

## **SPECIALIZATION OF SOUTH AFRICAN JUDGES AND COURTS: MULTI-SKILLED, MULTITASKED, MULTIACCESS?**

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*The Constitution of the Republic of South Africa (1996) and various acts of Parliament establish courts with diverse powers. The judiciary is required to be multi-skilled for the proper performance of multitasks in order to protect the constitutional right of everyone to have access to court in civil disputes. This article deals with the aspects of such skills, tasks and access to justice. The article demonstrates that a well diversified structure of courts exists and that the judiciary is constitutionally and statutorily required to be possessed of the necessary diverse skills not only to perform multitasks but also to ensure that the rights of everyone to have access to justice is properly protected. In this regard the article sets out the course of a civil trial and the requirements of a class action. As regards the latter, it is contended that class actions put new demands on South African judges and courts to be multi-skilled and multitasked in order to guarantee multiaccess to large numbers of litigants who are joined in such actions. To this extent, judges will need the necessary expertise (through experience and training) to ensure that they remain multi-skilled and well-equipped to perform the multitasks that are inherently part of class actions.*

*Key words: courts; judges; specialization; South Africa; comparative civil procedure.*

### **1. Introduction**

The terms 'multi-skilled,' 'multitasked' and 'multiaccess' were decidedly chosen to deal with the topic of specialization of South African judges and courts.

The terms, according to the *Collins English Dictionary*,<sup>1</sup> mean the following:

(a) 'multi-skilled: 'possessing or trained in more than one skill or area of expertise;'

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<sup>1</sup> 10<sup>th</sup> ed., Harper Collins Publishers 2009.

(b) 'multitask[ed]:' 'to work at several different tasks simultaneously;'

(c) 'multiaccess:' 'a [computing] system in which several users are permitted to have apparently simultaneous access to a computer.'

In the context of this paper the terms are employed to represent and embody the following questions:

(a) 'multi-skilled:' are South African judges possessed of or trained in more than one skill or area of expertise in the sphere of civil litigation;

(b) 'multitask[ed]:' are South African judges and courts required to work at several different areas of specialization in the sphere of civil litigation; and

(c) 'multiaccess:' are members of the public, as 'users' of the civil courts, granted simultaneous access to the various courts existing in South Africa?

## 2. Background

In order to put the questions in context, it is necessary to summarize the main features of the South African civil justice system and civil procedure:

(a) In terms of Sect. 166 of the Constitution of the Republic of South Africa, 1996 [hereinafter Constitution],<sup>2</sup> the courts are:

(i) The Constitutional Court;

(ii) The Supreme Court of Appeal;

(iii) The High Court;

(iv) The Magistrates' Courts;<sup>3</sup>

(v) Any other court established or recognized in terms of any Act of Parliament.

(b) The judicial authority of the Republic is vested in the courts.<sup>4</sup>

(c) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.<sup>5</sup>

(d) No person or organ of state may interfere with the functioning of the courts.<sup>6</sup>

(e) 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.<sup>7</sup>

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<sup>2</sup> See also *in general* The Judiciary in South Africa (Cora Hoexter & Morné Olivier, eds.) (Juta 2014).

<sup>3</sup> In terms of Sect. 170 of the Constitution, a Magistrate's Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President of the Republic.

<sup>4</sup> Section 165(1) of the Constitution.

<sup>5</sup> Section 165(2) of the Constitution.

<sup>6</sup> Section 165(3) of the Constitution.

<sup>7</sup> Section 165(4) of the Constitution.

(f) The law of civil procedure that is applied by the courts is, generally, of common law origin<sup>8</sup> and adversarial in nature.<sup>9</sup>

(g) Section 34 of the Constitution guarantees to everyone the right of access to court.<sup>10</sup>

### 3. Multi-Skilled?

#### 3.1. The Courts

The Constitutional Court:

(a) is the highest court of the Republic; and

(b) may decide:

(i) constitutional matters; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that court; and

(c) makes the final decision whether a matter is within its jurisdiction.<sup>11</sup>

The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President of the Republic is constitutional, and must confirm any order of invalidity by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.<sup>12</sup>

The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament.<sup>13</sup>

<sup>8</sup> H.J. Erasmus, *Historical Foundations of the South African Law of Civil Procedure*, 108 S. African L.J. 265, 265–67 (1991).

<sup>9</sup> Daniel E. van Loggerenberg, *Hofbeheer en Partybeheer in die Burgerlike Litigasieproses: 'n Regshervormingsondersoek*: LLD-Thesis, chs. 3–5 (University of Port Elizabeth 1987); W. le R. de Vos & Daniel E. van Loggerenberg, *Activism of the Judge in South Africa*, 1991(4) *Tydskrif vir die Suid-Afrikaanse reg* / *J. S. Afr. L.* 592, 592–610. See *infra*, ch. 4.

<sup>10</sup> Section 34 provides as follows:

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.

<sup>11</sup> Section 167(3) of the Constitution.

<sup>12</sup> Section 167(5) of the Constitution.

<sup>13</sup> Section 168(3)(a) of the Constitution. In terms of section 168(3)(b) of the Constitution, the Supreme Court of Appeal may decide only:

(i) appeals;

(ii) issues connected with appeals; and

(iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.

The High Court of South Africa may decide:

(a) any constitutional matter except a matter that:

(i) the Constitutional Court has agreed to hear directly in terms of section 167(6)(a) of the Constitution; or

(ii) is assigned by an Act of Parliament to another court of a status similar to the High Court; and

(b) any other matter not assigned to another court by an Act of Parliament.<sup>14</sup>

The High Court generally deals with all commercial, delictual, family, insolvency, copyright, enrichment, insurance, administrative law, building, motor vehicle accidents, *etc.* matters.

The following courts are established or recognized in terms of Acts of Parliament:

(a) Courts having admiralty jurisdiction: in terms of Sect. 2(1) of the Admiralty Jurisdiction Regulation Act,<sup>15</sup> each division of the High Court of South Africa has jurisdiction (*i.e.* admiralty jurisdiction) to hear and determine any maritime claim, including in the case of salvage, claims in respect of ships, cargo or goods found on land, irrespective of the place where the claim arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of the ship's owner;

(b) The Labour Court: in terms of Sect. 151 of the Labour Relations Act,<sup>16</sup> the Labour Court is established as a court of law and equity<sup>17</sup> with powers equal to that of the High Court.<sup>18</sup> As a general rule, the Labour Court deals exclusively with disputes arising from employment and other labour relations;<sup>19</sup>

(c) The Labour Appeal Court: in terms of Sect. 167 of the Labour Relations Act,<sup>20</sup> the Labour Appeal Court is established as a court of law and equity<sup>21</sup> with powers equal to that of the Supreme Court of Appeal.<sup>22</sup> The Labour Appeal Court is the final court of appeal in respect of all judgments and orders made by the Labour Court.<sup>23</sup>

(d) The Competition Appeal Court: in terms of Sect. 36 of the Competition Act,<sup>24</sup> the Competition Appeal Court is established as a court with a status similar to that of

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<sup>14</sup> Section 169(a) of the Constitution.

<sup>15</sup> 105 of 1983.

<sup>16</sup> 66 of 1995.

<sup>17</sup> Section 151(1).

<sup>18</sup> Section 115(2).

<sup>19</sup> Section 157.

<sup>20</sup> 66 of 1995.

<sup>21</sup> Section 167(1).

<sup>22</sup> Section 167(3).

<sup>23</sup> Section 167(2).

<sup>24</sup> 89 of 1998.

the High Court.<sup>25</sup> The function of the court is to review any decision of the Competition Tribunal or to consider an appeal arising from the Competition Tribunal;<sup>26</sup>

(e) The Land Claims Court: in terms of Sect. 22 of the Restitution of Land Rights Act,<sup>27</sup> the Land Claims Court is established as a court of law<sup>28</sup> with powers equal, in relation to matters falling within its jurisdiction, to that of the High Court.<sup>29</sup> The Land Claims Court, to the exclusion of the High Court, has the power, *inter alia*, to determine:

(i) a right to restitution of any right in land in accordance with the provisions of the Restitution of Land Rights Act;<sup>30</sup>

(ii) approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation or acquisition of such land in terms of the Restitution of Land Rights Act;

(iii) the person entitled to title to land contemplated in Sect. 3 of the Restitution of Land Rights Act;

(iv) whether compensation or any other consideration received by any person at the time of any dispossession of a right in land was just and equitable;

(f) Equality Courts: in terms of Sect. 16 of the Promotion of Equality and Prevention of Unfair Discrimination Act,<sup>31</sup> every division of the High Court is an equality court for the area of its jurisdiction.<sup>32</sup> Equality Courts deal with inquiries into allegations concerning unfair discrimination, hate speech or harassment;<sup>33</sup>

(g) The Electoral Court: in terms of Sect. 18 of the Electoral Commission Act,<sup>34</sup> the Electoral Court, with the status of the High Court, is established.<sup>35</sup> The Electoral Court has jurisdiction to review any decision of the Electoral Commission<sup>36</sup> and to

<sup>25</sup> Section 36(1)(a).

<sup>26</sup> Section 37(1)(a) and (b). The function of the Competition Tribunal is to adjudicate any conduct that is prohibited under the Competition Act and to hear appeals from, or review any decision of, the Competition Commission (Sect. 27).

<sup>27</sup> 22 of 1994.

<sup>28</sup> Section 22(1).

<sup>29</sup> Section 22(2)(a).

<sup>30</sup> 22 of 1994.

<sup>31</sup> 4 of 2000.

<sup>32</sup> Section 16(1)(a).

<sup>33</sup> Section 21(1).

<sup>34</sup> 51 of 1996.

<sup>35</sup> Section 18.

<sup>36</sup> The Electoral Commission is established by Sect. 3 of the Electoral Commission Act 51 of 1996 to strengthen constitutional democracy and promote democratic electoral processes. The functions of the Commission include to –

(i) manage any election;

(ii) ensure that any election is free and fair;

hear and determine an appeal against any decision of the Commission in so far as such decision relates to the interpretation of any law or any other matter for which an appeal is provided by law;<sup>37</sup>

(h) Children's Courts: in terms of Sect. 42 of the Children's Act,<sup>38</sup> every Magistrate's Court is a Children's Court for its area of jurisdiction.<sup>39</sup> A Children's Court may adjudicate any matter involving, *inter alia*:

- (i) the protection and well-being of a child;
- (ii) the care of, or contact with a child;
- (iii) paternity of a child;
- (iv) support of a child;
- (v) maltreatment, abuse, neglect, degradation or exploitation of a child, except criminal prosecutions in that regard;

(vi) the temporary safe care of a child;

(vii) the adoption of a child, including an inter-country adoption;<sup>40</sup>

(i) Maintenance Courts: in terms of Sect. 3 of the Maintenance Act,<sup>41</sup> every Magistrate's Court (for a district) is, within its area of jurisdiction, a Maintenance Court. A Maintenance Court has jurisdiction to hold an inquiry into the provision of maintenance, and to make an order against the person legally liable to maintain any other person, to pay maintenance in respect of such latter person.<sup>42</sup>

### **3.2. The Judiciary**

(a) The Constitutional Court, the Supreme Court of Appeal and the High Court: Sect. 174(1) of the Constitution provides that any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer and, further, that any person to be appointed to the Constitutional Court must also be a South African citizen.

(b) The Labour Court: the Judge President and the Deputy Judge President of the Labour Court must be judges of the High Court<sup>43</sup> and must have knowledge, experience and expertise in labour law.<sup>44</sup>

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(iii) promote conditions conducive to free and fair elections;

(iv) promote knowledge of sound and democratic electoral processes;

(v) promote voter education.

<sup>37</sup> Section 20(1)(a) and (b).

<sup>38</sup> 38 of 2005.

<sup>39</sup> Section 42(1).

<sup>40</sup> Section 45(1).

<sup>41</sup> 99 of 1998.

<sup>42</sup> Sections 10–18.

<sup>43</sup> Section 153(2)(a) of the Labour Relations Act 66 of 1995.

<sup>44</sup> Section 153(2)(b) of the Labour Relations Act 66 of 1995.

A judge of the Labour Court must be a judge of the High Court<sup>45</sup> or be a person who is a legal practitioner<sup>46</sup> and have knowledge, experience and expertise in labour law.<sup>47</sup>

(c) The Labour Appeal Court: the Labour Appeal Court consists of:

(i) the Judge President of the Labour Court,<sup>48</sup> who, by virtue of the provisions of Sect. 153(2) of the Labour Relations Act,<sup>49</sup> must be a judge of the High Court and must have knowledge, experience and expertise in labour law;

(ii) the Deputy Judge President of the Labour Court,<sup>50</sup> who, by virtue of the provisions of Sect. 153(2) of the Labour Relations Act,<sup>51</sup> must be a judge of the High Court and must have knowledge, experience and expertise in labour law;

(iii) such number of other judges who are judges of the High Court as may be required for the effective functioning of the Labour Appeal Court,<sup>52</sup> and each of whom, by virtue of the provisions of Sect. 174(1) of the Constitution, must be an appropriately qualified woman or man who is fit and proper to be appointed as a judge of the High Court.

(d) The Competition Appeal Court: the Judge President of the Competition Appeal Court and each of its judges must be a judge of the High Court,<sup>53</sup> who, by virtue of the provisions of Sect. 174(1) of the Constitution, must be an appropriately qualified woman or man who is fit and proper to be appointed as a judge of the High Court.

(e) The Land Claims Court: the President of the Land Claims Court and each of its judges:

(i) must be a fit and proper person to be a judge of the Land Claims Court;<sup>54</sup> and

(ii) must be a judge of the High Court or be qualified to be admitted as an advocate or attorney,<sup>55</sup> and has, for a cumulative period of at least 10 years, practised as an advocate or an attorney or lectured in law at a university;<sup>56</sup> or

<sup>45</sup> Section 153(6)(a)(i) of the Labour Relations Act 66 of 1993.

<sup>46</sup> Section 153(6)(a)(iii) of the Labour Relations Act 66 of 1995.

<sup>47</sup> Section 153(6)(b) of the Labour Relations Act 66 of 1995.

<sup>48</sup> Section 168(1)(a) of the Labour Relations Act 66 of 1995.

<sup>49</sup> 66 of 1995.

<sup>50</sup> Section 168(1)(b) of the Labour Relations Act 66 of 1995.

<sup>51</sup> 66 of 1995.

<sup>52</sup> Section 168(1)(c) of the Labour Relations Act 66 of 1995.

<sup>53</sup> Section 36(2) of the Competition Act 89 of 1998.

<sup>54</sup> Section 23(b) of the Restitution of Land Rights Act 22 of 1994.

<sup>55</sup> South Africa has a divided Bar similar to that of England, i.e. attorneys (solicitors) and advocates (barristers).

<sup>56</sup> Section 23(c)(i) of the Restitution of Land Rights Act 22 of 1994.

(iii) by reason of his or her training and experience, has expertise in the fields of law and land matters relevant to the application of the Restitution of Land Rights Act<sup>57</sup> and the law of the Republic.<sup>58</sup>

(f) Equality Courts: only a judge, magistrate or additional magistrate who has completed a training course as a presiding officer of an Equality Court may, subject to the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act,<sup>59</sup> be designated as a presiding officer of an Equality Court.<sup>60</sup>

(g) The Electoral Court: the members of the Electoral Court consist of:

(i) a chairperson, who is a judge of the Supreme Court of Appeal;<sup>61</sup> and

(ii) two judges of the High Court;<sup>62</sup> and

(iii) two other members who are South African citizens.<sup>63</sup>

(h) Children's Courts: the presiding officer of a Children's Court must be a magistrate.<sup>64</sup> In terms of Sect. 10 of the Magistrates' Courts Act,<sup>65</sup> any appropriately qualified woman or man who is a fit and proper person may be appointed as a magistrate.

(i) Maintenance Courts: any appropriately qualified woman or man who is a fit and proper person may be appointed as a magistrate.

### **3.3. Education and Training of Judicial Officers**

In order to fulfil the need for the education and training of judicial officers, a South African judicial education institute was established by the South African Judicial Education Institute Act<sup>66</sup> to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts by providing judicial education for judicial officers.

## **4. Multitasked?**

In providing an answer to this question, it is necessary to understand the role of the judiciary.

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<sup>57</sup> 22 of 1994.

<sup>58</sup> Section 23(c)(ii) of the Restitution of Land Rights Act 22 of 1994.

<sup>59</sup> 4 of 2000.

<sup>60</sup> Section 16(2) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>61</sup> Section 19(1)(a) of the Electoral Commission Act 51 of 1996.

<sup>62</sup> *Id.*

<sup>63</sup> Section 19(1)(b) of the Electoral Commission Act 51 of 1996.

<sup>64</sup> Section 42(2) of the Children's Act 38 of 2005.

<sup>65</sup> 32 of 1944.

<sup>66</sup> 14 of 2008.



Traditionally, the function of a judge in South Africa is to express or declare the law and not make law – *iudicis est ius dicere sed non dare*.<sup>67</sup> Under Sect. 173 of the Constitution, the Constitutional Court, Supreme Court of Appeal and High Court, however, have the inherent power to develop the common law,<sup>68</sup> taking into account the interests of justice. In addition, Sect. 172 of the Constitution provides as follows in respect of the powers of the Superior Courts in constitutional matters:

- (1) When deciding a constitutional matter within its power, a court –
  - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
  - (b) may make any order that is just and equitable, including –
    - (i) an order limiting the retrospective effect of the declaration of invalidity; and
    - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
- (2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
- (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
- (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
- (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

In a typical action in the High Court, which commences with the issue and delivery of a summons,<sup>69</sup> it is for the parties to take all the necessary steps to initiate the action and to prepare the case for trial, while the function of the judge is merely to consider requests for interim relief by the parties. Even at the trial, the parties play a leading role. They determine what evidence is to be presented to the court and

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<sup>67</sup> Lucas C. Steyn, *Uitleg van Wette 1* (5<sup>th</sup> ed., Juta 1981).

<sup>68</sup> The South African common (*i.e.* substantive) law is of Roman-Dutch origin.

<sup>69</sup> In High Court procedure there also exists an application procedure on notice of motion, supported by, in the event of an opposed motion, the respective parties' affidavits (*i.e.* founding, answering and replying affidavits).

they conduct their examination (questioning) of the witnesses. The function of the court is to see to it that the proceedings are conducted according to the prescribed procedure and to deliver a judgment at the conclusion of the trial.

The pre-trial phase is characterized by the exchange of pleadings between the parties and certain procedures, such as discovery, whereby they prepare themselves for the trial. The trial, in turn, is a continuous process which is characterized by the immediate (direct) and, mainly, oral presentation of evidence. On this occasion the parties present all the evidentiary material at their disposal to establish their respective cases, whereafter the judge gives a judgment based upon such material.<sup>70</sup> The proceedings are dominated by the advocates appearing on behalf of the parties, while the function of the judge is merely to ensure that the advocates keep to the 'rules of the game'.<sup>71</sup> After both parties have closed their cases they get the opportunity, in turn, to present their arguments to the judge. The purpose of these arguments is twofold: first, to persuade the judge to make a factual finding in favour of the party concerned and, secondly, to make submissions in regard to the relevant legal principles, substantiated by legal authority. The advocates play a leading role in presenting their arguments, but the court does not hesitate to put questions to them, to raise problematical points and to draw their attention to any authority that they have overlooked. Although it is for the advocates to apprise the judge of the legal authorities upon which they rely in support of their submissions, the principle of 'judicial unpreparedness' is not very strictly adhered to. The result is that

<sup>70</sup> Judges in South Africa do not have the power to search for the truth on their own motion, but is constrained to base their findings on the evidence presented to them by the parties. It follows that South African judges can hardly aspire to find the objective truth. They must necessarily contend themselves with the formal truth or, at best, a combination of the objective and formal truth (Vos & Loggarenberg, *supra* n. 9, at 598).

<sup>71</sup> Briefly stated, a civil trial normally develops as follows: the proceedings commence by the opening address of the advocate for the plaintiff, which is aimed at apprising the judge of the nature of the case and the issues to be tried. It should be noted that generally, the judge has no prior knowledge regarding the nature of the case and the development of the proceedings before the trial, except insofar as the judge could have gained such knowledge, shortly before the commencement of the trial, by means of a perusal of the pleadings and other processes contained in the court file. Thereafter the plaintiff's advocate proceeds by calling all the plaintiff's witnesses, including the plaintiff, consecutively, to testify under oath and *viva voce* in court. The advocate decides which witnesses are to be called and in what sequence they will testify, though this will normally be done in consultation with the plaintiff's instructing attorney. The evidence of each witness is presented by means of examination (questioning) conducted by the advocates. In this regard our system, like the English model, distinguishes examination-in-chief by the advocate who called the witness, cross-examination by the latter's opponent and re-examination by the first mentioned. The process of cross-examination, which has become a hallmark of the common law orientated model, also plays a crucial role in our system to establish the truth. Once a plaintiff has presented all the evidence, the plaintiff's case is closed, whereafter it is the defendant's turn to present its case. The advocate for the defendant may also deliver an opening address, but as the court will be apprised of the issues at that stage, the defendant's advocate normally proceeds to call the defendant's witnesses. The evidence on behalf of the defendant is presented in the same matter as that of the plaintiff and at the conclusion thereof the defendant's case is closed. The judge is to adopt a passive and neutral attitude during these proceedings. The judge may, however, put questions to a witness in order to clarify obscure points but is not allowed to go beyond this by, for example, putting questions to a witness in the form of cross-examination.

‘the court has a duty to ensure that it ascertains the correct legal position regarding any points of law actually raised and argued by the parties.’<sup>72</sup> The court, however, has no power or duty to decide a civil dispute on the basis of what it believes to be the ‘truly relevant’ legal issues arising from the facts placed before it. This is the prerogative of the parties.

Once the advocates have concluded their arguments, the court may proceed to deliver an *ex tempore* oral judgment, but it happens more often that the judge reserves judgment for consideration and delivers it at a later stage in written form. The judgment must be recorded and it has become an established practice that courts motivate their judgments regarding both the facts and the law.<sup>73</sup>

The doctrine of *stare decisis* prevails in South Africa. The gist of the rule, as applied locally, could be defined as follows:<sup>74</sup>

- (a) [a] court is absolutely bound by the *ratio* of a decision of a higher court or a larger court on its own level in the hierarchy, in that order, unless the decision was rendered *per incuriam* (for instance, a governing enactment was overlooked) or there was subsequent overriding legislation;
- (b) a court will follow its own past decision unless it is satisfied it is wrong, when it will refuse to abide by it and so in effect overrule it.

In order to properly and effectively conduct a trial, a judge must have special knowledge and experience in not only the substantive law, but also the law of evidence, the rules of procedure, the rules of ethics and, further, human behaviour, etc. To this end, judges are multitasked.

In High Court procedure, judges are, however, also multitasked in another sense. Typically, a judge’s monthly duties will be divided into the following:

- (a) unopposed applications;<sup>75</sup>
- (b) opposed applications;<sup>76</sup>
- (c) civil trials;
- (d) urgent applications;<sup>77</sup>
- (e) appeals.<sup>78</sup>

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<sup>72</sup> Lawrence G. Baxter, *Civil Litigation and Jura Novit Curia*, 96 S. African L.J. 531, 536 (1979).

<sup>73</sup> This practice is based upon considerations of fairness to the parties and it also facilitates the process of appeal.

<sup>74</sup> H.R. Hahlo & Ellison Kahn, *The South African Legal System and Its Background* 243 (Juta 1968).

<sup>75</sup> Unopposed applications largely deal with default and summary judgments in commercial matters, sequestrations and liquidations and procedural matters.

<sup>76</sup> Opposed applications involve the whole spectrum of substantive law.

<sup>77</sup> Urgent applications largely involve interdicts, family matters, commercial matters, etc.

<sup>78</sup> Appeals cover the whole spectrum of substantive law.

As far as applications and appeals are concerned, judges are tasked with extensive reading and understanding of court papers with emphasis on understanding the facts and the law and, generally, to operate under severe time constraints whilst remaining painstakingly meticulous, conscientious, industrious, patient, polite, *etc.*

## 5. Multiaccess

As stated in para. 2(g) above, Sect. 34 of the Constitution guarantees to everyone the right to access to court. Insofar as litigation by individual litigants is concerned, South African courts and judges are multi-skilled and multitasked in the respects set out in chs. 3 and 4 above, in giving effect to Sect. 34. The question, however, arises what the position with class actions is in this regard.

Class actions in respect of claims arising from the Constitution are provided for in Sect. 38 thereof:<sup>79</sup>

### Class actions

38. 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 –

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (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.

Neither the common law nor legislation made provision for a class action in non-constitutional claims not directly based on the alleged infringement of a fundamental right in the Bill of Rights.

In *Children's Resource Centre Trust v. Pioneer Food (Pty.) Ltd.*<sup>80</sup> the Supreme Court of Appeal developed the common law to allow for the use of a class action in non-constitutional claims.<sup>81</sup>

<sup>79</sup> See also Danie van Loggerenberg, *What is Happening to Fundamental Procedural Guarantees in the Area of Civil Justice? A View from South Africa*, Public and Private Justice 2014: Procedural Human Rights and Access to Justice in the World of Emergencies and Economic Crisis: Course Materials (Dubrovnik, 26–31 May 2014) (Inter University Centre Dubrovnik 2014), <[http://alanuzelac.from.hr/iuc/course2014/PPJ\\_2014\\_course\\_material.pdf](http://alanuzelac.from.hr/iuc/course2014/PPJ_2014_course_material.pdf)> (accessed Sep. 27, 2014).

<sup>80</sup> 2013 (2) SA 213 (SCA).

<sup>81</sup> The Supreme Court of Appeal acknowledged the source of its power to do so in Sect. 173 of the Constitution, which provides that the Constitutional Court, the Supreme Court of Appeal and the

The reasoning that led the Supreme Court of Appeal to this development was that it would be irrational to allow class actions for constitutional matters and not non-constitutional claims, because of the similarities involved.<sup>82</sup>

The Supreme Court of Appeal laid down the following requirements for a class action involving non-constitutional rights.

(a) *Certification*.<sup>83</sup> The party seeking to represent a class must apply to a court for it to certify the action as a class action. Thereafter it may issue summons. The court faced with the application need consider and be satisfied of the presence of the following factors, before certifying the action:

- (i) the existence of a class identifiable by objective criteria;
- (ii) a cause of action raising a triable issue;
- (iii) that the right to relief depends on the determination of issues of fact, or law, or both, common to all members of the class;
- (iv) that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;
- (v) that where the claim is for damages, there is an appropriate procedure for allocating the damages to the class members;

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High Court each has the inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice.

<sup>82</sup> The case involved the alleged unlawful conduct of bread producers to fix bread prices in an anti-competitive manner, to the detriment of a vast number of consumers. In developing the common law, the Supreme Court of Appeal, *inter alia*, stated (at 225(C)–(F) and 226(A)–(D)):

The class of people on whose behalf the appellants seek to pursue claims (leaving aside for the present the definition of that class) is both large and in general poor. Any claims they may have against the respondents are not large enough to warrant their being pursued separately, so that it is improbable that any lawyers would be willing to act for them on a contingency-fee basis. If those claims cannot be pursued by way of a class action, they are not capable of being pursued at all. The effect of that is to engage the right of access to courts vested in each of the members of the class by s 34 of the Constitution. The threatened infringement of that right may be challenged by way of a class action and the appropriate remedy is to permit a class action in respect of the underlying claims . . .

In my judgment it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate circumstances, merely because of the claimants' inability to point to the infringement of a right protected under the Bill of Rights. The procedural requirements that will be determined in relation to the one type of case can equally easily be applied in the other. Class actions are a particularly appropriate way in which to vindicate some types of constitutional rights, but they are equally useful in the context of mass personal-injury cases or consumer litigation. I accordingly reject the suggestion advanced in some of the academic writing, and in some of the heads of argument, that we should await legislative action before determining the requirements for instituting a class action in our law. The legislature will be free to make its own determination when it turns its attention to this matter and in doing so it may adopt an approach different from ours. In the meantime the courts must prescribe appropriate procedures to enable litigants to pursue claims by this means.

<sup>83</sup> At 226(H)–27(B), 228(B)–(E) and 229(C)–(E).

(vi) that the proposed representative is suitable to conduct the action and to represent the class;

(vii) whether, given the composition of the class and the nature of the proposed action, a class action is the most appropriate means of determining the claims of class members.

(b) *Class definition.*<sup>84</sup> The applicant for certification must define the class with enough precision for a class member to be identified at all stages of the proceedings.

(c) *A cause of action that raises a triable issue.*<sup>85</sup> The applicant must show a cause of action with a basis in law and the evidence. That is, the claim must be legally tenable, and there needs to be evidence of a prima facie case.

(d) *The procedure to be adopted in an application for certification.*<sup>86</sup> The application must be accompanied by draft particulars of claim setting out the cause of action, the class, and the relief sought. The affidavits need to set out the evidence available to support the cause, as well as evidence it is anticipated will become available, and the way it will be procured.

(e) *Common issues of fact or law.*<sup>87</sup> There must be issues of fact, or law, or fact and law, common to all members of the class, and which are determinable in one action.

(f) *The representative plaintiff and his lawyers.*<sup>88</sup> The representative plaintiff may be a member of the class or a person acting in its interest. This applies both to class actions based on a constitutional right and to other class actions. The representative's interests cannot conflict with those of the class members; and he must also have the capacity to properly conduct the litigation. The capacity requirement entails the ability to procure evidence, to finance the litigation and to access lawyers. The payment arrangement with the lawyers need also be disclosed, and cannot give rise to a conflict of interest of the lawyers and the class members.

On the same day that the Supreme Court of Appeal delivered judgment in the *Children's Resource Centre* case, it delivered judgment in a related matter, *Mukkaddam v. Pioneer Food (Pty.) Ltd.*,<sup>89</sup> involving a bread distributor seeking permission to institute a class action against the bread producers who allegedly made themselves guilty of unlawful, anti-competitive, price-fixing. The reasoning in the *Children's Resource Centre* and *Mukkaddam* cases was materially synchronic. Because the applicant in the *Mukkaddam* case, however, sought to pursue an 'opt-in' class action in terms of which claimants who join the class as a matter of individual choice, the Supreme Court of

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<sup>84</sup> At 229(E)–(H) and 213(F)–(G).

<sup>85</sup> At 232(A)–(E) and 233(B)–36(B).

<sup>86</sup> At 236(A)–(F).

<sup>87</sup> At 236(F)–37(D).

<sup>88</sup> At 237(D)–38(D).

<sup>89</sup> 2013 (2) SA 254 (SCA).

Appeal held that the circumstances of the case did not warrant a class action since joinder under Rule 10 of the High Court's Uniform Rules of Court allows multiple plaintiffs to join in a single action. The Supreme Court of Appeal recorded that the only advantage in favour of a 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 authorize the institution of a class action where access to court may equally be achieved by means of a joint action such as that contemplated by Uniform Rule of the High Court 10.

The *Mukkaddam* case went on appeal to the Constitutional Court *sub nomine Mukkaddam v. Pioneer Foods (Pty.) Ltd.*<sup>90</sup> The Constitutional Court held that:<sup>91</sup>

(a) pursuant to Sect. 173 of the Constitution, which alludes to the 'interests of justice,' the standard which must be applied in adjudicating applications for certification to institute class actions, is the 'interests of justice;'

(b) the requirements laid down by the Supreme Court of Appeal in the *Children's Resource Centre* case 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;

(c) none of the abovementioned factors is decisive of the issue;

(d) in the light of Sect. 34, read with Sect. 38 of the Constitution, 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. In this regard, Sect. 173 of 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;

(e) 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 the *Mukkaddam* 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;

(f) what is said about certification that must be obtained before instituting a class action of a non-constitutional nature, must not be construed to apply to class actions in which the enforcement of rights entrenched in the Bill of Rights is sought

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<sup>90</sup> 2013 (5) SA 89 (CC).

<sup>91</sup> At 99(D)–101(C).

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. In these circumstances, it is neither prudent nor necessary to pronounce on whether prior certification must be obtained for class actions instituted in terms of Sect. 38 of the Constitution, without interpreting the section. That aspect therefore lives for another day.

Class actions put new demands on South African judges and courts to be multi-skilled and multitasked in order to guarantee multiaccess to large numbers of litigants who are joined in such actions. To this extent, and in order to guarantee access to court to the individuals forming part of a class action, judges will need the necessary expertise (through experience and training) to ensure that they remain multi-skilled and well-equipped to perform the multitasks that are inherently part of class actions.

## 6. Conclusion

It is clear from the legislative provisions pertaining to both courts and judges that it is required of a South African judge to be multi-skilled and, therefore, to be possessed of or trained in more than one skill and area of expertise.

It is clear, further, from the various civil court procedures, that it is required of a South African judge to perform multitasks involving meticulous, industrious, conscientious, analytical, logical and polite skills.

It is clear, lastly, that class actions will require of South African judges new skills to execute multitasks to ensure that the right of everyone to access to court is protected.

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