



**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: 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

JUDGMENT – LEAVE TO APPEAL

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.¹ 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

¹ 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 Obiang², 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 Zweni³, 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 Nkala⁴ 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;

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

³ Zweni v Minister of Law and Order 1993 (1) SA 523 (A)

⁴ 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 Africa⁵ 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)⁶. 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 Centre⁷ 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 Property⁸, OUTA⁹ and SCAW¹⁰.

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

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

⁷ Children's Resource Centre Trust v Pioneer Foods Ltd 2013 (2) SA 213 (SCA) at [25]

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

⁹ 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.¹¹ The correct approach was recently clarified by the SCA in Ramakatsa¹².

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

¹¹ 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 Caratco¹³, 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

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

¹² Ramakatsa and others v African National Congress and another [2021] ZASCA 31 (31 March 2021)

¹³ 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 communal 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.

GAMBLE, J

APPEARANCES

For the applicants –

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For the respondents –

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