C:\documents\classact\class act.report.wpd

SOUTH AFRICAN LAW COMMISSION

PROJECT 88

THE RECOGNITION OF CLASS ACTIONS AND PUBLIC INTEREST ACTIONS IN SOUTH AFRICAN LAW

REPORT

AUGUST 1998

TO DR A M OMAR, MP, MINISTER OF JUSTICE

I am honoured to submit to you in terms of section 7(1) of the South African Law Commission Act 19 of 1973, for your consideration the Commission's report on the investigation into the recognition of class actions and public interest actions in South African law.

....

Mr Justice I Mahomed

Chairperson

September 1998

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

The Honourable Mr Justice I Mahomed (Chairperson)
The Honourable Mr Justice P J J Olivier (Vice-Chairperson)
The Honourable Madam Justice Y Mokgoro
Adv J J Gauntlett SC
Mr P Mojapelo
Prof R T Nhlapo
Ms Z Seedat

The Secretary is Mr W Henegan. The Commission's offices are on the 12 and 13th floors, Sanlam Centrum, corner of Andries and Schoeman Streets, Pretoria. Correspondence should be addressed to:

The Secretary
South African Law Commission
Private Bag X 668
PRETORIA
0001

Telephone : (012) 322 6440
Fax : (012) 320 0936
E-mail :gordon@salawcom.org.za

This document is available on the Internet under "The South African Law Commission" at http://www.law.wits.ac.za/salc/salc.html

The project leader is the Honourable Mr Justice P J J Olivier. The other members of the project committee are: Adv J J Gauntlett SC, Professor C Loots, Mr E Makgoba, the Honourable Madam Justice S Meer, Mr P Mojapelo, and Mr D Nkadimeng. The researcher responsible for the investigation is Mr G O Hollamby.

THE COMMISSION'S RECOMMENDATIONS

INTRODUCTION

1. The principles underlying class actions and public interest actions should be introduced by an Act of Parliament and the necessary procedures by rules of court. The Act and the rules should be introduced as a matter of urgency.

2. Class actions and actions in the public interest should be treated as two separate and distinct procedures. The two procedures serve different purposes and have to comply with different requirements. The essential difference between a class action and a public interest action is that the judgment given in a class action binds all the members of the class and may, therefore, be pleaded as *res judicata* against the members of the class. The judgment in a public interest action does not bound the people in whose interest it is brought.

PUBLIC INTEREST ACTIONS

3. The Act should define the term "public interest action". The Commission proposes the following definition: "public interest action" means an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interest. Judgment of the court in respect of a public interest action shall not be binding (*res judicata*) on the persons in whose interest the action is brought.

4. Any person should be able to institute action in a court claiming relief by way of a public interest action in the interest of the public generally or of any particular section thereof, irrespective of whether or not such person has any direct, indirect or personal interest in the relief claimed. Such person shall identify the action as a public interest action and nominate a suitable person (with that person's prior consent) to represent the public interest in the matter concerned. Before the court appoints the representative, it must be satisfied that the contemplated action is a *bona fide* public interest action. The representative acts in the public interest and for this reason the court should be able to remove and replace him or her on good cause shown.

5. If the remedy sought is an interdict or a mandamus, then a defendant should be cited in a public interest action. If the public interest litigant seeks a declaration of rights, then it is not necessary to cite a defendant.

6. The Supreme Court of Appeal, the Constitutional Court, the High Courts, the Land Claims Court, the Labour Court, and the Magistrates' Courts should be designated by the Minister of Justice to hear public interest actions with immediate effect. In addition, the Minister should be given the discretion to designate any other court to adjudicate public interest actions.

7. The court hearing the public interest action shall not make an order as to costs or order the representative to provide security for costs unless special circumstances apply.

CLASS ACTIONS

8. The Act should define the term "class action". The Commission proposes the following definition: "Class action" means an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and which action is certified as a class action in terms of the Act.

9. The person commencing the class action or the person appointed as representative in the class action need not be a member of the class. Since the quality of the representative may be relevant, only suitable persons should be appointed as representatives. The Act should accordingly provide that the person who brings the application for certification may request the court to appoint him or her, or any other suitable person (with that person's prior consent), to be the representative. Before the court appoints the representative, it must be satisfied that the contemplated action is a *bona fide* class action. The Act should further provide that the court may dismiss a representative on good cause shown.

10. In class actions a preliminary application should be brought before court requesting leave to institute or defend an action as a class action proceedings and to ask for directions as to procedure.

11. An application for certification as a class action may be granted by the court where:

(a) there is an identifiable class of persons;

(b) a cause of action is disclosed;

(c) there are issues of fact or law which are common to the class;

(d) a suitable representative is available;

(e) the interests of justice so requires; and

(f) the class action is the appropriate method of proceeding with the action.

12. At any time after a certification order has been granted the court should be entitled to order that the action no longer proceeds as a class action because the criteria for certification, or any of them, are no longer satisfied.

13. The court should be asked for directions as to procedure as part of the certification process. In this regard the court should have a wide discretion to determine its own procedures.

14. The courts should be given broad general management powers exercisable either on the application of a party or class member or on the court's own motion.

15. The Act should deal with the questions of when, by whom, to whom, and how notice should be given. As a general rule, notice to class members and prospective class members should always be given. The court should have the discretion to make opt-in, opt-out or no notice orders. In all cases it should be necessary for the court to consider whether notice of the application for certification should be given to all persons eligible to elect to join the class.

16. The court should have the discretion to make an order in respect of the binding effect of its judgment on the members of the class.

17. Common issues should be determined together and issues requiring the participation of individual class members should be determined individually. The term "common issues" should be defined. The court should not refuse to authorise a class action merely by reason of the fact that there are issues pertaining to the claims of some or all of the members of the class which will

require individual determination or that different relief is sought for different class members.

18. In determining the amount of damages to be awarded the court may make an aggregate assessment or individual assessments. In this regard the court may appoint a commissioner to assist the court. When an aggregate assessment is made the court should give directions regarding distribution of the award to class members and may, where appropriate, require the defendant to distribute the award directly to the class members. The Act should contain an express provision with regard to the aggregate assessment of monetary awards and the disposal of any undistributed residue of an aggregate award.

19. It should eventually be possible to institute class actions in any court. Initially, however, only the Supreme Court of Appeal, the Constitutional Court, the High Courts, the Land Claims Court, and Labour Court should be designated by the Minister of Justice to adjudicate class actions. The Minister should, however, have the discretion to designate other courts in which class actions may be prosecuted. The appropriate procedure in the different courts should be prescribed by the authorities empowered to make rules for those courts.

20. The court hearing the application for certification as a class action should have the power to give directions as to the appropriate court in which the action should be instituted.

21. In determining whether a particular class action falls within the jurisdiction of the Magistrates' Courts the individual value of the claims should be the deciding factor. In this regard it must be borne in mind that in terms of section 50 of the Magistrates' Courts Act, 1944, the defendant may apply for the removal of any action from the Magistrates' Courts to the High Court.

22. In awarding costs in class actions the court should retain its discretion to apply the general rule that costs follow the result. The court must, however, refuse to order the representative to provide security for costs unless special circumstances apply. The court may also authorise a class action on condition that the Legal Aid Board grants the necessary funds or indemnifies the defendant(s) for his or her costs. Those members of the class who opt-in may be ordered to contribute towards costs and, where appropriate, to provide security for costs.

23. A legal practitioner may, subject to the Contingency Fees Act 66 of 1997, make an arrangement with the representative stipulating for the payment of fees, or fees and disbursements, only in the event of success in the class action.

24. Contrary to our recommendation in the Working Paper, we no longer recommend the establishment of a separate public interest action and class actions fund. The Commission believes the existing Legal Aid Board should be utilized as the mechanism to provide legal aid to indigent litigants in class actions and public interest actions.

25. Settlement, discontinuance or abandonment of a class action should require the prior approval of the court.

26. The decision to certify an action as a class action is only the first step in the proceedings and should not be subject to appeal. The Act should, however, specifically provide that **non-**certification of an action as a class action is subject to appeal. If the representative does not appeal, or does not proceed with an appeal, it should be competent for another member of the class to do so with leave of the court.

27. The certification of an action as a class action should suspend limitation periods for all class members until the member opts out, the member is excluded from the class, or the action is decertified, dismissed, abandoned, discontinued or settled.

28. The Act should deal only with class actions and public interest actions and not with organisational or derivative actions.

29. In the light of these recommendations and the draft Bill proposed in the Working Paper, the Commission recommends the adoption of the legislation contained in Chapter 6 of this report.

CONTENTS

INTRODUCTION (iv)

THE COMMISSION'S RECOMMENDATIONS (v)

BIBLIOGRAPHY AND MODE OF CITATION (xiv)

TABLE OF CASES (xxii)

1. BACKGROUND AND WORKING PROCEDURE 1

1.1 Introduction 1
1.2 Background to the investigation 1
1.3 Working procedure 4

2. CLASS ACTIONS AND PUBLIC INTEREST ACTIONS DEFINED 6

2.1 Introduction 6
2.2 What is a public interest action? 6
2.3 What is a class action? 6
2.4 The differences between a class action and a public interest action 7
2.5 The defendant class action 9
2.6 Conclusion 10

3. THE NEED FOR LEGISLATION 11

3.1 Introduction 11
3.2 Lack of standing at common law 12
3.3 Section 7(4)(b) of the Constitution, 1993 and the courts 13

3.4 Lack of uniformity and consistency 15

3.5 Conclusion 20

4. PUBLIC INTEREST ACTIONS 21

4.1 Introduction 21

4.2 Is there a need for a public interest action in South African law? 21

4.3 How should a public interest action be defined? 23

4.4 What are the requirements for a public interest action? 24

4.5 "In the public interest" 26

4.6 The ideological plaintiff as representative 26

4.7 The defendant in a public interest action 27

4.8 Which courts should hear public interest actions? 29

4.9 Who should be liable for costs? 30

4.10 Conclusion 31

5. CLASS ACTIONS 32

5.1 Introduction 32

5.2 How should a class action be defined? 32

5.3 What are the characteristics of a class action? 33

5.4 Who may apply for leave to institute a class action? 34

5.5 Is certification as a class action necessary? 38

5.6 What criteria should be adopted in certifying an action as a class action? 40

- Numerosity 41
- A preliminary merits test 42
- The interests of justice 43
- Commonality 46
- A suitable representative 47
- The appropriate procedure 48

5.7 What can the court do if the criteria for certification are no longer met, after certification has been granted? 50
5.8 What procedure should be adopted in the application for certification of an action as a class action? 50
5.9 What procedure should be followed in the conduct of the class action? 52
5.10 Is it necessary to give notice of the action to members of the class and, if so, what form should such notice take, etc.? 53

* Notice of certification 55
* Costs of notice of certification 56
* Notice of judgment 56
* General notices 57

5.11 Should class members be required to opt in to the class proceedings in order to be subject to any judgment or settlement? In other words when will judgment in a class action be binding (*res judicata*) on the members of the class? 60
5.12 How should the common questions and the individual questions in a class action be determined? 62
5.13 How should damages in a class action be determined? 63
5.14 Which courts should be designated by the Minister to adjudicate class actions? 65
5.15 Which specific division or court should have jurisdiction in a class action where the cause of action arose within more than one jurisdiction? 67
5.16 Should any value limits be placed on the jurisdiction of the court's empowered to hear class actions? 68
5.17 Who is liable for costs? 68
5.18 Should contingency fees arrangements be allowed in class actions? 70
5.19 How should class actions and public interest actions be funded? 72

* A contingency legal aid fund 72
* A class action fund 73
* Legal aid 74

5.20 Is prior approval of the court necessary before a class action can be settled, discontinued or abandoned? 75

5.21 Can appeal proceedings be brought and, if so, by whom and when? 77

* Appeals against certification orders 78
* Appeals against the judgment on the common issues 79
* Appeals against the judgment on the individual issues 79

5.22 Should the statutory rules of prescription of obligations and limitation of actions be amended to cope with the introduction of class actions? 80

5.23 Should the scope of the proposed Act not be broadened to include "organisational actions" and the derivative action? 82

6. DRAFT LEGISLATION 85

6.1 Introduction 85

6.2 The Commission's draft bill on public interest actions and class actions 85

6.3 Explanatory notes to the draft bill 97

ANNEXURE A: LIST OF RESPONDENTS 104

BIBLIOGRAPHY AND MODE OF CITATION

Andrews "The class action"

Andrews N H "The class action" in J P Gardner (ed) **United Kingdom Law in the 1990s** London: UKNCCL 1990 pp. 133 - 151.

Australian Law Reform Commission **Access to the Courts II - Class Actions**

Australian Law Reform Commission **Access to the Courts II - Class Actions** (Discussion Paper No 11) Canberra: Australian Government Publishing Service 1979.

Australian Law Reform Commission **Grouped Proceedings in the Federal Court**

Australian Law Reform Commission **Grouped Proceedings in the Federal Court** (Report No 46) Canberra: Australian Government Publishing Service 1988.

Australian Law Reform Commission **Costs shifting - Who pays for litigation?**

Australian Law Reform Commission **Costs shifting - Who pays for litigation?** (Report No 75) Canberra: Australian Government Publishing Service 1995.

Australian Law Reform Commission **Who can sue?**

Australian Law Reform Commission **Who can sue? A review of the law of standing** (Discussion Paper No 61) Canberra: Australian Government Publishing Service 1995.

Australian Law Reform Commission ***Beyond the door-keeper***

Australian Law Reform Commission ***Beyond the door-keeper*****: Standing to sue for public remedies** (Report No 78) Canberra: Australian Government Publishing Service 1996.

Bottomley 1992 (15) **University of New South Wales Law Journal**

Bottomley S "Shareholder derivative actions and public interest suits: Two versions of the same story" 1992 (15) **University of New South Wales Law Journal** 127 - 148.

Bryden 1987 (66) **Canadian Bar Review**

Bryden P L "Public interest intervention in the courts" 1987 (66) **Canadian Bar Review** 490 - 528.

Cappelletti (ed) **Access to Justice**

Cappelletti M (ed) **Access to Justice and the Welfare State** Alphen aan den Rijn: Sijthoff 1981.

Cram 1995 (4) **Juridical Review**

Cram I "Towards good administration - the reform of standing in Scots Public Law" 1995 (4) **Juridical Review** 332 - 344.

De Vos 1996 (4) **Journal of South African Law**

De Vos W le R "Reflections on the introduction of a class action in South Africa" 1996 (4) **Journal of South African Law** 639 - 657.

De Vos **LL.M thesis**

De Vos W le R **Verteenwoordiging van groepsbelange in die siviele prosesreg** (unpublished LL.M thesis) Rand Afrikaans University 1984.

Dixon 1997 (46) **ICLQ**

Dixon J C L "The *res judicata* effect in England of a US class action settlement" 1997 (46) **International and Comparative Law Quarterly** 134 - 150.

Eckard **Die *locus standi* van aansoekers**

Eckard **Die *locus standi* van aansoekers by die geregtelike hersiening van administratiewe handelinge** (unpublished LLD thesis) University of South Africa 1975.

Eden "Group actions: The Scottish position"

Eden S M "Group actions: The Scottish position" in J P Gardner (ed) **United Kingdom Law in the 1990s** London: UKNCCL 1990 pp. 152 - 159.

Editorial 1978 (91) **Harvard Law Review**

Editorial "Defendant class actions" 1978 (91) **Harvard Law Review** 630 - 658.

Esterhuysen **Die publiek se kennis van en houding jeens die Regshulpraad**

Esterhuysen R **Sekere kategorieë van die publiek se kennis van en houding jeens die Regshulpraad en aanverwante aspekte** (HSRC Research Report S-114) Pretoria: HSRC 1984.

Fleming 1994 (42) **American Journal of Comparative Law**

Fleming J G "Mass torts" 1994 (42) **American Journal of Comparative Law** 507 - 529.

Friedlander 1995 (40) **McGill Law Journal**

Friedlander L "Costs and the public interest litigant" 1995 (40) **McGill Law Journal** 55 - 102.

Fudge 1987 (25) **Osgoode Hall Law Journal**

Fudge J "The public / private distinction: The possibilities of and the limits to the use of *Charter* litigation to further feminist struggles" 1987 (25) **Osgoode Hall Law Journal** 485 - 554.

Grant 1996 (63) **University of Chicago Law Review**

Grant M A "The right not to sue: A First Amendment rationale for opting out of mandatory class actions" 1996 (63) **University of Chicago Law Review** 239 - 273.

Hickinbottom 1995 **The Litigator**

Hickinbottom G R "Multi-Party actions in England and Scotland: Compare and contrast" 1995 **The Litigator** 190

Hodge 1995 (14) **Civil Justice Quarterly**

Hodge H "Current issues in access to justice: Legal aid and costs" 1995 (14) **Civil Justice Quarterly** 102 - 106.

Hohfeld 1913 (23) **Yale Law Journal**

Hohfeld W N "Some fundamental legal conceptions as applied in judicial reasoning" 1913 (23) **Yale Law Journal** 16 - 59.

Homburger 1974 (23) **Buffalo Law Review**

Homburger A "Private suits in the public interest in the United States of America" 1974 (23) **Buffalo Law Review** 343 - 410.

Hough 1991 **Denning Law Journal**

Hough B "Standing for pressure groups and the representative plaintiff" 1991 **Denning Law Journal** 77

Jaffe 1968 (116) **University of Pennsylvania Law Review**

Jaffe L L "The citizen as litigant in public actions: The non-Hohfeldian or ideological plaintiff" 1968 (116) **University of Pennsylvania Law Review** 1033 - 1047.

Judin "Class actions"

Judin M "Class actions could become feature of our legal system" **Business Day** 23 February 1996 18.

Koch J 1990 (48) **University of Toronto Faculty of Law Review**

Koch J "Making room: New directions in third party intervention"1990 (48) **University of Toronto Faculty of Law Review** 151 - 167.

Lane 1988 (18) **Queensland Law Society Journal**

Lane P D "Standing to sue for a Declaration and Injunction in the public interest" 1988 (18) **Queensland Law Society Journal** 115

Law Society (England and Wales) **Group Actions made easier**

Law Society (England and Wales) **Group Actions made easier** (Report by the Law Society's Civil Litigation Committee) September 1995.

Lindblom and Watson 1993 (12) **Civil Justice Quarterly**

Lindblom P H and G D Watson “Complex litigation - A comparative perspective” 1993 (12) **Civil Justice Quarterly** 33 - 91.

Loots 1987 (104) **SALJ**

Loots C "Locus standi to claim relief in the public interest in matters involving the enforcement of legislation" 1987 (104) **South African Law Journal** 131 - 148.

McBryde and Barker 1991 **New Law Journal**

McBryde W W and C Barker “Solicitors’ groups in mass disaster claims” 1991 **New Law Journal** 484 - 487, 504.

Morabito and Epstein **Class actions in Victoria**

Morabito V and J Epstein **Class actions in Victoria: Time for a new approach** (Victorian Attorney-General’s Law Reform Advisory Council Expert Report 2) Melbourne: Victorian Law Reform Advisory Council 1997.

Ontario Commission **Report on Class Actions**

Ontario Law Reform Commission **Report on Class Actions** (volumes 1 - 3) Toronto: Ministry of the Attorney General 1982.

Ontario AGA Committee **Class Action Reform**

Ontario Attorney General’s Advisory Committee **Report on Class Actions Reform** Toronto: Ministry of the Attorney General 1990.

Paterson 1991 (10) **Civil Justice Quarterly**

Paterson A “Legal aid at the crossroads” 1991 (10) **Civil Justice Quarterly** 124 - 137.

Ross 1995 (33) **Osgoode Hall Law Journal**

Ross J M “Standing in *Charter* declaratory actions” 1995 (33) **Osgoode Hall Law Journal** 151 - 201.

Safranek 1996 (22) **Wisconsin Law Review**

Safranek S J "Do class action plaintiffs lose their constitutional rights?" 1996 (22) **Wisconsin Law Review** 263 - 294.

Scott 1973 (86) **Harvard Law Review**

Scott K E "Standing in the Supreme Court - a functional analysis" 1973 (86) **Harvard Law Review** 645 - 692.

Scottish Law Commission **Multi-Party Actions Discussion Paper**

Scottish Law Commission **Multi-Party Actions: Court Proceedings and Funding** (Discussion Paper No 98) November 1994.

Scottish Law Commission **Multi-Party Actions Working Party Report**

Scottish Law Commission **Multi-Party Actions: Report by Working Party set up by Scottish Law Commission** June 1993.

Scottish Law Commission **Multi-Party Actions Report**

Scottish Law Commission **Multi-Party Actions** (Report No 154) Edinburgh: HMSO 1996.

South African Law Commission **Working Paper 57**

South African Law Commission **Working Paper 57: The recognition of a class action in South African law** Pretoria: South African Law Commission 1995.

South African Law Commission **Report on speculative and contingency fees**

South African Law Commission **Project 93: Report on speculative and contingency fees** Pretoria: South African Law Commission 1996.

Susman 1994 (13) **Wisconsin International Law Journal**

Susman S D "Distant voices in the courts of India - Transformation of standing in public interest litigation" 1994 (13) **Wisconsin International Law Journal** 57 - 103.

Swedish Commission **Group Actions**

Swedish Commission on Group Actions **Report to the [Swedish] Minister of Justice on Group Actions** (Summary in English) Malmo, 1995.

Thomas **Textbook of Roman Law**

Thomas J A C **Textbook of Roman Law** Amsterdam: North Holland Publishing 1976.

Uniform Law Conference of Canada **Class Actions Discussion Paper**

Uniform Law Conference of Canada **Class Actions Discussion Paper**, Quebec City, Quebec, August 6 - 10, 1995.

Van Wyk *et al* **Rights and Constitutionalism**

Van Wyk D *et al* **Rights and Constitutionalism - The new South African Legal Order** Cape Town: Juta 1994.

Vern 1988 (18) **Queensland Law Society Journal**

Vern P "Standing to sue for a declaration and injunction in the public interest" 1988 (18) **Queensland Law Society Journal** 115

Welch 1985 (43) **University of Toronto Faculty of Law Review**

Welch J "No room at the top: Interest group intervenors and *Charter* litigation in the Supreme Court of Canada" 1985 (43) **University of Toronto Faculty of Law Review** 204 - 231.

White and Willock **Scottish Legal System**

White R M and I D Willock **The Scottish Legal System** Edinburgh: Butterworths 1993.

Williams 1975 (13) **Osgoode Hall Law Journal**

Williams N J "Consumer class actions in Canada - Some proposals for reform" 1975 (13) **Osgoode Hall Law Journal** 1 - 88.

Wolfson 1977 (38) **Ohio State Law Journal**

Wolfson "Defendant class actions" 1977 (38) **Ohio State Law Journal** 459

Woolf Inquiry **Access to Justice**

Woolf, Rt Hon the Lord **Access to Justice (Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales)** London: HMSO June 1995.

Woolf Inquiry **Multi-Party Actions: Issues Paper**

Woolf Inquiry **Multi-Party Actions: Issues Paper** January 1996.

Zimbabwe Law Development Commission **Interim Report on Group Proceedings**

Zimbabwe Law Development Commission **Interim Report on Group Proceedings** (Report No 15) November 1991.

TABLE OF CASES

Abdool v Anaheim Management Ltd (1993) 15 OR (3d) 39 (Ontario General Division)

Abdool v Anaheim Management Ltd (1995) 121 DLR (4th) 496 (Ontario General Division)

Ahmadiyya AIIL (South Africa) v Muslim Judicial Council (Cape) 1983 (4) SA 855 (C)

Bagnall v Colonial Government 24 SC 470

Bamford v Minister of Community Development and State Auxiliary Services 1981 (3) SA 1054 (C)

Bate v Regional Magistrate, Randburg 1996 (7) BCLR 974 (W)

Batista v Commanding Officer, SANAB, SAP, Port Elizabeth 1995 (4) SA 717 (SE), 1995 (8) BCLR 1006 (SE)

Bernstein v Bester NO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC)

Besserglik v Minister of Trade, Industry and Tourism 1996 (4) SA 331 (CC)

Bohlokong Black Taxi Association v Interstate Bus Lines (Edms) Bpk 1997 (4) SA 635 (O)

Beukes v Krugersdorp Transitional Local Council 1996 (3) SA 467 (W)

Brink v Kitshoff NO 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC)

Cabinet for the Territory of South West Africa v Chikane 1989 (1) SA 349 (A)

Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A)

Canadian Aids Society v Ontario 1996 (32) CRR (2d) D5 (Ontario General Division)

Cats Entertainment CC v Minister of Justice; Van der Merwe v Minister of Justice; Lucksters CC v Minister of Justice 1995 (1) SA 869 (T)

Chairman of the Council of State v Qokose 1994 (2) BCLR 1 (CkA); 1994 (2) SA 198 (CkA)

Christian League of Southern Africa v Rall 1981 (2) SA 821 (O)

Contralesa v Minister for Local Government, Eastern Cape 1996 (2) SA 898 (TkSC)

Dalrymple v Colonial Treasurer 1910 TS 372

Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange 1983 (3) SA 344 (W)

Deary NO v Acting President, Rhodesia 1979 (4) SA 43 (R)

Director of Education, Transvaal v McCagie and others 1918 AD 616

Durban City Council v Association of Building Societies 1942 AD 27

Electrical Contractors's Association SA v Building Industries Federation SA (2) 1980 (2)

SA 516 (T)

Environment Committee of the Bay Inc v Alcam Electrolysis and Chemical Company Ltd [1990] QLR 655

Ex parte Natal Bottle Store-Keeping and Off-Sales Licensees' Association 1962 (4) SA 273 (D)

Ex parte Nell 1963 (1) SA 754 (A)

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (6) BCLR 671 (SCA)

Ferreira v Levin NO; Vryenhoek v Powell NO 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC)

Fose v Minister of Safety and Security 1997 (7) BCLR 851 (CC)

In re Certification of the Constitution of the Republic of South Africa Act, 1996 1996 (10) BCLR 1253 (CC)

Jacobs en 'n ander v Waks en andere 1992 (1) SA 521 (A)

Japaco Investments (Pty) Ltd v Minister of Justice 1995 (1) BCLR 113 (C)

J T Publishing (Pty) Ltd v Minister of Safety and Security 1997 (3) SA 514 (CC)

Lifestyle Amusement Centre (Pty) Ltd v Minister of Justice 1995 (1) BCLR 104 (C)

Luitingh v Minister of Defence 1996 (2) SA 909 (CC), 1996 (1) BCLR 1 (CC)

Mabaso v Felix 1981 (3) SA 865 (A)

Matukane and others v Laerskool Potgietersrus 1996 (3) SA 215 (T)

Minister of Health and Welfare v Woodcarb (Pty) Ltd 1996 (3) SA 155 (N)

Motsepe v Commissioner for Inland Revenue 1997 (2) SA 898 (CC)

Naken v General Motors of Canada Ltd (1979) 92 DLR (3rd) 100 (Ontario Court of Appeal); (1983) 144 DLR (3rd) 385 (Supreme Court of Canada)

Nasionale Party Suidwes-Afrika v Konstitusionele Raad 1987 (3) SA 544 (SWA)

Natal Fresh Produce Growers’ Association v Agroserve (Pty) Ltd 1990 (4) SA 749 (N)

Noll v Alberton Frames (Pty) Ltd 1989 (1) SA 730 (T)

Oos-Randse Administrasieraad v Rikhoto 1983 (3) SA 595 (A)

Padi v Botha NO 1996 (3) SA 732 (W)

Patz v Greene & Co 1907 TS 427

P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 801 (T)

Phillips Petroleum Co v Shutts 472 US 797 (1985)

Pillay v Krishna 1946 AD 946

Port Elizabeth Municipality v Prut NO 1996 (4) SA 318 (E)

R v Inspectorate of Pollution; ex parte Greenpeace Ltd (No. 2) [1994] 4 All ER 329 (QB)

Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation 1996 (1) SA 847 (ZSC)

Rikhoto v East Rand Administration Board 1983 (4) SA 278 (W)

Roberts v Chairman, Local Road Transportation Board (1) 1980 (2) SA 472 (C)

S v Bequinot 1997 (2) SA 887 (CC)

S v Mbatha 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC)

S v Mhlungu 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)

S v Rens 1996 (2) BCLR 155 (CC)

S v Saib 1994 (2) BCLR 48 (D)

S v Vermaas; S v Du Plessis 1995 (3) SA 292, 1995 (7) BCLR 851 (CC)

Society for the Prevention of Cruelty to Animals, Standerton v Nel 1988 (4) SA 42 (W)

South African Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited 1985 (3) SA 100 (O)

Standard General Insurance Co v Gutman NO 1981 (2) SA 426 (C)

Transvaal Canoe Union and another v Butgereit and another 1986 (4) SA 207 (T)

Transvaal Indian Congress v Land Tenure Advisory Board 1954 (2) SA 506 (T)

Tregea v Godart 1939 AD 16

Tremaine v A H Robins Canada Inc [1990] RDJ 500 (Court of Appeal, Quebec)

Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk 1976 (3) SA 471 (A)

United Watch and Diamond Co (Pty) Ltd v Disa Hotels Ltd 1972 (4) SA 409 (C)

Van Huyssteen NO v Minister of Environmental Affairs and Tourism 1995 (9) BCLR 1191 (C); 1996 (1) SA 283 (C)

Von Moltke v Costa Areosa 1975 (1) SA 255 (C)

Walker v Stadsraad van Pretoria 1997 (3) BCLR 416 (T)

Wehmeyer v Lane NO 1994 (2) BCLR 14 (C)

Wildlife Society v Minister of Environmental Affairs 1996 (3) SA 1095 (TkSC)

Wood and others v Ondangwa Tribal Authority 1975 (2) SA 294 (A)

Zantsi v Council of State, Ciskei 1995 (10) BCLR 1424 (CC)

CHAPTER 1

BACKGROUND AND WORKING PROCEDURE

1.1 Introduction

1.1.1 This report of the South African Law Commission on the topics of class actions and actions in the public interest contains the Commission's reasoned recommendations and a draft bill to give effect thereto. The recommendations in this report substantially confirm those in relation to the same issues in the Commission's 1995 working paper **The Recognition of a Class Action in South African Law** (hereinafter the "Working Paper"). This report accordingly builds on the research, consultations and findings of the Working Paper.

1.2 Background to the investigation

1.2.1 Traditionally the South African law of standing has been relatively restrictive: the courts have required a personal, sufficient, and direct interest[1] before a litigant is accorded standing in court.[2] This has posed fewer problems in matters of an essentially private law nature than in the realm of public law. In public law, for instance administrative law and environmental law, the interest of the litigant may well be shared with the public at large; the litigant may therefore be unable to meet the personal interest requirement.[3] Similarly, representative organisations have on occasion been denied standing on the basis that their interest, as opposed

---

1 **Standard General Insurance Co v Gutman NO** 1981 2 SA 426 (C); **Christian League of Southern Africa v Rall** 1981 2 SA 821 (O); **Cabinet of the Transitional Government for the Territory of South West Africa v Eins** 1988 3 SA 369 (A); **Cabinet for the Territory of South West Africa v Chikane and another** 1989 1 SA 349 (A).

2 Or "*locus standi*". See, for example, **Nasionale Party Suidwes-Afrika v Konstitusionele Raad** 1987 3 SA 544 (SWA); **South African Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited** 1985 3 SA 100 (O); **Ahmadiyya Anjuman Ishaati-Islam Lahore (SA) v Muslim Judicial Council (Cape) and others** 1983 4 SA 855 (C).

3 The decisions in **Bamford v Minister of Community Development and State Auxiliary Services** 1981 3 SA 1054 (C), **Jacobs en 'n ander v Waks en andere** 1992 1 SA 521 (A), and **Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council** 1998 (6) BCLR 671 (SCA) go some way to meeting this concern. The correctness of **Bamford** was, however, questioned by Rabie CJ in the **Eins**-decision (supra).

to that of their members, is insufficiently direct.[4] There are of course decisions that have taken a contrary view,[5] but the issue has remained a potentially troublesome one.[6]

1.2.2 Class actions and public interest actions are part of the worldwide movement to make access to justice a reality.[7] If the traditional notion of standing is strictly adhered to, public spirited individuals are prevented from claiming relief in the public interest or in the interests of persons who for various reasons are unable to enforce their rights. Furthermore, the Constitution of the Republic of South Africa Act 108 of 1996, as did the Constitution, 1993, specifically provides for class actions and actions in the public interest and it is logical that the same principle should apply in non-Bill of Rights cases.[8]

1.2.3 Internationally, class actions and public interest actions are used outside the scope of constitutional law where a number of persons have the same or similar claims or defences. Some examples of instances where numerous persons have similar claims are those

- arising from a single event ("sudden mass disaster");[9]
- attributable to a single cause but occurring at different times and in different circumstances

---

4 **South African Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited** 1985 3 SA 100 (O); **Noll v Alberton Frames (Pty) Ltd** 1989 1 SA 730 (T); **Bohlokong Black Taxi Association v Interstate Bus Lines (Edms) Bpk** 1997 (4) SA 635 (O).

5 **Transvaal Indian Congress v Land Tenure Advisory Board** 1954 2 SA 506 (T); **Ex parte Natal Bottle Store-Keeping and Off-Sales Licensees' Association** 1962 4 SA 273 (D) and, more recently, **Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism and others** 1996 (3) SA 1095 (Tk SC).

6 Van Wyk ***et al*** **Rights and Constitutionalism** 421.

7 Cappelletti (ed) **Access to Justice** 14; Morabito and Epstein **Class Actions in Victoria** 4 - 5.

8 See paragraph 1.3 of Working Paper 57.

9 In such cases a number of workers, travellers, spectators or residents of an area are adversely affected by a specific event, such as a train or aeroplane crash, a mine accident, an explosion at industrial premises, or a major incident at a sporting or leisure event. Generally, these will be personal injury or fatal accident claims; but they may also involve damage to property. There is usually no doubt as to the immediate cause of the damage and liability issues are often legally straightforward.

("creeping disaster");[10]

- arising from transactions concluded by consumers ("consumer claims");[11]
- arising from some other common factor affecting a class (pregnant women, children, parents, the disabled, etc.).

These examples are by no means exhaustive and other types of claims can be envisaged.

1.2.4 The passage of a vessel carrying nuclear waste from Europe to the East around the Cape illustrates the need for a public interest action in our law. On current tests for standing in court, no one - not even an inhabitant of the Cape Peninsula - would have the "sufficient and direct interest" required by our courts[12] to enable him or her to prevent the passage of the vessel through South Africa's economic zone (as in fact happened). Similar considerations could apply to nuclear waste disposal in a remote area of the Kalahari, or the erection of further nuclear power stations in inappropriate parts of the country.

1.2.5 If it was possible to institute a class action in South Africa, the benefits of a

---

[10]Claims alleging environmental pollution of an area, in nuisance or on a statutory basis, may also be of the "creeping" kind where the alleged pollution does not stem from a specific incident, but is said to have occurred over a period of time, such as seepage from an industrial plant, or a nuclear installation, or prolonged use of chemicals in other circumstances, e.g. in a rural area. These types of claims may involve both personal injury and property damage.

[11]These are typically claims by purchasers of defective goods or services for damage to property or financial loss, including, for example, claims by tenants of a block of flats or an estate for a landlord's failure to repair and maintain the premises, professional negligence claims e.g. by shareholders against a company or its auditors for disseminating misleading information, by residents of a neighbourhood against a public authority's decision to build a road or to permit development in their area, or by a group of package holiday customers against a tour operator who has allegedly "failed to deliver". Often (but by no means always) the claims will be individually small, but, together, substantial. They may involve no personal injury element. See also Swedish Commission **Group Actions** 1.

[12]See, for instance, **United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd** 1972 4 SA 409 (C) at 415 B per Corbett J (as he then was).

judgment such as that of **Rikhoto v East Rand Administration Board**[13] could have accrued to all those black people denied the right to remain in a "prescribed area" for more than 72 hours unless exempted.[14] Similarly, the parents of children refused admission to Laerskool Potgietersrus[15] could have joined forces with great effect by instituting a class action.

1.2.6 Class actions can also be to the advantage of large corporations, municipalities and the like. In **Port Elizabeth Municipality v Prut NO**,[16] for instance, the Municipality issued summons against a single "flat rate" payer. Although the doctrine of *stare decisis*[17] applies, the Municipality still has to issue individual summonses against all the other "flat rate" payers. If the Municipality brought a class action against all the defaulters, it could obtain a single judgment enforceable against all the defaulters.

1.3 **Working procedure**

1.3.1 The former Minister of Justice requested the Commission to investigate the possible recognition of class actions on 10 August 1992. Later that same year the Working Committee of the Commission resolved to include such an investigation in its programme. The scope of the investigation was, however, broadened to include actions in the public interest. A

---

[13]1983 4 SA 278 (W). The Appellate Division dismissed an appeal against this judgment: **Oos-Randse Administrasieraad v Rikhoto** 1983 3 SA 595 (A).

[14]In terms of section 10(1) of the Blacks (Urban Areas) Consolidation Act 25 of 1945.

[15]**Matukane and others v Laerskool Potgietersrus** 1996 3 SA 215 (T).

[16]1996 4 SA 318 (E). See also **Walker v Stadsraad van Pretoria** 1997 3 BCLR 416 (T) and **Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council** 1998 6 BCLR 671 (SCA).

[17]The expression "*stare decisis*" means "to stand by decisions". According to this doctrine, when a decision on a legal principle has been delivered by a superior court it should, in general, as far as possible be followed by all courts of equal and inferior status, until such time as that judgment has been overruled or modified by a higher court or by legislative authority.

project committee[18] was appointed to assist the Commission with its task and a working paper was published in 1995.

1.3.2 The Working Paper was circulated widely, not only to lawyers but also to other interested persons and bodies, whom the Commission invited to comment. It contained a draft Bill. Numerous persons and bodies availed themselves of the opportunity to comment.[19]

1.3.3 In the light of the comments received, and our own research, the Commission reviewed and tested its preliminary recommendations as contained in the Working Paper. In this regard the Commission was assisted in its task by a new project committee under the chairmanship of the Honourable Mr Justice P J J Olivier. The committee further consists of Adv J J Gauntlett, SC, Professor C Loots, Mr E Makgoba, the Honourable Madam Justice S Meer, Mr P Mojapelo and Mr D Nkadimeng. Special cognisance was taken of developments in our constitutional law and some recent developments in foreign jurisdictions.

1.3.4 The report is prepared for submission to the Minister of Justice who may then take appropriate action.

---

[18]The project committee was chaired by the Honourable Mr Justice P J J Olivier. The other members of the committee were Professors Piet Delport, Wouter de Vos, Cheryl Loots, Frans Malan, and Ms Shehnaz Meer.

[19]See Annexure A for a list of respondents.

CHAPTER 2

CLASS ACTIONS AND PUBLIC INTEREST ACTIONS DEFINED

2.1 Introduction

2.1.1 This Chapter introduces the concepts of "class action" and "public interest action" and gives some practical examples to illustrate the need for these actions in South African law. The defendant class action is also dealt with.

2.2 What is a public interest action?

2.2.1 A public interest action is one brought by a plaintiff who, in claiming the relief he or she seeks, is moved by a desire to benefit the public at large or a segment of the public.[20] 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.

2.2.2 The treatment of animals (involving practices such as vivisection; badly run circuses, zoos or rodeos; dog racing, dog or cock fighting), environmental issues and other matters call out for public interest actions.[21] On current tests for standing, a sufficient and direct interest is required by any person desirous of preventing such practices. Such persons may be hard to find.

2.3 What is a class action?

2.3.1 The class action is a device by which a single plaintiff may pursue an action on behalf of all persons with a common interest in the subject matter of the suit. The ruling of the court will bind all class members. This is perceived as a means of fostering both judicial economy

---

[20] Homburger 1974 (23) **Buffalo Law Review** 387; Loots 1987 (104) **SALJ** 132.

[21] See also **Society for the Prevention of Cruelty to Animals, Standerton v Nel** 1988 4 SA 42 (W); **Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism** 1996 3 SA 1095 (TkSC). See further **R v Inspectorate of Pollution; ex parte Greenpeace Ltd (No. 2)** [1994] 4 All ER 329 (QB).

and social utility - the courts will no longer be inundated with numerous claims relating to a common subject matter, and individual plaintiffs with claims too small for individual pursuit are provided access to the courts. Class actions can also serve an effective enforcement function, especially in the areas of civil rights, environmental law and consumer claims.

2.3.2 Take a bus or taxi accident as example. Under current practice, each and every injured person or his or her dependants can institute a separate action for damages against the negligent party. Where only two or three claimants are involved, joinder may be appropriate. More frequently, however, the individual actions are brought separately and on a piece-meal basis. Should one of the individual actions be successful, the remainder of the claimants can follow in its wake by relying on the *stare decisis* doctrine. It therefore happens that numerous actions flow from the same, single event. In this example, all the plaintiffs could have brought a single class action and could have achieved the same (or even better) result.

2.4 The differences between a class action and a public interest action

2.4.1 In the Working Paper the Commission argued that class actions and public interest actions are two different but not mutually exclusive procedures.[22] There is no absolute dividing line between these two procedures and they overlap to some extent. In cases involving civil rights, consumer interests and environmental protection issues may be of such public importance that, although the interests of the class or group are at stake, the public interest also comes into play. In such an event either a class action or a public interest action can be instituted.[23]

2.4.2 The Honourable Mr Justice B R du Plessis, with whom Judge President C F Eloff concurs, convincingly argues that the distinction between a class action and a public interest action should be maintained. Mr P J Conradie of Hofmeyr Attorneys, however, submits that the same arguments used with regard to the certification of class actions are also valid with regard to public interest actions. He recommends that certification of public interest actions should also be by way of application, with notice to all interested parties, which will give parties or persons wanting to

---

[22]See paragraphs 2.1, 3.1 and 6.15 of Working Paper 57.

[23]De Vos **LLM thesis** 45 -46. See also De Vos 1996 (4) **Journal of South African Law** 640; Homburger 1974 (23) **Buffalo Law Review** 387 - 388.

oppose the certification sufficient opportunity to do so. The Commission is not convinced that such a step will facilitate access to justice.

2.4.3 In our opinion, the differences[24] between a class action and a public interest action are the following:

Public Interest Action	**Class Action**
Any person, irrespective of whether or not he or she has a direct interest in the relief claimed, may institute the action.	Any person, whether a member of the class or not, may apply for leave to institute the action as a class action.
The action must be identified as a public interest action.	The action must be certified as a class action in order to proceed as a class action.
The court appoints a representative to prosecute the action.	The court appoints a representative to prosecute the action.
The action proceed as an ordinary action.	The court may determine its own procedures.
	Some form of notice to absent class members is usually required.
	The court may determine the common issues and give judgment on the common issues.
	The court may determine the individual issues and give judgment on the individual issues.
Judgment is not **res judicata** against all interested parties. The doctrine of **stare decisis** makes public interest actions effective.	Judgment is **res judicata** against all class members who have not opted out.

2.4.4 Accordingly we recommend:

2. Class actions and actions in the public interest should be treated as two separate and distinct procedures. The two procedures serve different purposes and have to comply with different requirements. The essential difference between a class action and a public interest action is that the judgment given in a class action binds all the members of the class and may, therefore, be pleaded as *res judicata* against the members of the class. The judgment in a public interest action does not

[24] See also De Vos 1996 (4) **Journal of South African Law** 640.

bound the people in whose interest it is brought.

2.5 The defendant class action

2.5.1 Put simply, a defendant class action is the reverse of a plaintiff class action. Instead of a person or persons asserting a claim on behalf of many individuals, in a defendant class action one or more persons is designated to defend on behalf of many. Essentially, defendant class actions can be divided into two main categories, namely, suits against unincorporated associations, such as trade unions or clubs, and suits against a large number of individuals who have no pre-existing relationship and who are alleged to have committed in common some wrong.

2.5.2 The jurisprudence in Anglo-Canadian jurisdictions has been concerned almost exclusively with the first category, suits against unincorporated associations. Undoubtedly one of the major reasons for this fact is that in many of these jurisdictions unincorporated associations have no legal status, and the rules of practice do not authorise the commencement of an action against an unincorporated association in its own name.[25]

2.5.3 In Ontario, the courts have adopted a different attitude toward defendant class actions involving unincorporated associations, focussing on the existence or non-existence of a "common fund" that could be used to satisfy a judgment against the class. Only if the unincorporated association can be said to have a common fund or "trust fund" will the defendant class action be allowed; in the absence of such a fund, the court will not authorise a defendant class action under Rule 75 of the Supreme Court of Ontario Rules of Practice.[26]

2.5.4 As indicated, the second category of defendant class actions involves suits against a large number of individuals who have no pre-existing relationship, but who are sued for some wrong that, it is alleged, they have committed in common. This type of defendant class action has received very little attention in the Anglo-Canadian cases or literature. It has received more attention in American cases and literature, although considerably less than that accorded to plaintiff class actions.

---

[25]The Commission recently included an investigation into the legal position of voluntary associations in its programme.

[26]Ontario Commission **Report on Class Actions** 42.

2.5.5 In the United States, defendant class actions brought in the federal courts are authorised by Rule 23(a) of the Federal Rules of Civil Procedure,[27] although the Rule contains no specific provisions governing defendant class actions. Reported cases indicate that defendant class actions have been used in a variety of contexts,[28] patent infringement cases and suits against public officials challenging the validity of state law apparently being the most typical.[29] Courts have also found defendant class actions to be appropriate with some frequency in antitrust, securities, and environmental suits.

2.5.6 The recent spate of "flat rate" cases[30] and the decision of the SABC to issue summonses against those who refuse to pay their TV licences illustrate the need and practical use of a defendant class action.

2.5.7 Although defendant class actions are not dealt with explicitly in the Working Paper, section 3(3)(c) of the draft bill includes a reference to "defences". To make our intention clear, the draft bill should state that it is possible to institute **or defend** an action as a class action.

2.6 Conclusion

2.6.1 Class actions and public interest actions are two different but not mutually exclusive procedures. Although there is no absolute dividing line between these two procedures, a clear distinction must be maintained. It is therefore imperative to define both concepts.

---

[27]Rule 23(a) states: "One or more members of a class may sue or *be sued* ... " (emphasis added).

[28]Wolfson 1977 (38) **Ohio State Law Journal** 459.

[29]Editorial 1978 (91) **Harvard Law Review** 632.

[30]See paragraph 3.4.6 *et seq* below for a discussion of some of these cases.

CHAPTER 3

THE NEED FOR LEGISLATION

3.1 Introduction

3.1.1 In the Working Paper the Commission recommended that public interest actions and class actions be introduced into South African law by way of an Act of Parliament.[31] This recommendation went unchallenged. A related question of whether section 7(4)(b) of the Constitution, 1993 on its own adequately provided for class actions and public interest actions was also dealt with in the Working Paper.[32] The Commission felt that it would also be necessary to introduce class and public interest actions into non-constitutional areas of the law by way of legislation. It was therefore implicit in the Commission's recommendation that it should not be left only to the courts to develop the necessary principles and guidelines.

3.1.2 We still hold these views and believe there is urgent need for legislation. Except for one (a spokesperson for a corporation),[33] all respondents agree that a special procedure should be provided for class actions and actions in the public interest. The Financial Services Board formulates the need for legislation of this kind in the following terms:

> For consumer groups the benefit of class actions lies in the mass determination of numerous claims that otherwise would not have been adjudicated upon at all, especially in cases where the individual damage is not so large to justify the expense of litigation. Class actions can also eliminate most of the impediments in consumer litigation especially in terms of time, costs and the fear most consumers have of the courts or of litigating against large corporations. It could be said that class litigation provides a far greater amount of security to the individual consumer and the united force of a class presents a much greater threat to a manipulative corporation than any individual action. Class and public interest actions present defendants to such actions with a far greater threat, in terms of adverse publicity

---

[31]See paragraph 6.1 of Working Paper 57.

[32]Paragraph 1.11 of Working Paper 57. The question equally applies to section 38 of the new Constitution, 1996.

[33]Mr DL Titlestad, the Manager: Legal Services, Anglo American Corporation.

as well as the magnitude of the potential liability, than any separate action could pose.

3.1.3 In the Working Paper the Commission recommended that class actions and actions in the public interest be introduced by way of an Act of Parliament and not by way of secondary legislation in the form of rules of the court.[34] However, the Commission also recommended that a uniform rule of court should complement the legislation.[35] We did not receive any objections to this proposal.[36]

3.1.4 Accordingly we recommend:

1. The principles underlying class actions and public interest actions should be introduced by an Act of Parliament and the necessary procedures by rules of court. The Act and the rules should be introduced as a matter of urgency.

3.2 **Lack of standing at common law**

3.2.1 Traditionally only the party who has suffered a legal injury personally may approach the court for relief. This is still the case today. In general, in non-Bill of Rights issues, the litigant must satisfy the court that it has a direct and substantial interest in the subject matter of the litigation.[37] Frequently it happens that an administrative body or a private organisation acts unlawfully, but no individual or organisation's interest is affected to such an extent that it qualifies

---

[34]See paragraph 6.1 of Working Paper 57.

[35]See paragraph 6.14 of Working Paper 57.

[36]See also De Vos 1996 (4) **Journal of South African Law** 643: "... this reasoning cannot be faulted, especially in the context of the new open and democratic dispensation in South Africa."

[37]**P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd** 1980 4 SA 801 (T) at 804 B-F. See also **Dalrymple v Colonial Treasurer** 1910 T.S. 372; **United Watch and Diamond Co (Pty) Ltd v Disa Hotels Ltd** 1972 4 SA 409 (C) at 415 B; **Ahmadiyya AIIL (South Africa) v Muslim Judicial Council (Cape)** 1983 4 SA 855 (C); **Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd** 1990 4 SA 749 (N).

as "sufficiently direct and substantial".[38] This causes delays, prolongs the trial, inevitably increases legal costs, overburdens the judicial system, and generally impedes access to the courts.

3.2.2 The requirement of standing does not act as an effective filter for disputes that are futile, vexatious or otherwise inappropriate for litigation. Such a filter is provided by other laws[39] and discretions available to the court.[40]

3.3 Section 7(4)(b) of the Constitution, 1993 and the courts

3.3.1 Section 7(4)(b) of the Constitution, 1993 has, at least for purposes of enforcement of the Bill of Rights,[41] profoundly changed the concept of legal standing. Chaskalson P, on behalf of the majority of the Constitutional Court, in **Ferreira v Levin NO; Vryenhoek v Powell NO**[42] emphasised the amplification of standing that section 7(4)(b) has wrought:[43]

---

[38]See also **Padi v Botha NO** 1996 3 SA 732 (W) where it was argued that the parents of two young persons who had been shot dead during police action did not have *locus standi* to bring an application to review the inquest proceedings.

[39]Such as the Vexatious Proceedings Act 3 of 1956.

[40]Such as a punitive cost order. See also Rule 33(8) of the Magistrate Court and Rules 6(15) and 23(2) of the Supreme Court.

[41]**Congress of Traditional Leaders of South Africa v Minister for Local Government, Eastern Cape** 1996 2 SA 898 (TkA).

[42]1996 1 SA 984 (CC) par 167.

[43]This approach is also evident in environmental cases. See, for instance, **Van Huyssteen NO v Minister of Environmental Affairs and Tourism** 1996 1 SA 283 (C) at 301G - 302E; **Minister of Health and Welfare v Woodcarb (Pty) Ltd** 1996 3 SA 155 (N). See also **Wildlife Society v Minister of Environmental Affairs** 1996 3 SA 1095 (TkSC) at 1105A-C where Pickering J remarked as followed: “[T]here is also much to be said for the view that, in circumstances where the *locus standi* afforded persons by s 7 of the Constitution is not applicable and where a statute imposes an obligation upon the State to take certain measures in order to protect the environment in the interests of the public, then a body such as the ... [Wildlife Society], should have *locus standi* at common law to apply for an order compelling the State to comply with its obligations in terms of such statute.”

> The category of persons empowered to do so (that is, bring a constitutional matter to a competent court of law) is broader than the category of persons who have hitherto been allowed standing in cases where it is alleged that a right has been infringed or threatened, and to that extent the section demonstrates a broad and not a narrow approach to standing.

3.3.2 Section 38 of the new Constitution, 1996 retains the substance of section 7(4) of the Constitution, 1993 and does not take the matter any further. It 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.

3.3.3 That both the old and new Constitutions provide for class actions and public interest actions in a constitutional context is clear. But it is equally clear that legislation will be necessary to give effect and meaning to these constitutional rights and to broaden the scope to non-Bill of Rights cases.[44] Professor De Vos supports this contention in the following terms:[45]

> In view of the lack of adequate protection of collective interests under our traditional civil procedure model, the innovation under consideration must be hailed as a major development in the quest for effective access to justice for all in the new South Africa. Since the constitutional provisions only countenance these procedures in the context of the enforcement of the fundamental rights enshrined in the Constitution, the law commission rightly proposed ... that their scope should be extended by means of legislation to include other areas such as consumer and environmental issues.

3.3.4 It is important to realise that a person referred to in section 7(4)(b) of the

---

[44]See also Fudge 1987 (25) **Osgoode Hall Law Journal** 485; Grant 1996 (63) **University of Chicago Law Review** 239; Safranek 1996 (22) **Wisconsin Law Review** 263; Welch 1985 (43) **University of Toronto Faculty of Law Review** 204 on the possibilities of and limits to the use of constitutional litigation.

[45]1996 (4) **Journal of South African Law** 641.

Constitution, 1993 is accorded the right to apply to courts with jurisdiction to enforce the Bill of Rights[46] and not any or every court.[47]

3.3.5 Regrettably, section 7(4)(b) of the Constitution, 1993, (as well as section 38 of the Constitution, 1996) only permits the bringing of representative or class actions in circumstances where a right in the Bill of Rights has been infringed or threatened. These sections did not abolish the requirement of standing in non-Bill of Rights cases or in cases falling outside the realm of the Constitutions.[48]

3.4 Lack of uniformity and consistency

3.4.1 It is always an option to leave the development of class actions and actions in the public interest to the courts.[49] However, this development may take place haphazardly or not at all. It is also dangerous as is evident from the lack of uniformity and consistency of approach in the various divisions of the Supreme Court.

3.4.2 In the **Contralesa**-case,[50] Pickering J held that the law, as it stands at present, does not permit the bringing of representative or class actions save in those circumstances specified in section 7(4) of the Constitution, 1993. He said:[51]

---

[46]In other words, a competent court.

[47]**S v Saib** 1994 2 BCLR 48 (D) at 55C - F; **Bate v Regional Magistrate, Randburg** 1996 7 BCLR 974 (W) at 984C - I.

[48]**Congress of Traditional Leaders of South Africa v Minister for Local Government, Eastern Cape** 1996 2 SA 898 (TkA) at 905 E - H.

[49]Loots 1987 (104) **SALJ** 148. See also **Roberts v Chairman, Local Road Transportation Board (1)** 1980 2 SA 472 (C); **Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange** 1983 3 SA 344 (W).

[50]**Contralesa v Minister for Local Government, Eastern Cape** 1996 2 SA 898 (TkSC) at 903 A.

[51]**Contralesa v Minister for Local Government, Eastern Cape** 1996 2 SA 898 (TkSC) at 905 E - H.

> In my view the facts of the *Ahmadiyya* and *Natal Fresh Produce Growers'* cases *supra* are analogous to those in the present application and the principles therein stated are applicable to the present matter. It is not alleged that the rights of traditional leaders in rural areas (whatever those rights might be) are being infringed by the proclamations issued by the respondents under the Transition Act because of their membership of Contralesa. Nor is it alleged that Contralesa organises, controls or administers the activities of traditional leaders in the execution of whatever duties may be imposed upon such leaders. ... As in the *Ahmadiyya* and *Natal Fresh Produce Growers'* cases *supra*, therefore, it has, at best, an indirect interest in the subject matter of the litigation. Traditional leaders who are members of Contralesa can claim relief in their own names, but applicant (Contralesa) cannot do so on their behalf by instituting what is in effect a representative action.
>
> In my judgment therefore the applicant does not have *locus standi*.

3.4.3 The same judge remarked, *obiter*, in another case[52] that there was much to be said for the view that in circumstances where the *locus standi* afforded to persons by section 7 of the Constitution, 1993 was not applicable and when a statute imposed an obligation upon the State to take certain measures to protect the environment in the interests of the public, then a body such as the Wildlife Society should have standing at common law to apply for an order compelling the State to comply with its obligations in terms of such statute.

3.4.4 In order to manoeuvre their application into the Cape of Good Hope Provincial Division of the Supreme Court so as to escape the blocked routes in other divisions, and hoping to clutch on to the straw held out by the **Wehmeyer** decision,[53] the applicants in **Lifestyle Amusement Centre (Pty) Ltd v The Minister of Justice**[54] "stumbled on to what counsel referred to as a class action in section 7(4)(b)(iv) of the Constitution." The applicants contended that the "class of interested persons" consisted of some two thousand casino owners. It was further argued

---

[52] **Wildlife Society v Minister of Environmental Affairs and Tourism** 1996 3 SA 1095 (TkSC) at 1105 A- B.

[53] **Wehmeyer v Lane NO** 1994 2 BCLR 14 (C). See also **Japaco Investments (Pty) Ltd v Minister of Justice** 1995 1 BCLR 113 (C); **Cats Entertainment CC v Minister of Justice; Van der Merwe v Minister of Justice; Lucksters CC v Minister of Justice** 1995 1 SA 869 (T).

[54] 1995 1 BCLR 104 (C) at 110 C - D.

that if one of the applicants established jurisdiction it is sufficient to clothe the remaining 1 999 applicants with *locus standi*. The Court held that the application was an abuse of the process of the Court. The application was accordingly dismissed with costs on a scale as between attorney and client. With regard to the class action the Court found that in order to qualify for the relief claimed, the applicants would have to explain how, why and in what manner they were so entitled.

3.4.5 In **Ferreira v Levin NO; Vryenhoek v Powell NO**[55] the Constitutional Court held[56] that a broad approach should be adopted to the issue of standing in constitutional cases. This is consistent with the mandate given to the Court to uphold the Constitution and serves to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.

3.4.6 In **Port Elizabeth Municipality v Prut NO**[57] the municipality, into which certain areas formerly administered by black local authorities in terms of the Black Local Authorities Act 102 of 1982 had been incorporated, had for several reasons decided to write off R 63 million in outstanding service charges owed by residents of those areas in terms of that Act. The respondents were the administrators of a trust which was the owner of certain immovable property situated within the area administrated by the municipality. During 1994 the municipality had issued summons against the respondents claiming payment of R 9158, 00 in respect of arrear rates levied against the property in terms of the applicable municipal ordinance. The magistrate refused summary judgment and granted the respondents leave to defend the action. In the summary judgment proceedings the respondents raised a defence based on the alleged violation of their fundamental rights in terms of the Constitution, 1993. In particular it was alleged on behalf of the

---

[55]1996 1 SA 984 (CC) at paras [162] - [164].

[56]Per Chaskalson P, Mahomed DP, Didcott J, Langa J, Madala J, Mokgoro J, and Trengove AJ concurring. O'Regan J delivered a separate judgment holding that the applicants had standing in terms of section 7(4)(b)(v) of the Constitution, 1993 to challenge the constitutionality of the particular section in the Companies Act, 1973 in the public interest. Kriegler J dissented on the questions of jurisdiction and standing.

[57]1996 4 SA 318 (ECD). See also **Walker v Stadsraad van Pretoria** 1997 3 BCLR 416 (T) and **Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council** 1998 6 BCLR 671 (SCA).

respondents that the recovery by the municipality of arrears levied against it constituted unfair discrimination because the municipality, by failing to write off the debt in a manner similar to the writing off of the amount of more than R 62 million, was unfairly discriminating against it.

3.4.7 For our purposes it is important to highlight the manner in which the court dealt with the issue of standing. The court held:[58]

> The result is that there seems to be no reason for denying the appellant standing, not only because it is acting in its own interest but also because it is acting in the public interest. In this regard it should be noted that it is clearly in the public interest to have clarity on whether the municipality's decision to write off more than R 62 m discriminates unfairly against other service-charge debtors or ratepayers.

3.4.8 The Eastern Cape Division of the Supreme Court therefore reiterated that courts should be slow to refuse to exercise jurisdiction in terms of section 7(4) of the Constitution, 1993 where the question to be decided is in the public interest and may put an end to similar disputes.[59] The Court further found that the mere allegation of an infringement of or threat to a right is sufficient to confer standing.

3.4.9 The broad approach of the Constitutional Court was adopted in **Beukes v Krugersdorp Transitional Local Council**[60] by the Witwatersrand Local Division of the Supreme Court. *In casu*, the applicant sought a declaration that the Local Council's conduct in not levying rates and taxes according to a uniform structure and in levying rates and taxes in two townships in its jurisdiction according to a fixed tariff, conflicted with the equality provisions[61] of the Bill of Rights and with section 178(2) of the Constitution, 1993. He also sought a declaration that the Local Council was not entitled to claim more than the fixed rate paid by the residents of the townships from him or members of his class.

---

[58]At 325J - 326A.

[59]Per Melunsky J at 325J.

[60]1996 3 SA 467 (W).

[61]Sections 8(1) and (2) of the Constitution, 1993.

3.4.10 The applicant litigated in his personal capacity but also claimed to act in terms of section 7(4)(b)(iv) of the Constitution, 1993 as a member of or in the interest of a group or class of persons. The persons on whose behalf the applicant claimed to act appended their names, addresses and telephone numbers to a form at a public meeting. It was headed "List of group to class action" and beneath it appeared: "We, the undersigned, all ratepayers within the municipal area of Krugersdorp, hereby authorise Johannes Petrus Beukes to bring an application on our behalf ...". The signatories numbered some 120 but none attested to his or her details, and none joined in the proceedings as an applicant or deponent.

3.4.11 The Local Council, although conceding that it was no longer essential that a litigant bringing constitutional challenges has a direct and substantial interest in the right which formed the subject of the litigation, contended that it would be contrary to principle and logic not to require that the group or class of persons on whose behalf litigation was brought to have a direct and substantial interest in the litigation and that for that purpose it was essential that the group or class be accurately defined. The Court held that the broad approach adopted to standing by the Constitutional Court was not only appropriate to the Constitutional Court but to all Courts that were called upon to adjudicate constitutional claims and that such approach should be taken not only as to who qualified as having standing under section 7(4)(b) of the Constitution, 1993, but also as to how that standing might be evidenced.[62]

3.4.12 The Court further held that in the present case the founding papers proceeded explicitly from the averment that the applicant as well as the listed persons lived in 'white areas' and that they were for that reason affected unfairly by the Local Council's discriminatory policy. From that it seemed to be plain that the group or class of persons as a member of whom and in whose interest the applicant was acting were those ratepayers of Krugersdorp within the Local Council's authority who did not enjoy the benefit of 'flat rate' municipal charges.[63]

---

[62]Per Cameron J at 474D-F.

[63]At 474F-G.

3.4.13 The Court continued:[64]

> It would run counter to the spirit and purport of the interim Constitution to require that persons who identify themselves as members of a group or class as a member of whom and in whose interest a litigant acts, should reiterate with formalistic precision the complaint with which they associated themselves. Even more contrary to that spirit and purport would be to require that they attest to their status or that they put in affidavits joining in the litigation. ... no unnecessary restrictions should be placed on the application of s 7(4)(b)(iv), and ... it should be read so as to avoid obstructions on its invocation ...

3.4.14 The Court accordingly found that the applicant had sufficiently identified the class of persons in whose interest and as a member of whom he acted.

3.5 Conclusion

3.5.1 The Commission welcomes the liberalisation of standing in constitutional litigation. We do not, however, believe that this alone will facilitate the development of class actions and actions in the public interest in non-constitutional litigation. Legislation is necessary to ensure a balance between the opening of the doors of access to justice to the masses and flooding the gates with inappropriate or vexatious litigation.

---

[64] At 474G-H/I.

CHAPTER 4

PUBLIC INTEREST ACTIONS

4.1 Introduction

4.1.1 This Chapter specifically deals with public interest actions. Public interest actions are concerned with the implementation and enforcement of rights vested in the general public or a segment of it. Normally they challenge an alleged unconstitutional or illegal exercise of power by the political branches of the government.

4.2 Is there a need for a public interest action in South African law?

4.2.1 Certain types of public interest actions were a feature of Roman law, but our courts have repeatedly held that all the *actiones populares*,[65] except the *actio de libero homine exhibendo*, became obsolete in Roman Dutch law by the sixteenth century and were never received into South African law.[66]

4.2.2 Actions in the public interest are therefore virtually unknown in South African law. There are a few reported cases that may be said to have been brought in the public interest, although they were not presented as such.[67] Some succeeded,[68] some failed.[69] The other cases in

---

65 In Roman law, actions were private (**privatae**) or popular (**populares**): Thomas **Textbook of Roman Law** 88 - 89. Private actions were actions between individuals arising out of a dispute peculiar to themselves, while popular actions were really means of social control and something of a substitute for criminal law.

66 **Bagnall v Colonial Government** 24 SC 470; **Dalrymple v Colonial Treasurer** 1910 TS 372 at 380; **Director of Education, Transvaal v McCagie and others** 1918 AD 616 at 621 per Innes CJ; **Wood and others v Ondangwa Tribal Authority** 1975 2 SA 294 (A) at 310 D per Rumpff CJ.

67 Loots 1987 (104) **SALJ** 132.

68 **Wood & others v Ondangwa Tribal Authority** 1975 2 SA 294 (A); **Deary NO v Acting President, Rhodesia** 1979 4 SA 43 (R); **Roberts v Chairman, Local Road Transportation Board (1)** 1980 2 SA 472 (C); **Bamford v Minister of Community Development and State Auxiliary Services** 1981 3 SA 1054 (C); **Transvaal Canoe Union and another v Butgereit and another** 1986 4 SA 207 (T) at 209 F-G.

69 **Dalrymple v Colonial Treasurer** 1910 TS 372; **Von Moltke v Costa Areosa** 1975 1 SA 255 (C); **Christian League of Southern Africa v Rall** 1981 2 SA 821 (O).

which the courts took the opportunity to observe that there is no action in the public interest were not actions in the public interest, nor did they purport to be so.[70] They were actions in the plaintiff's own interest.

4.2.3 Nor has there been a sustained development in our law towards a public interest action. Early case law established that South African law does not require the plaintiff to have an interest greater than that of other members of society[71] but the courts have consistently required that the plaintiff be personally affected by the wrong in issue.[72] A significant departure from this principle was made by the Appellate Division in **Wood and others v Ondangwa Tribal Authority and another**[73] where church leaders were allowed to claim an interdict in the interest of a large vaguely defined group of persons who feared that they would be illegally arrested, tried and subjected to summary punishment on account of their political affiliations. The Appellate Division could have used this decision as a precedent to justify the relaxation of the traditional rules of standing in many areas of law, instead it restricted it by limiting its application to matters involving violations of life, liberty or physical integrity.[74] The South African courts have not even allowed organizations to claim relief on behalf of their members, insisting that the individual members must approach the court themselves.[75]

4.2.4 The failure of South African courts to facilitate the development of public interest actions makes it imperative that legislation be enacted to enable this type of action to be brought. It is particularly important that access to justice should be a reality during periods of social and

---

[70] **Bagnall v The Colonial Government** (1907) 24 SC 470; **Patz v Greene & Co** 1907 TS 427; **Dalrymple v Colonial Treasurer** 1910 TS 372. See also Loots 1987 (104) **SALJ** 133 *et seq* for a discussion of these and other cases.

[71] **Dalrymple v Colonial Treasurer** 1910 TS 372.

[72] Eckard **Die Locus Standi van Aansoekers by die Geregtelike Hersiening van Administratiewe Handelinge** (unpublished LL.D thesis) University of South Africa, 1975 181; De Vos **LL.M thesis** 99 - 151; Loots 1987 (104) **SALJ** 131.

[73] 1975 2 SA 294 (A).

[74] See Loots 1987 (3) **SAJHR** 66.

[75] **Ahmadiyya Anjuman Ihaati-Islam Lahore (South Africa) and another v Muslim Judicial Council (Cape) and others** 1983 4 SA 855 (C) at 864 E-F; **South African Optometric Association v Frames Distributors (Pty) Ltd** 1985 3 SA 100 (O) at 103 F - 105 C; **Natal Fresh Produce Growers' Association and others v Agroserve (Pty) Ltd and others** 1990 4 SA 749 (N) at 758 G - 759 D.

economic change.[76] While section 38 of the Constitution, 1996 authorizes public interest actions, this is only for the purpose of enforcing the fundamental rights contained in the Bill of Rights. There will be many other kinds of actions which need to be brought in the public interest. Rather than following the route of enacting citizen suit clauses piecemeal in different legislative instruments, acceptance of the concept of public interest litigation should be demonstrated by the enactment of a statute which will authorize public interest actions for all types of matters in all courts.

4.2.5 Public interest litigation also helps to enhance judicial decisions in two ways. First of all, the willingness of courts to listen to interveners is a reflection of the value that judges attach to people. Our commitment to a right to a hearing and public participation in government decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect. Secondly, participation by public interest interveners in litigation creates a moral obligation on their part to respect the outcome of the litigation.[77]

4.3 How should a public interest action be defined?

4.3.1 In the Working Paper we defined[78] a public interest action as "an action instituted by a representative in the interest of the public generally, or in the interests of a section of the public, but not necessarily in that representative's own interest".

4.3.2 It appears as if some uncertainty exists as to what we mean by an action in the public interest. It is precisely for this reason that we defined the concept in the Working Paper. From the definition it is apparent that the overriding consideration in a public interest action is the "interest of the public generally".[79]

---

[76] See Bhagwati **Judicial Activism and Public Interest Litigation** 61 - 66.

[77] Bryden 1987 (66) **Canadian Bar Review** 508 - 509.

[78] Paragraph 2.1 of Working Paper 57; clause 1 of the draft bill.

[79] **Canadian Aids Society v Ontario** 1996 (32) CRR (2d) D5 (Ontario General Division). See also Bryden 1987 (66) **Canadian Bar Review** 490; Hough 1991 **Denning Law Journal** 77;

4.3.3 Unlike the class action plaintiff, the public interest plaintiff does not purport to represent any particular individual. He or she acts as a spokesman for a public at large or a segment of it. Neither problems of notice nor of *res judicata*, so troublesome in class actions, plague public interest litigation. If the plaintiff succeeds, the benefit of the judgment accrues automatically to the general public through injunctive, declaratory or other relief, restraining or invalidating the governmental action.[80] On the other hand, if the government prevails, under the present doctrine, *stare decisis* rather than *res judicata* should discourage a renewed attack by another public interest plaintiff.

4.3.4 Accordingly we recommend:

3. The Act should define the term "public interest action". We propose the following definition: "public interest action" means an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interest. Judgment of the court in respect of a public interest action shall not be binding (*res judicata*) on the persons in whose interest the action is brought.

4.4 What are the requirements for a public interest action?

4.4.1 In the Working Paper we proposed that the *locus standi* requirement of a direct and personal interest be relaxed to pave the way for an action in the public interest.[81] This proposal was qualified by the recommendation that the court should have a discretion to entertain or dismiss an action as a public interest action. We accordingly suggested[82] that the plaintiff should identify the

---

Koch 1990 (48) **University of Toronto Faculty of Law Review** 151; Lane 1988 (18) **Queensland Law Society Journal** 115; Susman 1994 (13) **Wisconsin International Law Journal** 57.

[80]Thus, although the public interest litigant acts in the interest of the public generally or a segment of it, a judgment in a public interest action is not binding on the public generally or a segment of it.

[81]Paragraph 3.3 of Working Paper 57.

[82]Paragraph 6.15 of Working Paper 57; clause 2(2) of the draft bill. See also Friedlander 1995 (40) **McGill Law Journal** 55; Fudge 1987 (25) **Osgoode Hall Law Journal** 485.

action as a public interest action and nominate either himself or herself or another suitable person to act as representative. Thereupon the court should consider whether the action should proceed as such and, if so, appoint the representative. Except as indicated, no special procedures are required and a public interest action follow the normal course of a civil action. "And since the *locus standi* barrier is set to disappear, no other real obstacles are foreseen."[83]

4.4.2 Mr D L Titlestad, the Manager: Legal Services, Anglo American Corporation suggests that public interest actions should be limited to matters in which the litigant claims declaratory or intermediary relief.[84] Mr P J Conradie of Hofmeyr Attorneys is of the same view as public interest actions are not well suited to claims for damages. Mr Conradie shows that members of a public interest group could be differently affected by, for example, pollution. The one member could have a claim for damages for corroded iron roofing caused by the pollutant and another member could have a claim for pollution that caused his crop to fail. Each individual member could therefore have different claims for different reasons.

4.4.3 Mr Conradie further recommends that public interest actions be subject to a certification process, with notice to all interested parties. Since Mr Conradie feels that public interest actions should be subject to a certification process, he criticises the Commission for not listing the criteria which the Court must take into account when allowing an action to continue as a public interest action. He feels that aspects such as the relief requested, whether the action is in the interest of the public generally or in the interest of a particular section of the public, the benefit that might accrue to the public at large or a specific group and the extent to which individuals who has suffered damages may be prejudiced by a judgment should be included as elements the court must consider before allowing a matter to proceed as a public interest action.

4.4.4 It will not open the doors of access to justice if public interest actions were subjected to complicated and costly procedures and requirements. The idea is to broaden standing by making it possible for person not having a direct interest in the relief claimed to institute an action in the public interest. Public interest actions should therefore not be subject to a certification process.

---

[83] De Vos 1996 (4) **Journal of South African Law** 642.

[84] See also Lane 1988 (18) **Queensland Law Society Journal** 115; Ross 1995 (33) **Osgoode Hall Law Journal** 151; Vern 1988 (18) **Queensland Law Society Journal** 115.

On the other hand, the courts will be able to limit unmeritorious public interest actions by the requirement that the action be instituted in the interest of the public generally or of any particular section thereof and the presence of a suitably qualified representative.

4.4.5 Accordingly we recommend:

> 4. Any person should be able to institute action in a court claiming relief by way of a public interest action in the interest of the public generally or of any particular section thereof, irrespective of whether or not such person has any direct, indirect or personal interest in the relief claimed. Such person shall identify the action as a public interest action and nominate a suitable person (with that person's prior consent) to represent the public interest in the matter concerned. Before the court appoints the representative, it must be satisfied that the contemplated action is a *bona fide* public interest action. The representative acts in the public interest and for this reason the court should be able to remove and replace him or her on good cause shown.

4.5 **"In the public interest"**

4.5.1 It is important to differentiate between an action in the public interest and an action based on a public right which is brought in the plaintiff's own interest. This second type of action seeks to enforce a right which is enjoyed by all members of the public. The outcome of the action may, by virtue of the doctrine of *stare decisis*, affect others who enjoy the same right, but the primary intention of the plaintiff is to claim the relief in his or her own interest.[85]

4.5.2 It is also necessary to highlight the different meanings of the phrase "in the public interest". The phrase can firstly mean that it is in the public interest to have a particular matter raised and adjudicated. Secondly, it can mean that the effect of the successful outcome of the matter is that each and every member of the public or a part thereof benefits therefrom. If it is in the public interest to raise and adjudicate issues, then the situation could arise that the courts would be flooded by busybodies with no real interest in the matter. This need not necessary be the case since it depends on the relief claimed.

---

[85] Loots 1987 (104) **SALJ** 132.

4.6 The ideological plaintiff as representative

4.6.1 A public interest action is one brought by a plaintiff who, in claiming the relief he or she seeks, is moved by a desire to benefit the public at large or a segment of the public. Such a plaintiff has been referred to as an ideological plaintiff.[86]

4.6.2 In the Working Paper it was contemplated that **any person** would be afforded the opportunity to institute action in court claiming by way of a public interest action relief in the interest of the public generally or of any particular section of the public, irrespective of whether or not such person has any direct interest in the relief claimed.[87] In terms of the draft bill, all that the person wishing to institute a public interest action has to do is to identify the public interest action as such and to nominate either himself or herself or any other suitable person as the representative plaintiff of those on whose behalf the relief is claimed.[88] If the court is satisfied that the action should proceed by way of a public interest action, it must appoint as the representative a person who, in the court's opinion, is suitably qualified to represent the public interest in the matter concerned.[89]

4.6.3 It is important to ensure that the representative will fairly and adequately protect the best interests of the public generally or of any particular section thereof. The representative should therefore be "suitably qualified" or "genuine" in his or her endeavours to represent the public interest. It follows that the court should also be in a position to remove any representative and appoint another on good cause shown. The requirement of promoting the "best interests" of the public implies that the representative concerned should be independent of the defendant(s), and that there should be no apparent conflict of interest, but does not imply that the representative

---

[86]Or a non-Hohfeldian plaintiff, a term used by Louis L Jaffe, referring to Hohfeld's characterisation of the plaintiff as one seeking a determination that he or she has a right, a privilege, an immunity or a power. See Jaffe 1968 (116) **University of Pennsylvania Law Review** 1033; Hohfeld 1913 (23) **Yale Law Journal** 16.

[87]Clause 2(1) of the draft bill.

[88]Clause 2(2) of the draft bill.

[89]Clause 2(3) of the draft bill.

should have the financial resources likely to be necessary to support the litigation.[90]

4.7 The defendant in a public interest action

4.7.1 In an ordinary action a specific plaintiff confronts a specific defendant. This is inherent in the word "action" and embodies the essence of our adversarial system. If judgment is given against a specific defendant, the principle of *stare decisis* would apply and this would ensure a much wider effect of the single judgment. However, the question has been raised whether it is necessary in a public interest action that the relief claimed be directed against one or more specific defendants.

4.7.2 Take the following example. Clearly it would be very much in the public interest if it was possible to determine authoritatively and economically, whether or not cigarette smoking causes lung cancer. Say, for instance, a widow institutes an action for damages against a tobacco company which was said to be responsible for her husband's death from lung cancer after smoking their products. That is to say, a specific plaintiff sues a specific defendant for specific relief, as will ordinarily be the case. No problems are foreseen in such a case. However, what happens if the deceased displayed no brand loyalty and smoked whatever he could lay his hands on? Do we still need a specific defendant tobacco company? If the widow claims damages, then it seems logical to sue a specific defendant, preferably one with deep pockets.[91] If intermediary relief is claimed, then it still seems necessary to cite a specific defendant or defendants. Even a general class of defendants will do. The widow can, for instance, ask for an interdict prohibiting the sale of cigarettes without clearly visible health warnings on the packets.

4.7.3 In the ordinary course of practice, however, it is not necessary to cite a specific defendant if a declaration of rights is sought. In terms of section 19(1)(a)(iii) of the Supreme Court Act, 1959, a division of the High Court may in its discretion and at the instance of any interested person enquire into, and determine any existing, future or contingent right or obligation

---

[90]This is also the recommendation of the Ontario Commission **Report on Class Actions** 358; contra Scottish Law Commission **Multi-Party Actions Report** 20.

[91]Problems concerning proof of causation might occur. However, these same problems occur in 'ordinary' (non-public interest) actions. See also Fleming 1994 (42) **American Journal of Comparative Law** 511 - 513 for more on the indeterminate defendant.

notwithstanding that such person cannot claim relief consequent upon the determination.[92] It is an essential requirement that there be an interested person upon whom the declaration will be binding. That does not mean that there must be an existing dispute.[93] The interest of the claimant must be real and not an abstract or intellectual one as it is not the function of the court to act in a consulting or advisory capacity.[94]

4.7.4 Accordingly we recommend:

5. If the remedy sought is an interdict or a mandamus, then a defendant should be cited in a public interest action. If the public interest litigant seeks a declaration of rights, then it is not necessary to cite a defendant.

4.7.5 To avoid bad publicity, for instance, the defendant cited in a public interest action may offer no defence or a poor defence. The danger is then that the court will basically be faced with a single version. In order to prevent such an occurrence or to address the inadequacy of the defence, the court can appoint either a commissioner, a curator or an *amicus curiae* to assist the defendant and or the court or to argue the matter on the defendant's behalf.

4.7.6 In the Working Paper[95] we proposed that the court may appoint a commissioner *inter alia* for the purpose of collating evidence. Such a commissioner will then be in a position to place factual material before the court. We endorse this proposal but also offer the following two alternatives. First, the court might appoint a curator to defend the public interest action on behalf of the reluctant defendant. The advantage of such a step would be that the curator can tax

---

[92] The Court cannot, however, grant a declaration as to a fact, as the declaration must relate to a right. The persons who have such a right are those in whom the right inheres or against whom it avails: **Electrical Contractors' Association SA v Building Industries Federation SA (2)** 1980 2 SA 516 (T).

[93] **Ex parte Nell** 1963 1 SA 754 (A).

[94] **Durban City Council v Association of Building Societies** 1942 AD 27.

[95] See clause 7 of the draft bill.

fees for the work done. Secondly, the court might rely on the services of an *amicus curiae*.[96]

4.8 **Which courts should hear public interest actions?**

4.8.1 In the Working Paper we suggested that the Constitutional Court, the Supreme Court (now the High Court) and any other court designated by the Minister of Justice should be empowered to hear public interest actions.[97] The Labour Court and the Land Claims Court obviously also fall under this category. We also indicated that nothing prevents the Minister to designate the lower courts as being entitled to adjudicate public interest actions as opposed to class actions where we suggested an incremental approach.[98] We reiterate our position even though the lower courts have only limited territorial jurisdiction as the public interest in a public interest action should not be equated with the national interest or even provincial interests.

4.8.2 Accordingly we recommend:

6. The Constitutional Court, the High Courts, the Land Claims Court, the Labour Court, and the Magistrates' Courts should be designated by the Minister of Justice to hear public interest actions with immediate effect. In addition, the Minister should be given the discretion to designate any other court to adjudicate public interest actions.

4.9 **Who should be liable for costs?**

4.9.1 In the Working Paper we noted that the general rule in South Africa is that costs follow the outcome of the action, resulting in the losing party paying most of the winning party's

---

[96]It should be noted that Rule 34 of the Constitutional Court Rules provides that any party to any proceedings before the court, and an *amicus curiae* properly admitted by the court, is entitled to canvas factual material which is relevant to the determination of the issues before the court and which does not specifically appear on the record. This is what is known in the USA as a "Brandeis brief". See also **Fose v Minister of Safety and Security** 1997 (7) BCLR 851 (CC) where the Constitutional Court held that the Human Rights Commission does not enjoy a privileged position with respect to admission as *amicus curiae*.

[97]See paragraphs 6.3 *et seq* of Working Paper 57.

[98]See paragraph 6.3 of Working Paper 57.

costs, including the fees of the legal representatives.[99] We do not depart from this general approach.[100] We did, however, recommend that the court be given the discretion to order the representative to provide security for costs; to refuse to do so where it is in the public interests to do so; to authorise a public interest action or a class action subject to the granting of funds or the indemnification of the defendant's costs by a Fund; and order those persons who have elected to opt-in to contribute towards costs and, where appropriate, to provide security for costs.[101] We still believe the court should have a discretion to deviate from the normal cost rules, but we are in principle against the court making costs orders against the representative or requiring the representative to provide security for costs as this will have an inhibiting factor on the bringing of public interest actions. We have accordingly provided for security to be furnished only where there is good reason to do so.

4.9.2 Accordingly we recommend:

7. The court hearing the public interest action shall not make an order as to costs or order the representative to provide security for costs unless special circumstances apply.

4.10 **Conclusion**

4.10.1 Public interest actions are concerned with the implementation and enforcement of rights vested in the general public or a segment of it. The public interest plaintiff, the representative, does not purport to represent any particular individual and acts as a spokesman for the public at large or a segment of it. If the representative succeeds, the benefit of the judgment accrues automatically to the general public through intermediary, declaratory or other relief.

---

[99] Paragraph 5.40 of Working Paper 57. See also De Vos 1996 (4) **Journal of South African Law** 651 who shows how the negative implications of the rule that costs follow the outcome of the suit are "substantially reduced" by the Commission's proposals regarding contingency fees arrangements and the public interest and class action fund.

[100] See also paragraph 4.74 of the Commission's **Report on Speculative and Contingency Fees**, 1996.

[101] See clause 9(1) of the draft bill.

CHAPTER 5

CLASS ACTIONS

5.1 Introduction

5.1.1 This Chapter specifically addresses class actions. A class action is a mechanism by which a single plaintiff can pursue an action on behalf of a group of persons sharing a common interest in the subject matter of the suit. The ruling of the court will bind all class members.

5.2 How should a class action be defined?

5.2.1 In the Working Paper we defined a class action as "an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class and certified as a class action ....".[102]

5.2.2 An Australian working definition of a class actions is:[103]

> A class action is a legal procedure which enables the claims of a number of persons against the same defendant to be determined in one action. In a class action one or more persons (‘the plaintiff’) may sue on his own behalf and on behalf of a large number of other persons (‘the class’) who have the same interest in the subject matter of the action as the plaintiff. The class members are not usually named as individual parties but are merely described. Although they usually do not take any active part in the litigation, they may nevertheless be bound by the result. It is, thus a device for multi-party litigation where the interests of a number of parties can be combined in the suit.

5.2.3 In the Quebec Code there is a succinct definition:[104]

---

[102]Clause 1 of the draft bill.

[103]Australia Law Reform Commission **Access to the Courts II - Class Actions**. See also Australia Law Reform Commission **Grouped Proceedings in the Federal Court; *Beyond the door-keeper***; Swedish Commission **Group Actions** 59.

[104]Article 999 of the Quebec Code.

> 'Class action' means the procedure which enables one member to sue without a mandate on behalf of all the members.

5.2.4 A distinctive feature of the procedure is that the members of the class may not be individually named but may merely be described, e.g. all the purchasers of a particular model of car during a certain period of time.[105]

5.2.5 The Scottish Law Commission defines 'class actions', which they treat as a category of what they describe as 'multi-party actions', as follows:[106]

> Class actions are brought by a named plaintiff (pursuer), who is typically the self-appointed representative of a class (or group) of persons, and who seeks redress for himself and for the other class members. Class actions may be regarded as a more sophisticated version of the representative action available in England and other countries which have adopted English court procedures.

5.2.6 From our discussion on the definition of a public interest action it is apparent that it is necessary to define the key concepts. The term 'class action' should therefore be defined in the Act.

5.2.7 Accordingly we recommend:

8. The Act should define the term "class action". We propose the following definition: "Class action" means an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and which action is certified as a class action in terms of the Act.

5.3 What are the characteristics of a class action?

5.3.1 A class action is a means by which a group of litigants faced with the same or

---

[105] See, for instance, the Canadian case **Naken v General Motors of Canada Ltd** (1979) 92 DLR (3rd) 100 (Ontario Court of Appeal); (1983) 144 DLR (3rd) 385 (Supreme Court of Canada).

[106] **Multi-Party Actions Report** par 2.2.

similar cause of action pool their resources to conduct a single action in circumstances where joinder is not possible or appropriate. In order for an action to be prosecuted as a class actions the action must be certified by a competent court according to a predetermined set of criteria. Once certified the class action is conducted by a representative on behalf of all the members of the class. The prosecution of the class action itself takes place in two stages: First, the issues common to all the members of the class are determined. Once that process is completed, the individual issues are determined.

5.4 Who may apply for leave to institute a class action?

5.4.1 In the Working Paper the Commission recommended that the concept of the ideological plaintiff be accepted for the purposes of class actions.[107] This would mean that the person commencing the action or the person appointed as representative need not be a member of the class. This recommendation elicited some strong responses.

5.4.2 The Honourable Mr Justice B R du Plessis, with whom Judge President C F Eloff concurs, qualifies his support for the concept of the ideological plaintiff. He argues that the concept impairs the freedom of individual choice and negates the difference between a class action and an action in the public interest.

5.4.3 In the Working Paper the Commission based its support for the ideological plaintiff on the fact that a large percentage of the South African population is unsophisticated, poorly educated and indigent and therefore unable to enforce their rights on their own.[108] Judge Du Plessis argues that it is not an answer to the problem to allow somebody, regardless of the wishes of the group of unsophisticated and poorly educated litigants, to proceed with an action on behalf of such a group. Judge Du Plessis concludes:

> The answer rather lies therein to allow a person who is not a member of the group to institute and pursue the action, but then to require that such a person should convince the court that he enjoys the support of the members of the group or at least a substantial part of the members of the group. [Own translation]

---

[107]Paragraph 6.19 of Working Paper 57.

[108]Paragraph 5.3 of Working Paper 57.

5.4.4 We believe the requirement[109] of the suitability of the representative adequately to represent the best interests of the members of the class embraces the above suggestion of Judge Du Plessis. The fact that the representative enjoys the support of at least a substantial part of the members of the class obviously makes such a person a more suitable person than somebody who does not enjoy that kind of support.

5.4.5 The Society of Advocates (OFS Division) points out, correctly in our opinion, the practical implication of accepting the concept of the ideological plaintiff. The Society argues that in practice it will simply mean that the court will have to make a ruling on whether the plaintiff or applicant has the required standing whenever it is faced with a class action or a public interest action. The only innovative aspect is that the representative need not be a member of the class and thus need not have a direct interest in the relief sought.

5.4.6 Mr Conradie of Hofmeyr Attorneys argues that the concept of the ideological plaintiff should not be extended to class actions, especially if monetary damages are claimed. He motivates his objection as follows:

> Uneducated and other classes of people could be misled by lawyers who are motivated by a desire to generate fees more than the desire to benefit the class. To furthermore prevent lawyers from enriching themselves to the prejudice of others, with pie in the sky promises of large money awards, it should be necessary to demonstrate a probability of success on the merits as a prerequisite to maintain a class action.[110]

5.4.7 This is not what the Commission had in mind.[111] We suggested three sets of factors that the court should take into account in appointing the representative.[112] These are the suitability of the nominee to adequately represent the best interests of the members of the class; any conflict

---

[109]Clause 4(3)(a) of the draft bill.

[110]See also McBryde and Barker 1991 **New Law Journal** 484 for the way in which English lawyers handled 'ambulance chasers'.

[111]Paragraphs 5.8 and 5.9 of Working Paper 57.

[112]Clause 4(3) of the draft bill.

of interest between the representative and the members of the class;[113] and the ability of the representative to make satisfactory arrangements with regard to the funding of the class action and the satisfaction of any order as to costs or for security for costs.

5.4.8 The Society of Advocates of Natal is opposed to the notion that an 'ideological plaintiff' should be able to be both representative and counsel at the same time. However, the crux of the objection of the Society seems to be against a particular set of circumstances where somebody other than the individual appearing in person or a legal representative(s) acts in litigation on behalf of the class. We dealt with this issue in the Working Paper.[114] The general rule is that, save in those instances where an individual appears in person, litigants should have legal representation. We believe, however, that a case has been made in the Working Paper for the use of in-house legal counsel in particular circumstances. We understand the concern of the Society but access to justice does not entitle us to reserve work for members of the Bar. We cannot, therefore, support this contention of the Society of Advocates of Natal.

5.4.9 The Ontario Act provides that only class members may commence proceedings on behalf of a class. In Quebec, however, nonprofit organisations and employee associations are given limited rights to act as class representatives. In accordance with article 1048 of the Code of Civil Procedure, legal persons may request representative status.[115] The experience in Quebec

---

[113]The South African National Consumer Council considers this requirement as redundant.

[114]Paragraph 5.8 of Working Paper 57.

[115]The possibility of granting representative status to certain legal persona may enable these groups to have negotiating power that benefits consumers and occasionally avoids the need for lawsuits. One example from Quebec illustrates this principle. In a letter addressed to the Fonds d'aide aux Recours Collectifs, the Automobile Driver Protection Association (APA) confirmed that the threat of a class action in Quebec had let to the resolution of two problems affecting many Canadian consumers. As of the fall of 1989, the Honda corporation stopped levying the $35 warranty transfer fee on its models. The APA showed that the resulting savings to consumers amounted to between $500 and $1 million per model-year. Similarly, in the summer of 1991, the Ford motor company introduced a program that saved owners of 1988 and 1989 Ford Tempo's and Mercury Topazes with defective fuel pumps approximately $1 million. This program provided for an extension on the warranty on the pump as well as reimbursement for the repairs already undertaken by the consumer.

has shown that no abuse has resulted from this provision.[116]

5.4.10 While recognising that an 'ideological advocate' may be an adequate class representative, the Ontario Law Reform Commission did not endorse the Quebec model. Their failure to do so appears to have been based both on American case law, under which class representatives generally must have individual standing, and their reluctance to make changes to the law of standing pending the release of their report on standing.

5.4.11 Section 2(4) of the British Columbia Act allows a court to certify a person who is not a member of the class as the representative plaintiff if it is necessary to do so in order to avoid a substantial injustice to the class. That provision was included in the Act on the belief that a particular non-member individual or group may possess special ability, experience or resources that would allow them to be not only an adequate class representative, but also, the most appropriate class representative.[117]

5.4.12 Although we are aware that some critics might argue that the concept of an ideological plaintiff could result in busybodies with frivolous claims inundating the courts, the Commission believes, as Professor De Vos does,[118] that this would be an overstatement of the potential risk involved.[119] We therefore believe that the concept of the ideological plaintiff can be implemented with success.

5.4.13 The representative takes the action forward on behalf of all the members of the class: He or she is looking after the interests of members of the class, some of whom might be absent. Furthermore, the judgment will bind not only the representative but also the members of the class on whose behalf he or she sues. The quality of the representative therefore matters to

---

[116]Uniform Law Conference of Canada **Class Actions Discussion Paper** p. 12.

[117]Uniform Law Conference of Canada **Class Actions Discussion Paper** p. 12.

[118]1996 (4) **Journal of South African Law** 645.

[119]Scott's remark in the 1973 **Harvard Law Review** 674 in this regard is to the point: "[T]he idle whimsical plaintiff, a dilettante who litigates for a lark, is a spectre which haunts the legal literature, not the court room."

the court and to the class members.

5.4.14 The assigned representative may, however, die or become unsuitable or unable to proceed with the class action after certification. This eventuality is not covered by the draft bill. The Act should therefore provide for the dismissal of a representative on good cause shown and should enable the court to appoint somebody else in his or her place.

5.4.15 Accordingly we recommend:

> 9. The person commencing the class action or the person appointed as representative in the class action need not be a member of the class. Since the quality of the representative may be relevant, only suitable persons should be appointed as representatives. The Act should accordingly provide that the person who brings the application for certification may request the court to appoint him or her, or any other suitable person (with that person's prior consent), to be the representative. Before the court appoints the representative, it must be satisfied that the contemplated action is a *bona fide* class action. The Act should further provide that the court may dismiss a representative on good cause shown.

5.5 **Is certification as a class action necessary?**

5.5.1 The first issue in any proposal for class action legislation is whether there is a need for a preliminary step in the process called "certification" or "authorization".[120] In Quebec, a class action cannot be instituted without the prior authorisation of the court. Under the Ontario Act, the British Columbia Act and the US Federal Rule 23, a member of the class may commence the action, but then must apply to the court for an order certifying the proceeding as a class action and appointing a representative plaintiff. Outside Quebec and Ontario, the existing law on class actions is set out in rules of court in terms similar to the following Saskatchewan provision:

> 70. Where there are numerous persons having the same interest in one cause or matter, including actions for the prevention of waste or otherwise for the protection of property, one or more of such persons may sue or be sued, or may be authorised by the court to defend in such cause or matter, on behalf of or for the benefit of all persons so interested.

---

[120]Uniform Law Conference of Canada **Class Actions Discussion Paper** p. 5.

5.5.2 This rule does not require judicial approval before a class action can be undertaken.

5.5.3 Amendments to the Federal Court of Australia Act in 1991 established a procedure for what it calls "Representative Proceedings". It does not include a certification process and relies instead on a number of other protections for absent class members and defendants. In Sweden, as well, the proposal of their law reform commission is that class action legislation be implemented that does not include a certification procedure.

5.5.4 After reviewing the class action procedures in the United States, Canada and Australia, the Scottish Law Commission suggested that a class action procedure be established in Scotland that includes a certification procedure.[121] This was also the recommendation of the Uniform Law Conference of Canada.[122]

5.5.5 The arguments in favour of a certification procedure include:

* It acts as a screen to potential abuse of the process;
* It shields the defendant from an unreasonable burden of complex and costly litigation;
* It is a counter-balance to other reforms that might be seen as favourable to class members (for example, special costs rules);
* It protects the interest of absent class members; and
* The fact that most class action procedures in other jurisdictions have rules which control the raising of class actions.[123]

5.5.6 The arguments against a certification procedure include:

* It is unnecessary, particularly if the procedure has an opt-in arrangement; and

---

[121]Scottish Law Commission **Multi-Party Actions Discussion Paper** paras 7.4 - 7.13; **Multi-Party Actions Report** paras 4.15 - 4.19.

[122]Uniform Law Conference of Canada **Class Actions Discussion Paper** p. 8.

[123]In recent years, the need for certification is starting to be questioned. See also Uniform Law Conference of Canada **Class Actions Discussion Paper** p. 7 *et seq*.

* The same matters can be considered, but at a more appropriate stage in the proceedings, by an application for decertification.

5.5.7 The generally accepted practice in other jurisdictions is that a class action may be commenced by a representative on behalf of the class, but within a specified time it must be certified by a court in order to proceed as such. In the Working Paper the Commission accepted the necessity of certification, but proposed a distinct two-stage approach to class action proceedings. Firstly, the representative would be required to bring an application, supported by affidavit, before the court for leave to institute a class action. Once the court has certified the action as a class action and determined the procedure to be followed and related matters, the case proceeds through the second phase to finality.

5.5.8 Professor De Vos supports this two-staged approach. He argues as follows:[124]

> I am of the view that the proposed scheme would be more compatible with South African civil procedure than the general [American] approach. It should also obviate the possibility of a class action being launched inappropriately in order to frighten the defendant into an early settlement. The use of affidavits would further have the advantage of providing the court with *evidence*, by means of which preliminary issues such as the adequacy of the representation and notice to absent members of the class could be determined.

5.5.9 Those respondents who commented also agree in general with our provisional view. Mr P J Conradie of Hofmeyr Attorneys, it will be recalled,[125] argues that public interest action should also be subject to a certification process.

5.5.10 Accordingly we recommend, as we did in the Working Paper,[126] that

10. In class actions a preliminary application should be brought before court requesting leave to institute or defend an action as a class action and to ask for directions as to procedure.

[124] 1996 (4) **Journal of South African Law** 645.

[125] See paragraph 4.9.1 above.

[126] Paragraphs 6.16 - 6.18 of Working Paper 57.

5.6 **What criteria should be adopted in certifying an action as a class action?**

5.6.1 The criteria on which an action may qualify as a class action constitute one of the most important and distinctive features of rules regulating a class action procedure.[127] These conditions are the prerequisites for an action to be maintained as a class action.[128]

5.6.2 Our provisional view was that the criteria for certification should be:[129]

(a) evidence of the existence of an identifiable class of two or more persons;
(b) the existence of a **prima facie** cause of action;
(c) issues of fact or law which are common to the claims or defences of individual members of the class;
(d) the availability of a suitable representative or representatives to represent the interests of the class; and
(e) whether, having regard to all relevant circumstances, a class action would be the appropriate method of proceeding with the action.

5.6.3 Contained within this draft clause are the various elements that make up the certification criteria. They are numerosity, commonality, a preliminary merits test, the adequacy of representation, and superiority. These elements will be discussed individually.

* Numerosity[130]

5.6.4 Not all respondents agree with our view that the group of potential pursuers (or petitioners) need not consist of a specified number of litigants. Mr P J Conradie of Hofmeyr Attorneys, for instance, argues that our formulation allows parties that could have been joined in

---

[127]The South African National Consumer Council proposes that these conditions should be defined as broadly as possible.

[128]To adopt the wording of US Federal Rule 23. See also Scottish Law Commission **Multi-Party Actions Report** 18.

[129]Paragraph 6.20 of Working Paper 57. See also clause 3(3) of the draft bill in Working Paper 57.

[130]An identifiable class of two or more persons.

terms of the normal rules applicable to joinder to participate in the benefits of an action without having to face the consequences of a cost order should the action fail. According to Mr Conradie this will open the system to abuse which will lead to severely unfair consequences to defendants. This is also the argument of Judge B R du Plessis who submits that it should be a requirement for certification that joinder is impracticable or impossible.

5.6.5 The precise number of the litigants is not necessarily directly related to the complexity of the litigation and whether it deserves a special procedure. The "two or more persons"-requirement recommended in the Working Paper[131] can therefore be done away with. However, numerosity is one of the matters to be taken into account in considering whether conventional procedures - such as joinder of actions or the selection of a test case - would be inappropriate or impracticable. Accordingly we recommend that in deciding whether to grant certification the court should be required to consider whether there are so many potential pursuers (or petitioners) that it would be impracticable for them to sue together in a single conventional action.

5.6.6 Prior to the passage of the Act, Rule 5(11) of the British Columbia Supreme Court Rules allowed a representative proceeding to be brought where “numerous” persons have the same interest. This rule provided that, where numerous persons have the same interest in a proceeding, one or more of them may commence the proceeding as representing all or some of them. Other jurisdictions tie the requirement for numerosity to the difficulty or impracticality of joining parties in one action[132] or require a minimum number of named plaintiffs.[133] The Ontario Law Reform Commission rejected these two options as too inflexible and recommended the maintenance of the “numerous persons” test. It is not clear from the case law what number of plaintiffs is required to meet this test, but courts interpreting former Ontario Rule 75 have held that classes of two, four and five members are not “numerous”.

5.6.7 The Ontario Act clarifies the issue by providing for a slightly different test. That

---

[131] Paragraph 6.22 of Working Paper 57; clause 3(3)(a) of the draft bill.

[132] US Federal Rule 23 and the Quebec Code.

[133] Uniform Law Conference of Canada **Class Actions Discussion Paper** p. 9.

Act requires an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant. The British Columbia Act adopted the model of the Ontario Act. The intent of the “two or more persons” test is to avoid litigation on what constitutes “numerous persons” while facilitating certification through a minimal numerosity threshold. The Australian legislation requires that there be seven or more persons.[134]

* The preliminary merits test[135]

5.6.8 The Ontario Law Reform Commission recommended more rigorous scrutiny of the merits of class actions at the certification stage than is available for ordinary actions. They recommended that an action be certified only if it has been brought in good faith and there is a reasonable possibility that the material issues of fact and law common to the class will be resolved at the trial in favour of the class. Under article 1003(b) of the Ontario Code of Civil Procedure, the judge must conclude that the facts alleged “seem to justify” the conclusions sought. However, neither the Ontario Act nor the British Columbia Act includes a preliminary merits test. Instead, these Acts merely require that the pleadings disclose a cause of action. The use of a preliminary merits test for interlocutory applications of this nature has been rejected by the courts because of the difficulty of conducting a mini-trial on the merits at this stage of the proceedings.

5.6.9 Some respondents do not agree with our view that a court considering whether to grant certification should assess the general suitability of the intended litigation for the new procedure but should not be required to undertake a preliminary assessment of the merits of the applicant’s proposed case. Mr P J Conradie of Hofmeyr Attorneys argues that it should be necessary to demonstrate a probability of success on the merits as a prerequisite to maintain a class action to “prevent lawyers from enriching themselves to the prejudice of others with pie in the sky promises of large money awards”. Judge B R du Plessis, with whom Judge President Eloff concurs, suggests that it should be required from the applicant for certification to show a reasonable prospect of success. If the applicant only needs to establish a *prima facie* cause of action it would probably mean that he or she only needs to aver facts that, if true, would establish

---

[134]The Law Society (England and Wales) **Group Actions made easier** par 6.9.2 suggested at least 10 claimants - "but with no pretence of scientific reasoning".

[135]The existence of a *prima facie* cause of action.

a cause of action.[136] However, if the applicant wants to convince the court that he or she has a reasonable prospect of success then he or she will have to disclose to the court not only his or her evidence, but also the nature of the evidential material in his or her possession.[137]

* The interests of justice

5.6.10 The Working Paper did not specify the interests of justice as a separate criteria for certification as a class action. This may have been an oversight especially if an analogy is drawn with one leg of the test for referral from the High Court to the Constitutional Court in terms of section 102(1) - (3) of the Constitution, 1993. Some elaboration, however, is necessary.

5.6.11 Section 102(1) of the Constitution, 1993 states the following:[138]

> If, in any matter before a Provincial or Local Division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court ... the Provincial or Local Division concerned shall, if it considers it to be in the interests of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the Provincial or Local Division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court.

5.6.12 The wording of section 102(1) sets out three requirements for a valid referral of an issue to the Constitutional Court:

* what is referred must be an issue in the matter which is potentially decisive for the case;
* the issue must be within the exclusive jurisdiction of the Constitutional Court; and

---

[136] As is the case with an application for summary judgment.

[137] This is not uncommon in our law. See, for instance, a request for condonation of non-compliance with the rules in terms of Supreme Court Rule 27(3) or in terms of Magistrates' Court Rule 60.

[138] See also section 172(2)(c) of the Constitution, 1996 which provides that national legislation must provide for a referral of an order of constitutional invalidity to the Constitutional Court.

* the referral of the issue must be in the interests of justice.[139]

5.6.13 In **S v Bequinot**[140] the Constitutional Court held that the order of referral was defective in that it failed to contain any indication (a) why the court *a quo* regarded the constitutionality of section 37 of the General Law Amendment Act 62 of 1955 to be potentially decisive of the case before it; (b) why it was considered to be in the interest of justice to order referral of that issue; and, in that context, (c) why the referral was made at that juncture, before considering the appeal on non-constitutional grounds. The Court held that a positive finding on each of those considerations was a prerequisite for a referral.[141]

5.6.14 An issue can be referred to the Constitutional Court under section 102(1) only if it is one raised in the matter before the High Court and is potentially decisive of the case. Thus in **Ferreira v Levin NO**[142] the Constitutional Court refused to entertain argument on a number of issues which had not been issues before the High Court but which the Court had purported to refer to the Constitutional Court under section 102(1).[143] In **Luitingh v Minister of Defence**[144] the Constitutional Court considered this requirement and Didcott J held that a referral may be competent not only when the entire case will turn on the issue referred but also when "some individual and self-contained part of the case will be directly affected".[145] However, where the

---

[139]Chaskalson *et al* **Constitutional Law of South Africa** 6 - 16 to 6 -19.

[140]1997 2 SA 887 (CC) at par 6.

[141]See also **Motsepe v Commissioner for Inland Revenue** 1997 2 SA 898 (CC) at per 23 where Ackermann J held, the other members of the Court concurring, that a litigant cannot, by refusing to pursue a non-constitutional remedy, compel a referral for allowing such a device to succeed would not be in the interest of justice.

[142]1996 1 SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 11- 13 and 16 - 18.

[143]See also **Batista v Commanding Officer, SANAB, SAP, Port Elizabeth** 1995 4 SA 717 (SE), 1995 (8) BCLR 1006 (SE) where the High Court refused to refer the question of the validity of a statute to the Constitutional Court on the grounds that it was not an issue in the case.

[144]1996 2 SA 909 (CC), 1996 (4) BCLR 581 (CC).

[145]Par 9. See also **Brink v Kitshoff NO** 1996 4 SA 197 (CC), 1996 (6) BCLR 752 (CC) at par 10.

pleadings disclose a possibility that the referred issue will not even arise on the evidence the issue cannot be described as one potentially decisive of the case.[146] Similarly, where the decisiveness of the referred issue depends on a finding of common law which has not yet been made be the referring court the referral is improper.[147] In **J T Publishing (Pty) Ltd v Minister of Safety and Security**[148] the Constitutional Court held that no sound reason exists to differentiate between cases of referral in which the questions calling for consideration were the sole ones raised and those where others that did not concern the Court accompanied them, excluding the former from the process and confining it to the latter.

5.6.15 A referral under section 102(1) of the Constitution, 1993 must be in the interests of justice.[149] The Constitutional Court has held that this requires at least that there must be a reasonable prospect that the law or provision referred is unconstitutional and invalid.[150] Even where there is a reasonable prospect that the law will be held to be invalid it will often not be in the interest of justice for a trial to be interrupted so that the Constitutional Court can consider the validity of the law.[151] The Court has confirmed that it is ordinarily not in the interests of justice

---

[146]**Luitingh v Minister of Defence** 1996 2 SA 909 (CC), 1996 (4) BCLR 581 (CC) at par 9. See also **S v Mbatha** 1996 2 SA 464 (CC), 1996 (3) BCLR 293 (CC) at par 29.

[147]**Brink v Kitshoff NO** 1996 4 SA 197 (CC), 1996 (6) BCLR 752 (CC) at paras 14 - 15.

[148]1997 3 SA 514 (CC) at par 9.

[149]Chaskalson *et al* **Constitutional Law of South Africa** 6.18 states that although the section appears to confer upon the High Court a discretionary power to assess the interests of justice, the Constitutional Court has made clear that it has an overriding power to determine whether or not a referral will be in the interests of justice: **Luitingh v Minister of Defence** 1996 2 SA 909 (CC), 1996 (4) BCLR 581 (CC) at par 12.

[150]**S v Mhlungu** 1995 3 SA 867 (CC), 1995 (7) BCLR 793 (CC) at par 59. See also **Ferreira v Levin NO** 1996 1 SA 984 (CC), 1996 (1) BCLR 1 (CC) at par 7; **Bernstein v Bester NO** 1996 2 SA 751 (CC), 1996 (4) BCLR 449 (CC) at par 2; **J T Publishing (Pty) Ltd v Minister of Safety and Security** 1997 3 SA 514 (CC) par 9.

[151]In **S v Mhlungu** 1995 3 SA 867 (CC), 1995 (7) BCLR 793 (CC) at par 59 Kentridge AJ stated: "The reasonable prospect of success is, of course, to be understood as a *sine qua non* of a referral, not as in itself a sufficient ground. It is not always in the interests of justice to make a reference as soon as the relevant issue has been raised. Where the case is not likely to be of long duration it may be in the interest of justice to hear all the evidence or as much of it as possible before considering a referral. Interrupting and delaying a trial, and above all a criminal trial, is in

for matters to be heard piecemeal and that cases should be decided without referrals of constitutional issues wherever possible.[152]

5.6.16 By analogy, the certification of an action as a class action must be in the interests of justice. This will require at least that the class action is the appropriate method of proceeding with the action. It is therefore recommended that a court must take the interests of justice into account in certifying an action as a class action.

* Commonality[153]

5.6.17 Generally class action legislation provides some form of common questions test. Such a test usually provides that the action must raise questions of fact or law common to the members of the class in order to qualify as a class action. The debate centres around whether or not such common questions should predominate over any questions affecting only individual members.[154]

5.6.18 In Quebec, common questions need not predominate.[155] Under the Ontario Act

---

itself undesirable, especially if it means that witnesses have to be brought back after a break of several months. Moreover, once the evidence in the case is heard it may turn out that the constitutional issue is not after all decisive. I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

[152]**S v Vermaas; S v Du Plessis** 1995 3 SA 292, 1995 (7) BCLR 851 (CC) at par 13; **Bernstein v Bester NO** 1996 2 SA 751 (CC), 1996 (4) BCLR 449 (CC) at par 2; **Brink v Kitshoff NO** 1996 (6) BCLR 752 (CC) at par 9; **Luitingh v Minister of Defence** 1996 2 SA 909, 1996 (4) BCLR 581 (CC) at par 11.

[153]Issues of fact or law which are common to the claims or defences of individual members of a class.

[154]The Ontario Commission recommended that the predominance of the common questions be considered as a component of the superiority test, which is discussed below. The Quebec Code has a slightly different test: “the recourse of the members raises identical, similar or related questions of law or fact.”

[155]See also **Environment Committee of the Bay Inc v Alcam Electrolysis and Chemical Company Ltd** [1990] QLR 655 and **Tremaine v A H Robins Canada Inc** [1990] RDJ 500 (Court of Appeal, Quebec). Both these cases state common questions need not

the predominance of the common questions is not a factor to be considered by the court. The Act provides merely that the claims or defences of the class members must raise common issues. Despite this, in **Abdool v Anaheim Management Ltd**[156] Mr Justice Montgomery appears to import a "common questions predominate" requirement into section 5(1)(c) of the Ontario Act. The phrase "whether or not those common issues predominate over issues affecting only individual members" was included in the British Columbia Act to steer a clear course around such an interpretation of the decision in **Anaheim**.[157]

5.6.19 It is implied that the common questions will predominate over any questions affecting only individual members but we see no need to follow US Federal Rule 23(b)(3) by making such predominancy an express requirement. We confirm our provisional view that a criterion for certification should be that the potential litigants are an identifiable group whose claims or defences give rise to common issues of fact or law.

* <u>A suitable representative</u>

5.6.20 Class actions are unique in that they allow the determination of the rights and interests of individuals who are not parties to the litigation. This means that special provisions are needed to protect the interests of absent class members. One such measure is the requirement that the representative adequately represent the interests of the class.[158]

5.6.21 Article 1003(d) of the Quebec Code requires that "the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately".[159]

---

predominate.

[156](1993) 15 OR (3d) 39 (Ontario General Division). Justice Montgomery's approach was rejected on appeal. See **Abdool v Anaheim Management Ltd** (1995) 121 DLR (4th) 496 at 513f - g per Moldaver J.

[157]Uniform Law Conference of Canada **Class Actions Discussion Paper** p. 10.

[158]See also De Vos 1996 (4) **Journal of South African Law** 646.

[159]See also section 5(e) of the Ontario Act.

5.6.22 We comprehensively dealt with the responses regarding the representative and the ideological plaintiff above.[160] We reiterate that it is important to ensure that the representative will fairly and adequately represent the best interests of the class. This implies that the person concerned should be a suitable person, that there should be no apparent conflict of interest with other group members and that one member of the group is not likely to be favoured at the expense of another, and that he or she has the financial resources likely to be necessary to support the litigation and the determination to pursue the litigation to a conclusion. However, the duty of the representative is to represent the class interests only in relation to those issues which are common to the class as a whole.

* The appropriate procedure

5.6.23 Many class action statutes include a requirement that the action be superior to other procedural alternatives in order to be certified. In some jurisdictions, the court may also consider whether the adverse effects of the action on the class members, the court or the public outweigh its benefits.

5.6.24 The Ontario Act requires that the class action be the "preferable procedure for the resolution of the common issues" and does not list any factors the court must consider in making its determination. The Scottish proposal requires that the class procedure be preferable or superior to any other available procedure for the fair and efficient determination of the similar or common issues.[161] The Quebec Code does not include a superiority test, but merely requires that other specified procedures be difficult or impracticable in order for the class action to be certified. The experience in Quebec has shown that it is often more effective to proceed by means of a class action than by a multitude of individual actions.[162]

5.6.25 Unlike the Ontario Act, the British Columbia legislation provides the court with a list of factors to consider in determining whether a class proceeding is the "preferable

---

[160]See paragraphs 4.11.1 *et seq* above.

[161]Scottish Law Commission **Multi-Party Actions Report** 19.

[162]Uniform Law Conference of Canada **Class Actions Discussion Paper** p. 13.

proceeding". Section 4(2) of that Act reads as follows:

> In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members,
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions,
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings,
> (d) whether other means of resolving the claims are less practicable or less efficient, and
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

5.6.26 One of the reasons for instituting a class action is that for certain cases it is likely to be a better means of handling the cases than other available procedures. We consider it necessary to make clear that a class action should be resorted to only where it is likely to be the **appropriate** method of adjudication taking into account all relevant factors.

5.6.27 Accordingly we recommend:

> 11. An application for certification as a class action may be granted by the court where:
>
> (a) there is an identifiable class of persons;
> (b) a cause of action is disclosed;
> (c) there are issues of fact or law which are common to the class;
> (d) a suitable representative is available;
> (e) the interests of justice so require; and
> (f) the class action is the appropriate method of proceeding with the action.

5.7 What can the court do if the criteria are no longer met, after certification has been granted?

5.7.1 The Commission did not deal with the possibility in the Working Paper that a case

which has been certified as a class action may subsequently cease to satisfy one or more of the prescribed criteria. It may therefore be necessary for the court to be able to order that an action be decertified as being no longer appropriate for the procedure.

5.7.2 In this regard the Scottish Law Commission recommended that the court should have the discretion to decertify an action as a class action either on the motion of a party or on the court's own initiative.[163]

5.7.3 Accordingly we recommend:

12. At any time after a certification order has been granted the court should be entitled to order that the action no longer proceeds as a class action because the criteria for certification, or any of them, are no longer satisfied.

5.8 **What procedure should be adopted in the application for certification of an action as a class action?**

5.8.1 In the Working Paper the Commission suggested that it would be more in keeping with South African procedures to require a preliminary application to be brought before the court requesting leave to institute class proceedings and asking for directions as to procedure.[164] We further suggested that application should be on notice of motion supported by the particulars of claim and a statement motivating the application for certification, supported by such affidavits and documents as may be necessary.[165]

5.8.2 On a motion for authorization the Quebec Code requires that an affidavit be filed that supports the allegations of fact in the motion. The rules of practice of the Quebec Superior Court sets out a detailed list of documents that must be filed in support of the motion. In British Columbia, the certification application also proceeds by way of affidavit. Section 5(5) of the

---

[163]Scottish Law Commission **Multi-Party Actions Report** par 4.45.

[164]Paragraphs 6.16 - 6.18 of Working Paper 57.

[165]Paragraph 6.30 of Working Paper 57.

British Columbia Act requires that a person filing an application for certification must:

(a) set out the material facts on which the deponent intends to rely at the hearing of the application;
(b) depose that the deponent knows of no fact material to the application that has not been disclosed in the deponent's affidavit or in the affidavits previously filed in the proceedings, and
(c) provide the person's best information on the numbers of members in the proposed class.

5.8.3 Mr Conradie of Hofmeyr Attorneys proposes that the party seeking to institute a class action should carry the onus of showing why the case should proceed as a class action. He further argues that certainty must exist regarding whether the case is suited for the class action procedure before the extremely expensive and time-consuming class action machinery is activated.

5.8.4 The incidence of the onus of proof in each issue is a matter of substantive law.[166] The Commission is therefore very reluctant to impose a statutory onus of showing why the matter should proceed as a class action on the party seeking to institute a class action. The ordinary rules of evidence should apply. Assume, for instance, that the class action is based on contract. The defendant admits the terms of the contract as averred by the plaintiffs, but avers an additional term. In such a case the onus is on the plaintiffs to prove the terms of the contract and there is no duty on the defendant to begin and adduce some evidence in support of the averment of an additional term.[167]

5.8.5 Accordingly we recommend:

13. The court should be asked for directions as to procedure as part of the certification process. In this regard the court should have a wide discretion to determine its own procedures.

5.9 **What procedure should be followed in the conduct of a class action?**

---

[166]See **Tregea v Godart** 1939 AD 16 at 32.

[167]**Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk** 1976 (3) SA 471 (A). See also **Pillay v Krishna** 1946 AD 946 at 953; **Mabaso v Felix** 1981 (3) SA 865 (A).

5.9.1 In the Working Paper the Commission proposed that in the event of the court authorising a class action it should formally appoint the representative, describe the class with as much particularity as is possible and give directions as to the procedure to be followed. As far as the latter is concerned, the court should have an unfettered discretion to devise its own procedures.[168]

5.9.2 Courts take a much more active role in managing the conduct of class actions than they would do in ordinary actions. This is due both to the complexity of most class actions and the fact that the rights and obligations of those not before the court are being determined. The Quebec Code provides:

> 1045. The Court may, at any stage of the proceedings in a class action, prescribe measures designed to hasten their progress and to simplify the proof, if they do not prejudice a party of the members.

5.9.3 The Ontario Law Reform Commission draft bill and the Ontario Act both include a broad general management provision that allows the court to make orders it considers appropriate to ensure a fair and expeditious hearing. While the Ontario Law Reform Commission would have allowed the court to exercise these powers on its own motion, under the Ontario Act the court may exercise its broad general management powers only on the motion of a party or class member. The British Columbia legislation follows the recommendations of the Ontario Law Reform Commission.[169]

5.9.4 Accordingly we recommend:

---

[168] See paragraph 6.36 of Working Paper 57.

[169] Section 12 of the Ontario Act reads as follows:

Court may determine conduct of a proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose such terms on the parties as it considers appropriate.

14. The courts should be given broad general management powers exercisable either on the application of a party or class member or on the court's own motion.

5.10 Is it necessary to give notice of the action to members of the class and, if so, what form should such notice take, etc.?

5.10.1 In the Working Paper the Commission recommended that the court which certifies an action as a class action should give directions as to whether the representative is required to give notice of the action to the members of the class and, if so

(a) the form which such notice should take;
(b) whether the notice should give class members the right to include or exclude themselves from the action;
(c) the way in which notice of the action is to be communicated to the class.[170]

5.10.2 When deciding whether notice should be given to the members of the class and, if so, what directions are appropriate in respect thereof, the Commission recommended that the court should take into account -

(a) the extent to which the members of a class might be prejudiced by being bound by a judgment given in an action which may not have come to their attention;
(b) the size of the class;
(c) the probable general level of education and understanding of class members;
(d) the possibility of identifying members of the class;
(e) the type of relief claimed;
(f) where the claim is for monetary relief, the size of each class member's claim;
(g) the likelihood of class members enforcing their claims individually; and
(h) any other relevant factor.[171]

5.10.3 It is crucial to the effective operation of class actions that potential members of the class know of the existence of the proceedings so that they may be able to elect to join the class. It is also essential, as Mr D L Titlestad, the Manager: Legal Services, Anglo American Corporation puts it, that the Court should define the members of the class in sufficient detail to

170 See clause 5(1) of the draft bill.

171 See clause 5(2) of the draft bill.

avoid subsequent argument as to persons who are bound by the judgment of the court hearing that action. Notices to class members may also be necessary at later stages of the litigation. Notices should be effective but, ideally, their cost should not be disproportionate either to the other costs of the litigation or to the benefits of a successful result so that the expense of the notice may even discourage the raising or continuation of the litigation.

5.10.4 Mr P J Conradie of Hofmeyr Attorneys recommends that notice to members of the class should be mandatory in cases where monetary relief is claimed. Moreover, individual notice sent to all known class members should be required as defendants, sued by a plaintiff class, could suffer prejudice with regard to uncertainty pertaining to the number of class members or the amounts that may be claimed. It could also severely prejudice any possibility of settlement as well as the defendants' ability to plan its strategy with regard to the action effectively. Mr Conradie submits that these prejudicial consequences outweigh any argument against mandatory notice.

5.10.5 In the context of class actions a strict interpretation of the notion of a fair trial would require that adequate notice be given to all the individual members of the class who stand to be affected by the judgment.[172] The reasoning behind this construction is that the binding effect of a class action judgment would be unfair *vis-à-vis* class members who had not received notice of the proceedings and, therefore, did not have an opportunity to litigate their own claims.[173] Professor De Vos, relying on Cappelletti,[174] feels that the traditional perception of procedural fairness should be reconsidered as an individualistic notion of a procedurally fair trial should give way to, or be integrated with, a social or collective concept of due process, since this is the only possible way to assure judicial vindication of the new rights. Professor De Vos continues:[175]

> This means that the right to be heard, belonging to all the class members, may be curtailed, provided it is fully guaranteed to the representative party. The absent class members will still get a "hearing", since an adequately representative plaintiff will present the case on

---

[172]See also Grant 1996 (63) **University of Chicago Law Review** 239; Safranek 1996 (22) **Wisconsin Law Review** 263.

[173]De Vos 1996 (4) **Journal of South African Law** 654.

[174]**Judicial Process in Comparative Perspective** 304.

[175]1996 (4) **Journal of South African Law** 654.

behalf of the class as a whole. Cappelletti adds succinctly:

> "In fact, these members of the class will have a better 'day in court' if representative litigation is allowed than if it is not, since, as a rule, they would simply be unable to go to court individually."

5.10.6 When and what type of notice is fair? Who should be responsible for giving notice and who should pay for it? The answers to these questions may differ for notice requirements at various stages of the proceedings.

* <u>Notice of certification</u>

5.10.7 Existing class action legislation offers a number of different examples of notice of certification provisions. For class actions seeking predominantly monetary damages under US Federal Rule 23(b)(3), the court in the United States must direct

> the best notice practicable in the circumstances, including individual notice to all members who can be identified by reasonable efforts.

5.10.8 Other forms of class actions under US Federal Rule 23 have no specific notice requirements and are subject to the general notice provisions of the Rule. Those provisions give the courts discretion to make orders regarding notice.

5.10.9 The Ontario Law Reform Commission draft bill and the Ontario Act have more flexible notice provisions than those under the US Federal Rule 23(b)(3), but they take slightly different approaches. Under the draft bill, the court may order that notice be given. The Ontario Act provides that the representative party shall give notice. However, the court may dispense with notice having regard to a number of factors, and both the draft bill and the Act provide for criteria to guide the court in its determinations regarding notice.

5.10.10 The British Columbia provision that deals with notice of certification also allows for a flexible approach. However, as with the Ontario Act, the representative party must give notice to class members.

5.10.11 In Quebec and Scotland[176] notice to class members that the court has authorised a class action is imperative. Article 1006 of the Quebec Code reads as follows:

The notice to the members indicates:

(a) the description of the group;
(b) the principal questions to be dealt with collectively and the related conclusions sought;
(c) the right of a member to intervene in the class action;
(d) the district in which the class action is to be brought;
(e) the right of a member to request his exclusion from the group, the formalities to be followed and the delay for requesting his exclusion;
(f) the fact that a member who is not a representative or an intervener cannot be called upon to pay the costs of the class action;
(g) any other information the court deems it useful to include in the notice.

5.10.12 The mandatory nature of article 1006, in combination with the list of key questions to be addressed collectively, make the notice provisions quite onerous and this resulted in exorbitant notice costs.[177]

* Costs of notice of certification

5.10.13 The Quebec Code, the Ontario and British Columbia Acts also differ in their treatment of the costs of notice. The Ontario and British Columbia Acts give the court the discretion to make any order regarding the costs of notice, including orders apportioning the costs among the parties. In Quebec, the costs of the notice is always borne in the first instance by the representative plaintiff. However, under Article 1035 of the Code of Civil Procedure, the costs of notice are transferred to the defendant if the class action is successful. The Ontario Act and the British Columbia Act also include a provision that allows, with leave of the court, the notice to include a solicitation for funds to support the class proceeding.

* Notice of judgment

5.10.14 The Ontario Act include specific provisions requiring notice of judgment where the

---

[176] Scottish Law Commission **Multi-Party Actions Report** par 4.67.

[177] Uniform Law Conference of Canada **Class Actions Discussion Paper** p. 28.

common questions have been disposed of, but further proceedings may be necessary to resolve individual questions. The provisions for notification of individual participants are similar to the notice of certification proceedings. The British Columbia legislation and the Quebec Code are different as they require that notice be given to class members when the court determines common issues for a class, regardless of whether or not further proceedings may be necessary to resolve individual questions. The British Columbia notice of judgment sections otherwise are similar to the Ontario Act and to the notice of certification requirements listed earlier. Both Acts and the Quebec Code include a description both of the judgment on the common issues and of the steps required for class members to take to establish an individual claim.

* General notices

5.10.15 General notice provisions in the Ontario and British Columbia Acts allow the court to require notice to be given when it is necessary for the fairness of the trial. Each gives the court the power to make any order regarding the costs of notice under this section. The Quebec Code allows the court to order the publication of a notice to the members of the class when it considers it necessary for the preservation of their rights.

5.10.16 The British Columbia Act also allows the court to order a party to give the notice required to be given by another party. This provision was included for situations, for example, where the defendants routinely serve documents or notices to class members by way of a routine delivery system.[178] The intent is that the notice could be included with the regular deliveries and this would minimise the costs of the notice.

5.10.17 In the Working Paper the Commission dealt extensively with the various notice regimes.[179] We favoured the discretionary approach of the Ontario Law Reform Commission but recommended that the court's discretion should be further extended by providing a choice between

---

[178]In **Beukes v Krugersdorp Transitional Local Council** 1996 3 SA 467 (W) notice could have been included, for example, in the monthly accounts of the residents involved. For a discussion of the case, see paragraphs 2.4.8 *et seq* above.

[179]Paragraphs 5.19 *et seq* of Working Paper 57.

opt-in notice (in limited circumstances), opt-out notice, and no notice at all.[180] This recommendation found application as clause 5(3) of the draft bill. It reads as follows:

> Where, after consideration of the factors listed in subsection (2), the court is of the opinion that members of the class may be significantly prejudiced by the fact that they will be bound by a judgment given in a class action which may not have come to their notice, the court may -
>
> (a) require from those members of the class who do not wish to be bound by the judgment written notice of their exclusion as members of the class; or
> (b) order that no notice to members of the class is necessary.

5.10.18 The recommendation of the Commission and the resultant clause elicited a varied but lively response.

5.10.19 While the South African National Consumer Union favours opt-out notice, Mr P J Conradie of Hofmeyr Attorneys recommends that the opt-in procedure should be included as an option in the draft bill. This recommendation can be accommodated.[181]

5.10.20 Judge B R du Plessis, with whom Judge President Eloff agrees, argues that provision should be made in the bill for the possibility that members of the class who after judgment can demonstrate that they were unaware of the action will not be bound by that judgment. Obviously, some class members will raise such a defence after an unfavourable judgment. Conversely, the numbers of the class will tend to swell once a favourable judgment is given. These aspects were dealt with in the Working Paper[182] and influenced us in recommending a discretionary approach.

5.10.21 Professor De Vos[183] prefers the flexible approach proposed by the Commission in

---

[180] Paragraph 5.23 of Working Paper 57; clause 5(3) of the draft bill. See also De Vos 1996 (4) **Journal of South African Law** 647 - 648.

[181] See the new clause 8(3)(b) of the draft bill below.

[182] Paragraph 5.27 of Working Paper 57.

[183] 1996 (4) **Journal of South African Law** 648.

terms of which the court would have a wide discretion in regard to the giving of notice. He believes it would enable the court to devise an appropriate notice scheme for each class action, according to the exigencies of each given case. This approach would also obviate the problems encountered in the United States in cases involving large groups. Professor De Vos explains:[184]

> In appropriate circumstances, for example where the claims are very small, 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.

5.10.22 The Deputy Chairman of the Zimbabwe Law Development Commission, Mr A R McMillan raises a difficulty in clause 5(3)(b) of the draft bill. He comments as follows:

> It [clause 5(3)(b)] seems to provide that if the court is of the opinion that class members may be prejudiced by the fact that they will be bound by the judgment in a class action which may not have come to their notice the court may ... order that no notice to members of the class is necessary.
>
> This is surely contradictory. If persons may be prejudiced by lack of knowledge why (or when) would a court order that no notice be given. In such circumstances surely the court would order that notice be given.

5.10.23 There is considerable merit in this comment. If the court is of the opinion that class members may be prejudiced by the fact that they will be bound by the judgment in a class action which may not have come to their notice, then the court should order that notice be given to the members of the class. This should be the general rule. If, however, the members of the class do not know of the action or judgment, then notice will serve no purpose.[185]

5.10.24 Accordingly we recommend:

15. The Act should deal with the questions of when, by whom, to whom, and how notice should be given. As a general rule, notice to class members and prospective class members should

[184] 1996 (4) **Journal of South African Law** 648.

[185] See now clauses 8(3) and 10(3) of the draft bill below.

always be given. The court should have the discretion to make opt-in, opt-out or no notice orders. In all cases it should be necessary for the court to consider whether notice of the application for certification should be given to all persons eligible to elect to join the class.

5.11 **Should class members be required to opt in to the class proceedings in order to be subject to any judgment or settlement? In other words when will judgment in a class action be binding (*res judicata*) on the members of the class?**

5.11.1 The main perceived justification for a class action procedure is that it readily enables a binding determination to be obtained on issues common to the members of the class. But how is class membership determined? Is it proper that a person's rights may be determined without his or her express consent to participate in the litigation? Do the arguments in favour of aggregation in a class action - such as access to justice and judicial economy and efficiency - outweigh the absence of an express mandate from each of the class members? This has been described as "one of the most controversial issues in the design of a class action procedure".[186]

5.11.2 Support for an opting in procedure is based largely on the belief that individuals who have no knowledge of a lawsuit should not be bound by its outcome.[187] Opting in requires litigants to make the choice to join an action in order to have their legal rights determined. Advocates of this procedure argue that opting out presupposes a significant level of sophistication by class members to know that their rights are being determined and to assess whether their interests are being adequately addressed in the proceedings. Supporters of the opt in procedure also suggest that class members ought to be required to show some minimal interest in the litigation in order to benefit from it.

5.11.3 Those who favour opting out argue that an opt in procedure is based on the assumption that failure to opt in reflects a deliberate, informed decision by an individual class

---

[186] Ontario Commission **Report on Class Actions** p. 467.

[187] Other arguments in favour of an opt-in scheme include: It ensures a single decision on all the issues on which the members of the class have the same interest; costs are reduced and efficiency increased for all concerned; the defendant is likely not to have to deal with any claims other than those made in the action; it contributes to access to justice; and it provides a remedy in those cases where a claim is individually non-recoverable.

member not to participate in the litigation.[188] They suggest that, because many of the psychological and social barriers to bringing individual actions could underlie a failure to opt in, such a requirement could undermine the access to justice goals of class actions. This could be particularly true with respect to class actions involving small individual claims. Supporters of the opt out procedure also claim that it is fairer to defendants, who know exactly how many class members they may face in subsequent individual proceedings.[189]

5.11.4 The general approach should be that the court's judgment in a class action binds all the members of the class.[190] If any of them brings a further action against the defendant(s) in regard to the same subject matter and raising the same questions, the court should dismiss the action on a plea by the defendant(s) of *res judicata*, that is that the action is excluded by the judgment in the class action. There may, however, be circumstances where such an approach would not be appropriate and we believe the court should have the discretion to state that in such circumstances opt-in or no notice is required.

5.11.5 While the doctrine of *res judicata* prevents parties from relitigating matters arising from the same cause of action, it is not clear that the doctrine allows non party class members to rely on a judgment to prevent an unsuccessful party from relitigating issues determined in the first case.[191] To clarify any uncertainty, the Ontario Law Reform Commission recommended, and the Quebec Code and the Ontario and British Columbia Acts incorporate, explicit provisions dealing with the binding effect of judgments in class actions.

5.11.6 The Ontario Law Reform Commission recommended that judgment on the

---

[188]Other arguments in favour of an opt-in scheme include: It preserves the liberty of the individual to choose whether to bring an action; a person who desires not to litigate should not find himself or herself willy-nilly "roped in" to a class action; and it reduces the possibility of the litigation becoming unmanageable.

[189]Uniform Law Conference of Canada **Class Actions Discussion Paper** p. 24.

[190]Clause 3(7) of the draft bill in Working Paper 57. Dr D L Craythorne of the Prologov Consultancy supports the idea of a judgment in a class action being *res judicata*, but suggests also that the court have the power to order a person, e.g. a provincial or government functionary, to carry or cause to be carried out, the judgment of the court.

[191]See also Dixon 1997 (46) **ICLQ** 134 *et seq* on the transnational effects of US class action settlements.

common questions should bind every member of the class who has not opted out. The judgment will be binding to the extent that it determines the common issues and relief specified in the certification order. This means that issues that could have been determined by the class action, but were not, can be litigated individually by class members. This recommendation is incorporated into the Ontario Act and the British Columbia Act and is consistent with the approach in Quebec that provides:

> Every final judgement describes the group and binds the member who has not requested his exclusion from the group.

5.11.7 The British Columbia Act also states that a judgment on common issues does not bind a party to the class proceeding, in any subsequent proceeding, between the party and a person who opted out of the class proceeding. This provision prevents a class member from opting out of a class proceeding and then, at some later date, benefitting from a judgment on the common issues.

5.11.8 Accordingly we recommend:

16. The court should have the discretion to make an order in respect of the binding effect of its judgment on the members of the class.

5.12 **How should the common questions and individual questions in a class action be determined?**

5.12.1 In the Working Paper we suggested that the conclusions of the Ontario Commission with regard to common and individual questions are sound and that a similar approach should be adopted in South Africa.[192] We further recommended that the Act should specifically provide that the court shall not refuse to authorise a class action merely by reason of the fact that there are issues pertaining to the claims of some or all of the members of the class which will require individual determination or that different relief is sought for different class

[192] Paragraph 5.32 of Working Paper 57; clause 3(3)(c) of the draft bill.

members.[193] Lastly we recommended that the Act should expressly empower the court to determine whether there are issues to be determined individually and to give directions as to the procedure to be followed.[194]

5.12.2 The Ontario Act and the British Columbia Act adopt the recommendation of the Ontario Law Reform Commission in providing that common issues shall be determined together and that issues requiring the participation of individual class members shall be determined individually. Both Acts give the court a broad discretion to require the participation of individual class members and to determine the procedure by which individual questions may be resolved.[195]

5.12.3 Section 11 of the Ontario Act reads as follows:

> **Stages of class proceeding**
>
> 11.(1) Subject to section 12, in a class proceeding,
> (a) common issues for a class shall be determined together;
> (b) common issues for a subclass shall be determined together; and
> (c) individual issues that require the participation of individual class members shall be determined individually ...

5.12.4 Mr P J Conradie of Hofmeyr Attorneys strongly recommends such a two stage resolution process where common issues are resolved in the class action and the individual issues are resolved afterwards in separate actions or separate trials within the class action.

5.12.5 Accordingly we recommend:

17. Common issues should be determined together and issues requiring the participation of individual class members should be determined individually. The term "common issues" should be defined. The court should not refuse to authorise a class action merely by reason of the fact that there are issues pertaining to the claims of some or all of the members of the class which will

---

[193]Paragraph 5.33 of Working Paper 57; clause 3(5) of the draft bill.

[194]Paragraph 5.35 of Working Paper 57; clause 6(1)(c) of the draft bill.

[195]Uniform Law Conference of Canada **Class Actions Discussion Paper** p. 19.

require individual determination or that different relief is sought for different class members.

5.13 **How should damages in a class action be determined?**

5.13.1 In class actions for the payment of money the question of liability will normally be a common question.[196] The alternative would have been to require separate mini-trials with individual proof from each class member. In some cases, this process would render the class action so unmanageable that it would not meet the test for certification.[197] Many other barriers could prevent individuals from pressing their claims for damages after liability has been determined and this could result in the unjust enrichment of the defendant.

5.13.2 If the court finds the defendants liable it will have to determine how much is due to the class members in respect of the defendants' breach of their obligation to the class members. In this regard, the question has been raised whether there are circumstances in which it is appropriate for the court to calculate the total amount due but to leave it to other arrangements (such as negotiation among the class members) to determine what amount each member of the class should receive. An example of such aggregate assessment is a consumer claim where a public utility has overcharged its customers for services over a specified period: the court may be able to calculate the total amount which the defendants should repay their customers, but it may not be able to quantify how much would be paid to each since the size of the class and the identity of its members (other than the representative) are not known.[198]

5.13.3 Such an aggregate assessment of damages is the most widely accepted mechanism and is in principle acceptable. The question remains, however, as to what the appropriate test for the court is to apply in assessing the aggregate award. Both the Ontario Act and the British Columbia Act adopt a more flexible requirement and allow the court to determine the aggregate

---

[196]Uniform Law Conference of Canada **Class Actions Discussion Paper** p. 30.

[197]For Professor De Vos 1996 (4) **Journal of South African Law** 648 it goes without saying that it would be impractical in most cases to hear evidence on each individual claim for the purposes of assessing the total award of damages as that would clearly overburden the proceedings and cause undue delay.

[198]Scottish Law Commission **Multi-Party Actions Report** par 4.96.

or part of a defendant's liability to class members where all or part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. The Ontario Law Reform Commission draft bill, on the other hand, includes a condition that the monetary relief awarded as part of an aggregate assessment must be capable of assessment "with the same degree of accuracy as in an ordinary action". This phrasing is not included in the Ontario Act or the British Columbia Act.

5.13.4 In the draft bill the Commission provided for the appointment of a commissioner for the purposes of collating evidence and making determinations, including the determination relating to individual issues or the individual assessment of monetary claims in a class action.[199]

5.13.5 Accordingly we recommend:

18. In determining the amount of damages to be awarded the court may make an aggregate assessment or individual assessments. In this regard the court may appoint a commissioner to assist the court. When an aggregate assessment is made the court should give directions regarding distribution of the award to class members and may, where appropriate, require the defendant to distribute the damages directly to the class members. The Act should contain an express provision with regard to the aggregate assessment of monetary awards and the disposal of any undistributed residue of an aggregate award.

5.14 Which courts should be designated by the Minister to adjudicate class actions?

5.14.1 In the Working Paper we suggested that the Act should authorise the Constitutional Court, the Supreme Court (now the High Court) and any other court designated by the Minister of Justice in terms of the Act.[200] We noted in the Working Paper that the question whether the lower courts should be empowered to hear public interest actions and class actions is likely to be controversial[201] and advised the deferment of the extension to the lower courts to

---

[199]Clause 7 of the draft bill.

[200]See paragraphs 6.3 *et seq* of Working Paper 57.

[201]See paragraph 6.3 of Working Paper 57.

hear **class actions** until such time as the procedure had been in operation in the High Court (the old Supreme Court) and the Constitutional Court for a few years and a body of case law has been established.[202] In terms of our proposal the Minister obviously has the discretion to designate the lower courts at the outset as being entitled to adjudicate **public interest actions**.[203]

5.14.2 Mr P J Conradie of Hofmeyr Attorneys believes only the Constitutional Court and the High Court should be able to hear class actions and actions in the public interest. He suggests that it is not desirable to grant the Minister any discretion to extend this type of actions to any other courts. Alternatively, if the Commission decides to retain the Minister's discretion, he suggests that the Act includes a provision providing for jurisdictional amount requirements to be satisfied by the aggregation of the claims of all the class members. This will ensure that huge compensation claims be adjudicated by the more able and competent High Court judges.

5.14.3 The Society of Advocates of Natal believes that an application for certification of a class action must in all cases be brought in the High Court. The High Court would then be required to give directions as to the court in which the class action, if authorised, should be brought. The Society also believes it should be the aggregate value of the claims of the members of the class which should be taken into account in deciding which court should have jurisdiction to hear the action.

5.14.4 Since the publication of the Working Paper a new labour law dispensation was introduced and the Labour Court[204] was established as a superior court with the authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that of the High

---

[202]The Scottish Law Commission **Multi-Party Actions Report** paras 4.3 - 4.7 recommended a similar course of action.

[203]See paragraph 6.6 of Working Paper 57.

[204]The new labour law dispensation was introduced by the Labour Relations Act, 1995. See also paragraph 6.4 of Working Paper 57 where the Commission expressed the opinion that it might also be appropriate for the Minister to designate the Industrial Court as a court entitled to hear class actions.

Court.[205] The Restitution of Land Rights Act, 1994 established the Land Claims Court[206] with similar authority, inherent powers and standing. Both these structures are ideally suited to adjudicate class actions and actions in the public interest and the Commission has no hesitation in recommending that the Act should authorise both procedures in these Courts.

5.14.5 Accordingly we recommend:

19. It should eventually be possible to institute class actions in any court. Initially, however, only the Supreme Court of Appeal, the Constitutional Court, the High Courts, the Land Claims Court, and Labour Court should be designated by the Minister of Justice to adjudicate class actions. The Minister should, however, have the discretion to designate other courts in which class actions may be prosecuted. The appropriate procedure in the different courts should be prescribed by the authorities empowered to make rules for those courts.

5.15 **Which specific division or court should have jurisdiction in a class action where the cause of action arose within more than one jurisdiction?**

5.15.1 In the Working Paper we indicated our preference for giving the court certifying the action as a class action the power to give directions as to the appropriate forum in which the action should be instituted.[207]

5.15.2 Only one respondent objected to this suggestion. Mr P J Conradie of Hofmeyr Attorneys contends that it is undesirable to give the court the discretion to determine an appropriate forum in which a class action should be instituted as only the High Court and the Constitutional Court are sufficiently equipped to attend effectively to class actions. We dealt with the appropriate forums to hear class actions above.[208] The objection does not address the issue of which particular division of the High Court should hear a class action where the cause of action

---

[205]Section 151(2) of the Labour Relations Act, 1995.

[206]Section 22 of the Restitution of Land Rights Act, 1994.

[207]See paragraph 6.13 of Working Paper 57.

[208]See paragraph 4.21.1 *et seq* above.

arises in more than one division.

5.15.3 In the United States, national class actions, referred to as “multi district litigation”, are conducted under special rules and have been legitimized in court decisions. These actions are not based on an opting in system, but rather follow the same opting out procedure as for any other class member. In the class case on this issue, **Phillips Petroleum Co v Shutts**,[209] the United States Supreme Court decided that there was no need for non-resident class members to have any form of contact with the state where the class action had been commenced. All that was required was that the non-resident class members be adequately represented, receive appropriate notice and be given the right to opt out. This position is based on the full faith and credit clause in the American Constitution.

5.15.4 However, the availability of an expanded class action procedure in a number of provinces could result in several class actions involving the same defendant and the same issues being commenced in each jurisdiction. In some cases, this could undermine the goals of judicial economy that underlie class actions.

5.15.5 Accordingly we recommend:

20. The court hearing the application for certification as a class action should have the power to give directions as to the appropriate division or court in which the action should be instituted.

5.16 **Should any value limits be placed on the jurisdiction of the court's empowered to hear class actions?**

5.16.1 In the Working Paper[210] the Commission discussed two possible approaches to determine the value limits on jurisdiction. The one possibility is to use the aggregate or total value of the claims of the members of the class as the determining factor which will have the effect that most class actions will be brought in the High Court. If, however, the value of the individual claims is to be the determining factor then most class actions will fall within the lower courts'

---

[209] 472 US 797 (1985).

[210] Paragraph 6.10 of Working Paper 57.

jurisdictional limits should the Minister decide to designate also the Magistrates' Court.[211]

5.16.2 The Society of Advocates of Natal suggests that, ordinarily speaking, it is the aggregate value of the claims which should be taken into account in deciding which court should have jurisdiction to hear the action.

5.16.3 Accordingly we recommend:

21. In determining whether a particular class action falls within the jurisdiction of the Magistrates' Courts the individual value of the claims should be the deciding factor. In this regard it must be borne in mind that in terms of section 50 of the Magistrates' Courts Act, 1944, the defendant may apply for the removal of any action from the Magistrates' Courts to the High Court.

5.17 **Who is liable for costs?**

5.17.1 The broad effect of the application of the general rule that "costs follow success" in class actions is shown in the following table.[212] The table shows how the liability for expenses would differ depending on whether the class action succeed or fail. It also shows that, in the absence of an arrangement to the contrary, the class members will have no entitlement to, or liability for, the expenses of the action.

Result of action	**Representative**	**Other members of the class**	**Defendant(s)**
Action succeeds (Class wins)	Entitled to party and party costs from defendant(s) Liable for own attorney's fees on attorney client scale	Entitlement: none Liability: none	Entitlement: none Liable for (a) own attorney's fees on the attorney client scale and (b) the representative's costs on the party and party scale

[211]See paragraph 5.14.5 above.

[212]Table taken from the Scottish Law Commission **Multi-Party Actions Discussion Paper** 241.

Action fails (Class loses)	Entitlement: none Liable for (a) own attorney's fees on the attorney client scale and (b) the costs of the defendant on the party and party scale	Entitlement: none Liability: none	Entitled to party and party costs from the representative Liable for own attorney's fees on the attorney client scale

5.17.2 Faced with a similar situation, the Scottish Law Commission expressed the view that the degree of financial risk a representative party in a class action would be required to undertake would be unreasonably high.[213] On the other hand, other class members would be over-protected. They would be entitled to benefit from the action without assuming any financial responsibilities at all. So fas as the defendants are concerned, the particular risk which they bear is that even if they win the action they may be unable to recover the costs awarded in their favour because the representative pursuer has no funds. The Scottish Law Commission accordingly recommended that in awarding costs in group proceedings the court should retain its discretion to apply the general rule that costs follow success.[214]

5.17.3 We also note that the Australian Law Reform Commission has recently recommended the retention of the general rule in civil and judicial review proceedings that the loser pays the winner's costs.[215]

5.17.4 Mr D L Titlestad, the Manager: Legal Services, Anglo American Corporation draws attention to clause 9(1)(d) of the draft bill. He argues that it is wrong that "those persons who elected to give written notice in terms of § 5(3)" should be ordered to contribute towards costs, because such persons are those who will have given written notice that they "do not wish to be bound by the judgment" and who will be excluded as members of the class concerned. Mr Titlestad is of course right. Only those members who decide to opt-in should be ordered to

---

[213]**Multi-Party Actions Report** par 5.7.

[214]**Multi-Party Actions Report** par 5.10.

[215]**Cost shifting - Who pays for litigation?** par 4.30; recommendation 8.

contribute towards costs. We believe our reformulation of clause 5(3) will settle the matter.[216]

5.17.5 Accordingly we recommend:

22. In awarding costs in class actions the court should retain its discretion to apply the general rule that costs follow the result. The court may refuse to order the representative to provide security for costs. The court may also authorise a class action on condition that the Legal Aid Board grants the necessary funds or indemnifies the defendant(s) for his or her costs. Those members of the class who opt-in may be ordered to contribute towards costs and, where appropriate, to provide security for costs.

5.18 **Should contingency fees arrangements be allowed in class actions?**

5.18.1 In the Working Paper the Commission recommended the introduction of a contingency fee arrangement for class actions.[217] We noted that this view was provisional as the Commission was, at the time, also considering speculative and contingency fees. This investigation has since been completed and the Commission's main recommendation is that contingency fee agreements should be legalised in South African law.[218] In particular the Commission recommended that legal practitioners, in the event of successful litigation, should be entitled to receive, in addition to their normal fees for the case in question, an uplift to a maximum of 100% of their normal fees. On the basis of the Commission's recommendations, the Contingency Fees Act 66 of 1997 was enacted.

5.18.2 The recommendation of the Commission to allow for contingency fee arrangements in class actions elicited a lively and varied response.

5.18.3 Judge B R du Plessis, with whom Judge President Eloff agrees, argues that the regulation of contingency fees should fall outside the scope and ambit of this Act. He believes it

---

[216]See Clause 11(2)(b) of the draft bill below.

[217]Clause 10 of the draft bill; paragraph 5.47 of Working Paper 57.

[218]**Report on Speculative and Contingency Fees** par 4.42.

should be dealt with separately. On the other hand the Securities Regulation Panel believes contingency fees arrangements should not be limited to class actions but should also include public interest actions and the derivative action. Of a similar opinion is Professor De Vos. He argues that "there can be no doubt that the contingency fee mechanism would make a significant contribution towards the success of class actions in South Africa".[219]

5.18.4 Mr P J Conradie of Hofmeyr Attorneys in turn believes contingency fees should be strictly regulated to prevent litigation becoming discredited. He therefore recommends that contingency fees arrangements in class action be approved by the court and that the actual fees either be approved by the court or taxed by the Taxing Master as payable between attorney and client. The Council of Southern African Bankers likewise suggests that consideration should be given to capping contingency fees at a maximum which would have been earned according to a standard tariff.

5.18.5 Some respondents express the opinion that clause 10 of the draft bill should be extended to cover counsel also.[220] One respondent went further. Mr D L Titlestad, the Manager: Legal Services: Anglo American Corporation believes that in the event that a representative does not provide security for costs or the Fund does not do so, then the attorney (and counsel) acting on a contingency basis, should, in the event that costs are awarded to the defendant, be jointly and severally liable for such costs.

5.18.6 Accordingly we recommend:

23. A legal practitioner may, subject to the Contingency Fees Act 66 of 1997, make an arrangement with the representative stipulating for the payment of fees, or fees and disbursements, only in the event of success in the class action.

5.19 How should class actions and public interest actions be funded?

---

[219] 1996 (4) **Journal of South African Law** 651.

[220] The Society of Advocates (OFS Division); the Securities Regulation Panel.

5.19.1 In the Working Paper we recommended the establishment of a statutory fund along the lines of the Ontario Class Proceedings Fund.[221] There are, however, various other means by any of which, or by a combination of which, class actions and public interest actions can be financed. For present purposes we concentrate on a contingency legal aid fund, a class action fund and legal aid.

* A contingency legal aid fund

5.19.2 A contingency legal aid fund is essentially a fund which takes a proportion of the money received by a successful pursuer to meet claims on the fund by unsuccessful pursuers. It may be seen as a form of mutual insurance. Usually, the initial funding is provided by the Government while the administration costs of the scheme are met by charging a registration fee to all applicants. A successful applicant would have to pass a test, as in legal aid, of *probabilis causa*, i.e. that he or she has an apparently good case. In theory, the fund would become self-financing in due course. In practice, it is open to doubt whether this would happen.[222]

5.19.3 The only working example of a contingency legal aid fund is in Hong Kong.[223] It appears to have had a remarkable success rate; in 95 of 97 concluded cases damages have been obtained. The scheme was set up in 1984 as an adjunct to legal aid, backed by a one million dollar loan facility from the State Lotteries Fund. The scope of the scheme is limited to plaintiffs in personal injury cases (excluding medical negligence) claiming in excess of the High Court lower limit of HK$60 000. Successful plaintiffs are required to pay 10% of the first HK$50 000 they recover, 12,5% of the next HK$200 000 and 10% on any excess. These percentages are reduced if the case is settled, depending on the stage reached.

5.19.4 Such a fund would have certain attractions in that it would widen access to justice in the areas in which it applied. However, the most serious drawback is that such a scheme could only be effective in cases where substantial sums of money are involved. "Even there, the evidence

---

[221]Paragraph 5.50 of Working Paper 57; clause 8 of the draft bill.

[222]Scottish Law Commission **Multi-Party Actions Report** par 5.17.

[223]Scottish Law Commission **Multi-Party Actions Discussion Paper** par 8.33.

is that the proportion of the winnings that would be payable to the fund to make it viable would have to be very high. There is also a difficult problem of principle where successful litigants are effectively financing unsuccessful cases out of the award of damages which have been judged fair."[224]

* A class action fund

5.19.5 A "class action fund" denotes simply an arrangement for third party financial assistance to class action litigants, other than legal aid or a contingency legal aid fund. All the features of such a fund can be adjusted to suit the policy requirements of the body which sets it up. We described the main features of the Quebec Fonds[225] and the Ontario Class Proceedings Fund in the Working Paper and on the basis of the developments there recommended the establishment of a Public Interest Action and Class Action Fund.[226]

5.19.6 Of the respondents who commented on this matter only Society of Advocates (OFS Division), the Securities Regulation Panel and the South African National Consumer Union were unequivocally in favour of the establishment of such a fund. The last mentioned believes the fund should make it possible to assist even the State or a parastatal organisation. The Union is, however, concerned that the composition of the Board of Control of the Fund is open to some doubt in this respect.

5.19.7 Professor Wouter de Vos expresses his support in favour of a statutory fund in no uncertain terms:

---

[224]Scottish Law Commission **Multi-Party Actions Report** par 5.18.

[225]The Quebec Fonds operates on a small budget with what appears to be a credible success rate. Its budget in 1993 was only a little over $750 000; its total cost over 15 years has only been around $14 million. As the largest cases begin to settle or are decided so the percentage of recovered costs rises. It is currently around 12%. Between 1979 and 1994, it assisted in 313 cases, the numbers rising as the procedure has become established and overcome judicial conservatism. Of the 163 cases that have come to a conclusion, 67 were successful. They covered an impressively wide range of different matters.

[226]Paragraph 5.50 of Working Paper 57; clause 8 of the draft bill.

> In my view the proposed fund is an imaginative solution that could go a long way towards solving the vexed problem of legal costs in the context of class actions. I, therefore, express the hope that it will receive the necessary support.

5.19.8 Mr P J Conradie of Hofmeyr Attorneys believes the powers of the Fund should be limited. He argues as follows:

> If money are readily available to plaintiffs in class actions the system would be abused. It is recommended that the Fund should only be entitled to furnish security for costs and pay cost orders awarded against parties representing a class or the public. The Fund should not be available to pay the fees and disbursements of especially plaintiff lawyers appearing for class representatives. These legal costs can be sufficiently accounted for through the contingency provision provided for ...

* Legal aid

5.19.9 Judge B R du Plessis, with whom Judge President Eloff agrees, is not in favour of a separate Class Action and Public Interest Fund. He proposes that the public monies available for such purposes be administered by the Legal Aid Board. He believes that by centralising the administration of public monies available for legal aid, priorities for its use can be determined better. We are persuaded by this argument and will give effect thereto in our draft bill.

5.19.10 The stated objects of the Legal Aid Board is to render or make available legal aid to indigent persons and to provide legal representation at State expense as contemplated in the Constitution, 1996.[227] The term "legal aid" is not defined in the Legal Aid Act, 1969. We believe it can be argued that "legal aid" includes, besides obtaining the services of legal practitioners, the indemnification of the litigant in a class action or a public interest action for the defendants' legal costs. Perhaps this needs to be spelled out in the Legal Aid Guide that is still to be published.

5.19.11 In their report the Scottish Law Commission came to the conclusion that legal aid is the most suitable means of providing financial assistance for group proceedings and

---

[227]Section 3 of the Legal Aid Act, 1969.

other multi-party actions.[228] This recommendation is based in part on the recent developments in England and Wales in the Benzodiazepine litigation.[229]

5.19.12 For its future, class actions and public interest actions in part depend upon a Legal Aid Board that is adequately staffed, managed, and funded. Legal aid is, however, in very high demand and the Legal Aid Board continuously faces manpower shortages and experiences financial difficulties.[230]

5.19.13 Accordingly we recommend:

24. Contrary to our recommendation in the Working Paper, we no longer recommend the establishment of a separate public interest action and class actions fund. We believe the existing Legal Aid Board should be utilised as the mechanism to provide legal aid to indigent litigants in class actions and public interest actions.

5.20 **Is prior approval of the court necessary before a class action can be settled, discontinued or abandoned?**

5.20.1 In conventional civil litigation, the pursuer is entitled to abandon or settle the action at any time before a final order is made or judgment is rendered, without obtaining the prior approval of the court. The theory of class action procedure, however, is that the representative conducts the litigation both on his or her own behalf and on behalf of all the members of the class (i.e. those who have opted-in or not opted-out). It is therefore argued that it is wrong for the

---

[228]Scottish Law Commission **Multi-Party Actions Report** par 5.50. See also Hodge 1995 (14) **Civil Justice Quarterly** 102; Paterson 1991 (10) **Civil Justice Quarterly** 124.

[229]This litigation involved complaints about tranquilliser drugs in the Benzodiazepine family of drugs. Some 13 000 claimants received legal aid and £30 - £35 million of legal aid expenditure was incurred. The Legal Aid Board has now withdrawn legal aid in the majority of cases.

[230]Legal Aid Board **Annual Report 1993/94**, **Annual Report 1994/95**. See also Rita Esterhuysen **Die publiek se kennis van en houding jeens die Regshulpraad**.

representative to be entirely free to abandon or settle the litigation as he or she wishes.[231]

5.20.2 We recommended in the Working Paper[232] that the Act should contain a provision which requires any settlement of a class action or a public interest action to be approved by the court. We did not deal with the possibility of the representative discontinuing or abandoning the class action or the public interest action and will rectify the omission.

5.20.3 Professor De Vos argues that it is unlikely that a plaintiff acting in the public interest would be inclined to settle a **public interest action** to the detriment of the public concerned.[233] In most instances such a plaintiff is a champion of the public cause, without the same personal interest in the matter as in the case of the representative in class action proceedings. He concedes, however, that the representative might overlook important aspects relating to the public interest or misconceive what the public interest demands. He agrees, therefore, that the court should also approve settlements in public interest actions.

5.20.4 Under the current British Columbia Rules of Court that deal with representative actions, the settlement or discontinuance of an action requires neither the approval of the court nor notice to other class members. The interests of absent class members are not protected under this Rule and representatives are in a position to use representative proceedings to enhance their own bargaining positions to settle their individual claims.

5.20.5 Both the Ontario Act, the Quebec Code and the Ontario Law Reform Commission draft bill attempt to remedy this by providing that proceedings may only be settled, abandoned or discontinued with the approval of the court. This provision applies to the pre and post certification stages of the proceeding. The Ontario Act and the British Columbia Act[234] directs

---

[231] Scottish Law Commission **Multi-Party Actions Report** 30. The representative might wish to abandon the action for reasons with which the other class members did not agree or the defendant(s) might seek to "buy him off" by making an offer impossible to refuse.

[232] Paragraph 6.36 of Working Paper 57; clause 11 of the draft bill.

[233] 1996 (4) **Journal of South African Law** 653.

[234] Section 35 of the British Columbia Act.

the court to consider the issue of notice. The Quebec Code makes notice mandatory for settlements, but not for discontinuance.

5.20.6 The Scottish Law Commission, however, recommended that the rules for the new procedure should not require the court to consider proposals for the abandonment or settlement of a class action and not make abandonment or settlement competent only with the court's prior approval.[235]

5.20.7 They argue as follows:[236]

> It seems anomalous to impose on the judge a special and onerous task which he does not have in conventional litigation. Problems are likely to arise because the judge may not have adequate information to access whether the proposed abandonment or settlement is reasonable. ... some or all of the absent group members may be prejudiced by abandonment or settlement. However, members of the group gain advantages from using the procedure which they would not enjoy if they sued individually in a conventional action. They should allow for corresponding disadvantages inherent in group proceedings. The potential disadvantage underline the importance of ensuring the competence of the class representative and his legal advisers.

5.20.8 Accordingly we recommend:

25. Settlement, discontinuance or abandonment of a class action should require the prior approval of the court.

5.21 **Can appeal proceedings be brought and, if so, by whom and when?**

5.21.1 We did not deal with appeals in the Working Paper. It was, however, implicit that we thought that a class action or public interest action should proceed in the same way as a conventional action for the same remedy raised by a single pursuer subject only to such

[235]Scottish Law Commission **Multi-Party Actions Report** par 4.92.

[236]Scottish Law Commission **Multi-Party Actions Report** par 4.92.

modifications as were considered appropriate.[237] The problem is that our rules of court provide that only final orders can be appealed against, but not interlocutory orders.[238]

5.21.2 The possibility of appeal raises two important questions:[239]

(a) Are specific appeal provisions needed? In particular is it necessary specifically to provide which interlocutory orders of a kind pronounced only in class action proceedings can be appealed against? And should they be appealable with, or without, leave of the court?

(b) If the representative fails to appeal, should it be competent for another member of the group or class to do so?

* Appeals against certification orders

5.21.3 The Ontario Law Reform Commission draft bill and the Ontario Act take slightly different approaches to the question of whether certification orders should be subject to appeal. Under the draft bill, appeals from certification orders lie, as of right, to the Divisional Court. Under the Ontario Act, a right of appeal exists from a refusal to certify a class action, while an appeal of an order certifying an action can be brought only with leave. The British Columbia legislation follows the Ontario Law Reform Commission recommendations and grants a right of appeal to either party. Under both the Ontario Law Reform Commission draft bill and the Ontario and British Columbia Acts, if a representative party does not appeal, any class member may seek leave from the court to act as the representative party for the purposes of bringing an appeal.

5.21.4 Under the Quebec Code, an order refusing to authorise a class action may be

---

[237]Paragraph 6.36 of Working Paper 57: "In giving directions for the procedure to be followed the court should be empowered to dispense with usual procedures and to design special procedures."

[238]Section 20 of the Supreme Court Act 59 of 1959, Rules 49 and 50 of the Supreme Court Rules; section 83 of the Magistrates' Courts Act 32 of 1944, Rule 51 of the Magistrates' Courts Rules.

[239]Scottish Law Commission **Multi-Party Actions Report** par 4.146.

appealed by the representative party or, with leave of a judge of the Court of Appeal, by any class member. An order certifying an action as a class action cannot be appealed. The limitation of this right of appeal was introduced in 1982 for a simple reason: until them, every ruling that authorised a class action was systematically appealed by the defendants.[240]

5.21.5 The Financial Services Board recommendation relates to appeal against class certification orders. On the suggestion of Professor N J Williams[241] the Financial Services Board recommends that an order certifying an action as a class action be deemed to be interlocutory while an order denying certification of an action as a class action be deemed to be a final order. Professor Williams further suggests that provision should be made in legislation on class actions for a separate section governing this aspect so as to remove any ambiguity and thus making it clear whether and when certification orders are subject to appeal.

* Appeals against the judgment on the common issues

5.21.6 Under the Ontario Law Reform Commission draft bill, the Quebec Code and the two provincial acts either party has a right to appeal judgment on the common questions, including an aggregate assessment, to the Court of Appeal. Where a representative party does not appeal, another class member may seek leave of the court to act as the representative party for the purposes of bringing the appeal.

* Appeals against the judgment on the individual issues

5.21.7 The Ontario Act includes a complicated set of rules respecting the appeal of orders distributing aggregate awards and determining individual issues. Class members, representative plaintiffs or defendants may, with leave, appeal any order dismissing a claim for monetary relief. Representative plaintiffs may appeal any order related to the distribution of an aggregate award if it is for $3 000 or more. Any class member may appeal an order distributing an aggregate award or determining an individual issue where the amount involved is more than $3 000. If the amount

---

[240] Uniform Law Conference of Canada **Class Actions Discussion Paper** p. 42.

[241] "Consumer class actions in Canada - Some proposals for reform" 1975 (13) **Osgoode Hall Law Journal** 1.

involved is less than $3 000, leave is required.

5.21.8 In British Columbia, an appeal of individual issues requires leave of the court regardless of the amount of the award. The Quebec Code does not provide for an appeal of individual issues. The Uniform Law Conference of Canada also recommended that class action legislation should provide for an appeal from an order refusing certification.[242] It further recommended that from an order granting certification, either an appeal should not lie or should require leave. Class members other than the representative should have the right to apply for leave to launch an appeal. An appeal should lie from a judgment on common questions and aggregate assessments. It lastly recommended that judgments on individual issues and individual assessments should be subject to appeal either with leave or where the amount at issue exceeds a fixed amount.

5.21.9 Certification of an action as a class action is the first hurdle to be crossed. It is therefore imperative to get finality on the nature and status of the proceedings as soon as possible. We believe there is considerable merit in providing in the Act that non-certification of an action as a class action should be subject to appeal. This does not constitute an automatic right to appeal and leave of the Court will be necessary.[243] Equally, the fact that an action was certified as a class action should not be appealable. Overseas experience has shown that where this was allowed, every decision to certify an action as a class action will be appealed against. This would defeat the purpose of a class action and hinder access to justice.

5.21.10 Accordingly we recommend:

26. The decision to certify an action as a class action is only the first step in the proceedings and should not be subject to appeal. The Act should, however, specifically provide that **non-**certification of an action as a class action is subject to appeal. If the representative does not appeal, or does not proceed with an appeal, it should be competent for another member of the class to do so with leave of the court.

---

[242] **Class Actions Discussion Paper** p. 43.

[243] The requirement of leave to appeal is not inconsistent with the equality provisions of the Constitution, 1993: **S v Rens** 1996 2 BCLR 155 (CC); **Besserglik v Minister of Trade, Industry and Tourism** 1996 4 SA 331 (CC).

5.22 **Should the statutory rules of prescription of obligations and limitation of actions be amended to cope with the introduction of class actions?**

5.22.1 The general principle is that after a specified period of time a right or obligation either prescribes[244] or becomes unenforceable by court proceedings through the limitation of actions rule.[245] The question was raised whether the aggregation of claims in a class action is compatible with the efficient operation of these rules of prescription and limitation.[246] If not, some provision would be needed.

5.22.2 Generally, statutory limitation periods stop running when an action is commenced. In most jurisdictions, the filing of a certification application suspends the running of time for all members of the class. If the limitation periods continue to run against class members until after certification, they may be forced to file individual actions to preserve their causes of action.

5.22.3 Section 28 of the Ontario Act suspends the running of time for all class members when a proceeding is commenced under the Act. Time begins to run against a class member when he or she opts out or is excluded from the class, a decertification order is made, or the class action is dismissed, abandoned or settled with the approval of the court. This provision of the Ontario Act is closely modelled on the Quebec Code and the Ontario Law Reform Commission draft bill and adopted in the British Columbia Act.[247]

5.22.4 The Scottish Law Commission, on the other hand, recommended that the statutory rules of prescription of obligations and limitation of actions need not be amended to cope with the

---

[244]In terms of the Prescription Act 68 of 1969.

[245]In terms of various legislation. See, for instance, section 32 of the Police Act, 1958; section 113 of the Defence Act, 1957. See also **Zantsi v Council of State, Ciskei** 1995 10 BCLR 1424 (CC); **Chairman of the Council of State v Qokose** 1994 2 BCLR 1 (CkA), 1994 2 SA 198 (CkA).

[246]Scottish Law Commission **Multi-Party Actions Discussion Paper** paras 7.85 - 7.87; **Multi-Party Actions Report** paras 4.136 - 4.140.

[247]Uniform Law Conference of Canada **Class Actions Discussion Paper** p. 43.

introduction of a Scottish class action procedure.[248]

5.22.5 None of the respondents raised this issue.

5.22.6 Accordingly we recommend:

27. The certification of an action as a class action should suspend limitation periods for all class members until the member opts out, the member is excluded from the class, or the action is decertified, dismissed, abandoned, discontinued or settled.

5.23 **Should the scope of the proposed Act not be broadened to include 'organisational actions' and the derivative action?**

5.23.1 In its memorandum the Securities Regulation Panel raises the possibility of using the proposed legislation in the fight against insider trading. The Panel proposes an action of the nature of a derivative action substantially different from that set out in section 266 of the Companies Act, 1973,[249] where conversely the Panel is authorised to bring a civil action for the recovery of any profit made by the insider, or payment of any loss avoided by the insider for the benefit of the counter parties to the insider dealing. The Panel accepts that the proposed derivative action does not quite fit comfortably within the proposed definitions of a class action or a public interest action.[250] It therefore recommends the amendment of the definition of 'public interest action' to encompass the proposed derivative action. In the alternative a new category of action - the proposed derivative action - could be added as a separate type of action.

5.23.2 This proposal leads to the question of whether the scope of the proposed Act should not be broadened. In this regard we considered using the term 'multi-party actions' in imitation of the Scottish Law Commission. The Scottish Law Commission divides multi-party

---

[248]Scottish Law Commission **Multi-Party Actions Report** par 4.140.

[249]See also paragraph 1.12 of Working Paper 57.

[250]See also Bottomley 1992 (15) **University of New South Wales Law Journal** 127.

actions into three categories.[251] These are public actions, organisation actions and class actions.

5.23.3 The Scottish Law Commission defines public actions as those brought by a public official who seeks redress for the public at large or for a group.[252] Organisation actions are brought by an organisation, such as a consumer organisation or environmental protection organisation, on behalf of its members and the public at large. Class actions are brought by a named plaintiff, who is typically the self-appointed representative of a class (or group) of persons, and who seeks redress for himself or herself and for the other class members.[253]

5.23.4 Our proposed public interest action is not the same as the Scottish public action. The circumstances covered under the Scottish public actions cause no hardship in South Africa as is evident from the numerous actions instituted and defended by government ministers and officials on their behalf. Such action might obviously benefit a lot of people, but it is not always an action in the public interest. In South Africa the problem addressed by organisation actions can be resolved by public interest actions and the broadening of standing.[254] The Commission's proposals regarding class actions also go further. This dovetails with the old Constitution of 1993 and the new Constitution of 1996 and broadens access to justice.

5.23.5 The Society of Advocates (OFS Division) is of the opinion that the draft bill fails in its objectives as it does not define a 'group'. The Society furthermore objects to the draft bill as its theoretical framework does not envisage language, cultural or religious groups. The Society concludes:

> It would seem as if the Law Commission had in mind in the draft Bill mainly structured group relations such as associations, partnerships or in law easily identifiable and operational bodies or institutions, but not group relations envisaged in the Constitution or [group relations] that are otherwise spontaneously encountered in the community but,

---

[251]Paragraph 2.2 of the Scottish Law Commission's **Multi-Party Actions Report**.

[252]In Scotland, for example, the Director General of Fair Trading has powers under the Unfair Terms in Consumer Contract Regulations, 1994 to stop misleading advertisements. The South African equivalent is the Harmful Business Practices Act, 1990.

[253]See also paragraph 4.7.5 above.

[254]See paragraph 4.6.4 above.

mutually, have different attitudes in respect of territory or interests. (Own translation.)

5.23.6 The Society seems to confuse the issues of 'group rights' and class actions. Nothing in the draft bill would prevent a language, religious or cultural group from instituting either a class action or an action in the public interest. Nor does the Commission believe that the old Constitution, 1993 or the new Constitution, 1996 protect group rights, at least not in the way the Society seems to suggest.

5.23.7 As for the proposals by the Securities Regulation Panel, the answer seems clear. Nothing prevents the Panel from instituting either a public interest action or a class action. Indeed, as the Financial Services Board puts it, regulatory and supervisory authorities, with limited enforcement powers, will with the introduction of public interest and class actions be able to approach the court in order to claim relief in the public interest or on behalf of others who would not be able to enforce their rights themselves. As for the proposed derivative action, the Panel supplies its own answer:

> It is clear that in addition to the draft law under consideration amendments will have to be made to Chapter XV of the Companies Act. Indeed the ideal would be to remove the whole chapter from the Companies Act and to have a separate law dealing solely with the Panel in all its activities including the investigation and prosecution of insider trading.

5.23.8 Accordingly we recommend:

28. The Act should only deal with class actions and public interest actions and not with organisational or derivative actions.

CHAPTER 6

DRAFT LEGISLATION

6.1 Introduction

6.1.1 This Chapter embodies the Commission's recommendations in the form of a draft bill. The recommendations and the proposed draft bill do not materially differ from the that proposed by the Commission in its Working Paper on the **Recognition of a Class Action in South African Law**. For ease of reference, we include an explanatory memorandum with cross references to our recommendations in this Chapter.

6.2 The Commission's draft bill on public interest actions and class actions

6.2.1 Accordingly we recommend:

(88)

REPUBLIC OF SOUTH AFRICA

PUBLIC INTEREST AND CLASS ACTIONS ACT

(As introduced)

(MINISTER OF JUSTICE)

[B - 99]

REPUBLIEK VAN SUID-AFRIKA

.... WETSONTWERP

(Soos ingedien)

(MINISTER VAN JUSTISIE)

[B - 99]

BILL

To make provision for the institution of public interest and class actions; to regulate the conduct of public interest and class actions; and to provide for matters connected therewith.

TO BE INTRODUCED BY THE MINISTER OF JUSTICE

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows: -

CHAPTER 1: DEFINITIONS

Definitions

1. In this Act, unless the context otherwise indicates -

"**action"** means any proceeding instituted in a court, whether by way of summons or notice of motion;
"certify" means to permit an action to be maintained as a class action, but does not mean to approve the merits of the action except to the extent provided for by section 6(2) of this Act;
"class action" means an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and certified as a class action in terms of section 6 of this Act;
"common issues" means common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

“court” means the Supreme Court of Appeal, the Constitutional Court of South Africa, the High Court of South Africa, the Land Claims Court, the Labour Court, and any other court designated by the Minister in terms of section 15 of this Act;

"Legal Aid Board" means the Legal Aid Board established in terms of section 2 of the Legal Aid Act, 1969;

“legal practitioner” means a practising advocate or practising attorney;

“members of a class” means two or more persons with a common interest in the class action;

“Minister” means the Minister of Justice;

“person” includes an association of persons, whether vested with legal personality or not;

“public interest action” means an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative’s own interest;

representative” means a person designated by the court as the representative of the plaintiffs or defendants in a public interest action or class action.

CHAPTER 2: PUBLIC INTEREST ACTIONS

Instituting a public interest action

2. (1) Any person may institute action in a court claiming by way of a public interest action relief in the interest of the public generally or of any particular section thereof, irrespective of whether or not such person has any direct, indirect or personal interest in the relief claimed.

(2) The person who institutes a public interest action shall identify the action as such and shall nominate either himself or herself or any other suitable person as representative of those on whose behalf the relief is claimed.

(3) The court may give directions to the representative as to the appropriate person

or persons to be served as respondents.

(4) Unless the court holds otherwise, judgment in a public interest action shall not be binding on the person or persons in whose interest the action is brought.

The representative in public interest actions

3. (1) If the court is satisfied that it is proper that the action should proceed by way of a public interest action, it shall appoint as the representative a person who, in the court's opinion, is suitably qualified to represent the public interest in the matter concerned.

(2) The court may at any stage before judgment **mero motu** or on application of any interested party remove any representative and appoint another suitably qualified representative on good cause shown.

Costs

4. (1) In a public interest action the court shall not make an order as to costs or order the representative to provide security for costs unless special circumstances apply.

(2) The court may authorise a public interest action and appoint the representative subject to the rendering or making available of legal aid by the Legal Aid Board.

CHAPTER 3: CLASS ACTIONS

Instituting a class action

5. Any person, whether a member of the class concerned or not, may apply to a

court for leave to institute or defend an action as a class action.

Certification

6. (1) No action shall proceed as a class action unless the court has certified the action as a class action.

(2) In deciding to certify an action as a class action, the court may take into account -

(a) evidence of the existence of an identifiable class of persons;
(b) the existence of a **prima facie** cause of action;
(c) issues of fact or law which are common to the claims or defences of individual members of a class;
(d) the availability of a suitable representative or representatives to represent the interests of the members of the class;
(e) the interests of justice; and
(f) whether, having regard to all relevant circumstances, a class action would be the appropriate method of proceeding with the action.

(3) The court may **mero motu** or on application of any interested party withdraw the certification order at any stage before judgment if the criteria in subsection (2) are no longer met.

(4) The court which certifies an action as a class action may give directions as to the appropriate court in which the action should be prosecuted.

(5) The court shall not be precluded from certifying an action as a class action merely by reason of the fact that there are issues pertaining to the claims of all or some of the members of the class which will require individual determination, or that different class members seek different relief.

(6) The refusal of the court to certify an action as a class action shall be subject to appeal.

The representative in a class action

7. (1) The court which certifies an action as a class action shall appoint one or more persons as representative or representatives of the class.

(2) The court may appoint the applicant, or any other suitable person, as representative in a class action.

(3) When appointing a person as the representative the court shall take into account -

(a) the suitability of that person adequately to represent the best interests of the members of the class;

(b) any conflict or potential conflict of interest between the representative and the members of the class;

(c) the ability of the representative to make satisfactory arrangements with regard to the funding of the class action and the satisfaction of any order as to costs, or for security for costs; and

(d) the ability of the representative to manage the class action.

(4) A representative appointed by the court shall conduct the class action in the best interests of the members of the class concerned and in accordance with the directions of court.

(5) The court may at any stage before judgment **mero motu** or on application of any interested party remove any representative and appoint another suitably qualified representative on good cause shown.

Notice in class actions

8. (1) The court which certifies an action as a class action may give directions to the representative with regard to -

(a) the giving of notice of the action to the members or potential members of the class concerned;
(b) the form which such notice should take;
(c) the way in which such notice is to be communicated to the members of the class.

(2) In considering the question whether notice should be given to the members of a class and, if so, what directions are appropriate in respect thereof, the court shall take into account -

(a) the extent to which the members of the class might be prejudiced by being bound by a judgment given in an action which may not have come to their attention;
(b) the potential size of the class;
(c) the general level of education and development of the members of the class;
(d) the ease with which members of the class can be identified;
(e) the type of relief claimed;
(f) where monetary relief is claimed, the amount of the claim of each member of the class;
(g) the difficulties likely to be encountered by members of the class in enforcing their actions individually;
(h) any other relevant factor.

(3) The court may -

(a) require from those members of the class who do not wish to be bound by the judgment written notice of their exclusion as members of the class;

(b) require from those members of the class who wish to be bound by the judgment written notice of their inclusion as members of the class; or

(c) order that no notice to members of the class is necessary.

Procedure in class actions

9. (1) The court in which the class action is prosecuted shall -

(a) give directions as to the procedure to be followed in the conduct of the class action;

(b) delineate the common issues to be decided in the class action;

(c) determine whether there are individual issues that require separate adjudication and, if so, give directions as to the procedure to be followed in order to adjudicate such issues;

(d) determine, where the claims are for damages or any other form of monetary relief, whether the individual claims of the members of the class should be assessed as one aggregate amount or whether the claims of the members of the class should be proved individually;

(e) determine how any aggregate award is to be distributed among the members of a class, appoint a person responsible for the administration of such distribution, and give directions as to matters incidental thereto.

(2) Any member of a class who stands to be bound by a judgment in a class action may apply for leave to intervene in the action in order to protect his or her own interests or the interests of the class or any section thereof.

Conduct of a class action

10. (1) The court in which the class action is prosecuted may first give judgment

on the common issues and then adjudicate the individual issues.

(2) The court may order consolidation of actions where a number of claims are based on substantially the same cause of action.

(3) Judgment of the court in respect of a class action shall be binding on the members of the class, unless the court is of the opinion, after consideration of the factors listed in section 8(2), that members of the class may be significantly prejudiced by the fact that they will be bound by a judgment given in a class action which may not have come to their notice.

Costs

11. (1) In a class action the court shall not order the representative to provide security for costs unless special circumstances apply.

(2) The court may -

(a) authorize a class action and appoint the representative subject to the rendering or making available of legal aid by the Legal Aid Board;

(b) order those members of the class who elected to give written notice in terms of section 8(3)(b) to contribute towards costs and, where appropriate, to provide security for costs.

(3) When an award is made in a class action in respect of which funds have been made available by the Legal Aid Board the court may order the representative or any member of the class to contribute a percentage of the award to the Legal Aid Board.

Contingency fees

12. (1) Subject to the Contingency Fees Act 66 of 1997, a legal practitioner may

make an arrangement in writing with the appointed representative stipulating for the payment of fees or fees and disbursements, in respect of a class action commenced under this Act only in the event of success in the action.

(2) For the purpose of this section, success in the action includes a judgment in favour of some or all members of the class on the questions of fact or law common to such members or a settlement that benefits some or all members of the class.

CHAPTER 4: GENERAL

Appointment of commissioner

13. (1) In a public interest action or a class action the court may appoint a commissioner for the purpose of -

(a) collating evidence;

(b) making a recommendation, including a recommendation relating to individual issues or the individual assessment of monetary claims in a class action.

(2) The commissioner shall report his or her findings or recommendation to the court.

(3) The findings or recommendation of the commissioner shall be subject to review by the court.

Settlement, abandonment, and discontinuance

14. An action commenced under this Act shall not be settled, abandoned or discontinued without the prior approval of the court first being obtained, and upon such terms and conditions, including notice or otherwise, as the court considers proper.

Designation of court by Minister

15. The Minister may designate by way of notice in the Gazette those courts in which public interest actions and class actions may be instituted.

Short title

16. This Act shall be called the Public Interest and Class Actions Act, 19...

EXPLANATORY NOTES TO THE DRAFT BILL ON PUBLIC INTEREST AND CLASS ACTIONS

The Act regulates public interest actions and class actions. It provides for the broadening of the traditional notion of standing in terms of which a direct, personal interest is required in the subject matter before the court to enable a person to institute or defend an action. The Act broadens access to justice and builds on sections 38(c) and (d) of the Constitution of the Republic of South Africa Act, 1996 where provision is made for public interest actions and class actions in constitutional litigation.

The Act defines the concepts "public interest action" and "class action". A public interest action is an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interests. A class action, on the other hand, enables a group of persons to join forces to bring one action on substantially the same issues of fact or of law. The essential difference between a class action and a public interest action is that the judgment in a class action binds all the members of the class and may, therefore, be pleaded as *res judicata* against the members of the class. The judgment in a public interest action does not bind the person in whose interest it is brought.

As such the Act implements recommendations 1, 2, 3, 4, 8 and 9.

Section 1: This section defines the following terms: "action", "certify", "class action", "common issues", "court", "Legal Aid Board", "legal practitioner", "members of a class", "Minister", "person", "public interest action", and "representative". It specifically implements recommendations 3, 8 and 17.

Section 2: This section provides for the introduction of a public interest action in South African law. It further defines the circumstances and manner in which a public interest action may be instituted and regulates the appointment and dismissal of the representative who is to conduct the public interest action. It implements recommendations 1, 3, 4 and 7.

Section 2(1): This subsection regulates the institution of public interest actions. The traditional notion of standing (i.e. a direct and substantial interest) is relaxed to enable any person to bring a public interest action in the interests of the public generally or of any particular section thereof. It implements recommendations 1, 3 and 4.

Section 2(2): This subsection provides for the manner in which a public interest action is to be instituted. The procedure is quite simple: The person who institutes the action identifies the action as a public interest action and nominate a suitable representative. It implements recommendation 4.

Section 2(3): The person who institutes a public interest action might not know against whom the action should be brought. In such a case, the court may come to that person's assistance by giving directions as to whom should be served as respondent or defendant in the matter. It implements recommendation 5.

Section 2(4): This section makes it possible for the court to regulate the binding effect of its judgment in a public interest action. As a public interest action by its very nature is brought on behalf of the public, judgment in such an action ordinarily cannot be binding (*res judicata*) on the persons in whose interests the action is brought. It implements recommendation 3.

Section 3: This section authorises the court to appoint a suitable representative to represent the public interest if the

court is satisfied that the matter should proceed as a public interest action. It implements recommendation 4.

Section 3(1): This subsection provides for the appointment of a suitably qualified person as the representative. It implements recommendation 4.

Section 3(2): This subsection allows the court to remove and replace a representative in appropriate circumstances. It also implements recommendation 4.

Section 4: This section deals with the questions of security for costs in public interest actions. It implements recommendation 7.

Section 4(1): In public interest actions the court must refuse to make an order as to costs or to order the representative to provide security for cost unless special circumstances apply. It implements recommendation 7.

Section 4(2): This subsection helps the indigent representative to institute a public interest action as it allows the court to authorise a public interest action on condition that the representative obtains legal aid from the Legal Aid Board. It implements recommendation 7.

Section 5: This section allows any person to apply for leave to institute or defend an action as a class action. Such a person need not be a member of the class and as such this section incorporates the concept of the "ideological plaintiff" in our law. It implements recommendation 9.

Section 6: This is one of the critical provisions in the Act as it provides for the certification of an action as a class action. It implements recommendations 8, 9, 10, 11, 12, 13, and 26 and (a) sets out who may apply to court for leave to institute an action as a class action; (b) describes the procedure under which an action may proceed as a class action; (c) lists the criteria to be taken into account in certifying an action as a class action; (d) provides for decertification of a class action in certain circumstances; (e) allows the court to give directions as to the appropriate division or court in which the class action is to be prosecuted; (f) provides for an "avoidance of doubt"-clause; and (g) regulates appeals against non-certification orders.

Section 6(1): In order to proceed with an action as a class action a preliminary application must be brought before court requesting leave to institute the class proceeding. This certification process is of critical importance. It implements recommendation 10.

Section 6(2): This subsection implements recommendation 11 and sets out the criteria which the court has to consider before it grants the application for certification. The criteria are: (a) evidence of the existence of an identifiable class of persons; (b) the existence of a genuine cause of action; (c) common questions of fact or of law; (d) the availability of a suitable representative; (e) the interests of justice; and (f) whether a class action would be the most appropriate method of proceeding with the action.

Section 6(3): This new subsection allows the court to revoke the certification order if it considers that the prerequisite requirements are no longer being met. It implements recommendation 12.

Section 6(4): This subsection authorises the certifying court to give directions as to the appropriate court or division in which the class action should be prosecuted. The certifying court is therefore not necessarily the same court in which the class action is eventually prosecuted. It implements recommendations 19 and 20.

Section 6(5): This is the "avoidance of doubt" -provision. It directs the court not to refuse to certify an action as a class action merely by reason of the fact that there are issues pertaining to the claims of all or some of the members of the class which will require individual determination, or that different class members seek different forms of relief. It implements recommendation 17.

Section 6(6): This new subsection makes it possible to bring appeal proceedings against **non**-certification of an action as a class action. No–refusal to certify an action as a class action is specifically excluded from this appeal provision as the international experience shows that certification orders are almost always appealed against, usually as a delaying tactic. It implements recommendation 26.

Section 7: This section addresses the pivotal role of the representative in a class action. It deals with the appointment, criteria for appointment, and dismissal of the class representative. The section implements recommendation 9.

Section 7(1): This subsection instructs the certifying court to appoint one or more persons as the representative(s) of the class. It implements recommendation 9.

Section 7(2): In terms of this subsection the court may appoint the applicant or any other suitable person as the representative of the class. The representative need not be a member of the class. This subsection implements recommendation 9 and introduces the concept of the "ideological plaintiff" in South African law.

Section 7(3): This subsection lists the criteria the court should consider when appointing a suitable representative in a class action. The criteria are: (a) suitability of the person; (b) avoidance of conflict or potential conflict of interests; (c) the ability to make satisfactory arrangements as to the funding of the class action and as to costs or security for costs; and (d) the managerial abilities of the representative. It implements recommendation 9.

Section 7(4): This subsection instructs the representative to conduct the class action in the best interests of the class and in accordance with the directions of the court. Should the representative fail to do so, the court may dismiss him or her in terms of section 7(5). It implements recommendation 9.

Section 7(5): This subsection authorises the court to remove and replace a representative on good cause shown. It implements recommendation 9.

Section 8: This section prescribes the giving of notice in class actions. As such it deals with the questions of when and by whom class members should be given notice. The court is given the discretion to order the representative or any other person to give opt-in notice, opt-out notice, or no notice at all. It implements recommendations 13, 14, 15 , and 16.

Section 8(1): This subsection grants the certifying court the discretionary power to give directions to the representative with regard to (a) the giving of notice of the institution of the action to class members; (b) the manner and form of such notice; and (c) the way in which such notice is to be communicated. It implements recommendation 15.

Section 8(2): This subsection lists the various factors the court should take into account in considering the question whether notice, in whatever form, should be given to the members of the class. It implements recommendations 15 and 16.

Section 8(3): It is very important that the members or potential members of the class be informed and be kept informed of all aspects related to the class action as the judgment in a class action is binding (*res judicata*) on them. Practical realities might, however, make individual notices to all members impossible, impracticable or not affordable. This section therefore grants the court a discretion to order the appropriate form of notice. It provides that the court may (a) require from those members of the class who wish to opt-out notice of their intention to be excluded as members of the class; (b) require from those class members who wish to opt-in notice of their intention to be included as members of the class; or (c) dispense with the giving of notice. It implements recommendation 15.

Section 9: This section confers a general power on the court to prescribe the appropriate procedure in a class action. It implements recommendation 14.

Section 9(1): This subsection empowers the court in which the class action is to be heard to (a) prescribe the procedure to be followed; (b) delineate the common issues; (c) delineate the individual issues; (d) determine, where the claims are for damages or other monetary relief, whether the individual claims should be assessed as one aggregate amount or whether the claims of class members should be proved individually; and (e) determine how such an aggregate award is to be distributed among the class members. It implements recommendations 17 and 18.

Section 9(2): This subsection entitles any class member to apply for leave to intervene in order to protect his or her own interests or the interests of the class or a section thereof. The need for a provision of this nature flows from the fact that in terms of section 10(3) of this Act judgment in a class action is binding on all those class members who have not opted out. It implements recommendation 16.

Section 10: This section confers on the court in which the class action is prosecuted the power to (a) first give judgment on the common issues as delineated in terms of section 9(1)(b) of this Act and then to adjudicate the individual issues and (b) to order consolidation of actions where necessary. Subsection 10(3) makes it clear that judgment of the court in respect of the class action shall be binding on all those members of the class who have not opted-out. It implements recommendations 14 and 16.

Section 10(1): As part of its broad general management powers, the court in which the class action is prosecuted may first give judgment on the common issues and then deal with the individual issues. The term “common issues” is defined in section 1 of the Act. It implements recommendation 17.

Section 10(2): This subsection allows the court to order consolidation of actions where a number of claims are based on substantially the same cause of action. It implements recommendation 14.

Section 10(3): Unless a class member has given notice of his or her desire to be excluded from the class action in terms of section 8(3) of this Act, judgment in the class action shall be binding (*res judicata*) on all members of that class. This is the effect of the implementation of recommendation 16.

Section 11: The threat of a negative cost order can seriously limit or dampen class actions. In class actions courts should retain the discretion to apply the general rule that expenses follow success. Courts are therefore conferred with a general discretionary power enabling it to make any appropriate order as to cost. It implements recommendation 22.

Section 11(1): This subsection provides that the court must not order the representative to provide security for cost unless special circumstances apply. It implements recommendation 22.

Section 11(2): This subsection confers a general discretionary power on the court to (a) authorise a class action and appoint the representative subject to availability of legal aid and (b) to order whose members who opted in to contribute towards costs and, where appropriate, to provide security for costs. This latter provision stands in addition to section 8A(1) of the Legal Aid Act, 1969 which provides that whenever a litigant who has received legal aid becomes entitled to costs, it is deemed that such litigant has ceded his or her right to such costs to the Legal Aid Board. It implements recommendation 22.

Section 11(3): The purpose of this subsection is to strengthen the financial position of the Legal Aid Board in the long run by allowing the court to order the representative and successful class members to contribute a percentage of the award received to the Legal Aid Board. The proviso is that the representative and/or the class members should have relied on legal aid by the Legal Aid Board. It implements recommendation 24.

Section 12: This section implements recommendation 23 and enables a legal practitioner, subject to the Contingency Fees Act, 1997, to make an arrangement with the representative stipulating for the payment of fees or fees and disbursements in respect of a class action commenced under this Act only in the event of success in the action. Section 1 of the Act defines the term “legal practitioner” so as to include both a practising advocate and a practising attorney. In terms of section 12(2) of this Act success in the action includes a judgment in favour of some or all members of the class on the questions of fact or law common to such members or a settlement that benefits any member of the class.

Section 13: In terms of this section the court may appoint a commissioner to assist it in the gathering of evidence and to make recommendations. It implements recommendation 18. This assistance is available to the court in both public interest actions and class actions.

Section 14: Settlement, discontinuance or abandonment of a class action is made subject to the prior approval of the court. It implements recommendation 25.

Section 15: The Minister of Justice is empowered to designate those courts in which public interest actions and class actions may be instituted. Class actions should eventually be prosecuted in all our courts. Due to their complexity and likely extent, class actions should perhaps initially be introduced only in the Supreme Court of Appeal, the Constitutional Court, the High Court, the Land Claims Court, and the Labour Court. For this reason the Minister of Justice is given a discretion to designate those courts in which class actions and public interest actions can be adjudicated. It implements recommendations

6, 19, 20 and 21.

Section 16: This is the usual form provision with regard to citation.

ANNEXURE A: LIST OF RESPONDENTS

1. Mr P J Conradie of Hofmeyr Attorneys, Johannesburg
2. The Council of Southern African Bankers
3. Dr D L Craythorne, Prologov Consultancy
4. The Honourable Mr Justice B R du Plessis, Gauteng Provincial Division
5. Judge President C F Eloff, Gauteng Provincial Division
6. Financial Services Board
7. Mr A R McMillan, Deputy Chairman, Law Development Commission of Zimbabwe
8. Securities Regulation Panel
9. Society of Advocates of Natal
10. Society of Advocates (Free State Provincial Division)
11. Society of Advocates (Gauteng Provincial Division)
12. South African National Consumer Union
13. Mr D L Titlestad, Manager: Legal Services, Anglo American Corporation of South Africa Limited