THE SOUTH AFRICAN CLASS ACTION VS GROUP ACTION AS AN APPROPRIATE PROCEDURAL DEVICE

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1 Introduction

The certification requirements set out in the judgment of Wallis JA in *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* ("*Children's Resource Centre Trust"*)[1] include that there must be a class, identifiable by objective criteria, and it must be shown that a class action is the most appropriate means of adjudicating the claims of the class members.[2] A proper class definition *inter alia* enables the court to determine how notification to the putative class members should be given, to decide who does not form part of the class and may accordingly institute individual actions, and to establish who will be bound by the court's order.[3] The requirement that a class action must be appropriate is, according to Erasmus and Van Loggerenberg, aimed at ensuring that only claims that cannot feasibly be instituted as ordinary actions with multiple plaintiffs are brought as class actions.[4]

In *Children's Resource Centre Trust*, after having listed the certification requirements,[5] Wallis JA proceeded to deal selectively with some of the requirements in more detail. He did not consider separately the certification requirement that a class action must be shown to be the most appropriate means of determining class members' claims. Instead, he essentially dealt with this requirement in the context of the first certification requirement, namely that there must be a class, identifiable by objective criteria. In this regard, Wallis JA mentioned *obiter* that:

> "In defining the class it is not necessary to identify all the members of the class. Indeed, if that were possible, there would be a question whether a class action was necessary, as joinder under Uniform Rule 10 would be permissible. It is, however, necessary that the class be defined with sufficient precision that a particular individual's membership can be objectively determined by examining their situation in the light of the class definition."[6]

It can be inferred from Wallis JA's *obiter dictum* that, where all the claimants are identifiable,[7] they may need to be joined as plaintiffs to the proceedings.

1 2013 1 All SA 648 (SCA).
2 Para 26.
3 HJ Erasmus & DE van Loggerenberg *Erasmus: Superior Court Practice* (RS 41 2013) A2-23.
4 A2-25.
5 2013 1 All SA 648 (SCA) para 26.
6 Para 29.
7 In the sense that the individual claimants can be named and specified.

A class action may therefore not be the appropriate procedural device to be utilised in such circumstances. Wallis JA does, however, forgo saying that a class action may never be used if the claimants are all personally identifiable. In fact, Wallis JA mentions that there is a measure of overlap between the certification requirements[8] and he also refers to the circumstances when a class action may be instituted in South Africa,[9] such as where the class is large, where the class members are poor, and where the claims are not substantial enough to be pursued separately.[10]

As mentioned, Wallis JA did not expressly deal with the certification requirement that a class action must be shown to be the most appropriate means of determining class members' claims. He also stated that it is unnecessary to identify all the class members; otherwise, the necessity of a class action would be questionable. It accordingly remains unclear when, if at all, the identifiability of class members will preclude the certification of a class action. Moreover, it is unclear what the test is our courts must apply and what factors they must consider to determine the appropriateness of a class action.

In *Mukaddam v Pioneer Foods (Pty) Ltd* ("*Mukaddam SCA*")[11] the class action had been framed in an opt-in manner. This meant that the class would have been confined to those individuals who took the necessary steps to opt into the class action. Nugent JA held that a class action was not suitable in *casu*. He held that once the class is confined to claimants who choose positively to advance their claims and are required to come forward for that purpose, he could see no reason why they are not capable of doing so in their own names – they do not need a representative to do so on their behalf. He then stated that the court rules make specific provision for multiple plaintiffs to join in one action.[12] The court in *Mukkadam SCA* therefore found, at the expense of the opt-in class action regime, joinder to be the more appropriate procedural device.

A potential problem evidenced by the approach of the court in *Mukaddam SCA* is that where, for example, the individual claimants are poor, uneducated, and lack access to resources, or where the class is large, joinder may in fact be cumbersome and inappropriate, even though all the claimants are personally identifiable.[13] This potential problem is significant in that a court ordering joinder in such circumstances could potentially undermine the rationale

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8 Para 26.
9 Paras 19-22.
10 Para 19.
11 2013 2 SA 254 (SCA).
12 Para 12. Rule 10(1) of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa allows joinder of multiple plaintiffs in a single action.
13 According to Erasmus & Van Loggerenberg *Erasmus: Superior Court Practice* A2-21, the traditional rules governing joinder may be impractical where the claimants comprise a large group and/or all the potential claimants have not yet been identified.

underpinning the incorporation of the class action mechanism into South African law, namely access to justice.[14]

The primary difficulties associated with joinder are that it is a cumbersome and costly process. An interested party is required to file an application[15] in terms of which the party's direct and substantial interest in the matter is set out, and in terms of which the court is requested to join the party to the proceedings. Joinder is a costly procedure, since the interested party is generally required to make use of legal representation to bring the application. Cameron JA, in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* ("*Ngxuza*"),[16] referred to the difficulties associated with joinder and held as follows in this regard:

> "It is precisely because so many in our country are in a 'poor position to seek legal redress', and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice, that both the interim Constitution and the Constitution created the express entitlement that 'anyone' asserting a right in the Bill of Rights could litigate 'as a member of, or in the interest of, a group or class of persons".[17]

In *Mukaddam v Pioneer Foods (Pty) Ltd* ("*Mukaddam CC*")[18] Jafta J referred to section 173 of the Constitution of the Republic of South Africa, 1996 ("Constitution") and confirmed the power of our superior courts to protect and regulate their own processes and, where necessary, to develop the common law to give effect to the interests of justice. Jafta J held that the interests of justice should guide our courts when considering class action certification applications.[19] Regarding the certification "requirements" mentioned in *Children's Resource Centre Trust*, Jafta J in *Mukaddam CC* stated as follows:

> "In *Children's Resource Centre* … the Supreme Court of Appeal laid down requirements for certification. These requirements must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. They must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise."[20]

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[14] The South African Law Commission *The Recognition of Class Actions and Public Interest Actions in South African Law Report* Project 88 (1998) paras 1.3-1.4. See also the South African Law Commission *The Recognition of a Class Action in South African Law Working Paper 57* Project 88 (1995) para 5.28 where it is stated that "[t]he whole purpose of class actions is to facilitate access to justice for the man on the street". See also *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA) para 1 where Cameron JA states that "[t]he law is a scarce resource in South Africa. This case shows that justice is even harder to come by. It concerns the ways in which the poorest in our country are to be permitted access to both". In *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 2 SA 254 (SCA) para 11 it is stated that "[t]he justification for recognising class actions is that without that procedural device claimants will be denied access to the courts". In *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC) para 29 Jafta J stated that "[a]ccess to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved".

[15] Notice of motion supported by affidavit(s).

[16] 2001 4 SA 1184 (SCA).

[17] Para 6.

[18] 2013 10 BCLR 1135 (CC).

[19] Paras 33-34.

[20] Para 35.

In other words, according to the Constitutional Court in *Mukaddam CC*, the certification "requirements" laid down in *Children's Resource Centre Trust* should be treated as a set of relevant "factors" that have to be taken into account when determining whether or not the class action should be certified. A court is also not limited to considering these factors only and may consider other relevant factors not mentioned by Wallis JA.[21] Further, in examining the prevalence or absence of each or all of the above-mentioned factors, the court's certification decision should be informed by the interests of justice.[22]

The law in the foreign jurisdictions that will be considered in this article relating to the circumstances when a class action should be used rather than joinder is comprehensively dealt with in statute, supplemented by an extensive body of case law. However, the position in South Africa is essentially as set out in the *Children's Resource Centre Trust, Mukaddam SCA* and *Mukaddam CC* cases. The court in *Mukaddam CC* did not deal with the comments of the Supreme Court of Appeal ("SCA") on joinder. This article accordingly, and especially in the light of the experiences of foreign jurisdictions, considers what test our courts should apply and what factors they should consider when determining the appropriateness of a class action compared to joinder. It also considers when, if at all, the identifiability of class members will preclude the certification of a class action.

2 Class action as an appropriate procedural device compared to joinder

2 1 American federal class action

The threshold requirements for certification of a class action are contained in rule 23(a) of the American Federal Rules of Civil Procedure ("Federal Rules"). These certification requirements are generally referred to as numerosity, commonality, typicality, and adequacy of representation.[23] The relevant certification requirement that merits consideration in the context of the class action as an appropriate procedural device compared to joinder, is the numerosity requirement contained in rule 23(a)(1) of the Federal Rules.

Rule 23(a)(1) provides that a court may certify a class only if it "is so numerous that joinder of all members is impracticable". Where joinder is found to be practicable, there will be no need for a class action.[24] According to Anderson and Trask, the numerosity requirement does not merely require

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[21] *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 5 SA 89 (CC) para 47. According to W de Vos "Opt-in Class Action for Damages Vindicated by Constitutional Court: Mukaddam v Pioneer Foods CCT 131/12" (2013) 4 *TSAR* 757 765-766, relegating the requirements for a class action to mere 'factors' under the umbrella of 'the interests of justice' is questionable. He states that "[t]his flies in the face of the very nature of a class action and the position in the leading class action regimes. A class action is very different from an ordinary civil suit. For a class action to proceed as such certain essential requirements must be satisfied, otherwise it would be a travesty to call it a class action".

[22] *Nkala v Harmony Gold Mining Company Limited* ZAGPJHC case nos 48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13 of 13 May 2016 para 32.

[23] PG Karlsgodt "United States" in PG Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* (2012) 22.

[24] RH Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 4 ed (2012) 39.

consideration of the number of putative class members. They state that consideration must also be given to "whether aggregating the claims of the known class members would be feasible without a class action".[25] They accordingly propose using feasibility, in addition to the number of putative class members, as the key considerations in determining whether joinder is impracticable and hence whether the numerosity requirement is met.

The numerosity requirement does not require a claimant to identify the exact number of class members. However, the claimant would need to show that there is a sufficiently large number of people in the class to discharge the rule 23 burden. It has been suggested that, while there is no magic number for satisfying numerosity, most courts will allow a class action to proceed if the class consists of at least 40 members.[26] Further, it is generally accepted that "when class size reaches substantial proportions … the impracticability requirement and hence the numerosity requirement is usually satisfied by the numbers alone".[27] In other words, the bigger the class, the more likely it is that joinder will be impracticable.

Regarding the feasibility consideration, class proceedings may be appropriate where joinder is possible but not necessarily feasible.[28] Ultimately, it would seem that if joinder is possible but would needlessly complicate the litigation of the case, then class action proceedings may be appropriate.[29] However, impracticability does not mean impossibility.[30]

In addition to having to satisfy the requirements for certification, including the numerosity requirement, each class action must satisfy the requirements of either rules 23(b)(1), 23(b)(2), or 23(b)(3). Rule 23(b)(3) pertains to the opt-out damages class action and specifically requires that a court should assess whether class action proceedings is "superior to other available methods for fair and efficient adjudication of the controversy". The superiority requirement "reflects a broad policy of economy in the use of society's difference-settling machinery".[31] Rule 23(b)(3)(A)-(D) lists four factors that a court must consider in making this assessment:

> "(A) the class members' interests in individually controlling the prosecution or defence of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action."

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25 B Anderson & A Trask *Class Action Playbook* (2014) 25-26.
26 26.
27 MH Greer *A Practitioner's Guide to Class Actions* (2010) 58.
28 Anderson & Trask *Class Action Playbook* 26-27.
29 26-27.
30 In *Robidoux v Celani* 987 F.2d 931, 935-936, the court held that "the district court in the present case, in concluding that numerosity was lacking because plaintiffs had not shown the class to be so large that joinder was 'impossible', applied the wrong standard". See also *Eggleston v Chicago Journeymen Plumbers' Local Union No. 130, U.A.* 657 F.2d 890, 895 (7th Cir. 1981) and Greer *Practitioner's Guide to Class Actions* 60.
31 *Berley v Dreyfus & Co.*, 43 F.R.D 397, 398 (S.D.N.Y. 1967).

In *Lake v First Nationwide Bank*[32] it was held that, in performing the superiority analysis, the court must consider the "inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually". Specifically, the manageability requirement in rule 23(b)(3)(D) "encompass[es] the whole range of practical problems that may render the class action format inappropriate for a particular suit".[33] It entails that a court focuses on the advantages of a class action compared to alternative forms of dispute resolution that may be available to the claimants, such as litigation through joinder. In *In re Managed Care Litigation*[34] it was held that this consideration "requires the Court to determine whether there is a better method of handling the controversy other than through the class action mechanism". In *Carnegie v Mutual Saving Life Insurance Company*[35] it was held that, where management problems may result in class proceedings being less fair and efficient than other dispute resolution methods, then a class action would be improper.

Manageability, as required by rule 23(b)(3)(D), becomes an important consideration where the administrative costs incurred in managing the class action will consume the award made in favour of the plaintiff class.[36] A further factor to be considered in the context of manageability is the difficulty associated with notifying a significant percentage of the class – this may count against possible certification.

Although courts are reluctant to certify classes whose members would be difficult to communicate with or to identify, the sheer size of the class would not necessarily result in the denial of certification.[37] Further, although certification generally should not be denied solely on the ground that class members would have to prove their damages on an individualised basis, potential difficulty in calculating damages might be a factor in assessing manageability. Further factors considered in determining superiority include whether an alternative regulatory mechanism exists and whether a class action would achieve significant judicial efficiencies.[38]

2 2 Australia

The approach of the Australian federal class action regime may be worth considering in order to determine what test our courts should apply and what factors they should consider when determining the appropriateness of a class action compared to joinder. The Australian approach may also be relevant to determine when, if at all, the identifiability of class members will preclude the certification of a class action.

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32 156 FRD 615, 625 (E.d.Pa. 1994).
33 *Eisen v Carlisle & Jacquelin*, 417 U.S 156, 164 (1974).
34 209 F.R.D 678, 692 (S.D. Fla. 2002).
35 No. CV-99-S-3292-NE, 2002 U.S. Dist. LEXIS 21396, at 76-77 (N.D. Ala. Nov. 1, 2002).
36 Anderson & Trask *Class Action Playbook* 62.
37 Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 131.
38 132.

In Australia's federal class action regime, unlike the American class action regime, there is no certification procedure.[39] However, in order to commence a class action in Australia, three threshold requirements must be satisfied, namely:

- at least seven persons must have claims against the same person;
- the claims must arise out of the same, similar or related circumstances; and
- the claims must give rise to at least one substantial common issue of law or fact.[40]

In terms of section 33H of the Federal Court of Australia Act of 1976 ("Federal Court Act"), an application commencing a representative proceeding[41] must describe or otherwise identify the group members to whom the proceeding relates. It must also specify the nature of the claims made, the relief claimed as well as the questions of law or fact common to the group members' claims.[42] It is, however, unnecessary to name or specify the number of group members.[43]

Once a representative proceeding has been instituted, it will continue unless the respondent applies to the court for an order terminating it.[44] Thus, unlike the South African and American class action regimes where the party bringing the action must prove that certain requirements are met before certification is granted, it is up to the respondent to raise non-compliance with the requirements. Nevertheless, a termination order may still be granted notwithstanding compliance with the above-mentioned threshold requirements. In this regard, the Federal Court is empowered in terms of sections 33L, 33M and 33N of the Federal Court Act to order the discontinuance of a representative proceeding under Part IV(A) where:

- in terms of section 33L, it appears likely to the court at any stage of a representative proceeding that there are less than seven group members;
- in terms of section 33M, "(a) the relief claimed in a representative proceeding is or includes payment of money to group members (otherwise than in respect of costs); and (b) on application by the respondent, the court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the respondent of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts"; or
- in terms of section 33N, it is satisfied that it is in the interests of justice to do so for one or more of the reasons specified in section 33N(1)(a)-(d).

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[39] The Supreme Courts of Victoria and New South Wales have class action regimes, which largely mirror the Australian Federal Court class action regime.

[40] Section 33C of the Federal Court of Australia Act 1976 (Cth); V Morabito "Australia" in DR Hensler, C Hodges & M Tulibacka (eds) *The Globalization of Class Actions* (2009) 320 322.

[41] SS Clark, J Kellam & L Cook "Australia" in P G Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* (2012) 392 406.

[42] Section 33H(1).

[43] Section 33H(2).

[44] Clark et al "Australia" in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 411.

Section 33N provides that a respondent may apply to court for an order, or the court may decide *mero motu* that the proceedings under Part IVA be discontinued, where it is satisfied that it is in the interests of justice to do so because:

> "(a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
> (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or
> (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
> (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding."

In terms of section 33N, the first issue that a court must decide is whether one of the conditions in paragraphs (1)(a)-(d) has been satisfied, which involves comparing the representative proceeding to other available alternatives, such as joinder. If another alternative is available, the court must then consider whether, due to the existence and appropriateness of that alternative, it is in the interests of justice to grant an order terminating the representative proceeding.[45]

As mentioned, section 33N(1)(b) provides that a respondent can apply to court for an order to discontinue proceedings where all the relief sought can be obtained by means of a proceeding other than a representative proceeding.[46] Although the same relief can generally be obtained by instituting individualised proceedings, it may, for example, be that class members are unidentifiable, that the class is numerous and that individual proceedings are not feasible, or that it would be too costly to pursue individualised proceedings. In such circumstances, it is unlikely that a court would order the discontinuance of class proceedings in terms of section 33N(1)(b).[47]

Further, in terms of section 33N(1)(c), if the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members, the court can also order its discontinuance. In *Wong v Silkfield Pty Ltd*,[48] Spender J held that:

> "Ultimately, if because of the extent of non-common issues, representative proceedings in the assessment of the court are not the preferable means of dealing efficiently and effectively with the claims, the court will no doubt terminate the representative nature of the proceedings ..."

Similarly, in *Hall v Australian Finance Direct Ltd*,[49] Hollingworth J of the Supreme Court of Victoria held that "[t]he fact that a proceeding will at some stage involve an examination of numerous individual contracts or transactions

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[45] Clark *et al* "Australia" in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 414-415. See also, for example, *McLean v Nicholson* 2002 172 FLR 90 at paras 7,12 where the court held that section 33N(1)(b) clearly applied to the facts of the case and that joinder was a suitable alternative to the representative proceedings.

[46] In *McLean v Nicholson* 2002 172 FLR 90 it was held that section 33N(1)(b) clearly applied insofar as the relief sought could be obtained by litigation through joinder. The court considered the fact that there were only ten (identifiable) plaintiffs and that such a procedure would therefore not be unfeasible.

[47] P Cashman *Class Action Law and Practice* (2007) 311-312.

[48] 1998 ATPR 41-613, 40, 726 approved in *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 33.

[49] 2005 VSC 306.

has not prevented courts from allowing the common issues to be determined in [a] group proceeding".[50] Hollingworth J cautioned against exercising the court's power under section 33N before, at least, the utility of the class action regime has been exhausted by a resolution of the common issues.[51]

Representative proceedings can also be discontinued in terms of section 33N(1)(d) where it is otherwise inappropriate for the claims to be pursued by means of a representative proceeding. It has been suggested that the power to order that the matter does not proceed as a class action where it is "otherwise inappropriate" is very broad and that there will usually be many competing issues to consider. In this regard: "costs, availability of relief, the size of the group, the period of time over which the breaches occurred, delays, and the nature of the causes of action, might make it inappropriate to pursue the claims by way of class action proceedings".[52]

Even if the criteria specified in section 33N(1)(a)-(d) are satisfied, the court must nevertheless be satisfied that it is in the interests of justice to make an order terminating the representative proceeding.[53] In *Bright v Femcare Limited* ("*Femcare*"),[54] Finkelstein J held that:

> "Whether or not it is in the interests of justice to make such an order has to be weighed against the public interest in the administration of justice that favours class actions. That requires one to consider the principal objects of the class action procedure. They are: (1) To promote the efficient use of court time and the parties' resources by eliminating the need to separately try the same issue; (2) To provide a remedy in favour of persons who may not have the funds to bring a separate action, or who may not bring an action because the cost of litigation is disproportionate to the value of the claim; and (3) To protect defendants from multiple suits and the risk of inconsistent findings."[55]

Should a court make an order in terms of sections 33L, 33M, or 33N, discontinuing the representative proceeding, the representative party may continue it against the respondent on his or her own behalf.[56] In addition, any person who was a class member for the purpose of the representative proceeding, may apply to court for an order joining him or her as an applicant to the proceeding.[57]

There are various similarities and differences between the threshold requirements in section 33C of the Federal Court Act and the certification requirements contained in rule 23 of the Federal Rules.[58] Although section 33C does not require it to be impracticable to join class members, the requirements of numerosity and commonality are conceptually similar to subsections 33C(1)(a) and (c). There is no requirement in section 33C similar to the typicality requirement contained in rule 23. The adequacy requirement is also not embodied in section 33C, but it has been suggested that this

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50 Para 50.
51 Para 52.
52 Cashman *Class Action Law and Practice* 321.
53 321.
54 2002 FCAFC 243; 195 ALR 574.
55 Para 152. See, eg, in *Huang v Minister of State for Immigration & Multicultural Affairs* (1997) 50 ALD 134.
56 Section 33P(a).
57 Section 33P(b). See also Cashman *Class Action Law and Practice* 323.
58 D Grave, K Adams & J Betts *Class Actions in Australia* (2012) 128.

requirement is similar to section 33T which permits the court to substitute a representative party if they are unable to adequately represent the interests of group members.[59]

According to Grave, Adams and Betts, the tendency of Australian courts has been not to place too much reliance on American case law regarding its certification requirements for guidance as to the proper interpretation of the threshold requirements under section 33C of the Federal Court Act.[60] This is essentially the result of statutory differences between rule 23 and section 33C and the increasing body of Australian jurisprudence available to provide direct guidance on interpretation-related questions.[61]

2 3 Ontario

The approach in Ontario is also relevant to establish the test that our courts should use to determine the appropriateness of class proceedings. In Ontario, similar to South Africa and the United States but unlike Australia, a class action cannot be commenced without certification by a court.[62] Section 5(1) of the Ontario Act provides that a class action should be certified where the following criteria are met:

> "(a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who:
> (i) would fairly and adequately represent the interests of the class;
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members."

In *Hollick v Toronto (City)* ("*Hollick*"),[63] it was held that section 5(1)(d) merits consideration of whether the proposed class action would be a "fair and manageable method" to advance the plaintiffs' claims, taking into account the importance of the common issues in relation to the claims as a whole. To determine whether the proposed class action would be a fair and manageable method of advancing the plaintiffs' claims, the court must consider whether, if the proposed common issues are resolved, it would advance the action in a significant way.[64] Importantly, the court must also consider alternatives to, and justifications for, class proceedings to determine whether it is the most appropriate way of dealing with the class members' claim(s). Such an

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[59] 130.
[60] 130.
[61] In *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, the High Court cautioned that it was "unprofitable and difficult" to make a precise comparison between a class action commenced under rule 23 and its Australian equivalent.
[62] H M Rosenberg & J Kalajdzic "Certification" in J Walker & G D Watson (eds) *Class Actions in Canada: Cases, Notes, and Materials* (2014) 55 55.
[63] 2001 3 SCR 158.
[64] Para 32.

alternative would, for example, include joinder.[65] The court also held that "the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification".[66]

In *Markson v MBNA Canada Bank*[67] Rosenberg JA summarised the principles applicable to determining whether a class action is the preferable procedure as follows:

> "(1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;
> (2) 'Preferable' is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and
> (3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole."[68]

According to Rosenberg JA, the preferability inquiry does not entail conducting separate inquiries in respect of each of the above-mentioned principles. To the contrary, "the inquiry into the questions of judicial economy, access to justice and behaviour modification can only be answered by considering the context, the other available procedures and, in short, whether a class proceeding is a fair, efficient and manageable method of advancing the claim".[69]

In *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP* ("*Excalibur*"),[70] Perell J concluded that, on the facts, joinder was the preferable procedure compared to a class action.[71] In arriving at this conclusion, he held that it is relatively easy to satisfy the preferable procedure criterion and that, *in casu*, apart from failing to show that a class action was necessary to overcome any barriers to access to justice, a class action was not necessary to achieve judicial economy or to effect behaviour modification.[72]

Recently, in *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP* ("*Excalibur ODC*"),[73] the Ontario Divisional Court ("ODC") upheld the ruling of Perell J. It was argued that Perell J incorrectly found that joinder was the preferable procedure, as the respondent did not raise joinder in their submissions in the certification application. In response to this argument, Lederer J held that "[j]oinder is not simply an alternative, it is the default position in considering whether a class proceeding is or is not the preferable procedure".[74] It was found that Perell J had not imposed

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65 See, eg, *Hollick v Toronto (City)* 2001 3 SCR 158 para 28 where the court referred to the preferability of class proceedings compared "to other procedures such as joinder…"
66 Paras 27-32.
67 2007 ONCA 334, 85 OR (3d) 321.
68 Para 69.
69 Para 70. See also *AIC Limited v Fischer* 2013 SCC 69 para 79.
70 2007 ONCA 334, 85 OR (3d) 321.
71 Para 218.
72 Para 217.
73 2015 ONSC 1634.
74 Para 13.

joinder on the plaintiff, but had simply pointed out that joinder "would provide effective redress for Excalibur and … other investors could join the action as co-plaintiffs".[75]

In view of the above, it can be concluded that the point of departure in Ontario law to determine whether a class action is the preferable procedure, is to ascertain whether it represents a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims. This is measured with regard to the underlying policy objectives of access to justice, behaviour modification, and judicial economy and the extent to which certification furthers those objectives. In considering an alternative to a class action, the court should examine whether that option could provide suitable procedural protections and effective redress for the claims being made.[76]

Specifically, it appears that courts should continue to apply the preferable procedure criteria set out in *AIC Limited v Fischer* ("*AIC*") .[77] This entails that courts "focus on the underlying purpose and nature of the alternative proceeding as compared with the class proceeding" and that they "assess the capacity of the alternative procedure to adequately resolve the claims raised by the class members".[78] Sachs J for the minority stated that Perell J failed to follow *AIC* and that, if he had properly conducted the access to justice analysis detailed in *AIC*, he would not have concluded that joinder was the preferable procedure.[79] Lederer J, however, held that Perell J had in fact applied the preferable procedure criteria set out in *AIC*.[80]

Accordingly, the fact that the majority of the ODC upheld the ruling of Perell J is relevant insofar as it provides insight into the interpretation and application of the preferable procedure requirement by Ontario courts. Perell J, in applying the preferable procedure requirement, essentially found that joinder was preferable because there were no significant economic, psychological or social barriers to individual actions. The applicants failed to show that there was a "genuine need" for the common issues to be resolved on a class-wide basis. In this regard, Perell J emphasised that the proposed representative plaintiff had a claim of almost $1 million that would justify taking on the litigation risk – it did not genuinely need a class action to obtain access to justice; the class members were all known and were all "accredited investors" with a net worth of at least $1 million or two years of $200,000 plus income – they were therefore not without resources to litigate; there was enough money at stake to warrant a contingency fee arrangement even without a class action; a class action would achieve only modest judicial economy over individual actions or the joinder of claims; there were no psychological or social barriers to bring individual claims; while a class action would be manageable, it would also be more procedurally cumbersome and protracted

[75] Para 13.
[76] Para 10.
[77] 2013 SCC 69.
[78] Para 79.
[79] Para 78.
[80] Para 23.

than a regular action; and behaviour modification was not needed beyond the behaviour modification that derives from a regular tort action.[81]

The founding papers in an application for certification of a class action in Ontario should, in view of the above, address the availability of joinder as an alternative to the class action, with regard to the considerations set out above. In particular, respondents should consider addressing *inter alia* the availability of joinder as an available alternative to the class action and the relative "necessity" of the class proceeding as a mechanism for pursuing the claims at issue, all within the framework detailed by the court in *AIC*.

2 4 South Africa

As we have seen, the law in the foreign jurisdictions referred to above regarding the circumstances when a class action, rather than joinder, should be utilised is, for the most part, comprehensively dealt with in statute and court rules, supplemented by an extensive body of case law. The approach of our courts in determining the appropriateness of a class action, in the absence of legislation and court rules regulating the issue, will be considered in more detail below.

2 4 1 Joinder as an alternative

Before considering the approach of our courts to determining the appropriateness of a class action, a brief note on joinder may be appropriate. Rule 10(3) of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa ("Uniform Rules") defines the joinder of defendants as follows:

> "Several defendants may be sued in one action… whenever the question arising between them, or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which if such defendants were sued separately would arise in each separate action."[82]

Under the common law, a number of defendants may be joined whenever convenience so requires.[83] In this regard, Caney J in *Anderson v Gordik Organisation*[84] held that joinder may be justified even if the person joined is not a necessary party[85] and accepted that the court could, in a proper case, permit joinder purely on the grounds of convenience especially in order to save costs or to avoid multiplicity of actions.[86] In such a case, the right of relief of the party sought to be joined to the proceedings must be dependent upon determining substantially the same question of law or fact.[87] Rule 10(1) of the Uniform Rules, which allows joinder on the grounds of convenience

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81 Paras 25 and 209.

82 See *Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd* 2015 2 SA 322 (GJ) para 4.

83 See *Van der Lith v Alberts* 1944 TPD 17. See also *McIndoe (in their capacities as joint liquidators of G&D Shoes (Pvt) Ltd and Belmont Leather (Pvt) Ltd) v Royce Shoes (Pty) Ltd* 2000 3 All SA 19 (W) 24.

84 1962 2 SA 68 (D).

85 70D-E.

86 72-72.

87 AC Cilliers, C Loots & C Nel *Herbstein & Van Winsen Civil Practice of the High Courts of South Africa* 5 ed (2009) 211-212.

under certain circumstances, complements this common-law power. In *Vitorakis v Wolf*[88] it was held that "our modern rules of court are so explicit on this point that there is now hardly anything left of the basic common-law approach to joinder and intervention".[89] However in *Rabinowitz NNO v Ned-Equity Insurance Co Ltd*[90] the court held that the rules were not intended to be exhaustive of the cases in which a party may be joined and that the court could still exercise its common-law power to allow joinder whenever convenience so requires.[91] Victor J, in *Fluxmans Incorporated v Lithos Corporation of SA*,[92] held that:

> "Parties may only be joined as a matter of necessity and not convenience. It is only necessary if the parties sought to be joined would be prejudicially affected by the judgment of the court in the proceedings. See Judicial Service Commission and Another v Cape Bar Council and another 2013 (1) SA 170 (SCA) at par [12] where the court held that: 'It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Bowring NO v Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one.'"

In *Shake's Multi-Save Supermarket CC v Haffejee; In re: Shake's Multi-Save Supermarket CC v Haffejee* ("*Shakes*"),[93] an application of joinder was opposed by arguing that joinder of parties on the basis of convenience is no longer possible.[94] Reliance was placed on the above comment of Victor J. In *Shakes*, Landman J held as follows:

> "In my view, the grammatical construction of the dictum of the Supreme Court of Appeal in the Judicial Service Commission judgment does not support the proposition. The court also made it clear that it was not concerned with joinder as a matter of convenience and that a plea of non-joinder can only be sustained if a person, who is not party to the action, has a direct and substantial interest which may be prejudicially affected by the judgment of the court in the proceedings in question. If the court in Fluxman Incorporated meant to say that parties may only be joined as a matter of necessity I would respectfully disagree. It is competent for the plaintiff to seek to join the Close Corporation on the grounds of convenience."[95]

As is evident from the above, an alternative to joinder on the basis of convenience is that parties may be joined on the basis of necessity because the party who seeks to be joined has a direct and substantial interest in the matter.[96] Where it is apparent that there is another party with a direct and substantial interest in the matter, the court has no discretion to allow the matter to proceed without joinder. This is because of the principle of *audi alteram partem*; interested parties should be afforded an opportunity to be

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88 1973 4 All SA 109 (W).
89 112.
90 1980 3 All SA 694 (W).
91 697.
92 (No 2) 2012 2 SA 322 (GJ) para 5.
93 (413/12) 2015 ZANWHC 48 (21 August 2015).
94 Para 3.
95 Para 4.
96 Joinder of necessity is not governed by the court rules. Guidance must be sought from case law as to when joinder of parties is necessary.

heard before an order is made that will affect them.[97] However, where the court is satisfied that there has been waiver of a right to be joined, joinder of necessity can effectively be circumvented.

A direct and substantial interest has been held to be "an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation".[98] It is a legal interest in the subject matter and the outcome of the litigation, excluding an indirect commercial interest. The possibility of such an interest is sufficient, and it is not necessary for the court to determine that it does in fact exist.[99] In the absence of a direct and substantial interest, a court has a discretion to order joinder based on convenience.[100]

In order to show that a class action is the most appropriate means to adjudicate class members' claims, the appropriateness of joinder as an alternative would also need to be considered. The above exposition of joinder of necessity and convenience will accordingly become relevant when considering the South African position regarding the assessment of the appropriateness of class proceedings set out below.

2 4 2 Class action objectives

In *Ngxuza*, Cameron JA held that the primary feature of class actions is that, although they are not formally and individually joined, class members benefit from, and are bound by, the outcome of the class action, unless they opt out.[101] He referred to the fact that, until 1994, if a claimant wanted to participate in existing court proceedings, he or she had to comply with the formalities of joinder.[102] Cameron JA accordingly dealt with the differences between joinder and a class action and the circumstances where a class action would be more appropriate than litigating through joinder.[103]

In *Excalibur ODC*, Sachs J referred to the frailties of joinder as an alternative procedure as recognised by the Ontario Law Reform Commission.[104] He stated that joinder would not be of much assistance to individuals with small claims, especially insofar as individual litigants will generally be liable for the costs pertaining to their legal representation whether the action succeeds or fails. And if it fails, they may also be liable for the defendant's costs. Further, according to Sachs J, "[i]f the victims of a mass wrong are a less than cohesive group, all are unlikely to be joined in one action … the result will be a multiplicity of proceedings, with the concomitant risk of inconsistent verdicts, additional expense for the parties and a greater burden on the courts".[105]

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97 Cilliers *et al Civil Practice of the High Courts of South Africa* 208.
98 *Bohlokong Black Taxi Association v Interstate Bus Lines (Pty) Ltd* 1997 4 SA 635 (O) 644A-B.
99 Cilliers *et al Civil Practice of the High Courts of South Africa* 217-218.
100 219.
101 Para 4. Or, unless they have not opted into the class action.
102 Para 4.
103 Paras 4-5.
104 Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982) 82-86.
105 Para 89.

According to Cameron JA, because there are so many poor individuals in South Africa who do not have the necessary resources to litigate, and because there are technicalities associated with joinder, the attainment of justice could be unduly complicated.[106] He did not comment on the identifiability of class members and its impact on the appropriateness of class proceedings. Cameron JA attached significant weight to access to justice as a consideration in deciding the appropriateness of a class action compared to joinder. He held that the needs of the types of individuals referred to above "who are most lacking in protective and assertive armour" should inform our understanding of the provisions of the Constitution, and that "it is against the background of their constitutional entitlements" that the class action provision in the Bill of Rights must be interpreted.[107] Cameron JA emphasised that, although there is no legislative framework regulating class actions in South Africa, section 39(2) of the Constitution enjoins the courts to promote the spirit, purport and objects of the Bill of Rights when developing the common law, and upon which section 173 confers inherent power to develop the common law, taking the interests of justice into account.[108]

In *Pretorius v Transnet Second Defined Benefit Fund* ("*Pretorius*"),[109] Makgoba J referred to *Ngxuza* and confirmed the finding of the SCA that the courts are enjoined by section 39(1)(a) of the Constitution to interpret the Bill of Rights so as to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom" and, in terms of subsection (2), to develop the common law so as to "promote the spirit, purport and objects of the Bill of Rights".[110] With reference to sections 39(2) and 173 of the Constitution, Makgoba J held that the provisions regarding a class action must be interpreted "generously and expansively, consistent with the mandate given to the courts to uphold the Constitution, thus ensuring that the rights in the Constitution enjoy the full measure of protection to which they are entitled".[111] In relation to assessing the appropriateness of class proceedings, Makgoba J held as follows:

> "The situation in the present case seems pattern-made for class proceedings. This is so in that the class the applicants represent in this case is drawn from the very poorest within our society (old pensioners), those in need of statutory social assistance. They also have the least chance of vindicating their rights through the ordinary legal process. As individuals they are unable to finance a legal action, given their meagre income in the form of pension moneys. What they have in common is that they are victims of official excess, bureaucratic misdirection and what they perceive as unlawful administrative methods."[112]

The primary consideration taken into account by Makgoba J in deciding whether a class action is the most appropriate means of adjudicating the claims of the class members was access to justice. Specifically, Makgoba J considered the ability of individual class members to seek legal redress by

[106] Para 6.
[107] Para 12.
[108] Para 12.
[109] 2014 6 SA 77 (GP).
[110] Para 24.
[111] Para 27.
[112] Para 26.

means of joinder and whether, through joinder, they would be able to vindicate their rights.[113]

Makgoba J did not refer to the comments of Wallis JA in *Children's Resource Centre Trust* or Nugent JA in *Mukaddam SCA* on the issue of joinder.[114] He did, however, refer to *Ngxuza* and accordingly attributed significant weight to the impact of the claimants' social and financial circumstances on their ability to vindicate their rights through a class action as opposed to some other mechanism, such as joinder. Accordingly, the court in *Pretorius*, as was the case in *Ngxuza*, attached significant weight to the claimants' constitutional right of access to justice. However, the courts in *Ngxuza* and *Pretorius* did not provide guidance regarding the test that our courts should apply, and the factors that they should consider, when determining the appropriateness of a class action, compared to joinder. They also did not indicate when, if at all, the identifiability of class members will preclude class certification.

2 4 3 Identifiability of class members

The *Ngxuza* and *Pretorius* judgments differ significantly from the *Mukaddam SCA* judgment in respect of the courts' approach to determining when a class action is the most appropriate means of adjudicating class members' claims, as opposed to joinder. The identifiability of class members appears to be the key consideration that the court in *Mukaddam SCA* took into account to determine whether a class action is the appropriate means for adjudicating class members' claims. Accordingly, where the individual class members are all identifiable, regardless of *inter alia* their financial means, the size of their individual claims and the size of the class, they may need to be joined as plaintiffs to the proceedings. A class action may therefore not be the appropriate procedural device to be utilised in such circumstances. However, where for example the individual class members are not in a financial position to vindicate their rights through ordinary litigation, where the class is numerous, or where the individual claims of class members are small, joinder may be costly, cumbersome and inappropriate. Requiring joinder in such circumstances may deprive class members of their right to access to justice. In other words, the fact that class members are identifiable should not necessarily mean that a class action is not the appropriate mechanism to adjudicate class members' claims. Other considerations must be taken into account in making this determination. These considerations will be dealt with in more detail below.

Hurter states that the approach adopted by the court in *Ngxuza* conforms to the view in foreign jurisdictions that the class should merely be ascertainable or identifiable and not require greater specificity. She states that "it would therefore be safe to say that in SA it will not be required that the identity of

[113] Para 26.
[114] The court in *Mukaddam CC* did not deal with the comments of Nugent JA in *Mukaddam SCA* on joinder.

each member be known, but that it would be sufficient if it can be determined in some manner whether a person is a member of the class or group or not".[115]

It has been suggested in the context of the American class action that, while a class does not need to be ascertainable, if the plaintiff can identify each individual class member by name, the class may not be too numerous for joinder to be impracticable.[116] However, the approach of the United States in this regard is that the identifiability of individual class members will *form part* of the assessment of the impracticability of joinder – it is not the only consideration in determining practicability of joinder compared to class proceedings.[117] There are other relevant factors to consider, such as the geographical dispersion of class members. The more geographically dispersed the class is, the more difficult it would be to require joinder of individual class members. In other words, if the class is limited to a specific geographical territory, it is more likely that joinder would be feasible.[118] Even where all the class members are identifiable, joinder is also likely to be impracticable where each class member's claim is small or when the class members are poor, uneducated or lack the resources that are necessary to pursue their claims individually. In such circumstances, the class members are unlikely to litigate unless a class is certified, thus making joinder in the absence of a class all but impossible.[119] Consideration will also be given to the ability and potential willingness of class members to institute individual actions.[120] The facts of the specific case may also indicate other reasons why joinder is impracticable.

In respect of representative proceedings in Australia, it is important to bear in mind that simply satisfying one of the requirements in section 33N is insufficient for the purpose of seeking the discontinuance of the representative proceeding. For example, where a court is of the view that the costs that would be incurred if the proceeding were to be continued as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding, or where all the relief sought could be obtained by means of litigation through joinder,[121] the court would also need to be convinced that it is in the interest of justice to grant the order discontinuing the representative proceeding.[122]

It would appear that the relevant considerations in determining the practicability of joinder and the superiority of class proceedings in the context of the American class action are similar to the considerations that are relevant in determining the appropriateness of representative proceedings in the context of the Australian Federal Court Act. For example, considering whether the representative proceeding will provide an efficient and effective

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[115] E Hurter "The class action in South Africa: Quo Vadis" (2008) 41 *De Jure* 293 302.
[116] Anderson & Trask *Class Action Playbook* 27.
[117] Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 40.
[118] Anderson & Trask *Class Action Playbook* 27.
[119] Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 41-42.
[120] Greer *Practitioner's Guide to Class Actions* 60-61.
[121] Section 33N(a) of the Federal Court of Australia Act of 1976.
[122] Section 33N.

means of dealing with the claims of group members[123] also forms part of the American impracticability and superiority inquiries.[124] At the very least, in both these class action regimes there is no room for concluding that joinder is practicable or appropriate solely on the basis that all the individual class members are identifiable.[125] The same applies in respect of the class action regime of Ontario – the identifiability of all the class members does not necessarily exclude a class action as the preferable procedure.[126] In view of these considerations, it therefore does not appear to be the case that where the class members are all identifiable, joinder is necessarily the most appropriate adjudication mechanism. Other relevant considerations should be taken into account in conducting the appropriateness-inquiry. These considerations will be dealt with in more detail below.

2 4 4 Access to justice

It is apparent from the approaches of the selected foreign jurisdictions that the class action objectives constitute important considerations when determining the appropriateness of a class action, compared to joinder. In the United States, the court in *Safran v United Steelworkers of America AFL-CIO*[127] held that the "numerosity requirement reflects the general theory behind class action lawsuits which is to permit a large group of individuals whose interests are sufficiently related to bring one lawsuit, instead of many lawsuits, so as to conserve judicial resources and increase judicial access".[128] As has been mentioned, in *Femcare* Finkelstein J for the Federal Court of Australia held that whether or not it is in the interests of justice to make an order that the representative proceeding be terminated requires consideration of the principal objects of the class action.[129] Similarly, in the context of class proceedings in Ontario, the court in *Hollick* held that the class action objectives should constitute the lens through which the preferability inquiry should be conducted.[130] In *Excalibur*, the Ontario Supreme Court, regarding the preferability inquiry, referred with approval to *AIC*.[131]

Hurter suggests that for a class action to be successful in the South African context, it needs to be uniquely South African "and cannot be the product of selective and haphazard adaptations of foreign solutions. It should be borne in mind that such solutions evolved in response to practice specific needs and

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[123] Section 33N(c) of the Federal Court of Australia Act of 1976.

[124] For example, rule 23(b)(3) requires that a class action be superior to other methods for fair and efficient resolution of the conflict.

[125] N Kirby "South Africa" in P G Karlsgodt (ed) *World Class Actions – A Guide to Group and Representative Actions around the Globe* 378 412; Greer *Practitioner's Guide to Class Actions* 58; Anderson & Trask *Class Action Playbook* 26; and section 33H(2) of the Federal Court of Australia Act of 1976.

[126] In *Keatley Surveying Inc v Teranet Inc* 2014 ONSC 1677, Sachs J held that a plaintiff is only required to propose a class definition that provides for an identifiable class of two or more people – a plaintiff is not required to establish the actual existence of two or more potential class members.

[127] 132 FRD 397 (WD Pa 1989).

[128] 401.

[129] Para 152.

[130] Paras 27-32.

[131] 2013 SCC 69 paras 24-38.

are therefore not necessarily applicable to our situation, or may come with undesirable baggage".[132]

It is submitted that our courts' point of departure in determining whether a class action is the appropriate mechanism to adjudicate claimants' claims should also be the principal objectives of a class action. This entails determining, with reference to the facts of the specific case, whether a class action is necessary to achieve access to justice, whether it is necessary to achieve judicial economy and/or whether it is necessary to effect behaviour modification. However, it is submitted that, in South Africa, access to justice should be the primary consideration when assessing the appropriateness of class proceedings compared to joinder, as was the case in *Ngxuza* and *Pretorius*. Section 34 of the Constitution enshrines the right of access to courts and states that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". The Constitution also recognises the values of human dignity and the advancement of human rights, and requires the State to respect, protect, promote, and fulfil the rights recognised in the Constitution.

Giving priority to those who are particularly vulnerable, in particular because of historical and socio-economic factors, is constitutionally required.[133] Cameron JA, in *Ngxuza*, mentioned that the needs of these types of individuals should inform our understanding of the Constitution's provisions and that it is against the background of their constitutional entitlements that section 38 should be interpreted. He emphasised that section 39(2) of the Constitution enjoins the courts to promote the spirit, purport and object of the Bill of Rights when developing the common law. This is amplified by section 173 conferring an inherent power upon the courts to develop the common law, taking the interests of justice into account.[134]

It is against the above background that it is submitted that our courts' primary consideration in determining the appropriateness of class proceedings should be class members' right to access to justice. For example, where the individual claimants are unable to litigate individually through joinder because they are drawn from the poorest portion of our society, access to justice dictates that a court should allow the matter to proceed as a class action. This ensures that the claimants' financial and social circumstances do not serve to constitute a barrier to access to justice.[135]

As mentioned, the test in *AIC* essentially entails conducting the preferability analysis through the lens of judicial economy, behaviour modification and access to justice, and considering whether the class action alternative will achieve access to justice. This *inter alia* entails determining whether there are economic, psychological, social, or procedural barriers to access to justice in

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[132] Hurter (2008) *De Jure* 303-304.

[133] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) paras 8-9. See also *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 25, where it was held that "[r]ights also need to be interpreted and understood in their social and historical context".

[134] Para 12.

[135] 1997 1 SA 124 (CC) para 14.

the case.[136] It is proposed that a test similar to the one formulated in *AIC* be applied by our courts to determine whether a class action is appropriate to adjudicate class members' claims.

It is suggested that our courts, when determining the appropriateness of a class action, compared to joinder, firstly consider whether certification of a class action is necessary to achieve access to justice.[137] In *AIC* it was held that "[a] class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered".[138] To determine whether certification is necessary to achieve access to justice, it must be determined whether there are any potential barriers to access to justice, the existence of which can effectively be addressed by certification of a class action.[139] Possible barriers to access to justice include the geographical dispersion of class members; the inability of claimants to engage in individualised litigation; and, the difficulties associated with requiring litigation through joinder. These potential barriers are similar to those referred to by the United States Court of Appeals for the Second Circuit in *Robidoux v Celani*[140] where it was held that when determining the practicability of joinder, "[r]elevant considerations include judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members".[141]

The geographical dispersion of class members should be considered as a potential barrier to access to justice. As mentioned, the more geographically dispersed the class members are, the less likely it is that they will engage in individualised litigation and the more impractical it is to join those class

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[136] 2013 SCC 69 paras 24-38.

[137] For example, in *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP* 2007 ONCA 334, 85 OR (3d) 321 para 217 Perell J held that it was not shown that "a class action is necessary to overcome any barriers to access to justice".

[138] Para 26.

[139] In the Ontario Law Reform Commission *Report on Class Actions* Toronto: Ministry of the Attorney General (1982) 121 it is stated that class actions can help overcome barriers to access to justice and may accordingly perform an important function in society. In *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP* 2007 ONCA 334, 85 OR (3d) 321 para 217 Perell J concluded that, on the facts, joinder was the preferable procedure *inter alia* because it was not shown that a "class action is necessary to overcome any barriers to access to justice". In *AIC Limited v Fischer* 2013 SCC 69 paras 24-38 it was held that a court must consider whether there are barriers to access to justice in the given case. In Ministry of the Attorney General, British Columbia, *Consultation Document: Class Action Litigation for British Columbia* (1994) 8 it was held that "the opt out model is the more effective means to ensure that the barriers to justice, which class actions are intended to overcome, are reduced". See also Alberta Law Reform Institute *Class Actions* (2000) Final Report No. 85 97; South African Law Commission *The Recognition of Class Actions Report* para 5.11; and, *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA) paras 4-6.

[140] 987 F.2d 931.

[141] 936.

members.[142] In such circumstances, a class action is likely to be more appropriate than joinder as a mechanism to adjudicate class members' claims.[143]

The inability of claimants to engage in individualised litigation is a further potential barrier to access to justice. This barrier entails consideration of various factors, which may contribute to, or result in, the claimants' inability to institute and pursue individual suits, such as whether the class members are poor and whether they lack resources.[144] The poorer the individual class members are, the more likely it is that they would be unable to litigate in the absence of certification of the class action.[145] A lack of resources and the inability of class members to meet the costs of legal representation generally mean that litigation through joinder would be too expensive.[146] It is therefore likely that in such circumstances, a court would conclude that a class action is appropriate.[147] Other relevant factors that our courts should consider that may contribute to the inability of claimants to engage in individualised litigation include:

> "[I]gnorance of the availability of substantive legal rights (Ontario Law Reform Commission, *Report on Class Actions*, vol. I (1982) ('OLRC Report'), at p. 127), ignorance of the fact that significant injuries have occurred (OLRC Report, at pp. 127-28), limited language skills (see e.g. Rubenstein, at § 4:65), elderly age of the claimants (see e.g. *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.)), frail emotional or physical state of the claimants (see e.g. *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184), fear of reprisals by the defendant (OLRC Report, at p. 128; see e.g. *Webb v. K-Mart Canada Ltd*. (1999), 45 O.R. (3d) 389 (S.C.J.)), or alienation from the legal system as a result of negative experiences with it (OLRC Report, at pp. 128-29) ..."[148]

There may also be procedural hurdles that could deprive claimants of access to justice. It has been mentioned above that the primary difficulties associated with joinder is that it is a cumbersome and costly process. In *Ngxuza*, Cameron JA also referred to the technicalities in legal procedure, including joinder, as a possible barrier to access to justice.[149]

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[142] See, eg, *Dameron v Sinai Hosp. of Baltimore, Inc.,* 595 F. Supp 1404, 1408 (D Md 1984), *aff'd in part and rev'd in part* 815 F.2d 975 (4th Cir. 1987); *In re Southeast Hotel Properties Limited Partnership Investor Litig,* 151 F.R.D. 597, 601 (WDNC 1993). *United Brotherhood of Carpenters and Joiners of America Local 899 v Phoenix Associates, Inc,* 152 F.R.D. 518, 522 (SD W Va 1994).

[143] According to Anderson & Trask *Class Action Playbook* 27, if the class is limited to a specific geographical territory it is likely that joinder would be feasible.

[144] See South African Law Commission *The Recognition of a Class Action in South African Law Working Paper 57* para 5.25.

[145] In *Lake v First Nationwide Bank* 156 FRD 615, 625 (E.d.Pa. 1994) it was held that, in performing the superiority analysis in terms of rule 23(b)(3) of the Federal Rules, the court must consider the "inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually". See similarly *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA) para 6. See also M Nyenti "Access to Justice in the South African Social Security System: Towards a Conceptual Approach" (2013) 4 *De Jure* 901 914.

[146] See *Gold Fields Limited v Motley Rice LLC, In re: Nkala v Harmony Gold Mining Company Limited* 2015 4 SA 299 (GJ) para 55.

[147] See *Robidoux v Celani* 987 F.2d 931 936.

[148] 2013 SCC 69 para 27. See also Nyenti (2013) *De Jure* 914, where he states that "knowledge of rights is a prerequisite to access to justice".

[149] Para 6. See also *Eggleston v Chicago Journeymen Plumbers' Local Union No. 130, U.A*. 657 F.2d 890, 895 (7th Cir. 1981); Kirby "South Africa" in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 386; *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA) paras 4-6.

Our courts should accordingly consider, on the facts of the case, whether certification of a class action is necessary to overcome the above-mentioned barriers and to achieve access to justice.[150]

2 4 5 Practical considerations

However, it is submitted that simply considering potential barriers to access to justice and determining whether certification is necessary to overcome those barriers, is insufficient to assess the appropriateness of a class action. Although access to justice, informed by the above-mentioned factors, should constitute the primary consideration, the courts' assessment should further be informed by practical considerations that are otherwise relevant to determining the appropriateness of class actions compared to joinder.[151]

Our courts should also consider the judicial economy that would arise if the multiplicity of actions were avoided as well as the necessity of class proceedings to effect behaviour modification. Achieving judicial economy would entail conjoining a number of lawsuits that would otherwise have been brought separately.[152] Behaviour modification would entail deterring potential defendants, who may otherwise have assumed that their minor wrongs would not result in litigation, from similar future wrongdoing.[153]

Apart from considering judicial economy and behaviour modification, it is further proposed that the courts should also consider any other practical consideration that may be relevant when determining the appropriateness of class proceedings. Such considerations could typically include the manageability of the class action;[154] whether the class members' claims are large enough to warrant being pursued separately;[155] and the importance of the common issues in relation to the claims as a whole. The manageability of

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[150] In *Robidoux v Celani* 987 F.2d 931 936 it was held that the "[d]etermination of practicability depends on all the circumstances surrounding a case…"

[151] See *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA) para 16.

[152] See, eg, the approach in Ontario as set out in *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP* 2007 ONCA 334, 85 OR (3d) 321 para 217. See also *Hollick v Toronto (City)* 2001 3 SCR 158 paras 27-32; *Markson v MBNA Canada Bank* 2007 ONCA 334, 85 OR (3d) 321 paras 69-70; *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP* 2015 ONSC 1634 para 26*; AIC Limited v Fischer* 2013 SCC 69 paras 24-38; *Bright v Femcare Limited* 2002 FCAFC 243; 195 ALR 574 para 152. See also South African Law Commission *The Recognition of Class Actions Report* para 5.11.3.

[153] *Western Canadian Shopping Centres v Dutton* (2001) 2 S.C.R. 534 para 29. See also R Mulheron *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 6.

[154] For the type of considerations that could typically inform the manageability of the class action see, for example, Anderson & Trask *Class Action Playbook* 62; *Eisen v Carlisle & Jacquelin*, 417 U.S 156, 164 (1974); *Carnegie v Mutual Saving Life Insurance Company* No. CV-99-S-3292-NE, 2002 U.S. Dist. Lexis 21396, 76-77 (N.D. Ala. Nov. 1, 2002); *Hollick v Toronto (City)* 2001 3 SCR 158 para 32; *Markson v MBNA Canada Bank* 2007 ONCA 334, 85 OR (3d) 321 paras 69-70; and, *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP* 2007 ONCA 334, 85 OR (3d) 321 para 217.

[155] In *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)* 2013 1 All SA 648 (SCA) para 19, Wallis JA mentions considerations that are relevant to determining the appropriateness of class proceedings compared to joinder, including considering whether the claims are large enough to warrant being pursued separately. See also *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA) paras 4-5.

the class action entails taking into account *inter alia* the size of the class,[156] the identifiability of class members,[157] and the extent of the non-common issues that would require individualised adjudication. The weight given to each of these factors should vary in proportion to those factors that form part of the access to justice consideration. For example, although the class members are identifiable, if the individual claimants are poor and therefore unable to litigate through joinder, a court should not find that the fact that they are identifiable makes joinder the appropriate means for adjudicating the claimants' claims. Extensive provision needs to be made for individuals who are not in a social or financial position to seek legal redress.[158]

Importantly, as part of the practical considerations referred to above, a court would need to consider the manageability of class proceedings. Judicial management is considered to be increasingly important for the effective functioning of civil litigation in general, and of the class action system in particular.[159] Moreover, as class action litigation is traditionally more complex than other kinds of litigation, it requires greater administration and management of the case.[160] Where manageability problems occur during the course of class proceedings, they could potentially result in the termination of the class action.[161]

The South African Law Commission ("SALC") has recommended that, because class actions are complex and the rights and obligations of absent class members are determined, our courts should be more active in managing class actions compared to ordinary litigation.[162] It accordingly proposed that "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".[163] Although the draft legislation proposed by the SALC does not

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[156] Regarding the numerosity requirement contained in rule 23 of the Federal Rules, the bigger the class the more likely it is that joinder would be impracticable. See Greer *A Practitioner's Guide to Class Actions* 58; Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 131; section 33N(1)(d) of the Federal Court of Australia Act of 1976; Cashman *Class Action Law and Practice* 321; *Nkala v Harmony Gold Mining Company Limited* ZAGPJHC case nos 48226/12, 31324/12, 31326/12, 31327/12, 48226/12, 08108/13 of 13 May 2016 para 52.

[157] According to Klonoff *Class Actions and Other Multi-party Litigation in a Nutshell* 40, the approach of the United States is that the identifiability of individual class members will form part of the assessment of the impracticability of joinder. It is not the only consideration in determining the practicability of joinder compared to class actions. See also *Keatley Surveying Inc v Teranet Inc* 2014 ONSC 1677; Kirby "South Africa" in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 378 412; Greer *Practitioner's Guide to Class Actions* 58; Anderson & Trask *Class Action Playbook* 26; and section 33H(2) of the Federal Court of Australia Act of 1976.

[158] See *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA) paras 4-5.

[159] C Piché "Judging Fairness in Class Action Settlements" (2010) 28 *Windsor YB Access Just* 111 121.

[160] According to Karlsgodt "United States" in *World Class Actions – A Guide to Group and Representative Actions around the Globe* 44, a tool that is regarded as useful in managing class action proceedings in the United States is to require the submission of a trial plan. See also Piché (2010) *Windsor YB Access Just* 117.

[161] In *Eisen v Carlisle and Jacquelin* 417 US 156 (1974) the enormity of the class and related issues such as notice to absent members and the distribution of an aggregate award to class members caused serious doubt about the viability of the case.

[162] South African Law Commission *The Recognition of Class Actions Report* para 5.9.2.

[163] Para 5.9.4.

expressly incorporate the manageability of class actions as a factor to be considered at the certification stage, it will no doubt play a role in the context of other questions. For example, it would be relevant in deciding whether a class action would be the appropriate method of adjudicating class members' claims.[164] If a class action would turn out to be unmanageable, it is unlikely that class proceedings would be regarded as appropriate.

3 Conclusion

A central theme in this article has been the importance of access to justice, and how it could serve as the foundation for the incorporation of the class action into South African law. It is essentially against this background that a court should decide on the appropriateness of class proceedings as a means of adjudicating the claims of class members.

Our courts' assessment should be aimed at establishing whether certification of a class action is necessary to achieve access to justice. This includes considering whether any possible barriers exist and whether certification is necessary to overcome such barriers. Further, the appropriateness inquiry entails determining whether a class action is necessary to achieve judicial economy and behaviour modification. Finally, the court should consider any other relevant factor(s) that may assist it in determining whether class proceedings are otherwise appropriate. In the light of these considerations, it is suggested that, when a court is required to determine whether a class action is the most appropriate means of adjudicating class members' claims, the court should adopt the following test. The test takes account of the experiences of foreign jurisdictions and the South African class action experience to date, and it requires a court to balance various considerations. The court should:

1. determine whether certification of a class action is necessary to achieve access to justice. This entails considering whether there are any potential barriers to such access, the existence of which could be effectively addressed by certification of a class action. The following factors may be considered in this regard:
    a. the geographical dispersion of class members;
    b. the inability of class members to engage in individualised litigation; and
    c. the difficulties associated with litigation through joinder;
2. determine whether a class action is necessary to achieve the judicial economy arising from the avoidance of a multiplicity of actions;
3. determine whether a class action is necessary to achieve behaviour modification; and
4. take all the surrounding circumstances into account and consider any other relevant factor(s) that may assist it in determining whether a class action is otherwise appropriate, including:
    a. the manageability of the class action;

[164] De Vos (1996) *TSAR* 649-650.

b. the importance of the common issues in relation to the claims as a whole; and
c. whether the class members' claims are large enough to warrant being pursued separately.

The manageability of the class action under point 4.a in the above suggested test requires taking into account *inter alia* the identifiability of class members, the size of the class and the extent of the non-common issues that would require individualised adjudication. Moreover, determining whether it is "otherwise appropriate" to certify a class action in terms of point 4 above entails taking all circumstances surrounding the case into account.[165] In other words, the manageability of the class action under part 4.a above should not be the only or even dominant consideration taken into account in assessing the appropriateness of class proceedings, as opposed to other mechanisms such as joinder, as a means of adjudicating the claims of class members. Rather, a holistic, common sense and pragmatic approach needs to be adopted where the assessment is made, having regard to all the circumstances of the case. It is further recommended that to promote legal certainty, consistency and uniformity in respect of the approaches of our superior courts, legislation should be adopted to regulate our courts' assessment of class proceedings' appropriateness as set out above

The above-mentioned observations do not, however, detract from the fact that the identifiability of class members is important as it essentially informs the court's decision regarding how notification to potential class members should take place; to decide who forms part of the class and may accordingly institute individual actions; and to establish who will be bound by the court's order.[166] This is significant in that, in class proceedings, once a final judgment or settlement is reached, the claims of members of the class are *res judicata*. Without a proper class definition, a large number of people may be deprived of their right to seek legal relief for a violation of their rights without having been provided with a fair opportunity to exercise a real choice as to whether to associate themselves with the class action. This would not only undermine their right of access to justice, but would be contrary to the object of public interest litigation, which is to give poor people a meaningful voice in litigation that affects them.[167]

SUMMARY

In *Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae)*, Wallis JA held that in defining the class it is not necessary to identify all the members of the class otherwise the question would arise whether a class action was necessary as joinder in terms of the court rules would be permissible. He held that what is required is that the class be defined with sufficient particularity that a specific person's membership can be objectively determined by examining his or her situation in light of the class definition. It

[165] W de Vos "Opt-in class action for damages vindicated by Constitutional Court" (2013) 4 *TSAR* 757 762-763.
[166] Erasmus & van Loggerenberg *Erasmus: Superior Court Practice* A2-23.
[167] S Liebenberg "From the Crucible of the Eastern Cape: New Legal Tools for the Poor" (2014) 28 *Speculum Juris* 1 4.

can accordingly be inferred that, where the claimants are all identifiable, irrespective of the size of the class, they may need to be joined as plaintiffs to the proceedings. Class action proceedings may therefore not be the appropriate procedural device to be utilised in such circumstances. The problem, however, is that where the class comprises a large group of persons, joinder may be cumbersome and largely unfeasible. This potential problem is significant in that a court ordering joinder in such circumstances could potentially undermine the very foundation for the incorporation of the class action in to South African law, namely, access to justice. The article will accordingly consider what the test is that our courts should apply and what the factors are that it should take into consideration when determining the appropriateness of a class action as opposed to joinder. These issues have not yet been subject to a comprehensive and critical analysis with regard to the procedural approaches of prominent foreign jurisdictions, which is what the article will aim to do.