Unsavoury: How effective are class actions in the protection and vindication of the right to access to food in South Africa?

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ABSTRACT

The right to food in South African jurisprudence has remained underdeveloped and the right to food is often vindicated through other means and the protection of other, related rights. The modern development of class actions in South Africa is implicitly intertwined with the infringement of citizens’ right to access sufficient food. The first class actions initiated in South Africa involved the food industry and affordability of the most staple food, bread. Since then, a more recent class action has been filed against a food manufacturer for selling unsafe food to consumers. In addition to developing the jurisprudence on class actions in South Africa, previous and ongoing class actions involving food companies offer an opportunity to indirectly vindicate South Africans’ rights to access to sufficient food under s 27(1)(b) of the Constitution of the Republic of South Africa, 1996. This paper will examine the effectiveness of and manner in which class actions can be utilised to protect the right to food. We will analyse the manner in which the right to food has functioned in existing class actions relating to national legislation, like the Consumer Protection Act and the Competition Act and what future there is for the right in food-based class actions.

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1. Introduction

Bread is part of the staple diet of very many South Africans. A very large number of South Africans some say of the order of 50% live in poverty. For such people, a small increase in the bread price, which they pay on a daily basis, can have a very material impact on their ability to obtain sufficient food for themselves and their families. It is not...
for nothing, I submit, that one of the colloquial ways of referring to a state of poverty and hunger is ‘living below the breadline’.¹

Food is a complex issue. South Africa, like many countries in sub-Saharan Africa, faces a food system in transition – local diets are changing and different, often foreign, food products are introduced to local supplies.² While food insecurity remains an issue of concern with a substantial number of South African children experiencing food undernutrition and hunger,³ there is also a simultaneous growth in the prevalence of obesity. The entry of large multinational food corporations in the South African market is having a significant impact on the quality and type of foods that are accessible, particularly to low-income groups.⁴ In many ways the food system and, correspondingly, access to food is being shaped by private actors. There are also ongoing debates related to land redistribution and food sovereignty, which put food production in flux.⁵ In short, the food system and environment across the country is changing. Yet, in all this change, the importance of food as an essential for everyday life has not changed.

The nature of the right to food reflects the complexity of this food system. In the various instruments, domestic and international, which recognise a right to food – the recognition varies from a recognition of a self-standing right to imbuing other rights with content that includes a right to food.⁶ Within South African jurisprudence, the right to food is rarely explicitly invoked yet finds protection through other rights such as the right to property, and the right to social security.⁷ Some scholars have considered the role of law, policy and legal mechanisms in the realisation of the right to food and in this consideration, analysed social safety nets, food provisioning systems and agricultural policies as well as proposing the introduction of new mechanisms such as framework laws and food security strategies.⁸ However, little analysis has considered

¹ Marcus Chinasamy Solomon, first applicant’s founding affidavit, Trustees for the Time Being of the Children’s Resource Centre Trust v Pioneer Foods (Pty) Limited; Mukaddam v Pioneer Foods (Pty) Limited [2013] JOL 30043 (WCC) para 68.
² BM Popkin, LS Adair & SW Ng ‘Global nutrition transition and the pandemic of obesity in developing countries’ (2012) 70 Nutrition Reviews 3.
³ NP Steyn, D Labaradarios, E Maunder, J Nel & C Lombard ‘Secondary anthropometric data analysis of the national food consumption survey in South Africa: the double burden’ (2005) 21 Nutrition 4.
⁴ Ibid; S Abdool Karim ‘Pepsi’s pioneer acquisition is not healthy’ Mail & Guardian (27 February 2020) https://mg.co.za/article/2020-02-27-pepsi-s-pioneer-acquisition-is-not-healthy
⁵ Peoples’ Food Sovereignty Act 1 of 2018 https://www.fes-southafrica.org/fileadmin/user_upload/FS_Act_no.1_of_2018_Short.pdf; A Siebert, ‘Transforming urban food systems in South Africa: Unfolding food sovereignty in the city’ (2020) 47 The Journal of Peasant Studies 401; V Satgar ‘Food sovereignty the viable alternative to ANC, EFF land solutions’ Mail & Guardian (15 March 2019) https://mg.co.za/article/2018-03-15-food-sovereignty-the-viable-alternative-to-anc-eff-land-solutions/
⁶ For example, see Social and Economic Rights Action Centre (SERAC) v Nigeria (2001) AHRLR 60 para 65 where the Commission imbues the right to life with a content that includes a right to food.
⁷ D Brand ‘Between availability and entitlement: The Constitution, Grootboom and the right to food’ (2003) 7 Law, Democracy & Development 1, 10.
⁸ Ibid; D Brand ‘The right to food’ in D Brand & CHHeyns (eds) Socio-Economic Rights in South Africa (2005) 153; S Khoza, ‘Realising the right to food in South Africa: not by policy alone—need for framework legislation’ (2004) 20 South African Journal on Human Rights 664; F Coomans & K Yakpo ‘Framework law on the right to food: An international and South African perspective’ (2004) 4 African Human Rights Law Journal 17; D Moyo ‘The future of food: Elements of integrated food security strategy for South Africa and food security status in Africa’ (2007) 101 Proceedings of the Annual Meeting (American Society of International Law) 103; BH Moyo and AMT Thow ‘Fulfilling the right to food for South Africa: Justice, security, sovereignty and the politics of malnutrition’ (2020) 11 World Nutrition 112.
the role of class actions as a part of this menu of tools to realise the right to food through direct or indirect means. This is a lacuna this paper seeks to fill.

The history of class actions in South Africa is intertwined with food, hunger and poverty. The Pioneer Foods cases that followed determinations of price fixing by the Competition Commission, were, at their core, about the impact anticompetitive behaviour had on people’s ability to afford that most essential food – bread – and the vindication of the rights of South Africans to have accessible and affordable food.9 Similarly, the ongoing listeriosis case against Tiger Brands is at the nexus of poverty and the limited access the poor have to sufficient and safe food. Yet, the path of class actions – including these two cases – has been divorced from the concept and duties of the right to food. In Pioneer Foods, the right to food was invoked but not relied upon in any form in the judgment while the founding papers in Tiger Brands Limited v Pillay invoke a myriad of rights including the right to bodily integrity, the right to life and the right to food.10

This paper seeks to analyse the role of class actions in protection and vindication of the right to food in South Africa, specifically whether class actions offer an effective pathway for these purposes. We begin by tracing the content of the right to food under both international, regional and domestic law. We then outline the reasons for focusing on the utilisation of class action litigation as a mechanism to realise the right to food, specifically exploring the unique opportunity class actions offer in relation to issues that affect the right to food and the manner in which the class actions make litigation of certain claims feasible through the aggregation of claims. The paper then critically analyses whether the two class actions related to food, the 2013 Pioneer Foods bread cartel class action and the pending case against Tiger Brands following the listeriosis outbreak in 2017, have protected or vindicated the right to food. We concluded by discussing the potential for class action litigation to utilise the existing legislative frameworks such as the Competition Act 12 of 1998 and Consumer Protection Act 68 of 2008 (CPA) can provide a mechanism to protect the right to food, albeit indirectly.

2. The right to food

2.1 Development of the right to food under international law

The right to food has been recognised in a number of international and regional instruments. As this section will discuss, the form of this recognition has varied from recognition of a right to food as a self-standing right to access to adequate food being recognised as a component of other rights such as the right to life. This is significant as even under international instruments, the right to food sometimes is protected and realised through the vindication of these other rights.

Article 25 of the Universal Declaration of Human Rights11 (UDHR) guarantees the right of every person ‘to a standard of living adequate for the health and well-being of himself and of his family, including food’.12 This recognises a right to food in the form

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9 Note 1 above, paras 68–9.
10 Tiger Brands Limited v Pillay (2019/25309; 2018/12835; 2019/36431) [2020] ZAGPJHC 160 (23 June 2020) (Listeriosis case).
11 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)).
12 The right to food was first recognised in the UDHR, as part of art 25.
of a composite relationship between access to food and other rights, specifically socio-economic rights in the context UDHR.

The most comprehensive recognition of the right to food is in art 11 of the International Convention on Economic, Social and Cultural Rights (ICESCR) where it is part of a composite entitlement to a ‘standard of living adequate for health and well-being’. Together with General Comment 12 on the content of art 11, the ICESCR remains one of the most comprehensive statements on the content of the right to adequate food. The ICESCR recognises explicitly an immediate entitlement to be ‘free from hunger’ as well as broader components of the right to food which are progressively realisable. Article 11 outlines both the entitlement to food and the corresponding duties including countries’ obligations to take steps to ensure that everyone is free from hunger, improve the distribution and production of food and, ensure equitable distribution of food globally.

General Comment 12 outlines the core content of the self-standing right to food as an entitlement for food to be available and accessible. The concept of availability described by the Committee on Economic, Social and Cultural Rights encompasses a number of other core obligations such as ensuring food is of sufficient quantity and quality, and culturally acceptable as well as requirements for food safety such as introducing protective measures to ensure food is free from adverse substances and preventing contamination. The core obligations to make food accessible would include ensuring food is physically and economically accessible, and further obligations related to sustainability and ensuring that this access does not interfere with the enjoyment of other human rights. This underscores the highly interdependent nature of the right to food with other rights which has been outlined above. In the context of food security, Asbjørn Eide, Arne Oshaug and Wenche Barth Eide expanded the obligations arising from the right to food to go beyond food security to include nutrition security. This includes further obligations that food be nutritionally adequate in meeting objectively determined recommended dietary allowances and are of a sufficient quality.

The Food and Agriculture Organisation of the United Nations (FAO) has also provided a definition of the right to food that embraces a holistic view of the right to food

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13 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966) UNGA Res 2200A (XXI).
14 Article 11 of ICESCR reads:
   1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.
   2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed.
15 CESR ‘General Comment 12: The Right to Adequate Food’ (12 May 1999) UN Doc E/C.12/1999/5 (General Comment 12).
16 Ibid 6.
17 Ibid 2.
18 Ibid 3.
19 Ibid.
20 A Eide, A Oshaug & WB Eide, ‘The Food Security and the Right to Food in International Law and Development Symposium: The global food regime in the 1990s – efficiency, stability and equity’ (1991) 1 Transnational Law & Contemporary Problems 415, 505.
21 Ibid 508.
that includes recognition of dimensions of availability, accessibility and acceptability, stating:

The right to adequate food is the right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear.22

This definition of the right, like many others, places food at the centre of the realisation of other rights and a person’s ability to live a dignified life.

Though the right to food is not explicitly recognised in the African Charter on Human and Peoples’ Rights, the African Commission on Human and Peoples’ Rights has implicitly recognised the right to food as being linked to one’s dignity and an essential component of the enjoyment of other rights, including life and health.23 In Social and Economic Rights Action Centre (SERAC) v Nigeria,24 the Commission recognised that although the right to food is not explicitly recognised in the Charter, it is integral to the enjoyment of other rights, stating:

While the right to food is not specifically enumerated in the African Charter, it is implicit in such provisions as the right to life (art 4), the right to health (art. 16) and the right to economic, social and cultural development (art 22) […] It is undeniable that food is central to the enjoyment of such other rights as health, education, work and political participation.25

There is stronger recognition to women and children’s right to nutrition as part of the right to health under the Maputo Protocol26 and African Charter on the Rights and Welfare of the Child27 (ACRWC). The Maputo Protocol explicitly recognises a right to food security under article XV which provides that women have a right to nutritious and adequate food. Under art 14 of the ACRWC, states are required ensure access to adequate nutrition and take steps to address disease and malnutrition.28 There are also obligations on states to support parents and provide, among other things, support for nutrition, health, education, clothing and housing.29

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22 Food and Agriculture Organization of the United Nations (FAO) ‘Right to adequate food in Constitutions’ (2019) Legal Brief for Parliamentarians in Africa 2019 FAO CA3518EN/1/02.191.
23 SERAC (note 6 above) para 65.
24 Ibid.
25 Ibid para 66.
26 Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) (the Maputo Protocol).
27 African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU CEB/LEG/153/Rev.2.
28 The relevant provisions of art 14.2 read:
   State Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:
   […]
   (c) to ensure the provision of adequate nutrition and safe drinking water;
   (d) to combat disease and malnutrition within the framework of primary healthcare through the application of appropriate technology;
   (h) to ensure that all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding.
29 Ibid art 20.2.
The 2004 Pretoria Declaration on Economic, Social and Cultural Rights in Africa states that the right to health in the Banjul Charter entails access to the minimum essential food, which is nutritionally adequate and safe to ensure freedom from hunger to everyone and to prevent malnutrition.\(^{30}\) The African Commission issued a resolution in 2017 calling on states to ensure the accessibility of food to members of vulnerable and disadvantaged groups through special programmes.\(^{31}\) This was followed by another resolution in 2019 that provides that countries should take appropriate action to ensure the enjoyment of the right to food, ‘which includes constantly accessible and quality food that meets the requirement of nutrition and cultural acceptability’.\(^{32}\)

2.2 The right to food in South Africa

The recognition of the right to food in the Constitution of the Republic of South Africa, 1996 is somewhat different from many other jurisdictions. The Bill of Rights contains a right to food (or nutrition) in three separate sections, each with different standards and content.\(^{33}\) Section 27 contains the general right of access to ‘sufficient’ food to everyone subject to progressive realisation within available resourced.\(^{34}\) The children’s right to basic nutrition (s 28) and the detainees right to ‘adequate nutrition’ (s 35(2)(e)) are both unqualified. The right to access to sufficient food, as is the case with all socio-economic rights, places an obligation on the State to respect, protect, promote and fulfil the right.\(^{35}\) This includes obligations on the State to refrain from interfering with the realisation of the right (respect), to prevent private actors from interfering with the right to food (protect) and taking steps to support and promote the realisation of the right (promote and fulfil), all of which are subject to ‘progressive realisation’ within the country’s available resources.\(^{36}\)

Though the right to access sufficient food, like the other socio-economic rights contained in the Bill of Rights, is justiciable, there is limited case law delineating the content of the right.\(^{37}\) Interpreting the right is made more complicated by the unique

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30 Ibid art 7.
31 African Commission on Human and Peoples’ Rights Resolution on the Right to Food and Food insecurity in Africa (2017) ACHPR/Res 374 (LX) https://www.achpr.org/sessions/resolutions?id=416.
32 African Commission on Human and Peoples’ Rights, Resolution on the Right to Food and Nutrition in Africa (2019) ACHPR/Res 431 (LXV).
33 Marketing of Agricultural Products Act 47 of 1996.
34 Section 27 of the Constitution.
35 Ibid s 7.
36 Ibid and s 27(2) read with the obligations outlined in General Comment 12 (note 15 above) para 15, which reads: The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must proactively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly.
37 In re: Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) para 78, which reads: Nevertheless, we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost
standard of ‘sufficient’ rather than ‘adequate’ food contained in s 27(1)(b), which makes the right distinct from most other treaties, domestic constitutions and other guidelines.\textsuperscript{38} Despite the limited case law on the right to food, there have been three cases that have elaborated on the content of this right.

In \textit{Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd},\textsuperscript{39} the Constitutional Court considered the content of the right to food – as articulated in s 27(1)(b) – under international law, in the context of agricultural land and gave it content beyond the immediacy of addressing hunger. The majority judgment, per Kroon AJ stated:

As the Minister pointed out, international law recognises that the content of the right to food has the twin elements of availability and accessibility. The first element refers to a sufficient supply of food and requires the existence of a national supply of food to meet the nutritional needs of the population generally. It also requires the existence of opportunities for individuals to produce food for their own use. The second element requires that people be able to acquire the food that is available or to make use of opportunities to produce food for their own use. In respect of both elements there is a measure of overlap with the state’s obligation under s 25(5) of the Constitution to facilitate equitable access to ‘agricultural land’, and with the State’s obligation under s 24 of the Constitution to conserve the environment.\textsuperscript{40}

The elements discussed in \textit{Wary Holdings} give content to several dimensions of the right to food and specifically factors that inform food security such as the means to produce food, an ability to acquire food, as well as the need for sufficient food to be available. To this extent, the elements of acceptability and accessibility as defined under international law form part of the content of the s 27(1)(b) right to access sufficient food.

In \textit{Huang v Head, Grootvlei Prison} the court had to consider whether prisoners were entitled to have special dietary requirements based on their religion accommodated under the Constitution. The judgment recognised the additional component of cultural acceptability as forming part of the rights detainees have to food under both s 35(2)(e) and s 27(1)(b).\textsuperscript{42}

\textit{Equal Education v Minister of Basic Education}\textsuperscript{43} challenged the suspension of the National Schools Nutrition Programme (NSNP) during the Covid-19 government lockdown. The impact of the suspension was that 45 million meals to about 9 million
school children per week were not distributed.44 The role of the NSNP to combat hunger and malnourishment was highlighted by the court,45 which noted that the structure of the NSNP – providing food to children in the poorest communities – also fulfilled the function of advancing substantive equality.46 The provision of basic nutrition to children was also intrinsically linked with the right to basic education as it is well established that ‘well-nourished schoolchildren learn better’.47 The court found that a suspension of the NSNP was a retrogressive measure and that no interpretation of the Constitution can allow for children to starve:

If there was no duty on the Department to provide nutrition when the parents cannot provide the children with basic nutrition, the children face starvation. A more undignified scenario than starvation of a child is unimaginable. The morality of a society is gauged by how it treats its children. Interpreting the Bill of Rights promoting human dignity, equality and freedom can never allow for the hunger of a child and a constitutional compliant interpretation is simply that the Department must in a secondary role roll out the NSNP, as it has been doing.48

It is contended by some scholars that the limited case law on the right to food is the result of the close links between the right to food and both the realisation and enjoyment of other rights.49 This echoes the embedding of the right to food within other rights under international conventions as described above. Danie Brand summarises the lack of explicit reliance and invocation of the right to food within South African law as follows:

Apart from the three food-related constitutional rights, the right to food is given little explicit expression in our law. The reason for this may be the extent to which the right to food is inextricably linked with other rights. The right to food both depends on and makes possible the enjoyment of other rights, and other rights can be used to protect or advance the enjoyment of the right to food. To acquire food, one needs access to land, to education, to employment and income generation and, in some instances, to social security or assistance. Food does not, in our day, just fall from trees. It has to be produced or acquired through exchange. The ability to produce food or to acquire it through exchange depends on realising these other rights to land, education, employment and social security.50

Brand previously stated that, more so than any other socio-economic right, the realisation of the right to food is dependent on the realisation of other rights.51 This position is echoed by Bright Nkrumah, who emphasises that the right to food is often not directly invoked in case law or in legislation but instead finds protection through other constitutional rights, or in other mechanisms.

44 Ibid paras 20–24.
45 Ibid para 32.
46 Ibid para 35.
47 Ibid para 32.
48 Ibid para 53.
49 Brand (note 7 above) 10; B Nkrumah, ‘Opening pandora’s box: a legal analysis of the right to food in South Africa’ (2019) 52 De Jure 47, 55.
50 Brand ibid 10.
51 Brand ibid, 10; D Brand ‘Chapter 56C food’ in S Woolman & M Bishop (eds) Constitutional Law of South Africa 2 ed (2013) OS 02-05, ch56C-p9.
Akin to other socioeconomic rights, the right to food is tied to other fundamental rights and freedoms [...] Thus, an obvious solution for providing greater access to sufficient food lies in improving access to these ancillary rights in ways that might positively impact on sections 27 and 28 of the Constitution [...] It was against this backdrop that Brand and Heyns avow that the right to food often finds protection through other constitutional rights, given that it is often not directly safeguarded by law or court rulings.52

On this basis, many scholars have advocated for a framework law for the right to food or a national strategy as a mechanism for the realisation of the right to food.53 Others still have contended that the solution lies in advocacy, creative judicial decision-making or the utilisation of chapter 9 institutions.54 At present, the landscape on the realisation of the right to food is a complex tapestry of policies, programmes and social safety nets that all indirectly seek to address food insecurity, malnutrition and food safety.55 These measures span government departments and institutions, from the Department of Basic Education’s school feeding scheme, through the Department of Agriculture’s food production to the Department of Social Development’s grants that are used, inter alia, to address hunger and the Department of Health’s regulation of many aspects of food safety and standards.56

Consequently, the realisation of the right to food is not under-developed per se, as the lack of case law and explicit policy would indicate, but rather underscores the reliance of mechanisms that support the indirect realisation of different facets of the right to food.

3. The potential for class actions in the enforcement of the right to food against private actors

3.1 The role of private actors in South African food system

Scholarship on the realisation of the right to food and enforcement has focussed on government action. However, South Africa has a highly concentrated food industry that sees a handful of companies exercising substantial control over the food system. For example, the ten largest food-producing companies are responsible for more than 80 per cent of the industry’s revenue.57 The food retail market is similarly dominated by five companies – Shoprite, Pick n Pay, Spar, Massmart and Woolworths – that have shaped the grocery retail sector and, consequently, access to food. In 2015, it was reported that the five largest food retailers controlled a third of the total retail market including food and non-

52 Nkrumah (note 49 above) referring to C Heyns & D Brand ‘Introduction to socio-economic rights in the South African Constitution’ (1998) 2 Law, Democracy and Development 156.
53 Nkrumah (note 49 above); Coomans & Yakpo (note 8 above) 17.
54 Moyo & Thow (note 8 above) 141–143; Nkrumah (note 49 above) 55.
55 Brand (note 7 above) 1; R Joala & N Gumede ‘Realising the right to food in South Africa’ (2018) Studies in Poverty and Inequality Institute Working Paper 21 http://spii.org.za/wp-content/uploads/2018/12/SPII-Working-Paper-21-Right-to-Food_Digital.pdf.
56 Brand (note 7 above) 12–18.
57 United States Department of Agriculture (USDA) ‘South Africa: Food processing ingredients report 2019’ (2019) Global Agricultural Information Network Report https://apps.fas.usda.gov/newgainapi/api/report/downloadreportbyfilename?filename=Food%20Processing%20Ingredients_Pretoria_South%20Africa%20-%20Republic%20of_3-28-2019.pdf.
food retail. A different report indicates that 97 per cent of sales within the formal food retail sector are controlled by four major South African companies.

Increasingly, there are indications that this market dominance is being abused and negatively impacting consumers. In 2019, the Competition Commission released a report outlining the findings of the grocery retail market inquiry. This inquiry found that large grocery retailers are using their market dominance to negotiate exclusivity on shopping centres and engage in other behaviours ‘that may prevent, distort, or restrict competition’. These behaviours constrains competition and, in turn limits the choices consumers have with regard to purchasing food from grocery retail stores. In a 2020 article, Busiso Moyo and Anne Marie Thompson Thow also uncover a series of cartels and collusive activities as South Africa moved towards de-regulation post-1994.

As will be discussed in more detail below, the Pioneer Foods class action litigation emanated from findings of the competition tribunal regarding price fixing of bread. In this context, where substantial portions of the food system are controlled by private actors who can have a material impact on the realisation of the right to health, there is a need to develop a mechanism which can be used to enforce the right to food against private actors.

### 3.2 Horizontal application of the right to food

Enforcement of the right to food beyond addressing acute hunger is more complicated due to the complexity of the food system and the significant role of third parties, in particular commercial actors, in producing, manufacturing and distributing food. Aside from food provisioning and measures to facilitate subsistence-level food production by some governments, most facets of the right to food in a globalised world rely on the conduct of private actors and thus enforcement must be targeted at those actors rather than governments. Aaron Bloom, Colleen Duffy, Monica Iyer, Aaron Jacobs-Smith and Laura Moy posit that within the rubric of a human rights framework of respect, protect and fulfil, the State has a duty to prevent third parties, such as

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58 S Greenberg ‘Corporate power in the agro-food system and the consumer food environment in South Africa’ (2017) 44 The Journal of Peasant Studies 467, 484.
59 LM Pereira ‘The future of South Africa’s food system: What is research telling us?’ (2014) Southern African Food Lab http://awsassets.wwf.org.za/downloads/safl_brochure_email.pdf.
60 Competition Commission, ‘The Grocery Retail Market Inquiry: Final Report’ (2019) http://www.compcom.co.za/wp-content/uploads/2019/12/GRMI-Non-Confidential-Report.pdf.
61 Ibid 260.
62 Moyo & Thow (note 8 above) 119.
63 Popkin et al (note 2 above); BM Popkin, ‘Urbanization, lifestyle changes and the nutrition transition’ (1999) 27 World Development 1905; R Beaglehole & D Yach, ‘Globalisation and the prevention and control of non-communicable disease: The neglected chronic diseases of adults’ (2003) 362 The Lancet 903; G Kennedy, G Nantel & P Shetty ‘Globalization of Food Systems in Developing Countries: Impact on Food Security and Nutrition’ (2004) Food and Agricultural Organization of the United Nations https://agris.fao.org/agris-search/-search.do?recordID=GB2013201546.
64 LO Gostin ‘Law as a tool to facilitate healthier lifestyles and prevent obesity’ (2007) 297 JAMA 87; RS Magnusson & D Patterson ‘The role of law and governance reform in the global response to non-communicable diseases’ (2014) 10 Globalization and Health 44; B Reeve & LO Gostin “Big” food, tobacco, and alcohol: Reducing industry influence on noncommunicable disease prevention laws and policies – comment on “Addressing NCDs: Challenges from industry market promotion and interferences” (2019) 8 International Journal of Health Policy and Management 450.
commercial actors, from interfering in citizens’ access to food.\(^6\) This aligns to the constitutional rights obligations of government as outlined in s 7 of the Constitution.\(^6\)

Section 8(2) of the Constitution provides that a provision in the Bill of Rights can bind a natural or juristic person ‘if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’.\(^6\) To achieve this, s 8(3) provides that:

a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with s 36(1).\(^6\)

Section 8(2) proceeds on the assumption that constitutional rights might be agent-relative and context-sensitive, inasmuch as their direct application against private agencies will depend on the circumstances of the case and the characteristics of the particular person.\(^6\) While s 8(3) provides that the preferred manner to vindicate a right in a private dispute would be through indirect mechanisms such as existing laws.\(^7\)

The question of how to hold large corporate entities, often transnational corporations, responsible for human rights violations is not a settled matter.\(^7\) The increased size and power of these corporation is making it increasingly difficult to deny their accountability for human rights obligations based on the asymmetry of power between states and private entities.\(^7\) The initial position, as articulated in Du Plessis v De Klerk,\(^7\) was that horizontal application against private parties could only happen indirectly under the Interim Constitution.\(^7\) Since then, our jurisprudence has developed to recognise that in certain circumstances, there is at least a negative obligation on the State and other entities to desist from impairing certain rights (such as housing,\(^7\) healthcare\(^7\) and basic education\(^7\)).

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\(^6\) A Bloom, C Duffy, M Iyer, A Jacobs-Smith & L Moy ‘Transnational corporations and the right to food’ New York University Law Students for Human Rights (2009) http://www.ww.rojasdatabank.info/TNCsandRTF.pdf 6 outlines the State’s obligations under the respect, protect and fulfil framework as an obligation to refrain from obstructing existing access to food (respect), an obligation to ensure that other third parties do not interfere with access to food (protect) and an obligation to take positive steps to implement adequate food for citizens and groups within their borders (fulfil). It is worth noting that, within this outline, the South African right to food has an additional component of ‘promote’ and is limited to access to sufficient food.

\(^6\) Section 7(2) of the Constitution reads: ‘The state must respect, protect, promote and fulfil the rights in the Bill of Rights’.

\(^6\) Section 8(2) of the Constitution.

\(^6\) Section 8(3) of the Constitution.

\(^6\) Cockrell in M Pieterse ‘Indirect horizontal application of the right to have access to health care services’ (2007) 23 South African Journal on Human Rights 157, 161.

\(^7\) K Ibrahim Horizontal effect of human rights in the era of transnational constellations: On the accountability of private actors for human rights violations (2014) 4.

\(^7\) Ibid 5.

\(^7\) Du Plessis v De Klerk 1996 (3) SA 850 (CC).

\(^7\) Ibid para 60. Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution). The Interim Constitution has been repealed.

\(^7\) Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 para 34.

\(^7\) Minister of Health v Treatment Action Campaign 2002 (5) SA 721 para 46.

\(^7\) Governing Body of the Juma Musjid Primary School v Essay 2011 (8) BCLR 761 (CC).
As the jurisprudence develops, the nature and scope of how horizontal application functions remains uncertain.\textsuperscript{78} In the realm of socio-economic rights, we have seen clearer, and more onerous, pronouncements from courts that expound on the scope of the obligations emanating from horizontal application. In \textit{Jaftha v Schoeman},\textsuperscript{79} for example, the court effectively limited the ability of a judgment creditors to sell mortgaged homes to recover outstanding debt and required a balancing exercise to be applied between the interest of the creditor and that of the person(s) being evicted.\textsuperscript{80}

However, there remain several difficulties and concerns with applying the right to food horizontally against private corporations. Stephen Ellman, for example, points to the internal qualifications placed on several socio-economic rights – for example, s 27(2) – such as recognising resource limitations of states and argues that a similar limit on the horizontal application of socio-economic rights against private actors should then apply.\textsuperscript{81} There is also a concern about the perception that socio-economic rights are more resource dependent and likelier to give rise to positive obligations.\textsuperscript{82}

This article does not intend to engage these particular arguments, save to note this is remains an on-going discussion and that courts might view any one, or all, of these concerns as barriers to applying the right to food directly and horizontally. The question of more immediate concern is whether the direct horizontal application of the right to food is necessary or a preferable means to improve food systems where indirect mechanisms as envisaged in s 8(3) could provide an alternative mechanism to protect the right to food – potentially in a more holistic and systematic fashion. In this context of a preference for developing the common law and indirect horizontal application, class actions could play a role in ensuring private entities in the food system do not impede access to the right to food.

\subsection*{3.3 Class actions as a mechanism to enforce against private actors}

There is recognition of the role of courts in protection of the right to food. Brand contends that there are two pathways for courts to work to the protect the right to food. First, in the context of legal challenges to measures that give effect to the right to food, the courts can protect these measures and balance the right to food against competing rights.\textsuperscript{83} Second, the courts can protect the right to food by interpreting legislation or developing the common law to promote the ‘spirit, purport and objects of the Bill of Rights’ as required by s 39(1) of the Constitution.\textsuperscript{84} These pathways have been utilised in the context of other socio-economic rights, both against government actors and, in the context of the right to housing, against private actors to different degrees. It is

\textsuperscript{78} See A Nolan ‘Holding non-state actors to account for constitutional economic and social rights violations’ (2014) 12 International Journal of Constitutional Law 61.

\textsuperscript{79} \textit{Jaftha v Schoeman; Van Rooyen v Stoltz 2005 (2) SA 140 (CC)}.

\textsuperscript{80} Ibid. Also see S Liebenberg ‘Socio-economic rights: beyond the public-private divide’ in M Langford, B Cousins, J Dugard & T Madlingozi (eds) \textit{Socio-economic Rights in South Africa: Symbols or Substance?} (2014) 72 for a discussion on the \textit{Jaftha} judgment.

\textsuperscript{81} S Ellman ‘A constitutional confluence: American ‘state action’ law and the application of South Africa’s socio-economic rights guarantees to private actors’ (2001) 45 New York Law School Law Review 21, 23.

\textsuperscript{82} Nolan (note 78 above) 81.

\textsuperscript{83} Brand (note 49 above) 56C-17.

\textsuperscript{84} Ibid 56C-18.
arguably under the latter that the courts can develop class action litigation to protect the right to food directly or indirectly.

In this regard, class actions are worth investigating as a mechanism to protect or vindicate the right to food for several reasons. Some scholars have recognised the potential role of litigation and, in particular, class actions in improving access to nutritious and safe food more broadly. Though constitutional rights-based litigation or public interest litigation offers a pathway to enforcement of the right to food against both the State and private actors, the damages that attach to class action litigation offer a particular mechanism for restitution following violations of the right and a powerful deterrent to other private actors against engaging in similar activities. This deterrent effect has been seen in other jurisdictions, such as the United States, where litigation against large food companies has led to reform across the industry. Whether class action litigation will have a similar deterrent or reform effect will remain to be seen as the jurisprudence develops.

More concretely, in the context of the right to food, the mechanism of class actions offers a significant advantage to poorer litigants seeking to pursue smaller claims. The aggregation of claims through the class action mechanism makes it feasible for litigants to pursue claims that would otherwise be too small or unfeasible to vindicate against the cost of litigation. This is particularly relevant in South Africa given that class actions offer a pathway to financial damages claims in a context where the Constitutional Court has been reluctant to award constitutional or financial damages in the context of public interest litigation. In *Fose v Minister of Safety and Security*, the Court emphasised the value of utilising existing common law mechanisms, albeit in the context of vicarious liability, to vindicate rights before placing direct reliance on constitutional damages.

In *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*, Cameron JA (as he was then) spoke of the role of class action in addressing some of the shortcomings of legal standing as it was understood in terms of the common law:

1. It addresses situations where large groups of people suffer a small harm which is difficult to pursue individually;
2. It avoids fragmented legal redress; and
3. It can assist where claimants cannot afford legal action, or does not even know of the possibility of pursuing legal action.

This particular advantage is clearly reflected in the *Pioneer* matter, where the judge asked: ‘If I pay 50c too much [for a loaf of bread], does this infringe my rights?’. Here the inherent potential of class actions as a method to realise the right to food becomes

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85 LO Gostin *Global Health Law* (2014) 395; Magnusson & Patterson (note 64 above) 46.
86 MM Mello, EB Rimm & DM Studdert ‘The McLawsuit: The fast-food industry and legal accountability for obesity’ (2003) 22 Health Affairs 207.
87 *Fose v Minister of Safety and Security* 1997 (3) SA 786.
88 Ibid paras 67–68.
89 Ibid.
90 *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA).
91 Ibid paras 5–6.
The right to access to food is inherently a class issue. Where people are struggling to economically access food, it is not surprising that they do not have the resources to vindicate their right individually. In *Tiger Brands*, it was apparent that food safety disproportionately impacted the poor; lower income consumers were more likely to resort to cheaper food alternatives (often ultra-processed food), less able to change consumption and less likely to access healthcare necessitated by the unsafe product. And when we move into a space of adequate ‘nutrition’, again, the burden of obesity and malnutrition predominantly befalls lower income groups.93

An additional reason to consider class actions specifically is that, within South African jurisprudence, litigation related to the right to food has not emanated from direct reliance on the right but has arisen in arenas where class actions are typically the pathway for restitution or resolution. This includes areas such as competition law, where the *Pioneer Foods* case remains seminal, and consumer protection law where the *Tiger Brands* litigation may become the basis for future litigation. Against this backdrop, there is a need to understand whether the current rubric of class actions within South Africa have yielded these benefits or whether there is a need to develop the field to achieve these objectives. The sections below will discuss consider whether food-related class action litigation in South Africa has achieved these aims by analysing the impact of the *Pioneer Food* and *Tiger Brands* class actions.

### 4. Class actions and the right to food: an analysis of *Pioneer Foods* and *Tiger Brands*

#### 4.1 Economic accessibility of food – the *Pioneer Foods* cases

In 2006, the Competition Commission received a complaint that there was a bread cartel operating in the Western Cape. Pioneer Foods (Pty) Ltd, Tiger Consumer Brands Ltd and Premier Foods Limited (Producers) were implicated in a scheme to fix the price of bread and other trading conditions to retailers. The four producers agreed to increase the price per load of bread at about 35 cents and to cap its discounts to ‘agents’ (which supply the informal market) to 90 cents.94 The producers also colluded to divide the bread market geographically.

Along with a fourth company – Foodcorp (Pty) Limited – these companies enjoyed between 50 per cent and 60 per cent of the bread market at that stage, providing bread to formal retailers as well as informal bread distributors operating in the informal market. Premier Foods Limited applied for corporate leniency (conditional immunity) and assisted the Commission with the investigation. This led to the revelation of a larger national bread cartel operation. Tiger Consumer Brands Ltd and Foodcorp negotiated a consent order and were ultimately fined in excess of R98 million and R45 million respectively. Pioneer Foods (Pty) Ltd was the only producer that denied its involvement in the cartel but was found to have contravened the Competition Act and fined R195 million based on evidence produced by the other members of the cartel.

92 R Kesselring ‘An injury to one is an injury to all? Class actions in South African courts and their social effects on plaintiffs’ (2016) 39 *PoLAR Political & Legal Anthropology Review* 74.
93 Popkin et al (note 2 above).
94 *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 paras 57–59.
Importantly, the structure and role of bread in the South African food system is significant. Bread is seen as a staple food and is not very price sensitive. Up to 1991, government subsidised bread but also had price control measures on bread.\(^{95}\) When deregulation mechanisms were introduced in 1991, the bread producers used the Chamber of Baking to maintain relationships and share market information.\(^{96}\) One of the tactics of these producers was to engage in predatory pricing to force small competitors out of the market.\(^{97}\)

Section 65 of the Competition Act provides a route to a claim for damages or loss flowing from a prohibited practice.\(^{98}\) Under this section, the Competition Tribunal has exclusive jurisdiction to make determinations on whether there have been contraventions of the Competition Act. Once such a determination has been made, a litigant who has suffered loss or damages as a result of the prohibited conduct may seek damages in a civil court, and the Tribunal’s determination will be binding on a civil court.

The Competition Tribunal found that the producers had engaged in prohibited behaviours by fixing the price of bread.\(^{99}\) Following this, both consumers and distributors of bread in the Western Cape applied for certification of class actions that sought to claim damages arising from this anti-competitive conduct utilising s 65 of the Competition Act.\(^{100}\)

### 4.1.1 Case history

Two separate ‘streams’ of application for damages via class actions were instituted in the Western Cape High Court: one action for consumers, and one for distributors of bread. In the consumer stream, the applicants originally argued that all bread consumers in the Western Cape ‘or elsewhere’ formed part of the class and that the producers’ actions amounted to a violation of s 27(1)(b) and s 28(1)(c) of the Constitution (the right to access to sufficient food and the right of the child to basic nutrition). The applicants alleged that these rights apply horizontally, at least in so far as it places a duty on food producers to not prevent or impair access to sufficient food and basic nutrition for children. The relief sought was to establish a trust or similar vehicle into which the producers were to pay the overcharge. The applicant explained this choice as follows:

The damages which each individual bread consumer suffered are of the nature of things, very small. If a global sum of damages was awarded in respect of the unlawful conduct of the respondents, the cost of distributing to each consumer his or her share of those damages would be prohibitive and not viable. The further problem which would arise would be to establish precisely how much of the respondents’ bread each individual consumer bought during the period in question. For this reason, in this class action the applicants will seek class relief, in the form of an order which will

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95 MG Keleme ‘Cartel detection in the South African bread market: A review of the studies by the Competition Commission and National Agricultural Marketing Council’ (2014) unpublished master’s thesis University of Pretoria 24.
96 Keleme ‘Food markets in South Africa: Liberalization, corporate behaviour and competition policy’ (2012) Competition Commission of South Africa 28.
97 Mncube ‘Strategic entry deterrence: Pioneer foods and the bread cartel’ (2013) 3 Journal of Competition Law & Economics 29.
98 Section 65 of the Competition Act.
99 Competition Tribunal: Pioneer Foods, Case Nos 15/CR/Feb07 and 50/CR/May08.
100 Trustees for the Time Being of the Children’s Resource Centre Trust (note 1 above).
require the respondents to pay the unlawful overcharge into a trust or similar institutions to be established for the benefit of the bread consumers who suffered damages.  

Choosing to leave the question of whether there was a negative duty placed on food providers under the Constitution open, the High Court read the proposed definition of the class as every bread consumer who suffered a violation of ss 27(1)(b) and 28(1)(c) so as to exclude consumers – such as restaurants – who were prejudiced by price increases but who were not experiencing a violation of their constitutional rights. The Court found this class too imprecise on two counts: first, that consumers would have difficulty identifying whether they met the threshold to determine whether there was violation of their socio-economic rights; and second, it was difficult to determine and apply where, and to what extent, cartel activity impacted consumers in different geographic areas of the country. The Court also indicated that the cause of action was unclear. These practical difficulties led to the Court dismissing the consumer application. The distributor’s application failed as the Court was not convinced the application raised common questions of law and fact – as the various distributor-producer relationships were significantly varied and different levels of impact (if any) were experienced.

The consumer stream appealed to the Supreme Court of Appeal (SCA). The SCA made several important comments. In terms of the use of class actions, the SCA held:

> 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.

Using this line of reasoning, the Court found that the right to access to court is the appropriate constitutional one to invoke and that reliance on s 27(1)(b) is not necessary. It also commented that:

> 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.

In the SCA case, the appellants couched their claim on a breach of a statutory duty (based in the Competition Act) by bread producers, and relied on the negative duty of food producers in terms of s 27(1)(b) in the alternative only. However, the SCA held that it was not impossible to define the class. The SCA did highlight that certain key factors were absent – for example, that consumers who purchase at formal large retailers were less likely to be as severely affected, presumably in comparison to consumers who purchased from informal vendors – and that not all forms of bread were

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101 Children’s Resource Centre Trust v Pioneer Food [2012] ZASCA 182 para 8.
102 Ibid para 76.
103 Ibid para 77, 78.
104 Trustees for the time being of Children’s Resource Centre Trust v Pioneer Food (Pty) Ltd 2013 (2) SA 213 (SCA).
105 Ibid para 19.
106 Ibid para 21.
deemed staple foods. However, the SCA outlined how this might be remedied through the introduction of a mechanism such as income bands to provide more specificity to the persons who are included in the class.\textsuperscript{107}

The SCA also found the proposed remedy problematic. The appellants had suggested allocated funds might be used in a school or community feeding scheme. The SCA noted that this meant the remedy will not necessarily target those impacted – given that children in schools were likely not impacted by the price fixing – and found that that the proposed remedy appeared more punitive than compensatory in nature. However, the Court was quick to denounce the idea that no remedy is available in situations with similar small claims. For one, it pointed to targeted price reductions that could be employed in an appropriate set of circumstances.\textsuperscript{108} The SCA ultimately upheld the appeal, allowing the applicants an opportunity to supplement their papers to deal with some of the outlined difficulties – now with the benefit of more judicial guidance on how to pursue their claim.\textsuperscript{109}

The distributors’ stream also appealed to the SCA. It was unsuccessful, as the Court held that there was no reason for distributors to pursue a class action instead of litigating in their own capacities. The Constitutional Court overturned this decision and held the distributors also had a ‘potentially plausible’ case. In a separate judgment, the SCA upheld an appeal by Premier Foods that effectively excluded them from being cited as a respondent in the class action.\textsuperscript{110}

4.1.2 Impact of the Pioneer Foods cases on the right to food

In the consumer stream of the litigation, the courts were alive to the role of class actions in vindicating these smaller claims, especially by vulnerable South Africans. However, the courts also found practical difficulty in defining the class (which is necessary to open class actions as an avenue for redress) for claims of this nature. These included the large numbers of consumers suffering damage as well as difficulties in determining geographies and the unequal impact and harm individual consumers may have suffered. This arises in part due to the nature of the claim but also due to the fact that South African food producers are often behemoths with intricate and wide-spread distribution channels and hence the ability to abuse their market share to broadly and incrementally make food economically inaccessible.\textsuperscript{111} Though it is admirable that the courts were willing to engage in steps to possibly ameliorate some of these shortcomings, ultimately – to the authors’ knowledge – the class actions did not continue, and some of these practical challenges might have proven terminal to consumer efforts to seek relief, thus limiting this class action’s practical impact in realising the right to food.

The parallel application of competition law through the Competition Commission system further exposes some of the comparative weaknesses of the class action mechanism. The Competition Commission had the necessary infrastructure and incentives to

\begin{itemize}
  \item \textsuperscript{107} Ibid para 77.
  \item \textsuperscript{108} Ibid para 86.
  \item \textsuperscript{109} Ibid para 93.
  \item \textsuperscript{110} Premier Foods v Manoim 2016 (1) SA 445 (SCA).
  \item \textsuperscript{111} USDA (note 57 above), Greenberg (note 58 above) and Pereira (note 59 above).
\end{itemize}
impose large penalties within a comparatively short period. The investigation started in 2006, and the Competition Tribunal reached findings against the bread producers in 2008 and 2009. The penalty for anti-competitive behaviour is significant. For example, entities involved in cartel behaviour can be fined up to 10 per cent of its annual turnover (not profit) in the preceding year.\footnote{Competition Commission of South Africa Guidelines for the Determination of Administrative Penalties for Prohibited Practices (2015) para 5.18.} The use of conditional immunity to whistleblowers can also encourage corporations to disclose and assist in curbing anti-competitive practices.\footnote{Competition Commission Corporate Leniency Policy (2008) s 2.} In addition, the mandate of the Commission allowed it to go even further; when the Commission noticed the price of bread did not stabilise, it investigated and fined actors across the entire food supply chain, impacting actors beyond the immediate supply of food, to include actors that form an integral part of the food system and ultimate availability and safety of food products.\footnote{Keleme (note 95 above) 31. See also Competition Commission of South Africa v Senwes Limited [2009] ZACT 8 (3 February 2009).}

Though the actions of the Competition Commission had material impacts on the food system, the explicit lacuna in competition law is the provision of compensation to impacted communities that, under the Competition Act, is to be achieved through the common law. Though the Pioneer case sought to utilise that provision, the decision equated the proposed remedy of a trust that could fund community and school feeding schemes to the penal function of the Commission. However, this equivocation is not entirely accurate. Had it moved forward, it is likely that the class action would have resulted in a very real impact on the food environment of impacted communities unlike the purely penal sanction of the Commission sanction that would not have a direct socio-economic impact on consumers affected by the anti-competitive behaviour. The lack of recognition of this distinction hindered the ability of the class action mechanism to compensate consumers for the infringements of their right to food that occurred as a result of Pioneer’s actions and, as a result, limits the ability of these class actions to truly vindicate the economic components of the right to food.

In future, this limitation could be addressed by reconceptualising the violations of the right to food through anticompetitive behaviours as a systemic violation. Perhaps the appropriate view is to see the initial right to food violation as a systemic violation experienced by vulnerable communities and not focus on individuals, thereby hindering avenues of redress.

4.2 Food safety – Ngobeni v Tiger Brands

4.2.1 Case history

From October to November 2017, the National Institute of Communicable Diseases (NICD) noted a marked uptake in meningitis resulting from *Listeria monocytogenes*\footnote{Founding Affidavit Listeriosis case (note 10 above) para 77; other sources date the outbreak of meningitis to an earlier date of July 2017. See J Thomas, N Govender, K McCarthy, LK Erasmus, TJ Doyle, M Allam, A Ismail, N Ramalwa, P Sekwadi, G Ntshoe, A Shonhiwa, V Essel, N Tau, S Smouse, HM Ngomane, B Disenyeng, NA Page, NP Govender, AG Duse, R Stewart, T Thomas, D Mahoney, M Toudijman, O Disson, P Thouvenot, MM Maury, A Leclercq, M Lecuit, AM Smith & LH Blumberg ‘Outbreak of listeriosis in South Africa associated with processed meat’ (2020) 13 New England Journal of Medicine 382.}.
While it was initially difficult to trace the food, through whole-genome sequencing, 93 per cent of the cases were due to one sequence type (ST6) and were highly related. Industry and health associations communicated this finding to food distributors nationwide. The incidence of listeriosis continued to increase, and several measures were put in place to identify the source: the NICD declared listeriosis as a category 1 notifiable disease, which meant that healthcare workers and laboratories were under a legal duty to immediately report any occurrence of listeriosis by the most rapid means possible, and each newly diagnosed patient’s home would be visited to obtain food samples. A breakthrough occurred when, in January 2018, eleven children from the same crèche were rushed to the hospital for febrile gastroenteritis – a consequence of *Listeria* infection – after having consumed Enterprise polony, which was contaminated with the same sequence type (ST6) associated with the outbreak. Enterprise is a wholly owned subsidiary of Tiger Brands and is the largest producer of processed foods in South Africa. Nearly 1,000 people fell ill; and at least 183 people died, 78 of whom were children.

In April 2019, a class action was launched by persons affected by the listeriosis outbreak (applicants). The respondents were Tiger Brands, and two of its subsidiaries – Enterprise and Tiger Consumer Brands. The applicants aver that the respondents failed on several fronts. First, once the outbreak of listeriosis became apparent, given their national footprint, they had a duty to start taking steps such as testing products and facilities. Second, after the incident where the 11 children fell ill from their product, the respondent neither tested its products nor withdrew the product from the market. Third, only after a second confirmation that one of its facilities was infected did the respondent take action in isolating certain batches – but not all – from the facility. There was no communication with the public.

The applicants based their cause of action on three alternative arguments: (1) The strict liability of Tiger Brands as an importer, distributor or retailer of any good that caused harm in terms of s 61(1) of the CPA (strict liability); (2) liability based on Tiger Brands’ negligence in terms of the common law; and 3) a violation of the applicants’ constitutional rights, including the right to access to sufficient food.
The strict liability argument is fairly simple: the mere fact that the respondents provided unsafe food and that harm manifested as a result is sufficient to vest a claim in terms of s 61(1).\footnote{Section 61 of the CPA provides: Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of—
(a) supplying any unsafe goods;
(b) a product failure, defect or hazard in any goods; or
(c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be. (Emphasis added)} Their first alternative argument stated that the respondents were liable in the law of delict by virtue of the wrongful, negligent breach of the respondents’ legal duty to the public not to cause contaminated food products to be made available for consumption.\footnote{Ibid para 106.} Specifically, the respondents had a positive duty to prevent harmful bacterial infection of food. This duty was created partially by legislation protecting food safety,\footnote{Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972; Occupational Health and Safety Act 85 of 1983; The Meat Safety Act 40 of 2000.} and partly by a broader duty to the public not to distribute dangerous food.\footnote{Combined Summons Listeriosis case (note 10 above) para 102.} The applicants referred to several concrete technical standards statutorily mandated to comply with this duty. And finally, the applicants contended that the respondent violated the following constitutional rights: the right to dignity; the right to life; the right to bodily integrity; the right to an environment that is conducive to the applicants’ health or wellbeing; the right of access to food, which implies the right to safe food; children’s right to parental or family care; and children’s right to basic nutrition.\footnote{Sections 10–12, 24, 27 & 28 of the Constitution.} The applicant stated that the pervasiveness of the violation justified constitutional damage, and that the nature of the rights and corresponding duties on the respondents justified applying the constitution horizontally.\footnote{Combined Summons Listeriosis case (note 10 above) para 105.}

\subsection*{4.2.2 The potential impact of the Tiger Brands case on the right to food}

Though the Tiger Brands case is still in process, the events following the outbreak and the initiation of the litigation itself provide a number of insights on the impact the case has had and may have in future for the right to food. The right to access sufficient food interlinks with the right to life, dignity and physical integrity. Food safety is therefore an integral component of the right, and food manufacturers have to meet sanitary and phytosanitary\footnote{Relates to the control of plant diseases, especially in agricultural crops.} measures to protect consumers against disease.

Despite the stringent guideline in place to regulate food safety and trace listeria outbreaks, the process to identify the source of the 2017 outbreak was lengthy and, according to the members of the class, Tiger Brands was at fault for these delays. However, there may be perverse incentives for hiding the source of an outbreak. Once Tiger Brands was identified as the source of the listeria outbreak, they suffered serious commercial damage: the company lost more than R5 billion in its company value, and...
a wide range of products was recalled.\textsuperscript{137} It is worth noting, however, that these losses were temporary, and the company has subsequently recovered most of the lost value and has continued trading with little to no further consequence.\textsuperscript{138}

This illustrates that while South Africa’s food safety regulatory framework is complex enough to establish clear and implementable guidelines for food producers, it does not contain the necessary mechanisms to hold violators of those regulatory standards accountable. Without the institution of the class action, it is likely that no further consequence would have attached to the respondents, particularly given how short-lived the reputational harms were to the financial status of Tiger Brands.

However, the Tiger Brands case finds its basis both within food safety standards and the infrastructure of the CPA and so, as in Pioneer Foods, the case is based within existing legislative frameworks. This reliance on the CPA is significant. The CPA can be a power tool to assist consumers in vindicating the infringements of their rights that limit or hinder their access to nutritious and good quality food. The product recalls and food safety issues arising in Tiger Brands reflect only one small aspect of the protections the CPA offers. For example, the CPA protects the right to correct misleading product labels and descriptions and the right to product information in plain and understandable language.\textsuperscript{139} Under the CPA, consumers have a right to safe, good quality goods, and have goods packaged, labelled and marketed in such a way that it includes ‘instructions for, or warnings with respect to the use of the goods’ to align with the general intended purpose of the good.\textsuperscript{140}

The CPA has within it provisions for consumers to obtain court orders awarding ‘damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any terms or conditions that the court considers just and equitable and suitable to achieve the purposes of this Act’.\textsuperscript{141} The listeriosis litigation offers a potential pathway to utilising the CPA in this fashion and, if the litigants are successful, the final decision may offer a new mechanism to vindicate the right to food.

However, due to the pending litigation, Tiger Brands has vehemently and categorically denied responsibility for the outbreak and, since the inception of the class action, has initiated a series of legal steps that have significantly delayed the claims. The complexity of listeriosis outbreaks and of food safety litigation more broadly has required extensive investigation and expert evidence – both of which would be costly pursuits for individual litigants. For example, in this case, the eight renowned international scientists, ranging from public health specialists and experts in food quality and safety to experts on trace-back investigations, were consulted.\textsuperscript{142} Tiger Brands also subpoenaed

137 Tiger Brands, RCL Foods lost R5.7 billion in one day after #ListeriosisOutbreak’ IOL Business Report (5 March 2018) https://www.iol.co.za/business-report/companies/tiger-brands-rcl-foods-lost-r57-billion-in-one-day-after-listeriosisoutbreak-13603415; ‘South Africa traces deadly listeria to sausage meat, issues recall’ Reuters (4 March 2018) https://www.reuters.com/article/safrica-disease-listeria/south-africa-traces-deadly-listeria-to-sausage-meat-issues-recall-idUSL5N1QM0I0.
138 T Malusi ‘Three years after listeriosis outbreak traced to Tiger Brands, victims remain without compensation’ Daily Maverick (5 March 2021): https://www.dailymaverick.co.za/opinionista/2021-03-05-three-years-after-listeriosis-outbreak-traced-to-tiger-brands-victims-remain-without-compensation/.
139 Sections 22 & 24 of the CPA. Equally, the consumer is protected against ‘false, misleading and deceptive’ misrepresentations under s 41 of the CPA.
140 Ibid s 55(4)(a).
141 Ibid s 76.
142 Founding Affidavit Listeriosis case (note 10 above) paras 24 & 25.
test results, records and protocols of the laboratories that analysed the samples, and any challenge to those documents would require further expertise and resources. This illustrates the particular benefits of pursuing a class action in litigation of this nature. The expertise required to pursue this type of litigation and the resources available to companies to try and deny liability or to frustrate a speedy resolution of claims, makes class actions a more viable option for claimants, especially where vulnerable people are disproportionately impacted by these kinds of cases.

Finally, there is a significant difference between the class as defined in *Pioneer Foods* cases and the class seeking certification in the *Tiger Brands* litigation. The latter is capable of easier and clearer identification. Due to the nature of the damage suffered – disease and death – it is easier to identify the impacted group and to structure a remedy that would fulfil a compensatory function. This addresses some of the shortcomings that made vindication of the right to food difficult in the *Pioneer* cases. As it currently stands, the *Tiger Brands* litigation is further developed than the *Pioneer Foods* class action was able to achieve. Given the clearer guidance on defining class actions that flowed from the *Pioneer Foods* case and the particular nature of the *Listeriosis* claimants, it is likely that the *Tiger Brands* litigation may result in compensation, and some vindication of the right to food for the litigants and offer a pathway to vindication for future litigants.

5. Are class actions an effective pathway for vindication of the right to food?

*Pioneer Foods* and the pending litigation against Tiger Brands do not offer a clear answer as to whether the right to food may be successfully vindicated through class actions. Immediately, they illustrate that the answer to vindication of the right to food through class actions is less likely to arise from direct reliance on the right to food. Instead, these cases highlight the potential for components of the right to be indirectly vindicated through mechanisms such as competition, consumer protection and food safety laws – particularly given the provision for litigation to obtain compensation contemplated in these existing frameworks. This aligns well with the conceptual model for vindicating the right to food, put forward by Brand and others, that emphasises the interrelated nature of the right to food with other areas of law and policy and the suggestions that the right may be vindicated through a myriad legal mechanisms.

Though the *Pioneer* and *Tiger Brands* cases do not categorically show that class action have served to effectively vindicate the right to food in South Africa, it is evident that, even within the infancy of class actions, there lies potential for the right to food to be vindicated and protected indirectly. In the *Pioneer* case, the nebulous and broad nature of the affected class presented a particular challenge for the practicality of using the class action mechanism. However, due to the nature of the class and how it was affected, the listeriosis litigation has been able to move past this impediment to develop food-based class actions even further. Within the *Tiger Brands* litigation, a new set of challenges – and, more importantly, questions about the extent to which consumer protection laws can be used to compensate consumers for contraventions – are arising.
and the answers the case is likely to provide have the potential to springboard the next phase of food-based class action litigation in South Africa. 

The development of food-based class action litigation that has occurred, even just between these two cases, has developed the foundation for a pathway to vindicate the right to food through class action litigation. While it is possible that class actions may, for the next decade, not see the material realisation or protection of the right to food, the development of the mechanism thus far illustrates that, like many of the other mechanisms suggested by scholars to vindicate the right to food, class actions may become an important tool to vindicate systemic or widespread violations or infringements of the right to food where the perpetrators are private actors.

6. Conclusion

Although the right to food has not been explicitly acknowledged in the class action jurisprudence, both the Pioneer Foods and Listeriosis litigation highlight the developing role class actions play in protecting and enforcing different components of the right. As South Africa’s food system changes and the mechanism of class actions matures, there is a possibility to leverage existing statutory instruments and legislation to protect the right to food through class actions.

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