

SOUTH AFRICA / JUDGMENT

Geldenhuis and Others v Orthotouch Limited and Others (42334/2014)

[2025] ZAGPJHC 743 (24 July 2025)

[2025] ZAGPJHC 743

COURT

South Gauteng High Court, Johannesburg

BEFORE

N.P. Mali

CASE / FILE NUMBER

42334/2014

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE

NO: 42334/2014

DOH:

7 and 8 November 2024

DATE

OF FINAL HEADS: 24 January 2025 (Reserved)

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

In

the matter between:

JURIE
JOHANNES GELDENHUYS
First Applicant
ARTHUR
BRADY COCHRANE
Second Applicant
SHARON
ANN VLOK
Third Applicant
BRIAN
JOHN WAXHAM
Fourth Applicant
CHRIS
NEL
Fifth Applicant
HYMIE
PINSHAW
Sixth Applicant
FRANCOIS
STRAUSS
Seventh Applicant
LEA MAGDALENA
MEYER
Eighth 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
GEORGIOU
Twelfth Respondent
ZEPHAN
PROPERTIES (PTY) LTD
Thirteenth Respondent
NICO
LAS GEORGIOU N.O.
Fourteenth Respondent
MAUREEN
LYNETTE GEORGIOU N.O.
Fifteenth Respondent
JOSEPH
CHEMALY N.O.
Sixteenth Respondent
GEORGE
NICOLAS GEORGIOU
Seventeenth Respondent
MICHAEL
NICOLAS GEORGIOU
Eighteenth Respondent
HENDRIK
JACOBI-IS 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
Twenty-seventh
PROPERTY
COMMISSION OF SOUTH AFRICA (CFC)
THE
HIGHVELD SYNDICATION INVESTORS Respondent
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")
This
Judgment was handed down electronically and by circulation to the
parties' legal representatives by way of email and
shall be
uploaded on Caselines. The date for hand down is deemed to be on 24
July 2025.

JUDGMENT

MALI J

- [1] This is an application in terms of Rule 42 (1), alternatively the common law, for the rescission or setting aside of an order sanctioning the scheme of arrangement granted by Moshidi J on 26 November 2014. A further prayer pertaining to leave to appeal was abandoned by the applicants at the hearing of this application. This case has a protracted history involving numerous role players, who have instituted parallel and/or other cases based on the same facts of this application.
- [2] The applicants are some of the investors and /or shareholders in the fourth to eleventh respondents (Highveld Companies). Highveld companies are public companies that were launched as property syndication companies for purposes of raising funds through public share subscriptions. The funds were to be utilized to acquire immovable property in the form of small shopping centers situated throughout the country. The investors would benefit from the proceeds out of the rental of the properties.

- [3] The application is opposed by the first respondent, the twelfth respondent, Mr Niculus Georgiou (who died in 2022), the thirteenth respondent and fourteenth to sixteenth respondents (the respondents).
- [4] The first respondent is Orthotouch (Pty) Ltd, a public company registered in terms of the Company Laws of the Republic. The twelfth respondent (who is now deceased) was the shareholder in the first respondent. The thirteenth respondent is Zephan (Pty) Ltd, a public company registered in terms of the Company Laws of the Republic. The fourteenth to sixteenth respondents are the trustees of the deceased trust, N Georgiou Trust.
- [5] It is not in dispute that the twelfth respondent controlled the first and thirteenth respondent; as well as the NAG Trust and the company called Accelerate Property Fund (Accelerate), not cited in these proceedings. Some of the disputed issues relate to the role played by Accelerate.
- [6] The investment commenced with an amount of R4,6 billion. Some properties were bought and the investors who were to receive regular income from their investments from the proceeds of rentals from the existing shopping centers. Some properties were purchased from the thirteenth respondent. Initially some investors received their monthly income but as time elapsed monthly payment commitments to investors were not met.
- [7] The fundraising scheme encountered financial difficulties. During September 2011, the Highveld companies commenced business rescue proceedings. Mr Hans Klopper, the third respondent, was appointed as a business rescue practitioner.
- [8] The business rescue plan entailed the offer from Orthotouch to buy all the properties referred to as Highveld 15-18 as well those that were supposed to be transferred to Highveld 19-22. The thirteenth respondent, Zephan, was supposed to procure certain properties which were to be transferred to Orthotouch. Those were the properties which were initially identified for purchase by Highveld companies. Orthotouch was tasked to transfer the properties and grow the property portfolio of Highveld companies. Orthotouch was supposed to pay reduced monthly payments to Highveld companies, who in turn would make payments to the investors.
- [9] The Highveld companies sold the properties to Orthotouch who would after five years pay the purchase price to the Highveld companies. The intention was that the investors were to get back the full value of their investment after five years.
- [10] On 7 October 2014, the 12th respondent, (deceased) signed the scheme of arrangement (the scheme) on behalf of Orthotouch. On 12 November 2014, a meeting was held with investors to sanction the scheme of arrangement which was later granted on Ex Parte basis on 26 November 2014.

- [11] On 3 March 2015, the applicants instituted this rescission application. The grounds for rescission were that material facts were not disclosed to the Court [in Ex Parte Application] and to the investors.
- [12] It is common cause that Orthotouch ceased making payments during November 2018. On 7 and 14 November 2019, Orthotouch and Zephan were placed in business rescue proceedings by the directors' resolutions. Mr Jacqui Du Toit was appointed as Orthotouch's business rescue practitioner. On 23 March 2023 the business rescue plan for both Orthotouch and Zephan was published. On 31 March 2023, both business plans were adopted.
- [13] On 1 July 2024, the applicants filed a notice of intention to amend and on 26 August 2024, filed an amended notice of motion. I allowed for the hearing of both the application for rescission and amendment. I first deal with the application to amend.

Proposed amendment

- [14] The notice of intention to amend dated 1 July 2024 reads as follows:

“By renumbering the current paragraph

2.1. (b) as para “(b) (i)”

2.2. By inserting the following paragraphs

- (b) (ii) and (b) (iii) immediately below the aforementioned newly numbered paragraph (b) (i):

“(b) (ii) That it be declared that the setting aside of the said court order has the effect of also setting aside and/ nullifying the Scheme of Arrangement in respect of Orthotouch Ltd referred to in the said court order.”

- (b) (iii) In the alternative to paragraph (b) (ii) above, the said Scheme of Arrangement be set aside and / or nullified.

2.3. By inserting the following two new paragraphs (to be numbered) (d) (1A)” and “(d) (1B)” respectively immediately above paragraph (d)

- (1) [i.e. immediately below the introductory part of paragraph (d)]

“(1A). Since about August or September 2018, Orthotouch has been unable and has completely failed (ceased), to perform its only obligation

(alternatively) its principal obligation) under the Scheme of Arrangement, namely to make monthly payments to the Highveld companies, who in turn, were to pay the investors as referred to in the Scheme of Arrangement document.

(1B) Orthotouch placed itself under business rescue on 7 November 2019 and is still under business rescue, which status and/ regime (i.e business rescue) is not compatible with the existence of the said Scheme of Arrangement.”

[15] The amended notice of motion reads as follows;

- a. It is declared, in terms of section 133(1)(b) of the Companies Act 2008 (“the Act”), that these proceedings against First Respondent (“Orthotouch”) and Thirteenth Respondent (“Zephan”) and Fourth to Eleventh Respondents (“the Highveld companies”) may proceed alternatively may commence despite the fact that Orthotouch and Zephan on 7 November 2019 (and the Highveld companies in September 2011) resolved in terms of section 129 of the Act to place themselves under supervision and having commenced business rescue proceedings.
- b. Setting aside the order granted on 26 November 2014 (the order) in the Ex Parte application in terms of Rule 42 (1) (a) of the Uniform Rules of Court....”.

Applicable law on amendment of Pleadings

[16] Rule 28 of the Uniform Rules of Court regulates amendments to pleadings. In deciding whether to grant or refuse an amendment, the court exercises a discretion. A court when exercising its discretion leans towards granting an amendment to ensure that justice is done between the parties.

[17] In *Moolman v Estate Moolman* 1927 CPD 27 at paragraph 29 it was held that –

“The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position they were when pleading which it is sought to be amend was filed.”

[18] In *Imperial Bank Ltd v Barnard and Others* NNO

[2013] (5) SA 612, the court stated at paragraph 8 that –

“The primary consideration in applications of this nature seems to be whether the amendment will have caused the other party prejudice

which cannot be compensated for by an order for costs or by some or other suitable order such as a postponement.”

[19] Mr Maree SC, Counsel for the applicants submitted that in essence the amendment sought is to the effect that if the court order sanctioning the scheme is set aside the result is the setting aside of the scheme itself, and as an alternative that the scheme itself be expressly set aside.

[20] To the application for amendment referred to the above, the first respondent (Orthotouch), the twelfth respondent (deceased) and the Zephan the thirteenth respondent instituted a conditional counter application. The essence of the conditional counter application is that if the amendment is granted the investors/applicants should be ordered to repay the benefits received in terms of the scheme.

- [21] The argument on behalf of the applicant was further that the whole scheme is a sham and acts as a barrier against the litigation of the investors who are struggling to fund the litigation.
- [22] It was also submitted that the applicants sought to include additional grounds for such setting aside in the Notice of Motion-namely that the first respondent (Orthotouch) has not been able to perform under the scheme since 2018 and has in fact subsequently been placed under Business Rescue. The case for amendment is mainly made based on the founding affidavit deposited by the seventh applicant, making a lot of reference to his replying affidavit.
- [23] One of the reasons for amendment is that the inability to perform on the part of Orthotouch results in the arrangement being a dead document. It serves as protection against claims against respondents under separate class action litigation for losses based on the indemnity provisions in the scheme.
- [24] The relevant clause 2.2.3.13.2 of the scheme stipulates as follows:
- “[T]he rights of all trade creditors and HS investors shall be confined to the right to claim payment or exercise other rights in terms of this arrangement, and no trade creditor and no HS investor shall have any other claim of whatsoever nature and howsoever arising against [Orthotouch], the HS Companies or any of their number, Georgiou, the Georgiou Family, the directors, or sureties for debts of the Company and/ or the HS Companies, after the final date, by virtue of the full and final settlement nature of this arrangement as envisaged in 2.2.2.2.”*
- [25] Mr Joubert SC, Counsel for the first, twelfth and thirteenth respondents, amid the submissions made stated that the respondents are opposed to amendment because it introduces a new cause of action. The order to set aside the sanctioning of the scheme of arrangement and the setting aside of the scheme of arrangement are two totally different concepts. If the amendment were to be granted, the respondents would need to be afforded an opportunity to file affidavits in answer to the amended case. Respondents insist on their right to respond to the new case, that is the application to set aside the scheme.
- [26] Furthermore, due to subsequent restructuring in Orthotouch the scheme became moot. The restructuring of Orthotouch’s financial affairs by adopting and sanctioning the scheme on 26 November 2014 was suspended by the adoption of the business rescue plan on 31 March 2023, which again restructured Orthotouch’s affairs, business, property, debts and liabilities.
- [27] Mr Bester, Counsel for the trustees, submitted that the first part of the amendment brings in a claim for final relief. It is a different case altogether. The parties must be granted the opportunity to carefully consider the consequences thereof.
- [28] Mr Bester further submitted that if the applicants are not bound by the scheme they are similarly not bound by indemnity. They cannot set aside the scheme that is not binding on them.

[29] In *Nedcor Investment Bank Ltd v Visser No and Others* 2002 (4) SA 588, on page 595 paragraph H, it is held that –

“Our Courts have recognized that in many cases it may be convenient to incorporate fresh causes of action in the original proceedings. An Amendment which introduces a new cause of action will only be allowed if no prejudice is occasioned by it. In principle, there is no objection to a new cause of action being added by way of an amendment where that is necessary to determine the real issues between the parties” and then the reference to authorities. [Court’s Emphasis].

[30] The application to amend is based on the fact that amendment was overshadowed in the replying affidavit of the seventh applicant, filed during November 2022. However, as the new ground for the application was not contained in the founding and supplementary affidavit, the applicants nevertheless invited the respondents to deal with such new ground by means of a further affidavit or in the counter application.

[31] This is irregular. First, a party is not permitted to raise new issues for the first time in the replying affidavit. Secondly, the filing of additional affidavits is a prerogative of the court. Thirdly, an amendment may not raise a new cause of action.

[32] The applicants in their own version submit that the scheme is dead and has no practical effect. Therefore, I agree with the respondents’ contention that there is no need to set aside something which is already dead.

[33] The amendment seeks different relief not supported by evidence, the basis for relief is that there are no payments being made to the applicants. The applicants did not dispute that the investors were paid approximately R1,2 billion. They were paid a high rate, and they were also paid after the sanctioning of the scheme.

[34] The applicants’ arguments that respondents do not need to file affidavits because respondents know they do not pay is absurd as it intends to short- circuit the provisions of section 133 (1) (b).

[35] Further the applicants refute that they are bound by the scheme because they have never been the creditors of Orthotouch. This is perplexing to say the least, having accepted payments from the scheme, they later want to distance themselves from the scheme they never queried their status. Whatever their status might be the crux of the matter is that they have benefited from the scheme and cannot disown it when it suits themselves.

[36] The applicant’s additional argument that if the sanctioning of the scheme is set aside, automatically the scheme comes to an end, is flawed as it introduces a new cause of action. It is misplaced and prejudicial to the respondents. The respondents must be afforded the opportunity to ascertain the consequences of the setting aside of the scheme and appropriately deal with the consequences of such an amendment, if they desired.

[37] Furthermore, the amendment sought is intended for the commencement of legal proceedings against Orthotouch a company in business rescue in terms of Section 129 of the Companies Act which provides that:

“(1) Subject to subsection (2)(a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that-

- (a) the company is financially distressed; and
- (b) there appears to be a reasonable prospect of rescuing the company.” [own emphasis]

[38] The purpose of placing the company under business rescue proceedings does not spell the end of the company. The placement is motivated by a reasonable prospect of rescuing the company. In the process the company is afforded breathing space as stated in *Land and Agricultural Development Bank of South Africa v Lazercore Eight(Pty) Ltd and Others* [2024] 3 All SA 273 (WCC) at paragraph 39.1.

[39] In *Arendse and Others v Van der Merwe and Another* NNO 2016

(6) SA 400 (GJ), it was held as follows at paragraph 11

“Section 133(1)(b) does not specify the criteria or procedural requirements that must be met in order to obtain the leave of the court. Ex facie the provision, the court would appear to enjoy a wide and unfettered discretion to make an order on “...any terms the court considers suitable”

[40] Legal proceedings can only be instituted with the (a) the consent of the business rescue practitioner or (b) leave of the court, subject to any terms the court may consider suitable. The section 133 moratorium requires the permission of either the business rescue practitioner or the court, before a party can institute legal proceedings against a company in business rescue.

[41] From the above it is apparent that an application in terms of section 133 (1) (b) is a substantive application with its own requirements separate from a rescission application. It cannot be in the interests of justice to grant leave, which is brought as new ground without the other party having been afforded the opportunity to deal with the application for leave.

[42] The amendment sought by the applicants has the effect of obtaining leave specified in section 133 through the back door. Having regard to the above, granting amendment as sought by the applicants will prejudice the respondents in that the order will be granted without affording them an opportunity to respond comprehensively in terms of the rules. In the result the application for amendment cannot succeed.

Application for rescission

[43] The application is brought in terms of Rule 42 (1) of the Uniform Rules of the Court, alternatively under common law.

[44] Rule 42(1) (a) of the rules provides.

"the court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary"

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

GROUND FOR SETTING ASIDE THE SCHEME OF ARRANGEMENT

- [45] The applicant's argument is that respondents failed to disclose material facts. It is trite that in Ex Parte applications all material facts must be disclosed which might influence a Court in coming to a decision. The non-disclosure of material facts need not be wilful or mala fide to incur the penalty of rescission; and the Court apprised of the true facts, has a discretion to set aside the former order or to preserve it.
- [46] According to the applicants the non-disclosure pertains to the following: First the court was not informed that there was a pending application for leave to file a class action by the third applicant, Ms Vlok at Pretoria High Court. Had the full facts been placed before the court on 26 November 2014, the court would not have sanctioned the scheme of arrangement.
- [47] Secondly the meeting of 12 November 2014 wherein the members purportedly voted for the scheme of arrangement is questionable. The applicants submit that not all the investors attended the meeting and that some applicants did not receive the notice for the meeting. The meeting was disorganized and the number of voters who voted for the scheme is far less than is required to have the scheme passed. Furthermore, the applicants stated that they did not get prior notice of the meeting.
- [48] Several 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.
- [49] Nevertheless, the applicants did not dispute the respondents' submission that votes were at 93.29 percent far more than the 75% majority voted required in terms of section 155 (6) of the Act. It is apparent from the above that there was nothing the respondents needed to appraise the Court sanctioning the scheme with.
- [50] In fact, the applicants state that they did not receive notice of the meeting, as it is they were not in attendance. Had they had received the notice; they would not have supported the scheme. This argument is untenable as the applicants benefited from the scheme from 2014 until 2018 when Orthotouch could not make any further payments.

- [51] The rescission application was instituted in 2015 whilst the applicants were benefitting from the scheme whose voting process was in question, and they continued to do so. The applicants could have applied for reconsideration of the order of Moshidi J. Since they were benefitting from the same order, they cannot have it both ways.
- [52] It was further argued on behalf of the applicant that the sanctioning court was not appraised with regard to the third applicant, Ms Vloks' class action. The basis of the class action is that the respondents referred to as Georgiou group committed fraud and /or acted recklessly. In Ms Vlok's affidavit founding affidavit at paragraph 9.1 she stated;
- "this application is aimed at the various individuals in their personal capacities for their fraudulent and or reckless conducted which resulted n the investors losing much of their investment if not everything."*
- [53] Furthermore, at paragraph 9.2 of the founding affidavit she avers "it is anticipated that investors (shareholders in the Highveld companies) will lose capital that they invested either in full or a substantial portion thereof."
- [54] With regards to the class action Ms Vlok's application contains serious allegations of misconduct, fraud, and misrepresentation. Ms Vlok did not identify the acts of misrepresentation and or fraudulent activities and have neither identified the individuals who had committed those activities. Furthermore, reckless conduct referenced to by Ms Vlok by certain individuals is not a recognized ground in common law to have the order granted rescinded and set aside. The court could not have refused to sanction the scheme based on Ms Vlok's unsubstantiated averments.
- [55] On a closer look, it appears from Ms Vlok's affidavit and submissions made in this application that what must be regarded as fraud is the non-transfer of the properties from Zephan, the thirteenth respondents to the Highveld companies. She further queries about the transaction regarding Accelerate.
- [56] Annexure A to the scheme which was disclosed to the court confirms the same. The applicants did not dispute that Annexure A to the scheme [which was presented in court] is in respect of Accelerate Property fund which transaction formed the asset base, with combined portfolio of the thirteenth respondent and Orthotouch, with combined value of approximately R2.4 Billion. The Court was made aware of the Accelerate' s transaction.
- [57] In Naidoo v Matlala and Others 2012 (1) SA 143 at paragraph 6, Southwood J said the following:
- "In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment."*

[58] The respondents have demonstrated that material facts were disclosed to the Court. The averments of the applicants are not correct. Consequently, there is nothing which could have prevented the sanctioning of the scheme. The order was not erroneously granted. In conclusion the application for rescission must fail. In the result the following order ensues.

ORDER

1. The application is dismissed with costs on Scale C, which include the cost of two counsel.

N.P. MALI

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

APPEARANCES:

Adv Maree SC for the Applicants

Instructed by Theron & Partners

021 887 7877

Adv Joubert SC & Adv De Vries for the 1st & 13th Respondents

Instructed by

Johan Victor Attorneys & Litigators

021 422 0369

Adv Bester for the 14th to 16th Respondents

Kyriacou Incorporated

087 898 9641

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