

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: 42334/14

In the application of:

JURIE JOHANNES GELDENHUYS

First Applicant

ARTHUR BRADY COCHRANE

Second Applicant

SHARON ANN VLOK

Third Applicant

and

ORTHOTOUCH LIMITED

First Respondent

DEREK PEDOE COHEN N.O.

Second Respondent

HANS KLOPPER N.O.

Third Respondent

HIGHVELD SYNDICATION NO 15 LTD

Fourth Respondent

HIGHVELD SYNDICATION NO 16 LTD

Fifth Respondent

HIGHVELD SYNDICATION NO 17 LTD

Sixth Respondent

HIGHVELD SYNDICATION NO 18 LTD

Seventh Respondent

HIGHVELD SYNDICATION NO 19 LTD

Eighth Respondent

HIGHVELD SYNDICATION NO 20 LTD

Ninth Respondent

HIGHVELD SYNDICATION NO 21 LTD

Tenth Respondent

HIGHVELD SYNDICATION NO 22 LTD

Eleventh Respondent

("the Highveld Companies")

NICOLAS GEORGIU

Twelfth Respondent

ZEPHAN PROPERTIES (PTY) LTD

Thirteenth Respondent

NICOLAS GEORGIU N.O.

Fourteenth Respondent

MAUREEN LYNETTE GEORGIU N.O.

Fifteenth Respondent

JOSEPH CHEMALY N.O.

Sixteenth Respondent

GEORGE NICOLAS GEORGIU

Seventeenth Respondent

MICHAEL NICOLAS GEORGIU

Eighteenth Respondent

HENDRIK JACOBUS MYBURGH

Nineteenth Respondent

BOSMAN & VISSER (PTY) LTD

Twentieth Respondent

PICKVEST (PTY) LTD

Twenty-first Respondent



HEINRICH PIETER MOLLER	Twenty-second Respondent
WILLEM MORKEL STEYN	Twenty-third Respondent
BAREND STEFANUS VAN DER LINDE	Twenty-fourth Respondent
FREDERICK JULIUS REICHEL	Twenty-fifth Respondent
EUGENE KRUGER INC.	Twenty-sixth Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA (CIPC)	Twenty-seventh Respondent

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")

FOUNDING AFFIDAVIT

I, the undersigned,

JURIE JOHANNES GELDENHUYS

do hereby make oath and say that:



1. I am an adult male logistics and risk management coordinator at Garden Route Agri, Mossel Bay and residing at 42 Tienie Botha Street, Mossel Bay, Western Cape.
2. The contents of this affidavit fall within my personal knowledge unless otherwise stated or implied. Averments which fall outside my personal knowledge are confirmed by means of confirmatory affidavits.
3. Where I make legal submissions, I do so on advice of my legal representatives, which advice I believe to be correct

THE PARTIES:

4.
 - 4.1 I am the First Applicant herein and an investor in Highveld 16 to Highveld 22, Respondents Five to Eleven ("the Highveld companies").
 - 4.2 Second Applicant is Arthur Brady Cochrane, an adult male retiree of Unit 35, Norton Park Retirement Village, Umtata Road, Benoni, Gauteng. He is an investor and shareholder in the so-called Highveld 16 and Highveld 21 companies.
 - 4.3 The Third Applicant is Sharon Ann Vlok, a business woman residing at 40 Frank Lane, Porterville, Western Cape.
5. The Respondents herein are therefore as follows:
 - 5.1 First Respondent is Orthotouch Ltd (Registration Number 2010/004096/06) a public company registered in terms of the company laws of South Africa with principal place of business at corner of Willow and Cedar Road, Cedar Square Shopping Centre, First Floor. Fourways, Gauteng.
 - 5.2 Second Respondent is Derek Pedoe Cohen N.O., an adult male consultant with place of business at Ground Floor, Fedhouse Group



- 5.2 Second Respondent is Derek Pedoe Cohen N.O., an adult male consultant with place of business at Ground Floor, Fedhouse Group House, 89 Bute Lane, Sandown, Sandton, Johannesburg in his capacity as Receiver under the Scheme of Arrangement which forms the subject matter of this Application].
- 5.3 Third Respondent is Johannes Frederick Klopper N.O. ("Klopper") (ID number 580714 5020 080), an adult male in his capacity as the business rescue practitioner of the Highveld companies, having his place of business at Blaauwklippen Office Park 2, Webbers Valley Road, Stellenbosch, Western Cape and residing at 3 Two Oceans View, Somerset West.
- 5.4 Fourth to Eleventh Respondents are the Highveld companies. I am advised that these companies are currently still under business rescue. (Their registered offices are all at the same address at 875 Schoeman Street, Pretoria). They are:
- (a) Highveld Syndication No 15 Ltd (registration number 2003/031034/06);
 - (b) Highveld Syndication No 16 Ltd (registration number 2005/031129/06);
 - (c) Highveld Syndication No 17 Ltd (registration number 2005/025913/06);
 - (d) Highveld Syndication No 18 Ltd (registration number 2005/030778/06);
 - (e) Highveld Syndication No 19 Ltd (registration number 2003/030144/06);
 - (f) Highveld Syndication No 20 Ltd (registration number 2005/029425/06);

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(g) Highveld Syndication No 21 Ltd (registration number 2005/027601/06);

(h) Highveld Syndication No 22 Ltd (registration number 2005/027390/06);

(these companies are hereinafter referred to as "Highveld 15" to "Highveld 22", or will collectively be referred to herein as "the Highveld companies").

- 5.5 Twelfth Respondent is Nicolas Georgiou (ID number 440919 5109 086), an adult businessman who resides at 1 Woodlands Avenue, Hurlingham Manor, Randburg, Johannesburg, and with place of business at corner of Willow and Cedar Road, Cedar Square Shopping Centre, First Floor, Fourways, Gauteng.
- 5.6 Thirteenth Respondent is Zephan Properties (Pty) Ltd (previously known as Zelpy 2095 (Pty) Ltd), a company registered in terms of the company laws of South Africa, with registration number 2003/020174/07, having its registered address at 96 Raymond Mhlaba Street, Bloemfontein.
- 5.7 Fourteenth Respondent is Nicolas Georgiou (the Twelfth Respondent) in his capacity as trustee of the N Georgiou Trust (No TMP 757), residing at 1 Woodlands Avenue, Hurlingham Manor, Randburg, Johannesburg, and with place of business at corner of Willow and Cedar Road, Cedar Square Shopping Centre, First Floor, Fourways, Gauteng [;
- 5.8 Fifteenth Respondent is Maureen Lynette Georgiou N.O, a female adult person of 67 Waverley Road, Bloemfontein, in her capacity as trustee of the aforesaid N Georgiou Trust.



- 5.9 Sixteenth Respondent is Joseph Reynolds Chemaly N.O, an adult male of 48 Waverley Road, Bloemfontein, Free State in his capacity as trustee of the aforesaid N Georgiou Trust.
- 5.10 Seventeenth Respondent is George Nicolas Georgiou (ID number 720806 5041 008) an adult businessman (and the second son of First Respondent) with place of business at 96 Raymond Mhlaba Street (Andries Pretorius Street), Naval Hill, Bloemfontein, Free State and residing at 25 Dean Lane, Bloemfontein.
- 5.11 Eighteenth Respondent is Michael Nicolas Georgiou (ID number 700118 5062 008) an adult businessman (and the eldest son of First Respondent) with place of business at 96 Raymond Mhlaba Street, Naval Hill, Bloemfontein, Free State and residing at 11 Webb Street, Bloemfontein.
- 5.12 Nineteenth Respondent is Hendrik Jacobus ("Rikus") Myburgh (ID number 651210 5041 089), an adult businessman residing at 240 Milner Road, Waterkloof, Pretoria, Gauteng (previously from Papenfus Road, Beaulieu Estate, Midrand).
- 5.13 Twentieth Respondent is Bosman & Visser (Pty) Ltd, a company with limited liability duly incorporated in terms of the Companies Act of South Africa having its registered address at 875 Schoeman Street, Arcadia, Pretoria.
- 5.14 Twenty-first Respondent is Pickvest (Pty) Ltd - formerly known as PIC Syndications (Pty) Ltd - a company with limited liability duly incorporated in terms of the Companies Act of South Africa having its registered address at 875 Schoeman Street, Arcadia, Pretoria.
- 5.15 Twenty-second Respondent is Heinrich Pieter Moller (ID number 740215 5089 080), an adult male whose present occupation is unknown to me of 638 Jacqueline Drive, Garsfontein, Pretoria.

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- 5.16 Twenty-third Respondent is Willem Morkel Steyn (ID number 580611 5128 089), a major male whose present occupation is unknown to me of 2 Kommandant Senekal Street, Dan Pienaar, Bloemfontein.
- 5.17 Twenty-fourth Respondent is Barend Stefanus van der Linde (ID number 710309 5010 082), a major male whose present occupation is unknown to me of 143 Abercrombie Street, Pretoria North, Gauteng.
- 5.18 Twenty-fifth Respondent is Frederick Julius Reichel (ID number 770915 5041 089) an adult male whose present occupation is unknown to me residing at 38 Bantry Road, Bryanston, Johannesburg, Gauteng and current place of business Baynhill Building, Gold Park, 32 Roos Street, Fourways, Gauteng;
- 5.19 Twenty-sixth Respondent is Eugene Kruger Inc., a company with limited liability duly incorporated in terms of the Companies Act of South Africa having its place of business at 875 Francis Baard Street, Pretoria (previously at 875 Schoeman Street, Arcadia, Pretoria).
- 5.20 Twenty-seventh Respondent is the Companies and Intellectual Property Commission of South Africa (CIPC).

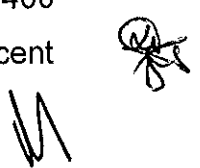
RELIEF SOUGHT:

6. This is an application in terms of Rule 42 (1) (a), *alternatively* under the common law, for the rescission of the order granted by this Honourable Court under case number 42334/2014 on 26 November 2014 in the *ex parte* application. A copy of the order is annexed hereto marked **Annexure "RA1."**
7. In the alternative, leave is sought to appeal against the whole of the order, including the order for costs.
8. As more fully explained hereunder, my co-applicants and I were, until recently, not aware of the said application or the granting of the order.

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BACKGROUND FACTS

9. My co-applicants and I are investors (shareholders) in one or more of the Highveld companies.
10. The Highveld companies are public companies that were launched as property syndication companies. Investments were sought and raised from the public through share subscriptions with a stated purpose for the companies to acquire immovable property.
11. The schemes encountered financial difficulty, and the Highveld companies voluntarily placed themselves under business rescue.
12. Currently, there is an application pending in the Pretoria High Court under case number 80811/14 ("*the Pretoria application*") for leave to institute a class action on behalf of the investors in the Highveld companies against various entities involved in the Highveld companies and their subsequent demise.
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 - 13.1. In the Pretoria application leave is sought (amongst others by Third Applicant herein ("*Vlok*")) to institute a class action against various individuals in relation to the said failed investment scheme. The schemes are more commonly known as the "Pickvest" or "Highveld" syndications or investment schemes.
 - 13.2. A copy of the Pretoria application will be placed before the court when this application is moved and I request that, insofar as it may be appropriate, the contents of the founding affidavit of Vlok be read as if incorporated herein.
 - 13.3. I am informed that notices of intention to oppose have been filed, and that opposing affidavits are awaited.
 - 13.4. The intended class action is to be brought on behalf of some 12 400 shareholders who have invested in one or more of the more recent

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investment schemes, being Highveld 19 to 22. The total investments made in such companies were about R3,6 billion.

- 13.5. A further class action will be brought in relation to Highveld 15 – 18, in which companies more than a billion rand has also been invested. I am informed that my current attorneys of record, who are also the attorneys in the Pretoria application, are busy with the preparation of such application.
- 13.6. Prospectuses were registered for the Highveld companies in terms of the Companies Act of 1973. Each prospectus stated that the purpose was to raise capital to acquire immovable property which was identified in the particular prospectus. Many properties were alleged to have had already been acquired for such purpose. It was also stated that the funds raised would be applied to pay in full for the properties. The companies would acquire unencumbered ownership in the properties in the process. The properties are typically smaller type shopping centres located throughout the country.
- 13.7. Investors were to receive regular income from their investments from rental income received from the existing shopping centres.
- 13.8. The prospectuses intimated that the relevant purchase contracts were available for inspection. It later transpired that the seller of the properties (i.e. Zephan Properties (Pty) Ltd - "Zephan", who was not named as the seller in the prospectus) had never been the owner of many of these properties. Zephan is a company controlled by Nicolas Georgiou ("Georgiou" - the Twelfth Respondent herein and the First Respondent in the Pretoria application). Georgiou is also the Managing Director of First Respondent ("Orthotouch").
- 13.9. The prospectuses referred to the existence of "Head lease" agreements in terms whereof Zephan would lease the properties concerned from the particular Highveld company (by way of a so-called

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"lease back"). Zephan would then sublease to the existing tenants and so become or remain the landlord *vis-à-vis* the various lessees.

- 13.10. Each of the prospectuses of Highveld 21 and 22 referred to a so-called buy-back agreement in terms of which Georgiou himself, his company Zephan (then named "Zelpy") and the N Georgiou Trust undertook to buy back the shares after five years at the same price at which they were originally bought. These buy-backs were included as "assurance" to the investors that their money (investment) was safe.
14. The grounds for the claims to be instituted in the class actions, so I am advised, can be summarised as follows:
- 14.1 Claims based in contract against Georgiou, in terms of the so-called "buy-back agreements" referred to in the prospectuses of the Highveld companies. The five year period lapsed in August 2014.
- 14.2 Claims based in delict for fraudulent or negligent misrepresentations contained in the various prospectuses.
- 14.3 Claims based on delict under the common law for the fraudulent and/or reckless and/or negligent handling by the various directors and individuals concerned with the funds collected from the investors.
- 14.4 Claims under the various provisions of the Companies Act of 1973, and the Companies Act of 2008, for the personal liability of the individuals concerned based on their fraudulent and/or reckless conducting of the business of the investment schemes.
- 14.5 Claims based on statutory provisions which prohibit (and criminalise) the release of funds received from investors in property syndication schemes without simultaneously giving transfer of the property to the relevant investment vehicle.



15. Third and Twelfth to Twenty Sixth Respondents are all Respondents in the said Pretoria application.

BUSINESS RESCUE PROCEEDINGS:

16. Initially, investors received their monthly income as promised. However, the schemes soon started to experience financial difficulty and, progressively, monthly payment commitments to investors were not met.
17. During September 2011, the Highveld companies commenced business rescue proceedings. The Third Respondent was appointed as business rescue practitioner.
18. Copies of the relevant notice, resolution of directors and affidavit in terms of Section 129(3)(a) of the said Act in relation to Highveld 21 are attached hereto marked **Annexure "RA2."**
19. Not only the four abovementioned Highveld companies (19 to 22) were put under business rescue, but also a further four Highveld companies, namely Highveld Syndication 15 to 18. These companies had been "syndicated" to the public in a similar manner as Highveld 19 to 22. In the case of Highveld 15 to 18, the immovable properties referred to in those particular prospectuses had been transferred to the relevant Highveld companies, as opposed to in Highveld 19 to 22 where no properties had been transferred. For purposes of business rescue, all eight Highveld companies (15 to 22) were "lumped" together and rental income distributed amongst all investors.
20. A copy of the Business Rescue Plan of November 2011 is attached hereto marked **Annexure "RA3."** In essence, and as will be noted from its contents, the plan was that properties of Highveld 15 to 18 were to be transferred to Orthotouch. The affairs of Highveld 19 to 22, and also those of Highveld 15 to 18, were to be salvaged through or "in" Orthotouch, with reduced monthly payments to be made by Orthotouch to the Highveld companies, which in turn would make monthly payments to investors.

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SCHEME OF ARRANGEMENT UNDER SECTION 155:

21.

21.1 It appears from "DPC1" to the Founding Affidavit of First Respondent in the *ex parte* application that on 7 October 2014, a scheme of arrangement ("the scheme document") was signed by Georgiou on behalf of Orthotouch.

21.2 As the scheme document consists of over 100 pages a further copy will not be attached to this application. The scheme document is by now freely available on various websites (including the website of Orthotouch Ltd at www.orthotouch.co.za) and formed part of the *ex parte* application.

22. Before referring to the contents of the scheme document, I first deal with the meeting of 12 November 2014 at which the scheme document was purportedly adopted.

NOTICE OF THE MEETING OF 12 NOVEMBER 2014

23. As will be noted from the second page of the scheme document, notice had purportedly been given of a meeting on 12 November 2014 in Centurion at which voting was to take place in respect of the various alternatives available to investors in terms of the arrangement.

24. As to "notice" of the abovementioned meeting:

24.1 Second Applicant and I never received any prior notice of the meeting. I never received a copy of the scheme document from anyone at any stage (I refer to Second Applicant's confirmatory affidavit filed herewith). Until this day we have not, for example, received a notice from a post office or courier that a copy had been dispatched to me.

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- 24.2 Despite the fact that the Highveld companies (and therefore Klopper and also Orthotouch) must have had Second Applicant and my name and full details on record no one tried to contact us by any such means to inform us of the meeting or to send me a copy of the scheme document.
- 24.3 The majority of investors appeared not to have received a copy of the scheme document before the meeting of 12 November 2014.
- 24.4 Vlok (the Third Applicant herein and the First Applicant in the Pretoria application) also did not receive any prior notice from anyone about the meeting. The first few pages of the scheme document were attached as one of the last annexures to her founding affidavit in the Pretoria application. These pages formed part of the bundle of annexures which were presented to her to depose her affidavit. That was the first time she had seen these pages. She never saw the full document.
- 24.5 Had I received prior notice of the meeting, I would not have supported the scheme of arrangement (and still do not approve thereof).
- 24.6 None of Vlok's co-applicants in the Pretoria application voted in favour of the scheme document, whilst most of them had not received a copy of the scheme document from Orthotouch before the meeting.

THE MEETING OF 12 NOVEMBER 2014

25. Although none of the Applicants herein were present at the meeting of Wednesday 12 November 2014 in Irene, Pretoria, the below facts are confirmed in a confirmatory affidavit of two persons who were present at the said meeting, namely Mr Helgard Petrus Hancke ("Hancke") and Mr Hermanus Stephanus Lombaard ("Lombaard"):



26. The following occurred before and during the meeting:

- 26.1 Approximately 1,200 people – mostly elderly investors – attended the meeting. (The total number of shareholdings in Highveld 15 to 22 is about 23 837, consisting of 17 298 individual persons (investors).)
- 26.2 Soon after the commencement of the meeting, the chairman (the Sixth Respondent herein and the deponent to the founding affidavit used in the Orthotouch application) referred to the prominent and “heavy” contingent of security guards (in tracksuits and dark glasses) and said that anyone who acts out of order will be removed from the premises.
- 26.3 Cohen opened the meeting without initially introducing any of the other “panel” members next to him on the stage of the hall. He introduced them after requests from the floor to do so. Various people from the floor voiced their disapproval of the fact that no one was there as representative of Orthotouch (or Klopper) or any other entity involved in the syndication schemes.
- 26.4 No agenda was put forward for the meeting and no minutes were taken by anyone on the “panel” on the stage.
- 26.5 During the meeting, some panel members addressed the meeting by referring to the various options/alternatives to vote for.
- 26.6 Mr Michael Kyriakides, one of the panel members, informed the meeting that investors could obtain the advice of their advisers in order to consider the various options proposed in the scheme document. This was in response to comments from the floor that investors had too little time to consider, and obtain advice on, the lengthy scheme document with its difficult and complex contents.

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26.7 On two occasions Cohen was requested, with the support of the overwhelming majority of people present, to postpone the meeting and the voting. He ignored the requests. In this regard, I am informed as follows:

- (a) During the early stages of the meeting, some irate people from the floor asked Cohen where Klopper and Georgiou were, and why they were not present. When Cohen responded that he did not know the answer, the majority of people protested. Cohen then asked whether the meeting should be adjourned and the voting be postponed. About 90% of those present loudly conveyed their support for the suggestion.
- (b) Cohen, however, changed his mind and continued with the meeting. (The security contingent at some stage collected the microphones that had been distributed to the floor at an earlier stage).
- (c) The meeting proceeded noisily from then on.
- (d) On a later occasion, a Mr Dolf Lategan proposed that, given the new information about the three options presented by members of the panel that the voting process be stopped and the meeting be postponed, that the votes which had already been received be deemed void, and that a new date be set for voting.
- (e) Hancke then got up and informed Cohen that he (Hancke) formally proposed Lategan's suggestion as a motion to be voted on, upon which Cohen nodded his head in the direction of Hancke, acknowledging that he had heard what Hancke said. Upon this, again about 90% of the people present supported the motion.

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(f) Again, however, Cohen ignored the proposal and continued with the meeting.

26.8 As stated, a number of investors had voiced their concerns about voting on the scheme document, given that it comprised of more than 100 pages with complex and confusing information, without being afforded a reasonable opportunity to study the documents and obtain legal and financial advice.

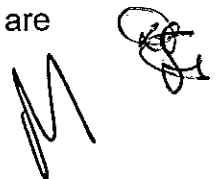
26.9 Before the meeting had commenced, Lombaard arrived with some 600 proxies to vote on their behalf. He was not allowed to register his proxies. A woman named "Natalie", who identified herself as the legal representative "of the meeting", informed Lombaard that he had to provide an affidavit that he had received the proxies from investors. After she confirmed to Lombaard that she was an attorney (and therefore a Commissioner of Oaths), Lombaard suggested that he would present a written statement to her for commissioning there and then. She refused to do so.

26.10 I am informed that the aforesaid "Natalie" is the same person, Natalie Lubbe ("Lubbe"), the attorney who acts on behalf of Orthotouch in the Pretoria application.

26.11 The meeting ended in chaos with some investors walking to the front of the hall and tearing up their ballots.

26.12 The motion referring to the scheme of arrangement (or any other motion) was never put forward by Cohen or anyone else to the meeting to vote on.

27. In his founding affidavit in the *ex parte* application, Cohen states that 2,914 votes were brought out in favour of the scheme of arrangement (and 155 against). Even if these figures were correct, the in favour votes constitute a very small percentage of the total number of investors (of which there are more than 23,000).



28. I am informed that most of those investors who did received the scheme document deliberately decided not to vote in favour of it and to rather abstain from voting.

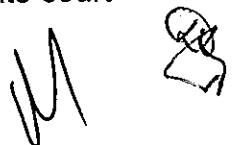
SEQUENCE OF EVENTS

29. The sequence of events since the Pretoria application was served on Orthotouch until the Court Order, sanctioning the Scheme of Arrangement, was obtained by Orthotouch, is as follows:

- 29.1 Orthotouch meeting to vote on the Scheme of Arrangement was on 12 November 2014;
- 29.2 The Pretoria application was served on Orthotouch on 18 November 2014 - see "Annexure"RA4."
- 29.3 Application to sanction the Scheme of Arrangement in this Honourable Court was issued on 20 November 2014;
- 29.4 Notice of Intention to Oppose the Pretoria application was served by Natalie Lubbe & Associates Attorneys (on behalf of Orthotouch) on 24 November 2014 (Annexure"RA5.").
- 29.5 The hearing of the sanctioning of the Scheme of Arrangement was on 26 November 2014.

GROUND FOR APPLICATION

30. Despite the fact that Orthotouch and its attorneys knew about the issued application by Vlok and her co-applicants in the Pretoria High Court to commence a class action (the applicant must have been aware that the scheme of arrangement sought to thwart the proposed class action by absolving the directors and others of all blame), it proceeded to bring its court

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application in this Honourable Court without any notice to Vlok or her (Pretoria) co-applicants or their legal representatives.

31. Orthotouch had a duty to inform the court of the pending application to institute a class action and, especially, the intended grounds upon which it is being brought – namely the alleged fraudulent and reckless dealings of the individuals concerned. (Certain clauses of the scheme document purport to thwart all claims in the intended class action.)
32. Contrary to the Scheme of Arrangement document which specifically defines “Court” [page 29 thereof] as Gauteng North Division (sic), Pretoria, the *ex parte* application was brought in the above Honourable Court, Johannesburg.
33. In view of the aforesaid, I submit that had the court been presented with the full picture and background facts, the order would not have been granted – and therefore stands to be set aside. Alternatively, the order is appealable on the grounds as set out in the accompanying notice of motion.
34. Furthermore, and in any event, I am advised that had the full contents of the scheme document been pointed out to the Court, especially those clauses referred to in the Notice of Motion hereto, the order would not and should not have been granted. Legal argument in this regard will also be presented at the hearing of this application.

CONDONATION FOR NON-COMPLIANCE WITH COURT RULES WITH REGARDS TO FORM AND SERVICE:

35. Substituted service on Highveld investors:

- 35.1. I am advised that notice of this application will be given to the Highveld investors by means of publication of an appropriate notice in the press (Sunday Times and Rapport newspapers).

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- 35.2. A copy of this application will also be made available on the website of the Highveld Syndication Action Group ("HSAG") – a voluntary group of investors who support and drive the intended class action – (www.hsaction.co.za) which website (address) has been widely publicised, amongst others in the press in reporting on the intended class action, as well as in the social media.
- 35.3. My co-Applicants and I (and the supporting investors) have no way to identify investors who voted in favour of the scheme of arrangement in order to give them notice of this application in a conventional manner. I submit that substituted service would be adequate notice in the circumstances. I request the court to sanction such manner of service and therefore condone the non-adherence of the court rules in that regard.
- 35.4. I am advised that, before the hearing of this application, an affidavit by my attorneys of record will be filed to confirm the publication and notice described above.
36. Form of Notice of Motion and time table for opposing papers:
- 36.1. I am advised that, due to the substituted service on investors as proposed and requested above, it is necessary to identify a date in advance for the hearing of this application (and to reflect same in the Notice of Motion and in notices to be published in the press) to enable the investors who wish to oppose this application to do so in the appropriate manner and to appear in court on that date.
- 36.2. I am advised that for that reason it is also prudent to set a time table in the Notice of Motion herein for the filing of opposing papers before the hearing.
37. Most of the Respondents in the Pretoria application are opposing that application and are formally represented therein by attorneys. With regard to service of this application on Respondents (herein) who are also opposing

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Respondents in the Pretoria application, a copy of this application will also be transmitted by email to the various firms of attorneys who have entered an appearance to defend on behalf of their said clients (with confirmation thereof to be provided at the hearing thereof). In this regard, the detail of the said attorneys representing the following Respondents, are as follows:

- 37.1. First Respondent (who is the Eighteenth Respondent in the Pretoria application) is represented by Natalie Lubbe & Associates from Block 2, Fancourt Office Park, cnr Northumberland & Felstead Avenue, Northriding , with email address natalie@natalielubbe.co.za.
- 37.2. Twelfth to Sixteenth Respondents (who are the First to the Fifth Respondents in the Pretoria application) are represented by Kyriacou Incorporated from 1st Floor, Fussel House, 48 Athol Oaklands Street, Melrose North, with email address legal@kincorporated.co.za.
- 37.3. Seventeenth and Eighteenth Respondents (who are the Sixth and Seventh Respondents in the Pretoria application) are represented in the Pretoria application by EG Cooper Majiedt Attorneys from 77 Kellner Street, Bloemfontein, with e-mail address riana@egc.co.za.
- 37.4. Nineteenth to Twenty-first Respondents (being the Eighth to Tenth Respondents in Pretoria) are represented by Rooth & Wessels Attorneys of Walker Creek Office Park, 2nd Floor, Walker Creek 2, Florence Ribeiro Street, Muckleneuk, Pretoria, with email address graemep@roothwessels.co.za.
- 37.5. Twenty-second Respondent (Eleventh Respondent in Pretoria) is represented by Gildenhuys Malatji Incorporated of GMI House, Harlequins Office Park, 164 Totius Street, Groenkloof, Pretoria with email address wckillers@gminc.co.za.
- 37.6. Twenty-third Respondent (Twelfth Respondent in Pretoria) is represented by Van Greunen & Associates Inc from 106 Panorama Road, Rooihuiskraal, Centurion.



37.7. Twenty-fourth Respondent (Thirteenth Respondent in Pretoria) is represented by Kyriacou Incorporated from 1st Floor, Fussel House, 48 Athol Oaklands Street, Melrose North, with email address legal@kincorporated.co.za.

37.8. Twenty-fifth and Twenty-sixth Respondents (being the Fourteenth and Fifteenth Respondents in the Pretoria application) are represented by Rooth & Wessels Attorneys of Walker Creek Office Park, 2nd Floor, Walker Creek 2, Florence Ribeiro Street, Muckleneuk, Pretoria, with email address graemep@roothwessels.co.za.

CONDONATION FOR LATE FILING OF THIS APPLICATION:

38. I am advised that a rescission application, whether brought in terms of Rule 42(1)(a) or under the common law, should be brought within a reasonable time. I respectfully submit that the application is indeed brought within a reasonable time period – especially given the facts stated above and below.
39. For purposes of the alternative application for leave to appeal (and if necessary for purposes of the rescission), I respectfully seek condonation for the late filing of this application for the reasons which follow.
40. As stated above, none of the investors received any notice of the *ex parte* application. My attorneys, who are also the attorneys of record for the Applicants in the Pretoria application (and the proposed class action), only became aware of the fact that some order was granted around late November 2014 (after investors had contacted them about it).
41. I am informed that my attorney of record was surprised by the news of the order being granted, given that the information that he had received about the meeting from Lombaard and others, was that no motion or decision on the scheme was taken at the meeting of 12 November 2014. I again refer to the supporting affidavits by Lombaard and Hancke, attached hereto.



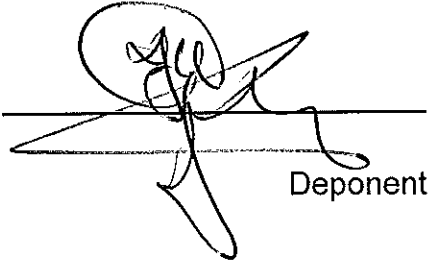
42. My attorneys thereupon emailed to Klopper, and also to Orthotouch, a request to provide them with a copy of the court application and details of the Court order. I attach hereto copies of the two emails dated 28 November and 5 December 2014 marked **Annexure“RA6.A”** and **Annexure“RA6.B”** respectively. Until date hereof, Orthotouch has ignored the request. Klopper replied by referring my attorneys to Orthotouch.
43. My attorneys initially attempted to obtain copies of the court papers from the registrar of the Pretoria High Court (being the court indicated in the Scheme of Arrangement document). This proved unsuccessful.
44. Shortly before my attorneys' offices closed for the festive season in December 2014, their Pretoria correspondents appointed correspondents in Johannesburg to seek and obtain the court papers from the Johannesburg Registrar.
45. Eventually, the Johannesburg correspondents managed to obtain the documents on 9 December 2014 and forwarded same to the Pretoria correspondents, who in turn sent it to my attorneys of record.
46. The offices of my attorneys of record closed for the festive season on 12 December 2014.
47. The attorney acting on behalf of the investors in the class action (being also my current attorney of record herein) returned to office on 19 January 2015, whereupon he immediately arranged a consultation with the advocates representing the investors in the class action, including senior counsel.
48. Junior counsel involved in the matter considered whether an approach to court for a rescission (or an appeal) was necessary, given the fact that the investors were not creditors of Orthotouch (Section 155 of the Act only envisioned a compromise between a company (Orthotouch) and its creditors).

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49. After further deliberation it was decided that an application for rescission and/or an appeal is the more prudent manner to deal with the existing order.
50. Information was also obtained from some investors who belong to the said HSAG and who attended the 12 November 2015 meeting on what precisely transpired at the meeting. They had been asked to provide statements of what transpired after telephonic consultations with them. All this, I am informed, took time.
51. I joined the HSAG on or about 1 December 2014.
52. 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. 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 Friday, the 13th of February 2015 by members of HSAG and confirmed my willingness to act as such. I became aware of the Court order which is sought to be rescinded during the aforesaid communication on 13 February 2015.

CONCLUSION

53. I respectfully submit that a proper case has been made out for the relief prayed for in the Notice of Motion to which this affidavit is annexed.


Deponent

I certify that the deponent has acknowledged that he/she knows and understands the contents of this affidavit which affidavit was signed and sworn to before me in my

presence at *Mossel Bay* on this *26TH* day of February **2015**, in accordance with Government Notice No. R1258 dated 21 July 1972, as amended by Government Notice No R1648 dated 19 August 1977, as further amended by Government Notice No. R1428 dated 11 July 1980, and by Government Notice No R774 of 23 April 1982.



COMMISSIONER OF OATHS

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Praktiserende Prokureur/Practising Attorney RSA

