REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

…….. ……..

CASE NO 2014/12111

In the matter between:

MAHAEENE MAHAEENE **First Applicant**

MOTLAJSI THAKASO **Second Applicant**

And

ANGLOGOLD ASHANTI LTD **Respondent**

JUDGMENT

HEADNOTE

Access to information act 2 of 2000 (PAIA) – sections 7 and 50 – interpretation –

The two applicants sought from the respondent, a private juristic entity, records pertinent to a possible claim by them against the respondent in terms of which it might be averred that the respondent was liable to compensate them for contracting silicosis whilst working on its mines – respondent refusing to disclose on the grounds that litigation had commenced and section 7(1) of PAIA excused disclosure on such ground

The pending litigation was an application against the respondent and several other companies alleging liability for their employees contracting silicosis which actions or putative actions were the subject of an application to consolidate all such claims into one and obtain certification thereof as a class action against all such companies– the hearing in such certification application had not yet occurred but was imminent when the applicants case was heard

Neither of the applicants was a plaintiff in the actions sought to consolidated and be certified as a class action, but both were members of the class sought to be certified – their attorney was a leading attorney in the certification application – the disclosure was demanded on the grounds that it was needed to inform their attorney of the circumstances relevant to the operations of the respondent so that he could prudently advise them whether or not to claim damages against the respondent or join the class action which envisaged an opt out/ opt in mechanism and thus as contemplated by section 50, the records were needed to protect their rights

The critical question was whether section 7(1) could apply to justify non-disclosure –

***Held* that section 7(1) did apply because, despite the applicants not being cited parties in the certification application, they were by virtue of their membership of the class sought to be certified, implicated as interested parties**

***Held* That the usual meaning customarily attributed to 'party' as being a person cited in the legal proceedings could not be the meaning for the purposes of section 7 – certification proceedings and the mechanics of class action litigation were yet to be addressed by the rules of court and hitherto judicially-driven governance prevailed – the rules of court were antiquated as regards the concept of class actions and the concept of an interested class implied that there would be persons who, although uncited, were de facto plaintiffs by reason of their membership of a designated class – thus section 7 did not require that the requester be a cited party,**

***Held* That the concept of 'proceedings' in section 7 was not confined to a specific proceedings initiated, typically, by a summons or by a notice of motion but to all litigious steps including pre-summons applications, of which certification as a class action was one of several examples**

***Held* That on the facts, as regards the applicants need to satisfy the section 50 requirement of 'reasonably needing' the requested records, the application should fail as the avowed rationale of needing the records to give advice as to sue or not was not established, more especially as the applicants were in the identical position of the several persons cited in the certification applications and of the other members of the envisaged class in respect of whom their attorney had axiomatically furnished precisely such advice.**

Held **That the application to compel disclosure be dismissed**

SUTHERLAND J:

Introduction

1. The two applicants seek, in this application, an order in terms of 82[1] of the Promotion of Access to information Act 2 of 2000 (PAIA) compelling the respondent to disclose specified information.

2. The applicants are former employees of the respondent. They suffer from silicosis. They contemplate an action to claim damages from the respondent based, among other grounds, on a failure to comply with statutory safety standards. The respondent has refused to disclose the information. Two grounds are relied on to refuse, both expressly provided for in PAIA.

3. The first ground invoked to justify the refusal is that stipulated in section 7(1):

> "(1) This Act does not apply to a record of a public body or a private body if-
> (a) that record is requested for the purpose of criminal or civil proceedings;
> (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and
> (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law."

[1] Section 82 of PAIA provides:
"The court hearing an application may grant any order that is just and equitable, including orders-
(a) confirming, amending or setting aside the decision which is the subject of the application concerned;
(b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order;
(c) granting an interdict, interim or specific relief, a declaratory order or compensation;
(d) as to costs; or
(e) condoning non-compliance with the 180-day period within which to bring an application, where the interests of justice so require."

4. As regards Section 7(1) the respondent contends that relevant ‘proceedings’ have commenced and the information requested is susceptible to discovery in terms of rule 35 of the Rules of the High Court.

5. The second ground invoked to justify refusal is that stipulated in section 50(1):

> “(1) A requester must be given access to any record of a private body if-
> (a) that record is required for the exercise or protection of any rights;
> (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
> (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.”

6. As regards section 50(1)(a) the respondents contend that the applicants have not met the threshold of ‘requiring’ the requested information.

The context and history of the controversy

7. The applicants are represented by attorney Richard Spoor. Mr Spoor has achieved distinction in the field litigation over industrial health and safety issues and, as these papers, and his public reputation attest, he represents many thousands of workers who have been diagnosed with silicosis, a lung destroying disease precipitated by the inhalation of fine silica dust particles, experienced chiefly in mining operations. Mr Spoor’s wider role in litigation about silicosis is specifically relevant to the present controversy. The deponent to the founding affidavit of the applicants is Mr Spoor.

8. The applicants are said to have worked in the mines of the respondent until August 2003 and March 2006 respectively, both being dismissed at those times on the grounds of medical incapacity, having contracted silicosis.

9. They instructed Mr Spoor on 14 September 2011 to pursue the prospects of a damages action. Mr Spoor caused requests in terms of PAIA to be made to the respondent. The requests are dated 8 August 2013 and 14 September 2013. They were transmitted to the respondent on 18 September 2013.

10. The information requested includes personal information about the applicants' employment experiences and more general information about the mining operations, and their safety and health practises. It was stated that the information was required to investigate the prospects of a suit against the respondent for damages. Mr Spoor explains that he wishes to be placed in a position to be able to give prudent advice to the applicants, including, among other matters, advice about bringing an action or not, and if so, whether to join in a class action, at present subject to a certification process, or opt out, the two applicants being members of the class sought to be defined in the certification application.

11. On 22 October 2013 the requests were refused by the respondent. The letter that communicated the refusal reads thus:

> "We refer to your request on behalf of Messrs Mahaeeane and Motlajsi for access to records of AngloGold Ashanti Limited ("AGA") in terms of section 53(1) of the Promotion of Access to Information Act, No. 2 of 2000.
>
> We hereby advise that your clients are not entitled to be given access to the records, the reason being the following:
>
> 1. The requests were furnished to us under cover of a letter from you dated 18 September 2013;

2. Prior thereto on 21 August 2013, you served on our attorneys, ENS, on behalf of AGA the application for the consolidation of the certification of the class actions previously instituted (Case No. 48226/2012, South Gauteng High Court);
3. Messrs Mahaeeane and Motlajsi are included in the group of persons on whose behalf the above application for consolidation has been brought;
4. Although the records are requested for "civil proceedings" such records have been requested after the commencement of such proceedings.

In view of the above, the Promotion of Access to Information Act does not apply in this instance. We refer in this regard to the provisions of section 7(1) of PAIA.

In view of the aforesaid AGA is not prepared to give you and your client's access to the records in question."

12. The allusion in this letter to the consolidation of a class action certification application, of which notice was served on the respondent on 21 August 2013, refers to an application which was pending at the time this application was heard. It is brought on behalf of 56 individuals, all silicosis sufferers, against thirty two of their several former or current employers, among whom is the respondent, who is the 11th respondent in that matter. Several attorneys represent various applicants, of whom Mr Spoor is one. Mr Spoor is the ```deponent to the founding affidavit in that matter. A draft of Particulars of Claim is annexed to the application, upon which, at least provisionally, if certification is granted, the claim will be founded. Axiomatically, in such an application, it is necessary to demonstrate a triable claim, together with the propriety of the modus of a class action. The Founding affidavit of Mr Spoor addresses the merits of the causes of action at length, in which he alludes to a breach of statutory health and safety regulations, a breach of common law duties towards the employees and violation of constitutional rights of the proto-plaintiff class.

13. The respondent's deponent to the answering affidavit remarks that Mr Spoor instituted a class action certification application against several mining companies including the

respondent as long ago as December 2012. This is one of the matters now subject to the consolidation application referred to.

The approach to decide the matter

14. The applicants are entitled to information requested from a private entity only if they satisfy the provisions of section 50(1). An onus rests on the applicants to establish, prima facie, that they 'require' the information.[2] If the applicants meet that test, the applicants shall be entitled to the information unless section 7(1) applies to the subject matter of the request. The onus is on the respondent in this latter regard.[3]

15. The respondent initially took the view that owing to the reliance by the respondent on section 7(1) alone in its letter of refusal, cited above, it was illegitimate to invoke other grounds. However, counsel for the applicants indicated from the bar that the parties wish both the section 7(1) and the section 50(1) defences to be decided in these proceedings. These grounds are dealt with together as the pertinent facts and circumstances are, to a significant degree, intertwined.

What is the Law?

16. The right to demand information to exercise or protect a right, in our law, derives from section 32 of the Constitution. The portion relevant to these parties is section 32(1)(b):

> "Everyone has the right of access to …any information that is held by another person and that is required for the exercise or protection of any rights".

[2] Claase v Information officer, South African Airways 2007 (5) SA 469 (SCA) at [6] and [8].
[3] Section 81(3) (a) of PAIA.

17. Section 32(2) of the Constitution mandates the enactment of legislation to give effect to the right. The function of PAIA is to do precisely that. However, it is not the only instrument of law that can be invoked to give effect to that right; other laws also give effect to it; eg, the Rules 35, 38, and 53 of the Rules of Court, of which Rule 35 which deals with discovery and perhaps Rule 38 which deals with the subpoena of evidence are specifically pertinent to this dispute. Other laws which enable access to information to protect rights, include, by way of illustration, provisions of the Promotion of Administrative Justice Act (PAJA).

18. Predictably, the provisions of section 50(1)(a) of PAIA expresses the right in identical phraseology to that of the Constitution. The locus of debate about entitlement by a requester is in the term 'required'. Understandably, the term in this section has been intensely scrutinised by the courts. What has emerged from the judgments is a guarded jurisprudence, disavowing both timidity and overreach.

19. In Unitas Hospital v Van Wyk & Ano 2006 (4) SA 436 (SCA) at [15] – [18] Brand JA collected the authorities on the meaning of 'require'. The information must be 'reasonably required' in the sense of being of assistance providing a substantial advantage to the requester. What is required to interpret 'required' is an *ad hoc* enquiry ultimately dictated by the specific circumstances. In my view, purposively interpreted, it must be asked what ought to happen to fulfil the promise guaranteed by section 32 of the Constitution, moderated, as always, by the provisions of section 36 of the Constitution.[4]

[4] Section 36 of the Contsitution provides:
(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
(a) the nature of the right;
(b) the importance of the purpose of the limitation;

20. What information is 'required' is a distinct question from 'how' a person obtains it; in the latter regard, section 7 of PAIA is a brake on the apparatus of PAIA: ie, if you can get the information through another legal channel you cannot invoke PAIA, however much you satisfy the norm of 'required' in section 50(1)(a).

21. The deference which PAIA shows to other means of obtaining information, is vividly illustrated in those judgments which make plain that PAIA remedies are not to have any impact on the process of information disclosure in litigation, and that where, typically, the rules of discovery and of subpoena apply, PAIA has no place. The most forthright of those judgments is Unitas Hospital v Van Wyk (Supra) which railed at the idea of early pre-litigation discovery.(at paras [19] – [21]) Brand JA went on to qualify his remarks deploring illicit early discovery, holding (at [22] – [23]) that when an application to disclose under PAIA that has the effect of pre-litigation discovery, it is to be examined with care, because such an impact on the litigation process is to be regarded as appropriate only in exceptional circumstances. As in his more general remarks about the facts dictating what is 'required,' the utility of the specific information must be examined to decide the question; for example, a requirement to identify the correct defendant, as distinct from other purposes related to the merits of the cause of action, was identified as a quintessential justification for 'requiring' the requested information.

(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

22. In determining the meaning that must be attributed to section 7(1), several subsidiary questions arise about the phraseology. None of the critical terms used in the section are defined in PAIA.

22.1. First, what meaning must be assigned to the term ‘commencement of such ….proceedings’?

22.2. Second, because the request must be for the ‘purpose’ of ‘such’ proceedings, if the request ‘formally’ is for other ‘proceedings’ not yet ‘commenced’ can the request be construed to be, *de facto,* for ‘such’ already commenced proceedings, if the information is also relevant thereto? How broadly must ‘purpose’ in this context be construed?

22.3. Third, must the requester be a cited party to the proceedings so commenced, or is there room for a non-party; the term “party’ being taken to mean, in the strict sense, a person who is named as a litigant on the pleadings or in the application? For example, can it include, in this context, a person who wants to intervene, or wants to join as a third party, or a person who wants to resist being joined, or a person who wants to participate as an amicus, or, most pertinently to this controversy, a person who is a member of a designated class in a class action, or a putative member of such a class still subject to certification?

The Respondents Contentions

23. The respondent’s essential thesis is this:

23.1. It is common cause that the two applicants/ requesters are members of the class in respect of which the certification application has been instituted. Their membership of that class means that they shall be beneficiaries and as such, 'participants' (a neutral term) in those proceedings. The section does not expressly address what relationship a requester has to have to a commenced proceeding, if any. Assuming a link is required, it would be, typically, as a cited party, but a sufficient link exists if the requester is a member of the class in a class action in proceedings to obtain certification. The prospect of the requesters opting out of the class action later cannot serve to exclude their involvement.

23.2. The term 'commencement of proceedings' is not limited to the service of a summons or a notice of motion. Litigious steps preparatory to the issue of a summons ought to be regarded as part of one continuous process or proceedings. Accordingly, the certification proceedings, notwithstanding the tentative nature thereof, constitutes proceedings which have indeed commenced and shall include the action, when the summons is, ultimately, served. Thus, 'commencement of proceedings' is broader than; eg, the 'commencement of an action', which axiomatically, could only be signalled by the issue of, or service of, a summons.

23.3. As to the request having to be for 'such' proceedings, despite prima facie, the request being for other prospective proceedings, a realistic appreciation of the factual circumstances in this case points to a stratagem to circumvent the section 7(1) limitation on such a request. In other words, the request is, *de facto,* for the purpose of the commenced (certification) proceedings, despite the façade of other individualised proceedings by the applicants being said to be under consideration.

Among the facts relevant to such an inference being drawn, is the role of Mr Spoor, who is ubiquitous in his representative capacity, and who has already advised, so his affidavits show, many other plaintiffs or proto-plaintiffs in the certification application, and other members of the class sought to be certified, whose causes of action are indistinguishable from the causes of action contemplated by the two applicants. He has advised those persons that they have a viable case, thereby rendering implausible the *ipse dixit* that the request on behalf of the two applicants is genuinely 'required' within the meaning attributed to that term for the alleged purposes.

The Applicants' Contentions

24. The applicant's riposte is to address the controversy in a wholly different way.

25. The essence of the applicants' thesis is that section 32 of the Constitution and section 50(1) and section 7(1) of PAIA are concerned to confer rights on individual persons. Once this thread is grasped, it is argued, the exercise of such a right to information ought not to be trumped by considerations which are not directed at the promotion of the rights of the individual. Should it occur, fortuitously, that the exercise of such a right, has also, an impact on other persons, or on other issues, or give rise to anomalies, those outcomes ought not to have an effect of disturbing the exercise of the right.

26. Thus, runs the argument, the mere fact that the disclosure of the information requested could be helpful in another case, is not a reason to refuse it. In the present case, the provisions of section 7 do not snooker the two applicants merely because of their

eligibility to benefit from the class action, if ultimately certification is obtained. No proper rationale exists, it is argued, to put a judicial gloss on the notion of 'commencement of proceedings', because only a party, in the proper sense of that term, can call for discovery under rule 35, and hence a summons ought to be the definitive outward signal of 'commenced' proceedings for these purposes, if not for all. Understood from this perspective, there is no justification for nursing a belief that Mr Spoor has artfully manipulated the legalities to procure that to which the two applicants are not, at present, entitled.

An analysis of the controversy

27. The text of section 7 (1) needs to be closely interpreted. What does the phrase "commencement of such…… proceedings 'mean? The crucial dimension of interpreting a term is to capture the whole phrase and not isolate a seemingly prominent word.[5] It is the

[5] Wallis JA in Natal joint Municipal Pension Fund Endumeni Municipality 201`2(4) SA 593 (SCA) at [18] – [26]; esp [25] and [26]:
"[25] Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However, that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.
[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration." (footnotes omitted)

meaning of 'commencement of such…..proceedings' as a whole that must be given meaning.

28. A 'commencement' is, sure enough, an outward and visible act that marks a beginning of something, but what is the substance of a commencement? Is the issue of, or perhaps, the service of, a summons or of an application the only meaning, *in this context*, of 'commencement of proceedings'? If that is what is intended by the section, why not stipulate precisely that in the section? Perhaps the reason is that there is indeed, sometimes, an earlier step than a summons which is properly to be acknowledged as a 'commencement of such……proceedings'. For example, an application to found jurisdiction through attachment of an asset of a peregrine must precede a summons; also, an application to appoint a curator *ad litem*, axiomatically, must precede a summons. Lastly, an application to certify a class action must precede a summons.

29. The word 'proceedings' is, like 'commencement,' not a term with an immutable narrow meaning. A 'piece of litigation' starting with a summons and ending when the *dies* for an appeal expire is (or are) 'proceedings.' In the context of section 7, bearing its function in mind, there is no reason to suppose that 'proceedings', in this context, should not mean a series of related 'proceedings' each building upon the former, in pursuit of an ultimate judgment.[6] In PFE International & Others v Industrial Development Corporation of South Africa Ltd 2013 (1) SA1 (CC) at [18] Jafta J held that section 7 of PAIA should be restrictively interpreted because its purpose was to fulfil constitutional guarantees. In my view, to understand and give effect to the degree of generality intrinsic in the phrase "commencement of such ….proceedings', does not offend that requirement because a

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[6] See, eg, Goldfields Ltd & Others v Motley Rice LLC 2015 (4) SA 299 (GJ) per Mojapelo DJP at [13][and [144].

wider meaning is functional to the purpose of excluding PAIA from impacting on the litigation process. The phrase is not, obviously, limited to a single action or application, but applies to proceedings which are triggered by any litigious step that might involve successive pieces of litigation, interlocutory or otherwise, perhaps even parallel proceedings too, in pursuit of the ultimate relief. Accordingly, insofar as the present case is concerned, an application to certify a class action, albeit such proceedings seeks no final relief, and has as yet no true plaintiffs because no summons has yet been issued or served, in my view, constitutes 'proceedings' which have commenced.

30. The word "such" must not be overlooked. Its role might seem minor but it is certainly important. Its function is to link the proceedings in question with the *purpose* for which the request is made. The section does not prescribe that a request must necessarily, formally identify 'such' proceedings *per se*; rather, the 'purpose' of the request ought to be for some form of engagement in 'such' proceedings. By this it must be understood that the information procured is to be used in relation to the participation of a person in 'such' proceedings. This consideration, in my view, calls for an objective test for the establishment of the relevant linkage rather than a mechanical search for an expressed linkage. Participation in proceedings can be a role which is broader than as a cited party.

31. As alluded to above, two major themes have dominated the jurisprudence hitherto. First, PAIA is not to be used to interfere with litigation. Second, PAIA is not to be used to obtain early discovery; ie pre-litigation discovery, except in truly exceptional circumstances. Both these themes address the *effects* of the invocation of PAIA, rather than the *animus* with imbues the decision to make a request. In other words, it is the

effect, rather than the motivation, that ought to determine the approach to evaluation of a PAIA request.

32. In my view, the applicants' membership of the envisaged class matters a great deal in this context. But for the accident (or contrivance for that matter) of the applicants not being a named as 'representative plaintiffs' in the certification application, there is little that might be argued to suggest section 7(1) would not be applicable to the two applicants request. Despite not being 'parties 'in the formal sense, because it is their rights which are to adjudicated the notion that they may be regarded as strangers to 'such proceedings' is untenable.

33. Class actions are at this time still a novelty in our courts. How to deal with the logistics has not, despite earnest efforts, received appropriate legislative attention to supplement section 38(c) of the Constitution, which section established the propriety of such proceedings in our law.[7] The manner of managing class action has thus, hitherto, been judicially driven. The decision in Children's Resource Centre v Pioneer Food (Pty) Ltd & Others 2013 (2) SA 213 (SCA) has prescribed the way that the courts will entertain such cases. There, Wallis JA remarked at [15]:

> "The South African Law Commission, in line with many other jurisdictions to which we have been referred, proposed that the procedures applicable to class actions be prescribed by statute, and to that end prepared a draft Bill. However, Parliament has not yet acted on its recommendations or those of a judicial commission of enquiry which made a similar recommendation.

[7] Section 38 of the Constitution provides:
Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.

> Academic voices over many years have likewise not been heard. The utility of a class action in certain circumstances is clear. We are thus confronted with a situation where the class action is given express constitutional recognition, but nothing has been done to regulate it. *The courts must therefore address the issue in the exercise of their inherent power to protect and regulate their own process and to develop the common law in the interests of justice*. This may on some occasions involve us, and courts that will follow the guidance we give, in having to devise ad hoc solutions to procedural complexities on a case-by-case basis — a possibility referred to by the Supreme Court of Canada — but the failure to pass appropriate legislation dealing with this topic leaves us little alternative in the face of the constitutional endorsement of class actions. In what follows we will give guidance as to the approach to be adopted in these cases. But first it is necessary to have clarity as to the essential nature of a class action." (Emphasis supplied)

34. In response to the need to regulate the logistics, Wallis JA held further:

> "[23] All of the parties accepted that it is desirable in class actions for the court to be asked at the outset, and *before issue of summons, to certify the action as a class action.* This involves the definition of the class; the identification of some common claim or issue that can be determined by way of a class action; some evidence of the existence of a valid cause of action; the court being satisfied that the representative is suitable to represent the members of the class; and the court being satisfied that a class action is the most appropriate procedure to adopt for the adjudication of the underlying claims. In my view they were correct to do so and *we should lay it down as a requirement for a class action that the party seeking to represent the class should first apply to court for authority to do so.* My reasons for adopting that requirement are the following.
>
> [24] Most jurisdictions around the world require certification either before institution of the class action or at an early stage of the proceedings. The exception is Australia. The justifications are various. *First, in the absence of certification, the representative has no right to proceed, unlike litigation brought in a person's own interests*. Second, in view of the potential impact of the litigation on the rights of others it is necessary for the court to ensure at the outset that those interests are properly protected and represented. Third, certification enables the defendant to show at an early stage why the action should not proceed. This is important in circumstances where the mere threat of lengthy and costly litigation may be used to induce a settlement even though the case lacks merit. Fourth, certification enables the court to oversee the procedural aspects of the litigation, such as notice and discovery, from the outset. Fifth, the literature on class actions suggests that, if the issues surrounding class actions, such as the definition of the class, the existence of a prima facie case, the commonality of issues and the appropriateness of the representative are dealt with and disposed of at the certification stage, it facilitates the conduct of the litigation, eliminates the need for interlocutory procedures and may hasten settlement. Lastly the Australian experience has

> not proved entirely satisfactory, with numerous interlocutory applications and significant costs and delays being experienced." (Emphasis supplied)

35. From these passages, it is plainly obvious why the *Rules of court* do not, at least yet, expressly address the mechanics of class actions. Understandably, if a class action is to find purchase in our system of litigation it must pass through the gate of certification. In my view, it is plain that the step of applying for such certification must accordingly be regarded at the commencement of any class action consequently instituted by way of a summons. It is a jurisdictional prerequisite, obtainable only through a litigious process culminating in a judicial decision.

36. Doubtless, because of the novelty, as class actions travel through the process of litigation, several more logistical issues will emerge and call for a pragmatic judicial response. One of these issues is hinted at by the applicant's contention that because, under the rules of court, discovery can only be obtained by a cited party, the certification proceedings cannot count as an event addressed by section 7; ie proceedings. This perspective is inappropriate in a context in which quite literally tens of thousands of members of a class are involved as beneficiaries in a class action, including the two applicants. Formal discovery may be compelled by the representative plaintiffs (in due course) and it would be fanciful to imagine that such process of discovery is not tantamount to discovery on behalf of all beneficiaries, including the two applicants. To ignore that dimension and invoke, mechanically, the Rules of court as, at present framed, bereft of context, is simply inappropriate. Again, In PFE International (Supra) at [27] Jafta J was at pains to articulate that a generous interpretation of the Rules of court was the correct approach in order to ensure that the Rules fulfilled their purpose, ie to facilitate effective and fair litigation.

37. The notion that the Rules of court cannot be used to procure information until late in the proceedings has already been dispatched by the decision in PFE International (Supra) which has held that Rule 38 Subpoenas are available during the trial preparation phase, and need not wait until set down.[8]

38. Turning to the facts of the present case, it is inescapable that the possible or actual causes of action upon which the two applicants might seek advice and, if so advised, to rely upon, in an action for damages are indeed indistinguishable from the possible or actual causes of action of the persons who are proto-plaintiffs in the certification application. Moreover, Mr Spoor, having indeed advised the many others to sue, must have, by his own lights, have concluded that there are prospects of a viable case for each of those persons. The respondent, understandably, contends that if he was able to reach that conclusion in their cases by the application of mind, professionally and diligently, what

[8] See PFE International , eEsp at [29] – [31] per Jafta JA:
[29] The statement quoted above demonstrates some of the anomalies brought about by the literal construction of rule 38. It is difficult to imagine how a party that is still to have access to a document can positively tell that a document would definitely be tendered as evidence at the trial. It seems to me that access must precede the formulation of an opinion regarding whether a particular document would have any evidential value at the trial. Limiting the scope of the rule to documents that are to be tendered as evidence and persons who are going to testify results in an absurdity. Furthermore, the literal construction would also lead to the application of PAIA and rule 38 to the same case, depending on the stage of the proceedings. PAIA would apply before the trial date is set and rule 38 afterwards.
[30] Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this court may in the interests of justice depart from its own rules.
[31] It is the flexibility of the interpretation and application of the rules of court that affords the applicants access to the same documents they sought under PAIA. In some cases a mechanical application of a particular rule may lead to an injustice. For example, the Supreme Court of Appeal issued directions dated 28 February 2011 in terms of which parties are given permission to deliver applications for leave to appeal to the registrar of that court, even if some documents required by its rules are outstanding. These directions also excuse parties from lodging for condonation for not complying with s 21(2) of the Supreme Court Act, regarding the period within which an application for leave should be submitted to the court. It is therefore necessary for courts to have the power to adjust the application of rules to avoid injustices. Moreover, the court rules are tailored to facilitate introduction and management of cases under the courts' supervision. I agree with the Supreme Court of Appeal that allowing PAIA to apply in cases such as this would be disruptive to court proceedings." (Footnotes omitted)

can he validly contend he lacks to similarly advise the two applicants, professionally and diligently?

39. The answer, in my view, is that nothing more is reasonably 'required'. A curious, though not too strained, a comparison might be made between the circumstances of the supposed need expressed by Mrs Van Wyk in Unitas v Van Wyk, who demanded disclosure of a report authored by Dr Naude, who was already advising her, and the applicants' request, having regard to their attorney's involvement in advising other persons, in an identical position to them, to require more information than already possessed by Mr Spoor, in order for them (but apparently none of the thousands of others) to adequately instruct Mr Spoor to give them advice addressing the prospect of the very litigation in respect of which Mr Spoor had advised so many others. In my view, just as Mrs Van Wyk's reasonable 'requirements' could be met by means other than a PAIA request, likewise, in relation to the purposes for which Mr Spoor deposes to 'require' the information requested, he already has enough information to give the requested advice, and the PAIA request, on the facts, does not clear the section 50(1) threshold of being reasonably required as the purpose for which it is claimed because that purpose has already been achieved, albeit at the generic level.

40. The applicants' case invites me to ignore the relevance of proceedings which have commenced in pursuit of the very same aim as the applicants' say they ultimately seek, in separate proceedings, notwithstanding that they are beneficiaries as members of the class and, in the face of those circumstances, I should conclude that section 7(1) could not contemplate un-suiting them in a PAIA request for information relevant to those

certification proceedings. In my view, the facts I have described illustrate the absurdity of such an outcome. A court will not tolerate absurdity in interpreting an instrument.[9]

41. In my view the applicants request is trumped by section 7(1) because the purpose of the request is pertinent to proceedings which have commenced in respect of which the applicants have a material interest as members of the class sought to be defined and certified. The respondent acted appropriately by invoking the section to refuse disclosure to the applicants, which would have, in the face of those circumstances, amounted to an early discovery of the type which Brand JA in Unitas Hospital v Van Wyk (Supra) held was inappropriate.

42. Accordingly, to sum up, in my view:

42.1. Section 7 (1) does not require a requester to be a cited party in proceedings.

42.2. Section 7(1) does not prescribe that the request must formally identify the commenced proceedings, and thus whether or not a request is for the purpose of given proceedings is an objective fact and shall not be determined by the peculiarity of the articulation of a request.

42.3. The term ‘Proceedings’ in section 7(1) includes all litigious steps in pursuit of certain relief, including steps taken before the issue or service of summons or the issue or service of an application.

42.4. Persons who are members of a class sought to be certified for the institution of a class action, who make a PAIA request, are not distinguishable, for the purposes of

[9] Eg, SATAWU & Another v Garvas 2013 (1) SA 83 (CC) per Moegoeng CJ at [37] and [144].

section 7(1), from the representative proto-plaintiffs cited as applicants in a certification application.

42.5. Persons who are members of a class, sought to certified for a class action, who ostensibly, for the purpose of individual proceedings distinct from the contemplated class action, make a PAIA request, are by reason of their membership of that class, not entitled to the requested information because it would constitute an illegitimate early discovery, in relation to the class action as contemplated, which would undermine the litigation process, and, as such, a refusal to disclose by the person requested to do so, would be justifiable in relation to the threshold prescribed by section 50(1) (a).

42.6. On the facts, the applicants do not reasonably 'require' the requested information as contemplated in section 50(1)(a) for the purpose of obtaining advice from Mr Spoor about their litigious aspirations.

The Order

43. The application is dismissed with costs, including the costs of two counsel.

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Roland Sutherland

Judge of the High Court,
Gauteng Local Division,
Johannesburg.

Hearing: 10 September 2015
Judgment: 6 October 2015

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