IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

APPEAL CASE NO: 1018/2017

In the matter between:

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

and

SHARON ANN VLOK	First Respondent
DANIEL EARNEST LAMPRECHT	Second Respondent
CHARLENE ESMAY JORDAAN	Third Respondent
JEAN PAPANDONIS	Fourth Respondent

RESPONDENTS' HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION

1 This appeal is one against the judgment and order of the Honourable Mr Justice Murphy in the Gauteng division, Pretoria, granted on 7 April 2017 ("**the Order *a quo***").[1] In terms of the Order *a quo*, Murphy J set aside two irregular notices in terms of which the applicants in the Court *a quo* purported to substitute their attorney of record, and then withdraw the main application ("**the two notices**").[2]

2 The main application in the court *a quo* (also referred to as the "**certification application**") is an application for leave to institute a class action against the first appellant ("**Georgiou**") and others.

3 For the sake of convenience, the respondents in this appeal, being the nominal applicants in the Court *a quo,* will be referred to as "**the applicants**" or "**the erstwhile applicants**".

4 These heads of argument are structured as follows:

4.1 we begin by setting out the factual background to the appeal;

4.2 second, we set out a point *in limine* which, if successful, would be dispositive of the appeal: that the Order *a quo* is not appealable, and that that his Court should decline to hear the matter on that basis; and

4.3 third, we deal with the grounds of appeal raised by the appellants, in their

---

1 **Judgment**, Record, Vol 5, pp 738-747.

2 The two notices are not included in the Record, and copies will be handed up in Court if required.

affidavits and heads of argument, concluding that, even if this Court determines that the Order *a quo* is appealable, it should dismiss the appeal.

FACTUAL BACKGROUND

The Facts Leading up the Judgment in the Court *a Quo*

5 In summary, the relevant *undisputed* facts are as follows:

5.1 The applicants were part of a group of some 6688 aggrieved individuals (members of the "**Highveld Syndicate Action Group**" or "**HSAG**") who mandated Theron and Partners Attorneys ("**Theron**") to launch a certification application both for their benefit and for the benefit of a wider group of investors in the Highveld Syndication property who had lost the value of their investments ("**the investors**").[3]

5.2 The members of the HSAG contributed financially to the costs of the main application.[4]

5.3 The litigation was principally directed by Theron and the steering committee selected from amongst the investors.[5]

5.4 The four applicants were selected from amongst the investors, any of whom could have been selected, as representative applicants in the main

---

3 **Founding affidavit**, Record, Vol 1, paras 5-9, pp 12-13.

4 **Founding affidavit**, Record, Vol 1, paras 9 and 11, p 13 and 15; **answering affidavit**, Record, Vol 1, para 44, pp 115-116; **replying affidavit**, Record, Vol 2, paras 7.9 and 23, p 191 and 201-202.

5 **Founding affidavit**, Record, Vol 1, para 9, p 13; **Replying affidavit**, Record, Vol 2, para 13, p 197.

application.[6]

5.5 Each of the applicants was aware that he or she was not cited as an applicant purely to act in his or her personal interests but rather, as representatives of the investors – and that the costs of the main application were being funded not by them personally but by the contributions of the HSAG.[7]

5.6 These facts are set out in the following uncontested passage in the founding affidavit by Theron which, we submit, goes to the heart of the matter:

> "*She [Visagie - a* member *of the steering committee of HSAG] was requested by the steering committee to identify and approach a few individuals invested willing to act as nominal Applicants on behalf of the prospective class to commence proceedings. The four Applicants knew very well that they were approached to represent the wider group of disgruntled investors, and that the legal costs of proceedings are to be paid from a pool of contributions by the investors as explained below.*"[8]

5.7 These facts set out above were, in broad terms, known to Georgiou.[9]

5.8 Unbeknown to the investors or to Theron, Georgiou reached settlement agreements with each of the applicants on undisclosed terms. The following terms of the settlement agreement, however, subsequently came to light:

---

6 **Founding affidavit**, Record, Vol 1, para 9, p 13.

7 **Founding affidavit**, Record, Vol 1, paras 9-11, pp 13-15.

8 Emphasis added. **Founding affidavit**, Record, Vol 1, para 9, p 13; **answering affidavit**, Record, Vol 1, paras 34-35, p 111.

9 **Founding affidavit**, Record, Vol 1, para 17, pp 18-19; **answering affidavit**, Record, Vol 1, para 57, p 118.

5.8.1 the applicants were required to withdraw the main application;[10] and

5.8.2 the applicants were required to withdraw the main application, specifically without prior warning to Theron or the HSAG.[11]

5.9 Each of the applicants comes from a different part of the country and they are not related or particularly known to each other save as co-applicants as described above.[12] Notwithstanding, the applicants jointly instructed a new attorney, Jeff Donnenberg & Co, who then simultaneously and without any prior notice to Theron, filed a notice substituting himself as attorney of record in place of Theron, and a notice withdrawing the main application on behalf of the applicants.[13]

5.10 Theron filed rule 30 notices to object against to the irregular withdrawal and the irregular notice of substitution of attorneys. When these were not heeded, the interlocutory application – also referred to as the "**reinstatement application**" – was successfully brought in respect of which Murphy J granted the Order *a quo* and which is the subject matter of this appeal.

5.11 Georgiou admits that he set out to settle the individual claims of each of the

---

10 **Founding affidavit**, Record, Vol 1, paras 21-22, pp 21-22; **answering affidavit**, Record, Vol 1, paras 64-66, pp 120-121.

11 **Founding affidavit**, Record, Vol 1, para 22.1, p 21; **answering affidavit**, Record, Vol 1, paras 64-66, pp 120-121.

12 **Founding affidavit**, Record, Vol 1, para 22.1, p 21; **answering affidavit**, Record, Vol 1, paras 64-66, p 120-121.

13 **Founding affidavit**, Record, Vol 1, paras 22.2-22.6, p 22; **answering affidavit**, Record, Vol 1, paras 64-66, p 120-121.

applicants, and that it was stipulated in the undisclosed settlement agreements that the applicants were required to withdraw from the main application (behind the backs of Theron and the other investors).[14]

6 This conduct, we submit, was part of a deliberate strategy, calculated to compromise both the main application (and consequent class action) and the individual claims of the investors.

7 If the applicants had simply wished to settle their claims with Georgiou, there would have been no need for them to have substituted their attorney of record. They would have informed Theron, settled their respective claims with Georgiou, and been substituted by the HSAG with another prospective representative plaintiff as applicant in the main application. The inescapable inference is that this was not done precisely because the applicants agreed to betray the investors against payment of consideration in an amount agreed between Georgiou and the applicants but not disclosed, in order to sabotage the class action, to the detriment of the thousands of investors who would form part of the class action if certified.

8 Although represented by different attorneys, Georgiou is the controlling mind behind Orthotouch.[15]

---

14 **Founding affidavit**, Record, Vol 1, para 21, p 21; **answering affidavit**, Record, Vol 1, paras 64-65, pp 120-121.

15 **Founding affidavit**, Record, Vol 1, para 14, pp 17-18; **answering affidavit**, Record, Vol 1, para 61, p 119.

The Finding of the Court *a Quo*

9 The Court *a quo* held that "*[t]he applicants were in substance nominal, representative applicants, by virtue of their understanding that they were representing the HSAG and by necessary implication, having regard to the very nature of the class action procedure*."[16] This finding is, with respect, correct as both a matter of fact and law.

10 The court also held that it is not correct that the relevant class only comes into existence once members opt in (or do not opt out) after certification; it held that the "*class already exists; the certification process defines its ambit*".[17]

11 The Court *a quo* held that the application before it could either be adjudicated on the basis of it being a rule 30 application (irregular step proceedings) or, alternatively, that it was an application pursuant to "*the inherent jurisdiction of the court to control its own process in order to do justice*".[18] Moreover, on either one of these grounds, the "*result is the same*", namely that the "*collusion between Georgiou and the Applicants occurred in a manner that can only be described as an abuse of the court process*".[19]

12 Against this factual background, we turn to the respondents' point *in limine*: that the Order *a quo* is not appealable and that leave to appeal ought not to have been granted against that order. On this basis alone, the Court should dismiss

---

16 **Judgment**, Record, Vol 5, para 17, p 744.

17 **Judgment**, Record, Vol 5, para 17, p 744.

18 **Judgment**, Record, Vol 5, para 19, p 745.

19 **Judgment**, Record, Vol 5, para 19, p 745.

the application, notwithstanding that the Court *a quo* granted leave to appeal.

POINT *IN* LIMINE: THE JUDGEMENT AND ORDER ARE NOT APPEALABLE

13 The judgment and order of the Court *a quo* is not subject to appeal because the order does not finally dispose of any of the issues in the matter and will not lead to a just and prompt resolution of the real issues between the parties.

14 The requirements that must be satisfied before leave to appeal may be granted are set out in section 17 of the Superior Courts Act in the following peremptory terms:[20]

> *"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—*
>
> *(a) (i) the appeal would have a reasonable prospect of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
>
> *(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
>
> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties*."
>
> (Emphasis added.)

15 The peremptory requirements in subsection 17(1)(a), (b) and (c) are conjunctive and limit the circumstances in which leave to appeal may be granted.[21]

---

20 The Superior Courts Act 10 of 2013 came to force 23 August 2010, after the commencement of the current proceedings.

21 **City of Cape Town v South African National Roads Agency Limited** (6165/12) [2014] ZAWCHC 151 (8 October 2014) ("**City of Cape Town**") at para 5; **Capendale and Another v Municipality of Saldanha Bay and Others, In Re; Capendale and Another v 12 Main St, Langebaan (Pty) Ltd and Others** (6580/2012), 840/2012) [2014] ZAWCHC 3 (29 January 2014) at para 9.

Accordingly, notwithstanding that there may be compliance with any one of the requirements, the failure to comply with all of the requirements means that this is fatal to any application for leave to appeal.

16 Section 17(1)(c) deals with decisions such as the present one that "*do not dispose of all the issues in the case*". In respect of such a decision an appeal only lies if the applicant for leave to appeal is able to show that the grant of leave to appeal "*would lead to a just and prompt resolution of the real issues between the parties*".

17 Section 17(1) thus lays down a new legal regime for the grant of leave to appeal. Previously, the position was regulated by section 20(1) of the Supreme Court Act 59 of 1959. It provided for "*[a]n appeal from a judgment or order of the court of a provincial or local division*".[22] Through interpretation of the phrase "*judgment or order*", the courts developed the then test for appealability. The leading judgment was **Zweni v Minster of Law and Order**.[23] There it was held that an order was only appealable if it was:

17.1 final in effect and not susceptible to change by the first instance court;

17.2 definitive of the rights of the parties; and

---

22 Emphasis added.

23 **Zweni v Minister of Law and Order** 1993 (1) SA 523 (A) ("**Zweni**").

17.3 had the effect of disposing of a substantial portion of the relief claimed in the proceedings.[24]

18 The approach of the courts under that regime was generally to hold that interlocutory orders were not appealable. However, as was observed by the Constitutional Court in **International Trade Administration Commission v SCAW South Africa Pty Limited**,[25] over time, this had infused an interest of justice criterion into the test laid down in **Zweni**. In the context of an appeal against an interlocutory order, an important (but not the only) consideration would be whether either party would suffer irreparable harm if leave was granted or refused, as the case might be.

19 Section 17(1)(c) represents a departure from the legal regime under the Supreme Court Act, 1959. Section 17(1)(c) targets:

19.1 interlocutory orders; and

19.2 other orders that do not dispose of all the issues in the case, thereby creating a risk of piecemeal litigation.

20 In this respect, it addresses concerns similar to those addressed by the regime under **Zweni** and the subsequent decisions of this Court.

21 The criterion that it introduces for whether or not to grant leave to appeal is,

---

24 **Zweni** at 535 F-I. See also: **Minister of Health and Others v Treatment Action Campaign and Others (NO.1)** 2002 (5) SA 703 (CC).

25 **International Trade Administration Commission v SCAW South Africa (Pty) Limited** 2012 (4) SA 618 (CC) at paras 47-55.

however, novel.[26] It imposes an onus on the applicant for leave to prove that the grant of leave to appeal would lead to a just and prompt resolution of the real issues between the parties. It is clear from the decisions in **Nova Property Group Holdings v Cobbett** and in **City of Cape Town v South African National Roads Agency Limited** that in the case of an interlocutory order, the real issues are those to be decided in the main proceedings (in this case, the certification application and the class actions itself), not interlocutory proceedings.[27] Notably, our Courts have held that certification proceedings are themselves interlocutory in nature.[28]

22 As was pointed out in relation to section 17(1) in **Capendale and Another v Municipality of Saldana Bay and Others, In Re: Capendale and Another v 12 Main St Langebaan Pty Ltd and others:**

> "*[13] Applying the* Natal Pension Fund *case, the court will apply a purposive approach to the interpretation of this section. Adopting such an approach, one is therefore driven to conclude that the Legislature intended that the function of courts of appeal was to be 'results driven' and that the trial court is required to carefully consider whether a hearing on appeal would ultimately lead to a disposal of the real issues between the parties.*
>
> *[…]*
>
> *[16] Considering these provisions of the Act in their general context, it seems to me that it is no longer 'business as usual'… when it comes to the intended prosecution of an appeal. A matter must meet the strict*

---

26 See **Nova Property Group Holdings Ltd and Others v Cobbett and Another** 2016 (4) SA 317 (SCA) at para 11 where the SCA recognized that, on the facts of that case, whilst the order would not have been appealable under the **Zweni** regime, being interlocutory in nature, it was appealable because it would lead to a just and prompt resolution of the real issue in the case – whether section 26(2) of the Companies Act gave an unqualified right of access to the securities register.

27 **City of Cape Town** at paras 6-7.

28 **Gold Fields and Another v Motley Rice LLC** 2015 (4) SA 299 (GJ) at para 15-16; and **Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others** 2001 (4) SA 1184 (SCA) at para 29. See also **Mukaddam v Pioneer Foods (Pty) Ltd and Others** 2013 (5) SA 89 (CC) at para 43.

> *criteria laid down by the Legislature before it will be referred to the Supreme Court of Appeal, one of the most important considerations undoubtedly being the practice of pursuing an appeal for essentially dilatory purposes. The Act is bold step by the Legislature to limit unnecessarily protracted litigation, a state of affairs which would tend to bring the administration of justice into disrepute in the eyes of the general public.*"[29]

23 The decision sought to be appealed against in this instance is certainly one that does not dispose of all the issues in the case. On the contrary, the appeal would only decide the question of whether the four applicants were entitled, in the circumstances in which they did so, to substitute their attorney of record and withdraw from the certification application, in the manner in which they did so. The appeal would not decide any of the issues in the certification or in the class action itself.

24 In the circumstances, section 17(1)(c) applies and an appeal is only permissible if it will lead to the just and prompt resolution of real issues between the parties. Plainly it will not:

24.1 The real issue between the parties is that in the main action relating to whether or not Georgiou and Orthotouch are liable to the investors – this issue will not even be considered, let alone resolved by the appeal; and

24.2 An appeal will serve only to delay, rather than accelerate, the resolution of the real issues, and will not result in a "*just and prompt*" resolution of the issues.

---

[29] **Capendale** at paras 13 and 16 (emphasis added, footnotes omitted).

25 Hence, the Order *a quo*, setting aside a notice of substitution and withdrawal in the present circumstances, is not susceptible to appeal in terms of the test laid down by section 17(1) of the Superior Courts Act.

26 For these reasons, we submit that the finding by Murphy J in his judgement granting leave to appeal on 30 August 2017, that the matter is appealable, is wrong for the following reasons:

26.1 first, in concluding that his order was final and not interlocutory, Murphy J erred in finding that his order was for the "*restitution of the withdrawn application*".[30] Instead, and apart from the joinder of parties, the Order *a quo* was simply for the setting aside of an irregular step, being the filing of a Notice of Withdrawal of Application (and the related Notice of Substitution of Attorneys). By definition, the setting aside of an irregular step means that the irregularity must be regarded to have never occurred. This is therefore not the "*restitution*" of the certification application, but rather the setting aside of the two notices which must be regarded as a nullity.

26.2 The relevant part of his order – which follows the Notice of Motion – reads as follows:

> "*23.3 It is declared that the Notice of Withdrawal of Application dated 10 November 2016, constitutes an irregular step and is hereby set aside.*
>
> *23.4 It is declared that the application issued on 31 October 2014 […] is not withdrawn and has never been withdrawn*".[31]

---

30 **Judgment granting leave to appeal**, Record, Vol 5, para 6, p 752.

31 **Judgment**, Record, Vol 5, para 23, p 746.

26.3 The application before Murphy J was to set aside an irregular step. It did not "*have the effect of a final order*" and it is purely interlocutory. The order did not pronounce on any dispute between the parties in the main application.

26.4 Importantly, there would be nothing to prevent the applicants, after the hearing and dismissal of this appeal, from again substituting Theron with their attorney of choice, and then withdrawing from the matter. What would not be permissible would be for all the applicants in the certification application each withdrawing in a manner calculated to destroy the entire certification application as was done here. Within these constraints, all that Murphy J's order determined was that the applicants could not appoint new attorneys and withdraw from the application in a manner in which they did so. They would not, however, be precluded from each carrying out the same steps, provided it was done in good faith and did not irreparably prejudice the other investors.

27 This situation is analogous to the general practice in our Courts of finding that an order dismissing an exception is not appealable, while an order upholding an exception, is.[32]

GROUNDS OF APPEAL

28 The Appellants, Georgiou and Orthotouch, rely on the following grounds of

---

32 **Minister of Safety and Security v Hamilton** 2001 (3) SA 50 (SCA).

appeal:

28.1 first, that the applicants could not have acted in a representative capacity *prior* to a court certifying the institution of a class action on behalf of a class – and hence that they were acting as independent litigants who were entitled to withdraw the main application for certification at any time;[33]

28.2 second, that there was no fiduciary duty on the part of the applicants, given that the class action had not yet been certified, and given the alleged absence of a contractual relationship between the applicants and the other investors;[34]

28.3 the settlements reached with the said applicants were reached in the normal course and without impropriety or ulterior motive, and no abuse of the process of Court;[35]

28.4 that Theron lacks the requisite *locus standi* to have brought the application;[36] and

28.5 that the joinder application ought not to have been granted.[37]

---

33 **Georgiou's heads of argument**, paras 14-29, pp 6-14.

34 **Georgiou's heads of argument**, paras 30-40, pp 14-18; and **Orthotouch's heads of argument**, paras 21-31, np.

35 **Georgiou's heads of argument**, paras 41-48, pp 18-20; and **Orthotouch's heads of argument**, paras 32-44, np.

36 **Georgiou's heads of argument**, paras 49-55, pp 20-21.

37 **Georgiou's heads of argument**, paras 56-58, pp 21-22; and **Orthotouch's heads of argument**, paras 45-47, np.

29 We deal with each of these grounds of appeal in turn.

Agreement not to withdraw

30 On the basis of the undisputed facts set out above, we submit that either an express or a tacit agreement came into being between the applicants and the other members of the HSAG when the applicants were approached by Visagie on behalf of the steering committee of the HSAG, and agreed to act as representative applicants. The applicants' acceptance of that request meant that they agreed to "*act as nominal applicants*".[38]

31 The applicants knew that the members of the HSAG (of which they were also members) all funded the litigation by pooling contributions.[39] It was therefore a tacit term of this agreement (if not an express one) that the applicants were acting not only on their own behalf, but on behalf of the members of HSAG and the class. In these circumstances, the agreement between HSAG and the applicants included a tacit term that they would not withdraw the main application in order to put an end to the litigation without the consent of HSAG.

32 We accept that applicants could not be compelled to remain in the litigation against their will. If they wished to extricate themselves from the litigation, however, they could simply have given their co-investors (or rather the co-members of HSAG) reasonable notice of their intention so as to enable the HSAG timeously to join new nominal applicants.

---

38 **Founding affidavit**, Record, Vol 1, para 9, p 13.

39 **Founding affidavit**, Record, Vol 1, para 9, p 13.

33 A fresh main application cannot be brought as the investors' claims will have become prescribed.[40]

34 The breach of the agreement, which is an unethical betrayal of the other investors and HSAG members, is itself sufficient for the Court to find that they were not entitled to act in this manner, particularly in circumstances where their conduct was primarily intended to enrich themselves and to scupper the class action litigation to the detriment of the thousands of investors who form part of the class. This conduct amounts to an abuse of the court process and also an irregular step.

35 Georgiou's conduct in orchestrating this scheme, was calculated to undermine the integrity of the administration of justice. We submit that the Court should indicate its displeasure in this regard through granting a cost order on the scale of attorney and own client.

36 If we are correct in our submission that that there was a tacit agreement that the applicants could not withdraw the certification application in the manner in which they did, then it is not necessary for this Court to decide the question of whether the applicants acted in a representative capacity, or the existence or a fiduciary duty.

Representative capacity

37 If, notwithstanding the arguments set out above, the court decides that it is

---

40 The certification application papers were issued in October 2014: see Record, Vol 5, para 12, p 419.

necessary to decide if the applicants acted not only for themselves but as representatives of others, it is submitted that it is not necessary for this Court to define precisely the *type* of representative capacity involved.

38 We accept that the applicants did not "*represent*" the class in the narrow sense of the word, given that the applicants did not act purely on behalf of the class; rather, they acted as representatives for the class, that is, in their own capacity and on behalf of the class as a whole. We accept, therefore, that the representative nature of the applicant's role must not be understood as a conventional "*agent and principal*" relationship.

39 Moreover, it is not necessary for this Court to decide whether the erstwhile applicants represented the "*HSAG*", or whether they represented the 6688 members of the HSAG, or whether they represented a "*wider group*" of disgruntled investors, or whether they in fact represented the class of investors envisaged in the certification application. This is because any of these constructions has the result that the applicants were not at liberty to conspire with Georgiou and secretively withdraw the application. Even if the class is found not yet to exist (which is denied), there are thousands of members of the HSAG who contribute to the funding of the litigation and on whose behalf applicants were approached.

40 The argument on behalf of Georgiou that the form filled in by the applicants and others to become members of the HSAG reflect that they act only for themselves, is misplaced. The need for the form is explained by Theron in paragraph 23 of

his Replying Affidavit. [41] In essence the form was necessitated by the fact that many individual investors sought legal advice and services in their individual capacities, outside of the endeavour to have the class action certified. Significantly, despite being applicants in the main application, none of these nominal applicants was ever requested to pay any invoices for legal fees.[42] That is because that litigation was funded by the contributions of the members of the HSAG. That proves beyond any question that the applicants were nominal, representative applicants and not free agents with the authority to withdraw the main application to the prejudice of the investors.

The terms "abuse of process" and "irregularity"

41 As stated earlier, it is Respondents case that it is the aforementioned improper, collusive, secretive and simultaneous filing of notices of withdrawal at the instance of the main defendant in the intended class action – which conduct was clearly calculated not merely to extricate the applicants from the litigation, but specifically to prejudice the rights of the thousands of litigants in concert with whom and for whose benefit the main application was brought – that renders such withdrawal an abuse of the process of court and thus irregular. In referring to the authorities below, we will expand on this argument and also again refer to some of the facts.

42 Class actions are relatively novel proceedings in our law. Wallis JA, in **Children's**

---

41 **Replying affidavit**, Record Vol 2, paras 23.1-23.6, pp 201-202.

42 **Replying affidavit**, Record Vol 2, para 23.5, p 202.

Resource Centre Trust, has described class action as a procedure

> "*in which a representative brings proceedings on behalf of a group of persons who have not authorised the representative to act on their behalf. Such actions trace their roots back to the principles of equity in England, were developed in the United States of America and have spread to a number of jurisdictions around the world.*"[43]

43 Contrary to this very notion, Georgiou contends that the applicants were at all material times acting as applicants in their personal capacity and thus entitled to appoint a new attorney and to withdraw the main application without reference to Theron or the HSAG or its steering committee.[44]

44 It is however well established that the court will not allow either its rules or its processes and procedures to be used for an ulterior, improper motive.

45 More specifically, it is submitted that whilst the rule permitting an applicant to withdraw motion proceedings may be used for that purpose, the court will not permit the rule to be invoked in such a manner that both the objective and purpose of withdrawal is not principally or merely to compromise the individual applicant's claim, but in order to compromise the claims of the unsuspecting HSAG members, as well as the claims of the members of the class of persons to whom the application for certification relates.

46 A typical instance in which our courts will set aside a process which although ostensibly regular, is tainted by irregularity or impropriety as contemplated by

---

43 **Children's Resource Centre Trust v Pioneer Food (Pty) Ltd** 2013 (2) SA 213 (SCA) ("**Chidlren's Resource Centre Trust**") at para 14.

44 **Answering affidavit**, Record, Vol 1, para 5-7.3, pp 102-104.

rule 30, is when a subpoena is issued and served for an improper or ulterior motive or purpose.

47 In **Beinash v Wixley**, Mohamed CJ held:

> "*There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse it is quite entitled to set it aside. As was said by De Villiers JA in* ***Hudson v Hudson and Another*** *1927 AD 259 at 268:*
>
> > *'When . . . the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.'*
>
> *What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective. (****Standard Credit Corporation Ltd v Bester and Others*** *1987 (1) SA 812 (W) at 820A--B;* ***Taitz The Inherent Jurisdiction of the Supreme Court*** *(1985) at 16.) A subpoena duces tecum must have a legitimate purpose. (The unreported judgment of Marais J in the WLD* ***Wachsberger v Wachsberger*** *on 8 May 1990 in case No 8963/90 and the unreported judgment of Plewman J in the WLD on 6 October 1993 in the case of* ***Lincoln v Lappeman Diamond Cutting Works (Pty) Ltd*** *17411/93.)*"[45]

48 We submit that it matters not whether this Court elects to deal with the merits of this application pursuant to rule 30 or pursuant to its inherent jurisdiction to control its own processes in order to do justice, or both. Indeed we submit that rule 30 is really a procedural rule which facilitates the Court's exercise of its inherent jurisdiction.

49 The term "*irregular step*" as contemplated in rule 30 is not defined in the court rules, but it is significant that rule 30 refers repeatedly to an irregular step arising

---

[45] **Beinash v Wixley** 1997 (3) SA 721 (SCA) at 734F-735A.

from an "*irregularity or impropriety*". [our emphasis]

50 Whilst an "*irregularity*" may lend itself to the narrow construction of a step in litigation which does not accord with the strict terms of the rules of court, the same cannot be said of the word "*impropriety*", the ordinary meaning of which is "*(a) a breach of rule or principle; an irregular, lawless, or irregular act. (b) Lack of conformity to rule, law, or principle; deviation from what is usual or normal; abnormality; anomalousness.*"[46]

51 In our submission the use of the word "*impropriety*" in rule 30 clearly implies a pejorative value judgement of the conduct forming the subject of the complaint. In the present context, the word adequately accommodates the improper collusive use of legal processes for an ulterior purpose or motive calculated to defeat rather than advance the fair adjudication of legal disputes in accordance with section 34 of the Constitution.

52 The disjunctive use of the words "*irregularity or impropriety*" denotes that even if a step is not irregular in the sense that it is contrary to the letter of the rules of court, it is nevertheless improper.

53 The standard by which a step is to be judged as to be so irregular or defective that it constitute a nullity, is not defined. As noted in **Krugel v Minister of Police**[47] by Nestadt J: "*[p]erhaps it is a question of degree*".

54 It is trite law that, even before the Constitution of 1996, our courts had the power

---

46 Shorter Oxford English Dictionary (Fifth edn, 2002).

47 **Krugel v Minister of Police** 1981 (1) SA 765 (T) at 768.

to regulate their own process in pursuit of fairness and justice.

55 In relation to the court's powers and discretion in this regard, the following was held in the matter of **Cape Town City v SANRAL**:

> "*[28] In adopting the rule [the "implied undertaking rule" not to disclose in relation to discovered documents], the High Court appears to have invoked its inherent power to regulate its own processes in terms of s 173 of the Constitution. That our courts were endowed with such power, even in our pre-constitutional era, is evident from the following dictum of Corbett JA:*
>
> > *'There is no doubt the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice …'*
>
> *Courts now derive their power from the Constitution itself. As it was put by the Constitutional Court in SABC v NDPP:*
>
> > *'This is an important provision which recognises both the power of Courts to protect and regulate their own process as well as their power to develop the common law. . . . The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in s 173 is that Courts in exercising this power must take into account the interests of justice.'"*[48]

56 Section 173 of the Constitution of 1996 provides as follows:

> "*The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.*"

57 In **Mathias**,[49] Binns-Ward J held as follows, with reference to various authorities:

> "*[11] The Anton Piller procedure was not part of the common law. It has been adopted by the superior courts in South Africa in the exercise by*

---

48 **Cape Town City v SANRAL** 2015 (3) SA 386 (SCA) at para 28.

49 **Mathias Intl Ltd v Baillache** 2015 (2) SA 357 (WCC).

the courts of their inherent jurisdiction to regulate their own process in the interests of justice, having regard to 'modern problems in the prosecution of commercial suits".

58 The duty of the court to prevent abuse of its own rules and processes flows inter alia from the well-established role of the presiding judge in the administration of justice, as described by Harms JA in **Take & Save Trading**:

> "*[3] That is one side of the coin. The other is this:*[50]
>
> *'A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.'*
>
> *The same applies to civil proceedings: a Judge is not simply a 'silent umpire'.*[51] *A Judge 'is not a mere umpire to answer the question ''How's that?''' Lord Denning once said.*[52] *Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources.*"[53]

59 In **Molala,** Flemming DJP held that the court has "*a discretion about how to deal with a proven abuse of process*".[54]

60 Contrary to what Georgiou contends, the main application had immediate legal

---

50 **R v Hepworth** 1928 AD 265 at 277 per Curlewis JA.

51 **Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd** 1976 (2) SA 565 (A) at 570E-F.

52 **Jones v National Coal Board** [1957] 2 All ER 155 (CA) at 159B.

53 **Take & Save Trading CC v Standard Bank of SA Ltd** 2004 (4) SA 1 (SCA) at para 3.

54 **Molala v Minister of Law & Order** 1993 (1) SA 673 (W) at 677E.

consequences for persons falling within a class sought to be certified in the main application.

61 For instance, a certification application interrupts prescription on behalf of the whole class of persons involved. In **Children's Resource Centre Trust**, Wallis JA held as follows:

> "*If, as we now hold, an application for certification is the first necessary step in proceedings to pursue a class action there is much to be said for the proposition that, for purposes of prescription, service of the application for certification would be service of process claiming payment of the debt for the purposes of s 15(1) of the Prescription Act. Such an interpretation would be supported by cases where the institution of similar necessary preliminary proceedings have been held to constitute the bringing or commencement of suit for various purposes.*"[55]

62 It follows in our submission that the applicants were in substance nominal, representative applicants, in two distinct senses of the phrase:

62.1 first, by virtue of their understanding that they were nominal applicants representing the HSAG or the members of the HSAG;

62.2 second, by necessary implication, having regard to the very nature of the class action procedure created by the Constitution and given procedural content by our courts, the class sought to be certified in the main application.

63 In view of the aforesaid, it is submitted that Georgiou's contention is incorrect that, prior to certification being granted, the applicants in a certification

---

55 **Children's Resource Centre Trust** at para 89.

application can only act in their personal capacity (and that their application has no consequences for the class of persons involved). Apart from the earlier submission (namely that, had the applicants intended to act only personally they would simply have issued individual summonses to pursue a claim), the fact that a certification application is a "*first step in the process*" to pursue a class action, necessarily means that the whole class involved benefits from such application. Therefore, the mere certification application has some status and consequences in law for purposes of the class action.

64 It is also not correct, as seemingly contended by Georgiou, that the relevant class only comes into existence once members opt in (or do not opt out) after certification. The court *a quo* correctly held that the class members involved of course already exists. After certification, it is just a question of determining (by means of the opt-in/opt-out process) which members of the pre-existing class intend joining the class action and which do not.

65 It is submitted that the nominal applicants' and Georgiou's colludion with one other can only be described as an abuse of the court process of the most egregious kind. At the prompting of the investors' adversary, the nominal applicants visited a grave betrayal on the HSAG and the investors whom they represented.

66 This is all the more egregious given one of the primary purposes of the class action procedure:

> "*[19] The Constitution, in s 38(c), recognises a class action specifically in relation to infringements of or threats to rights guaranteed in the Bill of Rights. That caused the appellants in this case to invoke s 27(1)(b) of*

> *the Constitution. However, that was unnecessary. The class of people on whose behalf the appellants seek to pursue claims (leaving aside for the present the definition of that class) is both large and in general poor. Any claims they may have against the respondents are not large enough to warrant their being pursued separately, so that it is improbable that any lawyers would be willing to act for them on a contingency-fee basis. If those claims cannot be pursued by way of a class action, they are not capable of being pursued at all. The effect of that is to engage the right of access to courts vested in each of the members of the class by s 34 of the Constitution. The threatened infringement of that right may be challenged by way of a class action and the appropriate remedy is to permit a class action in respect of the underlying claims. It was accordingly unnecessary to seek in s 27(1)(b) an alternative peg on which to hang the entitlement to proceed by way of a class action. The right to proceed in that way was clear, subject to satisfying the other requirements for such an action.*"[56]

67 As submitted earlier, these applicants were not at liberty to compromise the claims of the HSAG or of the investors. Georgiou, apart from abusing the process and acting irregularly, also acted with duplicity in that he, whilst pretending to negotiate with Theron about settlement with investors through the process and mechanism established through such negotiations, went behind Theron's back and settled directly with the applicants (Theron's clients) and persuaded them to withdraw the main application without prior notice to him or to the HSAG.

68 When a party to litigation employs schemes and stratagems to undermine other parties, it amounts to an abuse of process The following passage in **Cohen v Cohen** per Griesel J are apposite:

> "*It is abundantly clear from the papers that the respondent is driven by a desire to rid himself of his maintenance obligations vis-à-vis the applicant. In order to achieve that purpose, the respondent has employed various schemes and stratagems, some of which can only be described as abuses*

---

56 **Children's Resource Centre Trust** at para 19.

of the process of the courts."[57]

69 The court has a duty to prevent such abuse of process. In **Nedcor v Gcilitshana**, the Court held:

> "*[27] Ordinarily, the reasons and motives of a party for instituting legal proceedings are irrelevant. However, '(w)hen . . . the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.*"[58]

70 In order to place the above summary of salient facts in perspective and to dispel any suggestion, however feint, that the so-called settlement with the nominal applicants was in the ordinary course or that the purported withdrawal of the main application was simply an unfortunate by-product of the applicants' desire to settle their own claims as investors, we draw attention to the following facts.

70.1 This "*settlement*" of the applicants' claims by Georgiou was done "*outside*" the procedure and mechanism which had been put in place by Theron & Partners (in conjunction with Georgiou) whereby investors could reach a settlement with Georgiou in respect of the class action claim.[59] This settlement was agreed in principle after having been negotiated between Theron and Georgiou, and was in fact an offer from Georgiou.[60] As a fact, only 844 investors (of the 18,000) indicated any desire to settle on that

---

57 **Cohen v Cohen** 2003 (1) SA 103 (C) at para 27.

58 **Nedcor Bank Ltd v Gcilitshana** 2004 (1) SA 232 (SE) at para 27, with reference to the judgment of De Villiers JA in **Hudson v Hudson** 1927 AD 259 at 268.

59 **Founding affidavit**, Record, Vol 1, para 23.7, p 25.

60 **Founding affidavit**, Record, Vol 1, para 23.4, p 24.

basis.[61]

70.2 This procedure and mechanism for settlement entailed the making available by Theron & Partners – pursuant to their negotiations with Georgiou – of an agreed draft settlement which is to be filled in. In terms of this settlement investors will receive 50% of the capital, payable over a period of three years.[62]

70.3 Not one of these settlement agreements has however been signed by Georgiou, let alone any actual payments made by him in terms thereof[63].

70.4 An initial pivotal figure in the HSAG who drove the class action, Mrs Elna Visagie, was – to the surprise of investors – persuaded by Georgiou to go and work for him after he offered her a monthly six-figure salary[64.]

70.5 Visagie's "*replacement*", Mr Helgard Hancke[65], also then appeared to jump ship by accepting a secret settlement of his (or his father-in-law's) claim without disclosing same to Theron & Partners. Thereafter, he still sat on the HSAG committee which deals with sensitive and confidential information concerning the HSAG's strategies and the class action litigation generally.[66]

---

61 **Replying affidavit**, Record, Vol 2, para 9.14, p 195.

62 **Founding affidavit**, Record, Vol 1, para 23.4, p 24.

63 **Founding affidavit**, Record, Vol 1, para 23.4, p 24; **answering affidavit**, Record, Vol 1, paras 67-69, p 121.

64 **Founding affidavit**, Record, Vol 1, para 23.2, p 23; **answering affidavit**, Record, Vol 1, paras 67-69, p 121.

65 **Founding affidavit**, Record, Vol 1, para 23.3, p 23; **answering affidavit**, Record, Vol 1, paras 67-69, p 121.

66 **Founding affidavit**, Record, Vol 1, para 23.6, p 25; **answering affidavit**, Record, Vol 1, para 67-69, p 121.

70.6 Of all the investors, none has received any settlement payments except the nominal applicants and Mr Hancke.[67]

70.7 The so-called class action litigation also involves a pending application in the Johannesburg High Court, in which application is made to set aside a Scheme of Arrangement involving Orthotouch Ltd.[68]

70.8 Orthotouch Ltd (18th Respondent) is controlled by Georgiou.[69]

70.9 As mentioned in our Heads in the related appeal under case number 1027/17, the Scheme of Arrangement, purports to thwart the class action by absolving Georgiou and others from all liability.[70] Hence, the Scheme of Arrangement's setting aside is required to proceed with the certification application. The setting aside application in Johannesburg is brought on the grounds that material facts were not disclosed to the court concerning the class action and, furthermore, that the arrangement purports to bind all investors regardless of whether or not it was supported by such investor and despite none of the investors being creditors of Orthotouch for purposes of section 155(8) of the Companies Act of 2008. No opposing

---

67 **Founding affidavit**, Record, Vol 1, para 23.4-23.5, p 24; **answering affidavit**, Record, Vol 1, paras 67-69, p 121.

68 **Founding affidavit**, Record, Vol 1, para 17, pp 18-19; **answering affidavit**, Record, Vol 1, para 59, p 119.

69 **Founding affidavit**, Record, Vol 1, para 14, pp 17-18; **answering affidavit**, Record, Vol 1, paras 61, p 119.

70 **Founding affidavit**, Record, Vol 1, para 16, p 18; **answering affidavit**, Record, Vol 1, paras 61, p 119.

affidavits have therein been filed.[71]

71 We submit that if the applicants wanted to withdraw for the application they were at liberty to do so provided they did not do so in a manner calculated to compromise the rights and contingent rights of others. The facts show that they went out of their way to prejudice the very people who had funded the litigation. That their conduct was orchestrated by the primary person at whom the class action is aimed renders this impropriety all the more egregious.

Theron's *Locus Standi*

72 Georgiou disputes Theron's standing to bring the application.[72]

73 Theron, as the attorney of record, would ordinarily have the implied authority to bring interlocutory proceedings without a specific mandate from his clients, the applicants. There is no evidence on record that his mandate has been terminated other than by way of the impugned notice to replace him as the attorney of record. We therefore submit that the Court must for present purposes ignore the impugned notice, as it constitutes an essential and material part of the very abuse which we say the Court should not countenance.

74 In any event, where the applicants were nothing more than representative applicants, they lacked the authority to remove Theron as the attorney of record for HSAG or for the class more generally. Theron's mandate to represent HSAG

---

71 **Founding affidavit**, Record, Vol 1, para 17, pp 18-19; **answering affidavit**, Record, Vol 1, paras 61, p 119.

72 **Georgiou's heads of argument**, paras 49-55, pp 20-21.

remains and since they and the class are the true and beneficial litigants on behalf of whom the applicants were cited as representative applicants, he has the requisite standing to bring this application.

75 In **Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another**,[73] this Court held that in circumstances where a plaintiff had merged with another company resulting in its extinguishment, it was competent for the merged entity to apply to be substituted for the original plaintiff, notwithstanding that the original plaintiff no longer existed. The appellants challenged the authority of the attorney representing the new plaintiff to act on its behalf, and challenged the substitution notices as an irregular step. The new plaintiff brought an application for substitution. In dismissing the appeal, this Court upheld the Court *a quo*'s order granting the substitution, finding that "*in fact and in law the substitution application was brought by [the new plaintiff] and not by the non-existent [original plaintiff]*".[74]

76 Similalry, in **Kotze NO v Santam Insurance Ltd**,[75] the defendant challenged the authority of the plaintiff's attorney to institute proceedings on behalf of the plaintiff for damages as a result of severe head injuries, on the basis that those very head injuries deprived the plaintiff of the necessary capacity properly to instruct his attorney. After proceedings had been instituted, and the severity of the plaintiff's head injuries became apparent (they were not apparent at the time that the action was instituted), the plaintiff was represented by a curator *ad litem*. The curator

---

73 **Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another** 2011 (1) SA 35 (SCA) ("**Tecmed**").

74 **Tecmed** at para 16.

75 **Kotze NO v Santam Insurance Ltd** 1994 (1) SA 237 (C).

ad litem then brought an application for ratification and confirmation of all steps previously taken on the plaintiff's behalf. The Court granted the application.

The Joinder application

77 The only basis on which Georgiou and Orthotouch dispute the right and interest of the intervening applicants to be joined as applicants to the certification application is on the basis that the certification application was, at that stage, no longer pending or extant because of the withdrawal of the application by the applicants.

78 If, however, the certification application was not validly withdrawn, then it follows that there is no basis on which to object to the joinder application.

79 Notably, Georgiou seeks to benefit from the very irregular steps complained of, by contending that the notices delivered by Jeff Donnenberg & Co firstly deprived Theron of his mandate to institute the interlocutory proceedings in the name of the applicants and secondly, put an end to the main application. We submit that the Court should not countenance this argument as it relies on an abuse of its process to then deprive the investors of the ability to attempt to set the offending processes aside and continue with the class action.

80 In this regard, the joinder application was in fact foreshadowed in the reinstatement application. The "*new*" applicants who wished to join, were not only each identified in the founding affidavit of the (reinstatement) application, but

confirmatory affidavits had been filed by them[76] in which they request that they "*be regarded as applicants*" in the reinstatement application insofar as may be necessary. They had indicated, prior to the launching of the reinstatement application, that they support the application and are prepared to act as applicants in that application.[77]

81 If necessary, they should be treated as applicants and then the issue of Theon's ability to pursue the setting aside of the irregular proceedings in the name of the applicants falls away. Our primary submission remains that Theron was never validly removed as the attorney representing both the nominal applicants and the investors and as such had the requisite authority to act in their name in order to restore the status quo ante and the joinder of the ne applicants in the main application.

CONCLUSION

82 For the reasons set out above, we submit that this Court should dismiss the appeal.

83 In addition, we submit that this Court should express its displeasure towards the actions of Georgiou and Orthotouch and the applicants by means of a punitive costs order. It is requested that the appeal be dismissed with costs on an attorney and client scale, such costs to include the costs of two counsel, against Georgiou and Orthotouch.

---

76 Record, pp 55-66.

77 **Founding affidavit**, Record, Vol 1, paras 28-29, pp 26-28.

CE WATT-PRINGLE SC
CHJ MAREE
Counsel for the Respondents

Sandton Chambers
23 March 2018

TABLE OF AUTHORITIES

BOOKS

Shorter Oxford English Dictionary (Fifth edn, 2002)

CASE LAW

Beinash v Wixley 1997 (3) SA 721 (SCA)

Cape Town City v SANRAL 2015 (3) SA 386 (SCA) at para 28.

Capendale and Another v Municipality of Saldanha Bay and Others, In Re; Capendale and Another v 12 Main St, Langebaan (Pty) Ltd and Others (6580/2012), 840/2012) [2014] ZAWCHC 3 (29 January 2014)

Children's Resource Centre Trust v Pioneer Food (Pty) Ltd 2013 (2) SA 213 (SCA)

City of Cape Town v South African National Roads Agency Limited (6165/12) [2014] ZAWCHC 151 (8 October 2014)

Cohen v Cohen 2003 (1) SA 103 (C) at para 27.

Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd 1976 (2) SA 565 (A)

Gold Fields and Another v Motley Rice LLC 2015 (4) SA 299 (GJ)

Hudson v Hudson 1927 AD 259

International Trade Administration Commission v SCAW South Africa (Pty) Limited 2012 (4) SA 618 (CC)

Jones v National Coal Board [1957] 2 All ER 155 (CA)

Krugel v Minister of Police 1981 (1) SA 765 (T)

Mathias Intl Ltd v Baillache 2015 (2) SA 357 (WCC)

Minister of Health and Others v Treatment Action Campaign and Others (NO.1) 2002 (5) SA 703 (CC)

Minister of Safety and Security v Hamilton 2001 (3) SA 50 (SCA)

Molala v Minister of Law & Order 1993 (1) SA 673 (W)

Mukaddam v Pioneer Foods (Pty) Ltd and Others 2013 (5) SA 89 (CC)

Nedcor Bank Ltd v Gcilitshana 2004 (1) SA 232 (SE)

Nova Property Group Holdings Ltd and Others v Cobbett and Another 2016 (4) SA 317 (SCA)

Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA)

R v Hepworth 1928 AD 265 at 277

Take & Save Trading CC v Standard Bank of SA Ltd 2004 (4) SA 1 (SCA)

Zweni v Minister of Law and Order 1993 (1) SA 523 (A)