

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

Case number: 16262/2019

In the application of:

**PAYMENTS ASSOCIATION 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 PETSER	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	Nineteen respondent

FIRST TO EIGHTEENTH RESPONDENTS' HEADS OF ARGUMENT

Introduction

1. The applicant, Payments Association of South Africa ("PASA") applies to be admitted as an *amicus curiae* in the application brought by the Stellenbosch

University Law Clinic (“the Law Clinic”) to authorise and certify the institution of class action proceedings (“the main application” or “the certification application”).

2. The respondents raised three grounds of opposition to the *amicus* application, namely that:

2.1. PASA does not rely on any constitutional issue;

2.2. PASA’s submissions are not relevant to the certification application; and

2.3. PASA’s involvement in the matter, if any, is premature.

3. While rule 16A(2) refers to a party interested in a “constitutional issue”, and the main application does not raise such an issue, the respondents accept the submissions on behalf of PASA that this Court has the inherent jurisdiction to permit the admission of an *amicus curiae*.¹

4. Consequently, the respondents do not persist with this ground of opposition.

5. However, it is respectfully submitted that the *amicus* application still stands to be refused on account of the submissions by PASA being irrelevant and premature.

¹ Answering affidavit par 13, record 121.

PASA's interest and contribution

6. The role of an *amicus curiae* was described by the Constitutional Court as follows in *Hoffmann v South African Airways* (“*Hoffmann*”):²

“An *amicus curiae* assists the Court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the Court’s decision may affect its interests. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into litigation and thus compelled to incur costs. It joins the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It uses the side it wishes to join unless requested by the Court to urge a particular position.”³

7. Accordingly, an *amicus* should have an interest in the matter and provide a useful contribution.
8. PASA characterises its contribution in the main application as follows:

“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

² 2001 (1) SA 1 (CC).

³ 27H – 27B.

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 playing 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.)⁴

9. And its interests as follows:

"13. As I explain in greater detail below:

- 13.1 PASA is the regulatory body recognised by the South African Reserve Bank ('SARB') in terms of the National Payment System Act 78 of 1998 ('NPS Act') with responsibilities to

⁴ Heads of argument on behalf of PASA, par 13.

organise, manage and regulate participation in the National Payment System ('NPS'), by which debit orders (*inter alia*) are affected.

13.2 Abuse of the debit order system poses a significant danger to the safety, efficiency, integrity and reputation of the NPS. Addressing it is one of PASA's and SARB's highest priorities.

13.3 PASA is in the process of introducing new strategies and rules to combat debit order abuse.

14. The main application raises important and novel legal issues relating to the application of the CPA and common law to online businesses that make use of debit orders via the NPS.”⁵

10. It is accordingly clear that PASA's contribution relates to the *technical workings* of South Africa's payment system and in particular questions regarding the abuse of the debit order system.

11. However, as highlighted below, this interest and contribution is not relevant to the question to be determined in the certification application.

⁵ Founding affidavit, par 13 to 14, record 10.

PASA has no interest and its contribution is not relevant

12. The Law Clinic alleges that the respondents misrepresented the nature of their business in order to obtain debit order instructions from members of the public, which instructions they abused to unlawfully collect payments.
13. On this basis the Law Clinic contends that there is a class of individuals whose interests may be best served through the prosecution of a damages claim through class action proceedings.
14. As advanced in the heads of argument in the certification application, the analysis in that application is a normative one, namely whether the *type* of claim advanced by the Law Clinic is one that may be determined by way of class action proceedings.
15. While PASA's contribution relates to *how* debit orders may be abused, this is not relevant to the question to be determined in the certification application.
16. The dispute between the parties is not whether acting on invalid debit order mandates is unlawful (it can be accepted that such conduct is unlawful), but rather whether the debit order mandates that were obtained are invalid on account of misrepresentation.

17. The question as to the manner in which the debit order mandates were obtained is entirely distinct from the manner in which debit orders are ultimately processed.
18. Referring to the basis upon which an *amicus* is to be permitted as set out in *Hoffmann*, it is accordingly clear that the issue to be determined in both the certification and main action does not:
 - 18.1. affect PASA's interests, because the dispute does not relate to the question as to whether execution of invalid debit orders is unlawful; and
 - 18.2. falls outside the ambit of any technical knowledge that PASA may be able to provide.

PASA's contribution premature

19. However, if this Court holds that PASA's contribution in relation to the manner in which debit orders are prosecuted is relevant to the main action, it is submitted that PASA's involvement at this stage is premature.
20. PASA's motivation to enter the arena at the certification stage, as opposed to the main action, is elucidated as follows:

“45. Furthermore, experience has shown that once a class action is certified by court order, the parties often reach a settlement

agreement. 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).”⁶

21. It is submitted that the above evidences an acknowledgement that the appropriate stage of the proceedings for it to be involved in, is the main action itself that PASA but seeks intervention at this stage because of the possibility that the main action may be settled.
22. It is submitted that, since the role of an amicus is to assist the Court, the possibility of settlement of a dispute is not a relevant consideration to allow the admission of an *amicus curiae*.

Conclusion

23. PASA’s interests relate to the manner in which the debit order system may be abused. Notably they are interested in the phenomenon of debit order mandate abuses.
24. Neither the certification application, nor the proposed class action, revolve around whether debit orders were abused.

⁶ Heads of argument on behalf of PASA, par 45.

- 24.1. the certification application raises the normative question of whether the claims advanced are capable of determination by class action;
- 24.2. the class action raises the question of whether the mandates are valid.
25. In the circumstances, it is submitted that PASA has not made out a case to be admitted as an *amicus curiae*.
26. It follows that the application stands to be refused with costs.

Pieter-Schalk Bothma
Chambers
Cape Town
27 January 2021