SUPREME COURT OF APPEAL JUDGMENT ON FRIDAY, 2 NOVEMBER 2016

On 2 December 2016, the Supreme Court of Appeal ("the SCA") - under case number 1068/2015 - upheld the application for summary judgement by Mrs A De Lange and 46 others against Mr Nicolas Georgiou and others. The claims were instituted on the strength of the "Buyback agreements" which formed part of the Highveld Syndication 21 and 22's prospectuses. In terms of the Buyback agreement, Georgiou (and two other entities which he controls) undertook to buy back the shares of investors (in Highveld 21 and 22) after five years at the same price at which they were purchased.

(A brief overview of the issues and arguments involved in the SCA case, is given further below for those who are interested).

The question of course arises: what are the implications of this judgement for the class action? In a nutshell, it is very good news, in particular, for those investors in Highveld 21 and 22 who support the class action. This is so because the application to commence the class action, which is pending in the Pretoria High Court, includes the claim based on the buyback agreements for Highveld 21 and 22 mentioned in the court order.

However, the possibility arises that investors in Highveld 21 and 22 commence a "parallel process" in the meantime by issuing summons against Georgiou and others based on the buyback agreements (see however the cautionary note later below). The legal team and attorneys of the Highveld Syndication Action Group ("HSAG") may assist any individual who wishes to pursue the matter personally against Mr Nic Georgiou and his entities.

Given the above judgement of the SCA in favour of De Lange, it is considered that the HSAG attorneys issue a summons on behalf of those particular individual investors in Highveld 21 and 22 who are currently registered and part of the HSAG. Currently, more than 6688 investors are members of the HSAG by having joined the HSAG and with instructions to Theron & Partners to pursue the class action. A substantial number of those investors are investors in Highveld 21 and 22.

Theron & Partners will be requesting individual mandates from such investors in Highveld 21 and 22 over the next few weeks to issue summons on their behalf based on the buyback agreements. Such summonses can be issued during the beginning of 2017 , as a draft summons has already been drawn. It is proposed that multiple Plaintiffs (investors) be cited in such summons.

Two words of caution are however appropriate.

Firstly, there are no guarantees that these summonses will have the same result at the summary judgement stage as in Mrs De Lange's case. This is so because Georgiou might, this time, draft his opposing affidavit more thoroughly for purposes of opposing summary judgement. This could result in summary judgement not being granted, and for the case to then be referred to trial in the normal course for those defences to be dispelled at the (later) trial stage. Summary judgement is an extraordinary remedy which is not granted easily. It should be pointed out that the SCA judgement dispelled some arguments raised in court on behalf of Georgiou precisely because certain facts were not included in the opposing affidavit before court. For instance, the sanctioned Scheme of Arrangement was not raised as a defence by Georgiou at all. It is suspected that he will do so this time round. (There is a pending application by the HSAG to set aside such Scheme of Arrangement in the Johannesburg High Court but, until a court of law has set aside the said scheme, if may be used as a measure to delay such cases).

Secondly, although such "parallel process" (i.e. summonses separate from the class action) can be issued as suggested above, this process will only be prudent in the meantime, i.e. until the class action certificate is obtained from the Pretoria High Court. Once a certificate is obtained, it is arguable that investors claiming under the buyback agreements might have to choose between, on the one hand, continuing with such issued summons proceedings and, on the other, remaining part of the class action. The HSAG legal team is however of the view that this is not an insoluble problem, as there are ways in which to overcome this problem of "choice". For instance, the then pending actions (summonses) can either be withdrawn by those investors wishing to proceed by means

of the class action, or alternatively the claims can be consolidated by order of court with the class action, with the result that no withdrawal or choice having to be made after all.

To get back to the SCA judgement in the De Lange matter: A summary judgement procedure entails an application where a Plaintiff alleges that there exists no actual defence to the claim and that the case should not go to trial. The Defendant then has to file an affidavit in which his or her defence is set out.

The legal position is the following: Summary judgment is an extraordinary remedy. It permits judgment to be given without a trial. It closes the doors of the court to the defendant. That can only be done if there is no doubt that the plaintiff has an unanswerable case. It is only granted in clear cases and the court does not lightly deprive a defendant of an opportunity to defend the case against him by means of trial.

Georgiou essentially raised three defences. Two of them were “technical” legal defences which the court rejected. The third defence related to the Business Rescue Plan (“the BRP”). (The eight Highveld Syndication companies voluntarily placed themselves under business rescue in 2010). The argument on behalf of Georgiou was that the terms of the BRP, which was apparently adopted, restructured the rights of investors in that the BRP replaced the buyback agreements. Put differently: that the rights of investors under the buyback agreements were superseded by the BRP.

The court rejected this argument, holding that the BRP only relates to the restructuring of the business of the Highveld companies, and not of Georgiou and the entities he controls. The court also found that, despite the BRP, Mrs de Lange did not compromise her rights under the buyback agreement. Furthermore, with reference to the BRP, the court found that there was no evidence that the necessary second meeting of creditors of the Highveld companies took place as required under section 150 of the Companies Act 71 of 2008.