IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

APPEAL CASE NUMBER: 1027/2017
GAUTENG DIVISION CASE NO: 42334/2014

In the appeal of:

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

and

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

RESPONDENTS' HEADS OF ARGUMENT

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INTRODUCTION

1. Two related appeals are to be heard simultaneously, namely this appeal (SCA 1027/17) and the appeal under case number 1018/17, dealing with the setting aside of two notices on the basis that they constitute an irregular step ("**the irregular step appeal**").

2. We respectfully request that the Heads of Argument filed in the 1018/17 appeal be read first before these Heads of Argument are considered. The reason for this is that the two matters largely involve the same facts and legal issues, and our arguments regarding the background facts are already fully set out in those Heads of Argument and will not be repeated here.

3. We submit that for the reasons advanced in the 1018/17 appeal, the present matter ought to fail on the ground alone that the judgement and orders of the court *a quo* are not appealable.

4. These Heads of Argument will therefore only focus on the *differences* between the two matters and will deal only with the facts and issues that are peculiar to this particular case.

5. The appeal in this matter relates to an appeal against the Order and Judgment of the Honourable Mr Justice Ismail in the South Gauteng High Court. The main application in that court is an application to set aside an order sanctioning a Scheme of Arrangement pertaining to the first appellant, Orthotouch Ltd ("**Orthotouch**"). We refer to the main application as "**the rescission application**".

THE RELATIONSHIP BETWEEN THE TWO MAIN APPLICATIONS

6. In the respondents' view, the rescission application is a necessary court process to clear the path for the class action pursued in the North Gauteng High Court ("**the certification application**"). The rescission application must therefore be seen as part and parcel of the class action litigation. This is so because the Scheme of Arrangement purports to thwart the class action by absolving all Respondents from liability for losses of investors.[1] (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*".[2])

7. It was for this reason that the rescission application was launched in order to set aside, alternatively to appeal against, the Court sanctioning of the Scheme of Arrangement, which is clearly an obstacle in the pursuit of the class action.[3]

8. The grounds upon which the rescission application is brought in the South Gauteng High Court are, amongst others,[4] 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

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1 **Founding affidavit**, Record, Vol 1, para 7, p 11.

2 **Georgiou's answering affidavit**, Record, Vol 2, para 4.2, p 236.

3 **Founding affidavit**, Record, Vol 1, para 7, p 11.

4 The background facts are set out fully in the founding affidavit of Geldenhuys, paras 29-34, pp 428-429.

5 **Founding affidavit**, Record, Vol 1, paras 15 and 17, pp 16-17.

therefore not disclosed to the Court that there are a number of serious allegations regarding fraudulent and reckless activity which will form the basis of the class action once certified.[6] A further basis for the rescission application is that the arrangement purports to bind all investors regardless of whether or not it was supported by that investor and despite the fact that none of the investors are creditors of Orthotouch for purposes of section 155(8) of the Companies Act of 2008.[7]

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

10. As a result, the rescission application is part of the "**class action litigation**" – a term used in the court papers *a quo* to refer to both the rescission and certification applications.

11. The following facts are <u>common</u> to both matters:

11.1. the nominal applicants in both matters "*knew very well*" that they were approached to represent not only themselves but other investors;

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6 **Founding affidavit**, Record, Vol 1, paras 15 and 17, pp 16-17.

7 **Founding affidavit**, Record, Vol 1, paras 15 and 17, pp 16-17.

8 **Founding affidavit**, Record, Vol 1, para 22.1, p 19.

9 **Founding affidavit**, Record, Vol 1, para 9, p 12.

11.2. the nominal applicants in both matters were identified after having been approached on behalf of the steering committee of the HSAG. In both matters, the same attorney of record ("**Theron**") acts for the respective applicants;

11.3. the nominal applicants were all "*unrelated*" to each other and reside in different parts of the country;[10]

11.4. the nominal applicants in both matters, knew that the legal costs of proceedings are to be paid from a pool of contributions by investors (who are all members of HSAG);[11]

11.5. all the nominal applicants "*ended up*" - clearly not coincidentally - in the stable of the new attorneys Jeff Donenberg & Co – who then filed two notices on the Applicants' behalf (that is, the Notice of Substitution of Attorneys and the Notice of Withdrawal of the application). These notices were filed at the same time in each of the two courts; and

11.6. all the nominal applicants, in exchange for their withdrawal of the applications, were paid an undisclosed amount by Georgiou – which occurred outside the mechanism for settlement established between Georgiou and Theron.[12]

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[10] **Founding affidavit**, Record, Vol 1, para 22.1, p 19.

[11] **Founding affidavit**, Record, Vol 1, para 9, p 12.

[12] Founding Affidavit, Record Vol 1, page 18 par 21; page 20 par 23.2; page 22 par 23.7; Answering Affidavit Vol 2, page 259 par 74 - 76;

12. It is therefore clear that Georgiou executed precisely the same stratagem in both matters, which resulted in the "*withdrawal*" of both main applications.

13. The fact that the manner in which the rescission application was "*withdrawn*" corresponded exactly with the manner in which the certification application was "*withdrawn*" is, it is submitted, a clear indication in itself that the two matters are not only related but part and parcel of the so-called class action litigation. In both cases, the actions of Georgiou (and possibly some of his co-defendants in the class action) were exactly the same to conspire and thereby devise the withdrawal of both main applications. The attempt by the Appellants to divorce the two appeals from one another, is not sustainable.

14. For these reasons, all of the arguments and submissions made in the Heads of Argument filed in the irregular step appeal are applicable to this appeal, including the submissions concerning the appealability of the orders granted *a quo* and the joinder application in both matters. We ask that those submissions be read as incorporated into these submissions.

THE DIFFERENCES BETWEEN THE TWO CASES

15. The rescission application does not involve a request for certification of a class action. In addition, should the rescission application be granted, no "*representative status*" would be gained formally as in the case with the certification application.

16. Despite these obvious differences, we submit that these differences do not detract from the facts that:

16.1. the applicants were nominal applicants who acted not only in their own interests but also on behalf of other investors; and

16.2. the same strategy was followed by Georgiou in both matters (which resulted in the withdrawal of the respective applications).

17. If this court finds that the withdrawal in the certification application falls to be set aside (and that the appeal in that matter should be dismissed), it follows that the withdrawal of the rescission application also falls to be set aside for the same reasons. Hence we submit that the appeal in this matter should similarly be dismissed.

18. The fact that the nominal applicants in this matter knew that they acted not only for themselves but for others, was stated explicitly by Mr Geldenhuys himself (as the First Applicant *a quo*), where he dealt with the urgency of the matter in the context of explaining why the Interlocutory application concerned was not issued earlier, as follows:

> "*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 Court order which*

is sought to be rescinded during the aforesaid communication on 13 February 2015".[13]

INTENTIONAL ACTIONS TO DELAY THE CLASS ACTION LITIGATION

19. The attempted sabotage of the class action litigation by means of these "*withdrawals*", is part of a strategy by Giorgiou to cause as much delay as possible in the rescission application (and hence also in the certification application, given that the rescission application first needs to be adjudicated before the certification application can proceed).

20. The rescission application was issued as far back as 3 March 2015. No opposing papers have been filed to date, as a result of a number of objections and interlocutory applications that have been brought by the Appellants.[14]

CONCLUSION

21. Given the manner in which Georgiou attempted to sabotage the class action litigation, it is submitted that a punitive cost order should be awarded in this appeal.

22. It is therefore requested that the appeal be dismissed with costs, including the cost of two counsel, on the scale of attorney and client.

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13 **Founding affidavit of Geldenhuys**, Record, Vol 3, para 53, p 434.

14 See **founding affidavit**, Record, Vol 1, paras 19-20, pp 17-18.

CE WATT-PRINGLE SC
CHJ MAREE
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Sandton Chambers
23 March 2018