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BRIDGING THE JUSTICE GAP: BRINGING THE CLASS ACTION TO SOUTH AFRICA

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ABSTRACT

Widespread economic inequality in South Africa poses a substantial barrier for the equitable distribution of justice. Due to their limited means, many of the poor who suffer an injustice often cannot afford legal representation. Thus, many wrongs go un-righted. A robust class action system, by allowing many claims to go forward at once, could help to alleviate this problem. However, despite the significant potential benefits of class actions for South Africa's poor, the class action is extremely underutilised. This article provides recommendations for those seeking to utilise the class action, by drawing on the American and Canadian class action experiences. The authors ultimately conclude that the best path to achieving a class action regime is litigation.

I INTRODUCTION

The law is no longer a scarce resource in South Africa, but justice remains hard to come by.[1] While South Africa's Constitution is among the world's most ambitious governing documents, the country continues to suffer from vast socio-economic disparities that often prevent the equal application of the law. These gaps, the product of injustice, continue to produce greater injustice. Indeed, this justice gap is apartheid's most lasting and damaging legacy.

However, unlike apartheid's systematic and open denial of justice, the modern barrier to justice is much less overt. There are no formal laws that prevent the poor from litigating their

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[1] *See Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v. Ngxuza and Others* (2001) 493 ZASCA 85 (stating 'the law is a scare resource in South Africa [. . .] justice is even harder to come by.').

claims. In fact, all South Africans now technically enjoy the same legal rights and standing to bring suits. However, the repeal of apartheid laws did not give everyone the keys to the courtroom. Instead, as a result of their economic standing, many poor South Africans are denied the opportunity to be heard in court because they cannot afford legal representation.

While some claimants may be able to obtain representation from organisations such as the Legal Resources Centre and Legal Aid South Africa, these organisations have limited staff, funding, and resources and must turn away many prospective applicants. This lack of access exacerbates the justice gap in another way by creating an incentive to target the poor. Since the poor have less access to the courts, they become easier targets for predatory trade or business practices, which widens the injustice gap.

The authors believe that class actions are invaluable tools for bridging this gap and accordingly offer some thoughts on how South African lawyers can utilise the class action. However, the major contribution of this work is that it identifies what we consider the chief obstacle to the successful implementation of a class action regime; the uncertainty about the costs, rules, and effects of class actions. Using the American and Canadian experiences as instructive examples, we offer two possible solutions – (1) passage of specific legislation defining class actions and/or (2) aggressive legal advocacy that persuades the justice system to create a solution through the common law. Ultimately, we conclude that the most effective and politically feasible route is the judicial route, which would allow the Constitutional Court of South Africa to adjudicate upon and clarify the class action regime.

Part I of this paper identifies the current barriers to legal representation in South Africa and discusses the ways in which class actions could lower these hurdles. Part II identifies the barriers to implementing a class action regime in South Africa. Part III analyses two successful class actions regimes (the United States and Canada) and determines how each system has successfully instituted the class action. This section will show that a key component in the creation of a robust class action regime has been specificity and clarity. Finally, Part IV applies lessons learned from two foreign law case studies to the South African legal context and proposes a way forward.

II THE BENEFITS OF CLASS ACTIONS IN SOUTH AFRICA

> 'A modern class proceedings regime operates to ensure the widest possible access to justice for people who have suffered losses as the result of someone else's fault, particularly where those losses are not large enough in financial terms to justify involvement in the expensive process of litigation.'[2]

A robust class action regime can improve South Africa's legal system by increasing access to justice and improving judicial efficiency. First, class actions increase access to justice by adjudicating many claims at once. Many poor South Africans cannot afford to litigate a civil claim; given their modest means, many poor individuals might be unable to afford their attorney's fees. After all, the damages awards for something such as a breach of contract for a poor individual might not be enough to cover their own attorney's fees if they succeed without a cost order. Indeed, a perverse result of this inequality is that the amount of damages may only cover a few hours of a senior advocate's time, making it uneconomical to litigate the claim. Moreover, the risk that the claimant might have to pay his opponent's legal costs if he loses could be prohibitive.

A class action could solve this problem by pooling the risk of an adverse costs order among a larger number of plaintiffs. Since the risk of an adverse costs order is shared, class actions drastically lower each class member's risk exposure. Additionally, as class actions allow a large number of cases to be litigated at once, each individual beneficiary would pay a smaller percentage of his award in attorney's fees.

Class actions can level the uneven playing field. Not only are cases too expensive and economically risky for poor individuals, but also most poor litigants are not sophisticated applicants or plaintiffs. For many claimants, it might be their first experience with the legal system. On the other hand, many of the defendants are very sophisticated with experience and access to counsel. These wealthier defendants can stall litigation in an attempt to outlast or discourage a single claimant.

However, class actions mitigate the imbalance between parties in several different ways. First, by pooling resources, class action plaintiffs can afford more experienced attorneys

[2] Manitoba Law Reform Commission Issue Paper 100 *Class Proceedings Report* (1999) para 25.

and advocates than they could individually. These experienced attorneys could provide better advice and mitigate the experience gap between parties. Additionally, it is much easier to join a class action than it is to initiate a civil action on one's own, encouraging more plaintiffs to join. Also, a class can designate a small handful of its most sophisticated members to be the named plaintiffs; this allows the rest of the class to continue their lives uninterrupted throughout the litigation. By making it easier to join class actions, this regime allows even the less sophisticated parties to access courts and makes that access much less time-consuming and difficult.

Class actions are also an improvement over individual actions or public interest actions because they increase judicial efficiency. An important consideration when evaluating a class action regime is the balance of costs and benefits; these savings theoretically benefit society as a whole. While public interest standing arguably has many of the same advantages with respect to access to justice, class actions are more efficient.

Based on the doctrine of *res judicata*, if plaintiffs in a class action are unsuccessful, they are procedurally barred from raising the same issue in a subsequent case. In public interest standing cases, if individual A brings a case on behalf of his community and loses, individual B cannot bring the same claim on behalf of the same community. Thus, class actions prevent the re-trying of the same case. This is a benefit not only to the judicial system but also to corporations who could otherwise have to litigate dozens, hundreds, possibly even thousands of individual claims. As the Alberta Law Reform Institute noted, '[r]ather than waiting for individual claims, corporations can clean up their liabilities in one proceeding, without risking inconsistent decisions or facing multiple lawsuits in numerous jurisdictions.'[3] Thus, class actions could benefit defendants by reducing the number of trials and disputes.

III THE STATE OF CLASS ACTIONS IN SOUTH AFRICA: OBSTACLES AND UNCERTAINTY

Despite the many significant benefits of a class action regime, very few class actions have been attempted or successful in South Africa. The lack of successful class actions is especially

[3] Alberta Law Reform Institute Issue Paper 85 *Class Actions* (2000) para. 122.

surprising in the light of the fact that class actions are theoretically permitted. While no cases or statute have explicitly established general class actions, South Africa's standing laws and jurisprudence encourage a prospective class action litigant. Indeed, several pieces of legislation and the Constitution[4] explicitly endorse class actions in certain scenarios.

Under Section 38 of the Constitution, a person 'has the right to approach a competent court, when alleging that a right in the Bill of Rights has been infringed or threatened' as a 'member of, or in the interest of, a group or class of persons.'[5] In addition, several pieces of legislation create standing for class action proceedings.

South Africans have standing to bring class action suits for some environmental issues. Under the National Environmental Management Act,[6] 'any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act.'[7] Affected parties can also bring class action cases under the Consumer Protection Act[8] as 'a member of, or in the interest of, a group or class of affected persons.' Finally, the Companies Act[9] 'extended the standing to apply for remedies' to individuals 'acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interests of its members.'[10]

Moreover, there are no specific provisions that prohibit the pursuit of a class action in other instances. Since standing provisions must be interpreted generously and expansively in order to ensure that all enjoy the rights expressed in the Constitution,[11] a strong argument can be made that a general class action is available to South African litigants. Yet, while class actions are permitted under South Africa law, it is far from clear how they should proceed, when they are appropriate, and how they differ from other cases of individual litigants. Indeed, the lack of case law with respect to class actions is remarkable.

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[4] Constitution of the Republic of South Africa, 1996.
[5] Ibid. at section. 38; In South Africa's first class action proceeding, the Supreme Court of Appeal in *Permanent Secretary, Department of Welfare, Eastern Cape v. Ngxuza* 2001 (4) SA 1184 held that this section 38 of the Constitution created standing for four litigants to sue on behalf of all members of the Eastern Cape Province whose disability grants were cancelled or suspended.
[6] No. 107 of 1998.
[7] Section 32.
[8] Consumer Protection Act No. 68 of 2008 Section 4(1).
[9] No. 71 of 2008
[10] Ibid.
[11] *Ferreira v. Levin NO and others*, 1996 (1) SA 984 par. 165 (per President Chaskalson (as he was then)).

In *Permanent Secretary, Department of Welfare, Eastern Cape v. Ngxuza*,[12] the Supreme Court of Appeal provided a rough outline of what a class action should entail. In dismissing the appeal, the Court mentioned four factors that make up the "practical definition" of a class action: (1) the class is so numerous that joinder of all 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 will fairly represent the interests of the class. The Court also overruled prior class action cases *Lifestyle Amusement Centre and others v. The Minister of Justice and Others*[13] and *Maluleke v. MEC, Health and Welfare, Northern Province*[14] to the extent they are inconsistent with the judgment. Finally, it cites the American Federal Rule of Civil Procedure on class actions, suggesting that it incorporates some of its provisions. However, the case provides no further guidance on how the court will handle costs, the relationship of a class action to a public interest action, or the process for certifying a class - thus, uncertainty prevails.

While this lack of guidance is a principal problem with class actions, the reason there is little guidance is precisely because there are so few cases. We suggest that the best way to break this self-perpetuating cycle is to push forward a line of test cases that will raise class action issues.

In order to examine the best way for achieving a class action regime, we now examine how our two paradigm country case studies (United States and Canada) developed class action regimes. Both cases suggest that the road to a general class action regime is meandering at best, requiring judicial or congressional[15] intervention.

IV THE AMERICAN EXPERIENCE

The class action regime in the United States is robust.[16] Americans successfully formed classes to litigate issues ranging from employment discrimination to consumer protection to

[12] 2001 (4) SA 1184
[13] *Lifestyle Amusement Centre and others v. The Minister of Justice and Others* 1995 (1) BCLR 104 (C).
[14] *Maluleke v. MEC, Health and Welfare, Northern Province*, 1999 (4) SA 367 (T).
[15] Parliamentary.
[16] See e.g., Top 10 Class-Action Lawsuits *available at* http://www.cnbc.com/id/35988343/Top_10_Class_Action_Lawsuits?slide=1, accessed on 5 October 2012.

securities disputes. Indeed, to many lawyers and judges, the problem with class actions in the United States is that they are too easy to initiate,[17] clogging the courts with frivolous claims and frustrating the goal of judicial efficiency.[18] Whether or not this criticism is merited or accurate,[19] the American system gets plaintiffs into the courtroom, something the South African system has as yet been unable to do.

The foundations of the American class action system were laid not by the Congress or set out in the Constitution, but created by the Courts. However, it took the judiciary several years and numerous attempts to create a regime with such clear requirements, consequences, and procedures that litigants would be confident enough to institute proceedings. Progress came from an active judiciary that was focused on issues of equity, which along with litigants pushed cases to the Supreme Court, forcing the Supreme Court to clarify class actions complexities.

Representative actions have existed 'since the earliest days of English law.'[20] However, the American system initially operated under the 'necessary parties' rule, which held that 'all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be.'[21] Thus, litigants could not bring actions in the interest of an entire class unless each person became party to the suit.

Recognising that a restrictive rule could unfairly prevent parties from recovery when many individuals are affected,[22] the courts began moving away from this "general rule of equity" and toward the more inclusive class action regime. In his opinion in *West v. Randall*,[23] Justice Story discussed the benefits of representative actions in terms of judicial efficiency and avoiding injustice. He recognized that representative actions 'enabled [the court] to make a complete

[17] Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy' 2000 75 Notre Dame L. Rev.1377 at 1378 (class actions are 'the most controversial subject in the civil process today').
[18] Greg Burns & Michael J. Berens, 'The Class Action Game' Chi Trib.7 March 2004, at C1 (large corporations refer to class actions as 'a legal extortion racket.').
[19] Much of this criticism is overblown. In fact, 'per capita rates of litigation in United States courts fall in the same general range as those of England, Australia, Ontario and others.' Marc Galanter Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society (1983) 31UCLA L. Rev. 4,5; *see also* Deborah L. Rhode Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution (2004) 54 Duke L. J. 447, 456.
[20] *Ortiz v. Fibreboard Corp*. (1999) 527 U.S. 815, 832 (citing S. Yeazell From Medieval Group Litigation to the Modern Class Action (1987)).
[21] *West v. Randall* (1820) 29 F. Ca. 718, 721 (CC RI).
[22] Z. Chafee *Some Problems of Equity* (1950) 161-67.
[23] 29 F. Cas. 718 (R.I. 1820).

decree between the parties, [which] may prevent future litigation by taking away the necessity of a multiplicity of suits, and may make it perfectly certain, that no injustice shall be done.'[24]

Tracking this notion, the Supreme Court, in 1842, issued Federal Equity Rules Rule 48, which created an official exception to the traditional standing rules. Rule 48 stated:

> 'Where parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of the absent parties.'

These rules suggested that large groups could join together to prevent significant inconvenience, cost, and delay. However, these rules were far from clear and litigants were often unsure if they met the class requirements of 'very numerous' and 'manifest inconvenience.' As a result, class actions were exceedingly rare.

In a further attempt to clarify the rules, other state-level organisations began producing their own class action codes. For instance, the New York Assembly in 1849 adopted the Field Code, stating:

> 'When the question is one of a common or general interest to many persons, or when the parties are very numerous and it may be impractical bring them all before the court, one or more may sue or defend the whole.'

Thus, even though Congress did not enact new class action laws, the class action regime began to grow through judicial action.

Despite the active work of the courts, certain important class action issues remained unanswered. One of the most important questions surrounding a class action regime is the prejudicial effect of rulings on class members who are party to the suit and who are not. Justice Story's ruling did not address this issue, nor did the Field Codes produced by the states.

[24] Ibid.

However, Federal Equity Rule 48 stated that the rulings 'shall be without prejudice to the rights and claims of absent parties.' What were 'absent parties'? Did this mean individuals who were not part of the broader class or did it apply more to all individuals who were not party to the lawsuit? These unanswered questions meant potential litigants faced a dilemma in choosing whether or not to join a class action. If they were going to be bound to the judgment whether or not they joined, then they would have a significant incentive to join the class. However, if they could opt out of the suit and sue at a later date, then they had more options. Despite the significant efforts by the courts and state assemblies to set forth clear rules, none of these judicial provisions definitively addressed the issue of *res judicata* for non-class members.

In a further attempt to clarify civil procedure protocols, the Supreme Court adopted the Federal Rules of Civil Procedure in 1937, including Rule 23. While Rule 23 was significantly more clear and explicit than its predecessors on several issues, the issue of *res judicata* was still unresolved. Here, the development of the law was again spurred by litigation, not the promulgation of statutes and rules.

In 1940, in *Hansberry v. Lee*,[25] a Chicago neighbourhood attempted to enforce a racially restrictive covenant, which would have barred a group of African Americans from purchasing or leasing land. The defendants argued that the covenant itself was not valid because it was not signed by 95% of the homeowners, as required by its terms. However, the court ruled against the defendants finding that in a prior case involving the same covenant, but a completely different point of law, the covenant had already been declared valid. However, the defendants appealed to the Supreme Court arguing that since they were not party to the previous case they should not be barred from litigating the issue. The Supreme Court agreed with the defendants and held that persons whose interests had not been adequately represented in a class action were not bound by the judgment. It held that a contrary holding would deprive class members of due process. By forcing the issue, the litigants in *Hansberry* compelled the courts to clarify the uncertainty.

While many minor issues of *res judicata* remain undefined, the general contours of the doctrine are firmly established. The United States inherited some components of the modern day class action regime from the English legal system, which provided the necessary definitions that provided a basis for plaintiffs to bring suits. However, it was through litigation that the

[25] *Hansberry v. Lee* (1940) 211 U.S. 32.

inadequacies of the old definitions came to light, forcing the courts to continually re-examine their rules and procedures.[26]

V THE CANADIAN EXPERIENCE

Class action proceedings are a much more recent development in Canadian law. Class actions have only taken place in any considerable number in the past two decades. Compared with the United States this is a late development, and stems from differences in political structures, judicial activism, and societal values.

The legal system in Canada is divided; nine provinces have a common law system based on English law traditions, while the province of Quebec has a civil code flowing from its origins as a French settlement. In addition, Canada has a federal system of government; the Constitution divides the powers and responsibilities between the federal government and the ten provincial governments. The administration of justice is primarily a responsibility of the individual provincial governments. For these reasons, the legislative and not the judicial route appeared to be the most effective in Canada.

It is important to understand these divisions because Canadian Courts have historically refrained from creating class action procedures as part of the common law. In fact, the 1983 Supreme Court of Canada decision in *G.M. (Canada) v. Naken*[27] ("*G.M"*) is indicative of the Courts historic approach to class action proceedings. At the time of this decision, many provinces had vague civil procedure rules that allowed for one or more of a group of plaintiffs to be authorized by a court to represent all plaintiffs. In Ontario, this rule stated that a group of plaintiffs 'with a common interest in the subject of an intended action…' could start a proceeding as a class.[28]

G.M. involved thousands of owners of a specific vehicle who were claiming a breach of warranty based on a number of different written and oral contracts and advertisements. The Court canvassed a number of jurisdictions' class action regimes in an attempt to give meaning to

[26] That is not to say that the American system is the best system for South Africa. However, it is a model of specificity and would undoubtedly solve what we have identified as the major obstacle to class actions in South Africa.
[27] [1983] 1 S.C.R. 72.
[28] Ibid.

the specific civil procedure rule. The Court held that all of the considerations for and against class action proceedings were 'matters of policy more fittingly the subject of scrutiny in the legislative rather than the judicial chamber.'[29] The Court held that it only had to interpret the specific civil procedure rule under consideration.[30]

Interpreting the rule required solely looking at the construction of the phrase. The court interpreted 'common interest' narrowly, and held that the interests of the plaintiff vehicle owners were not close enough to be a common interest; therefore the class action could not proceed under the Ontario rule.[31] The decision left a broad, ambiguous area in class action procedure in Canada.

Given the Court's decision, it was left to the individual provinces to draft legislation and civil procedure rules. As a civil law jurisdiction, Quebec was the first province to draft comprehensive class action procedures.[32] Unlike other Canadian provinces, Quebec's class action rules form part of the *Code of Civil Procedure*, and are not standalone legislation.[33] In 1993, Ontario was the first common law province in Canada to enact legislation, when the *Class Proceedings Act*[34] came into force. Most other provinces have followed, with the most recent being Nova Scotia's *Class Proceedings Act*[35] in 2008. Along with the northern territories, Prince Edward Island is the only province that has not yet enacted a legislative class action regime.

Given the amount of time that passed between the Supreme Court of Canada's decision on class actions in *G.M.* and the legislative response from provincial governments, it's clear that the legislative solution is not quick to respond to the procedural necessity of class action proceedings. In 2001, the Supreme Court of Canada revisited the issue of class action proceedings in a trilogy of decisions.[36] *Dutton, Hollick, and Rumley* marked a dramatic shift in the Court's treatment of class action proceedings. The modern context had changed, and the

[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] This legislation came into force in 1979, even before the Supreme Court of Canada's controversial decision in *G.M.*
[33] Code of Civil Procedure, R.S.Q. 1977, c. C-25, arts. 999-1051; first enacted as S.Q. 1978, c.8, s.3.
[34] *Class Proceedings Act, 1992,* S.O. 1992, c.6.
[35] *Class Proceedings Act*, S.N.S. 2007, c. 28.
[36] Western Canadian Shopping Centres v. Dutton, [2000] S.C.J. No. 63, [2001] 2 S.C.R.534 (S.C.C.); Hollick v. Toronto (City), [2001] S.C.J. No. 67, [2001] 3 S.C.R; 158 (S.C.C.); and Rumley v. British Columbia, [2001] S.C.J. No. 39, [2001] 3S.C.R. 184 (S.C.C.).

Court felt that class action proceedings were incredibly important for efficiency and access to justice. The Court noted that:

> 'Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies the parties ex ante certainty as to their procedural rights.'[37]

This taxing impact on the judicial system required the courts to act, and move beyond deference to legislative bodies when considering class action frameworks. The Court held that:

> 'Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them. However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice.'[38]

The Court proceeded to define four conditions that are necessary for a class action. The conditions are: (1) the class must be capable of clear definition; (2) there must be issues of fact or law common to all class members; (3) with regard to the common issues, success for one class member must mean success for all; and (4) the class representative must adequately represent the class.[39] The court provided further discussion about certification and instances when a class action may not be certified, but the procedures were not defined in any greater detail.

Even with judicial involvement and legislation in many Canadian provinces, class action proceedings in Canada are still a quagmire. Consider just the issues of certification, costs, and residency.

[37] Western Canadian Shopping Centres v. Dutton, [2000] S.C.J. No. 63, [2001] 2 S.C.R. 534 (S.C.C.)
[38] Ibid.
[39] Ibid.

Ontario uses a certification procedure that is less onerous than that imposed by the American Rule 23. There is no two-step certification process, and a class action proceeding does not have to fit into any of the three categories outlined in Rule 23.[40] Most provinces are similar to Ontario, but Quebec has a complicated and more onerous certification requirement.[41]

Costs are treated differently in each province. British Columbia is similar to the United States, such that an unsuccessful plaintiff is not liable for the defendant's costs.[42] In Ontario and Quebec, an unsuccessful plaintiff is liable for the defendant's costs, but the calculations of the tariff differ in each jurisdiction.

Provinces have different residency requirements in their legislation. In British Columbia, only a resident of the province can commence a class action proceeding; non-residents can opt-in after it has been started, but they are unable to start the proceeding.[43] This residency requirement does not exist in other provinces, including Ontario or Nova Scotia.

Having different legislation and different procedures in each province causes a number of issues. One of the largest problems presents itself when a class action proceeding involves plaintiffs in more than one province. Reconciling the differing jurisdictions can be a nightmare. One recent interlocutory motion on a national class action proceeding required individual courtroom proceedings in each of the nine provinces involved. The proceedings took place simultaneously, with all of the courtrooms linked through teleconference. It moved swiftly and efficiently, but the economic and access to justice benefits of a class action proceeding are reduced when the logistics are complicated.

This problem is unlikely to present itself in South Africa, because of the concentration of legislative power in the overarching national government. But, this is a good example of the problems that poorly drafted or incomprehensive legislation and civil procedure rules can have on the class action process. Canada's class action procedures have advanced greatly in the past thirty years, but they are still new and growing pains persist.

[40] *J. Campion & V. Stewart 'Class Actions: Procedure and Strategy'.*
[41] Ibid.
[42] Ibid.
[43] Ibid.

VI RECOMMENDATIONS

The American system showed that courts can lead the way in developing a class action regime, while in Canada the legislative branch was the initial mover. However, both the courts and the legislative route on their own proved too inefficient and slow. Indeed, the impetus for change in both systems was litigation. Based on these experiences, this paper concludes by analysing the best route for South Africa.

(a) *Legislative Route*

The first option is lobbying the legislature to pass a new law on general class actions. This option has several significant benefits; however, the drawbacks are potentially overwhelming.

First, a statute authorising a general class action can be very specific. For instance, it could be modelled exactly on the American Rule 23 governing class actions and even include additional guiding statements based on American case law. Furthermore, it can be tailored to discourage the 'frivolous' litigation that many fear with class actions.

Second, it removes some of the uncertainty that could come with taking the litigation route. While the Constitutional Court works to achieve the progressive realisation of rights, there is no guarantee how the courts will rule. Indeed, it is entirely possible that the Constitutional Court will find that there is no general class action in South Africa. Indeed, the initial negative rulings in Canada may explain why the regime was so slow to develop and is still not widely successful.

However, if the Legal Resources Centre and other socially progressive organisations have a hand in drafting the legislation, then we presumably have more control over the language of the bill, the scope of the new regime, and the requirements for instituting an action.

However, the risks far outweigh the rewards in this instance.

First, the feeling of control might only be an illusion. Once the bill is introduced, policy makers could alter it to suit their own vision of the ideal class action legislation. Even worse, special interest groups, especially large corporations, might adamantly oppose the bill and could

exercise their considerable wealth and influence to kill the bill or even pressure law makers to make a very restrictive law on class actions. Second, we saw in both Canada and the United States that statutes and court procedures might be vague or poorly drafted, creating uncertainty.

(b) Judicial Route

The legal route initially appears to be a riskier option; there is no guarantee how a court will rule on this issue. However, it is the best route for South Africa.

First, the Constitutional Court has a long history of liberally interpreting the law to achieve the progressive realisation of rights. Indeed, the Court has specifically stated that the requirements of standing should be liberally interpreted in some cases. Next, as we learned from the American system, the litigation strategy can force courts to clarify an issue. For instance, the question of whether or not a class member that did not join the action remained unresolved until *Hansberry*.

However, the litigation route has risks and drawbacks. As noted above, we cannot forecast how the Court will decide. Will they create a class action doctrine that is much more restrictive than the one we could have achieved through the litigation route? Moreover, the judicial process and appeals can last a number of years. The United States courts took several decades before eventually promulgating Rule 23 and several more before they hammered out all of the details. However, this seems unlikely. Given the High Court's ruling in *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v. Ngxuza and Others*, it seems that the South African system is already close to a class action regime; it just needs a little push.

VII CONCLUSION

The prospects for a class action in South Africa are bright. First, there are many specific statutory provisions already in place, suggesting that the legislature might be willing to move even further. But more importantly, the Constitutional Court has a robust record of developing

the law in ways that protect and promote individual rights; lawyers should give them the opportunity to do so.

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