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

And

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

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

Bench: P.A.L.Gamble, J

Heard: 8 & 9 March 2021

Delivered: 21 July 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 15h00 on Wednesday 21 July 2021.

JUDGMENT

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. Advs.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, represented the applicants. The Court is indebted to counsel for their heads of argument which have greatly assisted in the preparation of this judgment.

IN LIMINE ISSUES

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"[1]. 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.

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

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 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.[2] 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 *lis* 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

[2] See pages 1043 to 1102

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.

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.[3] 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.[4] 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

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[3] 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

[4] Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza 2001 (4) SA 1184 (SCA)

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 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."*
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> [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.[5] Both matters were heard by the same panel of judges with separate judgments being delivered in each case. The *rationes decidendi* of the 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;

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[5] 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")

> • a cause of action raising a triable issue;
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> • that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class;
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> • that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;
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> • 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;
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> • 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,[6] 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

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[6] 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.

[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.

[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[7], 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.

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[7] Nkala and others v Harmony Gold Mining Co Ltd and others 2016 (5) SA 240 (GJ)

[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 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,[8] 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

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[8] The reference is to the writing of Professor Rachael Mulheron in '*The Class Action in Common Law Legal Systems: A Comparative Perspective 3.*'

equal or greater importance, as Professor Silver points out,[9] is the fact that the class action is 'a representational device'. It is -

> '… 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.
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> 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

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[9] The reference is to the writing of Prof. Charles Silver, "Class Actions – Representative Proceedings 5 *Encyclopaedia of Law and Economics* 194.

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 (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".[10]

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[10] 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.

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 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,[11] 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[12]. In that matter, Scalia J was of the view that the claims of the class –

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[11] At [44] – [45]

[12] Wal-Mart Stores Inc, Petitioner v Betty Dukes *et al* 131 S Ct 2541 at 2551

"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."

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."[13]

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 that 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;

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[13] CRC Trust at [45]

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;

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 communality 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.[14]

"[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

[14] Vivendi Canada Inc v Michell Dell' Aniello [2014] R.C.S 1 at [46]

claims of each class member with the same particularity as would be required in an individual suit.'

[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"[15]. 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."

[15] (2019) 30 Stell LR at 6

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

"[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[16] 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:

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

"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 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"[17]

"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.

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[17] *PER/PELJ* 2019 (22)

If it is likely that they would litigate independently, then those claimants should be given an opportunity to opt into the proceedings."

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[18], and in the administration of the proceeds of a class action in Linkside[19].

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

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[18] Mwelase and others v Director-General, Department of Rural Development and Land Reform and another 2019 (6) SA 597 (CC)

[19] 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 aforegoing 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. It

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.

<u>INTERDICTORY RELIEF</u>

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[20]

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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[20] 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://wwwloanchoicesa.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://wwwloanchoicesa.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 "

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

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.