IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 80811/2014

In the matter between:

SHARON ANN VLOK	1st Applicant
DANIEL EARNEST LAMPRECHT	2nd Applicant
CHARLENE ESMAY JORDAAN	3rd Applicant
JEAN PAPANDONIS	4th Applicant

and

NICOLAS GEORGIOU	1st Respondent
ZEPHAN PROPERTIES (PTY) LIMITED	2nd Respondent
NICOLAS GEORGIOU N.O.	3rd Respondent
MAUREEN LYNETTE GEORGIOU N.O.	4th Respondent
JOSEPH CHEMALY N.O.	5th Respondent
GEORGE NICOLAS GEORGIOU	6th Respondent
MICHAEL NICOLAS GEORGIOU	7th Respondent
HENDRIK JAKOBUS MYBURGH	8th Respondent
BOSMAN & VISSER (PTY) LIMITED	9th Respondent
PICKVEST (PTY) LIMITED	10th Respondent
HEINRICH PIETER MOLLER	11th Respondent
WILLEM MORKEL STEYN	12th Respondent
BAREND STEFANUS VAN DER LINDE	13th Respondent
FREDERIK JULIUS REICHEL	14th Respondent
EUGENE KRUGER & CO INCORPORATED	15th Respondent
E G COOPER & SONS INCORPORATED	16th Respondent
HANS KLOPPER	17th Respondent
ORTHOTOUCH LIMITED	18th Respondent
HIGHVELD SYNDICATION NO. 19 LIMITED	19th Respondent

HIGHVELD SYNDICATION NO. 20 LIMITED	20th Respondent
HIGHVELD SYNDICATION NO. 21 LIMITED	21st Respondent
HIGHVELD SYNDICATION NO. 22 LIMITED	22nd Respondent

EIGHTEENTH RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL

BE PLEASED TO TAKE NOTICE THAT the Eigteenth Respondent herewith gives notice that it will seek leave to appeal the whole of the Judgment of this Court delivered on 7 April 2017 on the following grounds:

1. The Court erred in finding that the historical applicants stood in a quasi-fiduciary relationship towards an identified class and thus were ethically obliged to act *bona fide* and in the interests of the members of the class. The judgment will have far-reaching consequences for future litigation where plaintiffs consider involving themselves as representative plaintiffs in class action certification processes.

2. The relationship between the historical applicants and any putative class does not require such a classification in order to give effect to the class action process as distilled in the authorities. Consequently, such a classification was an overbroad and unneccesary interpretation. The Court erred in developing the common law in order to meet the requirements of the interests of justice or the

exigiencies of the case in circumstances where an appropriate rule or procedural arrangement would have sufficed.

3. The Court conflated the precepts of ethics with that of the law where it found that an ethical obligation formed (or could form) the basis for the establishment of a quasi-fidicuary legal relationship. The Court made no findings that the quasi-fiduciary relationship arose from a contract between the historical investors and the HIGHVELD SYNDICATION ACTION GROUP ("**HSAG**") based on mandate or otherwise. Even so, any notional contract could only have been between the historical applicants and an incorporated or unincorporated entity which is capable of having rights and obligations.

4. The finding by the Court that the historical applicants were representing the HSAG is incorrect. There is no evidence to this effect on record.

5. The Court erred in the recognition of an independent obligation by the historical applicants to act *bona fide* and to protect the interests of the HSAG. There is no *nexus* between the historical applicants and the HSAG. Whatever the HSAG may be described as it does not nor can it issue instructions nor does it employ THERON. THERON is employed and mandated by individual clients only. The Court erred in reasoning

that it was called upon to assist the HSAG in its endeavor to launch the class action.

6. The Court should have had regard to, and found that the members of the four putative classes were described in the notice of motion in the application for certification as numerous different classes (four in total) as constituted by separate groups of investors in different Highveld Syndication Companies. The court did not have sufficient regard to the fact that all the members of the four different Highveld Syndication Companies are not also members of the HSAG. Consequently, the Court should have found that there is not just one putative class and neither is that putative class represented by the HSAG. The Court should have regarded the fact that the application for certification envisages that those investors who are not interested have to opt out failing which they will be regarded as members of a class with the concomitant rights and obligations. These different putative classes whom the historical applicants allegedly sought to represent are not the same as the 6688 individuals whom THERON represented in the application, being only those investors who opted in by joining the HSAG and constituting only one class.

7. There was no evidence before Court of the composition of the HSAG in terms of the different classes notionally represented therein. Consequently the Court erred in its findings regarding the HSAG as being the true and beneficial litigant and by necessary implication in

some fashion the directing mind of the litigious process and /or the mandator or principal of the historical applicants.

8. The Court should have found that it is not possible to determine from the papers what the putative class is which is purportedly represented by the HSAG and that this being so it erred in finding that the historical applicants represented any class whatever except themselves.

9. There is no principle in our law to the effect that representative litigants in putative class action proceedings may not settle or withdraw certification applications. The Court erred in finding that the historical applicants owed fiduciary duties to the HSAG which would require of them to first give THERON or the HSAG an opportunity to join the litigation before withdrawing it. The historical applicants had no obligations in law to either the HSAG or THERON. Put differently, the HSAG has no cognizable cause of action against the historical applicants if for instance a bad settlement was reached or the litigation was conducted unsuccesfully or negligently. It is not in the interests of justice that such an overbroad interpretation and classification should have followed.

10. The Court erred in finding that prior to the certification by the Court the class already existed which merely required to have its ambit defined. There were four different classes envisaged in the certification

application, without any reference to the HSAG. Contrary thereto, THERON required clients to join the HSAG and all members were lumped into one envisaged class action on the basis of opting in described merely as the class action.

11. The Court should have found that until such time as a class has been identified and defined there is no cognizable class - only a putative class at best and that the very purpose of the certification is to identify and define such putative class. The Court was with respect not called upon to describe or identify any class or pronounce upon its existence.

12. The Court erred in not finding that the HSAG was neither a legal entity nor an unincorporated body with rights and obligations and was therefore in no position to mandate or instruct the historical applicants to represent it.

13. The Court should have found that the HSAG could not speak for the four classes of investors as envisaged in the certification application.

14. The Court should have found that from the founding affidavit in the certification application it was apparent that the historical applicants retained autonomy and themselves engaged attorneys etc. (Para 76, FA, p 72, Certification Application). The Court should have found that the historical applicants were not chosen by any so-called steering committee of the HSAG but acted off their own bat.

15. The Court's finding of an abuse of its process is incorrect. For such a finding to have been competently made the Court should have found that the withdrawal of the application had as its primary and dominant purpose the termination of the certification application in itself as opposed to the settling of their individual claims. Apart from conjecture there was no evidence which supported such a finding. The *onus* was on THERON to demonstrate that the dominant purpose of settlement was to derail the certification application as opposed to a withdrawal having the necessary effect of bringing the application to an end. The Court should have found that THERON did not shed this *onus*.

16. A different Court may come to a finding that representative litigants in certification procedures do not owe fiduciary duties to any putative class. A different Court may come to the finding on the facts that the historical applicants did not represent the HSAG and that they were not the true beneficial litigant on whose behalf the historical applicants were cited and that furthermore the settlement did not have as its dominant purpose the derailment and/ or termination of the certification application.

DATED AT JOHANNESBURG THIS 25TH DAY OF APRIL 2017

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PER EMAIL

Received copy hereof on this ____ day of APRIL 2017

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