IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 42334/14

In the application of:

JURIE JOHANNES GELDENHUYS First Applicant

(and two others)

And

ORTHOTOUCH LIMITED First Respondent

(and twenty six others)

And

THE HIGHVELD SYNDICATION INVESTORS

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

APPLICANTS' HEADS OF ARGUMENT [REINSTATEMENT AND JOINDER]

Introduction

1 This matter involves both an application for the joinder by way of intervention of new applicants and an application to set aside both a notice of substitution as attorneys of record and a notice of withdrawal of application and for the reinstatement of the main application referred to below. Both notices are dated 10 November 2016 and were delivered on 16 November 2016.

2 For ease of reference, the term "*this application*" or "*the application*" will herein be used to refer to the reinstatement application. The joinder application shall be referred to as such.

3 The main application (also referred to as the "*setting aside application*") in this court is an application to set aside an order of this court dated 26 November 2014 in terms of which a Scheme of Arrangement involving First Respondent was sanctioned. The current applications are interlocutory applications in respect of the main application and are brought by way of urgency

4 For the sake of convenience, the abovenamed nominal applicants are referred to herein as "*the applicants*". We deal with their current status and the right of Theron effectively to bring these interlocutory proceedings further on in these heads.

5 In summary, the factual background to the relief sought is as follows:

5.1 The abovenamed applicants were part of a group of some 6688 aggrieved individuals (the "Highveld Syndicate Action Group" or "HSAG") who mandated Theron and Partners Attorneys ("Theron") to launch - in the Pretoria High Court - an application for the certification of a class action ("the *certification application*") both

for their benefit and for the benefit of a wider group of investors in the Highveld Syndication property who had lost the value of their investments ("the investors").[1]

5.2 The main application in this court is related to the certification application (Pretoria) as follows:

(a) The Scheme of Arrangement purports to thwart the class action by absolving all Respondents from liability for losses of investors[2]. (This is, to an extent, acknowledged by Georgiou in paragraph 4.2 of his opposing affidavit, in which he admits that the Scheme of Arrangement "affects the merits of the proposed class action"[3]).

(b) Hence, the main application was launched for the setting aside of, alternatively to appeal against, such sanctioning - as such order for sanctioning is clearly an obstacle in the pursuit of the class action[4]. The grounds upon which the main application are brought, are amongst others that material facts were not disclosed to the court concerning the class action (the existence of the pending class action papers were not even mentioned in Orthotouch's ex parte application to have the Scheme of Arrangement sanctioned)[5]. It was therefore not disclosed to the court that serious allegations of fraudulent and reckless actions by various individuals and entities are being made in the certification application[6]. A further ground is that

[1] FA 11 -12, paras 5-9
[2] FA 11 par 7
[3] AA 221 par 4.2
[4] FA 11 par 7
[5] FA 16, par 15 and 17
[6] FA 16, par 15 and 17

the arrangement purports to bind all investors regardless of whether or not it was supported by an investor and despite none of the investors being creditors of Orthotouch for purposes of section 155(8) of the Companies Act of 2008[7].

(c) There are three nominal Applicants in the main application, and four nominal Applicants in the certification application[8]. (Mrs Vlok is a common Applicant to both applications). All of them are members of the HSAG, and they were chosen by an initial steering committee of the HSAG[9]. Any of the disgruntled investors could have been selected as nominal Applicants.

(d) In both the certification application and the main application in this court (also referred to as "*the class action litigation*"), the nominal applicants "*knew very well*" that they were approached to represent the wider group of disgruntled investors in pursuit of the proposed class action, and that the legal costs of proceedings are to be paid from a pool of contributions by investors (by members of the HSAG)[10].

5.3 The members of the HSAG indeed financed the costs of the said certification application and the main application in this court.[11]

[7] FA 16, par 15 and 17
[8] FA 19, par 22.1
[9] FA 12 par 9
[10] FA 12 par 9
[11] FA 14 para 11

5.4 The class action litigation was principally directed by Theron and the steering committee selected from amongst the investors.[12]

5.5 As stated, each of the above named applicants was well aware that he or she was not cited as an applicant purely in his or her own personal interests but rather, in the first instance as representatives of the investors (or HSAG members) and in the second instance, as representatives of the class envisaged in the main application and that the costs of the main application were being funded not by them but by the contributions of the HSAG.[13]

5.6 Not only were the facts stated above in broad terms known to Georgiou.[14], but they are also effectively so stated by Mr Geldenhuys himself in paragraph 51 of his Founding Affidavit in the main application (page 33 of the main application record) – in which no opposing papers have been filed yet – as follows:

"51. *I am informed that for 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 of the scheme document) and enquire whether they (we) would be willing to act as Applicants herein. I am advised that it took a number of days and numerous enquiries by the HSAG to identify appropriate investors who were also prepared to apply to court on behalf of all investors. I was contacted on about Friday, 13th of February 2015 by members of HSAG and confirmed my willingness to act as such. I only personally became aware of the*

[12] FA p12 para 9; RA 13 para 12.2
[13] FA 13-15 paras 9-11
[14] FA 15 para 13;

Court order which is sought to be rescinded during the aforesaid communication on 13 February 2015".

5.7 The first respondent, Georgiou, unbeknown to the investors or the Theron, reached settlement agreements with each of the applicants – as well as with the applicants in the certification application – on undisclosed terms, save that it is not denied that a term of the settlement agreements was that the applicants were required to withdraw the main application.[15]

5.8 It is also not denied that the applicants were required to withdraw the main application without prior warning to Theron or the HSAG.[16]

5.9 Each of the applicants hails from a different part of the country and they are not related or particularly known to each other save as co-applicants as described above.[17]

5.10 This notwithstanding, the applicants jointly instructed a new attorney Jeff Donnenberg & Co who then simultaneously and without any prior notice to Theron, filed a notice substituting himself as attorney of record in place of Theron and a notice withdrawing the main application on behalf of the applicants.[18]

5.11 On the same date, similar notices of withdrawal and substitution of attorneys of record were filed in the Pretoria court in the certification

[15] FA 18 -21 paras 21-22; AA 224 para 71-73
[16] FA 19 para 22.1; AA 244 paras 71-74
[17] FA 19 para 22.1; AA 244 paras 71-74
[18] FA 19 para 22.2 – 22.6; ; AA 244 paras 71-73

application, whereby the certification application was purportedly withdrawn[19].

6 The simple premise on which the application is brought for the setting aside of these notices is that the main application was not the applicants' to settle, given:

6.1 their status in substance as nominal applicants; and

6.2 the interests of the HSAG who were part of the joint endeavour together with the applicants to launch the class action (and the related main application herein), which to the applicants' knowledge were to be vindicated by way of the class action envisaged in the certification application.

7 The inference that Georgiou did not merely set out to settle the individual claims of each of the applicants, but also stipulated in the undisclosed settlement agreements that the applicants were required to withdraw from the main application in a manner specifically calculated to compromise both the class action litigation and the individual claims of the investors, is both inescapable and not denied.

8 Equally inescapable is the inference that the applicants agreed to betray the investors in this manner against payment of whatever consideration was secretly agreed between Georgiou and the applicants.

Abuse of process constituting irregular steps

9 In his opposition to this application, Georgiou has the following two main contentions:

[19] FA 19, par 22.4

9.1 His first contention is that the applicants for certification of the class action and those in the main application in this court – and prior to the certificate having been issued – were acting as independent litigants and not as nominal applicants representing a much wider group. Therefore, so he reasons, they were entitled each to settle their claims against the respondents and withdraw the main application for certification.

9.2 Secondly, he somewhat brazenly suggests that the settlements reached with the said applicants were reached in the normal course and without impropriety or ulterior motive.

10 In brief, it is submitted the above analysis is incorrect. The conduct of Georgiou and of the applicants in this application must be seen in the light of the facts relevant to the similar reinstatement and joinder applications which were heard in relation to the application for certification of the class action, because both were part of the same endeavour and georgiou's conduct in both was part of one single nefarious scheme to defeat the class action.

11 In this regard:

11.1 Firstly, insofar as the certification application is concerned, if the applicants were not mere nominal applicants representing a much wider group, there would have been no purpose for them to pursue a class action at all. They would simply each individually have issued summons against the respondents in order to pursue their claims. The very fact that they opted instead to apply for the certification of a class action per se casts them in the role of applicants who are not merely acting to vindicate their own rights, but as representatives of the class (or at least the said 6688 investors) which they expressly

identified and in whose interests they launched and have hitherto pursued the main application for certification.

11.2 Secondly, it is clear that Georgiou did not merely settle the individual claims which the applicants sought to vindicate as members of the yet to be certified class. He also purported to settle the application for certification itself. That can be the only explanation why he targeted those particular applicants, and of course the nominal applicants in this court; why they all went to the same attorney on the same day and why they apparently instructed that attorney simultaneously to place himself on record and to lodge notices of withdrawal, in both the main application and the certification application, without prior notice to Theron & Partners or to the thousands of litigants whom they clearly represented in acting as nominal applicants in the main application and in the certification application, so as to prevent (so Georgiou believes) these thousands of litigants from selecting new nominal applicants to continue with the main application and the class action.

11.3 Thirdly and flowing from the above, it is our contention that the applicants were not at liberty to collude with one another and with Georgiou (and the entities he represents) deliberately to withdraw either the main application or the certification application in a manner calculated to scupper the proposed class action as a whole.

12 It is this improper, collusive, secretive and simultaneous filing of notices of withdrawal which amounts to conduct which was clearly calculated not merely to extricate the applicants from the litigation, but specifically to prejudice the rights of the thousands of litigants in concert with whom and for whose benefit the main application and the class action litigation were

brought, that renders the delivery of these notices an abuse of the process of court and thus irregular.

13 We expand on this summary of our main submissions below.

14 The main application which – so the respondents contend – has been properly withdrawn is as mentioned above an application for the setting aside of the sanctioning of a Scheme of Arrangement. Such main application is part and parcel of the so-called class action litigation as it pursues the same goal, namely to enforce the disgruntled investors' rights (claims) against various Respondents.

15 Class actions are novel proceedings in our law. Wallis JA - in **Children's Resource Centre Trust v Pioneer Food (Pty) Ltd** 2013 (2) SA 213 (SCA) at p222 para 14 has described class action as a procedure "*in which a representative brings proceedings on behalf of a group of persons who have not authorised the representative to act on their behalf. Such actions trace their roots back to the principles of equity in England, were developed in the United States of America and have spread to a number of jurisdictions around the world.* ".

16 Contrary to this very notion, Georgiou contends that the applicants were at all material times acting as applicants in their personal capacity and thus entitled to appoint a new attorney and to withdraw the main application without reference to Theron or the HSAG or its steering committee.[20]

17 It is however well established that the court will not allow either its rules or its processes and procedures to be used for an ulterior, improper motive.

[20] AA 228-230 paras 15-17

18 More specifically, it is submitted that whilst the rule permitting an applicant to withdraw motion proceedings may be used for that purpose, the court will not permit the rule to be invoked in such a manner that both the objective and purpose of withdrawal is not principally or merely to compromise the individual applicant's claim, but in order to compromise the claims of the unsuspecting HSAG, as well as the claims of the members of the class of persons to whom the application for certification relates.

19 A typical instance in which our courts will set aside a process which although ostensibly regular, is tainted by irregularity or impropriety as contemplated by rule 30, is when a subpoena is issued and served for an improper or ulterior motive or purpose.

20 In **Beinash v Wixley** 1997 (3) SA 721 (SCA) at 734F – 735A Mohamed CJ held:

There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes. 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:*

'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.'

*What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective. (****Standard Credit Corporation Ltd v Bester and Others*** *1987 (1) SA 812 (W) at 820A--B;* ***Taitz The Inherent Jurisdiction of the Supreme Court*** *(1985) at 16.) A subpoena duces tecum must have a legitimate purpose. (The unreported judgment of*

Marais J in the WLD ***Wachsberger v Wachsberger*** *on 8 May 1990 in case No 8963/90 and the unreported judgment of Plewman J in the WLD on 6 October 1993 in the case of* ***Lincoln v Lappeman Diamond Cutting Works (Pty) Ltd*** *17411/93.)*

*Ordinarily, a litigant is of course entitled to obtain the production of any document relevant to his or her case in the pursuit of the truth, unless the disclosure of the document is protected by law. The process of a subpoena is designed precisely to protect that right. The ends of justice would be prejudiced if that right was impeded. For this reason the Court must be cautious in exercising its power to set aside a subpoena on the grounds that it constitutes an abuse of process. It is a power which will be exercised in rare cases, but once it is clear that the subpoena in issue in any particular matter constitutes an abuse of the process, the Court will not hesitate to say so and to protect both the Court and the parties affected thereby from such abuse. (****Sher and Others v Sadowitz*** *1970 (1) SA 193 (C);* ***S v Matisonn*** *1981 (3) SA 302 (A).)*

21 We submit that it matters not whether this Court elects to deal with the merits of this application pursuant to rule 30 or pursuant to its inherent jurisdiction to control its own processes in order to do justice, or both. Indeed we submit that rule 30 is really a procedural rule which facilitates the Court's exercise of its inherent jurisdiction.

22 The term "*irregular step*" as contemplated in rule 30 is not defined in the court rules, but it is significant that rule 30 refers repeatedly to an irregular step arising from an "*irregularity or impropriety*".

23 Whilst an "*irregularity*" may lend itself to the narrow construction of a step in litigation which does not accord with the strict terms of the rules of court, the same cannot be said of the word "*impropriety*", the ordinary meaning of which is "*a failure to observe standards of honesty or modesty; improper behaviour or character*"[21]

[21] Online Oxford Dictionary

24 In our submission the use of the word "*impropriety*" in rule 30 clearly implies a pejorative value judgement of the conduct forming the subject of the complaint. In the present context, the word adequately accommodates the improper collusive use of legal processes for an ulterior purpose or motive calculated to defeat rather than advance the fair adjudication of legal disputes in accordance with section 34 of the Constitution.

25 The standard by which a step is to be judged as to be so irregular or defective that it constitute a nullity, is not defined[22]. As stated in **Krugel v Minister of Police**[23] by Nestadt J: "*Perhaps it is a question of degree".*

26 It is trite law that, even before the Constitution of 1996, our courts had the power to regulate its own process in pursuit of fairness and justice.

27 In relation to the court's powers and discretion in this regard, the following was held in the matter of **Cape Town City v SANRAL** 2015 (3) SA 386 (SCA) at par 28 per Ponnan JA:

[28] In adopting the rule [the "implied undertaking rule" not to disclose in relation to discovered documents], the High Court appears to have invoked its inherent power to regulate its own processes in terms of s 173 of the Constitution. That our courts were endowed with such power, even in our pre-constitutional era, is evident from the following dictum of Corbett JA:

'There is no doubt the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice . . . .'

Courts now derive their power from the Constitution itself. As it was put by the Constitutional Court in SABC v NDPP:

'This is an important provision which recognises both the power of Courts to protect and regulate their own process as well as their power to develop the common law. . . .

[22] Herbstein & Van Winsen (Civil Practice of the High Courts of South Africa, fifth edition, volume 1), page 738)
[23] 1981 (1) SA 765 (T) at 768.

The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in s 173 is that Courts in exercising this power must take into account the interests of justice.'

28 Section 173 of the Constitution of 1996 provides as follows:

The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

29 In the case of **Mathias Intl Ltd v Baillache** 2015 (2) SA 357 (WCC) Binns-Ward J held as follows, with reference to various authorities:

[11] The Anton Piller procedure was not part of the common law. It has been adopted by the superior courts in South Africa in the exercise by the courts of their inherent jurisdiction to regulate their own process in the interests of justice, having regard to 'modern problems in the prosecution of commercial suits".

30 The duty of the court to prevent abuse of its own rules and processes flows inter alia from the well-established role of the presiding judge in the administration of justice, as described by Harms JA (as he then was) in **Take & Save Trading CC v Standard Bank of SA Ltd** 2004 (4) SA 1 (SCA):

[3] That is one side of the coin. The other is this:[24]

'A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure head, he has not

[24] **R v Hepworth** 1928 AD 265 at 277 *per* Curlewis JA.

only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.'

The same applies to civil proceedings: a Judge is not simply a 'silent umpire'.[25] *A Judge 'is not a mere umpire to answer the question "How's that?"' Lord Denning once said.*[26] *Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources.*

31 In **Molala v Minister of Law & Order** 1993 (1) SA 673 (W) on page 677 E Flemming DJP held that the court has "*a discretion about how to deal with a proven abuse of process*".

32 The two pronged contrivance of Georgiou was clearly aimed at compromising the rights of people other than those nominal applicants with whom he entered into these so-called settlement agreements. His purpose is for the class action to prescribe and for the challenge to the scheme of arrangement to be stopped. Contrary to what Georgiou contends, the certification application had immediate legal consequences for persons falling within the class sought to be certified in the main application.

33 For instance, a certification application interrupts prescription on behalf of the whole class of persons involved. In the case of **Children's Resource Centre Trust v Pioneer Food (Pty) Ltd** 2013 (2) SA 213 (SCA) Wallis JA held as follows at par 89:

If, as we now hold, an application for certification is the first necessary step in proceedings to pursue a class action there is much to be said for the proposition that,

[25] **Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd** 1976 (2) SA 565 (A) at 570E - F
[26] **Jones v National Coal Board** [1957] 2 All ER 155 (CA) at 159B

for purposes of prescription, service of the application for certification would be service of process claiming payment of the debt for the purposes of s 15(1) of the Prescription Act. Such an interpretation would be supported by cases where the institution of similar necessary preliminary proceedings have been held to constitute the bringing or commencement of suit for various purposes.

34 It follows in our submission that the applicants were in substance nominal, representative applicants, in two distinct senses of the phrase:

34.1 first, by virtue of their understanding that they were nominal applicants representing the HSAG in pursuit of the class action litigation, which includes the main application herein to set aside the Scheme of arrangement;

34.2 second, by necessary implication, having regard to the very nature of the class action procedure created by the Constitution and given procedural content by our courts, they represented the class sought to be certified in the main application.

35 In view of the aforesaid, it is submitted that Georgiou's contention is incorrect that, prior to certification being granted, the applicants in a certification application can only act in their personal capacity (and that their application has no consequences for the class of persons involved). Apart from the earlier submission (namely that, had the applicants intended to act only personally they would simply have issued individual summonses to pursue a claim), the fact that a certification application is a "*first step in the process*" to pursue a class action, necessarily means that the whole class involved benefits from such application. Therefore, that the mere certification application has some status and consequences in law for purposes of the class action.

36 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 of members involved of course already exists. After certification, it is just a question of determining (by means of the opt-in/opt-out process) which members of the identified class intend joining the class action and who do not.

37 Although the current main application in this court seeks different relief from what is sought in the certification application, it is submitted – for the reasons mentioned above – that it is clearly part of the same litigation in pursuit of the eventual claims against the various Respondents.

38 Furthermore, if the purported withdrawal of the main application is not set aside, Georgiou will largely have achieved his goal in his collusive dealings with the nominal Applicants, in that it would greatly set back and prolong the current proceedings and hence the proposed class action. This is so since various interlocutory applications have been heard and adjudicated upon[27] in relation to the main application since its issuing in March 2015.

39 To now issue a fresh main application will mean that the same nterlocutory applications will probably be brought by Respondents, thereby *again* delaying the hearing of the main application for two years or more. In any event, a setting aside application (rescission), or a leave to appeal application, needs to be brought rather soon after the relevant order has been granted. In this case, the sanctioning of the scheme occurred in November 2014.

40 It is submitted that the nominal applicants' and Georgiou's collusion with one other can only be described as an abuse of the court process of the most

[27] FA 18, par 19.3

egregious kind. At the prompting of the investors' adversary, the nominal applicants visited a grave betrayal on the HSAG and the investors whom they represented.

41 This is all the more egregious given one of the primary purposes of the class action procedure:[28]

> *[19] The Constitution, in s 38(c), recognises a class action specifically in relation to infringements of or threats to rights guaranteed in the Bill of Rights. That caused the appellants in this case to invoke s 27(1)(b) of the Constitution. However, that was unnecessary. The class of people on whose behalf the appellants seek to pursue claims (leaving aside for the present the definition of that class) is both large and in general poor. Any claims they may have against the respondents are not large enough to warrant their being pursued separately, so that it is improbable that any lawyers would be willing to act for them on a contingency-fee basis. If those claims cannot be pursued by way of a class action, they are not capable of being pursued at all. The effect of that is to engage the right of access to courts vested in each of the members of the class by s 34 of the Constitution. The threatened infringement of that right may be challenged by way of a class action and the appropriate remedy is to permit a class action in respect of the underlying claims. It was accordingly unnecessary to seek in s 27(1)(b) an alternative peg on which to hang the entitlement to proceed by way of a class action. The right to proceed in that way was clear, subject to satisfying the other requirements for such an action.*

42 As submitted earlier, these applicants were not at liberty to withdraw the main application for the HSAG or of the investors. Georgiou, apart from abusing the process and acting irregularly, also acted with duplicity in that he, whilst pretending to negotiate with Theron about settlement with investors through the process and mechanism established through such negotiations, went behind Theron's back and settled directly with the

[28] **Children's Resource Centre Trust v Pioneer Food (Pty) Ltd** 2013 (2) SA 213 (SCA)

applicants (Theron's clients) and persuaded them to withdraw the main application without prior notice to him or to the HSAG.[29]

43 When a party to litigation employs schemes and stratagems to undermine other parties, it amounts to an abuse of process The following passage in **Cohen v Cohen** 2003 (1) SA 103 (C) at paragraph 27 per Griesel J are apposite:

It is abundantly clear from the papers that the respondent is driven by a desire to rid himself of his maintenance obligations vis-à-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.

44 The court has a duty to prevent such abuse of process. In the case of **Nedcor Bank Ltd v Gcilitshana** 2004 (1) SA 232 (SE) at page 241 paragraph 27 – with reference to the judgement of De Villiers JA in **Hudson v Hudson** 1927 AD 259 at 268 – the Court held:

[27] Ordinarily, the reasons and motives of a party for instituting legal proceedings are irrelevant. However, '(w)hen . . . 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.

45 In order to place the above summary of salient facts in perspective and to dispel any suggestion, however feint, that the so-called settlement with the nominal applicants was in the ordinary course or that the purported withdrawal of the main application was simply an unfortunate by-product of the applicants' desire to settle their own claims as investors, we draw attention to the following facts.

45.1 This "*settlement*" of the applicants' claims by Georgiou was done "*outside*" the procedure and mechanism which had been put in place

[29] FA p19 para 22.1 and p21 para 23.4

by Theron & Partners (in conjunction with Georgiou) whereby investors could reach a settlement with Georgiou in respect of the class action claim[30]. This settlement was agreed in principle after having been negotiated between Theron and Georgiou, and was in fact an offer from Georgiou[31]. As a fact only 844 investors (of the 18,000) indicated any desire to settle on that basis.[32]

45.2 This procedure and mechanism for settlement entailed the making available by Theron & Partners – pursuant to their negotiations with Georgiou – of an agreed draft settlement which is to be filled in. In terms of this settlement investors will receive 50% of the capital, payable over a period of three years[33].

45.3 Not one of these settlement agreements has however been signed by Georgiou, let alone any actual payments made by him in terms thereof[34].

45.4 An initial pivotal figure in the HSAG who drove the class action, Mrs Elna Visagie, was – to the surprise of investors – persuaded by Georgiou to go and work for him after he offered her a monthly six-figure salary[35].

45.5 Visagie's "*replacement*", Mr Helgard Hancke[36], also then appeared to jump ship by accepting a secret settlement of his (or his father-in-law's) claim without disclosing same to Theron & Partners. Thereafter, he still sat on the HSAG committee which deals with

[30] FA 22, para 23.7
[31] FA21, para 23.4
[32] RA 17 para 16.11
[33] FA22, para 23.4
[34] FA 21 para 23.4; AA 244 paras 74 - 76
[35] FA 20 para 23.1 to 23.2; AA 244 paras 74 - 76
[36] FA 21 para 23.3; AA 244 paras 74 -76

sensitive and confidential information concerning the HSAG's strategies and the class action litigation generally[37].

45.6 Of all the investors, none has received any settlement payments except the nominal applicants and Mr Hancke[38].

45.7 As repeatedly emphasised, the class action litigation being pursued by the HSAG on behalf of the class of 18 000 investors also involves the pending application in this Court, to set aside the Scheme of Arrangement involving Orthotouch Ltd[39].

45.8 Orthotouch Ltd (18th Respondent) is controlled by Georgiou[40].

45.9 Again, the Scheme of Arrangement, purports to thwart the class action by absolving Georgiou and others from all liability[41].

46 We submit that if the applicants wanted to withdraw for the application they were at liberty to do so provided they did not do so in a manner calculated to compromise the rights and contingent rights of others. The facts show that they went out of their way to prejudice the very people who had allowed them to act as nominal litigants and who have funded the litigation.

47 That their conduct was orchestrated by the primary person at whom the class action is aimed renders this impropriety all the more egregious.

[37] FA 22 para 23.6; AA 244 paras 74 - 76
[38] FA 21 para 23.4 – 23.5; AA 244 paras 74 - 76
[39] FA 16 para 17; AA 243 para 65
[40] FA 16, para 14; AA 242 para 64
[41] FA 16 para 16; AA 242 para 58

Theron's right to bring this application

48 Georgiou seeks to benefit from the very irregular steps complained of, by contending that the notices delivered by Jeff Donnenberg & Co firstly deprived him of his mandate to institute these interlocutory proceedings in their name and secondly, put an end to the main application.

49 We submit that the Court cannot by means of an abuse of its process be deprived of the ability to set the offending processes aside and thus do its duty to the parties, as it is enjoined to do by the authorities referred to above.

50 Theron as attorney of record would ordinarily have the implied authority to bring interlocutory proceedings without a specific mandate from his clients, the applicants. There is no evidence on record that his mandate has been terminated other than by way of the impugned notice to replace him as the attorney of record. We therefore submit that the Court is for present purposes entitled to ignore the notice in question, as it constitutes an essential and material part of the very abuse which, we submit, the Court will not countenance.

51 In any event, where the applicants were nothing more than nominal applicants, they lacked the authority to remove Theron as attorney of record. Theron's mandate to represent the HSAG remains and since they are the true or beneficial litigants on behalf of whom the nominal litigants (the applicants) were cited, he is in our submission by virtue thereof permitted to act.

52 In **Tecmed (Pty) Ltd v Nissho Iwai Corp** 2011 (1) SA 35 (SCA) the Court considered that an application for substitution of the named litigant (Nissho Iwai) by another party (Sojitz Corporation), in circumstances in which the

Nissho Iwai had ceased to exist as a result of its merger with Sojitz Corporation, on the basis that Sojitz Corporation was the universal successor of Nissho Iwai. The Court accepted that although the attorneys Bowman Gilfillan had brought the application in the name of Nissho Iwai, they had at all material times in fact acted for and taken instructions from Sojitz Corporation.

53 This approach of substance over form with respect commends itself to the present matter.

54 So too in **Santam Insurance Ltd v Booi** 1995 (3) SA 301 (A) the Court accepted that a summons issued by an attorney acting for a person whom, it turned out, lacked the mental capacity to give the attorney a valid mandate thus rendering the litigation unauthorised, was not a nullity and was capable of ratification by the court appointed curator ad litem.

55 If one has to be technical about this (as Georgiou would have it) the application for joinder can be granted first and the new applicants permitted to be the applicants in the application to set aside the impugned notices.

56 In this regard, the joinder application is foreshadowed in the reinstatement application. The "*new*" applicants who wish to join, are not only each identified in the founding affidavit of the (reinstatement) application, but confirmatory affidavits have been filed by all of them (record page 55 – 69) in which they request that they "*be regarded as applicants*" in the reinstatement application insofar as may be necessary. They had indicated, prior to the launching of this application, that they support this application and are prepared to act as applicants hereto[42].

[42] FA 23, para 28 (top of page 24, above para 29)

57 It is not our submission that the applicants were not permitted to withdraw from the main application, or to go to another attorney instead of Theron. Had they given Theron prior notice that they wished to do so, he would have been able to line up other nominal applicants as he has now done, the new applicants would have applied to intervene as applicants and the applicants could then withdraw form the matter, having settled their individual claims against Georgiou.

58 The manner in which they went about withdrawing from the litigation leads to only one inference: that they took money from Georgiou, not to settle their own claims, but to compromise the claims of the entire class. This they had no mandate and no right to do.

59 The fact that they acted clandestinely and with the intention to compromise claims other than their own is what renders their entire course of conduct and especially the delivery of the impugned notices, an abuse.

The joinder application

60 It is submitted that the right and interest of the intervening applicants to be joined is not in serious dispute other than on the basis of urgency and that the main application is no longer pending or extant. Once those contentions fail, we submit that the joinder application must succeed. Clearly, it is submitted the alleged late bringing of the joinder application did not prejudice any Respondents.

Urgency

61 This matter has been brought by way of a moderate degree of urgency. We submit that the grounds advanced are both cogent and compelling. It should be pointed out that Georgiou filed his opposing affidavit only on 22 February 2017, more than two months after having received same by email,

and almost a month after filing a very similar opposing affidavit in the related Pretoria High Court proceedings[43].

62 Indeed the respondents' opposition to the matter being heard on the urgent roll is motived by the same venal motives as the collusion with the nominal applicants.

63 We submit that when the process of Court has been so seriously abused in order to defeat the claims of thousands of investors, mostly elderly and impecunious, the Court should not allow the impropriety to continue for a moment longer than practicably necessary.

64 Theron's concern that news of the "*withdrawal*" of the main application is calculated to sow confusion amongst the investors and impede the momentum of their joint endeavour to obtain justice by pooling their resources is with respect valid.[44]

65 The stratagem by Georgiou to undermine the class action will in fact bear its intended fruits if this application is not dealt with as a matter of urgency.

[43] Replying affidavit: Page 8 par 3
[44] FA 25-26 paras 30 - 31

CONCLUSION

66 It is submitted that this court should express its displeasure towards the actions of Georgiou and the nominal applicants. It is requested that the relief sought in the reinstatement application (and joinder application) be granted, plus costs, including the cost of two counsel, against Georgiou (the First Respondent) and Orthotouch Ltd as they opposed the application.

C Watt-Pringle SC
CHJ Maree

Chambers, Sandton

27 February 2017