February 2014

The steady influx of international law firms to our shores has influenced the development of our jurisprudence over the past decade, resulting in it slowly starting to resemble that of our international counterparts. In essence, there would appear to be a shift to being more "user friendly". These changes range from the permissibility of class actions to the introduction of strict liability in respect of product liability matters. Having regard to some of these changes discussed briefly in this article, one will note that these have considerable implications for the local insurance industry, particularly in the liability sphere.

Class actions have long been the norm in the international arena. When our Constitution was adopted, specific provision was made for the instituting of class actions in instances where the rights as contained in our Bill of Rights are alleged to have been infringed. In this regard section 38(c) of our Constitution reads as follows:

"Anyone listed in this section has the right to approach a competent court, alleging that the rights 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 …… (c) any one acting as a member of, or in the interest of a group or class of persons—".

While section 38(c) is confined to the rights embodied in the Bill of Rights, from a practical perspective, its effect is far-reaching. Furthermore the Companies Act 71 of 2008 contains a similar provision. With very similar wording in section 157(1)(c), which reads as follows:

"When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person—acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interest of its members—"

Subsequently, in the latter part of 2012 our judiciary was called upon to rule on the issue of class actions in the matter of Children’s Resource Centre Trust v Pioneer Foods 2012 ZASCA 182. While the case in question related to price fixing by the respondents, it has had far-reaching implications in other arenas as well, in particular in the mining sphere.

An important element highlighted in this case is the necessity for allowing class actions. Class actions are actions brought by a number of individuals who seek to achieve a common purpose. These individuals generally cannot afford the costs associated with litigation and their claims are
not sufficiently large enough to warrant pursuing them individually on a contingency fee basis. By allowing class actions the courts are essentially granting these individuals access to our courts - a right which is enshrined in our Bill of Rights.

There are, however, certain requirements that are to be met when seeking to bring a class action. These requirements include certification of the class. This is in line with most international jurisdictions with the exception of Australia. Prior to a group of individuals being certified as a class for purposes of class action, various requirements have to be met, including:

- The existence of an identifiable objective criterion.
- Whether or not the cause of action is a trialable issue.
- The relief has to be common to all members of the class.
- The relief sought is ascertainable and determinable.
- That the class has a proposed representative who would conduct the litigation on behalf of a class.
- Whether or not the class action is the most appropriate means of achieving the relief sought.

As indicated, the mining sphere has been particularly hard hit by a number or class action suits. Subsequent to the Resource Centre Trust decision, Anglo American reached a settlement with a "class of miners" who had been diagnosed with silicosis. This particular suit was instituted in 2004 and was set down to proceed for arbitration in 2014. This settlement is one of the many cases now being brought in the mining area by silicosis sufferers against mining houses.

Another arena where we see our jurisprudence maturing to be in line with our international counterparts is in the arena of product liability. A decade ago the Supreme Court of Appeal was asked to impose strict liability in a product liability dispute in the case of *Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd 2003(2) All SA 167(SCA)*. In this case the appellant underwent surgery that required the administration of a Regiblock injection, a local anaesthetic that is manufactured and marketed by the respondent. As a result of the anaesthetic administered during the surgery, the appellant's right arm became paralysed. It was alleged that the anaesthetic was defective; the defect a result of negligence during the manufacturing process. It was argued by the appellant that fault should not be a requirement as the injured party had no knowledge of, or access to, the information required to prove negligence during the manufacturing process. Thus, the appellant sought to hold the respondent strictly liable. This argument was rejected both by the court *a quo* as well as the Supreme Court of Appeal that found that the appellant's remedy was confined to the cause premised on all the requirements of the Acquilian action (with proof of fault being one of them).

Ten years later the argument proposed by the appellant in the Pharmacare case was legislated in section 61 of the Consumer Protection Act 68 of 2008. In terms of this section producers, importers, distributors or retailers can be held liable for any damages resulting from the supply of unsafe goods, product failures, defects or hazards in goods, irrespective of whether or not
those damages are a consequence of any negligence on their part. Thus, as proposed by the appellant in the Pharmacare case, it is no longer necessary for consumers to prove fault on the part of those providing products – definitely a step in the right direction for the consumer; and definitely something to take cognisance of when underwriting product liability policies.

We also seem to have caught up with our international counterparts with regard to privacy legislation. While data protection legislation on the international front has been in existence since the 1970s, it is only now with the promulgation of the Protection of Personal Information Act (POPI) that we have aligned ourselves completely with international trends.

The first data protection legislation was adopted in 1970 in Germany followed by Sweden in 1973 and then the United States in 1974. Subsequent thereto a number of other countries have adopted data protection legislation. In 1995 the Organisation for Economic Corporation and Development issued guidelines relating to privacy protection (the OECD guidelines). These guidelines sought to regulate the protection of personal data at national level while at the same time providing for the free flow of information across national boundaries. The OECD guidelines evolved into the 1995 European Union Directive of Protection of Individuals with regard to the processing of personal data and on the free movement of such data directive. This directive embodied the eight principles that we now see in POPI. Similarly to the OECD guidelines, the purpose of POPI is to safeguard personal information in keeping with our Bill of Rights. In doing so, POPI stipulates that one has to adhere to the following eight principles relating to information processing:

- Accountability
- Processing limitation
- Purpose specification
- Further process limitation
- Information quality
- Openness
- Security safeguards
- Data subject participation

It is evident that two decades later (and with embracing the principles as enshrined in our Bill of Rights) our jurisprudence has appeared to evolve to be in line with international jurisprudence. While this is important, cognisance needs to be taken of the effect that this can have on insurers in the event of insured clients not safeguarding that they, too, have evolved their businesses and practices consistent with the current trends.

Given the extent to which liability has been widened, the cherry on the cake, so to speak, is the fact that our judiciary has over the past decade also adopted a much more liberal approach when making non-patrimonial damages awards. To illustrate this I will draw a comparison between two similar cases. In 1989 judgment was handed down in the case of Kontos v General Accident
Insurance Co Ltd 1989 (C&B 4 A2-1) TPD where the injured party was an adult male, aged 28 at time of the incident. He suffered injuries to the spine caused by a major spinal cord lesion, resulting in quadriplegia. There was partial paralysis of the shoulder girdle muscles, total paralysis of all accessory muscles of respiration and total quadriplegia. He remained connected to a respirator through a permanent indwelling tracheotomy tube. The plaintiff was unable to move any muscle or part of his body except his eyes, facial muscles, tongue and jaw. He required continuous respiratory support and constant general nursing care, which included two-hourly turning, feeding by an attendant, physiotherapy for passive removal of lung secretions, continuous bladder drainage, manual evacuation of bowels, and treatment of pressure sores. He was, however, fully aware of his condition and of his losses, and as a result he passed through various stages of depression and frustration. The court awarded ZAR120 000 in respect of non-patrimonial damages, which would amount to ZAR460 000 today.

Fourteen years later the court adopted a very different approach in the case of Delport vs Road Accident Fund 2003 C&B V A4-1 TPD, where the injured party was an adult female who was involved in a motor vehicle collision where she sustained a severe head injury, fractures of the left femur, the left tibia and fibula, as well as a rupture of the colon. The most severe injury was the head injury, which resulted in the injured being left without the use of any limbs except for the very limited use of her left arm and hand. She was unable to speak or to move, but was cognisant of her situation. She retained all sensory functions and thus she still experienced chronic pains. Consequently, she remained in a state of continuous depression as an individual with an "active mind in a useless body". In stark contrast to the approach adopted in the Kontos case above, here the court awarded non-patrimonial damages in the amount of ZAR1 250 000 with a current value of ZAR2 279 000.

Less than a decade ago class actions were unheard of, there were very few instances of strict liability, and damage awards were very conservative. Who would have thought that one could now be held strictly liable to a class of individuals where the damages could be millions of rands?