**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

CASE NO: 80811/14

In the matter between:

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| **NICOLAS GEORGIOU** | First Applicant |
| **ZEPHAN PROPERTIES (PTY) LTD** | Second Applicant |
| **NICOLAS GEORGIOU N.O.** | Third Applicant |
| **MAUREEN LYNETTE GEORGIOU N.O.** | Fourth Applicant |
| **JOSEPH CHEMALY N.O.** | Fifth Applicant |
| and | |
| **SHARON ANN VLOK** | First Respondent |
| **DANIEL EARNEST LAMPBRECHT** | Second Respondent |
| **CHARLENE ESMAY JORDAAN** | Third Respondent |
| **JEAN PAPANDONIS** | Fourth Respondent |

In re:

| | |
|---|---|
| **SHARON ANN VLOK** | First Applicant |
| **DANIEL EARNEST LAMPBRECHT** | Second Applicant |
| **CHARLENE ESMAY JORDAAN** | Third Applicant |
| **JEAN PAPANDONIS** | Fourth Applicant |
| and | |
| **NICOLAS GEORGIOU** | First Respondent |
| **ZEPHAN PROPERTIES (PTY) LTD** | Second Respondent |
| **NICOLAS GEORGIOU N.O.** | Third Respondent |
| **MAUREEN LYNETTE GEORGIOU N.O.** | Fourth Respondent |
| **JOSEPH CHEMALY N.O.** | Fifth Respondent |
| **AND SEVENTEEN OTHERS** | |

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**NOTICE OF APPLICATION FOR LEAVE TO APPEAL**

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**TAKE NOTICE THAT** the above-named applicants (originally the first to fifth respondents) intend to apply to the above Honourable Court for leave to appeal to the Supreme Court of Appeal of South Africa, *alternatively* to the full court of this Honourable Court, against the whole of the judgment and orders handed down by the Honourable Mr. Justice Murphy on 7 April 2017.

**TAKE NOTICE FURTHER THAT** this application for leave to appeal extends to both the application brought by attorney Jacques Brink Theron in terms of Uniform Rule of Court 30 as well as the application for joinder brought by Mr. Bryan John Waxham and others.

**TAKE NOTICE FURTHER THAT** the application for leave to appeal is based on the grounds set out below.

**(i) THE ORDER**

1. The Honourable Court granted an order in the following terms:

> *"23.1 The applicants in the joinder application (B Waxham, C Nel, H Pinshaw, F Strauss and L M Meyer) are joined as applicants in the main (certification) application, case number 80811/14, seeking leave to institute a class action.*
>
> *23.2 It is declared that the Notice of Withdrawal of Application dated 10 November 2016 constitutes an irregular step and is hereby set aside.*
>
> *23.3 It is declared that the Notice of Substitution as Attorneys of Record dated 10 November 2016 constitutes an irregular step and is hereby set aside.*

*23.4 It is declared that the application issued on 31 October 2014 under case number 80811/14, is not withdrawn and has never been withdrawn.*

*23.5 The respondents opposing these applications shall pay the costs of the applications, jointly and severally, such costs to include the costs of two counsel and senior counsel."*

2. The applicants respectfully submit that an appeal will have reasonable prospects of success, and that there is a reasonable prospect that another Court may grant an order in the following terms:

2.1. The urgent application brought by attorney Jacques Brink Theron in terms of Uniform Rule of Court 30, dated 20 December 2016, is dismissed with costs which costs shall include the costs of two counsel.

2.2. The application for joinder dated 20 January 2017, brought by Mr. Bryan John Waxham, is dismissed with costs which costs shall include the costs of two counsel.

**(ii) THE RULE 30 APPLICATION**

<u>Findings pertaining to HSAG</u>

3. The Court found:

3.1. At paragraph 5, that *"the applicants were part of a group of some 6688 aggrieved individuals, the Highveld Syndication Action Group*

*("HSAG"), who mandated Theron Attorneys to launch the application for the certification of a class action both for their benefit and for the benefit of a wider group of investors...".*

3.2. At paragraph 9, that Mr. Theron was *"acting on behalf of the HSAG"*. The Court also held that the HSAG has *"interests"* worthy of protection.

3.3. At paragraph 21 that *"HSAG remains the true or beneficial litigant on behalf of whom the nominal litigants (the applicants) were cited"*.

4. In making this finding:

4.1. The Court disregarded the fact that the applicants served a notice in terms of Rule 35(12) on Theron & Partners, calling upon them to provide the 6,688 alleged written mandates given to Theron & Partners, as referred to in Mr. Theron's founding affidavit in the Rule 30 application;

4.2. The Court disregarded the fact that Theron & Partners failed to comply with the Rule 35(12) notice, and only furnished thirty five written mandates;

4.3. The Court erred in fact and/or law in that it should have found that Theron & Partners, by having failed to comply with the Rule 35(12)

notice, was precluded from relying on the alleged mandates, and therefore failed to prove that it held a mandate to act on behalf of 6,688 investors.

5. Further, the Court should have found that HSAG was unable to mandate or instruct either the erstwhile applicants, or attorneys, to represent it by virtue of it not being a legal entity or an unincorporated body with rights and obligations. As such, the Court should have found that HSAG could not represent the purported members of the putative classes, and further that proceedings on behalf of a group of persons who have not authorised the representative to act on their behalf can only take place once a court has approved such representative litigant.

6. The Court erred in conflating and/or confusing the agreement between the litigants and their attorneys (alternatively the litigants and the members of HSAG) with the procedure adopted by them. In this regard:

6.1. Whatever the intention of the erstwhile applicants might have been, they did not in fact initiate the litigation on behalf of HSAG or any class of persons.

6.2. If they had instituted proceedings on behalf of HSAG or the members thereof, there is no explanation as to why the proceedings were

brought in their personal names. There is no provision in the Rules of Court or in the common law for such procedure.

6.3. If the erstwhile applicants had brought the application as representatives of HSAG, they would have had to establish that HSAG had locus standi to bring the application.

6.4. If HSAG was the party to the proceedings, it would have brought the proceedings in its own name, as it would be entitled to in terms of Uniform Rule of Court 14(2).

6.5. If the erstwhile applicants had breached an agreement between themselves and their attorneys or the members of HSAG, this would have constituted a breach of contract and not an irregular procedural step.

6.6. There was nothing preventing the first applicant from entering into a settlement agreement with the erstwhile applicants.

<u>Findings pertaining to representative capacity of erstwhile applicants</u>

7. The Court found, at paragraph 17, that:

> *"The applicants were in substance nominal, representative applicants, by virtue of their understanding that they were representing the HSAG and by necessary implication, having regard to the very nature of the class action procedure. It is incorrect that, prior to certification being granted, the applicants in the certification application can only act in their personal capacity (and that their application has no consequences*

*for the class of persons involved). It is also not correct, as seemingly contended by Georgiou, that the relevant class only comes into existence once members opt in (or do not opt out) after certification. The class already exists; the certification process defines its ambit."*

8. The Court should have found that:

8.1. The South African Law is familiar with the notion of a representative litigant, as in the case of an action pursued by a guardian or curator ad litem on behalf of a minor or children under disability.

8.2. It is certification that provides the authority for a representative to act on behalf of a class, and that without certification a litigant is not a representative in a legal sense.

8.3. Given the potential impact, on the rights of other litigants, of allowing an individual to represent others, it is necessary for the court at the outset to ensure that the interests of the other litigants are properly protected;

8.4. The erstwhile applicants could never, merely by virtue of allegedly being members of an uncertified class of litigants, and by virtue of how they chose to describe themselves in their affidavits, and merely by expressing their willingness to do so, automatically have attained the right to act as class representatives on behalf of others.

8.5. In the absence of certification, no class or nominal (representative) applicant had been certified and accordingly it could not be

contended that the erstwhile applicants were already acting in a representative capacity merely by instituting the certification application.

8.6. The four erstwhile applicants did not act in a representative capacity, and they were seeking relief in their personal capacity, *inter alia*, for an order authorising them to act as representatives of the (as yet to be certified) class.

8.7. There was no evidence that the four erstwhile applicants ever bound themselves to represent a group of persons. Consequently they could freely act as litigants in their own right.

8.8. In the event of an unsuccessful application for certification, respondents in such application could have held the erstwhile applicants personally liable for the legal costs incurred.

8.9. As at date of withdrawal of the certification application, the erstwhile applicants had not yet acquired "the right" (as referred to by Wallis JA in Children's Resources Centre) to act in a representative capacity on behalf of other persons.

8.10. Until such time as this right is acquired, the erstwhile applicants could not have litigated in any capacity other than personally, regardless of their arrangement with Mr. Theron.

8.11. The form attached to Mr. Theron's founding affidavit as JB2 (Bundle A, page 49) confirmed that the erstwhile applicants were personally liable to Theron and Partners for legal costs.

8.12. The suitability of proposed representative litigants is a crucial factor to be taken into consideration by a court in determining whether a litigant is suitable to represent others. Failure to do so (as the Court has done in this case) could result in so-called representative litigants being forced upon others, without these people having had any input or say in the identity of the person or persons ostensibly representing them.

9. The Court further erred:

9.1. In finding that it is incorrect to state that prior to certification being granted, the applicants in a certification application can already act in a representative capacity.

9.2. In finding that prior to the certification of a class, a class already exists and that certification merely defines its ambit.

9.3. By finding that the applicants contended that a class only comes into existence once people exercise an election to *"opt in"* or *"opt out"*. The applicants' contention is that a class only comes into existence upon a court granting and order certifying that a class exists.

9.4. By imposing a *quasi* fiduciary duty on applicants in a certification application.

9.5. In holding that an ethical duty on applicants in a classification application, can be translated into a legal duty.

10. In the premises, the Court should have held that the erstwhile applicants were persons litigating in their personal capacity, and as such that they were fully entitled:

10.1. To exercise their rights in terms of Rule 16(2)(a) to appoint new attorneys of record; and

10.2. To withdraw the main application as contemplated in Rule 41(1)(a).

**(iii) THE APPLICATION FOR JOINDER**

11. The joinder application is entirely contingent upon the Rule 30 application being successful. Until the Rule 30 application has been determined, there is no pending application for certification and accordingly no application to which any party can intervene or be joined.

12. The Honourable Court erred in fact and/or law in granting the application for joinder in that:

12.1. The Court should have found that the application for joinder would only have been competent if Mr. Waxham et al, the applicants in the application for joinder, were not originally represented by the erstwhile applicants. Should that have been the case, it would have been unnecessary and incompetent for Mr. Waxham *et al* to bring an application to be joined as parties, in circumstances where they were already represented.

12.2. The Court should have found that, since the erstwhile applicants were litigating in their personal capacity, the main application had already been withdrawn and that consequently an ex post facto application for joinder thereto, was incompetent.

13. The Court therefor erred in holding that the substitution as attorneys of record and the subsequent withdrawal of the certification application constituted an abuse of process.

14. The Court further erred, at paragraph 20, in holding that Mr. Theron had authority to bring the interlocutory applications *"to protect the members of the class from abuse"*. The Court should have held that there was as yet no class, and therefore no members of the class, and that Mr. Theron was acting without a mandate.

**(iv) APPEALABILITY OF THE ORDER**

15. The order is final in effect, in that it is unalterable by the Court which made it.

16. The order is definitive of the rights of the parties in that it grants definitive and distinct relief.

17. The order is dispositive of the issue of the capacity in which the erstwhile applicants launched the certification application.

18. The order is in conflict with the principals laid down by the Supreme Court of Appeal in **Children's Resource Centre Trust & Others v Pioneer Foods (Pty) Ltd & Others** 2013 (2) SA 213 (SCA), and will have far reaching consequences for applicants in applications for certification of class action.

19. Many of the issues raised in the application are *res nova* and it would be in the interests of justice to grant leave to appeal.

20. In the premises and for the above reasons, it is submitted that there is a reasonable prospect that another Court may come to a different conclusion in respect of the orders made by the Court.

**TAKE NOTICE FURTHER THAT** this application for leave to appeal will be heard on a date and a time to be arranged with the Registrar of this Honourable Court.

DATED AT MELROSE NORTH ON THIS 2ND DAY OF MAY 2017.

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