

SOUTH AFRICA / JUDGMENT

Smith and Others v Georgio and Others (93417/2019) [2025] ZAGPPHC 373 (25 April 2025)

[2025] ZAGPPHC 373

COURT

North Gauteng High Court, Pretoria

BEFORE

Janse van Nieuwenhuizen

CASE / FILE NUMBER

93417/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 93417/2019

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE: 25 April 2025

SIGNATURE: JANSE VAN

NIEUWENHUIZEN J

In

the matter between:

HENRY
ARDEN SMITH
First
Applicant
ANDRE
HANEKOM
Second
Applicant
CHRISTOFFEL
STEYN HOFFMANN
Third Applicant
DOREEN
BYRAM ABAN VAN DER
BERG
Fourth Applicant
ADRIAAN
DE KLERK STEYN
Fifth
Applicant
JUDITH
ANNE HUTCHINGS
Sixth
Applicant
JACOB
ELIZABETH
STRAUSS
Seventh Applicant
THERESA
ALICE HODGETTS
Eight
Applicant
ELIZABETH
CARYL
HENRICO
Ninth Applicant
NICOLE
GURTSCHMANN
Tenth Applicant
ESTHER
MARIE
ROUSSEAU
Eleventh Applicant
CHRISTINA
JACOBA HELENA LAUBSCHER
Twelfth Applicant
and
NICOLAS
GEORGIO
First
Respondent
MICHAEL

GEORGIO
Second Respondent
GEORGE
NICOLAS
GEORGIOUS
Third Respondent
JOHANNES
FREDERICK KLOPPER N.O.
Fourth
Respondent
JOHANNES
FREDERICK KLOPPER
Fifth
Respondent
CORNELIUS
FOURIE MYBURGH
Sixth
Respondent
PANOGIOTIS
KLEOVOULOU
Seventh
Respondent
ZEPHAN
PROPERTIES (PTY) LTD
Eight
Respondent
ORTHOTOUCH
LIMITED
Ninth
Respondent
ORTHOTOUCH
(PTY) LIMITED
Tenth
Respondent
NICOLAS
GEORGIU N.O
Eleventh
Respondent
MAUREEN
LYNETTE GEORGIU N.O.
Twelfth
Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

Introduction

- [1] This judgment is in respect of two applications that was served before me on 6 March 2025. I will deal with the applicants accordingly.

AD: Applicants' application for postponement

- [2] The respondents did not oppose the application for a postponement of the matter. The third respondent does, however, oppose the terms of the postponement. Prayer 2 contains the relief opposed by the third respondent, namely:

"2. That the hearing of the matter be postponed, alternatively stayed, pending the final adjudication of the so-called setting aside application in respect of the Scheme of Arrangement in respect of Orthotouch Ltd (case number 42332/14 in the Gauteng Division of the High Court) and in respect of which judgment has been reserved by the honourable Mrs Justic Mali on 14 November 2024."

- [3] In order to adjudicate the relief claimed in prayer 2, it is apposite to have regard to the litigation history between the parties. The applicants were shareholders in the fifteenth to

twenty-second respondents collectively referred to as the Highveld Companies. The companies were placed under business rescue and the fourth respondent was appointed as business rescue practitioner in 2011.

- [4] In terms of the business rescue plan Orthotouch Ltd ("Orthotouch") would take transfer of and grow the property portfolio of the Highveld Companies. Orthotouch could not fulfil its obligations in terms of the business rescue plan, which in turn led to a Scheme of Arrangement being entered into between Orthotouch and the investors. According to the applicants the Scheme was adopted by a small minority of investors and entailed that investors would receive less income and virtually no security for their investments.

- [5] The Scheme of Arrangement was sanctioned by the Gauteng Local Division (Johannesburg High Court) on 25 November 2014. Some investors, including the applicants, were opposed to the Scheme and during March 2015 a certain Jurie Johannes Geldenhuys together with seven other investors launched an application for the rescission of the order in the Johannesburg High Court.

- [6] Some four years later and on or about 12 December 2019 the applicants launched this application to obtain inter alia leave to institute a derivative action on behalf of the Highveld Companies against Orthotouch and certain individuals involved in the affairs of Orthotouch.

- [7] The respondents oppose the relief claimed by the applicants on inter alia the ground that the existence of the Scheme of Arrangement precludes the applicants from obtaining the relief sought herein.
- [8] The outcome of the rescission application in the Johannesburg High Court, therefore, has a direct implication on the relief claimed by the applicants herein. For various reasons that are not relevant for present purposes, the rescission application was only heard during November 2024. The application served before Mali J and judgment was reserved on 14 November 2024. At the time of the hearing of this application, judgment had not been handed down.
- [9] In the result and according to the applicants, it will not be in the interest of justice to proceed with this application whilst the judgment in the rescission of the Scheme of Arrangement application is pending.
- [10] In opposition to the relief claimed in prayer 2 of the notice of motion, the third respondent points out that should the relief be granted, the application will most probably not be heard for another two to three years, thus nine years or more after the application was launched.
- [11] The third respondent, furthermore, points out that;
- 11.1 he is not a party to the rescission application;
- 11.2 the rescission application was launched by persons other than those who feature as the applicants herein;
- 11.3 there is not a substantial or any overlap between the issues in the rescission application and those in this application;
- 11.4 should the unsuccessful party appeal the order in the rescission application, the appeal will in all probability only be heard in the Full Court in 2027, a further appeal to the Supreme Court of Appeal will only be heard in 2029 and a final appeal to the Constitutional Court in 2031. Such a scenario will constitute an instance of justice being denied
- 11.5 the applicants make serious unsubstantiated allegations of fraudulent conduct against him and his inability to address these serious allegations has caused and continues to cause enormous emotion stress and frustration.
- [12] Although the applicants only apply for a stay of proceedings in the alternative, the reasons provided for the relief fall squarely within the realm of an application for the stay proceedings and I will proceed to adjudicate the matter accordingly.
- [13] In *Mokone v Tassos Properties CC and Another* 2017 (5) SA 456 (CC), the court confirmed that a stay of proceedings may be granted in terms of the powers bestowed on the court to regulate its own proceedings as envisaged in section 173 of the Constitution. The court might exercise this power if it in the interests of justice to do so.

- [14] In casu the issue to be determined in the Johannesburg High Court, to wit the validity of the Scheme of Arrangement forms the subject matter of one of the grounds of defence raised by the respondents in this application. In circumstances where the Johannesburg High Court is in the process of pronouncing on the issue, it will in my view be in the interests of justice to stay the proceedings herein until the issue has been finally determined.
- [15] The rehearing of the issue will take up valuable court time and might result in different findings on the same issue. This will self-evidently not be in the interests of justice. I am mindful that an order staying these proceedings is prejudicial to the third respondent's right to have the dispute determined speedily. The interests of justice in casu, however, outweighs the prejudice that the third respondent will suffer if the order is granted.

Costs

- [16] By agreement between the applicants and the remaining respondents, the costs of the application will be costs in the main application. The applicants have, however, sought costs against any of the respondent that opposes the relief claimed herein. In view of the history of the matter and the fact that the applicants seek an indulgence, I am not prepared to saddle the third respondent with a cost order. The matter has been dragging on for five years due to no fault on the part of the third respondent. The third respondent was, in my view, well within his right to insist on the speedy resolution of the matter. In the result, costs will be costs in the main application.

ORDER

- [17] In the result, I grant the following order:

1. The application is postponed until the final adjudication of the application under case number 42332/14 in the Gauteng Local Division of the High Court of South Africa.
2. Costs is costs in the cause.

AD: Second and Third respondents' rule 41(1)(c) applications

- [18] On 17 November 2022, the applicants launched an application in this court for the transfer of the review application from the Johannesburg High Court. This court does not have jurisdiction to entertain a matter pending in the Johannesburg High Court and having been made aware of the jurisdictional obstacle, the applicants issued a further transfer application in the Johannesburg High Court in December 2022. Notwithstanding the aforesaid, the application in this court was only withdrawn on 15 June 2023 at the insistence of the respondents. The applicants did not tender costs in the notice of withdrawal.
- [19] In the result, the second and third respondents, each launched an application in terms of the provisions of rule 41(1)(c) of the Uniform rules court for an order for costs. The applicants opposed the application and submitted that they should not be saddled with a cost order.

[20] In considering the appropriate cost order, if any, it is apposite to have regard to the test applicable to costs orders in withdrawal applications. The test was succinctly summarised by Boruchowitz J in *ABSA Bank and Others v Robb* 2013 (3) SA 619 (GSJ), namely:

‘[8] It is trite that a party who withdraws an action or application or who abandons a defence is in the same position as an unsuccessful litigant, and therefore the other party is ordinarily entitled to costs. A departure from the principle, that costs must be awarded to the party which has been put to the expense of defending withdrawn proceedings, is only warranted in exceptional circumstances.’

[20] In opposing the second and third respondents’ respective applications for a cost order, the applicants advanced the following main reasons in support of their contention that a cost order should not be granted against them;

20.1 the application was issued on the strength of two directives, one by Weiner J in the Johannesburg High Court and one by the Deputy Judge President, Ledwaba J in this division. Both directives stated, according to the applicants, that the applicants need to apply for a transfer of the review application in this court;

20.2 the re-issuing of the transfer application in the Johannesburg High Court involved the use of the same founding affidavit than the affidavit filed in the abortive transfer application in this division;

20.3 the applicants are effectively representative or notional applicants, representing the investors in class action type litigation and a cost order against them personally would probably scupper not only the review application, but also the class action claims of the investors;

[21] The question then arises whether any of the grounds advanced on behalf of the applicants constitute “exceptional circumstances”. In respect of the first ground, directives issued during the case management of a matter do not exempt a party from complying with the provisions of the Superior Courts Act. Any notion to the contrary is ill-conceived and opportunistic to say the least.

[22] Secondly, the fact that the same founding affidavit was used in the Johannesburg High Court transfer application is of no relevance when a cost order in an application issued in this division is considered. This ground is similarly devoid of any merit.

[23] Lastly, the applicants point out that they represent 18 300 investors who do not have the means to litigate in their personal capacities. Any cost order made at this stage will in essence deprive the applicants from any chance to recover their hard-earned money that they in good faith invested in the Highveld Companies. Although I have sympathy for the unfortunate fate that has befallen the applicants, the launching of ill-fated applications cannot be countenanced by the court.

[24] Furthermore, the mere fact that the applicants are not in a position to finance the litigation is in itself not a bar against the issuing a cost order against them. [See: Affordable Medicines Trust and Others v Minister of Health and Others [2005] ZACC 3; 2006 (3) SA 247 CC at para 139 and Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC) at para 18.] As such, this ground of opposition does not constitute exceptional circumstances insofar as a cost order in terms of rule 41(1)(c) is concerned.

[25] In the result, the second and third respondents is entitled to their respective cost orders. I do not deem the applicants' conduct as deserving of a punitive cost order.

The following order is granted:

1. The applicants are ordered to pay the second respondent's costs in the Urgent application for removal dated 17 November 2022, jointly and severally, the one paying the other to be absolved, such costs to include the costs consequent upon the employment of two counsel.
2. The applicants are ordered to pay the third respondent's costs in the Urgent application for removal dated 17 November 2022, jointly and severally, the one paying the other to be absolved.
3. Costs of counsel on scale B.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

DATE HEARD:

6 March 2025

DATE DELIVERED:

25 April 2025

APPEARANCES

Counsel for the Applicants: Adv Maree Instructed by: Theron & Partners Counsel for the Second Respondent: Adv Cilliers SC Adv Groenewald Instructed by: Fluxmans Attorneys Counsel for Third Respondent; Adv Eloff SC Instructed by: MHI Attorneys

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Prepared on 11 October 2026 · Esheria