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

CASE NO: 42334/2014

In the matter between: -

NICOLAS GEORGIOU	First Applicant
ZEPHAN PROPERTIES (PTY) LTD	Second Applicant
NICOLAS GEORGIOU N.O.	Third Applicant
MAUREEN LYNETTE GEORGIOU	Fourth Applicant
JOSEPH CHEMALY N.O.	Fifth Applicant

and

JURIE JOHANNES GELDENHUYS	First Respondent
ARTHUR BRADY COCHRAINE	Second Respondent
SHARON ANN VLOK	Third Respondent

In re:

JURIE JOHANNES GELDENHUYS	First Applicant
ARTHUR BRADY COCHRAINE	Second Applicant
SHARON ANN VLOK	Third Applicant

and

ORTHOTOUCH LIMITED	First Respondent
AND TWENTY SIX OTHER RESPONDENTS	

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE THAT the abovenamed applicants (originally the twelfth to sixteenth respondents) intend to apply to the above Honourable Court for leave to appeal to the Supreme Court of Appeal of South Africa, *alternatively* to the Full Court of this Honourable Court, against the whole of the judgment and orders handed down by the Honourable Mr. Justice Ismail on 17 March 2017.

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

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

(I) THE ORDER

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

> "1. *I consider that both applications are urgent in the light of the stratagem om the erstwhile applicants and their attorney.*

> 2. *That the application setting aside the notice of substitution of attorneys and the notice to withdraw the application in the main application are set aside [sic]. The main application is therefore reinstated with costs. Such costs to include the costs of two counsel.*
>
> 3. *The joinder application succeeds with costs.*
>
> 4. *The costs, in respect of 2 and 3 above, to be paid jointly and severally by the first respondent and twelfth to sixteenth respondents. The one paying the other to be absolved from doing so."*

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

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

2.2. The application for joinder dated 10 February 2017, brought by Mr. Bryan John Waxham, is dismissed with costs which costs shall include the costs of two counsel.

(ii) THE RULE 30 APPLICATION

Court's finding that individuals can litigate in a representative capacity without having obtained the leave of the court to do so

3. It is common cause that none of the three original applicants, being Mr. Geldenhuys, Mr. Cochraine and Ms. Vlok (hereinafter referred to as "the erstwhile applicants") ever received the leave of the Court to act in a representative capacity on behalf of the so-called Highveld Syndication Action Group ("HSAG"), or on behalf of any other investor or investors in the Highveld Syndication Companies.

4. The only reference in Mr. Geldenhuys' founding affidavit in the main application to a purported representative capacity is contained in paragraph 52 of his founding affidavit in the main application, in which he stated:

> *"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 notification of the meeting (or of the scheme document) and enquire whether they (we) would be willing to act as Applicants herein. 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 Friday, the 13th of February 2015 by members of HSAG and confirmed my willingness to act as such. I became aware of the Court order which is sought to be rescinded during the aforesaid communication on 13 February 2015."*

5. In the premises:

5.1. The *legal representatives* of the HSAG decided that the main application should be brought;

5.2. No evidence was placed before Court substantiating the allegation that the main application was supported by any persons other than the legal representatives and the erstwhile applicants themselves.

6. Further, under no circumstances would any of the three erstwhile applicants, save for Ms. Vlok, ever have attained the imprimatur of the court to act as representative litigants. This is so, because only Ms. Vlok was also an applicant in the certification application pending in Pretoria.

7. Notwithstanding the above, the Honourable Court found:

7.1. In paragraph [9], that the erstwhile applicants were *"nominated to act on behalf of the HSAG investors"*;

7.2. In paragraph [17], that *"It is plain from what appears above that Mr. Geldenhuys brought the action [sic] in his own name and agreed to act as nominee of the HSAG investors"*;

7.3. That the erstwhile applicants were representative litigants who were precluded from appointing new attorneys of record and withdrawing the main application.

8. In coming to these conclusions, the Court erred in fact and/or law since the Court should have found that:

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

8.2. Proceedings on behalf of a group of persons who have not authorised the representative to act on their behalf can only take place once a court has approved such representative litigants;

8.3. Where a litigant seeks to act on behalf of a number (or class) of litigants, certification provides the authority for a representative to act;

8.4. Without certification he or she cannot proceed to act on behalf of a number (or class) of litigants, and he or she is not a representative in a legal sense;

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

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

8.7. In the absence of certification, no class or nominal (representative) applicant had been certified and accordingly it could not be contended that the rescission application was brought on behalf of people other than the erstwhile applicants themselves.

8.8. Under no circumstances could it be said that the erstwhile applicants, merely by virtue of allegedly being members of the (as yet to be certified) classes of litigants, and merely by expressing their willingness to do so, automatically attained the right to act as representative litigants on behalf of other people.

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

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

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

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

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

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

10.2. If they had instituted proceedings on behalf of HSAG or the members thereof, there is no explanation as to why the proceedings were brought in their personal names. There is no provision in the Rules of Court or in the common law for such procedure.

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

10.4. If HSAG was the party to the proceedings, it would have brought the proceedings in its own name, as it would be entitled to in terms of Uniform Rule of Court14(2).

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

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

The Court misconstrued the defence raised by the applicants

11. The Honourable Court found, at paragraph [6], that the interlocutory applications were opposed on the basis that it was *"nothing other than a class action being instituted when no certification thereof was obtained"*.

12. The Honourable Court found, at [18], that the applicants' legal representatives *"submitted that this was nothing other than a certification of a class action"*.

13. In coming to these conclusion the Court erred in fact and/or law, in that the Court should have found that the interlocutory applications were opposed on the basis that:

13.1. The erstwhile applicants, in never having obtained representative status, were individuals litigating in their personal capacity;

13.2. The erstwhile applicants, litigating personally, were not precluded from terminating Theron and Partners' authority to act for them and to thereafter appoint a new attorney of record, and to withdraw the main application in terms of the provisions of Rule 41(1)(a).

Further erroneous and/or unsubstantiated findings

14.

14.1. The Court found, in paragraph [2] that the main application was for *"the setting aside of the scheme of arrangement between, the first respondents and its trade creditors as well as the Highveld Syndication investors"*.

14.2. In coming to this conclusion the Court erred in fact and/or law and should have found that the main application sought a setting aside of the court order which sanctioned the scheme of arrangement whilst there has never been an application to set aside the scheme or arrangement itself.

15. The Court, in paragraph [15], ventured into the merits of the main application in circumstances where the merits of the main application were irrelevant to a determination of the issues before the Court.

16.

16.1. The Court found, at paragraph [31], that Theron & Partners represented 6,688 (six thousand six hundred and eighty eight) investors in the Highveld Syndication Companies.

16.2. In making this finding:

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

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

16.2.3. The Court erred in fact and/or law in that it should have found that Theron & Partners, by having failed to comply with the Rule 35(12) notice, was precluded from relying on the alleged mandates, and therefore failed to prove that it held a mandate to act on behalf of 6,688 investors.

17. The Court erred in fact and/or law, insofar as it may have relied on the judgment in **Techmed (Pty) Ltd v Nissho Iwai Corporation & Another** 2011 (1) SA 35 (SCA) in that:

17.1. The judgment in that matter related to a substitution of parties, in terms of Rule 15, following the merger of the original litigating party with another corporation, and a subsequent name change;

17.2. The judgment in that matter did not deal with the issue of representation and circumstances where a litigant purported to act on behalf of others without having attained the approval of the Court to do so.

17.3. The Court should have found that the judgment in the **Techmed** matter is distinguishable from, and inapplicable in, the current instance.

18. The Court further erred in fact and/or law, insofar as it might have relied on the judgment in **Santam Insurance Ltd v Booi** 1995 (3) 301 (A) in that:

18.1. In that matter the Court was faced with an instance where the plaintiff, who had originally instituted the action, was found to have been unable to manage its own affairs at the time of institution of the action. A curator *ad litem* was therefore appointed and applied for an order declaring as valid his ratification of all steps taken in the action by the attorney originally instructed by the plaintiff;

18.2. The judgment in that matter did not deal with the issue of a litigant who purported to act on behalf of others without having attained the approval of the Court to do so.

18.3. The Court should have found that the judgment in the **Santam Insurance** matter is distinguishable from, and inapplicable in, the current instance.

19.

19.1. The Court found, at paragraph [33], that:

> *"The withdrawal by the nominal applicants of the action was nothing other than an act to sabotage the claim of the other investors, in the form of the HSAG."*

19.2. In making this finding, the Court erred in fact and/or law in that the Court should have found that the claims of other investors had not been sabotaged, or affected at all, by the withdrawal of the main application.

19.3. There was no evidence that any of the other investors' claims had been sabotaged in any way.

20.

20.1. The Court further found, at paragraph [34] as follows:

> *"I am of the view that this Court cannot idly sit by and observe or countenance such conduct designed to deprive the investors of their rights to proceed with any intended action they may have."*

20.2. The Court erred in fact and/or law in making this finding and the Court should have found that none of the investors in the Highveld Syndication Companies lost any of their rights as a result of the withdrawal of the main application, since any of the investors and/or shareholders could have approached, and can still approach, the Court in their personal capacity for a rescission or setting aside of the order sanctioning the scheme of arrangement.

20.3. In addition, if HSAG has the necessary *locus standi*, it too has a right to approach the Court for such relief.

(iii) THE APPLICATION FOR JOINDER

21. The joinder application is entirely contingent upon the Rule 30 application being successful. Until the Rule 30 application has been determined, there is no pending application to set aside the order sanctioning the scheme of arrangement and accordingly no application to which any party can intervene or be joined.

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

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

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

(iv) APPEALABILITY OF THE ORDER

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

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

25. The order is dispositive of the issue of the capacity in which the erstwhile applicants launched the main application.

26. The order is in conflict with the principals laid down by the Supreme Court of Appeal in **Children's Resource Centre Trust & Others v Pioneer Foods (Pty) Ltd & Others** 2013 (2) SA 213 (SCA).

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

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

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

DATED AT **MELROSE NORTH** ON THIS **5th** DAY OF **APRIL 2017**.

KYRIACOU INCORPORATED
Twelfth to Sixteenth
Respondents' Attorneys
Tel: 011 444 2665
Fax: 086 653 5677
Email: legal@kincorporated.co.za
Ref: Mr Kyriacou

AND TO:

THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
JOHANNESBURG

AND TO:

THERON & PARTNERS
Alexander III Building
18 Alexander Street
Stellenbosch
Ref: JP Theron/H080359
c/o **BDK ATTORNEYS**
Ground Floor
3 Ninth Street
Houghton Estate
Johannesburg

AND TO:

NATALIE LUBBE & ASSOCIATES
First Respondent's Attorneys
Tel: 011 704 1563
Fax: 086 688 9555

AND TO:

ZWIEGERS ATTORNEYS
Second Respondent's Attorneys
Tel: 011 325 2207
Emal: corrie@zwiegers.co.za

AND TO:

FABER GOËRTZ ELLIS AUSTEN INC
Third to Eleventh Respondents' Attorneys
Tel: 011 590 3378
Fax: 011 267 2701

AND TO:

EG COOPER MAJIEDT
Seventeenth and Eighteenth Respondents' Attorneys
Email: st@egc.co.za

AND TO:

ROOTH & WESSELS ATTORNEYS
Nineteenth to Twenty First, Twenty Fifth
and Twenty Sixth Respondents' Attorneys
Email: gramep@roothwessels.co.za

AND TO:

GILDENHUYS MALATJI INC
Twenty Second Respondent's Attorneys
Tel: 012 428 8600
Email: wcilliers@gminc.co.za

AND TO:

VAN GREUNEN & ASSOCIATES
Twenty Third Respondent's Attorneys
Tel: 012 661 2065
Fax: 012 661 5494

AND TO:

JEFF DONENBERG & CO
First, Second and Third Applicants' Attorneys
59 First Avenue East
Parktown North
Johannesburg
Tel: 011 422 5700/1
Emal: jedon@iafrica.com
Ref: J Donenberg

AND TO:

POLSON ROSS ATTORNEYS
Nineteenth to Twenty First and Twenty
Fifth to Twenty Six Respondents' Attorneys
The Woodlands Office Park
Building 14, First Floor
20 Woodlands Street
Woodmead
Johannesburg

AND TO:

JURIE GELDENHUYS
First Applicant
Email: jgeldenhuys@tagri.co.za

AND TO:

ARTHUR BRADY COCHRANE
Second Applicant
Email: johndennison@johndennison.co.za

AND TO:

SHARON ANN VLOK

Third Applicant
Email: sharonannvlok@gmail.com