Actions for collective redress are recognised in both common law under the Constitution for infringements of rights guaranteed in the Bill of Rights and in the corporate sphere under certain pieces of legislation. In the absence of relevant regulations, the courts have used their inherent powers to lay down appropriate procedural requirements for a class action and extended the ambit of class actions.

Collective actions may be brought by a member of a specific class or by a person acting in the interests of that class, as representative. The court’s certification of a class is needed before proceedings may be commenced. The current test is whether the interests of justice favour certification, having regard to various factors such as commonality of issues of law and fact.

What forms of collective actions are permitted in this jurisdiction and under what authority?

Section 38(c) of the Constitution of the Republic of South Africa, 1996 ("Constitution") provides that:

"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."

The Constitution accordingly recognises a class action specifically in relation to infringements of or threats to rights guaranteed in the Bill of Rights.

In 1998 the South African Law Commission ("SALC") published a report entitled "The Recognition of Class Actions and Public Interest Actions in South African Law" and prepared a draft "Public Interest and Class Action Act". However, there has been no such legislation brought into effect and the procedural aspects of class actions remain regulated by the common law, to which reference is made below.

In addition to the Constitution, class action proceedings have also been given express sanction in recently enacted pieces of legislation. So, for example, section 157 of the Companies Act, 71 of 2008 ("Companies Act") provides for class actions in the corporate sphere. The section permits any application
that the procedural requirements that the Bill of Rights. The SCA found further infringement of a right protected under the claimants’ inability to point to the circumstances merely because of where a constitutional right is invoked, court to sanction a class action in cases held that it would be irrational for the Court of Appeal of South Africa (“SCA”) (29 November 2012) the Supreme (Pty) Ltd [2012] ZASCA 182 Resource Centre Trust v Pioneer Food Children’s

Whilst class actions were given express constitutional (and other statutory) recognition, nothing had been done to regulate them.


Whilst class actions were given express constitutional (and other statutory) recognition, South Africa was confronted with a situation where nothing had been done to regulate them. In the circumstances, the courts addressed 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. In addition to laying down appropriate procedural requirements for a class action, the courts also extended the ambit of class actions beyond Bill of Rights infringements and other (limited) statutory occasions.

In the seminal case of Children’s Resource Centre Trust v Pioneer Food (Pty) Ltd [50/2012] [2012] ZASCA 182 (29 November 2012) the Supreme Court of Appeal of South Africa (“SCA”) held that it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate circumstances merely because of the claimants’ inability to point to the infringement of a right protected under the Bill of Rights. The SCA found further that the procedural requirements that will be determined in relation to the one type of case can equally easily be applied in the other. It was accordingly found that “class 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”.

Class actions may be brought by a member of a specific class or by a person acting in the interests of that class. The court must be satisfied of two broad matters in regard to the representatives of the class:

> firstly, that they have no interests in conflict with those whom they wish to represent; and

> secondly, that the representative has the capacity to conduct the litigation properly on behalf of the class.

There is no legislative guidance regarding whether class actions must be on an opt in or opt out basis and the suggestions put forward by the SALC provide for both. In practice, class actions in South Africa have been brought on both an opt in and opt out basis. This was recognised most recently in case of Nkala and Others v Harmony Gold Mining Company Limited and Others [2016] ZAGPJHC 97 (13 May 2016), in which the court said that class actions may involve two stages. The first is an opt out stage during which applicants may elect not to be bound by the judgment on the merits. The second stage would be to opt in, during which the applicants elect to opt in to the damages phase.

Any prospective class will need to be certified by a court of law. Failing this, a class action cannot be brought.

The court in Children’s Resource Centre (see above) noted that the following requirements (some of which overlap with those proposed by the SALC) are necessary for certification:

> a person seeking to institute a class action must obtain certification of that class from a court before the issue of summons;

> in assessing whether a class action should be certified, the following criteria should be taken into account in the assessment:

> the existence of a class identifiable by objective criteria meaning that the class must 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;

> a cause of action raising a triable issue which the applicant can show by satisfying the test that there is a prima facie case on the evidence;

> that the right to relief depends upon the determination of issues of fact or law or both, common to all members of that class and that the determination of the truth or falsity of the common contention will resolve an issue that is central to the validity of each one of the claims in one stroke;

> that the relief sought or damages claimed flow from the cause of action and are ascertainable and capable of determination;

> that where the claim is for damages, there is an appropriate procedure for allocating the damages to the members of the class;
that the proposed representative of the class is suitable to be permitted to conduct the action and represent the class, in that the interests of the representative do not conflict with those of the other class members and they have capacity, which includes funds, to pursue the litigation; and

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.

In Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others 2013 (5) SA 89 (CC), the Constitutional Court added further to the development of class actions in South Africa.

While the court generally accepted the criteria set out in Children’s Resource Centre, it noted that these requirements must serve as factors to be taken into account in determining where the interests of justice lie in a particular case and must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The court pointed out that the absence of one or another requirement must not oblige the court to refuse certification where the interests of justice demand otherwise. The Constitutional Court’s focus was therefore on the flexible criterion of interests of justice as the guiding standard as to whether a certification should be granted.

Judge or jury?

The jury system was abolished with the coming into effect of the Abolition of Juries Act 34 of 1969 and therefore all trials (and antecedent applications for class certification) are heard by judges.

What relief may be obtained?

In terms of section 38 of the Constitution, “the court may grant appropriate relief, including a declaration of rights”. Examples of the kind of relief which may be granted include monetary damages, declaratory or interdictory relief.

How are such actions funded?

Generally, litigation is funded by the parties themselves and the fees are subject to negotiation but are typically based on hourly or daily rates. However, class actions are generally funded by third parties or on a contingency basis.

Prior to 2004 there was uncertainty regarding whether or not third party litigation funding agreement could be entered into and generally these agreements were held to be unenforceable. However, the case of Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd 2004 (6) SA 66 (SCA) held that litigation funding agreements were not contrary to public policy or void. It is therefore possible for such actions to be funded by way of a third-party litigation agreement.

Funding may also occur on a contingency basis in terms of the Contingency Fees Act 66 of 1997. This statute provides that an attorney acting on a contingency basis may charge either double their normal time-based fees or 25% of the amount awarded, whichever is lower.

Is pre-trial disclosure available?

The procedural aspects related to pre-trial disclosure will be governed by High Court Rule 35. A party may call on another party to make discovery of all relevant material once pleadings have closed. A party is entitled to be informed of and inspect all documentary evidence which will be used by the opposing party in the trial subject to certain limitations, for instance all documents which fall within the parameters of attorney-client privilege.

Likely future scope and development?

Criticisms have been levelled at the Constitutional Court’s judgment in Mukaddam and its effect at diluting the utility of the certification process, namely that:

> while there is merit in a degree of flexibility, the court did not provide sufficient guidance on when it will be in the interests of justice to grant certification;

> the court effectively reduced the criteria for certification to a mere guideline and did not expand on or consider in any detail the individual criteria set out in Children’s Resource Centre;

> the court did not sufficiently engage with the distinction between “opt in” and “opt out” class actions and the specific factors that may need to be taken into account in determining whether such a class action should be certified;

> the emphasis on the “interests of justice” in the court’s judgment detracted from the clear exposition of the certification criteria expounded by Children’s Resource Centre, resulting in confusion; and

> the court did not provide any practical examples of where the criteria set out in Children’s Resource Centre may not be met but where it would nonetheless be in the interests of justice to grant the certification.
Access to justice is clearly an important consideration in determining whether a class should be certified.

The judgment of the SCA in *Children’s Resource Centre* should be seen as an important step in the advancement of South African jurisprudence relating to common law class actions and provides some clarity as to the criteria to be used to determine a “class” and the process to be followed by class action litigants for purposes of outlining their causes of action. However, given the judgment in *Mukaddam* and the argument that an open-ended approach to certification has been created with insufficient guidelines for future class action litigation in South Africa, the procedural mechanisms pertaining to class action litigation may be best and most clearly articulated in legislation dealing with class action litigation.

Since the decisions of *Children’s Resource Centre* and *Mukaddam*, there has not been much activity in the class action spectrum except for the High Court decision of *Nkala and Others v Harmony Gold Mining Company Limited and Others* [2016] ZAGPJHC 97 (13 May 2016). Although this High Court decision is the subject of an appeal, it is believed to confirm several key points. One of these points is that future class action litigation will be decided having regard to the landmark decisions of both *Children’s Resource Centre* and *Mukaddam*, together with comparative law. Another is that the South African judiciary will no doubt be seeing an influx of collective redress in private damages claims.

In addition, access to justice is clearly an important consideration in determining whether a class should be certified. As Deputy Judge President Mojapelo remarked in the Nkala judgment: “…it is class action or no action at all. Class action is the only realistic option open to the mineworkers and their dependants. It is the only way they would be able to realise their constitutional rights of access to court bearing in mind that they are poor, lack the sophistication necessary to litigate individually, have no access to legal representatives and are continually battling the effects of two extremely debilitating diseases.” However, and despite the publishing of the SALC report, the *Children’s Resource Centre* and *Mukaddam* judgments and numerous calls for legislation governing class actions, there still appears to be no positive strides towards the enactment of the same.