# IN THE HIGH COURT

# GAUTENG LOCAL DIVISION, JOHANNESBURG

**CASE NO:** 42334/2014

In the matter between:

**Delete whichever is not applicable**

(1) Reportable: YES/NO
(2) Of Interest To Other Judges: YES/NO
(3) Revised: YES/NO

DATE: 16/03/2017 SIGN: .....

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| **JURIE JOHANNES GELDENHUYS** | FIRST APPLICANT |
| **ARTHUR BRADY COCHRANE** | SECOND APPLICANT |
| **SHARON ANN VLOK** | THIRD APPLICANT |

and

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| **ORTHOTOUCH LIMITED** | FIRST RESPONDENT |
| **DEREK PEDOE COHEN N.O.** | SECOND RESPONDENT |
| **HANS KLOPPER N.O.** | THIRD RESPONDENT |

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| **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** | FIFTEENTH RESPONDENT |
| **JOSEPH CHEMALY N.O.** | SIXTEENTH RESPONDENT |
| **GEORGE NICOLAS GEORGIOU** | SEVENTEETH 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 KURGER INC.** | TWENTY SIXTH RESPONDENT |
| **THE COMPANIES AND INTELLECTUAL PROPERY COMMISSION OF SOUTH AFRICA (CIPC)** | TWENTY SEVENTH RESPONDENT |

In re:

The ex-parte application of :

**ORTHOOUCH LIMITED**
**(Registration Number 2010/004096/06**

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**JUDGEMENT**

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Ismail J:

[1] This court granted an order in terms of section 155 (7)(b) of the Companies Act 71 of 2008 sanctioning and approving a Scheme of Arrangement of the Highveld Group of Companies during November 2014.

[2] The applicants sought relief in the main application, seeking the setting aside of the scheme of arrangement between, the first respondent and its trade creditors as well as the Highveld Syndication investors.

[3] This urgent application embraces two applications. The first application is to set aside a notice of substitution of attorneys and a notice to withdraw the application to set aside the main application by the three applicants cited. This application was launched on the 21 December 2016. This application is designed to remove an alleged irregular step and notice was given thereof on the 1 December 2016.

[4] The second application embraces an application for the joinder by five investors who seek to be joined as the 4th to 8th applicants in the rescission application. The joinder application was only delivered to the respondents on the 14 February 2017. The founding affidavit of that application is deposed to by one, Mr Waxham , an investor on behalf of four other persons who confirmed his affidavit.

[5] Both applications are opposed by the first respondent and the twelfth to sixteenth respondents.

[6] The applications are opposed on the grounds that it is not urgent and it is an abuse of the court practise and its directives. Secondly the merits are brittle and weak as there cannot be an application to join once an action has been withdrawn amongst other grounds. It was also submitted on behalf of the respondents that this is nothing other than a class action being instituted when no certification thereof was obtained.

***Background:***

[7] It is common cause that no class action has been certified by the Court to date hereof.

[8] Mr Theron, an attorney from Stellenbosch, deposed to an affidavit wherein he stated that he acts for some 6688 investors of

the Highveld Group of Companies. In total the group had some 18000 investors. These aggrieved investors, 6688 in total instructed Mr Theron which formed the so-called Highveld Syndication Action Group [HSAG]

[9] The application to have the scheme of arrangement set aside was brought under his auspices, by the three applicants who were nominated to act on behalf of the HSAG investors and in their own persons.

[10] Whilst Mr Theron was acting as attorney of record on behalf of the applicants, the latter mentioned persons engaged in settlement agreements with the twelfth respondent and they settled their own claims. In addition thereto they instructed attorney Jeff Donnenberg to act on their behalf without informing Mr Theron that his mandate was terminated.

[11] The notice of substitution of attorneys was served on the 16 November 2016, by attorney, Jeff Donnenberg, who simultaneously served a notice to withdraw the application on behalf of the applicants.

[12] It was submitted that the notice of withdrawal of the application by the former applicants constituted an irregular step and therefore ought to be set aside in terms of Rule 30. Similarly the substitution of attorneys of record, was equally irregular.

[13] Mr Watt-Pringle SC, acting on behalf of Mr Theron and the parties seeking to be joined, submitted that the actions of the erstwhile applicants through the actions of Mr Donnenberg was nothing other than a stratagem to scupper and torpedo the application to set aside the Scheme of Arrangement proceedings. To this end he submitted that Mr Donnenberg was nothing other than a surrogate acting for the twelfth respondent.

[14] In support of his contention he submitted that this was both an improper and irregular withdrawal of the application. He posed the rhetorical question is ' how was it possible that three people who hardly knew each other from different places in the country landed up in Mr Donnenberg's stable'. In addition the substitution of attorneys of record and notice to withdraw the application occurred simultaneously without any prior notice being given to Mr Theron.

[15] The argument advanced for the setting aside of the scheme of arrangement was that it was not disclosed to the court that there were serious allegations of fraudulent and reckless activities by individuals and entities which were made during the certification application.

[16] The argument advanced further was, which was contested before me, that the current applicants knew that they represented a wider group of investors, namely the HSAG, and not only themselves. Whilst nothing hindered or prevented them from settling their own claims, they had no 'right' nor the authority to withdraw the application when they knew they were also acting as nominees of others.

[17] The first respondent and twelfth to sixteenth respondents submitted that the erstwhile applicants acted in their personal capacities and not as nominees. To this end Mr Redman SC, submitted that in the founding papers the first applicant stated at paragraph 4.1, in case number 42334/14, that he acted on his own behalf. At paragraph 4.1 the following is stated:

> *"4.1 I am the first applicant herein and an investor in Highveld 16 to Highveld 22, Respondents Five to Eleven (" the Highveld companies")*

However, in response to this Mr Watt- Pringle submitted that

paragraph 4.1 must be read in conjunction with what is stated at paragraph 52 of the same affidavit, namely:

> *" 52 I am informed for the purposes of this application it was decided by legal representatives that the HSAG should make contact with those investors, like myself, who did not receive any prior notice of the meeting (or the scheme document) and enquire whether they (we) would be willing to act as Applicants herein. It took a number of days and numerous enquiries by the HSAG to identify appropriate investors who were also prepared to apply on behalf of all investors. I was contacted on Friday, the 13th of February 2016 by members of HSAG and confirmed my willingness to act as such.* (**my underlining**). *I became aware of the Court order which is sought to be rescinded during the aforesaid communication on 13 February 2015"*

It is plain from what appears above that Mr Geldenhuys brought the action in his own name and agreed to act as nominee for the HSAG investors..

[18] Mr Redman and Mr Smit in turn submitted that this was nothing other than a certification of a class action. The HSAG has to date not obtained any certification of a class action. Certification needs to be obtained from the Court, which needs to approve that a class action exist and approve the representative litigants. They relied upon the seminal judgment of Wallis JA in *Children's Resource Centre Trust & others v Pioneer Food (Pty) Ltd and others* 2013 (2) SA 213 (SCA) at [23] and [24].

[19] In *Nkala and others v Harmony Gold Mining Ltd and others* 2016 (5) SA 240 (GJ) at para [24] the court stated:

> *"The SALC recommended that, before a class action is brought, the person or group, intending to bring such an application should first apply to the court for an order certifying the proposed action. A certification application is no more than a request for permission to enter the court en masse and for the applicants to be accepted as applicant(s) to be accepted as representative(s) of the entire masse. In the absence of such an order the applicant(s) seeking to institute a class action would be precluded from doing so…."*

[20] It was submitted that in the absence of certification, the re-presentative has no right to proceed with litigation. This begs the question that if the application was not withdrawn, this argument could have been raised with vigour during the setting aside application, and if it succeeded the application would have been dismissed.

[21] I must immediately state that I do not regard this application before me to be one, wherein Mr Theron seeks to have a certification of a class action on behalf of the HSAG. The issue is a fundamentally simple one, namely whether the applicants could withdraw the application *mero moto,* when they knew that they were acting as

'nominees' for others. It also raises the issue raised by Mr Watt-Pringle regarding the conduct of Mr Donnenberg. Whether the latter acted irregularly or improperly with an ulterior motive to compromise the claims of HSAG investors.

[22] To this end it was submitted that the court should apply the principle set out in *Beinash v Wixley* 1997 (3) 721 (SCA) at 734-735A where Mohamed CJ held:

> *"There can be no doubt that every Court is entitled to protect itself and other against an abuse of its process. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse it is quite entitled to set it aside. As was said by de Villiers JA in* Hudson v Hudson and another *1927 AD 259 at 268:-*
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> > *' when ... the court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the court to prevent such abuse'.*

***Joinder application and urgency***

[23] Mr Smit, on behalf of the first respondent questioned why the joinder application by Mr Waxman and the others was only brought on the 14 February 2017. They were aware that the application was already withdrawn on 16 November 2016. The application was launched approximately two months thereafter and it was argued that this was a case of self- created urgency.

[24] He submitted that the first respondent would request that the joinder application be struck of the roll with a punitive cost order. The motivation for such an order being that it was only served on the 14 February 2017 when it was known to all that the application was withdrawn on the 16 November 2016. The delay in bringing the application in itself is suggestive that it is not urgent.

[25] Apart from that there is no application currently before the court, in view of the withdrawal of the matter, and for that reason it was submitted there can be no joinder or intervention application.

[26] The respondents submitted that the matter was not urgent and that it was an abuse of the court. Mr Redman SC, submitted that the papers were completed by the 26 January 2017 and for some unknown reason the application was only set down for the 28 February 2017. He posed the question that if it was all that urgent why was it not set down for urgent court on Tuesday the 7, 14 or 21 February 2017. No reason was tendered for the hiatus between January 26 and February 28.

[27] The suggestion was that by stalling to be heard approximately a month later was indicative of the fact that the matter was not urgent.

[28] As for the joinder application it was lodged approximately two months after the matter was withdrawn by the erstwhile applicants. Furthermore Waxman failed to provide reasons why the application was urgent as he and the other investors, who seek to be joined, do not furnish reasons that they would not have any substantial redress in due course.

[29] Regarding the issue of the time lapse as suggested by counsel for the respondents, I must state that far too often, the argument is advanced by respondents in such matters that they were brought to court under the most constricted and restrictive time periods. In this instance the argument is directed against generous time period afforded to the respondents to reply. This argument was countered by applicant's counsel who submitted that the matter was not set down with that degree of urgency as the applicant considered the matter to be semi-urgent. In *Luna Meubels Verwaardigers (Edm) Bpk v Makin ( t/a Makin Furniture Manufacturer)* 1977 (4) SA 135 (W) Coetzee J spoke of the different degrees of urgency.

[30] It was also submitted that this is an abuse of the rules and directives of the court and that paragraphs [2] and [3] of the judgment of Wepener J, *In re Several matters of the Urgent Court* 2013 (1) SA 549 (GJ) was relied upon.

Whilst I am in agreement with the tenor of what is stated in the paragraphs relied upon, it must be stated that the court would examine every case independently and that it would regulate the proper functioning of the Court in the light of circumstances of each case and determine whether or not it qualifies to be heard urgently.

[31] In my view, Mr Theron was in a situation akin to a captain of a ship where the sailors abandoned it. He had to make a decision on behalf of 6688 people who he represented. It was submitted that he lacked the *locus standi* to bring the application.

Mr Watt Pringle referred to the matters of *Techmed (Pty) Ltd v Nissho Iwai Corp* 2011 (1) SA 35 (SCA) and *Santam Insurance Ltd v Booi* 1995 (3) 301 (A) at 310C-G where a person who did not have authority brought an action on behalf of another.

[32] The court was requested to intervene in the light of the alleged abuse by Mr Georgiou, the twelfth respondent, who it was submitted devised the scheme by using Mr Donnenberg to withdraw the main application thereby setting back the current application and delaying and prolonging the class action. It was submitted that the court cannot sit back by indifferently and nonchalantly permitting this type of abuse and egregious conduct by a litigant against others rights.

[33] This is exacerbated by attorney Donnenberg's withdrawal of the main application without informing Mr Theron or the HSAG thereof timeously. This 'scheme or stratagem' it was submitted smacked of collusive behaviour on the part of Mr Georgiou and Mr Donnenberg to rid themselves of the HSAG investors claims. In this regard the Court was alerted to the judgment of *Cohen v Cohen* 2003 (1) SA 103 (C) at para [27] where a stratagem and scheme was used which amounted to an abuse of the process. The court stated:

> *"It is abundantly clear from the papers that the respondent is driven by a desire rid himself of his maintenance obligations vis-a –vis the applicant. In order to achieve that purpose, the respondent has employed various schemes and stratagems, some of which can only be described as abuses of the process of the courts"*

The withdrawal by the nominal applicants of the action was nothing other than an act to sabotage the claim of the other investors, in the form of the HSAG.

[34] I am of the view that this court cannot idly sit by and observe or countenance such conduct designed to deprive the investors of their rights to proceed with any intended action they may have.

[35] What concerns me is that the application to intervene was only

launched in February 2017. There was a delay of almost two months to launch the application. I can understand that Mr Theron had to obtain instructions from 6688 people and would have had to "rally the troops", thereby posing a logistic problem requiring time, hence the delay.

[36] The issue of costs is always within the discretion of the court. I see no reason why costs should not follow the result, notwithstanding what was stated in the paragraph above.

[37] Having heard the arguments and having had the benefit of heads of arguments, for which I thank all the counsel involved, I am of the considered view that the following would be an appropriate order.

1. I consider that both applications are urgent in the light of the stratagem of the erstwhile applicants and their attorney.

2. That the application setting aside the notice of substitution of attorneys and the notice to withdraw the application in the main application are set aside. The main application is therefore reinstated with costs. Such costs to include the costs of two counsel.

3. The joinder application succeeds with costs.

4. The costs, in respect of 2 and 3 above, to be paid jointly and severally by the first respondent and twelfth to sixteenth respondents. The one paying the other to be absolved from doing so.

Ismail J

APPEARANCES:

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|---|---|
| For the Applicant: | Adv Watt Pringle SC assisted by Adv CHJ Maree, instructed by Thereon and Partners c/o BDR Attorneys, Johannesburg. |
| For the First respondent: | Adv J Smit instructed by Natalie Lubbe & Associates |
| For the Twelfth to sixteenth Respondent: | Adv N Redman SC assisted by Adv Mostert instructed by Kyriacou Inc Attorneys |
| Date of Hearing: | 3 March 2017 |
| Date of Judgment: | 13 March 2017. |