

Class Actions in South Africa

South Africa has experienced a lot of change since the abolishment of the old apartheid regime and since 1994 many new laws have been established to protect the rights of its people. Fundamentally, the basic rights of people are protected through our Constitution (Bill of Rights) where each citizen is afforded the right to, amongst others, health, safety, housing and security.

Within our Constitution, referring specifically to the provisions contained within Section 38, citizens as a group are provided the right to approach a competent court when they believe their rights have been infringed or threatened. Whilst the Constitution - as an 'instrument' - can be used by citizens to seek relief from the courts when citizens feel aggrieved, our country is also being formally introduced to additional 'instruments', provided through the legal system, that will provide ordinary citizens the right to approach the courts as a 'class', in cases where they believe corporate businesses or any other type of organisation has done them wrong.

Class Action is big business overseas and, in broad terms, it empowers a group of ordinary people the ability to litigate against larger organisations to seek relief. Until now, the Class Action procedure was restricted in its use to matters involving the infringement of rights contained in the Bill of Rights, however with the introduction of Section 157 of the new Companies Act 2008, people will have the ability to form a group or class and apply their collective power to redress their infringement of consumer rights within the mainstream corporate and commercial business landscape. The new Companies Act not only makes specific provision for Class Action, but also establishes specific actionable wrong doing that may give rise to civil liability.

Clearly, with this additional 'fire power' given to citizens, whether they act as consumers or employees, organisations of all types will need to seriously re-consider the quality of its' leadership and whether the directors and managers of companies are adequately qualified (and equipped) to ensure that their organisations are not unintentionally setting themselves up for certain disaster. Previously, individuals had no chance to even consider taking on a fight with a big organisations, let alone win the fight!

Class Action has arrived - it is different in its tactics, its shape and form can be massive, it's outcome can be devastating. In addition, Section 218 of the new Companies Act 2008 extends the director's liability in that the claimants within the class will only have to prove that a breach of duty occurred, that loss or damage occurred and that the loss or damage flowed from that breach. This is yet one more reason why insurers of SA companies will need to institute D&O (Director & Officer) liability insurance to protect directors in their personal capacities as well as re-rate the company's risk exposure.

The Class Action 'instrument' opens the door to shareholders, creditors, trade unions and other stakeholder's action against directors and other company officers without the previous constraints of funding and motivation.
