

Difficulties in regulating class action litigation

Is there a need to articulate the rules?

By Nurina Ally and Andrew Konstant

Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others 2013 (2) SA 213 (SCA) was a significant leap forward in the South African jurisprudence of both class actions and litigation in general. The Supreme Court of Appeal (SCA) judgment, penned by Wallis JA, broke judicial ground on two fronts. First, it developed the common law so as to recognise class action claims in all suits (and not just Bill of Rights claims). Second, the judgment went further than any prior case in detailing the procedure that should exist for the administration of class actions in South Africa.

The Constitutional Court (CC) has since made its mark on the development of class actions in South Africa in *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC). In our view, the judgment has received comparatively little attention and has seemed to lack the novelty of the SCA's decision. This may be partly attributed to the fact that the majority judgment accepts most of the groundwork in the *Children's Resource Centre Trust* case and does not provide any in-depth engagement into the nature of class actions. Nonetheless, it would be misguided to view the CC judgment as simply confirmation of the *Children's Resource Centre Trust* case's approach. An examination of the judgment reveals important, albeit nuanced, shifts in the treatment of class actions. However, rather than assisting in the practical development of class action litigation, these shifts have the potential to compound the inherent difficulties in regulating class action litigation.

A step in the right direction? The SCA's approach to prior certification

Establishing coherent requirements for prior certification – the procedural hurdle that must be overcome by any group of individual litigants seeking recognition as a class – is perhaps the most troublesome aspect faced by any -jurisdiction venturing into the realm of class actions. Having regard to comparative developments abroad, Wallis JA, in the *Children's Resource Centre Trust* case, specified the following criteria as the core considerations that should be taken into account in a certification inquiry:

- Class definition: The class must be defined with enough precision so as to allow for the objective determination that an individual falls into that class (para 29).
- A cause of action raising a triable issue (para 35).
- Common issues of law or fact (para 44).
- The representative of the class. The representative should not have any conflict of interest with the class and must have the capacity to conduct the litigation properly (para 46 – 47).
- The tool of a class action must be the most appropriate procedure to adopt for adjudication of the underlying claims (para 23).

While accepting that these considerations are not exhaustive, and with factors such as appropriateness of the relief sought also being mentioned, Wallis JA clearly establishes that, at the least, the above factors have to be present before granting certification. He says (at para 28): 'Without 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 factors set out in the list [on previous page] and be satisfied that they are present before granting certification'.

Against a background of years of legislative inaction in the field of class actions, the *Children's Resource Centre Trust* case judgment was an undeniably welcomed step forward. The *Children's Resource Centre Trust* case's criteria for certification were immediately applied in the separate but related matter of *Mukaddam and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 254 (SCA).

The appellants in the *Mukaddam* case sought certification for an ‘opt-in’ class action, where interested persons only become part of the class once they choose to join the proceedings. Applying the *Children’s Resource Centre Trust* criteria, Nugent JA concluded that Mr Mukaddam’s class action should not be certified. Nugent JA found that he had no legally tenable claim and, importantly, held that r 10 of the uniform rules provided Mr Mukaddam with a far more suitable procedure to pursue his claim. Mr Mukaddam took his case on appeal to the CC.

A step back in the interests of justice? The CC’s approach

In the *Mukaddam* case, the majority judgment spent surprisingly little time on the conceptual nuances of class action claims and the detail of certification requirements. Indeed, for the most part, the CC accepts the judicial groundwork set out in the *Children’s Resource Centre Trust* case. However, Jafta J focuses particularly on the role and implications of judicial discretion under s 173 of the Constitution and the power to regulate the process by which litigants approach the court.

With s 173 as the reference point for judicial innovation in procedural matters, the majority concludes that Wallis JA erred in the *Children’s Resource Centre Trust* case when he suggested that the requirements for prior certification are conditions that must be met in order to succeed in an application for certification. Rather, the court held that the interests of justice standard should guide whether certification should be granted. The result, as we understand it, is that a court may permit a claim for certification where one or more of the requirements are not met, or may deny a claim for certification even where all the requirements for certification are met.

We are not suggesting that the interests of justice standard has no role to play in class action litigation. However, it is a principle that is inherently nebulous and dependent on the exercise of a court’s discretion. Managing litigation requires certainty and, to some extent, formality, in order to safeguard the proper working of the judicial system. This is particularly so when it comes to class action claims, which is an area of law that presents many challenges to the legal system simply by virtue of the size of claims, number of litigants and complexity of legal arguments. It is, therefore, imperative for the courts to ground the interests of justice standard firmly by substantively engaging with the range of complexities that arise in such a procedural innovation.

While the emphasis on a degree of flexibility is to be welcomed, the CC case of *Mukaddam* does not provide sufficient guidance on when it will be in the interests of justice to grant certification. Effectively the CC reduces the criteria for certification to a mere guideline, but with only a cursory consideration of the individual criteria in the *Children’s Resource Centre Trust* case and their relative importance. The court does not offer any examples of instances where the *Children’s Resource Centre Trust* case criteria may not be met, and yet would nonetheless be in the interests of justice to grant certification. Most striking perhaps is the failure to offer substantive reasoning as to why it may be in the interests of justice to allow for opt-in class actions even when a suitable alternative procedure is available that adequately allows for access to courts.

Given that Mr Mukaddam had sought certification for an opt-in class action and the joinder procedure would have been available, further guidance here would have been expected. The majority only states that Nugent JA erred in finding that certification in an opt-in class action requires the applicant to show ‘exceptional circumstances’ as opposed to being guided by the more flexible interests of justice standard (*Mukaddam*, at para 55). The failure by the court to provide an explanation on this front seems to suggest that the existence of other appropriate mechanisms is not a substantial consideration in the interests of justice inquiry. In our view, this has the potential to dilute the utility of the certification process.

Furthermore, the already uncertain field of class action litigation will almost certainly not benefit by the puzzling distinction that the majority of the CC makes between the procedure to be followed in Bill of Rights class action litigation and class action litigation based on other claims. In this regard, the majority holds that certification will not be required in Bill of Rights class action claims against the state. No view is expressed as to whether certification will be required in Bill of Rights class action claims against private persons. (In a separate concurring judgment, Froneman J expressed no opinion on whether certification should also be required where class actions are brought under s 38 of the Constitution. Froneman J finds that it was not an issue before the court and the parties were not in a position to present full argument on it.) Mhlantla AJ dissents on this point. In a brief judgment, she held that, given the rationale for certification and the nature of class actions, there is no reason in principle or practice for mandating the certification process to only some class action claims. Significantly, Mhlantla AJ recognises that certification is important in protecting the interests of persons whose rights may be extinguished by a class action (through the application of the *res judicata* principle). We agree with Mhlantla AJ and we expect that this aspect of the majority's reasoning may open the door to unfortunate attempts at artificially crafting a Bill of Rights dimension so as to avoid certification.

Conclusion

The *Children's Resource Centre Trust* case was not perfect. There were many aspects of the judgment that remain fertile ground for further development and refinement. But rather than advancing the gains made in the *Children's Resource Centre Trust* case, the CC in the *Mukaddam* case has failed to grapple adequately with the defining features and difficulties in class action litigation. The result is a judgment that seems to embrace an entirely open-ended approach to certification with insufficient guidelines for future class action litigation in South Africa. The upshot is that, with the seeming exhaustion of all alternative strategies, the imperative for legislative intervention has become resoundingly clear. There is a need to clearly articulate the rules around class action litigation so as to ensure that the right of access to courts can be protected for all parties implicated in class action claims.

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