



DISPUTES

A welcome step towards legislative reform of Class Actions in South Africa

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Current regulatory framework for class actions in South Africa

The South African Law Commission (as it was known at the time) published a report in August 1998 on class actions and public interest actions entitled "The recognition of class actions and public interest actions in South African Law" Project 88 (1998) ("the 1998 Report"). It was recommended in the 1998 Report that "The principles underlying class actions and public interest actions should be introduced by an Act of Parliament and the necessary procedures by rules of court. The Act and the rules should be introduced as a matter of urgency."

Although case law to date has greatly assisted with the development and refinement of the certification process of South African class actions, the regulatory framework for the procedure and conduct of class actions is yet to be further developed, especially from a case management perspective, even if guidance could, broadly speaking, be obtained from case law in the absence of any formal legislative framework governing class actions in South Africa.

Latest legislative developments effective from 19 September 2025

On 15 August 2025, 27 years since the publication of the 1998 Report, the Department of Justice and Constitutional Development published in the Government Gazette amendments to the Rules of Court which will, effective from 19 September 2025, introduce a definition for "class action" and a new Rule 11A providing for the "Certification of class actions" ("the certification rules").

The majority of the provisions of the certification rules appear to incorporate, with further augmentation, the class action provisions set out in the draft Public Interest and Class Actions Bill, as published in the 1998 Report ("the draft Bill"), which provisions deal with the institution of a class action, certification, the representative in a class action and notice in class actions.

The certification rules set out when an action shall proceed as a class action and provides that an application for certification of an action as a class action shall be made to court on notice of motion supported by an affidavit.

The provisions of Rule 11A(3)(a) that deal with the factors that must be set out in an affidavit in support of an application for certification encapsulate the elements which the Supreme Court of Appeal provided in *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* that should guide a court in making a certification decision.

In terms of Rules 11A(3)(a) and 11A(3)(b), the affidavit must, in addition to setting out any other relevant factor which may have a bearing on the granting or refusal of the application for certification, specifically set out factors which establish that

- (i) it is in the interest of justice to certify the action as a class action;
- (ii) there is a class identifiable or definable by specified objective criteria;
- (iii) there is a cause of action raising a triable issue;
- (iv) the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class;
- (v) whether the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;
- (vi) where the claim is for damages, whether there is an appropriate procedure for allocating the damages awarded to the members of the class;
- (vii) 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; and
- (viii) whether the applicant is suitable to be permitted to conduct the action and represent the class. Rule 11A(4) sets out what the affidavit must indicate to support the suitability of the applicant.

The affidavit must also, in terms of Rule 11A(5), stipulate whether the class will be an opt-in or opt-out class or a combination of both and must be accompanied by a draft Particulars of Claim setting out the grounds upon which the plaintiff's action will be based.

Rules 11A(6) and 11A(7) set out directions which the court, certifying an action as a class action, may give with regards to the nature, form and manner of the notice of the action and that such a court may make any other order which it deems appropriate in the interest of justice.

The following provisions of the draft Bill, and legislative reform as recommended in the 1998 Report, unfortunately remain unregulated: the procedure and conduct in the prosecution of class actions, appointment of a commissioner by the court to collate evidence and make recommendations, determination of damages in a class action, appeals against class action judgments and that settlement, abandonment and discontinuance can only take place upon obtaining prior approval from court. It is unclear if such provisions are still to follow as further amendments to the Rules of Court or what the legislature envisages with these provisions of the draft Bill and recommendations contained in the 1998 Report that are, after close to three decades, yet to be enacted.

The certification rules, once in effect, will assist to provide clarity and legal certainty as to the application process to have an action certified as a class action and is a welcome step towards legislative reform of class actions in South Africa but further legislative reform is still required.

There remains a dire need for clear guidance to be provided as to the procedural mechanics and conduct of class action cases to ensure its timely, proactive, cost-effective, efficient and pragmatic adjudication. Such guidance is in the interest of all parties concerned.

[1] GN R6504 GG 53149 of 15 August 2025.

[2] Pages 15 to 18 of <https://www.saflii.org/za/gaz/ZAGovGaz/2025/1056.html>.

[3] 2013 (2) SA 213 (SCA).



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