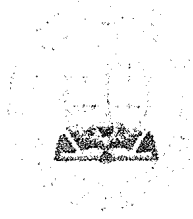



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 2017/26036

Date: 20 July 2018

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
11 August 2018	
DATE	SIGNATURE

In the matter between:

ZEPHAN (PTY) LTD

1st Applicant

NICOLAS GEORGIU N.O.

2nd Applicant

MAUREEN LYNETTE GEORGIU N.O.

3rd Applicant

JOE CHEMALY N.O.

4th Applicant

NICOLAS GEORGIU

5th Applicant

and

SURAIYA BEGUN NOORMAHOMED

Respondent

JUDGMENT

1. Applicants have applied for leave to appeal against the order granted by this Court on 14 May 2018.
2. The main thrust of the application is the following:
 - 2.1 That the scheme of arrangement in terms of section 155 of the Companies' Act, Act 71 of 2008 ("the Act"), that was sanctioned by order of Moshidi J on 26 November 2014, contained a *stipulation alteri* in respect of all the Highveld Syndication Investors;
 - 2.2 That, by accepting the monthly interest payments that were paid in terms of the scheme of arrangement, Respondent accepted the benefits of the scheme of arrangement, and thereby her rights as against Applicants were novated.
 - 2.3 That, by the HS 22 investors voting in favour of the statutory novation (by way of delegation) of their rights, the Respondent's rights as against Applicants were novated, and a new party, Orthotouch, became bound to purchase the Respondent's shares instead of Applicants.
3. Section 155 (2) of the Act reads:

"155 Compromise between company and creditors

(1).....

(2) The board of a company, or the liquidator of such company if it is being wound up, may propose an arrangement or a compromise of its financial obligations to all of its creditors, by delivering a copy of the proposal, and notice of meeting to consider the proposal to-"

4. The intention of the section is to provide for a mechanism whereby the company can enter into a compromise with its creditors. The compromise is between the company and its creditors and has no effect in respect of third parties. The mere fact, in my view, that a scheme of arrangement was entered into, and was sanctioned by court, does not absolve a third party of obligations arising from a prior agreement.
5. Delegation is a form of novation by which an existing debtor is relieved of its obligations, which obligations are then assumed by a third party, the latter becoming obliged to perform the obligations of the erstwhile debtor. In order for delegation to take place, all three parties, the original debtor, the new debtor, and the creditor have to agree that the new debtor will be bound in the place of the old debtor.
6. In *Van Achterberg v Walters 1950 (3) SA 734 (T)* it was held:

"This was no mere consent to a cession of rights under the lease, leaving the obligations of the lessee (Stohr) unimpaired and involving no priority of contract between the appellant and the respondent. (Cf. Wessels, Law of Contract (vol. 1, sec. 1721)). Stohr was being discharged and a new debtor taken in his place. This was a novation by way of delegation and necessitated a new contract to which the creditor, the original debtor and the debtor proposed in his place had all to be parties. The creditor has to agree to accept the new debtor in place of the old. (Ibid., paras. 1693, 2433, 2435, 2436, 2438.) The agreement may be that the new debtor shall be bound by all the conditions which were binding on the old debtor, or there may, as here,

be a variation of the conditions; but there can be no novation by delegation (of which the assignment of rights and liabilities under a lease is an example) without agreement between the creditor and the assignee."


7. The crux of the matter is whether Respondent agreed to the substitution of Orthotouch as debtor in the place of Applicants, and whether Orthotouch and Applicants intended for that substitution to occur.
8. The scheme of arrangement, in itself, could not result in the novation of Respondent's rights as against Applicants. There has to be evidence of at least a tacit agreement between Applicants, Respondent and Orthotouch that:
 - 8.1 Orthotouch accepted liability for Applicant's obligations arising from the buy-back agreement;
 - 8.2 Applicants agreed to Orthotouch being substituted as debtor in their stead; and
 - 8.3 Respondent agreed to the substitution of Orthotouch as debtor in the place of Applicants.
9. In my view there is no such evidence in the papers before me. There is no allegation that Orthotouch intended to assume Applicants' contractual obligations. There is most certainly no evidence that Respondent even knew of the scheme of arrangement at the time, and that she intended for her rights as against Applicants to be novated.
10. I am well aware of the fact that Applicants do not have to prove their defence. All they have to do is disclose a defence that, if proved at trial,

would result in their being successful. In my view there are no facts before me that justify the conclusion that novation of Respondent's rights took place.

11. I therefore do not believe that Applicants have reasonable prospects of success on appeal.

12. Consequently I make the following order:

14.1 The application for leave to appeal is dismissed with costs.



Swanepoel J
Acting Judge of the High Court,
Gauteng Division