THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case no: 050/2012

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE CHILDREN'S RESOURCE CENTRE TRUST	First Appellant
THE TRUSTEES FOR THE TIME BEING OF THE BLACK SASH TRUST	Second Appellant
CONGESS OF SOUTH AFRICAN TRADE UNIONS	Third Appellant
NATIONAL CONSUMER FORUM	Fourth Appellant
TASNEEM BASSIER	Fifth Appellant
BRIAN MPAHLELE	Sixth Appellant
TREVOR RONALD GEORGE BENJAMIN	Seventh Appellant
NOMTHANDAZO MVANA	Eighth Appellant
FARIED ALBERTUS	Ninth Appellant
and	
PIONEER FOOD (PTY) LTD	First Respondent
TIGER CONSUMER BRANDS LTD	Second Respondent
PREMIER FOODS LTD	Third Respondent
LEGAL RESOURCES CENTRE	Amicus Curiae

Neutral citation: *Children's Resource Centre Trust v Pioneer Food* (50/2012) **[**2012] ZASCA 182 (29 November 2012)

Coram: NUGENT, PONNAN, MALAN, TSHIQI et WALLIS JJA.

Heard: 7 November 2012

Delivered: 29 November 2012

Summary: Class action – when permissible – requirements for commencement of class action – cartel in bread industry fixing bread price – entitlement of non-governmental community organisations and individual consumers to institute action on behalf of all consumers – requirements in regard to cause of action and representation – definition of class – cause of action raising a triable issue – common issue – representation.

ORDER

On appeal from: Western Cape High Court, Cape Town (Van Zyl AJ sitting as court of first instance):

1 The appeal against the refusal to certify a class action in respect of the national complaint and the class 2 claimants is dismissed.

2 The appeal against the refusal to certify a class action in respect of the Western Cape complaint and the class 1 claimants is upheld and the application is remitted to the high court for determination in accordance with the principles in this judgment.

3 The order of the high court is set aside and replaced with the following order:

(a) If the applicants choose to pursue the application they are granted leave to supplement their papers within two months of this order by delivering supplementary affidavits, to which are annexed a draft set of particulars of claim in respect of their delictual claim against the respondents, embodying such further evidence as they deem meet in amplification of that claim.

(b) The respondents are to deliver such further answering affidavits as they deem meet within four weeks of the date for delivery of the affidavits referred to in para (a) of this order.

(c) The applicants are afforded two weeks thereafter to deliver their replying affidavits, if any.

(d) The costs of the application are reserved.

4 Each party is ordered to pay his, her or its own costs of this appeal.

JUDGMENT

WALLIS JA (NUGENT, PONNAN, MALAN et TSHIQI JJA concurring)

[1] When may a class action be brought and what procedural requirements must be satisfied before it is instituted? These two questions confront this court in litigation arising from an investigation by the Competition Commission (the Commission) into the bread producing industry, initially in the Western Cape, and later in four other provinces in South Africa. In the light of the outcome of that investigation the appellants applied to the Western Cape High Court for the certification of a class action in which they proposed to pursue a claim for damages against the respondents. That application was dismissed and leave to appeal was refused. Such leave was granted on petition to this court. The determination of the appeal requires that we address the two questions I have described. To that end we heard detailed argument in this and a related application over two days and were furnished with copious reference materials. That has assisted in illuminating the path for us in this novel area of procedural law and it is appropriate at the outset to express our gratitude to counsel for their assistance.

Background

[2] A brief sketch of the Commission's investigation and the functioning of the bread market is necessary to provide the setting for the present litigation. In 2006 the respondents,[1] to whom I will refer as Pioneer, Tiger and Premier respectively, were the three largest bread

[1]Pioneer Food (Pty) Ltd, Tiger Consumer Brands Ltd and Premier Foods Ltd.

producers in the Western Cape. At that time and for a considerable period prior to that they, together with Foodcorp,[2] were the four largest bread producers in South Africa. In December 2006, the Commission received complaints in relation to the apparently co-ordinated implementation of price increases in the Western Cape, in conjunction with apparently co-ordinated changes in the terms upon which the producers dealt with bread distributors, who supplied the informal sector of the bread market. It then commenced an investigation in relation to the Western Cape in terms of the Competition Act 89 of 1998 (the Act). Premier came forward and disclosed details of anti-competitive conduct in which it had engaged together with the other three bread producers, not only in the Western Cape but also in other parts of the country. It sought and was granted leniency in terms of the Commission's corporate leniency policy.[3]

[3] The disclosures by Premier led to the Commission instituting a further investigation in relation to other parts of the country, which was referred to, somewhat misleadingly, as the national complaint. Tiger entered into a settlement agreement with the Commission in relation to conduct in both the Western Cape and under the national complaint. Foodcorp entered into a similar agreement in relation to the national complaint only. Both settlements were confirmed in orders of the Competition Tribunal (the Tribunal). They involved the payment of administrative penalties of nearly R99 million in the case of Tiger and about R45 million in the case of Foodcorp. The complaints in respect of Pioneer were referred to the Tribunal for adjudication. At the end of a lengthy hearing it was found to have perpetrated anti-competitive conduct in relation to both the Western Cape and the national complaint.

[2]Foodcorp (Pty) Ltd.
[3]The corporate leniency policy was dealt with recently in the judgment of this court in *Agri Wire (Pty) Ltd v The Competition Commissioner* [2012] ZASCA 134 (660/2011); [2012] 4 All SA 365 (SCA).

Administrative penalties totalling nearly R 196 million were imposed upon it. It appealed against that decision but the matter was resolved before the hearing of the appeal. We were not told the basis for that resolution.

[4] The bread producers do not sell bread directly to the public. They determine list prices at a national level. The retail market has three elements. They are the large national supermarket chains, which purchase some 25 to 30 per cent of these bread producers' total production, smaller general retailers, and an informal sector that obtains supplies of bread from resellers, who are distributors who purchase bread for onward sale to informal retail outlets. Strictly speaking the resellers are wholesalers not retailers. Each producer's list price provides the basis for negotiating the prices at which they supply retailers with bread. With the large national customers these negotiations take place at a national level. With other customers they take place at a regional level, subject to some constraints and a degree of national oversight. The price actually paid by the retailers is determined on the basis of a discount, expressed as a percentage, of the list price. There is no direct control by the bread producers of the prices at which bread is sold in the retail market.

[5] The following conduct gave rise to the Commission's investigation. On 6 December 2006 the respondents' representatives in the Western Cape met and informed one another of the increases in the list price of bread determined by their respective national head offices. A date for implementation of the increases was agreed upon. At the same time it was agreed that discounts afforded to distributors would be restricted to 90 cents per loaf in Paarl and 75 cents per loaf in the Cape Peninsula and that the bread producers would not deal with one another's distributors.

The effect of this was, indirectly, to fix the price of bread and trading conditions in contravention of ss 4(1)*(b)*(i) and (ii) of the Act. The national complaint was more diffuse and less clear-cut. It involved agreements in terms of which bakeries were sold by one large bread producer to another, resulting in the purchaser achieving dominance in a particular region; meetings on various occasions and at various places where bread prices in relation to particular areas were discussed or agreed, or the date of increases in bread prices in that region were agreed; and agreements not to poach one another's customers. It is apparent from the description of these meetings in the tribunal's determination of the Pioneer complaint that these anti-competitive activities were sporadic during a lengthy period; did not always involve all of the bread producers and were frequently restricted to relatively small regions or even specific places.[4] Like the Western Cape they involved contraventions of ss 4(1)*(b)* (i) and (ii) of the Act. The determination by the tribunal that these provisions of the Act were contravened provides the foundation for the claims that are sought to be advanced in the proposed class action.

[6] Three of the appellants are NGOs that work among children, the poor and the disadvantaged, of whom there are so many in our society. The fourth, COSATU, is the largest trade union federation in South Africa. The other five are individuals who were consumers of bread in the Western Cape at the time of the conduct that gave rise to the competition complaint. All of these individuals had limited means and would have been adversely affected by any increase in the price of bread. In that sense they are typical of many consumers of bread in both the Western Cape and the country as a whole.

[4] The one agreement related to the Vanderbijlpark area alone. The bakery sales related to the Free State and Mpumalanga and did not involve Premier. An agreement in relation to price increases was confined to Gauteng.

The proposed class action

[7] Mr Solomon, the Centre Coordinator of the Children's Resource Centre, deposed to the founding affidavit. He alleged that the respondents' unlawful conduct had breached the rights of both bread consumers and bread distributors in the Western Cape, but expressly confined the scope of the application to consumers.[5] In regard to the national complaint he accepted that the Western Cape court lacked jurisdiction to deal with it.[6] In the result there were no allegations in his affidavit concerning the national complaint, its consequences or the identity of the persons injured by the conduct giving rise to the national complaints. Reverting to the Western Cape he alleged that:

'Every consumer who bought their products during the period in question suffered damages as a result of the unlawful price fixing and other prohibited practices.'

Mr Solomon said that the proposed class action was to be brought 'on behalf of the consumers for compensation and related relief'. He said that most were not in a position to afford to engage in litigation and that each individual's claim was too small to justify litigation as an individual, but that collectively the claims of consumers were 'for a very large sum of money'. That is hardly surprising, as he claimed that 'literally millions of bread consumers in the Western Cape' had been affected by the unlawful conduct and that for practical purposes this amounted virtually to the public at large in the Western Cape.

[8] Thus far the proposed action was expressed as one in which the claims of bread consumers against the respondents would be consolidated and dealt with in a single action with the appellants representing the

[5]The related application, heard at the same time as this case, was brought by a Mr Mukkadam on behalf of distributors. Judgment in that matter will be handed down simultaneously with this judgment.
[6] It is irrelevant whether this view was correct.

interests of the consumers. However, there was an important shift in emphasis when Mr Solomon came to deal with the relief to be claimed in the action. He said this:

'The damages which each individual bread consumer suffered are of the nature of things, very small. If a global sum of damages was awarded in respect of the unlawful conduct of the respondents, the cost of distributing to each consumer his or her share of those damages would be prohibitive and not viable. The further problem which would arise would be to establish precisely how much of the respondents' bread each individual consumer bought during the period in question. For this reason, in this class action the applicants will seek class relief, in the form of an order which will require the respondents to pay the unlawful overcharge into a trust or trust or similar institutions to be established for the benefit of the bread consumers who suffered damages.

This relief was adapted in the appellants' heads of argument and is dealt with in para 80 below.

[9] Having set out the basis for the proposed action in these terms, Mr Solomon claimed that the conduct of the respondents had infringed the constitutional right of all people in South Africa to sufficient food in terms of s 27(1)*(b)* of the Constitution. He invoked the section on the basis that it embodied a negative obligation on the respondents not to impair the right of access to sufficient food. His principal purpose in doing so appears to have been to bring the claim squarely within the provisions of s 38*(c)* of the Constitution that provides for class actions to be brought in respect of infringements of or threats to rights in the Bill of Rights. The reference to the right to sufficient food did not add anything to the cause of action or the contention that the anti-competitive conduct of the respondents had caused damage to consumers of bread and that this gave rise to claims against the respondents for damages.

The application in the high court

[10] Based on these allegations the appellants applied as a matter of urgency for the issue of a rule nisi calling upon the respondents to show cause against an order;

'Declaring that all bread consumers in the Western Cape Province ("*the consumers*") who were prejudicially affected by bread prices in consequence of the respondents' breach of section 4(1)(b)(i) and (ii) of the Competition Act … constitute members of a class.'

The draft order went on to say that the class would be an 'opt out' class and a declarator was sought that the members of the class would be bound by the judgment in the class action, unless they notified the appellants' attorneys that they wished to be excluded as members of the class. The other significant orders sought were a declaration that the appellants, duly assisted by their attorneys, to the extent necessary, had the requisite standing to bring the class action 'on behalf of the consumers for damages' pursuant to the findings of the Commission and the Tribunal and an authorisation for the commencement of the action forthwith without waiting for the return day of the rule nisi. The remaining portions of the proposed rule nisi were largely procedural in nature and dealt with notice to the members of the class, discovery and other matters that depended on the grant of the primary relief.

[11] The notice of motion was issued on 18 November 2010 and the application was heard on 23 and 25 November 2010. During the hearing the appellants were granted leave to amend the opening paragraph of the prayer, quoted above, by inserting the words 'or elsewhere' after 'Western Cape Province', presumably with a view to incorporating the national complaint. No additional affidavits were filed. In view of the urgency of the matter only short affidavits were delivered on behalf of the

respondents. That procedure was adopted on the footing that the respondents could present their case on the return date. The order dismissing the application was made on 26 November 2010.

[12] The result of this is that there is no evidence from the appellants in regard to the composition of the class in respect of the national complaint or the manner in which they propose to conduct that litigation. All we have is the description of the national complaint in the Tribunal's determination in relation to Pioneer We do not have full answering affidavits from the respondents in regard to the factual issues in respect of both complaints and the practical issues before the court. There is a further complication because the appellants accepted in their heads of argument that the certification originally sought was deficient. Instead they are now seeking a final order certifying two different classes described as follows:

'Class 1; All persons who purchased the bread of the first, second or third respondents in the Western Cape Province during the period 18 December 2006 to 6 January 2009.

Class 2: All persons who purchased the bread of the first, second or third respondents in Gauteng, Free State, North-West or Mpumalanga Province during the period 1 September 1999 to 6 January 2009'

In the course of oral argument these orders were further amended by inserting the words 'for personal consumption' after the word 'respondents' in each class. In addition the end date of the period in respect of class 1 was changed to 14 February 2007 and in respect of class 2 to 8 May 2008.

[13] We were thus asked to answer entirely novel questions, having potentially far-reaching implications for the respondents and our procedural law, in the absence of a complete set of affidavits and to grant

relief different from that sought from the high court. This will not matter if the respondents' arguments prevail and we are satisfied that this is not a case that can, on any basis, be permitted to proceed as a class action. In that event the appeal must fail. However, if there is some merit in the appellants' application, but it does not satisfy all the requirements we now prescribe for the commencement of a class action, it would be patently unfair to deny them relief on a final basis without affording them the opportunity to address matters that would have been addressed had they been aware of those requirements. On the other hand it would be equally unfair to uphold their appeal and make a final order before the respondents have had an opportunity to present their case fully. It would also be inappropriate for the court to set in train this type of novel litigation without all the relevant facts before it. That must affect the manner in which we dispose of the appeal. The court raised with counsel the possibility of an order remitting the matter to the high court, with leave to file further affidavits and we received submissions on that. Whether that is an appropriate order is a matter to which I will revert after dealing with the merits. First it is necessary to deal with the circumstances in which our law permits a class action to be brought and the requirements for doing so.

Class actions

[14] South African law is familiar with proceedings in which a number of potential plaintiffs join together in one action to pursue claims against one or more defendants on the basis that the common issues of fact and law in relation to their claims make such a joinder appropriate.[7] It is also familiar with the notion of a representative plaintiff, as in the case of an action pursued by a guardian or curator ad litem on behalf of a minor or

[7] Uniform Rule 10. In admiralty proceedings it is expressly permitted to bring proceedings under a collective title such as 'the cargo laden and lately laden on board the MV …' (Admiralty Rule 2(3)).

person under disability. In some at least of those instances the court steps in to appoint the representative because the individual is unable to do so. However, it has not, until recently, recognised an action in which a representative brings proceedings on behalf of a group of persons who have not authorised the representative to act on their behalf. Such actions trace their roots back to the principles of equity in England, were developed in the United States of America and have spread to a number of jurisdictions around the world.[8] They are generally referred to as class actions. There is now express provision for class actions in s 38*(c)* of the Constitution, which provides that:

'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 –

…

(c) anyone acting as a member of, or in the interest of, a group or class of persons.'

[15] The South African Law Commission, in line with many other jurisdictions to which we have been referred, proposed that the procedures applicable to class actions be prescribed by statute, and to that end prepared a draft bill.[9] However, Parliament has not yet acted on its recommendations or those of a judicial commission of enquiry which made a similar recommendation.[10] Academic voices over many years have likewise not been heard.[11] The utility of a class action in certain

[8] *World Class Actions: A Guide to Group and Representative Actions around the Globe* (ed Paul G Karlsgodt) (Oxford, 2012) lists 38 jurisdictions plus the European Union with some or other form of class action. The majority of these regulate class actions by special legislation or rules of court.

[9] South African Law Commission, Project 88, *The Recognition of Class Actions and Public Interest Actions in South African Law*, August 1998.

[10] *Commission of Enquiry into the Affairs of the Masterbond Group and Investor Protection in South Africa*, Vol 3, Chapter 16 by Mr Justice H C Nel.

[11] F R Malan 'Siviele proses, verbruikersbeskerming en kollektiewe optrede' 1982 *TSAR* 1; Wouter de Vos, 'Reflections on the introduction of a class action in South Africa' 1996 (4) *TSAR* 639 at 642; Wouter de Vos, 'Is a class action a "classy act" to implement outside the ambit of the Constitution?'

circumstances is clear.[12] We are thus confronted with a situation where the class action is given express constitutional recognition, but nothing has been done to regulate it. The courts must therefore address the issue in the exercise of their inherent power to protect and regulate their own process and to develop the common law in the interests of justice.[13] This may on some occasions involve us, and courts that will follow the guidance we give, in having to devise ad hoc solutions to procedural complexities on a case by case basis – a possibility referred to by the Supreme Court of Canada[14] – but the failure to pass appropriate legislation dealing with this topic leaves us little alternative in the face of the constitutional endorsement of class actions. In what follows we will give guidance as to the approach to be adopted in these cases. But first it is necessary to have clarity as to the essential nature of a class action.

[16] In class actions the party bringing the action does so, on behalf of the entire class, every member of which is bound by the outcome of the action, so that a separate action by a member of the class after judgment can be met with a plea of *res judicata*.[15] The concept is most fully defined, by Professor Mulheron,[16] in the following terms:

'A class action is a legal procedure which enables the claims (or parts of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons ("representative plaintiff") may sue on his or her own behalf and on behalf of a number of other persons ("the class") who have a claim

2012 *TSAR* 737.

[12]See the history and justification proffered by McLachlin CJC in *Western Canadian Shopping Centres Inc v Dutton* [2001] SCC 46; 201 DLR (4th) 385 paras 19 – 29.

[13] Section 173 of the Constitution. In *Ngxuza & others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E) Froneman J crafted an order to give effect to a class action that in due course received the approval of this court. *Permanent Secretary, Department of Welfare, Eastern Cape & another v Ngxuza & others* 2001 (4) SA 1184 (SCA). However, the appeal was argued on narrow grounds so that the general questions facing us were not canvassed in any detail.

[14]*Hollick v Toronto (City)* 2001 SCC 68; [2001] 3 SCR 158; 205 DLR (4th) 19 (SCC) para 14.

[15] A separate action instituted during the pendency of the class action could be met with a plea of *lis pendens*.

[16] Professor Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* 3.

to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ("common issues"). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.'

[17] The class action serves to bring a number of separate claims together in one proceeding. In other words it permits the aggregation of claims. However, that is not its only function. Of equal or greater importance, as Professor Silver points out,[17] is the fact that the class action is 'a representational device'. It is:

'… a procedural device that expands a court's jurisdiction, empowering it to enter a judgment that is binding upon everyone with covered claims. This includes claimants who, not being named as parties, would not ordinarily be bound. A class-wide judgment extinguishes the claims of all persons meeting the class definition rather than just those of named parties and persons in privity with them, as normally is the case.

Judges and scholars sometimes treat the class action as a procedure for joining absent claimants to a lawsuit rather than as one that permits a court to treat a named party as standing in judgment on behalf of them. This is a mistake … Class members neither start out as parties nor become parties when a class is certified.'[18]

[18] Recognition of the representative nature of a class action has important implications for determining the requirements for such actions. If the action is representative it is essential to identify, not necessarily by name but by description, those who are being represented. As it is their

[17] Charles Silver 'Class Actions – Representative Proceedings' 5 *Encyclopedia of Law and Economics* 194.

[18] See also Debra Lyn Bassett 'Constructing Class Action Reality' 2006 *Brigham Young University Law Review* 1415 at 1417-8.

rights that are to be adjudicated upon, they must either be given the opportunity to be excluded from the class (to opt out) or they must be required to join the class (to opt in). It is also necessary to identify the representative and to determine both their suitability to act as such and the basis upon which they will do so. The element of aggregation of claims dictates that the claims brought together in the action, whilst not necessarily identical, should raise common issues of fact or law, the resolution of which will serve to resolve or enable the resolution of all claims.

When may class actions be brought in South Africa?

[19] The Constitution, in s 38*(c)*, recognises a class action specifically in relation to infringements of or threats to rights guaranteed in the Bill of Rights. That caused the appellants in this case to invoke s 27(1)*(b)* of the Constitution. However, that was unnecessary. The class of people on whose behalf the appellants seek to pursue claims, (leaving aside for the present the definition of that class), is both large and in general poor. Any claims they may have against the respondents are not large enough to warrant their being pursued separately, so that it is improbable that any lawyers would be willing to act for them on a contingency fee basis. If those claims cannot be pursued by way of a class action, they are not capable of being pursued at all. The effect of that is to engage the right of access to courts vested in each of the members of the class by s 34 of the Constitution. The threatened infringement of that right may be challenged by way of a class action and the appropriate remedy is to permit a class action in respect of the underlying claims. It was accordingly unnecessary to seek in s 27(1)*(b)*an alternative peg on which to hang the entitlement to

proceed by way of a class action. The right to proceed in that way was clear, subject to satisfying the other requirements for such an action.[19]

[20] Similar circumstances will be present in many other potential class actions and the entitlement to proceed by way of a class action will be clear. However, one can envisage circumstances in which parties may wish to bring a class action, but are unable to contend that, if they are not able to do so, their s 34 rights will be infringed. For example, the families of passengers, killed when an aeroplane on an international flight crashes, may be able to pursue litigation in their own interests and be unable to point to a right in terms of the Bill of Rights that is infringed or threatened as a result of the death of their family members. Similarly, mortgagors, who contend that the financial institution from which they have borrowed money has miscalculated the interest on their loans and added impermissible charges, may be in a position to sue in a suitable court to ventilate their claims. However, in both instances a class action may be the most appropriate means for determining their claims.

[21] In my judgment it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked,[20] but to deny it in equally appropriate circumstances, merely because of the claimants' inability to point to the infringement of a right protected under the Bill of Rights. The procedural requirements that will be determined in relation to the one type of case can equally easily be applied in the other. Class actions are a particularly appropriate way in which to vindicate some types of constitutional rights, but they are equally useful in the context of mass personal injury cases or consumer litigation. I accordingly reject the

[19]This approach largely accords with that advanced by the Legal Resources Centre, which was admitted as *amicus curiae*.

[20] As was done in *Permanent Secretary, Department of Welfare, Eastern Cape & another v Ngxuza and Others* 2001 (4) SA 1184 (SCA).

suggestion advanced in some of the academic writing, and in some of the heads of argument, that we should await legislative action before determining the requirements for instituting a class action in our law. The legislature will be free to make its own determination when it turns its attention to this matter and in doing so it may adopt an approach different from ours. In the meantime the courts must prescribe appropriate procedures to enable litigants to pursue claims by this means.

[22] Having said that, it is right to enter one caveat. It is that, within the limited ambit of a class action as described earlier in this judgment, we are only concerned to determine the broad parameters within which class actions may be pursued and to lay down procedural requirements that must be satisfied in order to do so. Where necessary we must develop the common law in order to achieve this, for example, by expanding the scope of the *res judicata* principle. But, as the international literature shows, fundamental issues of policy may arise in determining the structure of such actions and their consequences. The resolution of those issues involves difficult policy choices that have received differing answers in different jurisdictions. It is not for us, in laying down procedural requirements, to make policy choices that may impinge upon, or even remove, existing rights. That would be to trespass upon the domain of the legislature, which the doctrine of the separation of powers – fundamental to our constitutional order – does not permit us to do. Against that background I turn to address the question of the requirements for pursuing a class action in South Africa.

Requirements for a class action

Certification

[23] All of the parties accepted that it is desirable in class actions for the court to be asked at the outset, and before issue of summons, to certify the action as a class action. This involves the definition of the class; the identification of some common claim or issue that can be determined by way of a class action; some evidence of the existence of a valid cause of action; the court being satisfied that the representative is suitable to represent the members of the class; and the court being satisfied that a class action is the most appropriate procedure to adopt for the adjudication of the underlying claims. In my view they were correct to do so and we should lay it down as a requirement for a class action that the party seeking to represent the class should first apply to court for authority to do so.[21] My reasons for adopting that requirement are the following.

[24] Most jurisdictions around the world require certification either before institution of the class action or at an early stage of the proceedings. The exception is Australia. The justifications are various. First, in the absence of certification, the representative has no right to proceed, unlike litigation brought in a person's own interests. Second, in view of the potential impact of the litigation on the rights of others it is necessary for the court to ensure at the outset that those interests are properly protected and represented. Third, certification enables the defendant to show at an early stage why the action should not proceed. This is important in circumstances where the mere threat of lengthy and costly litigation[22] may be used to induce a settlement even though the

[21] In *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape & another* supra 624D-E Froneman J suggested that 'the possibility of unjustified litigation can be curtailed by making it a procedural requirement that leave must be sought from the High Court to proceed on a representative basis prior to actually embarking on that road'. In *Firstrand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 (2) SA 592 (C) para 26 Traverso DJP said that this suggestion should be followed in the future, which no doubt explains the applications in the two cases that served before us.
[22] In *Tiemstra v Insurance Corp of BC* (1996) 22 BCLR (3d) 49 (SC) para 20 Esson CJSC said 'class actions have the potential for becoming monsters of complexity and cost'.

case lacks merit.[23] Fourth, certification enables the court to oversee the procedural aspects of the litigation, such as notice and discovery, from the outset. Fifth, the literature on class actions suggests that, if the issues surrounding class actions, such as the definition of the class, the existence of a prima facie case, the commonality of issues and the appropriateness of the representative are dealt with and disposed of at the certification stage, it facilitates the conduct of the litigation, eliminates the need for interlocutory procedures and may hasten settlement. Lastly the Australian experience has not proved entirely satisfactory, with numerous interlocutory applications and significant costs and delays being experienced.[24]

[25] Accordingly in my judgment an application for certification of the proposed action as a class action was necessary in the present case. As the dismissal of the application finally disposed of the question whether the appellants could institute such an action on behalf of the proposed class, it was appealable.[25] It is unnecessary for present purposes to determine whether the grant of certification would be subject to an appeal or whether it is a decision capable of alteration by the court of first instance and therefore not appealable. I turn next to consider the requirements for a certification application.

[26] In the course of argument the presiding judge put to counsel the following list of the elements that should guide a court in making a certification decision. They were:

- the existence of a class identifiable by objective criteria;

[23] Milton Handler *25 Years of Antitrust* 864-5 (1973) wrote: 'Any device which is workable only because it utilises the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure – it is a form of legalised blackmail.'
[24] Mulheron, op cit (fn 13), 23-29. SA Law Commission Report, fn 9 ante, para 5.5.
[25] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) 532I–533B.

- a cause of action raising a triable issue;
- that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class;
- that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;
- that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class;
- that the proposed representative is suitable to be permitted to conduct the action and represent the class;
- whether given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members.

There is an element of overlapping in these requirements. For example, the composition of the class cannot be determined without considering the nature of the claim. The fact that there are issues common to a number of potential claimants may dictate that a class action is the most appropriate manner in which to proceed, but that is not necessarily the case. A class action may be certified in respect of limited issues, for example, negligence in a mass personal injuries claim, leaving issues personal to the members of the class, such as damages, to be resolved separately.

[27] This list corresponds substantially with the factors identified by the Law Commission as the requirements for certification.[26] It also overlaps with what Cameron JA said were ‘the quintessential elements of a class action’, in dealing with a contention that a class had been inadequately described, namely

[26] Law Commission Report, ante, para 5.6, pp 41-50 and recommendation 11.

'… that (1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants through their legal representatives, the Legal Resources Centre, will fairly and adequately protect the interests of the class.'[27]

Similar requirements are prescribed in Federal Rule 23(a) of the Federal Rules of Civil Procedure in the United States of America, namely that the class is so numerous that joinder of all its members is impracticable; that there are questions of law or fact that are common to the class; that the claims of the representative parties are typical of the claims of the class; and that the representative parties will fairly and adequately represent the interests of the class. These requirements are referred to as numerosity, commonality, typicality and adequate representation.[28] Similar requirements are to be found in other jurisdictions.[29]

[28] Counsel did not dispute that these were the issues that require to be addressed in an application for the certification of a class action and directed their arguments at certain of them, primarily the definition of the class; the nature and existence of the cause of action being advanced; the commonality of the claims of members of the class; and the appropriateness of the relief being sought. Without excluding the possibility of there being other issues that require consideration, it suffices for our purposes to say that a court faced with an application for certification of a class action must consider the factors set out in the list in para 26 and be satisfied that they are present before granting certification. I now address in greater detail some of these factors that are of particular relevance for this case.

[27] *Permanent Secretary, Department of Welfare, Eastern Cape & another v Ngxuza & others* 2001 (4) SA 1184 (SCA) para 16.
[28] *Wal-Mart Stores, Inc, Petitioner v Betty Dukes et al* 131 S Ct 2541 at 2550.
[29] See Mulheron ante and Karlsgodt ante.

Class definition

[29] 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. It is important to be able to do this for three reasons. First, it affects the manner in which notice is given to the members of the class. In the conventional situation of an 'opt out' class the entitlement to opt out is negated if people cannot ascertain with reasonable certainty whether they are members of the class in the first place. Second, it is necessary for people to know whether they can commence their own litigation against the defendant or defendants in the class action. Third, it is essential to the identification of those who are bound by the judgment.[30]

[30] Two problems with class definition that arise in this case are over-inclusive definition and definition by subjective criteria. Where the class suffers from these problems it impacts upon other elements relevant to the certification decision. Thus if the class is too wide, as in an Australian case[31] where the original pleaded case included 'every man, woman and child who has been in this country between 1992 and 1999', the litigation will be unmanageable because of the need to take the personal circumstances of every person in the class into account. That indicates that a class action is inappropriate.

[30] *Bywater v Toronto Transit Commission* (1998) 27 CPC (4th) 172 (Ont. Gen. Div.); [1998] OJ No 4913 (Ont Gen Div); *2038724 Ontario Ltd v Quizno's Canadian Restaurant Corp* (2008) 89 OR (3d) 252 (SCJ).

[31] *Bray v Hoffman-La Roche Ltd* [2003] FCA 1505.

[31] An over-inclusive class also raises the question whether there are common issues of fact or law that can conveniently be resolved in the class action in the interests of all members of the class. The broader the class the less likely it will be that there is the requisite commonality. This was one of the reasons for the majority refusing certification in *Wal-Mart Stores, Inc, Petitioner v Betty Dukes et al*, the most recent decision of the United States Supreme Court on class actions. The claim for certification was denied because the statistical evidence of systemic discrimination against the 1.5 million members of the class, consisting of women employees from 1998 until the commencement of the litigation, scattered across 3 400 stores employing 1 million people in 50 states (in respect of 14 of which there was no anecdotal evidence of discrimination at all), was held to be inadequate. The sheer size of the class, the disparate circumstances of its members and the fact that policy for dealing with staffing issues was formulated by individual store managers, excluded the existence of a common issue and precluded certification.[32] That did not mean that some, even many, of the members of the class may not have been the victims of discrimination. It meant only that the claim of systemic discrimination, essential to the existence of a common issue for determination in the class action, was insufficiently demonstrated.

[32] The problem of certifying a class on the basis of subjective factors is particularly manifest when the definition makes membership of the class dependent upon the outcome of the litigation, for example, because it is dependent upon the class member having suffered loss, or

[32] The minority dissented on the commonality issue but concurred on another issue leading to the same result. In Canada the class was held to be over inclusive in a claim for compensation for wrongful dismissal where it was defined as including persons dismissed for just cause (*Webb v K-Mart Canada Ltd* (1999), 45 O.R. (3d) 389 (Ont S.C.J.)). An amendment to the class definition remedied the problem. Certification of a class action, in a claim against a school that it misrepresented the quality of its education and thereby prejudiced its graduates in seeking employment, was refused on the basis that the class included students who had found work after graduation without problems. (*Mouhteros v DeVry Canada Inc* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.).

dependent upon the ability of the defendant to raise defences to some claims and not others. The point is illustrated by the case of *Emerald Supplies Ltd & another v British Airways PLC*.[33] The claimant claimed that British Airways participated in illegal price fixing cartels operating in the area of air freight charges. It sought redress for itself and all consumers of international air freight services. The members of the class were those persons who were direct or indirect purchasers of such services at prices inflated artificially by the activities of the price fixing cartels. Three different types of loss were identified as having potentially been suffered by members of the class. Whether they had in fact suffered such loss depended on the individual user and it was accepted that loss would have to be proved individually. The claim was for a declaration that British Airways was liable 'in principle' to class members for the three different forms of loss.

[33] The problem was that, until it had been established that the price fixing cartels existed; that British Airways participated in them; and that prices were artificially inflated thereby, it was impossible to identify any member of the class. In addition, as the class included both direct and indirect purchasers of such services, whether any particular purchaser had suffered loss depended on whether the overcharge had been absorbed by the direct purchaser in fixing its prices or passed on to an indirect purchaser by way of a price enhancement. In a judgment by Mummery LJ the entitlement to pursue the action as a representative action was rejected. He said the following:

'Judgment in the action for a declaration would have to be obtained before it could be said of any person that they would qualify as someone entitled to damages against BA. The proceedings could not accurately be described or regarded as a representative action until the question of liability had been tried and a judgment on liability given. It

[33] *Emerald Supplies Ltd & another v British Airways PLC* [2010] EWCA Civ 1284.

defies logic and common sense to treat as representative an action, if the issue of liability to the claimants sought to be represented would have to be decided before it could be known whether or not a person was a member of the represented class bound by the judgment.'[34]

[34] Any attempt to define a class must take account of these potential pitfalls. The essential question will always be whether the class is sufficiently identified that it is possible to determine at all stages of the proceedings whether a particular person is a member of the class.

A cause of action raising a triable issue

[35] The appellants accepted that a class action should not be certified if the case is 'hopeless'. I am not sure that this constitutes a sufficiently clear standard to be applied on a case by case basis. Whether a case is hopeless has two aspects. It is hopeless if it is advanced on a basis that is legally untenable. It is also hopeless if it is advanced in the absence of any credible evidence to support it. These are categories that have long been recognised in our law and practice. A case is legally hopeless if it could be the subject of a successful exception. It is factually hopeless if the evidence available and potentially available after discovery and other steps directed at procuring evidence will not sustain the cause of action on which the claim is based. In other words if there is no prima facie case then it is factually hopeless.

[34]Para 63. In para 65 he added: 'In brief, the essential point is that the requirement of identity of interest of the members of the represented class for the proper constitution of the action means that it must be representative at every stage, not just at the end point of judgment. If represented persons are to be bound by a judgment that judgment must have been obtained in proceedings that were properly constituted as a representative action *before* the judgment was obtained. In this case a judgment on liability has to be obtained before it is known whether the interests of the persons whom the claimants seek to represent are the same. It cannot be right in principle that the case on liability has to be tried and decided before it can be known who is bound by the judgment. Nor can it be right that, with Micawberish optimism, Emerald can embark on and continue proceedings in the hope that in due course it may turn out that its claims are representative of persons with the same interest.' Mulheron, ante, 329, fn 39 refers to a body of Canadian authority that highlights the same point.

[36] In my judgment these are the standards that should be applied in assessing whether a proposed class action reflects a cause of action raising a triable issue. I will deal with each in turn. Causes of action are not in the first instance dependent on questions of law. They require the application of legal principle to a particular factual matrix. The test on exception is whether on all possible readings of the facts no cause of action is made out. It is for the defendant to satisfy the Court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts.

[37] An issue raised in argument was how this test could be applied in the context of a novel claim. The answer is that, provided the novel claim is legally plausible, the standard is met and the claim survives scrutiny and must be determined in the course of the action. Take a delictual claim based on a novel legal duty not to act negligently.[35] The existence of such a duty depends on the facts of the case and a range of policy issues. The need for the court to be fully informed in regard to the policy elements of the enquiry militate against that decision being taken without evidence. As Hefer JA said: [36]

'As the judgments in the cases referred to earlier demonstrate, conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which 'shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people" (*per* M M Corbett in a lecture reported *sub nom* "Aspects of the Role of Policy in the Evolution of the Common Law" in (1987) *SALJ* 104 at 67). What is in effect required is that, not merely the interests of the parties *inter se*, but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the Court conceives to be society's notions

[35] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 22; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 10 and 11.
[36] *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) 318E-I.

of what justice demands. (*Corbett* (*op cit* at 68); J C van der Walt "Duty of care: Tendense in die Suid-Afrikaanse en Engelse regspraak"1993 (56) *THRHR* at 563-4.) Decisions like these can seldom be taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies. In the passage cited earlier *Fleming* rightly stressed the interplay of many factors which have to be considered. It is impossible to arrive at a conclusion except upon a consideration of *all* the circumstances of the case and of every other relevant factor.'[37]

[38] That does not mean that certification should not be refused in an appropriate case, where there is no prospect of a trial court, with the benefit of all the evidence that the plaintiff can muster or suggest will be available to it, holding that the claim is legally tenable. Sometimes the test on exception can appropriately be applied in respect of novel legal claims. Harms JA pointed that out in the following passage from his judgment in *Telematrix*:[38]

'[2] The plaintiff's particulars of claim, with annexures, runs to 158 pages and contains a full exposition of the events surrounding the Directorate's decision. In addition we were provided with the ASA's Code of Advertising Practice and Procedural Guide and the parties, prudently, were content that regard could be had to it even though it does not form part of the pleadings. The case does not, therefore, have to be decided on bare allegations only, but on allegations that were fleshed out by means of annexures that tell a story. This assists in assessing whether or not there may be other relevant evidence that can throw light on the issue of wrongfulness. I mention this because, relying on the majority decision in *Axiam Holdings Ltd v Deloitte & Touche*, the plaintiff argued that it is inappropriate to decide the issue of wrongfulness on exception because the issue is fact-bound. That is not true in all cases. This Court, for one, has on many occasions decided matters of this sort on exception. Three important judgments that spring to mind are *Lillicrap*, *Indac* and *Kadir*. Some public policy considerations can be decided without a detailed factual matrix, which by contrast is essential for deciding negligence and causation.

[37] See also *Axiam Holdings Ltd v Deloitte & Touche* 2006 (1) SA 237 (SCA) para 25.
[38] *Telematrix*, supra, paras 2 and 3. Footnote references omitted.

[3] Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that 'cuts through the tissue of which the exception is compounded and exposes its vulnerability'. Dealing with an interpretation issue, he added:
"Nor do I think that the mere notional possibility that evidence of surrounding circumstances may influence the issue should necessarily operate to debar the Court from deciding such issue on exception. There must, I think, be something more than a notional or remote possibility. Usually that something more can be gathered from the pleadings and the facts alleged or admitted therein. There may be a specific allegation in the pleadings showing the relevance of extraneous facts, or there may be allegations from which it may be inferred that further facts affecting interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses, lacking any real foundation in the pleadings or in the obvious facts."'

[39] It must be borne in mind that, as a result of the procedure we now lay down, the party seeking certification will have set out in a draft pleading and in affidavits the basis for the proposed action. In so doing the court will probably have more material available to it in regard to the cause of action than would be the case with a normal exception. That will enable the court to make a proper assessment of the legal merits of the claim and, sensitively applied in this new area of law and procedure there should not be a difficulty. Unless it is plain that the claim is not legally tenable, certification should not be refused. The court considering certification must always bear in mind that once certification is granted the representative will have to deliver a summons and particulars of claim and that it will be open to the defendant to take an exception to those particulars of claim. The grant of certification does not in any way

foreclose that or answer the question of the claim's legal merit in the affirmative.

[40] Establishing a prima facie case on the evidence is not a difficult hurdle to cross. In the context of an attachment to found jurisdiction Scott JA set out the test as follows:

'[12] The requirement of a prima facie case in relation to attachments to found or confirm jurisdiction has over the years been said to be satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief — not even if the probabilities are against him; it is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused. . Nestadt JA, in the *Weissglass* case … warned that a court must be careful not to enter into the merits of the case or at this stage to attempt to adjudicate on credibility, probabilities or the prospects of success.

[13] …

[14] What is clear is that the evidence on which an applicant relies, save in exceptional cases, must consist of allegations of fact as opposed to mere assertions. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance. In other words, although some latitude may be allowed, the ordinary principles involved in reasoning by inference cannot simply be ignored. The inquiry in civil cases is, of course, whether the inference sought to be drawn from the facts proved is one which by balancing probabilities is the one which seems to be the more natural or acceptable from several conceivable ones … While there need not be rigid compliance with this standard, the inference sought to be drawn, as I have said, must at least be one which may reasonably be drawn from the facts alleged. If the position were otherwise the requirement of a prima facie case would be rendered all but nugatory …'

[41] A similar standard is applied in other instances such as the test for the existence of a defence in summary judgment proceedings. There is no reason why it cannot be applied to determine whether the applicant for

certification has shown the existence of a cause of action. I would add only this to Scott JA's exposition. The test does not preclude the court from looking at the evidence on behalf of the person resisting certification, where that evidence is undisputed or indisputable or where it demonstrates that the factual allegations on behalf of the applicant are false or incapable of being established.[39] That is not an invitation to weigh the probabilities at the certification stage. It is merely a recognition that the court should not shut its eyes to unchallenged evidence in deciding a certification application. Properly applied the test for a prima facie case should not pose any insuperable difficulties for an applicant for certification.

[42] The appellants accepted in their heads of argument that to obtain certification a prima facie case had to be established. They submitted that the existence of such a case did not involve any enquiry into the merits. In doing so they relied on two cases, *Eisen v Carlisle & Jacquelin et al*, from the United States of America,[40] and *Hollick v Toronto (City)*, from Canada.[41] Neither case supports this contention. The passage from *Eisen* on which reliance was placed was explained in *Wal-Mart*[42] as not excluding the necessity for evidence to show that the requirements of Federal Rule 23(a) were satisfied and this would necessarily involve evidence on the merits. In *Hollick* the question was posed to what extent the class representative 'should be allowed or *required* to introduce evidence in support of a certification motion.'[43] The answer in the light of the recommendations of the Ontario Law Reform Commission was that:

[39]*Dabelstein & others v Lane and Fey* NNO 2001 (1) SA 1222 (SCA) at 1227H–1228A; *MV Pasquale Della Gatta; MV Filippo Lembo; Imperial Marine Co v Deiulemar Compagnia Di Navigazione Spa* 2012 (1) SA 58 (SCA) paras 22 to 24.
[40]*Eisen v Carlisle & Jacquelin et al* 417 US 156 (1974).
[41]*Hollick v Toronto (City)* supra para 16.
[42]Page 2552, fn 6.
[43]Para 22.

'In my view, the Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.'

Evidence is therefore required to identify the class, identify the common issue or issues and show that a class action is appropriate. That necessarily means that there must be evidence showing a prima facie cause of action, because the existence of a cause of action underpins the existence of a class and serves to identify the issues common to that class that require determination.

[43] It is desirable to say something about the procedure to be adopted in certification applications. The appeal was complicated by the absence of a clear statement by Mr Solomon of the cause of action that the appellants intended to advance. It was unclear whether the claim was based on the breach of the Act's provisions or was a constitutional claim seeking constitutional damages.[44] In the appellants' heads of argument it was said to be a delictual claim, with an alternative claim based upon a breach of the constitutional right to sufficient food. This confusion would have been avoided if the application had been accompanied by a draft set of particulars of claim in which the cause of action was pleaded, the class defined and the relief set out. The affidavit or affidavits filed in support of the application would then have set out the evidence available to the appellants in support of that cause of action and the further evidence that they anticipated would become available to them to sustain the pleaded case and the means by which that evidence would be procured. That procedure should be followed in future applications. That will enable those opposing certification to respond meaningfully and the court to decide the application with a clear understanding of the nature of the

[44] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

case. That is not to say that the court must treat the draft pleading as if it were the law of the Medes and Persians, insofar as the content of the applicant's case is concerned. Manifestly it can be amended and the need for amendment may emerge in the course of the certification application. But it should at least serve to clarify the issues arising in the certification application.

Common issues of fact or law

[44] This does not require that every claim advanced in the class action, save possibly in relation to quantum, be identical. It requires that there be issues of fact, or law, or both fact and law, that are common to all members of the class and can appropriately be determined in one action. Dealing with the issue of commonality in *Wal-Mart* Scalia J said[45] that the claims:

'… must depend upon a common contention …That common contention, moreover, must be of such a nature that it must be capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'

In my view that is correct. The simplest example of such a common issue would be the issue of negligence in a case involving the derailment of a train. That could give rise to different claims, such as damages for personal injuries by passengers, dependents' claims for loss of support in respect of those killed, claims for loss of or damage to goods being carried on the train and damage to other property arising as a result of the derailment, but there would be sufficient commonality on the issue of negligence to sustain a class action.

[45] At p 2551. Similarly in *Hollick v Toronto (City)*, supra, McLachlin CJC said 'an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" … Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial … ingredient" of each of the class members' claims.' (para 18)

[45] That highlights the point that the class action does not have to dispose of every aspect of the claim in order to obtain certification. It might in an appropriate case be restricted to the primary issue of liability, leaving quantum to be dealt with by individual claimants. Certain common issues could be certified for the entire class, and other subsidiary issues certified in respect of defined sub-classes. But the question in respect of any class or sub-class is always whether there are common issues that can be determined that will dispose of all or a significant part of the claims by the members of the class or sub-class.

The representative

[46] In some jurisdictions, such as the United States, it is an express requirement that the representative plaintiff has a claim that is typical of the claims of the class. In Canada and Australia, whilst there is no express requirement of typicality, Professor Mulheron suggests that the jurisprudence of those countries in regard to commonality, makes that a requirement.[46] That question does not arise in South Africa, because s 38*(c)* of the Constitution expressly contemplates a class action being pursued by 'anyone acting as a member of, *or in the interest of*, a class'. Accordingly, while the appellants include five individuals who may be typical of the class they are seeking to represent, the other four appellants may permissibly act in the interest of the class. As already indicated there is no reason to differentiate in that regard between class actions based on infringement of rights protected under the Bill of Rights and other class actions.

[47] The court must be satisfied of two broad matters in regard to the representatives of the class. The first is that they have no interests in

[46]Mulheron, supra, 309–313.

conflict with those whom they wish to represent. A conflict of interest arises if the purpose of the litigation is to enrich the representatives, or to serve interests other than those of the class. The second issue is whether the representative has the capacity to conduct the litigation properly on behalf of the class. That is important because unsuccessful litigation will have the effect of destroying the claims.

[48] The capacity to conduct the litigation has a number of aspects that must be dealt with in the application for certification. First, has the representative the time, the inclination and the means to procure the evidence necessary to conduct the litigation? Second, has the representative the financial means to conduct the litigation and, if not, how is it going to be financed? This will involve making some assessment of the likely costs. Third, does the representative have access to lawyers who have the capacity to run the litigation properly? This will require some consideration of the likely magnitude of the case and the resources involved in dealing with it. Fourth, on what basis are those lawyers going to be funded? Fifth, if the litigation is to be funded on a contingency fee basis, details of the funding arrangements must be disclosed to ensure that they do not give rise to a conflict between the lawyers and the members of the class. The court must also be satisfied that the litigation is not being pursued at the instance of the lawyers for their own gain rather than in the genuine interests of class members, as the risk of conflicts of interest is inherent in that situation. It is for this reason that in other jurisdictions the court's approval of any settlement is required. Whilst that issue does not arise in these proceedings, so that it is unnecessary for us to be prescriptive, some similar requirement will need to be imposed when that situation does arise.

Application of principles in this case

[49] Whilst much of the argument focussed around the Western Cape and what the appellants now describe as Class 1, it is convenient to deal in the first instance with Class 2 and the application to certify a class action in respect of the issues flowing from the national complaint to the Commission.

Class 2

[50] This application did not originally seek certification in respect of the national complaint and a class consisting of purchasers of bread in the four provinces, Gauteng, Free State, North West and Mpumalanga, where the events giving rise to that complaint occurred. Accordingly we lack any evidence in regard to that class. All we have is the Tribunal's determination in the Pioneer case of the conduct that gave rise to the Tribunal's findings that Pioneer, in conjunction with the other bread producers, had engaged, directly or indirectly, in price fixing and the division of markets in those four provinces. However, there is no evidence as to the effect of that conduct in the market place and its impact on the price of bread for consumers. In addition the orders by the Tribunal in respect of Tiger and Foodcorp do not appear to overlap entirely with the findings in the determination in respect of Pioneer.

[51] This is relevant because the claim is based upon anti-competitive conduct in terms of the Act. That claim must be pursued on the basis of a determination by the Tribunal. Given the passage of time and the provisions of s 67(1) of the Act it seems improbable that any further determination will be made about anti-competitive conduct in the areas covered by the national complaint. The certification of a class action must

then be addressed on the footing that the case to be advanced will be in accordance with the determination by the Tribunal in the Pioneer case.

[52] The Commission did not allege before the Tribunal that a cartel existed at all times across all regions of the country or that the co-ordination or agreement or understanding between the bread producers related to the same subject matter in all regions.[47] The factual findings of the Tribunal were varied. In regard to the division of markets in 1999 Pioneer sold its bakery in Welkom to Tiger and Tiger agreed 'to keep out of the wider Free State area' in favour of Pioneer. In the North West, also in 1999, the agreement was confined to the informal trade, where it was agreed that the four bread producers would not compete in supplying that trade in the areas around Krugersdorp, Orkney, Stilfontein and Potchefstroom. In Mpumalanga in 2001, Tiger and Pioneer jointly sold a bakery in Bushbuckridge, in which they owned equal shares, to Foodcorp. In return Foodcorp sold its bakery in Groblersdal to Pioneer and its share in the bakery in Ermelo to Tiger.[48]

[53] It is impossible on this evidence to say that this division of markets affected all purchasers of the respondents' bread in these four provinces, or even that it detrimentally affected all purchasers of their bread in the particular areas. Nor can it be said that its impact on consumers would have been similar. That will have depended on what occurred as the bread passed down the value chain from producer to distributor or retailer and thence to the consumer. Any impact on the national chains of supermarkets would have been different from any impact on smaller retail outlets and the informal sector. There is no evidence that it actually

[47]Tribunal determination in Pioneer para 81.
[48]Curiously the Tribunal found anti-competitive intent in the fact that in two instances the seller *paid* the purchaser to take over the bakery. One would have thought that more indicative of the bakeries being unprofitable to the sellers.

resulted in higher prices in those areas or caused prejudice to consumers. It may, for all we know have resulted in greater production efficiencies and lower prices, particularly if the bakery sales occurred because the sellers were not operating them profitably. Even if it had an adverse effect on consumers, the nature, geographic scope and duration of that effect is not known and would have differed from area to area.

[54] In regard to price fixing, whether direct or indirect, there was no evidence of this in either the Free State or Mpumalanga. The Tribunal heard evidence about meetings in North West in 2003 or 2004, and another meeting in 2005, where information was exchanged about impending price increases and arrangements made to co-ordinate increases, not to undercut prices and not to poach customers when this occurred. These arrangements did not involve Tiger, but did include Foodcorp. There is no evidence that it had any effect elsewhere in the other three provinces. Its impact in the North West is not dealt with and we do not know the nature, geographic extent or duration of any adverse effect.

[55] In relation to Gauteng the Tribunal heard the evidence of one witness who testified to regular communications about price increases during 2003 and 2004 and the efforts made by the bread producers to ensure that this did not set off a round of discounting directed at increasing market share – probably the most significant element in determining profitability. This was done by exchanging information about price increases and, if one producer broke ranks by discounting in response to an increase, threats to retaliate. The same witness also testified to an agreement between Pioneer and Premier not to compete on price when a new distribution centre was opened in Vanderbijlpark and to

an agreement on the co-ordinated implementation of price increases in Gauteng generally in December 2006. Once again there is no evidence of the nature, geographic extent or duration of any adverse effect. This is particularly necessary in relation to price increases because, as the Tribunal's determination records, a major driver of price increases is the cost of the inputs into production, in particular wheat and flour, but also electricity, labour costs, transport costs and the like. Co-ordination of price increases would have had little impact if an increase by the price leader (the dominant producer in a particular region) would, in any event, have resulted in the other producers following suit.

[56] It is plain from this summary that the class for which certification is sought in Class 2 is over-broad; that the potential claims lack any central common feature; and that any losses that this anti-competitive conduct may have occasioned (none having been alleged or shown by evidence), would have varied from place to place, time to time and person to person. The class includes a considerable number of bread consumers who cannot possibly have been affected by the anti-competitive conduct of the bread producers, or would have been affected by some, but not all, of such conduct. I have considered whether there are common issues that would warrant certification in the wide class sought, together with the creation of sub-classes, to cover particular situations. However, the diversity of the Tribunal's findings in regard to the conduct falling under the national complaint precludes that. It cannot readily be segmented without information identifying the people affected by the division of markets in the Free State, or the agreement not to compete on price in Vanderbijlpark, or the coordinated increase in price in Gauteng in December 2006.

[57] A class can only be identified with reference to the conduct of a specific potential defendant or defendants. However, Premier was not involved in the anti-competitive conduct in the Free State and Tiger was not involved in the agreement in respect of Vanderbijlpark or those in the North West. Premier was not party to the market division in Mpumalanga. This diversity precludes the identification of a common issue the disposal of which would have a decisive effect on the claims of all members of the class.

[58] The findings by the Tribunal in the Pioneer case also preclude the possibility of there being a common issue or issues that can apply to a defined class of persons for the purpose of a class action. They involve six different types of conduct occurring respectively in 1999, 2003 and 2004, July 2006 and December 2006. The 1999 conduct did not extend to or impact upon Gauteng. The 2003 and 2004 agreements were confined to parts of the North West. The anti-competitive conduct in 2006 related to Gauteng alone. Although the findings and the papers before us repeatedly use the sweeping term ‘cartel’ to describe this conduct, it is misleading to the extent that it suggests widespread conduct beyond that which the Tribunal held had occurred. There was no finding of the existence of a general cartel operating in the bread producing industry in Gauteng, Free State, North West and Mpumalanga from 1 September 1999 to 8 May 2008, which is the area and the period for which certification was sought. Indeed there could not have been such a finding because that was not an allegation made by the Commission.

[59] Lastly it is necessary to mention that the absence of any evidence concerning the impact of this anti-competitive conduct on consumers also precludes certification. Without such evidence the requirement of

commonality among the members of the class is not satisfied. The claim is said to be one for damages. The assessment of whether damages have been suffered arising from anti-competitive conduct is a complex issue. The following method is taken from an English case involving a price fixing cartel[49] and adapted to this case:

- Determine or estimate the actual prices charged by the cartel during the relevant period.
- Estimate the price (known as the 'but for' price) that would have been charged had there been no cartel.
- Subtract the 'but for' price from the actual price.
- Determine the quantity of bread purchased by each claimant or by the class of claimants.
- Estimate the proportion of the 'over-charge' absorbed by intervening distributors and the retailers as the bread is passed down the chain of purchases to the end consumer.

[60] Applying this methodology – which was not challenged - to this case, involves entirely separate exercises being undertaken in a number of small regional areas in the four provinces, in respect of widely divergent conduct taking place at differing times and affecting consumers differently depending on the actions of the retailers and resellers. In addition the exercise is to take place in relation to three different bread producers who set list prices separately in relation to the different types of bread that they produced[50] and negotiated discounts separately and in different ways for different groups. The result was that they charged varying prices to the retailers and resellers to whom they sold bread. In turn the retailers and resellers fixed their own prices independently. The

[49]*Devenish Nutrition Ltd & others v Sanofi-Aventis SA & others* [2007] EWHC 2394 (Ch) para 19
[50]The Tribunal determination reflects that Pioneer produced 32 different types of bread, not all of which are available throughout the country.

inevitable result is that there is no commonality within the suggested class in regard to harm suffered or the nature of any damage that may have been caused to individual consumers. That would not matter if there were some overriding common issue that applied to all bread consumers in these four provinces during the relevant period, but none is identified. There is simply the sweeping statement (admittedly made in relation to the Western Cape) that ‘every consumer that bought their products during the period in question suffered damages’. That cannot be correct in the light of the Tribunal’s analysis of the offending conduct.

[61] The inevitable conclusion is that, on the assumption that there is a delictual action available to consumers who suffer damage in the form of higher prices in consequence of anti-competitive conduct, the proposed Class 2 is too broad because it includes people who were not injured by the conduct of the producers. Furthermore there is no common issue of fact or law shared by all the members of the class. Consumers who suffered damages as a result of any of the anti-competitive conduct constituting the national complaint did so for varying reasons arising from different conduct in different areas at different times. The cause, nature and extent of those damages are not common to the proposed class. The claim for certification in respect of Class 2 must therefore fail.

Class 1

[62] This is the class to which the application related from the outset. The proposed action arises from the co-ordinated implementation of price increases in the Western Cape by the respondents from 18 December 2006. Although reference is made in the founding affidavit to the other practices concerning the distributors it is not clear how they could have adversely affected the consumers. If the distributors’ discounts were

reduced, and they absorbed the reduction by accepting a decline in their profit margins, that would not have affected consumers at all. If they increased their prices in order to maintain their profit margins, not only would their sales have fallen, because consumers refused to buy bread at those prices or obtained it elsewhere, but any loss to consumers would have flowed from the independent actions of the distributors. Similarly the agreement not to poach distributors was supplementary to the discount agreement. It is, however, unnecessary for present purposes to decide this, as it suffices for the purpose of certification for the appellants to show that consumers would have a cause of action arising from the co-ordinated increase in list prices.

[63] The appellants have now nailed their colours to the mast of a delictual action flowing from a breach of statutory duty. They persisted with their constitutional claim based on a breach of a negative obligation not to interfere with the right to sufficient food in s 27(1)*(b)* of the Constitution, but only in the alternative. Whilst there was some criticism in argument of the manner in which their claim had fluctuated in the course of these proceedings I do not think that should affect matters. On any basis the proposed claim is a novel one and identifying the proper basis for it is a matter of some complexity. The appellants should not be penalised in certification proceedings for variations in the legal foundation of the claim they seek to advance. On a factual level it has always been the same claim, namely that consumers of bread in the Western Cape were obliged to pay more for bread than they would otherwise have done if the bread producers had not engaged in the prohibited anti-competitive conduct the Tribunal found they had perpetrated.

[64] The claim is advanced on the following basis. The appellants say that this type of anti-competitive conduct is prohibited in the interests of competition and the interests of consumers. These prohibitions serve to fulfil the aim of the Act as set out in the preamble and in particular the aim of providing markets in which consumers can freely, that is, without coercion by anti-competitive conduct, purchase the quality and variety of goods they desire. They also serve to provide consumers with competitive prices as provided in s 2*(b)* of the Act. Founding upon cases that say that a breach of a statutory duty can give rise to a legal duty not to cause financial loss,[51] the appellants contend that such a legal duty rested on the bread producers and that they breached it deliberately by their actions in agreeing on the co-ordinated increase of list prices. In support of such a duty they point to s 65(6) of the Act that contemplates that a person who has suffered loss or damage as a result of a prohibited practice may have an action to recover that loss or damage. They contend that the prohibited practice in this case resulted in consumers in the Western Cape paying more for the respondents' bread than they would otherwise have done.

[65] The respondents challenge this case on a variety of levels. First, they submit that as a matter of interpretation the Competition Act was not enacted for the benefit generally of the consumers on whose behalf it is sought to proceed and therefore does not create the alleged legal duty. Second, they contend that there is no evidence of loss suffered by the consumers arising out of the anti-competitive conduct. Third, they submit that there is no evidence linking the anti-competitive conduct with any increase in prices or damage to consumers, and hence the necessary causal element is missing. In other words, on the first leg they raise a

[51] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) paras 19-21 and *Olitzki Property Holdings v State Tender Board & another* 2001 (3) SA 1247 (SCA) paras 12-14.

legal argument and on the latter two legs they say there is no prima facie case in relation to these elements of a delictual action.

[66] Premier challenges the delictual claim on two other bases. Its principal argument is that such a claim is bad in law because s 65 of the Act provides for a 'follow on' claim founded on a finding of prohibited anti-competitive conduct by the Tribunal, and that on a proper construction of the Act this remedy is exclusive and precludes a common law delictual action. In the alternative it contends that the proposed claim is, by virtue of the relief being sought, not a claim for damages and accordingly not a valid delictual claim.

[67] The legal arguments about the existence of a legal duty and the existence of an exclusive statutory claim in terms of s 65 of the Act are linked. If Premier is correct that the Act provides an exclusive follow on claim then the legal duty on which the appellants rely does not exist. However, if it is incorrect, that strengthens the appellants' hand considerably, because, s 65(6) recognises the possibility of claims arising from prohibited anti-competitive conduct, so that the absence of a specific statutory claim would suggest that there must be a delictual claim available to at least some persons injured by such conduct.

[68] I am not convinced that s 65 of the Act provides for the type of exclusive follow on remedy for which Premier contends. The relevant portions of the section read as follows:

'(2) If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and—

(a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that—

(i) the issue has not been raised in a frivolous or vexatious manner; and

(ii) the resolution of that issue is required to determine the final outcome of the action.

(6) A person who has suffered loss or damage as a result of a prohibited practice—

(a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1); or

(b) if entitled to commence an action referred to in paragraph *(a)*, when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the prescribed form—

(i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;

(ii) stating the date of the Tribunal or Competition Appeal Court finding; and

(iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.

(7) A certificate referred to in subsection (6)*(b)* is conclusive proof of its contents, and is binding on a civil court.

(8) An appeal or application for review against an order made by the Competition Tribunal in terms of section 58 suspends any right to commence an action in a civil court with respect to the same matter.

(9) A person’s right to bring a claim for damages arising out of a prohibited practice comes into existence—

(a) on the date that the Competition Tribunal made a determination in respect of a matter that affects that person; or

(b) in the case of an appeal, on the date that the appeal process in respect of that matter is concluded.

(10) For the purposes of section 2A(2)*(a)* of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), interest on a debt in relation to a claim for damages in terms of this Act will commence on the date of issue of the certificate referred to in subsection (6).'

[69] Whilst the section contemplates the possibility of a claim for damages at the instance of a person who suffers loss or damage in consequence of a prohibited practice, it does not state that such a person will have an action, nor does it purport to determine the requirements for such an action. Its provisions are rather directed at the relationship between the Tribunal's determination and the court before which such an action is brought; the timing of such an action; the running of prescription in relation to the claim underlying such action and interest on the claim. As regards the first of these, it says in s 65(2) that the issue of whether prohibited conduct has occurred must be determined by the Tribunal, or the Competition Appeal Court on appeal from it, to the exclusion of the court before which the action is commenced. Proof of such prohibited conduct is provided by the certificate of the Chairperson of the Tribunal or the Judge President of the Competition Appeal Court (ss 65(6) and (7)). Until the proceedings before the competition authorities are complete an action may not be pursued (s 65(8)). If the Tribunal has already awarded damages in a consent order under s 49D(1) a further claim for damages is excluded. The commencement date for the running of prescription is dealt with in s 65(9) and the date upon which interest on a claim will start to run is dealt with in s 65(10). All of these are essentially procedural matters or, in the case of prescription and interest, matters dealt with in other statutes that require special treatment in this particular context.[52]

[52] There is nothing unusual in this. Section 8(3) of the Extension of Security of Tenure Act 62 of 1997 contains a similar provision.

[70] Premier draws attention to the bifurcation of jurisdiction created by the Act, where the specialist tribunals have exclusive jurisdiction over the question whether prohibited practices have been committed and the civil courts have no say. However, to my mind that is a two-edged sword. The writ of the specialist competition tribunals runs only to the extent of determining whether a prohibited practice has occurred and no further. Beyond that the civil courts provide the forum to which parties who suffer damages arising from the prohibited practice must turn in order to recover those damages. They will clearly apply conventional principles in regard to the assessment of damages and causation of loss. However, the more difficult question is to identify those who are entitled to pursue claims to recover such loss. Premier's argument assumes that anyone who has suffered loss or damage and can demonstrate a causal link between that loss and damage is entitled to be compensated for that loss or damage. That is consistent with its contention that the Act provides for strict liability.

[71] Under the principles of the law of delict it is insufficient for someone to say that they have suffered loss as a result of the conduct of another, even where such conduct was deliberate or negligent. They must first establish that the person from whom they seek to recover that loss owes them a legal duty to prevent such loss so that their failure to do so is wrongful in accordance with the legal convictions of the community.[53] In the context of pure economic loss, into which category this claim falls, that is a particularly complex enquiry.[54] For example the risk of indeterminate loss would have to be weighed against the inability of the

[53] *Minister of Safety and Security v Van Duivenboden*, supra, para 21;*Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) paras 12-16; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* supra, paras 10-12.
[54]*Fourway Haulage SA (Pty) Ltd v South African National Roads Agency Ltd* 2009 (2) SA 150 (SCA).

consumers to protect themselves against loss flowing from the prohibited practice. It would be a startling departure from principles that have been recognised as compatible with our new constitutional order,[55] for liability to compensate for loss or damage flowing from a prohibited practice to exist in the absence of any duty to prevent such loss. It would eliminate one of the basic principles by which our law prevents liability for acts causing damage from being extended beyond acceptable limits.

[72] On the other hand there are textual factors that lend support to Premier's argument. Thus s 65(6)*(a)* speaks of a person who has suffered loss or damage as a result of a prohibited practice commencing an action in a civil court 'for the assessment of the amount or awarding of damages'. The first part of that is consistent with the action concerning only the quantum of damages and nothing more. Section 49D(4) refers to a complainant 'applying for an award of civil damages'. That is also consistent with the making of the award being a mechanical process in which only the quantum of the claim must be assessed.

[73] The record as it stands is not apt for determining questions of this importance and difficulty. The claim by the appellants has been advanced on too simple a basis to determine whether the foundation for the legal duty necessary to support a delictual claim exists. That is not surprising. After all, the claim was only advanced on that basis when their heads of argument were filed in this court. However, the contention by Premier is not clearly correct and the corollary to its rejection appears to me to be that a delictual action would lie at the instance of at least some claimants. In my view it is undesirable to determine these issues in an appeal where

[55]*Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC) para 15; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) paras 37-47 and 69-70.

the arguments being advanced, both as to legal duty and as to the effect of s 65, are raised for the first time on papers that are admittedly incomplete.

[74] The arguments that the factual allegations made by the appellants were insufficient to make a prima facie case in respect of a delictual claim have force in the light of the limited evidence proffered by the appellants. However, the case is one of price fixing by agreeing on a date for implementation of price increases by all three respondents. That agreement would have served to stifle competition that might otherwise have resulted from any one of the respondents increasing its prices without such an agreement. As such it would have tended to increase the prices that the bread manufacturers were able to charge to their customers and, markets being what they are, it is probable that to some extent at least those price increases would have been passed on to consumers. After all part of the justification given by the bread producers for the increases was that prices of wheat and flour and other major input costs had risen and they needed to pass these on to consumers if their businesses were to remain profitable. If artificially high increases in the price of bread resulted from this prohibited practice by the respondents, it is a logical inference that consumers would have paid more for bread than would otherwise have been the case. In the absence of rebutting evidence from the respondents, demonstrating the falsity of that line of reasoning, the appellants' case on the facts cannot be rejected at this stage of proceedings. It is plain that the claim as now advanced raises both legal and factual issues that would be common to all affected consumers.

[75] In summary the claim that the appellants seek to advance has a potentially plausible basis, but it is premature at the stage of this appeal for this court to determine the questions raised by these arguments in

view of their novelty, complexity and the fact that they are raised for the first time in this court. The appellants should not be non-suited on these grounds, which would be the effect of dismissing their appeal, but equally the respondents' arguments cannot be rejected at this stage. That indicates that it is desirable to refer the present application back to the high court, with appropriate directions for the delivery of further affidavits, for it to be dealt with on a complete set of papers and in the light of the principles laid down in this judgment.

[76] There are two possible reasons why this court should not make that order. The first concerns the definition of the potential class and the second the proposed remedy. If we were to conclude that the class is incapable of satisfactory definition or that no proper relief can be claimed in this action then it would be wrong to remit the matter and cause further expense to be incurred and valuable court time consumed on a fruitless exercise. However, in considering that question one must be cautious not to stifle what may be litigation properly, if inadequately, commenced when we do not have all the facts and do not have the advantage of full affidavits on both sides of the question and argument that would clarify what is at present obscure.

[77] In regard to the proposed class it is clearly too broadly stated. The proposition that it includes virtually all consumers of bread in the Western Cape cannot be correct, when the market share of the respondents in South Africa as a whole was said by the Tribunal to be some 50 to 60 per cent of the domestic bread market. For all we know the respondents' operations may have been largely confined to the Cape peninsula and the winelands, leaving the vast hinterland of the province to smaller operations. That would suggest that the class should be confined to

people resident in that more limited area. The sales of the respondents in the Western Cape will have included sales to institutions, such as schools, hospitals and prisons, and commercial establishments, such as hotels, bed and breakfast establishments, restaurants and other establishments where food is served. These should be excluded. It may be that on further consideration it is appropriate to exclude consumers whose bread purchases were made through the national chains of supermarkets and garage forecourts, where prices were negotiated nationally and the impact of the price fixing may have been significantly different. It may also be appropriate to restrict the case to the basic types of bread – the standard loaf of white and brown bread, sliced and unsliced – and not include all the varieties that were available from the bread producers at the time, which are probably not the staple fare of the poor consumer. The fact that none of this was done illustrates that the proposed class is over-broad and cannot be certified as such.

[78] Having said that, however, can it be said that the proposed class is incapable of adequate definition? The evident aim of the appellants is to represent the interests of poor consumers in the Western Cape, or the relevant part of it, those who would have been hardest hit by any artificially sustained increase in the price of bread. It should be possible to define that group with greater specificity perhaps by using the income bands that economists, and many in the commercial world, use to differentiate differing economic groups. No doubt statistical information is available from Statistics SA and other sources. Information about the sources of bread for these consumers may enable the class to be defined with greater precision. It is probably inevitable that any class will include some people who do not consume bread or did not consume the respondents' bread, but that should not preclude certification if the class

is otherwise adequately defined and statistical controls are in place to accommodate that possibility.

[79] If one takes all these factors into consideration I do not think that it is necessarily impossible for the appellants to define the class they wish to represent with the degree of clarity that is required. I may be wrong in the light of information produced by the respondents when they have an opportunity to deliver full affidavits, which may show that the bread market is more fragmented than it may appear at first sight. However, that is not a reason at this stage to say that the appellants' task in seeking certification is doomed to failure.

[80] That leaves the question of remedy. The remedy that the appellants propose at this stage suffers from many defects. Whilst the appellants say that they wish to represent the consumers of bread and pursue the claims for damages of that class, the remedy they seek is that money be paid to unnamed and as yet unconstituted trusts or similar bodies that they say will use the funds generally to benefit bread consumers. How this is to be done is not explained. In the heads of argument it is suggested that the money would be used to fund community and school feeding schemes. Commendable though that may be it is not a means of compensating consumers of bread, who suffered loss or damage in consequence of the prohibited practices of the respondents, for their loss or the damage they suffered. It is a means of providing food – not necessarily bread – to those who lack it. Many of those will be people who suffered no loss or damage at all in consequence of the prohibited practices. Some, such as children, who are frequently the principal beneficiaries of such schemes, would not even have been alive at the time. Others may not have had the means to buy bread at the time or may not have been in the Western

Cape. This is clearly recognised in the appellants' heads of argument where they say that the purpose of the proceedings is not to identify the members of the class and distribute the proceeds to them. In fact the appellants seek to turn this to their advantage by saying that in view of the intended form of relief 'an over-inclusive class definition would be harmless'.

[81] The litigant who sues in delict sues to recover the loss suffered in consequence of the wrongful act of the defendant.[56] The appellants propose to prove the claim on this basis, but then not pay the damages to the members of the class. The justification for this approach is said to be that in circumstances where it is impractical to distribute to the members of the class directly the damages should be distributed *cy-près*, that is, in a manner as near as possible to a direct distribution. That would be a novel development in our law, but we were referred to foreign jurisprudence in relation to class actions that supports some alternative form of distribution of damages where distribution to the members of the class is impractical and urged to permit such a mode of distribution in the present case.

[82] According to Professor Mulheron,[57] Australia does not permit a distribution other than to the members of the class, although this has occasionally caused difficulties in distributing the balance of a settlement fund when all the beneficiaries that have come forward have been paid and there is a residual amount in the fund. In Canada provision is made by statute for such distributions in certain cases. Only in the United States does it appear that courts have permitted such distributions. Even there

[56] *Trotman & another v Edwick* 1951 (1) SA 443 (A) at 449B-C; *Ranger v Wykerd & another* 1977 (2) SA 976 (A) at 986D-E.
[57] Mulheron ante 426-434 and *The Modern Cy-près Doctrine* Chapter 7, pp 215-252.

this has usually been in relation to settlement agreements, where the court is asked to confirm a settlement the terms of which have been devised by the parties to the litigation, or in respect of residual amounts remaining after distribution to all members of the class who have come forward with claims. As a remedy in disputed litigation, distributions *cy-près* appear to have gained little purchase and they have by and large not been welcomed by appellate courts.

[83] In South Africa the Law Commission's working paper on class actions[58] proposed the application of an aggregate award of damages or a settlement amount in a way that could reasonably be expected 'to compensate or benefit class members, where actual division and distribution of the award among the class members is impossible or impracticable'. It gave as examples a price reduction for a certain time, where there had been an illegal overcharge for goods or services, and the use of compensation to clean up pollution or provide health services to those who were injured by the pollution. In each case whilst the money would not go directly to the beneficiaries it would be used for their benefit as a remedy for the harm they had suffered. However, when the Law Commission came to deliver its final report even this relatively modest proposal did not find favour. It limited its recommendations to the following:

'When an aggregate assessment is made the court should give directions regarding the 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.'[59]

[58]South African Law Commission *The Recognition of a Class Action in South African Law* (Working Paper 57, 1995) para 5.38.
[59]Recommendation 18, para 5.13.5, p 66.

The draft bill that accompanied the report did not in fact make provision for the distribution of an undistributed residue of an aggregate award, but presumably that was a drafting oversight.

[84] The remedy that is being sought at this stage does not aim to compensate the members of the proposed class in any way. It is unconnected to that goal. Its aim is purely punitive, a matter already dealt with by the Tribunal in the substantial administrative penalties that it levied against the respondents.[60] It has the effect of depriving the members of the class of their claims in order to enable the appellants (and this is likely in practice to mean the first four appellants, not the individual appellants) themselves, through a trust they control or set up, to oversee the distribution of the damages in a manner they think appropriate. That is a remedy that in some other jurisdictions has been introduced by way of legislation after a careful policy review and in other jurisdictions is simply impermissible. It is not a remedy foreshadowed by the Law Commission in its report. It has been adopted by some lower courts in the United States in different circumstances and has received at best a lukewarm and at worst a hostile reception from higher courts. As a remedy it is controversial as Professor Mulheron demonstrates in her comprehensive works in this area of the law.

[85] It is at this point that the warning I sounded earlier, about the court not making policy decisions that are properly the preserve of the legislature, comes to the fore. In my view the suggested remedy is not a permissible one. It departs from the purpose of the class action to compensate those who have suffered loss for that loss, by stripping them of their claims, with the excuse that as they are small they are worthless,

[60]Para 3 ante.

and vests those claims in others to pursue in their own interests. Worthy though those interests are that cannot justify the court in permitting this. It would not involve a development of the common law, but rather a substantial alteration to it. The new principle that would be created would be that where a large number of people had relatively small claims against a defendant, that it would not be worth their while to pursue individually, those claims can be confiscated from them by judicial *fiat* and vested in a person that will be able to use the proceeds of those claims in a socially useful manner. In my view that is a bridge we should decline to cross.

[86] Does that mean that, where the claims are so small that there is no practical way in which to pursue them and distribute the proceeds to the individual claimants, no class action can be brought? In my view not. The problem can be solved by a small extension of our existing principles of the law governing damages along the lines suggested in the Law Commision's working paper. The action proceeds on the basis that the claim is one to recover the damages suffered by the members of the class. Where those damages are all of the same nature, which is the case here where the complaint is that consumers were allegedly unlawfully forced to pay more for bread than they would otherwise have done, they can be computed on an aggregate basis using well-established statistical methods. There is nothing novel in this. Statistical methods are used in many aspects of the computation of damages.

[87] Once the aggregate damages have been computed the next step is for the appellants to identify the mode of distribution that will serve as a surrogate for the distribution directly to individuals of the amount of their loss. That may be by way of a targeted price reduction for a period, a

remedy that Professor Mulheron says has been found to be 'particularly effective for remedying overcharges on items which are repeatedly purchased by the same individuals'.[61] Alternatively it may be by way of distribution in a way that can be shown to be likely to benefit, directly or indirectly, the members of the class. This calls for the type of judicial creativity that Harms JA said is essential to provide an effective relief to those affected by a constitutional breach.[62] As we are extending the availability of a class action in order to give effect to the right of access to courts it is incumbent on us to ensure that the right is rendered effective by ensuring that appropriate remedies will flow from its exercise.[63] In my judgment that can be done in a class action for damages, where the damages cannot be distributed practicably to the members of the class, by way of alternative methods that will, directly or indirectly compensate the members of the class for their loss. The methods outlined above are examples of how that can be done, but do not constitute a closed list of possibilities. In each case the proposed remedy must be identified at the outset and must be appropriate to the facts of the particular case. What is impermissible is the type of remedy proposed in the present case where the members of the class are not compensated either directly or indirectly for the loss they have suffered.

Conclusion in respect of Class1

[88] In my judgment on the record before us the appellants have shown that there is a potentially viable claim for delictual damages vested in a class of consumers. That does not mean that the claim is a good claim in

[61]Mulheron, supra 427. See the potential pitfalls with this remedy in her *The Modern Cy-près Doctrine* 218-222.
[62]*Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae): President of the Republic of South Africa & others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) para 42.
[63]*Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 19 and 69.

law or that on these papers there is sufficient evidence available to demonstrate the existence of a prima facie case if it is sound in law. Those matters are not yet ripe for determination for the reasons given in para 75. All that can be said at this stage on these papers is that the claim is not legally untenable. The class is defined in terms that are overbroad, but there are grounds for believing that it is capable of more precise definition. The case raises issues common to all members of the class. It may, however, be open to attack both as a matter of law and on the grounds that there is insufficient evidence to sustain it even at a prima facie level. That can only be determined once a complete set of affidavits has been filed. In addition the relief that the appellants have indicated they wish to claim is not competent. However, there is no reason to think that in the light of the principles laid down in this judgment an appropriate prayer for relief cannot be formulated.

[89] I have considerable sympathy for the learned acting judge who was confronted with this application on a basis of extreme urgency and had to wrestle with these novel and difficult issues within a short time and against a background where there was no clarity as to the requirements for a class action beyond those he distilled from the Law Commission's report. In addition the arguments presented to us were not presented to him and he did not have the advantage we have had of full argument and reference to international authority by able counsel. His principal concern appears to have lain with the appellants' view that the claim against Tiger would prescribe and the consequent prayer to be permitted to issue summons before certification, which he treated as a prayer for final relief. That concern may have been misplaced. If, as we now hold, an application for certification is the first necessary step in proceedings to pursue a class action there is much to be said for the

proposition that, for purposes of prescription, service of the application for certification would be service of process claiming payment of the debt for the purposes of s 15(1) of the Prescription Act.[64] Such an interpretation would be supported by cases, where the institution of similar necessary preliminary proceedings, have been held to constitute the bringing or commencement of suit for various purposes.[65]

[90] Even if the prayer seeking authority to issue summons before finalising the issue of certification was bad, it did not necessitate the dismissal of the application at that stage. Had the learned acting judge had deployed before him the arguments that we have heard, and had the benefit of knowing the parameters that we now lay down within which such applications must be determined, I do not think that he would have disposed of the application in that summary way. He would (and should) have refused to certify the claim in respect of the national complaint now described as the claim in respect of Class 2. However, viewing the claim in respect of Class 1 in the light of the requirements of this judgment, he should have required that the appellants supplement their application by presenting a draft set of particulars of claim and afforded them the opportunity of addressing the issues of a prima facie case, the definition of the class, the appropriateness of the relief being claimed and the suitability of the representative (in the sense dealt with in paras 47 and 48) in further affidavits. He should then have given an opportunity to the respondents to file full answering affidavits and to the appellants to reply, after which the application could have been dealt with in the light of a full appreciation of the respective parties' cases.

[64] Act 68 of 1969.
[65] *The Merak: T B & S Batchelor & Co Ltd (Owners of Cargo on the Merak) v Owners of SS Merak* [1965] 1 All ER 230 (CA) at 238 ''(t)o bring suit, it is said, means to pursue the appropriate remedy by the appropriate procedure'. *Dave Zick Timbers (Pty) Ltd v Progress Steamship Co Ltd* 1974 (4) SA 381 (D) at 384A-D; *IGI Insurance Co Ltd v Madasa* 1995 (1) SA 144 (TkA) at 147B-C.

[91] As that is the approach that in my judgment should have been adopted, the appeal must succeed in relation to Class 1 and the matter must be referred back to the high court to be dealt with in accordance with the requirements of this judgment. In view of the fact that this is novel litigation, in which at first instance the parties were in large measure operating in the dark, and in view of the fact that such success as the appellants have obtained as a result of this judgment may in the long run bring them little advantage, the fairest order to make in regard to costs is that all the parties should bear their own costs in this appeal.

[92] The following order is made:

1 The appeal against the refusal to certify a class action in respect of the national complaint and the class 2 claimants is dismissed.

2 The appeal against the refusal to certify a class action in respect of the Western Cape complaint and the class 1 claimants is upheld and the application is remitted to the high court for determination in accordance with the principles in this judgment.

3 The order of the high court is set aside and replaced with the following order:

(a) If the applicants choose to pursue the application they are granted leave to supplement their papers within two months of this order by delivering supplementary affidavits, to which are annexed a draft set of particulars of claim in respect of their delictual claim against the respondents, embodying such further evidence as they deem meet in amplification of that claim.

(b) The respondents are to deliver such further answering affidavits as they deem meet within four weeks of the date for delivery of the affidavits referred to in para (a) of this order.

(c) The applicants are afforded two weeks thereafter to deliver their replying affidavits, if any.

(d) The costs of the application are reserved.

4 Each party is ordered to pay his, her or its own costs of this appeal.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	W H van der Linde SC (with him Steven Budlender and Michelle le Roux), the heads of argument having been prepared by Wim Trengove SC with Mr Budlender and Ms Le Roux. Instructed by: Abrahams Kiewitz Attorneys, Cape Town Honey Attorneys, Bloemfontein
For first respondent:	S F Burger SC (with him J P V McNally SC and J A Cassette) Instructed by: Cliffe Dekker Hofmeyr Inc, Sandton Symington & De Kok, Bloemfontein.
For second respondent	John Dickerson SC (with him Michelle O'Sullivan and Ross Garland) Instructed by: Edward Nathan Sonnenbergs, Cape Town Matsepes Inc, Bloemfontein
For third respondent	David Unterhalter SC (with him Max du Plessis and Michelle Goodman) Instructed by: Nortons Inc, Sandton McIntyre & Van der Post, Bloemfontein.
For amicus curiae	Tembeka Ngcukaitobi, the heads of argument having been prepared by Geoff Budlender SC with Mr Ngcukaitobi. Instructed by:

Bloemfontein Justice Centre, Bloemfontein.