

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: 16262/19

In the application of:

**PAYMENTS ASSOCIATION OF
OF SOUTH AFRICA**

Applicant for admission as an *Amicus Curiae*

In the matter between:

STELLENBOSCH UNIVERSITY LAW CLINIC	First Applicant
ADELE ROTHMANN	Second Applicant
IGNATIUS MICHAEL HEYNS	Third Applicant
DERRICK FERREIRA DOS SANTOS	Fourth Applicant
RONALD ABRAHAM ARTHUR ESBACH	Fifth Applicant
NICOLENE ELS	Sixth Applicant
ALICIA PELSER	Seventh Applicant
VANESSA VENTER	Eighth Applicant
CASSIEM HALLIDAY	Ninth Applicant

and

LIFESTYLE DIRECT GROUP INTERNATIONAL (PTY) LTD	First Respondent
CAPITAL LIFESTYLE SOLUTIONS (PTY) LTD t/a LIFESTYLE LEGAL	Second Respondent
LOAN TRACKER SA (PTY) LTD	Third Respondent
LOAN SPOTTER SA (PTY) LTD	Fourth Respondent
LOAN MATCH SA (PTY) LTD	Fifth Respondent
LOAN CHOICE SA (PTY) LTD	Sixth Respondent
LOAN QUEST SA (PTY) LTD	Seventh Respondent
LOAN CONNECTOR SA (PTY) LTD	Eighth Respondent
LOAN HUB SA (PTY) LTD	Ninth Respondent

LOAN ZONE SA (PTY) LTD	Tenth Respondent
LOAN LOCATOR SA (PTY) LTD	Eleventh Respondent
LOAN SCOUT SA (PTY) LTD	Twelfth Respondent
LOAN TRACER SA (PTY) LTD	Thirteenth Respondent
LOAN DETECTOR SA (PTY) LTD	Fourteenth Respondent
LIFESTYLE LEGAL (PTY) LTD	Fifteenth Respondent
LIFESTYLE ATTORNEYS (PTY) LTD	Sixteenth Respondent
ALL WHEEL AUTO (PTY) LTD	Seventeenth Respondent
DAMIAN MALANDER	Eighteenth Respondent
NANDIE PAICH	Nineteenth Respondent

**HEADS OF ARGUMENT FOR
THE PAYMENTS ASSOCIATION OF SOUTH AFRICA:
APPLICATION FOR ADMISSION AS *AMICUS CURIAE***

Table of Contents

<i>I. INTRODUCTION</i>	3
<i>Overview of the main application</i>	3
<i>Overview of the amicus application</i>	6
<i>II. INTERESTS OF JUSTICE TO ADMIT PASA AS AMICUS CURIAE</i>	9
<i>PASA has a significant legal interest in the main application</i>	10
<i>PASA’s proposed submissions are novel</i>	11
<i>PASA’s proposed submissions are relevant</i>	12
<i>PASA’s proposed submissions are of assistance</i>	13

<i>Further reasons in the interests of justice</i>	13
III. THE RESPONDENTS’ OBJECTIONS	14
<i>The main application involves no constitutional issue nor is it of public interest</i>	14
<i>PASA’s proposed involvement is premature</i>	17
<i>PASA’s proposed submissions are irrelevant</i>	18
<i>PASA is not objective</i>	19
<i>PASA has failed to comply with Rule 16A which non-compliance cannot be condoned</i>	20
IV. CONCLUSION	22
TABLE OF AUTHORITIES	23

I. INTRODUCTION

1. This is an interlocutory application (**‘the *amicus* application’**) brought by the Payments Association of South Africa (**‘PASA’**) to be admitted as an *amicus curiae* in an application (**‘the main application’**) instituted by the Stellenbosch University Law Clinic and eight further applicants (**‘the applicants’**) against seventeen companies and two individuals who are, or were, their directors (**‘the respondents’**).
2. Parts A and B of the main application will be heard together. The *amicus* application is set down for hearing *in limine* together with the main application.

Overview of the main application

3. In Part A the applicants seek interim interdictory relief *inter alia* restraining the respondents from operating certain websites, debiting certain bank accounts, demanding or collecting certain payments, and harassing persons in connection with such demands or collections, on the basis of alleged breaches of the Consumer

Protection Act 68 of 2008 ('the CPA'), alternatively the common law, pending the finalisation of a proposed class action against the respondents.

4. In Part B the applicants seek certification of that class action against the respondents.
5. The basis of parts A and B is the allegation that the respondents operate numerous businesses by way of websites which misleadingly lure potential clients to apply online for 'loan-finding services'. But having done so, such clients (allegedly) are surprised to discover that they have entered into a 12-month 'agreement' for telephonic legal advice services which they never desired, did not realise they were purchasing, and for which they pay by monthly debit order – the details of which were obscured and buried in small print. The applicants aver that clients have difficulty in cancelling the 'agreements', are charged exorbitant cancellation penalties, and are harassed by the respondents who attempt to enforce the 'agreements' and collect payment.
6. According to the applicants:
 - 6.1. The manner in which the websites are operated and the 'agreements' are unconscionable, unjust, unreasonable, or unfair in terms of sections 40, 41, and 48 of the CPA, which *prima facie* entitles clients *inter alia* to a declaratory relief and compensation in terms of section 52 of the CPA. Alternatively, they are *prima facie* entitled to declaratory relief, restitution, and damages at common law.
 - 6.2. The threats and harassment employed by the respondents in connection with their demands for or collection of payment – which include the use of simulated summonses – are also unconscionable and in breach of section 40 of the CPA, *prima facie* entitling clients to relief in terms of section 52, as well as in breach of section 15 of the Debt Collectors Act 114 of 1998.

6.3. The eighteenth and nineteenth respondents – Damian Malander (**‘Malander’**) and Nandie Paich – ought to be held liable, in their personal capacities, for amounts debited from clients’ bank accounts and bank charges incurred by clients who dispute and attempt to reverse such debits. Clients are *prima facie* entitled to such relief in terms of section 424(1) of the Companies Act 61 of 1973 on the basis of directors’ liability for fraudulent conduct of a business, alternatively in terms of section 20(9) of the Companies Act 71 of 2008 for an unconscionable abuse of the juristic personality of the company as a separate entity.

7. Accordingly the proposed class action, sought to be certified in part B, is for final declaratory relief, restitution, and compensation on the above grounds, and would be brought by

‘all persons who have had any moneys debited from their bank accounts and/or who have been harassed and/or threatened in connection with any demand for or collection of payment by any of the respondents at any time from 20 May 2015 [when the respondent companies were registered] to date on the basis of them having concluded purported ‘agreements’ with any of the respondents through any of the websites...’¹

8. It follows that at the heart of the main application is an allegation that the respondents have engaged in a form of ‘debit order abuse’, namely, they collected unauthorised debit orders in the absence of valid mandates given by consumers.² The applicants’

¹ Applicants’ Notice of Motion in the main application, Part B, prayer 1.1, main record p 4-5.

² PASA’s Founding Affidavit in the *amicus* application (**‘PASA FA’**) paras 52-53, *amicus* record p 21.

allege that the form of debit order abuse engaged in by the respondents amounts to fraud³ and operates as a scam.⁴

Overview of the amicus application

9. PASA is the regulatory body recognised by the South African Reserve Bank (**‘the SARB’**) in terms of the National Payment System Act 78 of 1998 with responsibilities to organise, manage, and regulate participation in the National Payment System (**‘the NPS’**) by which debit orders (*inter alia*) are effected.
10. Abuse of the debit order system poses a significant danger to the safety, efficiency, and reputation of the NPS and addressing it is one of the SARB and PASA’s highest priorities.⁵
11. PASA therefore applies to be admitted as an *amicus curiae* in the main application on the basis of High Court Rule 16A, alternatively on the basis of the High Court’s inherent jurisdiction at common law in the light of its *‘inherent power to protect and regulate [its] own process, and to develop the common law, taking into account the interests of justice’* in terms of section 173 of the Constitution.⁶

³ See eg Applicants’ Founding Affidavit in the main application (**‘Applicants FA’**) paras 63 and 118, main record p 46 and 64.

⁴ See eg Applicants FA paras 10-12, main record p 27.

⁵ PASA FA paras 13 and 56 as well as annexure WV8, *amicus* record p 10, 22, and 87 at 92.

⁶ See eg *S v Engelbrecht (Centre for Applied Legal Studies Intervening as Amicus Curiae)* 2004 (2) SACR 391 (W) paras 24-25 (**‘Engelbrecht’**); *Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp and Others* 2013 (2) SA 620 (CC) para 17 (**‘Children’s Institute’**).

12. The ultimate criterion, under both Rule 16A⁷ and the court's inherent jurisdiction,⁸ is whether it is in the interests of justice to admit PASA as an *amicus*, which is a matter for the court's discretion.
13. PASA seeks the court's leave to advance succinct submissions in the form of evidence, which is confined to paragraphs 25 to 64 of the Founding Affidavit in PASA's *amicus* application and the annexures thereto and PASA's Replying Affidavit, addressing:
 - 13.1. First, how debit orders operate, as part of the NPS, including how they are activated, given effect, disputed, and cancelled, along with the roles played in this regard by consumers (such as the second to ninth applicants) and their bank, on the one hand, and 'Users' (such as the respondent companies) and their banks (the 'Sponsoring Banks'), on the other hand. (See paragraphs 25 to 51 of PASA's Founding Affidavit.)
 - 13.2. Second, how PASA and its members, the banks, guard against debit order abuse by consumers and/or Users, including a new '4-prong' model based on collaboration between PASA and Sponsoring Banks, which was implemented from March 2019 onwards. (See paragraphs 52 to 60 of PASA's Founding Affidavit.)
 - 13.3. Third, the fact that the first to seventeenth respondents were exited from the NPS in May and June 2019 following the application of the above model. (See paragraphs 61 to 64 of PASA's Founding Affidavit.)
14. The remainder of these heads of argument is structured as follows.

⁷ Rule 16A(9) provides that '*The court may dispense with any of the requirements of this rule if it is in the interests of justice to do so.*' (emphasis added)

⁸ This is explicit in section 173 quoted (in relevant part) above at paragraph 11.

15. First, I argue below that it is in the interests of justice to admit PASA as an *amicus curiae* in the main proceedings for the following reasons:
 - 15.1. PASA has a significant legal interest in the main application because it raises important and novel legal issues, summarised above at paragraph 6, relating to the application of the CPA and common law to online business in the context of alleged debit order abuse.
 - 15.2. PASA's proposed submissions, namely the evidence summarised above at paragraph 13, are directly relevant to the main application.
 - 15.3. PASA's proposed submissions are also novel as no other party is in a position to provide the evidence in question.
 - 15.4. PASA's participation will there be of assistance to the court because it will be more fully informed about the regulatory and institutional context of the dispute and about the respondents' interaction with PASA and their exit from the NPS.
16. Second, I respond to various objections raised by the respondents to PASA's admission as an *amicus*. In particular, I refute the arguments that PASA cannot be admitted because (i) the matter involves no constitutional issue nor is it in the public interest, (ii) PASA's proposed submissions are irrelevant, (iii) PASA's proposed involvement is premature, (iv) PASA is not impartial, and (v) PASA has failed to comply with Rule 16A, which non-compliance cannot be condoned. Each of these complaints is without merit.
17. Finally, I conclude and address costs.

II. INTERESTS OF JUSTICE TO ADMIT PASA AS *AMICUS CURIAE*

18. The criteria applied by the court, in the exercise of its discretion whether it is in the interests of justice to admit an *amicus curiae*, are settled: interest; novelty; relevance; of assistance.⁹
19. For in relation to *'the determination of issues squarely in the public interest, and insofar as amici introduce additional, new and relevant perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged'*.¹⁰
20. The Constitutional Court in *Children's Institute* held that *amici* submissions may include evidence, which may in turn constitute *'background information not supplied by the original parties, thus enabling the Court to make decisions confident of their social consequences'*.¹¹ (emphasis added)
21. The Constitutional Court later observed that Rule 16A:

*'was specifically intended to facilitate the role of amici in promoting and protecting the public interest. In these cases, amici play an important role first, by ensuring that courts consider a wide range of options and are well informed; and second, by increasing access to the courts by creating space for interested non-parties to provide input on important public interest matters, particularly [ie not only] those relating to constitutional issues.'*¹² (references omitted; emphasis added)

⁹ *In re Certain Amicus Curiae Applications: Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 713 (CC) para 5. See also Rule 16A(6)(a)-(b) and *Ex parte Institute for Security Studies: In re S v Basson* 2006 (2) SACR 350 (CC) para 7.

¹⁰ *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) para 80 ('*Koyabe*').

¹¹ *Children's Institute*, footnote 6 above, para 22, citing with approval *Engelbrecht*, footnote 6 above, para 37, relying in turn on Christina Murray 'Litigating in the Public Interest: Intervention and the Amicus Curiae' (1994) 10 *SAJHR* 240 at 259, who is also cited with approval by the Constitutional Court.

¹² *Children's Institute*, *ibid*, para 26.

22. Earlier in the judgment, the Court had held that:

*‘even if Rule 16A does not provide for evidence to be adduced by an amicus, section 173 of the Constitution gives court the inherent power to regulate their own process and this includes the ability to allow amici to adduce evidence if the interests of justice so demand.’*¹³ (emphasis added)

PASA has a significant legal interest in the main application

23. As is explained in its Founding Affidavit:

23.1. PASA is the regulatory body recognised by the SARB with statutory duties to organise, manage, and regulate participation in the NPS by which debit orders are effected. PASA’s goals are aligned with those of the SARB, namely the safety, security, efficiency, and interoperability of the NPS.¹⁴

23.2. PASA is mandated and empowered to issue rules and policies, which are binding and enforceable on its Members, namely banks, which rules include those for the operation of debit orders.¹⁵

23.3. Debit order abuse is one of the most significant risks to the NPS and is one of the highest priorities of the SARB and PASA.¹⁶

23.4. PASA and its Members have also been instructed by the SARB to *‘improve the safety and efficiency of debit orders, including the introduction of measures to address risk emanating from debit order abuse’*.¹⁷

23.5. Therefore the new ‘4-prong’ model was developed by PASA in collaboration with its Members which, subsequently, was applied to the respondents.¹⁸

¹³ *Children’s Institute*, *ibid*, para 17.

¹⁴ PASA FA paras 25-30, *amicus* record p 14-16.

¹⁵ PASA FA paras 31-35, 39-41, *amicus* record p 16.

¹⁶ PASA FA paras 13.2 and 52, *amicus* record p 5 and 21.

¹⁷ PASA FA para 56, *amicus* record p 22.

¹⁸ PASA FA paras 57-64, *amicus* record p 22-26.

24. PASA has a significant legal interest in the main application, given:
- 24.1. its role and responsibilities in relation to the abuse of debit orders as just described;
 - 24.2. the fact that the main application raises important and novel legal issues, summarised above at paragraph 6, relating to the application of the CPA, common law, and 1973 and 2008 Companies Acts to online business in the context of alleged debit order abuse; and
 - 24.3. the fact that even *prima facie* findings in relation to these issues have the potential to influence banking practice, including that of PASA, its Members, and Users of the debit order system.

PASA's proposed submissions are novel

25. Given PASA's statutory powers and obligations and its past interactions with the respondents, it is the appropriate party to place before the court the evidence summarised above at paragraph 13.
26. No other party is in a position to provide this evidence, which is therefore necessarily different from the submissions of the other parties.
27. Even if new contentions are only those that 'may materially affect the outcome of the case' (a stricter criterion developed in the context of an *amicus*'s legal argument in the Supreme Court Appeal, rather than evidence in the High Court),¹⁹ I submit that evidence that the respondents were exited from the NPS may do so.

¹⁹ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA) paras 29-30.

PASA's proposed submissions are relevant

28. 'Relevant' is defined as being '*closely connected or appropriate*'.²⁰
29. PASA's proposed submissions, as summarised above at paragraph 13, concern how debit orders work; how abuse of debit orders is tackled by PASA and its members, the banks; and the fact that the first to seventeenth respondents were exited from the National Payment System as a result.
30. These submissions are relevant – i.e. closely connected and appropriately taken into account – in relation to the main application, because they:
 - 30.1. alert the court to the public importance of guarding against debit order abuse, as one of the SARB's highest priorities;
 - 30.2. provide helpful background information to the court, enabling it to understand the banking and regulatory context of debit orders and their abuse;
 - 30.3. explain the various parties involved and the distribution of responsibilities among them when debit orders are set up, given effect to, and challenged;
 - 30.4. explain the criteria PASA and its Members currently use to define and identify valid mandates as a necessary requirement for a valid debit order;
 - 30.5. set out the existing remedies consumers have with their banks when they are aggrieved at a debit order;²¹ and
 - 30.6. explain the fact that the respondents were exited from the NPS, by way of the application of the new 4-prong model that has been designed by PASA and Sponsoring Banks to guard against debit order abuse.
31. All of this information goes to ensuring that the court is "*well informed*" in relation to "*important public interest matters*" and therefore, when interpreting and applying the

²⁰ *Oxford Dictionary of English* (OUP, 2019).

²¹ PASA FA para 51, *amicus* record p 20.

CPA and companies legislation in the novel and vital context of online contracting, or if necessary when developing the common law, the court is more likely to be “*confident of the social consequences*” of its decisions.

PASA’s proposed submissions are of assistance

32. I submit that the very reasons why PASA’s proposed submissions will be of assistance to the court arise from the fact that those submissions are novel and relevant.
33. Those submissions have also been presented (I respectfully submit) in a convenient form – namely, a single, concise affidavit for the benefit of the court.
34. In a nutshell, if PASA is granted leave to participate as an *amicus* in the main application, this will assist the court because it will be more fully informed about the regulatory and institutional context of the dispute between the applicants and respondents, and about the respondents’ interaction with PASA and their exit from the NPS.

Further reasons in the interests of justice

35. Additional considerations in the interests of justice supporting the admission of PASA as *amicus* include the facts that:
 - 35.1. admitting PASA will not delay the main application,²² because the *amicus* application will be heard *in limine* at the same time and because, if admitted, PASA’s papers in the *amicus* application shall stand as its papers in the main application; and

²² Cf *S v Zuma* 2006 (2) SACR 257 (W) 265A.

35.2. the evidence contained in paragraphs 25 to 64 of PASA's Founding Affidavit is relatively uncontroversial and uncontested by the respondents,²³ who instead raise objections on other grounds.

III. THE RESPONDENTS' OBJECTIONS

36. I now address various objections raised by the respondents.

The main application involves no constitutional issue nor is it of public interest

37. This objection, raised in the respondents' Answering Affidavit,²⁴ should be rejected for the following reasons.

38. First, although Rule 16A(2) refers only to '*any interested part in a constitutional issue*', I respectfully submit that this is no barrier to PASA's participation as an *amicus* in this matter because:

38.1. Rule 16A(9) provides that '*The court may dispense with any of the requirements of this rule if it is in the interests of justice.*' Thus where the interests of justice would support an *amicus* participating in the High Court proceedings raising issues other than constitutional issues, the court is empowered to grant leave.

38.2. Thus the Constitutional Court has explicitly recognised the participation of *amici* in relation to issues other than constitutional issues,²⁵ and has emphasised the ultimate criterion of the interests of justice.²⁶

²³ Respondents' Answering Affidavit ('**Respondents AA**') paras 44-45, *amicus* record p 130.

²⁴ Respondents AA paras 14-18, *amicus* record p 122-123.

²⁵ *Children's Institute*, footnote 6, para 26, quoted above at paragraph 21. See also *Koyabe*, footnote 10, para 80 fn 70, where the court cites the following quote with approval: '*In matters of broad public interest, such as [i.e. not only] the interpretation of the Final Constitution, courts are more disposed towards the listening of the voices of persons other than the parties to a particular dispute.*'

²⁶ See eg *Children's Institute*, footnote 6, para 13, quote above at paragraph 22.

- 38.3. Consistent with this, the rules regulating the participation of *amici* before the Constitutional Court and Supreme Court of Appeal simply refer to ‘*any matter before the Court*’,²⁷ and it is possible for *amici* to lead evidence, in defined circumstances, before those courts.²⁸ If on occasion it may be in the interests of justice for *amici* to adduce evidence relating to issues other than constitutional issues before those courts, then *a fortiori* the same must be true before the High Court as a court of first instance.
- 38.4. Alternatively, this application is brought on the secondary basis of the High Court’s inherent jurisdiction at common law in the light of its ‘*inherent power to protect and regulate [its] own process, and to develop the common law, taking into account the interests of justice*’ in terms of section 173 of the Constitution.
- 38.5. This approach has been adopted before in *S v Engelbrecht*,²⁹ a case which was cited with approval by the Constitutional Court in *Children’s Institute*.³⁰ There are other examples of *amici* participating in High Court proceedings not addressing constitutional issues.³¹

²⁷ Constitutional Court rule 10(1); Supreme Court of Appeal rule 16(1).

²⁸ See Constitutional Court rule 31; *Nova Property Group Holdings Ltd and Others v Cobbett and Another* 2016 (4) SA 317 (SCA) paras 13-14, holding that despite SCA rule 16(8), the position is ‘*not invariable as the court’s power to regulate its own process in terms of s 173 of the Constitution may be invoked to allow an amicus to adduce further evidence, if to do so would promote the interests of justice.*’

²⁹ Footnote 6.

³⁰ Footnote 6, paras 22 and 26.

³¹ See eg *S v Boesman* 1990 (2) SACR 389 (E); *Wesbank, A Division of Firstrand Ltd v Papier (National Credit Regulator as Amicus Curiae)* 2011 (2) 396 (WCC); *Lonmin Ltd and Others v CG Steyn Inc t/a Steyn Attorneys and Others* [2018] ZANWHC 10. Erasmus *Superior Court Practice* RS 11 (2019) B1-21 remarks that ‘*A third manifestation of the amicus curiae known to our law even prior to the Constitution is the intervention in a case (after obtaining leave from the court) by an ‘outsider’, who has an interest not represented by the parties.*’

39. Second, the respondents' objection that the main application '*is not a public interest matter*' because its outcome '*is not of general public importance*'³² is incorrect for multiple reasons:

39.1. Given that this objection overlaps with the respondents' further complaint that PASA's application to participate in preliminary certification proceedings is *premature*, the arguments made under the next subheading are relevant here too.

39.2. More generally, combatting the scourge of debit order abuse is one of the SARB's highest priorities, as mentioned above, in order to protect the safety, efficiency, and integrity of the NPS, upon which the entire formal economy depends.

39.3. Moreover, the case involves the interpretation and application of provisions of the CPA which have received almost no judicial attention in a context – namely online contracting and use of debit orders – that is of great and growing practical importance to all South Africans. Even *prima facie* interpretations will provide invaluable guidance and may, like constitutional litigation, '*affect a range of people and interests that go well beyond those of the parties already before the court*'.³³

39.4. Thus the purposes of the CPA itself are engaged, including the legislative goals '*to promote a fair, accessible and sustainable marketplace for consumer products and services*', '*to prohibit certain unfair marketing and business practices*', '*to protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace*', given that '*recent and emerging technological*

³² Respondents AA para 18, *amicus* record p 123.

³³ *Koyabe*, footnote 10, para 80 fn 70.

changes, trading methods, patterns and agreements have brought, and will continue to bring, new benefits, opportunities and challenges to the market for consumer goods and services’.

- 39.5. These statutory purposes cohere with the transformative vision of the Constitution, thus it is unsurprising both that an organisation like the Stellenbosch Clinic is willing to expend its limited resources pursuing this matter and that the respondents’ activities have attracted significant media attention.
40. Accordingly, the first objection – that the main application involves no constitutional issue and is not of any public interest – is unconvincing.

PASA’s proposed involvement is premature

41. The respondents’ next objection is that it would be premature for PASA’s submissions to be taken into account at the certification stage of proceedings as opposed to any subsequent trial.³⁴ This too is unconvincing.
42. Even at such an initial stage, the court is called upon to determine (*inter alia*) whether the envisaged class has a *prima facie* cause of action, raising a triable issue. That, in turn, requires the court to make important findings relating to *prima facie* rights and remedies under the CPA, and their relationship with common-law rights and remedies.
43. Such findings are likely to be of significant public value – both generally and relating to online businesses that make use of the debit order system in particular. This is because thus far the courts have had the opportunity to interpret and apply the relevant provisions of the CPA only rarely, so any guidance they are able to provide will be invaluable.

³⁴ Respondents AA paras 24-29, record p 125-126.

44. Such *prima facie* findings (I respectfully submit) ought to be made on the basis of a sound contextual understanding of the existing regulation of debit orders, including existing remedies for consumers, and may, in turn, impact banking practice, including that of PASA, its Members, and Users of the debit order system.
45. Furthermore, experience has shown that once a class action is certified by court order, the parties often reach a settlement agreement.³⁵ This underlines the importance both of *prima facie* findings which may never come to be reconsidered, and of the certification outcome itself for the parties before the court and the large number of class members (of potentially thousands).
46. If PASA were excluded at the initial stage, and the matter later were settled, PASA would have been denied the opportunity to assist the court at all.
47. For these reasons, it is in the interest of justice for PASA to be admitted as *amicus* at this initial stage, which is an approach that has been adopted in other certification proceedings.³⁶

PASA's proposed submissions are irrelevant

48. The respondents' next objection is to the relevance of the submissions PASA proposes to advance.³⁷
49. PASA's submissions are summarised above at paragraph 13 and I have already explained at some length why they are relevant (see paragraphs 28 to 31 above), which arguments shall not be repeated here.

³⁵ See the R5bn settlement reached after *Nkala and Others v Harmony Gold Mining Company Limited and Others* 2016 (5) SA 240 (GJ) ('*Nkala*') at PASA's Replying Affidavit ('**PASA RA**') para 21 and annexures RA1 and RA2, *amicus* record p 152, 157 and 160.

³⁶ *Nkala*, *ibid*, paras 19-23.

³⁷ Respondents AA paras 19 to 23, *amicus* record p 123-124.

50. The basis of the respondents' relevancy objection is Malander's allegation in the Answering Affidavit that the only important issues before the court relate to misrepresentation and causation. This is inaccurate because the applicants have pleaded multiple statutory and common-law claims, summarised at paragraph 6 above, including *inter alia* that the manner in which the websites are operated and the 'agreements' themselves are unconscionable, unjust, unreasonable, or unfair in terms of sections 40, 41, and 48 of the CPA; that the threats and harassment employed by the respondents in connection with their demands for or collection of payment are also unconscionable in breach of section 40 of the CPA and section 15 of the Debt Collectors Act 114 of 1998; and that Malander and Nandie Paich should be held personally liable under the 1973 or 2008 Companies Acts.
51. On the basis of artificially narrowing the pertinent legal issues, the respondents would have the court close its eyes to relevant information about the context within which the dispute between the applicants and respondents has arisen and the role played by PASA as industry regulator partnering with Sponsoring Banks as industry participants both in general and relating to the respondents in particular.

PASA is not objective

52. The respondents object to PASA's averment in its Founding Affidavit that it does not intend to 'take sides' between the applicants and respondents,³⁸ by which PASA intended to convey that, if admitted as an *amicus*, it did not intend to advance legal submissions for or against the relief sought by the applicants. In that respect, PASA abides by the decision of the court.³⁹

³⁸ PASA FA para 20, *amicus* record p 11; Respondents AA paras 41 and 51, *amicus* record p 128 and 131.

³⁹ PASA RA para 28, *amicus* record p 153-154.

53. The respondents also allege that PASA *'is not an impartial bystander'*.
54. If this is a complaint that PASA is not objective, it too would be without foundation for the reasons given by Satchwell J in *S v Engelbrecht*. In a nutshell, *'neutrality is neither necessary nor a requirement of the amicus curiae function'*.⁴⁰

PASA has failed to comply with Rule 16A which non-compliance cannot be condoned

55. The respondents' Answering Affidavit complains that PASA has breached Rule 16A in two respects, first by failing in its Founding Affidavit explicitly to identify the novel legal questions raised in the main application by the applicants,⁴¹ and second, by failing to comply with the Rule's time periods which failure should not be condoned.⁴²
56. The first complaint is without merit, because Rule 16A does not require a party applying to be admitted as an *amicus* to repeat the legal issues raised by the parties to the main application. Instead the purpose of Rules 16A(1) is:

'to bring cases involving constitutional issues to the attention of persons who may be affected by or have a legitimate interest in such cases, so that they may take steps to protect their interests by seeking to be admitted as amici curiae with a view to drawing the attention of the court to relevant matters of fact and law to which attention would not otherwise be drawn'.⁴³

57. The responsibility rests on *'any person raising a constitutional issue'*, typically the applicant or respondent in the main proceedings. PASA is not such a person.
58. The second complaint is also without merit for the following reasons.

⁴⁰ *Engelbrecht*, footnote 6, paras 49-53.

⁴¹ Respondents AA para 26, *amicus* record p 125.

⁴² Respondents AA paras 53-54, *amicus* record p 131-132.

⁴³ *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA)

59. First, to the extent that PASA is admitted as an *amicus* by the High Court in the exercise of its inherent jurisdiction at common law in the light of section 173 of the Constitution and the interests of justice, the specific time-periods in Rule 16A are inapplicable.
60. Alternatively, if the time-periods do apply,⁴⁴ I submit that PASA has made out a proper case to condone its non-compliance therewith.⁴⁵
61. PASA took the reasonable view that it would be premature to participate only in Part A of the main application. When it later became apparent on 18 December 2019 that Parts A and B would be heard together in April 2020, PASA could only institute its *amicus* application after obtaining the consent of the respondents' Sponsoring Banks, being PASA members, which consent was provided only in late January 2020.
62. In addition, the respondents have suffered no genuine prejudice. Their complaint of prejudice is premised on their other objections against PASA's *amicus* application,⁴⁶ which, for the reasons given above, do not stand up to scrutiny.
63. Also, having complained that PASA's participation is premature (i.e. too early), the respondents cannot in the same breath complain that PASA's application is too late.
64. Finally it should also be noted that, following the agreed timetable in the *amicus* application between PASA and the respondents which was made an order of court,⁴⁷ the respondents were afforded 18 court days to answer PASA's Founding Affidavit rather than the 5 days provided for in Rule 16A(7)(a). Given that (i) PASA's Founding Affidavit is concise and contains largely uncontested information, (ii) only four of its

⁴⁴ Cf *Engelbrecht*, footnote 6, para 25.

⁴⁵ PASA FA paras 66-72, *amicus* record p 26-28.

⁴⁶ Respondents AA para 54, *amicus* record p 132.

⁴⁷ Annexure AC1 to Respondents AA, *amicus* record p 134.

paragraphs (paragraphs 61 to 64) deal with the respondents directly, and (iii) PASA has agreed – and it has been made a court order – that its papers in the *amicus* application will not be supplemented by further affidavits if it is admitted, the respondents’ complaints of prejudice ring hollow.

IV. CONCLUSION

65. To sum up, I submit that it is in interests of justice to admit PASA as an *amicus curiae* in the main proceedings, and therefore to receive the submissions in its Founding Affidavit into evidence, because:

65.1. PASA has a significant legal interests in the main application;

65.2. PASA’s proposed submissions are relevant, novel, relatively uncontroversial and largely uncontested by the respondents, and will assist the court;

65.3. PASA’s admission as *amicus* will not delay the main application; and

65.4. the respondents’ objections do not stand up to scrutiny.

66. PASA does not ask for costs.

ALISTAIR PRICE

Counsel for PASA
Chambers, Cape Town
19 March 2020

TABLE OF AUTHORITIES

Statutes

1. Companies Act 61 of 1973
2. Consumer Protection Act 68 of 2008
3. Debt Collectors Act 114 of 1998
4. National Payment System Act 78 of 1998

Case-law

5. *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Other* 2013 (2) SA 620 (CC)
6. *Ex parte Institute for Security Studies: In re S v Basson* 2006 (2) SACR 350 (CC)
7. *In re Certain Amicus Curiae Applications: Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 713 (CC)
8. *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC)
9. *Lonmin Ltd and Others v CG Steyn Inc t/a Steyn Attorneys and Others* [2018] ZANWHC 10
10. *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA)
11. *Nkala and Others v Harmony Gold Mining Company Limited and Others* 2016 (5) SA 240 (GJ)
12. *Nova Property Group Holdings Ltd and Others v Cobbett and Another* 2016 (4) SA 317 (SCA)
13. *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA)
14. *S v Boesman* 1990 (2) SACR 389 (E)

15. *S v Engelbrecht (Centre for Applied Legal Studies Intervening as Amicus Curiae)* 2004 (2) SACR 391 (W)
16. *S v Zuma* 2006 (2) SACR 257 (W)
17. *Wesbank, A Division of Firstrand Ltd v Papier (National Credit Regulator as Amicus Curiae)* 2011 (2) 396 (WCC)

Scholarly writing

18. Murray 'Litigating in the Public Interest: Intervention and the Amicus Curiae' (1994) 10 *SAJHR* 240