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## ***Class Actions in South Africa***

*(This is an abridged version of the full report which is available for purchase. The 41 page report may be used throughout your company.)*

“The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

*The Constitution of the Republic of South Africa, Act 108 of 1996*



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# Executive Summary - Class Actions in South Africa

*(This is an abridged version of the full report which is available for internal use within your company.)*

***“Class actions can enhance access to justice by opening the ‘doors’ of our courts to those with individually non-recoverable claims or whose claims would not have led to individual proceedings because of social or psychological barriers.”***

Quoted in: Department of Justice Law Commission: “Nel Commission”

# Formalised “class actions” had their origin in the United States of America . . .

## What is a class action?

- A class action lawsuit may be described as:
  - an action conducted by a representative on behalf of a class, whether the representative is a member of the class or not - "class" means a number of persons with common issues and includes a subclass

Proposed Bill for the institution of class actions and public interest actions drafted by the Nel Commission (Definitions)
- Class actions enhance access to justice by providing an expeditious legal procedure for various groups of plaintiffs or applicants seeking to protect their rights

## Class actions & public interest actions

1. A class action is distinguished from other types of legal action in 2 primary respects:
  - (i) one or more applicants/plaintiffs litigate against a defendant on behalf of a class of similar claimants, &
  - (ii) the outcome of the action binds all the members of the class unless they elect to opt out of the matter
2. A public interest action, is defined by the South African Law Commission (SALC) in its report on "Class Actions and Public Actions" as follows:
  - “A public interest action is one brought by a plaintiff who, in claiming the relief he or she seeks, is moved by the desire to benefit the public at large or a segment of the public. The intention of the plaintiff is to vindicate or protect the public interest, not his or her own interest, although he or she may incidentally achieve that end as well.”

A public interest action differs from a class action in that:

- a judgment in a class action is binding on all members of the class, whereas with a public interest action, the proceedings are brought in the public interest, but all members of the public are not bound by the judgment
- where a public interest action succeeds, members of the public cannot individually execute upon the judgment in terms of the civil court rules, unlike in the case of a successful class action

# ... class actions & other mechanisms for collective action have *gained support in many parts of the world*

## Types of class action

- Typically, in the USA, class actions may be divided into:
  1. A consumer class action, which is a legal action brought by a class action lawyer on behalf of a large number of people with similar legal claims involving common questions of law & fact
  2. A product liability class action is a class action brought by a class action lawyer on behalf of a large number of people, ordinarily with claims of negligence pertaining to products, policies, or conditions
  3. A securities class action is typically brought on behalf of all people who purchased or acquired the stock or other security of a publicly traded company during a period of artificial market price inflation

## Objectives

- The introduction of a class action has 3 main objectives, namely:
  1. to provide access to justice for those who would otherwise be excluded from access to the courts
  2. the more efficient use of judicial resources
  3. the modification of the behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore public obligations

# **The South African Constitution introduced a type of group or class action allowing a court to protect the rights of groups of people**

## **The Constitution of the Republic of South Africa, 1996: Section 38**

- The Constitution of the Republic of South Africa, in Section 38, laid the foundation for class & group actions in South Africa
- Section 38 of the Constitution reads as follows:

"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 –

  - a) anyone acting in their own interest;
  - b) anyone acting on behalf of another person who cannot act in their own name;
  - c) anyone acting as a member of, or in the interest of, a group or class of persons;**
  - d) anyone acting in the public interest;**
  - e) an association acting in the interest of its members"
- Whilst Section 38(c) of the Constitution allows for class actions in South African law, it does not set out the procedures by which a class action is to be conducted

# **Judicial resources may be used more effectively & efficiently by joining people together who have suffered similar losses arising out of similar events**

## **Main benefits of class actions**

- Although the adoption of class action procedures may appear to be of technical interest to lawyers alone - the social, economic & political consequences of permitting class actions (representative collective litigation) are vast
  - class actions empower individuals with relatively modest claims that would be impractical to litigate, to join together to seek redress
  - class actions enable the shifting of power between legal “haves” & “have-nots”
  - class actions & other forms of collective litigation have the potential to deter corporate & other institutional misbehaviour
- In a class action:
  - the judgment is binding on all members of the class unless they have opted out of the proceedings
  - members of that class can individually execute upon the judgment in terms of the civil court rules

# ***The restricted use of the class action procedure to cases involving the infringement of rights protected in the Bill of Rights is likely to change with the promulgation of the new Companies Act of 2008***

## **Companies Act , No. 71 of 2008: Section 157**

- Until now, the class action procedure has been restricted in its use to matters involving the infringement of rights contained in the Bill of Rights (i.e. Section 38 of the Constitution)
- The new Companies Act, in Section 157, makes provision for a class action & will introduce the class action procedure into “mainstream corporate & commercial activity in South Africa”
- Section 157 provides that an application can be made to, or a matter can be brought before, a court, the Companies’ Ombud, the Take-over Panel or the Commission, that right can be exercised by a person who is:
  - directly contemplated in the particular provision of the Act;
  - acting on behalf of such person who cannot act in their own name;
  - acting as a member of, or in the interest of, a group or class of affected persons or an association acting in the interests of its members; or
  - acting in the public interest, with leave of the court
- Section 157 follows the wording of Section 38 of the Constitution, so there is precedent available as to how the class action will work in practice
- The court or office before whom the action is brought establishes the procedure to be followed in pursuing the class action
- The Companies Act not only makes specific provision for a class action, but also establishes specific actionable wrongs that would give rise to civil liability

# **The Companies Act establishes many specific actionable wrongs that would give rise to civil liability on the part of directors & officers of companies**

## **Companies Act , No. 71 of 2008: Section 218(2)**

- Section 218(2) provides that:
  - “Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.”
- The introduction of the class action in terms of the new Companies Act will give rise to some of the following considerations:
  - the Directors and Officers Liability Insurance market will need to be re-rated in view of the increased exposure that will result from the introduction of class actions
  - the class action opens the door to shareholder & creditor action against directors & officers independently of liquidators & without the constraints of legislation dealing with corporate insolvency
- Companies will have to consider their appointments of directors & officers very carefully, given that the introduction of class actions will enable applications to be made on behalf of “groups” or “classes” of persons that have suffered loss or damage as a result of a director/s or officer/s of a company wrongdoing or contravention of any provision of the Companies Act

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