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KANTOOR VAN DIE ADJUNK REGTER PRESIDENT
2018 -09- 13
PRETORIA
OFFICE OF THE DEPUTY JUDGE PRESIDENT

12 September 2018

Office of the Honourable Deputy Judge President AP Ledwaba
Gauteng Division, Pretoria
Pretoria

BY HAND

Dear Deputy Judge President Ledwaba

Re: **REQUEST FOR CASE MANAGEMENT:**
Matter: Vlok a.o. vs Georgiou and 21 others (case number 80811/2014 GP (*"the application"*) (related to 53020/18 GP)

1. We hereby respectfully wish to request that the above application – in which leave is sought to institute a class action – be urgently placed under case management in terms chapter 6.3 of the Practice Manual.

2. We act for the claimants (Applicants) in the intended class action. A recently issued interlocutory application has triggered this request for case management not only for such interlocutory application, but for the intended class action litigation which our clients wish to proceed with.

3. The reason for the request are as follows:

   - The complexity of the matter;
   - The expected duration thereof; and

- The delaying tactics deployed thus far by some Respondents in the class action litigation.

Background to this pending class action litigation:

4.

4.1 As far back as 31 October 2014, the "main application" under the above case number (80811/14) was issued, in which leave is sought to institute four separate but related class actions on behalf of about 9000 investors who have bought shares in one or more of four separate property syndication schemes.

4.2 These syndication schemes are known generally as the "Highveld syndication schemes" or also as the "Pickvest property schemes".

4.3 No opposing affidavits have yet been filed for the reasons stated later below.

4.4 From the issued court papers, it will be noted that the intended claims are against various directors and individuals involved in the said property syndication schemes based on, amongst others, alleged fraudulent and reckless dealings and misrepresentation. The main role player was First Respondent (*"Georgiou"*). More than R3,6 billion was invested by members of the public (the investors) in the syndication schemes.

(The said syndication schemes were conducted through four companies with related names, being "Highveld Syndication No 19 Ltd" to Highveld Syndication No 22 Ltd – which have in the meantime all been placed under Business Rescue).

4.5 The prospectuses in which members of the public were invited to invest in the property syndication Schemes all reflected that unencumbered immovable property, as identified therein, would be transferred to the investment vehicles (the Highveld companies). However, no such properties were transferred, as confirmed in the report of the business rescue practitioner. (This non-transfer of properties was adjudicated by the appeals tribunal of the Financial Services Board, to be a criminal act under the relevant statutory regime governing such public investment schemes).

4.6 To date, approximately 7000 investors have "joined" the class action by giving mandates to this firm and contributing money in support of the class action. This includes those investors in 4 more related property syndications - Highveld Syndication No 15 to No 18. We hold instructions to institute a further class action, which will be directed against essentially the same Defendants as those in the current class action.

4.7 The total number of investors in the (combined) eight (8) Highveld companies (No 15 – 22) is just over 18,300 – of which, as stated, about 7000 already have actively joined the intended class actions.

5. The Scheme of Arrangement:

5.1 One of the reasons why the class action litigation in this court is being delayed, is that a Scheme of Arrangement under section 155 of the Companies Act of 2008 ("*the Arrangement*") was proposed in November 2014. The terms of the Arrangement purport to thwart the class action claims by absolving all the syndication companies and individuals concerned from liability for the failed scheme.

5.2 The Arrangement was proposed after the eight Highveld companies (No 15 – 22) were earlier, in 2012, placed under Business Rescue. The business rescue plan ("*the Plan*") entailed that a new company, Orthotouch Ltd (the 18th Respondent), which is controlled by Georgiou, would acquire all properties and then assume some of the obligations, which were reduced, of the Highveld companies towards investors, albeit scaled down.

5.3 When Orthotouch Ltd did not meet its obligations under the Plan, the Scheme of Arrangement was proposed which further watered down the obligations towards investors.

6. Shortly after the issuing of the main application herein, Orthotouch obtained an *ex parte* order in the Johannesburg High court whereby the Arrangement was sanctioned under section 158(7) of the Companies Act of 2008.

7. In approaching the Johannesburg court *ex parte* for such sanctioning, Orthotouch not only failed to disclose to the court that the main application in this court was issued shortly before (in which allegations of serious misconduct on the part of the various individuals and entities are made), but it failed to disclose that the Arrangement purports to absolve all such persons from liability. In addition, the Johannesburg court was approached for the sanctioning, despite the Arrangement document reflecting that the Pretoria High court (hereinafter "*this court*") is the one to be approached.

8. With regard to the application to set aside the Arrangement – and the delays thereto, I mention the following:

8.1 Given the circumstances under which the order for the sanctioning was obtained, and given the fact that the Arrangement purports to absolve all entities and individuals from liability, it was decided to first apply to set aside the order by which it was sanctioned, alternatively for leave to appeal against such sanctioning.

8.2 Therefore such application – to which I shall refer to as "*the setting aside application*" – was issued in March 2015 in the Johannesburg court by like-minded investors who support the class action. They (and their co-applicants) are all members of the Highveld Syndication Action Group

("HSAG") – a voluntary group of investors who support and drive the intended class action litigation.

8.3 At that stage, it was envisaged that such setting aside application could be finalised within a few months, which contributed to the decision to first try and set aside the Arrangement before continuing with the main application in this court.

8.4 No opposing affidavits have however been filed in the setting aside application due to the opportunistic and even *male fide* stratagems employed by Georgiou to frustrate and delay it. In two separate interlocutory judgments (one in this court and one in Johannesburg High court) it was held that ploys by Georgiou executed in both courts amount to "*an abuse of the court process*", which is referred to in the issued interlocutory application.

8.5 These delaying tactics are set out in the last few paragraphs of the founding affidavit to the recently issued interlocutory application referred to below, which I respectfully request be considered in so far as may be regarded as relevant (which we submit is the case) for purposes of the decision whether or not to place the matter under case management.

8.6 From such paragraphs it will be noted that such delays involved, amongst others, the following:

Ill-founded claims of irregularities (and unsuccessful court applications to set them aside); the applying for leave to appeal against such dismissals and, subsequently, the petitioning of the SCA (and the withdrawal of such petition in the case of another Respondent (Klopper); conspiring with some applicants in the class action litigation (in both said courts) to pay them undisclosed amount of money in return for them "withdrawing", the litigation; then, after such irregular withdrawals have been successfully set aside on behalf of investors, Georgiou appealed but, on the day of the hearing before the SCA, withdrew such appeal and tendered cost on a punitive scale as between attorney and client.

8.7 These delaying tactics, as expected, are already employed in this court, as described below. This is in keeping with the overall strategy by Georgiou and others to frustrate and delay matters as much as possible.

<u>The recent interlocutory application to fast track the buy-back claims:</u>

9. Amongst the various grounds for the claims in the proposed class action, and as set out in the founding papers of the main application, are claims based on the so-called buyback agreements in terms of which Georgiou and some others undertook to buy back the shares from investors, after five years, at the same price at which they were sold to investors. These buyback agreements were

entered into with all investors that invested in Highveld 21 and 22, which involve a few thousand investors.

10. As stated above, it was initially decided by the legal team of the Applicants to first set aside the Arrangement before continuing with the issued main application in this court. At the time, it was intended to bring the class action to trial in respect of "all grounds" in one action even though the claims based on the buyback agreements are claims which are independent from the other claims (which are based on misrepresentation, fraud and non-transfer of properties).

11. Given this initial approach, an earlier application brought by Georgiou was not opposed where he sought (and obtained) an order in this court that he is excused from filing opposing papers in the main application pending the set aside of the Arrangement in the Johannesburg court. The varying of this order is part of the relief which is currently sought (part A of the interlocutory application). There are various grounds set out in the papers why the conditions under which the order was granted do no longer apply.

12. In a recent unreported judgement relating to a buyback claim by another investor – in the case of Zephan Properties (Second Respondent in the current main application] vs Noormahomed (case 26036/17 in this court) – it was held by the honourable Swanepoel AJ that the said Arrangement does *not* preclude a claim under the buyback agreements.

13. Also the Supreme Court of Appeal has upheld another judgement by the the honourable Hiemstra J in the case of De Lange vs Zephan Properties e.a. (case number 82322/14 in this court), the reasoning of which Swanepoel AJ followed, where the court also granted the claim of an investor based on a buyback agreement.

14. These judgements are referred to and attached to the founding papers of the recently issued interlocutory application.

<u>The recently issued (interlocutory) application:</u>

15. Given the aforementioned judgements, and given the frustration in the delay in the class action litigation, it was decided to approach this court to "fast track" the class action in relation to the buyback agreements.

16. Therefore our clients issued an interlocutory application on 26 July 2018 seeking the leave to proceed, for now, with "part of" the intended class action, i.e. the claims in relation to the buyback agreements (this is the interlocutory application referred to earlier above). As part of the relief sought in that regard (i.e. under part A of the Notice of Motion), and as an initial step, it is sought to vary the order whereby Georgiou is excused from filing opposing papers pending the setting aside application, so as to now oblige him to file opposing papers in relation to the seeking of an order which will grant applicants leave to proceed with the class action based on the buyback agreements.

17. I mention, in passing, that this Interlocutory application was, due to a misunderstanding with our correspondents in Pretoria, by mistake issued under a separate case number, i.e. 53020/18 (instead of the main applications case number being 80811/14). The Respondents who are opposing the interlocutory relief have been informed of this error.

18.

18.1 As stated, delaying tactics have already been employed on behalf of Georgiou. To date, no opposing affidavit to any the relief sought has been filed. Instead, a rule 7(1) Notice have been filed challenging my firm's authority to act on behalf of certain Applicants.

18.2 In addition, formal objection to the current procedure is being made by means of the filing of notices in terms of rule 6(5)(d)(iii) whereby complaints are raised that the grounds for the relief sought under Part A and Part B overlap (which overlapping, we submit, is inevitable).

18.2 I attach hereto marked "A" – "B" recent correspondence exchanged between this firm and the firm representing Georgiou and the other Respondents who oppose the said interlocutory application (i.e. Frist to Fifth Respondents).

19. As a further relevant consideration, I point out that we (and our counsel) are situated in the Western Cape, making it expensive and impractical to travel to Pretoria frequently for postponements or other unnecessary interlocutory skirmishes created by the Respondents. A Judge managing the process is likely to obviate unnecessary travels and appearances.

20. The majority of the 18,300 investors are elderly pensioners, many who invested all their funds/their livelihood in the HS companies and left with limited or even no funds. Further delay in concluding any litigation on their behalf is highly inconvenient and not in the interest of justice.

21. Given that the claims on the strength of the buybacks are only sought against the 1st to 5th Respondent, it is only such parties that are opposing the current interlocutory application.

22. This letter will nevertheless also be forwarded to the legal representatives of all Respondents.

23. We look forward to hearing from you at your earliest convenience.

Yours faithfully
THERON & PARTNERS

PER:
J FURSTENBERG

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