In a class of their own

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It is evident from recent legal judgements and pending damages claims, such as the bread-fixing cartel and the construction anti-competitive cartels, that South African citizens are more alive to their rights embodied in the Constitution and other legislation. This poses potential legal risks for directors and officers of companies who are sued by a group or member of society for compensation of losses arising from infringement of their rights.

Directors and officers’ cover is designed to protect past, present and future directors and officers by indemnifying them against loss resulting from a wrongful act, including errors or omissions which the director or officer is alleged to have committed in their capacity as a director or officer. The cover usually includes reimbursement for civil damages, defence costs, judgments, settlements and reimbursement to the director or officer company/employer for any indemnification to the director or officer for any such costs.

Section 38(c) of the Constitution lays down the foundation for class actions. Section 157 of the Companies Act 71 of 2008 builds on the concept of class actions in our Constitution. It states any of the following persons may apply for a class action:

- Any person considered in the Act or any person acting on behalf thereof.
- Any class of affected persons.
- Any person acting in the public interest.

In terms of section 157(1)(c) of the Companies Act, the application can be made to court, the Companies Tribunal and Take-Over Panel or the Commission for Certification of a Class Action. In *Mukaddam v Pioneer Foods (Pty) Ltd 2013 (5) SA 89 (CC)*, the court ruled on the proper or appropriate procedure to be followed by claimants who wish to certify a class action before seeking compensation. The court stated that the class on whose behalf the action would be brought must have identifiable members; the class must be defined with sufficient precision that permits an objective determination of who qualifies as a member; the class has a cause of action which raises a triable issue; various claims by members of the case must raise common issues of fact or law and the commonality must be of nature that the determination must be achieved by deciding a single ground common to all claims; a representative in whose name a
class action would be brought must be identified and the interests of the representative may not be in conflict with the members of the class, and the representative must have the capacity to prosecute the class action, including the funds necessary for litigation.

Further, section 218(2) of the Companies Act of 2008 has introduced civil remedies. It states that "any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention". This section potentially opens up liability exponentially to indeterminable persons. It is evident that the Constitution, Companies Act of 2008 and the Mukaddam case have laid a fertile ground for class actions and have considerably simplified the process and compliance requirements.

Class actions appear to become a reality in South Africa, especially when relating to the corporate sector. In a recent judgement in the North Gauteng High Court, directors of a private/public company were held personally liable for massive losses incurred by investors. Mr Frik Vermaak and his co-directors were ordered to repay R522 million they allegedly misappropriated in a failed investment scheme in which they were involved. Beeld newspaper has rated this "the greatest claim for personal liability of directors that has been granted in South Africa". Vermaak and his co-directors were sued by the curators of Corporate Money Managers (CMM) jointly and severally liable for R1.1 billion losses that investors suffered in a string of complex transactions between 26 companies.

The trustees argued that the directors at these companies used investors' money for their own benefit. Vermaak was involved in CMM while he was the CEO of Allegro Bridging, a subsidiary of the listed African Dawn. It appears that Allegro used the money from the CMM investors' trust to provide financing for doubtful property transactions, property developments or loans to companies that were in trouble. This eventually led to the investors' losses, because the chances were slim that those loans would be paid. However, the 11 companies of which Vermaak was either CEO or a director, charged management fees and divided the interest that could be earned between the directors. The losses were concealed by the issuance of worthless bonds between related companies. It appears, surprisingly, that the action was not opposed by Vermaak and his co-directors.

Even though the matter was instituted under the old section 424 of the Companies Act of 1973 and involved personal liability of directors, it demonstrates that our courts are not loath to grant judgments in instances were directors have breached their duties or acted reckless and negligently. Furthermore, what is fundamental about this judgement is that the investors were the plaintiffs or the curators of the trust that acted on behalf of the investors. It is evident that this case and pending bread and construction cartels cases have set a fertile ground for potential class action cases in South Africa.

Predominantly and globally class action cases are a result of securities violation by directors of a company, and these cases are often settled out of court and therefore there are no legal
precedents. The present and foreseeable trend in South Africa in terms of class actions appears to be varied and this is further complicated by the liberal legislative framework and jurisprudence. International firms have put in place proper cover for such costs and potential liability. It is imperative that the insurers and insured, that do not have a global exposure or presence, review their policies and take stock of global trends and best practices to have in place proper and adequate cover for such actions.

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