IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

..... **1 September 2016**
SIGNATURE

CASE NO: 42334/2014

In the matter between:

JURIE JOHANNES GELDENHUYS	**First Applicant**
ARTHUR BRADY COCHRANE	**Second Applicant**
SHARON ANN VLOK	**Third Applicant**
And	
ORTHOTOUCH LIMITED	**First Respondent**
DEREK PERDOE COHEN N.O.	**Second Respondent**
HANS KLOPPER N.O.	**Third Respondent**
And OTHERS	**Fourth to Twenty-seventh Respondents**

And

THE HIGHVELD SYNDICATION INVESTORS

("the Main Application")

In re:

The ex parte application of:

ORTHOTOUCH LIMITED

(Registration number: 2010/004096/06)

Application for the sanctioning of a Scheme of Arrangement in terms of section 155(7) of the Companies Act, no 71 of 2008

("the ex parte application")

APPLICATION FOR LEAVE TO APPEAL

SPILG, J:

1 September 2016

INTRODUCTION

1. The parties will be identified as in the original application.

2. There were a number of competing interlocutory applications brought which were dealt with as a special motion. They came to be reduced to two applications which required determination.

3. In the one, the first respondent brought a rule 30A application to declare as an irregular proceeding the application brought by the applicants to rescind an order the sanctioning a scheme of arrangement. It was contended that the rescission application was defective because of a failure to join and give notice to all the affected persons, who would include the investors in each of the Highveld Syndications, or first to have applied for substituted service. It was common cause that they number between 17 000 to 18 000 individuals. This application was supported by the third to sixteenth respondents. The respondents argued that the failure in not first complying with rule 42(2) (and obtain an order for notice to be given to all persons affected by the rescission application) or in not complying with rule 4(2) read with 5(2) (in regard to substituted service) was fatal.

   I held that the rescission application was not fatally defective.

4. In the other, the applicants applied for substituted service of the rescission application allowing for notice to all investors by means of a notice in two national weekend newspapers which would direct them to a website where the application could be viewed and downloaded. The third respondent indicated that he would abide the decision in this regard.

   I considered that the form of notice proposed by the applicants was inadequate and would amount to only formalistic compliance. In my view an effective form of notification, having regard to the number of investors (and taking into account those who allegedly supported the rescission application), required a structured order whereby *inter alia* the third respondent (Mr Klopper in his representative capacity) would be involved in providing the names and contact details of the relevant investors. This is reflected in the terms of the order.

5. The first respondent accepts that the judgment in respect of the rule 30A application is not appealable.

   It however contends that the order for substituted service is appealable. Klopper who abided the decision of the court in this regard now enters the fray and also applies for leave to appeal on the grounds that he being subjected to a mandatory order without having been heard.

6. There are two preliminary issues. The first is whether the order for substituted service is appealable. The second is whether Klopper is entitled to apply for leave to appeal without an explanation as to why he is no longer prepared to abide the decision and where he does not assert prejudice.

APPEALABILITY

7. The respondents rely on *Nova Property Group Holdings Ltd v Cobbett and others* 2016(4) SA 317 (SCA) as the basis for being entitled to appeal an order which is purely interlocutory in form and in effect.

8. Leaving aside the requirement, at the time, that the Constitutional Court could only be seized with a constitutional issue in *South African Informal Traders Forum and Others v City of Johannesburg and Others* 2014 (4) SA 371 (CC) (the '*SAITF case*') the court held that there is no absolute bar against an interlocutory order being appealable. In the SAITF case the court allowed an appeal because the issue was determinative of the rights and obligations between the parties and that, as stated in the subsequent case of *Zulu and Others v Ethekwini Municipality and Others* 2014 (4) SA 590 (CC) at para 53;

   > "*The qualifier is the interests of justice, since interim orders can be reconsidered and altered by the court of first instance.*"

9. In *Nova Property* the SCA held that section 17(1) of the Superior Courts Act gives express recognition that the paramount consideration remains the interests of justice.

10. It appears that one of critical issues that the SAITF case required to be considered was whether the point raised and decided is determinative of the rights and obligations between the parties. Clearly the question of substituted service cannot be.

11. My findings are therefore not definitive of the main issues to be dealt with in the rescission proceedings. My decision is purely concerned with how best to give effective service where there are many thousands of affected investors.

12. *Adv Brett* in anticipation of this contended for a new ground of appeal not foreshadowed in either the application for leave to appeal or in his heads of argument; namely that there was a substantive constitutional law point involving access to information. It was contended that the provisions of the Promotion of Access to Information Act 2 of 2000 *("PAIA")* would not be respected in that the privacy rights of investors would be affected if Klopper was to provide the information as required in my order without first proceeding in terms of that Act. It was contended that my order was therefore *ultra vires*.

13. Adv Brett's attention was drawn to s7(1) of PAIA which exempts from the purview of the Act *inter alia* recorded information requested after the commencement of civil proceedings from any public or private body. The subsection reads:

> *(1) This Act does not apply to a record of a public body or a private body if-*
>
> *(a) that record is requested for the purpose of criminal or civil proceedings;*

(b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and

(c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.

The respondents conceded that the point was not good.

14. It was then contended that there was some substantive irregularity in that I could not make an order which had not been sought by the applicant.

The applicants had sought relief from the strictures of notice to all affected persons or personal service under rules 42 or 4 of the Uniform Rules respectively. I considered that it was unlikely to properly serve its intended purpose and that a more effective means of giving notice should be adopted. It will also be recalled that the application was heard together with the Rule 30A application where it was contended that the failure to give notice of the rescission application to all investors was fatal.

15. The respondents cannot have it both ways. This is a classic case of a party performing cart wheels with no purpose other than to frustrate the merits of the case being dealt with expeditiously.

In the Rule 30A application the respondents challenged the failure to give each investor notice and in the substituted service application Klopper was prepared to abide the decision if the court ordered a much diluted form of giving notice to investors. What was before the court was an application for substituted service and the court determined how best to deal with it bearing in mind that the affected persons who have an interests are the investors whose right to be heard on whether they support or object to the grant of the rescission application are paramount. Accordingly if the interests of justice are taken into account their rights prevail.

16. Moreover it is difficult to see why it would be in the interstates of justice to further delay the determination of the merits. The issues raised now are symptomatic of a Stalingrad defence; where side issues taken on appeal simply delay the matter and build up costs for lay litigants against those who have deep pockets. The risk of being financially out-litigated cannot be in the interests of justice particularly where the interests of justice are served ultimately by ensuring that the most effective and practical means is adopted to bring the rescission application to the notice of the thousands of affected investors.

17. This does not seem to be an issue in respect of which the first respondent can complain.

18. As regards Klopper, who is cited in his capacity as the duly appointed business rescue practitioner, the court required a more effective form of service. This cannot possibly be detrimental to the interests he is required to protect and serve, considering his duties and responsibilities under the Companies Act. If it is, then he was obliged to say so under oath when explaining why he has changed his non-intervention position. The form of notice or service and when and how it will be relaxed is a discretionary judicial power exercised on a regular basis by courts when looking after the interests of all potentially affected parties who are not presently before court.

19. The attempt to make the case fit within the scope of a substantive law point in order render it appealable is misconceived. The respondents are trying to force a square peg into a round hole.

    The order made is neither final nor definitive of any rights. It remains a purely procedural means of giving notice in a practical manner to over 17 000 individuals.

20. In my view this case is not appealable.

THE MERITS

21. If I am incorrect on the issue of appealablity, then save for possibly an immaterial error regarding who attorney Lubbe represented, I am satisfied on re-reading the judgment in light of the points raised that an appeal would not have reasonable prospects of success. I should add that this would be on the assumption that I was not exercising a judicial discretion. I however believe that the issue of substituted service on persons who are not before the court concerns the exercise of a judicial discretion and no acceptable grounds have been raised for challenging the basis upon which the discretion was improperly exercised.

ORDER

22. Aside from deciding the application for leave to appeal it was agreed that I should amend the order for substituted service so as to take into account any further appeal process. The terms were was agreed upon.

23. I accordingly order that:

1. *The application for leave to appeal is refused.*

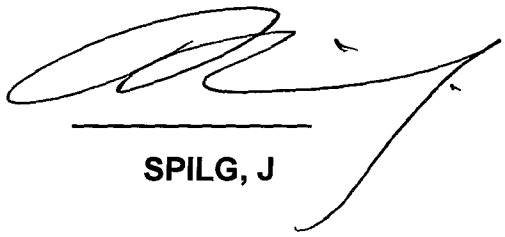
2. *The order of 26 May 2016 is amended as follows;*

    a. *The date of 6 June 2016 in para 4 is deleted and replaced with: "within three weeks of the respondents exhausting the appeal process"*

    b. *The date of 11 July 2016 in para 6 is deleted and replaced with:*

        "within eight weeks of the respondents exhausting the appeal process"

3. *The respondents are to pay the costs of the application including the costs of two counsel*



SPILG, J

DATES OF HEARING:	
DATE OF JUDGMENT:	1 September 2016
LEGAL REPRESENTATIVES:	
FOR APPLICANTS:	Adv NJ Graves SC
	CH J Maree
	Theron & Partners c/o BDK Attorneys
FOR FIRST RESPONDENT:	Adv Brett SC
	Adv J Smit
	Nathalie Lubbe & Associates Inc
FOR 3rd to 16th RESPONDENTS:	Adv Smit
	Faber Goerts Ellis & Austin Inc
	Kyriacou Inc