



\*AFRIKAANS HIERBO\*

**MONTHLY NEWSLETTER: AUGUST 8.1 2023**

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**The obligation to keep us up to date with any inaccurate information or of any changes to your personal and/or contact details as well as to make sure that the contents of your monthly statements are correct rests on you as HSAG member.**

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## 1 **INTRODUCTION**

In this newsletter, we highlight significant recent events and examine the events shaping the current state of affairs. Firstly, it is important to note that we have two hearings scheduled for this year, namely during October and in the fourth quarter, with a pending court date.

Considering that there are many members who have not yet paid their Special Trial Levy (STL), we earnestly appeal to members to encourage settling their trial levies promptly to ensure the best possible legal representation in court.

The HSAG and its legal team remain optimistic about the merits and continue tirelessly to bring the cases to trial. If successful, this would have substantial implications for those who have participated.

Regarding the Liquidation Application, the HSAG confirms that progress is being made with the case. The documents have been served and distributed to all Respondents. Jacques du Toit, along with Zephan and Orthotouch, has indicated his intention to oppose the Liquidation application but has not yet provided affidavits. Contrary to expectations, the Georgiou brothers, who only received the documents for informational purposes, have also opposed the liquidation application.

Du Toit has served us with a customary Rule 30(2) notice of irregularity, to which we responded, resulting in the withdrawal of the aforementioned notice.

The HSAG is determined to maintain the procedural integrity of the cases and continues to safeguard members' rights within the bounds of the law. Our legal team remains focused on effectively addressing these matters and ensuring the progression of our case.

When the CCAF legal team appeared before Judge Tolmay at the Pretoria High Court during a hearing, it was in response to an application by the opposing party disputing the inclusion of HS21B investors in the broader CCAF class action.

Although we expected the ruling within three months, we have been informed that the process might take a bit longer. Rest assured, we remain committed to keeping you updated and are optimistic that the matter will be thoroughly considered and decided upon.

Judge Tolmay issued a directive for the Court to be approached for a date in the fourth term for the hearing of the main application in CCAF. This is very encouraging news, and we now urge everyone to join forces in the continuation and resolution of the case.

As for recent developments involving Jacques du Toit, the business rescue practitioner of Zephan and Orthotouch, clarification is needed. Despite the so-called "approved business rescue plan" promising a payout to creditors, Mr. du Toit has opted not to honour the agreed "5c settlement" for investors who wanted to take that option. As on a previous occasion, he once again referred to "pending litigation" as his reason for purported inability to pay. Du Toit previously employed such tactics when a so-called declaratory order, ultimately resulting in a damning decision against him as BRP, was used.

The HSAG firmly believes that this deliberate refusal to honour the agreed settlement or be transparent is, in reality, a premeditated tactic to undermine the progress of his plan.

Du Toit has not adequately addressed the pending liquidation application, depriving concerned investors and creditors of an accurate understanding of the current state of affairs.

We also believe it is necessary to shed light on the ethical responsibilities of actions taken by a business rescue practitioner in South Africa. These responsibilities involve acting in the best interest of the company and its stakeholders, including prioritizing the company's success, stakeholders' rights, providing transparent information, maintaining impartiality, maximising returns, exercising reasonable care and skill, and ensuring transparent and effective communication.

While circumstances may play a role, the business rescue practitioner plays a pivotal role in handling the complexities of insolvency while upholding ethical standards and fulfilling duties toward the company and its stakeholders.

In conclusion, we emphasise the diverse interests at play within the context of a business rescue process in South Africa.

## **2 PROGRESS IN THE DECA CASE**

**MEMBERS ARE ADVISED THAT WE HAVE A HEARING UPON US AND REQUEST ALL OF OUR URGENT ATTENTION AND COOPERATION TO GET THEIR OUTSTANDING REQUISITIONS UP TO DATE.**

The upcoming hearing of the Rule 30 matter in the Funding Application is scheduled for 27 October 2023, in the Pretoria High Court.

While the opposing parties often pretends to be in a hurry to expedite the hearing of this case, ironically, they are the parties who have caused delays. By not timely providing their Heads of Argument to our legal team, the process and applicants are prejudiced.

Unfortunately, this is not an isolated incident. In the Transfer Application, where opposition to our Application for the Setting Aside of the Section 155 Scheme of Arrangement is requested, one of the Respondents similarly ignored the prescribed timelines, despite a specific request to comply. This non-compliance was attributed by them to the High Court's "vacation period" (recess), despite prior undertakings during a case management meeting.

Despite the lack of timelines by the opposing party, the HSAG instructed our correspondents in Johannesburg to proceed and apply for a date in the case. They did so, and we await confirmation from the court regarding the date on which the case will be heard. (The opposing party also, as anticipated, objected to the format of the roll filing, to which our correspondents immediately responded that it was done in accordance with the standard format.)

As stated, we are on track in this matter, and we are currently getting ready for the hearing of the matter.

### **3 LIQUIDATION APPLICATION**

The HSAG also wishes to inform members about developments in the Liquidation Applications that have been initiated against both Orthotouch and Zephan. Due to the large number of interested parties, the process has been delayed, but we are in the process of physically serving all the documents on the last nominal Respondent. The Respondents have already received the documents electronically.

Jacques du Toit, as well as both Georgiou brothers, have indicated their intention to oppose the application. However, Mr. Hans Klopper has confirmed that he does not oppose the case and has expressed that he abides by the court's decision.

As the case progresses, the HSAG will announce the appropriate liquidator, and proxy forms will be sent to members. These forms will enable our legal team to appoint a liquidator and/or proceed with the submission of claims, aligning our claims with the proceedings.

As reported earlier, only Mr. Jacques du Toit, in his capacity as BRP, along with Zephan and Orthotouch, has indicated an intention to oppose the Liquidation application. The former served a Rule 30(2) on the HSAG's legal team but subsequently withdrew it.

Over time, we have received inquiries about what a Rule 30 application entails. Rule 30(2) is a legal process that allows one party to object when they believe that the opponent has not properly followed the court rules. In this case, Rule 30(2) refers to our founding affidavit. The HSAG has become accustomed to Respondents using various delay tactics. Multiple Rule 30 notices and applications have been filed over the years. In one instance, the HSAG successfully opposed the R30 application and obtained a cost order from the Court of Appeal.

It is not known if this was done on legal advice, but for the HSAG, it appears that the message is clear that the Georgiou brothers, at almost any cost, want to protect the Georgiou Family's interests in order to avoid probing insolvency inquiries. Initially, they attempted to pretend that they had no knowledge or involvement in their father's affairs, and it will be interesting to see their defenses (other than the usual technical ones).

#### **4 PROGRESS IN THE CCAF CASE**

**MEMBERS ARE ALSO ADVISED THAT WE HAVE A HEARING UPON US AND REQUEST ALL OF OUR URGENT ATTENTION AND COOPERATION TO GET THEIR OUTSTANDING REQUISITIONS UP TO DATE.**

The CCAF legal team appeared before Judge Tolmay in the Pretoria High Court in May. The focus of this appearance was an application by the opposing party challenging the inclusion of HS21B investors in the broader CCAF class action.

Until now, the mentioned investors were included by everyone, including Georgiou, Klopper, Cohen, etc. However, the Court will have to decide on the importance of this inclusion. The ruling will determine whether HS21B investors will remain a separate group or whether their interests will be included in those of the broader CCAF class action.

The Judge's office confirmed that unfortunately, the ruling cannot be delivered within the expected three-month period, but everyone has been assured that they are diligently working to provide a well-considered decision, and we expect to hear from them soon.

We have also received a directive from the Judge that a date can be requested in the fourth term of 2023 for the hearing of the main application in the CCAF!

This is, of course, very good news as well. The senior and junior advocates of the Georgiou Estate indicated that they have not yet received instructions from the attorneys of the executor, Mr. Luke Saffy, of the late Nic Georgiou. These are the same

advocates who represent Jacques du Toit, the BRP of Zephan, as well as the Georgiou trust.

In practice, the legal representatives will usually not act when they do not have coverage (funds) to do so, or when there are certain ethical issues at play, but we are not certain about the case here.

## **5 RESPONSE TO BRP JACQUES DU TOIT**

Earlier this year, a significant step was taken by Du Toit when his so-called business rescue plan was 'approved'. Part of this plan included an approved payout of 5 cents in the Rand to every investor who had submitted a 'valid' claim against the companies. (Refer to our April 2023 Newsletter for a summary of the creditors' meeting).

Regrettably, we need to inform everyone once again that Mr. Jacques du Toit, once again, is not acting as he promised and is now taking the same stance of citing pending litigation for his refusal to honour the 'agreed settlement' to such investors. As expected, he claims that no claims will be paid while there is pending litigation against him. But was the implementation of a valid business rescue plan really obstructed by unrelated matters as claimed by Du Toit?

We have little doubt that this 'refusal' to honour the agreed settlement is merely a delay tactic to undermine his own purported "claim" made so far, and not, as explained by him. He fails to be transparent and fails to precisely communicate to creditors in his latest newsletter what the actual reason for his decision is.

Much worse, however, those who accepted his agreement will likely be disappointed later if the companies go into liquidation, because if they settled for 5 cents in the rand, a liquidator will pay only a fraction of their 5c claims, if any, from the proceeds.

Those who settled with Du Toit or with Helgard Hancke must therefore be cautious and seek independent legal advice to cancel this settlement before it's too late. The simple question is: Why would a BRP accept a rescue plan when he knew or should have known he couldn't perform in terms of it?

Du Toit's latest report fails to substantially address the liquidation application against his companies and therefore does not give those investors and creditors who carefully examine the content of the practitioner's reports an accurate picture of the current state of affairs in which the companies currently find themselves.

Not only that, but Du Toit once again assumes the role of judge in his own case, first pretending that settlement claims will be paid to creditors, and then deciding that they won't be paid anymore. This, even after liquidation applications have been filed. He has already received the liquidation documents and apparently decided that it will not be successful?

This consequently raises valid questions from the HSAG about the transparency and conduct of the practitioners as well as the relevant respondents. The HSAG will continue to pursue the interests of its members and will persist in fighting for their rights.

## **6 ETHICAL DUTIES AND RESPONSIBILITIES OF A BUSINESS RESCUE PRACTITIONER**

In South Africa, a business rescue practitioner has several ethical responsibilities to act in the best interests of the company and its stakeholders. In the case of insolvent companies in dire situations, their responsibilities include *inter alia*:

- **Duty of Trust (Fiduciary Duty):** The practitioner must act honestly, in good faith, and in the best interest of the company, with the aim of promoting the company's success and the rights of stakeholders.
- **Transparency is Essential:** The practitioner must provide clear and accurate information to all stakeholders, maintaining transparency in decisions and actions throughout the rescue process.
- **Neutrality is Key:** A business rescue practitioner must remain impartial, avoid conflicts of interest, and make objective decisions without favoring any specific stakeholder group. If a company is insolvent, the practitioner must act in the best

interests of stakeholders, even if it means recommending liquidation as the best or only option.

- **Exercise Reasonable Care:** Practitioners are required to exercise reasonable care, skill, and transparency while carrying out their responsibilities. Sustainability is also a factor to be considered. They must consider the long-term sustainability of the company if possible, and explore options that can lead to its rescue and ongoing success, which is seemingly impossible in the case of Orthotouch and Zephan.
- **Communication:** Creditors, employees, shareholders, and other stakeholders are entitled to regular and effective communication to maintain trust and manage expectations.
- **Compliance with Legislation is Paramount:** The practitioner must comply with the requirements set out in the Companies Act and other relevant laws that regulate business rescue procedures.
- **Limiting Harm:** If insolvency is unavoidable, the practitioner must actively work to limit harm to employees, creditors, and other stakeholders.
- **Finally, a practitioner needs an Exit Strategy:** If rescue efforts fail, the practitioner must facilitate an orderly exit process that ensures assets are distributed fairly and in accordance with the law, which in this case is liquidation.

It's important to note that specific ethical and legal responsibilities are explicitly based on the circumstances of the case. The business rescue practitioner plays a critical role in navigating the companies while maintaining ethical standards and fulfilling their duties to the company and its stakeholders.

## **7 HOT OFF THE PRESS**

Recently, news emerged that 26 properties owned by the Michael Georgiou Family Trust will be auctioned in Bloemfontein in August 2023. The combined value of the properties set to be auctioned is reportedly R700 million. It appears that the Trust has managed to accumulate millions in debt, with the Mangaung Metro alone owing more than R100 million.

## **8 IMPORTANT: USE OF CORRECT ACCOUNT NUMBERS AND REFERENCES**

**Members are reminded to note the reference numbers as contained on their statements.** Requisitions must be paid by members into the correct accounts with the correct reference number attached. The time, effort and administration it costs the HSAG's legal team to correct any erroneous payment leads to the HSAG case becoming unnecessarily expensive.

**Account numbers and references are affixed to each statement and we request that members please review their statements carefully when making payments.**

**If you have paid your amount into an incorrect account, send an e-mail with a request to transfer the amount to the correct account, and remember to attach your proof of payment to the email.**

If you paid the amount into e.g. CCAF Trust Account 3, but the amount was intended for your HSAG Trust Account 2, or vice versa.

Payments made incorrectly in CCAF, send email to [admin@ccaf.co.za](mailto:admin@ccaf.co.za).

Payments incorrectly paid in HSAG, send email to [hsactiongroup@gmail.com](mailto:hsactiongroup@gmail.com)

## **9 GENERAL ENQUIRIES**

A query we often get is regarding the transfer of shares, after the death of a loved one. We would like to remind everyone that this is done by Orthotouch. It is the company that handles the transfer of the shares and it is only after we have received a document, issued by them, indicating that the shares have been transferred in a new name, that we can change it on our system. We are also aware of the fact that it is in Business Rescue - however, this should have no impact on their work performance and we ask that everyone contact them on this email: [admin@orthotouch.co.za](mailto:admin@orthotouch.co.za).

Over the years, some people's claims have increased to an amount greater than the initial investments invested in the Highveld Syndication, due to the fact that, among other things, they inherited investments from their parents. Members must make sure that they provide documents and certificates that prove the transfer, as they will eventually be needed to prove the increased claim amount. At this stage we accept people's value of their investment based on their written evidence.

Finally, please note that if no payments have been made by you over a long period of time, it is possible that previous trust requisitions and payments may not be reflected on the statement.

## 10 **IMPORTANT: USE OF THE CORRECT EMAIL ADDRESSES!**

The correct use of e-mail addresses (as stipulated on our website and e-mails) as well as HSAG members' initials and surnames, syndication numbers and reference numbers (e.g. identity number, etc.) for all communications are essential and obligatory. Failure to comply herewith may lead to unnecessary delays or any reply at all.

The official and existing e-mail addresses for the HSAG are as follows:

- **hsactiongroup@gmail.com** for all General Enquiries; (For Example - to change contact details, Proof of Payments, Death of a Member, payments erroneously paid into HSAG Trust Account 2, incorrect references etc.);
- **hsagenquiries@gmail.com** for Specific Enquiries; (For Example requesting information/statements regarding a specific member, exemption queries for a specific member);
- **hsagregister@gmail.com** for the registration and deregistration of HSAG members, as well as notice of members who have died;
- **hsagwhistle@gmail.com** for all Confidential Information that you would like to send to us anonymously;
- **hsagstates@gmail.com** for all estate related questions.

The official and existing e-mail addresses for CCAF (HS 21 & 22 certified class action) are as follows:

- [accounts@ccaf.co.za](mailto:accounts@ccaf.co.za) for proof of payments, incorrect references on proof of payments
- [admin@ccaf.co.za](mailto:admin@ccaf.co.za) for the official request to pay registration fees over 6 months form, payments erroneously made to CCAF Trust Account 3, as well as deregistering from CCAF;
- [enquiries@ccaf.co.za](mailto:enquiries@ccaf.co.za) for statements not received and all other CCAF questions and enquires

If an investor or any person sends an email to the wrong address, it will result in the email not receiving the speedy or necessary attention, if any. If you do not wish to receive any further emails, please inform us thereof in writing.

## **11 IMPORTANT GENERAL TERMS AND CONDITIONS**

**The general and repetitive terms, conditions and other general information that was previously contained in the Newsletter, is now available on the HSAG website at [www.hsaction.co.za](http://www.hsaction.co.za) and can directly be accessed via the following link: <http://hsaction.co.za/wp-content/uploads/2020/01/HSAGTsCs.pdf>**

The HSAG Steering Committee wishes prosperity and success to each and every member for the foreseeable future.

**Kind regards**

**HSAG Steering Committee**

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