

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no:

Western Cape Division case no: 16262/2019

In the matter between:

<b>LIFESTYLE DIRECT GROUP INTERNATIONAL (PTY) LTD</b>	1 <sup>st</sup> Applicant (1 <sup>st</sup> Respondent <i>a quo</i> )
<b>CAPITAL LIFESTYLE SOLUTIONS (PTY) LTD</b> <b>t/a LIFESTYLE LEGAL</b>	2 <sup>nd</sup> Applicant (2 <sup>nd</sup> Respondent <i>a quo</i> )
<b>LOAN TRACKER SA (PTY) LTD</b>	3 <sup>rd</sup> Applicant (3 <sup>rd</sup> Respondent <i>a quo</i> )
<b>LOAN SPOTTER SA (PTY) LTD</b>	4 <sup>th</sup> Applicant (4 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN MATCH SA (PTY) LTD</b>	5 <sup>th</sup> Applicant (5 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN CHOICE SA (PTY) LTD</b>	6 <sup>th</sup> Applicant (6 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN QUEST SA (PTY) LTD</b>	7 <sup>th</sup> Applicant (7 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN CONNECTOR SA (PTY) LTD</b>	8 <sup>th</sup> Applicant (8 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN HUB SA (PTY) LTD</b>	9 <sup>th</sup> Applicant (9 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN ZONE SA (PTY) LTD</b>	10 <sup>th</sup> Applicant (10 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN LOCATOR SA (PTY) LTD</b>	11 <sup>th</sup> Applicant (11 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN SCOUT SA (PTY) LTD</b>	12 <sup>th</sup> Applicant (12 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN TRACER SA (PTY) LTD</b>	13 <sup>th</sup> Applicant (13 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN DETECTOR SA (PTY) LTD</b>	14 <sup>th</sup> Applicant (14 <sup>th</sup> Respondent <i>a quo</i> )



LIFESTYLE LEGAL (PTY) LTD

15<sup>th</sup> Applicant  
(15<sup>th</sup> Respondent *a quo*)

LIFESTYLE ATTORNEYS (PTY) LTD

16<sup>th</sup> Applicant  
(15<sup>th</sup> Respondent *a quo*)

ALL WHEEL AUTO (PTY) LTD

17<sup>th</sup> Applicant  
(17<sup>th</sup> Respondent *a quo*)

DAMIAN MALANDER

18<sup>th</sup> Applicant  
(18<sup>th</sup> Respondent *a quo*)

and

STELLENBOSCH UNIVERSITY LAW CLINIC

1<sup>st</sup> Respondent  
(1<sup>st</sup> Applicant *a quo*)

ADELE ROTHMANN

2<sup>nd</sup> Respondent  
(2<sup>nd</sup> Applicant *a quo*)

IGNATIUS MICHAEL HEYNS

3<sup>rd</sup> Respondent  
(3<sup>rd</sup> Applicant *a quo*)

DERRICK FERREIRA DOS SANTOS

4<sup>th</sup> Respondent  
(4<sup>th</sup> Applicant *a quo*)

RONALD ABRAHAM ARTHUR ESBACH

5<sup>th</sup> Respondent  
(5<sup>th</sup> Applicant *a quo*)

NICOLENE ELS

6<sup>th</sup> Respondent  
(6<sup>th</sup> Applicant *a quo*)

ALICIA PELSER

7<sup>th</sup> Respondent  
(7<sup>th</sup> Applicant *a quo*)

VANESSA VENTER

8<sup>th</sup> Respondent  
(8<sup>th</sup> Applicant *a quo*)

CASSIEM HALLIDAY

9<sup>th</sup> Respondent  
(9<sup>th</sup> Applicant *a quo*)

NANDIE PAICH

10<sup>th</sup> Respondent  
(10<sup>th</sup> Applicant *a quo*)

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FOUNDING AFFIDAVIT

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I, the undersigned

**HENDRIK JOHANNES BOTHMA**

do hereby make oath and state that:

1. I am a major male attorney, practising as a director of the firm Abrahams & Gross Incorporated, the applicants' attorney of record.
2. I have been involved in the matter from its inception and the facts set out herein are within my personal knowledge.
3. I depose to this affidavit in support of an application for leave to appeal against a judgment and order of the Western Cape Division of the High Court, certifying the institution of class action proceedings by the first to ninth respondents (applicants in the court *a quo*) against the applicants herein and the tenth respondent (respondents in the court *a quo*).
4. The judgment and order appealed against was granted on 6 August 2021, and an application for leave to appeal followed on 22 October 2021. On 3 November 2021, the court *a quo* refused leave to appeal. I annex hereto marked "FA1(a)" and "FA1(b)" the judgment and order appealed against and "FA2(a)" and "FA2(b)" the judgment and order refusing leave to appeal.



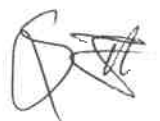
## Background

5. The respondents, led by the Stellenbosch Law Clinic ("the law clinic") and eight other individuals (collectively "the representatives") applied to court for leave to institute a class action against the applicants and the tenth respondent.
6. The eighteenth applicant ("Malander") and the tenth respondent ("Paich") were between them the officers of the other applicants. Prior to the commencement of this litigation Malander and Paich had a fall out and, for reasons unknown to me, the latter has elected not to participate actively in this litigation – hence her citation in this application as a respondent.
7. The third to fourteenth respondents are the owners of various websites that form the basis of the representatives' proposed claim ("the websites"). The remaining applicants are associated companies.
8. The representatives contend that the applicants conducted a fraudulent online scheme in terms of which, through misrepresentation, they misled members of the public ("the consumers" or "the class members") to conclude contracts with them in terms of which the consumers agreed to make a monthly payment to the applicants in exchange for legal and other consumer related advice.
9. This, the representatives contend, was achieved through the misleading nature of the websites. All the relevant websites contained the word "loan"



prominently in their title. Examples are "www.loantrackersa.co.za"; "www.loanspottersa.co.za" and "www.loanmatchsa.co.za".

10. The representatives allege that happening upon these websites, a consumer was led to believe that they are applying for a loan when, in reality, they were entering into an online agreement for advice relating to legal matters and to improve their credit score (part of this service is a referral to registered loan providers – this aspect was billed as a "free add-on").
11. All the websites require of consumers to enter their banking details and, prior to entering into the agreement, click a check box confirming that they have read the relevant terms of service. The terms of service are available through a link on the websites and there is no dispute that it accurately reflects the terms of the ultimate agreement between the parties. Significantly, the representatives do not contend that the terms of these agreements are unconscionable or otherwise objectionable.
12. The court *a quo* certified four claims against the applicants namely:
  - 12.1. claim 1 – a claim in terms of the provisions of the Consumer Protection Act, 68 of 2008 ("the CPA" and "the CPA claim");
  - 12.2. claim 2 – an alternative claim on the basis of common law principles of misrepresentation ("the misrepresentation claim");



- 12.3. claim 3 – a claim based on alleged threats and harassments under the CPA (“the harassment claim”); and
- 12.4. claim 4 – a claim holding Malander and Paich personally liable for the debts of the other applicants.
13. In claim 1, the representatives rely on the provisions of section 52 of the CPA, which provide that a court may, where a transaction or agreement is unconscionable, unjust, unreasonable or unfair, make a declaration to that effect and compensate the consumers for loss relating thereto.
14. In brief, the representatives contend that the applicants’ *modus operandi* places the agreements within the aforementioned framework, and that the trial court is at liberty to set aside *all* agreements concluded between the applicants and class members.
15. In the alternative, claim 2, the representatives contend that the agreements were concluded on the basis of misrepresentation and that the trial court would similarly be justified in setting aside the agreements on this basis and awarding damages to all the consumers – the damages representing the payments made by consumers under the agreements.
16. Claim 3, the harassment claim, also relies on provisions of the CPA, notably section 40(1)(d). The representatives contend that, in demanding payment under the agreements, the applicants harassed class members since the



agreements are void *ab initio* either on the basis set out in claim 1 or claim 2.

17. Notably, it is common cause that not all class members may complain of harassment as demands for payment were not made to every class member. It is unclear at this stage which class members may enjoy a claim under this cause of action.
18. Claim 4 is a claim to pierce the corporate veil of the applicant companies and hold Malander and Paich personally liable for any damages that may be awarded to the class members.

#### **The applicants' case**

19. The applicants applied for leave to appeal on the basis of both sub-sections 17(1)(a)(i) – that the appeal has reasonable prospects of success, and section 17(1)(a)(ii) – that there are other compelling reasons why the appeal should be heard, of the Supreme Court's Act ("the SC Act").<sup>1</sup>
20. In the judgment refusing leave to appeal, the court *a quo* recorded that the applicants had *not* advanced section 17(1)(a)(ii) as a ground of appeal.<sup>2</sup> This recordal is incorrect.

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<sup>1</sup> 10 of 2013.

<sup>2</sup> Par 14.



21. I was present at the hearing where counsel for the applicants argued that the appeal should also be allowed on the basis of other compelling reasons. The point is also taken in the applicants' heads of argument in the leave to appeal application. I annex hereto a copy of those heads of argument as annexure "FA3" and refer this Honourable Court to paragraphs 22, 73 to 78 and 81.3 thereof.
22. Herein I similarly contend that leave to appeal should be granted because the appeal has reasonable prospects of success *and* that there are other compelling reasons why it should be heard.

Reasonable prospects of success

23. The applicants contend that the primary question in this application does not relate to the legality or otherwise of their business practices, but whether the claims advanced by the representatives are appropriate for prosecution through class action proceedings. It therefore requires a normative analysis.
24. Principally, the applicants contend that these claims are not suitable for class action proceedings because:
- 24.1. liability turns on an individualised assessment of the facts and circumstances relevant to each member of the class; and
- 24.2. certification will not meaningfully advance the litigation process.



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

*Commonality*

26. Primarily, the applicants contend that the claims sought to be prosecuted by the representatives do not exhibit the requisite measure of commonality for certification, because a central tenet of both the claims is that the relevant consumers were, as a fact, misled by the websites to conclude the agreements.
27. Even if it is accepted that the content of the website constitutes an objective misrepresentation of the nature of the agreements (which is nevertheless denied by the applicants) a determination of liability can only be made upon the factual finding that a particular class member relied on that misrepresentation when entering into an agreement with the applicants.
28. The existence of the terms of service, which set out the true nature of the agreement (and the fact that every class member certified that they had read these terms of service) invites an investigation as to why each class member should be excused from the *caveat subscriptor* rule and whether, in reality, they were ignorant of the true nature of the agreement.
29. I pause at this juncture to point out that a significant element of the agreements was that the applicant companies would refer the consumers to third party loan providers as part of its "free add-on" and it is not



inconceivable that the consumers would have knowingly concluded the agreements for this added benefit.

30. The question of causation is accordingly central to a determination of liability. Evidence exists which show that some consumers entered into agreements on more than one occasion and that some *were* granted loans by third party providers.
31. Malander contends that these consumers cannot raise misrepresentations and that, in any event, the nature of the agreements appear from the terms of services. He contends that consumers who wish to prosecute claims should be tested on whether they read the terms of service, and if not, why they certified that they did.
32. Therefore, a determination of causation requires an individualised assessment of each consumer, rendering such misrepresentation claims unsuitable for prosecution through class action proceedings. As I elaborate below, I am aware of international authority on this point – that individualised assessments of reliance (or causation) renders such claims uncertifiable.<sup>3</sup>
33. While the representatives contend that *they* did not read the terms of service, they can of course not testify as to whether any of the other thousands of consumers did. Absent a finding on causation, it is irrelevant

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<sup>3</sup> See *Abdool v Anaheim Management Ltd* (1995) 121 DLR (4<sup>th</sup>) 496 (Div Ct) and *McKenna v Gammon Gold Inc* 2010 ONSC 1591.

whether the trial court holds that the websites constitute a misrepresentation.

34. Claims 1 and 3, which rely on the provisions of the CPA are also problematic for another reason.
35. Section 52(2) of the CPA provides that, prior to a court setting aside an agreement on the basis of it being unconscionable, unjust, unreasonable or unfair (and ordering compensation) a court *must* consider a host of individualised questions. For example, a court must consider:
  - 35.1. the nature of the parties to the agreement; their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position (section 52(2)(b));
  - 35.2. the circumstances that existed or were foreseeable at the time each agreement was concluded (section 52(2)(c));
  - 35.3. whether there was any negotiation between the parties, and if so, the extent of that negotiation (section 52(2)(e)); and
  - 35.4. whether consumers knew, or reasonably ought to have known, of the existence and extent of provisions of the agreement complained of, having regard to:
    - 35.4.1. custom of trade; and



35.4.2. any previous dealings between the parties (section 52(2)(h)).

36. I respectfully say that it is self-evident that the aforesaid, mandatory enquiry, requires an individualised assessment of class members because:

36.1. class members have disparate capacity, education, experience, sophistication and bargaining power:

36.2. the circumstances of the transactions are different;

36.3. the question of any negotiations between the parties differs among class members; and

36.4. class members are likely to have different levels of knowledge of the content of the agreements, as some have had previous dealings with the applicants.

37. Additionally, the claims proceed from the premise that the agreements were void *ab initio*. I submit this is wrong in law. The Constitutional Court has confirmed that where agreements were introduced by misrepresentation, the agreements are not *void ab initio*, but *voidable* at the instance of the innocent party.<sup>4</sup>

38. Claim 3 is also premised on the allegation that the agreements are void *ab initio*. For the reasons set out above, this is incorrect.

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<sup>4</sup> *Absa Bank Ltd v Moore* 2017 (1) SA 255 (CC) par 38.



39. In addition, not all class members complain of harassment. In order to ascertain which class members would enjoy a cause of action under this claim, further individualised evidence would therefore be required.
40. Claim 4 is contingent on the previous 3 claims succeeding and is, consequently, also not susceptible for certification.

#### *Appropriateness*

41. Even if, notwithstanding the difficulties in commonality, the matter be deemed certifiable for prosecution by way of class action proceedings, it is submitted that such proceedings are inappropriate in the circumstances.
42. This is so, because absent evidence from each and every class member, the litigation will be an exercise in futility.
43. It serves to note that a central argument of the representatives is that it is impractical to conduct litigation in respect of each and every class member. However this argument also undermines the appropriateness of class action proceedings. For the same reason that it is impractical to conduct thousands of individual trials, it is similarly impractical to lead evidence of thousands of individual class members. The consequence is that a failure to lead such evidence undermines the claim for *all* class members.
44. Should the class action proceed, and the representatives fail to lead evidence regarding causation, the election of class members to terminate the agreements, the factors set out in section 52(2) of the CPA and the



identification of those individual class members that have complained of harassment, the plaintiffs would have failed to make out a cause of action rendering the action susceptible to absolution.

45. On the basis of the aforesaid, I respectfully submit that there is a reasonable prospect that another court would disagree with the findings of the court *a quo* within the meaning of sub-section 17(1)(a)(i) of the SC Act.

Other compelling reasons

46. Irrespective of the merits of the appeal, there are also two compelling further reasons why an appeal should be heard namely:
- 46.1. conflicting judgments in connection with the test for commonality in the certification of class action proceedings; and
- 46.2. uncertainty in the approach to be adopted in connection with class actions based on *misrepresentation*.
47. I am aware that this Court in *Children's Resources Centre v Pioneer Foods*<sup>5</sup> ("*CRC Trust*") adopted the United States of America approach to commonality as expounded in *Wal-mart v Dukes*.<sup>6</sup> In that matter it was held that commonality requires that a claim must call upon a court to determine a common contention of such a nature that it is capable of class wide

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<sup>5</sup> 2013 (2) SA 213 (SCA).

<sup>6</sup> 131 S Ct 2541.

resolution, meaning that its determination will resolve an issue that is central to the validity of each one of the claims in one stroke.

48. In contrast, the full bench of the South Gauteng High Court in *Nkala v Harmony Gold Mining Company Ltd*<sup>7</sup> (“Nkala”) adopted the more stringent Canadian approach to commonality expounded in *Vivendi Canada Inc v Michel Dell’Aniello*,<sup>8</sup> to the effect that commonality is established where the determination of a common issue would “move the litigation forward”.<sup>9</sup>
49. The court *a quo* also adopted the *Nkala* approach to commonality and, while the High Court (Gauteng Local Division) in *De Bruyn v Steinhoff International Holdings N.V.*<sup>10</sup> sought to reconcile these divergent approaches,<sup>11</sup> the issue remains unresolved.
50. In this respect the present matter provides an opportunity for this Honourable Court to provide valuable direction regarding the correct approach to commonality.
51. In addition, an analysis of international case law reveals difficulties in accommodating misrepresentation claims in a class action procedure.

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<sup>7</sup> 2016 (5) SA 240 (GJ).

<sup>8</sup> [2014] 1 SCA 3.

<sup>9</sup> Par 46.

<sup>10</sup> As of yet unreported judgment 2020 JDR 1405 (GJ).

<sup>11</sup> See par 258 of that judgment.



52. I am aware of authority from Canada (where the less stringent approach to commonality applies), to the effect that the courts have routinely refused to certify class actions based on misrepresentation for a lack of commonality.
53. In *Abdool v Anaheim Management Ltd*<sup>12</sup> the Canadian Divisional Court held that the inherent nature of misrepresentation actions makes it difficult to find central aspects capable of proof on a common basis.<sup>13</sup>
54. Similarly, in *McKenna v Gammon Gold Inc*<sup>14</sup> the Ontario Superior Court of Justice considered a claim based on negligent misrepresentation and concluded that the element of causation, central to misrepresentation claims, and the inability to establish reliance on the misrepresentation by each class member as a common issue, misrepresentation claims "fundamentally unsuitable" for certification.<sup>15</sup>
55. I am however, also aware of decisions involving misrepresentation where certification was granted.<sup>16</sup> At this stage it is unclear which approach to misrepresentation cases and class actions apply in the South African context and I respectfully say that it is in the interest of justice that this matter

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<sup>12</sup> (1995) 121 DLR (4<sup>th</sup>) 496 (Div Ct).

<sup>13</sup> Par 52.

<sup>14</sup> 2010 ONSC 1591.

<sup>15</sup> Par 160.

<sup>16</sup> The legal representatives for the representatives pointed to the matters of *Wong v Pretium Resources Inc.* 2021 ONSC 54 and *Goldman Sachs Group Inc v Arkansas Teacher Retirement System* 594 U.S. 2021 during argument in the application for leave to appeal.



be resolved in what is still a novel and developing branch of South African law.

**The findings of the court *a quo***

56. The court *a quo* rejected the difficulties in determining causation by holding that it is the applicants' *modus operandi* that is relevant and that the question to be determined is whether the applicants business practices were intended to mislead the consumers into believing that they were applying for loans when, they were not. The court held as follows:

"In my view, this argument misses the point. The consumers in the prospective class complained that they were misled by the websites they visited, having been referred there automatically when they accessed an online search engine such as Google looking for short-term loans. The contention that there are a series of unique factual determinations which will be required is actually a myth. *The primary issue is whether the respondents' modus operandi was the establishment of websites which were intended to mislead innocent consumers into believing they were applying for loans when, in truth and fact, they were not.* That state of affairs can be factually determined with reference to an objective assessment of the individual websites concerned, and in particular, whether they were designed to mislead. The inquiry, ultimately, is whether [the applicants] created a trap for consumers through which they intended to benefit themselves".<sup>17</sup>

57. While it is undoubtedly so that one of the questions to be determined by the trial court is whether the applicants intended to mislead class members, the

<sup>17</sup> Par 57 (emphasis added).

court erred in not recognising that causation is a necessary requirement for finding liability. In this sense, the court *a quo* departed from an erroneous premise in exercising its discretion to allow certification.

58. In connection with claim 1, the court *a quo* also held that it is capable of objective determination. In this regard it was held that:

“Similarly, the proposed inquiry under the CPA as to whether an agreement into which a consumer was misled was unconscionable, unjust and/or unreasonable and thus not enforceable, is capable of being made on an objective assessment of the wording of the agreement itself, read in its contextual setting. That is an assessment that can be made on behalf of the class as a whole without the necessity of having to resort to an individualised approach through the presentation of case-specific evidence. The same argument applies to the fourth cause of action where it seeks to pierce the corporate veil”.<sup>18</sup>


59. However, the characterisation by the court *a quo* of claim 1 in this manner is factually incorrect. As appears from the draft particulars of claim submitted in support of the proposed class action, the representatives do not complain that the *terms* of the agreement fall foul of the CPA, but rather that the misrepresentations contained on the websites *caused* the conclusion of the agreement and is hence in breach of the CPA. In this regard claim 1 and claim 2 are effectively identical and in both instances a lack of commonality on the question of causation renders the claims unsuitable for certification. Consequently, in this respect the court *a quo* departed from an incorrect factual basis in deciding certification.

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<sup>18</sup> Par 57.



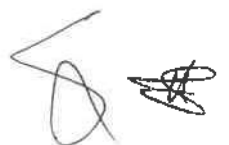
60. In addition, and as set out above, a determination of the claims 1 and 3 requires an individualised assessment of the factors set out in section 52(2) of the CPA. I respectfully submit that the court *a quo* erred in not taking account of these factors and that had it done so the unavoidable conclusion is that the claims are unsuitable for certification.
61. In holding that certification is appropriate, the court *a quo* considered the definition of the class and the risks and pitfalls of a multitude of smaller claims by class members.
62. However, I respectfully say that in this instance too, the court *a quo* departed from an erroneous premise. In considering a certification application the primary consideration is not whether the class members have an alternative to class action, but whether the requisites of class action are met. Absent these requirements a class action will effectively decide nothing and be a peripheral exercise in futility.
63. In the judgment refusing leave to appeal the court *a quo* relied on the decisions to certify a class action fully within the ambit of a judicial discretion.
64. In this regard, I respectfully submit, that this court *a quo* erred in exercising its discretion because it did not take account of:
- 64.1. the necessity to perceive individual reliance on misrepresentations to complete a case of action;

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- 64.2. the necessity to conduct the individualised assessments required by section 52(2) of the CPA;
- 64.3. that the CPA claim did not rest on an interpretation of the *terms* of the agreements, but rather on what *induced* it;
- 64.4. the necessity to show that all class members elected to resile from the agreements; and
- 64.5. the necessity to show which class members complain of harassment.

### **Appealability**

- 65. The question of appealability remains. It is settled that the *refusal* of a certification application is subject to appeal but there is some debate about whether the granting of such an application is appealable.
- 66. In *Nkala* the High Court refused an application for leave to appeal on the basis that the judgment was not final in effect. I have been able to ascertain that this Honourable Court granted leave to appeal in that judgment, but the matter became settled and was therefore never finally prosecuted.
- 67. The applicants contend that the granting of a certification application *is* appealable. This is so because it resolves a central aspect of the litigation: namely the capacity of the class representatives to institute proceedings,



the outcome of which binds parties not before court and is determinative of their rights.

68. In this sense the relief granted in the certification application is final and not susceptible of alteration by the court of first instance.

### **Conclusion**

69. While the court *a quo* accepted, without deciding, that the granting of a certification application is appealable, the applicants contend that it nevertheless erred by not granting leave to appeal. This is so because the application for leave to appeal satisfies the test set out in section 17(1) of the SC Act in that:

- 69.1. there is a reasonable prospect that another court may hold that the individualised assessment required in respect to the claims would compromise commonality to such an extent that the test of commonality is not met;
- 69.2. that the practical difficulties in the misrepresentation claim such as this renders it inappropriate for certification; and
- 69.3. that it is in the interest of justice that the matter proceed to appeal because an appeal would resolve conflicting approaches to the threshold of commonality and give guidance on the suitability of prosecuting misrepresentation claims through a class action.



70. For these reasons I respectfully ask that leave to appeal be granted to this Honourable Court and that costs for this application be costs in the appeal.



HENDRIK JOHANNES BOTHMA

I certify that:-

1. the deponent acknowledged to me that the deponent:-
  - a. knows and understands the contents of this affidavit;
  - b. has no objection to taking the prescribed oath;
  - c. considers the prescribed oath to be binding on the deponent's conscience;
2. the deponent thereafter uttered the words "I swear that the contents of this affidavit are true, so help me God";
3. the deponent signed this affidavit in my presence at the address set out hereunder.

Signed on this 3rd day of DECEMBER 2021 at Cape Town



COMMISSIONER OF OATHS

**SM de Saude-Sadat Darbandi**  
Commissioner of Oaths  
Practising Attorney, R.S.A, Cape Town  
Suite 2702, Foreshore Place,  
2 Riebeeck Street, Cape Town  
(021) 418 3188

"FA 1(a)"



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

**REPORTABLE**

**CASE NO: 16262/2019**

In the matter between:

**STELLENBOSCH UNIVERSITY LAW CLINIC**

**ADELE ROTHMANN**

**IGNATIUS MICHAEL HEYNS**

**DERRICK FERREIRA DOS SANTOS**

**RONALD ABRAHAM ARTHUR ESBACH**

**NICOLENE ELS**

**ALICIA PELSER**

**VANESSA VENTER**

**CASSIEM HALLIDAY**

And

**LIFESTYLE DIRECT GROUP INTERNATIONAL**

**(PTY) LTD**

**CAPITAL LIFESTYLE SOLUTIONS (PTY) LTD**

**t/a LIFESTYLE LEGAL**

**LOAN TRACKER SA (PTY) LTD**

**LOAN SPOTTER SA (PTY) LTD**

**LOAN MATCH SA (PTY) LTD**

**LOAN CHOICE SA (PTY) LTD**

**LOAN QUEST SA (PTY) LTD**

**LOAN CONNECTOR SA (PTY) LTD**

First Applicant

Second Applicant

Third Applicant

Fourth Applicant

Fifth Applicant

Sixth Applicant

Seventh Applicant

Eighth Applicant

Ninth Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

Eighth Respondent

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

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**JUDGMENT AS CORRECTED IN TERMS OF RULE 42(1)(b) ON 6 AUGUST 2021**

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**GAMBLE, J:**

**INTRODUCTION**

1. The applicants seek the certification by this Court of an "opt-out" class action to be instituted against the respondents in which they will seek to undo certain agreements which the respondents allegedly concluded with a multitude of consumers, to reverse various transactions concluded pursuant to such agreements and to compensate aggrieved consumers for the losses allegedly incurred as a consequence of a fraudulent scheme implemented by the respondents. The applicants also seek to interdict the respondents from conducting such scheme pending the final determination of the class action.

2. The applicants contend that the respondents are not registered credit-providers but that they nevertheless lure unsuspecting consumers with promises of loans and loan-finding services. Then, it is said that, although the respondents are not

registered legal practitioners, they purport to charge consumers for legal advice. It is said that in the process, the respondents conduct an unlawful scam, firstly, by inviting online applications for financial assistance and then by making use of the information and personal details supplied by consumers making such applications to dupe them into concluding unwanted fixed-term contracts for legal assistance in which so-called "subscription fees" are then debited from the consumers' bank accounts.

3. In short, say the applicants, the respondents are wily confidence tricksters who exploit the informality of the internet and the financial straits in which poor consumers find themselves to perpetrate an array of frauds against innocent and vulnerable persons on a daily basis. In summary, say the applicants, consumers are duped into believing that they are applying for a much-needed cash loan while in fact they receive no money and end up paying a monthly instalment for legal "services" which they never sought, nor receive. They seek to bring an end to this sorry state of affairs through the mechanism of a class action, and in the interim, through the imposition of an interdict *pendent lite*.

4. After the launch of the application for a class action on 13 September 2019, there were two applications by non-parties to the suit. Firstly, on 19 December 2019, Legalwise South Africa (Pty) Ltd, under Rule 12 of the Uniform Rules, sought leave to intervene as the tenth applicant in the proceedings. Secondly, on 21 February 2020, the Payments Association of South Africa ("PASA") applied to be admitted to the proceedings as *amicus curiae*.

5. The matter was originally enrolled for hearing over 2 days in April 2020 but had to be postponed due to the Covid 19 pandemic. It eventually came before this Court on 8 and 9 March 2021 when a virtual hearing was conducted. The applicants were represented by Adv. J.G. Dickerson SC and L.C. Kelly, the respondents by Adv. P-S. Bothma, PASA by Adv. A.M. Price and Legalwise by Adv. N. Mayosi. The Court is indebted to counsel for their heads of argument which have greatly assisted in the preparation of this judgment.

IN LIMINE ISSUES

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6. The respondents oppose Legalwise's application for joinder as a co-applicant and that procedural issue will thus need to be determined in the course of this judgment.

7. As far as PASA's participation is concerned, I did not understand any of the parties to be opposed thereto. Mr. Bothma, correctly in my view, accepted that the case as a whole raised a number of novel issues arising from, inter alia, the application of the Consumer Protection Act, 68 of 2008 ("the CPA") and that the issue of the utilization of the debit order system by the respondents fell for consideration. To the extent that PASA, as an arm of the South African Reserve Bank ("SARB"), had expert knowledge of the implementation of this system, its contribution would be relevant.

8. The admission to proceedings of an *amicus curiae* is governed by Rule 16A of the Uniform Rules as well as the court's inherent jurisdiction to regulate its own process. Ultimately, the discretion to admit an *amicus* is taken in the interests of justice and is intended to promote transparency, efficiency and understanding in constitutional litigation "by creating space for interested non-parties to provide input on important public interest matters"<sup>1</sup>. Having heard counsel for PASA, I am satisfied that its contribution is helpful to the determination of the issues and it is thus appropriate that it be admitted as an *amicus*. The substance of PASA's submissions will appear from the body of this judgment.

9. At the commencement of proceedings on the second day of the hearing, Mr. Bothma sought leave to introduce a supplementary affidavit by the eighteenth respondent setting out certain developments which had emerged since the filing of the respondents' papers. This arose as a consequence of the Court's query at the commencement of argument on the first day whether the respondents were still operating the various internet websites of which the applicants had complained. The Court's concerns in that regard were occasioned by its own inability to access those

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<sup>1</sup> Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and others 2013 (2) SA 620 (CC) at [26]

websites via the internet to view them, and a further concern that the interlocutory relief might be moot in the circumstances.

10. The thrust of the supplementary affidavit was directed at the interim relief sought by the applicants and intended to demonstrate that no such relief was required in the circumstances as the websites had been closed down. The applicants managed to file a reply to the respondents' supplementary affidavit shortly before the conclusion of proceedings on the second day. That affidavit sought to demonstrate that certain of the websites claimed to have been closed down by the respondents were in fact still operative and that the case for interim relief was very much still a live issue.

11. In the result, both supplementary affidavits were received by the Court and now form part of the record.<sup>2</sup> They thus fall to be considered in the course of the judgment.

12. As will appear from this judgment, there is significant common ground between the applicants and respondents on the criteria for the certification of a class action and the //s between the parties in this application is limited to two discrete issues – (i) commonality of issues, and (ii) appropriateness of the remedy.

#### DEVELOPMENT OF THE CLASS ACTION IN OUR LAW

13. While it has been employed extensively in the United States of America and certain common law jurisdictions similar to ours, class action litigation is a relative novelty in South African law and can be considered still to be in the stage of jurisprudential development. That notwithstanding, our highest courts have already pronounced decisively on the topic and guidelines have been set to guide both litigants and courts alike faced with an application such as this, for the certification of a class action.

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<sup>2</sup> See pages 1043 to 1102

14. At the heart of class action litigation lies access to justice for ordinary working people who cannot otherwise afford the exorbitant cost of litigation in our country.<sup>3</sup> Such collective litigation saw the light of day in our legal system at the turn of the century in response to a serial failure by the Eastern Cape Provincial Government to pay disability grants to needy persons who qualified therefor. A group of four individuals, duly assisted by a public interest law firm, the Legal Resources Centre, commenced proceedings to secure the recovery of outstanding grants and to procure the future payment thereof. After such action had been sanctioned in the Provincial Division, the Province took the matter on appeal, where Cameron JA delivered the unanimous judgment of the Supreme Court of Appeal.<sup>4</sup> I shall quote in some detail from that judgment as it usefully provides the legal tapestry against which the present matter falls to be considered. All internal references in the judgments cited in this judgment have been omitted, unless expressly cited.

15. In Ngxuza, Cameron JA described the social importance of class action litigation as follows.

"[1] The law is a scarce resource in South Africa. This case shows that justice is even harder to come by. It concerns the ways in which the poorest in our country are to be permitted access to both. In the Eastern Cape Division of the High Court four individual applicants, assisted by the Legal Resources Centre, brought motion proceedings against the Eastern Cape provincial government (represented by respectively the departmental and political heads of provincial welfare, who are the first and second appellants). They sought two-fold relief. The first portion was to reinstate the grants they had been receiving under the Social Assistance Act, which the province had without notice to them terminated. The province conceded the claims of three of the applicants, with payment of arrears and interest. They are the respondents in the appeal (I refer to them as "the applicants"). A fourth applicant failed, and he plays no further part in the proceedings in which the contested issue is the immensely

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<sup>3</sup> See, for example, The South African Law Commission *The Recognition of Class Actions and Public Interest Actions in South African Law Report Project 88* (1998) para 1.3 – 1.4; South African Law Commission *The Recognition of a Class Action in South African Law Working Paper 57 Project 88* (1995) para 5.28

<sup>4</sup> Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza 2001 (4) SA 1184 (SCA)



more expansive, second portion of the relief the applicants sought. That concerned the plight of many tens of thousands of Eastern Cape disability grantees they alleged were in a similar predicament to themselves, in that they, too, had had their grants unfairly and unlawfully terminated. On their behalf, aiming to secure the reinstatement en masse of their cancelled pensions, the applicants sought to institute representative, class action and public interest proceedings in terms of s 38(b), (c) and (d) of the Constitution. Froneman J, in a judgment now reported granted them leave to proceed."

16. The Learned Judge of Appeal went on to examine the procedural basis for allowing litigants to proceed by way of a class action.

"[4] In the type of class action at issue in this case, one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it. Defendants may also be sued as members of a class. The class action was until 1994 unknown to our law, where the individual litigant's personal and direct interest in litigation defined the boundaries of the court's powers in it. If a claimant wished to participate in existing court proceedings, he or she had to become formally associated with them by compliance with the formalities of joinder. The difficulties the traditional approach to participation in legal process creates are well described in an analysis that appeared after the class action was nationally regularised in the United States through a federal rule of court more than sixty years ago:

*"The cardinal difficulty with joinder ... is that it presupposes the prospective plaintiffs' advancing en masse on the courts. In most situations such spontaneity cannot arise either because the various parties who have the common interest are isolated, scattered and utter strangers to each other. Thus while the necessity for group action through joinder clearly exists, the conditions for it do not. It may not be enough for society simply to set up courts and wait for litigants to bring their complaints — they may never come. What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it."*

[H Kalven, Jr and M Rosenfield "The Contemporary Function of Class Suit" (1941)

*University of Chicago Law Review* 684 at 687-8. To similar effect is H Erasmus *Superior Court Practice* A2-4J: The traditional rules governing joinder "are impractical where the number of applicants is large and/or all the potential applicants have yet to be identified."]

[5] The class action cuts through these complexities. The issue between the members of the class and the defendant is tried once. The judgment binds all, and the benefits of its ruling accrue to all. The procedure has particular utility where a large group of plaintiffs each has a small claim that may be difficult or impossible to pursue individually. The mechanism is employed not only in its country of origin, the United States of America, where detailed rules governing its use have developed, but in other countries as well. The reason the procedure is invoked so frequently lies in the complexity of modern social structures, and the attendant cost of legal proceedings:

*"Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all."*

[6] It is precisely because so many in our country are in a 'poor position to seek legal redress', and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice, that both the interim Constitution and the Constitution created the express entitlement that 'anyone' asserting a right in the Bill of Rights could litigate 'as a member of, or in the interest of, a group or class of persons'".

17. In November 2012, the Supreme Court of Appeal heard two applications brought by purveyors of bread seeking the certification of class actions aimed at attacking the dominance in the consumer market of certain bread cartels allegedly responsible for price fixing.<sup>5</sup> Both matters were heard by the same panel of judges with separate judgments being delivered in each case. The *rationes decidendi* of the

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<sup>5</sup> Trustees for the time being of the Children's Resource Centre Trust v Pioneer Food (Pty) Ltd and others 2013 (2) SA 213 (SCA) ("CRC Trust"); Mukkadam and others v Pioneer Foods (Pty) Ltd and others 2013 (2) SA 254 (SCA) ("Mukkadam SCA")

decisions were, however, unanimous and the decisions are now regarded as having established the criteria to be applied by courts considering the certification of class actions.

18. In CRC Trust, Wallis JA stressed the importance of correctly categorizing the nature of the intended class action.

"[18] Recognition of the representative nature of a class action has important implications for determining the requirements for such actions. If the action is representative it is essential to identify, not necessarily by name but by description, those who are being represented. As it is their rights that are to be adjudicated upon, they must either be given the opportunity to be excluded from the class (to opt out) or they must be required to join the class (to opt in). It is also necessary to identify the representative and to determine both their suitability to act as such and the basis upon which they will do so. The element of aggregation of claims dictates that the claims brought together in the action, whilst not necessarily identical, should raise common issues of fact or law, the resolution of which will serve to resolve or enable the resolution of all claims."

19. The learned Judge of Appeal went on to list the requirements for certification of class actions.

"[26] In the course of argument the presiding judge put to counsel the following list of the elements that should guide a court in making a certification decision. They were:

- the existence of a class identifiable by objective criteria;
- a cause of action raising a triable issue;
- that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class;
- that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;

- that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class;
- that the proposed representative is suitable to be permitted to conduct the action and represent the class;
- 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.

There is an element of overlapping in these requirements. For example, the composition of the class cannot be determined without considering the nature of the claim. The fact that there are issues common to a number of potential claimants may dictate that a class action is the most appropriate manner in which to proceed, but that is not necessarily the case. A class action may be certified in respect of limited issues, for example, negligence in a mass personal injuries claim, leaving issues personal to the members of the class, such as damages, to be resolved separately.

[27] This list corresponds substantially with the factors identified by the Law Commission as the requirements for certification. It also overlaps with what Cameron JA said [in Ngxuza] were 'the quintessential elements of a class action', in dealing with a contention that a class had been inadequately described, namely

'... that (1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants through their legal representatives, the Legal Resources Centre, will fairly and adequately protect the interests of the class.'

Similar requirements are prescribed in Federal Rule 23(a) of the Federal Rules of Civil Procedure in the United States of America, namely that the class is so numerous that joinder of all its members is impracticable; that there are questions of law or fact that are common to the class; that the claims of the representative parties are typical of the claims of the class; and that the representative parties will fairly and adequately represent the interests of the class. These requirements are referred to as numerosity, commonality, typicality and adequate representation. Similar requirements are to be found in other jurisdictions."

20. In CRC Trust, the Supreme Court of Appeal set aside the court *a quo*'s refusal to certify a class action and remitted the matter back for reconsideration in accordance with the criteria suggested by that court.

21. In delivering the unanimous judgment of the court in Mukkadam (SCA), Nugent JA concurred with the approach of the panel in CRC Trust as regards the approach to class action certification but declined to certify such action on the basis of the facts before that court.

22. Mukkadam (SCA) proceeded to the Constitutional Court where the main judgment of the court was delivered by Jafta J,<sup>6</sup> who commented as follows in relation to the approach to be adopted in the certification of class actions, with specific reference to the judgment of Wallis JA in Mukkadam (SCA).

*\*Section 173*

[33] Section 173 of the Constitution provides: —

'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

*Standard for certification*

[34] It is apparent from the text of the section that it does not only recognise the courts' power to protect and regulate their own processes but also their power to develop the common law where necessary to meet the interests of justice. The guiding principle in exercising the powers in the section is the interests of justice. Therefore, this is the standard which must be applied in adjudicating applications for certification to institute class actions.

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<sup>6</sup> Mukkadam v Pioneer Foods (Pty) Ltd and others 2013 (5) SA 89 (CC) ("Mukkadam CC"). Mhlantla J and Froneman J (Skweyiya J concurring) delivered separate judgments in which they agreed with Jafta J on the outcome of the appeal for varying reasons.

[35] In *Children's Resource Centre*, the Supreme Court of Appeal laid down requirements for certification. These requirements must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. They must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise.'

23. Against that background, class action certification has been considered in the High Court in a number of cases. Perhaps the most celebrated decision to date is Nkala<sup>7</sup>, the so-called "silicosis case", in which mine-workers affected by that lung disease and pulmonary tuberculosis, sought to recover compensation for occupational injuries suffered at the hands of their employers over the years.

24. A Full Bench of the erstwhile Gauteng Local Division, which granted the applicants leave to pursue a class action, gave the following useful overview of the procedure.

"[33] To sum up, a class action represents a paradigmatic shift in the South African legal process. It is a process that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group or "class" against one or more defendants. The process is utilised to allow parties and the court to manage a (sic) litigation that would be unmanageable or uneconomical if each plaintiff was to bring his/her claim individually. It is normally instituted by a representative on behalf of the relevant class of plaintiffs. The class action process is part of the equity-developed law and is designed to cover situations where the parties, particularly plaintiffs, are so numerous that it would be almost impossible to bring them all before the court in one hearing, and where it would not be in the interest of justice for them to come before court individually.

[34] It is not only for the benefit of plaintiffs that the class action process was conceived, it is also designed to protect a defendant(s) from facing a multiplicity of actions resulting in it having to recast or regurgitate its case against each and every individual plaintiff. Furthermore, it enhances judicial economy by protecting courts from having to consider the same issues and evidence in multiple proceedings, which carries with it the possibility of

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<sup>7</sup> Nkala and others v Harmony Gold Mining Co Ltd and others 2016 (5) SA 240 (GJ)

decisions by different courts on the same issue. On the other hand, a class action allows for a single finding on the issue(s), which finding binds all the plaintiffs and all the defendants.”

25. Lastly, by way of background discussion, it is necessary to mention the question of representivity and, further, to distinguish between the “opt-out” and “opt-in” procedures which are integral to class actions. In CRC Trust, the court explained it thus.

“[16] In class actions the party bringing the action does so, on behalf of the entire class, every member of which is bound by the outcome of the action, so that a separate action by a member of the class after judgment can be met with a plea of res judicata. The concept is most fully defined, by Professor Mulheron,<sup>8</sup> in the following terms:

‘A class action is a legal procedure which enables the claims (or parts of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons (“representative plaintiff”) may sue on his or her own behalf and on behalf of a number of other persons (“the class”) who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff (“common issues”). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.’

[17] The class action serves to bring a number of separate claims together in one proceeding. In other words it permits the aggregation of claims. However, that is not its only function. Of equal or greater importance, as Professor Silver points out,<sup>9</sup> is the fact that the class action is ‘a representational device’. It is -

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<sup>8</sup> The reference is to the writing of Professor Rachael Mulheron in ‘*The Class Action in Common Law Legal Systems: A Comparative Perspective* 3.’

<sup>9</sup> The reference is to the writing of Prof. Charles Silver, “Class Actions – Representative Proceedings 5 *Encyclopaedia of Law and Economics* 194.

... a procedural device that expands a court's jurisdiction, empowering it to enter a judgment that is binding upon everyone with covered claims. This includes claimants who, not being named as parties, would not ordinarily be bound. A class-wide judgment extinguishes the claims of all persons meeting the class definition rather than just those of named parties and persons in privity with them, as normally is the case.

Judges and scholars sometimes treat the class action as a procedure for joining absent claimants to a lawsuit rather than as one that permits a court to treat a named party as standing in judgment on behalf of them. This is a mistake ... Class members neither start out as parties nor become parties when a class is certified.'

[18] Recognition of the representative nature of a class action has important implications for determining the requirements for such actions. If the action is representative it is essential to identify, not necessarily by name but by description, those who are being represented. As it is their rights that are to be adjudicated upon, they must either be given the opportunity to be excluded from the class (to opt out) or they must be required to join the class (to opt in). It is also necessary to identify the representative and to determine both their suitability to act as such and the basis upon which they will do so. The element of aggregation of claims dictates that the claims brought together in the action, whilst not necessarily identical, should raise common issues of fact or law, the resolution of which will serve to resolve or enable the resolution of all claims."

As I have said, the applicants seek an "opt-out" certification in this matter. Further, the first applicant ("the Law Clinic") has undertaken to represent the class and there is no objection thereto by the respondents.

#### THE RELEVANT FACTUAL MATRIX

26. Given the limited disputes in this application for certification, I need only give a broad overview of the relevant background facts and circumstances. I shall rely extensively on the Law Clinic's founding affidavit deposed to by one of its senior attorneys, Mr. Stephanus van der Merwe, for that purpose. Mr. van der Merwe is also a lecturer at the University.



## THE WEBSITES

27. Mr. van der Merwe notes that the Law Clinic had received hundreds of complaints from irate consumers concerning some 12 websites that were cause for concern. Listed under the address prefix <https://www>, they all prominently bore the word "loan" as part of their respective domain names as appears from the following list (the name of the company using such website is indicated in parentheses)

- (i) loantrackersa.co.za (Loan Tracker SA (Pty) Ltd, the third respondent);
- (ii) loanspottersa.co.za (Loan Spotter SA (Pty) Ltd, the fourth respondent);
- (iii) loanmatchsa.co.za (Loan Match SA (Pty) Ltd, the fifth respondent);
- (iv) loanchoicesa.co.za (Loan Choice SA (Pty) Ltd, the sixth respondent);
- (v) loanquestsa.co.za (Loan Quest SA (Pty) Ltd, the seventh respondent);
- (vi) loanconnectorsa.co.za (Loan Connector SA (Pty) Ltd, the eighth respondent);
- (vii) loanhubsa.co.za (Loan Hub SA (Pty) Ltd, the ninth respondent);
- (viii) loanzonesa.co.za (Lone Zone SA (Pty) Ltd, the tenth respondent);
- (ix) loanlocatorsa.co.za (Loan Locator SA (Pty) Ltd, the eleventh respondent);
- (x) loanscoutsa.co.za (Loan Scout SA (Pty) Ltd, the twelfth respondent);
- (xi) loantracersa.co.za (Loan Tracer SA (Pty) Ltd, the thirteenth respondent).



The twelfth website related to an entity called "Loan Detector SA (Pty) Ltd" (the fourteenth respondent) whose domain name is unknown to the Law Clinic.

28. Each of these websites, says Mr. van der Merwe, offered either loans or a loan finding service, intended to induce consumers to conclude agreements for unwanted services. In most instances, monies were debited from the bank accounts of consumers who had subscribed for such services via the websites, shortly after they had visited the website in question. It is said that the websites generally employed the same *modus operandi* to mislead consumers: they were invited to submit an on-line application form for what appeared to be a loan (or a service that would assist them in procuring a loan). However, tucked away in the terms of service discretely advertised on the website was a recordal that the consumer had entered into an agreement for a service unrelated to a loan (or loan-finding service) e.g. "telephonic legal advice service." Such agreement was invariably for a fixed term of 12 months and comprised an initial subscription fee ranging from R399 to R429 and a monthly subscription of R99 for the remaining duration of the agreement.

29. In the founding affidavit, Mr. van der Merwe has consistently referred to an "agreement" thereby suggesting, through the use of inverted commas, a purported agreement. The respondents, on the other hand, have referred to a "Service Agreement" thereby suggesting, I understand, an agreement for the provision of services of some or other kind. For the sake of clarity and consistency, I shall refer throughout in this judgment to the consequences of a consumer's application on any of the websites for an advertised product as an agreement. I expressly avoid the use of inverted commas in relation thereto.

#### THE MODUS OPERANDI

30. It is pointed out that consumers were required to provide their banking details when submitting their applications. Mr. van der Merwe says that the common understanding amongst people with whom the Law Clinic had spoken was that such details were furnished on the understanding that they were applying for a loan. But, once again, buried in the terms of the service was an authorisation by the consumer



permitting the company behind the website in question to debit monies due under the agreement from their bank accounts.

31. Consumers told the Law Clinic that after submitting such applications they began to notice deductions being effected from their bank accounts while no loan payments were forthcoming. When they followed up with the companies in question they were routinely informed, to their astonishment, that they had concluded agreements with the one of the respondent companies and in the process had authorized debit orders to be set up against their bank accounts. Yet, when they attempted to cancel the agreements, consumers were stonewalled by the companies responsible for the deductions. They are said to have been harassed by those companies' employees who threatened to take legal action, including blacklisting, against consumers who did not make payment in terms of their agreements.

32. The Law Clinic reports that there were literally thousands of complaints by consumers who had fallen foul of the respondents' alleged trickery. A Facebook group set up in response to the alleged scam was said to have numbered almost 700 in August 2019. In addition, there had been widespread coverage in the print and electronic media detailing the plight of consumers said to have been caught out by the respondents. For instance, on 28 April 2019, an investigative television programme known as "*Carte Blanche*" aired an expose of the alleged scam noting as follows –

"Struggling to make ends meet in the current economy, South Africans who have found themselves desperate enough to apply for certain online loans have stepped into a world of pain as they inadvertently ended up in a debt spiral, having to pay for services they never asked for, through debit orders they had no idea they were authorising. It's a nightmare that once begun, can take you years to clear up."

33. Mr. van der Merwe illustrated his evidence through screen shots from various of the websites referred to above. As I have said, the Court was unable to access these websites directly to evaluate for itself how they functioned. However, the Law Clinic's founding affidavit provides useful assistance in that regard. The websites, as appear from their names listed above, all prominently feature the word "loan". Not



only do the names of the websites immediately create the impression that the respondents offer loans or loan finding services, the wording of many of the screen shots consistently advertise loans. I shall recite but one example.

34. The website [www.loanlocatorsa.co.za](http://www.loanlocatorsa.co.za) (being that of the eleventh respondent) contains the following get up.

**"Blacklisted and need a loan? / Quick and easy online signup....**

Loans up to R200 000, no loan fees. No credit checks. Apply online now. Open Monday–Friday.

Highlights: Hassle Free Application Process. Convenient Service Package. Offering Expert services.

Apply Online. Log In. Loan Information"

35. The respondents generally made use on their webpages of hyperlinks whereby consumers could access application forms directly by clicking their computer cursors on words such as "Apply Online". Mr. van der Merwe points out that the respondents targeted some of the most vulnerable members of society, being cash-strapped consumers desperate for financial assistance who are easily attracted by the offer of easy finance to relieve their debt-burdens.

36. The joinder in the application of the second to ninth applicants adequately demonstrated how a range of consumers spread out across the country – from the Western Cape to KwaZulu-Natal, Gauteng and beyond - had been entrapped in unwanted contracts by offers of quick money via the respondents' websites. Their individual circumstances (confirmed by supporting affidavits) more than adequately lends credence to the Law Clinic's assertions that they believed they were applying for loans whereas they were ultimately told that they had applied for legal services. These services were said to have been unwanted, not required and, most importantly, never rendered to the consumers in question.

THE RESPONDENTS

37. The third to fourteenth respondents comprise a web of small companies, each with physical offices located across greater Cape Town. They are all associated with the first respondent, ("the Lifestyle Direct Group") which has its registered offices in Bellville. The second respondent (Capital Lifestyle Solutions (Pty) Ltd, which trades as "Lifestyle Legal" and will thus be referred to as such) is a subsidiary of the Lifestyle Direct Group and has its registered offices at Century City. It has been registered as a debt collector since 2015 and this is its primary focus – it functions as the "in-house" debt collection agency for the Lifestyle Group.

38. The fifteenth respondent, which is described as Lifestyle Legal (Pty) Ltd, has its registered offices at the same premises as the Lifestyle Group in Bellville, while the sixteenth respondent ("Lifestyle Attorneys") also has its registered offices at Century City. It is said that Lifestyle Legal (i.e. the second respondent) was the corporate entity used to harass consumers by sending them threatening emails, letters of demand, draft summonses and the like.

39. The persons behind this web of corporate entities are Mr. Damian Malander (the eighteenth respondent) and Ms. Nandie Paich (the nineteenth respondent), both of whom reside in Cape Town. Mr. Malander is the sole director of the Lifestyle Group, Lifestyle Legal, Lifestyle Attorneys and the seventeenth respondent, an entity curiously known as "All Wheel Auto (Pty) Ltd".<sup>10</sup>

40. It is pointed out by Mr. van der Merwe that all of the companies that operate the websites referred to were registered on the same day – 20 May 2015 – and that all such websites are hosted on the same server ("ns1.lifestyle-srv.com"). On 10 June 2016, Mr. Malander resigned his sole directorships of the third to fourteenth

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<sup>10</sup> This company is alleged to have debited a consumer's bank account without that consumer having had any contact with it. It is therefore inferred by the Law Clinic that it must have procured the consumer's banking details from one of the other entities in the group.



respondents and was immediately replaced by Ms. Paich, who remains the sole active director of those entities. Mr. Malander remains a director of Lifestyle Attorneys, together with Mr. Dlakavu Ndumiso. Neither Messers Malander and Ndumiso nor Ms. Paich are qualified or practicing attorneys. The claim by the Law Clinic that Mr. Malander and Ms. Paich are ultimately in control of the companies behind the alleged online loan scam thus appears to be well founded on the facts as presented to the Court.

41. The Law Clinic further points out that, although the websites advertise loans or "loan-finding services", none of the companies that own and operate them are registered credit providers. In fact, it says that their real business is that of a "telephonic legal advice assistance centre" yet none of the consumers it interacted with ever wanted such a service or received such advice. It goes without saying that the companies, which were not registered as legal practitioners, were never lawfully permitted to furnish such advice.

42. In summary, the *modus operandi* employed by the Lifestyle Direct Group and its subsidiaries or affiliates, is said to have been

- intended to lure unsuspecting consumers in need of a loan to supply their banking details;
- to obfuscate the true nature of the legal relationship actually concluded between the parties;
- immediately to deduct unauthorized amounts from such bank accounts;
- to prevaricate when consumers attempted to cancel the agreements so concluded; and



- to harass and threaten the consumers with bogus legal action and blacklisting when they attempted to terminate the legal relationship that had ultimately eventuated between the parties.

#### THE APPLICANTS' CAUSES OF ACTION

43. Mr. van der Merwe says that the class action will encompass four causes of action, two of which are based on the common law with the others sourced in the CPA.
44. Firstly, it is said that the agreements concluded between the members of the class and the respondents were prima facie unconscionable, unjust unreasonable or unfair in terms of ss 40, 41 and 48 of the CPA. If this is established at trial, the members of the class would be entitled to declaratory relief to such effect, the restoration to them of any monies paid over to the respondents as well as compensation under s52 of the CPA for any losses incurred as a consequence of such agreements and deductions from their bank accounts.
45. Secondly, and in the alternative to the primary cause of action, the Law Clinic contends that the consumers are entitled to declaratory relief that the agreements are unlawful at common law on the basis of fraudulent misrepresentation and that they are entitled to restitution and damages.
46. Thirdly, it is said that the respondents' conduct in demanding (or collecting) payments from the consumers was unconscionable in terms of s40 of the CPA or unlawful at common law. This would entitle such members of the class to declaratory relief and an order under s52(3)(b)(iii) of the CPA to cease such conduct, alternatively to a prohibitory interdict at common law.
47. Fourthly, it is claimed that Mr. Malander and Ms. Paich used the respondent companies to conceal and avoid their liability for the alleged online scam thereby conducting the businesses of the companies with the intention of defrauding



their customers. It is said that consumers are entitled to common law relief for declaratory orders piercing the corporate veil.

48. In discharging its evidential burden, the Law Clinic says the class will seek to rely on the Electronic Communications and Transactions Act, 25 of 2002 ("ECTA") which deals with so-called "click wrap contacts". These are agreements concluded electronically when a consumer ticks a box on a website prior to submitting an online application. It says that the probity and enforceability of contracts so concluded has not yet been tested in our courts.

49. As I have said, Mr. Bothma accepted that the applicants had made out a prima facie case for relief based on the causes of action as pleaded in the founding affidavit of Mr. van der Merwe and the relevant facts set out therein. Counsel accepted, too, that the Law Clinic was a suitable party to act as the class representative. It is thus not necessary to consider these aspects of the application in any greater detail. The only contentious issues for purposes of certification were the questions of commonality and appropriateness. The determination of the appropriateness of certifying a class action will, largely, be influenced by the question of commonality, and it is to that criterion that I then turn.

#### COMMONALITY

50. In CRC Trust,<sup>11</sup> the SCA considered the criterion of commonality in a class action suit in relation to questions of fact and law, with reference to the decision of the US Supreme Court in Wal-Mart<sup>12</sup>. In that matter, Scalia J was of the view that the claims of the class –

"must depend upon a common intention....That common intention, moreover, must be of such a nature that it must be capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one strike."

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<sup>11</sup> At [44] – [45]

<sup>12</sup> Wal-Mart Stores Inc, Petitioner v Betty Dukes et al 131 S Ct 2541 at 2551

51. Consequently, a class action does not require every member of the class to have an identical cause of action or to put forward identical facts and seek identical relief. Nor does such an action need to dispose of every aspect of a claim for certification to be granted. It is sufficient that there be some issues of fact, or some issues of law (or a combination thereof) that are "common to all members of the class and can appropriately be determined in one action."<sup>13</sup>

52. The present case concerns the alleged implementation by Mr. Malander and Ms. Paich, through the corporate entities that they effectively controlled, of a fraudulent scheme which targeted unsuspecting consumers through the repetitive use of misrepresentations, on the one hand, and material omissions on the other, to lure them into completing online application forms for services they neither needed nor had requested, followed by the almost immediate deduction of debit orders from their bank accounts in respect of services never rendered. This is said to have been a relatively simple scheme which was repeated many, many times with a veritable host of victims being targeted countrywide. Articulated thus, the scheme appears to neatly fit the commonality criteria for a class action claim.

53. Indeed, the founding affidavit of Mr. van der Merwe demonstrates the following common issues of fact and law in this application.

53.1 The manner in which the respondent companies implemented the scheme, from the first advertisement to the final debit order;

53.2 The extent to which the respondents and the agreements are regulated by the CPA;

53.3 Whether the respondents' conduct amounts to unconscionable, false and misleading, unfair, unreasonable or unjust conduct under the CPA and, if so, what the appropriate remedies under the CPA would be;

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<sup>13</sup> CRC Trust at [45]

53.4 What the respondents' representations to consumers were and whether they may be considered fraudulent;

53.5 Whether, given the respondents' *modus operandi*, the agreements were validly concluded or whether they were induced by misrepresentation;

53.6 Whether the bank charges that consumers were forced to incur might justify a claim for damages;

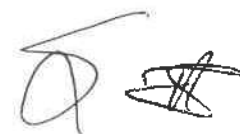
53.7 Whether it would be just and equitable to order restitution to the consumers of the amounts so debited from their bank accounts;

53.8 Whether the conduct of Mr. Malander and Ms. Paich constituted reckless or fraudulent abuse of the corporate respondents' legal personalities, and if so

53.9 Whether it would be appropriate to pierce the corporate veil so as to hold them personally responsible for the losses suffered by the consumers.

54. I agree with counsel for the Law Clinic that these issues can be determined by the adducing of evidence and the presentation of argument at one hearing, long as it may be in anticipated duration. Put otherwise, if a class action is denied, similar (if not identical) evidence will have to be lead in separate courts by each of the thousands of the members of the class. Given the relatively limited quantum involved individually, these cases would likely be spread across numerous regional and magisterial jurisdictions throughout the country. That state of affairs needs only to be stated to demonstrate that it would be inefficient and an unnecessary waste of resources for both parties. Indeed, a single consolidated hearing would appear to be manifestly beneficial to the respondents as well.

55. The respondents argued that, since the individual causes of action are delictual, there were issues unique to each prospective plaintiff that were not capable of class-wide resolution. In this regard, the question of causation was highlighted, the




submission by Mr. Bothma being that courts would be required to conduct unique factual investigations into each consumer's claim with the further prospect of cross-examination to test the veracity and reliability thereof. For instance, it was said that the respondents would want to be satisfied that a particular consumer had actually been duped by a particular website visited rather than having intentionally "taken a punt" (as counsel put it) on the service on offer.

56. In my view, this argument misses the point. The consumers in the prospective class complain that they were misled by the websites they visited, having been referred there automatically when they accessed an online search-engine such as Google looking for short-term loans. The contention that there are a series of unique factual determinations which will be required is actually a myth. The primary issue is whether the respondents' modus operandi was the establishment of websites which were intended to mislead innocent consumers into believing they were applying for loans when, in truth and fact, they were not. That state of affairs can be factually determined with reference to an objective assessment of the individual websites concerned, and in particular, whether they were designed to mislead. The enquiry, ultimately, is whether the respondents created a trap for consumers through which they (the respondents) intended to benefit themselves.

57. Similarly, the proposed enquiry under the CPA as to whether an agreement into which a consumer was misled was unconscionable, unjust and/or unreasonable and thus not enforceable, is capable of being made on an objective assessment of the wording of the agreement itself, read in its contextual setting. That is an assessment that can be made on behalf of a class as a whole without the necessity of having to resort to an individualized approach through the presentation of case-specific evidence. The same argument applies to the fourth cause of action which seeks to pierce the corporate veil.

58. But even if there are areas where the concept of commonality is perhaps somewhat stretched, this would not be a reason to refuse certification. Such issues as may well be found to be lacking in commonality can be dealt with in due course through the directions of the trial judge and the judicial manager (the so-called



“Special Master” referred to below) appointed to oversee the class action. After all the over-riding consideration in certifying any class action is the interests of justice and this purpose is served by such an approach.

59. In Nkala, the court cited with approval the *dictum* of the Canadian Supreme Court in Vivendi.<sup>14</sup>

“[94] The approach adopted by the Canadian Supreme Court in *Vivendi Canada Inc v Michell Dell’ Aniello* is instructive. There the court held:

‘the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.’

[95] This is particularly so because:

‘the underlying (commonality) question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be ‘common’ only where its resolution is necessary to the resolution of each class member’s claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member’s claim. However, the class members’ claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.’

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<sup>14</sup> Vivendi Canada Inc v Michell Dell’ Aniello [2014] R.C.S 1 at [46]

[96] In *Vivendi* the court noted with reference to similar cases that an issue will be considered common if addressing it enables all the claims to move forward. It need not be determinative of the final resolution of the case. It is sufficient that it allows the claims to move forward without duplication of the judicial analysis. This however does not preclude a class action suit.

[97] The approach in *Vivendi*, in our view, is correct for it ensures that the interests of justice predominate.”

I consider that the approach advanced in Vivendi is applicable in this matter too.

### APPROPRIATENESS

60. Turning to the question of the appropriateness of the envisaged procedure in respect of the claims in this matter, one must first consider the definition of the class sought to be represented. I did not understand Mr. Bothma to take issue with the proposed definition and the matter can thus be dealt with briefly.

61. The Law Clinic’s manager and a senior lecturer at the University of Stellenbosch, Dr. Theo Broodryk, penned an article in the 2019 Stellenbosch Law Review entitled “The South African Class Action Vs Group Action As An Appropriate Procedural Device”<sup>15</sup>. The article is wide-ranging and discusses much of the relevant case law, both local and international. In discussing the importance of the definition of the relevant class Dr. Broodryk observes that

“[a] proper class definition inter alia enables the court to determine how notification to the putative class members should be given, to decide who does not form part of the class and may accordingly institute individual actions, and to establish who will be bound by the court’s order.”

62. Dr. Broodryk goes on to point out that, even where class members are identifiable, this does not necessarily render class action proceedings inappropriate.

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<sup>15</sup> (2019) 30 Stell LR at 6



"[W]here for example the individual class members are not in a financial position to vindicate their rights through ordinary litigation, where the class is numerous, or where the individual claims of class members are small, joinder may be costly, cumbersome and inappropriate. Requiring joinder in such circumstances may deprive class members of their right to access to justice. In other words, the fact that class members are identifiable should not necessarily mean that a class action is not the appropriate mechanism to adjudicate class members' claims."

63. In Steinhoff<sup>16</sup> Unterhalter, J provided the following useful summary of the importance of the definition of the class.

"27. Class definition provides the foundation for a class action. As Children's Resources makes plain, the class or classes should be defined with sufficient precision to ensure that membership of the class can be determined by reference to objective criteria. There are good reasons for this. The rights of members of the class are affected by certification. They are bound by the outcome of the class action if they have not chosen to opt out or, in some species of class action, they have elected to opt in. The members of the class must thus be determined or determinable. The membership of the class should have an identity of interest. Furthermore, the definition of the class will be relevant to other considerations that the certification court is required to consider. Thus, by way of example, the heterogeneity of a class may impact upon the common issues capable of determination in a class action, the suitability of a class representative and the complexity of the proposed litigation. So too, a class that is under-inclusive may lack utility, because the joinder of individual plaintiffs in a single action may be quite as effective as the certification of a class action. In other cases, a class may [be] over-extensive and lack coherence which gives rise to other infirmities."

64. The applicants propose that the class in this matter be defined as follows:

"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 to date on the basis of them having

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<sup>16</sup> De Bruyn v Steinhoff International Holdings NV and others [2020] ZAGPJHC 145 (26 June 2020)

concluded purported 'agreements' with any of the respondents through any of the websites listed in Annexure A".

65. Accordingly, membership of the proposed class is established by way of objective criteria, viz –

65.1 Whether any of the respondents debited any amount from an individual's bank account. This can be objectively established by viewing the bank statements of the member concerned.

65.2 Whether any of the respondents have subjected the individual member to threats of harassment in relation to payments under an agreement concluded via one of the websites. This can be objectively established by considering correspondence from the respondents – either via SMS, email or letter.

65.3 Whether the individual purported to conclude an agreement with one of the respondents. This is established through correspondence with the respondents and the individual's own records regarding the submission of an application form via one of the respondent's websites.

66. In the result, I am persuaded that membership of the proposed class is determined by an objective connection to one (or more of) the respondents, the alleged unlawful conduct of the respondents in question and a defined timeframe. This renders certification appropriate.

67. Finally, on this score, the appropriateness of the certification is confirmed by the fact that the class is a large one and the claims relatively small – some so low that they might conceivably be recoverable in the Small Claims Courts. Added to that is the fact that the claims are spread over a multitude of geographical jurisdictions which would not only place strain on the litigants (and the respondents in particular) but the courts as well, where there is the risk of multiple findings at variance with each other. Such an outcome is clearly not in the interests of justice.



## OPTING OUT OR IN?

68. As to the form of certification, the Law Clinic has asked for an “opt-out” class action regime. In the answering affidavit, there was opposition to this categorisation but at the hearing of the matter, I did not understand Mr. Bothma to raise any objection thereto. The distinction between the two regimes was summarized as follows by Dr. Broodryk in the abstract to a journal article he authored entitled “The South African Class Action Mechanism: Comparing the Opt-In Regime to the Opt-Out Regime”<sup>17</sup>

“The opt-in class action regime requires individual class members to take positive steps to participate in the class action. In other words, class members are required to come forward and opt into the class action, failing which they will not be bound by or benefit from the outcome of the litigation. Support for the opt-in regime is essentially premised on the belief that individuals who are unaware of the litigation should not be bound by its outcome. The opt-out class action regime, on the other hand, automatically binds members of the class to the class action and the outcome of the litigation unless the individual class members take steps to opt out of the class action. Support for the opt-out regime is essentially based on the view that the opting-in requirement could undermine one of the primary purposes of class action litigation, which is to facilitate access to justice.”

69. In his concluding remarks in this article, Dr. Broodryk makes the following point.

“It may be that the circumstances of the case are such that the opt-in procedure is indeed preferable to the opt-out procedure. As was the case in *Linkside*, this may occur where the court is confronted with a relatively small group of individual claimants each of whom is identifiable and especially where each claimant has a substantial individual claim. In this regard, the court should assess whether the size of the claimants’ individual claims is such that it is unlikely that they would, in the absence of class proceedings, litigate independently. If it is likely that they would litigate independently, then those claimants should be given an opportunity to opt into the proceedings.”

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<sup>17</sup> PER/PELJ 2019 (22)

Finally, the author stresses the importance of a court being afforded the discretion to decide upon the appropriate regime.

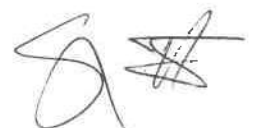
"The primary advantage of providing the court with judicial discretion to choose between requiring opt-in, opt-out and no-notice orders is that it enables the court to decide, with reference to the circumstances of the particular case, which procedure would be most suited to the overall disposition of the case."

70. In my view, the present matter is well suited to an opt-out class action. The envisaged class is large and the individual claims are relatively small when compared, for instance, to the personal injuries sustained in the silicosis case. Given that there is no evidence that any of the affected consumers has commenced legal proceedings against any of the respondents, it is reasonable to infer that there is little likelihood of independent litigation ensuing. Lastly, the cost of individual litigation in relation to the sums intended to be recovered is likely to be high and thus a deterrent to the pursuit of individual claims. The interests of justice would, in such circumstances, favour the extension of collective litigation to all members of the class without more, so as to render such consumer-based claims affordable.

#### THE SPECIAL MASTER

71. The applicants have indicated in their notice of motion (as amended) that they intend asking for the appointment by the trial court of a so-called "special master" to attend to the nuts and bolts of the administration of the class action, including the verification of claims, the disbursement of payments and the management of any surplus amounts.

72. The office of the special master is a novel concept in our law but is well known in the United States of America where it is expressly catered for by regulation. Its introduction into our law has been the subject of some legal debate and resistance but the appointment of such an entity was expressly sanctioned by the Constitutional



Court, albeit in different circumstances, in Mwelase<sup>18</sup>, and in the administration of the proceeds of a class action in Linkside<sup>19</sup>.

73. In his celebrated final judgment in the Constitutional Court in Mwelase, Cameron J explained the origins and utility of the office of a special master, stressing the importance of not breaching the separation of powers principle by retaining judicial control over the functions of the special master.

"[56] Yet we can gain much from considering how what works elsewhere might also work here. In the United States, the use of special masters has developed flexibly. It occurs in all areas of law. It is more familiar in courts with heavier caseloads and complex law suits that test judicial capacity and expertise. Special masters may help the court with complex electronic discovery, or undertake fact-finding investigations, or facilitate settlement attempts, or formulate remedies and monitor compliance. But the critical point is that under Rule 53 of the Federal Rules of Civil Procedure the court keeps its power freely to endorse or reject or change, in part or wholly, the special master's recommendations, or remit with directives. It is the court that retains responsibility and control over the eventual order....

[58] Special masters, often with expertise in specialist areas of government, may assist with either devising a remedial plan or implementing it. In implementing a remedy, the main task of a special master is to oversee and monitor – rather than usurping performance of executive functions, which is closer to the functions of other court-appointed officers (administrators or receivers, whose respective tasks may be to supplement or replace management of a government institution)."

74. In their revised draft order furnished to the Court after the hearing, the applicants asked only that the trial court ultimately hearing this matter appoint a special master on such terms as it considers appropriate. Having considered the approach of the court in Linkside, I am satisfied that the appointment of a special master will provide an effective procedural mechanism in this matter to oversee the

<sup>18</sup> Mwelase and others v Director-General, Department of Rural Development and Land Reform and another 2019 (6) SA 597 (CC)

<sup>19</sup> Linkside and others v Minister of Basic Education and others [2015] ZAECGHC 36 (26 January 2015)

administration of the consequences of the class action (if successful). It is best left to the trial court to determine the precise parameters of the special master's functions and duties.

### CONCLUSION

75. In the light of all of the foregoing considerations, and mindful of the built in safeguards contained in the order proposed by the Law Clinic, I am satisfied that the certification of a class action on the terms and conditions proposed should be granted.

### JOINDER OF LEGALWISE

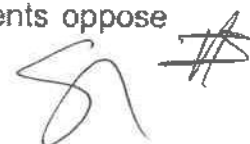
76. According to the deponent to the founding affidavit in the intervention application, Ms. Underhay, LegalWise's "Executive Officer",

"20. ...LegalWise, is a private company that operates as a service provider to Legal Expenses Insurance Southern Africa Limited, a short-term insurance provider in terms of the Short-Term Insurance Act, 53 of 1998...The services it provides to its insured members comprise of (sic) legal and consulting services in the form of legal and court procedures counselling, general legal assistance in negotiations and correspondence with third parties, debt relief and other legal services.

21. In broad terms, insured members are provided with para-legal services and other legal insurance benefits...

23. The legal insurance benefits provide members with cover for civil, criminal and labour litigation matters, as well as access to the panel of attorneys countrywide who form part of the LegalWise network."

77. LegalWise says that it seeks to intervene in the proceedings, acting both in its own interests and those of its members but it does not immediately say what those interests are. It goes on to say that it has not cited the applicants as parties in the joinder application because they have consented to the intervention of Legalwise in the main application i.e. the application for certification. The respondents oppose



the intervention application by LegalWise, primarily on the basis that it has no legal interest in the class action.

78. The basis for the intervention, says LegalWise, is because a number of its clients (who apparently enjoy insurance cover with it) were victims of the alleged online scam perpetrated by the respondents and it provides the Court with ample examples of its clients' complaints.

79. LegalWise says that the main application -

"75... raises substantially the same issues as those that have been brought to the attention of LegalWise by its members. These are the same issues that would arise in any litigation that Legalwise would institute against the respondents on behalf of its members.

76. The core business of LegalWise is premised on the protection of the rights of its members. Its aim is to provide its members with equal, fair and affordable access to justice and legal assistance, by giving people the opportunity to have access to a lawyer and enjoy even the most basic rights they have according to the law. These services are provided to members in return for a monthly fee or premium. The conduct described by the second to the ninth applicants in the main application on the one hand, and that described to LegalWise counsellors by its members on the other hand, implicates the legal rights of its members and accordingly LegalWise's obligation to protect those rights. Given that the conduct of the respondents as described in the main application is the same as that experienced by LegalWise members, and that this conduct raises in relation to the applicants in the main application the same legal issues as arise in relation to Legalwise members, I submit that, in those circumstances, it is evident that LegalWise has a direct and substantial interest in the subject matter of the main application. Its interest is more than a financial one. It is a legal interest in the case itself, in that any judgment handed down and orders granted by this Court in the main application will directly impact Legalwise and its members and may prejudicially affect their interests.

77. A further factor which makes the intervention of LegalWise justified in this matter is convenience. Were LegalWise to pursue separate legal proceedings on behalf of its members, arising from the same conduct against the same respondents as those asserted in the main application, the waste of judicial resources and other parties' resources is patent.



would not serve judicial economy. In addition, separate proceedings would give rise to the real possibility of conflicting judgments in relation to substantially the same facts and legal issues, against the same respondents. This too is a factor that justifies this Court permitting the intervention of LegalWise is applicant in this matter.”

80. I must confess to some confusion as to just what LegalWise seeks to achieve through its purported intervention in this application. It does not say that it wishes to join as a co-plaintiff in the class action proceedings and it is obvious that it cannot so join: it has no cause of action vis-vis any of the respondents and there is consequently no *lis* between it and any of the respondents. As an insurer, LegalWise would be entitled to seek relief on behalf of any its insured parties in such parties' names through the principle of subrogation, but it does not make out such a case in its joinder application either. Nor does LegalWise say that it wishes to be certified as a joint class representative with the Law Clinic in the class action.

81. It seems to me that it effectively wishes to hold a “watching brief” in these proceedings on behalf of those clients who might be the victims of the alleged scam to ensure that they are properly looked after by the Law Clinic. But, to do so, it does not require to be joined in the suit as a party since there could be no objection at any stage of proceedings for LegalWise’s lawyers to be present in court as observers. Nor does it need to be joined as a party to provide the Law Clinic with evidential and/or procedural support

82. I agree with Mr. Bothma that LegalWise has, however, no legal interest which justifies its joinder in this application. The application must accordingly fail and LegalWise must bear the wasted costs occasioned to any of the other parties through its application for joinder under Rule 12.

#### INTERDICTIONARY RELIEF

83. In its notice of motion, the Law Clinic asks for an interim interdict (its so-called Part A Relief) under s114 of the CPA, alternatively the common law, in terms whereof the respondents are –

83.1 ordered to shut down the websites listed in Annexure A to the notice of motion. (These are the websites that have been set out above.);

83.2 in the alternative, restrained from operating the websites in a manner which is unconscionable, unjust, unreasonable or unfair in terms of ss 40, 41 and 48 of the CPA;

83.3 interdicted from debiting the bank accounts of any persons in terms of any agreement purportedly concluded through the aforesaid websites;

83.4 restrained from making any demands for, or collecting, payment from consumers for services allegedly provided under any agreement allegedly concluded through the websites;

83.5 interdicting the respondents from threatening or harassing any persons in connection with any demand for, or collection of, any payment allegedly due under any agreement purportedly concluded via any of the websites.

This interim relief is sought pending the final determination of the application for class action certification and any class action initiated pursuant to such certification.

84. During argument on the second day of the hearing (9 March 2021) Mr. Bothma referred to the supplementary affidavit deposed to by Mr. Malander earlier that day. This is the affidavit already referred to which was filed in response to the Court's enquiries regarding the functionality of the websites. In that affidavit, Mr. Malander gives details of the chronology of the matter since the filing of this application.

85. Mr. Malander refers to the Carte Blanche airing on 28 April 2019 and says that subsequent thereto, in May and June 2019, the first to seventeenth respondents were "exited" from the National Payment System ("NPS") on the insistence of PASA. He references the founding affidavit in the *amicus* application by PASA in that regard.



86. As I understand PASA's affidavit, as part of its statutory functions under the National Payment System Act, 78 of 1998, it monitors, inter alia, the abuse of the debit order system by commercial users in the banking sector, and it is empowered to put an end to such abuse in appropriate circumstances. PASA says the following regarding the respondents in the affidavit of Mr. Walter Victor Volker, its CEO, dated 6 January 2020.

"62. Through the monitoring component of the 4-prong model [described above], PASA has been informed of customer complaints against the Fourth Respondent, Loan Spotter SA (Pty) Ltd, with directors Damian Malander (Eighteenth Respondent) and Nandie Paich (Nineteenth Respondent).

63. Further quantitative and qualitative due diligence uncovered direct links between the Eighteenth and Nineteenth Respondents and the other Respondents in the main action, as well as debit order disputes and unpaid ratios resulting from customer complaints and disputes.

64. As a result, the First to Seventeenth Respondents were exited from the NPS during May and June 2019. In addition, the Respondents' company registration details, director details, as well as their Abbreviated Shortnames (ABSNs) were added to the PASA exit database, which information is centrally stored and administered by PASA on behalf of the Sponsoring Banks."

87. The effect of these steps by PASA, says Mr. Malander, is that

"15. At this stage, and primarily because of the respondent companies having been exited from the NPS, the continuing of their business became untenable and on 3 April 2020 the respondent companies' websites were decommissioned. The respondent companies have not traded since."

Mr. Malander goes on to allege that the Law Clinic was aware of this situation by 24 April 2020 at the latest.

88. As regards the future of the companies' businesses, Mr. Malander says the following.

"20. As explained above the respondent companies were exited from the National Payment System during July 2019. Eventually, and on account of an inability to process debit payments the business of the respondent companies grinded (sic) to a halt and the websites were decommissioned on 3 April 2020.

21. As matters stand, the respondent companies do not trade and do not operate any of the websites. There is also no demand for payment made by the respondent companies of any customer.

22. The negative press occasioned by the Carte Blanche episode as well as the inability to process debit payments has rendered it impossible for the respondent companies to recommence business activities. I also have no intention or appetite to revive the respondent companies' business.

23. I therefore have no difficulty in giving an undertaking along the lines set out in paragraphs 2.1 to 2.4 of the notice of motion."

89. As I have said, the Law Clinic smartly put together a reply to this supplementary affidavit by Mr. Malander which was handed up after lunch on the second day of the hearing. In that affidavit, Mr. van der Merwe takes issue with the veracity of the allegations made by Mr. Malander and notes that he had accessed the website of the Lifestyle Direct Group (the second respondent) that very morning and found it to be "still extant and operative".

90. Mr. van der Merwe further points out that a search of the records of the Companies and Intellectual Property Commission ("the CIPC") had revealed that certain of the respondent companies were still listed as being "in business" and that the CIPC had actually corresponded with Mr. Malander a couple of months previously. Further, he notes that CIPC records reflect that certain of the companies were in the process of deregistration.

91. Mr. van der Merwe expresses disquiet at the fact that certain of the respondent companies were being deregistered in the midst of attempts to fix them with liability for their alleged malpractices under the CPA. These steps are said to be



"indicative of a surreptitious effort to frustrate the relief sought by the applicants" and Mr. van der Merwe voices concern that by the time the class action commences, the corporate records and documentary evidence of the companies involved in the alleged scam might have been done away with. He also suggests that there may be other entities that Mr. Malander controls that the applicants may not even be aware of. To this end, Mr. van der Merwe indicates that the applicants might have to consider beefing up their interdictory relief "to prohibit Malander from directly or indirectly replicating his pattern of fraud through other natural and/or juristic persons."

92. At the conclusion of the hearing, counsel for the Law Clinic submitted a revised draft order which made provision for extended interim relief and asked that the draft serve as an amendment of the notice of motion.

93. On 24 March 2021, Mr. Malander deposed to and filed a further supplementary affidavit in which he sought to respond to Mr. van der Merwe's allegations in the affidavit of 9 March 2021 and to furnish further undertakings to the Court *pendent lite*. The applicants did not oppose the filing of this affidavit which the Court then received and filed of record<sup>20</sup>

94. In the further supplementary affidavit, Mr. Malander explains that he believed that the Lifestyle Legal website had been decommissioned and was surprised to see that its homepage had not been decommissioned. In any event, he says, Lifestyle Legal does not trade. Mr. Malander explains that the records of the CIPC are misleading if they suggest that the respondent companies are still trading and repeats that they are dormant, as are their bank accounts. Lastly, Mr. Malander says that having considered the draft order handed in by the Law Clinic at the conclusion of the hearing, he has no difficulty furnishing an undertaken along the lines of the interim interdict sought in paragraph 12 of the draft order.

95. There has been no response from the Law Clinic to this tender, and, importantly, no suggestion that such an undertaking is unacceptable to it, or that it

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<sup>20</sup> See pp 1103 - 1123

would not serve the same purpose as an interdict. Given the manner in which the issues were ultimately ventilated so late in the day, and the limited evidence warranting an interim interdict, I consider that Mr. Malander should be taken at his word and his undertaking recorded as part of the Court's order. He would breach that undertaking at his peril and the Law Clinic would then be entitled to approach the court urgently for further interim relief.

### COSTS

96. There is no reason why the costs occasioned to the Law Clinic in bringing this application should not follow the result. Further, I am satisfied that the complexity and magnitude of the application warranted the employment of two counsel. The evidence presented by the *amicus curiae* was of assistance to the court in considering the implications of the respondent companies having exited the NPS system and was accordingly admitted. The *amicus* only sought costs in the event of opposition to its application. There was no opposition and so no such order will thus be made.

97. As I have already said, the wasted costs incurred in response to its abortive joinder application must be borne by LegalWise.

### IN THE RESULT, THE FOLLOWING ORDERS ARE MADE:

#### A. AMICUS CURIAE

The application for admission as *amicus curiae* by the Payments Association of South Africa is granted, with no order as to costs.

#### B. JOINDER APPLICATION

1. The application by Legalwise South Africa (Pty) Ltd to be joined as an applicant in this matter is refused.



2. Legalwise South Africa (Pty) Ltd is to bear the wasted costs occasioned to the First to Nineteenth Respondents by their opposition to the joinder application.

C. CLASS CERTIFICATION

1. The following persons shall constitute a class for purposes of the class action described in paragraph 0 below ("the class"):

1.1 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 the respondents at any time from 1 May 2015 to date on the basis of them having concluded purported agreements with the respondents by submitting an application on one of the websites listed in Annexure "A" hereto.

2. It is declared that the applicants may act as representatives of the class in an action claiming the relief set out in the particulars of claim attached to the applicants' supplementary affidavit dated 11 November 2019 (as may be amended from time to time) ('the class action').
3. The applicants are declared to have the requisite legal standing to bring the class action on behalf of the class.
4. The applicants are granted leave to pursue the class action on the basis that any members of the class who do not wish to be bound by the



outcome of the class action may opt out thereof as contemplated in paragraph 5 below.

5. The members of the class shall be bound by the outcome of the class action unless they give notice of their election to opt out thereof to Stellenbosch University Law Clinic ('the Law Clinic'), in the manner described in annexure "B", by not later than 1 October 2021.
6. The members of the class are to be notified of this action by way of the notice attached hereto as annexure "B", with the notice to be publicised by the respondents within 1 month from the date of this order, which notice must be publicised as follows:
  - 6.1 by mail to each person on the respondents' customer databases at their last known address by the respondents;
  - 6.2 by email to each person on the respondents' customer databases at their last known email address by the respondents;
  - 6.3 by SMS to each person on the respondents' customer databases at their last known cell phone number by the respondents;
  - 6.4 by publication in one edition per week of the most widely circulated daily newspaper in each province of the Republic for four weeks following the granting of this order;
  - 6.5 by having the notice read out over: (1) an English-language radio station with the highest listenership in each province of the Republic and (2) a radio station broadcasting in the language most widely spoken in each province of the Republic, other than English, which



readings must take place at least once a day for four weeks following the granting of this order;

- 6.6 by publication of the notice on: (1) the Law Clinic's webpage and Facebook pages, as well as on the home page of each website operated by any of the respondents or their proxies and associates and (2) keeping such notice there for a period of eight weeks from the date of the granting of this order; and
- 6.7 by publication of the notice on the Facebook group page 'Action Against Lifestyle Legal, Loan Hub SA and other Scams', where it must be kept for at least eight weeks from the date of this order.
7. The respondents are ordered to pay the costs of the aforesaid notifications jointly and severally and are to report to the Law Clinic and this Court within 1 week from the date on which they have complied with paragraph 6 above.
8. The respondents are ordered to furnish the Law Clinic with the last known physical address, email address and telephone / cell phone numbers of each person on the respondents' customer databases.
9. The parties are granted leave to approach this Court for a variation or amplification of this order in respect of the notifications, on duly amplified papers, if any party deems it necessary.
10. The respondents shall file reports with this Court detailing their compliance with paragraph 5 within 8 weeks of the granting of this order.
11. A special master shall be appointed on such terms as the trial court deems appropriate.



12. It is recorded that the first to eighteenth respondents have furnished to the Court an undertaking that, pending the final determination of the class action as aforesaid, they will desist from directly or indirectly (whether themselves or through any other natural or juristic person):

12.1 operating the websites listed in annexure "A" (save for the publication of the notice referred to in paragraph 5 above) or websites with substantially similar content;

12.2 conducting the same, or substantially similar business(es), conducted by the respondents and described in the papers filed of record in order to market financial and/or legal services or conclude any agreement in respect such;

12.3 debiting the bank accounts of any persons in terms of any agreement allegedly concluded through the listed websites or any website with similar content referred to in paragraph 12.2 above;

12.4 making demands for or collecting payment from consumers for services allegedly provided in terms of any agreement allegedly concluded through the listed websites or any website referred to in paragraph 12.2 above;

12.5 harassing and/or threatening any person in connection with any demand for, or collection of payment, in terms of any agreement allegedly concluded with any of the respondents through the listed websites or any website referred to in paragraph 12.2 above;



- 12.6 proceeding with the de-registration of any of the respondent companies;
- 12.7 destroying, removing, expunging or altering any of the company's records, including but not limited to: share registers, share certificates, minutes of directors and shareholder meetings, minutes and resolutions of shareholder meetings, bank statements, databases (whether electronic or hardcopy), contracts with any members of the class, financial statements, management accounts, correspondence and the referral of any debts for debt collection.
13. The first to eighteenth respondents shall pay the applicants' costs of suit relating to this application jointly and severally, the one paying the other(s) to be absolved, which costs will include the costs of two counsel where employed. Such costs shall include all reserved costs in respect of all previous set downs and scheduled hearings.

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GAMBLE, J



**ANNEXURE A – LIST OF WEBSITES**

<https://www.loantrackersa.co.za>

<https://www.loanspottersa.co.za>

<https://www.loanmatchsa.co.za>

<https://www.loanchoicesa.co.za>

<https://www.loanquestsa.co.za>

<https://www.loanconnectorsa.co.za>

<https://www.loanhubsa.co.za>

<https://www.loanzones.co.za>

<https://www.loanlocatorsa.co.za>

<https://www.loanscoutsa.co.za>

<https://www.loantracer.co.za>

The website for Loan Detector SA (domain name unknown)



**ANNEXURE B – NOTICE TO THE CLASS**

Please take notice that a class action will be instituted in the Western Cape Division of the High Court of South Africa against the companies and individuals listed below:

1. Lifestyle Direct Group International (Pty) Ltd
2. Capital Lifestyle Solutions (Pty) Ltd t/a Lifestyle Legal
3. Loan Tracker SA (Pty) Ltd
4. Loan Spotter SA (Pty) Ltd
5. Loan Match SA (Pty) Ltd
6. Loan Choice SA (Pty) Ltd
7. Loan Quest SA (Pty) Ltd
8. Loan Connector SA (Pty) Ltd
9. Loan Hub SA (Pty) Ltd
10. Loan Zone SA (Pty) Ltd
11. Loan Locator SA (Pty) Ltd
12. Loan Scout SA (Pty) Ltd
13. Loan Tracer SA (Pty) Ltd
14. Loan Detector SA (Pty) Ltd
15. Lifestyle Legal (Pty) Ltd
16. Lifestyle Attorneys (Pty) Ltd
17. All Wheel Auto (Pty) Ltd
18. Damian Malander
19. Nandie Paich



Please take notice further that the class action will be brought on behalf of the following class:

"All persons who have had any monies debited from their bank accounts and/or who have been harassed and threatened in connection with any demand for or collection of payment by any of the respondents at any time from 20 May 2015 to date on the basis of them having concluded purported agreements with any of the respondents through any of the websites listed below:

<https://www.loantrackersa.co.za>

<https://www.loanspottersa.co.za>

<https://www.loanmatchsa.co.za>

<https://www.loanchoicesa.co.za>

<https://www.loanquestsa.co.za>

<https://www.loanconnectorsa.co.za>

<https://www.loanhubsa.co.za>

<https://www.loanzones.co.za>

<https://www.loanlocatorsa.co.za>

<https://www.loanscoutsa.co.za>

<https://www.loantracer.co.za>

The website for Loan Detector SA (domain name unknown)."

Should you wish not to be a member of the class you may opt out of the class by notifying the class action attorneys of record, the Stellenbosch University Law Clinic, of your choice to so opt out by no later than Friday 1 October 2021.



The Stellenbosch University Law Clinic can be contacted at:

Address: 18 – 24 Crozier Street

Stellenbosch

Telephone: (021) 808 3600

Email: [rhkadmin@sun.ac.za](mailto:rhkadmin@sun.ac.za)

Electronic copies of the Court's order certifying the class action and the particulars of claim therein shall be available on the Stellenbosch University Law Clinic's webpage – <https://www.sulawclinic.co.za>

You may contact the Stellenbosch University Law Clinic through the details provided above should you wish to obtain more information about the class action.



"FA1(b)"



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

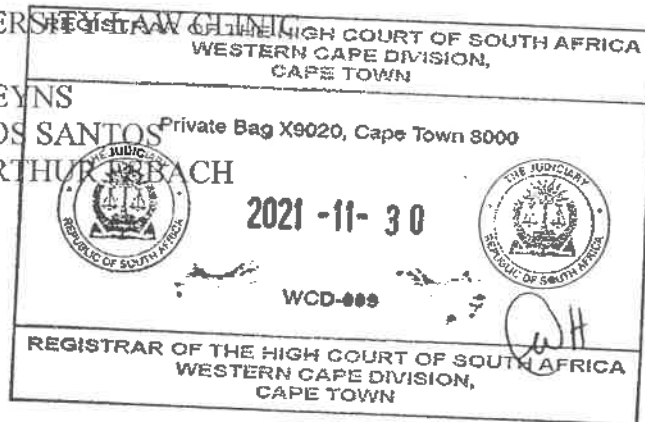
Case No. 16262/2019

IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)  
CAPE TOWN: Friday 6 August 2021

BEFORE THE HONOURABLE MR JUSTICE GAMBLE

In the matter between:

STELLENBOSCH UNIVERSITY & LAW CLINIC  
ADELE ROTHMANN  
IGNATIUS MICHAEL HEYNS  
DERRICK FERREIRA DOS SANTOS  
RONALD ABRAHAM ARTHUR BACH  
NICOLENE ELS  
ALICIA PELSER  
VANESSA VENTER  
CASSIEM HALLIDAY



First Applicant  
Second Applicant  
Third Applicant  
Fourth Applicant  
Fifth Applicant  
Sixth Applicant  
Seventh Applicant  
Eighth Applicant  
Ninth Applicant

And

LIFESTYLE DIRECT GROUP INTERNATIONAL (PTY) LTD  
CAPITAL LIFESTYLE SOLUTIONS (PTY) LTD  
t/a LIFESTYLE LEGAL  
LOAN TRACKER SA (PTY) LTD  
LOAN SPOTTER SA (PTY) LTD  
LOAN MATCH SA (PTY) LTD  
LOAN CHOICE SA (PTY) LTD  
LOAN QUEST SA (PTY) LTD  
LOAN CONNECTOR SA (PTY) LTD  
LOAN HUB SA (PTY) LTD  
LOAN ZONE SA (PTY) LTD  
LOAN LOCATOR SA (PTY) LTD  
LOAN SCOUT SA (PTY) LTD  
LOAN TRACER SA (PTY) LTD  
LOAN DETECTOR SA (PTY) LTD  
LIFESTYLE LEGAL (PTY) LTD  
LIFESTYLE ATTORNEYS (PTY) LTD  
ALL WHEEL AUTO (PTY) LTD  
DAMIAN MALANDER  
NANDIE PAICH

First Respondent  
Second Respondent  
  
Third Respondent  
Fourth Respondent  
Fifth Respondent  
Sixth Respondent  
Seventh Respondent  
Eighth Respondent  
Ninth Respondent  
Tenth Respondent  
Eleventh Respondent  
Twelfth Respondent  
Thirteenth Respondent  
Fourteenth Respondent  
Fifteenth Respondent  
Sixteenth Respondent  
Seventeenth Respondent  
Eighteenth Respondent  
Nineteenth Respondent

Having heard the Legal Representative for the Applicants  
and having read the documents filed of record;

**IT IS ORDERED:**

**A. AMICUS CURIAE**

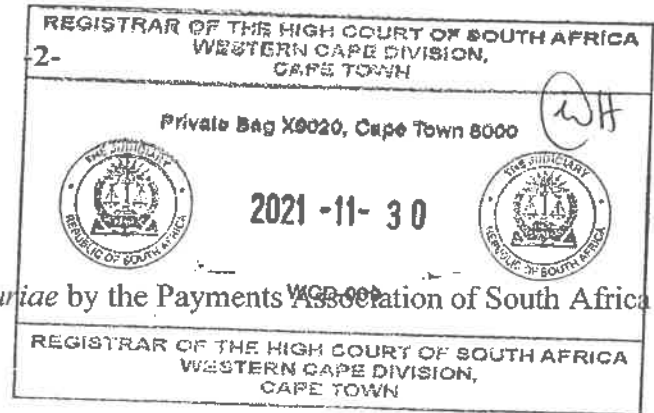
That the application for admission as *amicus curiae* by the Payments Association of South Africa is granted, with no order as to costs.

**B. JOINDER APPLICATION**



1. That the application by Legalwise South Africa (Pty) Ltd to be joined as an applicant in this matter is refused.
2. That Legalwise South Africa (Pty) Ltd is to bear the wasted costs occasioned to the First to Nineteenth Respondents by their opposition to the joinder application.

**C. CLASS CERTIFICATION**

1. That the following persons shall constitute a class for purposes of the class action described in paragraph 2 below ("the class"):
  - 1.1 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 the respondents at any time from 1 May 2015 to date on the basis of them having concluded purported agreements with the respondents by submitting an application on one of the websites listed in Annexure "A" hereto.
2. That it is declared that the applicants may act as representatives of the class in an action claiming the relief set out in the relief set out in the particulars of claim attached to the applicants' supplementary affidavit dated 11 November 2019 (as may be amended from time to time) ("the class action").
3. That the applicants are declared to have the requisite legal standing to bring the class action on behalf of the class.
4. That applicants are granted leave to pursue the class action on the basis that any members of the class who do not wish to be bound by the outcome of the class action may opt out thereof as contemplated in paragraph 5 below.
5. That the members of the class shall be bound by the outcome of the class action unless they give notice of their election to opt out thereof to Stellenbosch University Law Clinic ("the Law Clinic"), in the manner described in annexure "B", by not later than 1 October 2021.
6. That the members of the class are to be notified of this action by way of the notice marked annexure "B", with the notice to be publicised by the respondents within 1 month from the date of this order, which notice must be publicised as follows:



- 6.1 by mail to each person on the respondents' customer databases at their last known address by the respondents;
  - 6.2 by email to each person on the respondents' customer databases at their last known email address by the respondents;
  - 6.3 by SMS to each person on the respondents' customer databases at their last known cell phone number by the respondents;
  - 6.4 by publication in one edition per week of the most widely circulated daily newspaper in each province of the Republic for four weeks following the granting of this order;
  - 6.5 by having the notice read out over: (1) an English-language radio station with the highest listenership in each province of the Republic and (2) a radio station broadcasting in the language most widely spoken in each province of the Republic, other than English, which readings must take place at least once a day for four weeks following the granting of this order;
  - 6.6 by publication of the notice on: (1) the Law Clinic's webpage and Facebook pages, as well as on the home page of each website operated by any of the respondents or their proxies and associates and (2) keeping such notice there for a period of eight weeks from the date of the granting of this order; and
  - 6.7 by publication of the notice on the Facebook group page 'Action Against Lifestyle Legal, Loan Hub SA and other Scams', where it must be kept for at least eight weeks from the date of this order.
7. That the respondents are to pay the costs of the aforesaid notifications jointly and severally and are to report to the Law Clinic and this Court within 1 week from the date on which they have complied with paragraph 6 above.
  8. That the respondents are to furnish the Law Clinic with the last known physical address, email address and telephone / cell phone numbers of each person on the respondents' customer databases.
  9. That the parties are granted leave to approach this Court for a variation or amplification of this order in respect of the notifications, on duly amplified papers, if any party deems it necessary.
  10. That the respondents shall file reports with this Court detailing their compliance with paragraph 5 within 8 weeks of the granting of this order.
  11. That a special master shall be appointed on such terms as the trial court deems appropriate.

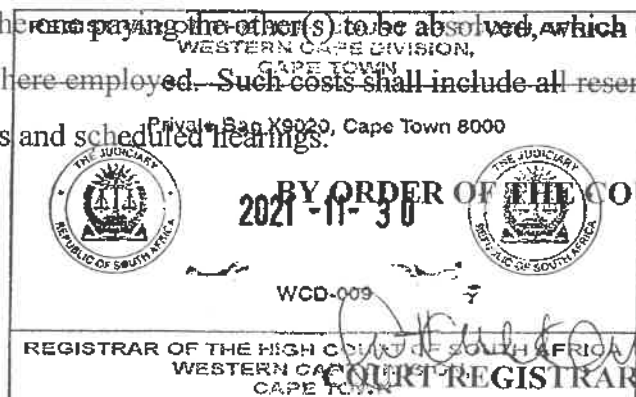
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA CAPE TOWN	
Private Bag X9020, Cape Town 8009	
	
2021 -11- 30	
WCD-009	
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA WESTERN CAPE DIVISION, CAPE TOWN	

*[Handwritten signature]*

12. That it is recorded that the first to eighteenth respondents have furnished to the Court an undertaking that, pending the final determination of the class action as aforesaid, they will desist from directly or indirectly (whether themselves or through any other natural or juristic person):
- 12.1 operating the websites listed in annexure "A" (save for the publication of the notice referred to in paragraph 5 above) or websites with substantially similar content;
  - 12.2 conducting the same, or substantially similar business(es), conducted by the respondents and described in the papers filed of record in order to market financial and/or legal services or conclude any agreement in respect such;
  - 12.3 debiting the bank accounts of any persons in terms of any agreement allegedly concluded through the listed websites or any website with similar content referred to in paragraph 12.2 above;
  - 12.4 making demands for or collecting payment from consumers for services allegedly provided in terms of any agreement allegedly concluded through the listed websites or or any website referred to in paragraph 12.2 above;
  - 12.5 harassing and/or threatening any person in connection with any demand for, or collection of payment, in terms of any agreement allegedly concluded with any of the respondents through the listed websites or any website referred to in paragraph 12.2 above;
  - 12.6 proceeding with the de-registration of any of the respondent companies;
  - 12.7 destroying, removing, expunging or altering any of the company's records, including but not limited to: share registers, share certificates, minutes of directors and shareholders meetings, minutes and resolutions of shareholder meetings, bank statements, databases (whether electronic or hardcopy), contracts with any members of the class, financial statements, management accounts, correspondence and the referral of any debts for debt collection.
13. That the first to eighteenth respondents shall pay the applicants' costs of suit relating to this application jointly and severally, ~~the one paying the other(s) to be absolved, which~~ costs will include the costs of two counsel where employed. ~~Such costs shall include all reserved costs~~ in respect of all previous set downs and scheduled hearings.

2 Abrahams & Gross Inc.  
CAPE TOWN

/avz





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

**REPORTABLE**

**CASE NO: 16262/2019**

In the matter between:

**STELLENBOSCH UNIVERSITY LAW CLINIC  
ADELE ROTHMANN  
IGNATIUS MICHAEL HEYNS  
DERRICK FERREIRA DOS SANTOS  
RONALD ABRAHAM ARTHUR ESBACH  
NICOLENE ELS  
ALICIA PELSER  
VANESSA VENTER  
CASSIEM HALLIDAY**

First Applicant  
Second Applicant  
Third Applicant  
Fourth Applicant  
Fifth Applicant  
Sixth Applicant  
Fifth Applicant  
Seventh Applicant  
Eighth Applicant

And

**LIFESTYLE DIRECT GROUP INTERNATIONAL  
(PTY) LTD  
CAPITAL LIFESTYLE SOLUTIONS (PTY) LTD  
t/a LIFESTYLE LEGAL  
LOAN TRACKER SA (PTY) LTD  
LOAN SPOTTER SA (PTY) LTD  
LOAN MATCH SA (PTY) LTD  
LOAN CHOICE SA (PTY) LTD  
LOAN QUEST SA (PTY) LTD**

First Respondent  
  
Second Respondent  
Third Respondent  
Fourth Respondent  
Fifth Respondent  
Sixth Respondent  
Seventh Respondent

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

Bench: P.A.L. Gamble, J

Heard: 22 October 2021

Delivered: 3 November 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Wednesday 3 November 2021

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## **JUDGMENT – LEAVE TO APPEAL**

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**GAMBLE, J:**

### INTRODUCTION

1. On 21 July 2021 this Court handed down judgment in an application granting the applicants leave to proceed against the respondents by way of a class action. The basis of the applicants' claims against the respondents, broadly speaking, is the recovery of losses allegedly suffered by them as a consequence of a fraudulent on-line scheme initiated by the respondents to lure unsuspecting members of the

public into believing they were applying for loans from the respondents, when in fact they were not.

2. After certain patent errors in the judgment were brought to the Court's attention by the parties, a revised judgment was handed down on 6 August 2021. The revision related only to limited typographical errors in the original judgment and did not vary the *ratio* thereof. The respondents then delivered an application for leave to appeal the judgment to the Supreme Court of Appeal ("SCA") on 17 August 2021.

3. By agreement that application was argued virtually on Friday 22 October 2021 when Advs. P-S. Bothma and F.A. Ferreira represented the erstwhile respondents (the applicants for leave to appeal) and Adv.L.Kelly appeared on behalf of the erstwhile applicants.<sup>1</sup> The Court is indebted to counsel for their detailed heads of argument and bundles of authorities filed in this application for leave.

#### ISSUES TO BE CONSIDERED IN THE APPLICATION FOR LEAVE TO APPEAL

4. The application for leave to appeal raises three issues.

(i) Firstly, there is a dispute as to whether the judgment is appealable.

(ii) Secondly, the issue is whether, if the judgment is appealable, the respondents have brought the application within the ambit of s 17(1)(a) of the Superior Courts Act, 10 of 2013 ("the SC Act"); and

(iii) Thirdly, in deciding the issue raised under (ii) above, the enquiry is limited to determining whether there is a reasonable prospect of the SCA holding that this Court erred in exercising its discretion in certifying the class action. The only dispute on that point is whether the Court was correct in holding that the consideration of commonality, as a

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<sup>1</sup> For the sake of convenience the parties will be referred to herein as they were in the main application.

prerequisite for such certification, had been established by the applicants.

### IS THE ORDER APPEALABLE?

5. In arguing that the order was appealable, Mr. Bothma relied on the Full Bench decision in this Division in Obiang<sup>2</sup>, submitting that the certification granted here was a judgment which was final in effect because, at the least, it included an order confirming *locus standi* on the part of the applicants to proceed by way of a class action. Obiang, in which one of the issues was *locus standi*, was in turn based on Zweni<sup>3</sup>, the leading judgment in the SCA on this point in which Harms AJA listed some nine considerations to be taken into account in deciding whether a judgment was final in effect or not.

6. In opposing this point, Mr. Kelly adopted the stance that a judgment in an application for the certification of a class action was essentially procedural in nature and thus not capable of appeal. He referred the Court to the unreported decision of the Full Bench in Gauteng in an application for leave to appeal the certification of the class action in Nkala<sup>4</sup> where the Court found that such orders were *per se* not appealable. The Full Bench expressed its view as follows.

"[9] As far as the first issue is concerned, we hold that a certification of a class action is not appealable, for the following reasons:

(i) It is interlocutory in nature;

(ii) It does not dispose of any of the relief sought in the class action that was certified;

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<sup>2</sup> Obiang v Janse van Rensburg [2019] 4 All SA 287 (WCC)

<sup>3</sup> Zweni v Minister of Law and Order 1993 (1) SA 523 (A)

<sup>4</sup> Nkala and others v Harmony Gold Mining Company Ltd and others [2016] ZAGPJHC 175 (24 June 2016)



(iii) It is not dispositive of any of the rights of any of the parties to the class action.”

7. Mr. Bothma urged the Court to find that this ruling on the part of the Full Bench was wrong and that it was open to the Court to hold otherwise. In the course of argument it emerged that after leave had been refused by the court *a quo* in Nkala, the SCA had granted leave on application to it. As is the custom, no reasons were given for that order. Furthermore, Nkala was evidently settled before the appeal was heard and so there is no clarity on the question of the non-appealability of class actions *per se*.

8. Mr. Kelly submitted, with reference to one of the leading text books on the topic, Class Action Litigation in South Africa<sup>5</sup> at p41 *et seq*, that the refusal to certify a class action is appealable. That much is apparent from the judgment of the Constitutional Court in Mukaddam (CC)<sup>6</sup>. However, counsel submitted that the issue is rather different in relation to an appeal against the certification of a class action and in that regard he relied on the aforementioned *dictum* of the Full Bench in Nkala.

9. However, the authors in Class Action Litigation point out that the SCA expressly refrained from deciding the issue of appealability in Children’s Resource Centre<sup>7</sup> because that matter, too, involved an appeal against a refusal to certify. The authors go on to suggest that the hitherto customary approach in matters such as Zweni of examining whether the order is final in effect and not susceptible to alteration by the court of first instance has been overtaken by the interests-of-justice considerations that one finds in cases such as Nova Property<sup>8</sup>, OUTA<sup>9</sup> and SCAW<sup>10</sup>.

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<sup>5</sup> Edited by Max du Plessis, John Oxenham, Isabel Goodman, Sarah Pudifin-Jones and Mr Kelly himself

<sup>6</sup> Mukaddam v Pioneer Foods (Pty) Ltd and others 2013 (5) SA 89 (CC)

<sup>7</sup> Children’s Resource Centre Trust v Pioneer Foods Ltd 2013 (2) SA 213 (SCA) at [25]

<sup>8</sup> Nova Property Group Holdings Ltd and others v Cobbett and another 2016 (4) SA 317 (SCA) at [8]-[9]

<sup>9</sup> National Treasury and others v Opposition to Urban Tolling Alliance and others 2012 (6) SA 223 (CC) at [22]-[30]

10. Having considered the matter, I believe the following passage in Class Action Litigation is applicable to the circumstances of this case.

“Since certification procedures are still being developed, one cannot predict with certainty the approach that will be taken, but we see no reason why a court, having granted a certification order, would take the view that the order was capable of alteration. It seems more likely that the order would be considered final. In principle, a decision to certify is final in effect at least in so far as the question of whether the matter may proceed by way of class action. Even though the certification would not determine any of the substantive outcomes in the class action itself, given the nature of the procedure, the mere fact that litigants have the ability to proceed by way of class action may have significant implications for the rights of the defendants and the rights of the class members, who would be bound by the certification decision.”

11. In the result, I shall assume, without finally deciding, that the order granted in this matter is appealable.

#### APPLICATION OF S17(1)(a)(i) OF THE SC ACT

12. In order to succeed in this application, it is common cause that the respondents must clear the hurdle set by s17(1)(a) of the SC Act. That sub-section provides that leave to appeal may only be granted if the court *a quo* considers that –

“(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration.”

13. Various High Court decisions have suggested that s17(1)(a) now sets a higher threshold for an applicant for leave to appeal than under the previous act.<sup>11</sup> The correct approach was recently clarified by the SCA in Ramakatsa<sup>12</sup>.

<sup>10</sup> International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC)

<sup>11</sup> See, for example, Mont Chevaux Trust v Goosen and others [2014] ZALCC 20 (3 November 2014); Valley of the Kings Thaba Motswere (Pty) Ltd and another v Al Mayya International [2016] ZAECGHC

"[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in *Caratco*<sup>13</sup>, pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive'. I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."

Accordingly, the test remains as before: whether there are reasonable prospects of success on appeal or not.

#### REASONABLE PROSPECTS

14. Mr. Bothma did not submit that there was any compelling reason under s17(1)(a)(ii) of the SC Act which warranted the granting of leave to appeal. Rather, he addressed the Court on the reasonable prospects of success on appeal under s17(1)(a)(i). In that regard counsel further focused on the consideration of

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139 (10 November 2016); *Magashule v Ramaphosa and others* [2021] ZAGPJHC 405 (13 September 2021).

<sup>12</sup> *Ramakatsa and others v African National Congress and another* [2021] ZASCA 31 (31 March 2021)

<sup>13</sup> *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA).

commonality as it has been applied in our law in the certification of class actions. It was submitted that the determination of causation in respect of the applicants' claims against the respondents was problematic from the point of commonality, the argument being that there was likely to be an absence of uniformity in that regard. This, it was said, was a consideration which suggested a lack of commonality in the applicants' claims.

15. The argument advanced by the respondents at the certification hearing and again in this application for leave to appeal proceeds as follows. The applicants' claims are founded on material misrepresentations in the various websites operated by the respondents. The principle misrepresentation is that persons clicking on the appropriate banner on the website in question would be misled into believing that they were applying for a loan (or a so-called "loan-finding service"). In addition to the banner, each website contained a "click box" where the participants certified that they had read the terms and conditions contained in the fine print on the website. That fine print, in turn, contained confirmation that the participants had read the terms and conditions on the website, which incorporated a statement that the participants were aware of the fact that they were subscribing to legal services allegedly to be provided by the company.

16. There can be no debate that those participants who thought they were applying for a loan (or "loan-seeking service") when they clicked on the banner and did not read further when they ticked the "click box", are likely to have been misled by the loan allegations. Mr. Bothma fairly conceded that there was, at least at a prima facie level, the prospect of causation being established in such circumstances. But, he submitted, there may well be cases where participants had read the fine print and actually intended to subscribe to the alleged legal services. In that event, it was contended, there would be no causal link between the misrepresentation on the website for a loan and the legal services subscribed for – ultimately, "they got what they asked for and have no cause for complaint", as it were.

17. Developing the argument further, Mr. Bothma submitted that the case would require an individual assessment of the nature and extent to which each



applicant was misled. This meant that there was a wide range of differing circumstances which constituted the causation in respect of each applicant's claim, and this was antithetical to the communality consideration in the certification of class actions, said counsel.

18. Mr. Kelly submitted that the case for the applicants had been misconceived by the respondents. He said that the applicants' case was that the respondents had operated a scheme which had, as its very purpose, the intention to mislead customers. That scheme operated through a series of websites designed to lure consumers to conclude a binding agreement for the deduction of a debit order on the consumer's bank account under the guise of a loan or "loan-finding service".

19. The applicants' causes of action are summarized in [44] – [47] of the main judgment and need not be repeated herein. Claim 1 is said to be founded on ss 40, 41 and 48 of the Consumer Protection Act, 68 of 2008 ("CPA") and so, it is argued, the question as to whether the conduct of the respondents' conduct allegedly falls foul thereof will be adjudicated upon an objective basis without the need for causation to be shown.

20. In respect of claim 2 (which is a common law claim advanced in the alternative), the argument is that the cause of action is premised upon a declaratory order that the scheme itself was fraudulent – the primary aim was to obtain the participants' bank details so that unlawful deductions could be made therefrom. Accordingly, it is said that the question of individual assessment of each applicant's reliance on the scheme is not required. An overall objective assessment of the scheme would be conclusive.

21. With regard to claim 3, it was argued that the cause of action was based on s40 of the CPA, alternatively the common law, and seeks declaratory relief that the respondents' scheme was unconscionable. Mr. Kelly submitted that this similarly required an objective determination by the trial court and individual causation need not be established. He suggested that if the respondents' conduct is found to have been unconscionable, the trial court would be entitled to make an order to desist

under s52(3)(b)(iii) of the CPA or issue a prohibitory interdict at common law. In the result, it was submitted, there is no need for an individualized assessment of causation in regard to claim 3.

22. Lastly, there is claim 4 which is aimed at fixing personal liability on the part of the actors allegedly seeking the protection of the corporate veil. This was similarly said not to involve an individual assessment of a consumers' response and thus it is claimed that causation is irrelevant.

23. In the result Mr. Kelly argued that the Court's findings at [56] of the judgment were not assailable on appeal and that leave should thus be refused. I am inclined to agree with counsel on that score.

24. In the alternative, and with reference to Mukaddam (CC) at [42], Mr. Kelly argued that, in any event, the power which a court exercises in certifying a class action is the exercise of a discretion. This in turn means that a court of appeal would exercise restraint in setting aside the lawful exercise of such a discretion, as the following *dictum* of Jafta J in that matter makes clear.

"[43] The institution of a class action amounts to a procedural matter of choosing a process suitable to a particular case, like instituting an individual action or a joint action, both of which are regulated by the Uniform Rules. In order to avoid interfering unduly with the exercise of the power to certify a class action, a court of appeal must exercise restraint when determining an appeal against the exercise of that power. Consistent with the approach, in *S v Basson* [2013 (1) SA 1 (CC)] this Court rejected the argument that that it should overturn the trial court's ruling, in terms of which evidence was excluded, on the basis that the ruling was wrong. This Court said:

*'Even if a discretion is not a discretion in the strict sense, there may be circumstances in which a court will nevertheless adopt an approach on appeal which will overturn the lower court's decision only if it has not been judicially made, or based on incorrect principles of law or a misappreciation of the facts. It is necessary to consider now the nature of the discretion at issue in relation to the exclusion of the bail record by the trial court.'*

*Under our constitutional order, a trial court may exclude otherwise admissible evidence on the basis that it may render the trial unfair in order to protect the right to a fair trial. There can be no doubt that is the duty of the trial court to ensure that the trial is fair in substance and the trial court is obliged to give content to this notion. In considering the approach to the exercise of discretion to exclude otherwise admissible evidence in order to ensure a fair trial upon appeal, it should be borne in mind that trial judges must be given freedom to exercise this discretion fairly on their understanding of the case before them. Courts must be slow to adopt rules which would straight-jacket a trial judge in the exercise of that discretion.'* [Footnotes omitted]

[44] This was the approach adopted by this court in relation to the exercise of a similar power by the Supreme Court of Appeal in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and others* [2007 (1) SA 523 (CC)]. This Court stated:

*"Where the discretion is a discretion in the strict sense, in that the Court had a range of legal choices open to it, an appellate Court will ordinarily interfere with the exercise of that discretion only in narrow circumstances. However, this court has also recognized that there will be occasions where a decision made by another Court, which does not involve the exercise of a discretion in the strict sense, will also be interfered with only in narrow circumstances. Relevant considerations in these cases will be the need for the exercise of judgment by the Court to determine whether the fairness of the proceedings before it is under threat. That judgment will often have to be exercised in the light of a range of complex factors, as this Court observed in relation to a different but related question in Basson:*

*'When a trial court assesses the question whether the admission of evidence would render the trial unfair, it has to consider a range of factors: the nature of the evidence in question, and how much of it is of advantage to the parties; the need to be fair not only to the accused but also to the prosecution, in the interests of the broader community; the need to ensure that the trial can run efficiently and reasonably quickly; and the reasons underlying the fact that the admission of the evidence may render the trial unfair. These are complex factors which may well pull in different directions.'* [Footnotes omitted]."

25. Finally, on the question of the exercise of a discretion, Jafta J remarked, as follows –

"[48] As was observed by this Court in *South African Broadcasting Corporation*, the proper approach on appeal in the present case is not whether the decision to refuse certification was correct but whether the High Court

'did not act judicially in exercising its section 173 discretion, or based the exercise of that discretion on the wrong principles of law, or a misdirection of material facts.'

26. As Mukaddam (CC) highlights, the certification of a class action involves the weighing up of a number relevant considerations, and there is no prescribed check list to be adhered to: the interests-of-justice consideration is paramount.

"[35] In *Children's Resource Centre supra*, the Supreme Court of Appeal laid down requirements for certification. These requirements must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. They must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise.

[36] Our courts are familiar with an evaluation of factors with the view to determine where the interests of justice lie in a given case. For example, this court undertakes a similar examination in determining where it will be in the interests of justice to grant leave to appeal. This is not to mean that the factors relevant to the inquiry are not important. But none of them is decisive of the issue. The High court may follow a similar approach in determining applications for certification."

27. Accordingly, the fact that the commonality consideration might not be as strong, for example, as the suitability consideration does not mean that the class action must not be certified in the event that the interests of justice favour certification.

28. In argument, Mr. Bothma did not point to any misdirection by the Court in the exercising of the discretion to certify the class action nor did he demonstrate that this court failed to exercise its discretion judicially. Rather, he fairly submitted that there were divergences in approach upon which two lawyers might reasonably differ. As the judgment of Jafta J in Mukaddam (CC) makes clear, a court on appeal will



require something more than just such a reasonable difference, given the fact that this court exercised a strict discretion where there is limited room for interference on appeal.

29. If I am wrong in my assessment of the claims and causation is indeed material, I consider that the advantages of a class action (which are fully set out in the certification judgment) far outweigh any potential prejudice to the respondents. If there are consumers who genuinely signed up for legal services and were supplied same, the respondents should have little difficulty adducing such evidence from their records. On the other hand, the trial court can be asked to consider the bulk of the evidence presented on behalf of the applicants and to draw reasonable inferences therefrom.

30. In conclusion on this aspect of the application, I do not believe that the interests-of-justice consideration which underpins s173 of the Constitution has been undermined by this Court's certification. On the contrary, the refusal of the application would have severely impacted on the ability of persons with relatively limited means, scattered around the country, to achieve some measure of success against the alleged fraud of the respondents.

### CONCLUSION

31. In the light of the foregoing, I consider that the respondents have failed to show that they have reasonable prospects on appeal of persuading another court to set aside the certification of the applicants' class action. It follows that the application must fail.



**ORDER OF COURT**

The application for leave to appeal is dismissed with costs.



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**GAMBLE, J**

**APPEARANCES**

For the applicants –

Adv. L. Kelly  
Instructed by Stellenbosch University Law Clinic,  
Stellenbosch.

For the respondents –

Adv. P-S. Bothma and  
Adv. F.A. Ferreira  
Instructed by Abrahams and Gross Attorneys,  
Cape Town.





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

Case No. 16262/2019

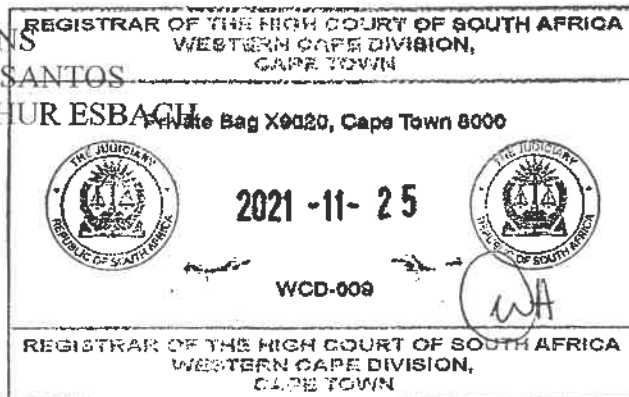
**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

CAPE TOWN: Wednesday 3 November 2021

**BEFORE THE HONOURABLE MR JUSTICE GAMBLE**

**In the matter between:**

STELLENBOSCH UNIVERSITY LAW CLINIC  
ADELE ROTHMANN  
IGNATIUS MICHAEL HEYNS  
DERRICK FERREIRA DOS SANTOS  
RONALD ABRAHAM ARTHUR ESBACH  
NICOLENE ELS  
ALICIA PELSER  
VANESSA VENTER  
CASSIEM HALLIDAY



First Applicant  
Second Applicant  
Third Applicant  
Fourth Applicant  
Fifth Applicant  
Sixth Applicant  
Seventh Applicant  
Eighth Applicant  
Ninth Applicant

And

LIFESTYLE DIRECT GROUP INTERNATIONAL (PTY) LTD  
CAPITAL LIFESTYLE SOLUTIONS (PTY) LTD  
t/a LIFESTYLE LEGAL  
LOAN TRACKER SA (PTY) LTD  
LOAN SPOTTER SA (PTY) LTD  
LOAN MATCH SA (PTY) LTD  
LOAN CHOICE SA (PTY) LTD  
LOAN QUEST SA (PTY) LTD  
LOAN CONNECTOR SA (PTY) LTD  
LOAN HUB SA (PTY) LTD  
LOAN ZONE SA (PTY) LTD  
LOAN LOCATOR SA (PTY) LTD  
LOAN SCOUT SA (PTY) LTD  
LOAN TRACER SA (PTY) LTD  
LOAN DETECTOR SA (PTY) LTD  
LIFESTYLE LEGAL (PTY) LTD  
LIFESTYLE ATTORNEYS (PTY) LTD  
ALL WHEEL AUTO (PTY) LTD  
DAMIAN MALANDER  
NANDIE PAICH

First Respondent  
Second Respondent  
  
Third Respondent  
Fourth Respondent  
Fifth Respondent  
Sixth Respondent  
Seventh Respondent  
Eighth Respondent  
Ninth Respondent  
Tenth Respondent  
Eleventh Respondent  
Twelfth Respondent  
Thirteenth Respondent  
Fourteenth Respondent  
Fifteenth Respondent  
Sixteenth Respondent  
Seventeenth Respondent  
Eighteenth Respondent  
Nineteenth Respondent

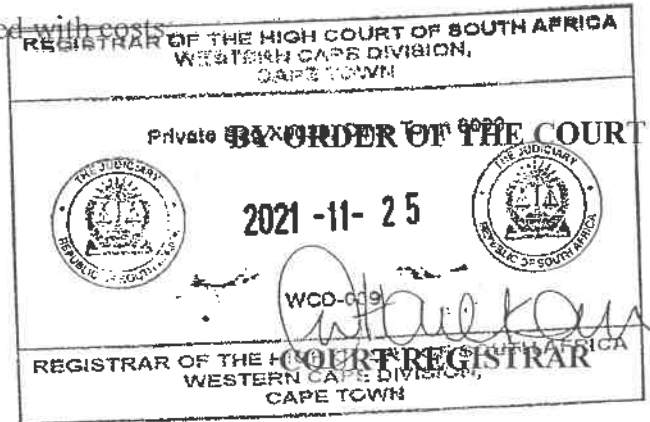
**Having heard the Legal Representative for the Applicants  
and having read the documents filed of record;**

**IT IS ORDERED:**

That the application for leave to appeal is dismissed with costs

2 Abrahams & Gross Inc.  
CAPE TOWN

/avz



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

Case no: 16262/2019

In the matter between:

<b>LIFESTYLE DIRECT GROUP INTERNATIONAL (PTY) LTD</b>	<b>1<sup>st</sup> Applicant</b>
<b>CAPITAL LIFESTYLE SOLUTIONS (PTY) LTD</b>	
<b>1/a LIFESTYLE LEGAL</b>	<b>2<sup>nd</sup> Applicant</b>
<b>LOAN TRACKER SA (PTY) LTD</b>	<b>3<sup>rd</sup> Applicant</b>
<b>LOAN SPOTTER SA (PTY) LTD</b>	<b>4<sup>th</sup> Applicant</b>
<b>LOAN MATCH SA (PTY) LTD</b>	<b>5<sup>th</sup> Applicant</b>
<b>LOAN CHOICE SA (PTY) LTD</b>	<b>6<sup>th</sup> Applicant</b>
<b>LOAN QUEST SA (PTY) LTD</b>	<b>7<sup>th</sup> Applicant</b>
<b>LOAN CONNECTOR SA (PTY) LTD</b>	<b>8<sup>th</sup> Applicant</b>
<b>LOAN HUB SA (PTY) LTD</b>	<b>9<sup>th</sup> Applicant</b>
<b>LOAN ZONE SA (PTY) LTD</b>	<b>10<sup>th</sup> Applicant</b>
<b>LOAN LOCATOR SA (PTY) LTD</b>	<b>11<sup>th</sup> Applicant</b>
<b>LOAN SCOUT SA (PTY) LTD</b>	<b>12<sup>th</sup> Applicant</b>
<b>LOAN TRACER SA (PTY) LTD</b>	<b>13<sup>th</sup> Applicant</b>
<b>LOAN DETECTOR SA (PTY) LTD</b>	<b>14<sup>th</sup> Applicant</b>
<b>LIFESTYLE LEGAL (PTY) LTD</b>	<b>15<sup>th</sup> Applicant</b>
<b>LIFESTYLE ATTORNEYS (PTY) LTD</b>	<b>16<sup>th</sup> Applicant</b>
<b>ALL WHEEL AUTO (PTY) LTD</b>	<b>17<sup>th</sup> Applicant</b>
<b>DAMIAN MALANDER</b>	<b>18<sup>th</sup> Applicant</b>

and

<b>STELLENBOSCH UNIVERSITY LAW CLINIC</b>	<b>1<sup>st</sup> Respondent</b>
<b>ADELE ROTHMANN</b>	<b>2<sup>nd</sup> Respondent</b>
<b>IGNATIUS MICHAEL HEYNS</b>	<b>3<sup>rd</sup> Respondent</b>
<b>DERRICK FERREIRA DOS SANTOS</b>	<b>4<sup>th</sup> Respondent</b>



<b>RONALD ABRAHAM ARTHUR ESBACH</b>	5 <sup>th</sup> Respondent
<b>NICOLENE ELS</b>	6 <sup>th</sup> Respondent
<b>ALICIA PELSER</b>	7 <sup>th</sup> Respondent
<b>VANESSA VENTER</b>	8 <sup>th</sup> Respondent
<b>CASSIEM HALLIDAY</b>	9 <sup>th</sup> Respondent
<b>NANDIE PAICH</b>	10 <sup>th</sup> Respondent

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**APPLICANTS' HEADS OF ARGUMENT – APPLICATION FOR LEAVE TO APPEAL**

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## INTRODUCTION

1. This application for leave to appeal raises two primary questions namely:
  - 1.1. whether the judgment and order certifying the class action (“the judgment and order” or “the certification order”) is appealable; and
  - 1.2. whether, given the test set out in section 17(1) of the Superior Courts Act,<sup>1</sup> leave to appeal should be granted.
2. Under the rubric of appealability, the primary issue is whether the certification order grants definitive and distinctive relief and is, accordingly, final in effect.
3. In relation to whether leave to appeal should be granted, we submit that an appeal has reasonable prospects of success and that it is in the interests of justice that it should be heard, the latter on account of conflicting judgments and the developing and novel nature of class action litigation in South Africa.

## APPEALABILITY

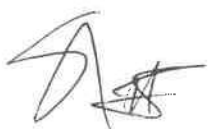
4. It is now settled that the refusal to certify a class action is appealable.<sup>2</sup>
5. What remains however contentious is whether the *certification* of a class action is appealable. In *Nkala v Harmony Gold Mining Co Ltd*<sup>3</sup> (“*Nkala*”) the

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<sup>1</sup> 10 of 2013.

<sup>2</sup> *Children’s Resource Centre Trust v Pioneer Foods (Pty) Ltd* 2013 (2) SA 213 (SCA) par 1; *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) par 48.

<sup>3</sup> 2016 (5) SA 240 (GJ).



Full Bench of the South Gauteng High Court refused leave to appeal against its certification order and held that:

"... certification of the class action is not appealable, for the following reasons:

- (i) It is interlocutory in nature;
- (ii) It does not dispose of any relief sought in the class action that was certified;
- (iii) It is not dispositive of any of the rights of any of the parties to the class action."<sup>4</sup>

6. It is however worth noting that on application to it, the Supreme Court of Appeal ("SCA") granted leave to appeal against the certification order in *Nkala*, suggesting that such an order is appealable.<sup>5</sup>

7. The test of whether a judgment and order is appealable was set out by Harms AJA in *Zweni v Minister of Law and Order*.<sup>6</sup>

"7. In determining the nature and effect of a judicial pronouncement 'not merely the form of the order must be considered but also, and predominantly, its effect' ...

8. A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it

<sup>4</sup> *Nkala* application for leave to appeal judgment, 24 June 2016 (not reported) par 9.

<sup>5</sup> We were unable to obtain a copy of the SCA order granting leave to appeal, but this fact appears from D Unterhalter SC and A Coutsoudis "The Certification of Class Actions in M du Plessis, J Oxenham, I Goodman, L Kelly and S Pudifin-Jones (eds) *Class Action Litigation in South Africa* (2017) 20 43, the accuracy of which we have no reason to doubt.

<sup>6</sup> 1993 (1) SA 523 (A).

must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least of a substantial portion of the relief claimed in the main proceedings ... The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definitive and distinct relief.”<sup>7</sup>

8. Having regard to the above, we submit that the High Court in *Nkala* erred in refusing leave to appeal, as a certification order is not only final in effect, but also definitive of the parties’ rights and dispositive of a substantive portion of the litigation.
9. In an analogous scenario, the Full Bench of this Court in *Obiang v Janse van Rensburg*<sup>8</sup> (“*Obiang*”) was confronted with the question of whether an order to attach and confirm jurisdiction was appealable.
10. In concluding that such an attachment was final in effect (and therefore appealable), the Court held as follows:

“The decision of the court *a quo*, in confirming the attachment order granted in terms of the *rule nisi* issued earlier, has the effect that Mr van Rensburg is now permitted to litigate against Mr Obiang in the domestic court of his choice. And, jurisdiction having vested through the attachment of the Clifton property, it will continue until the case has finally been determined. *That certainly disposes of any argument in the main case regarding the lack of jurisdiction*, which undoubtedly would otherwise have been an important part of Mr Obiang’s case. Finally, the

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<sup>7</sup> 532M (references to authority omitted).

<sup>8</sup> [2019] 4 All SA 287 (WCC).

confirmation of the *rule nisi* was not capable of being set aside by the court *a quo* – that could only be done by a court of appeal.”<sup>9</sup>

11. In the present matter the Court granted an order with the following characteristics:

11.1. certifying a group of persons to constitute a class for the purpose of the envisaged litigation;

11.2. that the applicants *a quo* (first to ninth respondents herein) may act as representatives of the class (“the representatives”);

11.3. that the representatives are declared to have the requisite *locus standi* to bring the class action;

11.4. that the representatives are granted leave to pursue the class action on the basis that members who do not wish to be bound thereby are required to opt out of the litigation; and

11.5. that the class members shall be bound by the outcome of the class action unless they elected to opt out.<sup>10</sup>

12. We submit that this order is analogous to that in *Oblang* in the sense that the question of *locus standi* of the representatives has now been finally

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<sup>9</sup> Par 33 (emphasis added).

<sup>10</sup> Judgment, orders C1 to 5. The balance of the orders under section C of the judgment relate to obligations placed on the applicants to enable the representatives to prosecute the class action.

determined in the same way that *jurisdiction* was finally determined in *Obiang*.

13. The effect of the certification order is that the representatives are now permitted to litigate against the applicants on behalf of the class members through the mechanism of a class action. This disposes of any argument in the main proceedings regarding the *locus standi* of the representatives, which undoubtedly would otherwise be an important part of the applicants' case.
14. Additionally, the certification of a class has the effect that class members' rights are determined without the necessity of them being joined as parties to the litigation.
15. Stated otherwise, had the class action not been certified, the applicants could have objected to the respondents' *locus standi*, alternatively have raised issues of non-joinder in as far as class wide relief was sought.
16. Confirmation by this Court that the requirements of a class action have been met, and that the representatives have *locus standi* to bring the class action, renders these issues *res judicata* and only capable of being set aside on appeal.
17. Therefore, we submit that the certification order is:
  - 17.1. final in effect and not susceptible of alteration by the court of first instance;



17.2. definitive of the rights of the parties; and

17.3. dispositive of a substantial portion of the main proceedings.

18. Consequently, it is appealable.

19. This conclusion also enjoys academic support. Unterhalter SC (as he then was) and Coutsoudis express their view as follows:

"It seems more likely that the order would be considered final. In principle, a decision to certify is final in effect at least in so far as the question of whether the matter may proceed by way of class action. Even though the certification would not determine any of the substantive outcomes in the class action itself, given the nature of the procedure, the mere fact that litigants have the ability to proceed by way of class action may have significant implications for the rights of the defendants and the rights of the class members, who would be bound by the certification decision."<sup>11</sup>

and

"Although we cannot definitely say how the Constitutional Court or the SCA will determine this issue, we believe it would be appropriate for courts generally to allow appeals against class action certifications where the appellants have demonstrated that there are prospects of successfully having the certification set aside."<sup>12</sup>

20. We accordingly submit that the certification order is, in principle, appealable.

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<sup>11</sup> Unterhalter and Coutsoudis "The Certification of Class Actions" in *Class Action Litigation in South Africa* 42.

<sup>12</sup> Unterhalter and Coutsoudis "The Certification of Class Actions" in *Class Action Litigation in South Africa* 43.



**THE CERTIFICATION ORDER MEETS THE TEST FOR LEAVE TO APPEAL  
TO BE GRANTED**

21. Section 17 of the Superior Courts Act sets out the test for applications for leave to appeal:

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

22. We submit that the present matter meets both these requirements and that leave to appeal may be granted on either basis.

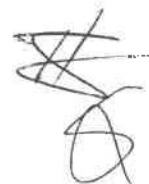
**Reasonable prospects of success**

23. While the inclusion of the word "would" in section 17(1)(a) of the Superior Courts Act does raise the bar for a matter to proceed to appeal, we submit that the oft-cited *dictum* in *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen*<sup>13</sup> to the effect that "a measure of certainty that another court would differ from the court's whose judgment is sought to be appealed against",<sup>14</sup> sets the bar too high.

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<sup>13</sup> Unreported, LCC case number LCC14R/2014, 3 November 2014.

<sup>14</sup> Par 6.



24. In our submission, the correct approach is that set out by Smith J in *Valley of the Kings Thaba Motswere (Pty) Ltd and Mostert v Al Mayya International*,<sup>15</sup> where the court held as follows:

“There can be little doubt that the use of the word ‘would’ in section 17(1)(i) of the Superior Court Act implies that the test for leave to appeal is now more onerous. The intention clearly being to avoid our courts of appeal being flooded with frivolous appeals that are doomed to fail. I am, however, of the respectful view that the ‘measure of certainty’ standard propounded by the learned judge in *Mont Chevaux Trust (supra)* may be placing the bar too high. It would, in my respectful view, be unreasonably onerous to require an applicant for leave to appeal to convince a judge – who invariably would have provided extensive reasons for his or her findings and conclusions – that there is a ‘measure of certainty’ that another court would accept those findings. It seems to me that a contextual construction of the phrase ‘reasonable prospect of success’ still requires of the judge, whose judgment is sought to be appealed against, to consider, objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in arguments advanced by the losing party.”<sup>16</sup>

25. Applying this standard there are reasonable prospects that another court may find merit in the arguments advanced on behalf of the applicants opposing certification of a class action. In particular we submit that two strong arguments remain, namely:

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<sup>15</sup> Unreported judgment of the High Court of South Africa (Eastern Cape Division Grahamstown), case number EL926/2016 (11 November 2016).

<sup>16</sup> Par 4.

- 25.1. that the underlying facts require an individualised assessment thereby falling short of the requirement of commonality; and
- 25.2. that the practical difficulties in prosecuting the class action renders that procedure inappropriate for determination of the class members' claims.

### Commonality

27. This criterion requires a determination of whether there are sufficient points of commonality that bind class members together and make it appropriate to deal with their combined interests in a class action. The threshold for commonality varies across jurisdictions.<sup>17</sup>
28. In *Children's Resource Centre v Pioneer Foods*<sup>18</sup> ("CRC Trust") the SCA adopted the US approach expounded in *Wal-Mart v Dukes*,<sup>19</sup> where it was held that commonality requires that the claim must call upon the court to determine a common contention that:

"must be of such 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 one of the claims in one stroke."<sup>20</sup>

<sup>17</sup> Unterhalter and Coutsoudis "The Certification of Class Actions" in *Class Action Litigation in South Africa* 26.

<sup>18</sup> 2013 (2) SA 213 (SCA).

<sup>19</sup> 131 S Ct 2541.

<sup>20</sup> Unterhalter and Coutsoudis "The Certification of Class Actions" in *Class Action Litigation in South Africa* 26.

29. In contrast, the High Court in *Nkala* adopted the less stringent Canadian approach, expounded in *Vivendi Canada Inc v Michel Dell'Aniello*,<sup>21</sup> that:

"the commonality requirement does not mean that an identical answer is necessary for all members of the class, or even that the answer must benefit each of them to the same extent."<sup>22</sup>

30. *Nkala* held that sufficient commonality is established if deciding a common issue would "move the litigation forward".<sup>23</sup>

31. As pointed out by Unterhalter and Coutsoudis,<sup>24</sup> the High Court in *Nkala* did not consider, (at least not in its judgment) the fact that the SCA in *CRC Trust* expressly approved the US approach which, as indicated above, adopts a higher threshold for commonality.

32. Common issues must therefore be capable of being answered on a general and class-wide basis. Therefore, as we submit below, if "the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question"<sup>25</sup> rendering the claim unsuitable for certification for a lack of commonality.

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<sup>21</sup> [2014] 1 SCR 3.

<sup>22</sup> Par 46.

<sup>23</sup> Unterhalter and Coutsoudis "The Certification of Class Actions" in *Class Action Litigation in South Africa* 99.

<sup>24</sup> Unterhalter and Coutsoudis "The Certification of Class Actions" in *Class Action Litigation in South Africa* 28.

<sup>25</sup> *Blades v Monsanto Co* 400 F.3d 562 (8<sup>th</sup> Cir 2005).



*The claims based on misrepresentation (Claims 1 and 2)*

33. In claim 1 the representatives allege that the applicants breached sections 40, 41 and 48 of the Consumer Protection Act<sup>26</sup> ("CPA") through creating a misleading scheme that caused class members to conclude contracts with them ("the agreements"). Significantly, it is not alleged in claim 1 that any of the *terms* of the agreements are in breach of the CPA.<sup>27</sup>
34. Claim 2 alleges common law misrepresentation resulting in the conclusion of the agreements.<sup>28</sup>
35. Accordingly, both these claims are based on the premise that misrepresentations on the websites caused or induced class members to conclude the agreements. Stated otherwise, to succeed in the claims, the representatives are required to prove reliance on the misrepresentations by each class member.
36. The difficulty faced by the representatives is that, while they allege that *they* relied on the misrepresentations (and did not read the terms and conditions of the agreements)<sup>29</sup> they, of course, have no knowledge of the extent to

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<sup>26</sup> Act of 68 of 2008

<sup>27</sup> Draft particulars of claim, par 60.1 to 60.3, record 892.

<sup>28</sup> Draft particulars of claim, par 68, record 892.

<sup>29</sup> With the exception of the third respondent, Mr Hugo, who was represented in the dealings with the applicants by his spouse. Third respondent's supporting affidavit, record 1003.



which other class members relied on the misrepresentations, or whether they had regard to the terms and conditions of the agreements.

37. We submit that to find on reliance (causation) the trial court will be required to conduct an individualised assessment of the extent to which each class member was influenced by the misrepresentations. If there is no causal connection between the misrepresentations and the conclusion of the agreements in any particular case, that class member would not have a claim. This determination requires an individualised assessment that fails the requirement of commonality.

38. In the judgment, this Court dismissed this argument as follows:

"In my view, this argument misses the point. The consumers in the prospective class complain that they were misled by the websites they visited, having been referred there automatically when they accessed an online search-engine such as Google looking for short-term loans. The contention that there are a series of unique factual determinations which will be required is actually a myth. *The primary issue is whether the respondents' modus operandi was the establishment of websites which were intended to mislead innocent consumers into believing they were applying for loans when, in truth and fact, they were not.* That state of affairs can be factually determined with reference to an objective assessment of the individual websites concerned, and in particular, whether they were designed to mislead. The enquiry, ultimately, is whether [the applicants] created a trap for consumers through which they intended to benefit themselves."<sup>30</sup>

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<sup>30</sup> Par 56 (emphasis added).



39. We agree that the issue of whether the applicants conducted a misleading scheme will be one of the issues at trial. However, we submit that absent a finding that a class member relied on the misrepresentations (in the sense that it caused the conclusion of the agreements) no finding of liability can be made.

40. Christie and Bradfield<sup>31</sup> state the nature of a misrepresentation claim as follows:

"The general effect of misrepresentation and fraud on a contract can be shortly stated: A party who has been induced to enter into a contract by misrepresentation of an existing fact is entitled to rescind the contract provided the misrepresentation was material, was intended to induce him to enter into the contract *and did so induce him*."

41. It is precisely the requirement of causation above that renders misrepresentation claims unsuitable for determination through the class action procedure.

42. This is so because, where a class member read and understood the terms and conditions of the agreement, curing any possible misrepresentation, the causal nexus between the misrepresentation and the conclusion of the agreement is severed. It is this necessary enquiry that renders the representatives' claims incompatible with the class action procedure.

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<sup>31</sup> R H Christie and G B Bradfield *Christie's The Law of Contract in South Africa* 6<sup>th</sup> ed (2011) 281 (emphasis added).

43. In this regard it is telling that even in Canada (where the less stringent approach to commonality applies) the courts have routinely refused to certify class actions based on misrepresentation for a lack of commonality.

44. In *Abdool v Anaheim Management Ltd*<sup>32</sup> the Canadian Divisional Court held that:

"[t]he inherent nature of misrepresentation actions makes it difficult to find central facts capable of proof on a common basis."<sup>33</sup>

45. In *McKenna v Gammon Gold Inc ("McKenna")*<sup>34</sup> the Ontario Superior Court of Justice considered whether plaintiffs, claiming that a negligent misrepresentation affected their decision to purchase securities, should prove that they relied on the misrepresentation. The court concluded that the need to prove reliance was –

"a necessary element of negligent misrepresentation, and the inability to establish reliance as a common issue, makes the common law misrepresentation claims, both in the primary and the secondary markets, *fundamentally unsuitable for certification*."<sup>35</sup>

46. The plaintiff in *McKenna* sought leave to appeal which was denied. In denying leave, the court specifically held that there was no basis to doubt the correctness of the above reasoning, noting that courts usually conclude

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<sup>32</sup> (1995) 121 DLR (4<sup>th</sup>) 496 (Div Ct).

<sup>33</sup> Par 52.

<sup>34</sup> 2010 ONSC 1591.

<sup>35</sup> Par 160 (emphasis added).

that negligent misrepresentation claims are unsustainable for certification because of the necessity for establishing reliance.<sup>36</sup>

47. We accordingly submit that there is a reasonable prospect that another court will hold that it is insufficient to only prove that the applicants operated a misleading scheme and that proof of *reliance* on this misrepresentation (causation) is required to complete the cause of action.

48. The inability to establish such reliance as a common issue renders claims 1 and 2 fundamentally unsuitable for certification.

49. We have submitted above that claim 1, correctly interpreted, is a misrepresentation claim. However this Court characterised claim 1 as an objective claim that the terms of the agreement fall foul of the CPA. In this regard it was held that:

“Similarly, the proposed enquiry under the CPA as to whether an agreement into which a consumer was misled was unconscionable, unjust and/or unreasonable and thus not enforceable, is capable of being made on an objective assessment of the wording of the agreement itself, read in its contextual setting. That is an assessment that can be made on behalf of a class as a whole without the necessity of having to resort to an individualized approach through the presentation of case-specific evidence. The same argument applies to the fourth cause of action which seeks to pierce the corporate veil.”<sup>37</sup>

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<sup>36</sup> *McKenna v Gammon Gold Inc* 2010 ONSC 4068 par 33.

<sup>37</sup> Par 57.

50. We respectfully submit that the characterisation of claim 1 in this manner is not supported by the case made out in the draft particulars of claim.<sup>38</sup> However even on this characterisation of claim 1, we submit it still not meet the requirement of commonality.
51. Section 52(2) of the CPA lists a host of factors that a court *must* consider when adjudicating a claim under sections 40, 41 or 48 thereof. This list includes highly individualised investigations of which we highlight four.
52. In determining whether relief should be granted under sections 40, 41 or 48, a court must consider:
- 52.1. the nature of the parties to the agreement; their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position (section 52(2)(b));
  - 52.2. the circumstances of the agreement that existed or were foreseeable at the time each agreement was concluded (section 52(2)(c));
  - 52.3. whether there was any negotiation between the applicants and each class member, and if so, the extent of that negotiation (section 52(2)(e); and

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<sup>38</sup> Draft particulars of claim, par 60.1 to 60.3, record 892.



52.4. whether each class member knew, or reasonably ought to have known, of the existence and extent of provisions of the agreement complained of, having regard to any:

52.4.1. custom of trade; and

52.4.2. any previous dealings between the parties (section 52(2)(h)).

53. These factors require a highly individualised enquiry into the unique circumstances of each class member. For example:

53.1. class members would have disparate capacity, education, experience, sophistication and bargaining position, as contemplated in section 52(2)(b);

53.2. the circumstances of the transaction with each class member is different, as contemplated in section 52(2)(c), and evidenced by the experience of the third respondent, Mr Heyns;<sup>39</sup>

53.3. the question of any negotiations between the parties, as contemplated in section 52(2)(e), differs among class members; and

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<sup>39</sup> Mr Heyns had no direct dealings with the applicants, but was represented by his spouse. Record 1003.



53.4. class members have differing levels of knowledge of the content of the agreements and some have previous dealings with the applicants, as contemplated in section 52(2)(h).

54. Therefore, even if claim 1 could be characterised as an attack on the terms of the agreements, the trial court must nevertheless conduct an individualised assessment of the case-specific facts, rendering the claim unsuitable for a class action.

*Harassment and piercing the corporate veil (claims 3 and 4)*

55. Claim 3 relies on section 40(1)(d) of the CPA. The representatives claim that the applicants employed "pressure, duress or harassment, unfair tactics or other similar conduct"<sup>40</sup> to demand payment from some class members.

56. We submit that claim 3 also does not meet the requirements of commonality, because:

56.1. not all class members claim harassment;

56.2. the conduct complained of will differ between those class members who do claim harassment; and

56.3. the individualised factual assessment required by section 52(2) of the CPA, also applies to this claim.

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<sup>40</sup> Draft particulars of claim, par 70, record 897.



57. In claim 4, the representatives seek an order piercing the corporate veil of the applicant companies.<sup>41</sup>

58. This claim is contingent upon the success of the preceding three claims. However the representatives also plead causation in paragraph 72.3 of the draft particulars of claim:

"Malandar 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."<sup>42</sup>

59. Therefore, the question of causation is also pivotal to claim 4.

60. We accordingly submit that there is a reasonable prospect that another court may find merit in the argument that the claims advanced by the representatives do not possess sufficient commonality for certification.

### Appropriateness

61. In holding that certification is appropriate, this Court considered the definition of the class,<sup>43</sup> and the risks and pitfalls of a multitude of smaller claims by class members.<sup>44</sup>

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<sup>41</sup> Draft particulars of claim, par 72, record 898.

<sup>42</sup> Draft particulars of claim, par 72.3, record 898 (emphasis added).

<sup>43</sup> Judgment par 61 to 66.

<sup>44</sup> Judgment par 67.

62. We respectfully submit that a determination of appropriateness on account of viable alternatives to prosecute the class members' claims, departs from an erroneous premise. In considering a certification application we submit the primary consideration is not whether class members have an alternative to class action available, but whether the requisites for a class action (rendering it possible and practicable for the trial court to determine all or a significant part of the issues in the case on a class wide basis) are present.
63. Absent these requisites, the class action will effectively decide nothing and be a peripheral exercise in futility.
64. For the reasons set out above, we submit that the trial court will be compelled to hear case-specific evidence from each class member to determine liability.
65. If the class action is limited to the question of misrepresentation only, we respectfully submit that it will serve no purpose as a myriad of individual trials will still be required.
66. Additionally, the prosecution of the claims through class action proceedings will result in procedural unfairness.
67. The procedural unfairness which the applicants will suffer by virtue of the certification of the class action inheres in the fact that the applicants will not be able to test the individual evidence of each class member to ascertain to what extent the class members enjoy claims.



68. For example, it is trite that a person induced to contract by the fraudulent representations of another may either stand by the contract or claim its rescission.<sup>45</sup>
69. The agreements entered into between the applicants and the class members are therefore not void *ab initio*. It is only at the election of the individual class member that a contract induced by fraudulent misrepresentation may be rescinded.
70. This renders class certification inappropriate as the possibility cannot be excluded that certain class members elected to stand by the agreements despite having been induced by a misrepresentation.
71. Practically, class action proceedings are not appropriate where separate and individual enquiries are required to assess the validity of defences available to the applicants in relation to each individual class member, precisely because the commonality of the element of causation is not necessarily present in each individual claim.
72. For these reasons it is submitted that the requirement of appropriateness has not been satisfied and, accordingly, there is a reasonable prospect that another court may find merit in this argument.

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<sup>45</sup> *Absa Bank Ltd v Moore and Another* 2017 (1) SA 255 (CC) par 38.



**Other compelling reasons**

73. We submit that irrespective of the merits on appeal, there are other compelling reasons why an appeal should be heard.
74. In the first instance, there are conflicting judgments on the commonality test which also came to the fore in this matter. Secondly, given the novel and still developing nature of class action litigation in South Africa, it is desirable that an appellate court pronounce on the suitability of misrepresentation claims being prosecuted through class action proceedings.
75. As highlighted above, there are principally two approaches to the question of commonality in certification applications: the more stringent US approach, preferred by the SCA in *CRC Trust*, and the more forgiving standard preferred in *Nkala* and by this Court.<sup>46</sup>
76. In the result there are conflicting judgments on the measure of commonality required for the certification of a class action which require settlement.
77. Additionally, this matter raises the question whether a case based on misrepresentation is suitable for prosecution through class action. We have shown above that in other jurisdictions misrepresentation claims are excluded from class action proceedings.
78. Given the developmental nature of class action proceedings in South Africa, and the above international precedent, we submit that it is desirable for an

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<sup>46</sup> Judgment par 59.

appellate court to consider the appropriateness of prosecuting misrepresentation claims through a class action.

## CONCLUSION

79. The certification order finally determines the representatives' *locus standi* to prosecute a claim that binds parties who are not before court. That decision is *res judicata* and may only be altered on appeal.
80. Accordingly, the certification order is final in effect and, in principle, appealable.
81. The application for leave to appeal also satisfies the test set out in section 17(1) of the Superior Courts Act in that:
- 81.1. there is a reasonable prospect that another court may hold that a determination of the claims require an individualised assessment, compromising commonality;
  - 81.2. that the practical difficulties in a misrepresentation claim renders it inappropriate for certification; and
  - 81.3. that it is in the interest of justice that the matter proceeds to appeal, because such an appeal would resolve conflicting approaches to the threshold of commonality, and give guidance on the suitability of prosecuting misrepresentation claims through a class action.




82. In the circumstances the applicants pray for an order granting them leave to appeal against the certification order to the Supreme Court of Appeal, alternatively the full bench of the Western Cape Division of the High Court, with costs of this application to be determined in the appeal.



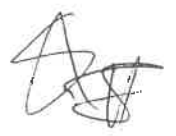
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**P-S BOTHMA**



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**F A FERREIRA**  
Chambers, Cape Town  
11 October 2021



**IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

Case No:

(Western Cape Division Case No: 16262/19)

In the matter between:

<b>LIFESTYLE DIRECT GROUP INTERNATIONAL (PTY) LTD</b>	First Applicant
<b>CAPITAL LIFESTYLE SOLUTIONS (PTY) LTD t/a LIFESTYLE LEGAL</b>	Second Applicant
<b>LOAN TRACKER SA (PTY) LTD</b>	Third Applicant
<b>LOAN SPOTTER SA (PTY) LTD</b>	Fourth Applicant
<b>LOAN MATCH SA (PTY) LTD</b>	Fifth Applicant
<b>LOAN CHOICE SA (PTY) LTD</b>	Sixth Applicant
<b>LOAN QUEST SA (PTY) LTD</b>	Seventh Applicant
<b>LOAN CONNECTOR SA (PTY) LTD</b>	Eighth Applicant
<b>LOAN HUB SA (PTY) LTD</b>	Ninth Applicant
<b>LOAN ZONE SA (PTY) LTD</b>	Tenth Applicant
<b>LOAN LOCATOR SA (PTY) LTD</b>	Eleventh Applicant
<b>LOAN SCOUT SA (PTY) LTD</b>	Twelfth Applicant
<b>LOAN TRACER SA (PTY) LTD</b>	Thirteenth Applicant
<b>LOAN DETECTOR SA (PTY) LTD</b>	Fourteenth Applicant
<b>LIFESTYLE LEGAL (PTY) LTD</b>	Fifteenth Applicant
<b>LIFESTYLE ATTORNEYS (PTY) LTD</b>	Sixteenth Applicant
<b>ALL WHEEL AUTO (PTY) LTD</b>	Seventeenth Applicant
<b>DAMIAN MALANDER</b>	Eighteenth Applicant

and

<b>STELLENBOSCH UNIVERSITY LAW CLINIC</b>	First Respondent
<b>ADELE ROTHMANN</b>	Second Respondent
<b>IGNATIUS MICHAEL HEYNS</b>	Third Respondent
<b>DERRICK FERREIRA DOS SANTOS</b>	Fourth Respondent
<b>RONALD ABRAHAM ARTHUR ESBACH</b>	Fifth Respondent
<b>NICOLENE ELS</b>	Sixth Respondent

**ALICIA PELSER**

Seventh Respondent

**VANESSA VENTER**

Eighth Respondent

**CASSIEM HALLIDAY**

Ninth Respondent

**NANDIE PAICH**

Tenth Respondent

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**RESPONDENTS' ANSWERING AFFIDAVIT**

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I, the undersigned,

**STEPHANUS JOHANNES HOFFMAN VAN DER MERWE,**

do hereby make oath and state as follows:

1. I am an adult male, employed as a senior attorney and lecturer by the first respondent.
2. Save where the context indicates to the contrary, the facts in this affidavit fall within my personal knowledge, and are, to the best of my knowledge and belief, true and correct. Where I rely on information conveyed to me by others, I verily believe such information to be true and correct.
3. The first to ninth respondents (the respondents) have been appointed as representatives of a class of persons who sought and obtained certification of a class action in the Western Cape High Court against the first to eighteenth applicants (the applicants). The respondents oppose the applicants' application for leave to appeal to this Honourable Court. I am charged with the conduct of the matter and am duly authorised to depose to this answering affidavit, which sets out the basis of that opposition, on behalf of the respondents.

## INTRODUCTION

4. On 21 July 2021, the Western Cape High Court (per Gamble J) handed down judgment in the applicants' application for certification of a class action. On 6 August 2021, the High Court made certain minor clerical corrections to the judgment and order in terms of Rule 42(1)(b) of the Uniform Rules.
5. The applicants sought leave to appeal from the High Court. On 3 November 2021, the High Court refused leave to appeal. Thereafter, the applicants applied directly to this Court for special leave to appeal.
6. For the reasons which follow, the respondents submit that the applicants' application for special leave to appeal should be refused. Firstly, the certification of a class action is not generally appealable, and there are no particular facts or circumstances which render it in the interest of justice to grant leave to appeal in this case. Secondly, and in any event, the very limited basis upon which leave to appeal is sought is fundamentally misconceived and there is no reasonable prospect that this Court will find that the High Court erred in granting certification.

## THE APPLICANTS' UNLAWFUL CONDUCT

7. The applicants are not registered credit providers or registered legal practitioners. However, as the High Court found, there is at very least *prima facie* evidence that they lure unsuspecting members of the public via a network of websites with promises of loans and loan-finding services into signing up for a legal advice service. The applicants invite online applications for financial assistance, and then use the information submitted to trap individuals in unwanted fixed-term contracts and to debit unexpected "subscription fees"

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from those individuals' bank accounts. In short, the applicants are confidence tricksters who use the informality of the internet and the desperation of straitened consumers to perpetrate an array of frauds against thousands of innocent and often vulnerable third parties on a daily basis.

8. The applicants conduct this fraudulent scheme by deliberately luring consumers into submitting what appear to be online application forms for loans or loan finding services. Tucked away in the proverbial small print – in this case a series of technical documents that are lengthy, jargonistic, only visible on separate webpages and accessible through a series of links – is an onerous set of obligations that presents a completely different picture.
9. These obligations are set out in a suite of documents that supposedly comprise an “agreement” between a consumer and one of the applicants. However, describing it as an “agreement” is a misnomer, because at no stage is the consumer aware of the applicants’ one-sided terms or that they are supposedly agreeing to any obligations. In truth, there is no agreement at all, but a trap into which innocent members of the public are unknowingly seduced by the applicants’ fraudulent misrepresentations. The applicants then seek to rely on the supposed conclusion of a formal contract to bully consumers into allowing their bank accounts to be debited with the costs of unwanted services.
10. The respondents’ founding papers in the certification application clearly demonstrate that consumers are deliberately misled into thinking that they are signing-up for free loan finding services only to discover later that they are debited for unwanted “telephonic legal advice assistance”. No consumer submitting an application form is given the impression or made aware that the relevant applicant will treat the application as (a) an undertaking

to purchase services (in respect of a loan or otherwise) and (b) an expression of desire for services that are unrelated to the procurement of a loan. Certainly, no consumer submitting an application form would reasonably think that they are also empowering one of the applicants to debit their bank account with charges for completely unrelated conveyancing, litigation or other legal services. That is because such a consumer relies on the impression created by the applicants' advertising, the website they have consulted and the form they have filled out. It is this impression – that the consumer is doing no more than submitting a benign application for a loan – on which the applicants rely to perpetrate their scam.

11. Significantly, there was no evidence on the applicants' websites (now taken offline), or indeed put up by the applicants in their various affidavits, that the purported "*legal advice*" is registered with or regulated by the Legal Practice Council. Thus, even if it was offered (which is denied), or indeed a customer did in fact intend to contract for it (also denied), the rendering of the service would itself be unlawful.
12. In answer to the respondents' assertions in the certification application, Mr Damian Malander, the eighteenth applicant and controlling mind behind the fraudulent scheme, filed an answering affidavit on behalf of the applicants. Mr Malander's affidavit *inter alia* contained unsubstantiated allegations that thousands of consumers enjoyed the benefits of these services, even to the extent that they had reapplied for same.
13. However, what is striking about these allegations, and what made them wholly untenable in the High Court proceedings, is the fact that the applicants did not identify a single client by name (let alone procure an affidavit from any one of them) who has confirmed being

a willing party to these “agreements, or has either used the “service package” or who cancelled one of the agreements but later “*applied for service packages*”.

14. In light of Mr Malander’s failure to substantiate these claims in answering papers in the High Court, the respondents filed a notice in terms of Rules 35(12) and (14) of the Uniform Rules on 12 November 2019. The notice called on the applicants to make available certain documentation referred to in Mr Malander’s answering affidavit to substantiate his claims of satisfied customers. When faced with a compelling application, the applicants produced 42 472 pages of documents. Notably, the applicants were unable to point to a single document evidencing that any such services have ever been rendered, or are even physically available. This was common cause in the High Court.
15. The personal information pertaining to the “customers” reflected on the documentation was deliberately concealed after the documents were printed in order to render this information illegible. Correspondence pertaining to cancellations evidenced a consistent theme: consumers disputed that they had given authorisation for debit orders, believed that the respondents offered complimentary loan finding services, and had no idea that they were signing up for paid telephonic “legal advice assistance”.
16. It is against this backdrop that the High Court granted certification of the respondents’ class action for relief arising from the applicants’ unlawful conduct. Before dealing with the High Court’s judgment, and why the applicants’ narrow grounds of appeal bear no reasonable prospects, I deal first with the issue of appealability.

## **APPEALABILITY**



17. The test for appealability is well established. The *Zweni* triad of factors, although not immutable, are the following:<sup>1</sup>

17.1. First, the decision must be final in effect in the sense that it is not susceptible of alteration by the court of first instance;

17.2. Second, it must be definitive of the rights of the parties; and

17.3. Third it must dispose of at least a substantial portion of the relief sought.

18. In *Nkala*<sup>2</sup> the Full Bench of the High Court held that the grant of an order certifying a class action is not appealable because it does not have these attributes. This is because at the certification stage, the court is merely asked to sanction the institution of an action on the premise that a *prima facie* case exists for the relief sought. It is interlocutory in the sense that although it sanctions the framework of the “class”, it is not final, not definitive of rights, does not dispose of the relief, and is always in principle capable of being revisited.<sup>3</sup>

19. Although this Court granted special leave to appeal does not mean that it is necessarily the case certification orders are always appealable. There may be cases where the overriding considerations of justice operate in favour of an appeal. However, this is not the case here.

20. As the South African Law Reform Commission has noted, experience has shown that appeals against certification orders are used as a tactic to delay, ultimately to the detriment

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<sup>1</sup> *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532.

<sup>2</sup> *Nkala v Harmony Gold Mining Co Ltd & Others* 2016 (5) SA 240 (GJ).

<sup>3</sup> This is implicit in the judgment in *Nkala* on leave to appeal. See para 9.

of those seeking access to justice.<sup>4</sup> This was also one of the reasons why the Full Bench in *Nkala* refused leave, noting that it would delay the proceedings, cause the claimants to suffer prejudice, and that the parties in that case (as is the case here) were unable to show that the claims could be prosecuted individually.<sup>5</sup> The case for prejudice is particularly strong here given that Mr Malander confirmed to the High Court that the websites have been shut down and that a number of companies behind them have been deregistered.

21. The respondents accordingly submit that special leave to appeal should be refused on the basis that the order is not appealable and that it would not be in the interests of justice to nevertheless grant leave to appeal in this case.

#### COMMONALITY

22. The crux of the applicants' case for leave to appeal is in effect that certification is inappropriate in respect of claims 1 and 2 of the respondents' claims because "*a determination of causation requires an individualised assessment of each consumer, rendering such misrepresentation claims unsuitable for prosecution through class action proceedings*".<sup>6</sup> The same is said in respect of claim 3 (harassment) and claim 4 (veil piercing).<sup>7</sup>

23. As regards claims 1 and 2, the applicants contend that the requirement of commonality is absent because the trial court would be required to determine that each individual "relied" on the applicants' misrepresentations, as opposed to having regard to their terms and

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<sup>4</sup> See Du Plessis *et al* "*Class Action Litigation in South Africa*" at pp 42-43.

<sup>5</sup> *Nkala* judgment on leave to appeal (unreported), para 10.

<sup>6</sup> Applicants' founding affidavit para 32.

<sup>7</sup> Applicants' founding affidavit paras 39-40.

conditions and nevertheless electing to subscribe for “telephonic legal advice services”.<sup>8</sup> In support of this contention, the applicants cite cases of McKenna<sup>9</sup> and Abdool<sup>10</sup> as authority for the proposition that courts “routinely” refuse to certify class actions based on misrepresentation.<sup>11</sup>

24. There are a number of flaws in these submissions, and those made in respect of claims 3 and 4.

24.1. **Firstly**, the applicants have misconceived the essence of the respondents’ case.

24.2. The respondents’ case is that the applicants operated a scheme which had as its very purpose to mislead consumers. The scheme operated through a network of websites, each of which adopted the same *modus operandi* to bait consumers to conclude a binding debit order “agreement” under the guise of free loan finding services.

24.3. Claim 1 is premised on sections 40, 41 and 48 of the Consumer Protection Act, 68 of 2008 (CPA). Whether or not the applicants’ conduct and the “agreements” which they claim to have concluded with consumers fall foul of these provisions is ultimately an objective enquiry.

24.4. For example, whether or not the applicants made false, misleading, or deceptive representations for purposes of section 41 of the CPA is objectively assessed. So, too, is the enquiry into whether or not the “agreement” purportedly struck with consumers is unfair, unreasonable, or unjust for purposes of section 48.

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<sup>8</sup> Applicants’ founding affidavit paras 27-31.

<sup>9</sup> (1995) 121 DLR (4th) 496 (Div Ct).

<sup>10</sup> 2010 ONSC 1591.

<sup>11</sup> Applicants’ founding affidavit paras 52-54.

  
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24.5. In respect of claim 2 (a common law claim sought in the alternative), this is premised on the scheme itself being fraudulent. In other words, the question of an “individual assessment” of reliance is irrelevant: if the scheme was fraudulent it follows that the “agreements” fall to be declared unlawful.

24.6. Claims 3 and 4 also follow claims 1 or 2: if the scheme itself was unlawful (whether in terms of the CPA or the common law) – and was perpetrated ultimately by Mr Malander – then there is no need for an “individualised assessment” of the facts. Simply put, each consumer’s individual experience becomes irrelevant insofar as the ultimate relief is concerned.

24.7. It is for these reasons that the court *a quo* concluded that the “*scheme appears to neatly fit the commonality criteria for a class action claim*”, and summarily dismissed the applicants’ contentions to the contrary in the following terms:<sup>12</sup>

“The consumers in the prospective class complain that they were misled by the websites they visited, having been referred there automatically when they accessed an online search-engine such as Google looking for short-term loans. The contention that there are a series of unique factual determinations which will be required is actually a myth. **The primary issue is whether the respondents’ modus operandi was the establishment of websites which were intended to mislead innocent consumers into believing they were applying for loans when, in truth and fact, they were not. That state of affairs can be factually determined with reference to an objective assessment of the individual websites concerned, and in particular,**

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<sup>12</sup> Judgment, para 56.

whether they were designed to mislead. The enquiry, ultimately, is whether the respondents created a trap for consumers through which they (the respondents) intended to benefit themselves.” (Emphasis added)

24.8. It is submitted that there is no reasonable prospect of another court finding that the court *a quo* misdirected itself in arriving at these findings.

24.9. **Secondly**, and in any event, the applicants’ submissions lose sight of: (a) the correct standard for certification; and (b) the principles applicable to “commonality” as one of the factors relevant to certification.

24.10. As to the former, the Constitutional Court has held that *CRC Trust*<sup>13</sup> established “factors” which are to be taken into account when the court ultimately applies the “interests of justice” test to determine whether certification should be granted. In other words, as the Constitutional Court affirmed, “*the absence of one or another requirement must not oblige a court to refuse certification where the interest of justice demand otherwise*”.<sup>14</sup> As to the latter, the central thesis of *Nkala*<sup>15</sup> (following *Vivendi*<sup>16</sup>) is that commonality “*does not mean that an identical answer is necessary for all members of the class*”, and what matters is progressing the claims without the duplication of judicial analysis.<sup>17</sup>

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<sup>13</sup> *Trustees for the time being of the Children’s Resource Centre Trust v Pioneer Foods (Pty) Ltd & others* 2013 (SA) 2 213 (SCA).

<sup>14</sup> *Mukaddam v Pioneer Foods (Pty) Ltd & Others* 2013 (5) SA 89 (CC) at para 35.

<sup>15</sup> *Nkala v Harmony Gold Mining Co Ltd & Others* 2016 (5) SA 240 (GJ).

<sup>16</sup> *Vivendi Canada Inc v Mitchell Dell’ Aniello* [2014] R.C.S 1.

<sup>17</sup> *Nkala* (supra) at para 95.

- 24.11. The applicants are unable to demonstrate that the court *a quo* erred in the clear application of these principles, and accordingly that there is a reasonable prospect that a different court would overturn these findings on appeal.
- 24.12. **Thirdly**, the references to the *McKenna* and *Abdool* cases are unhelpful. *McKenna* concerned whether or not a press release issued by a mining company contained a misrepresentation causing pure economic loss. *Abdool* was a case about misrepresentations made by a property developer in the context of a property development.
- 24.13. They are worlds apart from the present case which, as noted, is directed against a scheme which by its design was intended to mislead, and to which statutory and common law remedies apply.
- 24.14. It is also overstating matters to contend that courts “*routinely*” refuse certification of misrepresentation cases – see the recent decision of the Ontario Supreme Court in *Wong v. Pretium Resources Inc.*, 2021 ONSC 54 and the recent decision of the United States Supreme Court in *Goldman Sachs Group Inc v Arkansas Teacher Retirement System* 594 U.S. 2021, both cases involving misrepresentation. In the local context, the court in *De Bruyn* (a claim based on misrepresentation causing economic loss) expressly found that the requirement of commonality was established.<sup>18</sup>
25. In an attempt to buttress the “commonality” ground, the applicants seek to rely on selected sub-sections of section 52 of the CPA, which it is contended “requires an individualised

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<sup>18</sup> *De Bruyn v Steinhoff International Holdings N.V. and Others* (29290/2018) [2020] ZAGPJHC 145 (26 June 2020) at paras 257 *et seq.*

assessment of class members”.<sup>19</sup> However, this fails to appreciate that section 52(2) of the CPA describes factors to be considered by the court in determining an appropriate remedy consequent on a finding of a contravention of sections 40, 41 and/or 48. The fact that some of these factors may be “individualised” in some cases does not mean that they apply in all cases. That is plainly not the purpose of the provision, and not basis to contend that commonality is not established.

26. Applicants further seek to place reliance on the *caveat subscriptor* rule in an attempt to place a burden of proof on individual class members to explain why they had “certified” that they had read the terms of service setting out “the true nature of the agreement”.<sup>20</sup> For the reasons set out above, I again deny that an “agreement” was concluded between the parties resembling the terms purported by the applicants, or that consumers had “certified” as much.

27. In addition, the applicants’ reference to the common law *caveat subscriptor* rule is misplaced in the context of the contemporary constitutional dispensation and the expanded consumer protection afforded by the CPA and the Electronic Communications and Transactions Act, 25 of 2002 (ECTA), especially within the online commercial environment. Insofar as this common law rule may be applicable to the current matter, the Western Cape Division in *van Wyk* recognised the important role of the CPA to “temper the unjust and unfair application of the *caveat subscriptor* rule, especially on unsuspecting and illiterate consumers”.<sup>21</sup>

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<sup>19</sup> Applicants’ founding affidavit paras 34-36.

<sup>20</sup> Applicants’ founding affidavit paras 28, 31.

<sup>21</sup> *Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty) Ltd* (5651/2014) [2019] ZAWCHC 166 para 81.

28. In his case discussion of *van Wyk*, Professor Mark Tait described the important role of the CPA in regard to the *caveat subscriptor* rule as follows:<sup>22</sup>

*“The court expressed the fundamental purpose of section 49 [of the CPA] as one of ensuring improved access to quality information, which, in turn, will allow consumers to make informed choices based on individual circumstances (par 80). The court later emphasised the importance of informing the consumer “properly, and in practical terms, ... where the provisions in an agreement as stated in subsections (49)(1)(a)–(d) would be applicable” as it would enable consumers to understand the nature and import of the clauses referred to in section 49(1)(a)–(d) when used in a contract (par 85). As a result, consumers would be protected from “a situation where the consumer is caught off-guard, or where a consumer would be tripped up by an unscrupulous or indifferent supplier” (par 88). It is exactly for this reason, the court states, that section 49 was “necessary and long overdue” (par 86). Section 49 serves to ameliorate “the unjust and unfair application of the caveat subscriptor rule” (par 81) and also to “prevent the formalistic application and harsh consequences thereof, as happened in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA), which applied the principle that was laid down in *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A)” (par 82).”*

## APPROPRIATENESS

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<sup>22</sup> M Tait “Judicial guidance on the application of section 49 of the consumer protection act 68 of 2008 - *Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty) Ltd* [2020] 1 All SA 857 (WCC)” *Obiter* 41(4) 2020

29. The second ground of appeal advanced by the applicants is that the High Court erred in certifying the class having regard to the criterion of “appropriateness”.
30. The applicants contend that a class action would not be appropriate because “absent evidence from each and every class member, the litigation will be an exercise in futility”.<sup>23</sup> The applicants also contend that the respondents’ argument in favour of class certification, (namely that it is impractical to conduct separate litigation for every class member), undermines class actions because “*it is similarly impractical to lead evidence of thousands of individual class members.*”<sup>24</sup>
31. This is misconceived. It similarly relies on the premise that there is insufficient commonality, and that consumers are required to pursue their claims individually, or at least present evidence on an individual basis.
32. But if this argument fails (as it must, for the reasons given), so too must this ground of appeal as there is no suggestion by the respondents that any of this Court’s other findings as regards appropriateness are wrong.<sup>25</sup>

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<sup>23</sup> Applicants’ founding affidavit para 42.

<sup>24</sup> Applicants’ founding affidavit para 43.

<sup>25</sup> Prof Theo Broodryk recently authored an article titled “*Inappropriately assessing appropriateness of class proceedings: Nkala v Harmony Gold Mining Company Ltd*”, (2021) 37:1 *South African Journal on Human Rights* 21-30 (to be published), in which he argues persuasively that “appropriateness” extends far more broadly to entail other considerations as well: “It is submitted that our courts’ point of departure in determining whether a class action is the appropriate mechanism to adjudicate claimants’ claims should also be the principal objectives of a class action. This entails determining, with reference to the facts of the specific case, whether a class action is necessary to achieve access to justice, whether it is necessary to achieve judicial economy and/or whether it is necessary to effect behaviour modification. However, it is submitted that, in South Africa, access to justice should be the primary consideration when assessing the appropriateness of class proceedings...For example, where the individual claimants are unable to litigate individually through joinder because they are drawn from the poorest portion of our society, access to justice dictates that a court should allow the matter to proceed as a class action. This ensures that the claimants’ financial and social circumstances do not serve to constitute a barrier to access to justice.” (25) In the article “Class action certification and constitutional claims: the South African case” (2020) *Maastricht Journal of European and Comparative Law* 18-19, Prof Broodryk states that: “In order

## OTHER COMPELLING REASONS

33. The applicants contend that regardless of the merits, there are two other compelling reasons to grant leave in terms of section 17(1)(a)(ii) of the Superior Courts Act. Neither has merit.

33.1. **First**, the applicants contend that there are conflicting judgments on the issue of commonality.<sup>26</sup>

33.2. It is suggested that the court in *CRC Trust* adopted “the United States of America” approach to commonality, whereas *Nkala* (and the court *a quo*) adopted the “more stringent Canadian” approach to commonality set out in *Vivendi*.<sup>27</sup> This is misconceived.

33.3. In *CRC Trust*, the central proposition as regards commonality was held to be that it “...does not require that every claim advanced in the class action, save possibly in relation to quantum, be identical. It requires that there be issues of fact, or law, or both fact and law, that are common to all members of the class and can appropriately be determined in one action.”<sup>28</sup>

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to determine whether a class action is in the interests of justice, the court would also need to consider whether certification of the class action is necessary to achieve access to justice...Essentially, this consideration entails determining whether there are any potential barriers to access to justice, the existence of which can effectively be addressed by certification of a class action. Possible barriers to access to justice include the geographical dispersion of class members, the inability of claimants to engage in individualized litigation, and the difficulties associated with requiring litigation through joinder. For example, the more geographically dispersed the class members are, the less likely it is that they will engage in individualized litigation and the more impractical it is to join those class members. In such circumstances, a class action is likely to be more appropriate than joinder as a mechanism to adjudicate class members’ claims.”

<sup>26</sup> Applicants’ founding affidavit para 46.1.

<sup>27</sup> Applicants’ founding affidavit paras 47-49.

<sup>28</sup> *CRC Trust* (supra) at para 44.

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33.4. In *Nkala*, which was handed down after *Mukaddam*, the court held, with reference to *Vivendi*, that the “commonality requirement does not mean that an identical answer is necessary for all the members of the class” but that “the class members’ claims must share a substantial common ingredient”.<sup>29</sup>

33.5. There is nothing “conflicting” about these judgments. They are entirely compatible, save that *Nkala* correctly references the overall “interests of justice” consideration referred to by the Constitutional Court in *Mukaddam*.

33.6. The alleged conflicting approaches regarding commonality in these two judgments are therefore clearly reconcilable, a fact recognised by the Gauteng High Court in *De Bruyn*.<sup>30</sup> In this judgment, the court had no difficulty in concluding that there is a single approach (and not multiple approaches) to the determination of commonality:

“Where, as here, there are multiple claims brought against different defendants, the assessment of commonality is made more complex. **But the approach does not differ in principle.** The judgment of commonality is a question of degree. In a case of multiple claims, there must be a coherent way of understanding the claims so as to decide whether central features of the claims are common to members of the class or subclasses. If this is shown, the more compelling is the showing of commonality.”<sup>31</sup> (Emphasis added)

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<sup>29</sup> *Nkala* (supra) at paras 94-97.

<sup>30</sup> *De Bruyn* (supra) at para 258.

<sup>31</sup> *De Bruyn* (supra) at para 259.

33.7. I note that applicants themselves seem to be unsure as to the nature of the alleged distinction between the various approaches, as the Canadian approach is described as both “more stringent” and “less stringent”.<sup>32</sup> I suggest that this uncertainty further underscores the extent of the false dichotomy which the applicants seek to manufacture.

33.8. **Second**, the respondents contend that “an analysis of international case law reveals difficulties in accommodating misrepresentation claims in a class action procedure”, and that “courts have routinely refused to certify class actions based on misrepresentation for lack of commonality”.<sup>33</sup>

33.9. This is neither a distinct ground nor compelling reason for leave to appeal to be granted. There is no general rule in any jurisdiction which excludes misrepresentation claims from the ambit of class actions. Indeed, for the reasons already given, class actions based on misrepresentations are recognised both locally and abroad.

#### ***AD SERIATIM RESPONSE***

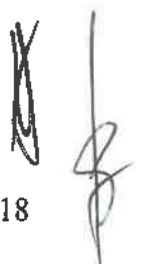
34. I do not intend to traverse each paragraph of the applicants’ founding affidavit, and respectfully ask that where allegations in it are at variance with anything contained in this answering affidavit, such allegations should be regarded as being denied.

#### **Ad paragraphs 1 to 4**

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<sup>32</sup> Applicants’ founding affidavit paras 48 and 52.

<sup>33</sup> Applicants’ founding affidavit paras 51-52.

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35. I note the deponent's omission to explicitly state that the facts contained in his affidavit are true or correct. In so far as it may be inferred from the remainder of the affidavit, I deny that this is the case.

**Ad paragraphs 5 to 11**

36. The applicants' *modus operandi*, to wit a fraudulent scheme designed to deliberately mislead desperate consumers, has been summarised above and was previously described in detail in the respondents' papers in the certification application. In short, the "product purchased" is not the service advertised on the various websites. The applicants cannot genuinely dispute that all of the marketing on the websites in question are for "loan finding" services which have nothing to do with the alleged "legal advice" purportedly offered telephonically. This "product" is plainly not "*explained clearly on the websites*" but is deliberately buried in the terms and conditions contrary to the relevant provisions of the CPA and ECTA, as explained in the respondents' founding affidavit.
37. For the reasons given, I deny that the terms that are obscured behind the misleading advertising and various hyperlinks to separate webpages accurately reflect the terms of the "ultimate agreement", as no agreement as purported by the applicants can be said to have been concluded between the parties.
38. It is false to state that the respondents do not contend that the terms of "these agreements", the existence of which are denied, are unconscionable or otherwise objectionable. The respondents have repeatedly emphasised that no properly informed consumer, as required by the CPA and ECTA, would reasonably accede to the terms of service offered by these unregistered service providers.

39. I pause here to reiterate that to date, more than two years after the respondents' initial notice in terms of Rules 35(12) and (14), the applicants have been unable to produce a single document to evidence that even one consumer willingly agreed to the obfuscated terms of service or that any such service was rendered to a client. Consumers were deliberately misled to incur alleged responsibility for services they did not want nor received.
40. I have already explained that none of the applicants are registered credit providers, legal practitioners, or financial advisors. The applicants also put up no proof whatsoever that Capital Lifestyle Solutions or All Wheel Auto (or any of the other "associated companies") are actually registered with the Council for Debt Collectors. It is not explained how All Wheel Auto can lawfully be a "vehicle" through which the applicants can collect debts, or how it could possibly be lawful for the applicants to share confidential consumer information with All Wheel Auto in compliance with the provisions of the Protection of Personal Information Act, 4 of 2013.

**Ad paragraphs 12 to 18**

41. To the extent that the applicants accurately describe the relief sought by the respondents, these allegations are not disputed.
42. Claim 2 as certified by the court *a quo* is based on *fraudulent* misrepresentation. The applicants' conduct in this regard is *prima facie* unlawful and the alleged "agreement" void *ab initio*.
43. Claim 3 is exclusively directed at prohibiting the applicants from harassing and threatening relevant consumers. This claim does not place any positive duty on the

applicants to render a performance or to pay damages, as is the case with claims 1, 2 and 4.

**Ad paragraphs 19 to 22**

44. I deny that the appeal has a reasonable prospect of success and that there are other compelling reasons why it should be heard. I therefore deny that leave to appeal should be granted.

**Ad paragraphs 23 to 25**

45. I submit that the *prima facie* illegal and unlawful nature of the applicants' business practices are important factors in the determination of whether the appeal would have a reasonable prospect of success.

46. As demonstrated above, Mr Malander's allegations that some consumers could not have been misled by his companies' conduct is without foundation and simply untrue. Furthermore, it remains the case that the applicants' fraudulent actions are, objectively, a trap for the unwary and therefore by definition misleading in a consensus-destroying manner.

47. This is an important consideration in the applicants' attack on the certification of the class action on the basis of the alleged absence of the commonality requirement. The applicants imply as much by making repeated references to questions surrounding the scope of the misrepresentation in the applicants' founding affidavit.<sup>34</sup>

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<sup>34</sup> See eg Applicants' founding affidavit paras 31 to 33.

48. I deny that the applicants' liability turns on individualised assessment and that certification will not meaningfully advance the litigation in this case. I therefore deny that respondents' claims are unsuitable to class action proceedings due to a failure to meet the commonality and appropriateness requirements. The interest of justice dictates that this case is in fact ideally suited to the class action mechanism.

**Ad paragraphs 26 to 40**

49. I have addressed the requirement of commonality in detail above and will not repeat my assertions in that regard. In short, I deny that a determination of liability requires individual assessment of class members' reliance on the applicants' fraudulent misrepresentation. The *modus operandi* employed by the applicants to deceive consumers is the same in the case of each consumer and is unlawful for the same reasons pleaded under the CPA, ECTA, and the common law. This is precisely why class action proceedings are the only appropriate mechanism for these consumers to obtain redress.

50. For the reasons explained previously, I dispute applicants' attempt to make out a case that certification is inappropriate because there are some customers who knowingly chose to subscribe for telephonic "legal advice assistance service packages". It is incorrect as a matter of law that a class action is inappropriate simply because it is baldly alleged that there may be certain members of the class who wanted to sign up for these "services".

51. There is absolutely no basis for the applicants' contention that some visitors to their various websites had knowingly agreed to sign-up for "*telephonic legal advice assistance*". Not a single document is attached to any of the applicants' papers in the main certification application or subsequent applications for leave to appeal substantiating this

allegation. Furthermore, as I have explained, the documentation produced in terms of the Rule 35 order demonstrates this to be false.

52. I also dispute applicants' unsubstantiated speculation that "free add-on" referrals cause the conclusion of agreements to be "not inconceivable". As explained above, this speculation is at odds with the lack of evidence on behalf of the applicants. The "complimentary" loan "referral service" is, for all of the reasons set out above, deliberately used as one of the methods to mislead consumers into agreeing to the websites' terms and conditions and thereby unknowingly authorising the applicants to debit their accounts for a "service" for which they never intended to contract in the first place. The websites create the false impression that the loan finding service is a separate and distinct free service.
53. I therefore deny that any credible evidence whatsoever exists to show that consumers willingly and knowingly chose to enter into the purported service agreements even once, let alone on more than one occasion. I also deny that there is any evidence of consumers receiving any services, including being granted loans.
54. I am surprised that the deponent of the applicants' founding affidavit, the applicants' attorney of record, places reliance on evidence when he must be aware of the above facts, must have advised his clients to furnish him with this crucial information, and must know that this evidence simply does not exist.
55. I deny the applicants' assertion that the relevant "agreements" are not void *ab initio*, but only voidable at the instance of the innocent party. The applicants' argument in this regard fails to appreciate and acknowledge the extent of the misapprehension introduced by the applicants' misrepresentation. As explained above, the scope of the applicants' fraudulent

activities excludes any possibility of consensus between the parties and amounts to a mistake of a material or fundamental nature. Consequently, the relevant “agreements” are indeed void *ab initio* for lack of consensus.<sup>35</sup>

**Ad paragraphs 41 to 45**

56. I have addressed the requirement of appropriateness in detail above and will not repeat my assertions in that regard. For the reasons given above (and the legal argument to be raised at the hearing) there is no merit in the contention that a class action is inappropriate because each member of the class will have to lead evidence in order to establish causation.

57. The claims are indeed precisely the kind of claims for which class action proceedings are intended, not least in terms of section 4 of the CPA. There can be no dispute about the “*causal nexus*” of the various claims. Consumers were all misled by the same *modus operandi* and the questions of law and fact clearly have sufficiently commonality to be appropriately prosecuted in class action proceedings.

**Ad paragraphs 46 to 55**

58. I have addressed the lack of other compelling reasons for appeal in detail above and will not repeat my assertions in that regard. In short, I deny that there are any compelling reasons warranting the hearing of an appeal.

**Ad paragraphs 56 to 60**

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<sup>35</sup> *Brink v Humphries & Jewell (Pty) Ltd* [2005] All SA 343 (SCA) at 421.

59. To the extent that the applicants accurately describe the findings of the court *a quo*, these allegations are not disputed.
60. For all the reasons set out above, I deny that the court *a quo* erred in holding that individual assessment is not required to establish causation and liability in this matter.
61. I deny applicants' representation, which is in fact another *misrepresentation*, that the respondents "do not complain that the *terms* of the agreement fall foul of the CPA". This allegation is yet another attempt to misconstrue respondents' case. Firstly, as explained above, I deny that there is any agreement between the parties. Secondly, even if this was the case, which is denied, the respondents are certainly at odds with the *terms* of the concealed service agreements. As the respondents have consistently indicated, *inter alia* repeatedly in their draft particulars of claim,<sup>36</sup> the terms of the purported agreements saddle consumers with unwanted and illicit paid services.
62. Despite their efforts in this regard, the applicants cannot escape the legal reality that the fraudulent manner in which these "agreements" are brought into being, taints every aspect of their continued existence. The applicants' attempts at divorcing the existence of the agreements from the terms of the agreement, are therefore untenable. The CPA confirms as much in section 48(2):

*"a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if— (c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41".*

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<sup>36</sup> See, eg, Respondents' draft particulars of claim paras 40, 60, 67, 68.

63. As a result, applicants' argument that the court *a quo* departed from an incorrect factual basis must fail.

**Ad paragraphs 61 to 64**

64. I agree that the court *a quo* gave consideration to "the definition of the class" and the difficulties of "a multitude of smaller claims by class members". In the process, the court considered the strain that multiple separate claims would place on *both* parties as well as on the courts.<sup>37</sup>

65. I deny the applicants' baseless and unsubstantiated assertion that the issue of the difficulties with alternatives to class action was "the primary consideration" in the court *a quo*'s evaluation.<sup>38</sup> In terms of the settled legal position discussed above, this aspect was only one of the various factors that the court *a quo* considered in its determination of the decisive "interests of justice" test.

66. Consequently, the applicants' assertion that the court *a quo* "departed from an erroneous premise" by considering the lack of alternative remedies available to class members must be rejected.

67. I deny that the court *a quo* erred in exercising its judicial discretion by refusing leave to appeal.

**Ad paragraphs 65 to 68**

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<sup>37</sup> Judgment para 67.

<sup>38</sup> For example, ten paragraphs (paras 50-59) of the judgment of the court *a quo* was spent dedicated to the commonality factor, while the difficulties with alternative processes was covered in one paragraph (para 67).

68. I have addressed the question of appealability in detail above and will not repeat my assertions in that regard.

**Ad paragraphs 69 to 70**

69. Other than admitting that the court *a quo* assumed, without finally deciding, that the order granted in this matter is appealable, and for all the reasons already discussed, I deny each and every allegation in these paragraphs.

**CONCLUSION**

70. In summary, the applicants have failed to make out a case for leave to appeal and their application should be dismissed with costs.

70.1. In the first instance, an order of certification does not have the attributes of appealability, and as a general proposition it would not be in the interests of justice for leave to appeal to be granted.

70.2. There are no interest of justice factors in this case which should sway this Honourable Court to depart from this general principle. To the contrary, there are strong reasons why it would not be in the interests of justice to permit an appeal, not least because of the prospect of further delay.

70.3. In any event, irrespective of the issue of appealability, the requirements of section 17(1)(a) are plainly not established.

70.4. The grounds of appeal are thin and unconvincing. There is no prospect of another court interfering with the exercise of the court *a quo*'s discretion (exercised in the

“strict sense”) and concluding that there was a material misdirection of fact or law which requires intervention on appeal.<sup>39</sup>

70.5. There are also no compelling reasons to support the granting of leave.


71. I respectfully ask that this Honourable Court dismiss the application for leave to appeal, with the applicants being directed to pay the costs of the application.



**STEPHANUS JOHANNES HOFFMAN  
VAN DER MERWE**

I certify that:

- I. the Deponent acknowledged to me that:
  - A. He knows and understands the contents of this declaration;
  - B. He has no objection to taking the prescribed oath;
  - C. He considers the prescribed oath to be binding on his conscience.
- II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".
- III. the Deponent signed this declaration in my presence at the address set out hereunder on this 28<sup>th</sup> day of January 2022.



**COMMISSIONER OF OATHS**

Designation and Area: Practising Attorney Western Cape  
Full Names: Tanya Brenda Mberab  
Street Address: Legal Aid SA  
Suite 201, Eickstad Mall  
Stellenbosch

<sup>39</sup> In *Mukaddam* (supra), at paras 43-48, the Constitutional Court held that a decision not to allow certification is one which is exercised in the “strict sense”, and accordingly that a material misdirection is required before an appeal court will interfere. There is no reason in principle why the same test does not apply in relation to orders granting certification.

**IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

Case no:

Western Cape Division case no: 16262/2019

In the matter between:

<b>LIFESTYLE DIRECT GROUP INTERNATIONAL (PTY) LTD</b>	1 <sup>st</sup> Applicant (1 <sup>st</sup> Respondent <i>a quo</i> )
<b>CAPITAL LIFESTYLE SOLUTIONS (PTY) LTD t/a LIFESTYLE LEGAL</b>	2 <sup>nd</sup> Applicant (2 <sup>nd</sup> Respondent <i>a quo</i> )
<b>LOAN TRACKER SA (PTY) LTD</b>	3 <sup>rd</sup> Applicant (3 <sup>rd</sup> Respondent <i>a quo</i> )
<b>LOAN SPOTTER SA (PTY) LTD</b>	4 <sup>th</sup> Applicant (4 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN MATCH SA (PTY) LTD</b>	5 <sup>th</sup> Applicant (5 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN CHOICE SA (PTY) LTD</b>	6 <sup>th</sup> Applicant (6 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN QUEST SA (PTY) LTD</b>	7 <sup>th</sup> Applicant (7 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN CONNECTOR SA (PTY) LTD</b>	8 <sup>th</sup> Applicant (8 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN HUB SA (PTY) LTD</b>	9 <sup>th</sup> Applicant (9 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN ZONE SA (PTY) LTD</b>	10 <sup>th</sup> Applicant (10 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN LOCATOR SA (PTY) LTD</b>	11 <sup>th</sup> Applicant (11 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN SCOUT SA (PTY) LTD</b>	12 <sup>th</sup> Applicant (12 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN TRACER SA (PTY) LTD</b>	13 <sup>th</sup> Applicant (13 <sup>th</sup> Respondent <i>a quo</i> )
<b>LOAN DETECTOR SA (PTY) LTD</b>	14 <sup>th</sup> Applicant (14 <sup>th</sup> Respondent <i>a quo</i> )

**LIFESTYLE LEGAL (PTY) LTD**

15<sup>th</sup> Applicant  
(15<sup>th</sup> Respondent *a quo*)

**LIFESTYLE ATTORNEYS (PTY) LTD**

16<sup>th</sup> Applicant  
(15<sup>th</sup> Respondent *a quo*)

**ALL WHEEL AUTO (PTY) LTD**

17<sup>th</sup> Applicant  
(17<sup>th</sup> Respondent *a quo*)

**DAMIAN MALANDER**

18<sup>th</sup> Applicant  
(18<sup>th</sup> Respondent *a quo*)

and

**STELLENBOSCH UNIVERSITY LAW CLINIC**

1<sup>st</sup> Respondent  
(1<sup>st</sup> Applicant *a quo*)

**ADELE ROTHMANN**

2<sup>nd</sup> Respondent  
(2<sup>nd</sup> Applicant *a quo*)

**IGNATIUS MICHAEL HEYNS**

3<sup>rd</sup> Respondent  
(3<sup>rd</sup> Applicant *a quo*)

**DERRICK FERREIRA DOS SANTOS**

4<sup>th</sup> Respondent  
(4<sup>th</sup> Applicant *a quo*)

**RONALD ABRAHAM ARTHUR ESBACH**

5<sup>th</sup> Respondent  
(5<sup>th</sup> Applicant *a quo*)

**NICOLENE ELS**

6<sup>th</sup> Respondent  
(6<sup>th</sup> Applicant *a quo*)

**ALICIA PELSER**

7<sup>th</sup> Respondent  
(7<sup>th</sup> Applicant *a quo*)

**VANESSA VENTER**

8<sup>th</sup> Respondent  
(8<sup>th</sup> Applicant *a quo*)

**CASSIEM HALLIDAY**

9<sup>th</sup> Respondent  
(9<sup>th</sup> Applicant *a quo*)

**NANDIE PAICH**

10<sup>th</sup> Respondent  
(10<sup>th</sup> Applicant *a quo*)

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**REPLYING AFFIDAVIT**

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I, the undersigned

**HENDRIK JOHANNES BOTHMA**

do hereby make oath and state that:

1. I am the same Hendrik Johannes Bothma who deposed to the applicants' founding affidavit. My details remain as set out in paragraph 1 thereof.
2. The facts deposed to herein, unless otherwise indicated or evident from the context hereof, fall within my personal knowledge and are, to the best of my belief, both true and correct.
3. I depose to this affidavit in reply the respondents' answering affidavit deposed to by Stephanus Johannes Hoffman van der Merwe on 28 January 2022.
4. In compliance with the Rules of this Honourable Court, I only reply to new matter raised in the answering affidavit. Accordingly, allegations to which I do not reply, unless consistent with the context of the applicants' affidavits, should be construed as denied.

**Ad paragraphs 5 – 6**

5. I deny that this is an application for special leave to appeal as contemplated in section 16(1)(b) of the Superior Courts Act 10 of 2013.
6. This is an application for leave to appeal against the judgment of a single Judge of the Western Cape Division of the High Court sitting as Court of first instance.



**Ad paragraph 9**

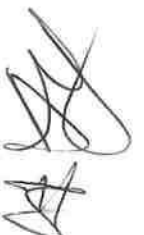
7. The assertion by Mr van der Merwe that "...innocent members of the public are unknowingly *seduced* [emphasis added] by the applicants' fraudulent misrepresentations" is denied.
8. This assertion cannot fall within Mr van der Merwe's personal knowledge. He has no personal knowledge of whether every consumer read the terms of service. Individual reliance must therefore be proved on an individual basis.

**Ad paragraph 10**

9. There is no basis upon which the respondents can assert that every consumer relied on the impression created by the applicants' advertising. Mr van der Merwe has no knowledge of whether individual consumers relied on the criticised advertising or whether they had regard to the terms of service.
10. Reliance on an impression created by the applicants' advertising therefore cannot be inferred. It has to be established by the evidence of each individual consumer.

**Ad paragraph 18**

11. I deny that an order certifying a class action is merely interlocutory in effect and not final or definitive of the rights of the parties. Certification disposes of any argument in the main proceedings regarding the *locus standi* of the class representatives which undoubtedly would otherwise be an important part of the applicants' case.



12. Furthermore, the certification of a class action is in itself final in nature insofar as an action cannot be decertified once a certification order is granted.
13. For these reasons, as well as the reasons alluded to in the judgment refusing leave to appeal, I respectfully aver that the Court *a quo* correctly assumed that that the certification order is appealable.<sup>1</sup>

**Ad paragraph 20**

14. I deny that the granting of leave to appeal would cause prejudice to the respondents that outweigh the prejudice that the applicants will suffer if leave to appeal is refused.
15. In this regard I respectfully aver that certification will effectively deprive the applicants of their right to test the evidence of class members as it pertains to their individual reliance on the alleged misrepresentations (insofar as their common law claim of misrepresentation is concerned). Certification will also deprive the Court of considering and applying the factors listed under section 52(2) of the CPA to each individual consumer.

**Ad paragraph 24.2**

16. It is respectfully averred that the *modus operandi* of the applicants is irrelevant to the determination of whether each individual class member actually relied on the alleged misrepresentations.

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<sup>1</sup> Judgment – Leave to Appeal, p 6, par 11.



17. Fundamental to a claim based upon misrepresentation is not only whether a misrepresentation was made, but also whether reliance was placed on such misrepresentation which in turn caused loss (i.e., the element of causation).
18. Stated otherwise, irrespective of whether the applicants conducted a "misleading scheme", the question determinative of establishing liability is whether each consumer was induced thereby or whether they had regard to the true facts set out in the terms of service.

**Ad paragraphs 24.3 – 24.4**

19. The respondents do not contend in the draft particulars of claim that specific terms of the agreements, objectively considered, fall foul of the CPA. Their sole objection is that the agreements were induced by misrepresentations and thus falls foul of the CPA.
20. To evaluate this allegation, individualised assessments are required to ascertain whether a customer was induced by the advertising and then, in addition, the factors enumerated in section 52(3) must be considered.

**Ad paragraphs 24.5 – 24.7**

21. The alleged fraud of the applicants' scheme and its alleged intention to mislead is in itself insufficient to establish individual reliance in order to prove the element of causation.

**Ad paragraph 24.10**

22. Insofar as the respondents correctly set out the factors to be taken into account when determining whether certification should be granted as held in *CRC Trust*,



the content of this paragraph is admitted. However, should the Court, as in this case, be unable to determine causation without an individual assessment, certification would be an exercise in futility.

**Ad paragraphs 24.12 – 24.13**

23. The statutory remedies alluded to by the respondents only apply, insofar as the claim is based on the provisions of the CPA, after consideration of the factors listed under section 52(2). Insofar as the common law claim of misrepresentation is concerned, only after a determination of individual reliance.
24. I concede that there is no blanket prohibition against certification of misrepresentation claims. In limited cases misrepresentation claims may be prosecuted through class action. For example, certification may be appropriate where there is no question as to whether a misrepresentation induced a contract. However where, as in this case, the correct facts are set out in the terms of service, an individualised assessment as to whether a consumer took stock thereof is required to establish liability. Where such assessment is required, certification is not suitable.
25. It is in this context that the cases referred to by Mr van der Merwe should be viewed.

**Ad paragraph 25**

26. Section 52(2) of the CPA provides that a Court, in any matter contemplated in subsection (1) (i.e. contravention of sections 40, 41 and 48), *must* consider the



factors listed under the subsection. This requires an individual enquiry relating to each individual claimant, incapable of determination on a class-wide basis.

27. The averments contained in this paragraph are, for the reasons herein above stated, incorrect.

**Ad paragraph 33.6**

28. The paragraph from *De Bruyn*<sup>2</sup> quoted by Mr van der Merwe correctly sets out the legal position insofar as commonality is said to be “a question of degree.”
29. However, the afore-quoted paragraph fails to take into account the finding at par 265 where the Court held as follows regarding the question of commonality:


“Commonality is judged by asking whether the issue of law or fact, once determined, resolves the issue for the class. If, by contrast, the determination of the issues requires multiple individual determinations, then commonality is lacking.”

30. In *De Bruyn* the question arose whether the cause of action advanced on behalf of the class members requires, in our law, a showing of detrimental reliance by each shareholder or whether “imputed reliance” suffices if shareholders relied upon the price at which they bought or retained their shares. The Court did not find it necessary to pronounce on this issue.<sup>3</sup>
31. I respectfully submit that the principle of imputed reliance does not form part of the South African common law.

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<sup>2</sup> 2022 (1) SA 442.

<sup>3</sup> Supra at par267.



**Ad paragraph 33.7**

32. Reference to the “more stringent Canadian approach” in paragraph 48 of the founding affidavit is an inadvertent typographical error. It should have read “the less stringent Canadian approach”.

**Ad paragraph 35**

33. I confirm that the content of the founding affidavit is true as certified on page 22 thereof when the affidavit was commissioned.

**Ad paragraph 40**

34. The argument pertaining to the applicants not being legal practitioners was belatedly and impermissibly raised for the first time in reply in the Court *a quo*. It was not fully ventilated on the papers and cannot be relied upon in substantiation of their certification claim.
35. The argument pertaining to compliance with the provisions of the Protection of Personal Information Act, 4 of 2013 was also impermissibly raised for the first time in the respondents’ answering affidavit in this Court.
36. In addition, neither of these facts form the basis of the claims advanced in the draft particulars of claim.

**Ad paragraph 54**

37. The evidence shows that certain consumers applied more than once and in fact received loans. If required, this evidence will be led at trial.



38. Such evidence is however not relevant for the present purposes *viz* a normative assessment of whether the claims that the respondents seek to prosecute are suitable for class action litigation.

**Ad paragraph 62**

39. I note the quoted section of the CPA. In particular it is noted that the section provides that an agreement or a term of an agreement is unfair, unreasonable and unjust if the consumer *relied* upon a representation as contemplated in section 41.
40. This provision therefore supports the applicants' contention that individual reliance is a necessary element of both the respondents' common law and statutory claims.
41. In the premises, the applicants persist with the relief sought in their notice of application for leave to appeal.



HENDRIK JOHANNES BOTHMA

I certify that:

1. The deponent acknowledged to me that:
  - (a) he knows and understands the contents of this declaration;
  - (b) he has no objection in taking the prescribed oath;
  - (c) he considers the prescribed oath to be binding on his conscience.
2. The deponent thereafter uttered the word "I swear the contents of this declaration are true, so help me God";
3. The deponent signed this declaration in my presence at the address set out hereunder on this the 11<sup>th</sup> day of **February 2022**.



COMMISSIONER OF OATHS

**ADRÉ ELIZABETH HEESE**  
 Advocate of the High Court of South Africa  
 Huguenot Chambers  
 40 Queen Victoria Street  
 Cape Town