O

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO:

GLD CASE NO: 42334//2014

In the matter between: -

ORTHOTOUCH LIMITED	Applicant
and	
JURIE JOHANNES GELDENHUYS	First Respondent
ARTHUR BRADY COCHRAINE	Second Respondent
SHARON ANN VLOK	Third Respondent

In Re:

JURIE JOHANNES GELDENHUYS	First Applicant *a quo*
ARTHUR BRADY COCHRAINE	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*

And

THE HIGHVELD SYNDICATION INVESTORS

In re:

The ex parte application of:

ORTHOTOUCH LIMITED
(Registration number: 2010/004096/06)

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE THAT ORTHOTOUCH LIMITED ("The First Applicant") herewith makes application for an order in the following terms:

1. That leave be granted to the First Applicant to appeal the order of the Court *a quo* issued on 26 May 2016.

2. That the appeal be upheld with costs such costs to include the costs of two counsel and that the order of the Court *a quo* be set aside.

BE PLEASED TO TAKE NOTICE FURTHER THAT the affidavit of PANAGIOTIS KLEOVOULOU together with its annexures will be used in support of the application.

TAKE NOTICE THAT the First Applicant has appointed NATALIE LUBBE & ASSOCIATES INC, c/o EG COOPER MADJIEDT, 77 Kellner street, Westdene, Bloemfontein as the address at which it will accept service of all documents in the application.

TAKE NOTICE THAT if you wish to oppose the relief sought you must file your answering affidavit within one month after service of this application on you.

KINDLY ENROLL THE MATTER ACCORDINGLY

DATED at JOHANNESBURG on this the 30th day of SEPTEMBER 2016

NATALIE LUBBE & ASSOCIATES INC
Attorneys for the First Applicant
Tel: 011 704-1563
Fax: 086 688 9555
Email: Natalie@natalielubbe.co.za
Ref: N Lubbe/MAT1899
c/o EG COOPER MAJIEDT
77 Kellner street
Westdene
BLOEMFONTEIN
Tel: 051 447 3374/5/6
Fax: 086 602 0351
Ref: Mr Nick Oosthuizen

TO: REGISTRAR OF THE SUPREME COURT OF APPEAL
BLOEMFONTEIN

AND TO:
THERON & PARTNERS
Attorneys for the First, Second and Third Respondents
C/O BDK ATTORNEYS
Ground floor.
3 Ninth Street
Houghton Estate
JOHANNESBURG

Received By:
David H Botha, Du Plessis & Kruger Inc.

Received on 30 day of SEPTEMBER 2016

JW 14:55

for and on behalf of the first, second, and third applicants

AND TO:
ZWIEGERS ATTORNEYS
Attorneys for the 2nd Respondent a quo
288 Dunkeld West Centre
Cnr Bompas & Jan Smuts
Tel: 087 945 2100
Fax: (011) 325-2207
REF: Mr Wn/Z497/K

Received on 30 day of SEPTEMBER 2016

for and on behalf of the 2nd respondent a quo

AND TO:
FABER GOERTZ ELLIS AUSTEN INC
Attorneys for the 3rd to 11th Respondents a quo
Tel: 010 590-3378
Fax: 011 267-6701
Ref: Mr D Ellis
Email: diaan@fgea.co.za
c/o JOHN BROIDO ATTORNEYS
1724 Marble Towers
206/214 Jeppe street
JOHANNESBURG
Tel: (011) 333-2141
Ref: Mr John Broido / Ms Shiela Smith

JOHN BROIDO
WITHOUT PREJUDICE

Received on 30th day of SEPTEMBER 2016

15h30

for and on behalf of the 3rd to 11th respondents a quo

AND TO:
KYRIACOU INCORPORATED
Attorneys for the 12th to 16th 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

KYRIACOU INCORPORATED
Accepted without prejudice to clients rights

Date: 30 September 2016

Sign: 2:28pm

Received on _____ day of SEPTEMBER 2016

for and on behalf of the 12th to 16th & 24th respondents a quo

AND TO:
EG COOPER MAJIEDT ATTORNEYS
Attorneys for the 17th & 18th Respondents a quo
Email: st@egc.co.za

Per E-mail

AND TO:
POLSON & ROSS ATTORNEYS
Attorneys for the 19th, 20th, 21st, 25th & 26th Respondents a quo
Tel: 012 452 4000
Email: apolson@polsonross.com /
apolson@mostertlaw.com /
afourie@mostertlaw.com
REF: Mr Graeme Polson

Per E-mail

AND TO:
GILDENHUYS MALATJI INC
Attorneys for the 22nd Respondent a quo
Tel: 012 428 8600
Email: wcilliers@gminc.co.za

Per E-mail

AND TO:
ANDRE VLOK ATTORNEYS
Attorneys for the 23rd Respondent a quo
Tel: 041 367-3550
Fax: 086 549 3721
Email: andre@vlokattorneys.co.za
REF: Mr Andre Vlok

Per E-mail

AND TO:
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA
27TH Respondent a quo
DTI Campus (Block F – Entfutfukweni)
77 Meintjies Street
PRETORIA

REGISTRATEUR VAN MAATSKAPPYE EN VAN BESLOTE KORPORASIES
REGSAFDELING
2016 -10- 03
LEGAL DIVISION
REGISTRAR OF COMPANIES AND OF CLOSE CORPORATIONS

Received on 03 day of SEPTEMBER 2016
October

and on behalf of the 27th Respondent a quo

GRIFFIER VAN DIE SUID-GAUTENG HOOGGEREGSHOF JOHANNESBURG
PRIVAAT SAK / PRIVATE BAG X67 JOHANNESBURG
2016 -10- 03
CIVIL APPEALS
REGISTRAR OF THE SOUTH GAUTENG HIGH COURT JOHANNESBURG

Natalie Lubbe

From: Natalie Lubbe
Sent: Friday, 30 September 2016 1:23 PM
To: 'Beánca Kotze'; 'corrie@zwiegers.co.za'; 'Diaan Ellis'; 'legal@kincorporated.co.za'; 'st@egc.co.za'; 'gpolson@polsonross.com'; 'wcilliers@gminc.co.za'; 'andre@vlokattorneys.co.za'
Subject: RE: Orthotouch Limited / J J Geldenhuys & others: appliction for leave to appeal to the Supreme Court of Appeal (EMAIL 2)
Attachments: 20160930 Ann PK1 - PK5.pdf

Dear All

Further to my previous email, please find annexed hereto Annexures "PK1" to "PK5" to Orthotouch's founding affidavit.

Annexures "PK6" to "PK11" will follow under cover of a third email.

Regards
Natalie

Natalie Lubbe
Natalie Lubbe & Associates Inc
Fancourt Office Park, Block 2
cnr Northumberland & Felstead ave
Northriding ext 17, 2169.
PO Box 662, Bromhof, 2154

Tel: 011 704 1563
Direct Fax: 086 688 9555
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Email: natalie@natalielubbe.co.za
Website: www.natalielubbe.co.za

Natalie Lubbe & Associates

Reduce, Reuse, Recycle

Natalie Lubbe

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Natalie Lubbe & Associates

Reduce, Reuse, Recycle

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO:

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THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA (CIPC)	Twenty Seventh Respondent *a quo*

And

THE HIGHVELD SYNDICATION INVESTORS

In re:

The ex parte application of:

ORTHOTOUCH LIMITED
(Registration number: 2010/004096/06)

AFFIDAVIT

I, the undersigned

PANAGIOTIS KLEOVOULOU

do hereby make oath and say that:

1. I am a director of the Applicant. I am duly authorised to depose to this affidavit on behalf of the Applicant in evidence of which I annex hereto a resolution by the Applicant as ***Annexure "PK1"***.

2. The content hereof falls within my personal knowledge, save to the extent that the context indicates the contrary, and is both true and correct.

3. This is an application for leave to appeal the judgment and order of the Gauteng Local Division as the Court of first instance (**"Court *a quo*"**) granted by Spilg,J dated 26 May 2016, where appeal was refused.

4. A certified copy of the order (**"the order *a quo*"**) and a copy of the judgment are annexed hereto as ***Annexures "PK2"*** and ***"PK3"***.

5. An application for leave to appeal the judgment *a quo* was refused on 1 September 2016 by Spilg, J.

6. A copy of the order refusing leave to appeal dated 1 September 2016 is annexed hereto as ***Annexure "PK4"***, and a copy of the judgment pursuant to which the order was issued as ***Annexure "PK5"***. For the sake of completeness, the draft order marked "X" and initialed by Spilg, J is attached hereto as ***Annexure "PK6"***.

7. The Honourable Court should note that the order *a quo* does not reflect the entire order made by Spilg, J as set out in the judgment *a quo*. Similarly, the order refusing leave to appeal does not reflect the entire order made by Spilg, J as set out in the judgment refusing leave to appeal and in the draft order marked "X".

8. In respect of the order dismissing the applications for leave to appeal, attached hereto as ***Annexure "PK7"*** is a letter from attorneys Polson & Ross, who are the attorneys of record for the 19th, 20th, 21st, 25th and 26th Respondents, dated 2 September 2016 addressed to Spilg, J advising that the 19th, 20th, 21st, 25th and 26th Respondents did not participate in the application for leave to appeal, and enquiring whether it was the court's intention that they became liable for the costs of the applications.

9. On 6 September 2016, Spilg, J's registrar responded to Mr Polson by email and advised that Spilg, J would amend the order and send out the amended order. A copy of this email is attached hereto as ***Annexure "PK8"***.

10. To date of this affidavit, we have not been able to obtain the rectified order *a quo*, nor a rectified order dismissing the application for leave to appeal.

11. In terms of the Honourable Court's Practice Directions: 15 November 2014, we have, in the interim obtained a letter from the Registrar of the Gauteng Local Division certifying the dates of both the order *a quo* and the order dismissing the application for leave to appeal. This letter is attached hereto as ***Annexure "PK9"***.

12. The Applicant's attorneys are endeavouring to have the orders corrected, and will furnish the Honourable Court with the corrected orders as soon possible. To the extent it is necessary to do so, the Applicant requests condonation for the late filing of the corrected orders.

13. The short background to the order *a quo* was that :

13.1. During October 2014 the Applicant proposed a scheme of arrangement under the provisions of Section 155 of the Companies Act, 71 of 2008 ("**the Act**") to some eighteen thousand investors ("**the Highveld Syndication Investors**") in the Fourth to Eleventh Respondents, being

the so-called Highveld Syndication Companies and their trade creditors as well as those of the Applicant.

13.2. The scheme of arrangement (**"the arrangement"**) restructured and determined the rights of the Highveld Syndication Investors as well as those of the trade creditors of the Highveld Syndication Companies and the Applicant.

13.3. The arrangement was duly sanctioned in terms of section 155 (7) of the Companies Act No. 71 of 2008 on 24 November 2014 *per* Moshidi, J in the Gauteng Local Division of the High Court. The sanctioning order was properly taken *ex parte*. The proposed arrangement provided in its terms for its sanctioning in accordance the provisions of Section 155 of the Act.

13.4. The order sanctioning the arrangement was preceded by a meeting of the Highveld Syndication Investors and trade creditors on 12 November 2014 (**"the scheme meeting"**) at which the statutory majorities with regard to number, value of claims and number of votes was attained.

13.5. The First to Third Respondents thereafter sought under the provisions of Uniform Rule 42(1)(a), alternatively under the common law, to rescind the sanctioning of the arrangement and in the alternative sought leave to appeal the order of Moshidi, J sanctioning the arrangement (**"the rescission application"**). A copy of the notice of motion forming part of the rescission application is annexed as ***Annexure "PK10"***.

13.6. The First to Twenty-Seventh Respondents in the rescission application were duly served with that application, but no service thereof took place on the Highveld Syndication Investors, albeit that they were generically cited therein as "*The Highveld Syndication Creditors*". No service took place on the trade creditors.

13.7. No provision was made for the citation of the trade creditors nor are they referred to in the rescission application.

13.8. In terms of prayer (a) of Annexure "PK10", the Applicants in the rescission application, being the First to Third Respondents in the application for leave to appeal (**"the Respondents"**), sought condonation for non-compliance with the rules of Court with regard to the form and service of the rescission application, suggesting that notice by way of publication in two newspapers and on a website would be sufficient for that purpose.

13.9. Annexure "PK10" had pre-determined a date for hearing as 19 May 2015, thus simply assuming that the Court *a quo* would at the hearing of the rescission application condone non-service thereof on the Highveld Syndication Investors.

13.10. The Applicant initiated and proceeded with an application under under Rule 30A on 8 May 2015, on the basis that the Respondents had failed to comply with Uniform Rule 4(2) and had not sought the Court's

directions as to the manner of service prior to setting the rescission application down for hearing on the 19th May 2015.

13.11. The matter was not heard on the day, it not being enrolled due to Moshidi, J being on long leave and the date not having been arranged with his registrar.

13.12. In the course of opposing the Rule 30A application, the Respondents then initiated an application for substituted service on 15 June 2015. This application was brought on notice to the First to Twenty-Seventh Respondents in the rescission application A copy of the notice of motion is annexed hereto as ***Annexure "PK11".***

13.13. No provision was made for, or any reference made to, trade creditors in the application for substituted service.

13.14. The application for substituted service was opposed by the Applicant. Three sets of affidavits were filed.

THE ORDER *A QUO* IS INCOMPETENT AND DEFECTIVE

14. The rescission application will affect the legal interests of both the Highveld Syndication Investors and the trade creditors.

15. The Highveld Syndication Investors and trade creditors are by law entitled to be joined in the rescission application since they have a direct and substantial legal interest in the arrangement on the following basis:

15.1. All of the Highveld Syndication Investors and trade creditors by virtue of the statutory contract to which they became bound when the arrangement was sanctioned in accordance with Section 155(7)(b) read with Sections 155(7)(a) and 155(8) of the Act[1];

15.2. Independently of 15.1above, all those Highveld Syndication Investors and trade creditors who voted in favour of the adoption of the arrangement at the scheme meetings on the basis of *consensus.*

16. The order *a quo,* confusingly, provided, *inter alia,* that:

> *"b. It is declared that the joinder of all the 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 ... 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.*

[1] **Serein Investments (Pty) Ltd v Myb (Pty) Ltd 1967 (4) SA 437 (C)** at 439A; **Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste 1994 (2) SA 265 (A)** at 292B-C

d. *The second respondent is to provide to the applicants' attorneys of record ... a list of all persons who voted... in favour of or against the approval of the arrangement.*

...

f. *The applicants shall ...:*

i. *Give notice of the main application on (sic) each persons (sic) 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:*

...

2. *such notice shall be by way of e-mail or sms, or failing which by registered post..." ;*

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

1. *publication of a notice in .....newspapers at least three weeks before the hearing;*

2. by making available ... the founding papers... on the website..."

(Emphasis added)

17. Both the Highveld Syndication Investors and trade creditors are defined in the arrangement, the one specifically excluding the other.

18. A copy of the definition clause of the arrangement is annexed as ***Annexure "PK12"***. In order to avoid prolixity the remainder of the arrangement is not annexed.

19. The order *a quo* distinguishes between *persons* on the one hand and *investors* on the other. It envisages catering for both the Highveld Syndication Investors and the trade creditors, albeit that no such disctinction was drawn nor any reference made to trade creditors or relief sought in relation to them in the application for substituted service or in the rescission application.

20. Even so, the order *a quo,* in addition, also distinguishes two different methods of service:

20.1. On the *persons* who voted at the scheme meeting, by way of e-mail, sms or registered post;

20.2. On the *investors* by way of publication in newspapers and a website.

21. The order *a quo* treats those who voted at the scheme meeting differently to those who did not vote. The attendees are to be notified by e-mail, sms or registered post, and such of them who are Highveld Syndication investors are in addition to be given notice per the publication in newspapers and on the website.

22. The Court *a quo* misdirected itself in not requiring service in the same manner on both trade creditors and Highveld Syndication Investors by way of publication in newspapers and on the website. This in effect means that the substituted service as ordered differs in relation to parties whose legal interests are affected equally by the order *a quo*.

23. The effect of the order *a quo* is also that no notice is required at all to trade creditors who did not vote at the scheme meeting, thus denying them their right to a fair hearing under Section 34 of the Constitution.[2]

MANDATORY ORDERS INCOMPETENTLY MADE WITHOUT NOTICE TO FIRST RESPONDENT AND ORDER *A QUO* NOT PROVIDING FOR SUBSTITUTED SERVICE ON TRADE CREDITORS: THE ORDER *A QUO* IS APPEALABLE

24. It is the Applicant's case that the nature of the orders made, in particular paragraph b. of the order *a quo* were, in relation to the Applicant and to the Third Respondent *a quo*, are mandatory in nature and consequently incompetent and falling outside of the Court's powers.

25. The Court *a quo* erred in not pre-cognizing the Applicant (and the Third Respondent *a quo*) of the fact that a mandatory order would be made or was contemplated by the Court *a quo* and consequently its right to state its case and be heard on the matter was ignored, thus infringing on its right to a fair hearing under Section 34 of the Constitution. Notification of the initiation of any process in general requires service which forms part of the basic right to a fair hearing under Section 34 of the Constitution. [3]

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[2] **De Beer v North Central Council and South Central Local Council 2002 (1) SA 429 (CC)** at para [10] and [11] pp 439-440

[3] **De Beer** *op cit* at para [10] and [11] pp 439-440

26. The order *a quo* does not provide for substituted service of the rescission application on trade creditors of the Highveld Syndication Companies or those of the Applicant at all.

27. The order *a quo* will have immediate effect and will not be reconsidered. It will exclude the trade creditors *in toto* from the proceedings and as against them it will have a final effect since the initiation of proceedings against them will have been authorised without their knowledge or any form of notice. As a direct consequence it will also be definitive of their rights and dispose of the whole of the relief claimed as against them in the rescission proceedings in their absence.[4]

28. The appealability of the order *a quo* would be in line with the decisions in **Moch v Nedtravel**[5], and further in **Philani-Ma-Africa v Mailula**[6] where it was held that the general principles on the appealability of interim orders

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[4] **Zweni v Minister of Law & Order of the Republic of South Africa 1993 (1) SA 523 (A)** at 532I-533

[5] **Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A)** at 10E-G

[6] **2010 (2) SA 573 (SCA)**

are to accord with the equitable and context-sensitive standard of the interests of justice favoured by the Constitution.[7]

29. The order *a quo* is appealable on this basis since it is clearly in the interests of justice that it be set aside.[8] The interests of justice are a paramount consideration in deciding whether a judgment is appealable.[9]

30. It is in addition, in relation to the Applicant (and the Second Respondent *a quo*), against the interests of justice to issue a mandatory order without having regard to the principle of *audi alteram partem,* or by subjecting that well established principle to a pragmatic view which was apparently taken by the Court *a quo* in order to "*move things along*".[10] To permit the order to stand would militate against the interests of justice in this regard as well.

31. The application for substituted service did not seek the mandatory relief as granted, and in particular the relief sought did not include an order to disclose the identity of the Highveld Syndication Investors, or provide their

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[7] **International Trade Administration Commission v SCAW South Africa (Pty) Ltd** 2012 (4) SA 618 (CC) at para 53

[8] **International Trade Administration Commission** *op cit* at para 63

[9] **Nova Property Group Holdings Ltd and Others v Cobbett and Another 2016 (4) SA** 317 at 323D- E

[10] **Ekurhuleni Metropolitan Municipality v Dada NO and Others 2009 (4) SA 463 (SCA)** at [13] and [14] pp 469-470

contact detail or identify those to whom notice was given of the scheme of arrangement. It was not an issue raised in the substituted service application.

32. The Court *a quo* exceeded its powers as envisaged in Rule 4(2) of the Uniform Rules of Court by going beyond the giving of directions relating to the manner of service.

33. The Court *a quo* granted an order that was far more extensive than the relief claimed.[11]

34. The Court *a quo mero motu* issued an order which was too wide, overbearing and *ultra vires.* The Court *a quo* was not asked in the papers to make such an order.

35. The Court *a quo* erred in adopting a solution for the Repondents which fell outside of its powers by proposing as a *first step* the securing of a list of all investors: *".....Due to the conduct of the relevant respondents it is*

[11] **Baront Investments (Pty) Ltd v West Dune Properties 296 (Pty) Ltd 2014 (6) SA 310 (KZP)** at [80] and [81] p 310, para [93] and [94] p 311

necessary that they provide the lists to the applicants."[12] The Court *a quo* erred in finding that there was a recalcitrance on the part of the Applicant to furnish information.[13]

THE COURT MISDIRECTED ITSELF IN DECLARING THAT JOINDER NOT NECESSARY IN APPLICATION FOR RESCISSION

36. Having a direct and substantial legal interest in the outcome of the rescission application, all the Highveld Syndication Investors and trade creditors must be joined to the proceedings. Their statutory entitlements in accordance with the arrangement are sought to be set aside. In this regard it is common cause that a number of instalments under the arrangement have already been paid to them.

37. The Court *a quo* erroneously interpreted Rule 42(2) to mean that mere notice to affected parties of the application for rescission was sufficient for purposes of compliance with the Rule, as opposed to joining a party with a legal interest in the outcome thereof, and proceeded to issue a declarator to this effect.[14]

[12] Paragraph 44, Judgment *a quo*

[13] Paragraph 30, Judgment *a quo*
[14] Paragraph 34, Judgment *a quo*, p 11

38. The meaning to be given to the words: " *upon notice to all parties whose interests may be affected*" read with the words: "*make application therefor*" contained in Rule 42(2), properly interpreted, must be in accordance with and subject to the corresponding meaning envisaged in Rule 6(1) of the Uniform Rules where "*on notice*" means service of an application in the normal course.

39. Rule 42(2) does not expressly create or envisage an exception to this position. In the absence thereof the Rule must be interpreted as stated above.

40. Joinder of necessity is requisite quite apart from whether substituted service is ordered or not. The necessity of joinder stands separate, and is distinct, from the requirements of service under Rule 4(2) or the ambit of Rule 42(2).

41. The Court *a quo* erred in making its finding in relation to Rule 42(2) applicable also to the alternative relief sought, namely leave to appeal.

THE ORDER FOR DISCLOSURE OF INFORMATION RELATING TO PRIVATE THIRD PARTIES INCOMPETENT ABSENT COMPLIANCE WITH THE PAIA OR ORDER FOR DISCOVERY

42. The information required to be compiled into a list relates to third parties who are not shareholders of the Applicant but who are private investors in the Highveld Syndication Companies. It was not canvassed in the papers or at the hearing whether such recorded information exists.

43. The Highveld Syndication Investors are neither shareholders nor investors in the Applicant.

44. The Court *a quo* therefore misdirected itself by issuing an order compelling the compilation and disclosure of private records where no request for information had been directed at the Applicant *a priori* in accordance with the procedural provisions of the Promotion of Access to Information Act 2 of 2000 (**"PAIA"**) or an order for discovery sought in terms of Uniform Rule 35(13).[15]

[15] **PFE International v Industrial Development Corporation of SA 2013 (1) SA (SCA) 1** at [21] p 7 F-G

45. The Court *a quo* erred in finding that PAIA was of no application to the matter in light of Section 26(2) of the Companies Act, 71 of 2008. The latter section deals with access to company records by shareholders and not with access to personal details of legal and natural persons who invested in other third party entities such as the Highveld Syndication Companies. Neither the Highveld Syndication Investors nor the trade creditors are shareholders or holders of any beneficiary interest in the Applicant.

46. Furthermore if the information to be disclosed and compiled in the agreed list does form part of the records of the Applicant, then the provisions of PAIA, and in particular Section 53 thereof, would be of application. In such an event the privacy provisions of Section 63 of PAIA would enjoin the Applicant to refuse the information sought.

47. If the information to be disclosed and compiled in the agreed list cannot be said to be a part of any *record* of the Applicant, as defined in Section 1 of PAIA, and does not fall foul of the provsions of the Act, then the order *a quo* is simply a mandatory order which falls outside the purview of substituted service and is therefore incompetent.

CONCLUSION

48. The envisaged appeal has a reasonable prospect of success and the grounds stated constitute compelling reasons why the appeal should be heard in due course and why leave should be granted to appeal the order *a quo* with costs.

49. I accordingly humbly pray for such an order to issue.

PANAGIOTIS KLEOVOULOU

SIGNED AND SWORN TO BEFORE ME AT JOHANNESBURG ON THIS THE 30th DAY OF SEPTEMBER 2016, THE DEPONENT HAVING ACKNOWLEDGED THAT HE/~~SHE~~ KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND CONSIDERS THE OATH BINDING ON HIS/~~HER~~ CONSCIENCE

COMMISSIONER OF OATHS

NAME: BEVERLEY POTGIETER

CAPACITY: Commissioner of Oaths-Practising Attorney RSA

ADDRESS: Van der Berg Incorporated
Building 3 Fancourt Office Park
c/o Felstead Rd & Northumberland Ave
Northriding

PK 1

EXTRACT FROM THE MINUTES OF THE BOARD OF DIRECTORS OF ORTHOTOUCH LIMITED REGISTRATION NUMBER 2010/004096/07 ("ORTHOTOUCH") HELD AT FOURWAYS ON THE 10th DAY OF DECEMBER 2015

It is recorded that:

Orthotouch is currently involved in a number of litigious matters relating to the Highveld Syndication companies and the Highveld Syndication Investors.

It is resolved:

PANAGIOTIS KLEOVOULOU, in his capacity as director of Orthotouch, is hereby authorised to depose to any affidavits on behalf of Orthotouch that are to be filed in such litigation.

CERTIFIED A TRUE EXTRACT

N GEORGIOU

C MYBURGH

H KLOPPER

P KLEOVOULOU

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CERTIFIED A TRUE EXTRACT

N GEORGIOU

C MYBURGH

H KLOPPER
9 /12/2015

P KLEOVOULOU

PK2

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

GRIFFIER VAN DIE HOOGGEREGSHOF VAN SUID-AFRIKA,
GAUTENG PLAASLIKE AFDELING, JOHANNESBURG
PRIVAATSAK/PRIVATE BAG X7
JOHANNESBURG 2000
2016 -09- 27
SENIOR REGISTRAR
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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	***13the 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

GRIFFIER VAN DIE HOOGGEREGSHOF VAN SUID-AFRIKA,
GAUTENG PLAASLIKE AFDELING JOHANNESBURG
PRIVAATSAK/PRIVATE BAG X7
JOHANNESBURG 2000
2016 -09- 27
SENIOR REGISTRAR
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

REGISTRAR
/ykb

PK3

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

.....
SIGNATURE

25 May 2016

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 15 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 Klopper, 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 2015 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 19 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 substituted 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 5(2) in regard to substituted service is fatal.

27. The applicants have identified 17 298 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 6 000 investors who expressly support them, of access to justice. Rules of court are there to facilitate justice;' 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

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[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

DATES OF HEARING:	15 March 2016
DATE OF JUDGMENT:	25 May 2016
LEGAL REPRESENTATIVES:	
FOR APPLICANTS:	Adv S Burger SC
	Adv C Maree
	Adv T Du Preez
	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 PF Rossouw SC
	Adv M Mostert
	Faber Goerts Ellis & Austin Inc
	Kyriacou Inc

PK4

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	*13the Respondent*
NICOLAS GEORGEIOU N.O.	*14th Respondent*
MAUREEN LYNETTE GEORGIOU N.O.	*15th Respondent*
JOSEPH CHEMALY N.O.	*16th Respondent*

GRIFFIER VAN DIE HOOGGEREGSHOF VAN SUID-AFRIKA,
GAUTENG PRIVAATSAK/PRIVATE BAG X7
JOHANNESBURG 2000
2016 -09- 27
SENIOR REGISTRAR
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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.*

GRIFFIER VAN DIE HOOGGEREGSHOF VAN SUID-AFRIKA, GAUTENG PLAASLIKE AFDELING, JOHANNESBURG
PRIVAATSAK/PRIVATE BAG X7
JOHANNESBURG 2000
2016 -09- 27
SENIOR REGISTRAR
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

BY THE COURT

REGISTRAR
/zb

PK 5

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 held 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 Brett* 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 appealablity, 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

PK 6

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

1/9/2016

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")

DRAFT ORDER

SPILG, J:

1 September 2016

Having heard counsel and read the papers filed of record

IT IS ORDERED 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

BY ORDER

REGISTRAR

PK 7

POLSON & ROSS

ATTORNEYS | NOTARIES | CONVEYANCERS

Our reference: JRGP/PIC1/0001
E-mail: gpolson@polsonross.co.za
Your reference: Case No. 42334/14

02 SEPTEMBER 2016

REGISTRAR TO JUDGE SPILG
CHAMBER 1107,ELEVENTH FLOOR
SOUTH GAUTENG HIGH COURT
CNR KRUIS AND PRITCHARD STREETS
JOHANNESBURG
2001

e-mail: pnkomo@justice.gov.za

Sir

JJ GELDENHUYS & OTHERS/ORTHOTOUCH & OTHERS - CASE NUMBER: 42334/2014 : JUDGMENT AND COURT ORDER

1. We have taken note of the judgment granted on 1 September 2016.

2. We act in this matter for the 19, 20th, 21st, 25th and 26th Respondents all of whom abided the Court's decision in the application brought in terms of Rule 30A of the Uniform Rules of Court, as well as the application for the rescission of the judgment sanctioning the Scheme of Arrangement. Affidavits to that effect were filed.

3. Our clients did not participate in the litigation in any manner whatsoever, nor did they participate in the application for leave to appeal.

4. The order granted on 1 September 2016, however, orders the **Respondents** to pay the Applicant's costs. The purpose of this letter is to enquire whether it was the Court's intention that our clients would become liable for the costs of the Applicant under the circumstances set out above. If not, it is suggested that the order be amended to rectify the position.

5. We look forward to hearing from you as to what the Honourable Judge's intention was.

TELEPHONE: +27 11 656 3870 | FACSIMILE: +27 11 656 3898 | EMAIL: info@polsonross.com
The Woodlands Office Park | First Floor | Building 14 | Woodlands Drive | Woodmead

Yours faithfully
POLSON & ROSS

.....
Per: J R G POLSON

Cc *Natalie Lubbe & Associates*
Kyriakio Incorporated
Theron & Partners, c/o BDK Attorneys
Eugene Kruger & Co Inc

P&R

PK8

Natalie Lubbe

From: Nkomo Precious <PNkomo@justice.gov.za>
Sent: Tuesday, 06 September 2016 4:20 PM
To: Graeme Polson
Cc: Mario Kyriacou; ekruger@ekprok.co.za; Beánca Kotze; Natalie Lubbe
Subject: RE: JUDGMENT AND COURT ORDER : J J GELDENHUYS & OTHERS / ORTHOTBOUCH & OTHERS

Importance: High

Dear Mr Polson

The Judge says he will amend the order and then send out the amended one.

Yours sincerely

Thuli Nkomo
Registrar to Judge Spilg
Chamber 1107,Eleventh Floor
South Gauteng High Court
Cnr Kruis and Pritchard Streets
Johannesburg,2001
Tel : 011 335 0129
Mobile: 079 700 9610
Email: PNkomo@justice.gov.za

-----Original Message-----
From: Graeme Polson [mailto:GPolson@mostertlaw.com]
Sent: 02 September 2016 02:49 PM
To: Nkomo Precious
Cc: Mario Kyriacou; ekruger@ekprok.co.za; Beánca Kotze; natalie@natalielubbe.co.za
Subject: JUDGMENT AND COURT ORDER : J J GELDENHUYS & OTHERS / ORTHOTBOUCH & OTHERS

Please see the annexed correspondence from Mr Graeme Polson.

-----Original Message-----
From: toshiba@mostertlaw.com [mailto:toshiba@mostertlaw.com]
Sent: 02 September 2016 02:55 PM
To: Graeme Polson <GPolson@mostertlaw.com>
Subject: Send data from MFP07467454 02/09/2016 14:55

Scanned from MFP07467454
Date:02/09/2016 14:55
Pages:2
Resolution:200x200 DPI

PK 9

OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

THE OFFICE OF THE REGISTRAR
Gauteng Local Division
Johannesburg

UNIT: ARCHIVES
10TH FLOOR
Tel:0113350300

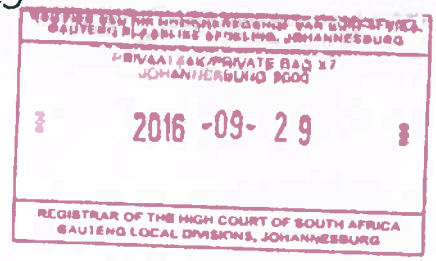
Fax:

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



PK 10

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

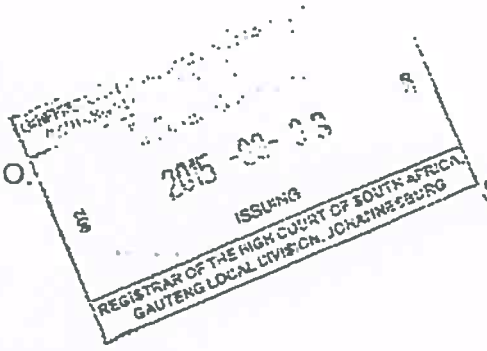
Case No: 42334/14

In the application of:

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

and

ORTHOTOUCH LIMITED	First Respondent
DEREK PEDOE 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
	("the Highveld Companies")
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")

NOTICE OF APPLICATION TO HAVE COURT ORDER SET ASIDE, ALTERNATIVELY FOR LEAVE TO APPEAL

TAKE NOTICE that the applicants in the main application intend to make application in the above Honourable Court on Tuesday 19 May 2015 at 10:00 for the following relief:

(a) That condonation be granted for the non-compliance with the court rules with regards to the form and service of this application.

(b) Setting aside the order granted on 26 November 2014 ("the order") in the ex parte application in terms of Rule 42(1)(a) of the Uniform Rules of Court on one or more of the grounds set out in (d)(1) - (12) below, alternatively under the common law;

Alternatively:

(c) Condonation for the late noting of this appeal and extending the time period prescribed in Uniform Rule 49(1)(b);

(d) Granting leave to appeal the order granted in the ex parte application on the following grounds:

(1) No compromise between the First Respondent, Orthotouch

Limited ("Orthotouch") and its creditors is permitted whilst Orthotouch and the HS Companies (clause 1.29 of the arrangement) or The Highveld Syndication Investors (clause 1.38 of the arrangement) are engaged in business rescue proceedings (section 155(1) of the Companies Act, 2008 ("the Act"): cf clause 1.10, 1.16, 1.44 and 1.49 of the arrangement).

(2) What is defined in the arrangement as "The Highveld Syndication Investors" are not and have never been creditors of Orthotouch for purposes of section 152(2) of the Act: cf paragraph 2.1.51.

(3) As some or all of the properties involved were not registered in the names of the HS companies, these companies were accordingly not able to sell such properties to Orthotouch, and as Orthotouch was in any event in breach of its obligations under the December 2011 business rescue plan, investors in the HS companies could not be affected by the latest compromise sanctioned at the behest of Orthotouch in December 2014.

(4) The HS companies are not creditors of Orthotouch (paragraph 2.1.51 of the compromise).

(5) Orthotouch has no claim against the HS companies, due to its own default (cf clause 2.1.47.3.2 of the compromise).

(6) The arrangement is incomplete in material respects: cf paragraphs

1.4.1.3, 1.4.1.5 and 2.1.15, and accordingly did not comply with section 155(3) of the Act.

(7) Having regard to the definition of *trade creditor* in clause 1.60 of the arrangement read with annexure "H" thereto, Orthotouch had no trade creditors whose claims could be compromised.

(8) The arrangement seeks to compromise the claims of third parties to the compromise (clauses 1.14, 1.20, 1.38 - 1.40 and 2.1).

(9) The ex parte application was brought in the wrong division of the High Court (clause 1.19 of the arrangement).

(10) The arrangement is unintelligible in material respects by way of example:

- The fixed assets of Orthotouch as per annexure "F" is irreconcilable with paragraphs 2.1.47.3 and 2.1.47.3.2 of the arrangement and annexure "A" thereto, as well as with annexure "C" thereto.

(11) The opinion of the BRP referred to in paragraph 2.1.54 of the arrangement could not have been rationally held in view of the information disclosed in the arrangement itself, especially with reference to annexure "B" thereto, where it is recorded that the HS Investors in the HS Companies constitute affected parties in the Business Rescue proceedings "... and are indirectly creditors of

Orthotouch."

(12) The court could not, on the strength of the averments contained in paragraphs 10 to 15 of the affidavit by the Second Respondent, read with the annexures thereto, have been satisfied that notice of the meeting to consider the arrangement had been received by all interested parties.

(e) Leave to appeal to the full court will be sought.

(f) Costs of the application to be paid by Orthotouch (First Respondent) and, in the event of any other Respondents opposing the relief, that such costs be paid jointly and severally by First Respondent and those Respondents opposing the relief.

(g) Further and/or alternative relief.

BE PLEASED TO TAKE FURTHER NOTE THAT the accompanying affidavits of Applicants together with annexures thereto will be used in support of this application.

TAKE FURTHER NOTE THAT the Applicant has appointed the undermentioned firm of attorneys as attorneys of record who will accept service of all notices and documents in these proceedings at their address as stated below.

TAKE FURTHER NOTICE THAT if you intend opposing this application you are required:

a) to file notice of opposition within 5 (five) days of receiving notice of this Application;

b) and within 15 (fifteen) days after you have so given notice of your intention to oppose the application, to file your answering affidavits, if any; and further that you are required to appoint in such notification an address referred to in Rule (5)(b) at which you will accept notice and service of all documents in these proceedings.

c) If no such intention to oppose be given, the application will still be made on the 19th day of May 2015 at 10:00.

DATED at JOHANNESBURG on this 3rd day of March 2015.

Attorneys for Applicants
BDK ATTORNEYS
Ground Floor
3 Ninth Street
Houghton Estate
JOHANNESBURG

For Theron & Partners
Stellenbosch

TO: THE REGISTRAR OF THE GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

AND TO: FIRST TO TWENTY SEVENTH RESPONDENTS (SERVICE BY SHERIFF AND/OR E-MAIL)

PK 11

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

Case No: 42334/14

In the application of:

JURIE JOHANNES GELDENHUYS
(and Two others) — First Applicant

and

ORTHOTOUCH LIMITED
(and Twenty Six others) — First Respondent

And

THE HIGHVELD SYNDICATION INVESTORS

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

Application for Substituted Service

TAKE NOTICE that the above Applicants intend to make application in the above Honourable Court on a date to be determined in conjunction with the appointed judge (for the management of the case), for the following relief:

1. That this application be heard as one of urgency and that the Honourable Court in accordance with Rule 6 (12) dispense with the normal rules with regard to forms and service.

2. That the investors as referred to in the founding papers in the main application, are to be given notice of the main application in the following manner:-

   (a) One notice in both the Sunday Times and Rapport newspapers at least 3 weeks before the hearing.

   (b) By making available for reading and download, and keeping so available, the founding papers in the main application on the website "hsaction.co.za".

3. That the contents of such notice in the two newspapers be similar to the notices which appeared in the aforesaid to newspapers on 15 March 2015, except for the new date of hearing and that the time period for filing of notice of opposition would be five (5) days from publication, and the

time period for filing opposing papers would be ten (10) days from publication.

4. In the alternative that such notice to the investors be given in the manner and form which the honourable court deems appropriate.

5. Costs of this application, only in the event of it being opposed.

6. Alternative relief.

BE PLEASED TO TAKE FURTHER NOTE THAT the accompanying affidavit of Jacques Brink Theron will be used in support of this application.

TAKE FURTHER NOTICE THAT if you intend opposing this application you are required:

a) to file notice of opposition within 5 (five) days of receiving notice of this Application;

b) and within 5 (five) days after you have so given notice of your intention to oppose the application, to file your answering affidavits, if any;

DATED at JOHANNESBURG on this _____day of JUNE 2015.

_____

BDK ATTORNEYS
Ground Floor
3 Ninth Street
Houghton Estate
JOHANNESBURG

For Theron & Partners
Stellenbosch

TO: THE REGISTRAR OF THE GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

AND TO: FIRST TO TWENTY SEVENTH RESPONDENTS