

## **Representative Proceedings**

1. Our current system of civil justice allows for what are commonly called ‘representative proceedings’. More particularly, the procedures are governed by Order 15 rules 12 and 13 of the High Court Rules.
2. Representative proceedings arise when numerous people have the same interest in a grievance and seek the same relief. In such circumstances, our procedural rules allow for one or more plaintiffs to commence proceeding, representing a larger class of aggrieved persons. However, subject to what is said in paragraph 7 below, both the named plaintiffs and those they represent must be clearly defined. The statement of claim will not only give particulars of the named plaintiffs but also of those whom they represent. Represented persons are invariably listed in an annexure to the statement of claim. An order of the court is not required to enable plaintiffs to commence proceedings on this representative basis.
3. Representative proceedings under our procedural rules are different from ‘class actions’ which are recognised in American jurisprudence. In our law, representative proceedings are no more than a flexible tool of convenience for the administration of justice – a case management mechanism – in terms of which one or more plaintiffs represent a much larger group of plaintiffs who are nevertheless identified individuals. The essential purpose of representative proceedings is to allow for the litigation to proceed in a manageable, cost effective fashion. The issues common to all the plaintiffs can thereby be decided in a single set of proceedings rather than in a proliferation of collateral proceedings, all of which in substance seek the same thing.
4. Similarly, our procedural rules allow for a plaintiff to sue two or more defendants, those defendants representing a class of individuals who may be unknown to the plaintiffs but who are bound together by being members of a club, society, association or other identifiable group of individuals. A plaintiff may only sue defendants in their representative capacity with leave of the court. A represented defendant who wishes to resist enforcement of

judgment against him can only do so by showing that he was not in fact a member of the group or class that was sued.

5. If the court is of the opinion that Order 15 should be invoked, it has the power at any stage of the proceedings to appoint representative plaintiffs or defendants.
6. Any judgment or order given in a representative action; that is, an action subject to Order 15 rules 12 and 13, is binding not only on the named plaintiffs or defendants but also on all those whom they represent.
7. In certain restricted circumstances, the court has the power to appoint one or more plaintiffs or defendants to represent a class of persons whose identities may not all be known; indeed persons not yet born. Order 15 rule 13 of the Rules of the High Court restricts these circumstances to proceedings concerning the estate of a deceased person, property which is subject to a trust or to proceedings which concern the construction of a written instrument, including an Ordinance or any other written law. Representative plaintiffs or defendants will only be appointed in terms of this rule when certain conditions have been satisfied. After appointment, any judgment or order given in the proceedings will be binding not only on the appointed persons but also on those they represent, ascertained or unascertained.
8. Appointments in terms of Order 15 rule 13 are frequently made when a limited class of persons are to be affected by a judgment or order of the court, for example, beneficiaries of a trust, some of whom may not be known or even born yet.
9. Even if for some reasons, Order 15 of the Rules of the High Court is not applicable, in cases where there are numerous plaintiffs or defendants linked by a common interest, the court possesses general powers of case management to direct matters so that the procedural benefits of representative proceedings may nevertheless be obtained. A judge faced with a proliferation of collateral actions which demand a determination of common issues may direct that he will hear one or more actions, which he or she considers to be representative, ahead of the others. In the past,

these have been variously described as ‘test’ or ‘lead’ cases. It is then up to the parties to decide whether they will agree to be bound by the determination of the issues in these ‘test’ or ‘lead’ cases and if so, which issues. They are not compelled to be bound. Each is entitled to be heard. However, with the common issues having been determined, precedent has been set and parties who do proceed, insisting on their day in court, will do so at their peril.