Giving notice to members of opt-out class actions

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1 *Introduction*

This article 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)*,[1] 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 subject to a comprehensive and critical analysis in order to clarify when individual notice of the opt-out class action to each class member would be required, or whether some form of general notice to the class would suffice.

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.[2] 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.[3]

The South African law commission recommended that courts should have a discretion to make opt-in, opt-out or no notice orders.[4] The supreme court of appeal in the *Children's Resource Centre Trust* case 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,

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1 2013 1 All SA 648 (SCA), 2013 2 SA 213 (SCA). [The spelling in the printed law report is retained, although the company name is registered as "Pioneer Foods (Pty) Ltd" – ed].

2 Kirby "South Africa" in Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* (2012) 378 384.

3 De Vos "Judicial activism gives recognition to a general class action in South Africa" 2013 *TSAR* 370 378.

4 The South African Law Commission *The Recognition of Class Actions and Public Interest Actions in South African Law Report* Project 88 (1998) par 5.10.24. At the time it was known as the South African Law Commission. It became the South African Law Reform Commission in 2003 (*GG* 24277).

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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 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]

Ultimately, the purpose of this contribution 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 Ontario and the United States.

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

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 be departed from only 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 class members have a right not to be bound by a court order without having been afforded an opportunity to state their cases.[6]

The question then arises how notice should be effected. As the class-action judgment would have a binding (*res judicata*) effect on all members who fail 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 of it. 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 bound by the court decision and would be precluded from enforcing their claims individually outside the scope of the class action.

3 *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-á-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.

5 Kirby (n 2) 384.

6 See Currie and De Waal *The Bill of Rights Handbook* (2013) 673; South African Law Commission *The Recognition of a Class Action in South African Law* Working Paper 57, Project 88 (1995) par 5.23.

Unlike the categories of class actions contained in rules 23(b)(1) and (2),[7] which generally are not subject to notice of certification or a right to opt out,[8] class actions certified under rule 23(b)(3) are subject to specific notice and opt-out requirements.[9] Rule 23(b)(3) therefore affords due process protections through the requirement of notice and the opportunity to opt out of the class action.[10] Rule 23(c)(2) 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".[11] Any form of notice deemed necessary by the certifying judge must conform to the requirements of rule 23(c)(2)(B), which requires that the notice inform 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*[12] 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".[13] 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.[14] However, in *Eisen v Carlisle & Jacquelin*[15] 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.[16] 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

7 American Federal Rules of Civil Procedure.

8 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).

9 Klonoff *Class Actions and other Multi-party Litigation in a Nutshell* (2012) 193.

10 Mullenix "Re-interpreting American class action procedure: the United States supreme court speaks" 2000 *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 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.

11 According to Karlsgodt "United States" in Karlsgodt (ed) (n 2) 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.

12 339 (1950) US 306 315.

13 the *Mullane* case (n 12) 314.

14 the *Mullane* case (n 12) 314-315.

15 417 (1974) US 156.

16 the *Eisen* case (n 15) 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.

effectively prevent the class action from proceeding.[17] The decision in the *Eisen* case accordingly established a stricter standard for notice than was previously required to ensure due process.[18] 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.[19] This is exactly what happened in the *Eisen* case, 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 have accordingly caused serious problems.[20]

Although the *Eisen* case 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 be identified.[21] A case in point is *In re "Agent Orange" Products Liability Litigation*,[22] 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.[23]

The situation in Ontario differs from the situation in the United States. Whereas rule 23 favours individual notice, the Ontario Class Proceedings Act of 1992 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*) 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.

[17] 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 was acceptable where members of the class could not be located through reasonable means.

[18] 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.

[19] De Vos "Reflections on the introduction of a class action in South Africa" 1996 *TSAR* 639 647.

[20] Weinstein *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices* (1995) 136.

[21] Silberman "The vicissitudes of the American class action – with a comparative eye" 1999 *Tul J Int'l & Comp L* 201 212.

[22] (n 17).

[23] Silberman (n 21) 212.

4 *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 large[24] and the costs associated with the issuing of the notice are so excessive that this may result in the discontinuance of the class action. It may further be impossible to issue individual notice where, for example, the class members are unidentifiable.[25] For instance, in the *Children's Resource Centre Trust* case the putative class 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."[26]

The *sui generis* nature of class actions is 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.[27] 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.[28] In this regard Wallis JA, in the *Children's Resource Centre Trust* case 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".[29] The court held that, where the litigation is aimed at enriching the class representatives or serving 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, Wallis JA required that a court must be addressed on the following issues in the certification application:

i Whether the representative has the time, the inclination and the means to procure the evidence necessary to conduct the litigation.
ii 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.
iii 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.

[24] See s 8(2)(*b*) of the draft bill proposed by the South African Law Commission.
[25] s 8(2)(*d*).
[26] De Vos (n 19) 648.
[27] The South African Law Commission (n 4) par 5.6.20.
[28] the *Children's Resource Centre Trust* case (n 1) 228C-D.
[29] the *Children's Resource Centre Trust* case (n 1) 237G-H.

iv 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.

v 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 the *Children's Resource Centre Trust* case, the court held that some similar requirement would need to be imposed when that situation does arise.[30] In *Nkala v Harmony Gold Mining Company Limited,*[31] 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."[32]

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 law commission, 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 affected by the judgment. Referring to De Vos,[33] the law commission 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.[34] 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.[35]

If our class action mechanism is to be successful – if success is to be measured against the attainment of the class action objectives[36] – 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 the *Children's Resource Centre Trust* case, it was expressly stated that it is not a certification requirement that the individual identities of the class members must be known.[37] Such circumstances

[30] the *Children's Resource Centre Trust* case (n 1) 238C. See also *Pretorius v Transnet Second Defined Benefit Fund* 2014 6 SA 77 (GP) par 21.
[31] 2016 5 SA 240 (GJ).
[32] (n 31) par 39.
[33] De Vos (n 19) 654.
[34] The South African Law Commission (n 4) par 5.10.5.
[35] De Vos (n 19) 654-655.
[36] Access to justice, judicial economy and behaviour modification.
[37] the *Children's Resource Centre Trust* case (n 1) par 29.

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.[38] 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, 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 the *Pretorius* case.[39] 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.[40] This did not prevent the court from certifying the class action.[41] 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
> 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.

[38] The South African Law Commission (n 4) par 5.11.3.

[39] (n 30).

[40] In the *Children's Resource Centre Trust* case (n 1) par 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 his/her 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.

[41] 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.

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."[42]

The *Nkala* case[43] 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".[44]

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 possible alternative way to giving notice to class members.

5 *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 consider *De Beer NO v North-Central Local Council and South-Central Local Council*.[45] In the *De Beer* case 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.[46] 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

[42] the *Pretorius* case (n 30) 88-89.

[43] (n 31).

[44] the *Nkala* case (n 31) par 168.

[45] 2002 1 SA 429 (CC).

[46] the *De Beer* case (n 45) par 13. See also *Mukkaddam v Pioneer Food (Pty) Ltd 2*013 2 SA 254 (SCA) par 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.

> possible to bring the notice to the attention of the affected person if it is clear that fairness requires an investigation of that kind."[47]

Other factors that the constitutional court in the *De Beer* case 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.[48] The part of the judgment in the *De Beer* case 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*.[49] In the *Ngxuza* case, one of the terms of the order as agreed between the parties to the dispute pertained to notice:

> "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."[50]

The court in the *Ngxuza* case 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.[51] Although the court did not refer to the *De Beer* case, 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".[52] 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, 8 459 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 the *De Beer* case 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.[53]

It is apparent from the *De Beer* case 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

[47] the *De Beer* case (n 45) par 14.
[48] the *De Beer* case (n 45) par 15.
[49] 2003 JOL 11714 (E).
[50] the *Ngxuza* case (n 49) 3.
[51] the *Ngxuza* case (n 49) 6-7.
[52] the *Ngxuza* case (n 49) 10.
[53] the *Ngxuza* case (n 49) 10-11. This is similar to the "workable plan" requirement in the Class Proceedings Act, 1992.

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, that is the class members?

Generally, the rules of court make provision for what constitutes reasonable notice but, according to the *De Beer* case, 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 the *Mukaddam* case 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 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.[54] 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.[55]

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 law commission in section 8(2)[56] 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 law commission 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.[57]

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

[54] *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC) par 32.

[55] the *Mukaddam* case (n 54) par 31-33. S 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".

[56] Draft Bill.

[57] The South African Law Commission (n 4) par 5.10.21.

notice scheme has been executed?[58] 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.[59]

In the *Access to Justice Final 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 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."[60]

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.[61]

6 *Proof of notice*

Finally, a brief comment in respect of proof of notice in opt-out class actions may be appropriate. Although notice of the class action should generally be given to class members, there is 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.[62] 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

[58] the *De Beer* case (n 45) par 20.
[59] the *De Beer* case (n 45) par 13.
[60] Woolf *Access to Justice* (Final Report, 1996) 236-237.
[61] Victorian Attorney General's Law Reform Advisory Council *Class Actions in Victoria: Time for a New Approach* (Report, 1997) 53.
[62] *Swart v Vosloo* 1965 1 SA 100 (A) 105F-G.

to be satisfied. In *Sebola v Standard Bank of South Africa Ltd*,[63] 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.[64] The constitutional court held that the most reasonable course of action would be to focus on whether the debtor received the notice.[65]

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 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 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 make 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 article, it is nevertheless a crucial one as it could defeat a class action notwithstanding initial certification.

SAMEVATTING

KENNISGEWING AAN LEDE VAN UITTREE-GROEPSGEDINGE

Die artikel bespreek groepsgedinge in die konteks van die Suid-Afrikaanse siviele prosesreg. Groepsgedinge is meer as 20 jaar gelede vir die eerste keer in Suid-Afrika in die interim grondwet erken. Daar bestaan egter 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)*, wat sleutelaspekte van die Suid-Afrikaanse reg rakende groepsgedinge uiteensit.

Oorblywende dubbelsinnighede, inkonsekwenthede 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 in wanneer, indien ooit, kennis van ’n uittree-groepsgeding aan groepslede gegee moet 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?

[63] 2012 5 SA 142 (CC).
[64] the *Sebola* case (n 63) par 49, 74.
[65] the *Sebola* case (n 63) par 87.

In hoofsaak is die doel van die artikel 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 groepsgeding-stelsels van prominente buitelandse jurisdiksies, veral die van Ontario en die Verenigde State van Amerika. Dit is nie noodwendig ideaal om 'n *ad hoc* benadering aangaande prosedurele probleme wat van geval tot geval ontstaan, toe te pas nie. 'n Lukraak benadering ten opsigte van die regulering van groepsgedinge kan moontlik inkonsekwente benaderinge van die verskillende afdelings van die hooggeregshof van Suid-Afrika tot gevolg hê.

HAULMARKS OF GOOD JUDGMENT: SELF DIRECTION TO THE LAW AND APPLICATION TO THE FACTS

"I would like to pay testimony to the judgment of His Honour Judge Moloney QC as a model of clarity and cogency. Lord Clarke has set out at, paras 14 and 15, the judge's self-direction as to the law (para 2.5) and his application of it to the facts (para 2.6)" (par 54). "To establish the tort of deceit it must be shown that the defendant dishonestly made a material false representation which was intended to, and did, induce the representee to act to its detriment. The elements essential for liability can be broken down under three headings: (a) the making of a materially false representation (the defendant's conduct element); (b) the defendant's accompanying state of mind (the fault element); and (c) the impact on the representee (the causation element). Where liability is established, it remains for the claimant to establish (d) the amount of any resulting loss (the quantum element)" (par 58). "Inducement is a question of fact. In a typical case the only way in which a dishonest representation is likely to influence the representee to act to its detriment will be if the representee is led to believe in its truth. It is therefore not surprising to find statements by judges in such cases that the misrepresentee must show that he believed or "relied on" the misrepresentation" (par 63). "I agree with His Honour Judge Moloney QC's analysis in para 2.5 of his judgment. The question whether there has been inducement is a question of fact which goes to the issue of causation. The way in which a fraudulent misrepresentation may cause the representee to act to his detriment will depend on the circumstances. He rightly focused on the particular circumstances of the present case. Mr Hayward's deceitful conduct was intended to influence the mind of the insurers, not necessarily by causing them to believe him, but by causing them to value his litigation claim more highly than it was worth if the true facts had been disclosed, because the value of a claim for insurers' purposes is that which the court is likely put on it. He achieved his dishonest purpose and thereby induced them to act to their detriment by paying almost ten times more than they would have paid but for his dishonesty. It does not lie in his mouth in those circumstances to say that they should have taken the case to trial, and it would not accord with justice or public policy for the law to put the insurers in a worse position as regards setting aside the settlement than they would have been in, if the case had proceeded to trial and had been decided in accordance with the corrupted medical evidence as it then was. For those reasons, which accord to all intents and purposes with the judgment of Lord Clarke, I too would allow the insurers' appeal and restore the order of Judge Moloney" (par 71-72) – *Zurich Insurance Company Plc v Hayward* 2016 4 All ER 628 (UKSC).

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