IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 80811/14

In the matter between:

SHARON ANN VLOK	**First Applicant**
DANIEL EARNEST LAMPBRECHT	**Second Applicant**
CHARLENE ESMAY JORDAAN	**Third Applicant**
JEAN PAPANDONIS	**Fourth Applicant**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

....

DATE SIGNATURE

and

NICOLAS GEORGIOU	**First Respondent**
ZEPHAN PROPERTIES (PTY) LTD	**Second Respondent**
NICOLAS GEORGIOU N.O.	**Third Respondent**
MAUREEN LYNETTE GEORGIOU N.O.	**Fourth Respondent**
JOSEPH CHEMALY N.O.	**Fifth Respondent**
GEORGE NICOLAS GEORGIOU	**Sixth Respondent**
MICHAEL NICOLAS GEORGIOU	**Seventh Respondent**
HENDRIK JACOBUS MYBURGH	**Eighth Respondent**

BOSMAN & VISSER (PTY) LTD	**Ninth Respondent**
PICKVEST (PTY) LTD	**Tenth Respondent**
HEINRICH PIETER MOLLER	**Eleventh Respondent**
WILLEM MORKEL STEYN	**Twelfth Respondent**
BAREND STEFANUS VAN DER LINDE	**Thirteenth Respondent**
FREDERICK JULIUS REICHEL	**Fourteenth Respondent**
EUGENE KRUGER INC.	**Fifteenth Respondent**
E G COOPER & SONS INC.	**Sixteenth Respondent**
HANS KLOPPER	**Seventeenth Respondent**
ORTHOTOUCH LTD	**Eighteenth Respondent**
HIGHVELD SYNDICATION NO 19 LTD	**Nineteenth Respondent**
HIGHVELD SYNDICATION NO 20 LTD	**Twentieth Respondent**
HIGHVELD SYNDICATION NO 21 LTD	**Twenty First Respondent**
HIGHVELD SYNDICATION NO 22 LTD	**Twenty Second Respondent**

JUDGMENT

Murphy J

1. The applicants on 31 October 2014 instituted an application in which they applied for an order certifying the existence of certain classes of litigants (comprising investors in four public companies jointly referred to as the Highveld Syndication Companies) and granting them leave to act as representatives of the classes so certified and granting them leave to institute class actions on behalf of the members of the identified classes - "the certification application".

2. On 16 November 2016 the applicants in the certification application filed a notice of substitution as attorneys of record, substituting their former attorneys, Theron & Partners, ("Theron Attorneys") with new attorneys, Jeff Donenberg & Company

("Donenberg") and filed a notice of withdrawal in respect of the pending certification application. In response, on 30 November 2016, Theron Attorneys, filed a notice in terms of rule 30(2)(b) averring that both the notice of substitution and the notice of withdrawal of the certification application, constitute irregular steps. The rule 30(2)(b) notice was supported on affidavit by Mr. Jacques Theron, a director of Theron Attorneys.

3. On 20 December 2016, Theron launched the present interlocutory application as matter of semi-urgency, relying on the provisions of rule 30, in which he sought orders setting aside the notice of substitution and the notice of withdrawal, and declaring the certification application not to have been withdrawn ("the rule 30 application"). This application was followed by an application filed on 20 January 2017 by Mr. Brian Waxham on behalf of himself and four other applicants for an order joining them as applicants to the certification application ("the application for joinder"). Both applications are the subject of this judgment.

4. The first to fifth, and the eighteenth, respondents oppose both applications on the merits as well as on the issue of urgency.

5. The applicants were part of a group of some 6688 aggrieved individuals, the Highveld Syndicate Action Group ("HSAG"), who mandated Theron Attorneys to launch the application for the certification of a class action 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"). Each of the applicants hails from a different part of the country. They are not known to each other save as co-applicants.

6. The members of the HSAG contributed financially to the costs of the certification application. The litigation was directed by Theron Attorneys and a steering committee selected from amongst the investors.The applicants were selected from amongst the same investors as nominal applicants in the certification application as representatives of the class envisaged in the application. They were aware that the costs of the certification application were being funded not by them but by the contributions of the HSAG.

7. The first respondent, Georgiou, unbeknown to the investors or Theron Attorneys, reached settlement agreements with each of the applicants on undisclosed terms conditional upon the applicants withdrawing the certification application. It has not been denied that the applicants were required to withdraw the certification application without prior warning to Theron Attorneys or the HSAG.

8. The applicants then jointly instructed Donenberg who, as mentioned, simultaneously, and without prior notice to Theron Attorneys, filed a notice substituting himself as attorney of record and a notice withdrawing the certification application on behalf of the applicants.

9. Theron acting on behalf of the HSAG has brought this interlocutory application to safeguard the certification application. The premise of the rule 30 application is that the certification application was not the applicants' to settle, given their status in substance as nominal and representative applicants. The court is asked to protect the interests of the HSAG in its endeavour to launch the class action. Theron alleges that Georgiou did not merely set out to settle the individual claims of each of the applicants, but also by requiring the withdrawal of the certification application contrived to compromise the certification application.

10. Georgiou contended that the applicants for certification of the class action were acting as independent litigants and not as nominal applicants representing a wider group. The settlements reached with the applicants, he submitted, were concluded in the normal course and without impropriety or ulterior motive. The applicants, he argued, did not act in a representative capacity in the certification application. They sought relief in their personal capacity, inter alia for an order authorising them to act as representatives and were thus free to act as litigants in their own right. The certification application was still pending and the court had not yet certified the existence of any classes of litigants or granted leave to the erstwhile applicants to act as representatives of any classes of litigants. At the date of their withdrawal of the certification application the applicants had not yet acquired the right to act in a representative capacity on behalf of other persons. If the certification application had proceeded to a successful outcome, the applicants would have obtained the relief

sought, including a costs order in their personal favour. Until such time as this right is acquired, the applicants could not have litigated in any capacity other than personally.

11. In the premises, the respondents argued, the applicants were fully entitled, as persons litigating in their personal capacity, to exercise their rights in terms of rule 16(2)(a), which provides that:

> " Any party represented by an attorney in any proceedings may at any time.... terminate such attorney's authority to act for him, and thereafter act in person or appoint another attorney to act for him therein, whereupon he shall forthwith give notice to the Registrar and to all other parties of the termination of his former attorneys' authority and if he has appointed a further authority so to act for him, of the latter's name and address."

12. Similarly, it was submitted that the applicants were not prevented from withdrawing the proceedings as contemplated in rule 41(1)(a), which provides:

> " A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of a court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party."

13. Theron submitted that if the applicants were not mere nominal applicants representing a much wider group, there would have been no purpose for them to pursue a class action at all. They would each individually simply have issued summons against the respondents in order to pursue their claims. The very fact that they opted instead to apply for the certification of a class action casts them in the role of applicants acting not only to vindicate their own rights, but as representatives of the identified class and in whose interests they launched and pursued the certification application. Georgiou on his own version did not merely settle the individual claims but also purported to settle the application for certification itself. The applicants went to the same attorney and instructed him to place himself on record

and lodge notices of withdrawal of the certification application, without prior notice to Theron or to the thousands of litigants whom they represented.

14. Theron contended that the applicants were not at liberty to collude with one another and with Georgiou (and the entities he represents) in this calculated effort to scupper the proposed class action as a whole. Such conduct prejudiced the rights of the thousands of litigants in concert with whom and for whose benefit the certification application was brought, and, hence, he submitted, the delivery of the notices of substitution and withdrawal in the circumstances of this case are an abuse of the process of the court and thus irregular.

15. The preliminary issue for determination is whether applicants in a certification application can be said to act in a representative capacity prior to a court certifying the existence of a class and authorising the institution of class action proceedings on behalf of the members of such a class. The certification of an action as a class action involves the identification of some common claim or issue by members of a class and the court being satisfied that a chosen representative is suitable to represent the members of the class in the proposed litigation. It is trite that in order for a class action to be instituted, and in order for litigants to be authorised to represent others in a class action, a court first has to certify that a class exists and approve of the representative litigants. The parties seeking to represent a class must first apply to court for the authority to do so. Certification is therefore a preliminary matter requiring resolution before a class action may be instituted. In the absence of certification, the representative has no right to proceed, unlike litigation brought in a person's own interests. Certification provides the authority for a representative to act on behalf a class and enables the court to control the procedural aspects of the proceedings.

16. As pointed out by Wallis JA in *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others*[1] until such time as Parliament legislates for the conduct of class actions, the courts are obliged to prescribe appropriate rules and procedures to enable litigants to pursue claims by this means. Courts must adopt a

[1] 2013 (2) SA 213 (SCA) at para 21

robust approach and resort to their inherent power to protect and regulate their own processes and to develop the common law in the interests of justice.[2] This would include in my opinion determining the duties upon applicants seeking certification in relation to other members of the class.

17. The 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. It is incorrect that, prior to certification being granted, the applicants in a certification application can only act in their personal capacity (and that their application has no consequences for the class of persons involved). 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 class already exists; the certification process defines its ambit. Moreover, a certification application has legal consequences for persons falling within the class sought to be certified. For instance, a certification application interrupts prescription on behalf of the whole class of persons involved.[3]There is accordingly little doubt in my mind that applicants for the certification of a class act in a quasi-fiduciary capacity and are thus ethically obliged to act *bona fide* in the best interests of the members of the class, even prior to certification. Otherwise, as witnessed in the present matter, it will be easy for respondents in such actions to scupper a class action to the prejudice of members of the class.

18. Rule 30(3) permits a court to set aside a proceeding or step it considers to be irregular or improper and to make any such order as to it seems meet in the circumstances. A court will not allow either its rules or its processes to be used for an ulterior, improper motive. Every court is entitled to protect itself and others against an abuse of its processes. Where a court is satisfied that conduct in litigation constitutes an abuse it is entitled to set it aside.[4] When a court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is duty bound to prevent such abuse. What constitutes an abuse of the process of the court is a matter determined by the circumstances of each case. There can be no all-

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[2] *Ibid* para 17 and section 173 of the Constitution
[3] *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) at par 89
[4] *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734F – 735A

encompassing definition of the concept of abuse of process. In general terms, an abuse of process takes place where the procedures permitted by the rules of court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.[5] Unethical behaviour by parties in the conduct of litigation may constitute an abuse, impropriety or irregularity entitling the court to reverse such behaviour under rule 30 or the common law. It follows that the rules permitting substitution of an attorney of record and an applicant to withdraw motion proceedings may not be invoked for improper, irregular or unethical purposes.

19. Therefore, whether we choose to deal with the merits of this application pursuant to rule 30, or pursuant to the inherent jurisdiction of the court to control its own processes in order to do justice, the result is the same. The applicants and Georgiou colluded with one other in a manner that can only be described as an abuse of the court process. They have left the other members of the class seeking certification of the class action high and dry. Had the applicants wanted to withdraw from the application on *bona fide* grounds they were at liberty to do so provided they did not do so in a manner compromising the rights and contingent rights of those they sought to represent. As representatives of the class seeking certification, they had a duty to act in the best interests of the class. If they wished to be free of the quasi-fiduciary duty they undertook, they should have withdrawn as parties and allowed Theron to join other parties. It was improper and potentially prejudicial to the other members of the class to withdraw the application in pursuit of their personal interests. The applicants had a duty to prevent a conflict of interest from arising between their personal interests and the interests of the members of the class they sought to represent. The facts show that their conduct improperly prejudiced the people who had funded the litigation and in whose interest it was brought. To make matters worse, their conduct was orchestrated by the persons at whom the class action is aimed.

20. There has been some question about Theron's right to bring this interlocutory application. Georgiou seeks to benefit from the irregular step by contending that the notices delivered by Donenberg firstly deprived Theron of his mandate to institute these interlocutory proceedings in the name of the members of the class and

[5] *Hudson v Hudson and Another* **1927 AD 259 at 268; and** *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W) at 820A--B

secondly put an end to the certification application. I am satisfied that Theron as an attorney and officer of the court has authority to bring these interlocutory proceedings to protect the members of the class from the abuse, despite his mandate seemingly having been terminated by the applicants. The HSAG remains the true or beneficial litigant on behalf of whom the nominal litigants (the applicants) were cited. In any event, the problem, if any, is cured by granting the application for joinder. The right and interest of the intervening applicants to be joined in the certification application is beyond dispute, especially in view of my finding that its withdrawal was an abuse.

21. The two interlocutory applications were brought on the basis of a moderate degree of urgency. The grounds advanced for urgency are both cogent and compelling. Improper and irregular steps have been taken in order to defeat the claims of numerous mostly elderly and impecunious claimants. It is fitting that the court should act urgently to put an end to the impropriety and to avoid any confusion amongst the investors about the status of the certification application.

22. The costs should be borne by the respondents opposing the interlocutory applications. The unusual nature of the issues justifies the employment of senior counsel.

23. The following orders are made:

23.1 The applicants in the joinder application (B Waxham, C Nel, H Pinshaw, F Strauss and L M Meyer) are joined as applicants in the main (certification) application, case number 80811/14, seeking leave to institute a class action.

23.2 It is declared that the Notice of Withdrawal of Application dated 10 November 2016 constitutes an irregular step and is hereby set aside.

23.3 It is declared that the Notice of Substitution as Attorneys of Record 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 under case number 80811/14, is not withdrawn and has never been withdrawn.

23.5 The respondents opposing these applications shall pay the costs of the applications, jointly and severally, such costs to include the costs of two counsel and senior counsel.

JR MURPHY

JUDGE OF THE HIGH COURT

Counsel for Theron:	Adv. C Watt-Pringle SC
	CHJ Maree
Instructed by:	Theron Attorneys
Counsel for First to Fifth Respondent:	Adv PF Rossouw SC
	Adv M Mostert
Instructed by:	Kyriacou Incorporated
Counsel for Eighteenth Respondent:	Adv JG Smit
Instructed by:	Natalie Lubbe and Associates
Date Heard:	3 February 2017
Date of Judgment:	7 April 2017