IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

SCA CASE NO:

GLD CASE NO: 42334/2014

In the application of:

HANS KLOPPER N.O.	First Applicant
HIGHVELD SYNDICATION NO 15 LTD	Second Applicant
HIGHVELD SYNDICATION NO 16 LTD	Third Applicant
HIGHVELD SYNDICATION NO 17 LTD	Fourth Applicant
HIGHVELD SYNDICATION NO 18 LTD	Fifth Applicant
HIGHVELD SYNDICATION NO 19 LTD	Sixth Applicant
HIGHVELD SYNDICATION NO 20 LTD	Seventh Applicant
HIGHVELD SYNDICATION NO 21 LTD	Eighth Applicant
HIGHVELD SYNDICATION NO 22 LTD	Ninth Applicant

In the application of:

HANS KLOPPER N.O.	First Applicant *a quo*
HIGHVELD SYNDICATION NO 15 LTD	Second Applicant *a quo*
HIGHVELD SYNDICATION NO 16 LTD	Third Applicant *a quo*
HIGHVELD SYNDICATION NO 17 LTD	Fourth Applicant *a quo*
HIGHVELD SYNDICATION NO 18 LTD	Fifth Applicant *a quo*
HIGHVELD SYNDICATION NO 19 LTD	Sixth Applicant *a quo*
HIGHVELD SYNDICATION NO 20 LTD	Seventh Applicant *a quo*
HIGHVELD SYNDICATION NO 21 LTD	Eighth Applicant *a quo*
HIGHVELD SYNDICATION NO 22 LTD	Ninth Applicant *a quo*

In re the matter between:

JURIE JOHANNES GELDENHUYS	First Applicant *a quo*
ARTHUR BRADY COCHRANE	Second Applicant *a quo*
SHARON ANN VLOK	Third Applicant *a quo*

and

ORTHOTOUCH LIMITED	First Respondent *a quo*
DEREK PEDOE COHEN N.O.	Second Respondent *a quo*
HANS KLOPPER N.O.	Third Respondent *a quo*
HIGHVELD SYNDICATION NO 15 LTD	Fourth Respondent *a quo*
HIGHVELD SYNDICATION NO 16 LTD	Fifth Respondent *a quo*
HIGHVELD SYNDICATION NO 17 LTD	Sixth Respondent *a quo*
HIGHVELD SYNDICATION NO 18 LTD	Seventh Respondent *a quo*
HIGHVELD SYNDICATION NO 19 LTD	Eighth Respondent *a quo*
HIGHVELD SYNDICATION NO 20 LTD	Ninth Respondent *a quo*
HIGHVELD SYNDICATION NO 21 LTD	Tenth Respondent *a quo*
HIGHVELD SYNDICATION NO 22 LTD	Eleventh Respondent *a quo*
NICOLAS GEORGIOU	Twelfth Respondent *a quo*
ZEPHAN PROPERTIES (PTY) LTD	Thirteenth Respondent *a quo*
NICOLAS GEORGIOU N.O.	Fourteenth Respondent *a quo*
MAUREEN LYNETTE GEORGIOU N.O.	Fifteenth Respondent *a quo*
JOSEPH CHEMALY N.O.	Sixteenth Respondent *a quo*
GEORGE NICOLAS GEORGIOU	Seventeenth Respondent *a quo*

MICHAEL NICOLAS GEORGIOU	Eighteenth Respondent *a quo*
HENDRIK JACOBUS MYBURGH	Nineteenth Respondent *a quo*
BOSMAN & VISSER (PTY) LTD	Twentieth Respondent *a quo*
PICKVEST (PTY) LTD	Twenty-first Respondent *a quo*
HEINRICH PIETER MOLLER	Twenty-second Respondent *a quo*
WILLEM MORKEL STEYN	Twenty-third Respondent *a quo*
BAREND STEFANUS VAN DER LINDE	Twenty-fourth Respondent *a quo*
FREDERICK JULIUS REICHEL	Twenty-fifth Respondent *a quo*
EUGENE KRUGER INC.	Twenty-sixth Respondent *a quo*
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA (CIPC)	Twenty-seventh Respondent *a quo*

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE THAT the first to ninth applicants hereby apply to the President of the Supreme Court of Appeal for an order in the following terms:

1. The applicants are granted leave to appeal to the Full Court of the Gauteng Local Division of the High Court of South Africa, *alternatively*, to the Supreme Court of Appeal against paragraphs 48(b), (c), (e) and (g)

of the judgment of the Honourable Justice Spilg delivered on 25 May 2016.

2. The costs of this application and the application for leave to appeal before the court *a quo* be costs in the appeal.

3. Further and/alternative relief.

TAKE NOTICE FURTHER THAT the accompanying affidavit of HANS KLOPPER is annexed in support of the application.

TAKE NOTICE THAT if you intend opposing this application, you are required to lodge your affidavit in support of your opposition, after prior service upon the applicants herein, with the registrar of the above honourable court within 1 (one) month after service of this application upon you.

DATED at BLOEMFONTEIN on this the 30TH day of SEPTEMBER 2016

FABER GOERTZ ELLIS AUSTEN INC.

First to Ninth Applicants' Attorneys

(Applicants in the application for leave to appeal)

Tel: 010 590 3378

Fax: 011 267 6701

Ref: D Ellis

Email: diaan@fqea.co.za

c/o McINTYRE VAN DER POST

12 Barnes Street, Westdene

BLOEMFONTEIN

TO: The Registrar of the Appeal Court

BLOEMFONTEIN

AND TO: **NATALIE LUBBE & ASSOCIATES INC.**

Attorneys for the First Respondent

Tel: 011 704 1563

Fax: 086 688 9555

Email: natalie@natalielubbe.co.za

Ref: N Lubbe

c/o JOHN BROIDO ATTORNEYS

1724 Marble Towers

206/214 Jeppe Street

JOHANNESBURG

Tel: 011 333 2141

Ref: Mr John Broido / Ms Shiela Smith

AND TO: **THERON & PARTNERS**

Attorneys for the 1st, 2nd and 3rd Applicants

Tel: 021 887 7877

Email: law1@theronlaw.co.za / marsha@theronlaw.co.za

c/o BDK ATTORNEYS

Ground Floor

3 Ninth Street

Houghton Estate

JOHANNESBURG

AND TO: **ZWIEGERS ATTORNEYS**

Attorneys for the 2nd Respondent

288 Dunkeld West Centre

Cnr Bompass & Jan Smuts

Tel: 087 945 2100

Fax: 011 325 2207

Email: corrie@zwiegers.co.za

Ref: Mr WN/Z497/K

AND TO: **KYRIACOU INCORPORATED**

Attorneys for the 12th to 16th & 24th Respondents

First Floor Fussell House

48 Athol Oaklands Road

Melrose North

JOHANNESBURG

Tel: 011 444 2665

Fax: 086 653 5677

Email: legal@kincorporated.co.za

AND TO: **EG COOPER MAJIEDT ATTORNEYS**

Attorneys for the 17th & 18th Respondents

Email: st@egc.co.za

AND TO: **POLSON & ROSS ATTORNEYS**

Attorneys for the 19th, 20th, 21st, 25th & 26th Respondents

Tel: 012 452 4000

Email: gpolson@polsonross.com /

gpolson@mostertlaw.com /

afourie@mostertlaw.com

Ref: Mr Graeme Polson

AND TO: **GILDENHUYS MALTJI INC.**

Attorneys for the 22nd Respondent

Tel: 012 428 8600

Email: wcilliers@gminc.co.za

AND TO: **ANDRE VLOK ATTORNEYS**

Attorneys for the 23rd Respondent

Tel: 041 367 3550

Fax: 086 549 3721

Email: andre@vlokattorneys.co.za

Ref: Mr Andre Vlok

AND TO: **THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA**

27th Respondent

DTI Campus (Block F – Entfutfukweni)

77 Meintjies Street

PRETORIA

IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

SCA CASE NO:

GLD CASE NO: 42334/2014

In the application of:

HANS KLOPPER N.O.	First Applicant
HIGHVELD SYNDICATION NO 15 LTD	Second Applicant
HIGHVELD SYNDICATION NO 16 LTD	Third Applicant
HIGHVELD SYNDICATION NO 17 LTD	Fourth Applicant
HIGHVELD SYNDICATION NO 18 LTD	Fifth Applicant
HIGHVELD SYNDICATION NO 19 LTD	Sixth Applicant
HIGHVELD SYNDICATION NO 20 LTD	Seventh Applicant
HIGHVELD SYNDICATION NO 21 LTD	Eighth Applicant
HIGHVELD SYNDICATION NO 22 LTD	Ninth Applicant

In the application of:

HANS KLOPPER N.O.	First Applicant *a quo*
HIGHVELD SYNDICATION NO 15 LTD	Second Applicant *a quo*
HIGHVELD SYNDICATION NO 16 LTD	Third Applicant *a quo*
HIGHVELD SYNDICATION NO 17 LTD	Fourth Applicant *a quo*
HIGHVELD SYNDICATION NO 18 LTD	Fifth Applicant *a quo*
HIGHVELD SYNDICATION NO 19 LTD	Sixth Applicant *a quo*
HIGHVELD SYNDICATION NO 20 LTD	Seventh Applicant *a quo*
HIGHVELD SYNDICATION NO 21 LTD	Eighth Applicant *a quo*
HIGHVELD SYNDICATION NO 22 LTD	Ninth Applicant *a quo*

In re the matter between:

JURIE JOHANNES GELDENHUYS	First Applicant *a quo*
ARTHUR BRADY COCHRANE	Second Applicant *a quo*
SHARON ANN VLOK	Third Applicant *a quo*

and

ORTHOTOUCH LIMITED	First Respondent *a quo*
DEREK PEDOE COHEN N.O.	Second Respondent *a quo*
HANS KLOPPER N.O.	Third Respondent *a quo*
HIGHVELD SYNDICATION NO 15 LTD	Fourth Respondent *a quo*
HIGHVELD SYNDICATION NO 16 LTD	Fifth Respondent *a quo*
HIGHVELD SYNDICATION NO 17 LTD	Sixth Respondent *a quo*
HIGHVELD SYNDICATION NO 18 LTD	Seventh Respondent *a quo*
HIGHVELD SYNDICATION NO 19 LTD	Eighth Respondent *a quo*
HIGHVELD SYNDICATION NO 20 LTD	Ninth Respondent *a quo*
HIGHVELD SYNDICATION NO 21 LTD	Tenth Respondent *a quo*
HIGHVELD SYNDICATION NO 22 LTD	Eleventh Respondent *a quo*
NICOLAS GEORGIOU	Twelfth Respondent *a quo*
ZEPHAN PROPERTIES (PTY) LTD	Thirteenth Respondent *a quo*
NICOLAS GEORGIOU N.O.	Fourteenth Respondent *a quo*
MAUREEN LYNETTE GEORGIOU N.O.	Fifteenth Respondent *a quo*
JOSEPH CHEMALY N.O.	Sixteenth Respondent *a quo*
GEORGE NICOLAS GEORGIOU	Seventeenth Respondent *a quo*

MICHAEL NICOLAS GEORGIOU	Eighteenth Respondent *a quo*
HENDRIK JACOBUS MYBURGH	Nineteenth Respondent *a quo*
BOSMAN & VISSER (PTY) LTD	Twentieth Respondent *a quo*
PICKVEST (PTY) LTD	Twenty-first Respondent *a quo*
HEINRICH PIETER MOLLER	Twenty-second Respondent *a quo*
WILLEM MORKEL STEYN	Twenty-third Respondent *a quo*
BAREND STEFANUS VAN DER LINDE	Twenty-fourth Respondent *a quo*
FREDERICK JULIUS REICHEL	Twenty-fifth Respondent *a quo*
EUGENE KRUGER INC.	Twenty-sixth Respondent *a quo*
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA (CIPC)	Twenty-seventh Respondent *a quo*

FOUNDING AFFIDAVIT

I, the undersigned

JOHANNES FREDERICK (HANS) KLOPPER

do hereby make oath and state as follows:

1. I am an adult male business rescue practitioner, cited in my representative capacity as the third respondent in the applications before the Court *a quo*, and the first applicant herein.

2. Unless otherwise stated or the converse appears from the context, the facts herein contained are within my personal knowledge and belief, and are both true and correct.

3. The legal submissions contained herein are those of my legal representatives; I verily believe same to be correct.

4. For sake of convenience and to avoid confusion, I refer to the parties as they are cited in the applications before the Court *a quo*.

5. I am duly authorised to bring the application on behalf of the fourth to eleventh respondents.

PURPOSE OF THE APPLICATION

6. The third to eleventh respondents seek leave to appeal against paragraphs 48(b), (c), (e) and (g) of the judgment, and order of the Honourable Justice Spilg delivered on 25 May 2016. A copy of the judgment is attached as **"A1.1"** and a copy of the order is attached hereto as **"A1.2"**.

7. The third to eleventh respondents seek, with the leave of the above Honourable Court, that the appeal be upheld with costs and that paragraphs 48(b), (c), (e) and (g) of the judgment be deleted, insofar as they apply to them.

8. The third respondent delivered a notice of application for leave to appeal on 15 June 2016. The application for leave to appeal was heard by the Honourable Justice Spilg on 12 August 2016. The learned judge refused the application on 1 September 2016. A copy of the judgment is attached as **"A2.1"** and a copy of the order is attached as **"A2.2"**.

BACKGROUND

9. On 26 November 2014, the Gauteng Local Division granted an order sanctioning a scheme of arrangement proposed by the first respondent in terms of section 155 of the Companies Act, 71 of 2008, as amended ("the Act").

10. The effect of the arrangement in law was that it finally restructured the rights of approximately 18 300 investors ("the affected parties") in the Highveld Syndication Companies, the fourth to eleventh respondents.

11. On 3 March 2015, the applicants launched an application wherein they sought the following relief, amongst others:

    11.1 that condonation be granted for the non-compliance with the court rules with regards to the form and service of the application;

11.2 setting aside the order sanctioning the scheme of arrangement, granted on 26 November 2014 in terms of Rule 42(1)(a) of the Uniform Rules of court alternatively under the common law.

("the main application")

12. In the founding affidavit of the main application, the applicants accepted that the rights of such investors would be affected by the outcome of the main application and stated that the affected parties would be notified by way of advertisements in newspapers and sought condonation from the court for giving said notice by way of substituted service.[1]

13. On 16 April 2015, the first respondent served a notice in terms of Rule 30A, notifying the applicants of their non-compliance with Rule 42(2) and Rule 4(1).[2]

14. The applicants failed to comply with the Rule 30A notice and on 8 May 2015 the first respondent launched an application in terms of Rule 30A to set aside or dismiss the applicants' main application ("the Rule 30 Application").

15. On 15 June 2015 the applicants launched an application for leave to serve the notices on the affected parties by way of substituted service ("the application for substituted service"). I elected to abide by the

[1] Applicants' main application p. 28-29, para. 35
[2] Third Respondent's Rule 30A application p. 24-35

decision of the Court *a quo* in respect of this application on the basis of the relief sought by the applicants in their notice of motion.

16. The parties agreed that the applications would be argued simultaneously. On 15 March 2016, the applications were heard before the Honourable Justice Spilg.

17. On 25 May 2016, the Honourable Justice Spilg delivered his judgment wherein he:

17.1 dismissed the first respondent's Rule 30A application with costs;

17.2 granted the applicants' leave to serve the main application by way of substituted service;

17.3 declared that the joinder of all the affected parties in the main application is unnecessary ("the declaratory relief");

17.4 directed the first and third respondents to provide the applicants' attorneys with a list of all persons who were entitled to vote in respect of the arrangement and to whom notice was given ("the mandatory relief").

18. This application is directed at the relief referred to in paragraphs 17.3 and 17.4 above.

GROUNDS OF APPEAL

19. The third respondent seeks leave to appeal on the following grounds:

The Declaratory Relief

19.1 The declaratory relief disposes of any question of whether or not the affected parties, in the form of the approximately 18 300 investors whose rights are affected by the outcome of the application, are required to be joined to the main application. Curiously, although the applicants' obligation to effect service which arises from the outcome of the order is limited to those investors who voted at the meetings of the scheme of arrangement, the declaratory relief is not similarly limited in its scope and is directed at all affected parties, whether they voted at the meetings or not;

19.2 The question of whether any of such affected parties ought to have been joined to the proceedings was not an issue which arose out of the applicants' application for substituted service;

19.3 The application for substituted service, whilst directed merely at a form and manner of service, did not seek any declaration in regard to any obligation on the part of the applicants to join such affected persons as respondents to the main application;

19.4 The declaratory relief, in the circumstances, is not relief which was sought by the applicants in the application for substituted service. No case was made out for the declaratory relief in the applicants' affidavits or in argument and the third to eleventh respondents were not given notice of such relief being sought or granted;

See: **South African Reserve Bank v Heystek and Others (A248/2010, 21961/08) [2012] ZAGPPHC 301 (7 November 2012) at paras 6, 150 and 170**

19.5 The third to eleventh respondents were not notified or precognised of the fact that the declaratory relief would be considered by the Court *a quo* and were not given an opportunity to make representations in this regard;

19.6 The Court *a quo* accordingly erred and exceeded its powers by *mero motu* issuing the declaratory relief. The granting of such relief offends against the *audi alteram partem* principle and the respondents' rights to a fair hearing;

19.7 Having granted the declaratory relief, the respondents have been deprived of a defence which they would otherwise be entitled to raise in the main application, namely, a defence of non-joinder;

19.8 It would have been for the court hearing the main application to properly consider such defence after having been properly and pertinently ventilated in an answering affidavit delivered in the main application;

19.9 As such, the Court *a quo* erred in granting the declaratory relief.

The Mandatory Relief

19.10 The mandatory relief obliges the first and third respondents jointly to provide an agreed list comprising detailed information of all persons who were entitled to vote in relation to an arrangement proposed in terms of section 155 of the Companies Act, 71 of 2008 ("the Act") by 6 June 2016. The application for substituted service did not seek the mandatory relief as granted, in particular the relief sought did not include an order to identify the investors or provide their details. No case was made out for the mandatory relief in the applicants' affidavits or in argument, and the third to eleventh respondents were not given notice of such relief being sought or granted;

See: **South African Reserve Bank v Heystek *supra***

19.11 The Court *a quo* erred in not finding that the applicants chose not to, and did not ask for the mandatory relief and that consequently

the third respondent was not required to meet such a case. Conversely, the Court *a quo* should have found that in the absence of the mandatory relief having been sought, the application for substituted service was defective and fell to be dismissed with costs;

19.12 The third to eleventh respondents were not notified or pre-cognised that the mandatory relief would be considered by the Court *a quo*, and we were not given an opportunity to make representations in this regard;

19.13 The Court *a quo* erred in its interpretation of Uniform Rule 4(2) that would permit the mandatory relief to be issued *mero motu* without such an order having been sought or canvassed at the hearing;

19.14 The Court *a quo* erred and exceeded its powers by *mero motu* issuing the mandatory relief. The mandatory relief offends against the *audi alteram partem* principle and my right to a fair hearing;

19.15 The Court *a quo* erred in finding that the first, second and third respondents were recalcitrant in providing information about the identity of the investors to the applicants. There was no evidence before the Court *a quo* on which such a finding could be based

and the incorrect finding on the face thereof contributed to the mandatory relief being granted *mero motu*.[3]

20. Although both applications heard in the Court *a quo* were, strictly speaking, interlocutory to the main application, I am advised that it is not necessary to express any views in regard to the appealability of an order dismissing an application in terms of Rule 30A or an order granting an application for substituted service because the present application is not directed at *that relief* but is directed at the declaratory relief and the mandatory relief which was granted by the Court *a quo* without:

20.1 such relief being sought;

20.2 the third to eleventh respondents receiving any notice of an intention to seek such relief; or

20.3 an amendment to the notice of motion in the application for substituted service.

21. The declaratory relief and mandatory relief granted by the Court *a quo* is final in effect. The declaratory relief precludes the respondents from raising, as a defence in the main application, a defence of non-joinder. The Court *a quo* was not called upon to decide a question of joinder, but

[3] Judgment of the Court *a quo* p. 12, para. 40

merely, to pronounce upon the appropriate manner of service on the affected parties. In granting the declaratory relief, the Court *a quo*, with respect, erred in conflating the concept of joinder (and the relevant legal principles in regard thereto) with the concept of service. The applicants simply did not make out a case for declaratory relief neither did they seek such relief.

22. Thus, despite it being implicitly conceded by the applicants that the "*investors*" have a direct and substantial interest in the outcome of the main application (by recognising the obligation to serve on them, albeit in substituted form), the Court *a quo*, *mero motu* pronounced upon the issue of joinder in a manner which was precluded by the applicants' concession in this regard, and did so without providing the respondents an opportunity to properly ventilate this issue.

23. In so doing, the Court *a quo* finally pronounced upon the rights of the respondents to raise this issue in the main application thereby finally precluding the respondents from doing so.

24. The declaratory relief, in the premises, is final, both in its terms and in its effect.

25. Similarly, the mandatory relief is in the nature of a final interdict. Such relief, with respect, is, *par excellence*, final in effect and the order, similarly, was granted against me without any notice being given to me

nor with me being provided an opportunity to state my case in regard to the relief sought.

26. It is trite that for a final interdict the applicant has to satisfy the following requirements:

26.1 He has a clear right;

26.2 Actual harm or apprehension of harm; and

26.3 No other satisfactory remedy available.

27. The applicants did not make out a case for a final mandatory interdict and neither did they seek such relief. In the circumstances, the Court *a quo* erred in granting such relief.

28. The Uniform Rules of Court regulate the manner in which matters are to be prosecuted in the Gauteng Local Division. Although I accept that the court has a discretion to condone non-compliance with these rules, such discretion has to be exercised judicially. In the present case, the Court *a quo* exceeded its powers by *mero motu* issuing the declaratory and mandatory relief and countenanced the applicants' failure to comply with the rules of court.

29. I submit that it is in the interest of justice for the above Honourable Court, to pronounce on whether the Uniform Rules permit the Court *a quo* to

mero motu issue the declaratory and mandatory relief without such an order having been sought by the applicants or canvassed at the hearing and in circumstances where I chose to abide the decision of the court based on the relief sought in the notice of motion.

EXPLANATION REGARDING CERTIFIED COURT ORDER

30. The honourable court should note that the order *a quo* attached hereto does not reflect the entire order made by Spilg J, as set out in the judgment *a quo.* The order refusing leave to appeal also does not reflect the entire order.

31. A request has been made to Spilg J's registrar for the learned judge to rectify the orders. As at the date of this affidavit, the rectified orders have not been received.

32. In accordance with the provisions of the honourable court's Practice Direction dated 15 November 2014, a letter has been obtained from the Registrar of the Gauteng Local Division certifying the dates of both the order *a quo* and the order refusing leave to appeal. I attach the letter as **A3.1.**

33. The corrected orders will be furnished to the honourable court as soon as Spilg J has rectified same. To the extent that it is necessary, I seek

condonation from the honourable court for the late filing of the rectified orders.

CONCLUSION

34. It is submitted that:

34.1 the Court *a quo* erred in granting the declaratory and mandatory relief and that there is a reasonable prospect that another court will find that such relief ought not to have been granted;

34.2 the declaratory and mandatory relief is final in effect; and

34.3 to the extent that it may not be final in effect, it is nonetheless in the interest of justice that the appeal be entertained for the reasons set out above.

WHEREFORE the third to eleventh respondents pray for the relief set out in the notice of motion to which this founding affidavit is attached.

J F KLOPPER

Jacques Viljoen
Commissioner of Oaths
Practising Attorney
Unit G1A Stellenpark Business Park
R44 Stellenbosch

SIGNED and SWORN to before me at Stellenbosch on the 30th day of SEPTEMBER 2016, after the deponent stated that he is aware of the content of this statement and considers the oath to be binding on his conscience. I certify that the regulations provided for in the Government Gazette Notice R. 1258 of 21 July 1972 have been complied with.

COMMISSIONER OF OATHS

Jacques Viljoen
Commissioner of Oaths
Practising Attorney
Unit G1A Stellenpark Business Park
R44 Stellenbosch

"A1.1"

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

28 May 2014

SIGNATURE

CASE NO: 42334/2014

In the matter between:

JURIE JOHANNES GELDENHUYS	First Applicant
ARTHUR BRADY COCHRANE	Second Applicant
SHARON ANN VLOK	Third Applicant

And

ORTHOTOUCH LIMITED	**First Respondent**
DEREK PERDOE COHEN N.O.	**Second Respondent**
HANS KLOPPER N.O.	**Third Respondent**
HIGHVELD SYNDICATION NO 15 LTD	**Fourth Respondent**
HIGHVELD SYNDICATION NO 16 LTD	**Fifth Respondent**
HIGHVELD SYNDICATION NO 17 LTD	**Sixth Respondent**
HIGHVELD SYNDICATION NO 18 LTD	**Seventh Respondent**
HIGHVELD SYNDICATION NO 19 LTD	**Eighth Respondent**
HIGHVELD SYNDICATION NO 20 LTD	**Ninth Respondent**
HIGHVELD SYNDICATION NO 21 LTD	**Tenth Respondent**
HIGHVELD SYNDICATION NO 22 LTD	**Eleventh Respondent**

NICOLAS GEORGIOU	Twelfth Respondent
ZEPHAN PROPERTIES (PTY) LTD	Thirteenth Respondent
NICOLAS GEORGIOU N.O.	Fourteenth Respondent
MAUREEN LYNETTE GEORGIOU N.O.	Fifteenth Respondent
JOSEPH CHEMALY N.O.	Sixteenth Respondent
GEORGE NICOLAS GEORGIOU	Seventeenth Respondent
MICHAEL NICOLAS GEORGIOU	Eighteenth Respondent
HENDRIK JACOBUS MYBURGH	Nineteenth Respondent
BOSMAN & VISSER (PTY) LTD	Twentieth Respondent
PICKVEST (PTY) LTD	Twenty-first Respondent
HEINRICH PIETER MOLLER	Twenty-second Respondent
WILLEM MORKEL STEYN	Twenty-third Respondent
BAREND STEFANUS VAN DER LINDE	Twenty-fourth Respondent
FREDERICK JULIUS REICHEL	Twenty-fifth Respondent
EUGENE KRUGER INC.	Twenty-sixth Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA (CIPC)	Twenty-seventh Respondent

And

THE HIGHVELD SYNDICATION INVESTORS

("the Main Application")

In re:

The ex parte application of:

ORTHOTOUCH LIMITED

(Registration number: 2010/004096/06)

Application for the sanctioning of a Scheme of Arrangement in terms of section 155(7) of the Companies Act, no 71 of 2008

("the ex parte application")

JUDGMENT

SPILG, J:

25 May 2016

INTRODUCTION

1. Each applicant had invested in one of a number of public companies that were formed as property syndications. Each company was established to acquire certain specified properties. The properties typically comprised smaller shopping centres around the country.

2. The eight companies are the fourth to eleventh respondents, being Highveld Syndication no 16 Ltd going consecutively up to Highveld Syndication no 22

Ltd. It is evident that they are associated companies, with at least a common controlling mind. They will be referred to collectively as the Highveld Syndications.

3. In terms of the prospectus of each company the capital raised was to be utilised to fully pay for and procure unencumbered title to the specified properties, many of which, it was stated, had already been acquired. The prospectuses were not provided to the court as they were not considered necessary for present purposes.

   It however appears that the net rental income from the shopping centres acquired would be distributed on a monthly basis to investors presumably in the form of dividend income. It is alleged that the investment proved attractive particularly for pensioners. This is understandable as the scheme promised a regular monthly income return while the value of the capital base, comprising the properties, was likely to appreciate over time or at least remain intact.

4. The applicants alleged that the prospectuses intimated that each contract for the purchase of the properties in question was available for inspection. The applicants however claim that the seller was not in fact the owner of many of these properties. It was subsequently ascertained that the purported seller of the properties, which it is alleged was not named in the prospectus, turned out to be Zephan Properties (Pty) Ltd ('*Zephan*'). It is the thirteenth respondent.

5. Each prospectus mentioned that Zephan had concluding a '*head lease*' in terms of which it would leaseback the properties from the particular Highveld Syndication and in turn sub-lease to the existing tenants. Accordingly each Highveld Syndication would not itself conclude a lease with the individual tenants but would look to Zephan for a set rental for the entire centre and presumably Zephan would in turn charge its own rental to the sub-tenants.

6. It is also alleged that the prospectuses contained an undertaking in terms of which Mr N Georgiou, Zephan and the N Georgiou Trust would buy back the shares after five years for the same price at which they were originally bought, thereby also warranting or representing to investors that their investment was safe. Some R3.6 billion was invested by members of the public into the eight Highveld Syndication companies.

7. Each Highveld Syndication was placed under business rescue in about December 2011. Hans Kloppar, who is the third respondent, was appointed the business rescue practitioner of each company. In terms of the business rescue plan(*"the plan"*) which was adopted at a duly convened meeting under

section 151 of the Companies Act 71 of 2008 (*"the Act"*) Orthotouch was to purchase each Highveld Syndication and in the interim pay interest. The investor creditors then proceeded to receive a pro-rated portion of the rental income under the distribution plan.

8. All the Highveld Syndications were lumped together for business rescue purposes in respect of the distribution of rental income although transfer of the properties had only taken place in the case of Highveld Syndication no's 15 to 18.

   In terms of the business rescue plan the properties of Highveld Syndication no's 15 to 18 were to be transferred to Orthotouch

9. However Orthotouch subsequently failed to comply with the terms of the plan and on 7 October 2014 a scheme of arrangement was proposed between Orthotouch and its creditors under section 155 of the Act.

10. It is evident that from at least the time the arrangement was proposed that investors were considering instituting a class action. The application to initiate a class action was served on 18 November and a notice of opposition was delivered on 24 November. The class action is intended to be brought on behalf of the investors against a number of directors and other individuals in relation to the affairs of the companies.

11. The intended class action seeks relief on a number of grounds;

    a. enforcement of the buy-back agreements since the 5 year period ended in August 2014;

    b. fraudulent or negligent misrepresentations contained in the prospectuses;

    c. fraudulent, reckless or negligent conduct in the handling of investor funds by directors or others;

    d. personal liability for the fraudulent or reckless conducting of the investment schemes in the companies;

e. transgression of statutory provisions prohibiting the release of funds received from investors in property syndication schemes without simultaneously giving transfer of the property to the relevant investment vehicle, which also has a criminal sanction.

12. This court was not provided with the application in that case. However it appears that Zephan is controlled by Nicolas Georgiou, the twelfth respondent. He is also the managing director of Orthotouch which is the first respondent.

13. The applicants contend that 6 300 individual investors, representing 9 700 claims, have already confirmed their participation in the class action. Orthotouch and Klopper contend that there are between 17 000 to 18 000 investors in the companies but the figure of affected claimants could be up to 23 000. It is unclear whether this represents the total number of individuals or the total number of claims (which would be higher because an individual may have invested in more than one of the companies).

14. However, prior to service of the application to institute a class action, a meeting of the investors (being presumably being the only affected class of relevant creditor or member for purposes of section 155(2)) was held on 12 November to consider the proposal. The report of Mr Derek Cohen who presided at the meeting was prepared and on 26 November my brother Moshidi J sanctioned the arrangement. In law the scheme of arrangement therefore became binding on all creditors of the Highveld Syndications.

15. In December the investors commenced receiving the first of nine payments due under the arrangement.

16. On 3 March 2016 the present applicants launched an application to rescind the judgment sanctioning the arrangement alternatively an application for leave to appeal. I will refer to this as the main application unless the context indicates otherwise.

They did not give notice of the main application as required by rule 42(2) on all parties whose interests may be affected; namely all the investors who in terms of section 155(8) of the Companies Act are bound by the scheme.

17. On 21 April 2015Orthotouch brought a notice under rule 30A setting out the grounds for declaring the application an irregular proceeding. This was followed up on 8 May with a substantive application to set aside the main application.

18. On 15 May the applicants delivered a notice of intention to oppose the rule 30A application. This was shortly prior to the set down date for the hearing of the main application.

19. The main application was set down for 18 May but could not proceed because the judge allocated to hear the matter was on long leave.

20. The applicants subsequently delivered an opposing affidavit to the rule 30A application on 4 June and a short time later, on 15 June, also brought an application for substituted service.

21. After these events Orthotouch served a replying affidavit to its rule 30A application and subsequently an answering affidavit to the application for substituted service.

22. On 6 August my brother Francis J dismissed an urgent application brought by the applicants to stay the scheme of arrangement process and to put a hold on the finalisation of the liquidation and distribution account ("*L&D account*") in terms of the arrangement. The application was held not to be urgent. The court did not deal with the merits but found that the application could have been brought much sooner and that the applicants had sought to use the notification regarding the L&D account as the peg on which to justify urgency.

23. Shortly afterwards the applicants delivered a replying affidavit to their application for subetituted service. Application was again made for the matter to be heard as a special motion and came before me on 15 March 2016.

Orthotouch's rule 30A application is supported by the 3rd to 16th respondents. They are Hans Klopper in his representative capacity, the eight Highveld Syndication companies, Nicolas Georgiou (Georgiou) personally, Zephan, and the trustees of the N Georgiou Trust, being Georgiou, Maureen Georgiou and Joseph Chemaly in their representative capacities.

THE APPLICATIONS BEFORE COURT

24. There are two applications before me;

    a. Orthotouch's application of 21 April under rule 30A to set aside or dismiss the application to rescind the order sanctioning the scheme of arrangement

    b. The applicants' application of 15 June for substituted service.

25. Although the applicants have sought substituted service they have not conceded that their main application to rescind the order sanctioning the scheme fails to comply with the rules of court.

ORTHOTOUCH'S APPLICATION UNDER RULE 30A

26. Orthotouch, supported by the 3rd to 16th respondents contend that the rescission application is defective because the applicants failed to join and serve on all the affected persons, who would include the investors in each of the Highveld Syndications, or first to have applied for substituted service. They argue that the failures to first have complied with rule 42(2) for service on all persons affected by a rescission application or rule 4(2) read with 6(2) in regard to substituted service is fatal.

27. The applicants have identified 17 296 investors but, as stated earlier, the number according to the Klopper and Orthotouch could be up to 23 000. It however appears that the applicants to date have the *de facto* support of 6300 investors.

28. It hardly bears repeating that every investor is affected by the rescission application since they have received monthly income under the sanctioned arrangement.

29. In my view the starting point is whether the applicants could have obtained details of all the investors in order to comply with the provisions of rule 42(2), let alone rule 4 at the time the main application was launched.

In the applicants' affidavit opposing the rule 30A application it is evident that despite written request the attorney representing Cohen who is Natalie Lubbe and Associates inc failed to provide the list of investors and details of those who voted for and against the arrangement. The same attorneys represent Orthotouch in the present proceedings. It is evident from the papers as a whole that the applicants will not get ice in winter from any of the respondents who have opposed the application for substituted service unless ordered to do so by the court.

30. Secondly, the application for rescission has not yet been heard. Accordingly there can be no prejudice to provide a means whereby the applicant's right to a hearing in order to convince a court that the arrangement should not have been sanctioned. Nor as far as I am aware can the rules of court deprive a person of such a right where *any* failure to comply can be resolved prior to the hearing date. None have been suggested by either *Mr Brett* or *Mr Rossouw* for the respondents. Accordingly a failure to comply with rule 42(2) at this stage cannot be fatal since it can always be cured.

31. There is a further aspect. The rules regarding service and joinder are by their nature flexible. Indeed substituted service can be sought at any stage, even after a matter has been brought before court and the judge is dissatisfied with the purported service. Cases involving large numbers of occupiers of land or buildings come readily to mind.

There also appears to be no reason why defective service cannot be condoned in the absence of a formal application provided the court is satisfied that the circumstances precluded service under the ordinary rules and where the process as served would have been expected to come to the attention of each affected person. The rules do not take away the court's power to condone a failure of strict compliance with service in appropriate circumstances. Furthermore the court always has a discretion to condone a departure from the rules provided it is exercised judicially and there is no prejudice to an affected party.

32. Mr Brett also challenged the efficacy of bringing an application for rescission at the same time as an application for leave to appeal. Provided the papers cover both contingencies there appears to be no reason for a party to preclude itself by reason of time limits from pursuing both avenues where

there is uncertainty. It also tactically precludes the opponent from contending that whatever course is chosen that the other course was the correct one. In the present case there is enough before me, if regard is had to the unique but readily comprehendible procedure of notifying those affected of a meeting to consider a proposed arrangement that will be subject to court sanction without further notice, to indicate the difficulties that the applicants would face if forced to make a prior election.

Moreover it is assumed that if the applicants are met with a challenge to the main application properly being one for rescission that they would then deal with this aspect as a point of law, obtain finality and then, if necessary, simply request a set down for leave to appeal before the judge who sanctioned the arrangement. In this way no point could be taken that the application for leave to appeal itself was out of time.

33. It is therefore clear that the application for rescission alternatively for leave to appeal is not fatally defective.

34. Finally on this point it is necessary to give a definitive decision on whether in the circumstances of this case it is necessary to join every investor in the rescission application in order to comply with rule 42. Rule 42(2) only requires notice to all affected parties. The actual application brought before the court to sanction the scheme identifies who brought it and as long as the persons identified in the citation are cited in the rescission application there can be no quarrel. That has taken place.

35. Notice to every other affected party may therefore be given without being formally joined. It would be a task of supererogation to join over 17 000 investors let alone the 23 000 suggested by Orthotouch and Klopper.

36. If regard is had to the cost incurred by Cohen in just sending notices to investors, in regard to the meeting called under section 155(2) of the Act to consider the proposed arrangement, then it is evidently beyond the present individual applicants to give formal notice by joining or serving through the sheriff, let alone by registered post or email, on each investor together with all relevant documents. The cost would be in the region of R600 000. It is not disputed that most of the investors are elderly and that every investor would have lost a significant percentage of their investment. Moreover a number of investors would have passed away and therefore their rights would have been bequeathed or otherwise have devolved on others.

37. It is therefore evident that requiring joinder as a *sine qua non* to proceeding with a rescission application under rule 42 would result in lengthy delay before the matter could ever be heard and in exorbitant costs which would negate the right of the applicants, and the over 8 000 investors who expressly support them, of access to justice. Rules of court are there to facilitate justice,[1] not result in undue delay or deprivation of the very right sought to be exercised. They must be read so as not to frustrate the ability to bring a bona fide application and they must be applied in harmony with the right of access to justice, the right to be notified and heard on a matter that may prejudicially affect a person's rights or interests and the right to a fair trial under section 34 of the Constitution[1].

38. While not pertinently sought, but necessarily following on the arguments presented, I therefore also positively find that joinder of all the investors in the rescission alternatively leave to appeal application is unnecessary.

APPLICATION FOR SUBSTTUTED SERVICE

39. I have already found that there is before the court a competent application for substituted service and that it is unnecessary to join each of the investors in the main application.

40. I have also dealt with the factual difficulties of identifying every investor both by reason of the apparent recalcitrance of Klopper, Cohen and Orthotouch, who are the only ones who are likely to have accurate lists of the subscribers, and by reason of such lists not taking into account the identity of the executors or beneficiaries in cases where the investor has passed away.

41. At this juncture I should deal with Mr Brett's contention that there is somehow a right to privacy issue involved in the lists of investors. In the present case this is a red herring by reason of the provisions of rule 42, the purpose for obtaining their names and the obvious entitlement that ordinarily arises under section 26(2) of the Act. The first respondent has not suggested any

---

[1] Section 34 *Access to courts*

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

impediment that might deprive the applicants of that right bearing in mind that his own client, Klopper and Cohen would have accessed the lists for the same purpose as is now sought by the applicants.

42. The prohibitive cost of bulk post or emailing the documents that would have to be served also may frustrate the ability to proceed with the case. I have also considered utilising SENS. However it appears that this method of notification adopted by the JSE is limited to listed companies.

43. It is further evident from the number of investors who allegedly attended the meeting to vote on the arrangement that the phenomenon of voter apathy was prevalent.

44. In my view the first step is to secure the list of all investors. Due to the conduct of the relevant respondents it is necessary that they provide the lists to the applicants. This will include the list that Cohen has of the names and contact details of all those who attended the section 155(2) meeting to vote on the arrangement. They obviously cannot be accused of voter apathy.

45. However among those are investors who have actively joined in the class action. On adequate written proof that they support the class action and support the rescission application, which may be done by a round robin list with their names, identity numbers and signatures it appears unnecessary that they be served with papers, unless they specifically request so in writing.

46. That leaves the balance of investors who still appear to represent the majority of those affected. The requirement of giving notice must however not ultimately frustrate the ability to have the application heard on its merits with adequate safeguards that anyone wishing to oppose it is likely to have acquired knowledge of the application. In this regard I bear in mind that investors may prefer to go along with the arrangement.

47. In my view a hybrid solution appears appropriate in order to secure the likelihood of notice to the greatest number of persons with due regard to cost, avoiding delay in the disposal of the application and the right to have the dispute resolved fairly.

ORDER

48. I accordingly order that:

a. The Rule 30A application is dismissed.

b. It is declared that the joinder of all investors in the application for rescission alternatively for leave to appeal (*"the main application"*) is unnecessary.

c. The first and third respondents are to jointly provide to the applicants' attorneys of record by no later than 6 June 2016 a list agreed between such respondents, of all persons who were entitled to vote in respect of the arrangement and to whom notice thereof was given;

d. The second respondent is to provide to the applicants' attorneys of record by no later than 6 June 2016 a list of all persons who voted, whether in person or by proxy in favour of or against the approval of the arrangement

e. Each such list shall contain a list of all known contact details, including email addresses and cellphone numbers, with leave granted to the applicants to approach this court on the same papers, duly supplemented, if they contend that information available to such respondents of email addresses and cellphone numbers has not been provided.

f. The applicants shall no later than 11 July 2016;

i. Give notice of the main application on each persons who voted at the meeting in terms of section 155(2) of the Companies Act convened on 12 November 2014 to consider the proposed scheme of arrangement provided that;

1. it shall be unnecessary to give notice to any person who has expressly waived in writing an entitlement to receive such application; it being sufficient for such purpose if such person has signed a round robin list against their names, and provided his or her identity number (or in case of a company the responsible person's name and the entities name and registration number), or has otherwise in writing expressly associated with the class action and the application;

2. such notice shall be by way of email or sms, or failing which by registered post, stating that;

    a. the founding papers in the main application are accessible and available for reading and download on the website 'hsaction.co.za";

    b. stating the date of hearing of the main application and the time period for filing a notice of opposition which shall be 10 days from date of confirmed transmission, and the time period for filing opposing papers being 20 days from date of such confirmed transmission;

    c. and in the case of emails reproducing the same contents as the notice which is to appear in the newspapers as set in the following paragraph while the sms shall contain a link to the aforesaid website;

ii. Give notice to all the investors referred to in the founding papers in the main application by;

1. publication of a notice in the Sunday Times, The City Press and Rapport newspapers at least three weeks before the hearing;

2. by making available for reading and download, and keeping so available, the founding papers in the main application on the website "hsaction.co.za";

    a. the contents of such notice in the aforesaid newspapers shall be similar to the notices which appeared in the Sunday Times and Rapport on 15 March 2015, except for the new date of hearing and that the time period for filing a notice of opposition which shall be 10 days from date of publication, and the time period for filing opposing papers being 20 days from date of such publication;

g. The first and third to sixteenth respondents inclusive shall pay the costs of R30A application, including the costs of two counsel, jointly and severally the one paying the other to be absolved;

h. The costs in the application for substituted service shall be costs in the main application unless the court hearing that application directs those costs to be costs in any other application or action, in which case such costs will be costs in that other proceeding.

SPILG, J

'A1.2'

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: *2014/42334*
PH NO: *0*

JOHANNESBURG, 26 May 2016
BEFORE THE HONOURABLE JUDGE SPILG

In the ex parte application of:-

JURIE JOHANNES GELDENHUYS	*1st Applicant*
ARTHUR BRADY COCHRAINE	*2nd Applicant*
SHARON AAN VLOK	*3rd Applicant*
and	
ORTHOTOUCH LIMITED	*1st Respondent*
DEREK PEDOE COHEN N.O.	*2nd Respondent*
HANS KLOPPER N.O.	*3rd Respondent*
HIGHVELD SYNDICATION NO 15 LIMITED	*4th Respondent*
HIGH HIGHVELD SYNDICATION NO 16 LIMITED	*5th Respondent*
HIGHVELD SYNDICATION NO 17 LIMITED	*6th Respondent*
HIGHVELD SYNDICATION NO 18 LIMITED	*7th Respondent*
HIGHVELD SYNDICATION NO 19 LIMITED	*8th Respondent*
HIGH HIGHVELD SYNDICATION NO 20 LIMITED	*9th Respondent*
HIGHVELD SYNDICATION NO 21 LIMITED	*10th Respondent*
HIGHVELD SYNDICATION NO 22 LIMITED	*11th Respondent*
	("the Highveld Companies")
NICOLAS GEORGIOU	*12th Respondent*
ZEPHAN PROPERTIES (PTY) limited	*13thr Respondent*
NICOLAS GEORGEIOU N.O.	*14th Respondent*
MAUREEN LYNETTE GEORGIOU N.O.	*15th Respondent*
JOSEPH CHEMALY N.O.	*16th Respondent*
GEORGE NOCOLAS GEORGIOU	*17th Respondent*

MICHAEL NICOLAS GEORGIOU	***18th Respondent***
HENDRIK JACOBUS MYBURG	***19th Respondent***
BOSMAN & VISSER (PTY) LIMITED	***20th Respondent***
PICKVEST (PTY) LIMTIED	***21st Respondent***
HEINRICH PIETER MOLLER	***22nd Respondent***
WILLEM MORKEL STEYN	***23rd Respondent***
BAREND STEFANUS VAN DER LINDER	***24th Respondent***
FREDERICK JULIUS REICHEL	***25th Respondent***
EUGENE KRUGER INC.	***26th Respondent***
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA (CIPC)	***27th Respondent***

And

THE HIGHVELD SYNDICATION INVESTORS ***("the main application)***

In re:

The ex parte application of:

ORTHOTOUCH LIMITED

HAVING read the documents filed of record and having considered the matter:-

IT IS ORDERED THAT:-

1. Rule 30A Application is dismissed.

BY THE COURT

REGISTRAR
lykb

'A2.1'

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

1 September 2016
SIGNATURE

CASE NO: 42334/2014

In the matter between:

JURIE JOHANNES GELDENHUYS	First Applicant
ARTHUR BRADY COCHRANE	Second Applicant
SHARON ANN VLOK	Third Applicant
And	
ORTHOTOUCH LIMITED	First Respondent
DEREK PERDOE COHEN N.O.	Second Respondent
HANS KLOPPER N.O.	Third Respondent
And OTHERS	Fourth to Twenty-seventh Respondents

And

THE HIGHVELD SYNDICATION INVESTORS

("the Main Application")

In re:

The ex parte application of:

ORTHOTOUCH LIMITED

(Registration number: 2010/004096/06)

Application for the sanctioning of a Scheme of Arrangement in terms of section 155(7) of the Companies Act, no 71 of 2008

("the ex parte application")

APPLICATION FOR LEAVE TO APPEAL

SPILG, J:

1 September 2016

INTRODUCTION

1. The parties will be identified as in the original application.

2. There were a number of competing interlocutory applications brought which were dealt with as a special motion. They came to be reduced to two applications which required determination.

3. In the one, the first respondent brought a rule 30A application to declare as an irregular proceeding the application brought by the applicants to rescind an order the sanctioning a scheme of arrangement. It was contended that the rescission application was defective because of a failure to join and give notice to all the affected persons, who would include the investors in each of the Highveld Syndications, or first to have applied for substituted service. It was common cause that they number between 17 000 to 18 000 individuals. This application was supported by the third to sixteenth respondents. The respondents argued that the failure in not first complying with rule 42(2) (and obtain an order for notice to be given to all persons affected by the rescission application) or in not complying with rule 4(2) read with 5(2) (in regard to substituted service) was fatal.

   I held that the rescission application was not fatally defective.

4. In the other, the applicants applied for substituted service of the rescission application allowing for notice to all investors by means of a notice in two national weekend newspapers which would direct them to a website where the application could be viewed and downloaded. The third respondent indicated that he would abide the decision in this regard.

   I considered that the form of notice proposed by the applicants was inadequate and would amount to only formalistic compliance. In my view an effective form of notification, having regard to the number of investors (and taking into account those who allegedly supported the rescission application), required a structured order whereby *inter alia* the third respondent (Mr Klopper in his representative capacity) would be involved in providing the names and contact details of the relevant investors. This is reflected in the terms of the order.

5. The first respondent accepts that the judgment in respect of the rule 30A application is not appealable.

   It however contends that the order for substituted service is appealable. Klopper who abided the decision of the court in this regard now enters the fray and also applies for leave to appeal on the grounds that he being subjected to a mandatory order without having been heard.

6. There are two preliminary issues. The first is whether the order for substituted service is appealable. The second is whether Klopper is entitled to apply for leave to appeal without an explanation as to why he is no longer prepared to abide the decision and where he does not assert prejudice.

APPEALABILITY

7. The respondents rely on *Nova Property Group Holdings Ltd v Cobbett and others* 2016(4) SA 317 (SCA) as the basis for being entitled to appeal an order which is purely interlocutory in form and in effect.

8. Leaving aside the requirement, at the time, that the Constitutional Court could only be seized with a constitutional issue in *South African Informal Traders Forum and Others v City of Johannesburg and Others* 2014 (4) SA 371 (CC) (the '*SAITF case*') the court held that there is no absolute bar against an interlocutory order being appealable. In the SAITF case the court allowed an appeal because the issue was determinative of the rights and obligations between the parties and that, as stated in the subsequent case of *Zulu and Others v Ethekwini Municipality and Others* 2014 (4) SA 590 (CC) at para 53;

   > *"The qualifier is the interests of justice, since interim orders can be reconsidered and altered by the court of first instance."*

9. In *Nova Property* the SCA hold that section 17(1) of the Superior Courts Act gives express recognition that the paramount consideration remains the interests of justice.

10. It appears that one of critical issues that the SAITF case required to be considered was whether the point raised and decided is determinative of the rights and obligations between the parties. Clearly the question of substituted service cannot be.

11. My findings are therefore not definitive of the main issues to be dealt with in the rescission proceedings. My decision is purely concerned with how best to give effective service where there are many thousands of affected investors.

12. *Adv Bratt* in anticipation of this contended for a new ground of appeal not foreshadowed in either the application for leave to appeal or in his heads of argument; namely that there was a substantive constitutional law point involving access to information. It was contended that the provisions of the Promotion of Access to Information Act 2 of 2000 *("PAIA")* would not be respected in that the privacy rights of investors would be affected if Klopper was to provide the information as required in my order without first proceeding in terms of that Act. It was contended that my order was therefore *ultra vires*.

13. Adv Brett's attention was drawn to s7(1) of PAIA which exempts from the purview of the Act *inter alia* recorded information requested after the commencement of civil proceedings from any public or private body. The subsection reads:

> *(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.

The respondents conceded that the point was not good.

14. It was then contended that there was some substantive irregularity in that I could not make an order which had not been sought by the applicant.

The applicants had sought relief from the strictures of notice to all affected persons or personal service under rules 42 or 4 of the Uniform Rules respectively. I considered that it was unlikely to properly serve its intended purpose and that a more effective means of giving notice should be adopted. It will also be recalled that the application was heard together with the Rule 30A application where it was contended that the failure to give notice of the rescission application to all investors was fatal.

15. The respondents cannot have it both ways. This is a classic case of a party performing cart wheels with no purpose other than to frustrate the merits of the case being dealt with expeditiously.

In the Rule 30A application the respondents challenged the failure to give each investor notice and in the substituted service application Klopper was prepared to abide the decision if the court ordered a much diluted form of giving notice to investors. What was before the court was an application for substituted service and the court determined how best to deal with it bearing in mind that the affected persons who have an interests are the investors whose right to be heard on whether they support or object to the grant of the rescission application are paramount. Accordingly if the interests of justice are taken into account their rights prevail.

16. Moreover it is difficult to see why it would be in the interstates of justice to further delay the determination of the merits. The issues raised now are symptomatic of a Stalingrad defence; where side issues taken on appeal simply delay the matter and build up costs for lay litigants against those who have deep pockets. The risk of being financially out-litigated cannot be in the interests of justice particularly where the interests of justice are served ultimately by ensuring that the most effective and practical means is adopted to bring the rescission application to the notice of the thousands of affected investors.

17. This does not seem to be an issue in respect of which the first respondent can complain.

18. As regards Klopper, who is cited in his capacity as the duly appointed business rescue practitioner, the court required a more effective form of service. This cannot possibly be detrimental to the interests he is required to protect and serve, considering his duties and responsibilities under the Companies Act. If it is, then he was obliged to say so under oath when explaining why he has changed his non-intervention position. The form of notice or service and when and how it will be relaxed is a discretionary judicial power exercised on a regular basis by courts when looking after the interests of all potentially affected parties who are not presently before court.

19. The attempt to make the case fit within the scope of a substantive law point in order render it appealable is misconceived. The respondents are trying to force a square peg into a round hole.

    The order made is neither final nor definitive of any rights. It remains a purely procedural means of giving notice in a practical manner to over 17 000 individuals.

20. In my view this case is not appealable.

THE MERITS

21. If I am incorrect on the issue of appealability, then save for possibly an immaterial error regarding who attorney Lubbe represented, I am satisfied on re-reading the judgment in light of the points raised that an appeal would not have reasonable prospects of success. I should add that this would be on the assumption that I was not exercising a judicial discretion. I however believe that the issue of substituted service on persons who are not before the court concerns the exercise of a judicial discretion and no acceptable grounds have been raised for challenging the basis upon which the discretion was improperly exercised.

ORDER

22. Aside from deciding the application for leave to appeal it was agreed that I should amend the order for substituted service so as to take into account any further appeal process. The terms were was agreed upon.

23. I accordingly order that:

1. *The application for leave to appeal is refused.*

2. *The order of 26 May 2016 is amended as follows;*

    a. *The date of 6 June 2016 in para 4 is deleted and replaced with: "within three weeks of the respondents exhausting the appeal process"*

    b. *The date of 11 July 2016 in para 6 is deleted and replaced with:*

        "within eight weeks of the respondents exhausting the appeal process"

3. *The respondents are to pay the costs of the application including the costs of two counsel*

SPILG, J

DATES OF HEARING:	
DATE OF JUDGMENT:	1 September 2016
LEGAL REPRESENTATIVES:	
FOR APPLICANTS:	Adv NJ Graves SC
	CH J Maree
	Theron & Partners c/o BDK Attorneys
FOR FIRST RESPONDENT:	Adv Brett SC
	Adv J Smit
	Nathalie Lubbe & Associates Inc
FOR 3rd to 16th RESPONDENTS:	Adv Smit
	Faber Goerts Ellis & Austin Inc
	Kyriacou Inc

A22.

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: *2014/42334*
P/H NO: *0*

JOHANNESBURG, 01 September 2016
BEFORE THE HONOURABLE JUDGE SPILG

In the ex parte application of:-

JURIE JOHANNES GELDENHUYS	***1st Applicant***
ARTHUR BRADY COCHRAINE	***2nd Applicant***
SHARON AAN VLOK	***3rd Applicant***

and

ORTHOTOUCH LIMITED	***1st Respondent***
DEREK PEDOE COHEN N.O.	***2nd Respondent***
HANS KLOPPER N.O.	***3rd Respondent***
HIGHVELD SYNDICATION NO 15 LIMITED	***4th Respondent***
HIGH HIGHVELD SYNDICATION NO 16 LIMITED	***5th Respondent***
HIGHVELD SYNDICATION NO 17 LIMITED	***6th Respondent***
HIGHVELD SYNDICATION NO 18 LIMITED	***7th Respondent***
HIGHVELD SYNDICATION NO 19 LIMITED	***8th Respondent***
HIGH HIGHVELD SYNDICATION NO 20 LIMITED	***9th Respondent***
HIGHVELD SYNDICATION NO 21 LIMITED	***10th Respondent***
HIGHVELD SYNDICATION NO 22 LIMITED	***11th Respondent***
	("the Highveld Companies")
NICOLAS GEORGIOU	***12th Respondent***
ZEPHAN PROPERTIES (PTY) limited	***13thc Respondent***
NICOLAS GEORGEIOU N.O.	***14th Respondent***
MAUREEN LYNETTE GEORGIOU N.O.	***15th Respondent***
JOSEPH CHEMALY N.O.	***16th Respondent***

2016 -09- 27

GEORGE NOCOLAS GEORGIOU	***17th Respondent***
MICHAEL NICOLAS GEORGIOU	***18th Respondent***
HENDRIK JACOBUS MYBURG	***19th Respondent***
BOSMAN & VISSER (PTY) LIMITED	***20th Respondent***
PICKVEST (PTY) LIMTIED	***21st Respondent***
HEINRICH PIETER MOLLER	***22nd Respondent***
WILLEM MORKEL STEYN	***23rd Respondent***
BAREND STEFANUS VAN DER LINDER	***24th Respondent***
FREDERICK JULIUS REICHEL	***25th Respondent***
EUGENE KRUGER INC.	***26th Respondent***
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA (CIPC)	***27th Respondent***

And

THE HIGHVELD SYNDICATION INVESTORS	***("the main application)***

In re:

The ex parte application of:

ORTHOTOUCH LIMITED
Application for the sanctioning of a Scheme of Arrangement in terms of section 155(7) of the Companies Act, No 71 of 2008

("the ex parte application ")

HAVING read the documents filed of record and having considered the matter :-

THE COURT ORDERS :-

1. *The Application for Leave to Appeal is refused.*

2. *The Respondents to pay the costs of the application including costs of Two Counsel.*

BY THE COURT

REGISTRAR
/zb

A3.1

OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

THE OFFICE OF THE REGISTRAR
Gauteng Local Division
Johannesburg

UNIT: ARCHIVES
10TH FLOOR
Tel:0113350300 Fax:

DATE:	28-09-2016	FILE NR:	2014/42334
TO:	SCA	FROM:	Archives Registrar
CC:			

SUBJECT:	The court orders for 2014/42334

I Thandi Malele the registrar of the above mentioned division do hereby state under oath that the we have two court orders for the file of 2014/ 42334 which were issues on 26th May 2016 and 1st September 2016.

T. Malele

2016 -09- 29