

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

CASE NO: 42334/2014

In the matter between:

<u>BRIAN JOHN WAXHAM</u>	First Applicant
<u>CHRIS NEL</u>	Second Applicant
<u>HYMIE PINSHAW</u>	Third Applicant
<u>FRANCOIS STRAUSS</u>	Fourth Applicant
<u>LEA MAGDALENA MEYER</u>	Fifth Applicant

and

<u>ORTHOTOUCH LIMITED</u>	First Respondent
<u>DEREK PERDOE COHEN N.O.</u>	Second Respondent
<u>HANS KLOPPER N.O.</u>	Third Respondent
<u>HIGHVELD SYNDICATION NO 15 LTD</u>	Fourth Respondent
<u>HIGHVELD SYNDICATION NO 16 LTD</u>	Fifth Respondent
<u>HIGHVELD SYNDICATION NO 17 LTD</u>	Sixth Respondent
<u>HIGHVELD SYNDICATION NO 18 LTD</u>	Seventh Respondent
<u>HIGHVELD SYNDICATION NO 19 LTD</u>	Eighth Respondent
<u>HIGHVELD SYNDICATION NO 20 LTD</u>	Ninth Respondent

<u>HIGHVELD SYNDICATION NO 21 LTD</u>	Tenth Respondent
<u>HIGHVELD SYNDICATION NO 22 LTD</u>	Eleventh Respondent
<u>NICOLAS GEORGIU</u>	Twelfth Respondent
<u>ZEPHAN PROPERTIES (PTY) LTD</u>	Thirteenth Respondent
<u>NICOLAS GEORGIU N.O.</u>	Fourteenth Respondent
<u>MAUREEN LYNETTE GEORGIU N.O.</u>	Fifteenth Respondent
<u>JOSEPH CHEMALY N.O.</u>	Sixteenth Respondent
<u>GEORGE NICOLAS GEORGIU</u>	Seventeenth Respondent
<u>MICHAEL NICOLAS GEORGIU</u>	Eighteenth Respondent
<u>HENDRIK JACOBUS MYBURGH</u>	Nineteenth Respondent
<u>BOSMAN & VISSER (PTY) LTD</u>	Twentieth Respondent
<u>PICKVEST (PTY) LTD</u>	Twenty-first Respondent
<u>HEINRICH PIETER MOLLER</u>	Twenty-second Respondent
<u>WILLEM MORKEL STEYN</u>	Twenty-third Respondent
<u>BAREND STEFANUS VAN DER LINDE</u>	Twenty-fourth Respondent
<u>FREDERICK JULIUS REICHEL</u>	Twenty-fifth Respondent
<u>EUGENE KRUGER INC.</u>	Twenty-sixth Respondent
<u>THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA (CIPC)</u>	Twenty-seventh Respondent

In re:

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

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HIGHVELD SYNDICATION NO 20 LTD

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HIGHVELD SYNDICATION NO 21 LTD

Tenth Respondent

HIGHVELD SYNDICATION NO 22 LTD

Eleventh Respondent

NICOLAS GEORGIU

Twelfth Respondent

NICOLAS GEORGIU N.O.

Thirteenth Respondent

MAUREEN LYNETTE GEORGIU N.O.

Fourteenth Respondent

<u>ZEPHAN PROPERTIES (PTY) LTD</u>	Fifteenth Respondent
<u>JOSEPH CHEMALY N.O.</u>	Sixteenth Respondent
<u>GEORGE NICOLAS GEORGIU</u>	Seventeenth Respondent
<u>MICHAEL NICOLAS GEORGIU</u>	Eighteenth Respondent
<u>HENDRIK JACOBUS MYBURGH</u>	Nineteenth Respondent
<u>BOSMAN & VISSER (PTY) LTD</u>	Twentieth Respondent
<u>PICKVEST (PTY) LTD</u>	Twenty-first Respondent
<u>HEINRICH PIETER MOLLER</u>	Twenty-second Respondent
<u>WILLEM MORKEL STEYN</u>	Twenty-third Respondent
<u>BAREND STEFANUS VAN DER LINDE</u>	Twenty-fourth Respondent
<u>FREDERICK JULIUS REICHEL</u>	Twenty-fifth Respondent
<u>EUGENE KRUGER INC.</u>	Twenty-sixth Respondent
<u>THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA (CIPC)</u>	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")

FIRST RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL

BE PLEASED TO TAKE NOTICE THAT the First Respondent herewith applies for leave to appeal the whole of the judgment of the Honorable Mr Justice Ismail delivered on 16 March 2017 on the following grounds:

1. The court erred in finding that the historical applicants in the main application acted in those proceedings on behalf of the Highveld Syndication Action Group (HSAG) investors *qua* nominees by virtue only of their willingness to act for them, and that they consequently owed a legally cognizable duty to the "*wider group of investors*".
2. The court erred in not finding that Section 38(c) of the Constitution exclusively

regulates the effect and ambit of legal proceedings where any party seeks to act in the interests of a group or class, and that consequently the historical applicants did not and could not represent any other interests in the main application outside of their personal entitlements.

3. The court erred in not finding that the willingness of the historical applicants to act as such is a legally irrelevant consideration and does not, and cannot, create any rights or obligations in relation to the litigation outside of the provisions of Section 38(c) of the Constitution.
4. The court erred in not finding that the main application was not an application for leave to institute a class action as envisaged under Section 38(c), that no such relief was evident from the notice of motion and that the historical applicants did not seek to make out such a case in their founding papers.
5. Hence the court erred in its basic premise that a legally cognizable obligation or responsibility was owed by the historical applicants to any wider group of investors. The court consequently erred in finding that any question of a “right” or authority to withdraw the main application arose for the historical applicants (Para [16] judgment).
6. The court erred in not finding that outside of a putative class action process as envisaged in Section 38(c) of the Constitution, no such a putative group or class had any enforceable rights in and to the litigation, whether procedurally or substantively, in circumstances where:

- 6.1 No putative class action was envisaged to determine any rights of a putative class;
 - 6.2 The applicant/litigant himself or herself had the requisite *locus standi* pursuant to a vested personal interest in the litigation which is in its nature merely a rescission under Rule 42 alternatively an application for leave to appeal;
 - 6.3 Any member of the putative class himself or herself could in all events have pursued the litigation without more; and therefore:
 - 6.4 No need whatever arose for a class action to be instituted or certified.
7. The court erred in not finding that in all events, absent the court's *imprimatur* being sought and granted to act in that representative capacity, the historical applicants were not the nominal applicants for any wider group of investors, and that therefore the issue of representation never arose or became legally relevant. Absent such *imprimatur* the wider group of investors had no interest in the litigation whatever.
 8. The court in this regard erred in finding, in effect, that the historical applicants held some form of mandate from, or owed a contractual or fiduciary duty to, the wider group of investors which required, and was mistakenly given, legal recognition.
 9. The court misdirected itself by making a finding of an abuse of its process against

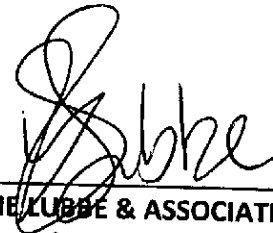
which it would be entitled to protect itself where no such an abuse was or could be present, regardless the effect which the settlement by the historical applicants had on any putative group rights since no such rights formed the subject matter of the main application. No question of ulterior motive in this context arises where the rules of court are not used to achieve a result foreign to the rule, but rather to achieve the precise result for which the rule is designed.

10. The court erred in not finding that a private arrangement between individuals and groups concerning litigious proceedings does not concern the court in the absence of proceedings on record as envisaged in Section 38 (c) and therefore it cannot form the basis for a finding of an abuse of the process of court.
11. The court erred in not refusing to enrol the joinder application as an urgent application in the absence of any cogent explanation for the late bringing thereof on 14 February 2017, in circumstances where the urgent application was set down for 28 February 2017 and the belated filing thereof was clearly as a result of dilatory and remiss conduct on the part of Theron
12. A different court may come to the finding that the matter of the settlement or withdrawal of claims by litigants who act outside of the putative class action process as envisaged in Section 38(c) of the Constitution, is novel as well as complex and would or could justify an appeal hearing. So too is the question whether outside of the said process, rights and obligations can arise for a litigant willing or agreeing to represent others and, lastly, whether an abuse of the court's process can be present where a wider group of investors has not sought

9
the court's *imprimatur* to have their rights in any litigation recognised and determined.

13. The court should also grant leave to appeal in circumstances where a constitutional issue is or may be involved namely the right of access to a court of law and its counter-part namely whether such access was rightfully denied.

DATED at NORTHRIDING on 31 MARCH 2017.



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TO: REGISTRAR OF THE GAUTENG LOCAL DIVISION
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AND TO:

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Received on _____ day of MARCH 2017

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