CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 131/12
[2013] ZACC 23

In the matter between:

IMRAAHN ISMAIL MUKADDAM	Applicant
and	
PIONEER FOODS (PTY) LTD	First Respondent
TIGER CONSUMER BRANDS LIMITED	Second Respondent
PREMIER FOODS LIMITED	Third Respondent
and	
LEGAL RESOURCES CENTRE	Amicus Curiae

Heard on : 7 May 2013

Decided on : 27 June 2013

JUDGMENT

JAFTA J (Moseneke DCJ, Bosielo AJ, Khampepe J, Nkabinde J and Zondo J concurring):

Introduction

[1] In our constitutional dispensation everyone is guaranteed access to a competent court to have their dispute resolved by the application of law and decided in a fair manner.[1] But this guarantee does not include the right to choose the method of approaching and placing a dispute before a particular court. The determination of the process to be followed when litigants approach courts is left in the hands of the courts.

[2] Section 173 of the Constitution recognises and preserves the courts' power to determine how disputes are to be placed before them.[2] Our superior courts enjoyed this power even before the adoption of the Constitution.[3] This case concerns the exercise of this power by the Western Cape High Court, Cape Town (High Court) in circumstances where the applicant sought permission to institute a class action against the respondents. The claims to be pursued are for the payment of damages allegedly suffered by members of a particular class as a result of certain conduct by the respondents.

The facts and litigation history

[3] The applicant in this application for leave to appeal is Mr Imraahn Ismail Mukaddam. At the relevant period, he carried on the business of distributing bread in the Western Cape. He purchased bread from some of the respondents who are major

[1] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[2] The full text of section 173 is quoted in [33] below.

[3] Then the source of the power was the common law.

bread producers, and sold it to informal traders from whom consumers bought their bread. The record shows that there were approximately 100 distributors like the applicant in the Western Cape.

[4] The respondents are Pioneer Foods (Pty) Ltd (Pioneer Foods), Tiger Consumer Brands Limited (Tiger Brands) and Premier Foods Limited (Premier Foods). All are producers of bread from whom the applicant and other distributors sourced their supplies. However, the respondents' businesses are not confined to the Western Cape Province. They trade throughout the country.

[5] In 2006 the Competition Commission launched an investigation against the respondents, following complaints that they were involved in anti-competitive behaviour in dealing with bread distributors in the Western Cape. The applicant was one of the individuals who submitted complaints to the Commission. The investigation was undertaken in terms of the Competition Act.[4] Premier Foods sought leniency from the Commission and came forward with the disclosure of how it had engaged in anti-competitive conduct with the other respondents in violation of the Competition Act. The Commission has a corporate-leniency policy in terms of which business entities who cooperate in its investigations are rewarded with the imposition of lenient fines.[5]

[4] 89 of 1998.

[5] *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others* [2012] ZASCA 134; [2012] 4 All SA 365 (SCA).

[6] The disclosure by Premier Foods led to the expansion of the Commission's investigation to other parts of the country. Tiger Brands was among the entities implicated in the disclosure. It negotiated and concluded a settlement agreement with the Commission in relation to unlawful conduct in the Western Cape and other parts of the country. A penalty of nearly R99 million was imposed on Tiger Brands.

[7] The complaints against Pioneer Foods were referred to the Competition Tribunal for adjudication. A lengthy hearing ensued which culminated in Pioneer Foods being found guilty of anti-competitive conduct in breach of the Competition Act. Approximately R196 million in penalties were imposed on it.

In the High Court

[8] The applicant and two other persons[6] instituted an application in the High Court for certification authorising them to bring a class action against the respondents. The application was opposed by the respondents.

[9] In deciding whether to grant certification or not, the High Court focussed on two requirements only. First, it considered whether the cause of action identified by the applicants raised triable issues. But in this regard the High Court looked at only two of the three causes of action mentioned in the applicants' founding papers. With regard to the claim for damages based on section 22 of the Constitution, the High Court held that the section affords protection to individual citizens and not corporate

[6] One of the parties was a juristic person.

entities. No ruling was made in relation to the present applicant and another litigant, both natural persons.

[10] The second requirement considered by the High Court was whether common issues of fact or law would be raised in the proposed class action. Regarding the applicant, the High Court considered the arguments made in support of contractual claims. The applicant alleged that Pioneer Foods and Premier Foods had breached agreements he had with them for the supply of bread. The Court compared these claims to those of the other two applicants and concluded that the issues to be raised were different. Accordingly certification was refused.

[11] The High Court overlooked a third cause of action mentioned in the papers. This related to the cause of action based on the anti-competitive conduct in breach of the Competition Act. The applicants had asserted that they would seek damages sustained by them and other distributors as a result of the unlawful conduct for which the respondents were penalised by the Commission.

[12] In the founding affidavit deposed to by the present applicant, he alleged:

> "Every distributor suffered damages as a result of the unlawful price fixing and other prohibited practices which the respondents engaged in.
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> The bread distributors who distributed bread during the period in question were particularly affected and suffered damages as a result of the respondents' unlawful and prohibited collusion:

1. that discounts (commissions) given by all three firms to agents in Paarl would be capped at 90c and 75c for agents in the Cape Peninsula; and
2. that none of the firms would supply new distributors.

The principal relief which will be sought in the class action is to recover the damages suffered by the distributors in consequence of the respondents' unlawful conduct.

It is not possible to quantify this with any degree of exactitude at this time since we require access to and detailed analysis of the relevant records and accounts of the respondents. In the nature of things, the applicants do not have access to these records and accounts before instituting proceedings. In the class action, the applicants will therefore seek an accounting and a debate of account in order to establish the damages which have been suffered by the class. Early discovery will also be sought in this application."

In the Supreme Court of Appeal

[13] With leave of the Supreme Court of Appeal, the applicant appealed to that Court against the High Court order refusing him permission to institute a class action. The Supreme Court of Appeal also granted leave in a related matter involving a similar request by the consumers who claimed to have sustained damages as a result of the respondents' collusive and unlawful conduct.[7] A panel of five Judges heard both appeals.[8] Judgments in these cases were delivered on the same day.[9] The reasoning in the judgments was, except in respect of one point, synchronic. The discordant aspect related to what a party is required to establish for certification of an "opt-in" class action.

[7] *Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA) (*Children's Resource Centre*).

[8] They were Nugent JA, Ponnan JA, Malan JA, Tshiqi JA and Wallis JA.

[9] 29 November 2012.

[14] Apparently in the exercise of its inherent power, the Supreme Court of Appeal in *Children's Resource Centre* pronounced that class actions should not be limited to constitutional claims. Writing for a unanimous Court, Wallis JA rejected the call made from certain quarters that courts should wait for the Legislature to pass a law extending class actions to other claims. He held that courts must prescribe an appropriate procedure to enable litigants to institute class actions. He proceeded to determine "the broad parameters within which class actions may be pursued and to lay down procedural requirements that must be satisfied"[10] when a class action is to be instituted.

[15] The Supreme Court of Appeal then endorsed the notion that prior certification by a court is necessary for the institution of a class action. It proceeded to lay down requirements which must be met in an application for certification. First, it said the class on whose behalf the action would be brought must have identifiable members, even if it is some and not all members that are capable of being identified. The baseline is that the class must be defined with sufficient precision that permits an objective determination of who qualifies as a member.

[16] Second, an applicant for certification must show that the class has a cause of action which raises a triable issue. In the case of a novel claim, for example a claim

[10] *Children's Resource Centre* n 7 at para 22.

based in delict, the applicant is required to allege facts sufficiently showing that a new claim must be recognised when policy issues are taken into account.[11]

[17] Third, the various claims by members of the class must raise common issues of fact or law. The commonality must be of a nature that the determination of the issue may be achieved by deciding a single ground common to all claims.

[18] Fourth, a representative in whose name the class action would be brought must be identified. The interests of the representative must not be in conflict with those of the members of the class. In addition the representative must have the capacity to prosecute the class action, including funds necessary for litigation.[12]

[19] Writing in this case, Nugent JA simply transposed and applied the requirements laid down by Wallis JA in *Children's Resource Centre*. In this regard he said:

> "I have already joined with Wallis JA in the appeal in the [*Children's Resource Centre*] case in recognising class actions as a permitted procedural device for pursuing claims, where the case calls for it, so as to permit those who are wronged to have access to a court. I need not repeat what will need to be shown for such a class action to be certified. I need say only that included amongst them the applicants for certification will need to satisfy a court, where a novel cause of action is sought to be established, that the claim is at least legally tenable, albeit that the court is not called upon to make a final determination as to the merits of the claim, and that a class action is the most appropriate means for the claims to be pursued. Failing that, the

[11] Id at para 37.

[12] Id at para 48.

> certification of a class action holds the potential only to be oppressive to the proposed defendants."[13]

[20] This was followed by an analysis of the claims set out in the founding papers lodged in the High Court. The analysis commenced with a consideration of the claim based on section 22 of the Constitution.[14] The Supreme Court of Appeal listed three hurdles standing in the way of this claim. The first was that the evidence did not show that members of the class are citizens, in view of the fact that section 22 guarantees rights to citizens only. The second was that some of the proposed claimants would be juristic persons on whom no rights are conferred by the section. The third was that on the reading of the section by the Supreme Court of Appeal, it did not guarantee success once a trade, profession or occupation has been entered.

[21] Turning to the claim for damages based on the anti-competitive conduct that contravened the Competition Act, the Supreme Court of Appeal held that this claim was not tenable in law. The Court reasoned thus:

> "The Competition Act does not purport to protect the profits that an enterprise will make. On the contrary, at least so far as the distribution of bread is concerned, it is designed to protect consumers against excessive prices emanating from anti-competitive behaviour. The effect of the appellants' claims is to assert that it was they, instead of the producers, who were entitled to reap the rewards of the prohibited

[13] *Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others* [2012] ZASCA 183; 2013 (2) SA 254 (SCA) (*Mukaddam*) at para 4.

[14] Section 22 provides:

> "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

> conduct. They assert a right to transfer to themselves the profits that the producers made, which in my view is simply untenable."[15]

[22] The Supreme Court of Appeal went further to consider whether in the present circumstances delictual claims could be legally tenable. It concluded that they could not. On this aspect the Court said:

> "Reliance upon delictual claims takes the matter no further. It can be taken now to be well established that the recognition of claims for pure economic loss is heavily policy laden. Nothing was advanced on behalf of the appellants to suggest that public policy calls for recognition of a claim to maximise profits from the sale of bread, least of all to reap the rewards of price fixing. The fact alone that the fixing of prices for bread is prohibited is sufficient to dispose of any suggestion that policy requires a claim to be recognised for the recovery of profits from the practice. Indeed, the corollary of our finding in [*Children's Resource Centre*] that a claim by consumers is potentially plausible is destructive of the distributors' case."[16] (Footnote omitted.)

[23] Because the applicant sought to pursue an "opt-in" class action in terms of which claimants would join the class as a matter of individual choice, the Supreme Court of Appeal held that the circumstances of the case did not warrant a class action since joinder under Rule 10 of the Uniform Rules of Court allows multiple plaintiffs to join in a single action.[17] The Court recorded that the only advantage in favour of

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[15] *Mukaddam* above n 13 at para 9.

[16] Id at para 10.

[17] Rule 10(1) provides:

> "Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing."

the class action which was advanced on the applicant's behalf was that he would be insulated against personal liability for costs. The Court did not consider this to be adequate to move it to authorise the institution of a class action where access to court may equally be achieved by means of a joint action.

[24] In rejecting the reason put forward on behalf of the applicant in support of certification, the Supreme Court of Appeal said:

> "That does not seem to me to be a good reason for allowing a class action. On the contrary, the potential for personal liability for costs will often serve as a salutary restraint upon frivolous actions that are brought oppressively for the purpose of inducing defendants into financial settlements, which is one of the dangers to be avoided in certifying class actions. Indeed, the court that becomes seized of the case has a wide discretion to determine where the costs should fall, taking account the merit of the claim and the conduct of the litigation, and is better placed to do so than a certifying court. Although I do not close the door to an 'opt in' class action in my view the circumstances would need to be exceptional before one would be allowed, and nothing exceptional has been shown in this case."[18]

[25] The appeal was then dismissed but in view of the novelty of the claim, no order was made for costs. The applicant seeks leave to appeal against the order of the Supreme Court of Appeal.

Leave to appeal to this Court

[26] Implicating as it does the exercise of the power located in section 173 of the

[18] *Mukaddam* above n 13 at para 14.

Constitution[19] and access to courts which is guaranteed to everyone by the Bill of Rights, this matter clearly raises constitutional issues of considerable importance. In addition the scales are tilted in favour of granting leave in the interests of justice. As just mentioned, the case raises important constitutional questions, some of which are presented to this Court for the first time. The judgment of this Court will benefit litigants who wish to access courts through the institution of class actions. It will also serve as a guide to courts of first instance when called upon to exercise the power in section 173, with a view to determine whether in a particular case, the institution of a class action should be permitted. Our judgment will also guide appeal courts in assessing whether the exercise of that discretion was done judicially. Therefore, leave must be granted.

Issues

[27] The main issue is whether the High Court has properly exercised the power to protect and regulate its process when it refused to certify the institution of a class action in this case. But the question that precedes this issue is whether the Supreme Court of Appeal, against whose order leave to appeal is sought, was right in dismissing the applicant's appeal and endorsing, albeit for different reasons, the High Court's decision. All parties having accepted that the standard laid down by the Supreme Court of Appeal in *Children's Resource Centre* is correct, the third question is whether the correct test for certification was applied by that Court in this case.

[19] The full text of section 173 is quoted in [33] below.

Constitutional and legal background

[28] For a proper determination of these novel issues, it is necessary to commence with an outline of relevant constitutional and other legal provisions. Our Constitution guarantees everyone the right of access to courts which are independent of other arms of government.[20] But the guarantee in section 34 of the Constitution does not include the choice of procedure or forum in which access to courts is to be exercised. This omission is in line with the recognition that courts have an inherent power to protect and regulate their own process in terms of section 173 of the Constitution to which I will turn in a moment.

[29] Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the State. Our courts are mandated to review the exercise of any power by State functionaries, from the lowest to the highest ranking officials.

[20] Section 34 quoted above n 1 read with section 165 of the Constitution. Section 165 provides:

> "(1) Judicial authority of the Republic is vested in the courts.
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> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
>
> (3) No person or organ of state may interfere with the functioning of the courts.
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> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
>
> (5) An order or decision issued by a court binds all persons whom and organs of state to which it applies."

[30] In *Chief Lesapo v North West Agricultural Bank and Another*,[21] this Court underscored the importance of access to courts in these terms:

> "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable."[22] (Footnote omitted.)

[31] However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute. In the main these procedures are contained in the rules of each court. The Uniform Rules regulate form and process of the High Courts. The Supreme Court of Appeal and this Court have their own rules. These rules confer procedural rights on litigants and also help in creating certainty in procedures to be followed if relief of a particular kind is sought.

[32] It is important that the rules of courts are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for courts and not that the courts are established for rules. Therefore, the primary function of the rules of courts is the attainment of justice. But sometimes circumstances arise which are not provided for in the rules. The proper course in those circumstances is to approach the court itself

[21] [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).

[22] Id at para 22.

for guidance. After all, in terms of section 173 each superior court is the master of its process.

Section 173

[33] Section 173 of the Constitution provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

Standard for certification

[34] It is apparent from the text of the section that it does not only recognise the courts' power to protect and regulate their own processes but also their power to develop the common law where necessary to meet the interests of justice. The guiding principle in exercising the powers in the section is the interests of justice. Therefore, this is the standard which must be applied in adjudicating applications for certification to institute class actions.

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

[36] Our courts are familiar with an evaluation of factors with the view to determine where the interests of justice lie in a given case. For example, this Court undertakes a similar examination in determining whether it will be in the interests of justice to grant leave to appeal. This is not to mean that the factors relevant to the enquiry are not important. But none of them is decisive of the issue. The High Court may follow a similar approach in determining applications for certification.

[37] In the light of section 34 read with section 38 of the Constitution,[23] there can be no justification for elevating requirements for certification to the rigid level of prerequisites for the exercise of the power conferred without restrictions. Indeed in section 173, the Constitution does not limit the exercise of the power nor does it lay down any condition, except that what is done must be in the interests of justice. Compelling reasons would therefore be necessary for introducing inflexible requirements.

[23] Section 38 provides:

> "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—
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> (a) anyone acting in their own interest;
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> (b) anyone acting on behalf of another person who cannot act in their own name;
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> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."

[38] Courts must embrace class actions as one of the tools available to litigants for placing disputes before them. However, it is appropriate that the courts should retain control over class actions. Permitting a class action in some cases may, as the Supreme Court of Appeal has observed in this case, be oppressive and as a result inconsistent with the interests of justice. It is therefore necessary for courts to be able to keep out of the justice system class actions which hinder, instead of advancing, the interests of justice. In this way prior certification will serve as an instrument of justice rather than a barrier to it.

[39] Flexibility in applying requirements of procedure is common in our courts. Even where enacted rules of courts are involved, our courts reserve for themselves the power to condone non-compliance if the interests of justice require them to do so. Rigidity has no place in the operation of court procedures. Recently in *PFE International and Others v Industrial Department Corporation of South Africa Ltd*,[24] this Court reaffirmed the principle that rules of procedure must be applied flexibly. There this Court said:

> "Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules."[25] (Footnote omitted.)

[24] [2012] ZACC 21; 2013 (1) SA 1 (CC); 2013 (1) BCLR 55 (CC).

[25] Id at para 30.

[40] What is said in this judgment about certification that must be obtained before instituting a class action must not be construed to apply to class actions in which the enforcement of rights entrenched in the Bill of Rights is sought against the State. Proceedings against the State assume a public character which necessarily widens the reach of orders issued to cover persons who were not privy to a particular litigation.[26] Class actions in those circumstances are regulated by section 38 which confers, as of right, the authority to institute a class action on certain persons, defined in the section. Moreover, claims for enforcing rights in the Bill of Rights may even be brought in the wider public interest without certification.

[41] In this case we are not concerned with an enforcement of a right in the Bill of Rights against the State. Although one of the claims mentioned by the applicant is for the vindication of the rights in section 22 on the Constitution, this claim is to be pursued against private companies. I prefer to leave open the question whether the institution of a class action to enforce a right in the Bill of Rights against a private litigant, requires prior certification. The issue was not canvassed before us and the interpretation of section 38 of the Constitution was not placed in issue. Parties on both sides accepted that the requirements for instituting a class action laid down in the *Children's Resource Centre* apply to this matter. That case was concerned with certification of a class action under the common law. In these circumstances it is neither prudent nor necessary to pronounce on whether prior certification must be

[26] See in this regard *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) at para 10.

obtained for class actions instituted in terms of section 38, without interpreting the section.

Proper approach on appeal

[42] Section 173 makes plain that each of the superior courts has an inherent power to protect and regulate its own process and to develop the common law on matters of procedure, consistently with the interests of justice. The language of the section suggests that each court is responsible and controls the process through which cases are presented to it for adjudication. The reason for this is that a court before which a case is brought is better placed to regulate and manage the procedure to be followed in each case so as to achieve a just outcome. For a proper adjudication to take place, it is not unusual for the facts of a particular case to require a procedure different from the one normally followed. When this happens it is the court in which the case is instituted that decides whether a specific procedure should be permitted. The determination to certify a class action is not different to exercising the power to allow one procedure instead of the other.

[43] The institution of a class action amounts to a procedural matter of choosing a process suitable to a particular case, like instituting an individual action or a joint action, both of which are regulated by the Uniform Rules. In order to avoid interfering unduly with the exercise of the power to certify a class action, a court of appeal must exercise restraint when determining an appeal against the exercise of that

power.[27] Consistent with this approach, in *S v Basson*[28] this Court rejected the argument that it should overturn the trial court's ruling, in terms of which evidence was excluded, on the basis that the ruling was wrong. This Court said:

> "Even if a discretion is not a discretion in the strict sense, there may be circumstances in which a court will nevertheless adopt an approach on appeal which will overturn the lower court's decision only if it has not been judicially made, or based on incorrect principles of law or a misappreciation of the facts. It is necessary to consider now the nature of the discretion at issue in relation to the exclusion of the bail record by the trial court.
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> Under our constitutional order, a trial court may exclude otherwise admissible evidence on the basis that it may render the trial unfair in order to protect the right to a fair trial. There can be no doubt that it is the duty of the trial court to ensure that the trial is fair in substance and the trial court is obliged to give content to this notion. In considering the approach to the exercise of discretion to exclude otherwise admissible evidence in order to ensure a fair trial upon appeal, it should be borne in mind that trial judges must be given freedom to exercise this discretion fairly on their understanding of the case before them. Courts must be slow to adopt rules which would straight-jacket a trial judge in the exercise of that discretion."[29] (Footnotes omitted.)

[44] This was the approach adopted by this Court in relation to the exercise of a similar power by the Supreme Court of Appeal in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others.*[30] This Court stated:

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[27] See *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* [1992] ZASCA 149; 1992 (4) SA 791 (A).

[28] [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC).

[29] Id at paras 111-2.

[30] [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) (*South African Broadcasting Corporation).*

> "Where the discretion is a discretion in the strict sense, in that the Court had a range of legal choices open to it, an appellate Court will ordinarily interfere with the exercise of that discretion only in narrow circumstances. However, this Court has also recognised that there will be occasions where a decision made by another Court, which does not involve the exercise of a discretion in the strict sense, will also be interfered with only in narrow circumstances. Relevant considerations in these cases will be the need for the exercise of judgment by the Court to determine whether the fairness of the proceedings before it is under threat. That judgment will often have to be exercised in the light of a range of complex factors, as this Court observed in relation to a different but related question in *Basson*:
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> > 'When a trial court assesses the question whether the admission of evidence would render the trial unfair, it has to consider a range of factors: the nature of the evidence in question, and how much of it is of advantage to the parties; the need to be fair not only to the accused but also to the prosecution, in the interests of the broader community; the need to ensure that a trial can run efficiently and reasonably quickly; and the reasons underlying the fact that the admission of the evidence may render the trial unfair. These are complex factors which may well pull in different directions.'"[31] (Footnotes omitted.)

[45] Having accepted that "the exercise of the powers recognised in section 173 is not capable of single characterisation for the purposes of determining the correct approach on appeal",[32] this Court held that interference on appeal should happen only in specific circumstances. The Court listed factors which persuaded it to conclude that intervention must be on the narrow grounds that apply to the exercise of a strict or narrow discretion. These factors included the fact that it was undesirable for this Court to instruct the Supreme Court of Appeal how to regulate the conduct of its own proceedings. This, I may add, is consistent with the proposition that power vests in

[31] Id at para 39.

[32] Id at para 40.

the court whose process falls to be protected and regulated. Ordinarily other courts do not have the authority to exercise the power in question and can intervene on appeal only if the power is not exercised judicially.[33]

[46] Another factor listed in *South African Broadcasting Corporation* was the fact that the Supreme Court of Appeal in that case was called upon to exercise a value judgment on how best to ensure that proceedings before it were conducted fairly. In addition, it was pointed out that in the exercise of the section 173 power, different courts might legitimately come to different conclusions.[34] These factors will apply equally to the exercise of the power to determine whether a class action ought to be certified. It is the court before which the class action is to be brought which is best placed to determine whether a class action in relevant circumstances will be in the interests of justice.

[47] However, this does not mean that the court of first instance is not obliged to follow the law as developed by a superior court. In deciding whether a class action should be allowed, that court is bound to apply the standard or test laid down by a superior court. This accords with the principle of judicial precedent. This means that in future the High Courts will be bound to apply the interests of justice standard and in determining where those interests lie in a given case, guidance will be sought from the factors mentioned in paragraphs 15 to 18 above. But the list of factors mentioned there is not exhaustive. A court will be free to consider any factor relevant and

[33] Id at paras 40-1.

[34] Id at para 40.

material to the enquiry. The point dealt with in this aspect of the case is, however, the identification of the standard applicable on appeal to a decision of the court of first instance on whether a class action should be permitted or not. Decisions of this Court suggest that interference on appeal is justified only if certain grounds are established.

[48] As was observed by this Court in *South African Broadcasting Corporation*, the proper approach on appeal in the present case is not whether the decision to refuse certification was correct but whether the High Court "did not act judicially in exercising its section 173 discretion, or based the exercise of that discretion on wrong principles of law, or a misdirection on the material facts."[35]

Refusal to certify

[49] With this approach in mind, it is now convenient to consider if there is justification for overturning the High Court's refusal to certify the class action. At the time the High Court considered the request, the standard applicable to such requests had not been determined and the Uniform Rules did not provide for the institution of class actions. The closest the Uniform Rules come is to authorise joint actions. The High Court was asked to negotiate uncharted waters without any guidelines. It is therefore understandable that the Court ended up applying a standard other than the interests of justice. As a result its decision was based on an incorrect test. This justifies interference with its decision on appeal.

[35] Id at para 41.

Dismissal of appeal

[50] Ordinarily the application of an incorrect standard ought to have moved the Supreme Court of Appeal to set aside the High Court's order and remit the matter to the High Court, in the same manner as it did in *Children's Resource Centre*. In that case consumers of bread sought certification to institute a class action for damages allegedly suffered by them, arising from the same anti-competitive conduct of the respondents. The claims they sought to pursue were described in terms which were as unclear as the present claims. The Supreme Court of Appeal in that case, approached the matter on the footing that it was not necessary to determine whether the consumers' claims were good in law or that on the papers as they stood then, there was sufficient evidence showing a prima facie case. The Court held that those issues were not ripe for determination due to the novel nature of the claim, its complexity and the fact that those issues were raised for the first time in the Supreme Court of Appeal.[36]

[51] But in this case the Supreme Court of Appeal adopted a different approach. It decided the very issues which it had declined to consider in *Children's Resource Centre* because it held that their determination in that case would have been premature. Here the Supreme Court of Appeal proceeded to "non-suit" the applicant on the basis of a standard established by it which did not exist at the time the application for certification was launched in the High Court. As at that stage it was not clear what were the requirements to be satisfied in an application for certification.

[36] *Children's Resource Centre* above n 7 at para 88 read with para 75.

[52] It seems to me that there are no compelling reasons for the Supreme Court of Appeal to have followed an approach different to the one it adopted in *Children's Resource Centre*. This is more so when the facts that the same panel adjudicated these cases and both judgments were delivered on the same date, are taken into account. It is clear that the Supreme Court of Appeal's judgment in *Children's Resource Centre* was prepared before its judgment in this case. Its judgment in this case refers to and adopts the standard for certification laid down in that case.[37]

[53] The only discernible distinction between these two judgments of the Supreme Court of Appeal is that in *Children's Resource Centre*, it held that the applicants had a claim that was "potentially plausible" even though the Court could not say whether the claim was good in law or that its existence was prima facie established. Here the Supreme Court of Appeal held, after evaluation, that the claims advanced were not legally tenable. It is not clear to me here why the claim that arose from the same set of facts could not be potentially plausible.

[54] More so when regard is had to section 65 of the Competition Act which permits claims for damages arising from anti-competitive conduct to be pursued only after a relevant authority under that Act has certified that the conduct in question constituted a prohibited practice.[38] The certificate issued in terms of the Competition Act

[37] *Mukaddam* above n 13 at para 4.

[38] Section 65(6) provides:

"A person who has suffered loss or damage as a result of a prohibited practice—

constitutes conclusive proof of its contents.[39] It is apparent from the text of section 65(6)(a) that a party which suffered damages as a result of anti-competitive conduct may approach a civil court for the assessment or award of damages, if that party was not awarded damages in terms of a settlement agreement converted into a consent order by the Competition Tribunal under section 49D(1) of the Competition Act.

[55] In these circumstances the Supreme Court of Appeal erred in not finding that the applicant's claim, like in *Children's Resource Centre*, was also potentially plausible. A further error committed by the Court was the finding that certification in an opt-in class action requires the applicant to show exceptional circumstances.[40] The test of exceptional circumstances is at variance with the standard laid down by that Court in *Children's Resource Centre.*

[56] For these reasons the appeal must succeed and the order issued by the Supreme Court of Appeal should be set aside. An order similar to the one issued by the

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(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."

[39] Section 65(9).

[40] *Mukaddam* above n 13 at para 14.

Supreme Court of Appeal in *Children's Resource Centre* must be granted. Its effect would be to remit the case to the High Court to be dealt with in the light of this judgment.

Costs

[57] Although this case raises constitutional issues, it is essentially a commercial matter between private litigants. I can think of no reason why the usual rule that costs follow the event should not apply here. By the reason of his success the applicant is entitled to costs in this Court as well as in the Supreme Court of Appeal.

Order

[56] In the result the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the High Court and the Supreme Court of Appeal are set aside and replaced with the following order:

"(a) Should the applicant pursue certification in the High Court, he is granted leave to supplement his papers within two months of this order, by delivering supplementary affidavits to which a draft set of particulars of claim will be attached, setting out his claim against the respondents.

(b) The respondents may deliver answering affidavits within a month from the date of delivery of affidavits referred to in (a).

(c) The applicant may deliver his reply, if any, within two weeks from the date he receives affidavits referred to in (b).

(d) The costs of the application are reserved."

4. The respondents are ordered to pay the applicant's costs in the Supreme Court of Appeal and in this Court, including costs of two counsel where applicable.

MHLANTLA AJ:

[58] I am grateful to my brother Jafta J for his judgment (main judgment), which I support subject to only one reservation. In my respectful view, I can see no reason, principled or practical, for circumscribing the reach of the certification requirement in "class actions in which the enforcement of rights entrenched in the Bill of Rights is sought against the State"[41] or for the caution expressed regarding certification in a class-action claim where horizontal application of the Bill of Rights is at issue. As I see it, given the rationale for certification and the nature of class actions, the benefits of the certification process apply in all class action suits.[42]

[59] That is not to say that the source and nature of the class-action claim will have

[41] See [40] above.

[42] This refers to the type of representative action where members of a class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation in question. In the context of constitutional claims under the Bill of Rights, section 38(c) of the Constitution specifically recognises the possibility for such class actions. See, for example, *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (ECD), where the Court considered class actions in the context of section 38 of the Constitution. There, the Court noted the potential benefits of a preliminary stage where leave has to be sought in order to proceed with the class action suit (at 624D-J). In that case, the Court crafted an order to give effect to the class action, which order was later approved by the Supreme Court of Appeal (*Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others* [2001] ZASCA 85; 2001 (4) SA 1184 (SCA)).

no relevance to the certification process. It may indeed. As the main judgment rightly emphasises, requirements for certification should "not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed."[43] Rather, courts must always have regard, ultimately, to what the interests of justice demand in a particular case.

[60] The rationale for requiring certification in class actions relates to the peculiar challenges that such litigation presents to ensuring effective and fair processes in our courts. The main judgment summarises this as follows:

> "Courts must embrace class actions as one of the tools available to litigants for placing disputes before them. However, it is appropriate that the courts should retain control over class actions. Permitting a class action in some cases may, as the Supreme Court of Appeal has observed in this case, be oppressive and as a result inconsistent with the interests of justice. It is therefore necessary for courts to be able to keep out of the justice system class actions which hinder, instead of advance, the interests of justice. *In this way prior certification will serve as an instrument of justice rather than a barrier to it*."[44] (Emphasis added.)

[61] Certification is also significant in protecting the interests of persons whose right to pursue a claim may be extinguished by a class action. The outcome of a class action, favourable or unfavourable, is binding on all members of a class. Thus, the right of those members to raise the dispute again will, in terms of our current law, be substantially limited by the application of the *res judicata* principle. The preliminary stage of certification therefore plays an important role in informing and protecting

[43] See [35] above.

[44] See [38] above.

potential class members through, for example, notification procedures.[45] To my mind, this must be so both in constitutional rights claims as well as non-constitutional rights claims, and whether the parties are State or non-State actors.

[62] I therefore support the order and the main judgment's reasoning, save for paragraphs 40 and 41 thereof.

FRONEMAN J (Skweyiya J concurring):

[63] I agree that leave to appeal must be granted and that the appeal must succeed, but I have a different understanding of the effect that the development of the common law by the Supreme Court of Appeal in *Children's Resource Centre*[46] had on its own adjudication of the present case. I also consider it necessary to expand somewhat on why I consider that the Supreme Court of Appeal's treatment of the applicant's potential claim in the proposed class action was too strict. Lastly, I express no opinion on whether certification should also be required where class actions are brought under section 38 of the Constitution, as it was not an issue before this Court and the parties were not in a position to present full argument on it.

[45] Such notification procedures are not available in joinder proceedings. By contrast, once a class is certified a court must provide for members of the class to be notified of the upcoming action. Notification procedures are particularly significant in the context of opt-out class actions because all members of the class will be bound by the judgment except for those members who actively opt out of the class. Without adequate notification procedures individuals could be bound to a judgment even though they had not explicitly consented to, and may not even have been aware of, the action.

[46] *Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA).

Development of the common law

[64] Neither the common law nor legislation made provision for a class action. The Supreme Court of Appeal developed the common law in *Children's Resource Centre* to allow for the use of a class action in non-constitutional claims not directly based on the alleged infringement of a fundamental right in the Bill of Rights. It acknowledged the source of its power to do so in section 173 of the Constitution.[47] The reasoning that led Wallis JA to this development was that it would be irrational to allow class actions for constitutional matters and not non-constitutional claims,[48] because of the similarities involved.[49] This is what gives this case much of its constitutional dimension.

[65] In *Children's Resource Centre* the Supreme Court of Appeal was careful not to tread onto policy issues in its development of the common law, because that "would not involve a development of the common law, but rather a substantial alteration to it."[50] It expressed similar caution that the factors that it mentioned should be considered in deciding whether certification of a class action should be granted, were not exclusive[51] and that the application of its guidelines would have to be applied on a case-by-case basis.[52]

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[47] Id at para 15.

[48] See section 38(c) of the Constitution.

[49] *Children's Resource Centre* above n 46 at para 21.

[50] Id at paras 22 and 85.

[51] Id at para 28:

> "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

[66] None of the parties sought to attack the Supreme Court of Appeal's approach to the development of the common law in this manner in *Children's Resource Centre*. I can find no fault with it either. To the contrary, it is an important and valuable contribution to the body of our law. It provides our courts with a flexible set of guidelines to apply in applications for the certification of class actions in common law claims, case by case.

[67] My understanding of the legal position flowing from this development is that courts are bound by the authoritative exposition of the development of the common law by the Supreme Court of Appeal – or by this Court, if it adds to or alters any feature of the development made by the Supreme Court of Appeal. Courts have no discretion under section 173 of the Constitution not to apply the common law as authoritatively articulated by the Supreme Court of Appeal or this Court. What they may do is to apply the developed law within the framework of their own process. Their decision not to allow certification[53] may be set aside on appeal only if there was a material misdirection of fact or law. I see no reason to deviate from this approach here.

> 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*." (My emphasis.)

[52] Id at para 15.

[53] Whether the granting of certification is appealable was left open in *Children's Resource Centre* above n 46 at para 25.

Application of the development of the common law

[68] The Supreme Court of Appeal applied the law as developed in *Children's Resource Centre* to the facts of the present case. Once again I can find no fault with that general approach. As explained by this Court in *K v Minister of Safety and Security*,[54] development of the common law may take place incrementally or on occasion more substantially, when "a common-law rule is changed altogether, or a new rule is introduced".[55] When that happens the developed rule is applied to the case at hand and subsequent cases,[56] much in the same way as this Court recognises that the retrospective effect of an order may need to be limited in the light of the doctrine of objective constitutional validity or invalidity.[57] The development that occurred in *Children's Resource Centre* was of the substantial kind.

[69] What remains is to determine whether the Supreme Court of Appeal's application of the *Children's Resource Centre* principles to the facts of this case was correct. In my view there are two aspects of that application that are open to criticism. The first is the addition of a further requirement, namely that in opt-in cases certification should only be granted in exceptional circumstances. I agree with the main judgment that this stringent addition to the *Centre Resource Centre* guidelines is uncalled for. The second relates to the finding that the applicant's claim is not

[54] [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC).

[55] Id at para 16.

[56] Compare *Minister of Finance and Others v Gore NO* [2007] ZASCA (98); 2007 (1) SA 111 (SCA); *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2005] ZASCA (109); 2006 (3) SA 138 (SCA); and *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).

[57] *Gory v Kolver NO and Others* (*Starke and Others* Intervening) [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) at para 43.

tenable. I consider that evaluation as too harsh in the particular circumstances. It is to that aspect that I now turn.

A tenable claim?

[70] The applicant has done no one any favour in the manner in which he has prevaricated and changed the grounds for his alleged claim against the respondents in argument before the Supreme Court of Appeal and before this Court.[58] In the Supreme Court of Appeal he apparently relied on a claim under section 22 of the Constitution,[59] allied to the provisions of the Competition Act,[60] but the Court treated it on a wider basis, namely as a claim under section 22 of the Constitution, read together with the Competition Act, as well as one under the common law.[61]

[71] In this Court the applicant did not pursue the section 22 argument with any vigour and rightly so. As pointed out by the Supreme Court of Appeal,[62] the right that section 22 guarantees to a citizen is to enter a trade, profession or occupation, but not a right to a successful outcome once having done so. And if there is another basis in the common law or in legislation to claim damages, one would be hard pressed to find a cogent reason for a separate constitutional claim for damages as well.[63]

[58] In this Court he sought to advance another cause of action, based on the alleged interference with contractual relations. This had no basis in the papers.

[59] Section 22 provides that "[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

[60] 89 of 1998.

[61] Supreme Court of Appeal judgment at para 6.

[62] Id at para 8.

[63] See *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).

[72] The Supreme Court of Appeal also made short shrift of the delictual claim, stating that no policy reasons were advanced for the "recognition of a claim to maximise profits from the sale of bread, least of all to reap the rewards of price fixing."[64] It is here where some more caution was, in my view, called for.

[73] In *Children's Resource Centre* the Supreme Court of Appeal stated:

> "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."[65]

[74] Because of the particular circumstances of the case we have no pleadings or affidavits before us yet. The founding affidavit does, however, contain the passage quoted in the main judgment,[66] which seeks to lay the bare basis for a damages claim under section 65 of the Competition Act. The Competition Tribunal findings are before us and establish the unlawful conduct under the Competition Act which allegedly caused the damages. It has not yet been determined in our law what the true

[64] Supreme Court of Appeal judgment at para 10.

[65] *Children's Resource Centre* above n 46 at para 39.

[66] See [12] above.

nature of a claim under section 65(1) is and it is unwise to attempt to do so at this early certification stage of proceedings.[67]

[75] In argument before us it was contended that there is no room, on the basis of the Tribunal's findings, for a damages claim by both the applicant's class of bread distributors and by consumers as a separate class. It could only be one or the other, the argument went. The difficulties of proving causation were alluded to in this regard. There may well yet be merit in these contentions, but the apparent inexorable logic of the contentions will be better tested in later court proceedings where the policy considerations relating to unlawfulness and legal causation can be fully aired and assessed, as is the case in normal court proceedings.

[76] For the moment, at this early stage of the proceedings, and also because we are at the early development of any possible damages claims under section 65 of the Competition Act, it suffices to state that although neither the Constitution nor the common law guarantees profit, they do not forbid the making of profit either. I am of the view that it would be premature finally to determine, at this early stage of certification, that there is no tenable claim in our law when someone alleges that, had there been no price fixing, his or her business could have been better off in the competitive environment that would have followed, and that, because of this, ultimately consumers could have benefitted too. There may well be difficulties in relation to who would have benefitted in the competitive market, on what basis they

[67] Compare *Children's Resource Centre* above n 46 at paras 66-73.

may have benefitted, and to what extent they would have benefitted, but these considerations should rather await fuller examination once the action is commenced.

[77] For these reasons I concur in the order granted in the main judgment.

For the Applicant:	Advocate R P Hoffman SC, Advocate W de Vos and Advocate C D Shone instructed by Knowles Hussain Lindsay Inc.
For the First Respondent:	Advocate S F Burger SC, Advocate P McNally SC and Advocate J A Cassette instructed by Cliffe Dekker Hofmeyer Inc.
For the Second Respondent:	Advocate J Dickerson SC and Advocate M O'Sullivan instructed by Edward Nathan Sonnenbergs.
For the Third Respondent:	Advocate D Unterhalter SC, Advocate M du Plessis and Advocate L Kelly instructed by Nortons Inc.
For the Amicus Curiae:	Advocate T Ngcukaitobi and Advocate M Bishop instructed by Legal Resources Centre.