and each class member must give oral evidence to prove his or her damages, the trial may take years to conclude. In fact, some of the class members could have passed away by the time that the court delivers judgment in the matter. In other words, such an approach may overburden proceedings and cause undue delay. It may accordingly be necessary, in such circumstances, to utilise procedures that would enable the determination of each individual's damages. These procedures should be innovative, practical and time-efficient.⁴

4 2 Terminology

Before considering, firstly, whether the existence of certain issues that may need to be determined individually necessarily precludes the use of the class action mechanism to resolve class members' claims and, secondly, possible methods to determine the quantum of damages in the context of mass personal injury class actions, it is necessary to consider the meaning of the term 'mass personal injury'.

The term 'mass personal injury' is not statutorily defined nor has its meaning been expounded by our courts. However, it may be instructive to consider attempts made to define the term 'mass tort' in the context of claims aggregation in the United States. In this regard, Chamblee states that the "broad term mass tort can refer to anything from an airplane crash, to a chemical spill, to a defective product affecting a considerable number of people".⁵ She refers with approval to the following definition of 'mass tort' by the Advisory Committee on Civil Rules and the Working Group on Mass Torts: "[m]ass tort litigation emerges when an event or series of related events injure a large number of people or damage their property".⁶ According to Hensler, 'mass tort' is "not a formal legal designation but a term of art that has come to describe a large number of tort claims

³ Para 26.

⁴ W de Vos "Judicial Activism Gives Recognition to a General Class Action in South Africa: Children's Resource Centre Trust v Pioneer Foods (50/12) [2012] ZASCA 182" (2013) 2 *TSAR* 370 373-374.

⁵ L E Chamblee "Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements" (2004) 65 *La L Rev* 164.

⁶ 165.

arising out of the same factual circumstances and alleging the same or similar injuries”.⁷ More specifically, however, the term is used to describe either a mass accident that involves a single event⁸ or personal injuries sustained on a widespread basis typically involving defective products.⁹

Single-accident mass torts are single incidents in which a number of people are injured, for example an airplane crash involving injuries sustained by many individuals. In other words, they involve a known number of claimants who are injured or killed in a common accident having a single, determinable cause.¹⁰ It is generally the case that all class members concerned are injured simultaneously. Other examples of single-accident mass torts include a hotel fire, the collapse of a structure, a bushfire,¹¹ or an explosion.¹²

Dispersed mass torts occur where personal injuries are incurred over an extended period, and these injuries have a common cause and are generally manifested at different times and in different ways, often over a period of months or years.¹³ Examples of dispersed mass torts include defective products or dangerous substances such as silicone gel breast implants, diet drugs or other medical devices, and exposure to asbestos.¹⁴ In some instances, the exposed victims know of their exposure and have suffered injury. In other instances, exposed class members may know of their exposure, but have not developed any injuries.¹⁵

Whereas single-accident mass torts seldom involve complex legal issues, causation is usually an issue in the context of dispersed mass torts.¹⁶ For example, in an asbestos-related dispersed mass tort, the variations in individual factual issues that would need to

⁷ D R Hensler “Has the fat lady sung? The future of mass toxic torts” (2007) 26 *Rev Litig* 883 890.

⁸ Single-accident mass torts. See M F Connor “Taming the Tort Monster” (2000) 4 *Briefly* 1 3.

⁹ Dispersed mass torts. Connor (2000) *Briefly* 3.

¹⁰ 3.

¹¹ For example, the ‘Black Saturday’ bushfires of 7 February 2009 ravaged large parts of Victoria, Australia, which gave rise to a series of class actions.

¹² 3.

¹³ I R M Panzer and T E Patton “Utilizing the Class Action Device in Mass Tort Litigation” (1985-1986) 21 *Tort & Ins LJ* 560 560.

¹⁴ R H Klonoff *Class Actions and Other Multi-Party Litigation in a Nutshell* (2012) 331 723.

¹⁵ Such claimants are commonly referred to as ‘future claimants’.

¹⁶ Connor (2000) *Briefly* 3.

be taken into account, such as smoking or pre-existing illnesses, may constitute significant considerations when determining whether there is a sufficient causal link between the conduct and the injury. There may also be different levels and timing of exposure, different types of injuries suffered and the gravity of those injuries among the individual claimants would typically vary greatly.¹⁷ Connor states as follows regarding dispersed mass torts and the challenges they present:

“What are sometimes referred to as ‘dispersed’ mass tort actions involve multiple occurrences, over an extended period of time, of personal injuries that have a common cause. They typically allege harms caused by unreasonably dangerous products or environmental contaminants. They entail an indefinite and perhaps indeterminable number of individual claims for a variety of injuries, ranging from trifling to fatal or, with increasing frequency, simply a concern that such injuries will occur in the future. Causation is always an issue: (1) whether the product or substance is harmful at all and, if so, what harms it may cause (general causation); (2) whether, given general causation, a particular claimant’s injury is attributable to the product or substance (specific or individual causation).”¹⁸

Feinberg also refers to the difficulties associated with dispersed mass torts when he states the following:

“Plaintiffs in such cases have traditionally faced extraordinary difficulties in establishing a causal connection between the harmful product and the particular injury. Scientific evidence that may provide the basis for medical diagnoses or epidemiological studies is often not transferrable to the legal system. Even where a plaintiff is able to establish general causation, that is, an accepted causal relationship between a particular product and certain types of diseases, the plaintiff may be unable to show that his or her disease was caused by the product at issue and not some other agent. The difficulty in establishing causation is magnified where there is a long latency period between the exposure to a product and the development of the disease. As the length of time between exposure and development of the disease increases, the likelihood that the plaintiff’s exposure to other agents that might have caused the same disease also increases. In addition, a long latency period exacerbates problems of identifying the particular product that caused the injury.”¹⁹

¹⁷ K R Feinberg “The Dalkon Shield Claimants Trust” (1990) 53(4) *Law and Contemporary Problems* 79 89.

¹⁸ Connor (2000) *Briefly* 3.

¹⁹ Feinberg (1990) *Law and Contemporary Problems* 82.

The remainder of this chapter refers to a mass personal injury class action as a type of class action where the proceedings relate to claims arising from personal injury. It distinguishes between a mass personal injury class action based on a single accident²⁰ and a mass personal injury class action based on a dispersed incident.²¹ As will become evident throughout the remainder of this chapter, this distinction is important because of the risk in dispersed incident mass personal injury class actions that the individual issues may overwhelm the fact that class proceedings may be otherwise appropriate, thereby possibly rendering the claims unsuitable for class action treatment.

4 3 Individual issues and the class action mechanism

The following part of this chapter considers whether the fact that there are individual issues that may need to be decided upon by a court in mass personal injury litigation, should preclude the use of a class action to adjudicate class members' claims. To do so, it may be instructive to look at the position in other jurisdictions before considering the South African position in this regard.

4 3 1 The approaches of foreign jurisdictions

4 3 1 1 Australia

In terms of section 33C of the Federal Court of Australia Act of 1976 ("Federal Court Act"), all that is required to maintain a representative proceeding is a single, substantial, common issue of fact or law.²² This requirement is unlike rule 23(b)(3) of the American Federal Rules of Civil Procedure ("Federal Rules") that requires that common issues predominate over individual issues.²³ The Australian courts have interpreted the section 33C-requirement in a manner that makes it relatively easy to satisfy in practice. The issue does not have to be of special significance or likely to have a major impact on the litigation in order to be 'substantial'; all that is required is that the issue must be real or of substance.²⁴

²⁰ Single-accident mass personal injury class action.

²¹ Dispersed incident mass personal injury class action.

²² See Appendix B.

²³ See Appendix A.

²⁴ D Grave, K Adams & J Betts *Class Actions in Australia* (2012) 126 165.

The fact that section 33C only requires a single, substantial, common issue of fact or law indicates that the existence of certain issues that may need to be determined individually by a court does not necessarily preclude use of a class action to adjudicate class members' claims. This is reinforced by section 33Q of the Federal Court Act which provides that, if it appears to the Federal Court that determination of the issue(s) common to all the class members will not finally determine the claims of all those class members, the court may give directions in relation to the determination of the remaining issues. This may include directions establishing a subgroup of members and the appointment of a person to be the subgroup representative party on behalf of the subgroup members. "In giving directions under section 33Q, the court may permit an individual group member to appear in the proceeding for the purpose of determining an issue that relates only to the claims of that member".²⁵

The existence of individual issues does not necessarily mean that the court will order that the representative proceeding no longer continues as a representative proceeding under section 33N of the Federal Court Act. In other words, the fact that the damages hearings would need to be undertaken on an individual basis does not prevent there being a substantial question of law and fact.²⁶

Although Australian courts have accepted mass tort class actions under Part IVA of the Federal Court Act, it is still debated by academics and the courts whether Part IVA really lends itself to dispersed mass torts.²⁷ As was mentioned above, in a single-accident mass

²⁵ Section 33R.

²⁶ See, for example: *Marks v Gio Australia Holdings Ltd* 1996 63 FCR 304 315; *Nixon v Philip Morris (Australia) Ltd* 1999 95 FCR 453 89; *Johnson Tiles Pty Ltd v Esso Australia Ltd* (No 2) 1999 ATPR 41-679 42-683; *McBride v Monzie* 2007 164 FCR 559; and, *Smith v University of Ballarat* 2006 229 ALR 343 30.

²⁷ See, for example, B Lipp "Mass Tort Class Actions under the Federal Court of Australia Act: Justice for All or Justice Denied" (2002) 28 *Monash University Law Review* 361 365; W Pengilly "Class Actions Stumble: Tobacco Companies Win on Class Action Certification" (2000) 16(3) *Australian and New Zealand Trade Practices Law Bulletin* 31 32. In *Philip Morris (Australia) Ltd v Nixon* 2000 170 ALR 487, the applicants claimed that each class member had contracted a smoking related disease as a result of being influenced by representations made by the respondent tobacco companies. Sackville, Spender and Hill JJ held that the application did not satisfy the requirement in section 33C(1)(a) that each group member must have a claim against each respondent. They also held that the requirement in section 33C(1)(b) that the claims of each applicant and group member arise in similar or related circumstances was not satisfied because the claims of each of the thousands of group members arose from disparate representations made to them over a long period of time, resulting in different injuries with separate defences. It appears that Sackville J was

tort, the claims of all group members are likely to share the common characteristics of time, place and cause of injury, making resolution of the common claims arising in related circumstances suitable for class treatment. However, in the case of dispersed mass torts, the extent to which class members' claims are individualised raises the question whether a class action is the appropriate mechanism to adjudicate class members' claims. For example, individual class members may need to lead evidence to prove causation, not only the quantum of damages, on an individualised basis. The courts have accordingly been reluctant to deal with such actions under Part IVA.²⁸

4 3 1 2 Ontario

Section 6 of the Ontario Class Proceedings Act, 1992 ("Ontario Act"), provides that:

"The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds: 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues..."²⁹

The Ontario Commission recommended the adoption of a lower common-issues threshold test compared to the common-issues predominance test of the United States.³⁰ It believed that it was possible to envisage actions that would benefit from class treatment even though the individual issues raised by the litigation predominate over the common issues. The Ontario Commission was of the view that, in such cases, judicial economy could still be achieved by a class action, or access to court may be provided to those with claims that otherwise could not be asserted because they are individually non-recoverable. As an example, the Ontario Commission cited a mass accident involving individual damage assessments where, despite a lack of predominance of common issues, a class action may nevertheless be the preferable mechanism to adjudicate class members' claims. Even in such circumstances, savings in time and money could still be secured in having some or all of the common liability questions determined in a single proceeding to avoid

concerned by the court's capacity to manage such a complex case when he said (at 521) that "further pleading and endless management issues would be raised" if it were to proceed.

²⁸ See, for example, *Philip Morris (Australia) Ltd v Nixon* 2000 170 ALR 487.

²⁹ In this regard, see the Ontario Commission's recommendation made at: Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982) 347.

³⁰ See 4 3 1 1 above where it is stated that rule 23(b)(3) of the American Federal Rules, for certification, requires that common issues predominate over individual issues.

inconsistent verdicts on the common questions that may arise in multiple individual actions concerning the same mass accident.³¹

Although, as mentioned above, the predominance of common issues over individual issues is not required by the Ontario Act, it may inform the section 5(1)(c) ‘common issues’³² by assisting the court in deciding whether the determination of the common issues would advance the claim in a meaningful way, considering the claim as a whole. It may also inform the section 5(1)(d) issue of whether the class action is the ‘preferable procedure’ for the resolution of the common issues.³³ In other words, the relative importance of common issues, on the one hand, and individual damages and other individual issues, on the other, remain relevant factors in the common issue and preferable procedure tests for certification.³⁴ Therefore, although there is no predominance test in Ontario, if the common issues do predominate over the individual issues, it may nonetheless operate against the granting of the certification application.

In *Cloud v Canada (Attorney General)*³⁵ the court held that the section 5(1)(c) analysis turns on the importance of the common issue(s), rather than on the predominance of common issues over individual issues.³⁶ Goudge JA did, however, recognise that the weighing of common and individual issues would be important to the determination of the preferable procedure under section 5(1)(d) of the Ontario Act.³⁷

It is apparent from the above that the existence of certain issues that may need to be decided upon by the court individually in mass personal injury litigation does not necessarily preclude the use of the class action mechanism to adjudicate class members’

³¹ T Harvey, Q C Strosberg, W V Sasso & J A Horvat “Recovery of Individual and Aggregate Damages in Class Actions” in *Special Lectures 2008: Personal Injury Law* (2009) 379 398.

³² Section 5(1)(c) of the Class Proceedings Act, 1992, S.O. 1992, c. 6. provides that the court shall certify a class proceeding if “the claims or defences of the class members raise common issues”.

³³ 398.

³⁴ H M Rosenberg & J Kalajdzic “Certification” in J Walker & G D Watson (eds) *Class Actions in Canada: Cases, Notes, and Materials* (2014) 55 84.

³⁵ 2004 73 OR (3d) 401, 2004 CanLII 45444 (CA).

³⁶ Paras 53, 58.

³⁷ Para 65. For a succinct summary of the position in Ontario, see *Singer v Schering-Plough Canada Inc* 2010 ONSC 42, 87 CPC (6th) 276.

claims. In *Scott v TD Waterhouse Investment Services (Canada) Inc*³⁸ Martinson J held that “[t]here will be individual inquiries needed once the common issues have been resolved. That does not, of itself, preclude certification. I conclude that certification will not create a monster of complexity”.³⁹

It is evident from what has been set out above that the position in Ontario is similar to the position in Australia. In both jurisdictions, the existence of individual issues does not by itself necessarily mean that the matter cannot be conducted as a class proceeding. Both jurisdictions have adopted legislation to regulate this issue, but the Ontario Act goes even further than its Australian counterpart does by incorporating express wording to this effect. The position of these jurisdictions will now be compared to the position in the United States.

4 3 1 3 United States

The position in the United States differs slightly from the approaches of Australia and Ontario in the sense that, in the United States, it is more likely that the existence of certain issues that may need to be determined individually may indeed preclude the use of the class action mechanism as a means to adjudicate class members’ claims.

No area of class action law has generated more judicial and scholarly debate than mass tort class actions.⁴⁰ The origin of the debate can be traced to the 1966 Advisory Committee Notes where it is stated that:

“A ‘mass accident’ resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.”⁴¹

³⁸ 2001 BCSC 1299.

³⁹ Para 132.

⁴⁰ See, for example, Klonoff *Class Actions and Other Multi-Party Litigation in a Nutshell* 330; S S Clark & C Harris “The Past, Present and Future of Product Liability and Other Mass Tort Class Actions in Australia” (2009) 32(3) *UNSW Law Journal* 1022 1022.

⁴¹ Advisory Committee’s Notes to Proposed Rule of Civil Procedure 39 FRD 69, 103 (1966).

Because of the above comment, the courts were initially inclined to refuse to certify mass tort class actions.⁴² In this regard, Mullenix states as follows:

“In 1966 the rulemakers amending the class action rule knew about mass accident cases – the airplane crash, for example – but they did not and could not envision contemporary mass tort litigation. Hence the rulemakers wrote their now-famous Advisory Committee Note, eschewing class certification of mass accident cases. This singular lack of vision subsequently enabled their Note to take on a life of its own, fulfilling the law of unintended consequences in the realm of mass tort litigation.”⁴³

The courts’ initial reluctance to certify mass tort class actions started to change in the late 1970’s when a number of federal trial courts certified such actions. However, the majority of these cases were reversed on appeal.⁴⁴ A major shift in the federal courts’ attitude regarding certification of mass tort class actions occurred in mid-1980. Courts were suddenly more inclined to certify mass tort class actions, notwithstanding the 1966 Advisory Committee Notes and the fact that decisions favouring certification tended to be overturned on appeal.⁴⁵

*Jenkins v Raymark Industries*⁴⁶ (“*Jenkins*”) is regarded as a landmark ruling regarding the certification of mass tort class actions. In *Jenkins*, the Fifth Circuit approved the certification of a mass tort class action involving asbestos-related personal injuries instituted in terms of rule 23(b)(3) of the Federal Rules.⁴⁷ The court referred to the fact that

⁴² See, for example, *Casey v Pan American World Airways Inc* 66 FRD 392 (ED Va 1975) where the court denied the plaintiffs’ application for certification of a class action of airplane crash cases.

⁴³ L S Mullenix “Practical Wisdom and Third-generation Mass Tort Litigation (1997-1998) 31 *Loy L A L Rev* 551 552.

⁴⁴ Klonoff *Class Actions and Other Multi-Party Litigation in a Nutshell* 332. Examples of cases certified but then reversed on appeal include: a class action involving the collapse of two skywalks at the Kansas City Hyatt Regency killing 114 people – certified in 1982 and reversed the same year; a nationwide class of persons claiming injuries from the Dalkon Shield birth control device – certified in 1981 and reversed in 1982.

⁴⁵ See, for example, R H Transgrud “Mass Trials in Mass Tort Cases: A Dissent” (1989) *U III L Rev* 69 71.

⁴⁶ 782 F2d 468 (5th Cir 1986).

⁴⁷ It may be worth restating that rule 23(b)(3) provides for opt-out class actions and that, in addition to complying with the threshold requirements of numerosity, commonality, typicality and adequacy, the plaintiff must also show that “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy”.

the courts had been reluctant to certify mass tort cases but stated that, in light of the 5 000 pending asbestos cases in the relevant circuit, “necessity moves us to change and invent”.⁴⁸ The Fifth Circuit found that the predominance⁴⁹ and superiority⁵⁰ requirements were satisfied and accordingly held that the district court’s decision to permit the consolidation of approximately 900 cases pending in its district into a class of plaintiffs under rule 23(b)(3) was justified.⁵¹

Because of the appellate courts’ willingness to certify mass tort class actions, various cases *inter alia* relating to toxic spills, pharmaceutical products and medical devices were instituted and certification was successfully sought.⁵² In recent years, however, courts have again viewed mass tort class actions with scepticism. Moreover, similar to Australia, courts have been more willing to certify single-accident mass torts than they have been to certify dispersed mass torts.⁵³ For example, in *Amchem Products Inc v Windsor*⁵⁴ (“*Amchem*”) the United States Supreme Court held that the proposed class did not satisfy the predominance requirement because it involved individuals exposed to different products that contained asbestos, over different time-periods and in different ways. Furthermore, the class members had developed a variety of symptoms because of their

⁴⁸ 473.

⁴⁹ The district court found that the ‘state of the art’ defense i.e. that the dangerous nature of asbestos could not reasonably have been known at the time it was placed on the market, predominated over any individual issues.

⁵⁰ The Fifth Circuit (at 473) noted that the district court’s “plan is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state of the art issues with, as [the] experienced [district court] judge says, ‘days of the same witnesses, exhibits and issues from trial to trial’”.

⁵¹ There were also other significant appellate court rulings upholding class certification during the mid-1980s. See, for example, *In re School Asbestos Litigation* 789 F2d 996 (3rd Cir 1986) 1009, where the Third Circuit noted that “the trend has been for courts to be more receptive to use of the class action in mass tort litigation” and *In re “Agent Orange” Product Liability Litigation* 818 F2d 145 (2nd Cir 1987), where the Second Circuit upheld the certification of a class of former military members and their families seeking damages for injuries caused by exposure to the herbicide Agent Orange.

⁵² See, for example, *In re AH Robins Co* 880 F2d 709 (4th Cir 1989).

⁵³ *Klonoff Class Actions and Other Multi-Party Litigation in a Nutshell* 332. In the mid-1990s, this view became more prevalent following upon the issuing of several significant rulings by various federal appellate courts. See, for example, *In re Rhone-Poulenc Rorer Inc* 51 F3d 1293 (7th Cir 1995) and *Castano v Am Tobacco Co* 84 F3d 734 (5th Cir 1996).

⁵⁴ 521 US 591 (1997).

exposures with some having no symptoms at all.⁵⁵ Specifically, the court stated the following in this regard:

“In contrast to mass torts involving a single accident, class members in this case were exposed to different asbestos containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases.”⁵⁶

In *Ortiz v Fibreboard Corporation*⁵⁷ (“*Ortiz*”), the Supreme Court again ruled against certification of an asbestos class action. According to Hensler:

“The ultimately successful critique of mass tort class actions that culminated in the *Amchem* and *Ortiz* decisions was based on the belief that these class actions deprived tort claimants of their right to individualized process and outcomes, a belief that ignores the realities of aggregated non-class mass tort litigation, which offers little of either”.⁵⁸

According to Klonoff, the reluctance⁵⁹ of courts to certify mass tort class actions does not mean that the class action mechanism is no longer appropriate to be utilised in such cases.⁶⁰ Similarly, Mullenix states that:

“[L]awyers and judges have not given up on the class action as a possible means, among many, for resolving mass tort litigation. Quite sensibly, the practitioners understand that the Supreme Court’s pronouncements in its *Amchem* decision have not eliminated either the

⁵⁵ Klonoff *Class Actions and Other Multi-Party Litigation in a Nutshell* 336-337. See also *Ortiz v Fibreboard Corp* 527 US 815 (1999); Mullenix (1997-1998) *Loy L A L Rev* 554-555.

⁵⁶ 609.

⁵⁷ 527 U.S. 815 (1999).

⁵⁸ D R Hensler “Goldilocks and the Class Action” (2012-2013) 126 *Harv L Rev* 56 58.

⁵⁹ Interestingly, according to Hensler (2007) *Rev Litig* 910, in a study conducted after the United States Supreme Court handed down its decisions in *Amchem* and *Ortiz*, which were widely viewed as signifying the end of certification of mass tort class actions, it was found that the number of annual mass tort class action filings declined in the year the court handed down its decision in *Amchem*, but increased after *Ortiz* was decided. By 2001 the number of mass tort class action filings had almost doubled, by comparison with the year in which *Amchem* was decided. It was further reported that the number of annual federal class action filings in mass tort cases remained the same from 2001 through 2005.

⁶⁰ See, for example, *In re Copley Pharm Inc* 161 FRD 456 (D Wyo 1995).

litigation class or the settlement class as a means for aggregating and resolving mass tort litigation”.⁶¹

However, the application of the class action device to the adjudication of mass torts has nevertheless been fraught with difficulty and uncertainty.⁶² Satisfying the prerequisites for a class action is generally unproblematic.⁶³ However, as mentioned, certification under rule 23(b)(3) requires that a question of law or fact common to the class predominate over any questions affecting only individual class members and that a class action be superior to other available methods for a fair and efficient adjudication of the controversy.⁶⁴ “In order to meet the predominance requirement of rule 23(b)(3), a plaintiff must establish that ‘the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole,...predominate over those issues that are subject only to individualized proof.’”⁶⁵ In other words, when one or more of the central issues in the action predominates, the action can be maintained pursuant to rule 23(b)(3) even though other significant issues may have to be tried separately. For example, predominance may be found even in cases where damages have to be determined individually. However, it has been proposed that, if the central issues in the case require the separate adjudication of each class member’s individual claim or defence, a rule 23(b)(3) class action is usually inappropriate.⁶⁶

Rule 23(b)(3) provides a list of factors that courts should consider to determine predominance and superiority. One such factor is the difficulties that may arise in managing the class action. This is often a determinative factor. A defendant’s liability will ordinarily be a question common to all persons injured in an incident by the same defective product. Of concern are the disparate injury claims of thousands of plaintiffs who at some stage in the action will all be required to come to court individually and to prove their own injury and damages. This gives rise to serious manageability issues. However, it has been suggested that extraordinary pressure has been brought to bear on our courts to devise

⁶¹ Mullenix (1997-1998) *Loy L A L Rev* 554.

⁶² Panzer & Patton (1985-1986) *Tort & Ins L J* 561.

⁶³ M H Mintzer and Y Daley-Duncan “Mass tort litigation: Why class action suits are not the answer” (1992-1993) *Brief* 25 26. See also Panzer & Patton (1985-1986) *Tort & Ins L J* 563.

⁶⁴ See *Danvers Motor Co v Ford Motor Co* 543 F3d 141, 148 (3d Cir 2008) “[w]here an action is to proceed under rule 23(b)(3), the commonality requirement is subsumed by the predominance requirement”.

⁶⁵ *Runstein v Avis Rent-A-Car Sys., Inc.*, 211 F3d 1228, 1233 (11th Cir 2000).

⁶⁶ M H Greer *A Practitioner’s Guide to Class Actions* (2010) 85.

means to control the flood of mass tort litigations which some people view as threatening to break down the United States judicial system. Thus, the view proffered is that courts are coming to learn that the central issue of liability may well be considered controlling over the separate issues of injury and damages. Therefore, according to Panzer & Patton, the fact that damages may raise individualised issues should not necessarily defeat the maintenance of the class action as to liability.⁶⁷

According to Mulheron, where the existence of a number of non-common issues will result in the class proceedings breaking down into a long series of individual trials, it is likely that any potential judicial efficiency that may be brought about by the use of the class action mechanism will be lost. She therefore states that, in the United States, there is a close connection between the commonality and superiority requirements in class action adjudication. Mulheron states that, whilst the class action regime of the United States expressly refers to predominance of common issues, the regimes of Australia and Ontario have concluded that where the common issues are not ‘substantial’ or ‘big’ enough in relation to the individual issues, then judicial economy will not be served by the class action. In this event, the class action device is not likely to be the superior device because of the manageability problems associated with the individual issues.⁶⁸

Regarding the determination of damages in mass tort class actions, in *Comcast Corporation v Behrend*⁶⁹ (“*Comcast*”), the United States Supreme Court held that, where a plaintiff cannot show how it would prove damages with common proof, individual damages issues may predominate.⁷⁰ Cailteux & Barraza state as follows regarding the *Comcast* decision:

“When the Supreme Court decided *Comcast* two years ago, it was described as a ‘game-changer’ that would make it more difficult for plaintiffs to obtain class certification by requiring class-wide proof of damages under Fed. R. Civ. P. 23(b)(3) at the certification stage. Since *Comcast*, though, the federal circuit courts of appeal have, by and large, narrowly interpreted the decision as standing for just two propositions: (1) when moving for class certification under Rule 23(b)(3), the plaintiffs’ model for determining class-wide damages must measure damages

⁶⁷ Panzer & Patton (1985-1986) *Tort & Ins L J* 567-568.

⁶⁸ R Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 260.

⁶⁹ 133 S. Ct. 1426 (2013).

⁷⁰ See, for example, *Smilow v Southwestern Bell Mobile Systems Inc* 323 F3d 32, 40 (1st Cir 2003).

that result from the class's asserted theory of injury; and (2) individualized damages do not automatically defeat Rule 23(b)(3) certification."⁷¹

Multiple circuit courts have subsequently interpreted and applied *Comcast* in the context of class certification. The majority of the courts that have expressed a view on the scope of *Comcast* have interpreted it as finding that a model for determining class-wide damages relied upon to certify a class under rule 23(b)(3) must measure damages that result from the class's asserted injury claim. Furthermore, they have made the important finding that *Comcast* is not authority for the proposition that a class cannot be certified under rule 23(b)(3) because individual damages cannot be measured on a class-wide basis.⁷² According to a recent Second Circuit decision, these views are shared by the First, Second, Fifth, Sixth, Seventh and Ninth Circuits.⁷³

There has, however, been a tendency in the United States, when dealing with mass tort litigation, to consider alternative forms of aggregated litigation, other than class proceedings. Hensler states that, in the United States, many different large-scale litigation devices exist, other than the class action. These include "multi-district litigation, formal consolidation, informal aggregation and bankruptcy. Some of these devices have been established by statute, some by court rule and some are the products of creative management by judges and lawyers".⁷⁴ She further states that:

"Courts have responded to the challenges posed by mass personal injury litigation by devising streamlined procedures to resolve individual cases, informally aggregating and formally consolidating cases for settlement or trial, facilitating global settlements and facilitating the

⁷¹ K L Cailteux & C D Barraza "The Impact of Comcast v. Behrend on Food Labeling Class Action Litigation" (2015) *Class Action Monitor* 5 5.

⁷² See, for example, *Roach v T.L. Cannon Corp.* F.3d No. 13-3070-cv (2nd Cir. Feb. 10, 2015) (citing multiple circuit court opinions); *In re Nexium Antitrust Litigation* F.3d No. 14-1521 (1st Cir. Jan. 21, 2015) (citing multiple circuit court opinions).

⁷³ See *Roach v T.L. Cannon Corp.* F.3d No. 13-3070-cv (2nd Cir. Feb. 10, 2015); *In re Nexium Antitrust Litigation* F.3d No. 14-1521 (1st Cir. Jan. 21, 2015); *In re Urethane Antitrust Litigation*, 768 F.3d 1245, 1257-58 (10th Cir. 2014); *In re Deepwater Horizon*, 739 F.3d, 790, 817 (5th Cir. 2014); *Butler v Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013); *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation* 722 F.3d 838, 860-61 (6th Cir. 2013), cert. denied, 134 S.Ct. 1277 (2014); *Leyva v Medline Industrial Inc.*, 716 F.3d 510, 513 (9th Cir. 2013).

⁷⁴ D R Hensler "Revisiting the monster: new myths and realities of class action and other large scale litigation" (2001) 11 *Duke J Comp & Int'l L* 179 182.

design and implementation of administrative processes for delivering compensation to individual claimants. These approaches have been used alone in some litigation, but many mass tort cases have involved the use of two or more of these approaches concurrently or sequentially.”⁷⁵

It is beyond the scope of this dissertation to consider alternatives to a class action in the context of mass personal injury litigation. As mentioned, the purpose of this chapter is, firstly, to consider whether the fact that there are issues that may need to be determined individually necessarily precludes the use of the class action mechanism to adjudicate class members’ claims and, secondly, to consider the methods our courts could utilise to determine damages in mass personal injury class actions. It is apparent from the above-mentioned approaches of Australia, Ontario and the United States that the existence of such issues does not necessarily mean that the class action mechanism cannot be utilised. As will be explained in more detail below, the South African certification requirement that there must be issues of fact and/or law common to all the members of the class is more aligned to the approaches of Australia and Ontario than the United States where, as mentioned, predominance of the common issues over the individual issues is required. However, it will be argued below that manageability considerations become increasingly relevant when considering whether to certify a dispersed incident mass personal injury class action.

4 3 2 South Africa

In *Children’s Resource Centre Trust*, Wallis JA held that it is a requirement for class certification that there must be “some common claim or issue that can be determined by way of a class action”.⁷⁶ In other words, the existence of individual issues does not necessarily preclude the utilisation of the class action mechanism to adjudicate class members’ claims. Wallis JA commented as follows in this regard:

“This does not require that every claim advanced in the class action, save possibly in relation to quantum, be identical. It requires that there be issues of fact, or law, or both fact and law, that are common to all members of the class and can appropriately be determined in one action... The simplest example of such a common issue would be the issue of negligence in a case

⁷⁵ D R Hensler “A glass half full, a glass half empty: the use of alternative dispute resolution in mass personal injury litigation” (1994-1995) 73 *Tex L Rev* 1587.

⁷⁶ Para 23.

involving the derailment of a train. That could give rise to different claims, such as damages for personal injuries by passengers, dependents' claims for loss of support in respect of those killed, claims for loss of or damage to goods being carried on the train and damage to other property arising as a result of the derailment, but there would be sufficient commonality on the issue of negligence to sustain a class action. That highlights the point that the class action does not have to dispose of every aspect of the claim in order to obtain certification. It might in an appropriate case be restricted to the primary issue of liability, leaving quantum to be dealt with by individual claimants. Certain common issues could be certified for the entire class, and other subsidiary issues certified in respect of defined subclasses. But the question in respect of any class or subclass is always whether there are common issues that can be determined that will dispose of all or a significant part of the claims by the members of the class or subclass."⁷⁷

The above approach adopted by Wallis JA is in line with the recommendations of the South African Law Commission ("SALC") in its Working Paper. The SALC recommended that the proposed legislation should expressly provide that the resolution of individual issues does not preclude a court from certifying a class action. The SALC, in its Report, recommended that the relevant clause should simply provide that:

"The court shall not be precluded from certifying an action as a class action merely by reason of the fact that there are issues pertaining to the claims of all or some of the members of the class which will require individual determination, or that different class members seek different relief".⁷⁸

Further, in the Working Paper, the SALC recommended that the proposed legislation should empower the court to recognise the existence of issues that may need to be determined individually and to give directions as to the procedure to be followed to determine such issues. According to the Working Paper, consideration would need to be given to the question whether more detailed provisions are necessary with regard to the resolution of individual issues and, if so, whether these should be contained in legislation or court rules.⁷⁹

⁷⁷ Paras 44-45.

⁷⁸ South African Law Commission *The Recognition of Class Actions Report* 92.

⁷⁹ South African Law Commission *The Recognition of a Class Action in South African Law Working Paper* 57 para 5.35. See also South African Law Commission *The Recognition of Class Actions Report* 95 and the detailed discussion in Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982) 605-624.

Moreover, in *Children's Resource Centre Trust*, Wallis JA held that “[c]lass actions are a particularly appropriate way in which to vindicate some types of constitutional rights, but they are equally useful in the context of mass personal injury cases or consumer litigation”.⁸⁰ He held that a “class action may be certified in respect of limited issues, for example, negligence in a mass personal injuries claim, leaving issues personal to the members of the class, such as damages, to be resolved separately”.⁸¹

The position in South Africa regarding the question whether the existence of individual issues precludes the use of class proceedings is more in accordance with the approaches of Australia and Ontario than the approach in the United States. As mentioned, the approach in the United States is to determine whether the individual issues predominate over the common issues. If so, then a class action is inappropriate. There is no predominance requirement in respect of class actions in South Africa insofar as the individual issues *vis-à-vis* the common issues are concerned. It is also not a requirement in Australia and Ontario. Section 33C of the Australian Federal Court Act only requires a single, substantial, common issue of fact or law and section 5(1) of the Ontario Act requires that “the claims or defences of the class members raise common issues”. Similar to Australia and Ontario, the threshold is relatively low in South African class proceedings. All that is required for certification is “some common claim or issue that can be determined by way of a class action”.⁸² Ultimately, therefore, unlike the position in the United States, the existence of individual issues should not necessarily preclude certification of a class action as a means to adjudicate class members’ claims.

4 4 Determining damages in mass personal injury class actions

Although the existence of individual issues should not necessarily preclude certification of a class action, our courts have not yet given proper consideration as to how the individual issues could be determined, specifically the devices that could be utilised when determining damages in mass personal injury class actions. In the following part of this chapter certain possible methods to determine damages in South African mass personal injury class actions are considered, having regard to the existing procedural framework

⁸⁰ Para 21.

⁸¹ Para 26.

⁸² Para 23.

developed by our courts and the approaches followed in Australia, Ontario and the United States.

4 4 1 Class-wide damages

In assessing the quantum of delictual damages after a damage-causing event, the object or aim is to compensate the injured or prejudiced plaintiff(s) by placing them in the same financial position they were, had the damage-causing event not occurred. The plaintiff is *inter alia* burdened with the duty to prove the loss he or she has suffered, including the uncertain future loss that might not yet have transpired at the time the claim is lodged. In civil cases, the standard of proof is a balance of probability. This means that plaintiffs must prove that they have more likely than not suffered damage and they must also prove the exact amount of damages that should be awarded to compensate for their loss.⁸³

With the above in mind, one possible method to determine the quantum of damages in mass personal injury class actions is to replace individual damage trials with class-wide calculation of damages. In other words, a court determines damages payable by means of an aggregate award against the defendant so that the damages sustained by the class as a whole can be computed by class-wide proof.⁸⁴ Aggregate assessment either may occur by a global or lump sum award against the defendant or may be achieved by the application of a formula to individual class members' claims. The individual class members are not required to prove their actual loss or damages in separate trial proceedings.⁸⁵ Once damages are calculated on a class-wide basis, they can be distributed individually, usually through a type of claims process or to the class as a whole.

Although the class-wide calculation of damages avoids the burdensome approach of conducting individual trials for each class member, it does give rise to due process concerns and concerns regarding inaccuracy in the calculation of the aggregate assessment.⁸⁶ In the United States, courts have mostly disapproved of proving individualised damages issues through the class-wide calculation of damages in the

⁸³ L Steynberg "Fair' Mathematics in Assessing Delictual Damages" (2011) (14)2 *PELJ* 1 1.

⁸⁴ Mulheron *A Comparative Perspective* 407.

⁸⁵ 408.

⁸⁶ Klonoff *Class Actions and Other Multi-Party Litigation in a Nutshell* 639.

context of mass personal injury class actions. The prevalent view is that a determination of the quantum of damages generally requires individual assessment.⁸⁷

The approach of Ontario is similar to the approach followed in the United States. Section 24(1)(c) of the Ontario Act provides that a court may determine the aggregate or a part of a defendant's liability to class members and render judgment where the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. It has been held that this section is not appropriate in the context of a mass personal injury class action as the claims could not be "reasonably determined without proof by individual class members".⁸⁸

A similar approach is adopted in Australia where the Federal Court Act provides that the court must not make an aggregate award "unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment".⁸⁹

The case of *Bywater v Toronto Transit Commission*⁹⁰ ("*Bywater*") is an example of a situation where the determination of class members' damages is necessarily entirely individualistic, dependent upon a number of factors unique to the class member, requiring individual assessment of damages.⁹¹ In *Bywater*, the class consisted of individuals exposed to smoke arising from a fire that broke out in the Toronto Transit Commission subway system, including their estates and all living relatives of such individuals. Winkler J held that the case was not appropriate for an aggregate assessment of damages. The action *inter alia* advanced claims for personal injury and these claims could not be "reasonably determined without proof by individual class members" as required by section 24(1)(c) of the Ontario Act. Further, each individual claim required proof of the essential element of causation which, in the words of section 24(1)(b) was a "question of fact or law other than those relating to an assessment of damages". In addition, the assessment of damages in each case had to be individual. All of the usual factors had to be considered in

⁸⁷ Greer *A Practitioner's Guide to Class Actions* 495-498-499.

⁸⁸ See, for example, *Bywater v Toronto Transit Commission* 1998 OJ No 4913 (QL), 27 CPC (4th) 172 (Gen Div).

⁸⁹ Section 33Z(3) of the Federal Court of Australia Act of 1976.

⁹⁰ 1998 OJ No 4913 (QL), 27 CPC (4th) 172 (Gen Div).

⁹¹ Mulheron *A Comparative Perspective* 419.

assessing individual damage claims for personal injury, such as: the individual plaintiff's time of exposure to smoke; the extent of any resultant injury; general personal health and medical history; age; any unrelated illness and other individual considerations. Even if by class definition the members of the proposed class suffered exposure to smoke, the extent of such exposure and any damage flowing from it would vary on an individual basis.

One way to establish class-wide proof of damages is through extrapolation.⁹² Extrapolation occurs when cases are tried after being selected randomly according to probability principles on the basis that it could have statistical validity for the entire field of cases.⁹³ The use of random sampling and probability analysis for damages calculation, by determining individual trials for randomly selected plaintiffs in each category of plaintiffs and then extrapolating the average damage award to all class members in that category, has for the most part been disapproved of in the United States.⁹⁴ The same disapproval has been shown toward statistical sampling as a way to circumvent the need for individual hearings to determine the quantum of damages.

In *McLaughlin v American Tobacco Co*⁹⁵ (“*McLaughlin*”), the plaintiffs proposed to prove damages on a class-wide basis and then set up a claims process for individual plaintiffs.⁹⁶ The plaintiffs – cigarette users – claimed they were deceived into believing that ‘light’ cigarettes were not as dangerous as regular cigarettes.⁹⁷ The plaintiffs proposed to estimate the percentage of defrauded class members through statistical methods and then to calculate damages by way of an estimate of the average loss per plaintiff.

⁹² According to Greer *A Practitioner's Guide to Class Actions* 712, extrapolation involves the use of statistical analysis to derive individual damage verdicts from the trial of sample cases or from determination by a jury of aggregate damages.

⁹³ 694.

⁹⁴ *Cimino v Raymark Industries Inc* 751 F Supp 649 (ED Tex 1990). The federal appellate court later found the ‘extrapolation’ phase improper, holding that it violated the defendants’ Seventh Amendment right to individualised evidence as to causation and damage issues for each of the class members: 151 F 3d 297 (5th Cir 1998). See also Mulheron *A Comparative Perspective* 266-267.

⁹⁵ 522 F.3d 215 (2d Cir. 2008).

⁹⁶ 231.

⁹⁷ 220.

The Second Circuit rejected this attempt as a “disconnect” that violated both due process and the Rules Enabling Act,⁹⁸ which provides that the Federal Rules cannot be used to “abridge, enlarge, or modify any substantive right”.⁹⁹ Numerous courts throughout the United States are in accord with *McLaughlin*.¹⁰⁰ Cases rejecting statistical sampling often show a particular aversion to statistical evidence in certain types of class actions. Typically, courts show increased hesitancy to allow statistical sampling and extrapolation where the underlying cause of action is inherently particularised to each individual plaintiff. In this regard, several courts have emphatically rejected statistical sampling evidence in personal injury suits.¹⁰¹

In re Fibreboard Corporation,¹⁰² the Fifth Circuit rejected extrapolation in the context of thousands of asbestos cases. Under the trial plan proposed by the district court, plaintiffs and defendants were each to choose fifteen illustrative plaintiffs, whose individual claims would be tried along with those of the eleven class representatives. Then, based upon the forty-one cases plus expert testimony, the jury would determine the total damages suffered by the remaining 2 990 class members. The Fifth Circuit invalidated the trial plan and in so doing indicated that such aggregated proof raised due process and Seventh Amendment concerns. The court rejected the plaintiffs’ claim that statistical measures of representativeness and commonality would be sufficient for the jury to make informed judgments concerning damages.¹⁰³ It also rejected the argument that this approach was “the only realistic way of trying these cases” and that “the difficulties faced by the courts as well as the rights of the class members to have their cases tried [cried] powerfully for innovation and judicial creativity”.¹⁰⁴ The court noted that such arguments were compelling but that they are better addressed by the representative branches – congress and the state legislature.¹⁰⁵ The court also stressed that the trial plan would have altered the substantive law of Texas by eliminating the need for each claimant to prove causation and damages.¹⁰⁶ The Fifth Circuit took a similar approach in a subsequent post-trial phase *In*

⁹⁸ 28 U.S. Code § 2072.

⁹⁹ 522 F.3d 231 (2d Cir. 2008).

¹⁰⁰ Greer *A Practitioner’s Guide to Class Actions* 498.

¹⁰¹ 499.

¹⁰² 893 F2d 706 (5th Cir. 1990).

¹⁰³ 710.

¹⁰⁴ 712.

¹⁰⁵ 712.

¹⁰⁶ Klonoff *Class Actions and Other Multi-Party Litigation in a Nutshell* 342.

re Fibreboard in which the same district court again tried to determine class-wide damages using a sample of class members.

Similarly, in *Cimino v Raymark Industries Inc*¹⁰⁷ the court rejected the district court's random selection of 160 cases and five categories of disease to extrapolate damages to 2 128 other asbestos cases on numerous grounds, including the Seventh Amendment right to jury trial and the Texas substantive requirement that damages be proved by "individuals, not groups".¹⁰⁸ The main difference between the approaches of Parker J for the court *a quo* and the Fifth Circuit relates to the issue of whether leeway may be given in aggregated cases to allow determination of damages on a basis other than strict individualised examination as to each plaintiff. The Fifth Circuit was of the view that such leeway cannot be given *inter alia* for the reasons referred to above.

In *Arch v American Tobacco Company*,¹⁰⁹ the court also rejected the plaintiff's proposal to use statistical sampling to award class-wide damages in a tobacco lawsuit, concluding that the "degree of injury" for each class member "would necessarily entail an individual inquiry".

It is apparent from what has been set out above that courts have generally rejected the use of statistical sampling or extrapolation to determine damages in personal injury cases on the basis that the class action device does not trump the requirement that plaintiffs must individually show proof of damages.¹¹⁰ As one court explained, proof of injury "is in no way lessened by reason of being raised in the context of a class action".¹¹¹ The class action mechanism "does not alter the required elements which must be found to impose

¹⁰⁷ 151 F.3d 297 (5th Cir. 1998).

¹⁰⁸ Para 9.

¹⁰⁹ 175 F.R.D. 469 (E. Dist. Pa. 1997) 493.

¹¹⁰ Greer *A Practitioner's Guide to Class Actions* 495 498-499. See also *McLaughlin v Am Tobacco Co* 522 F 3d 215 231 (2d Cir 2008); *Cimino v Raymark Indus Inc* 151 F 3d 297 316 (5th Cir 1998); *Arch v Am Tobacco Co* 175 FRD 469 493 (ED Pa 1997); *Bell Atlantic Corp v AT&T Corp* 339 F 3d at 304; *Piggly Wiggly Clarksville Inc v Interstate Brands Corp* 100 F App'x 296, 300 (5th Cir 2004); *Broussard v Meineke Disc Muffler Shops Inc* 155 F 3d 331, 342-343; *Windham v Am Brands Inc* 565 F 2d 59, 68 (4th Cir 1977); *Plekowski v Ralston Purina Co* 68 FRD 443 454-455 (MD Ga 1975); *Ralston v Volkswagen-werk AG* 61 FRD 427 432-433 (WD Mo 1973).

¹¹¹ *Bell Atl. Corp v AT&T Corp* 339 F3d 294, 302 n 52 (5th Cir 2003).

liability and fix damages”.¹¹² In *Wal-Mart Stores Inc v Dukes*¹¹³ the Supreme Court held that it was not possible to replace individualised adjudication with extrapolation and the use of statistical methods in that a “class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims”.¹¹⁴

It is recommended that South African courts should follow a similar approach when deciding on the permissibility of class-wide proof of damages in mass personal injury cases insofar as class-wide proof of damages would, in a South African context, conceivably also raise ‘due process’ concerns. For example, the individual class members could argue that they are entitled to provide the court with individualised proof of the damages that they have suffered. The defendants, in turn, could argue that they should be entitled to contest the damages claims of individual class members. A further concern is the questionable accuracy of methods utilised to prove damages on a class-wide basis, such as extrapolation or statistical sampling.¹¹⁵ The SALC in its Working Paper addressed the appropriateness of aggregate assessment of damages in the context of mass personal injury class actions. The SALC stated that in some cases it may be appropriate for the court to determine the monetary claims as a common issue and make an aggregate award that assesses the total liability of the defendant to the class.¹¹⁶ According to the SALC, where the class members can be identified and the amount of their individual claims can be easily determined without their assistance, aggregate awards are appropriate; for example, where individuals have been overcharged in respect of services rendered. In this kind of case, the court can order the defendant to produce its records to facilitate identification of the class members and evaluation of their claims. It would be unnecessary to require that class members prove their claims individually, which would be the case in a personal injury class action.¹¹⁷ According to the SALC, in a mass personal injury class action, the quantum of damages is regarded as an individual issue and it is generally not

¹¹² *Cimino v Raymark Industries Inc* 151 F3d 312.

¹¹³ 131 S Ct 2541 2011.

¹¹⁴ Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 341, 343-345.

¹¹⁵ 639.

¹¹⁶ See the discussion on aggregate assessment of monetary relief and distribution of aggregate awards of the Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982) 531-603.

¹¹⁷ South African Law Commission *The Recognition of a Class Action in South African Law Working Paper* 57 para 5.36.

acceptable to award damages to class members based on an aggregate assessment.¹¹⁸ The view of the SALC is informed by and accords with the approaches of the above-mentioned foreign jurisdictions.

It is therefore likely that class-wide proof of damages through extrapolation, statistical sampling or otherwise, would be problematic in a South African context, as is the case in the United States. It is therefore recommended that individual proof of damages in mass personal injury class actions should in principle always be required by South African courts. There may, however, be devices that could be utilised to facilitate individual proof of damages in mass personal injury class actions. These devices could assist in achieving judicial economy without detracting from or infringing upon a party's right to a fair public hearing as enshrined in section 34 of the Constitution of the Republic of South Africa, 1996 ("Constitution"), and will be considered in more detail below.

4 4 2 Severing the common issues from the individual issues

Where the damages suffered by class members have to be determined, it is generally necessary for individual evidence to be given by each class member. It may therefore be necessary to sever the common issues from the individual issues for all class members in multiple stages of the same litigation. This is typically referred to as bifurcation. According to Mulheron, the jurisdictions of Australia, Ontario and the United States all practise bifurcation or a similar form of splitting of the trial. It entails that the individual issues are resolved within the class action itself but in a phase of the litigation which is separate from the common-issues trial.¹¹⁹

The most common form of bifurcation is between liability and damages. For example, in the United States, judges who have certified mass tort cases for trial typically tend to try the common issues first and then hold separate trials for individual damage claims or

¹¹⁸ Para 5.36.

¹¹⁹ Mulheron *A Comparative Perspective* 261. See also, for example, *McMullin v ICI Australia Operations Pty Ltd* (No 6) (1998) 84 FCR 1, 2 where judgment on liability was delivered whereafter certain damages claims were heard and determined by judges and some were heard and determined by a judicial registrar. Split trials have also been endorsed under rule 23 of the Federal Rules in respect mass torts: see *Stanford v Johns-Manville Sales Corp* 923 F 2d 1142 (5th Cir 1991); asbestos claims: *Jenkins v Raymark Industries Inc* 782 F 2d 468 (5th Cir 1986).

groups of damage claims. In the first asbestos worker injury class action – *Jenkins* – Judge Robert Parker proposed to hold a single trial on the common issues of liability and punitive damages, followed by multiple individual trials on damages in which juries would hear the cases of seven to ten plaintiffs at a time and determine damages for each.¹²⁰ Similarly, in the Australian case of *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*,¹²¹ Mason P stated that the court may decide to sever a single representative proceeding into separate proceedings, or groups of proceedings, if it is desirable to resolve specific issues that may remain after the common issues are resolved. The fact that the proceedings sought the recovery of specific amounts in respect of each individual was held not to preclude the application of the representative action rule.¹²²

Regarding the severance of the common issues from the individual issues, section 33Q of the Australian Federal Court Act provides that, if it appears to the Federal Court that determining the issue(s) “common to all group members will not finally determine the claims of all group members, the court may give directions in relation to the determination of the remaining issues”. This may include directions establishing a subgroup of group members and the appointment of a person to be the subgroup representative party on behalf of the subgroup members. Further, in giving directions under section 33Q, the court may permit an individual group member to appear in the proceeding to determine an issue that relates only to the claims of that group member.¹²³ Section 33R has been invoked by the courts to facilitate orders dealing with the determination of the claims of individual group members following a decision in relation to common issues at an initial trial.¹²⁴

Accordingly, the Australian regime expressly allows for the determination of individual or ‘subgroup’ issues as part of a class action. The precise approach of the court to determining these issues is dependent upon the facts of each case. The court has wide powers to make orders to ensure that justice is done in a proceeding. It has broad powers

¹²⁰ D R Hensler *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (2000) 111.

¹²¹ 2005 63 NSWLR 203.

¹²² 204.

¹²³ See also Explanatory Memorandum to the Federal Court of Australia (Amendment) Bill 1991 (Cth) para 26: “[i]n some cases determination of the common issues in a representative proceeding will still leave some issues relating to the particular claims of group members to be determined. This section [section 33Q] enables the Court to provide for the most convenient method of resolving such issues by giving directions”.

¹²⁴ *Grave et al Class Actions in Australia* 493.

to direct how class members should establish their entitlement to share in the damages and the manner in which any dispute that may arise in this regard should be determined.¹²⁵

The Ontario Act also makes provision for the severance of the common issues from the individual issues in class proceedings. Section 24 of the Ontario Act provides as follows:

“24(1) The court may determine the aggregate or a part of a defendant’s liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant’s monetary liability; and
- (c) the aggregate or a part of the defendant’s liability to some or all class members can reasonably be determined without proof by individual class members.

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.”

Section 25(1) of the Ontario Act provides as follows:

“When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
- (c) with the consent of the parties, direct that the issues be determined in any other manner.”

¹²⁵ 491.

Subsections 25(2) and (3) further provide that the court shall give directions as to the procedure to be followed and, in doing so, shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to the class members and the parties, including dispensing with any procedural step or authorising any special procedural step.

In considering the procedure for individual assessments under section 25, the courts have recognised that when deciding the manageability question, the decision of the court should be based on what, on the basis of experience, is likely to occur assuming good faith and professional competence, and considering all available forms of dispute resolution.¹²⁶ According to Winkler C.J.O., the provisions that allow for the use of modified procedures to conduct individual assessments are aimed at ensuring that the court is able determine the individual issues in a cost-effective and timely fashion. Accordingly, the fact that damages may not be amenable to aggregate assessment at the conclusion of a common issues trial is not fatal to certification of a class proceeding. He states that an action may be certified as a class proceeding even in cases where small amounts of damages must be individually assessed because, in the absence of this possibility, the purposes of the Ontario Act would be eroded. Therefore, what is called for in addressing the preferable procedure requirement is to look not just at the common issues trial, but also at the other procedural options for conducting the class action litigation pursuant to the Ontario Act.

Winkler C.J.O. refers to section 25 that confers broad jurisdiction on the common issues trial judge to fashion procedures to be followed where *inter alia* damages cannot be aggregately assessed. The common issues trial judge has the authority to direct a further trial,¹²⁷ to appoint “one or more persons to conduct a reference”,¹²⁸ and to give directions on the procedures to be followed.¹²⁹ He refers to section 25(3) which amplifies the broad jurisdiction of the common issues judge. The section provides that, in giving directions under section 25(2), “the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties, and in so doing, the court may, (a) dispense with any procedural step that it

¹²⁶ Harvey *et al* “Recovery of Individual and Aggregate Damages in Class Actions” in *Special Lectures 2008: Personal Injury Law* 415.

¹²⁷ Section 25(1)(a).

¹²⁸ Section 25(1)(b).

¹²⁹ Section 25(2).

considers unnecessary; and (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate”.¹³⁰

Accordingly, section 25 of the CPA confers a wide discretion upon the trial judge to determine how individual issues are to be dealt with, including the power to dispense with usual procedural steps.¹³¹ Cullity J states the following in this regard:

“The court at this stage [certification] of the proceeding is, of course, not equipped with sufficient foresight to predict with any certainty the most appropriate method, or methods, of resolving the individual issues that will remain after the trial of common issues. That question—and the details that will need to be addressed—must be considered in the light of the decisions on the common issues and the evidence that will be given at the trial. For this reason, Section 25 of the CPA confers a wide discretion on the trial judge to decide how the individual issues will be dealt with. The discretion includes authority to authorise or dispense with procedural steps—including discovery—and to prescribe rules relating to the admission of evidence and the means of proof that the judge considers appropriate.”¹³²

It is apparent from the above that the class action regimes of Australia and Ontario make provision for severance of the common issues from the individual issues through bifurcation or some other form of trial-splitting. In the United States, rule 23(c)(4) of the Federal Rules provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues”.

This provision has given rise to some controversy – it has been given both a restrictive and expansive interpretation and, whichever interpretation is chosen, has a significant effect on whether the common issues are substantial enough to justify class action treatment. In other words, the relationship between rule 23(c)(4) and the predominance requirement is unclear. An expansive reading of the provision means that the class is restricted to the common issues and absent class members must institute subsequent individual

¹³⁰ *Cassano v The Toronto-Dominion Bank* 2007 ONCA 781 paras 62-64.

¹³¹ Harvey *et al* “Recovery of Individual and Aggregate Damages in Class Actions” in *Special Lectures 2008: Personal Injury Law* 417.

¹³² *Healey v Lakeridge Health Corp.* 2006 O.J. No. 5621 (S.C.J.) 2–4, 102; see also *Cloud v Canada (Attorney General)* 2004, 73 O.R. (3d) 401 (C.A.), leave to appeal to S.C.C. refused, 2005 S.C.C.A. No. 50; *Pearson v Inco Ltd.* 2005, 78 O.R. (3d) 641 (C.A.) para 97.

proceedings after the class action has terminated to resolve all remaining non-class issues. This expansive interpretation means that, because all the particular issues will be common to the class, class actions satisfy the rule 23(b)(3)-predominance requirement by definition.¹³³

Conversely, a restrictive reading of rule 23(c)(4) authorises bifurcated class actions and reiterates a court's power to certify a class action even when some issues cannot be resolved commonly. Supporters of this interpretation contend that the provision is merely a housekeeping tool, not a mechanism to circumvent other rule 23 requirements and, in particular, is not intended to serve as an alternative to a rule 23(b)(3) class action or to alter the predominance test in any way.¹³⁴

It is suggested that the expansive interpretation would render the predominance requirement superfluous insofar as class actions would satisfy it by definition. On the other hand, the restrictive interpretation appears to render rule 23(c)(4) itself superfluous as it does not really add to or vary the other rule 23 provisions. Mulheron therefore justifiably states that the uncertainty and lack of uniformity with which rule 23(c)(4) has been interpreted suggests that the wording is best avoided in other regimes.¹³⁵

Bifurcation is a significant device for segmenting and ultimately disposing of aggregate litigation. The sequential trial lowers the expected cost of litigation compared to a unitary trial for both the plaintiff and defendant, because it holds out the prospect of avoiding litigation on subsequent issues if the defendant succeeds in respect of the current issue or the parties settle the remaining issues after the current one is decided.¹³⁶

The selected foreign jurisdictions clearly make provision for some form of bifurcated procedure. This in itself, however, does not necessarily address the problem, which is the actual method of proof of individual damages, referred to as a problem essentially pertaining to the manageability of class litigation. Even if the proceedings are bifurcated, the question remains what mechanisms or devices can be used to determine damages in mass personal injury class actions.

¹³³ Mulheron *A Comparative Perspective* 262.

¹³⁴ 262-263.

¹³⁵ 263.

¹³⁶ Greer *A Practitioner's Guide to Class Actions* 701.

4 4 3 Subclassing

Subclassing serves as an adjunct to bifurcation.¹³⁷ Once a trial has been bifurcated, subclasses may be necessary for handling various damages claims. For example, in an action arising out of an environmental catastrophe, there may be subclasses based on the degree of exposure or the severity or type of physical injury.¹³⁸

The only reference in the American Federal Rules to subclasses is rule 23(c)(4) mentioned above. In this regard, in *Harris v Pan Am World Airways Inc*¹³⁹ it was held that “[t]he court may provide for the protection of separable interests by resort to Rule 23(c)(4) and direct that ‘a class...be divided into subclasses and each subclass be treated as a class...’” Similarly, in Australia, provision is made for subclasses. For example, in *McMullin v ICI Australia Operations Pty Ltd*,¹⁴⁰ judgment on liability was delivered, followed by the hearing and determination of some damages claims and the settlement of some of these claims. For those claims under \$100 000, orders were made under section 33Q(1) of the Federal Court Act for 16 sub-classes and to delegate those to a judicial registrar, with the larger claims heard by judges.

In South Africa, Wallis JA in *Children’s Resource Centre Trust* expressly confirmed that subclasses can be established to determine individual issues.¹⁴¹ Accordingly, where the matter is bifurcated, it may also be worth considering creating subclasses where issues common to the subclass can be determined and disposed of.

4 4 4 Devices or mechanisms to determine damages

In Australia, Ontario and the United States, judicial burdens have been eased by the use of various judicially- and legislatively-directed devices that avoid the necessity of every class member giving his or her evidence individually. Mulheron suggests that some departures from traditional methods of proof are justifiable within the bounds of necessity. The necessity that Mulheron refers to is the necessity of assuring effective and timely

¹³⁷ 703.

¹³⁸ 704.

¹³⁹ 74 FRD 24 (CD Cal 1977).

¹⁴⁰ (No 6) (1998) 84 FCR 1, 2.

¹⁴¹ Paras 44-45.

compensation to all deserving victims, which would otherwise be jeopardised by the limited resources of an ordinary judicial system. The aim of all such procedures is to resolve individual issues creatively and efficiently, while at the same time not derogating from or unlawfully infringing the substantive rights of the parties.¹⁴²

In view of the above, the drafters of the respective class action regimes of Australia, Ontario and the United States have sought to assist courts in the management of class actions, by bestowing upon the courts wide powers to enable individual issues to be determined expeditiously and justly,¹⁴³ to prescribe measures by which to simplify proof or argument,¹⁴⁴ and to dispense with or impose any procedural steps that the courts consider appropriate and consonant with justice to the parties.¹⁴⁵ The drafters of the Canadian provincial regimes have gone even further by permitting the use of standardised proof of claims forms, the auditing of claims on a sampling basis where the assessment and distribution of monetary relief is concerned,¹⁴⁶ as well as the possibility of statistical evidence.¹⁴⁷ These powers and the exercise of the court's inherent jurisdiction to control its procedures have resulted in an array of innovative procedures and timesaving measures being judicially developed and implemented.¹⁴⁸

In Australia, Ontario and the United States, when deciding whether a class action should be certified, courts have been willing to consider alternative methods of proof that may be used later in the proceeding. Instances of such alternatives that have not survived judicial scrutiny have included: application of the market share theory,¹⁴⁹ where there is uncertainty as to which of several possible defendants have been responsible for the

¹⁴² Mulheron *A Comparative Perspective* 264.

¹⁴³ Sections 12 and 25(1) of the Class Proceedings Act, 1992, S.O. 1992, c. 6.; sections 33Q and 33R of the Federal Court of Australia Act of 1976.

¹⁴⁴ Section 23 of the Class Proceedings Act, 1992, S.O. 1992, c. 6.; rule 23(d)(1) of the Federal Rules; but, no equivalent in the Federal Court of Australia Act of 1976.

¹⁴⁵ Section 25(3) of the Class Proceedings Act, 1992, S.O. 1992, c. 6.; section 33ZF(1) of the Federal Court of Australia Act of 1976.

¹⁴⁶ Section 24(6)(a), (c) of the Class Proceedings Act, 1992, S.O. 1992, c. 6.

¹⁴⁷ Section 23 of the Class Proceedings Act, 1992, S.O. 1992, c. 6.

¹⁴⁸ Mulheron *A Comparative Perspective* 264-265.

¹⁴⁹ Permitted in *Garipey v Shell Oil Co* (2001) 51 OR (3d) 181 (SCJ) 11. The theory applies in the case of an interchangeable substance, such as a generic drug, where the manufacturer of the substance used by a class member is unknown, but the product by different manufacturers is the same; each manufacturer's liability is limited to its market share.

plaintiffs' injuries; the use of epidemiological studies,¹⁵⁰ where there is doubt as to what caused the injuries;¹⁵¹ and the use of random sampling and probability analysis for damages calculation, by determining individual trials for randomly selected plaintiffs in each category of plaintiffs and then extrapolating the average damages award to all class members in that category.¹⁵²

As mentioned, there is a range of diverse mechanisms that have been employed across the foreign jurisdictions to deal with the determination of the quantum of damages as an individual issue. An example of such an alternative can be found in *Gagne v Silcorp Ltd*¹⁵³ (“*Gagne*”). In this case, the appellants were solicitors who had acted on behalf of the representative plaintiff in a class action against Silcorp Ltd. The action arose because the plaintiff and other persons had been dismissed from employment by Silcorp Ltd and had been offered less than the legislated minimum termination and severance pay.¹⁵⁴ A wrongful dismissal class action was commenced on behalf of the former employees. After a motion for an injunction was adjourned, and after extensive negotiations, a settlement was reached and approved by the court. The settlement involved the certification of the action, a commitment to comply with the Employment Standards Act, a judgment against Silcorp Ltd and a reference to enable the determination of the quantum of damages for each class member. This entailed a mini-hearing process with a mediation stage and an arbitration stage. Class members were each permitted to be represented in the mini-hearing process by their own legal representatives, rather than by the appellant solicitors. The court held that “the settlement provided for a creative and effective mini-hearing process that resulted in the complete resolution of all individual claims within little more than a year”.¹⁵⁵

¹⁵⁰ This evidence seeks to establish a causal relationship by comparing a class of persons exposed to the suspected agent with the general population.

¹⁵¹ *Anderson v Wilson* 1998 156 DLR (4th) 735 37 OR (3d) 235 (Div Ct) 17, but overruled on appeal: 1999 175 DLR (4th) 409, 44 OR (3d) 673 (CA) 28-30, leave to appeal refused: SCC 25 May 2000.

¹⁵² *Cimino v Raymark Industries Inc* 751 F Supp 649 (ED Tex 1990). The federal appellate court later found the ‘extrapolation’ phase improper. It found that it violated the defendants’ Seventh Amendment right to individualised evidence as to causation and damage issues for each of the class members: 151 F 3d 297 (5th Cir 1998). See Mulheron *A Comparative Perspective* 266-267.

¹⁵³ 1998 1584 (ON CA).

¹⁵⁴ Employment Standards Act R.S.O. 1990, c. E.14.

¹⁵⁵ Para 22.

It is possible to delegate the assessment of damages to a registrar, special master or referee.¹⁵⁶ In *Webb v K-Mart Canada Ltd*¹⁵⁷ (“*Webb*”), the court ultimately ordered that members of the Bar, as court officers and referees, assess individual damages. The case arose out of the purchase of K-Mart by HBC and the merger of the K-Mart chain with the Zellers and Bay chains, resulting in the closing of approximately 31 stores across the country and the termination of thousands of employees’ employment. Although these employees received sufficient statutory notice and termination pay, the representative plaintiff argued that they were entitled to more and that their termination was a common issue “sufficient to ground a class action for common law damages for wrongful dismissal”.¹⁵⁸ In response to concerns regarding the quantification of individual claims, the plaintiff proposed a “mini-hearing mediation and determination process, under court supervision”.¹⁵⁹ The defendant, in turn, argued that the case was not appropriate for a class action, since the individual contracts of employment required individual consideration. Justice Brokenshire disagreed. He held that the issues of whether the class members’ contracts of employment required the defendant to provide reasonable notice if dismissed without cause, and whether the class members were in fact dismissed without cause, were common, even if issues of quantum and mitigation were personal to each member. Regarding the proposed process for determining the individual claims, he noted that:

“[T]eams of experienced mediators and referees, using expedited and simplified procedures in informal settings, should be able to quickly and fairly arrive at satisfactory awards that would exhibit some uniformity for claimants in similar circumstances across the country...In short, I conclude that using the Class Proceedings Act, and in particular a reference type of adjudication of individual claims is the preferable course...and is likely to be simple and expeditious, less expensive than normal litigation, and not prejudicial to anyone.”

¹⁵⁶ See also in Australia: *McMullin v ICI Australia Operations Pty Ltd* (No 6) 1998 84 FCR 1, more fully discussed in *King v AG Australia Holdings Ltd* 2002 FCA 1560 6. In the United States: *In re Industrial Diamonds Antitrust Litigation* 167 FRD 374, 186 (SD NY 1996).

¹⁵⁷ *Webb v K-Mart Canada Ltd* 1999 45 OR (3d) 425 (SCJ) 24, 1999 O.J. No. 2268, 45 O.R. (3d) 389 (Ont. Sup Ct).

¹⁵⁸ 392.

¹⁵⁹ 392.

Another device that has been used to deal with the evidence required from absent class members in order to resolve their individual claims is standardised claim forms¹⁶⁰ that are sworn to by the claimants and assessed by a panel of legal experts.¹⁶¹ In *Butler v Kraft Foods Ltd*¹⁶² (“*Butler*”), claimants’ individual claims were assessed by three barristers. 2 500 Australians had joined suit against Kraft, claiming injuries from eating contaminated peanut butter. Justice Raymond Northrop of the Federal Court of Australia oversaw an opt-in/opt-out settlement in which Kraft agreed to pay claimants between AUS\$500 and AUS\$50 000 depending on the seriousness of their illness. Accordingly, claimants who had consumed the affected peanut butter and experienced symptoms or suffered demonstrable physical injury were able to recover in the resultant settlement, notwithstanding the individual nature of their reaction to consumption of the product. There does not appear to be a published judgment regarding the Federal Court’s approval of the settlement.

Alternatively, class members can be required to depose to affidavits regarding individual issues. In *Maxwell v MLG Ventures Limited*¹⁶³ (“*Maxwell*”), the Ontario Court of Justice (General Division) certified a class action for misrepresentations contained in an offering circular, notwithstanding that some of the class members may have had actual knowledge of the matters alleged not to have been disclosed. The court ruled that any difficulties relating to the actual knowledge of undisclosed facts of each plaintiff could be addressed by requiring class members to depose to affidavits outlining the facts upon which they relied and by permitting the defendant to cross-examine on these affidavits. In other words, the court held that determining such individual knowledge could easily be established by requiring each member of the class to file an affidavit swearing to their actual knowledge of the undisclosed facts.

In practice, most judges anticipate that parties to a mass tort class action will settle the individual damage claims without trial, as was the case in *Jenkins* where the defendants settled the claims of class members five weeks into the common issues trial.¹⁶⁴ However,

¹⁶⁰ *In re First Databank Antitrust Litigation*, 205 FRD 408 (DDC 2002); *Butler v Kraft Foods Ltd* (FCA) 19 Jun 1997.

¹⁶¹ *Butler v Kraft Foods Ltd* (FCA) 19 Jun 1997.

¹⁶² (FCA) 19 Jun 1997.

¹⁶³ 1995 54 ACWS (3d) 847 (Ont Ct (Gen Div)).

¹⁶⁴ Hensler *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 111.

what if the parties do not settle? As mentioned above, our courts have not properly considered the approach to be followed when determining damages in mass personal injury class actions. Conventional mechanisms for calculating damages may not be practicable in the context of a mass personal injury class action involving a numerous class. In this regard, the traditional adversarial evidentiary hearing is a precise method to determine each class member's quantum of damages but individual damage trials for all or even a substantial portion of the class members may place an intolerable burden on the courts.¹⁶⁵ The availability and potential utility of judicial devices to assess damages should accordingly be a relevant matter that informs judicial discretion as to whether or not a court will determine a class action to be the appropriate method to adjudicate class members' claims.¹⁶⁶ In order to determine what approach our courts should follow to determine damages in a mass personal injury class action, it may be worth revisiting the distinction between a single-accident mass personal injury class action and a dispersed incident mass personal injury class action.

4 4 4 1 Single-accident mass personal injury class action compared to dispersed incident mass personal injury class action

As mentioned, in mass personal injury class actions that arise from dispersed incidents, causation is usually an issue. For example, in an asbestos-related dispersed incident mass personal injury class action, the variations in individual factual issues calling to be considered, may constitute significant issues when determining whether a sufficient causal link exists between the conduct and the injury. There may also be different levels and timing of exposure, different types of injuries suffered and the gravity of those injuries among the individual claimants would typically vary greatly. Therefore, when dealing with an application for certification of a dispersed incident mass personal injury class action, because of the non-common issues that require determination in order to dispose of class members' claims, there is a risk that the class proceedings may break down into a long series of individual trials, in which event any potential judicial efficiency would be lost. Class proceedings may therefore not be the appropriate mechanism to adjudicate class members' claims.

¹⁶⁵ Klonoff *Class Actions and Other Multi-Party Litigation in a Nutshell* 638-639.

¹⁶⁶ Mulheron *A Comparative Perspective* 269.

As mentioned,¹⁶⁷ it is still debated whether Part IVA of the Australian Federal Court Act lends itself to dispersed mass torts. In a single-accident mass tort, the claims of all group members are likely to share the common characteristics of time, place and cause of injury, making resolution of the common claims arising in related circumstances suitable for class treatment. However, where the exposure to a defective product or contaminant and its effects are dispersed, the courts have shown a reluctance to deal with such actions under Part IVA.¹⁶⁸ Lawyers acting for respondents argue that where there is so much diversity between the claims of group members, and the non-common issues will dominate the proceeding, a representative proceeding under Part IVA will not be the most efficient or appropriate means of dealing with the claims of group members, and the court should exercise its discretion to terminate it under section 33N(1)(c) or (d) of the Federal Court Act.

Similar concerns about dispersed mass torts have been expressed in the United States.¹⁶⁹ According to Clark and Harris, since causation would have to be considered on an individual basis, a class action is impractical or even impossible.¹⁷⁰ They refer to *Bright v Femcare Ltd*,¹⁷¹ where Kiefel J acknowledged that proof of causation might involve a considerable part of the evidence and substantial argument in each individual case. This problem is usually the reason why certification has been denied in the United States.¹⁷² The concern is accordingly that the degree of individualisation required to determine any one claim renders the class action inappropriate. For example, in *Brown v Southeastern Pennsylvania Transportation Authority*,¹⁷³ plaintiffs sought class certification for personal and economic injuries allegedly due to the defendants' handling, storage and use of 'PCBs' (polychlorinated biphenyl) at a Pennsylvania railyard. The court found that the causation issues were too individual to merit a class action because the plaintiffs could not single out one set of operative facts to establish the defendants' liability, because the

¹⁶⁷ See 4 3 1 1 above.

¹⁶⁸ Lipp (2002) *Monash University Law Review* 365.

¹⁶⁹ See 4 3 1 3 above. See also Klonoff *Class Actions and Other Multi-Party Litigation in a Nutshell* 336-337. See also *Ortiz v Fibreboard Corp* 527 US 815 (1999); Mullenix (1997-1998) *Loy L A L Rev* 554-555.

¹⁷⁰ Clark & Harris (2009) *UNSW Law Journal* 1031.

¹⁷¹ (2002) 195 ALR 574 603.

¹⁷² Clark & Harris (2009) *UNSW Law Journal* 1031-1032.

¹⁷³ 1987 WL 9273 25 (ED Pa) (unpublished opinion).

alleged injuries occurred over a ten-year period, and because the plaintiffs' circumstances, medical histories and injuries varied.

Mojapelo DJP recently certified the first South African mass personal injury class action. In *Nkala v Harmony Gold Mining Company Limited*¹⁷⁴ ("Nkala"), Bongani Nkala and 55 other individuals sought certification of a dispersed incident mass personal injury class action on behalf of mineworkers for damages arising from silicosis contracted by mineworkers through their employment on the mines.¹⁷⁵ In certifying the class action, Mojapelo DJP held that although, for instance, class members' damages would need to be individually determined "there are sufficient common issues of fact and law that allow for, at least at the first stage, a single proceeding to be held where evidence and argument common to all the mines is entertained".¹⁷⁶ Mojapelo DJP essentially found that the second stage of the class action, which would probably entail determining causation and damages, would have "to be left to the trial court as that court would not be hamstrung by the same information deficit that besets this court".¹⁷⁷ Mojapelo DJP accordingly confirmed that the class action would be bifurcated:

"Hence, a certification of the class action would translate into the following: once the common issues are determined, and assuming they favour the mineworkers' case, then each mineworker would have to develop the rest of his case on its own facts. In other words, even after the common issues are dealt with and finalised there nevertheless remains the issue of each mineworker having to prove his own case. It follows axiomatically that the stage when each mineworker would have to prove any outstanding aspects of his case, particularly those aspects peculiar to his own case, such as for example, the amount of the damages he sustained, would have to be the final stage of the class action."¹⁷⁸

He proceeded to state that:

¹⁷⁴ (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016).

¹⁷⁵ Paras 2-3.

¹⁷⁶ Paras 79, 84.

¹⁷⁷ Para 86. Chapter two above contains a critical discussion concerning Mojapelo DJP's finding that the fact that there are common issues, the determination of which would advance class members' claims, makes it unnecessary to inquire into the appropriateness of class proceedings. It would, according to Mojapelo DJP, be in the interests of justice to certify a class action.

¹⁷⁸ Para 77.

“It is also conceivable that before that stage is reached, and after the issues common to all the mineworkers have been dealt with, there remain certain issues common to only some mineworkers. This would best be described as issues pertaining to a sub-class. Depending on how the overall general common issues are determined there could be more than one sub-class that may be identified by the trial court. Whether it will be necessary to determine the issues pertaining to each sub-class before the final stage (of each individual mineworker proving his loss) are reached is a matter for the trial court. The presiding judge would be completely at liberty to determine how best to conduct the trial once the overall common issues had been determined.”¹⁷⁹

Although, in South Africa, no predominance of the common issues over the individual issues is required, it is nevertheless worth questioning whether a class action would be appropriate to adjudicate class members’ claims in a dispersed incident mass personal injury class action. As mentioned, in mass personal injury class actions that arise from dispersed incidents, determining causation and damages present management difficulties. In *Nkala*, Mojapelo DJP acknowledged that “[i]t is obvious that not all the elements of the delictual action will be finalised once the common issues have been determined. We know for instance that as each mineworker’s damages are unique to that mineworker, these will have to be individually determined...The mineworkers are acutely aware of this reality”.¹⁸⁰ Certification of the class action in *Nkala* could therefore give rise to serious manageability concerns. However, Mojapelo DJP did not really grapple with these potential difficulties other than by referring to the trial court’s powers to manage class actions.

The fact that Mojapelo DJP did not really consider the manageability concerns that may arise from certification of the class action and deflected these concerns to the trial court, does not detract from the correctness of the court’s decision to certify the class action. The size of the class ranged from between 17 000 to approximately 500 000 members. Further, “[t]he scope and magnitude of the proposed silicosis and TB claims is unprecedented in South Africa. The action, if it proceeds, will entail and traverse novel and complex issues of fact and law”.¹⁸¹ The class members are “poor, lack the sophistication necessary to litigate individually, have no access to legal representatives and are

¹⁷⁹ Para 78.

¹⁸⁰ Para 84.

¹⁸¹ Para 7.

continually battling the effects of two extremely debilitating diseases”.¹⁸² “It was not disputed that the majority of mineworkers have little to no access to the South African justice system as they are all impoverished or indigent and are living in the rural areas of South Africa, Mozambique, Malawi, Lesotho and Swaziland, and are in poor health.”¹⁸³ These individuals are unlikely to litigate independently in the absence of certification of the class action.¹⁸⁴ Accordingly, applying the criteria of the appropriateness-inquiry detailed in chapter two, it would appear that a class action is the appropriate method to adjudicate class members’ claims. This is the case even though there may be manageability concerns that may arise during the second phase of the bifurcated proceeding. These concerns are overshadowed by the need for class members to be provided with access to justice. Such an approach, it is suggested, would be in the interests of justice.

However, circumstances may arise where manageability concerns, along with other factors that form part of the appropriateness-assessment, may render class proceedings inappropriate. Consider, for example, where a chocolatier, plying her trade in an upmarket neighbourhood, has been selling a chocolate product that contains small traces of inorganic mercury, which is extremely poisonous, for a period of six months. The clients consume the chocolate in different quantities and over different periods. They also experience a variety of symptoms such as nausea, vomiting, extreme abdominal pain, and kidney failure that, in certain instances, results in death. However, some of the clients have pre-existing medical conditions, including kidney-related medical diseases.

In the above example of personal injuries resulting from a dispersed incident, it is suggested that it is unlikely that the matter would be appropriate for class action treatment because the manageability concerns that arise from the extent of the individual issues that would require determination, including causation and damages, militate against certification of a class action. Further, the putative class members do not comprise the poorest portion of our society and they are, for the most part, likely to have access to the resources necessary to pursue their claims individually. Joinder, as an alternative to a class action, may also be appropriate in the circumstances.

¹⁸² Para 100.

¹⁸³ Para 103.

¹⁸⁴ Paras 106-107.

It is therefore not necessarily the case that our courts should certify a dispersed incident mass personal injury class action, notwithstanding the existence of individual issues that require determination. Where there is no factor that outweighs the manageability concerns that may arise, such as the need to provide the putative class members with access to justice, courts should caution against certifying class proceedings. Because of the extent of the individual issues that may require determination, it is therefore more difficult to succeed with a certification application in the context of a dispersed incident resulting in personal injuries, compared to a single-accident mass personal injury class action.

In single-accident mass personal injury class actions, it is generally the case that the only non-common issue is the quantum of damages payable to each class member.¹⁸⁵ “Typically, plaintiffs in a single event mass tort share the common characteristics of time, place, and cause of injury...issues of science are usually resolved with existing knowledge and with the kind of expert testimony conventionally employed in tort litigation. What is different from the ordinary two-or three-party tort is the number of people affected and the stakes involved, not the facts or the law.”¹⁸⁶ Single accidents therefore present courts with fewer variables compared to dispersed incidents, which generally makes class treatment more appropriate.¹⁸⁷

In view of what has been set out above, the proposal to determine damages in mass personal injury class actions below would therefore not resolve all the individual issues generally involved in dispersed incident mass personal injury class actions. For example, it is not aimed at addressing problems of causality that typically arise in dispersed incident mass personal injury class actions. The proposal will therefore be aimed at determining damages in single-accident mass personal injury class actions. However, it may be that the proposal could also be utilised by a court in the context of dispersed incident mass personal injury class actions.

¹⁸⁵ 562.

¹⁸⁶ Advisory Committee on Civil Rules and Working Group on Mass Torts, Report on Mass Tort Litigation, 10 n. 1, app. D, at 1 (1999), reprinted without appendices in 187 F.R.D. 293 (considering a group of fifty claimants for designation as a ‘mass tort’).

¹⁸⁷ J C Coffee Jr “Class Wars: The Dilemma of the Mass Tort Class Action” (1995) 95 *Colum L Rev* 1343 1358.

4 4 4 2 Proposal to determine damages in mass personal injury class actions

As mentioned by Wallis JA in *Children's Resource Centre Trust*, where a single-accident mass personal injury class action is certified, the proceedings are usually bifurcated in that there is typically a verdict on liability and the quantum of individual damages is subsequently individually determined, separate from the liability phase.¹⁸⁸ In *Simon v Philip Morris Inc*¹⁸⁹ it was held that the “[b]ifurcation procedure has evolved to accommodate modern emphasis on active judicial management in complex cases, particularly in the realm of mass tort disputes”. However, the problem remains that the number of claimants in mass personal injury litigation overwhelms traditional commitment to individual, case-by-case, adjudication of damages claims. Cases involving thousands of injured persons seeking damages rule out any serious consideration of individual damages trials and should therefore prompt experimentation by South African courts with devices aimed at assessing quantum of damages without the need for individual trials. “Courts have long recognized the need for special case-management practices in single incident mass torts, such as a hotel fire, the collapse of a structure, the crash of a commercial airliner, a major chemical discharge or explosion, or an oil spill.”¹⁹⁰ As noted by the Fifth Circuit, “[t]he courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters”.¹⁹¹ The challenge has been, and will be, to define procedures for the resolution of individual issues that achieve the fine balance of procedural fairness and cost effectiveness, while always having regard to the class action objectives of judicial economy, access to justice, and behaviour modification.¹⁹²

It is accordingly recommended that, to enable South African courts to experiment with devices aimed at assessing the quantum of damages without the need for individual trials, they should enjoy a broad discretion in managing class actions to facilitate the effective adjudication of these issues. The trial courts in the foreign jurisdictions are afforded such a discretion; for example, it has been held that the “[t]rial court must be accorded the

¹⁸⁸ Paras 44-45.

¹⁸⁹ 2000 FRD 21 32 (EDNY 2001).

¹⁹⁰ Manual for Complex Litigation 4th ed (2004) 343-44.

¹⁹¹ *Jenkins v Raymark Industries* 782 F.2d 468, 473 (5th Cir. 1986).

¹⁹² Harvey *et al* “Recovery of Individual and Aggregate Damages in Class Actions” in *Special Lectures 2008: Personal Injury Law* 390.

flexibility ‘to adopt innovative procedures, which will be fair to the litigants and expedient in serving the judicial process’.¹⁹³

Under United States federal and state rules, “the trial judge maintains a great degree of control over the conduct of a class action trial”.¹⁹⁴ As mentioned, section 25 of the Ontario Act confers a wide discretion upon the trial judge to determine how individual issues are to be dealt with, including the power to dispense with the usual procedural steps. It is for the trial judge to determine how issues not determined at the common-issues trial will be decided.¹⁹⁵

It is proposed that our courts’ powers in respect of damages assessment in class actions should be similarly wide. Such an approach has been endorsed on several grounds in the selected foreign jurisdictions. One such ground is that class proceedings are not a traditional form of litigation and that it is inappropriate to impose upon it structures derived from earlier times and traditional powers in litigation between individual parties. Another ground is that, accepting that class actions are proper procedural devices where individual suits are not economically feasible given the insignificant amounts involved, it follows by implication that individualised proof of damages of the type in traditional litigation may not be practical or economically feasible either.¹⁹⁶

As mentioned above, some of the methods utilised in the foreign jurisdictions to determine individual damages include small group trials and alternative dispute resolution processes.¹⁹⁷ Courts have also made use of innovative summary judgment procedures and lighter burdens of proof at the individualised damages trials to make it easier to quantify damages without abandoning the individual trial requirement.¹⁹⁸ However, these methods have not necessarily only been applied in the context of a single-accident mass personal injury class action. They have also, for the most part, been used in the context of

¹⁹³ *Linder v Thrifty Oil Co.* 2000 23 Cal. 4th 429, 440.

¹⁹⁴ *Gold Strike Stamp Co. v Christensen* (10th Cir. 1970) 436 F.2d 791, 792, n.2.

¹⁹⁵ See 4 4 2 above.

¹⁹⁶ Mulheron *A Comparative Perspective* 411.

¹⁹⁷ For example, in *Jenkins v Raymark Industries* 782 F.2d 468, 473 (5th Cir. 1986), Parker J proposed to hold a single trial on the common issues of liability and punitive damages followed by multiple individual trials on damages in which juries would hear the cases of seven to ten plaintiffs at a time and determine the damages for each.

¹⁹⁸ Klonoff *Class Actions and Other Multi-Party Litigation in a Nutshell* 639.

class action settlements where both parties agree to utilisation of the specific method to determine damages. For example, the cases of *Gagne*, *Webb* and *Maxwell*, referred to above, were not personal injury class actions and it is accordingly questionable whether the methods used therein to determine the quantum of damages could be utilised to determine quantum of damages in the context of a South African single-accident mass personal injury class action. It would have been easier to propose the incorporation into South African law of a method that has been successfully utilised on a consistent basis in any of the foreign jurisdictions discussed herein; however, such a method does not appear to exist – at least not one that could simply be adopted locally.

It appears that the preference in mass personal injury class actions in the above-mentioned foreign jurisdictions is to conduct individual hearings to determine the quantum of damages in respect of each class member. It may accordingly be worthwhile to consider developing a *sui generis* proposal that draws on the experiences of the foreign jurisdictions that can be utilised in the context of single-accident mass personal injury class actions in South Africa. Such a suggested approach is detailed below.

4 4 4 2 1 Introduction

There are generally two variables in single-accident mass personal injury class actions – the number of class members and the damage which each of the individual members has suffered. In most cases, one or the other, or both of these variables will be present.¹⁹⁹ If an approach is followed in terms of which class members are required to opt into the second phase of the class action, where individual class members' quantum of damages is established, one of the aforementioned variables, namely the number of class members, is removed. Such an approach is similar to *McMullin v ICI Australia Operations Pty Ltd*²⁰⁰ and *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 2)*²⁰¹ where orders were made precluding group members from maintaining claims for damages if they failed to take steps to identify themselves by a particular date. Once orders such as these are implemented, the precise number of group members who maintain a claim in the proceeding may be clarified.²⁰²

¹⁹⁹ Mulheron *A Comparative Perspective* 412-413.

²⁰⁰ 1998 84 FCR 1.

²⁰¹ 2003 VSC 212.

²⁰² *Grave et al Class Actions in Australia* 496.

The South-Gauteng division of the High Court of South Africa followed a similar approach in the *Nkala* case.²⁰³ Mojapelo DJP referred to the bifurcated proceedings that would follow upon his certification of the class action and held as follows in this regard:

“[T]he second stage of this bifurcated process involves the invocation of the opt-in method of identifying the total number of mineworkers who form part of the class action. This means that at the conclusion of the opt-in process the names and details of all the mineworkers who claim rights of membership to the classes will be known. There will be no need for them to issue summonses. The mining companies are already before court. All they will then need to know is who exactly the plaintiffs are”.²⁰⁴

Before detailing a proposal for determining damages in single-accident mass personal injury class actions, it is recommended that the judge should, as a point of departure, encourage participation by the parties in a negotiation process. Feinberg’s remarks are to the point: “[J]udges have increasingly taken on a more active role in encouraging settlement, sometimes by appointing a special master to facilitate negotiation among parties. In addition, the parties themselves can seek the aid of an outside party to facilitate negotiation.”²⁰⁵ The aim of negotiation should be to facilitate settlement of the dispute or a part thereof. However, the failure of negotiation does not necessarily mean that the process was without value. For example, it could nevertheless have assisted in a narrowing of the issues.²⁰⁶

4 4 4 2 2 Exchange of affidavits

When a court has to determine damages in single-accident mass personal injury class actions, it is proposed that it could, in the absence of agreement between the parties, approve a protocol in terms of which the requisite standard of proof would be met by the submission of an affidavit deposed to by each class member who has opted into the second phase of the class proceedings. The affidavit should contain the *facta probantia* necessary to prove the class member’s entitlement to the quantum of damages claimed. This would entail that the affidavit should have attached to it proof of the class member’s

²⁰³ (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016).

²⁰⁴ Para 88.

²⁰⁵ Feinberg (1990) *Law and Contemporary Problems* 91.

²⁰⁶ Chapter five below considers possible court-annexed mediation of class actions in South Africa.

medical condition in the form of an individualised report from a medical practitioner. The medical report would furnish information about any injuries suffered by the class member because of the accident that gave rise to the mass personal injury class action.

The affidavit should also have attached to it further documentary evidence required to prove the quantum of damages claimed, such as an actuarial report where loss of earnings forms part of the claim. It may also be that, for example, the hospital records of the trauma unit where the class member was admitted would need to be attached. The class member may also need to attach other medical reports, such as the expert report of a clinical or industrial psychologist whom the class member may have visited. This approach resembles the approach followed in the *Butler* and *Maxwell* cases regarding the determination of the quantum of damages. In *Butler*, as mentioned, standardised claim forms were used. These claims forms were sworn to and assessed by a panel of legal persons. In *Maxwell*, as mentioned, individual class members deposed to affidavits regarding the individual issues.

It is proposed that the medical report should resemble the medical report found in the context of South African Road Accident Fund claims, titled Claim for Compensation and Medical Report.²⁰⁷ The latter report is comprehensive and contains sufficient detail for the purpose of this proposal. Section 24(2)(a) of the Road Accident Fund Act No 56 of 1996 provides that the medical report must be completed by the medical practitioner who treated the injured or deceased person for the bodily injuries sustained by him or her in the accident from which this claim arises or by the superintendent (or his or her representative) of the hospital in which the injured or deceased person was treated for such bodily injuries.

A report of the above nature is sufficiently detailed to assist the court or its reference to assess the quantum of damages of the individual class members. Such an approach is similar to *Lopez v Star World Enterprises Pty Ltd*²⁰⁸ where the settlement scheme made detailed provision for the manner in which assessment of the claims made by group members would occur. Each member of the group had to submit a written claim verified by medical reports or medical certificates. The quantum of damages to which each group

²⁰⁷ Sections 17(1) and 24(1)(a) of Act No. 56 of 1996 and regulation 3(1) of the Regulations under the Act.

²⁰⁸ 1999 FCA 104.

member was entitled then had to be assessed and the fund distributed *pari passu*, accordingly.

4 4 4 2 3 Defendant's affidavit

It is obvious, however, that merely assessing damages with reference to the affidavit and accompanying evidentiary material filed by each class member, without affording the defendant the opportunity to dispute the quantum, could infringe the defendant's right to a fair public hearing as entrenched in section 34 of the Constitution and the *audi alteram partem* principle. The defendant should accordingly be provided the opportunity to respond to the individual class members' claims through filing an answering affidavit, which addresses the issues raised in each class member's founding affidavit. Attached to the answering affidavit could be annexures similar to those that are attached to the class member's founding affidavit including, for example, a medico-legal report and an actuarial report, where necessary. The defendant should therefore be able to call upon the class members concerned, through the class representative, to avail themselves for medical evaluations by the defendant's medical experts.

Consider, for example, a single-accident mass personal injury class action that arose from a train derailment²⁰⁹ where approximately 300 individuals sustained injuries and some of them died because of the accident. If the defendant has been found to be liable for the individual class members' damages sustained because of the accident, the second phase of the trial would entail determining the quantum of those damages claims. In this regard, it is unlikely that the defendant would dispute the claims of those individual class members whose claims relate to minor, superficial injuries incurred as a result of the accident if those individuals choose to opt into the second phase of the proceeding. This is because, firstly, the class members' claims, as mentioned, are set out on affidavit, deposed to under oath, supported by a medical report and other relevant documentary evidence. Secondly, it is unlikely that the defendant would incur the costs associated with disputing an individual's claim in such circumstances, especially where the probable difference in the outcome would be negligible, as it would *inter alia* entail subjecting the claimant to a further medical examination by the defendant's medical expert, at the defendant's

²⁰⁹ The example used by Wallis JA in *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA) paras 44-45.

expense. Rather, it is likely that some of the damages claims would be settled or agreed to by the defendant upon receipt of the affidavits of the individual class members. The defendant's answering affidavit would accordingly indicate whether it agrees with the quantum claimed by each individual class member and, in relation to those class members whose amounts claimed are disputed, the defendant would, for example, require further medical examinations by its medical expert.

It is suggested that a further opportunity to settle individual class members' claims presents itself through the filing of replying affidavits by the class members in circumstances where the defendant disputes their claims. The defendant may, upon receipt of the replying affidavit and in light of its contents, agree to the quantum of damages claimed by the individual class member concerned. It is accordingly a further opportunity to limit the number of claims that require adjudication by the court because of settlement between the parties.

4 4 4 2 4 Panel

Once the above-mentioned exchange of affidavits has taken place, the court would have the option to request that a court-appointed panel of experienced and suitably qualified medical and actuarial experts conduct evaluations on behalf of the court to consider the damages claims filed by the individual class members. The court would have the option to refer any aspect of a class member's claim, or all the class members' claims in its entirety, to the court-appointed panel for their consideration and evaluation. It does not happen automatically. For example, the panel may be required to report on the nature and extent of the injuries incurred or the estimated loss of earnings in the event of particularly conflicting medical or actuarial reports. Specifically, the medical experts would be responsible *inter alia* for conducting the relevant medical evaluations and/or referring the class member(s) for necessary additional examinations²¹⁰ to any specialist, compiling medico-legal reports and providing the court with expert evidence, where necessary.²¹¹ The actuarial experts would be responsible *inter alia* for the calculation of past loss of earnings up to the present time and the calculation of future loss of earnings.

²¹⁰ Such as CT scans, X-rays or blood tests.

²¹¹ Should the court-appointed panel deem it necessary to medically consult the class member concerned, it should be able to do so.

The court-appointed panel would need to draft a report regarding its evaluation that is filed at court along with the evidentiary material of the individual class members and the defendant. Ultimately, when the court receives the evidentiary material, it would need to weigh it up to make a finding ‘on the papers’. It is suggested that a finding on the papers is necessary in order to avoid individual damages trials, which approach is justifiable if regard is had to the approaches of the above-mentioned foreign jurisdictions. For example, it may be worth recalling that the Fifth Circuit in *Jenkins* held that “necessity moves us to change and invent”.²¹² Similarly, according to Mulheron, an approach has to be considered that would avoid the necessity of every class member giving individual evidence.²¹³ She further favours some departures from traditional methods of proof within the bounds of necessity, i.e. the necessity of assuring effective and timely compensation to all deserving victims, which would otherwise be jeopardised by the limited resources of an ordinary judicial system. The aim of all these procedures is to resolve individual issues creatively and efficiently, while at the same time not to derogate from or unlawfully infringe upon the substantive rights of the parties.²¹⁴

It is proposed, however, that if the court deems it necessary to receive oral evidence on a particular issue, it may request that the witness concerned attends at court for this purpose. The report provided by the panel of court-appointed experts may accordingly be supplemented, where necessary, by testimony in open court. For example, it may be that the court requires the actuarial experts on the court-appointed panel to deliver *viva voce* evidence regarding the application and explanation of mathematical or actuarial calculations in respect of future loss.²¹⁵ The judge should be responsible for questioning the witness so that the court can acquire the information that it deems necessary to make a finding as to the quantum of damages that should be awarded to each individual class member.

Implementation of the above-mentioned proposal would essentially entail that our judges become more proactive in identifying issues and gathering evidence and also take full control of the proceedings and control the participation of the parties. Judges would need to assume a wide-ranging role from the pre- to post-hearing stage; the judge would have

²¹² 782 F2d 468 (5th Cir 1986) 473.

²¹³ Mulheron *A Comparative Perspective* 264.

²¹⁴ 264.

²¹⁵ Steynberg (2011) *PELJ* 16.

to take charge of the case and of case management, and issue directions as to which particular matters and evidence require examination; the judge may also commission expert evidence.²¹⁶ It is suggested that this is the role that the judge should assume in the quantification of damages in single-accident mass personal injury class actions.²¹⁷

Such an approach is similar to a typical civil law trial where judicial officials perform a more active role that is not limited to the examination of the evidence presented by the parties or to the execution of the parties' motions. The control over the process is shifted from the parties to the court, which enjoys greater discretion in the evaluation of the evidence and may guide the discovery process with bench requests. In these systems, the presiding judge determines the order in which evidence is taken and is free to weigh up the relative value of conflicting evidence, acting independently of the proposals and motions of the parties. The court determines the credibility and relative weight of each piece of information. The court is vested with a large degree of initiative to shape the course of the litigation. The judge contributes to ascertaining the facts and identifying potentially relevant evidence, and actively screens and evaluates the evidence presented by the parties.²¹⁸

The rationale for adopting a more inquisitorial approach in the context of the above proposal is that, if the court is to take decisions that best implement policy goals, then it should rely upon the best available information rather than just the evidence presented by the parties, which requires an active style of adjudication.²¹⁹ According to Harms, “[a]n efficient trial requires that judicial officers cease to be passive onlookers and instead

²¹⁶ R Thomas “From 'Adversarial v Inquisitorial' to 'Active, Enabling, and Investigative': Developments in UK Administrative Tribunals” SSRN Paper <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144457> (accessed: 12/11/2015)>.

²¹⁷ According to J A Jolowicz “Adversarial and Inquisitorial Models of Civil Procedure” (2003) 52(2) *The International and Comparative Law Quarterly* 281 281, simply characterising common law countries' systems of civil procedure as adversarial and the system of continental countries as inquisitorial is somewhat flawed: “the most that can be said is that some systems are more adversarial – or more inquisitorial – than others. There is a scale on which all procedural systems can be placed, at the one end of which there is the theoretically pure adversary system and at the other the theoretically pure inquisitorial”. It is suggested that the role of the judge in the context of the proposal is more inquisitorial than it is adversarial.

²¹⁸ F Parisi “Rent-Seeking through Litigation: Adversarial and Inquisitorial Systems Compared” (2002) *International Review of Law and Economics* 1 7.

²¹⁹ R Thomas “From 'Adversarial v Inquisitorial' to 'Active, Enabling, and Investigative': Developments in UK Administrative Tribunals” SSRN Paper <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144457> (accessed: 12/11/2015)>.

become actively involved in the management of the trial. To be passive is easy and not stressful; one does not have to concentrate; few decisions have to be made; one can place any blame on the lawyers; and one is safe from receiving reprimands from courts of appeal".²²⁰ It is essentially because of the manageability concerns that it is proposed that a more inquisitorial approach to determining the quantum of damages in single-accident mass personal injury class actions be adopted. Insofar as determining the quantum of damages in single-accident mass personal injury class actions is concerned, a typical inquisitorial proceeding should therefore be followed where the trial is dominated by a presiding judge, who determines the order in which evidence is taken and who evaluates the content of the gathered evidence. The court determines the credibility and relative weight of each piece of evidence without being constrained by strict rules in that respect.²²¹

De Vos states that "as the right to an oral hearing is not a hard and fast rule, it could be further qualified in order to expedite the proceedings and, thus, promote effective access to justice".²²² He also states that it is "in the interest of effective access to justice to restrict the principle of party control by providing for a certain degree of judicial control...perhaps the exigencies of the present day South African society demand that the principle of case management be fully accepted as a necessary feature of civil litigation".²²³ It is accordingly suggested that, taking account of the *sui generis* nature of class proceedings and the approaches to determining quantum of damages in single-accident mass personal injury class actions, the approach proposed above should be aligned with the principle of effective access to justice. This philosophy, which has taken firm root in South Africa during the last decade, promotes expeditious and cost-effective proceedings, as well as the early settlement of disputes.²²⁴ Such a process would conceivably be less time-consuming than individual damages trials for each class member. It would also not substantially derogate from the litigants' right to a fair public hearing and *audi alteram partem*. It could also be argued that any limitation of these rights would be justifiable, especially in light of the class action objectives. Such an approach would make it easier to

²²⁰ L C T Harms "Demystification of the Inquisitorial System" (2011) *PER* 2 6.

²²¹ Parisi *International Review of Law and Economics* (2002) 1.

²²² W de Vos "Civil Procedural Law and the Constitution of 1996: An Appraisal of Procedural Guarantees in Civil Proceedings" (1997) *TSAR* 444 459.

²²³ De Vos (1997) *TSAR* 458-459.

²²⁴ De Vos (1997) *TSAR* 457.

quantify damages without abandoning the requirement that claims must be proved individually.

The identification and selection of neutral experts by the court is a critical step in ensuring the fairness of the proceeding.²²⁵ It is envisaged that the appointment of the panel takes place after the first phase of the class action litigation on the issue of liability, but before commencement of the second phase of the trial regarding the quantification of damages. This would avoid unnecessarily appointing experts to assist in the quantification exercise where there is no finding on liability or where the matter is settled during the first phase of the litigation or shortly after a finding that the defendant is indeed liable. It is also proposed that the parties play an inactive role in the recruitment and selection of the court-appointed panel. The judge would need to assume responsibility for identifying suitable candidates from a pre-approved list of experts, rather than simply, for example, relying on informal recommendations from the judge's friends and associates. Such unsystematic approaches to identifying needs and recruiting experts would raise doubts about the extent to which the procedure provides the timely and neutral assistance warranted by the central importance of the experts' task.²²⁶

It may be worth considering, in compiling a list of pre-approved medical and actuarial experts, adopting a similar approach to the one provided for in the context of South African court-annexed mediation. A list of persons accredited as mediators in terms of rule 86(2) of the Court-Annexed Mediation Rules was recently published. Rule 86(1) of the rules provides that the "qualification, standards and levels of mediators who will conduct mediation under these rules, will be determined by the Minister" and rule 86(2) provides that a "schedule of accredited mediators, from which mediators for the purposes of this chapter must be selected, will be published by the Minister". The adoption of a court rule or legislative provision in this regard would accordingly be required. Ultimately, such a list should convey the full names of the experts, their designations and areas of speciality and the region where they practise.

Moreover, it is recommended that the proposed legislative provision authorising the court to refer the claims for further assessment by a court-appointed panel should be drafted in

²²⁵ J S Cecil & T E Willging "Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706" (1993) *Federal Judicial Center* 1 31.

²²⁶ 34.

a similar fashion to section 38 of the Superior Courts Act 10 of 2013 (“Superior Courts Act”). Section 38 allows a division of the High Court of South Africa, with the consent of the parties, to order a referee inquiry of any matter requiring extensive examination of documents, accounts or scientific, technical or local investigations that cannot be conducted by the court. The court may adopt the referee’s report either wholly, or in part, either with or without modifications, and may even send the report back to the referee for further enquiry. Any person summoned to attend a referee inquiry would be liable for a fine or imprisonment of up to three months. The primary difference between the proposed legislation and section 38 of the Superior Courts Act would be that, in the context of the damages-assessment of a single-accident mass personal injury class action, the consent of the parties would not be required to refer the matter for investigation by the court-appointed panel.

4 4 4 2 5 Role of the judge

Once again, the role of the judge in this process cannot be overstated. Judges must become active managers of the quantification process. As mentioned, class action law in Ontario and the United States generally mandates more active judicial management in class actions. Traditionally, in conformity with the adversarial tradition, the judicial system enabled parties to a dispute to control its progress. In recent times, however, the position has changed in the American, Australian and Canadian jurisdictions, as new case management rules were enacted as well as rules on pre-trial conferences and other judicial activism measures. Judges have become increasingly involved with parties in chambers, supervising case preparation and management, helping shape the litigation and encouraging settlement. They have become mediators, negotiators, planners as well as adjudicators. In the class action context, judges have revised their traditional role in litigation, becoming more actively involved in the prosecution of the class action, in part to protect absent class parties. Their new role has been motivated by the increasing size and complexity of class actions necessitating more hands-on management. As such, class action judges must become actively involved in the litigation.²²⁷

It is envisaged that the judge would, at the commencement of the second phase of the trial, explain to the parties the process that would be followed to determine the quantum of

²²⁷ C Piché “The Cultural Analysis of Class Action Law” (2009) 2 *J Civ L Stud* 101 128-130.

damages. Specifically, the judge would explain to them their respective roles throughout the process and, in consultation with the parties, decide on the timelines that would have to be met throughout the process. It would also be important for the judge to provide instructions to the court-appointed panel. This could take place *via* a conference call involving the judge, the expert, and the parties, informal conferences in chambers, and written orders, sometimes with enclosed documents and exhibits. Judges' instructions could be used to establish a record of the terms and conditions of the appointment, including the terms of payment; to define the legal and technical issues in the case and identify the technical issues the expert was to address; to clarify the role of the expert in relation to the role of the judge; and, to establish procedures for assembling information, communicating with the parties, and reporting findings and opinions.²²⁸

4 4 4 2 6 Compensation of experts

Regarding the payment of court-appointed experts, it could be argued that the court-appointed panel should be compensated in a similar fashion as is provided for in section 38(6) of the Superior Courts Act that provides as follows:

“Any referee is entitled to such remuneration as may be prescribed by the rules or, if no such remuneration has been so prescribed, as the court may determine and to any reasonable expenditure incurred by him or her for the purposes of the enquiry, and any such remuneration and expenditure must be taxed by the taxing master of the court and shall be costs in the cause.”

However, the parties may resist compensating experts they did not retain and who offer testimony that is damaging to their interests. They would also already have incurred expenses regarding the medical and actuarial examinations undertaken by their own experts – the parties would probably be reluctant to contribute further to such assessments conducted in respect of the individual damages claims. In addition, if the parties fail to pay, the judge must either enforce payment by means of a formal order and a hearing, thereby disrupting the litigation and possibly increasing the level of acrimony between the parties, or postpone payment, thereby leaving the expert uncompensated for an indefinite period.²²⁹

²²⁸ Cecil & Willging (1993) *Federal Judicial Center* 35-36.

²²⁹ 57.

It is accordingly proposed that the experts who constitute the court-appointed panel should be paid a fee similar to the prescribed fee payable in the context of rule 38 of the Uniform Rules of Court, which permits a party to compel the presence of a witness to testify at a trial by means of a subpoena issued by the registrar and served on the witness by the sheriff.²³⁰ In this regard, sections 37(1) and (2) of the Superior Courts Act provide that the witness fee is determined against a fixed tariff, but that certain considerations, such as distance travelled to appear at court or the profession or occupation of the witness, may result in payment of a higher allowance to the witness above the fixed tariff.²³¹ It is therefore recommended that the proposed legislation should also make provision for payment of a reasonable fee according to a tariff in circumstances where the court exercises its discretion to use a court-appointed panel of experts to determine the quantum of damages in the context of a single-accident mass personal injury class action.

To determine whether a fee is reasonable, it is suggested that one could consider factors similar to those listed in clause 9.2²³² of the Colorado Interprofessional Code.²³³ Clause 9.2 provides that “an expert is entitled to fair and reasonable compensation for providing expert testimony”. It states that, to determine what constitutes a fair and reasonable expert witness fee, some or all of the following factors should be considered:

- “(1) The amount of time spent, including review, preparation, drafting reports, travel, or testimony;
- (2) The degree of knowledge, learning, or skill required;
- (3) The amount of effort expended;
- (4) The uniqueness of the expert’s qualifications;
- (5) Current and reliable statistical income information of similarly situated experts;
- (6) The amounts charged by similarly situated experts for similar services;
- (7) The amount of other professional fees lost; and
- (8) The impact, if any, on the expert’s practice because of scheduling difficulties, other commitments, or other problems.”

²³⁰ The rule deals with ordinary subpoenas and subpoenas *duces tecum*, affidavit evidence in trial proceedings, and evidence on commission. See also *Laskarides v German Tyre Centre (Pty) Ltd (in liquidation)* 2010 1 SA 390 (W).

²³¹ The commencement date of section 37 has yet to be proclaimed.

²³² Expert Compensation and Expert Witness Fees.

²³³ The Interprofessional Committee *Interprofessional Code* 3 ed (2010) available at <<https://www.cobar.org/index.cfm/ID/226/CITP/Interprofessional-Code/>> (accessed 08/02/2016).

4 5 Conclusion

Ultimately, the above approach to determining the quantum of damages in a single-accident mass personal injury class action, or variations thereof, should be made possible through the adoption of legislation regulating class actions. This proposal echoes the view of the SALC insofar as it is stated in the Working Paper that, “[a]lthough South Africa has no similar case history, it is suggested that the ‘newness’ of the whole concept of a class action procedure requires that a matter such as this should be put beyond doubt by the inclusion of an express provision”.²³⁴

It is recommended that the proposed legislation should adopt, as a point of departure, the recommended provision of the SALC that “[t]he court shall not be precluded from certifying an action as a class action merely by reason of the fact that there are issues pertaining to the claims of all or some of the members of the class which will require individual determination, or that different class members seek different relief”.²³⁵

It may further be worth adopting a legislative provision that is similar to section 33Q of the Australian Federal Court Act which provides that, if it appears to the Federal Court that determination of the issue(s) common to all group members will not finally determine the claims of all group members, the court may give directions in relation to the determination of the remaining issues. This may include directions establishing a subgroup of group members and the appointment of a person to be the subgroup representative party on behalf of the subgroup members. Such a provision would enable South African courts to bifurcate the class action and to establish subclasses for the purpose of assessing the quantum of damages. It also expressly empowers the court to determine individual issues and to give directions as to the procedure to be followed to determine such issues.

It is, however, proposed that legislative provisions that provide for the resolution of the individual issues in a more detailed manner should also be adopted.²³⁶ Specifically, it is

²³⁴ South African Law Commission *The Recognition of a Class Action in South African Law Working Paper* 57 para 5.33.

²³⁵ South African Law Commission *The Recognition of Class Actions Report* 92.

²³⁶ South African Law Commission *The Recognition of a Class Action in South African Law Working Paper* 57 para 5.35. South African Law Commission *The Recognition of Class Actions Report* 95. See also the

recommended that our legislature should draw on the experiences of foreign jurisdictions, particularly the legislative provisions that they have adopted to regulate the determination of the quantum of damages in mass personal injury class actions. Borrowing from the approaches of the foreign jurisdictions, the legislation should bestow upon the courts wide powers to enable individual issues to be determined expeditiously and justly,²³⁷ to prescribe measures to simplify proof or argument,²³⁸ and to dispense with or impose any procedural steps that the courts consider appropriate and consonant with justice to the parties.²³⁹ Regarding the Ontario regime, the SALC states that “the conclusions of the Ontario Commission with regard to common and individual issues are sound and that a similar approach should be adopted for the purpose of drafting a class action statute for South Africa”.²⁴⁰ It is accordingly suggested that the proposed legislation should provide that the court may conduct further hearings, appoint someone to conduct a reference and direct that the issues be determined in any other manner.²⁴¹

In order to relieve our overly burdened courts, the legislature, acting in a clear and precise manner, must provide for devices geared towards the determination of damages in single-accident mass personal injury class actions. As mentioned above, it may be that such devices could also be utilised in the context of dispersed incident mass personal injury class actions. This would serve to promote judicial economy and be aimed at ensuring that certification of a class action is not denied solely on the basis that the class action is unmanageable. It requires trial innovation, innovative means of adjudication and workable solutions to dispose of claims economically and fairly.²⁴²

detailed discussion in Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982) 605-624.

²³⁷ Sections 12 and 25(1) of the Class Proceedings Act, 1992, S.O. 1992, c. 6.; sections 33Q and 33R of the Federal Court of Australia Act of 1976.

²³⁸ Section 23 of the Class Proceedings Act, 1992, S.O. 1992, c. 6.; rule 23(d)(1) of the Federal Rules; but, no equivalent in the Federal Court of Australia Act of 1976.

²³⁹ Section 25(3) of the Class Proceedings Act, 1992, S.O. 1992, c. 6.; section 33ZF(1) of the Federal Court of Australia Act of 1976. See also 4 4 2 and 4 4 4 above.

²⁴⁰ South African Law Commission *The Recognition of a Class Action in South African Law Working Paper* 57 para 5.32.

²⁴¹ Section 25(1).

²⁴² Zimand (1991) *Washington University Law Review* 899.

It is suggested that the above proposal to determine damages in single-accident mass personal injury class actions is persuasive in terms of necessity, public policy and judicial economy. It is aimed at phasing the trial to encourage settlement, thereby reducing the court's time and resources.²⁴³ It takes account of the fact that the class action is aimed at conserving "the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion".²⁴⁴ For example, where the individual class members are geographically dispersed across South Africa, utilisation of the above proposal would mean that, as individual hearings regarding the quantum of damages claimed are not required, it would not be necessary for each individual claimant to take the time and to incur the costs associated with travelling to court for the purpose of giving *viva voce* evidence. From the court's perspective, utilisation of the proposal would mean that it would not need to allocate resources to enable adjudication over individual class member's damages hearings. Even the defendant would benefit from implementation of the proposal insofar as the costs to be incurred in preparing for individual damages trials of numerous class members would be avoided. Thus, although class members would be required to submit individual proof of injury, the procedure is designed to give effect to the overarching purpose of the class action mechanism.

²⁴³ 909.

²⁴⁴ *General Tel Co v Falcon* 456 US 147 155 (1982) quoting *Califano v Yamasaki* 442 US 682 701 (1979).

CHAPTER FIVE: JUDICIAL MANAGEMENT OF CLASS ACTIONS AND MEDIATION AS A TOOL TO MANAGE AND RESOLVE CLASS ACTIONS

5 1 Introduction

The manageability of class proceedings is a very important consideration when a court determines whether to certify a class action. Various factors could influence the application of this consideration and hence influence the appropriateness of class proceedings. The manageability of a class action was not listed by Wallis JA in *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)*¹ (“*Children's Resource Centre Trust*”) as one of the factors that our courts should consider when deciding whether to grant a certification application.² In chapter two it is contended that the manageability consideration should form part of the appropriateness inquiry; in other words, the manageability of class proceedings becomes relevant when a court needs to decide on the appropriateness of class proceedings as a means of adjudicating class members' claims.

As mentioned previously,³ the manageability consideration entails taking account of “the whole range of practical problems that may render the class action format inappropriate for a particular suit”.⁴ For instance, it entails considering whether the administrative costs incurred in managing the class action would consume the award made in favour of the plaintiff class.⁵ A further factor to be considered in the context of manageability is the difficulty associated with notifying a significant percentage of the class – this may count against possible certification.⁶ Although certification generally should not be denied solely because class members would have to prove their damages on an individualised basis,

¹ 2013 1 All SA 648 (SCA).

² However, Mojapelo DJP did consider the manageability of proceedings in *Nkala v Harmony Gold Mining Company Limited* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016) paras 51-52.

³ See chapter two above.

⁴ *Eisen v Carlisle & Jacquelin*, 417 U.S 156, 164 (1974).

⁵ B Anderson & A Trask *Class Action Playbook* (2014) 62.

⁶ See chapter three above.

potential difficulty in calculating damages may also be a factor in assessing manageability.⁷

Because of the management difficulties generally encountered in class action litigation, effective judicial management is considered increasingly important for the efficient functioning of class actions.⁸ As class action litigation is traditionally more complex than other kinds of litigation, it requires greater administration and management of the case.⁹ The importance of managing class actions effectively is evidenced by the fact that manageability problems could, as is the case in Ontario and the United States, result in a court refusing to certify a class action or,¹⁰ as is the case in Australia, in the termination of a class action.¹¹

⁷ See chapter four above regarding the determination of damages in personal injury class actions.

⁸ C Piché “Judging Fairness in Class Action Settlements” (2010) 28 *Windsor YB Access Just* 111 121. C S Diver “The Judge as Political Powerbroker: Superintending Structural Changes in Public Institutions” (1979) 65 *VA L Rev* 43 45 states that the “transformation in the character of litigation necessarily transforms the judge’s role as well”.

⁹ See P G Karlsgodt “United States” in P G Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* (2012) 44; Piché (2010) *Windsor YB Access Just* 117.

¹⁰ In the United States, a class action will not be certified if there is proof that it would indeed be unmanageable (due to *inter alia* the size of the class, the giving of notice and the distribution of damages) since it will then not be superior to other methods of adjudication as required by rule 23(b)(3). For example, in *Eisen v Carlisle and Jacquelin* 417 US 156 (1974) the enormity of the class and related issues such as notice to absent members and the distribution of an aggregate reward to class members caused serious doubt about the viability of the case. In the recent mass personal injury class action of *Nkala v Harmony Gold Mining Company Limited* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016), the class consisted of between 17 000 and 500 000 class members. Mojapelo DJP (at para 52) held that “[w]hat we have here is that the sizes of the two classes may be very large but that does not make the...class action trial unmanageable”.

¹¹ In Australia, once a representative proceeding has been instituted, it will continue unless the respondent applies to the court for an order terminating it. Thus, unlike the class action regimes of Ontario, South Africa and the United States, where the party bringing the action must show that certain requirements are met before certification is granted, it is up to the respondent to raise non-compliance with them. Of relevance in the context of manageability is section 33N of the Federal Court of Australia Act of 1976 (Cth) in terms of which a court may order the discontinuance of class proceedings if it is satisfied that it is in the interests of justice to do so for one or more of the reasons specified in section 33N(1)(a)-(d).

To enable effective managerial judging¹² of class actions, the selected foreign jurisdictions have conferred upon their trial judges extensive powers to manage these proceedings. For example, in Australia, a judge can discontinue a properly instituted class action and substitute the representative plaintiff who does not adequately represent the class members' interests. The court also needs to give its approval before a class action can be settled or discontinued and before settlement of the representative plaintiff's individual claim can take place.¹³

In the United States, rule 23 of the Federal Rules of Civil Procedure¹⁴ ("Federal Rules") contains various provisions governing the trial court's powers, obligations and discretion in managing class actions.¹⁵ Rules 23(c), (d) and (e) confer upon courts managerial authority over class actions.¹⁶ For example, judges play a role in certifying the class and approving the adequacy of the class representative and class counsel.¹⁷ Judges are also required to approve proposed and final settlements and to review objections by class members.¹⁸

Ontario's Class Proceedings Act, 1992 ("Ontario Act"), also affords to judges extensive managerial powers to manage class actions.¹⁹ Courts use their powers in case management to prevent class proceedings from becoming too cumbersome and to protect the interests of class members.²⁰

¹² According to T B Wolff "Managerial Judging and Substantive Law" (2013) 90 *Washington University Law Review* 1027 1027, Professor Judith Resnik coined the term 'managerial judging' thirty years ago to describe the expanded role of federal district judges under the American Federal Rules of Civil Procedure.

¹³ V Morabito "Australia" in D R Hensler C Hodges & M Tulibacka (eds) *The Globalization of Class Actions* (2009) 320 323.

¹⁴ See Appendix A.

¹⁵ Karlsgodt "United States" in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 35.

¹⁶ R H Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 4 ed (2012) 25. See also Appendix A and the discussion under 5 3 3 below.

¹⁷ Rule 23(c). See also J Brewster "A Kick in the Class: Giving Class Members a Voice in Class Action Settlements" (2013) 41 *W St U L Rev* 1 11.

¹⁸ Rule 23(e).

¹⁹ See, for example, section 12 of the Class Proceedings Act, 1992, S.O. 1992, c. 6. titled "Court may determine conduct of proceeding".

²⁰ J Kalajdzic, W A Bogart & I Matthews "Canada" in D R Hensler, C Hodges & M Tulibacka (eds) *The Globalization of Class Actions* (2009) 46.

The increasing size and complexity of class action lawsuits necessitate a more hands-on management approach than in the case of ordinary civil litigation. As such, class-action judges must become actively involved in the litigation.²¹ This chapter accordingly considers what the role of our courts should be in order to manage class actions effectively. It also considers court-annexed mediation as a tool that our courts could utilise to assist them in managing, and possibly resolving, class proceedings.²² These issues have not been subject to critical analysis.²³ It may therefore be instructive to consider the approaches of Australia, Ontario and the United States, to assist in conducting the analysis.

5 2 The nature of courts' judicial management role

Managerial judging does have its critics. According to Elliot,²⁴ the techniques advocated by judges in managing proceedings tend to vary widely. In other words, it lacks consistency and uniformity.²⁵ Such discretionary management tactics that vary inordinately from judge to judge may threaten litigants' due process rights.²⁶ It has also been argued that, because managerial judging is less visible and usually unreviewable, it gives trial courts more authority and at the same time provides litigants with fewer procedural safeguards to protect them from abuse of that authority. Resnik therefore suggests that managerial judging "may be redefining *sub silentio* our standards of what constitutes rational, fair, and impartial adjudication".²⁷ Critics of managerial judging have also *inter alia* argued that

²¹ C Piché "The Cultural Analysis of Class Action Law" (2009) 2 *J Civ L Stud* 101 128, 130. See also the discussion under 5 4 4 below regarding the limits imposed on a judge when managing a class action.

²² Court-annexed or court-connected mediation refers to mediation that is connected to the courts. The connection takes various forms in various jurisdictions. See L Adrian "The Role of Court-Connected Mediation and Judicial Settlement Efforts in the Preparatory Stage" in L Ervo & A Nylund (eds) *Current Trends in Preparatory Proceedings: A Comparative Study of Nordic and Former Communist Countries* (2016) 209 211.

²³ See, for example, E Hurter "Some Thoughts on Current Developments Relating to Class Actions in South African Law as Viewed Against Leading Foreign Jurisdictions" (2006) *CILSA* 39(3) 485 489, and W de Vos "Reflections on the Introduction of a class action in South Africa" (1996) 4 *TSAR* 639 649-650, where they refer to the courts' role in managing class actions.

²⁴ D Elliot "Managerial and the Evolution of Procedure" (1986) 53 *U Chi L Rev* 306 308-309.

²⁵ According to J Resnik "Managerial Judges" (1982-1983) 96 *Harv L Rev* 374 377, both before and after the trial, judges play a critical role in shaping litigation and influencing results.

²⁶ J T Molot "An *Old Judicial Role* for a New Litigation Era" (2003) 113 *Yale L J* 27 41-42.

²⁷ Resnik (1982-1983) *Harv L Rev* 380. See also Elliot (1986) *U Chi L Rev* 314.

judicial efforts to reduce costs may have just the opposite effect and that judicial haste to clear dockets often renders litigation outcomes less fair or accurate.²⁸

Despite the above criticisms levelled against managerial judging, its supporters respond by arguing that these problems may be the lesser of two evils when compared to the problems that would ensue if litigation decisions were left entirely to litigants. If judges did not adopt an active judicial management role, it would “clog dockets, increase litigation costs, and free litigants to use litigation’s expense and delay to gain unfair tactical advantages over their adversaries. For every potential problem that managerial judging’s critics identify, its defenders identify other cases in which judicial case management has facilitated efficient resolutions and saved valuable court resources”.²⁹ This is especially true in the class action context, where the *sui generis* nature of class proceedings clearly distinguishes it from ordinary civil litigation. An active judicial management approach is necessary to ensure that the class action does not fail due to management difficulties.

Class actions have a number of distinctive features that necessitate judicial management. For example, class actions involve the existence of unidentified parties whose interests require protection. They also require making administrative arrangements for the giving of notice and the distribution of monetary relief as well as the establishment of procedures for the determination of individual issues.³⁰ The distinctive nature of the class action mechanism necessitates a change in the court’s traditional role – it essentially requires that our judges become more active in their management of civil litigation. It is simply not feasible for the parties to be solely responsible for the management of a class action. Rather, “judges are required to step outside the usual passive role assigned to them by the traditional adversarial model of litigation and actively to take part in such management”.³¹

Traditionally, judges in civil litigation are “passive arbiters of conflicting private interests who rule on questions of law”.³² In accordance with the adversarial tradition, the parties

²⁸ Molot (2003) *Yale L J* 41-42.

²⁹ 42.

³⁰ V Morabito “Judicial Supervision of Individual Settlements with Class Members in Australia, Canada, and the United States” (2003) 38 *Texas International Law Journal* 663 672.

³¹ Hurter (2006) *CILSA* 489. See also R Miller “Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the ‘Class Action Problem’” (1979) 92 *Harv Law Review* 664 667-668.

³² M F Connor “Taming the Tort Monster” (2000) 4 *Briefly* 1 8-9.

control the pace and shape of the proceedings. Litigation is therefore governed by the principle of party control. It entails that the parties to a civil dispute investigate, prepare, and present evidence and arguments whilst the judge plays a passive role throughout the proceedings.³³ According to Connor, however, class actions do not fit comfortably within this system because the adversarial approach to individualised justice is impractical when thousands of claims must be dealt with quickly and efficiently. Accordingly, courts have become “active managers and watchdogs, disregarding the traditional norms of judicial passivity and neutrality”.³⁴

Hensler refers to what the judicial management role of judges in damage class actions³⁵ practically entails:

“Judges play a unique role in damage class actions: Without the judge’s decision to grant certification, a class action lawsuit does not exist. Without the judge’s approval, a lawsuit cannot be settled. Without a judge’s decision to award fees, the class action attorneys cannot be paid. Moreover, judges have special responsibilities while the litigation is ongoing: They approve the form and content of notices to class members that a class action has been certified or settled; they determine when and where fairness hearings will be held, how long they will be, and who can participate; they decide whether non-class members can intervene in the litigation, and whether lawyers representing objectors will receive any compensation. Even after a case is resolved, judges may continue to play a role by overseeing the disbursement of settlement funds. How judges exercise these responsibilities determines the outcomes of the class actions that come before them. But even more important, how judges exercise these responsibilities determines the shape of class actions to come. Lawyers and parties learn from judges’ actions what types of claims may be certified as class actions, what types of settlements will pass muster, and what the rewards of bringing class actions will be.”³⁶

The American Pocket Guide for Judges issued by the Federal Judicial Center also contains the following description of the unique and non-traditional role that judges fulfil in class action litigation:

³³ See, for example, Resnik (1982-1983) *Harv L Rev* 380-381; F James & G Hazard *Civil Procedure* 2nd ed (1977) 4-8; R W Millar “The Formative Principles of Civil Procedure” (1923) 18 *Ill L Rev* 1 9-24.

³⁴ Connor (2000) *Briefly* 8-9.

³⁵ Rule 23(b)(3) of the Federal Rules provides for the opt-out damages class action.

³⁶ D R Hensler *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (2000) 445.

“Class actions demand that judges play a unique role. There is no such thing as a simple class action. Everyone has hidden hazards that can surface without warning. Your role includes anticipating the consequences of poorly equipped class representatives or attorneys, inadequate class settlement provisions, and overly generous fee stipulations. The high stakes of the litigation heighten your responsibility, and what’s more, you cannot rely on adversaries to shape the issues that you must resolve in the class context. Indeed, you have to decide first which adversaries on the plaintiff side—class representatives and class counsel—can represent the class adequately and whom you should appoint to do so. And, once the adversaries agree on a settlement, you must decide—largely without any clash of views from class counsel, class representatives, or the defendant—whether that settlement is fair, reasonable, and adequate to satisfy the interests of the class as a whole.”³⁷

The above quoted passages clearly highlight the distinctive features that are inherent to class actions that reinforce the need for active judicial management. Piché, referring to class action law in Canada and the United States, reiterates that judges’ traditional role in litigation has been revised insofar as they are more actively involved in the prosecution of class actions, in part to protect absent class parties.³⁸ Regarding active judicial management of class actions, especially when comparing class action litigation to other types of litigation, the *Manual for Complex Litigation* provides that:

“Because the stakes and scope of class action litigation can be great, class actions often require closer judicial oversight and more active judicial management than other types of litigation. Class action suits present many of the same problems and issues inherent in other types of complex litigation. The aggregation of a large number of claims and the ability to bind people who are not individual litigants tend to magnify those problems and issues, increase the stakes for the named parties, and create potential risks of prejudice or unfairness for absent class members. This imposes unique responsibilities on the court and counsel. Once class allegations are made, decisions such as whether to settle and on what terms are no longer wholly within the litigants’ control. Rather, the attorneys and named plaintiffs assume responsibilities to represent the class. The court must protect the interests of absent class members, and Rule 23(d) gives the judge broad administrative powers to do so, reflecting the equity origins of class actions.”³⁹

³⁷ B J Rothstein & T E Willging *Managing Class Action Litigation: A Pocket Guide for Judges* (2005) 2.

³⁸ Piché (2009) *J Civ L Stud* 128-130.

³⁹ *Manual for Complex Litigation* 4th ed (2004) 243-244.

Further, according to the Ontario Commission, this type of complex litigation can only be handled efficiently, and the interests of absent class members can only be protected against the termination of class proceedings because of manageability problems, if judges are expressly empowered to assume an active role.⁴⁰

It is apparent that the approach followed in the selected foreign jurisdictions is not only to encourage active judicial management of class actions, but also to mandate it. Locally, there have also been calls for active judicial management of class actions. The South African Law Commission (“SALC”) has recommended that our courts be more active in managing class actions compared to ordinary litigation.⁴¹ This is because class actions are generally more complex and it entails the determination of the rights and obligations of absent class members. The SALC accordingly proposed that “the courts should be given broad general management powers exercisable either on the application of a party or class member or on the court’s own motion”.⁴²

Hurter has also emphasised the need for judges to “step outside the usual passive role assigned to them by the traditional adversarial model of litigation and actively to take part in such management”.⁴³ Similarly, De Vos states that “[l]egal representatives and judges will have to act in innovative ways to overcome complex procedural issues relating to class actions, such as notice to class members, proof and distribution of damages and management of these proceedings”.⁴⁴ Harms agrees that the need for active judicial management is not limited to class actions.⁴⁵

It is apparent from what has been set out above that the trend has been to recognise the need for active judicial management of class proceedings. The question that arises is how this issue should be regulated in a South African context. In this regard, the foreign jurisdictions have largely responded to the difficulties in managing class actions by

⁴⁰ Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982) 449-450.

⁴¹ South African Law Commission *The Recognition of Class Actions and Public Interest Actions in South African Law Report* Project 88 (1998) para 5.9.2.

⁴² Para 5.9.4.

⁴³ Hurter (2006) *CILSA* 489.

⁴⁴ W de Vos “Judicial Activism Gives Recognition to a General Class Action in South Africa: Children’s Resource Centre Trust v Pioneer Foods (50/12) [2012] ZASCA 182” (2013) 2 *TSAR* 370 380.

⁴⁵ L C T Harms “Demystification of the Inquisitorial System” (2011) *PER* 2 6.

adopting comprehensive legislation and court rules to regulate it,⁴⁶ conferring upon judges extensive managerial powers and accordingly enabling active judicial management of class proceedings. Unfortunately, and as we know by now, the South African legislature has ignored repeated calls for the introduction of class action legislation in South Africa.⁴⁷ According to De Vos, the Supreme Court of Appeal in *Children's Resource Centre Trust* should be commended for adopting an active judicial approach by developing South African class action law to protect the masses.⁴⁸ However, it is submitted that serious consideration would need to be given to the adoption of a legislative framework aimed at regulating class actions, including the courts' role as judicial manager of class proceedings.⁴⁹ In *Children's Resource Centre Trust*, Wallis JA stated as follows in this regard:

"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 that made a similar recommendation. Academic voices over many years have likewise not been heard. 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. This may on some occasions involve us, and courts that will follow the guidance we give, in having to devise *ad hoc* solutions to procedural complexities on a case by case basis – a possibility referred to by the Supreme Court of Canada – but the failure to pass appropriate legislation dealing with this topic leaves us little alternative in the face of the constitutional endorsement of class actions."⁵⁰

Ad hoc procedural activism is one of the main criticisms of managerial judging. Establishing a legislative framework that deals with our courts' management powers may assist in addressing possible inconsistency insofar as judges' approaches to managing

⁴⁶ W de Vos "Is a Class Action a 'Classy Act' to Implement Outside the Ambit of the Constitution?" (2012) 4 *TSAR* 737 754.

⁴⁷ 756.

⁴⁸ De Vos (2013) *TSAR* 380.

⁴⁹ E Hurter "Class Action: Failure to Comply with Guidelines by Courts Ruled Fatal" (2010) 2 *TSAR* 409 413. See also the concluding comments of this chapter in this regard.

⁵⁰ Para 15.

class actions are concerned. Ultimately, the situation should be avoided where the judiciary, through *ad hoc* procedural activism, implements far-reaching changes in a piecemeal manner and with little reflection on the cumulative implications of such changes for the adversarial system.⁵¹ It is accordingly submitted that it may be a particularly appropriate area of the law of civil procedure for development not only through a process of common law evolution, but also through conscious design choices made by legislators and rule-makers.⁵²

However, before adopting a legislative framework regulating class actions, including our courts' managerial powers in this regard, it may be worthwhile to obtain data regarding active judicial management of class actions in practice. Managerial judging as the "self-conscious restructuring of procedural incentives by trial judges on an *ad hoc* basis to achieve certain objectives" is a relatively recent innovation in the history of Anglo-American civil procedure.⁵³ Critics of managerial judging accordingly emphasise the lack of sufficient data available to evaluate conclusively whether managerial judging creates net benefits by increasing the overall efficiency of civil litigation as a mechanism for resolving disputes.⁵⁴ It may therefore be beneficial to the functioning of South African civil procedure to conduct empirical studies in respect of how managerial judging actually works in practice.⁵⁵

It is further proposed that the inherent limitations posed by the *ad hoc* nature of managerial judging be removed by developing guidelines to assist judges in making managerial decisions. Ideally, these guidelines would need to be based on an analysis of what constitutes successful managerial judging, including the data obtained from the conduct of the empirical studies referred to above. The Manual for Complex Litigation and the Pocket Guide for Judges could be considered in the drafting of the guidelines. However, it has been stated that the Manual for Complex Litigation is deficient in that it avoids the controversial and central issue of the judge's role in promoting settlement.⁵⁶ Any guidelines

⁵¹ Resnik (1982-1983) *Harv L Rev* 444.

⁵² Elliot (1986) *U Chi L Rev* 308.

⁵³ 326.

⁵⁴ 326.

⁵⁵ 326.

⁵⁶ 336.

prepared for our judges would need to address this issue because, as mentioned above, it entails a drastic departure from their traditional, adversarial role.

5 3 Judicial management of class actions in foreign jurisdictions

5 3 1 Introduction

The purpose of the following part of this chapter is briefly to consider the managerial powers conferred upon judges in the selected foreign jurisdictions to assist in determining the potential scope of such powers in our law.

5 3 2 Australia and Ontario

The Federal Court of Australia has extensive powers, including under Part IVA of the Federal Court of Australia Act of 1976 (Cth) (“Federal Court Act”), to manage the conduct of a representative proceeding.⁵⁷ The Supreme Courts of Victoria and New South Wales also possess extensive powers, including under Part 4A of the Supreme Court Act of 1986 (Vic) and Part 10 of the Civil Procedure Act of 2005 (NSW), to manage the conduct of a representative proceeding. In these courts, representative proceedings are managed with reference to an overarching purpose, promulgated by statute, to facilitate the just and efficient resolution of the dispute.⁵⁸ Furthermore, as the Australian Law Reform Commission (“ALRC”) notes, “without active court management, the interests of unidentified parties may not be taken properly into account”.⁵⁹ Accordingly, the managerial powers are directed towards ensuring that the court is able to adopt an active role in protecting the interests of persons not before the court and to ensure that representative proceedings are appropriately utilised. According to the ALRC, court management is aimed at ensuring that justice is achieved for parties and group members in a quick and inexpensive manner.⁶⁰

⁵⁷ D Grave, K Adams & J Betts *Class Actions in Australia* (2012) 382.

⁵⁸ Grave *et al Class Actions in Australia* 382.

⁵⁹ The Australian Law Reform Commission *Grouped Proceedings in the Federal Court* Report No 46 (1988) para 157.

⁶⁰ Para 157.

The courts' powers of management of representative proceedings under the Federal Court Act⁶¹ include the power to:

- discontinue representative proceedings;⁶²
- in certain circumstances, substitute a representative party who is not adequately representing the interests of group members;⁶³
- establish, in the case of issues not common to all group members, a subgroup of group members and to appoint a person as subgroup representative;⁶⁴
- order, at any stage of the proceeding, that notice of any matter be given to group members;⁶⁵
- decline to approve a settlement of a representative proceeding;⁶⁶ and
- make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding.⁶⁷

Class action legislation in Ontario also confers upon provincial courts broad discretion as to the manner in which class actions should be conducted.⁶⁸ As in Australia, the objective in exercising these powers is the just and efficient resolution of the dispute, provided that fairness to the parties and the interests of justice are appropriately balanced.⁶⁹

There are numerous instances in the Ontario Class Proceedings Act, 1992 ("Ontario Act"), where managerial powers are conferred upon judges to manage class actions. For example, section 12 of the Ontario Act provides that the court, on the motion of a party or class member, may "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose,

⁶¹ See Appendix B.

⁶² See, for example, sections 33L, 33M, 33N and 33P.

⁶³ See, for example, section 33T.

⁶⁴ See, for example, section 33Q(2).

⁶⁵ See, for example, section 33X(5). Section 33X(5) allows the court "at any stage, [to] order that notice of any matter be given" to class members.

⁶⁶ See, for example, section 33V.

⁶⁷ See, for example, section 33ZF(1) which empowers the court to make "any order... [it] thinks appropriate or necessary to ensure that justice is done in the proceedings".

⁶⁸ P Cashman *Class Action Law and Practice* (2007) 654.

⁶⁹ 654.

may impose such terms on the parties as it considers appropriate”.⁷⁰ Furthermore, a proceeding commenced pursuant to the Ontario Act may not be discontinued or abandoned without the approval of the court.⁷¹ Similarly, a “settlement of a class proceeding is not binding unless approved by the court...”⁷² Once approved by the court, a settlement binds all class members who have not opted out.⁷³ There is not only considerable flexibility in determining how common issues are to be resolved, but also broad latitude in deciding how individual issues are to be determined.⁷⁴

In Ontario, it is common for case conferences to be held in chambers to enable the case management judge to meet informally with class counsel before hearing motions (including the initial certification motion) and at other times to discuss the management of the action. Apparently, these conferences typically address scheduling issues, but it is not uncommon for the judge directly or indirectly to impart his or her views regarding the merits of the case and attempt to encourage settlement of the issues.⁷⁵ These sessions are regarded as being very important for both sides, as the court will often express its general concerns or ideas about the case.⁷⁶

5 3 3 United States

In re Air Crash Disaster at Florida Everglades,⁷⁷ the court held that “[i]n class actions we recognize, indeed insist upon, the court’s participation as the manager of the case”.⁷⁸

⁷⁰ According to the Attorney General’s Advisory Committee on Class Action Reform, Report (1990) 37, “[t]his section describes the general power of the court to control its own process and to develop procedures as needed from case to case...” See also *Ontario New Home Warranty Program v Chevron Chem. Co.* 1999 46 O.R.3d 130, 148 (Ont. Sup. Ct. J.), where it was held that, “[t]hrough legislative foresight, the court has been given the necessary power to adapt procedures to ensure that the interests of all parties can be adequately protected in situations where those interests conflict...”

⁷¹ Section 29(1).

⁷² Section 29(2).

⁷³ Section 29(3). See also Morabito (2003) *Texas International Law Journal* 687-688.

⁷⁴ *Cashman Class Action Law and Practice* 654.

⁷⁵ See 5 4 4 below where, in the context of the proposed approach to court-annexed mediation it is argued that, although it is important for a judge to manage the mediation process, it is not preferable for a judge to attempt to mediate a settlement.

⁷⁶ K Jones-Lepidas *Defending Class Actions in Canada* 2 ed (2007) 207-208.

⁷⁷ 1972 549 F2d 1006 n8 (5th Cir 1977).

⁷⁸ 1012.

According to Shaw, “[b]y incentivising private attorneys to identify and represent groups with legitimate injuries and by encouraging active judicial initiative and management of suits, the rule [rule 23 of the Federal Rules] aimed to enhance the litigation opportunities of hitherto powerless groups”.⁷⁹ Accordingly, it has been stated that federal district courts have both the duty and the broad authority to govern the conduct of the named parties and the attorneys in class action litigation because the class action mechanism presents the potential for abusive conduct.⁸⁰ As is the case with its legislative equivalents in Australia and Ontario, rule 23 of the Federal Rules gives the judge broad administrative powers to protect the interests of absent class members.⁸¹

Express authority for a court’s active management role in class actions can be found not only in rule 16 (which deals with the court’s authority to issue scheduling and case management orders), but also in rule 23 of the Federal Rules.⁸² Rule 23(c) deals with the courts’ management role *inter alia* in respect of the certification process, the giving of notice and in respect of classes and subclasses, whilst rule 23(e) refers to the courts’ role in approving class action settlements. Importantly, rule 23(d) affords to courts a broad discretion to accomplish their role as managers in the conduct of class actions.⁸³ According to Ball, the rule “allows the court authority to prescribe appropriate regulations for the conduct of the action, so that, rather than requiring a particular procedure, it permits and even encourages the courts to establish appropriate procedures tailored to the facts of a particular case...”⁸⁴ Under the broad authority granted by rule 23(d)(1), courts can issue a wide-ranging variety of orders in aid of the effective management of class actions.⁸⁵

In the United States, courts are involved in the active management of class actions from the initial filing of the class action until the conclusion of post-settlement administration. For example, the court is empowered to issue pre-certification court orders regarding issues

⁷⁹ G C Shaw “Class Ascertainability” (2015) 124 *Yale Law Journal* 2354 2388.

⁸⁰ See *Gulf Oil Co. v Bernard* 452 US 89, 100 (1981). See also R C Rice “Defendant Communications With Absent Class Members in Rule 23(b)(3) Class Action Litigation” (1985) 42 *Wash & Lee L Rev* 145 149.

⁸¹ *Manual for Complex Litigation* 244.

⁸² Rule 23(d)(1)(A)-(D).

⁸³ D D Levenhagen “Class Actions: Judicial Control of Defense Communication with Absent Class Members” (1984) 59 *Ind L J* 133 133.

⁸⁴ L J Ball “Damages in Class Actions: Determination and Allocation” (1969) 10 *BC Indus & Com L Rev* 615 632.

⁸⁵ M H Greer *A Practitioner’s Guide to Class Actions* (2010) 5.

such as communications with class members and the court may be required to decide whether to grant certain pre-certification motions, such as motions relating to jurisdictional challenges, standing and summary judgment motions.⁸⁶

The Pocket Guide for Judges provides the following regarding the courts' management powers in the United States:

“Now that CAFA [Class Action Fairness Act] is on the books and Federal Rule of Civil Procedure 23 has been amended, you can expect to encounter the following class action responsibilities... • appointing counsel who have the professional skills, legal support staff, and financial resources needed to provide the class with adequate representation...; • determining when and how to decide class certification motions...; • establishing effective standards and procedures for evaluating the actual value to the class of proposed settlements and for determining whether the settlements are fair, reasonable, and adequate for class members...; • assessing reasonable attorney fees for class counsel by ensuring that fee awards are commensurate with the value of the results to the class as a whole...; • coordinating with state judges the management of competing and overlapping class actions...; and • deciding when to use special masters and court-appointed experts to assist in managing class actions and reviewing settlements...”

The Manual for Complex Litigation states, as a general principle, that “[f]air and efficient resolution of complex litigation requires that the court exercise early and effective supervision (and, where necessary, control)...and that the judge and counsel collaborate to develop and carry out a comprehensive plan for the conduct of pretrial and trial proceedings”.⁸⁷ The Manual describes a trial judge’s appropriate management role as active, substantive and continuing.⁸⁸

5 3 4 South Africa

In South Africa, when considering judges’ managerial powers in the context of class action litigation, it is necessary to consider the inherent jurisdiction enjoyed by our superior courts. In *Chunguete v Minister of Home Affairs and Others*,⁸⁹ Flemming J referred to Sir

⁸⁶ See the discussion in the *Manual for Complex Litigation* 242-265.

⁸⁷ *Manual for Complex Litigation* 7.

⁸⁸ 12.

⁸⁹ 1990 2 SA 836 (W).

Jack Jacob's lecture delivered in the 1970's⁹⁰ and quoted the following features of the court's inherent jurisdiction:

- “(1) The inherent jurisdiction of the Court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law; it is invoked in relation to the *process* of litigation.
- (2) The distinctive and basic feature of the inherent jurisdiction of the Court is that it is exercisable by summary process....
- (3) Because it is part of the machinery of justice, the inherent jurisdiction of the Court may be invoked...in relation...to anyone, whether a party or not, and in respect of matters which are not raised as issues in the litigation between the parties.
- (4) The inherent jurisdiction of the Court is a concept which must be distinguished from the exercise of judicial discretion....
- (5) The inherent jurisdiction of the Court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case....”⁹¹

According to Jacob, “the exercise of these powers was derived simply from the very nature of the Court as a superior Court of law. It is for that reason that the jurisdiction is ‘inherent’”.⁹² “The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner”.⁹³ Flemming J states the following regarding the meaning of ‘inherent jurisdiction’:

“What is appropriately called the 'inherent jurisdiction' is related to the Court's functioning towards securing a just and respected process of coming to a decision and is not a factor which determines what order the Court may make after due process has been achieved. That is a function of the substantive law. The Court - always - is charged with holding the scales of justice. It is not within its task to add weights to the scales by detracting from a right given by the substantive law or granting a right not given by the substantive law.”⁹⁴

In the context of South African procedural law, the courts' inherent jurisdiction is utilised with a view to regulating the court's procedures in the interests of the proper administration

⁹⁰ J Jacob “The Inherent Jurisdiction of the Court” (1970) 23 *Current Legal Problems* 23 24.

⁹¹ 841.

⁹² 841. See also Jacob (1970) *Current Legal Problems* 27.

⁹³ 841. See also Jacob (1970) *Current Legal Problems* 27.

⁹⁴ 848.

of justice,⁹⁵ especially where there is no rule dealing with a particular matter.⁹⁶ However, where a particular matter is provided for by the rules, the scope for the court's exercise of its inherent powers is limited.⁹⁷ Compelling grounds must exist before a court may act outside the powers provided for specifically in the rules.⁹⁸ Where the rules do not provide for a particular set of circumstances, the court has inherent jurisdiction to read the rules in a manner that facilitates the administration of justice and to handle the matter along practical lines.⁹⁹ As there are no class action court rules, the courts' inherent jurisdiction is therefore relevant, and important, to effectively manage class actions.

Section 173 of the Constitution of the Republic of South Africa, 1996 ("Constitution"), added a further dimension to the inherent jurisdiction by empowering courts to develop the common law, which clearly comprises not only procedural law but also substantive law.¹⁰⁰ It enshrines the inherent jurisdiction of our superior courts.¹⁰¹ In *Mukaddam v Pioneer Foods (Pty) Ltd*¹⁰² ("*Mukaddam CC*"), regarding the inherent jurisdiction of our superior courts, the Constitutional Court held as follows:

⁹⁵ *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 2 SA 734 (A); *Krygkor Pensioenfonds v Smith* 1993 3 SA 459 (A); *White v Moffett Building & Contracting (Pty) Ltd* 1952 3 SA 307 (O); *California Spice and Marinade (Pty) Ltd* 1997 4 All SA 317 (W); *Soller v Maintenance Magistrate, Wynberg* 2006 2 SA 66 (C); *Carmel Trading Company Limited v Commissioner for the South African Revenue Services* 2008 2 SA 433 (SCA).

⁹⁶ *S v Pennington* 1997 4 SA 1076 (CC). See also *Phillips v National Director of Public Prosecutions* 2006 1 SA 505 (CC) para 46 for the limits of this power. *Krygkor Pensioenfonds v Smith* 1993 3 SA 459 (A); *Neal v Neal* 1959 1 SA 828 (N); *Matyeka v Kaaber* 1960 4 SA 900 (T); *Watson v Krieks* 1963 3 SA 546 (O); *A v R Kinder- en Kindersorgvereniging* 1996 1 SA 649 (T); *Beinash v Wixley* 1997 2 All SA 241 (A).

⁹⁷ *Western Bank Ltd v Packery* 1977 3 SA 137 (T); *Collective Investments (Pty) Ltd v Brink* 1978 2 SA 252 (N).

⁹⁸ *Moulded Components and Rotomoulding SA (Pty) Ltd v Coucourakis* 1979 2 SA 457 (W).

⁹⁹ *Brown Bros Ltd v Doise* 1955 1 SA 75 (W), quoted with approval in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 1 SA 773 (A) 783.

¹⁰⁰ *SABC Ltd v National Director of Public Prosecutions* 2007 1 SA 523 (CC) paras 35 and 36; *Legal Aid Board v S* 2011 1 All SA 378 (SCA); *Coetzee v National Commissioner of Police* 2011 2 SA 227 (GNP); *FirstRand Bank Ltd v Beyer* 2011 1 SA 196 (GNP).

¹⁰¹ *SA Broadcasting Corporation Ltd v National Director of Public Prosecutions* 2007 1 SA 523 (CC) para 88; *S v Thebus* 2003 6 SA 505 (CC).

¹⁰² 2013 10 BCLR 1135 (CC).

“Section 173 makes plain that each of the superior courts has an inherent power to protect and regulate its own process and to develop the common law on matters of procedure, consistently with the interests of justice. The language of the section suggests that each court is responsible and controls the process through which cases are presented to it for adjudication. The reason for this is that a court before which a case is brought is better placed to regulate and manage the procedure to be followed in each case so as to achieve a just outcome. For a proper adjudication to take place, it is not unusual for the facts of a particular case to require a procedure different from the one normally followed. When this happens it is the court in which the case is instituted that decides whether a specific procedure should be permitted. The determination to certify a class action is not different to exercising the power to allow one procedure instead of the other.”¹⁰³

The Constitutional Court in *Mukaddam CC* also referred to *PFE International v Industrial Department Corporation of South Africa Ltd*¹⁰⁴ where the principle that rules of procedure must be applied flexibly, was reaffirmed by the court:

“Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules.”¹⁰⁵

Our superior courts clearly enjoy a broad discretion to manage class actions, notwithstanding the absence of legislation or rules that confer upon them the power to do so. In *Nkala v Harmony Gold Mining Company Limited*¹⁰⁶ (“*Nkala*”), Mojaelo DJP held as follows regarding the trial court’s powers to manage a class action:

“The trial court will, no doubt, be tasked with managing the process once the class action is certified... [T]hat court, using its powers in terms of s 173 of the Constitution, the various rules of court and practice directives, will be able to decide on the route(s) best suited to resolve the manifold disputes that are bound to surface. That court has significant powers to manage the proceedings in the interests of justice. It is, furthermore, within the wit of that court to determine

¹⁰³ Para 42.

¹⁰⁴ 2013 1 SA 1 (CC); 2013 1 BCLR 55 (CC).

¹⁰⁵ Para 39.

¹⁰⁶ (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016).

whether sub-classes should be formed and for the proceedings to be arranged in such a manner so as to do justice between the parties.”

However, it is apparent that the selected foreign jurisdictions referred to above all confer upon their judges, through the adoption of legislation and rules that regulate class actions, broad discretionary powers to manage class proceedings. These powers entail active and extensive judicial involvement in, and management of, class actions. The South African approach should be no different. Hurter supports such an approach,¹⁰⁷ as does De Vos¹⁰⁸ and the SALC.¹⁰⁹

As mentioned,¹¹⁰ it is preferable to regulate the courts’ judicial management powers statutorily.¹¹¹ Such an approach would accord with the approaches of foreign jurisdictions as set out earlier in this chapter.¹¹² These jurisdictions make provision for specific circumstances in class proceedings where the court would need to fulfill an active judicial management role and provide a framework for the exercise of the courts’ powers in this regard. Our courts are compelled to rely on their inherent jurisdiction without the benefit of legislative guidance on their role in respect of the judicial management of class actions.¹¹³ Although such discretionary freedom may encourage creativity and innovation insofar as class action management is concerned, it would not necessarily assist in promoting judicial certainty and uniformity. In any event, a legislative framework adopted to regulate class actions should afford to judges sufficient room to manoeuvre to enable them to manage such proceedings effectively. Legislative regulation of class actions does not necessarily preclude judicial innovation insofar as its management is concerned.

¹⁰⁷ See 5 2 above.

¹⁰⁸ W de Vos “Reflections on the Introduction of a Class Action in South Africa” (1996) 4 *TSAR* 639 649-650.

¹⁰⁹ South African Law Commission *The Recognition of Class Actions Report* para 5.9.2.

¹¹⁰ See 5 2 above.

¹¹¹ See also the concluding comments of this chapter.

¹¹² See 5 1 above.

¹¹³ Our courts can also seek guidance from the practice directives issued under the auspices of the respective divisions of the High Court of South Africa. For example, in *Nkala v Harmony Gold Mining Company Limited* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016) para 87, it was held that a “very important consideration to be taken into account is that even before the pre-trial processes are finalised, the practice directives of this court allow for the case to be judicially managed so that it is trial-ready. If required and if it is in the interests of justice, there is no reason why a relevant paragraph in the practice directive should not be invoked”.

A further consideration that favours legislative intervention to regulate class actions is the doctrine of the separation of powers. This doctrine essentially requires that courts apply the law and not make it. The legislature is empowered to make, amend and repeal rules of law.¹¹⁴ The judiciary has the power, if there is a dispute, to determine what the law is and how it should be applied in disputes.¹¹⁵ According to Mojapelo DJP, in the South African constitutional dispensation, the doctrine of separation of powers is not fixed or rigid.¹¹⁶

In *Children's Resource Centre Trust*, Wallis JA referred to the doctrine of the separation of powers and the development of the common law by our courts to regulate class actions in South Africa. He held as follows in this regard:

"I, accordingly, reject the suggestion...that we should await legislative action before determining the requirements for instituting a class action in our law. The Legislature will be free to make its own determination when it turns its attention to this matter and in doing so, it may adopt an approach different from ours. In the meantime, the courts must prescribe appropriate procedures to enable litigants to pursue claims by this means. Having said that, it is right to enter one *caveat*. It is that, within the limited ambit of a class action as described earlier in this judgment, we are only concerned to determine the broad parameters within which class actions may be pursued and to lay down procedural requirements that must be satisfied in order to do so. Where necessary we must develop the common law in order to achieve this, for example, by expanding the scope of the *res judicata* principle. However, as the international literature shows, fundamental issues of policy may arise in determining the structure of such actions and their consequences. The resolution of those issues involves difficult policy choices that have received differing answers in different jurisdictions. It is not for us, in laying down procedural

¹¹⁴ P M Mojapelo "The Doctrine of Separation of Powers (a South African Perspective)" (2013) 26 *Advocate* 37 43. See for example: *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 59 (Sachs J referred to the legislature and healthcare executives as "those better equipped" than the court to make the allocation choices regarding the provision of medical treatment at issue); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41 (Yacoob J deferred to the legislature and executive to make the determination of the "precise contours and content of the measures to be adopted", thereby declining to prescribe a particular solution to the problem of the provision of emergency shelter); *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 60 (the court declined to determine the content of the right to have access to sufficient water because, according to the court, this is an exercise best and properly left to the legislature and executive); *Bhe and Others v Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA* 2005 1 BCLR 1 (CC) paras 114-115 (the court held that "the Legislature is in the best position to deal with the situation").

¹¹⁵ Mojapelo (2013) *Advocate* 37.

¹¹⁶ 39.

requirements, to make policy choices that may impinge upon, or even remove, existing rights. That would be to trespass upon the domain of the Legislature, which the doctrine of the separation of powers – fundamental to our constitutional order – does not permit us to do.”¹¹⁷

As Wallis JA mentions above, there will inevitably be difficult policy choices that would need to be made to develop a structure for the adjudication of class actions in South Africa. The doctrine of the separation of powers dictates that our courts cannot make these decisions; rather, the legislature would need to consider it when it turns its attention to the issue. However, the longer it remains up to our courts to develop a structure for the adjudication of class actions in South Africa, the more likely it becomes that our courts could trespass on the domain of the legislature by taking decisions regarding issues that are subject to legislative consideration and determination.

Furthermore, it is not ideal to adopt an *ad hoc* approach in respect of the development of a class action procedural framework.¹¹⁸ A haphazard developmental approach to the regulation of class actions could potentially result in inconsistency in the approaches of the various divisions of the High Court of South Africa.¹¹⁹ Most foreign jurisdictions with some form of class action mechanism regulate it legislatively or through court rules.¹²⁰ Locally, several scholars have called for the introduction of specific class action legislation in South Africa.¹²¹ The introduction of comprehensive legislation and court rules regulating class actions in South Africa could ensure that development of class action procedure is not at the discretion of our courts and could enable South Africa to follow in the footsteps of other

¹¹⁷ Paras 21-22.

¹¹⁸ *Trustees for the time being of the Children’s Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA) para 15.

¹¹⁹ G Saumier “Competing Class Actions across Canada: Still at the Starting Gate After Canada Post V Lepine?” (2009) 48 *Can Bus LJ* 462 463.

¹²⁰ Karlsgodt “United States” in *World Class Actions: A guide to Group and Representative Actions around the Globe*.

¹²¹ See *inter alia* W de Vos *Verteenwoordiging van Groepsbelange in die Siviele Proses* LLM dissertation RAU (1985); W de Vos “n Groepsgeding in Suid-Afrika” (1985) 3 *TSAR* 296; W de Vos “n Groepsgeding (‘class action’) as Middel ter Beskerming van Verbruikersbelange” (1989) *De Rebus* 373; De Vos (1996) *TSAR* 639; E Hurter “Some thoughts on current developments relating to class actions in South African law as viewed against leading foreign jurisdictions” (2006) 39(3) *CILSA* 485; E Hurter “The class action in South Africa: Quo Vadis” (2008) 41(2) *De Jure* 293; E Gericke “Can class actions be instituted for breach of contract?” (2009) (2) *THRHR* 304.

countries with specific class action legislation.¹²² Statutory regulation of class actions will provide more certainty and clarity regarding class actions in South African law. If the primary objective of class actions is to provide access to justice, it does not make sense that the average person on the street would need to interpret case law to acquire an understanding of the structure for the adjudication of class actions in South African law. A class action legislative framework appears to be a preferred route to facilitate the access to justice goal of class actions.

The statutory provisions in which the courts' powers of management are embedded will inevitably vary depending on the nature of the issue in respect of which the power is to be exercised. Thus, there should be a variety of statutory provisions, each of which evidences the courts' power to manage class actions. For example, there may be a provision that enables the court to substitute a representative plaintiff who is not adequately representing the interests of the class members,¹²³ and a provision that enables the court to order the discontinuance of a properly instituted class action.¹²⁴ Insofar as the overarching empowering provision, expressly empowering our courts to adopt an active approach to managing class actions, is concerned, it may be worthwhile for our legislature to consider similar provisions in the Australian and Ontario class action statutes. Section 33ZF(1) of the Australian Federal Court Act empowers the court to make "any order... [it] thinks appropriate or necessary to ensure that justice is done in the proceedings". Section 12 of the Ontario Act provides that "[t]he court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose such terms on the parties as it considers appropriate". Both provisions empower the court to manage the class action in a way that it considers appropriate. However, section 12 of the Ontario Act does not enable the court to exercise its powers of management *mero motu*. To actively manage class actions, our courts should be expressly empowered to make certain managerial choices during the course of proceedings without having to wait for a party to bring an application. The SALC proposed that the courts' management powers should be exercisable either on the application of a party or class member or on the court's

¹²² F Cassim & O S Sibanda "The Consumer Protection Act and the Introduction of Collective Consumer Redress through Class Actions" (2012) 75 *THRHR* 586 587-588.

¹²³ See, for example, section 33T of the Federal Court of Australia Act of 1976.

¹²⁴ See, for example, section 33A of the Federal Court of Australia Act of 1976.

own motion.¹²⁵ It may therefore be preferable to adopt a provision similar to section 33ZF(1) when designing an empowering provision in a South African class action statute.

It is further submitted that, beyond the implementation of a legislative framework to regulate the courts' judicial management powers, one would also need to consider the specific tools our courts could utilise to manage class actions effectively. In the above-mentioned foreign jurisdictions, tools frequently utilised by judges to manage class actions include, for example, the submission of trial plans, the issuing of case management orders, and the bifurcation of class proceedings.¹²⁶ One such tool that has been successfully utilised in Australia and the United States to manage and possibly resolve class actions is court-annexed mediation. The remainder of this chapter considers the possible utilisation of this form of mediation as a tool to manage South African class actions effectively.

5 4 Court-annexed mediation as a tool to manage and resolve class actions in South Africa

5 4 1 Introduction

Mediation historically operated independently of the court system. However, it is no longer viewed as an alternative to litigation; rather, it is seen as an integral part of it. Mediation is a valuable case management tool, even when it fails to lead to immediate settlement of the dispute.¹²⁷ Where it does not result in settlement of the dispute, mediation may nevertheless have value from the perspective of, for example, a potential partial settlement of the dispute or by providing a party with valuable information of the other party's case.¹²⁸ Ultimately, however, mediating disputes may have the effect of relieving our superior courts' high caseload, as well as shielding the parties and the courts from the high costs

¹²⁵ South African Law Commission *The Recognition of Class Actions Report* para 5.9.

¹²⁶ Regarding bifurcation, see chapter four above.

¹²⁷ The ultimate goal of any alternative dispute resolution mechanism is to foster settlement. See A S Ray, E F Sherman & S R Peppet *Processes of Dispute Resolution: The Role of Lawyers* 4th ed (2006) 305-308; Greer *Practitioner's Guide to Class Actions* 688; T K Kuhner "Court-Connected Mediation Compared: The Cases of Argentina and the United States" (2005) 11:3 *ILSA J Int'l & Comp L* 1 2; T Kratz 57 "Alternative Dispute Resolution in Complex Litigation" (1988-1989) *UMKC L Rev* 839 841.

¹²⁸ J D Melnick "The Mediation of Securities Class Action Suits: A Panel Discussion Hosted by the Benjamin N. Cardozo School of Law" (2007-2008) 9 *Cardozo J Conflict Resol* 397 400.

and delays generally involved in civil litigation.¹²⁹ McGuire states the following regarding the success rate of mediation and the benefits that it could provide:

“Mediation enjoys a high success rate. Most cases settle during or shortly after mediation, regardless at what point in the litigation life cycle mediation is used. It is generally acknowledged that in many cases, even if the mediation is not successful in settling the entire case, the process may help the parties to focus on the issues that are truly in dispute and narrow the scope of needed discovery, saving significant legal expenses.”¹³⁰

There appears to be an increased tendency to utilise mediation in complex legal disputes. Mediation is accordingly increasingly utilised in class action litigation.¹³¹ At first, these cases may seem impossible to mediate, but they are increasingly resolved through successful mediation.¹³² “Because of the complexity of class-action litigation, courts and litigants have frequently turned to alternative dispute resolution...for the management and resolution of class actions.”¹³³ It may accordingly be worthwhile to consider utilising mediation as a tool to manage and resolve class actions in South Africa, having regard to the approaches of foreign jurisdictions in this regard.

5 4 2 Mediation in South Africa

South Africa has been relatively slow to embrace alternative modes of dispute resolution.¹³⁴ Consequently, as is the case with class actions in South Africa, there is no

¹²⁹ Kuhner (2005) *ILSA J Int'l & Comp L* 1 10, 15-16, 18.

¹³⁰ J E McGuire “Mediation mandate: refusing to mediate becoming more difficult on both sides of Atlantic” (2002-2003) 9 *Disp Resol Mag* 17 18.

¹³¹ See, for example, M Lee & D Bampton “Current Issues Relating to Mediation in Shareholder Representative Proceedings in Australia” (2009) 32(3) *UNSW Law Journal* 988 988: “In large scale litigation it has become unlikely a matter will proceed to trial without recourse to some form of alternative dispute resolution process: in a representative proceeding, when an initial trial of common issues will not resolve all individual issues, some form of dispute resolution at some stage of the curial process is almost inevitable.”

¹³² E D Green “Re-Examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons from *Microsoft* and Other Megacases” (2006) 86 *Boston University Law Review* 1171 1175. See also 1172 where he states that there is “increasing pressures on courts to deal with megacases, and regular resort to mediation in these cases”.

¹³³ Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 667.

¹³⁴ A Anthimos, A V Baker, G De Palo, W A Herbert, M Judin & N Tereshchenko “International Commercial Mediation” (2011) 45.1 *International Lawyers* 111 119.

single, general, South African mediation statute or court rule. A distinction is drawn between 'private mediation', triggered by contractual agreement, and various forms of 'institutionalised mediation', that is mediation connected to the courts or required by statute.¹³⁵ Of relevance for purposes of this chapter is what has been referred to above as 'institutionalised mediation'. The proposal made at the conclusion of this chapter, which aims to assist our courts to manage class actions, relates to a form of institutionalised mediation. This proposed form of institutionalised mediation will be informed by the recently introduced South African court-annexed mediation rules and the mediation regimes of prominent foreign jurisdictions.

In South Africa, limited provision is made for mediation as a means to assist our superior courts to manage civil litigation. Rule 37 of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa ("Uniform Rules") contains the issues that should be dealt with at a pre-trial conference. The rule does not require that the parties engage in mediation in an attempt to resolve the dispute; it merely requires that the parties consider referring the dispute for mediation and record their decision in this regard in the pre-trial conference minute. This is reflected in subrule 37(6), which provides as follows:

"The minutes of the pre-trial conference shall be prepared and signed by or on behalf of every party and the following shall appear therefrom...(d) whether any issue has been referred by the parties for mediation, arbitration or decision by a third party and on what basis it has been so referred..."

Apart from the reference to mediation in rule 37, it has been argued that it is now accepted that legal representatives are well advised to recommend mediation or they could be deprived of their costs, as could parties who unreasonably refuse to mediate.¹³⁶ In this regard, in *MB v NB*¹³⁷ ("*Brownlee*"), it was held that, in divorce proceedings, the parties' legal representatives should advise them of the benefits of mediation. Each party was ordered by the court to bear their own costs, taxed on a party and party basis. The attorneys were deprived of their full attorney and client fees. Brassey AJ referred to the failure of the attorneys to act appropriately i.e. to advise their clients of the benefits of

¹³⁵ L Boule & A Rycroft *Mediation: Principles, Process, Practice* (1997) 4-5.

¹³⁶ Anthimos *et al* (2011) *International Lawyers* 123.

¹³⁷ 2010 3 SA 220 (GSJ).

mediation and held “[f]or this they are to blame and they must, I believe, shoulder the responsibility that comes from failing properly to serve the interests of their clients”.¹³⁸

It has been argued that, following the *Brownlee* decision and in light of other recent developments in South African law, parties to a dispute are obliged to consider the appropriateness of mediation¹³⁹ and that a dispute should be referred to mediation where there is a reasonable possibility that it could result in the resolution of the dispute. Also, attorneys must advise their clients of the benefits of mediation and assist them to submit a dispute to mediation. Failure to do so may result in the issuing of an adverse cost order.¹⁴⁰

A further, relatively recent, development in South African law has been the publication by the Department of Justice and Correctional Services of court-annexed mediation rules (“Mediation Rules”) and the launching of court-annexed mediation at pilot site courts across the country from 1 December 2014. The Mediation Rules provide the procedure for the voluntary submission of civil disputes to mediation in selected magistrates’ courts.¹⁴¹ The Mediation Rules were introduced in the form of amendments to the rules regulating the conduct of proceedings of South African magistrates’ courts. The primary objectives of the Mediation Rules are to assist case-flow management in the reduction of disputes appearing before court and to promote access to justice.¹⁴²

Parties to a class action instituted in a South African superior court can generally agree to submit the dispute to private mediation. However, there is no form of institutionalised mediation that provides for voluntary or mandatory mediation of disputes in our superior courts, as is the case with court-annexed mediation in our lower courts and the mediation regimes of prominent foreign jurisdictions. Having briefly referred to the Mediation Rules, it may be instructive to consider the approaches of foreign jurisdictions in this regard.

¹³⁸ Para 59.

¹³⁹ Rule 37 of the Uniform Court Rules.

¹⁴⁰ Anthimos *et al* (2011) *International Lawyers* 123.

¹⁴¹ Rule 72.

¹⁴² The Mediation Rules can be downloaded from the website of the Department of Justice and Constitutional Development of the Republic of South Africa at <<http://www.justice.gov.za/mediation/mediation.html>> (accessed 02/02/2016).

5 4 3 Mediation regimes of the foreign jurisdictions

Rules 24.1 and 75.1 of the Rules of Civil Procedure¹⁴³ constitute the Ontario Mandatory Mediation Program. The website of the Ministry of the Attorney General in Ontario describes the program as follows:

“The Mandatory Mediation Program is a program designed to help parties involved in civil litigation and estates matters settle their cases early in the litigation process to save time and money. The Mandatory Mediation Program applies in Toronto, Ottawa and Windsor to certain civil actions under rule 24.1 of the Rules of Civil Procedure and to contested estates, trusts and substitute decision matters under rule 75.1 of the Rules of Civil Procedure...Under the Mandatory Mediation Program, cases are referred to a mediation session early in the litigation process to give parties an opportunity to discuss the issues in dispute. With the help of a trained mediator, the parties explore settlement options and may be able to avoid the pre-trial and trial process.”¹⁴⁴

Rule 24.1 applies to class actions commenced under the Ontario Act only if certification has been denied.¹⁴⁵ The Mandatory Mediation Program therefore does not permit court-annexed mediation of class actions (voluntary or mandatory) prior to certification or where the class action has been certified by the court. Although limited consideration will be given to Ontario’s Mandatory Mediation Program in formulating a proposal for adoption in South Africa, certain provisions could nevertheless be utilised in a South African class action context.¹⁴⁶

In 1990, in the United States, the Civil Justice Reform Act of 1990¹⁴⁷ required district courts to “consider...principles and guidelines of litigation management and cost and delay reduction”.¹⁴⁸ District courts were allowed to “refer appropriate cases to alternative dispute

¹⁴³ Courts of Justice Act R.R.O. 1990, Regulation 194.

¹⁴⁴ The website of the Ministry of the Attorney General in Ontario can be accessed at <http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/fact_sheet_mandatory_mediation.pdf> (accessed 02/02/2016).

¹⁴⁵ See 5 4 4 2 below where it is contended that there may be value in mediating before certification of the class action or after a certification application has been granted.

¹⁴⁶ See, for example, 5 4 4 4 and 5 4 4 5 below.

¹⁴⁷ Pub. L. No.101–650 § 101, 104 Stat. 5089 (1990).

¹⁴⁸ Section 473(a).

resolution programs...including mediation".¹⁴⁹ Thereafter, the Alternative Dispute Resolution Act of 1998¹⁵⁰ ("Dispute Resolution Act") was introduced. The Dispute Resolution Act requires federal district courts to authorise the use of alternative dispute resolution in civil proceedings. However, it allows each court to determine for itself what types of cases are covered and it enables courts to compel parties to enter mediation.¹⁵¹ The Dispute Resolution Act provides that "[e]ach United States district court shall authorize...the use of alternative dispute resolution processes in all civil actions...Each United States district court shall devise and implement its own alternative dispute resolution program...to encourage and promote the use of alternative dispute resolution in its district".¹⁵² Each United States district court may mandate mediation through their local rules.¹⁵³ The Dispute Resolution Act further authorises each court to exempt "specific cases or categories of cases in which use of alternative dispute resolution would not be appropriate", but requires that they consult a member of the bar including the United States attorney for their district.¹⁵⁴

As of 1999, "mediation programs [were] the most...frequently authorized ADR program. Nearly eighty district courts have authorized or established at least one court-wide ADR program".¹⁵⁵ The degree to which mediation is mandatory therefore depends on the local rules in each district.¹⁵⁶ Crowne states that the Dispute Resolution Act provides no guidance as to the proper role of alternative dispute resolution in the court system and confirms that it affords to district courts tremendous discretion to design alternative dispute resolution processes. She further states that thoughtful incorporation of alternative dispute

¹⁴⁹ Section 473(a)(6).

¹⁵⁰ Pub. L. No. 105-315 § 1, 112 Stat. 2993 (1998).

¹⁵¹ Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 673.

¹⁵² Section 3(b).

¹⁵³ Section 4(a) provides that "[a]ny district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration".

¹⁵⁴ Section 4(b).

¹⁵⁵ Kuhner (2005) *ILSA J Int'l & Comp L* 11-12.

¹⁵⁶ 12, where he also states that "[a]lthough the precise ratio of mandatory to optional mediation in all the districts is unknown, it is known that both types exist".

resolution into the United States district courts could enrich their justice system and provide substantial benefits.¹⁵⁷

According to Senior United States District Judge Sandra Beckwith, “the approaches taken by the various district courts regarding court-annexed or court-approved ADR programs have varied over time, no doubt in part as a reflection of local customs and regional needs for different types of programs”.¹⁵⁸ She states that “[t]he benefits that can be derived from such programs are now viewed as a positive adjunct to the district court’s important considerations of open accessibility, transparency, fairness, and impartiality in the administration of justice. Court-annexed mediation programs can also advance the goals of the Federal Rules of Civil Procedure as defined by Rule 1 – to secure the just, speedy, and inexpensive determination of every action and proceeding”.¹⁵⁹ According to Beckwith J, the prevalence of court-annexed ADR programs has supplanted “the prior informal procedures for ad hoc settlement conferences that are conducted mostly by magistrate judges”.¹⁶⁰

The Ontario Mandatory Mediation Program only applies to class actions in limited circumstances. Further, the American district courts developed their own alternative dispute resolution programs and rules, and these programs and rules inevitably vary from one court to another. It may therefore be worthwhile to consider the relatively uniform Australian approach to court-annexed mediation. “Court-annexed ADR, and specifically court-annexed mediation, has become a well established feature of the Australian judicial system since the 1990s.”¹⁶¹

In the Australian Federal Court, the parties are obliged to negotiate with the view to settling the dispute prior to the commencement of proceedings and must file a genuine steps statement, stating that this was done, together with the application commencing

¹⁵⁷ C H Crowne “The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice” (2001) *New York University Law Review* 1768 1770.

¹⁵⁸ S S Beckwith “District Court Mediation Programs: A View From the Bench” (2011) 26 *Ohio St J on Disp Resol* 357 357.

¹⁵⁹ 357.

¹⁶⁰ 357.

¹⁶¹ R French CJ *Law Council of Australia Multi-Door Symposium Perspectives on Court Annexed Alternative Dispute Resolution* (2009) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj27july09.pdf>> (accessed 02/02/2016).

proceedings. This is a form of legislatively compelled alternative dispute resolution.¹⁶² Further, section 53A of the Federal Court Act empowers a court to refer proceedings to a mediator, with or without the consent of the parties. Section 53A provides as follows:

“(1) The Court may, by order, refer proceedings in the Court, or any part of them or any matter arising out of them:

- (a) to an arbitrator for arbitration; or
 - (b) to a mediator for mediation; or
 - (c) to a suitable person for resolution by an alternative dispute resolution process;
- in accordance with the Rules of Court.

(1AA) Subsection (1) is subject to the Rules of Court.

(1A) Referrals under subsection (1) (other than to an arbitrator) may be made with or without the consent of the parties to the proceedings. Referrals to an arbitrator may be made only with the consent of the parties.

(2) The Rules of Court may make provision for the registration of awards made in an arbitration carried out under an order made under subsection (1).

(3) This section does not apply to criminal proceedings.”

Part 28 of the Australian Federal Court Rules¹⁶³ (“Australian Rules”) supplements section 53A of the Federal Court Act. It provides that the parties and the court must consider mediation as early as is reasonably practicable.¹⁶⁴ A party may also apply to court for an order that the proceeding or part of the proceeding be referred to a mediator.¹⁶⁵ Where the parties refer the proceeding to a mediator, the applicant must apply to the court for directions as to the future management and conduct of the proceeding within 14 days of the referral.¹⁶⁶ Courts are empowered to make further orders including an order regarding the time within which the mediation must start and finish.¹⁶⁷ Any party may apply to the court for an order terminating a mediation or ADR process, or terminating the appointment of a mediator or suitable person.¹⁶⁸ Rules 28.21 to 28.25 deal specifically with the practicalities involved in the mediation process, including the process of selecting a

¹⁶² Part 2 of Civil Dispute Resolution Act 2011 (Ct); B Cairns *Australian Civil Procedure* 10th ed (2013) 60, 125.

¹⁶³ Federal Court Rules 2011, Select Legislative Instrument 2011, No. 134.

¹⁶⁴ Rule 28.01.

¹⁶⁵ Rule 28.02.

¹⁶⁶ Rule 28.05.

¹⁶⁷ Rule 28.03.

¹⁶⁸ Rule 28.04.

mediator,¹⁶⁹ the conduct of the mediation,¹⁷⁰ the mediator's report,¹⁷¹ the termination of mediation,¹⁷² and the mediation agreement.¹⁷³

The jurisdictions of Ontario and the United States, compared to the Australian approach, offer less value from the perspective of informing the development of the proposed approach to mediating class actions in South Africa as set out below. The Ontario Mandatory Mediation Program does not permit court-annexed mediation of class actions before or after (successful) certification. In the United States, the district courts' approaches to mediation, including the extent to which mediation is mandated, vary significantly. The relatively consistent and uniform Australian approach to mediation set out above accordingly informs the approach suggested in the next section to utilise mediation as a tool to manage and to resolve class actions in the South African superior courts. The suggested approach will therefore seek guidance from the Australian approach and it will take account of court-annexed mediation in the South African lower courts as evidenced by the Mediation Rules.

5 4 4 Suggested approach to mediating class actions in South Africa

South African law, unlike Australian law, does not provide for either voluntary or mandatory court-annexed mediation of class actions.¹⁷⁴ It is submitted that, in view of the benefits of mediation generally, and specifically in the context of class action litigation,¹⁷⁵ provision should be made for both these forms of mediation of class actions in our superior courts.

With the above in mind, it may be worthwhile to consider in further detail the suggested approach to court-annexed mediation of class actions in South Africa. If we specifically take into account the approach of Australia to court-annexed mediation and our Mediation Rules, it is evident that any legislative framework aimed at regulating court-annexed mediation of class actions in the South Africa would need to address a wide range of

¹⁶⁹ Rule 28.21.

¹⁷⁰ Rule 28.22.

¹⁷¹ Rule 28.23.

¹⁷² Rule 28.24.

¹⁷³ Rule 28.25.

¹⁷⁴ Kuhner (2005) *ILSA J Int'l & Comp L* 13.

¹⁷⁵ See 5 4 1 above.

issues. These issues include the degree to which parties enter into mediation consensually; the timing of mediation and its duration; the appointment, qualifications, expertise and skills of the mediator; the payment of fees and the issue of approval by the court of any mediated settlement. These issues are considered in the remainder of this chapter. Other issues that have not been listed above would also have to be addressed by the legislature if it were to recognise a class action court-annexed mediation regulatory framework. For example, it would also have to address the ethical duties of the mediator in conducting the mediation and practical issues pertaining to the mediation process itself. Unfortunately, the scope of this dissertation does not permit a detailed exposition of all such issues.

5 4 4 1 The degree to which parties enter into mediation consensually

In South Africa, parties to a civil dispute may engage in private mediation in respect of disputes instituted in both the lower and the superior courts. Parties are also able to engage in voluntary court-annexed mediation within the context of civil disputes instituted in our lower courts. As mentioned, however, no provision is made for voluntary or mandatory court-annexed mediation of civil disputes instituted in our superior courts, which makes it impossible to use these mechanisms in South African class action disputes. However, as will be argued below, this is an unsatisfactory position, especially if we consider the positive experiences in Australian and American law. It will further be argued that the mediation should ideally take place on a consensual basis, but the courts should retain a discretion to mandate it in appropriate circumstances.

Rule 74 of the Mediation Rules of the lower courts provides that they apply to the voluntary submission of civil disputes by parties to mediation prior to the commencement of litigation and to disputes in litigation that have already commenced, as contemplated in rules 78 and 79.¹⁷⁶ According to rule 75, the parties may refer a dispute to mediation prior to the commencement of litigation or after the commencement of litigation but prior to judgment provided that, where the trial has commenced, the parties must obtain the authorisation of the court. Further, a judicial officer may at any time after the commencement of litigation, but before judgment, enquire into the possibility of mediating the dispute and accord the parties an opportunity to refer the dispute to mediation. Importantly, mediation can clearly

¹⁷⁶ Rule 74.

take place in terms of the Mediation Rules on a consensual basis but the judge does not have a discretion to compel parties to mediate the dispute. The Mediation Rules accordingly apply to voluntary mediation, but do not provide for mandatory court-annexed mediation of civil disputes in the lower courts.

The Mediation Rules are therefore insufficient to give effect to the proposal herein that court-annexed mediation of class actions should take place on a voluntary or mandatory basis. However, as mentioned,¹⁷⁷ court-annexed mediation in the Australian Federal Court can be consensual or it can be court-ordered. It may therefore be instructive to consider the reasons why Australian law adopted this position and, if they are compelling, to consider incorporating appropriate parts of the Australian Federal Court Act and Australian Rules into South African law to give effect to the proposal. In this regard, section 53(1A) of the Australian Federal Court Act provides that an order “may be made with or without the consent of the parties to the proceedings...” Section 53A(1)(b) provides that a court may order that proceedings (or a part thereof) be referred to mediation. Rule 28.02 reinforces mandatory mediation insofar as it provides that a court may refer a proceeding to mediation of its own motion.

The Australian court-annexed mediation regime therefore clearly provides for mandatory mediation. Regarding the courts’ power to order mediation, Hanks states as follows:

“Courts in Australia have wide discretionary powers to order mediation without the parties’ consent. Legislative provisions empowering the Supreme Court of NSW to order mandatory mediation first appeared in 2000. Supreme Court Practice Notes have reinforced these powers of judges to order unwilling parties to mediate. There has been open judicial support for this initiative, often in the form of court-annexed mediation where the process is carried out by a court officer and in some cases, a judge.”¹⁷⁸

The issue of consensual court-annexed mediation is relatively uncontroversial; however, the appropriateness of mandatory court-annexed mediation has been subject to debate.¹⁷⁹ The arguments favouring mandatory court-annexed mediation appear to be overwhelming.

¹⁷⁷ See 5 4 3 above.

¹⁷⁸ M Hanks “Perspectives on Mandatory Mediation” (2012) 35(3) *UNSW Law Journal* 945-946.

¹⁷⁹ See, for example, H Genn *Judging Civil Justice* (2010) 106; H Genn, P Fenn, M Mason, A Lane, N Bechai, L Gray & D Vencappa *Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure* (2007) 9.

In Re Atlantic Pipe Corporation, Petitioner,¹⁸⁰ the court stated “when mediation is forced upon unwilling litigants, it stands to reason that the likelihood of settlement is diminished”. However, the studies of mediation success suggest otherwise.¹⁸¹ According to McGuire, if the mediator is skilled, the chance of success does not vary between voluntary and court-ordered mediations.¹⁸² Further, Clark states that “mandating mediation may also help embed the process generally and lead to its increased acceptance and use”.¹⁸³ He refers to research conducted in respect of a mandatory court-annexed mediation regime in respect of which it was concluded that, “despite initial resistance to the programme by lawyers, judicial compulsion of mediation led to a shift in disputing culture in which some lawyers and their clients began to accept and embrace the process as it became normalised”.¹⁸⁴ He refers to similar programs in the United States in respect of which it was concluded that mandatory mediation increases general deployment of the process, enhances the flow of information from lawyers to disputants about alternative dispute resolution processes and may also over time lead to dilution of some of the less desirable adversarial practices of lawyers.¹⁸⁵ According to Clark, against a backdrop of low voluntary uptake of mediation but potentially high *post-hoc* success and the scope for efficiency contributions to civil court systems, mandatory mediation may represent an attractive prospect for policy makers.¹⁸⁶

Hanks also supports mandatory mediation and states that “compelling parties to attempt mediation has the potential of reducing costs, allowing for a wider range of solutions, and maintaining the relationships between the parties”.¹⁸⁷ Further, “[w]here the use of ADR is mandated by the courts, parties usually recognize that the court will expect a high degree of cooperation while working toward settlement”.¹⁸⁸

¹⁸⁰ 304 F.3d 135 (1st Cir. 2002).

¹⁸¹ S B Goldberg, F E A Sander & N H Rogers *Dispute Resolution: Negotiation, Mediation and Other Processes* (1999) 393.

¹⁸² McGuire (2002-2003) *Disp Resol Mag* 18.

¹⁸³ B Clark *Lawyers and Mediation* (2012) 148.

¹⁸⁴ 148.

¹⁸⁵ 148.

¹⁸⁶ 148.

¹⁸⁷ Hanks (2012) *UNSW Law Journal* 947.

¹⁸⁸ M S Greenberg “What Mediators Need to Know About Class Actions” (2004) 27 *Hamline Law Review* 191 214.

In view of these considerations, it is submitted that the South African court-annexed mediation regulatory framework should, as a first port of call, make provision for class actions to be mediated on a consensual basis. However, it should further provide that, in the absence of consent, a court retains the discretion to compel the parties to mediate. Our legislature could consider utilising section 53A of the Australian Federal Court Act as the class action court-annexed mediation authorising provision, with minor amendments. In this regard, the authorising provision could provide that the parties may agree to “refer proceedings...or any part of them or any matter arising out of them...to a mediator for mediation...in accordance with the Rules”.¹⁸⁹ It could further provide that a referral to mediation “may be made...without the consent of the parties to the proceedings”.

It is submitted that it should not be a *fait accompli* that the failure by parties to engage in consensual mediation would result in mediation being mandated. Rather, there should be scope for our courts only to compel mediation of class actions in certain circumstances. For example, where the court is of the view that mediation would not contribute to either the management or the resolution of the class action, it may decide against compelling mediation. In this regard, according to Giles QC, mediation may not be appropriate in certain circumstances and the courts’ discretion should, in such circumstances, be exercised against compelling mediation:

“[T]here are many cases where a party should never be asked to mediate. The fact is that some litigants have a valid claim. Some have a valid defence. There is no reason why the matter should be compromised in either case. Undoubtedly, mediation can be extremely valuable in the right case and at the right time. Every lawyer has a duty to recommend mediation in the right case and at the right time. Nevertheless, it also carries the danger of favouring the unreasonable, the dishonest and the bullies.”¹⁹⁰

5 4 4 2 Timing of mediation and its duration

A further issue that would need to be considered in respect of court-annexed mediation of class actions in South Africa is the timing of the mediation; in other words, whether it should precede or follow the class action certification decision. It is submitted that the

¹⁸⁹ The proposal made herein entails the promulgation of a class action statute, supplemented by rules of court.

¹⁹⁰ J Giles QC “The Compulsory Mediator” (2004) 62 *Advocate Vancouver* 537 537.

parties should be able to agree to court-annexed mediation before the certification decision or after the certification decision if the certification application is successful.¹⁹¹ It is further submitted that our courts should retain a discretion to mandate mediation before the certification decision or after the class action has been certified.

In deciding when to compel the parties to engage in mediation, a court would need to consider where mediation best fits in the sequence of litigation events, given the circumstances of the particular case. In this regard, it is possible to conceive of a number of factors that could operate in favour of mediating before the certification decision. For example, mediating the dispute prior to certification may save costs, both in delay and expense, insofar as settlement would mean the parties would not have to argue the certification application and wait for it to be decided. Further, given that class actions routinely take a substantial period of time, sometimes years, to reach certification, it may be preferable for the mediation to take place pre-certification.¹⁹² Should the parties wait for the certification decision, there is a change in relative bargaining power that occurs after the court grants a class action certification application. It may be preferable for mediation to take place pre-certification, because the uncertainty of whether the court will certify the class provides an incentive for both sides to settle.¹⁹³

Conversely, where a party is of the view that it is likely to prevail in respect of the class action certification decision, such a party may prefer to proceed immediately with the certification process rather than mediating. A successful certification application would obviously strengthen the applicant's hand at mediation. Similarly, the respondent to the certification application could argue that an unsuccessful certification application would render mediation unnecessary and that it is therefore preferable that no expense is incurred in preparing for and engaging in the mediation. These factors could accordingly militate against mediating before certification.

¹⁹¹ Parties can agree to mediate the dispute privately prior to the institution of litigation. Further, if the certification application is unsuccessful, the parties should not be forced to mediate; they could, however, agree to engage in private mediation in such circumstances.

¹⁹² J Kalajdzic "Class Actions and Settlement Culture in Canada" in C Hodges & A Stadler (eds) *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (2013) 132, 137.

¹⁹³ T F Jackson, K G Scott, M C Maneker & P S Rukin "Mediating Wage and Hour Disputes" in M Mandelbaum (ed) *California Wage and Hour: Law and Litigation* (2015) §13.1, §13.7.

A further issue that would need to be considered, insofar as the implementation of a court-annexed mediation regulatory framework is concerned, is the duration of the mediation. Rule 77 of the Mediation Rules provides that, if the parties agree to submit the dispute to mediation, the clerk or registrar of the court must assist the parties to conclude a written mediation agreement.¹⁹⁴ The agreement should *inter alia* regulate¹⁹⁵ “the period of time that will be allocated for each mediation session;” and “the time within which mediation will be concluded and the method by which any periods or time limits may be extended;...” The Government Notice, in terms of which the qualification, standards and levels of mediators are determined, provides that “[e]very mediator must be punctual for a mediation session and keep to time limits, if any, set by the parties”.¹⁹⁶

It is apparent that, in terms of the Mediation Rules, the parties decide on the duration of the mediation. This position is in contrast with the Australian court-annexed mediation regime. As mentioned,¹⁹⁷ rule 28.03 of the Australian Federal Court Rules provides that a “[c]ourt may make further orders including an order for the time within which the mediation must start and finish”. Rule 28.22 provides that “[a] mediation must be conducted in accordance with any orders made by the Court”. Further, rule 28.05 states as follows:

“(1) Nothing in this Division prevents the parties to a proceeding referring the proceeding to:...(b) a mediator for mediation;...(2) However, if the parties refer the proceeding under subrule (1), the applicant must, within 14 days of the referral, apply to the Court for directions as to the future management and conduct of the proceeding.”

It is submitted that the Australian approach, in terms of which the court decides on the duration of the mediation, is preferable. It is conceivable that the interests of the parties to a class action may differ insofar as the duration of the mediation is concerned, regardless of whether the mediation is mandatory or voluntary. For example, circumstances may arise where the applicant may want to limit the duration of the mediation to be able to proceed with the certification application as soon as possible, whereas the respondent may want to engage in an extended mediation process to delay the certification hearing for as long as possible. It may therefore be desirable for the court to decide on the duration of the

¹⁹⁴ Rule 77(4)(c).

¹⁹⁵ Rule 77(4)(c).

¹⁹⁶ Para 9.7 in Schedule 2 of GN854 in GG38163 of 31-10-2014.

¹⁹⁷ See 5 4 3 above.

mediation. Further, if such an approach is followed in South Africa, it would be in line with what was stated above regarding the active management role of judges insofar as the mediation of class actions is concerned:¹⁹⁸ although judges should preferably not engage in the mediation itself, they should nevertheless play an active role in managing the mediation. This management role should entail deciding on the duration of the mediation. A court should nevertheless be able to take into account the views of the parties and the mediator insofar as a decision on the duration of the mediation is concerned.

5 4 4 3 Appointment, qualifications, expertise and skills of the mediator

A further issue that would need to be considered when implementing court-annexed mediation of class actions in South Africa is the appointment, qualifications, expertise and skills of the mediator. The Mediation Rules, in relatively comprehensive terms, deal with the appointment, qualifications, expertise and skills of the mediator. It defines a 'mediator' as a person selected by parties or by the clerk or registrar of the court from a schedule referred to in rule 86(2), to mediate a dispute between the parties.¹⁹⁹ The schedule of persons accredited as mediators in terms of rule 86 (2) of the Mediation Rules currently comprises 233 individuals in total. The document contains each individual's full name and surname as well as his or her designation.²⁰⁰ It further indicates the individual's area of focus/speciality²⁰¹ and his or her magisterial/sub district. Finally, the 'level' of each individual is contained in the document, varying between a level one and a level two. The persons listed in the schedule accordingly comprise the 'Panel of Court-Annexed Mediators'²⁰² appointed to mediate civil disputes in our lower courts where the parties have agreed to the mediation. Rule 86 of the Mediation Rules provides for the qualifications, standards and levels of mediators who will conduct mediation under the rules to be determined by the Minister. The schedule published in this regard²⁰³ contains detailed provisions on the qualifications and standards for accreditation as a mediator. It is submitted that the content of these provisions can equally apply to the mediation of class

¹⁹⁸ See 5 2 and 5 3 above.

¹⁹⁹ Rule 73.

²⁰⁰ In most cases, the designations of the individuals listed in the document vary between 'practising attorney', 'advocate' and 'mediator'.

²⁰¹ For example, 'civil and labour mediation' or 'property, engineering and construction disputes'.

²⁰² Para 6.

²⁰³ Schedule 2 of GN854 in GG38163 of 31-10-2014.

actions instituted in our superior courts. However, the mediator training and accreditation requirements would need to be much more rigorous than in the case of the training conducted under the auspices of the Magistrate's Courts. Mediating class actions would require mediators who are sufficiently equipped to deal with the difficulties posed by such proceedings. Green describes the challenge of mediating complex cases as follows:

"Every case is unique; megacases are uniquely unique. In their variety and particularity, they tend to be extremely difficult and pose special challenges for judges and mediators for several reasons. What these different challenges have in common is that they all demand a high level of expertise, and when several of these challenges are present in the same case, as they often are, they require a high level of expertise in multiple fields. Achieving the required level of expertise in any one field is difficult enough; achieving the required level of expertise in the multiple fields required is beyond that which seems reasonably attainable for any single individual, Leonardo da Vinci, Thomas Jefferson, Benjamin Franklin, and maybe Oliver Wendell Holmes excepted. To the normal highly educated, respected, and experienced judge or mediator, megacases push one beyond known limits of competency and confidence."²⁰⁴

Mediating class actions is, ultimately, far more complex and difficult than settling an individual claim. The stakes are much higher and the issues, procedural rules and substantive law are generally far more complex compared to ordinary civil litigation. The 'Panel of Court-Annexed Mediators' would accordingly need to comprise individuals who have received the appropriate training and accreditation to enable them to mediate class actions in our superior courts.

It is conceivable that, given the difficulties associated with mediating class actions, it would be more challenging to find the required high level of expertise among members of this profession in South Africa that would enable them to mediate in such complex proceedings. However, given that class actions are still in its infancy in South African law, the incidence of class actions remains relatively low. It may therefore be unnecessary, as a first port of call, to constitute a panel consisting of a large number of mediators. A small group of suitably qualified mediators, ideally geographically dispersed across the jurisdictions in which our superior courts are situated, should therefore suffice.

²⁰⁴ Green (2006) *Boston University Law Review* 1172.

5 4 4 4 Payment of fees

A South African court-annexed class action mediation regulatory framework would also need to address the issue of liability for the mediator's fees. It is submitted that, regardless of whether the mediation takes place on a consensual basis or whether it is compelled by the court, the parties should be responsible for payment of the mediator's fees. Rule 84 of the Mediation Rules provides that liability for the fees of a mediator must be borne equally between opposing parties, except where the services of a mediator are provided free of charge and provided that any party may offer or undertake to pay in full the fees of a mediator. However, the parties should incur the legal costs of their own legal representatives in preparing for and attending the mediation.²⁰⁵ Such an approach also accords with the Ontario Regulation promulgated to regulate mediators' fees. The Ontario Regulation provides *inter alia* that "[e]ach party is required to pay an equal share of the mediator's fees for the mandatory mediation session".²⁰⁶

It is further submitted that our courts should, however, retain a discretion to allocate responsibility for the mediator's fees in a manner other than equal shares between the parties. The approach followed in the New South Wales Civil Procedure Act of 2005 could be considered in this regard. Section 28 confers a discretion upon courts as to the allocation of responsibility for the costs of the mediation. Section 28 provides as follows:

"The costs of mediation, including the costs payable to the mediator, are payable:

- (a) if the court makes an order as to the payment of those costs, by one or more of the parties in such manner as the order may specify, or
- (b) in any other case, by the parties in such proportions as they may agree among themselves".

The primary difference between the above proposal and the position set out in section 28 is that, in terms of the proposal, the point of departure is that the parties share liability for the costs of the mediation in equal portions. Leaving it to the parties to agree to liability for the costs of the mediation could create a platform for unnecessary party-disagreement. In any event, where circumstances dictate a departure from equal liability, the court would be

²⁰⁵ Rule 76(2) of the Mediation Rules provides that "[a] clerk or registrar of the court must – (a) inform the parties that they may be assisted by practitioners of their choice, at their own cost;..."

²⁰⁶ Section 4(2) of O. Reg. 451/98.

required to assume its role as active manager of the class proceedings and would need to make the appropriate order as to liability for the mediation costs.

The Minister has published the tariffs of fees chargeable by mediators. According to the tariff, a level one mediator will receive R225 per half hour spent mediating while a level two mediator will receive R300 per half hour. The tariff provides that a mediator's maximum daily fee is R4 500 or R6 000, depending on whether the mediator has been categorised as a level one or a level two mediator.²⁰⁷ The tariff also provides for the payment of a mediator's fees relating to the perusal of documents, preparation of a report and travelling.²⁰⁸

It is submitted that the fees payable to mediators of class actions in our superior courts would have to be increased compared to the fees that are payable under the Mediation Rules. Mediating a class action dispute is potentially considerably more challenging than mediating civil disputes in the context of our magistrates' courts, with its limited jurisdiction. Mediators would therefore need to be compensated accordingly. In terms of the potential regulation of this issue, it is conceivable that a tariff of fees chargeable by mediators could be inserted into the Uniform Rules,²⁰⁹ specifically in the form of a schedule thereto.

5 4 4 5 The mediated settlement

Rule 80(2) of the Mediation Rules provides that “[a] mediator must, within 5 days of the conclusion of mediation, submit a report to the clerk or registrar of the court informing him or her of the outcome of the mediation”. Rule 82 of the Mediation Rules provides that if a settlement is not reached at mediation in a dispute which is the subject of litigation, the clerk or registrar of the court must, upon receipt of a report from the mediator, file the report to enable the litigation to continue, from which time all suspended time periods will resume. Rule 82 further provides that, in the event that the parties reach settlement, the mediator must assist the parties to draft the settlement agreement, which must be transmitted by the mediator to the clerk or registrar of the court. If a settlement is reached

²⁰⁷ Regarding the mediator levels, see paragraph 6 of Schedule 2 of GN854 in GG38163 of 31-10-2014.

²⁰⁸ Schedule 1 of GN854 in GG38163 of 31-10-2014.

²⁰⁹ In terms of the Rules Board for Courts of Law Act No 107 of 1985.

at mediation in a dispute which is the subject of litigation,²¹⁰ the clerk or registrar of the court must, at the request of the parties and upon receipt of the settlement agreement from the mediator, place the settlement agreement before a judicial officer in chambers for noting that the dispute has been resolved or to make the agreement an order of court.

It is submitted that a similar approach could be utilised when mediating class actions in our superior courts, with minor amendments. For example, apart from certain obvious amendments,²¹¹ the time-period for the filing of a mediation report should be extended. Rule 24.1.15(1) of the Ontario Rules of Civil Procedure²¹² provides that “[w]ithin 10 days after the mediation is concluded, the mediator shall give the mediation co-ordinator and the parties a report on the mediation”. The time-period of ten days²¹³ would appear to be more realistic in the context of class action litigation compared to the five days referred to in the Mediation Rules; it may even be necessary to afford the mediator a further extension to ensure accurate and detailed reporting on the success or failure of the mediation.

Moreover, consideration would have to be given to the issue of the court’s role in approving or rejecting a mediated settlement.²¹⁴ Whilst the issue of court-approval of settlement did not arise in *Children’s Resource Centre Trust*, the court held that some similar requirement would need to be imposed when that situation does arise.²¹⁵ In *Nkala v Harmony Gold Mining Company Limited*²¹⁶ (“Nkala”), Mojapelo DJP held that such approval is required in terms of the Contingency Fees Act 66 of 1997 and that, in any event, settlement agreements concluded post-certification should be subject to court approval to ensure that it is “fair, reasonable, adequate and that it protects the interests of the class”.²¹⁷

²¹⁰ The proposed legislative framework should make it clear that only disputes that are subject to litigation are susceptible to court-annexed mediation. Otherwise, the parties are free to engage in private mediation.

²¹¹ For example, as class actions are instituted in the superior courts, no provision would need to be made for reference to a clerk of the court.

²¹² R.R.O. 1990, Reg. 194 under *Courts of Justice Act*, R.S.O. 1990, c. C.43.

²¹³ As the time-period is likely to be regulated by the rules, it would typically be court days (i.e. weekends and public holidays are excluded from the calculation of the time-period).

²¹⁴ Regarding court approval of settlement see, for example, Rothstein & Willging *Managing Class Action Litigation: A Pocket Guide for Judges* 8 and the *Manual for Complex Litigation* 172-173.

²¹⁵ Paras 46-48. See also *Pretorius v Transnet Second Defined Benefit Fund* 2014 6 SA 77 (GP) para 21.

²¹⁶ (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016).

²¹⁷ Para 39.

5 5 Conclusion

Class actions are inherently complex and they involve the interests of large numbers of people and, generally, significant amounts of money. They necessitate a more active management approach by the judges who are required to adjudicate over them. As Hurter states:

“It should be pointed out that since class action litigation is complex litigation, the procedural rules required to achieve proper management are fairly complex and to this end the usual procedural rules regulating ordinary litigation are inadequate. The potential volume of plaintiffs in a class action offers a logistical challenge to the plaintiff attorney, representative plaintiff, and the court, requiring innovative procedural rules to ensure proper management of the litigation. Proper and effective management of class actions is crucial to the success of class actions.”²¹⁸

Court management is aimed at facilitating the achievement of justice in a speedy and cost-effective manner. This aim is not facilitated by unfettered party control because the legal representatives generally act in the interests of their own clients. For example, in some cases it may be in a party's interests to delay the proceedings or to engage in procedural disputes. Further, as mentioned above, unidentified parties' interests may not be properly considered without active court management.²¹⁹

South Africa still has some way to go insofar as its approach to the effective management of class actions is concerned, especially when compared to the selected foreign jurisdictions. All of the foreign jurisdictions referred to above have adopted comprehensive legislation to regulate class actions. Their legislation encourages and mandates an active role by courts in managing class actions. However, our courts continue to rely on their inherent jurisdiction, as echoed in section 173 of the Constitution, to manage class actions.²²⁰ Our class action system remains exposed to the inherent limitations of

²¹⁸ Hurter (2006) *CILSA* 489. See also J C Alexander *An Introduction to Class Action Procedure in the United States* (2000) Paper Presented at Conference *Debates over Group Litigation in Comparative Perspective*, Geneva, Switzerland <<https://law.stanford.edu/publications/an-introduction-to-class-action-procedure-in-the-united-states/>> (accessed 02/02/2016), regarding the courts' active role in managing class actions.

²¹⁹ Morabito (2003) *Texas International Law Journal* 672.

²²⁰ Supplemented by the practice directives of the respective divisions of the High Court of South Africa. As mentioned, section 173 provides that “[t]he Constitutional Court, Supreme Court of Appeal and High Courts

unregulated *ad hoc* managerial judging in class proceedings. Further, our courts are still far from institutionalizing effective case management techniques.

It is therefore recommended that judges should be expressly empowered by legislation to assume an active role to enable class actions to be managed efficiently and to ensure that the interests of absent class members are protected against unnecessary dismissal of class actions because of manageability problems. A broad discretionary management power is necessary, because it is impossible to anticipate all the circumstances arising in a class proceeding where the intervention of the court is appropriate or desirable. However, where such circumstances can be contemplated, it should be dealt with in legislation or court rules promulgated especially for this purpose. According to Hurter, “much of the success of this procedural device depends on how it is viewed by the judiciary: if negatively, then its growth (application field) is restricted and its value as an instrument to facilitate better access to justice is diminished”.²²¹ She therefore states that the extended judicial role should not be left to the courts to develop.²²² The proposed adoption of a legislative framework to regulate class actions is also premised upon the approaches of prominent foreign jurisdictions in this regard. For example, Brunet refers to Resnik when he states as follows regarding the change in the American judiciary following upon the introduction of the Federal Rules:

“Professor Resnik first described the federal judge sitting in 1915 as a ‘solo player,’ noting that there were only 120 district judges at that time who sat ‘with few shared practices.’ The early twentieth century federal judge toiled in isolation. Resnik points out that the twentieth century growth of the American Bar Association led to procedural reforms such as passage of the Federal Rules of Civil Procedure. *In the pre-Federal Rules period, the lack of uniform procedures undoubtedly contributed to a culture of judging that excluded pressures to settle rather than to try cases. Resnik sees the passage of the Federal Rules as part of a more significant trend toward unifying the federal judiciary.*”²²³ (own emphasis).

Thus, it is further proposed that mediation as an effective class action management and resolution tool be institutionalised in our superior courts. There are many reasons why

have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice”. See the discussion at 5 3 4 as to why it is not desirable.

²²¹ Hurter (2006) *CILSA* 489.

²²² 489.

²²³ Brunet (2002/2003) *Nevada Law Journal* 242.

court-annexed mediation of class actions may be beneficial from the perspective of managing and resolving class actions in South Africa.²²⁴ For example, according to Kratz, complex cases generally take much longer to finalise and their costs are typically astronomical. Alternative dispute resolution methods such as the one proposed herein may accordingly be preferable.²²⁵

It is therefore recommended that provision should be made for court-annexed mediation of class actions on consensual and mandatory grounds for the reasons set out above.²²⁶ Ultimately, institutionalised mediation could be an extremely valuable tool to assist our courts in managing and resolving class actions:

“Mediation's statistical evidence out-distances the other processes available. Court-annexed mediation is the trend of the future in court annexed dispute resolution. As attorneys, judges, and litigants become more educated about the mediation process, the number of cases being settled in mediation will continue to increase...There is little rocket science involved in the conclusion to be drawn from the evidence regarding court-annexed dispute resolution. The process that produces the most significant and permanent reductions in cases to be tried will become the process of choice for court-annexed dispute resolution. Mediation is that process, and it is the future of court-annexed dispute resolution.”²²⁷

A legislative framework regulating class actions, including the management of such proceedings, as well as mediation aimed at resolving the issues involved, is certainly the ideal solution. However, given the failure by the South African government to act on recommendations to this effect from various experts and bodies since the commencement of our constitutional democracy, it is conceivable, if not probable, that our government would similarly ignore the recommendations contained herein. It may therefore be preferable for our courts to develop guidelines, as is the case with the American Pocket Guide for Judges, or to implement practice directives to address the issues raised herein,²²⁸ or to utilise a combination of both.

²²⁴ See, for example, 5 4 1 above.

²²⁵ Kratz (1988-1989) *UMKC L Rev* 841.

²²⁶ See 5 4 4 1 above.

²²⁷ K F Dunham “The Future of Court-Annexed Dispute Resolution Is Mediation” (2001) 5 *Jones L Rev* 35 49.

²²⁸ To the extent that such issues are not already addressed in the practice directives of the respective divisions of the High Court of South Africa.

Such guidelines or practice directives would assist in promoting judicial uniformity although, as mentioned, it is not the preferred method of regulating class actions. Implementing practice directives may generally be more suitable as they are binding and acquire the legal force and effect that such directives have; however, they would not seek to override the Uniform Rules. Although the directives would be binding upon the courts, they are nevertheless flexible and could be developed further as class action law continues to mature in South Africa.²²⁹ It should, however, be understood that, if our government does decide to act on the above-mentioned recommendations, the legislature would be well advised to take cognisance of the content of such guidelines or directives, as the case may be.

In conclusion, a brief note on the role of the judge *vis-à-vis* the mediator may be appropriate. Mediating mega-cases²³⁰ present huge challenges for the judges who are required to manage them.²³¹ Green therefore suggests that class action judges should play an active role by encouraging, ordering and managing the mediation. It is submitted that such an approach is essential for mediation to be an effective class action management tool. It would be contradictory to propose that our judges should become active managers of class actions, but that they should refrain from properly utilising the tools necessary to enable the effective management of the class proceedings. However, it is submitted that caution should be exercised regarding Green's suggestion that judges should actively engage in the mediation itself.

The propriety and desirability of judges attempting to mediate cases assigned to them for trial is questionable.²³² Warren observes in this regard that, where judges mediate disputes privately, justice is closed to the community; rather, judges are supposed to conduct their work publicly and to be transparent in what they do.²³³ Brunet states that, where a judicial mediation process does not instill public confidence, it could result in

²²⁹ *Nkala v Harmony Gold Mining Company Limited* (48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13) 2016 ZAGPJHC 97 (13 May 2016) para 87.

²³⁰ A class action is a type of mega-case to which Green refers. In this regard, see Green (2006) *Boston University Law Review* 1171.

²³¹ 1171, 1202.

²³² P Robinson "Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial" (2006) 2 *Journal of Dispute Resolution* 1 2.

²³³ M Warren AC "Should judges be mediators?" (2010) 21 *ADRJ* 77 84.

institutional distrust and, if this occurs, it would be difficult for even the most respected or experienced judges to mediate effectively.²³⁴ It is submitted that the role of judges should not be diluted.²³⁵ Further, the risk arises that the judge may be perceived as reaching a decision in a matter based on the evidence and arguments presented at the mediation, rather than at the trial itself.²³⁶ Another concern regarding judges mediating class actions is that it would entail the relocation of precious judicial resources (judges) away from trials and appeals.²³⁷ It is accordingly submitted that, although a judge should manage the class action mediation, the judge should not become the class action mediator.

²³⁴ E Brunet “Judicial Mediation and Signaling” (2002/2003) 3 *Nevada Law Journal* 232 237.

²³⁵ Warren AC (2010) *ADRJ* 84.

²³⁶ Brunet (2002/2003) *Nevada Law Journal* 246.

²³⁷ Warren AC (2010) *ADRJ* 84.

CHAPTER SIX: CONCLUSION

6 1 Introduction

The aim of this study was to analyse key aspects of the class action procedural framework developed by South African courts, with a view to assisting the development of a local structure for the adjudication of such actions. In furthering this aim, substantial use was made of comparative perspectives, which especially draw on the experiences in Australia, Ontario and the United States.

The South African law on class actions has not yet been subjected to a comprehensive and critical analysis aimed at providing answers to the research questions posed in the preceding chapters. At present, the development of the procedural framework within which the class action device operates depends entirely on our courts. As mentioned,²³⁸ however, it is not ideal to develop class action procedure on an *ad hoc*, case-by-case basis. The introduction of comprehensive legislation regulating class actions in South Africa is accordingly desirable. This dissertation aims to contribute to the future development of legal theory in this regard.

With these considerations in mind, this chapter first sets out the findings and recommendations made. It then considers the relationship between, and significance of, its main findings and recommendations.

6 2 Findings and recommendations

The first question posed in the dissertation is when a class action, compared to joinder, is the appropriate procedural device to be utilised for the adjudication of a claim.²³⁹ It was found that no guidance has been provided by the legislature and our courts on the test that should be applied to answer this question. It is accordingly recommended that the appropriate approach is for the court to assess whether certification of a class action is necessary to achieve access to justice. This includes considering whether there are any potential barriers to access to justice. Such barriers include the geographical dispersion of class members, the inability of class members to engage in individualised litigation and the

²³⁸ See 1 2 in chapter one above.

²³⁹ This question is considered in chapter two above.

difficulties associated with litigation through joinder. The court must further determine whether a class action is necessary to achieve judicial economy and behaviour modification.²⁴⁰ Finally, the court should consider any other relevant factor that may assist it in determining whether class proceedings are otherwise appropriate. This entails taking all the surrounding circumstances into account and considering any other relevant factor that may assist it in determining whether a class action is otherwise appropriate. Such factors could include: (1) the manageability of the class action;²⁴¹ (2) the importance of the common issues in relation to the claims as a whole; and (3) whether the class members' claims are large enough to warrant being pursued separately.

The above-mentioned manageability consideration in particular requires taking into account *inter alia* the identifiability²⁴² of class members, the size of the class²⁴³ and the extent of the non-common issues that would require individualised adjudication. Moreover, determining whether it is 'otherwise appropriate' to certify a class action entails taking all circumstances surrounding the case into account. A holistic, common sense and pragmatic approach needs to be adopted when the assessment is made, having regard to all the circumstances of the case. It is further recommended that legislation should be adopted to regulate our courts' assessment of the appropriateness of class proceedings as set out above.

Secondly, it was enquired whether scope exists for the opt-in class action regime, as opposed to the opt-out class action regime, in South African law.²⁴⁴ In *Mukaddam v Pioneer Foods (Pty) Ltd*²⁴⁵ ("Mukaddam SCA"), Nugent JA suggested that joinder is the appropriate procedural device where all the claimants are identifiable. It is accordingly unclear whether there is scope for the opt-in class action regime in South African law. It is recommended that our courts should be afforded a discretion to choose, with regard to the circumstances of each case, whether to require opt-in notice, opt-out notice or no notice at

²⁴⁰ See 6 3 2 below.

²⁴¹ See 6 3 3 below.

²⁴² See 6 3 1 below.

²⁴³ See 6 3 3 below.

²⁴⁴ This question is also considered in chapter two.

²⁴⁵ 2013 2 SA 254 (SCA).

all.²⁴⁶ The opt-in regime would typically be utilised in circumstances where the size of the class²⁴⁷ is much more limited, compared to where an opt-out regime is followed where the individual class members are identifiable,²⁴⁸ and where each class member has a substantial individual claim. The identifiability of class members is not the only consideration - circumstances may arise where the class members are identifiable, but where joinder is nonetheless cumbersome and inappropriate.²⁴⁹ There is accordingly scope for the opt-in class action regime in South African law, which should afford our courts a discretion to make opt-in, opt-out or no-notice orders.

The third question was when, if ever, notice of a class action should be given to class members?²⁵⁰ Again, no legislative or judicial guidance has been provided on this issue. The general point of departure in the context of the opt-out class action regime is that, in accordance with the principle of *audi alteram partem* and the doctrine of *res judicata*, class members should receive notice of the proceedings in terms of which they are, amongst other things, informed of their right to opt out of the class action. However, circumstances may arise where no notice of the class action may be required. It is recommended that the court takes the following factors into consideration to assist it in making this determination: (1) the extent to which the members of the class may be prejudiced by being bound by a judgment given in an action which may not have come to their attention; (2) the potential size of the class;²⁵¹ (3) the general level of education and development of the members of the class; (4) the ease with which members of the class can be identified;²⁵² (5) the type of relief claimed; (6) where monetary relief is claimed, the amount of the claim of each member of the class; (7) the difficulties likely to be encountered by members of the class in enforcing their actions individually; and (8) any other relevant factor.

In the context of the opt-in class action regime, it is recommended that notice of the class action to class members should always be given. It is an *absolute* requirement.

²⁴⁶ Although this issue is briefly mentioned in chapter two, chapter three considers notice of class actions in detail.

²⁴⁷ See 6 3 3 below.

²⁴⁸ See 6 3 1 below.

²⁴⁹ Hence, class proceedings may be appropriate. In particular, the opt-in regime may be preferable. See also 6 3 1 below.

²⁵⁰ This question is considered in chapter three.

²⁵¹ See 6 3 3 below.

²⁵² See 6 3 1 below.

Fourthly, assuming that notice should be given to class members, it was asked whether individual notice to each class member is required, or whether some form of general notice to the class would suffice.²⁵³ Once more, legislative and judicial guidance is absent. Although individual notice of class actions to class members is preferable, circumstances may arise where such notice is simply not feasible or possible. For example, it would be impossible to issue individual notice where the class members are unidentifiable.²⁵⁴ In such circumstances, it is recommended that compliance with the 'adequacy of representation' certification requirement should be regarded as sufficient protection of the class members' interests and that their right to be heard could justifiably be limited by not requiring that individual notice of the opt-out class action be given to them. Otherwise, if individual notice of the opt-out class action is to be regarded as an absolute requirement from which derogation is impermissible, it would undermine one of the primary objectives of class actions, which is to facilitate access to justice.²⁵⁵

Where the court exercises its discretion and orders that general notice, as opposed to individualised notice, be given, it is recommended that reasonable notice should be required. In other words, a reasonable attempt should be made to ensure that the class members are aware of the class action and of their right to opt out. Reasonableness should be assessed based on the circumstances of each case. This assessment should take place in light of the purpose of the notice requirement, namely to bring relevant information about the claim and the hearing to the attention of anyone affected by it.

Fifthly, it was enquired whether the fact that certain issues may need to be determined individually in a mass personal injury class action, precludes using it as a means to adjudicate class members' claims. If this was not the case, the further question arose as to what the procedural devices are that our courts could use to determine damages in mass personal injury class actions.²⁵⁶

²⁵³ This question is also considered in chapter three.

²⁵⁴ Section 8(2)(d) of the Draft Bill proposed by the SALC, which deals with notice of class actions.

²⁵⁵ See 6.3.2 below.

²⁵⁶ These questions are considered in chapter four.

All that is required to succeed with the certification application is “some common claim or issue that can be determined by way of a class action”.²⁵⁷ It is accordingly recommended that the existence of individual issues should not necessarily preclude certification of a mass personal injury class action as a means to adjudicate class members’ claims. However, when dealing with an application for certification of a dispersed incident mass personal injury class action, the position may differ. Because of the extent of the non-common issues that require determination in order to dispose of class members’ claims, it is recommended that the extent of the non-common issues that require individualised determination should form part of the manageability enquiry during the certification proceedings.

It is recommended that individual proof of damages in mass personal injury class actions should, in principle, always be required by South African courts. There may, however, be devices that could be utilised to facilitate individual proof of damages in a mass personal injury class action. One such device that could be utilised when a court has to determine damages in single-accident mass personal injury class actions,²⁵⁸ is a protocol in terms of which the requisite standard of proof could be met by the submission of an affidavit deposed to by each class member who has opted into the second phase of the class proceedings. The affidavit should contain *facta probantia* evidentiary material necessary to prove the class member’s entitlement to the quantum of damages claimed. The defendant should be provided the opportunity to respond to the individual class members’ claims through filing an answering affidavit, which addresses the issues raised in each class member’s founding affidavit. A further opportunity to settle individual class members’ claims presents itself through the filing of replying affidavits by the class members in circumstances where the defendant disputes their claims. The defendant may, upon receipt of the replying affidavit and in light of its contents, agree to the quantum of damages claimed by the individual class member concerned.

The court would then have the option to request that a court-appointed panel of experienced and suitably qualified medical and actuarial experts conduct evaluations on behalf of the court to consider the damages claims filed by the individual class members.

²⁵⁷ *Trustees for the time being of the Children’s Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA) para 23.

²⁵⁸ It may also be that the proposal is utilised in the context of dispersed incident mass personal injury class actions. Consider chapter four in this regard.

The court would have the option to refer any aspect of a class member's claim, or all the class members' claims in their entirety, to the court-appointed panel for their consideration and evaluation. The court-appointed panel would need to prepare a report regarding its evaluation that should be filed at court along with the evidentiary material of the individual class members and the defendant. Ultimately, when the court receives the evidentiary material, it would need to assess it to make a finding 'on the papers'. If the court deems it necessary to receive oral evidence on a particular issue, it may request that the witness concerned attends at court for this purpose. The report provided by the panel of court-appointed experts may accordingly be supplemented, where necessary, through testimony in open court.

It is suggested that the implementation of the above proposals would require our judges to become more active in managing the proceedings – i.e. to become proactive in identifying issues, gathering evidence and taking full control of the proceedings.²⁵⁹

The sixth main research question was how a class action should be managed and what the role of the courts should be in this regard.²⁶⁰ It is recommended that an active judicial management approach is necessary to ensure that the class action does not fail due to management difficulties. Further, it may be preferable to regulate the courts' judicial management powers statutorily. Beyond the implementation of a legislative framework to regulate the courts' judicial management powers, it is also necessary to consider the specific tools our courts could utilise to manage class actions effectively. In this regard, it is recommended that provision should be made for court-annexed mediation of class actions in South Africa.

6 3 Synthesis of findings

The findings and recommendations made in respect of each of the above-mentioned research questions may at first appear to be distinct or unrelated, insofar as each set of findings and recommendations covers a different area of class action procedure. However, further reflection reveals that there are certain underlying connections, and that the

²⁵⁹ See 6 3 3 below.

²⁶⁰ These questions are considered in chapter five.

solutions proposed to problems at times may be more integrated or complementary in nature.

Consider, for example, the relationship between chapters two and four of the dissertation. Chapter two *inter alia* sets out a proposed test for considering the appropriateness of a class action. This test is given more specific content in chapter four, where it is recommended that the availability and potential utility of judicial devices to assess damages should be a relevant matter that informs judicial discretion as to whether or not a court will determine a class action to be the appropriate method to adjudicate class members' claims. It is also recommended that the extent of the non-common issues that would require individualised adjudication should form part of the court's appropriateness-inquiry. Further connections between the various problems and proposed solutions are also apparent when considering the prominent common issues or underlying themes in the following part of this chapter.

Ultimately, the integrated or complementary nature of the proposed solutions referred to above share the aim of fostering the class action objectives mentioned in chapter one of this dissertation. In other words, they aim to advance access to justice, to promote judicial economy and to effect behaviour modification.

6 3 1 Identifiability of class members and the opt-in class action regime compared to the opt-out class action regime

The identifiability of class members is a consideration that features prominently throughout the dissertation.

Chapter two essentially considers whether the fact that class members are identifiable necessarily means that a class action is not the appropriate mechanism to adjudicate class members' claims. It also considers the viability of the opt-in class action regime in light of Nugent JA's suggestion in *Mukaddam SCA* that joinder is the appropriate procedural device where all the claimants are identifiable. Further, it is recommended that, to determine whether a class action is the most appropriate means of adjudicating class members' claims, the court should consider the manageability of the class action, which includes considering *inter alia* the identifiability of class members.

The identifiability of class members is also an important consideration in chapter three of the dissertation, which deals with notice of class actions. It is a relevant consideration when determining whether notice should be given to class members and, if so, whether individual notice is required or whether some kind of general notice would suffice. For example, it may not be possible to give individual notice where the class members are unidentifiable.

Chapter four of the dissertation in turn contains a proposal that class members should be required to opt into the second phase of the class action where individual class members' quantum of damages is established. This would mean that group members would be precluded from maintaining claims for damages if they failed to take steps to identify themselves by a particular date. There is accordingly certainty as to the precise number of group members who maintain a claim in the proceeding.

It is apparent from the above that the identifiability of class members is relevant in order to determine whether class proceedings are appropriate. Specifically, it forms part of the manageability consideration during certification. Where a court finds class proceedings to be the appropriate mechanism to adjudicate class members' claims, the court would need to decide whether notice should be given to class members and, if so, whether individual notice is required or whether some kind of general notice would suffice. Class members' identifiability will essentially inform these issues. The opt-in proposal contained in chapter four reinforces the findings and recommendations made in chapters two and three that there is indeed scope in South African law for the opt-in class action regime and that it is coupled with the discretion of our courts to make opt-in, opt-out or no-notice orders. It relates to identifiability insofar as the opt-in regime is generally utilised in circumstances where the class members are identifiable. Broadly stated, it therefore follows that, where class members are identifiable, class proceedings may be manageable and ultimately found to be appropriate in the form of the opt-in regime coupled with individual notice of the class action to class members.

6 3 2 Principal objectives of class actions

A central underlying theme of the dissertation is the importance of the class action objectives in the context of class actions in South Africa and in the selected foreign jurisdictions. As we have seen, these objectives include access to justice, judicial economy

and behaviour modification. For example, in chapter two it is indicated that Australia, Ontario and the United States clearly emphasise the objectives of class proceedings as important considerations when determining the appropriateness of class proceedings, compared to joinder. The chapter accordingly proposes, as mentioned above, that our courts' point of departure in determining whether a class action is the appropriate mechanism to adjudicate claimants' claims should be the class action objectives. This entails determining, with reference to the facts of the specific case, whether a class action is necessary to achieve these objectives. However, it is recommended that access to justice should be the primary consideration when assessing the appropriateness of class proceedings. The chapter also refers to potential barriers to access to justice, including the geographical dispersion of class members; the inability of claimants to engage in individualised litigation; and, the difficulties associated with requiring litigation through joinder.

The class action objectives are also prevalent in chapter three of the dissertation, which indicates that section 34 of the Constitution of the Republic of South Africa, 1996 ("Constitution") constitutes the point of departure to determine whether notice of a class action and of class members' right to opt out is required. This chapter also shows that, if our class action mechanism is to be successful – assuming that success is to be measured against the attainment of the class action objectives – then individual notice simply cannot be required in all circumstances. Although individual notice is preferable, circumstances may arise where it is not feasible or possible. If individual notice of the opt-out class action is an absolute requirement from which derogation is impermissible, it would undermine the primary purpose of the class action, which is to facilitate access to justice. The chapter also states that the importance of notice of an opt-in class action is underlined by one of the objectives of the class action mechanism, namely the attainment of judicial economy. Failure to give notice of an opt-in class action would, in all likelihood, result in a multiplicity of actions and the class action would fail to contribute to the efficiency of our courts and the consistency of judgments rendered by it.

Chapter four essentially seeks to establish a procedure for the resolution of individual issues that achieve the fine balance of procedural fairness and cost effectiveness while having regard to the class action objectives. The proposed procedure is conceivably less time-consuming than individual damages trials for each class member. Although class

members would be required to submit individual proof of injury, the procedure is designed to give effect to, and advance, the class action objectives.

Similarly, chapter five recognises the importance of the class actions objectives. For instance, it refers to the primary objectives of the Mediation Rules to assist case-flow management in the reduction of disputes appearing before court and to promote access to justice. The chapter also refers to Hurter who states that “much of the success of this procedural device depends on how it is viewed by the judiciary: if negatively, then its growth (application field) is restricted and its value as an instrument to facilitate better access to justice is diminished”.²⁶¹ She therefore suggests that the extended judicial role should not be left to the courts to develop.²⁶²

It is apparent from the above-mentioned that the class action objectives constitute key considerations throughout the dissertation, including when determining whether a class action is the appropriate mechanism to adjudicate class members’ claims and when considering notice of class proceedings. It is also relevant when devising procedures to resolve individual issues in mass personal injury class actions. Ultimately, it is possible to argue that all decisions made by judges when managing class actions in South Africa should take account of the importance of the class action objectives.

6 3 3 Manageability and the courts’ role in managing class actions

Apart from the identifiability of class members and the class action objectives, there are other common issues or themes, such as the size of the class. Chapter two refers to the fact that it is generally the case that the size of the class in an opt-in class action is smaller compared to the size of the class in an opt-out class action. It also mentions that the opt-in procedure is typically utilised in circumstances where the size of the class is much more limited compared to where an opt-out procedure is typically used.²⁶³ Further, the test formulated to assess the appropriateness of class proceedings²⁶⁴ entails taking account of

²⁶¹ E Hurter “Some Thoughts on Current Developments Relating to Class Actions in South African Law as Viewed Against Leading Foreign Jurisdictions” (2006) *CILSA* 39(3) 485 489. Although it may be preferable, it will not necessarily be possible. See the concluding comments of chapter five above in this regard.

²⁶² 489.

²⁶³ See 6 3 1 above.

²⁶⁴ This issue is considered in chapter two of the dissertation.

the size of the class as part of the manageability-consideration.²⁶⁵ Chapter three provides that, when deciding whether notice should be given to class members and, if so, what directions are appropriate in respect thereof, the potential size of the class should be considered, along with other factors.

Ultimately, however, the core themes of this dissertation, which culminates in chapter five, are the manageability of class actions and the court's role in managing class proceedings. Chapter two emphasises the importance of both these issues. Regarding manageability as a factor to be considered during certification, the chapter refers to rule 23(b)(3) of the American Federal Rules of Civil Procedure ("Federal Rules"), which pertains to the opt-out damages class action, and specifically requires that courts assess whether class action proceedings is "superior to other available methods for fair and efficient adjudication of the controversy". Rule 23(b)(3)(A)-(D) lists four factors that must be considered by a court in making the superiority assessment. One such factor is contained in rule 23(b)(3)(D) which entails considering "the likely difficulties in managing a class action". Manageability is also a certification consideration in Ontario. In *Hollick v Toronto (City)*²⁶⁶ ("*Hollick*") it was held that the preferability criteria in section 5(1)(d) merits consideration of whether the proposed class action would be a fair and manageable method of advancing the plaintiffs' claims, taking into account the importance of the common issues in relation to the claims as a whole. The chapter accordingly recommends that our courts need to consider the manageability of the class action, which entails taking into account *inter alia* the size of the class,²⁶⁷ the identifiability of class members²⁶⁸ and the extent of the non-common issues that would require individualised adjudication.

Regarding manageability as a factor to be considered during certification, chapter three commences by stating that the issue of notice is a rather complicated one, especially in circumstances where the class is substantial, and it comprises individuals who are poor, illiterate and often without access to the resources that are required to bring the action to their attention. The method employed in giving notice and the accompanying costs may raise complex issues that could even threaten the continuation of a class action. These

²⁶⁵ As mentioned in chapter two, the identifiability of class members is also considered to form part of the manageability-consideration.

²⁶⁶ 2001 3 SCR 158.

²⁶⁷ See the discussion on class size at the commencement of 6 3 3 above.

²⁶⁸ See 6 3 1 above.

types of manageability concerns are relevant when a court has to consider whether to certify the class action. Similarly, chapter four deals with manageability as a factor to be considered during certification. The chapter shows that, in the context of a mass personal injury class action, a concern is the disparate injury claims of thousands of plaintiffs who at some stage in the action will all be required to come to court individually and to prove their own injury and damages. This gives rise to serious manageability issues. It may therefore result in our courts refusing to certify dispersed incident mass personal injury class actions.

Regarding the court's role as judicial manager of the proceedings, chapter two states that, because class action litigation is traditionally more complex than other kinds of litigation, it requires increased judicial management. Chapter three, in turn, considers the need for our courts to protect absent class members. To do this, it is proposed that judges would need to become more actively involved in the management of the class action. Chapter four reinforces the need for our judges to become actively involved in the management of class actions. The proposal made in the chapter would essentially entail that our judges become more proactive in identifying issues and gathering evidence and also take full control of the proceedings and govern the participation of the parties.

Chapter five encapsulates the above by arguing, as a point of departure, that because of the management difficulties generally encountered in class action litigation, effective judicial management is considered increasingly important for the efficient functioning of class actions. It is from this perspective that it becomes apparent that continuous emphasis in the dissertation on manageability as a consideration during certification essentially results in the need for active judicial management of class proceedings. The chapter specifically considers the nature of the court's role in class action litigation and it proposes mediation as a tool to manage and possibly resolve class actions.

It is apparent from what has been set out above that the manageability of class actions, as a consideration during certification, and the court's role in managing class proceedings, are the overarching themes of the dissertation. They are linked to all the other issues or themes discussed above. For example, the identifiability of class members is a relevant consideration in order to decide whether the class action is manageable and whether class proceedings are appropriate. A court may decide in a given case that, because class members are unidentifiable, thus making individual notice inappropriate, because of other

considerations forming part of the manageability consideration, the class action is unmanageable and therefore inappropriate.

A further example of the interrelatedness between class action manageability and the other issues or themes discussed above is the prevalence of the class action objectives in chapter four. These goals were referred to in chapter one. It provides *inter alia* that the challenge has been and will be to define procedures for the resolution of individual issues that achieve the fine balance of procedural fairness and cost effectiveness, while always having regard to the class action objectives. The chapter accordingly contains a recommendation that, to enable South African courts to experiment with devices aimed at assessing quantum of damages without the need for individual trials, they should enjoy a broad discretion in managing class actions. To give effect to the proposals made in chapter four, our courts would need to assume an active management role in respect of the class actions which they are required to adjudicate.

Similarly, chapter three shows that our courts should follow a lenient approach by emphasising the importance of adequacy of representation, rather than by insisting on individual notice to all members of a class. This approach is reinforced by the active managerial role that judges are expected to fulfil to protect the interests of absent class members.²⁶⁹ Therefore, the argument that a lack of (proper) notice impinges upon class members' right to a fair trial, should be viewed against adequacy of representation as a certification requirement and, moreover, against the courts' overall role in managing the class action and protecting the interests of absent class members.

6 4 Conclusion

At present, the framework within which class actions operate is mainly based on case law. It might seem fitting that our courts are currently responsible for developing a class action framework because of their atypical role in managing class actions. In other words, because the courts (and not the legislature) are required to manage class actions, it could be argued that they should be responsible for developing the class action framework. However, our courts appear to be developing the procedural framework regulating class actions, and addressing problems that arise in class proceedings, on an *ad hoc*, case-by-

²⁶⁹ Chapter five considers the courts' role in managing class actions. See also 6 3 3 above.

case, basis. Such an approach is neither preferable nor desirable. It does not lend itself to creating legal certainty or judicial consistency and uniformity. It has been shown that various contradictions, inconsistencies and problems remain within our current class action system. It has also been demonstrated that similar contradictions, inconsistencies and problems have been addressed in foreign jurisdictions by adopting comprehensive legislation to regulate such issues.

Throughout the dissertation, it has accordingly been recommended that wide-ranging legislation regulating class actions in South Africa should be promulgated, and certain proposals have been made on how this could be effected. As Zimand states, “[a] legislative solution is preferable. At a minimum, legislature must provide procedural legislation to bring some predictability, control and efficiency to this arena. It should be tailored to meet the modern crisis”.²⁷⁰ *In Re Fibreboard Corporation*²⁷¹ it was further held that “[t]he arguments [for class certification] are compelling, but they are better addressed to the representative branches – Congress and the State Legislature”. Wallis JA in *Children’s Resource Centre Trust* expressed similar sentiments.²⁷²

However, as mentioned, although it is desirable, it is unlikely that our legislature will in the near future adopt legislation that regulates class actions in South Africa. Therefore, although it is not the preferred route, it is recommended that our courts take it upon themselves, where possible, to develop guidelines and/or to implement practice directives to address the issues raised in this dissertation, and also possibly issues not covered herein. It is further submitted that such guidelines or practice directives would assist in promoting judicial consistency and uniformity. The implementation of practice directives can generally be supported, as they are binding and acquire legal force and effect; however, they would not override the Uniform Rules of Court. Although the directives would be binding upon the courts, they are nevertheless flexible and could be developed further as class action law continues to mature in South Africa.

²⁷⁰ P Zimand “National Asbestos Litigation: Procedural Problems Must be Solved” (1991) 69 *Washington University Law Review* 899 917.

²⁷¹ 893 F2d 706 712 (5th Cir 1990).

²⁷² Para 22.

ADDENDUM A: AMERICAN FEDERAL RULE 23

Rule 23: Class Actions

(a) **PREREQUISITES.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **TYPES OF CLASS ACTIONS.** A class action may be maintained if Rule 23(a) is satisfied and if:

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

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

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

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

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

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

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

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

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

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses*. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General*. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders*. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

ADDENDUM B: FEDERAL COURT OF AUSTRALIA ACT OF 1976

Part IVA—Representative proceedings

Division 1—Preliminary

33A Interpretation

In this Part, unless the contrary intention appears:

group member means a member of a group of persons on whose behalf a representative proceeding has been commenced.

representative party means a person who commences a representative proceeding.

representative proceeding means a proceeding commenced under section 33C.

respondent means a person against whom relief is sought in a representative proceeding.

sub-group member means a person included in a sub-group established under section 33Q.

sub-group representative party means a person appointed to be a sub-group representative party under section 33Q.

33B Application

A proceeding may only be brought under this Part in respect of a cause of action arising after the commencement of the *Federal Court of Australia Amendment Act 1991*.

Division 2—Commencement of representative proceeding

33C Commencement of proceeding

(1) Subject to this Part, where:

- (a) 7 or more persons have claims against the same person; and
- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- (c) the claims of all those persons give rise to a substantial common issue of law or fact;

a proceeding may be commenced by one or more of those persons as representing some or all of them.

(2) A representative proceeding may be commenced:

- (a) whether or not the relief sought:
 - (i) is, or includes, equitable relief; or
 - (ii) consists of, or includes, damages; or
 - (iii) includes claims for damages that would require individual assessment; or
 - (iv) is the same for each person represented; and

(b) whether or not the proceeding:

- (i) is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or
- (ii) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.

33D Standing

(1) A person referred to in paragraph 33C(1)(a) who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceeding against that other person on behalf of other persons referred to in that paragraph.

(2) Where a person has commenced a representative proceeding, the person retains a sufficient interest:

- (a) to continue that proceeding; and
- (b) to bring an appeal from a judgment in that proceeding; even though the person ceases to have a claim against the respondent.

33E Is consent required to be a group member?

(1) The consent of a person to be a group member in a representative proceeding is not required unless subsection (2) applies to the person.

(2) None of the following persons is a group member in a representative proceeding unless the person gives written consent to being so:

- (a) the Commonwealth, a State or a Territory;
- (b) a Minister or a Minister of a State or Territory;
- (c) a body corporate established for a public purpose by a law of the Commonwealth, of a State or of a Territory, other than an incorporated company or association; or
- (d) an officer of the Commonwealth, of a State or of a Territory, in his or her capacity as such an officer.

33F Persons under disability

(1) It is not necessary for a person under disability to have a next friend or committee merely in order to be a group member.

(2) A group member who is under disability may only take a step in the representative proceeding, or conduct part of the proceeding, by his or her next friend or committee, as the case requires.

33G Representative proceeding not to be commenced in certain circumstances

A representative proceeding may not be commenced if the proceeding would be concerned only with claims in respect of which the Court has jurisdiction solely by virtue of

the *Jurisdiction of Courts (Cross-vesting) Act 1987* or a corresponding law of a State or Territory.

33H Originating process

(1) An application commencing a representative proceeding, or a document filed in support of such an application, must, in addition to any other matters required to be included:

(a) describe or otherwise identify the group members to whom the proceeding relates; and

(b) specify the nature of the claims made on behalf of the group members and the relief claimed; and

(c) specify the questions of law or fact common to the claims of the group members.

(2) In describing or otherwise identifying group members for the purposes of subsection (1), it is not necessary to name, or specify the number of, the group members.

33J Right of group member to opt out

(1) The Court must fix a date before which a group member may opt out of a representative proceeding.

(2) A group member may opt out of the representative proceeding by written notice given under the Rules of Court before the date so fixed.

(3) The Court, on the application of a group member, the representative party or the respondent in the proceeding, may fix another date so as to extend the period during which a group member may opt out of the representative proceeding.

(4) Except with the leave of the Court, the hearing of a representative proceeding must not commence earlier than the date before which a group member may opt out of the proceeding.

33K Causes of action accruing after commencement of representative proceeding

(1) The Court may at any stage of a representative proceeding, on application made by the representative party, give leave to amend the application commencing the representative proceeding so as to alter the description of the group.

(2) The description of the group may be altered so as to include a person:

(a) whose cause of action accrued after the commencement of the representative proceeding but before such date as the Court fixes when giving leave; and

(b) who would have been included in the group, or, with the consent of the person would have been included in the group, if the cause of action had accrued before the commencement of the proceeding.

(3) The date mentioned in paragraph (2)(a) may be the date on which leave is given or another date before or after that date.

(4) Where the Court gives leave under subsection (1), it may also make any other orders it thinks just, including an order relating to the giving of notice to persons who, as a result of the amendment, will be included in the group and the date before which such persons may opt out of the proceeding.

33L Situation where fewer than 7 group members

If, at any stage of a representative proceeding, it appears likely to the Court that there are fewer than 7 group members, the Court may, on such conditions (if any) as it thinks fit:

- (a) order that the proceeding continue under this Part; or
- (b) order that the proceeding no longer continue under this Part.

33M Cost of distributing money etc. excessive

Where:

- (a) the relief claimed in a representative proceeding is or includes payment of money to group members (otherwise than in respect of costs); and
- (b) on application by the respondent, the Court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the respondent of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts;

the Court may, by order:

- (c) direct that the proceeding no longer continue under this Part; or
- (d) stay the proceeding so far as it relates to relief of the kind mentioned in paragraph (a).

33N Order that proceeding not continue as representative proceeding where costs excessive etc.

(1) The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part where it is satisfied that it is in the interests of justice to do so because:

- (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
- (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or
- (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or

(d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

(2) If the Court dismisses an application under this section, the Court may order that no further application under this section be made by the respondent except with the leave of the Court.

(3) Leave for the purposes of subsection (2) may be granted subject to such conditions as to costs as the Court considers just.

33P Consequences of order that proceeding not continue under this Part

Where the Court makes an order under section 33L, 33M or 33N that a proceeding no longer continue under this Part:

(a) the proceeding may be continued as a proceeding by the representative party on his or her own behalf against the respondent; and

(b) on the application of a person who was a group member for the purposes of the proceeding, the Court may order that the person be joined as an applicant in the proceeding.

33Q Determination of issues where not all issues are common

(1) If it appears to the Court that determination of the issue or issues common to all group members will not finally determine the claims of all group members, the Court may give directions in relation to the determination of the remaining issues.

(2) In the case of issues common to the claims of some only of the group members, the directions given by the Court may include directions establishing a sub-group consisting of those group members and appointing a person to be the sub-group representative party on behalf of the sub-group members.

(3) Where the Court appoints a person other than the representative party to be a sub-group representative party, that person, and not the representative party, is liable for costs associated with the determination of the issue or issues common to the sub-group members.

33R Individual issues

(1) In giving directions under section 33Q, the Court may permit an individual group member to appear in the proceeding for the purpose of determining an issue that relates only to the claims of that member.

(2) In such a case, the individual group member, and not the representative party, is liable for costs associated with the determination of the issue.

33S Directions relating to commencement of further proceedings

Where an issue cannot properly or conveniently be dealt with under section 33Q or 33R, the Court may:

- (a) if the issue concerns only the claim of a particular member—give directions relating to the commencement and conduct of a separate proceeding by that member; or
- (b) if the issue is common to the claims of all members of a sub-group—give directions relating to the commencement and conduct of a representative proceeding in relation to the claims of those members.

33T Adequacy of representation

(1) If, on an application by a group member, it appears to the Court that a representative party is not able adequately to represent the interests of the group members, the Court may substitute another group member as representative party and may make such other orders as it thinks fit.

(2) If, on an application by a sub-group member, it appears to the Court that a sub-group representative party is not able adequately to represent the interests of the sub-group members, the Court may substitute another person as sub-group representative party and may make such other orders as it thinks fit.

33U Stay of execution in certain circumstances

Where a respondent in a representative proceeding commences a proceeding in the Court against a group member, the Court may order a stay of execution in respect of any relief awarded to the group member in the representative proceeding until the other proceeding is determined.

33V Settlement and discontinuance—representative proceeding

(1) A representative proceeding may not be settled or discontinued without the approval of the Court.

(2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

33W Settlement of individual claim of representative party

(1) A representative party may, with leave of the Court, settle his or her individual claim in whole or in part at any stage of the representative proceeding.

(2) A representative party who is seeking leave to settle, or who has settled, his or her individual claim may, with leave of the Court, withdraw as representative party.

(3) Where a person has sought leave to withdraw as representative party under subsection (2), the Court may, on the application of a group member, make an order for

the substitution of another group member as representative party and may make such other orders as it thinks fit.

(4) Before granting a person leave to withdraw as a representative party:

(a) the Court must be satisfied that notice of the application has been given to group members in accordance with subsection 33X(1) and in sufficient time for them to apply to have another person substituted as the representative party; and

(b) any application for the substitution of another group member as a representative party has been determined.

(5) The Court may grant leave to a person to withdraw as representative party subject to such conditions as to costs as the Court considers just.

Division 3—Notices

33X Notice to be given of certain matters

(1) Notice must be given to group members of the following matters in relation to a representative proceeding:

(a) the commencement of the proceeding and the right of the group members to opt out of the proceeding before a specified date, being the date fixed under subsection 33J(1);

(b) an application by the respondent in the proceeding for the dismissal of the proceeding on the ground of want of prosecution;

(c) an application by a representative party seeking leave to withdraw under section 33W as representative party.

(2) The Court may dispense with compliance with any or all of the requirements of subsection (1) where the relief sought in a proceeding does not include any claim for damages.

(3) If the Court so orders, notice must be given to group members of the bringing into Court of money in answer to a cause of action on which a claim in the representative proceeding is founded.

(4) Unless the Court is satisfied that it is just to do so, an application for approval of a settlement under section 33V must not be determined unless notice has been given to group members.

(5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.

(6) Notice under this section must be given as soon as practicable after the happening of the event to which the notice relates.

33Y Notices—ancillary provisions

- (1) This section is concerned with notices under section 33X.
- (2) The form and content of a notice must be as approved by the Court.
- (3) The Court must, by order, specify:
 - (a) who is to give the notice; and
 - (b) the way in which the notice is to be given;and the order may include provision:
 - (c) directing a party to provide information relevant to the giving of the notice; and
 - (d) relating to the costs of notice.
- (4) An order under subsection (3) may require that notice be given by means of press advertisement, radio or television broadcast, or by any other means.
- (5) The Court may not order that notice be given personally to each group member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.
- (6) A notice that concerns a matter for which the Court's leave or approval is required must specify the period within which a group member or other person may apply to the Court, or take some other step, in relation to the matter.
- (7) A notice that includes or concerns conditions must specify the conditions and the period, if any, for compliance.
- (8) The failure of a group member to receive or respond to a notice does not affect a step taken, an order made, or a judgment given, in a proceeding.

Division 4—Judgment etc.**33Z Judgment—powers of the Court**

- (1) The Court may, in determining a matter in a representative proceeding, do any one or more of the following:
 - (a) determine an issue of law;
 - (b) determine an issue of fact;
 - (c) make a declaration of liability;
 - (d) grant any equitable relief;
 - (e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies;
 - (f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;
 - (g) make such other order as the Court thinks just.

(2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.

(3) Subject to section 33V, the Court is not to make an award of damages under paragraph (1)(f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.

(4) Where the Court has made an order for the award of damages, the Court may give such directions (if any) as it thinks just in relation to:

(a) the manner in which a group member is to establish his or her entitlement to share in the damages; and

(b) the manner in which any dispute regarding the entitlement of a group member to share in the damages is to be determined.

33ZA Constitution etc. of fund

(1) Without limiting the operation of subsection 33Z(2), in making provision for the distribution of money to group members, the Court may provide for:

(a) the constitution and administration of a fund consisting of the money to be distributed; and

(b) either:

(i) the payment by the respondent of a fixed sum of money into the fund; or

(ii) the payment by the respondent into the fund of such instalments, on such terms, as the Court directs to meet the claims of group members; and

(c) entitlements to interest earned on the money in the fund.

(2) The costs of administering a fund are to be borne by the fund, or by the respondent in the representative proceeding, as the Court directs.

(3) Where the Court orders the constitution of a fund mentioned in subsection (1), the order must:

(a) require notice to be given to group members in such manner as is specified in the order; and

(b) specify the manner in which a group member is to make a claim for payment out of the fund and establish his or her entitlement to the payment; and

(c) specify a day (which is 6 months or more after the day on which the order is made) on or before which the group members are to make a claim for payment out of the fund; and

(d) make provision in relation to the day before which the fund is to be distributed to group members who have established an entitlement to be paid out of the fund.

(4) The Court may allow a group member to make a claim after the day fixed under paragraph (3)(c) if:

- (a) the fund has not already been fully distributed; and
- (b) it is just to do so.

(5) On application by the respondent in the representative proceeding after the day fixed under paragraph (3)(d), the Court may make such orders as are just for the payment from the fund to the respondent of the money remaining in the fund.

33ZB Effect of judgment

A judgment given in a representative proceeding:

- (a) must describe or otherwise identify the group members who will be affected by it; and
- (b) binds all such persons other than any person who has opted out of the proceeding under section 33J.

Division 5—Appeals

33ZC Appeals to the Court

(1) The following appeals under Division 2 of Part III from a judgment of the Court in a representative proceeding may themselves be brought as representative proceedings:

- (a) an appeal by the representative party on behalf of group members and in respect of the judgment to the extent that it relates to issues common to the claims of group members;
- (b) an appeal by a sub-group representative party on behalf of sub-group members in respect of the judgment to the extent that it relates to issues common to the claims of sub-group members.

(2) The parties to an appeal referred to in paragraph (1)(a) are the representative party, as the representative of the group members, and the respondent.

(3) The parties to an appeal referred to in paragraph (1)(b) are the sub-group representative party, as the representative of the sub-group members, and the respondent.

(4) On an appeal by the respondent in a representative proceeding, other than an appeal referred to in subsection (5), the parties to the appeal are:

- (a) in the case of an appeal in respect of the judgment generally—the respondent and the representative party as the representative of the group members; and
- (b) in the case of an appeal in respect of the judgment to the extent that it relates to issues common to the claims of sub-group members—the respondent and the sub-group representative party as the representative of the sub-group members.

(5) The parties to an appeal in respect of the determination of an issue that relates only to a claim of an individual group member are that group member and the respondent.

(6) If the representative party or the sub-group representative party does not bring an appeal within the time provided for instituting appeals, another member of the group or sub-group may, within a further 21 days, bring an appeal as representing the group members or sub-group members, as the case may be.

(7) Where an appeal is brought from a judgment of the Court in a representative proceeding, the Court may direct that notice of the appeal be given to such person or persons, and in such manner, as the Court thinks appropriate.

(8) Section 33J does not apply to an appeal proceeding.

(9) The notice instituting an appeal in relation to issues that are common to the claims of group members or sub-group members must describe or otherwise identify the group members or sub-group members, as the case may be, but need not specify the names or number of those members.

33ZD Appeals to the High Court—extended operation of sections 33ZC and 33ZF

(1) Sections 33ZC and 33ZF apply in relation to appeals to the High Court from judgments of the Court in representative proceedings in the same way as they apply to appeals to the Court from such judgments.

(2) Nothing in subsection (1) limits the operation of section 33 whether in relation to appeals from judgments of the Court in representative proceedings or otherwise.

Division 6—Miscellaneous

33ZE Suspension of limitation periods

(1) Upon the commencement of a representative proceeding, the running of any limitation period that applies to the claim of a group member to which the proceeding relates is suspended.

(2) The limitation period does not begin to run again unless either the member opts out of the proceeding under section 33J or the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member's claim.

33ZF General power of Court to make orders

(1) In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

(2) Subsection (1) does not limit the operation of section 22.

33ZG Saving of rights, powers etc.

Except as otherwise provided by this Part, nothing in this Part affects:

- (a) the commencement or continuance of any action of a representative character commenced otherwise than under this Part; or
- (b) the Court's powers under provisions other than this Part, for example, its powers in relation to a proceeding in which no reasonable cause of action is disclosed or that is oppressive, vexatious, frivolous or an abuse of the process of the Court; or
- (c) the operation of any law relating to:
 - (i) vexatious litigants (however described); or
 - (ii) proceedings of a representative character; or
 - (iii) joinder of parties; or
 - (iv) consolidation of proceedings; or
 - (v) security for costs.

33ZH Special provision relating to claims under Part VI of the *Competition and Consumer Act 2010* etc.

(1) For the purposes of the following provisions, a group member in a representative proceeding is to be taken to be a party to the proceeding:

- (a) subsection 87(1) of the *Competition and Consumer Act 2010*;
- (b) subsection 238(1) of Schedule 2 to that Act, as that subsection applies as a law of the Commonwealth.

(2) An application by a representative party in a representative proceeding under:

- (a) subsection 87(1A) of the *Competition and Consumer Act 2010*; or
- (b) subsection 237(1) of Schedule 2 to that Act, as that subsection applies as a law of the Commonwealth;

is to be taken to be an application by the representative party and all the group members.

33ZJ Reimbursement of representative party's costs

(1) Where the Court has made an award of damages in a representative proceeding, the representative party or a sub-group representative party, or a person who has been such a party, may apply to the Court for an order under this section.

(2) If, on an application under this section, the Court is satisfied that the costs reasonably incurred in relation to the representative proceeding by the person making the application are likely to exceed the costs recoverable by the person from the respondent, the Court may order that an amount equal to the whole or a part of the excess be paid to that person out of the damages awarded.

(3) On an application under this section, the Court may also make any other order it thinks just.

ADDENDUM C: CLASS PROCEEDINGS ACT, 1992

S.O. 1992, Chapter 6

Last amendment: 2006, c.19, Sched.C, s.1(1).

Definitions

1. In this Act,

- “common issues” means,
 - (a) common but not necessarily identical issues of fact, or
 - (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; (“questions communes”)
- “court” means the Superior Court of Justice but does not include the Small Claims Court; (“tribunal”)
- “defendant” includes a respondent; (“défendeur”)
- “plaintiff” includes an applicant. (“demandeur”)

Plaintiff’s class proceeding

2.(1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class.

Motion for certification

(2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff.

(3) A motion under subsection (2) shall be made,

(a) within ninety days after the later of,

(i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and

(ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or

(b) subsequently, with leave of the court.

Defendant’s class proceeding

3. A defendant to two or more proceedings may, at any stage of one of the proceedings, make a motion to a judge of the court for an order certifying the proceedings as a class proceeding and appointing a representative plaintiff.

Classing defendants

4. Any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant.

Certification

5.(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members

Subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

- (a) would fairly and adequately represent the interests of the subclass;
- (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and
- (c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class.

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.

Certain matters not bar to certification

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

Refusal to certify: proceeding may continue in altered form

7. Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,

- (a) order the addition, deletion or substitution of parties;
- (b) order the amendment of the pleadings or notice of application; and
- (c) make any further order that it considers appropriate.

Contents of certification order

8.(1) An order certifying a proceeding as a class proceeding shall,

- (a) describe the class;
- (b) state the names of the representative parties;
- (c) state the nature of the claims or defences asserted on behalf of the class;
- (d) state the relief sought by or from the class;
- (e) set out the common issues for the class; and
- (f) specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out.

Subclass protection

(2) Where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the

court, the protection of the interests of the subclass members requires that they be separately represented, subsection (1) applies with necessary modifications in respect of the subclass.

Amendment of certification order

(3) The court, on the motion of a party or class member, may amend an order certifying a proceeding as a class proceeding.

Opting out

9. Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

Where it appears conditions for certification not satisfied

10.(1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.

Proceeding may continue in altered form

(2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties.

Powers of court

(3) For the purposes of subsections (1) and (2), the court has the powers set out in clauses 7 (a) to (c).

Stages of class proceedings

11.(1) Subject to section 12, in a class proceeding,

- (a) common issues for a class shall be determined together;
- (b) common issues for a subclass shall be determined together; and
- (c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 24 and 25.

Separate judgments

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

Court may determine conduct of proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

Court may stay any other proceeding

13. The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

Participation of class members

14.(1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

(2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

Discovery

Discovery of parties

15.(1) Parties to a class proceeding have the same rights of discovery under the rules of court against one another as they would have in any other proceeding.

Discovery of class members with leave

(2) After discovery of the representative party, a party may move for discovery under the rules of court against other class members.

(3) In deciding whether to grant leave to discover other class members, the court shall consider,

(a) the stage of the class proceeding and the issues to be determined at that stage;

(b) the presence of subclasses;

(c) whether the discovery is necessary in view of the claims or defences of the party seeking leave;

(d) the approximate monetary value of individual claims, if any;

(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered; and

(f) any other matter the court considers relevant.

(4) A class member is subject to the same sanctions under the rules of court as a party for failure to submit to discovery.

Examination of class members before a motion or application

16.(1) A party shall not require a class member other than a representative party to be examined as a witness before the hearing of a motion or application, except with leave of the court.

(2) Subsection 15 (3) applies with necessary modifications to a decision whether to grant leave under subsection (1).

Notice of certification

17.(1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section.

Court may dispense with notice

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

Order respecting notice

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

- (a) the cost of giving notice;
- (b) the nature of the relief sought;
- (c) the size of the individual claims of the class members;
- (d) the number of class members;
- (e) the places of residence of class members; and
- (f) any other relevant matter.

(4) The court may order that notice be given,

- (a) personally or by mail;
- (b) by posting, advertising, publishing or leafleting;
- (c) by individual notice to a sample group within the class; or
- (d) by any means or combination of means that the court considers appropriate.

(5) The court may order that notice be given to different class members by different means.

Contents of notice

(6) Notice under this section shall, unless the court orders otherwise,

- (a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;
- (b) state the manner by which and time within which class members may opt out of the proceeding;
- (c) describe the possible financial consequences of the proceeding to class members;
- (d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;

- (e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;
- (f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;
- (g) describe the right of any class member to participate in the proceeding;
- (h) give an address to which class members may direct inquiries about the proceeding; and
- (i) give any other information the court considers appropriate.

Solicitations of contributions

- (7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements.

Notice where individual participation is required

- 18.(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section.
- (2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

Contents of notice

- (3) Notice under this section shall,
 - (a) state that common issues have been determined in favour of the class;
 - (b) state that class members may be entitled to individual relief;
 - (c) describe the steps to be taken to establish an individual claim;
 - (d) state that failure on the part of a class member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;
 - (e) give an address to which class members may direct inquiries about the proceeding; and
 - (f) give any other information that the court considers appropriate.

Notice to protect interests of affected persons

- 19.(1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.
- (2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

Approval of notice by the court

20. A notice under section 17, 18 or 19 shall be approved by the court before it is given.

Delivery of notice

21. The court may order a party to deliver, by whatever means are available to the party, the notice required to be given by another party under section 17, 18 or 19, where that is more practical.

Costs of notice

22.(1) The court may make any order it considers appropriate as to the costs of any notice under section 17, 18 or 19, including an order apportioning costs among parties.

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass.

Statistical evidence

23.(1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

(2) A record of statistical information purporting to be prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity.

Notice

(3) Statistical information shall not be admitted as evidence under this section unless the party seeking to introduce the information has,

(a) given reasonable notice of it to the party against whom it is to be used, together with a copy of the information;

(b) complied with subsections (4) and (5); and

(c) complied with any requirement to produce documents under subsection (7).

Contents of notice

(4) Notice under this section shall specify the source of any statistical information sought to be introduced that,

(a) was prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada;

(b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public; or

(c) was derived from reference material generally used and relied on by members of an occupational group.

(5) Except with respect to information referred to in subsection (4), notice under this section shall,

(a) specify the name and qualifications of each person who supervised the preparation of statistical information sought to be introduced; and

(b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced.

Cross-examination

(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information.

Production of documents

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure.

Aggregate assessment of monetary relief

24.(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to

share in the award or to determine the exact shares that should be allocated to individual class members.

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

- (a) the use of standardized proof of claim forms;
- (b) the receipt of affidavit or other documentary evidence; and
- (c) the auditing of claims on a sampling or other basis.

Time limits for making claims

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section.

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court.

Extension of time

(9) The court may give leave under subsection (8) if it is satisfied that,

- (a) there are apparent grounds for relief;
- (b) the delay was not caused by any fault of the person seeking the relief; and
- (c) the defendant would not suffer substantial prejudice if leave were given.

Court may amend subs. (1) judgment

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so.

Individual issues

25.(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner.

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

- (a) dispense with any procedural step that it considers unnecessary; and
- (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

Time limits for making claims

(4) The court shall set a reasonable time within which individual class members may make claims under this section.

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

Extension of time

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5).

Determination under cl. (1) (c) deemed court order

(7) A determination under clause (1) (c) is deemed to be an order of the court.

Judgment distribution

26.(1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate.

- (2) In giving directions under subsection (1), the court may order that,
- (a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;
 - (b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and
 - (c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court.

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant.

(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined.

(6) The court may make an order under subsection (4) even if the order would benefit,
(a) persons who are not class members; or
(b) persons who may otherwise receive monetary relief as a result of the class proceeding.

Supervisory role of the court

(7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate.

Payment of awards

(8) The court may order that an award made under section 24 or 25 be paid,
(a) in a lump sum, forthwith or within a time set by the court; or
(b) in instalments, on such terms as the court considers appropriate.

Costs of distribution

(9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate.

Return of unclaimed amounts

(10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court.

Judgment on common issues

27.(1) A judgment on common issues of a class or subclass shall,

- (a) set out the common issues;
- (b) name or describe the class or subclass members;
- (c) state the nature of the claims or defences asserted on behalf of the class or subclass; and
- (d) specify the relief granted.

Effect of judgment on common issues

- (2) A judgment on common issues of a class or subclass does not bind,
- (a) a person who has opted out of the class proceeding; or
 - (b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).
- (3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,
- (a) are set out in the certification order;
 - (b) relate to claims or defences described in the certification order; and
 - (c) relate to relief sought by or from the class or subclass as stated in the certification order.

Limitations

- 28.(1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,
- (a) the member opts out of the class proceeding;
 - (b) an amendment that has the effect of excluding the member from the class is made to the certification order;
 - (c) a decertification order is made under section 10;
 - (d) the class proceeding is dismissed without an adjudication on the merits;
 - (e) the class proceeding is abandoned or discontinued with the approval of the court; or
 - (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.
- (2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

Discontinuance, abandonment and settlement

29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

Appeals

Appeals: refusals to certify and decertification orders

30.(1) A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding.

Appeals: certification orders

(2) A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court.

Appeals: judgments on common issues and aggregate awards

(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

Appeals by class members on behalf of the class

(4) If a representative party does not appeal or seek leave to appeal as permitted by subsection (1) or (2), or if a representative party abandons an appeal under subsection (1) or (2), any class member may make a motion to the court for leave to act as the representative party for the purposes of the relevant subsection.

(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may

make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3).

Appeals: individual awards

(6) A class member may appeal to the Divisional Court from an order under section 24 or 25 determining an individual claim made by the member and awarding more than \$3,000 to the member.

(7) A representative plaintiff may appeal to the Divisional Court from an order under section 24 determining an individual claim made by a class member and awarding more than \$3,000 to the member.

(8) A defendant may appeal to the Divisional Court from an order under section 25 determining an individual claim made by a class member and awarding more than \$3,000 to the member.

(9) With leave of the Superior Court of Justice as provided in the rules of court, a class member may appeal to the Divisional Court from an order under section 24 or 25,

(a) determining an individual claim made by the member and awarding \$3,000 or less to the member; or

(b) dismissing an individual claim made by the member for monetary relief.

(10) With leave of the Superior Court of Justice as provided in the rules of court, a representative plaintiff may appeal to the Divisional Court from an order under section 24,

(a) determining an individual claim made by a class member and awarding \$3,000 or less to the member; or

(b) dismissing an individual claim made by a class member for monetary relief.

(11) With leave of the Superior Court of Justice as provided in the rules of court, a defendant may appeal to the Divisional Court from an order under section 25,

(a) determining an individual claim made by a class member and awarding \$3,000 or less to the member; or

(b) dismissing an individual claim made by a class member for monetary relief.

Costs

31.(1) In exercising its discretion with respect to costs under subsection 131 (1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

Liability of class members for costs

(2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims.

Small claims

(3) Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court.

Fees and disbursements

32.(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

- (a) state the terms under which fees and disbursements shall be paid;
- (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
- (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

Court to approve agreements

(2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

Determination of fees where agreement not approved

- (4) If an agreement is not approved by the court, the court may,
- (a) determine the amount owing to the solicitor in respect of fees and disbursements;
 - (b) direct a reference under the rules of court to determine the amount owing; or
 - (c) direct that the amount owing be determined in any other manner.

Agreements for payment only in the event of success

33.(1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.

Interpretation: success in a proceeding

- (2) For the purpose of subsection (1), success in a class proceeding includes,
- (a) a judgment on common issues in favour of some or all class members; and
 - (b) a settlement that benefits one or more class members.

Definitions

(3) For the purposes of subsections (4) to (7),

“base fee” means the result of multiplying the total number of hours worked by an hourly rate; (“honoraires de base”)

“multiplier” means a multiple to be applied to a base fee. (“multiplicateur”)

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

- (a) given judgment on common issues in favour of some or all class members; or
- (b) approved a settlement that benefits any class member.

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

- (a) shall determine the amount of the solicitor’s base fee;
- (b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
- (c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee.

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding.

Motions

34.(1) The same judge shall hear all motions before the trial of the common issues.

(2) Where a judge who has heard motions under subsection (1) becomes unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

(3) Unless the parties agree otherwise, a judge who hears motions under subsection (1) or (2) shall not preside at the trial of the common issues.

Rules of court

35. The rules of court apply to class proceedings.

Crown bound

36. This Act binds the Crown.

Application of Act

37. This Act does not apply to,

- (a) a proceeding that may be brought in a representative capacity under another Act;
- (b) a proceeding required by law to be brought in a representative capacity; and
- (c) a proceeding commenced before this Act comes into force.

38. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT).

39. OMITTED (ENACTS SHORT TITLE OF THIS ACT).

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