REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE HIGH COURT, PORT ELIZABETH)

In the matter between: Case No: 2286/2014

JOHANNES IGNATIUS BARTOSCH **Applicant**

And

STANDARD BANK OF SOUTH AFRICA LIMITED **First Respondent**

NEDBANK LIMITED t/a MFC **Second Respondent**

ABSA BANK LIMITED **Third Respondent**

THE NATIONAL CREDIT REGULATOR **Fourth Respondent**

SATINSKY 128 (PROPRIETARY) LIMITED **Fifth Respondent**

FIRSTRAND BANK LIMITED t/a WESBANK **Sixth Respondent**

Coram: **Chetty J**

Heard: **7 August 2014**

Delivered: **21 August 2014**

Summary: ***Practice*** *– Class Action – Requirements for – Jurisdiction – Section 21(1) Superior Courts Act – Cause of action raising triable issue – Evidence requirement – Costs de bonis propriis – When ordered*

JUDGMENT

CHETTY J: -

[1] This is an application for the certification of a class action. The proposed action seeks, as its ultimate aim, a declarator that thousands of credit agreements concluded between consumers and credit providers are reckless as envisaged by s 80 of the **National Credit Act**[1] (the Act) and, concomitant orders in terms of s 83(2) - (i) setting aside all or part of those consumers' rights and obligations under the agreements as the court considers just and reasonable in the circumstances or (ii) suspending the force and effect of such credit agreements in accordance with subsection (3)(b)(i)[2].

[2] Although of recent vintage in South Africa, the approach to be adopted by a court in class actions in which certification is sought, is clear. ***Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others***[3] prescribed the requirements for a class action which, in the headnote, is succinctly summarised thus: -

> "**Requirements for class action**
>
> *Certification*

[1]Act No, 34 of 2005
[2]"suspending the force and effect of that credit agreement until a date determined by the Court when making the order of suspension;"
[3]2013 (2) SA 213 (SCA)

The party seeking to represent a class must apply to a court for it to certify the action as a class action. Thereafter it may issue summons. The court faced with the application need consider and be satisfied of the presence of the following factors, before certifying the action —

(1) the existence of a class identifiable by objective criteria;

(2) **a cause of action raising a triable issue**;

(3) that the right to relief depends on the determination of issues of fact, or law, or both, common to all members of the class;

(4) that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;

(5) that where the claim is for damages, there is an appropriate procedure for allocating the damages to the class members;

(6) that the proposed representative is suitable to conduct the action and to represent the class;

(7) 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.

Class definition

The applicant for certification must define the class with enough precision for a class member to be identified at all stages of the proceedings.

A cause of action that raises a triable issue

The applicant must show a cause of action with a basis in law and the evidence. That is, the claim must be legally tenable, and there needs to be evidence of a prima facie case.

The procedure to be adopted in an application for certification

The application must be accompanied by draft particulars of claim setting out the cause of action, the class, and the relief sought. The affidavits need to set out the evidence

> **available to support the cause, as well as evidence it is anticipated will become available, and the way it will be procured.**
>
> *Common issues of fact or law*
>
> There must be issues of fact, or law, or fact and law, common to all members of the class, and which are determinable in one action.
>
> *The representative plaintiff and his lawyers*
>
> The representative plaintiff may be a member of the class or a person acting in its interest. This applies both to class actions based on a constitutional right and to other class actions. The representative's interests cannot conflict with those of the class members; and he must also have the capacity to properly conduct the litigation. The capacity requirement entails the ability to procure evidence, to finance the litigation and to access lawyers. The payment arrangement with the lawyers need also be disclosed, and cannot give rise to a conflict of interest of the lawyers and the class members." (emphasis added)

[3] The abject attempt to comply with the aforestated requirements is manifest and extensively adverted to in the first, second and third respondents' comprehensive heads and in argument before me. The common thread which resonates throughout the submissions was that none of the requirements had in fact been met. I agree. Leaving aside the other requisites, no cause of action raising a triable issue has been disclosed. Additionally, and equally fatal, this court does not have the necessary jurisdiction to adjudicate upon the matter. A decision on those two issues alone is dispositive of the application and obviates the need to decide upon the other requirements for certification.

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Jurisdiction

[4] In his founding affidavit, the applicant relied upon two factors viz, his permanent residence in Port Elizabeth and the fact that the first, second and third respondents have a presence in and conduct business in Port Elizabeth as investing this court with the requisite jurisdiction to adjudicate upon the application. In reply, and to meet the defence raised that the court lacked jurisdiction, the applicant broadened the scope of this court's jurisdictional reach by invoking the provisions of s 21(1)(c) of the **Superior Courts Act**[4] and sections 34, 38(c) and (d), 39(2) and 137 of the **Constitution of the Republic of South Africa Act**[5]. Reliance upon the aforementioned constitutional provisions is entirely misplaced. The right of access to a court of law, whether by way of action, enforcement of rights, etcetera, is not violated by upholding a plea of non-jurisdiction. Any dispute which requires resolution will be determined by a court vested with the requisite jurisdiction.

[5] The applicant's supposition that being ***"an incola of the area of which the court exercises jurisdiction"*** *ipso facto* empowers this court to grant the relief sought is wrong and reliance upon the *dicta* of Trollip J.A in ***Estate Agents Board v Lek***[6] entirely misplaced. The argument advanced ignores the pointed rider expressed that a court may assume jurisdiction in the scenario postulated where the relief sought is ***"only declaratory or empowering"***. The substantive relief sought by the applicant in *casu* is entirely dissimilar to the examples tabulated in ***Lek*** and, although framed as a declarator, anything but declaratory or empowering.

[4]Act No, 10 of 2013
[5]Act No, 106 of 1996
[6]1979 (3) SA 1048 (AD) at p1068A-B

[6] It was submitted by Mr *Cockrell* who developed the jurisdiction challenge argument before me on behalf of the respondents that the applicant conflates two entirely disparate questions viz, (i) whether the High Court has jurisdiction to certify a class action, with (ii) whether this court has jurisdiction over the respondents. This court's non-jurisdiction he submitted is readily apparent from s 21(1) of the **Superior Courts Act**. It provides as follows: -

> "(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power-
>
> (a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;
>
> (b) to review the proceedings of all such courts;
>
> (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

[7] *Ex facie* the founding affidavit, this court's jurisdiction appears to repose upon the allegations that the first to the third respondents ***"conduct its business in Port Elizabeth . . ."*** and that their respective ***"service addresses were likewise in Port Elizabeth."*** The mere fact that the aforementioned service addresses are in Port Elizabeth is entirely irrelevant. It is trite law that a company resides in the area of

jurisdiction of a court if it either – (i) has its registered office or (ii) its place of central control in that area.

[8] It is not in issue that the respondents' registered offices are outside this court's jurisdiction. Furthermore, the mere fact that the first to the third respondents conduct business in Port Elizabeth does not connote that they reside within this court's area of jurisdiction. As Innes J.A pointed out[7] in ***T.W. Beckett & Co Ltd v H Kroomer Ltd***[8]: -

> "Now, the terms "reside" and "residence" can only be used in their true significance with regard to natural persons. The residence of a legal persona, like a company, artificially created, must be a mere notional conception introduced for purposes of jurisdiction and law (see Foote, p. 112). The only home which a corporation can be said to have is the place where the operations for which it was called into existence are carried on. So far as it can be said to reside anywhere, that is where it resides. And if the analogy of a natural person is to be followed, one would say that it could only reside in one place at one time. This is a point on which from the nature of things it is not possible to obtain Roman Dutch authority; but there is ample support in English law - both text books and cases - for that view in regard to the domestic aspect of the residence of companies. With what may be called the international aspect I shall deal later. The doctrine is firmly established that where a company carries on business at more places than one its true residence is located where its general administration is centred. To quote the words of Lindley (Companies, 6th Ed., p. 1223), "The residence and domicile of an incorporated company are determined by the situation of its principal place of business. This is not only the opinion of the most recent writers on private international law, but is supported by the decisions of our own Courts. By the principal place of business is meant the place where the administrative business of the company is conducted; this may

[7] At p334-335
[8] 1912 A.D 324

> <u>not be where its manufacturing or other business operations are carried on."</u> (See also Foote's Private International Jurisprudence, p. 112). Accordingly, there are a large number of English decisions, of which Brown v L. & N. W. Railway (32 L.J., Q.B., p. 318), Aberystwith Railway Co. v Cooper (35 L.J., Q.B., p. 44), and Jones v Scottish Accident Co. (L.R., 17 Q.B.D., p. 421) are examples, to the effect that trading and railway corporations reside or carry on their business at the place where their chief office is situated; and that the locality of that office fixes the forum in which alone the company is justifiable. The principle underlying these decisions was acted upon by the Transvaal Supreme Court in Sciacero v Central South African Railways (T.S., 1910, p. 119), where it was held that the railway administration did not reside at or carry on business within the meaning of the Magistrate's Court Proclamation at an ordinary branch station, and could not be sued in the Magistrate's Court of the district where such station was situated. And if that principle is to decide the present dispute, then the defendant's special plea should have been upheld. Because, however considerable the operations of the Johannesburg branch may be, the administration of the defendant Company's business as a whole was undoubtedly conducted at Pretoria, which was not only the registered head office, but the site of the parent establishment." (emphasis added)

[9] It follows from the aforegoing that the claim for jurisdiction by virtue of ***"residence"*** is misplaced. Is this court nonetheless vested with the requisite jurisdiction by virtue of the ***"cause arising"*** in its area of jurisdiction? To assail the respondents' challenge to this court's jurisdiction hereanent, the applicant content's himself in reply with the assertion ***"The credit agreement I concluded with Absa was of course conducted at Port Elizabeth and my performance in terms of such contract, namely the payment was also concluded at Port Elizabeth."*** The

aforegoing averment amounts to a conclusion of law which is wholly insufficient to found jurisdiction[9].

[10] The respondents' jurisdictional challenge is furthermore resisted by invoking s 21(1)(c) of the Superior Courts Act which provides: -

> "(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

Finding succour therein, the applicant alleges: -

> "The Superior Courts Act, at section 21(1)(*c*), provides it with a discretion to hear any dispute in which declaratory relief is sought. I submit that this Court may exercise its discretion in my favour to hear this dispute by virtue of the overwhelming public interest and my constitutional right to approach this Court in terms of sections 38(*c*) and (d) of the Constitution."

[11] As adumbrated hereinbefore, recourse to the aforementioned constitutional prescripts is misplaced. So too, the selective reliance on subparagraph (i)(c). A court's power to **"enquire into and determine any existing, future or contingent right or obligation . . ."** is dependent upon it having the requisite jurisdiction as envisaged by s 21(1). It cannot willy-nilly assume jurisdiction.

[9] Amlers Precedent of Pleadings, 7th ed at p248

[12] A finding that a court lacks the requisite jurisdiction to adjudicate upon a matter would ordinarily not require further consideration of an application/action. However, given the nature of the relief sought and the cogent legal issues raised, it is apposite to determine whether, as adumbrated hereinbefore, a cause of action raising a triable issue has been disclosed. The applicant's founding affidavit has perforce to be examined to unearth the *prima facie* case contended for but first, some judicial pronouncements vis-à-vis its attributes.

[13] In ***Children's Resource***, with reference to authority both here and in foreign jurisdictions, this requirement was articulated thus: -

> "[40] Establishing a prima facie case on the evidence is not a difficult hurdle to cross. In the context of an attachment to found jurisdiction Scott JA set out the test as follows:
>
> '[12] The requirement of a prima facie case in relation to attachments to found or confirm jurisdiction has over the years been said to be satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief — not even if the probabilities are against him; it is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused. . . . Nestadt JA, in the Weissglass case . . . warned that a court must be careful not to enter into the merits of the case or at this stage to attempt to adjudicate on credibility, probabilities or the prospects of success.
>
> . . .

[14] What is clear is that the evidence on which an applicant relies, save in exceptional cases, must consist of allegations of fact as opposed to mere assertions. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have I any relevance. In other words, although some latitude may be allowed, the ordinary principles involved in reasoning by inference cannot simply be ignored. The inquiry in civil cases is, of course, whether the inference sought to be drawn from the facts proved is one which by balancing probabilities is the one which seems to be the more natural or acceptable from several conceivable ones. . . . While there need not be rigid compliance with this standard, the inference sought to be drawn, as I have said, must at least be one which may reasonably be drawn from the facts alleged. If the position were otherwise the requirement of a prima facie case would be rendered all but nugatory.'

[41] A similar standard is applied in other instances such as the test for the existence of a defence in summary-judgment proceedings. There is no reason why it cannot be applied to determine whether the applicant for certification has shown the existence of a cause of action. I would add only this to Scott JA's exposition. The test does not preclude the court from looking at the evidence on behalf of the person resisting certification, where that evidence is undisputed or indisputable or where it demonstrates that the factual allegations on behalf of the applicant are false or incapable of being established. That is not an invitation to weigh the probabilities at the certification stage. It is merely a recognition that the court should not shut its eyes to unchallenged evidence in deciding a certification application. Properly applied the test for a prima facie case should not pose any insuperable difficulties for an applicant for certification.

[42] The appellants accepted in their heads of argument that to obtain certification a prima facie case had to be established. They submitted that the existence of such a case did not involve any enquiry into the merits. In doing so they relied on two cases, Eisen v Carlisle & Jacquelin, from the United States of America, and Hollick v Toronto (City), from Canada. Neither case supports this contention. The passage from Eisen on which reliance was placed was explained in Wal-Mart as not excluding the necessity for

evidence to show that the requirements of Federal Rule 23(a) were satisfied and this would necessarily involve evidence on the merits. In Hollick the question was posed to what extent the class representative 'should be allowed or required to introduce evidence in support of a certification motion'. The answer in the light of the recommendations of the Ontario Law Reform Commission was that:

'In my view, the Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity to respond with evidence of its own.'

Evidence is therefore required to identify the class, identify the common issue or issues and show that a class action is appropriate. That necessarily means that there must be evidence showing a prima facie cause of action, because the existence of a cause of action underpins the existence of a class and serves to identify the issues common to that class that require determination."

[14] Before analysing the applicant's papers to uncover the evidential basis underpinning the relief sought it is germane to recount the ultimate aim of the class action. The founding affidavit declares that: -

"The consumers, who are members of the class, intend commencing legal proceedings in this court for the consideration of the credit agreements entered into between the consumers and three of the four commercial retail banks. The effect of this relief would be to declare that these credit agreements are reckless, together with an order that the operation of these agreements be suspended, or that they be set aside."

[15] In reply the applicant alleges – ***"At the end of the day, what is sought to be achieved is the declaration of invalidity (nullity) of the various credit agreements."*** The relief sought in the belated draft particulars of claim is articulated as: -

> **"(a) An order declaring that the credit agreements entered into by all persons, who are members with either the First Defendant, Second Defendant or Third Defendant, through the intervention of Satinsky 128 (Pty) Ltd, in terms of an advertisement "Drive a new car fromR699" between 1 January 2010 and ____________ (Please insert date of judgment) be declared 'reckless';**
>
> **(b) the setting aside of all or part of the members of the class' rights and obligations under the credit agreements, as the court determines just and reasonable in the circumstances;**
>
> **(c) that the First Defendant, Second Defendant and Third Defendant be ordered to accept delivery or return of the members' of the class motor vehicles that form the subject of the credit agreements so concluded;"**

[16] Scrutiny of the applicant's papers establishes that his case is based entirely on conjecture and assertions. One scours the affidavits in vain for the factual substratum underpinning the assertions made. The entire case is predicated upon extravagant assertions, to wit -

> "46. It is **my submission** that the credit providers (three of the four commercial retail banks) did not conduct an assessment as required by them in terms of Section 81(2) of the NCA.
>
> 47. **I submit** that Satinsky collaterally performed this function, impermissibly, on behalf of the credit providers. Even if I am incorrect in this regard, and **on the assumption** that the commercial banks did conduct an assessment, it **would readily appear on a preponderance of information** available to the credit providers that: -
>
> **(i)** **the consumer did not generally understand or appreciate the consumer's risk, costs or obligations under the proposed credit agreement**; or
>
> **(ii)** the entering into of that credit agreement would make the consumer over-indebted."

[17] Even allowing for some latitude for poor draughtsmanship, it will be gleaned from the aforegoing examples and the applicant's papers as a whole that he has dismally failed to disclose any cause of action whatsoever. Such failure is intrinsically fatal to the success of the application.

<u>Costs</u>

[18] Costs generally follow the result. It was however submitted that since the advent of the democratic order a far more flexible approach to an award of costs has

surfaced in constitutional litigation and, in the event of a finding adverse to the applicant, be followed and the applicant not be mulcted with costs.

[19] This case in fact raises no constitutional issues. It is apparent from the papers and the draft particulars of claim belatedly furnished that the proposed litigation is premised exclusively upon provisions of the Act. The constitutional dimension warranting a flexible cost order does consequently not arise. Does the application nonetheless raise a matter of sufficient public interest to justify a departure from the ordinary rules governing costs?

[20] In each of the first to the third respondents' answering affidavits, the deponents thereto appraised the applicant and his attorneys that the respondents would seek adverse cost orders against him and, against the applicant's attorneys, and order for costs *de bonis propriis*. The raison d'etre for seeking such an order was extensively elucidated. Although the applicant's attorney, Mr *Duncan Heuer* (*Heuer,*) deposed to a confirmatory affidavit annexed to the applicant's replying affidavit, the adverse costs order sought was never addressed. Similarly, in his affidavit in support of the application for the draft particulars of claim to be admitted as part of the papers, this issue was skirted. What does emerge from *Heuer's* confirmatory affidavits is a faint suggestion that his involvement in the litigation was purely altruistic. The founding papers however establish that *Heuer* was the progenitor of the litigation.

[21] This appears clearly from the founding affidavit. The applicant's averments hereanent, confirmed by *Heuer* in his confirmatory affidavit, that -

"39. On 10 July 2014 the Herald newspaper published an article in which affected consumers were to provide their names and contact details to Mr Duncan Heuer of Pieterse Cary Finlaison Attorneys, their present attorneys of record. The title of the Herald article is *"Car Deal Motorists get help: Lawyer steps forward with class action plain".*

40. I, along with a sizeable number of people have either directly contacted PCF Attorneys at its Port Elizabeth offices or left their details through the short code sms facility created by PCF Attorneys for the very purpose of this litigation.

41. Mr Heuer, the attorney of record, indicates that there is, on average, five new sponsors or consumers to the proposed class action litigation. He estimates that an average of five members is added every hour. These members SMS to the short-code text messaging service established by PCF Attorneys. In this text message, they provide their name and contact details, which consist of cell-phone numbers and e-mail addresses.

42. My attorney further indicates that this short-code SMS facility was only started shortly before midday on 14 July 2014. At the time that I deposed to this affidavit there

are over 200 consumers who have sent text message to this number. I attach hereto as **Annexure "B4"** a printed database from 'SMS PORTAL", the company which operates this bulk short-code SMS facility or online SMS platform. This list indicates the first name and surname, cell phone number and e-mail address of each of the affected consumers.

43. In order for people to send their contact details, Mr Heuer placed a communication on Facebook. I attach hereto a 'screen-shot' of this Facebook post at **"Annexure B5"**. Mr Heuer also advises me that there is a Facebook group established with the name *"I have been done in by Drive a New Car from R 699 a month"* which currently has, at time of deposition, 2 479 followers. It is not known who started this Group. The communication at Annexure "B5" was posted on this Facebook Group.

44. I also attach hereto a list compiled by my attorney, marked **Annexure "B6"**. This list has been compiled manually by him. The manual list was compiled before the short-code SMS facility was registered."

[22] It will be gleaned from the aforegoing narrative that these proceedings, astonishingly enrolled as a matter of urgency, and persisted with notwithstanding cogent and valid opposition raised, was persisted with by *Heuer*. The invitation to the public at large, in both the print media and the internet, to participate in the litigation was, to my mind, a matter of aggrandizement, pursued for self-interest and not in the

public interest. In such circumstances, the appropriate costs order is that sought by the respondents. In the result the following order will issue –

The application is dismissed with costs, including the costs of two counsel in the instance of the first and third respondents, to be paid *de bonis propriis*, by the applicant's instructing attorneys, Pieterse Cary Finlaison Incorporated.

____

D. CHETTY

JUDGE OF THE HIGH COURT

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Obo the First Respondent:	*Adv C.D.A. Loxton SC / Adv F.B. Pelser*
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Obo the Fifth Respondent:	*Adv R. Schoeman*
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