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

Case number: 16262/2019

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	Nineteenth respondent

FIRST TO EIGHTEENTH RESPONDENTS' HEADS OF ARGUMENT

Introduction

1. The primary question in this application does not relate to the legality or otherwise of the respondents' business practices, but to whether the claims advanced by the applicants are appropriate for prosecution through class action proceedings. It therefore requires a normative analysis.

2. As illustrated below, these claims (details of which are set out at record 875 to 920) are not suitable for class action proceedings because:

2.1. liability turns on an individualised assessment of the facts and circumstances relevant to each member of the class; and

2.2. certification will prejudice the respondents to such an extent that the ensuing trial will not be fair.

3. Stated otherwise, the claims do not meet the requirements of "commonality" and "appropriateness" for certification.

The certification process and the interplay between "commonality" and "appropriateness"

4. In *Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd*[1] ("*Children's Resource Centre*") the Supreme Court of Appeal ("SCA") identified seven factors to be considered in determining whether to certify a class action.[2]

5. The Court emphasised that a future court faced with an application for certification would have to consider all these factors and "be satisfied that they are present before granting certification".[3]

---

[1] 2013 (2) SA 213 (SCA).

[2] These factors are: Identifiability; Trialability; Commonality; Determinability; Allocatability; Representative and Appropriateness.

[3] *Children's Resource Centre*, par 28.

6. The two factors relevant in this application are those of:

6.1. "commonality" – that the right to relief depends on the determination of questions of fact, or law, or both, common to *all members* of the class; and

6.2. "appropriateness" (also referred to as "predominance") – whether, given the composition of the class and the nature of the proposed action, a class action is the most appropriate means of determining the claims of class members.[4]

The correct approach to "commonality"

7. The criterion of "commonality" requires that a court determine whether there are sufficient points of commonality in relation to questions of fact or law to bind the members of a class.

8. Two approaches to "commonality" have developed, the American approach, and the Canadian approach.[5]

---

[4] Par 26.

[5] An excellent discussion of these two approaches appears at 26 of D Unterhalter SC & A Coutsoudis "*The Certification of Class* Actions" in M Du Plessis, J Oxenham, I Goodman, L Kelly & S Padafin-Jones (eds) *Class Action Litigation in South Africa* (2017). A copy of this chapter is included in the authority bundle delivered with these heads of argument.

9. The American approach requires that the claim must call upon the court to determine a contention "of such a nature that it is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke".[6]

10. The Canadian approach adopts a much lower threshold and holds that "commonality" is present where class action "will avoid duplication of fact-finding or legal analysis".[7]

11. The applicants rely on the Canadian approach[8] which was adopted by the High Court in *Nkala v Harmony Gold Mining*[9] ("*Nkala*"). However, as pointed out by Unterhalter and Coutsoudis,[10] the High Court in *Nkala* did not consider the fact that the SCA in *Children's Resource Centre*, expressly approved the American approach:

> "… the class action does not have to dispose of every aspect of the claim in order to obtain certification. *It might in an appropriate case be restricted to the primary issue of liability*, leaving quantum to be dealt with by individual claimants. Certain common issues could be certified for the

---

6 *Wal-Mart Stores Inc, Petitioner v Bette Dukes* 131 S Ct 2541 at 2551. Quoted from Unterhalter & Coutsoudis ini *Class Action Litigation* 27.

7 *Western Canadian Shopping Centres Inc v Dutton* [2001] 2 SCR 534, 2001 SCC 46 par 39. Quoted from Unterhalter & Coutsoudis ini *Class Action Litigation* 27.

8 Applicants' Heads of Argument, par 120.

9 2016 (5) SA 240 (GJ).

10 Unterhalter & Coutsoudis in *Class Action Litigation* 28.

> entire class, and other subsidiary issues certified in respect of defined subclasses. But the question in respect of any class or subclass is always whether there are common issues that can be determined that will dispose of all or a significant part of the claims by the members of the class or subclass."[11]

12. Importantly, the SCA did not endorse the piece-meal prosecution of litigation by approving certification of only one element of the claim on the merits. At best, it is submitted, liability (merits) may be determined separately from quantum.

13. This approach should be supported, as the utility of class actions is eroded if an ultimate finding on liability (merits) would nevertheless require further individual hearings.

14. Consequently, the approach relied on by the applicants is inconsistent with that set out by the SCA in *Children's Resources Centre*, and should not be followed.

<u>The correct approach to "appropriateness"</u>

15. In *Nkala*, the High Court conflated "commonality" and "appropriateness" and found that, once a court had determined that a case raised sufficient common issues to justify a class action, "the question of the most appropriate way to proceed would almost certainly fall away".[12]

---

[11] *Children's Resource Centre*, par 45.

[12] *Nkala v Harmony Gold Mining*, par 110.

16. This approach is also in conflict with the approach adopted in *Children's Resources Centre*, which listed as one of the factors to be met for certification "whether given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members".[13]

17. As pointed out by Unterhalter and Coutsoudis,[14] the SCA requires an analysis of whether a class action is the most appropriate means of determining the claim, *irrespective* of whether the other factors are present. In so doing, the Court is afforded a certain level of discretion in certifying class actions.

18. In other jurisdictions a similar criterion, referred to as "superiority", is adopted and several factors have developed to determine whether class action proceedings are appropriate or "superior" to other proceedings. One such factor is whether the defendant would be adversely affected by a class action.

---

[13] *Children's Resource Centre*, par 26.

[14] Unterhalter & Coutsoudis in *Class Action Litigation* 32.

19. An example of such an adverse effect is the defendant's procedural rights, such as disadvantages in disclosure (discovery). Mulheron[15] highlights this consideration as follows:

> "Interestingly, the relationship between class litigation and the right of disclosure has manifested at the commencement of class litigation by two separate arguments concerning the fairness of the class action upon the defendant. The first of these concerns the scope of disclosure expected of the defendant, and the second concerns the defendant's right to disclosure against class members other than the representative plaintiff.
>
> One reason given for the discontinuance of a class action … is that the circumstances of the class members were so disparate that many of the allegations were hypothetical for some members. Although such a case may well fail because the claims of the class members are not sufficiently common, it is important to note that a dual attack on the class action is that the scope of the *potential disclosure required on the defendant's part may also render the proceedings unfair*. Thus, the proceedings may fail both on commonality and superiority."[16]

20. The acknowledgment that *procedural* prejudice to the defendant may render the hearing unfair is significant in this application. As illustrated below, the prosecution of the claims through a class action will prejudice the respondents, as it would

---

[15] R Mulheron *Class Action in Common Law Legal Systems: A Comparative Perspective* (2004). A .pdf version of this title is available and the relevant extract is annexed to the bundle.

[16] 253 (emphasis added).

render them unable to adequately investigate an individualised defence against each member of the class.

21. It is submitted that the procedural integrity and fairness of the trial constitutes an important consideration in considering whether the certification of class action proceedings is appropriate in this matter.

22. The effect of an individualised defence on the factors of "commonality" and "appropriateness" is illustrated by the USA matter of *Easter v City of Orlando*[17] ("*Easter v City of Orlando*").

Easter v City of Orlando

23. In *Easter v City of Orlando*, the City of Orlando ("the City") adopted an ordinance that authorised the use of cameras recording vehicles that failed to properly stop at red lights ("the ordinance"). This ordinance was invalid because it conflicted with State statutes.[18]

24. In April 2010, Richard Easter ("Easter") received a fine from the City for an infraction in terms of the ordinance. He appealed the fine, arguing that the ordinance was unlawful (which it was) but, under protest, nevertheless paid the

[17] No 5D17 – 276 (Fla. 5th DCA June 8, 2018). A copy of this judgment is included in the authority bundle delivered together with these heads of argument.

[18] *Easter v City of Orlando* 3.

fine. Thereafter, he filed an application to certify a class action suit against the City on behalf of all members of the public that paid fines under the ordinance.[19]

25. The court of first instance refused the application and an appeal was prosecuted to the District Court of Appeal of the State of Florida for the Fifth District.

26. One of the defences open to the City against the claim was the "voluntary payment defence".[20] In that jurisdiction a person who voluntarily paid a claim with full knowledge of all the facts cannot reclaim payment. Such a claimant can only escape the voluntary payment defence by showing "some compulsion or coercion" which provoked the payment.[21]

27. At issue was therefore whether the voluntary payment defence undermined the certification of class action proceedings.

28. As in South Africa, a prerequisite for the certification of a class action in Florida is "commonality". In addition, a class representative is also required to prove "predominance" (the equivalent of "appropriateness"). In this respect Florida Rule of Civil Procedure 1.220(b)(3) requires for certification that:

---

[19] 4.

[20] 4.

[21] *Jefferson City v Hawkins* 2 So. 362, 365 (Fla. 1887).

> "[q]uestions of law or fact *common* to the claim or defence of the representative party and the claim or defence of each member of the class *predominate* over any question of law or fact affecting only individual members of the class, and class representation is *superior* to other available methods for the fair and efficient adjudication of the controversy."[22]

29. These requirements, described as the "predominance" and "superiority" requirements, effectively entailed that it be determined that class action proceedings are the appropriate proceedings for the particular claim.

30. In relation to "commonality", the Court held that considerations of commonality do not only relate to whether each class member's claim arises from the same set of facts, but *also* whether there is commonality in the *defences* open to the defendant:

> "To establish the commonality requirement, the class proponent must establish that its claim or defence 'raises questions of law or fact common to the questions of law or fact raised by the claim or defence of each member of the class' Fla. R. Civ. P. 1.220(a). The primary concern in a consideration of commonality is whether the representatives' claim arises from the same practice or course of conduct that gave rise to the remaining claims and whether the claims are based on the same legal theory ... *However, the court may also consider the application of defenses in analyzing the commonality element* ... here because the issue of whether the City improperly assessed fines under the Ordinance has been resolved, the trial court would be called upon to determine whether

[22] Emphasis added.

> each class member's claim was precluded by the voluntary payment defence."[23]

and

> "In considering the application of the voluntary payment defense, Easter's course of conduct was significantly different than that of virtually all other members of the proposed class. Specifically, Easter paid his fine under protest after raising a legal challenge to the validity of the Ordinance. As a result, the trial court could properly conclude that the questions of law or fact that would need to be addressed on Easter's claim are not common to the questions of law or fact that would need to be addressed on the claims of other proposed class members."[24]

31. Therefore, because Easter had paid his fine under protest, and because other class members may not have done so, the City had an individualised defence against such members but not against Easter. Determining the merits of this defence accordingly required that a court investigate the unique circumstances of the payment made by each class member.

32. This individualised assessment meant that sufficient "commonality" did not exist because liability could not be established across the class in one investigation.

33. The voluntary payment defence also represented an insurmountable obstacle in the context of "predominance" (appropriateness).

---

[23] *Easter v City of Orlando* 10 (emphasis added).

[24] 10 and 11.

"To establish the predominance element, the class proponent must establish 'the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class'. … The Florida Supreme Court has observed that the determination of whether a party has shown actual compulsion or coercion sufficient to overcome the voluntary payment defense normally requires an individualized, fact-intensive inquiry. See Pacific Mut. Life. Ins. Co. of Cal., 170 So. at 583 (stating that because of difficulty in setting forth a definite and exact rule of universal application to determine whether a payment is voluntary or involuntary, each case 'must depend somewhat upon its own peculiar facts'); see also Chateau Cmtys., Inc., 783 So. 2d at 1231 (reversing certification of class members where plaintiff's claims, as pled, were not suitable for class action; stating '[e]qually individual are each tenant's claim of coercion and available defenses such as voluntary payment').

Here, the application of the voluntary payment defense doctrine supports the trial court's conclusion that Easter failed to prove the predominance element. In discussing predominance, the trial judge noted that even if those proposed class members who 'objected to their fines but did not seek judicial relief' were not immediately barred, overcoming the voluntary *payment defense would require a 'highly individualized' determination regarding the nature of the objection, the extent to which each person pursued the objection, and whether the potential penalties compelled or coerced payment from that person*. Thus, the trial court could properly conclude that in determining whether the City was required to pay refunds to potential claimants, individual issues would predominate over common issues."[25]

[25] 12 (emphasis added).

34. Since an evaluation of the voluntary payment defence required an individualised assessment of the facts relevant to each class member, class action did not "predominate" over individual actions. In other words, it was not appropriate to determine liability through class action proceedings.

35. On a practical level this conclusion must be supported, as class action proceedings are not appropriate where separate and individual inquiries are required to assess the validity of a defence available on an individualised level.

The factual matrix of this application

36. The factual background to this application is set out in detail in the founding and answering affidavits, as well as in the applicants' heads of argument, and need not be repeated in full.

37. For the purposes of the below argument, it is only necessary to highlight the following:

    37.1. The nature of the agreement between the respondents and class members is clearly set out at clause 3 of the "terms of service" document available on each webpage;[26]

[26] Answering affidavit, par 41, record 756; Annexure AA1, record 815.

37.2. Before an agreement is concluded, a class member is required to tick a "box" that reads as follows:

> "By ticking this box and submitting this application, you (the applicant/client) confirm that you (the applicant/client) have read the Terms of Service, Terms of Use, Legal Disclaimer, Product Advice and the Privacy Policy (Collectively known as the Policies) of Loan Hub SA and fully understand the contents thereof and are satisfied therewith. If you do not agree to the Policies, do not submit this application."[27]

37.3. The terms of service provides for a "cooling off" period within which class members may resile from the agreement, which was exercised by some.[28]

38. Against this background, an examination of the four claims advanced by the applicants reveals a defence that undermines certification. As in *Easter v City of Orlando*, the primary defence available to the respondents (the causation defence) requires "highly individualized"[29] investigations that compromises both "commonality" and "appropriateness".

---

[27] Answering affidavit, par 43, record 757.

[28] Answering affidavit, par 47, record 758.

[29] *Easter v City of Orlando* 12.

Claims advanced disclose an individualised defence

39. The applicants seek to prosecute four claims, namely:[30]

39.1. Claim 1 – a claim in terms of the provisions of the Consumer Protection Act, 68 of 2008 ("the CPA claim");[31]

39.2. Claim 2 – an alternative claim on the basis of the common law and the principles of misrepresentation ("the misrepresentation claim");[32]

39.3. Claim 3 – a claim based on threats and harassment under the CPA ("the harassment claim");[33] and

39.4. Claim 4 – a claim holding Malander and Paich personally liable for the debts of the other respondents.[34]

40. As stated above, these claims are all contingent upon the determination of an individualised defence compromising "commonality" and "appropriateness".

---

[30] Record 875.

[31] Draft particulars of claim, par 55 to 67.7, record 891 to 895.

[32] Draft particulars of claim, par 68 to 69.6, record 896 to 897.

[33] Draft particulars of claim, par 70 to 71.3, record 897 to 898.

[34] Draft particulars of claim, par 72 to 72.3, record 898.

Claim 1

41. The CPA claim relies on section 52(3) of the CPA which provides as follows:

> "(3) If the court determines that a transaction or agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair, the court may-
>
> (a) make a declaration to that effect; and
>
> (b) make any further order the court considers just and reasonable in the circumstances, including, but not limited to, an order-
>
> (i) to restore money or property to the consumer;
>
> (ii) to compensate the consumer for losses or expenses relating to-
>
> (aa) the transaction or agreement; or
>
> (bb) the proceedings of the court; and
>
> (iii) requiring the supplier to cease any practice, or alter any practice, form or document, as required to avoid a repetition of the supplier's conduct."

42. The applicants contend that the agreements are to be set aside in terms of section 52 of the CPA on account of them being the *product* of:

42.1. unconscionable *conduct* as contemplated in section 40 of the CPA;[35]

[35] Draft particulars of claim, par 60.1, record 892.

42.2. false, misleading or deceptive *representations*, as contemplated in section 41 of the CPA;[36] and

42.3. an "unfair, unreasonable or unjust" *application process* within the meaning of section 48 of the CPA.[37]

43. It is significant that the draft particulars of claim does not disclose an attach on the *terms* of the agreements, but limits the complaint to the *conduct* of the respondents that *induced* clients to enter into the agreements.

44. The CPA claim therefore presents an individualised defence as no claim stands where the causal nexus between the conduct complained of and the conclusion of the agreements is severed ("the causation defence").

45. For example, irrespective of whether the applicants are able to show that the respondents' conduct is unconscionable or misleading within the meaning of sections 40, 41 and 48, a class member will not be entitled to recovery of damages where such conduct was not the result of the conclusion of the agreements.

46. Stated otherwise, where the conduct complained of did not *induce* the conclusion of the contract (because for example a class member read the terms and

[36] Draft particulars of claim, par 60.2, record 892.

[37] Draft particulars of claim, par 60.3, record 892.

conditions, understood the scheme but nevertheless agreed in the hope of receiving a loan) no claim will lie on the basis of this ground.

47. This is because once a class member had read the terms of service stating clearly what the nature of the services provided were, the misrepresentation complained of cannot be said to have caused the conclusion of the service agreement. In other words, if a class members nevertheless proceeds to contract on this basis, the causal nexus would have been broken.

48. Similarly, where a class member had cancelled an agreement within the seven day cooling-off period, only to conclude a further agreement later (as some have) it cannot be said that those members were ignorant of the provisions of the terms of service.

49. The causation defence is therefore, as in *Easter v City of Orlando*, individualised.

50. Overcoming the causation defence requires a "highly individualized"[38] determination regarding the circumstances under which each class member concluded the relevant agreement. Such a determination would require an investigation into the extent to which each member relied on the marketing material, considered the terms of service and other policies, and how each was introduced to the respondents (for example through referral by another member).

---

[38] *Easter v City of Orlando* 12

51. It is not possible to conduct such individualised determinations through class action proceedings, thereby undermining certification.

Claim 2

52. Claim 2 is based on misrepresentation. In brief, the applicants contend that the respondents misrepresented the nature of the agreements, that this misrepresentation *induced* its conclusion, and that the class members suffered damage as a result.[39]

53. As correctly summarised on behalf of the applicants, this claim only lies where "the representations *induced* the consumers to enter into the service agreements".[40] Accordingly, where the causal link is severed, no claim lies.

54. As with the CPA claim, the determination of causation requires an individualised assessment of the conduct of each class member and the circumstances surrounding the conclusion of the service agreements.

55. The misrepresentation claim is therefore also unsuitable for prosecution through class action proceedings.

---

[39] Draft particulars of claim, par 68, record 896.

[40] Applicants' heads of argument par 65 and the authorities there cited (emphasis added).

Claim 3

56. Claim 3, the harassment claim, relies on the provisions of section 40(1)(d) of the CPA, which provides as follows:

> "40. Unconscionable conduct –(1) A supplier or an agent of the supplier must not use physical force against a consumer, coercion, undue influence, pressure or harassment, unfair tactics or any other similar conduct in connection with any –
>
> …
>
> (d) demand for, or collection of, payment for goods or services by a consumer; …"

57. The applicants' case in this respect is set out in the following terms:

> "71. The companies and Lifestyle Legal have contravened section 40(1)(d) of the CPA through their conduct as aforesaid in that:
>
> 71.1 they are not entitled to demand or collect payment from the class members at all on the basis that consumers are *induced to contract through fraudulent misrepresentation* as aforesaid;
>
> 71.2 they employ unjustified threats of blacklisting and legal action in order to *induce* consumers to make payment in circumstances where there is no lawful basis to blacklist or take legal action against any consumer in order to enforce the 'agreements' because the 'agreements' are unenforceable; and

71.3 they make fraudulent or misleading representations in connection with their demands for collection of payment."[41]

58. Claim 3 accordingly relates only to those consumers who concluded the service agreement *as a result* of the complained misrepresentation and who were *induced* to pay through threats.

59. As with Claim 1 and Claim 2, a determination of liability under Claim 3 requires an individualised assessment of whether each client *was* harassed and whether such harassment *induced* payment.

60. The applicants contend that the respondents harassed class members who where in default of payment – specifically excluding those who were not. The determination of this claim firstly does not meet the requirement of "commonality", because the harassment complained of is not common across the entire basis of the class.

61. Secondly, the allegations of harassment require an individualised assessment of the facts pertaining to each class member. Some members may have been threatened with legal action and others not. To arrive at a conclusion of whether a particular class member was harassed, a court will be necessitated to investigate that class member's unique circumstances, therefore also undermining

[41] Draft particulars of claim, par 71, record 897.

"commonality" and "appropriateness" for the same reason as advanced in regard to Claims 1 and 2.

62. Consequently, claim 3 is also not capable of determination through class action proceedings.

Claim 4

63. Claim 4 is pleaded as follows:

> "72. As pleaded above, at all material times the first to seventeenth defendants have been controlled by Malander and/or Paich.
>
> 72.1 Malander incorporated the companies to conceal and avoid his liability for the scam operated or fraud perpetrated through the listed websites;
>
> 72.2 Malander and Paich are using the defendant companies to conceal and avoid their liability for the fraud perpetrated through the listed websites, constitutes an unconscionable abuse of the juristic personality of these companies as separate entities;
>
> 72.3 Malander and Paich have at all material times knowingly conducted the business of the first to seventeenth defendants with the intention of defrauding consumers by

> *inducing* consumers to contract through fraudulent *misrepresentation*."[42]

64. Claim 4 is contingent on the success of Claims 1 to 3, and cannot stand alone, rendering it "inappropriate" for certification. In addition, it relies on the alleged misrepresentation inducing the conclusion of the agreements.

65. None of the claims that the applicants seek to advance are therefore suitable for prosecution through class action proceedings.

Further rationale for the "appropriateness" requirement in the present matter

66. It is clear from the *Children's Resources* and *Nkala* matters that class action proceedings were introduced to aid in the administration of justice by obviating a plethora of individual trials.

67. Accordingly, where an action affecting a group of claimants may:

    67.1. be determined as one, and

    67.2. without prejudice to the defendant to conduct a full and proper defence;

    certification will be appropriate.

---

[42] Draft particulars of claim, par 72, record 898 (emphasis added).

68. However, the prosecution of the claims through class action will not achieve any of these two goals.

69. On account of the individualised defences available to the respondents, liability on the merits can only be determined once an individualised assessment has been made as to whether each claimant was, factually, misled. Where a claimant was *not* misled (because they had read the terms and conditions or applied a second time), no recourse would lie for *that* claimant against the respondents in relation to *that* specific context. In order to prove liability, the claimants would therefore need to present evidence on each member of the class.

70. In addition, the respondents have the procedural right to cross-examine each claimant to ascertain whether they did read the terms and conditions (by clicking the box they all confirmed that they did) and what the true factual cause for concluding the agreement was. If such cause was not the alleged misrepresentation, the claim in relation to that particular claimant must fail.

71. If the action is prosecuted through a class action, the respondents will be deprived of this opportunity and prejudiced in conducting their defence in the sense described by Mulheron.[43]

---

[43] Mulheron *Class Action* 252.

72. The result is that the respondents will be unable to advance their individualised defences, rendering the trial procedurally unfair.

Conclusion

73. The certification factors of "commonality" and "appropriateness" should be determined according to the more stringent approach set out by the SCA in *Children's Resources* and not that of the High Court in *Nkala*. This means that the action should resolve a significant aspect of the litigation common to all the class members such as "liability" and that a piece-meal approach should be avoided. It also means that "appropriateness" remains a distinct and separate consideration.

74. Adopting the SCA's approach, it is clear that the claims do not raise sufficient "commonality". This is so because an important element of the merits of all the claims (liability) is that of causation, which cannot be determined without an individualised assessment of the defence available to the respondents.

75. The causation defence also renders certification inappropriate on two levels:

    75.1. firstly, because it will not achieve the object of avoiding a plethora of individual trials to establish liability to each class member; and

75.2. secondly, because it deprives the respondents of the procedural right to cross-examine each class member, rendering the trial unfair.

76. Consequently, on a normative level, the claims advanced by the applicants do not meet the requirements for certification of a class action, and in the result the application stands to be dismissed with costs.

P-S Bothma
Chambers
Cape Town
27 January 2021