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EXTENDED *LOCUS STANDI* FOR REPRESENTATIVE COMPLAINTS IN TERMS OF THE SOUTH AFRICAN PROTECTION OF PERSONAL INFORMATION ACT 4 OF 2013

by

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"*Start now. Start where you are. Start with fear. Start with pain. Start with doubt. Start with hands shaking. Start with voice trembling but start. Start and don't stop. Start where you are, with what you have. Just... start*."- Ijeoma Umebinyuo. This is for my dear departed mother **Kedibone Sara Morwenyane** who embodies the spirit of Ijeoma's words. Thank you, mother, for teaching me to relentlessly pursue my dreams, and for teaching me that I am enough. You would always say: "*Ngwanake selo se se sa bueng, ga se ka ke sa go palela*."

I would also like to thank all my friends and my family who believed in me wholeheartedly. To **Martin Mmoloki Mosweu**, mama, my heart, thank you for spending all those sleepless nights with me and for ceaselessly affirming me and telling me that I am smart, even on days when I didn't believe it. Thank you, for getting me over the line mama! To **Mx Letlhogonolo Mokgoroane,** thank you for your love and support even in those moments where technology seemed to elude me.

To my dear departed friend **Sam Junior Mbatha**, I remember you with the bible verse Psalms 66 v 11-12: "*You brought us into prison; You laid burdens on our backs; You let men ride over our heads; we went through fire and water, but You brought us into abundance.…*". Finally, to God Almighty, I see, and I thank You for this abundance, thank You for this beautiful life.

DECLARATION

I, Emmanuel Letlhogonolo Morwenyane, 1224376, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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ABSTRACT

The Protection of Personal information Act 4 of 2013 does not seem to provide for lodging of representative complaints in order to vindicate data subjects' rights in terms of section 73 of the Act. This paper critically analyses the approach taken in the Act and argues that the approach may cause inefficiencies when complaints that arise from the same cause of action or from the same incident are lodged on an individual basis with the Information Regulator. The recent mass data breaches in South Africa have created an incentive for the Act to be amended to provide for representative claims to be lodged in the form of class complaints not only to accommodate the data subjects, but other stakeholders such as the responsible parties themselves who may be affected by the infringement of data subjects' rights in terms of the Act. By shining a light on cases like *Nkala*, the research shows how principles of *locus standi* in class actions can be incorporated into our data privacy legislation in order to facilitate the vindication of rights of data subjects, which may be infringed including data subjects who may not even know about the infringement of their privacy rights. The paper argues for a more liberal approach to be adopted when it comes to class complaints. This will not only improve efficiency when the Information Regulator deals with complaints, which arise from the same cause of action, but also facilitate the administration of justice.

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INTRODUCTION

The Protection of Personal Information Act[1] (POPIA) is a fairly new legislation within the South African legal regime. The Act was introduced in order to realise the constitutionally entrenched right to privacy as contained in section 14,[2] which right must be carefully balanced with other competing rights such as the right to access to information,[3] and the right to just administration, and other important rights.[4] The Protection of Personal Information Act does not guarantee the protection of the right to privacy in its entirety, but only regulates privacy with respect to people's personal information,[5] which in the information age, where phenomena such as the mining and misuse of ordinary data subjects' personal information by big technological and social media companies have come under so much attention and scrutiny.[6] Zuboff refers to this phenomenon as surveillance capitalism and highlights the importance of societies standing up together to fight against a greater power behind this.[7]

The establishment of the Information Regulator is just one of the ways the South African data/information privacy legal regime is trying to ensure the all-important right.[8] POPIA sets out eight conditions for lawful processing of personal information in Chapter 3 of the Act, and other further additional protections.[9] Every data subject has a positive right to have his, her or its personal information processed in accordance to the conditions for the lawful processing of

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[1] The Protection of Personal Information Act 04 of 2013.
[2] Section 14 of the Constitution of the Republic of South Africa, 1996.
[3] Ibid section 32
[4] For example, section 27 the right to health care and the right to access to courts section 34.
[5] Iain Currie & Johan De Waal *The Bill of Rights Handbook* 6 ed (2013) 302-303, refer to the right to privacy to be inclusive of what they term Informational privacy.
[6] Sara Quach, Par Thaichon, et al 'Digital technologies: tension in privacy data' (2022) *Journal of the Academy of Marketing Science* at 1301 gives a great explanation of how digital technologies have been used to mine and benefit from data, and Supreeth Shastri, Melissa Wasserman, Vijay Chidambaram 'The Seven Sins of Personal-Data Processing Systems under DGPR' 11th USENIX Workshop on Topics on Cloud Computing (Hotcloud 2019) (2019) at 1 last accessed on from *https://shastri.info/papers/hotcloud2019.pdf* on 01 August 2022, allude to how Facebook in 2016 had their user data illegally harvested to influence U.S and U.K democratic processes.
[7] Shoshana Zuboff *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier for Pow*er (å2019) 480 to 492.
[8] The information Regulator is established in terms of section 39 of the POPIA, supra note 1.
[9] Supra note 1, these additional protections include, inter alia notification of Information Regulator in instances of security comprises (section 22), the rights of data subjects regarding direct marketing (section 69), rights regarding automated decision-making (section 71). The brief summary of the additional protections can be seen in section 73(b) of the Act which protects against infringements or interference with those rights.

personal information.[10] In an instance where a data subject's rights or additional protections are violated, he or she would ideally be able to approach the Information Regulator to lodge a complaint for interference with the protection of their personal information.[11] *Locus standi* (legal standing) to lodge a claim with the Regulator in terms of section 74 comes into the spotlight in this regard. This research paper critically discusses how the *locus standi* in claiming this right is seemly curtailed in the Act specifically by section 77(1)*(e),* which provides that the Regulator may decide not to take any further action in a claim lodged with it, if it is of the view that the complainant does not have a sufficient personal interest in the subject matter of the complaint. Moreover, the right to lodge a complaint is curtailed by the fact that a provision enabling representative complaints, particularly group or class complaints is not contained in the Act, which could be a missed opportunity for our data privacy legal regime.

I will discuss how these limitations, in terms of section 77(1)(e), fail to recognise representatives' legal standing which is firstly recognised by our own Constitution,[12] and our own legal jurisprudence which for a long time has recognised different types of legal standing.[13] These issues may also may also impact how effectively the Information Regulator ensures the protection of personal information.

The paper will also conduct a comparative study of similar data privacy in regional and domestic legislations from other Jurisdictions with similar legal systems to that of South Africa, particularly, Europe and Australia which allow for lodging of data privacy complaints in a representative capacity. It will recommend ways in which the South African POPIA can expand its provisions to accommodate complaints in the representative capacity, and more particularly class and group complaints.[14] The paper is also couched in the context of what is happening within our own borders regarding mass data privacy breaches discussed as in Part II below. The structure of the paper is as follows:, Part I is the introduction. In Part II of the report, I will provide some background, context within which this paper it based and set out the stakeholders involved in this discussion, and a brief history of data privacy legislation in South Africa. In Part III, I will discuss the current South African principles when it comes to *locus standi* and

[10] Ibid section 5.
[11] Ibid section 74(1).
[12] Section 39 Supra note 2.
[13] Extensively discussed in part IV below.
[14] See part VII below.

representation of data subjects as it stands currently in South Africa. Part IV will explore how the South African Constitution and common law have been interpreted to expanded principles relating *locus standi* particularly representative claims such as class actions in our courts. Part V will discuss the comparative study particularly focused on Australia as a jurisdiction which we can model the recommended legislative amendments. Part VI sets out the lessons for South Africa, and I will conclude in Part VII.

BACKGROUND AND CONTEXT

In August 2020, reports emerged that a credit bureau company, Experian, experienced a data breach, where millions of South Africans' credit information, which also includes personal information was leaked.[15] This data breach means that the personal information of millions of South African is vulnerable and can be misused to their detriment. In 2021, this breach seemed to still have been a problem as reports emerged again that Experian client data was leaked on telegram. Another data breach was reported in 2022 of an international credit bureau company, TransUnion, which also exposed millions of South Africans to potential misuses of their personal data.[16] These two phenomena are the perfect justification for the existence of data protection laws like POPIA which require companies, who are responsible parties to establish and maintain security measures in their organisations to prevent data breaches.[17]

There are possible complaints in terms of section 73 of POPIA, that can emerge as a result of these data breaches, and since millions of people are affected, complaints can easily run into hundreds of thousands or even millions of individual complaints. This sheer amount creates an incentive for complaints to be lodged as class or group complaints, representative complaints, by the actual data subjects who actually individually suffer from data breaches or by the responsible parties (companies) themselves who hold and process personal information of data subjects in instances where they have not caused interference with the protection of personal information.

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[15] Sibahle Malinga 'Experian struggles to quell breach as data leaked again' *it web* last accessed from https://www.itweb.co.za/content/o1Jr5qx9OpbvKdWL on 03 January 2023.
[16] Neesa Moodley 'TransUnion data breach potentially leaves 54 million South African's Exposed' *Daily Maverick* 09 March 2022 last accessed from https://www.dailymaverick.co.za/article/2022-03-19-transunion-union-data-breach-leaves-54-million-south-africans-exposed/ 03 January 2023.
[17] Section 19 of POPIA.

As indicated above, section 77(e) seems to present an obstacle for complaints in such representative capacity as class or group complaints, as it only requires that a person must have sufficient personal interests for the information Regulator to entertain a complaint. Therefore, the possible stakeholders like data subjects who may just be acting as representatives in a class or group compliant or responsible parties who maybe also use operators to process personal information of data subjects, and who may not be the cause of a complaint in terms of section 73 of POPIA, may seemly be prevented from lodging complaints with the Information Regulator. Furthermore, there is no provision in the Act and the Regulations that allows for this. Possible stakeholders include companies who process personal information themselves, companies who trade in personal information, and the data subjects themselves. The issues that emanate from this is that, in instances of complaints that emerge from a single incident like that of data breaches explained above, or complaints which involve a single perpetrator, or complaints where data subjects have common cause and seek a similar remedy, neither of the above-mentioned stakeholders can lodge group or class complaints as this is not provided for in POPIA as compared to other jurisdictions like Australia where this is provided for. There is a justification for each data subject to be able to exercise their own right and autonomy to lodge a complaint with the Information Regulator in their own individual capacity, however, in instances mentioned above, it is argued in this paper that it would be ineffective and inefficient to lodge individualised complaints in matters of common cause or complaints emanating from a single incident which may affect a whole class of data subjects / complainants. Furthermore, this may even take an administrative toll on data privacy Regulator as young as the Information Regulator (South Africa). It is within this context that this research paper is written, wherein it is argued that we can improve the legislation to include complaints within representative capacity and class complaints. A comparative study of Australia's legal system and data privacy legislation will also be undertaken and used as a benchmark of how South Africa can improve its own data privacy legislation.

The South African Law Reform Commission issued a discussion paper on data privacy.[18] The Commission even proposed a draft bill for data protection, the bill also contained the general principles for processing personal information similar to the currently existing 8 conditions for lawful processing of Personal Information.[19] The commission also proposed the establishment of the Information Protection Commission,[20] which would enforce the protection of personal information. The current Protection of Information Act is heavily reliant on the European Union's General Data Protection Regulation,[21] (GDPR) as it has been said that European Union has been at the forefront in the development of data protection legislation.[22] POPIA is therefore known to be very similar to the GDPR, thus a comparison is warranted between the two pieces of legislation.[23] POPIA was assented to by the President on 19 November 2013[24] and came into effect on 01st July 2020.

LOCUS STANDI AND REPRESENTATION OF DATA SUBJECTS IN SOUTH AFRICA

(a) Locus standi and representatives claims in POPIA

Locus Standi (legal standing) refers to the right to sue and be sued in one own's legal capacity.[25] The test for *locus standi* is two-pronged; first step is to enquire whether the party has direct and substantial interest, and secondly whether the party has the legal capacity to litigate in the matter.[26] The principles surrounding legal standing in South Africa have been far more developed beyond individualised claims especially in the context of our constitutional democracy to include group actions, class actions, and representative claims. Any person can approach a competent court to claim or vindicate the rights entrenched in the bill of rights. [27]

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[18] South African Law Commission Discussion Paper 109 (Project 124) *Privacy and Data Protection* (2005).
[19] Ibid. Annexure B.
[20] Ibid chapter 5.
[21] General Data Protection Regulation (EU) 2016/679 that came into operation in May 2018.
[22] Y. Burns & and A. Burger-Smidt *A Commentary on the Protection of Personal Information* Act 1 ed (2018) 5.
[23] Cynthia Yav 'Perspectives on the GDPR from South Africa' (2018) 2:3 *International Journal for the data protection Officer, Privacy Officer, and Privacy Counsel* 19-20.
[24] Supra note 1 (GN 37067 in GG of 26 November 2013).
[25] Stephen Pete *et al Civil Procedure: A Practical Guide* 2 ed (2013) 13.
[26] Ibid 13-16.
[27] See section 38 *(c)* and *(d)* of the Constitution, Supra Note 2, which provides that anyone acting as a member, or in the interest of, a group or class of persons to approach such a competent to vindicate a right contained in the bill of Rights.

Although the Information Regulator is not necessarily a court of law, which is the forum that developed the principles surrounding *locus standi*, I suggest that the same principles and tests are used to establish legal standing in forums like regulatory bodies and other quasi-judicial forums. This is evidenced by the very wording contained in section 77 (1) *(e)* of POPIA. Section 74 provides that any person may submit a claim to the Regulator alleging interference with the protection of personal information, and then section 77(1) (e) provides that the Regulator may decide not to take any action if it is of the opinion that the complaint lacks "sufficient personal interest" in the matter. This may appear to immediately curtail complaints before the Regulator to individual complaints. The Act itself seems to be silent on complaints that can be brought on representative capacity, absent any provision in the Act that speaks any form of representation.[28] It appears that the only type of complaint that the Regulator may take an action on or entertain is one where there is *"sufficient personal interest"* in the matter. The Information Regulator seems to have also recognised this deficiency since there is a proposed amendment to Regulation 7 of the exciting regulation which provides representative claims to a certain extent.[29] This is further discussed below.

(b) Proposed amendments for the extension

The Information Regulator has recognised that there may be a need to extend *locus standi* to include representative claims when claiming interference with the protection of information. The existing Regulations to the Protection of Personal Information[30] are silent on the representative claims in POPIA, however, there is a proposed amendment to Regulation 7 published in Government Gazette,[31] which provides as follows:

[28] This is both the case in the provisions of the main Act and Regulation 7, thereto which speaks of submission of a complaint to the Regulator as published in 'Regulations relating to the Protection of Personal information 2018' (GN R 1383 in GG 42110 of 14 December 2018).
[29] 'Amendment of the Regulations relating to the Protection of Personal Information, 2018' (GN 560 in GG 44761 of 25 June 2021).
[30] 'Regulations relating to the Protection of Personal Information, 2018' (GN R1383 in GG 42110 of 14 December 2018).
[31] 'Amendment of the Regulations relating to the Protection of Personal Information, 2018' (GN 560 in GG 44761 of 25 June 2021).

"Amendment of Regulation 7

7. Regulation 7 of the regulations is hereby amended by the insertion of regulations 7.3 to 7.18

7.1. The following person may complain-

…

7.1.2. *Any person acting on behalf of data subject whose personal information has been interfered with, as referred to in section 73 of the Act*; …

7.1.5. *Any person acting in the public interest."*

It appears that in the suggested amendment to the existing Regulations, two types of representative claims are proposed which are any person acting on behalf of a data subject whose protection of personal information has been interfered with as envisaged in proposed amendment Sub-Regulation 7.1.2, and any person acting in the "public interest" in Amendment Sub-Regulation 7.1.2. Sufficient personal is still retained.[32] The proposed amendment that speaks to someone acting in a representative capacity seemingly seems to still be centred around an individualised complaint. The proposed amendment is silent on the group or class actions. The new proposed legislation is also silent on the suitability of the representatives as indicated in both the European and Australian legislation, which will be further discussed below. In the GDPR a representative is required to be a non-profit organisation acting within the public interest while in Australia, where the Privacy Act specifically provides for class action, a representative is actually required to be a member of the class.

(c) Sufficient Personal Interest similar to Common Law locus standi

It is noted that "sufficient personal interest" is a statutory concept, however, it does not seem to be different from common law principles or language used when establishing *locus standi* in a court of law, which principles, are to date, still relevant. In establishing *locus standi* the language used therein is either "*sufficient interest" / "direct interest*".[33] The stark similarities

[32] Ibid. Amendment Sub-Regulation 7.1.3.

[33] See Stephen et al op cite note 25 at 13, also see the matter of T*ransitional Government for the territory of South West Africa v Eins* 1988 3 SA 369 (A) 378J and 389I – 390A which held that to show that the requirements of *locus standi* mean that someone who applied for legal aid must have a ***sufficient interest*** in the action of the for the court to decide that his claim should be considered, and see the Appellate division judgment of *Jacobs v Waks* 1992 (1) SA 521 (A) wherein Botha AJ

between the statutory language 'sufficient personal interest' and 'sufficient/direct interest' cannot be denied which are the tests or standards used to find *locus standi*, and which test was used in *Jacobs*.[34] The facts in this case briefly summarised involved a town council that took a decision to demarcate certain parts of town for the exclusive use of white persons, which decision was made in terms of section 2(1) of the Separate Amenities Act 49 of 1953 (currently repealed by the Discriminatory Legislation Regarding Public Amenities Repeal Act 100 of 1990). The notice to this effect was erected in the parks, and in March of the same year, a decision was taken to provide more financing to have the notices translated into Setswana. The affidavit of the second respondent who was the president of the chamber of commerce (COC) indicated that some African people were deeply offended by this which led to the boycott of the businesses that Africans supported, because a right that they had for a long time was suddenly taken away, and the president of COC further alleged that it led to up to a 100% loss in turnover for some businesses, and in some, retrenchments occurred. This led Waks, an African rates payer, residing in Khutsong (an African area around Carletonville), to institute an action of review against these decisions along with other respondents. The court found that the first respondent and third respondents had *locus standi* and not the second respondent an African who claimed that his dignity was affected by the notice.[35]

The matter came before the Appellate Division, and in a judgment delivered by Botha JA, the *locus standi* of all three respondents was re-examined. In the instance of the first and third respondents, the fact that Mr. Waks owned a hardware and timer store and suffered a loss in turnover due to the boycott as a result of the council's decision, and that the third respondent owned a clothing store that also suffered a loss in turnover led the court to conclude that there was *"sufficient interest"* to establish *locus standi*.[36] In the instance of the second respondent, Botha JA indicated the fact that the decision affected his dignity (*dignitas*) along with many other Africans, and the fact that he resided in Khutsong and often visited Carletonville provided an intimate enough relationship to establish a "direct interest".[37] In the instance of the third respondent who did not reside in Carletonville but merely owned a business the court referred

indicated in that matter that in order to determine locus standi in that matter It was particularly the requirement of ***direct interest*** which was relevant at 522H.

[34] Ibid *Jacobs*.

[35] The English summary of the *Jacobs v Waks 1992 1 SA 521 (A)* is the courtesy of an article by Johan Kruger SC 'The Appellate Division takes another look at locus Standi, *Jacobs v Waks 1992 1 SA 521(A)*, SA' (1992) *Publickreg /public Law* at 320 -329, because the case was written in Afrikaans.

[36] Ibid page 323 – 324

[37] Ibid page 324 and para (543 C-F) in the *Jacobs* Judgment.

to the other test of *locus standi* called "special interest" which was explained in the case *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd 1933 AD 81 101-102* as follows:

> "Someone cannot claim *locus standi* if his interests in the matter are nothing different from all other citizens, however, if a right which can be exercised personally is infringed, his *locus standi* is not excluded merely because he shares the interest with other members of the public."[38]

Kruger, same as Stephen, describes that the right to claim relief is governed by two questions, whether there is a legally enforceable right, and whether the complainant is entitled to enforce the right.[39] He further quotes authors like Baxter[40] whom he claims to have attempted the most lucid explanation of what the phrase "sufficient interest" means, which is explained as "to comprise of different kinds of interests including *proprietary, pecuniary,* and *personal liberty"*.[41] It is further delineated that "the range of interests is qualified by the fact that they must be direct in the sense that they directly concern the complainant**,** and capable of individuation."[42] This sounds more like the statutory concept of "sufficient personal interest" we see in POPIA. Kruger also indicates the position of academics like Baxter that there is no need to show special interest. Any recognised personal interest, even if shared with other members of the public, will be sufficient. He points out that all three aspects were available in the *Jacobs* case.

The tests to establish *locus standi* as explained above are still relevant and used in our law as they were endorsed in the recent 2016 Constitutional Court judgment of *Areva NP Incorporated in France v Eskom Holdings Soc Limited*,[43] using the same language as the phrase "direct interest", Zondo J in his Majority Judgment, quoting an earlier judgment by the Constitutional Court in *Giant Concerts,*[44] held that:

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[38] Ibid page 325
[39] Ibid 325.
[40] Lawrence Baxter *Administrative Law* (1984) 653.
[41] Ibid 325.
[42] Ibid at 654-655.
[43] 2017 (6) SA 621 (CC).
[44] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (*Giant Concerts*) at para 43.

> "This Court held in *Giant Concerts* that, "where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities". We said: "The own interest litigant must therefore demonstrate that his or her interests or potential interests are "directly affected**"** by the unlawfulness sought to be impugned".[45]

The key phrase therein is *"directly affected".* It is prudent to take note that this is the same language used by the learned author Baxter when he described the range of interests contained in the phrase *"sufficient interest"* which he said must be direct in the sense that they must concern the complainant.[46] This can be equated to the *"...personal interest"* phrase used in POPIA, the *"sufficiency"* thereof will depend on the facts.[47] Which we saw from this court case that it can be hard to prove.

The facts, in *Areva*, were that a company called WEBSA which had won the review application in the high court and the Supreme Court of Appeal against Eskom in their decision to award a tender to their competitor Areva Inc, who claimed that WEBSA did not have *locus standi* to institute the application in its own name as it was not the true tenderer or bidder, because it was its sister company incorporated in the US called Westinghouse USA using WEBSA's letterhead that tendered with Eskom.[48] The court held that

> "Just because company A belongs to the same group of companies as company B does not give any one of the two companies *locus standi* to institute court proceedings in its own right in a matter that only directly affects the other company."[49]

The majority judgment seems to have adopted a very strict or narrow approach towards what would constitute *sufficient interest or direct interest* to establish *locus standi* since in its view, not even a parent company has sufficient interest or direct interest in the affairs of its subsidiary, however, in the dissenting judgment delivered by Moseneke J, he held that WEBSA had the requisite standing in the judicial review it sought. It had *"direct and substantial interest"* under the common law, and own standing conferred by section 38 of the Constitution brought about by the section 33 right to Just Administrative Action."[50]

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[45] Ibid at para 32.
[46] *Baxter* Op cite note 40 at 654-655.
[47] Supra note 43 at para 12 under the dissenting Judgment by Moseneke J.
[48] Ibid at para 33.
[49] Ibid at para 38.
[50] Ibid at para 50.

Furthermore, the dissenting judge in testing the *"sufficiency"* held that WEBSA and Westinghouse USA along with Areva were involved in a protracted bidding process, and not even once did Areva or Eskom raise an issue at that stage. The court held further that even if WEBSA acted for a disclosed or undisclosed principal, which would confer on it *"sufficient own-interest"*.[51] The Constitutional Court is the highest court to establish precedence and lower courts will be bound by its decisions.

Supreme Court judgments like *Jacobs,* and Constitutional Court judgments like *Areva* and *Giant Concerts* and academic writings like that of Baxter and Kruger endorsing and elucidating these common law tests are likely to be used to influence the Regulator to give meaning to the phrase "sufficient personal interest" contained in section 77(1)*(e)* as it is closely worded to what is described in the academic writing and legal jurisprudence when using phrases like "sufficient and direct interest".[52] However, in the conclusion of Kruger's article, he points out that the *Jacobs* decision is an indication that *locus standi* should not be a stumbling block in a search for relief, and in establishing such, the approach should be extensive rather than restrictive.[53] Most importantly the Constitutional Court in *the Giant Concerts* case acknowledged that each case must be decided upon its own facts.[54]

EXTENSION OF *LOCUS STANDI* BY THE SOUTH AFRICAN CONSTITUTION,1996 AND CLASS ACTION JURISPRUDENCE

(a) Current status of locus standi

As indicated above South African law on the principles of *locus standi* has developed far beyond the individual or, as the Constitutional Court describes, "own-interest" litigation.[55] This is particularly because of the introduction of section 7 of the Interim Constitution which is currently section 38 of our Constitution.[56] Section 38 *(c)* and *(d)* provide as follows:

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[51] Ibid at para 58.
[52] *Baxter* op cit note 40 at 653.
[53] Ibid 329.
[54] Supra 44 at para 41.
[55] Supra note 43 *Areva* at para 52-55 where the Court uses the phrase "own-interest litigation."
[56] For a brief history of the development of class actions See the Judgment of *Nkala and Others v Harmony Gold Mining Company Limited and Others* [2016] 3 All SA 233 (GJ) at para 24 to 33.

> "Anyone listed in this section has a 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 a person who cannot act in their own name;
> *(c) Anyone acting as a member of, in the interest of, a group or class of persons.*
> (d) *Anyone acting in the public interest*; and
> (e) And association acting in the interest of its members."

In the most recent and seminal judgments about class actions, *Nkala and Others v Harmony Gold Mining Company Limited and Others,*[57] the court interpreted the above constitutional provision particularly section 38(c) to have expanded the standing of a person allowed to approach the court. The court held that:

> "It provided for a person acting as a member of, or in the in the interest of a group, or class of persons to approach the court *"even if the person has no real or direct interest"* in the relief" (emphasis added).[58]

It appears that our Constitution and courts have altered the common law position and adopted a much broader approach in establishing *locus standi* because when it comes to class actions or group actions it encourages representation by both members of a class and non-class members alike. This is then done by referring to the phrase "as a *member of* or "*in the interest of"* particularly the latter, is changing the common law position relating to the test of "*direct interest*". However, it must still be carefully noted that this consideration is only within the context of class of group actions. Therefore, as shown by the Constitutional Court judgments in *Giant Concerts* and *Areva*, the standard "direct interest" test is still relevant in our law especially in individual or "own interest" claims.

In the context of data protection, class or group actions can be a very useful tool in effectively protecting data privacy of individuals. Zuboff argues that in the context of large data collection, or surveillance of data subjects, in order to ensure dramatic reversals of such practices it is better for data subjects to come together in a community like approach against the bigger power. He argues:

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[57] Ibid.
[58] Ibid at Para 25.

> "individuals each wrestling with a myriad complexities of their own data protection will be no match for surveillance capitalism staggering asymmetries of knowledge and power…the individual alone cannot bear the burden of this fight at the new frontier of power."[59]

This community-based approach seems to be more of a powerful and arguably an efficient and effective tool to ensuring data protection of data subjects who usually face large corporations with bigger powers, and as Zuboff argues, to ensure the reversal of such practices that are harmful to data subjects, like data surveillance.

However, in class actions, the aspect of "suitable representation" remains an important consideration in our law. This consideration first appeared in our jurisprudence in the judgment by the Supreme Court of Appeal of *Nngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*[60] where the court accepted that certification is a necessary step to be taken before one institutes a class action and the court identified the four requirements for such certification to be ordered as follows: the class must be so numerous that joinder is impracticable, the questions of law and fact are common to the whole class, the applicants representing the class are typical of the class of the rest and the applicants will fairly and adequately protect the interest of the class.[61] The Supreme Court of Appeal later in the case of *Children's Resources Centre Trust v Pioneer Foods*[62] further developed the above considerations and elevated them to the status of requirements as follows:

1. That a class, objectively identifiable, exists;
2. That a triable cause of action exits;
3. That there are some issues of fact, law, or both, which are common to the relief claimed by all the potential members of the class that will have to be determined;
4. That the relief sought, or damages claimed, by the potential class members 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 members of the class;
6. That the proposed representative is suitable to represent the class and conduct the litigation; and,

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[59] Op cite note 7 at 428.
[60] *Nngxuza v Permanent Secretary, Department of Welfare, Eastern Cape and Another* 2001 (2) SA 609 (E).
[61] Ibid at para 16.
[62] 2013 (2) SA 213 (SCA).

7. Whether in the particular case a class action is the most appropriate means of determining the claims, or issues (factual, legal, or both) raised in the claims, of the class member.

The consideration that this paper is most concerned with is consideration number six which speaks to the suitability of the class representative. However, this status of requirements was short-lived as the Constitutional Court in the matter of *Mukaddam v Pioneer Foods (Pty) Ltd*[63] against the background of the court recognising section 173 of the Constitution empowers courts to protect and regulate their own processes "what is called inherent power/ inherent jurisdiction, taking into account the interests of justice,[64] the requirements as laid down by the court in *Children's Resource Centre* case must merely be taken as factors in determining the interest of justice and not strict requirements. The court went further to state that the absence of one factor or other factors should not entitle the court to deny certification.[65] One wonders if this means that the absence of a suitable representative can be rendered superfluous or if a named plaintiff who himself or herself is uninjured (has no direct interest in the relief) can represent a class. This is discussed further below.

(b) Suitability of representatives

The Constitutional Court in *Mukaddum* aside from endorsing the consideration or factors involved in a class action as laid down by the *Children's Resource Centre* case, did not extensively delineate what the consideration or the factor of "suitable representative" actually entails which is important to the discussions in this paper, however, the court did mention that the interest of the representative must not be in conflict with that of the class members.[66] We now have to turn back to the Supreme Court of Appeal in *Children's Resources Centre* judgment wherein Wallis AJ attempted to describe what constitutes a "suitable representative".

Wallis AJ started by indicating, as a matter of comparison, that in some jurisdictions such as the United States, it is an express requirement that the representative plaintiff has a claim that

[63] *Mukaddam v Pioneer Foods (Pty) Ltd and Others* (CCT 131/12) [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) 27 June 2013.
[64] Section 173 of the Constitution.
[65] Supra note 62 at para 35.
[66] Supra note 63 at para 18.

is typical of the claims of the class (meaning the representative must be a member of a class).[67] and in Canada and Australia, whilst there is no express requirement of typicality. Mulheron suggests that the jurisprudence of those countries makes that a requirement. He then importantly states:

> "That question does not arise in South Africa, because section 38(c) of the constitution expressly contemplates a class action being pursued by anyone acting as a member of, *or in the interest of*, a class"[68]. (emphasis added)

The judge even recognised that some of the appellants in that matter to just be acting in the interest of the class.[69] Again, this is a classic example of a South African court, and this time a Supreme Court of Appeal, appreciating the implication of the constitutional phrase "*or in the interest of"* to include persons who have *no direct interest in the relief of the matter*" to have the constitutional ability to represent a group or a class of people. It appears that when it comes to class actions, the requirement of *"direct interest"* can fall away, this is even at the level of the Constitution. The courts seem to have adopted a more liberal approach in respect to representative claims especially in class actions.

The court then proceeded to set out at a high level, two broad requirements/elements which a court needs to be satisfied with when it relates to class representatives, first, that there is no conflict of interests between the representative and those with whom they wish to represent, and second, whether the representative has the capacity to conduct the litigation properly on behalf of a class. The court indicated that this is important, because unsuccessful litigation will have the effect of destroying the claims.[70] The capacity to act in a representative capacity includes the following aspects:

- Does the representative have the time, inclination, and means to collect and procure the evidence necessary to conduct litigation;?
- Does the representative have the financial means to conduct litigation and if not, how are they going to be financed?
- Does the representative have access to lawyers with the capacity to run the litigation properly?

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[67] This is as per Rule 23 of the Federal Rules of Civil Procedure.
[68] Supra note 62 at para 46.
[69] Ibid.
[70] Ibid para 47.

- On what basis are those lawyers funded?
- If litigation is completed on a contingency, agreements to that effect must be completed.

In the context of protecting data subjects, especially a large number of them against data privacy infringements, it may be in the interest of South African data privacy legislators to also adopt this liberal approach in allowing representative complaints in the form of class complaints to come before the Information Regulator. This is to accommodate stakeholders such as the responsible parties who process personal information, in cases where they were not the cause of such infringements, or organisations who are acting in the public interest in the data privacy space, and who may be acting on behalf of many data subjects who may not be aware of the infringements of their data privacy rights. This approach may allow for expeditious settlement of complaints and may also increase the Regulator's efficiency. Since we are not necessarily dealing with litigation, the suggested amendments to the legislation below might not need to include every aspect indicated above. It is later shown in the comparative study below, how the European data privacy regime incorporated the consideration of "suitability of representatives" into their legislation at the regulatory complaint stage.

SOUTH AFRICAN POSITION IN A COMPARATIVE CONTEXT

When it comes to the representation of data subjects, the South African position is distinguishable from other jurisdictions like the UK, the EU and Australia which have ironically largely contributed to how our very own POPIA was drafted except for the provisions around representation.[71] This is in the sense that POPIA is silent on the issue of representation of data subject or complainants, there is no provision in the Act that specifically provides for it, except for the fact that section 74 of the Act provides that " any person' may submit a complaint to the Regulator…" then section 77 (1) (*e)* curtails this in the sense that it empowers the Regulator not to take action in a complaint if it is of the opinion that the complainant does not have "*sufficient personal interest*" in the matter. This is concerning as it might be limiting to the rights of data subjects to be vindicated in a myriad of ways rather than just one traditional method, which may adversely affect millions of data subjects, and therefore limiting to the

[71] Op cit note 22 and 23.

project of achieving justice and to the purpose of POPIA set out in section 2 *(c),* which is to provide persons with rights and remedies to protect them against the processing of personal information that is not in accordance with the Act.

(a) Representation in the GDPR

When one looks at the EU data privacy laws which are regulated by the General Data Protection Regulation (GDPR) which is a regional data protection law, there is a specific provision relating to the representation of data subjects. Article 80 provides as follows:

> "**Representation of data subjects**
>
> (1) The data subject shall have the right to mandate a not-for-profit body, organisation, or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf were provided for by Member State law.

It is noted that representative claims under the GDPR are very specific with an array of requirements for the representative namely it must be a non-profit body, acting in the public interest and in the field of data protection. This appears to be a very high standard of who can act in a representative capacity, and, it does not appear that individuals can act in this capacity. Furthermore, the provisions regarding representative complaints do not specifically refer to class complaints, however it seems that complaints could be lodged in that manner as they also seem to accommodate that prospect. Furthermore, it does not appear that the provision requires 'sufficient personal interest' it just requires a 'public interest'.

(b) Representation in the United Kingdom

The United Kingdom (UK) has its own domestic data privacy legislation called the Data Protection Act, 2018,[72] and the provisions that speak to representation are contained in the Act from **section 187 and 188** which provides as follows:

> **"Representation of data subjects with their authority**

[72] Data Protection Act, 2018 c.12.

(1) In relation to the processing of personal data to which the GDPR applies—

(a) Article 80(1) of the GDPR (representation of data subjects) enables a data subject to authorise a body or other organisation which meets the conditions set out in that Article to exercise the data subject's rights under Articles 77, 78 and 79 of the GDPR (rights to lodge complaints and to an effective judicial remedy) on the data subject's behalf, and

(b) a data subject may also authorise such a body or organisation to exercise the data subject's rights under Article 82 of the GDPR (right to compensation).

(2) In relation to the processing of personal data to which the GDPR does not apply, a body or other organisation which meets the conditions in subsections (3) and (4), if authorised to do so by a data subject, may exercise some or all of the following rights of a data subject on the data subject's behalf—

(a) rights under section 165(2), (4)(d) and (6)(c) (complaints to the Commissioner);…"

The GDPR does not apply to the UK, however as indicated in the above quote, its provisions have been incorporated into the UK's domestic legislation and the data privacy principles remain the same.[73] Furthermore, there are similar requirements in respect of the representative body being charitable, and acting in public interest in the data privacy field.[74] One can immediately see how the European and the UK's legislation takes the "suitability of the representative" consideration very seriously. Article 80 specifically requires the representative to be a non-profit organisation, with a statutory objective that is in the public interest and activity in the field of protection of data subjects. Furthermore, the domestic legislation in the UK requires such a representative body to be charitable in its nature, and not to distribute its assets amongst its members[75]. However, it is only fair to question if they are not too stringent, and if they will pass the "in the interest of a class or group" or the "no direct interest in relief" tests contained in our Constitution and developed by our jurisprudence respectively. Quite distinguishably, the suitability of representatives in the context of data privacy protection in Europe is seemingly judged on the basis of being charitable and acting in public interest, while in South Africa it may be judged on skill and financial muscle to pursue a group or class action, given the thinking of the *Children's Resources Centre* judgment.[76]

[73] Information Commissioner's Office UK 'Overview-Data protection and the EU' last accessed from https://ico.org.uk/for-organisations/dp-at-the-end-of-the-transition-period/overview-data-protection-and-the-eu/#:~:text=in%20the%20EEA.-,Does%20the%20GDPR%20still%20apply%3F,Act%202018%20(DPA%202018) on the 01 January 2022.

[74] Section 187 (3), (4) and (5) Data Protection Act (UK).

[75] Ibid section 187 (3) (b).

[76] Supra note 62 at para 47.

(c) Australia's civil legal system (comparative parameters)

Australia's data privacy Act is used in this paper as the comparative benchmark against which South Africa can measure its own legislation. It is prudent at this point of the paper, to set out the comparative parameters, by assessing its civil law legal system, more particularly as it relates to class and group actions as compared to that of South Africa, before discussing its data privacy legislation.

As a point of departure, Australia has a similarly structured legal system to that of South Africa, with a Federal Constitution called the Commonwealth of Australia Constitution Act of 1990, which is the supreme law of the Federal Government its states and territories. The Constitution provides for a federal and state government as well a Federal and state courts, all of them having jurisdiction over different areas of the law. The courts have an adversarial legal system similar to that of South Africa. [77]

Class action in Australia unlike in South Africa is governed by legislation, more specifically part IVA of the *Federal Court of Australia Act*.[78] The provision outlines requirements to institute class action being that there must be seven or more persons with a same cause of action, with a common issue of law.[79] The representative must have sufficient interest in the matter to commence the class action on behalf of other persons.[80] A notable difference with the South African class action regime, is Australia's rejection of the certification procedure which still endures in our jurisprudence, however the court has the power to discontinue the class action.[81] Australia is used as a comparative premises as it has similar adversarial court processes and similar processes in respect to class action.

[77] Thomson Reuters: Practical Law 'Legal Systems in Australia: Overview' last accessed from https://uk.practicallaw.thomsonreuters.com/0-638-7137?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a261405 on 26 December 2022.
[78] Federal Court of Australia Act 1976 *and see* Vince Morabito "Class Actions in the Federal Court of Australia – The story so far" (2004) 10 *Canterbury Law Review* 229, The Act was introduced in 1992.
[79] Ibid Federal Court of Australia Act 1976 section 33C(1).
[80] Ibid section 33D(1).
[81] Morabito Op cite note 76 at 234-235.

(d) Australia's Data Privacy Act

Australia has had data privacy legislation longer than South Africa and the federal/ national legislation governing the field is the Privacy Act of 1988[82] which also provides for representation of a class of data subjects by providing for conditions to make a representative complaint to the Australian Information Commission (similar to the Information Regulator). Section 36 provides that any one individual can make a complaint in a case of data privacy interference which affect the privacy of two or more individuals on behalf of the others,[83] and section 38 further provides for conditions for one to act in a representative capacity which include the requirement that they must be a member of the class with a complaint arising out of the same cause of action or related circumstances.[84]

One can immediately tell that the position taken in Australia, is distinguishable from South Africa in at least one aspect, although they embrace lodging complaints on behalf of a group or a class of people, their position is similar to what Wallis AJ discussed of America above,[85] that the representative must actually be a member of a class, as indicated in section 38(1) (a), which does not seem to fit within the South African section 38 (c) of the Constitution.[86]

The provisions of section 38B give the Australian supervisory authority wide discretionary powers over a complaint, for example, it may decide that a complaint will not be dealt with as a class complaint if it will not efficiently and effectively deal with the issues,[87] or even replace a representative complainant with another, if it is of the opinion that the complainant will not adequately represent the interest of the class.[88] It is clear from the language of section 38A that the "representatives" must be "complainants" themselves. The other peculiar aspect contained in the Australian data privacy legislation which is important to highlight is that a class complaint may even be lodged on behalf of the data subject without his or her consent.[89] This implies that a class complaint may be lodged on behalf of a data subject without his or her knowledge.

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[82] Australia Privacy Act of 119 of 1988.
[83] Section 36(2).
[84] Section 38(1) (a) and (b).
[85] Supra note 62 at para 46.
[86] Supra note 2.
[87] 38A (2)(b).
[88] 38B (1).
[89] Section 38(3).

Another aspect of the Australian Data Privacy Act worth noting is the exclusion of individualised complaints once a class complaint has been lodged. This is dealt with in terms of section 39 of their Data Privacy Act, which extinguishes an individual class member's ability to lodge a complaint once they are a member of a representative complaint.[90] This rule makes sense since the intention of a class action is to expeditiously and in the most efficient way deal with claims which may arise from a substantially similar cause of action.[91] However, Fox is of the view that class actions should not be pursued if they may lead to any of the class members' interests being unfairly or inadequately dealt with, therefore leading to justice being denied.[92] It would be equitable if such a rule could have an exception to it being that, an individual claim should be allowed where a class member feels that his or her interest may not be adequately dealt with in a group or a class complaint. The Regulator may also be given a discretion to determine the best course of dealing with the complaint.

It is clear from the above provisions that the Australian, English and European legislators anticipated a situation where they would have to deal with complaints involving a group or a class of persons or cases where a data subject(s) is represented by someone else, which South African legislators seem not to have anticipated given the absence of the provision from the legislation.

LESSONS FOR SOUTH AFRICA AND PROPOSED LEGISLATIVE AMENDMENTS.

(d) Justification for extension of representative claims in South African law

A justification for POPIA to be amended to recognise representative complaints exists given our own reported instances of data breaches that may lead to class or group complaints. Recently South Africa has been hit with its own reports of mass data privacy breaches the

[90] Section 39 provides a person who is a class member for a representative complaint is not entitled to lodge a complaint in respect of the same subject matter.
[91] South African Law Reform Commission Report (Project 88) *The Recognition of class Actions and Public interest Actions in South African Law* (1998) para 2.2 and 2.3.1.
[92] Jacob Logan Fox 'Representative Actions and Proceedings' (1954) 1 *University of Illinois Law Forum* 99.

example of Experian[93] and TransUnion[94] credit bureaus being the most recent where personal information of millions of South Africans was compromised. Given these experiences, group actions and class actions will become an important form of access to data privacy rights in South Africa. Scholars like Zuboff even believe strategic collective actions against what he terms surveillance capitalism are better than individual actions.[95]

(e) Section 77 as a discretion

Elizabeth de Stadler and Paul Esselaar suggest that the section 77 decision not to take further action is a discretion, because of the use of the word "may".[96] However, De Stadler and Esselaar argue that while POPIA provides for a chance of a court appeal following a dismissal of a complaint by the Information Regulator, a complaint may be the last resort or the "end of the road" for most complainants due to the high legal fees involved in high court litigation.[97] This is why the South African data privacy legislation must open all manner of avenues enabling for representative claims in a form of group and class actions, in order to facilitate maximum access to justice and vindication of data privacy rights for those who may not necessarily have access to courts, including those data subjects who may not even be aware that an interference with their data privacy rights has been committed as envisaged in terms of section 73 of POPIA, especially in instances of large data breaches, or contraventions.

(f) Public interest might not be enough

As discussed above, the Regulator intends on introducing an amendment to the existing Regulations to POPIA.[98] One of the amendments is to enable any person to lodge a complaint acting in the public interest.[99] Even though the possibility to lodge a representative complaint on the basis of public interest exists, this may not be enough to effectively include complaints

[93] Catalin Cimpanu 'Experian South Africa discloses data breach impacting 24 million customers' ZDNET 19 August 2020 last accessed from https://www.zdnet.com/article/experian-south-africa-discloses-data-breach-impacting-24-million-customers/ on 05 August 2022.
[94] Neesa Moodley 'TransUnion data breach leaves 54 million South Africans exposed' *daily maverick* last accessed from https://www.dailymaverick.co.za/article/2022-03-19-transunion-union-data-breach-leaves-54-million-south-africans-exposed/ on 05 August 2022.
[95] Op cit note 7 at 486.
[96] Elizabeth de Stadler & Paul Esselaar *A Guide to the Protection of Personal Information Act* (2015) 80.
[97] Ibid 81.
[98] Supra note 29.
[99] Supra note 30.

which may be brought as a group action or class action. Scholars such as Baxter believe that there is no general right for anyone to vindicate the public interest, 'a person's claim, must still in that instance be tied to a direct, personal, and sufficient interest in the action.'[100]

(g) South Africa's constitutional dispensation

South Africa's constitutional dispensation means that every law is subject to the supremacy of the Constitution and that laws inconsistent with it may be declared invalid.[101] Besides section 14 privacy provision contained in the Bill of Rights,[102] the two provisions that are pivotal to this discussion are both sections 38 and 39, which provide for the enforcement of the rights contained in the Bill of rights and the interpretation of the Bill of rights respectively.

Section 38 as indicated above provides that anyone including someone, acting "in the interest of the class" may represent a class in an action to vindicate their rights. Section 39 indicates that when interpreting the rights in the Bill of Rights, a court, tribunal, or forum, (c) may consider foreign law.

It is clear from the manner in which the Australian privacy legislation was drafted that when it comes to class and group complaints, only class members may act as representatives in a claim for breach of data privacy rights.[103] Should the South African legislator wish to incorporate the class complaints into its legislation, the Australian model as contained in their Privacy Act is still a good model to follow however, it is not certain that the South African legislator can legitimately strictly require the representative to actually be a class member as seen in the Australian Privacy legislation because of the wording contained in section 38 of the South African Constitution which has a much more liberal approach compared to Australia. Furthermore, the legislator will also have to incorporate other factors related to class or group actions, which include consent of the parties being represented as well as the suitability of the representatives, which issues are not necessarily addressed in the Constitution and in the current text of the Regulations to POPIA as well as the proposed amendments thereto.

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[100] *Baxter* op cit note 40 at 658.
[101] Section 2 Supra note 2. Also see section 8(1) of the Constitution which provides that the Bill of rights is binding on all law, legislature, and organs of State.
[102] Ibid Chapter 2.
[103] See part VI *(d)* above.

(h) Consent to lodge a class complaint

The Australian Privacy Act as indicated above, enables class representatives to lodge complaints without the consent of the data subjects.[104] This may be used in instances where there is a large number of data subjects, or the data subjects who may be part of the class are unknown. Even though the issue of consent can be very complex because of the promulgation of POPIA, there are some instances in POPIA where exceptions from complying with certain conditions have been created because of practicality reasons.[105] The legislator may also incorporate a similar provision when drafting class complaint provisions to reflect that consent may not be needed where it is not reasonably practicable to obtain.

CONCLUSIONS AND RECOMMENDATIONS

The introduction of POPIA in our law furthers the constitutionally entrenched right to privacy. It has been indicated above that the principles surrounding *locus standi* can be applied in both narrow and wide approaches. Therefore, when it comes to the "representation of data subjects" or "*locus standi*" it is clear that POPIA still has to catch up with the developments of our law and in other jurisdictions when it comes to *locus standi* in respect to the representation of data subjects at complaint level. It is reiterated that the requirement of "sufficient personal interest", given the principles of *locus standi* still remains relevant to our law but more particularly when it relates to individual claims, however, when it relates to group action or complaint on behalf of a class of persons it has been proven that our law and legal jurisprudence is quite developed given the operation of section 38 of the Constitution and its interpretation in the *Nkala* and *Children's Resource Centre* judgements, in that such persons can be represented by people with "*no direct interest in the matter*" emphasis added.

POPIA might later need to be developed or amended to be on par with EU and Australian legislation to specifically provide for the "representation of data subjects" as it is done in those pieces of legislation, in this regard it is recommended that the Regulator make a recommendation for the legislative amendment accordingly as it is empowered to do so in terms of section 40 (1) (a) (iv) of the POPIA. The arguments in this paper should not be

[104] Note 80 supra.
[105] For example, section 12(2)*(f)* POPIA Supra note 1.

misconstrued to mean that section 77(e) be removed from POPIA or the Regulations thereto, as it still remains relevant, particularly to individual claims. However, I have observed that that both the existing and proposed legislation does not provide extensive and well-developed provisions as it relates to representative claims for interference with the protection of personal information, leaving out important stakeholders such as the responsible parties, and other related companies to play a role in vindicating the rights of data subjects.

It is also recommended that our legislation or the Regulations be reformed to specifically provide for class and group complaints, and more extensive provisions about the suitability of representative and consent of the class members who would be represented in class or group complaints as it is done in the Australian legislation.

It is noted that the considerations around suitability might be different in South Africa, and the *Children's Resources* case has shed some light on what can be considered to determine the suitability of representative complainants. In determining whether a representative complainant should continue representing the class, I recommend that the Regulator should consider Article 80 of the GDPR, the Australian Privacy Act and some lessons learned from the class action litigation in South Africa which include the following factors: the nature of the complaint made on behalf of the class or group members; whether the representative is acting in the public interest; whether they are active within the field of protection of data subject's rights and freedoms under the Act; that they have identified class members; whether the interests of the representative are not conflicting with those of the class members; the costs implications involved in representative claims particularly the representative's capacity to carry out the complaint; is the representative complaint brought in good faith; and whether or not should the matter be disposed of more effectively and efficiently through a representative class complaint.

With respect to the consent of class members, Australian legislation provides that a representative complaint may be lodged without the consent of the class members.[106]The issue of consent could be complex and difficult given the promulgation of POPIA itself. POPIA is silent on whether representative class complaints and on whether the consent of the class members needs to be obtained before one would commence lodging such a claim, however, as

[106] Section 36(3).

indicated above consent from each class member may be impractical to obtain, hence the liberal approach of the Australian Privacy Act.

Similar to the Australian legislation, another consideration of the proposed amendment should be extinguishing the class members' individual complaints once a representative class complaint has been lodged, to ensure the efficiency and effectiveness of the class complaint.

South Africa seemingly still has a long road ahead in the further development of its privacy legislation, and representation of data subjects when they need to lodge complaints with the Regulator. This may still be a developing and contentious area, considering how far other jurisdictions have developed this aspect of their privacy legislation.

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