

TOWARDS A CLASS ACTION UNDER RWANDAN LAW*

Abstract

Among the recipients of the right to access to justice are groups of individuals who have been injured by the same defendant through a similar and single action. The current approach to 'standing' under Rwandan law of civil procedure makes it impossible for some or many of the members of such group to access the courts and have their grievances heard. This article suggests that this problem can be overcome by introducing a class action procedure and the conditions and modalities under which it could be exercised.

Keywords: *class action, access to justice, Rwandan civil procedure*

1. Introduction

Under article 3 of the Rwandan code of civil procedure,¹ a person may not institute a lawsuit unless he has a 'personal' interest in it. If a person is not personally concerned with the matters raised in the lawsuit, it is said that he lacks 'standing' (*locus standi*) and the suit is therefore dismissed. Although this is the position with many countries with a 'civil law' (as opposed to common law) tradition, it does not resonate well with the right to access to justice enshrined in articles 2(3), 14(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR) to which Rwanda is party. There is no full access to justice in a country when this right is enjoyed only by those who are able to pay for it. It must be accessible to and affordable to all citizens, including the poor and vulnerable groups. Among the recipients of the right to access to justice are groups of individuals who have been injured by the same defendant through a similar and single action. The current approach to 'standing' makes it impossible for some or many of the members of such group to access the courts and have their grievances heard. This article suggests that this problem can be overcome by introducing a class action procedure and the conditions and modalities under which it could be exercised.

2. What is a class action lawsuit and when is it used?

The term 'class action'² means an action instituted by a representative on his own behalf and on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class.³ This procedure allows a person (class representative) to institute an action on his own behalf, and on behalf of the other persons (the class) who have a claim arising out of the same or a similar alleged wrong as the class representative alleges.⁴ This procedure is the most appropriate procedure to be followed in at least five situations. Firstly, the procedure is used when a court would otherwise have to entertain numerous claims relating to the same cause of action

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¹ Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure (Official Gazette n° 29 of 16/07/2012). Article 3 reads as follows: 'Only the interested parties can begin an action, except when the law provides otherwise'.

² A class action should not be confused with a 'public interest action'. A public interest action means 'an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative's own interest'. If the remedy sought is an interdict or a mandamus, then a defendant should be cited in a public interest action. If the public interest litigant seeks a declaration of rights, then it is not necessary to cite a defendant. The South African Law Commission Project, 'The Recognition of Class Actions and Public Interest Actions in South African Law' (August 1998), at iv-vi. An example of public interest litigation would be an action related to environmental issues. *Idem*, p. 6.

³ The South African Law Commission Project, *supra* note 2, at 88.

⁴ *Children's Resource Centre Trust & Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) at 224B-E. See also Section 1711(2) US Class Action Fairness Act of 2005.

and that would be impractical.⁵ The court then brings together and disposes of thousands of claims at one time which it would not be able to handle separately. In this way, class action serves a practical purpose. For instance, there is an undeniable interest for the judicial system to dispose of in one judgment a case in which there are 240.000 plaintiffs and it is clear that more others may emerge later.⁶

Secondly, the procedure of class action is used where each or some of the members of the aggrieved group have small claims that may be economically difficult or impossible to pursue individually.⁷ Where, for instance, many casual laborers are claiming unpaid days against their employer, and the claim of each laborer does not exceed 25.000 frw, it would be economically impossible to pursue the claims in court individually since the amount of court fees that each laborer would be required to pay would exceed the amount pursued. No reasonable person can pursue such an action in court. The procedure of class action allows one member of the group to pursue the action against the defendant on his own behalf and on behalf of the rest of the group.

Thirdly, the procedure of class action reduces the cost of litigation and thereby promotes access to justice.⁸ Litigation is an expensive process. It involves paying court fees; advocates fees, transport... In order to give effect to the right to access to justice for more people, it is important that the cost of litigation is reduced, and class action is one way this can be achieved. A judicial system that keeps thousands of citizens outside the reach of courts cannot claim to be functioning correctly and must be reformed.⁹

Fourthly, class action is used when some of the members of the group would otherwise not have access to justice for a variety of reasons, including illiteracy, poor access to communication or location in remote areas. Through the procedure of class action, these persons have the opportunity to be represented in court and have their claims adjudicated.¹⁰

Lastly, class action procedure would allow a case that interests a sizable number of persons to be determined once for all, in a single judgment, thereby preventing re-litigation of a similar issue before courts in the future which would be both time and resource consuming for the judicial system.¹¹ Here, the judge decides the basic question of who wins the case and the judgment becomes *res judicata* for the entire class. If the defendant wins, the class lawsuit is dismissed and the individuals in the group are

⁵ C. Loots, 'Standing, Ripeness and Mootness' in S. Woolman and M. Bishop (ed) *Constitutional Law of South Africa* 2nd ed (2004), at 7-7.

⁶ *In Re Joint E. & S. Dist. Asbestos Litigation*, 878 F. Supp. 473 (S.D.N.Y. 1995). See also *In Re Philadelphia Stock Exchange, Inc.* Nos. 613, 2007, 615, 2007, in which there was 400.000 class members. See further *In re PokerTek Merger Litigation*, No. 14-CVS-105679 (Jan. 22, 2015), para 26: the Court finds that the class here consists of thousands of shareholders of PokerTek such that it is impractical to bring them all before the Court, easily meeting the numerosity requirement.

⁷ *Permanent Secretary, Department of Welfare, Eastern Cape. And Another v Ngxuza & Others* 2001 (4) SA 1184 (SCA) (*Ngxuza II*) at 1193C-E.

⁸ Class action assists in 'leveling the playing field' for poor or economically less powerful individuals who would not ordinarily have the resources to instruct an attorney. Such persons are at a significant disadvantage when litigating against well-resourced corporations which can afford premier legal representation. However, when claims are brought together in a class action, the aggregate value of the claims may be enough to allow for the instruction of equally skilled legal representation. Alexander J C 'An Introduction to Class Action Procedure in the United States' <https://law.duke.edu/groupplit/papers/classactionalexander.pdf>. [12/01/2018], p. 1.

⁹ K. M. Robertson, *An Analysis of the Class Action in South Africa* (LLM dissertation, University of Pretoria, 2015), p. 26.

¹⁰ Loots, *supra* note 5 at 7-7.

¹¹ Cornell University Law School, Legal Information Institute 'Class Action' https://www.law.cornell.edu/wex/class_action [12/04/2017].

prohibited from filing new lawsuits over the same issue. For example a claim concerning the alleged unconstitutionality of a certain provision in the guidelines on provisional release from prison may be introduced by one of the affected prisoners, on his own behalf and on behalf of the entire class.¹² If it is determined that the section is not unconstitutional, the rest of the prisoners would be barred from raising the same question again in the future.

3. Class action and the right to access to justice for poor and vulnerable persons

In a developing nation, such as Rwanda, where the majority of the population is economically poor and illiterate, class actions are a useful and appropriate mechanism to ensure the proper realisation of the fundamental right of access to justice.¹³ The right of access to justice is of little use to a potential litigant who has a small claim that would not be worth pursuing on an individual basis, or who seeks the enforcement of a right but who cannot afford to instruct an attorney. The inclusion of class actions in the legal system significantly enhances the right of access to justice for these persons.¹⁴ The link between class actions and their potential to enhance individual rights, particularly in poor countries, was discussed by the Supreme Court of India in *SP Gupta And Others v President of India And Others*.¹⁵ The court noted that the rules of standing need to be relaxed to allow for class actions (and other representative actions; notably public interest litigation) because the law is an important tool in bringing about socio-economic change. The court noted that individual rights may be ‘practically meaningless’ unless there is in place mechanisms necessary to enforce them.¹⁶ Since class actions allow suits which would otherwise not be realized to be achieved, it promotes access to justice and must find way into the legal system of any nation that is cares for the rights of its people.

A recent case in the District of Ngoma illustrates well the necessity of a class action procedure in realizing the right to access to justice in Rwanda. In 2013 the District of Ngoma entered into a contract with a certain ECOCAS company Ltd for the purpose of terracing certain hills. The Company hired more than 700 persons to carry out the activities. The Company, however, failed to pay the workers their allowances in full, each of the workers remaining with a claim against the employer. Certain claims were about sums as low as only 15.000 Frw. The employees sought to bring the matter before the Intermediate Court which has jurisdiction over labour disputes. According to the law,¹⁷ a lawsuit is not admissible in an intermediate court unless the plaintiff has paid court fees equivalent to 50.000 Frw. Would a person pursue a claim of 15.000 frw by paying 50.000 frw? From an economic viewpoint, the answer falls to be no. The effect of this is that, in this case, around 600 workers were unable to pursue their claims in court. Only around 150 workers who qualified for indigent certificates were able to proceed with their claims against the company. The others simply could not pay the court fees required and, accordingly, could not have ‘access’ to justice. This can be remedied by introducing a class action

¹²*United States Parole Comm'n v. Geraghty* 445 U.S. 388 (1980). Accessed at <https://supreme.justia.com/cases/federal/us/445/388/case.html#403> [11/04/2017].

¹³ Articles 2(3), 14(1) and 26 ICCPR.

¹⁴ G. Jephson ‘Standing, Class Actions and the Right of Access to Justice’ <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Jephson.pdf>. [10/01/2018]. See also *Children’s Resource Centre Trust & Others v Pioneer Food (PTY) LTD and Others* 2013 (2) SA 213 (SCA) at 225C-G: ‘the members of the class are generally poor and that any claims that they may have against the producers would not be large enough for them to be pursued individually. Accordingly, if the claims could not be pursued on a class basis, they would not be able to be pursued at all, which would amount to a violation of the class members’ right of access to justice in terms of (...) the Constitution.’

¹⁵ *SP Gupta And Others v President of India And Others* (1982) 2 SCR 385.

¹⁶ *SP Gupta And Others v President of India And Others* (1982) 2 SCR 385, para 19.

¹⁷ Ministerial Order n°002/08.11 of 11/02/2014 on Court Fees in Civil, Commercial, Social and Administrative Matters (Official Gazette n° Special of 12/02/2014).

procedure which would allow all the workers to be represented by those who have access to the courts. From an economic point of view this makes a lot of sense. Supposing that each of the (around) 700 workers had to file an individual suit by paying court fees (50.000 frw) and the fees for legal representation (500.000 frw), the total cost of litigation (one should add the costs related to transportation, meals, communication...) would come to 385.000.000 frw. That cost would by far exceed the total amount of the claims pursued by the plaintiffs which is around 40.000.000 frw. Yet, if the claims were not to be pursued, the 40.000.000 frw would constitute a huge illegal enrichment for the defendant. That, as discussed immediately below, would constitute an incentive for the defendant to repeat his illegal acts in the future.

4. Class action and deterrence of future harm

Class action may be an appropriate tool to serving the goals of deterrence for future violations. No matter what rights may be written in the substantive law, if there is no means by which those rights can be enforced the law might as well not exist, for it can be violated with impunity.¹⁸ In a world of mass production and labor, it is not uncommon for many individuals to be harmed in essentially identical ways by mass-produced products or standardized corporate practices and labor relations. In such cases, individual claims are typically small but could yield large illegal profits for the culprits. Class actions can provide a solution to this economic obstacle by aggregating many individual claims together into a single lawsuit that can support the cost of litigation. This has the effect of preventing corporate companies from abusing rights of the poor and weak in the future. The case of ECOCAS Company and its 700 workers, discussed above, is also instructive here. The fact that, owing to their claims being too small to pursue individually, more than 550 former workers are unable to sue their former employer before the courts will generate an enormous gain for the Company and that will be an incentive, rather than a deterrent, for the Company to continue its illegal practices in the future. If an average of 20.000 frw of unclaimed salary is taken for each worker, that will bring about an aggregate of 11.000.000 frw of unpaid salaries which will remain unclaimed. That is too huge profit for the Company. The current law that prevents small claims to be pursued in courts is thus an incentive for unscrupulous employers to retain small portions of their employees' salaries with the assurance that they will never have to pay them.

5. Requirements of a class action

For a lawsuit to be certified by the court as a class action the following requirements must be met.¹⁹

5.1. There must exist a 'class'

There is no class action if the complainants cannot be said to constitute a class. The members do not have to be individually named, they must merely be described in sufficient terms (for example, people who have consumed a certain product).

5.2. There must exist a cause of action giving rise to a triable issue

Certification is not granted if a *prima facie* case is not established at the certification stage. To make a proper decision regarding the merits of a case, the plaintiff's particulars of the claim should appear together with the application. The legal basis of the case and the evidence to support it should also be included in the founding affidavits.²⁰

¹⁸ Alexander, *supra* note 8, at p. 1.

¹⁹ See The South African Law Commission Project, *supra* note 2, at 7; together with Robertson, *supra* note 9, at 27-29 and Alexander, *supra* note 2, at p. 4. See also Rule 23(a) of the American Federal Rules of Civil Procedure.

²⁰ Robertson, *supra* note 9 at 29.

5.3. There must exist questions of law and fact that are common to the entire class.

A lawsuit through a class action procedure is not admissible in court, unless it is based on questions of law and fact that are common to the entire group. The common issue must predominate over issues affecting only individual class members.

Commonality, however, does not require that every claim be identical to those of other members in the class. What is required is that there are common issues, so that the case can be decided in one class action.²¹ Furthermore, the class action will not need to dispose of all the issues between the members of the class and the defendant. Individual plaintiffs may, for example, deal with the issue of damages individually and separately at a later stage.²²

5.4. The claims of the applicants representing the class must be typical of the claims of the rest of the class

This is self-explanatory. If the claims of the representative are different from those of the rest of the class, then he does not belong to the class and may not represent it.

5.5. It must be in the ‘interests of justice’ to allow the case to proceed as a class action.

Class actions are admissible only if it is in the interests of justice to do so. This would be the case for example, where, as stated above, the class is so numerous that joinder of all members would not be practical. Classes have been certified with as few as 35 members, but normally there are hundreds, thousands or even millions of persons in the class. The procedure is resorted to when the number of class members renders it impracticable to join them in the action through ordinary procedures of joinder or intervention.

5.6. The applicants, through their legal representatives, will fairly and adequately protect the interests of the entire class.

For a class action to succeed and therefore bring about the desired advantages, a suitable representative must be chosen and appointed. The integrity, character, education and financial status come into play here. Another crucial factor is that the representative should enjoy widespread support among the members of the group. Where the class is assisted by a legal counsel, the level of education and degree of legal knowledge required of the class representative should not be too onerous. The enthusiasm and drive of the representative to advance the interests of the class should be given more weight than his intellectual capacities. The element of a suitable representative also implies that there should not be any conflicts of interest between the class representative/s and the other members of the class.²³

If the above requirements are met, the plaintiff must then seek court ‘certification’ (approval) for the proceedings to proceed as a class action.

6. Steps in a class action procedure

6.1. Certification

Certification is the order of the court allowing a suit to proceed as a class action. Certification serves a number of purposes. Firstly, a *prima facie* case must be established at the certification stage. The requirement of a *prima facie* case serves to prevent that unscrupulous lawyers who are only interested in making money could mislead uneducated people with promises that are clearly empty. To prevent this, the class representative and the class’s lawyers should be required to convince the court that there is a reasonable probability of success.²⁴ Secondly, certification allows to protect defendants against

²¹ South African Law Commission Project, *supra* note 2, at 39.

²² American Federal Rule 23(c)(4). See also *Children’s Resource Centre Trust & Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA), at 237B-D.

²³ *Children’s Resource Centre Trust & Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA), at 237D-I.

²⁴ Robertson, *supra* note 9 at 29.

actions that are reckless or without merit.²⁵ Lastly, certification allows the court to determine whether the class action procedure is ‘superior to other available methods’ for resolving the dispute. In other words, the court must be persuaded that it is in the interests of justice to proceed as a class action in the instant case. If it is not, the court shall order that the suit proceeds according to ordinary procedures.²⁶

In *Children’s Resource Centre Trust & Others v Pioneer Food (pty) Ltd and Others* 2013 (2) SA 213 (SCA), the South African Supreme Court of Appeal explained the importance of certification as follows:

First, in the absence of certification, the representative has no right to proceed, unlike litigation brought in a person's own interests. Second, in view of the potential impact of the litigation on the rights of others it is necessary for the court to ensure at the outset that those interests are properly protected and represented. Third, certification enables the defendant to show at an early stage why the action should not proceed. This is important in circumstances where the mere threat of lengthy and costly litigation may be used to induce a settlement even though the case lacks merit. Fourth, certification enables the court to oversee the procedural aspects of the litigation, such as notice and discovery,²⁷ from the outset. Fifth, the literature on class actions suggests that, if the issues surrounding class actions, such as the definition of the class, the existence of a prima facie case, the commonality of issues and the appropriateness of the representative are dealt with and disposed of at the certification stage, it facilitates the conduct of the litigation, eliminates the need for interlocutory procedures and may hasten settlement.²⁸

In order to make the procedure of a class action a fully-fledged right, the law should provide that the refusal by the court to certify an action as a class action should be subject to appeal. The same should apply to a decision to ‘decertify’ a class action, which will be discussed below.

6.2. Notice

When a class action is instituted, the identity of all other members of the class may not be known to the class representative. Accordingly, due process requires that adequate notice be given to all potential members of the class so that they are aware of the class action and that they may be bound by the outcome thereof. The form and content of such notice will vary, depending on the nature of the class action and the position of the members of the class in society.²⁹

Apart from informing class members of the class action, the notice given to all class members must include information about how a class member can include or exclude herself from the action, should they wish to do so (thereby agreeing to be bound by any judgment on the common issues or not).³⁰

6.3. Decertification

²⁵ Robertson , *supra* note 9 at 25-26.

²⁶ See Rule 23(b) of the American Rules of Civil Procedure.

²⁷ Discovery is the pre-trial stage in a lawsuit by which each party can request documents and other evidence from other parties.

²⁸ *Children’s Resource Centre Trust & Others v Pioneer Food (pty) Ltd and Others* 2013 (2) SA 213 (SCA), at 227B-F. See also *Mukaddam v Pioneer Foods (PTY) LTD & Others* 2013 (5) SA 89 (CC) at 99D-F: ‘it is appropriate that the courts should retain control over class actions. Permitting a class action in some cases may [...] 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.’

²⁹ Loots, *supra* note 5 at, at 7-7. In order to avoid ambiguities, the law should specify when, by whom, to whom, and by which means notice should be given to members of the prospective class.

³⁰ Jephson , *supra* note 14.

It may be that a case that once complied with all the requirements to be certified ceases to comply. In this case the law should allow the courts to decertify the case and order that the action no longer proceeds as a class action because the criteria for certification, or any of them, are no longer satisfied.³¹

7. Types of class actions

Class actions are litigated in three ways: opt-in; opt-out and non-opt-out class actions. An opt-in class action is one where only those members of the class who specifically ‘opt-in’ (in a prescribed manner, for example, by contacting the legal representatives of the class) will be bound by any judgment in the class action. In an opt-out class action, all class members are bound by any judgment unless they specifically opt-out of being bound thereby.³²

In contrast to the above two types of class action, there is also a non-opt-out (or no notice) class action in which members of the class are barred from opting-out of the class. These are the cases that involve predominantly ‘equitable claims,’³³ rather than claims for ‘money judgments.’³⁴ The purpose is to avoid unnecessary inconsistencies in future litigation.³⁵

8. Conclusion

This article has demonstrated that the procedure of class action can be an effective solution to those whose claims are too small to meet litigation expenses and those who, for various reasons (such as sickness, inability to pay legal representation, geographical location and illiteracy) are unable to litigate their claims. In this way, it was argued, class action promotes the right to access to justice that is central to a democratic State. In order to give effect to the right to access to court, it is imperative that a class action procedure is provided for and is permissible in our law. Rules of procedure should always be ‘used as tools to facilitate access to courts rather than hindering it.’³⁶ To the extent that class actions promote access to courts, they also facilitate an orderly resolution of disputes and, therefore, peaceful co-existence in the society. Making access to court easier for destitute people is something that we have to strive to do. Justice is not attained when people are kept out of the courtroom because they cannot finance their litigation. The paper has also demonstrated that the class action procedure is beneficial to the judicial system itself by allowing a court to bring together and dispose of thousands of claims at one time, in one judgment, which it would not be able to handle separately and, thereby also preventing litigation of a similar issue in the future which would be both time and resource consuming for the judicial system.

In view of the aforesaid, and in keeping with Rwanda’s obligations under the International Covenant on Civil and Political Rights (ICCPR), it is suggested that the Law Reform Commission initiates, as a matter of urgency, a revision of the provisions of the code of civil procedure governing standing before Rwandan courts in order to provide for a class action procedure.

³¹ The South African Law Commission Project, *supra* note 2, at 7.

³² Jephson, *supra* note 14.

³³ A plaintiff who seeks equitable relief is asking the court for an injunction. An injunction is a court order compelling a party to do or refrain from doing a specified act. For example, a request for an injunction to stop the construction of a factory in a certain area.

³⁴ *In re PokerTek Merger Litigation*, No. 14-CVS-105679 (Jan. 22, 2015), para 31.

³⁵ *In re PokerTek Merger Litigation*, No. 14-CVS-105679 (Jan. 22, 2015), para 31.

³⁶ *Children’s Resource Centre Trust & Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA), at 98F-G.