IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

25 May 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**
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;

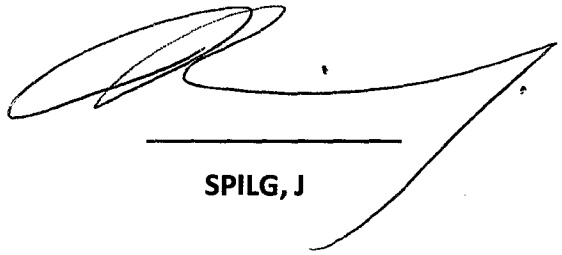
1. publication of a notice in the Sunday Times, The City Press and Rapport newspapers at least three weeks before the hearing;

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