

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

Case No:

In the application of:

|                               |                   |
|-------------------------------|-------------------|
| <b>ROBERT JAN BLACK</b>       | First Applicant   |
| <b>ARTHUR BRADY COCHRANE</b>  | Second Applicant  |
| and                           |                   |
| <b>ORTHOTOUCH LIMITED</b>     | First Respondent  |
| <b>DEREK PEDOE COHEN N.O.</b> | Second Respondent |
| <b>NICOLAS GEORGIOU</b>       | Third Respondent  |

---

**FOUNDING AFFIDAVIT**

---

I the undersigned,

**ROBERT JAN BLACK**

do hereby make oath and state as follows:

1. I am an adult male of 4 Koedoe Street, Kemptonpark, Gauteng.
2. The fact contained herein are within my personal knowledge, unless the contrary is stated or implied and are to the best of my knowledge both true and correct.
3. Where I make submissions of a legal nature I do so on advice of my legal representatives which advice I verily believe to be true and correct.

RB TS

**Parties:**

4.

- 4.1. I am the First Applicant in this application. I am an investor and shareholder in the so-called Highveld 21 syndication company, as explained below.
- 4.2. Second Applicant is Arthur Brady Cochrane, an adult male retiree of Unit 35, Norton Park Retirement Village, Umtata Road, Benoni, Gauteng. He is an investor and shareholder in the so-called Highveld 16 and Highveld 21 companies.
- 4.3. First Respondent is Orthotouch Ltd (Registration Number 2010/004096/06) a public company registered in terms of the company laws of South Africa with principal place of business at corner of Willow and Cedar Road, Cedar Square Shopping Centre, First Floor, Fourways, Gauteng.
- 4.4. Second Respondent is Derek Pedoe Cohen N.O., an adult male consultant with place of business at Ground Floor, Fedhouse Group House, 89 Bute Lane, Sandown, Sandton, Johannesburg in his capacity as Receiver under the Scheme of Arrangement referred to below.
- 4.5. Third Respondent is Nicolas Georgiou (ID number 440919 5109 086), an adult businessman who resides at 1 Woodlands Avenue, Hurlingham Manor, Randburg, Johannesburg, and with place of business at corner of Willow and Cedar Road, Cedar Square Shopping Centre, First Floor, Fourways, Gauteng

RB JKS

5. The above Respondents are already represented by attorneys of record in the related application to set aside, alternatively obtain leave to appeal, as referred to below – and given the urgency of this application, notice of this application will be effected by serving on such attorneys of record and on the Respondents via email.
6. This is an urgent application in terms of which certain interim relief is sought pending further litigation, as set out in the Notice of Motion herein.

### **Background**

7. This application relates to a Scheme of Arrangement ("*the Arrangement*") sanctioned by this Court in terms of section 155 of the Companies Act 71 of 2008 on 26 November 2014, under case number 42334/14. The Arrangement purported to arrange the relationships between First Defendant (hereinafter referred to as "*Orthotouch*"), on the one hand, and its creditors and certain investors on the other hand.
8. The Arrangement document comprises 108 pages, and I am advised that only relevant extracts thereof are to be attached hereto, which I do, marked "**FA1**". A complete copy will however be made available to court at the date of this hearing. Respondents naturally are already in possession of a full copy.
9. Briefly stated, the Arrangement came about as follows.
10. Eight so-called Highveld companies ("the Highveld companies"), more accurately described below, were set up as property investment companies during 2005 to about 2009.
11. The Highveld companies were launched as property syndication companies whereby funds were sought to be raised from the public

RB JS

through share subscriptions in order to purchase property. The Highveld companies would pay the investors monthly income derived from such property investments. I am informed that the total investments made in such companies by investors amounted to approximately R4,6 billion.

12. These companies then experienced financial difficulties and, in 2011, each of the Highveld companies was placed under business rescue.
13. An application for leave to institute a class action is pending before the High Court in Pretoria in terms of which approximately 12 000 investors seek leave to institute action against certain directors and other individuals and entities in respect of investments in one or more of the Highveld 19 to 22 for losses suffered. This application was issued in October 2014. The grounds for such proposed class action entail various contractual and delictual grounds, some based on allegations of serious misconduct and fraud.
14. The eight Highveld companies are as follows:
  - (a) Highveld Syndication No 15 Ltd (registration number 2003/030144/06);
  - (b) Highveld Syndication No 16 Ltd (2005/029425/06);
  - (c) Highveld Syndication No 17 Ltd (2005/027601/06);
  - (d) Highveld Syndication No 18 Ltd (2005/027390/06);
  - (e) Highveld Syndication No 19 Ltd (2003/030144/06);
  - (f) Highveld Syndication No 20 Ltd (2005/029425/06);

RB JS

(g) Highveld Syndication No 21 Ltd (2005/027601/06);

(h) Highveld Syndication No 22 Ltd (2005/027390/06);

(For obvious reasons the Highveld companies are usually referred to as "Highveld 15", to "Highveld 22").

15. As stated, in 2011 the Highveld companies (voluntarily) commenced business rescue proceedings by resolving to do so in terms of section 129(1) of the Companies Act of 2008.
16. The business rescue plan entailed that Orthotouch (First Respondent) "takes over" some of the obligations, albeit scaled down, of the Highveld companies towards investors. In terms of the plan, Orthotouch would pay the respective Highveld companies, who in turn would pay the investors (reduced) monthly amounts as returns on investments. In return, Orthotouch acquired all rights and title to the immovable properties, or, more precisely, had already acquired same under the Business Rescue Plan which preceded the Arrangement.
17. After Orthotouch failed to comply with its obligations in terms of the Business Rescue Plan, the Scheme of Arrangement document ("the scheme document") was drafted and signed by Third Respondent ("*Georgiou*") on 7 October 2014.
18. I am advised, and as set out in the aforementioned pending applications, Georgiou is the central figure in the whole said property syndication schemes. He heads the Georgiou Group of companies, which is essentially a family business involved in property development. He is, directly or indirectly, also the controlling shareholder of Orthotouch.

RB JZ

19. In the eight Highveld companies, approximately 18,000 investors invested in one or more of the eight companies, comprising about 23,000 separate *investments*. The investors are mostly pensioners, most of whom have invested their life savings in the schemes after being persuaded in the public prospectuses of the "safe" investment in immovable property. They are located all over the country. Second Respondent and I are supporting the intended class action, and are members of the voluntary group of investors (the "HS Action group") who spearheads the class action.
20. Pursuant to a meeting held on 12 November 2014, which only a small percentage of investors attended, the Arrangement was accepted. I am informed that, with proxies included, only 2,914 out of about 23,000 investors voted in favour of the Arrangement, although this constituted a sufficient majority of investors present at the meeting.
21. The Arrangement purports to absolve all directors and individuals concerned of any liability towards investors, thereby purporting effectively also to "settle" the class action.
22. Significantly, in their *ex parte* application to have the Arrangement sanctioned by this Court, Orthotouch and its legal representatives apparently failed to bring the following under the court's attention:
  - 22.1. That a class action is "pending" in the Pretoria High Court;
  - 22.2. That the class action is grounded on serious allegations of misconduct;
  - 22.3. That the Scheme of Arrangement purports to absolve such individuals from liability;
  - 22.4. That the investors are, even *ex facie* the Scheme of Arrangement document, not creditors of the First Respondent (Orthotouch) – but yet are purported to be creditors for purpose of the Scheme

RB JS

and, therefore, also for purposes of section 155(8) in making it "binding" on all of them.

- 22.5. That the Scheme of Arrangement document itself states that the Pretoria High Court will be the court approached for the potential sanctioning of the Arrangement – and that, despite this, the Johannesburg court was, for some undeclared reason, approached.
23. I am informed that, in the said *ex parte* application (in which Cohen deposed to the founding affidavit), very little was stated apart from the "cold" facts pertaining to the various voting categories and percentages in relation to the meeting held at which the Arrangement was considered. The application also, naturally, had attached to it the said Arrangement document.

**The "Liquidation and Distribution account".**

24. I attach hereto a letter dated 29 July 2015 received from the Second Respondent, annexed hereto as "FA2", in which it is stated that the Liquidation and Distribution account is laying open for inspection for a period of seven days.
25. Clauses 4.3 and 4.4 of the Arrangement provide as follows:

"4.3. *Notice by email shall be given by the Receiver to the Company, the HS Companies, financial proposer, and to all known trade creditors and HS Investors of the Company and the HS Companies, that the account is lying for inspection for a period of 7 (seven) days calculated from the third business day succeeding that upon which the notice is despatched, but the failure of the Receiver to give such notice shall in no way entitle any person to*

RB JS

*initiate a late objection nor shall such failure invalidate such account or any distribution made pursuant thereto.*

*4.4 Any person objecting to the account shall be obliged to lodge notice of his objection (stating the full grounds thereof) with the Receiver before the expiry of the period of 7 (seven) days referred to in 4.3 above, failing which the account shall be deemed to be accepted by all interested parties. The Receiver shall rule on any objection so lodged and shall give the creditor written notice of his ruling, which notice shall be delivered by email."*

26. I am advised that, apart from the facts and submissions referred to below, the letter by Second Respondent of 29 July 2015 is defective and stands to be set aside in that it does not comply with the mandatory time periods set out in clause 4.3 of the Arrangement document. The seven day period is to be calculated only from the third business day succeeding that upon which the notice was dispatched. According to my calculation, the seven day period only commenced therefore on 3 August 2015.

27. In any event, it is literally impossible for investors properly to inspect and consider possible objections to the proposed liquidation and distribution account, for the reasons that follow:

27.1. The said letter by Second Respondent dated 29 July 2015 does not even indicate an address where inspection of the account could take place. In fact, no address whatsoever is reflected. It however contains a "call centre" telephone number through which "an appointment" can be made to inspect the account. As mentioned below, the number is that of Orthotouch, and a person "phoning in" is given another telephone number to phone a "Marie"

RB JS



to make an appointment. Upon request for a copy thereof, or an extract thereof, or that a copy of such be e-mailed to you, Marie then refers you to "Evilen", who informs you that copies or e-mails cannot not be provided (even of relevant extracts of the Liquidation and Distribution accounts). Furthermore, on Monday morning at some stage the telephone line to the said "call centre" was dysfunctional and investors could make contact not make appointments.

- 27.2. The vast majority of investors would not know what to make of a liquidation and distribution account without independent advice.
- 27.3. The Second Respondent, Cohen, has interpreted the Arrangement document to mean that he is **not permitted** to allow investors to take copies of the Liquidation and Distribution Account, because the Arrangement document expressly allows for inspection.
- 27.4. In this regard I refer to an email from an investor, Ms Charlene Jordaan, to an assistant of the Second Respondent, dated 31 July 2015, requesting to be able to obtain a copy of the Liquidation and Distribution account, to which the Second Respondent personally responded as follows:

*" Please tell Ms Jordaan that in terms of the Scheme document which was approved by the vast majority of voting investors and subsequently made an order of Court, the document specifically makes provision for the L + DA to lie open for inspection by investors.*

*I do not have the powers to provide copies of the accounts. If this was indeed the case then the Scheme document would have made provision for this. Please tell Ms Jordaan to read para 4 of the Scheme document.*

RB 

*Kind Regards, Derek Cohen*

- 27.5. A copy of Ms Jordaan's email and the response thereto is annexed hereto marked "FA3". I also refer to the last paragraph of Ms Jordaan's email of 31 July, in which she set out the frustrating process she had to go through in order to make an appointment and request copies.
- 27.6. I am advised and respectfully submit that the Second Respondent has misconstrued the Arrangement document. Whilst it may be so that it does not expressly make provision for copies to be made and taken, it also does not prohibit the taking of copies. The Arrangement document must be interpreted in such a manner that is facilitates the rights of investors properly to consider the documents and to lodge objections if so advised.
- 27.7. Cohen's interpretation, which appears intentionally calculated to thwart any objections to the Liquidation and Distribution account being lodged, is with respect clearly wrong.
- 27.8. It is thus apparent that investors are, despite requests, not permitted to make any copies of the purported liquidation and distribution account in order properly to consider the documents and obtain independent advice;
- 27.9. The Respondents failed to provide or annex any substantiating documentation showing how the payments suggested in the liquidation and distribution account will be effected or what the source of these payments will be;

(In fact, the affairs of Orthotouch, despite being a public company, and despite the Arrangement, have been shrouded in secrecy as

RB JS

no financial information of any sorts has been made available to investors over the last four years or more. This was in fact the case since the commencement of Business Rescue proceedings, when, despite various requests from various investors, financial statements and other information was not provided and investors are, I submit, deliberately kept in the dark).

27.10. Through much trouble, amongst others since I am wheelchair bound, I managed to inspect the account on 3 August (yesterday) at about 10:30 AM at the address given, being Bayhill Office Block, 32 Roos Street, Four Ways Golf Park, Four Ways (not even the address of Orthotouch). It seems that said account only contain the following information:

- (a) The name of a particular investor and his/her ID number;
- (b) The amount of initial investment made (amount paid);
- (c) Which one of the three options was voted for. (According to the Arrangement document, if no vote was cast at the meeting, such investor would automatically fall into the first category/ option (of the three). This option entailed a smaller monthly income being received, whilst a projected percentage of the purchase price (investment amount) would then be received at some later stage;
- (d) the current value of the investment made (of the shares bought), listed as approximately 53% of the initial investment, according to my calculations;

Given the aforesaid, I respectfully submit the said Liquidation and Distribution account does not comply with clause 4.1 of the Scheme of Arraignment and the related minimum requirements which the law prescribes for purposes of (the existence of) such

RB 83

an account. I am informed that the account inspected amounts to a mere investor "list", with the addition of a cold figure stating the alleged current value of my investment – without any explanation or calculation as to how such figure is derived.

27.11. I am advised that the term "days" are defined in the Arrangement document as calendar days, which means that the seven day period lapses on Thursday (6 August 2015) or possibly the night of Wednesday (5 August 2015), according to my calculations. However, as mentioned below, the offices of Orthotouch at which the account can be inspected, was not open over the past weekend and Ms Beanca Kotze of the offices of my attorneys of record were informed by Orthotouch that, according to them, the period for inspection ends coming Thursday 6 August. Therefore, effectively, the period of only five days were allowed for inspection. In the circumstances, and given that the thousands of investors are scattered throughout the country, this period and manner allowed for inspection allowed is wholly inadequate, I submit, to consider same and also lodge a considered or meaningful objection thereto; (this is apart from the fact that, as stated above, the notice is, I submit, defective in that it does not comply with the time periods set out in clause 4.3 of the Arrangement document).

27.12. I also mention that the "call centre" telephone number referred to in the notice ("FA2"), is the number for the Orthotouch's reception, who's staff is unable to assist investors with enquiries. In this regard, and as stated in her confirmatory affidavit, Ms Bianca Kotze of the office of my attorney's of record phoned that number on Friday 31 July 2015 on behalf of an investor. (I refer to her accompanying confirmatory affidavit). She was also, as in the

RB JB

case of Mrs Jordaan mentioned above, referred to various individuals, not one of whom could give her meaningful information in respect of the account. She was also informed that copies of neither the account, nor extracts thereof, may be made; Also that neither the account, or extracts thereof, may be e-mail to anyone. She was however informed by "Marie" that the said offices were not open over the weekend (of 1 August) for inspection, and that Orthotouch regarded the 7 day period of lapsing on Thursday 6 August 2015, which period includes such weekend.

- 27.13. For the sake of completeness, I attach hereto a further letter marked "FA4" recently distributed by Orthotouch (undated) in relation to various queries, in which they state that Second Respondent is not authorised to extend the seven day period, and in which they confirm that no copies of the account will be distributed or e-mailed. Again, I submit there is no reason why the account, or extracts thereof, cannot be published in a much more convenient manner, for instance on Orthotouch's website. Technological advances has made such forms of publication relatively easy.

**Objections against the account:**

27. I respectfully submit that, to be able to provide meaningful comment (or objection) to the said account, it is to contain much more information than it currently does. Legal argument in this regard will be presented at the hearing of this matter.
28. In the short time to my disposal, and with information received from some members of the HS Action group pertaining to the affairs of Orthotouch, the following serious question marks in relation to the said account can be

RB TS

mentioned:

- 28.1. This despite the fact that Orthotouch was supposed to acquire all the relevant immovable properties which formed part of the syndication schemes, it appears that no such properties were transferred to Orthotouch. I am informed by my attorney of record that a deep search in respect of Orthotouch reflects that it currently owns no immovable property, although that it previously reflected ownership of 50 (fifty) immovable property.
- 28.2 In the business rescue plan, which preceded the Arrangement, 77 immovable properties was listed and identified as distant to be transferred or required by Orthotouch.
- 28.3. In the premises, where have these properties gone? Who received the proceeds if they were transferred to other entities? Again, no disclosure of any financial information is made despite continuous and various requests over the last few years.
- 28.4. As a result, it is questionable how Orthotouch would be able to make payment of the projected or stated value of the various investments as reflected in the current Liquidation and Distribution account. Since no assets or other financial information is reflected in the said account, it is impossible to form any opinion as to its accuracy in that regard.

**Urgency:**

29. As stated, the above Ms Kotze was informed by Orthotouch on 31 July that the deadline for inspection of and objection to the liquidation and distribution account is 6 August 2015. I am advised that it is arguable that the said period may lapse even on Wednesday evening 5 August.

RB 

30. On receipt of the said letter of 29 July (FA2), same was forwarded to my current attorneys of record who managed to arrange a meeting in Cape Town with counsel on the earliest possible occasion, namely on Friday 31 July, i.e. two days after receipt of the letter. During that day, reports were also obtained from one or two investors who inspected the account on that day on what information was contained in the said account.
31. I am informed that a first draft of this application was drafted by junior counsel in Cape Town over that weekend (1 and 2 August), whereafter necessary facts were obtained during the course of Monday, 3 August 2015, including my inspection of the account on that morning. The application papers were then finalised, I am informed, during the early hours of Tuesday morning, after which they were signed once the logistics of collating annexures, and so forth, were completed.
32. Although it was contemplated by my attorney of record to write a letter of demand requesting Respondents to undertake not to finalise the account into extend the seven day period, it was decided that time is too short therefor. Also Respondents would in any event not have assented thereto given the past history of the whole matter and actions by them until now.

**Lack of financial information provided by First Respondent:**

33. As mentioned before, despite Orthotouch being a public company, and despite various requests, Orthotouch has provided no information in relation to its financial affairs, and investors have therefore been kept in the dark.
34. I respectfully submit that Orthotouch is obliged to provide and publish information relevant to its affairs, including its financial statements. I am

RB 7/15

advised by my attorney of record that Orthotouch has not published its annual financial statements, or alternatively has kept them secret.

**Irreparable Harm:**

35. I respectfully submit that, in accordance with clause 4.4 of the Arrangement document, in the event of no objection being lodged against the said account, it will be "deemed to be accepted by all interested parties". Therefore, adequate time to properly consider the account, once a copy is obtained of a proper account containing sufficient detail as argued above, is necessary in order for this deeming provision not to find application.
36. Furthermore, I submit that if the purported (current) Liquidation and Distribution account which is currently playing open for inspection is indeed, in its current form, finalised – which seems probable given the inability of investors like myself to properly consider any meaningful information in that regard – it could eventually be argued that investors has no further right to query or challenge how the calculations were made with regards to the periodical (income) and final (capital) payments to them. I submit that, presently, there is no transparency whatsoever in relation to the affairs of Orthotouch in general, and in particular the said Liquidation and Distribution account.

**Balance of convenience:**

37. I submit that, pending the return day herein, and (then) also pending the said application to set aside or leave to appeal, there could be no prejudice to Respondents if the relevant interim relief herein is granted - especially given the fact that there is no reason why the Liquidation and Distribution account has to be finalised over the next few months or even

RB JB



years. In terms of the Arrangement, it would be a matter of years still in/over which the relevant monthly income is payable to investors (depending on what option was chosen by a particular investor) or until any percentage of the initial investment (i.e. of the capital/ purchase price paid) is to be repaid by Orthotouch.

38. Currently, Orthotouch is making payments to investors (or rather, to the relevant Highveld companies, who in turn pays investors), where applicable, in accordance with the terms of the Arrangement.
39. Therefore, the granting of any interim relief resulting in the delay in the finalisation of the relevant Liquidation and Distribution account, will not result in any prejudice or inconvenience to any Respondent as the *status quo* will simply persist regardless. Stated differently, finalisation of the said account will become relevant or necessary some years from now, when percentages of initial investments first become due and payable to investors. As stated, currently, only monthly income is payable by Orthotouch (and is being paid) in respect of certain (most) investors.

**Conclusion:**

40. In the premises, I humbly request that the relief be granted as sought in the Notice of Motion herein.



Deponent

I certify that the deponent has acknowledged that he/she knows and understands the contents of this affidavit which affidavit was signed and sworn to before me in my presence at \_\_\_\_\_ on this \_\_\_\_\_ day of August



2015, in accordance with Government Notice No. R1258 dated 21 July 1972, as amended by Government Notice No R1648 dated 19 August 1977, as further amended by Government Notice No. R1428 dated 11 July 1980, and by Government Notice No R774 of 23 April 1982.

SOUTH AFRICA POLICE SERVICE  
NORKEM PARK  
2015 -08- 04  
TEL: 011 391 1814  
SUID-AFRIKAANSE POLISIEDIENST

  
711374-6  
MAEDIMOLE  
**COMMISSIONER OF OATHS**

MAEDIMOLE JAMES BOBANE  
CONSTABLE 711374-6

RB JB