The advent of amendments to the Competition Act No. 89 of 1998 has, at least for one of those chapters, being chapter 4A dealing with market inquiries become a reality.

The most notable decision is Children's Resource Centre Trust vs Pioneer Food Proprietary Limited (50/2012) [2012] ZASCA 182 (29 November 2012). The Pioneer Food matter dealt with an alleged cartel in the bread industry in so far as the fixing of the bread price was concerned in certain provinces in South Africa. The matter came before the Supreme Court of Appeal from the Western Cape High Court, Cape Town. The class issue before the Supreme Court of Appeal was "[w]hen may a class action be brought and what procedural requirements must be satisfied before it is instituted?"  

The issue of a class action arose due to the fact that the appellants were all constituted as non-governmental organisations that work amongst children, the poor and the disadvantaged "of whom there are so many in our society."  

The further enhancement of the initial application of a class action was occasioned by the Centre Coordinator of the Children's Resource Centre in his founding affidavit in the proceedings in the Western Cape High Court, Cape Town, where he stated that "[e]very consumer who bought their products during the period in question suffered damages as a result of the unlawful price fixing and other prohibited practices."  

In addition, there was an attempt by the appellants to bring their claim within the confines of the Constitution of the Republic of South Africa, 1996 for certain infringements of the rights of the members of the class based on section 27(1)(b) of the Constitution. 

The rationale for introducing the constitutional challenge was to ensure that the provisions of section 38(c) of the Constitution were available to the appellants. Generally speaking,
and prior to the Pioneer Food judgement, class actions were only permitted in so far as the plaintiffs were basing their cause of action on a constitutional right. The introduction of the constitutional challenge required the Supreme Court of Appeal to revisit the issue of whether or not a class action may be introduced in the absence of a challenge based on a constitutional right.⁶

The most important issue concerning class actions, as identified by the Supreme Court of Appeal, is the scope and ambit of the class, i.e. who is bringing the action on behalf of whom:

“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 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.”⁷

Examining the basis upon which and when a class action may be brought in South African law, required, as stated, the Supreme Court of Appeal to examine whether or not class actions were limited only to challenges based on constitutional rights. The Supreme Court of Appeal was convinced that class actions now find a place in South African civil procedure even where a cause of action is made without a constitutional challenge required the Supreme Court of Appeal to examine whether or not class actions now find a place in South African civil procedure. The most important issue concerning class actions, as identified by the Supreme Court of Appeal, is the scope and ambit of the class, i.e. who is bringing the action on behalf of whom:

The requirements necessary for a class action in South African law. The requirements examined by the Supreme Court of Appeal are certification, class definition, a cause of action raising a triable issue, common issues of fact of law and the identity of the representative. Each of these requirements is examined closely by the Supreme Court of Appeal and particular criteria are imposed in respect of how one is to meet these requirements as a particular class in any potential class action:

The requirements are:

**Certification**

It is now a requirement that a person seeking to institute a class action must obtain certification of that class from a court. In order for the class to be certified, the following criteria are imposed:

- The existence of a class identifiable by objective criteria;
- 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 the claim is for damages where 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.”⁸

**Class definition**

The Supreme Court of Appeal held that the class must be defined “with sufficient precision so that a particular individual’s membership may be objectively determined by examining their situation in the light of the class definition.”⁹

Therefore, the class may not be too broad as it will then fail as a class.¹⁰ The circumstances of each of the members of the class must be similar and not to disparate or else the class will also fail.¹¹

The Supreme Court of Appeal held that in so far as the composition of a class is concerned that “[t]he 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.”¹²

**A cause of action raising a triable issue**

The cause of action that is used as the basis upon which the class action is to be instituted must be possible of being tried. Therefore, the requisite amount of factual support for the claim must exist together with the proper evidence indicating a probable cause of action that may be tried in a court. “The answer is that, provided a novel claim is legally plausible, the standard is met and the claim survives scrutiny and must be determined in the course of the action.”¹³ It is therefore a requirement now of class actions that the applicant class must include within its application papers to be certified a draft set of pleading and set of affidavits setting out the basis for the proposed action:¹⁴

“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 affidavits that are accompanying the application for certification must set out the evidence available to the applicants to support the existence of the class. The civil process would be to file the requisite papers on the basis that “the application [must be] accompanied by a draft set of particulars of claim in which the cause of action [is] pleaded, the class defined and the relief set out”, then the process of certifying the class is clearer.

In addition, the Supreme Court of Appeal stated, with reference to the particular circumstances in the Pioneer Food case, that “[t]he 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

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⁶ See paragraph 15 of the Pioneer Food judgement
⁷ At paragraph 18 of the Pioneer Food judgement
⁸ At paragraph 21 of the Pioneer Food judgement
⁹ See paragraph 23 of the Pioneer Food judgement
¹⁰ At paragraph 26 of the Pioneer Food judgement
¹¹ At paragraph 29 of the Pioneer Food judgement
¹² At paragraph 31 of the Pioneer Food judgement
¹³ At paragraph 34 of the Pioneer Food judgement
¹⁴ At paragraph 37 of the Pioneer Food judgement
¹⁵ See paragraph 39 of the Pioneer Food judgement
case and the means by which that evidence would be procured. That procedure should be followed in future applications."

**Common issues of fact or law**

The Supreme Court of Appeal held that the claim advanced by a class "requires that the issues of fact, or law, or both fact and law, that are common to all members of the class and can appropriately be determined one action."²⁰

Importantly, the Supreme Court of Appeal held that the class action does not have to dispose of every aspect of a claim in order for the class to be certified but merely certain elements of the cause of action such as negligence or causation.²²

**The representative**

A fundamental requirement is that the representative of the class is to have no conflict of interest with the class or members of the class. The inquiry into a conflict of interest also extends to the representative attorneys or lawyers of the class concerned.²¹

The primary criteria applicable to the representative are therefore that the representative is able to conduct the litigation properly on behalf of the class and has no interest and conflict with the members of the class.

In relation to the ability to conduct litigation by the representative, the criteria that are to be applied are as follows:

"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."²²

Applying the process and criteria identified by the Supreme Court of Appeal to the facts in the Pioneer Food case, the Supreme Court of Appeal was only able to certify one class of potential applicants, being those situated in the Western Cape Province and dismissing certification of a second class of potential applicants situated in Gauteng, the North West Province, Limpopo and Mpumalanga.

The existence of the class was determined with reference to the particular facts of an alleged cartel operating in relation to the fixing of bread prices in the provinces concerned and the legal aspects concerning how to apply any anti-competitive behaviour to the members of that class. The factual basis for the claim by the appellants was that "[c]onsumers of bread in the Western Cape are 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."²³ The assessment of this argument by the Supreme Court of Appeal was as follows:

"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 [Competition] 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 [Competition] 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, 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 ordered increased of list prices. In support of such a duty they point to s 65(6) of the [Competition] 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."

The Supreme Court of Appeal was of the view that the class that was proposed to exist in the Western Cape be defined correctly and more narrowly with reference both to the nature of the damages suffered by members of the class and the members of the class themselves. In this regard, the papers before the Western Cape High Court, Cape Town, would have to be supplemented in order to ensure that the class was more carefully defined:²⁵

"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 Statics 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."²⁶

In relation to the remedy that is to be applied to the class, that remedy lies in the aggregation of the awarded damages or a settlement amount in a way that could reasonably compensate or benefit the class members especially "where actual division and distribution of the award among the class members is impossible or impractical".²⁷

The Supreme Court of Appeal required that the damages sought as a remedy be sought in an aggregated assessment and not in a manner that somehow removes the right of that remedy from each member of the class. In the Pioneer Food matter, the remedy that was sought was the payment of damages into a trust or such similar vehicle, which would

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²⁰ At paragraph 39 of the Pioneer Food judgement
²¹ See paragraph 45 of the Pioneer Food judgement
²² At paragraph 47 of the Pioneer Food judgement
²³ At paragraph 48 of the Pioneer Food judgement
²⁴ At paragraph 63 of the Pioneer Food judgement
²⁵ At paragraph 78 of the Pioneer Food judgement
²⁶ At paragraph 77 of the Pioneer Food judgement
²⁷ At paragraph 64 of the Pioneer Food judgement
²⁸ See paragraph 44 of the Pioneer Food judgement
²⁹ See paragraph 43 of the Pioneer Food judgement
³⁰ See paragraph 41 of the Pioneer Food judgement
³¹ See paragraph 40 of the Pioneer Food judgement
then fulfil a mandate of feeding the poor or hungry.

The Supreme Court of Appeal was critical of such a remedy as it did not compensate the members of the proposed class in any way. Instead, the Supreme Court of Appeal required that there be an aggregation of damages in order to ensure that the some measure of money was paid or payable to each member of the class in so far as the class was ultimately successful in its action:

“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 Commission’s working papers. 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.”

In relation to the existence of the classes that were before the Supreme Court of Appeal, the Supreme Court of Appeal declined to certify the second class but allowed for the certification of the first class by applying the criteria established by the Supreme Court of Appeal. With reference to the decision of the Western Cape High Court, Cape Town, the Supreme Court of Appeal held that the Judge in the Cape Town High Court “should have required that the appellants supplement their application by presenting a draft set of particulars of claim and afford 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 respondent 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.”

Conclusion

The South African law of class actions has been materially advanced by the Pioneer Food decision and relative clarity has been provided in relation, importantly, to the criteria to be used to determine and certify a class and the process to be followed by potential class action litigants for purposes of outlining their causes of action and the manner in which the civil process is to be followed and developed to this end.

Obviously, greater clarity would be appreciated in amendments to the Uniform Rules of the High Court and other courts in order to ensure that the introduction of class actions is suitably consistent with existing South African Civil Procedure.
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