

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: **93417/2019**

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 HUDGETTS	Eighth Applicant
ELIZABETH CARYL HENRICO	Ninth Applicant
NICOLE GURTSCHIMANN	Tenth Applicant
ESTHER MARIE ROUSSEAU	Eleventh Applicant
CHRISTINA JACOBA HELENA LAUBSCHER	Twelfth Applicant

and

NICOLAS GEORGIU	First Respondent
MICHAEL GEORGIU	Second Respondent
GEORGE NICOLAS GEORGIU	Third Respondent
JOHANNES FREDERICK KLOPPER N.O	Fourth Respondent
JOHANNES FREDERICK KLOPPER	Fifth Respondent
CORNELIUS FOURIE MYBURGH	Sixth Respondent
PANOGIOTIS KLEOVOULOU	Seventh Respondent
ZEPHAN (PTY) LTD (IN BUSINESS RESCUE)	Eighth Respondent

INSTRUCTING ATTORNEYS
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ORTHOTOUCH LTD	Ninth Respondent
ORTHOTOUCH (PTY) LTD (IN BUSINESS RESCUE)	Tenth Respondent
NICOLAS GEORGIU N.O.	Eleventh Respondent
MAUREEN LYNETTE GEROGIOU N.O.	Twelfth Respondent
JOSEPH CHEMALY	Thirteenth Respondent
DEREK PERDOE COHEN	Fourteenth Respondent
HIGHVELD SYNDICATION NO 15 LTD	Fifteenth Respondent
HIGHVELD SYNDICATION NO 16 LTD	Sixteenth Respondent
HIGHVELD SYNDICATION NO 17 LTD	Seventeenth Respondent
HIGHVELD SYNDICATION NO 18 LTD	Eighteenth Respondent
HIGHVELD SYNDICATION NO 19 LTD	Nineteenth Respondent
HIGHVELD SYNDICATION NO 20 LTD	Twentieth Respondent
HIGHVELD SYNDICATION NO 21 LTD	Twenty-First Respondent
HIGHVELD SYNDICATION NO 22 LTD	Twenty-Second Respondent

EIGHTH AND TENTH RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

JACQUES DU TOIT

do hereby make oath and say that:



1. I am an adult admitted attorney, conveyancer and notary and I am currently practising as a Senior Business Rescue Practitioner (and licensed as such by the CIPC) under the name and style of Du Toit Business Rescue Practice (Pty) Ltd, with my offices at **70** Carmine Drive, BURGUNDY ESTATE, Western Cape.
2. I am the duly appointed business rescue practitioner for the Eighth Respondent, Zephan (Pty) Ltd (in business rescue) (and Tenth Respondent, Orthotouch (Pty) Ltd (in business rescue).
3. I depose to this affidavit in my official capacity as duly appointed business rescue practitioner ("BRP") for the Eighth and Tenth Respondents, being so appointed on **14 November 2019**.
4. The events upon which the Applicants rely for the relief they sought predated my involvement with the Eighth and Tenth Respondents and for that matter all the Highveld Syndication companies, being the Fifteenth to Twenty-Second Respondents ("HS Companies"). It should be noted that:



- 4.1 My investigations have been limited due to the constraints placed on a BRP's investigative powers by the Companies Act **71** of **2008** in that BRP's do not have the same investigative powers as afforded to insolvency practitioners in terms of the provisions of the Companies Act **61** of **1973**, for instance that in terms of **s 415**, **s 417** and **s 418** of that last mentioned Act.
- 4.2 I extended an invitation to all creditors at the first meeting of creditors to provide me with any and all information that may be relevant to Orthotouch and Zephan or to a creditor's investment, as well as any information to substantiate claims / allegations of wrongdoing, misconduct or impropriety.
- 4.3 Despite a creditors' committee being formed as envisaged in **s 149** of the Companies Act **71** of **2008** for the purpose of them "consulting with" me it would appear that no interactions between creditors and the creditors' committee took place. Notwithstanding an invitation by me to the creditors' committee to engage with me, only one meeting between the creditors' committee and I took place.



- 4.4 Be that as it may, I have had the opportunity to peruse a great number of court documents and affidavits filed of record to have been properly alerted to a mass of claims / allegations of wrongdoing, misconduct or impropriety.
- 4.5 I made numerous enquiries pursuant to what was contained in the aforesaid court documents and was provided with comprehensive answers and substantiated denials of wrongdoings, misconduct and / or improprieties.
- 4.6 In addition to this I, independently, conducted a comprehensive investigation on the property transactions applicable as referred to later herein.
5. For purposes of these proceedings, and to substantiate the limited number of factual allegations I will make in this affidavit, I have, in main, relied on my understanding and interpretation of the history of this matter as set out and contained in:
- 5.1 The books and records of Orthotouch and Zephan; and
- 5.2 The records of the different offices of the Registrars of Deeds;



5.3 The affidavits and other court documentation filed in various litigious matters, inclusive of:

5.3.1 A certification application for leave to institute a class action on behalf of some Highveld Syndication No 21 Limited and Highveld Syndication No 22 Limited investors ("HS 21 and 22 Investors") in the Gauteng High Court Division, Pretoria, case number **80811/2014**, and the judgment delivered in that matter by the Honourable Ms Justice Tolmay on **10 December 2019**;

5.3.2 An application to set aside the sanctioning of the Scheme of Arrangement ("SoA") issued from the Gauteng Local Division, Johannesburg, case number **42334/2014**, which sanction of the SoA by an Order of Court, I may add, is still in place and valid as another court has not decided on the merits of that application;

5.3.3 An application to set aside a demand made by HS Investors in terms of **s 165** of the Companies

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Act, launched by Johannes Frederick Klopper (“Hans Klopper”) the BPR responsible for the Klopper BR Plan, dealt with herein later and a counter-application brought by attorneys Le Grange Incorporated and **4** others claiming that the HS Companies be wound up, issued from the Gauteng Division, Pretoria, under case number **70859/2019;**

5.3.4 The class action application based in the buy-back agreements relating to HS Company 21 and 22, issued from the Gauteng Division, Pretoria, case number **9272/2020;**

5.3.5 The affidavits and documents filed in this application with special reference to the answering affidavit of Hans Klopper, dated **25 February 2021**, which I believe, save for a few instances with which I will deal hereinlater, contains a fairly correct exposition of the factual detail of the history of the affairs of the HS Companies, Orthotouch and Zephan relevant to this matter.

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- 5.4 I will also, for purposes of these proceedings, rely on an application for a declaratory, issued by me from the Gauteng Division, Pretoria, case number **4049/2021**, with which I will deal with hereinlater, and for purposes of the exposition of the factual matrix of that matter I heavily relied on the information provided to me by Frederik Julius Reichel ("Reichel"). Reichel has intimate knowledge of the HS Companies. His knowledge commenced in **2005**, when he became involved in the administration conducted by Picvest (Pty) Ltd and whose institutional knowledge, access of investors database and interactions with investors due to his function as director of Picvest (Pty) Ltd. These were also the reasons why his assistance was sought by Hans Klopper, with regard to the business rescue of HS Companies, thereafter by Derek Pedoe Cohen, to assist with the administration of the SoA as and now by me in my present capacity as the business rescue practitioner of Orthotouch and Zephan.
6. Therefore, in essence, I am relying herein on information conveyed to me by others, or information appearing from

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documents under my control, which I verily believe to be true and correct, unless otherwise stated. In so far as hearsay evidence is relied upon, I believe that such statements attributed to the persons named are true and correct. I ask for admission of such hearsay evidence in the interest of justice, having regard to the provisions of **s 3(1)(c)** of the Law of Evidence Amendment Act **45** of **1988**.

7. Finally, although I am legally trained, all submissions of a legal nature constitute legal advice I have received and which I accepted as being correct.
8. Before I deal with the founding affidavit deposed to by Henry Arden Smith ("*Smith*"), it should be emphasised that I appreciated that the statutory powers and duties of a BRP include the following:
 - 8.1 The BRP has full management control over the Company in substitution for the board of directors and the pre-existing management;
 - 8.2 The BRP may delegate any of his powers or functions to a director or manager of the Company;



- 8.3 The BRP may remove from office any person who forms part of the pre-existing management of the Company or appoint a person as part of the management of the Company whether to fill a vacancy or not;
- 8.4 The BRP is required to investigate the affairs of the Company in order to ascertain whether there are reasonable prospects for the Company to be rescued and if so to develop a business rescue plan to be considered by affected persons and thereafter to implement the BR Plan; and
- 8.5 In the event that the BRP discovers evidence regarding the dealings of the Company before the Business Rescue Proceedings began of any voidable transactions or failure by the Company or any director to perform any material obligation relating to the Company, then the BRP must take the necessary steps to rectify the matter and may direct management to take the appropriate steps.



INVESTIGATIONS CONDUCTED BY MYSELF REGARDING IMPROPRIETY AND/OR MISAPPROPRIATIONS OF FUNDS:

9. Having had the aforesaid in mind, when I was confronted at the first creditors meeting with a number of comments and allegations made by affected parties regarding impropriety and / or misappropriations of funds stemming from the implementation of the Klopper BR Plan (as duly adopted on **14 December 2011**) and the SoA (as adopted on **12 November 2014** and sanctioned by Court Order on **26 November 2014**), an invitation was extended, at that first creditors meeting, to all affected persons to provide me with documentary proof of such claims of misappropriation to enable me to properly investigate such allegations.

10. As such documentary proof was not forthcoming, I embarked on my own factual investigation. Alerted by these comments and allegations I read and considered a great number of affidavits and other court documentation filed in various litigious matters, inclusive of those listed in paragraph **5.3** above.

11. I have also read and considered:

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- 11.1 Various judgments delivered in matters relating to the HS Companies, inclusive of the High Court judgment of *Zephan (Pty) Ltd and Others v Noormahomed* **(2017/26036) [2018] ZAGPPHC 346 (14 May 2018)** and the Supreme Court of Appeal judgment of *Zephan (Pty) Ltd and Others v Noormahomed* **(1303/18) [2019] ZASCA 162 (29 November 2019)**; and
- 11.2 Various media publications compiled by 'investigative' journalists, regarding purported losses and disappearance of funds caused through the process of the implementation of the Klopper BR Plan and the SoA, and commentaries thereon.
12. I thereupon conducted an independent investigation which entailed a review of the property transactions between various entities, which transactions gave rise to allegations of impropriety and/ or misappropriations referred to in court documentation, made by individuals and mentioned in various media publications.
13. The independent investigation entailed a review of the transfer of properties to and from Zephan / Third Parties / Orthotouch /

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Bosman & Visser (Pty) Ltd ("Bosman & Visser") / the HS Companies / Accelerate Property Listed Fund ("Accelerate") / Others considering the following:

- 13.1 The value of the properties in regard to the Klopper BR Plan of the HS Companies;
- 13.2 The value of the properties as included in the SoA and its annexures attached hereto as Annexure "JDT1";
- 13.3 The purchase price to Orthotouch or others as reflected in the Deeds Office against the value in terms of the SoA;
- 13.4 The purchase price against the value to Accelerate or others; and
- 13.5 The following sequence of events and other factors:
 - 13.5.1 Zephan / Third Parties sold properties to Bosman & Visser at the then market related prices.
 - 13.5.2 The properties were then sold by Bosman Visser at marked-up values to the HS Companies.
 - 13.5.3 In regard to this mark-up the following were the combined result of HS Companies 15 to 22:



13.5.3.1 The properties were bought from Zephan at property values agreed by Zephan to a value of **R3,946 billion**.

13.5.3.2 Added costs of **R682 256 536,00** (equal to **17.29%** of the purchase price) were added to the purchase prices, which added costs were disclosed in each of these syndication prospectuses, as confirmed by a letter received from a Bosman Visser representative, attached hereto as Annexure "**JD12**".

13.5.3.3 The total costs for HS Company 21 and HS Company 22 were disclosed in the prospectus. In relation to HS Company 15 to HS Company 20 only the direct costs were disclosed and additional costs were borne by Bosman Visser.

13.5.3.4 These costs as per the prospectuses include:

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13.5.3.4.1 Commissions to broker network in an amount of **R361 280 900,00;**

13.5.3.4.2 Publication costs in an amount of **R7 334 860,00;**

13.5.3.4.3 Printing in an amount of **R2 410 639,00;**

13.5.3.4.4 Audit fees in an amount of **R1 435 372,00;**

13.5.3.4.5 Legal fees in an amount of **R13 203 888,00;**

13.5.3.4.6 Marketing costs in an amount of **R23 949 096;**

13.5.3.4.7 Admin fees in an amount of **R61 426 388,00;**

13.5.3.4.8 Other fees and costs in an amount of **R20 715 490,00;**

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13.5.3.4.9 Incentives to broker network in an amount of **R64 665 491,00;**

13.5.3.4.10 Profit sharing in an amount of **R18 223 645,00;**

13.5.3.4.11 Management remuneration in an amount of **R107 610 767,00.**

13.5.4 The unforeseen economic downturn in **2008** negatively affected the property values making the headlease and buy-back models untenable.

13.5.5 Numerous new regional developments were completed at the time and a migration of tenants away from strip malls (which were the main property type in the portfolios) occurred which further compromised the property values as recorded in the Klopper BR plan. The retail sector was hard hit, and the HS Companies were inevitably placed in business rescue (the "Klopper Business Rescue"). The result of the



Klopper Business Rescue was the adoption of the Klopper BR Plan on **14 December 2011** by more than **99%** of HS Investors present and voting in **December 2011** and a subsequent scheme of arrangement in terms of **s 155** the Companies Act in **November 2014** (as contained in the SoA) voted for by the statutory majority of more than **95%** of all creditors (as defined in the SoA) present and voting in relation to Orthotouch. This SoA was sanctioned by an order of the High Court of South Africa on **26 November 2014**. The Order of Court remain, as at the date of publication of this BR Plan, in effect and in place.

13.5.6 The purchase prices to be utilised for the purpose of transfer in terms of the SoA to Orthotouch, was reflected by the author of the sales documents and effected by the transferring attorneys by allocating values to properties based on the prospectus values instead of the values as in terms of the SoA (sanctioned by court order) as the value of the properties, whereafter;

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13.5.7 The properties were transferred to Accelerate and others at a value determined by an independent valuer as well as by an additional JSE approved valuer.

13.6 The values as recorded at the Deeds Office, utilised for the transfer to Orthotouch, has resulted in the perception that Orthotouch obtained properties at a high value and together with the HS Companies in the Klopper Business Rescue on sold the properties at a discount to Accelerate, which is not correct. The recorded purchase prices should be compared with the SoA values which is the realistic figure in comparison to the end purchaser price calculated at the market value at that time and not the Deeds Office values.

14. My investigation and my conclusions set out in Annexure “**JDT3**” hereto reflects the accurate state of affairs, which is the recordal of how the transactions were intended and should have been documented. The investigation also showed that the Deeds Office records and the capturing of information are, in certain cases, incorrect and are not reflecting / allocating the correct purchase prices to the properties especially where



more than one property were the subject of one sale agreement. In addition to the aforementioned, normal typographical errors occurred. It became clear that the allegations and journalistic investigations published were based on the selective documentation available at the time, not taking all the facts disclosed herein into consideration especially the SoA values and the Deeds Office errors.

15. According to my investigation, I could not find proof of misappropriation in regard to the property transactions concerning Zephan and / or Orthotouch, for example:

15.1 Example 1: **As per explanation above, the model below shows incorrect values used for properties transferred from Klopper Business Rescue to Accelerate as recorded at the Deeds Office.**

Property:	Description:	Owner	Trf Date	Purchase Price	Owner:	Trf Date	Incorrect Purchase Price in Deeds Office:	Prospectus Value offered to Investors:
Glen Gables	ERF 772, Lynnwood	Zephan	2006	R59m	Orthotouch	2013	R123 304 205	R200 722 759

Correct Purchase Price as per SoA:	Owner:	Trf Date:	Purchase Price:
R59 613 263	Accelerate	2013	R32 556 543

15.1.1 The difference between the prospectus value of **R200 722 759,44** and the purchase price as per the SoA is as a result of the HS Companies allocating a value to the building on a basis which is unknown to me. Although some properties showed a higher markup than others, on average the markup was **17,9%**.

15.1.2 The difference between the correct purchase price as per the SoA and the purchase price of Accelerate, I am informed, was as a result of this property being in a state of disrepair and tenant vacancies.

15.2 Example 2:

Property	Description:	Owner	Trf Date	Purchase Price	Owner	Trf Date	Increased Purchase Price in Deeds Office:
Beacon Isle	ERF 332, Florida, JHB	B&V	2009	R17 100 000	HS 18	2009	R26 150 000

Correct Purchase Price as per SoA:	Owner:	Trf Date:	Purchase Price:
R22 077 664	Accelerate	2013	R17 683 711

15.2.1 The difference between the correct purchase price as per the SoA and the purchase price of Accelerate, I am informed, was as a result of this property being in a state of disrepair and tenant vacancies.

15.3 Example 3: **Incorrect purchase price reflected in Deeds Office, Scheme of Arrangement value and purchase price to Accelerate, this as a result of the price being incorrectly recorded at the Deeds Office since it reflects the value of the total of 4 "Melville properties Portfolio" which accumulatively comes to R99 Million as per the prospectus which is the value of the whole portfolio and not for just this particular property. Furthermore, as a result of severe urban decay in Melville as reflected in the independent valuations these properties lost considerable value.**



Property:	Description:	Owner:	Trf Date	Purchase Price	Owner	Trf Date	Increased Purchase Price in Deeds Office:
14 Main Road Melville	ERF 319, Melville, JHB	B&V	2009	R99 993 000	HS 18	2009	R16 000 000
9 & 11 Main Road Melville	ERF 320, Melville, JHB	B&V	2009	R99 993 000	HS 18	2009	R16 000 000

15.3.1 The above properties formed part of a transaction where a few properties were sold for **R99 993 000,00** in terms of one agreement of sale. The Deeds Office however, reflects, for each individual property, the total sum as the purchase price instead of the individual purchase prices.

15.3.2 The increased purchase price was the incorrect purchase price and was supposed to be the SoA price, as below.

Correct Purchase Price as per SoA:	Owner	Trf Date:	Purchase Price:
R6 985 733	Accelerate	2013	R8 215 845
R15 063 242	Accelerate	2013	R27 338 745

15.3.3 The Deeds Office allocation of group transactions reflects purchase prices which is totally confusing to the reader. However, the

correct purchase price as per the SoA is shown in the investigation spreadsheet and the purchase price to Accelerate in the Deeds Office is correct.

15.3.4 It is to be noted that in this instance a higher purchase price to Accelerate was achieved than the actual SoA value as a result of the specific property condition and rental return.

15.4 Example 4: **Incorrect purchase price reflected in Deeds Office, Scheme of Arrangement value and typographical error by Deeds Office in the purchase price to Accelerate:**

Property:	Description:	Owner:	Trf Date	Purchase Price	Owner	Trf Date	Increased Purchase Price in Deeds Office:
7 Main Road Melville	ERF 213, Melville, JHB	B&V	2009	R99 993 000	HS 18	2009	R16 000 000

15.4.1 The above properties formed part of a transaction where a few properties were sold for **R99 993 000,00** in terms of one agreement of sale. The Deeds Office reflects, at each individual property, the total sum as the purchase price instead of the individual purchase prices.

15.4.2 The increased purchase price was the incorrect purchase price and was supposed to be the SoA price, as below.

Correct Purchase Price as per SoA:	Owner:	Trf Date:	Purchase Price in Deeds Office:
R28 221 291	Accelerate	2013	R7 790 107 000

15.4.3 The above property formed part of a transaction where a few properties were sold for **R77 million** in terms of one agreement of sale. The Deeds Office reflects, at each individual property, the total sum as the purchase price instead of the individual purchase prices.

15.4.4 Furthermore, it is to be noted that the Deeds Office made a typographical error as the property price is reflected as **R7,7 billion** instead of **R77 million**.

THE DECLARATORY AND THE APPLICANTS' LACK OF LOCUS STANDI AGAINST ZEPHAN AND ORTHOTOUCH FOR THE RELIEF HEREIN SOUGHT:

16. I am an independent Business Rescue Practitioner. I have prepared business rescue plans for Zephan and Orthotouch based on the fact that the creditors the HS Investors, in their



capacities as noted in the business rescue plans, are the affected parties for voting purposes. Subsequent to the publications thereof, which were on **31 March 2020**, and whilst I was in the process of preparing a needed revised business rescue plan, it was brought to my attention that a vote on such a basis will be irregular because the SoA, being made an order of Court, stipulates that the affected parties as stated in the business rescue plan have ceded their claims. It is apparent that there are differences of opinion and I as business rescue practitioner needed to obtain clarity of the route to follow in obtaining a valid vote. I am not there to decide on legal matters, and I had to request the court to give me direction. I needed it to be determined by a Court who the creditors are specifically in respect of HS Companies 21 and 22, what their claims amount to, and what the sources of their claims are. Some say their claims are based on the so-called buy-back agreements (Note - For current purposes and for reason that the class action buy-back agreement application is still pending, I do not deal with the issue of prescription and reserve my right to do so at the opportune time when dealing with that class action) and some say based on the SoA. It cannot be both and I do not have the right to choose.

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17. Therefore, I had to go back and, *inter alia*, reanalyse the rights that have been compromised by the SoA and the judgment of the Supreme Court of Appeal in *Noormahomed* referred to above and apply that to the business rescue processes of Zephan and Orthotouch. After having received legal advice in that regard, I concluded that as there is a reasonable, and indeed strong possibility that the Court may find in all respects as applied my me, that, and I quote from the Notice of Motion as issued on **28 January 2021** under case number **4049/2021**:

- "1.1. That the Judgment in the Case of Ravin Construction CC v Bekker NO and Others 2016 (6) SA 589 (SCA) is to be followed by the Applicant [I] in his capacity as the Business Rescue Practitioner, seized with the affairs of Orthotouch Limited (sic – Orthotouch (Pty) Ltd) and Zephan (Pty) Ltd;*
- 1.2. That the rights and obligations which flow from the Buy-Back Agreements relating to Highveld Syndication No. 21 and Highveld Syndication No. 22, Annexures "BB21" and "BB22", have been compromised, in terms of the provisions of the Scheme of Arrangement, sanctioned by the abovementioned court on 26 November 2014, rendering the Buy-Back Agreements non-executable.*
- 1.3. That the Applicant, as the Business Rescue Practitioner of Orthotouch Limited and Zephan (Pty) Ltd need only to consult with the receiver for creditors, Mr Derek Pedoe Cohen, appointed in terms of the Scheme of Arrangement, sanctioned by the Court,*

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and dated 7 October 2014 between Orthotouch Limited and the Trade Creditors and Orthotouch Limited and the Highveld Syndication. Investors, who is obliged to ensure the protection and execution of the Investors' residual right in terms of the Scheme of Arrangement.

1.4. That Zephan (Pty) Ltd, is the holder of all the Investor's claims in terms of the provision contained in paragraph 2.2.3.13.1 and paragraph 2.2.3.13.2 of the Scheme of Arrangement." (sic)

18. The content of these proceedings, which I will hereinafter refer to as "the declaratory application", is relevant to this matter in regard to the factual basis upon which relief sought is based and in regard to the legal argument that is presented in support thereof, but instead of me repeating *verbatim* what I have stated therein, I annexed hereto, marked Annexure "**JDT4**", the Notice of Motion and founding papers, inclusive of the annexures thereto in order to facilitate an easy digestible single document (although the effect will be a duplication of certain documentation), and I pray that the content thereof be regarded as specifically herein set out and repeated.

19. Four of the five sets of attorneys that have (and still are) representing HS Investors have filed an affidavit deposed to by HS investor Robert Jan Black, a copy of which is annexed hereto, marked Annexure "**JDT5**". Theron and Partners of

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Stellenbosch, who is acting for the Applicants in the current matter, have not yet filed answering papers in the declaratory application, notwithstanding the fact that they should have done so some **six** months ago. I have instructed my legal team to apply for an order compelling the delivery of answering papers, alternatively barring them from doing so should they persist with their default after having been afforded a further specific period of time to do so.

20. My legal team representing me in the declaratory application is not the same legal team that represents me in these proceedings, and the former is still busy finalising my replying affidavit to the answering affidavit of Mr Black. I beg leave to annex those replying papers once they are duly served and filed, to this affidavit, marked as Annexure "**JDT6**". I will make due application that the contents of those replying papers be incorporated herein as if specifically, herein set out and repeated by me.
21. The specific relevance of the declaratory application and its content is the fact that I, in my representative capacity as business rescue practitioner of Zephan and Orthotouch is compelled by a Court Order of **26 November 2014**, to

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restructure the affairs, business, property, debt and equity of Zephan and Orthotouch on the basis that the SoA was duly sanctioned and therefor implemented. That order is equally binding on the Applicants. For reason that the Applicants claims "*of whatsoever nature and howsoever arising against the Company [Orthotouch]*" have been ceded to Zephan in terms of the provisions of paragraph **2.2.3.13.1** of the SoA, they do not possess the necessary *locus standi* to have instituted the application for that relief they are seeking from Zephan and Orthotouch. For current proposes I specifically refrain from dealing with the issue whether or not a cession of the HS Investors other rights / claims against other 'individuals' and / or sureties could similarly have been ceded as there are conflicting judgments (in regard to business rescue proceedings) in the Western Cape Division and KwaZulu-Natal Division, with an obiter remark from the Supreme Court of Appeal which seems not to support the judgment of the Western Cape Division. However, I reserve my right to deal with these issues in argument, should the need therefor arise.

22. Currently, and whilst the order of Justice Moshidi is in existence, the Applicants have and can enforce against Zephan and

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Orthotouch (within the business rescue processes of Zephan and Orthotouch) only those rights they have in terms of the SoA, being either the rights in terms of option **1** or the rights in terms of option **2**, depending on what choice or default position of options is applicable to them.

23. Therefore, the existence of the order of Justice Moshidi is an unsurmountable hurdle in the way of the Applicants for all and any relief herein sought against Orthotouch, and Zephan for that matter as one cannot sue oneself, and it makes the Applicants application premature, judicially unsusceptible, bad in law and in fact, and excipiable for reason that the Applicants lack the necessary *locus standi* to bring this application against Orthotouch, and Zephan.

ZEPHAN AND ORTHOTOUCH'S ANSWER:

24. I have read the founding affidavit deposed to by Henry Arden Smith ("*Smith*"), dated **11 December 2019**.
25. For reason that I was not involved with the affairs of Orthotouch, Zephan and / or Highveld Syndication companies in the period complained of by the Applicants I do not intend



dealing separately with each and every paragraph of the founding affidavit. In this regard, as aforesaid, and after having had regard to the supporting documentation annexed to the answering affidavit of Hans Klopper and those documentation in my possession, coupled with what I have been informed of by Reichel, I believe that the content of the affidavit of Hans Klopper, is in all material respects correct (save for the few instances which I will deal with hereinlater), which include the points of law and special defences raised, with which I associate myself and which will be more comprehensively be dealt with in argument, those being the following issues:

25.1 Section 133:

25.1.1 I confirm the contents of paragraphs **17.1** and **17.2** and allegations elsewhere made in the answering affidavit of Hans Klopper on this topic.

25.1.2 In addition - The asset base of Zephan and Orthotouch will not increase as a result of the intended litigation of the Applicants. Quite the opposite is true. The extensive litigation will only

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further deplete the available resources (immovable properties, available capital and funds) and will lead to further delays in the finalisation of the business rescue processes and to a further diminishing of the amount of the eventual payments to be received by the HS Investors, or share options or whatever the solution, if any, will be at that stage or may even lead to the liquidation of Zephan and Orthotouch, the latter which will be catastrophic for Zephan and Orthotouch as is confirmed by the published business rescue plans of Zephan and Orthotouch dated **31 March 2020**, which will for part of the annexures to my replying affidavit to be filed in the declaratory application and as also confirmed by the further draft business rescue plans referred to hereinlater.

25.1.3 Furthermore, if the HS Investors prove to have claims against Zephan and Orthotouch in an amount of, say **R4 billion**, instead of the current approximate **R2,4 billion**, all the HS Investors will

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still only be able to share in the available resources of Zephan and Orthotouch (immovable properties, available capital and funds - i.e. the pot of gold within Zephan and Orthotouch cannot change) supplemented or exchanged in whatever manner in business rescue plans to be redrafted to take into consideration the larger amount of debt. The practical and factual result of an increased claim of HS Investors or HS Companies, whatever the case might be, against Zephan and Orthotouch will not increase the dividend / benefit to be in business rescue and / or eventual liquidation should these vexatious proceedings not be resolved soon.

25.1.4 The offer currently on the table, which I do not at the present time know whether or not it had survived the recent passing of Mr Nicolas Georgiou, is contained in the revised business rescue plan annexed hereto, marked as Annexure "**JD7**", that is still a work in progress,

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which financial information has not been recently updated and which content is dependent on the outcome of the declaratory application.

25.2 **Derivative action:**

25.2.1 I confirm the factual and legal basis of opposition and points of law as set out in paragraphs **18.1** to **18.10** and allegations made elsewhere of the answering affidavit of Hans Klopper on this topic.

25.2.2 In addition; - Whilst the Applicants are relying on the contents of a founding affidavit which consist almost exclusively of hearsay evidence, conclusion of law and fact, which has no foundation in fact, and which appears to be based solely on conjecture and speculation, in an attempt to make out a "*prima facie*" case as Smith incorrectly state it to be.

25.2.3 By resorting to this 'because I say so' - manner of producing evidence, whilst the deponent for the Applicants does not have any personal knowledge of many of the matters he deposed to, the inference is inescapable that the



Applicants have to be misinformed as to the *onus* of proof that rests on an Applicant applying for relief in terms of section **165** as fairly recently confirmed by the Supreme Court of Appeal, being the *Plascon-Evans* test with the consequence that the version of the Respondent can only be rejected if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.

25.2.4 It is clear in this matter that neither of the Respondents' versions can be rejected.

25.2.5 An appropriate application to strike out the mentioned offending material will be filed in due course and will be argued with the leave of the court *in limine et initio litis*.

25.3 **Class action:**

25.3.1 The relief sought in the alternative in paragraphs **4** and **5** of the Notice of Motion do not concern

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the Zephan and Orthotouch, similar as in regard to the relief sought in paragraph **3.2**.

25.3.2 Be that as it may, as will be dealt with hereinunder under the heading "Prescription", if my interpretation (I repeat as advised by my legal team) of **s 77(7)** of the Companies Act **71** of **2008** is correct, as a result of more than three years that has lapsed since the actions or omissions of the 'individuals' complained of, no proceedings can be commenced against them.


25.4 **Prescription:**

25.4.1 I confirm the factual basis of this special defence as set out in paragraphs **27.1** and **27.3** and elsewhere of the answering affidavit of Hans Klopper on this topic.

25.4.2 In addition, in regard to the Applicants' intended **s 165** claims against the 'individuals', on the basis of being a 'director' or in regard to Hans Klopper in terms of **s140(3)(b)** of the Companies Act **71** of

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2008, as a result of the provisions of **s 77(7)** of the same act those proceedings to recover such loss, damage or costs may not be commenced more than **three** years after the act or omission that gave rise to the liability. That is the case regardless of whether a director of the company is held liable in accordance with the principles of the common law relating to (a) breach of a fiduciary duty as a consequence of any breach by the director of a duty contemplated in **s 75, s 76** to or **s 76(3)(a)** or **(b)** or if the director is held liable in accordance with the common law relating to (b) delict as a consequence of any breach by the director of a duty contemplated in **s 76(3)(c)**, and / or any provision of the Companies Act **71** of **2008** not otherwise mentioned in **s 77** and / or any provision of the Company's Memorandum of Incorporation.



25.5 ***Lis Alibi Pendens:***

25.5.1 On the factual basis as set out in paragraphs **28.1** and **28.3** and elsewhere of the answering affidavit of Hans Klopper on this topic.

26. In regard to Hans Klopper's *ad seriatim* response to the individual paragraphs of the Smith founding affidavit, I repeat that I believe that the content of the affidavit of Hans Klopper is in all material respects correct (negligible or nit-picking points excluded), save for the following:

26.1 At the time of the adoption of the SoA, Accelerate's pre-listing statement was already one year, and not three years, in public domain; and

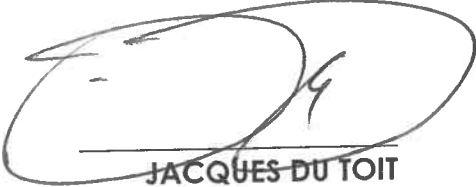
26.2 Hans Klopper could not have resigned as business rescue practitioner of the HS Companies; his remedy would have been to terminate the business rescue process and the liquidation of those HS Companies would have followed.

27. In regard to the relief sought in paragraph **3.3** of the Applicants' Notice of Motion, I associate myself with and



confirm the correctness of the contents of paragraph **80** to **86** of the answering affidavit of the late Nicolas Georgiou, dated **11 December 2020**. These issues will be dealt with more comprehensively in argument.

WHEREFOR, I PRAY THAT the Applicants' application in regard to the relief sought against Zephan and Orthotouch be dismissed with costs on an attorney and client scale.



JACQUES DU TOIT

The deponent has acknowledged to me in my presence that he:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the prescribed oath;
- (c) considers the prescribed oath to be binding on his conscience;
- (d) Uttered the words: *"I swear that the contents of this declaration are true, so help me God"*

DATED AND SIGNED AT CAPE TOWN ON THIS 28TH DAY OF SEPTEMBER 2021



COMMISSIONER OF OATHS

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