

SOUTH AFRICA / JUDGMENT

Smith and Others v Georgiou and Others (93417/2019) [2024] ZAGPPHC 585 (6 June 2024)

[2024] ZAGPPHC 585

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: YES

DATE: 6 June 2024

SIGNATURE:

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
JACOBA
ELIZABETH STRAUSS
Seventh Applicant
THERESA
ALICE HODGETTS
Eight Applicant
ELIZABETH
CARYL HENRICO
Ninth Applicant
NICOLE
GURTSHMANN
Tenth Applicant
ESTHER
MARIE
ROUSSEAU
Eleventh Applicant
CHRISTINA
JACOBA HELENA LAUBSCHER
Twelfth Applicant
and
NICOLAS
GEORGIOU
First Respondent
MICHAEL
GEORGIOU
Second Respondent
GEORGE
NICOLAS GEORGIOU
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
GEORGIOU N.O.
Eleventh Respondent
MAUREEN
LYNETTE GEORGIOU N.O.
Twelfth Respondent
JOSEPH
CHEMALY N.O.
Thirteenth Respondent
DEREK
PERDOE COHEN
Fourteenth Respondent
HIGHVELD
SYNDICATION NO 15 LIMITED
Fifteenth Respondent
HIGHVELD
SYNDICATION NO 16 LIMITED
Sixteenth Respondent
HIGHVELD
SYNDICATION NO 17 LIMITED
Seventeenth Respondent
HIGHVELD
SYNDICATION NO 18 LIMITED
Eighteenth Respondent
HIGHVELD
SYNDICATION NO 19 LIMITED
Nineteenth Respondent
HIGHVELD
SYNDICATION NO 20 LIMITED
Twentieth Respondent

HIGHVELD
SYNDICATION NO 21 LIMITED
Twenty-First Respondent
HIGHVELD
SYNDICATION NO 22 LIMITED
Twenty-Second Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

INTRODUCTION

- [1] The issue to be decided in this judgment is whether the issues pertaining to the relief claimed against Cohen, the fourteenth respondent, should be separated from the remainder of the issues underlying the relief claimed against the other respondents. Cohen also contents that a continuation of the proceedings against him will be an abuse of process. In the result a brief history of the matter will suffice.

BACKGROUND

- [2] The application concerns the plight of thousands of investors, mostly pensioners, who invested large sums of money in an investment scheme, known as the Highveld Syndication Scheme, from 2005 until 2009. The scheme promised handsome returns on the investments and more than R4,6 billion in investments were received from investors. In reality the scheme, however, collapsed leaving the investors with little more than empty promises.
- [3] The scheme entailed the creation of eight companies (the fifteenth to twenty second respondents “the HS companies”), which companies would operate as property syndication companies. In terms of the scheme investors became shareholders in the HS companies.
- [4] The HS companies acquired commercial properties, which were let to tenants and the income thus received was supposed to result in payments to the investors. The venture did not yield the necessary returns and the HS companies were placed in business rescue on or about 7 September 2011. Klopper (the fourth respondent) was appointed as the business rescue practitioner of the companies. Klopper prepared a business rescue plan which envisaged that Orthotouch (the ninth respondent in its capacity as a public company and the tenth respondent in its capacity as a private company) would take transfer of and grow the investment portfolio of the HS companies. The plan was formerly adopted on 14 December 2011.

- [5] The rescue plan did, however, not materialise. Orthotouch could not perform in terms of the plan and in order to rescue some form of return for the investors, a Scheme of Arrangement was entered into between Orthotouch, the trade creditors and the investors. Cohen was appointed as the receiver under the Scheme of Arrangements.
- [6] The Scheme of Arrangement proved to be another ill-fated attempt to salvage the initial property syndication scheme. On 9 November 2019 Orthotouch was also placed in business rescue.
- [7] On 12 December 2019 the applicants, representing some 1800 disgruntled investors launched the present application. The applicants seek inter alia leave to institute eight derivative actions on behalf of the HS companies against Cohen and some of the other respondents. Leave

is also requested to institute eight separate class actions on behalf of the investors against the HS companies.

- [8] In order to appreciate the relief claimed against Cohen, it is apposite to give a brief overview of the other role players. The first respondent, Nicolas Georgiou (deceased) was the father of the second and third respondents. The applicants allege that the late Nicolas Georgiou, through a company Pickvest Investment (Pty) Ltd, was the mastermind behind the property syndication scheme and a director of various other companies that played a role in the ultimate demise of the HS companies. According to the applicants, the second and third respondents were closely involved in the affairs of the aforementioned companies.
- [9] Klopper is cited in his personal capacity as the fifth respondent. Klopper is cited together with the sixth and seven respondents as directors of Orthotouch and it is alleged that they were intimately involved in the affairs of the company when the value of the HS companies diminished by the day. The eight respondent, Zephan Properties (Pty) Ltd and the eleventh to thirteenth respondents, in their capacities as trustees of the N Georgiou Trust, are cited as securities and co-principal debtors for the obligations of Orthotouch under the business rescue plan.
- [10] Although the applicants have also launched a funding application against Cohen, the relief sought in the funding application will only become relevant, should the relief in the main application be granted.

SEPARATION APPLICATION

MAIN APPLICATION

- [11] The relief claimed against Cohen in the main application is contained in Prayer 3 of the notice of motion, and the relevant portions reads as follows:

“3. That the applicants be granted leave under section 165(5) of the Act to institute eight separate actions on behalf of, and in the name of, Fifteenth to Twenty-Second Respondents respectively (hereinafter “the Highveld companies”) against Orthotouch – and against Eight Respondent (“Zephan”) and the N Georgiou Trust, represented by Eleventh to Thirteenth Respondents, as sureties and co-principal debtors in respect of Orthotouch’s said liabilities – for:

3.1 Payment of:

- (a) The purchase price of various properties sold to Orthotouch by the respective Highveld Companies as set out in the Business Rescue Plan of Orthotouch (sic) I (“the Plan”) as adopted on 14 December 2011; ...

3.2 An order declaring that First to Third Respondents (Georgiou and his sons) and the current and erstwhile directors of Orthotouch (Being Fifth, Sixth and Seventh Respondents)- herein after referred to as “the directors of Orthotouch” – and Fourteenth Respondent (“Cohen”), are personally liable, jointly and severally, with Orthotouch for payment to the Highveld companies of the aforementioned liability

(claim) referred to in paragraph 3.1 above, and for judgment against them for payment thereof.

3.3 That it be declared, in terms of common law (alternatively in terms of s 20(9) of the Act) that Orthotouch shall be deemed not to be juristic person in respect of any obligation by it towards the Highveld company and the investors in such companies – and that, on that basis, the individuals referred to above be held personally liable for the liabilities of Orthotouch towards the Highveld companies.”

[12] Further relief is claimed in the alternative, which relief is not relevant for present purposes.

[13] Factually, it is common cause that Cohen only became involved in the HS companies saga when he was appointed as receiver in terms of the Scheme of Arrangement that was concluded on 12 November 2014. Cohen resigned as receiver during 2018.

[14] Upon a cursory perusal of the factual averments made against Cohen in the founding affidavit coupled with the answers contained in Cohen’s answering affidavit, I was of the view that there is at least a prima facie case to be made for an order in terms of rule 33(4) or on the abuse of process basis.

[15] Ms Milovanovic-Bitter, counsel for Cohen, informed the court that Cohen will, for purposes of this application, not rely on any points in limine and both Ms Milovanovic-Bitter and Mr Maree, counsel for the applicants addressed me at length on the merits of the proposed claim against Cohen.

[16] In preparing this judgment, I had regard to the section relied upon by the applicants for the relief claimed against Cohen. Section 165(5) of the Companies Act 71 of 2008 reads as follows:

“(5) A person who has made a demand in terms of subsection (2) may apply to a court for leave to bring or continue proceedings in the name and on behalf of the company, and the court may grant leave only if—

- (a) the company—
 - (i) has failed to take any particular step required by subsection (4);
 - (ii) appointed an investigator or committee who was not independent and impartial;
 - (iii) accepted a report that was inadequate in its preparation, or was irrational or unreasonable in its conclusions or recommendations;
 - (iv) acted in a manner that was inconsistent with the reasonable report of an independent, impartial investigator or committee; or
 - (v) has served a notice refusing to comply with the demand, as contemplated in subsection (4)(b)(ii); and (b) the court is satisfied that—
 - (i) the applicant is acting in good faith;
 - (ii) the proposed or continuing proceedings involve the trial of a serious question of material consequence to the company; and
 - (iii) it is in the best interests of the company that the applicant be granted leave to commence the proposed proceedings or continue the proceedings, as the case may be.” (own emphasis)
- [17] On my reading of the section, an application in terms of section 165(5) may only be entertained by a court once the jurisdictional factors contained in section 165(5)(a) have been established.
- [18] Neither counsel addressed me on this point, most probably due to the fact that Cohen did not rely on any points in limine.
- [19] The fact remains that the application is brought in terms of rule 165(5)(a), and the jurisdictional requirements must first be satisfied before a court may entertain the merits of the application for leave to bring the action against Cohen.
- [20] The same issue also arises in respect of the relief claimed against the other respondents mentioned in prayer 3 and it will as a result, not be convenient to separate the issues pertaining to the relief claimed against Cohen from the remainder of the issues pertaining to the relief claimed against the other respondents. The same applies to the alternative basis, to wit whether the continuation of the proceedings against Cohen is an abuse of process. Such finding can only be made, once the merits of the case against Cohen is considered.

[21] In view of the aforesaid finding, it is premature to deal with the funding application.

COSTS

[22] Due to the fact that the issue that informs the ruling in this judgment was not canvassed by counsel, the costs occasioned by the application in terms of rule 33(4) will stand over to be adjudicated at the hearing of the application.

Order:

1. The application for a separation of issues in terms of rule 33(4) is dismissed.
2. Costs are reserved.
3. The application against the fourteenth respondent is postponed to 3 March 2025.

JANSE VAN NIEUWENHUIZEN, J

JUDGE OF THE HIGHT COURT

GAUTENG DIVISION, PRETORIA

DATES HEARD:

13, 14 & 17 May 2024

DATE DELIVERED

6 June 2024

APPEARANCES

For the Applicant's: Advocate Maree Instructed by: Geyser & Coetzee Attorneys For the 14th
Respondent: Advocate Milovanovic-Bitter Instructed by: Innes R Steenekamp Attorneys

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