


IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 42334/14

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
6 May 2024,	
DATE	SIGNATURE

In the matter between:

JURIE JOHANNES GELDENHUYS
ARTHUR BRADY COCHRANE
SHARON ANN VLOK
BRIAN JOHN WAXHAM
CHRIS NEL
HYMIE PINSHAW
FRANCOIS STRAUSS
LEA MAGDALENA MEYER

First Applicant
 Second Applicant
 Third Applicant
 Fourth Applicant
 Fifth Applicant
 Sixth Applicant
 Seventh Applicant
 Eighth Applicant

and

ORTHOTOUCH LIMITED
DEREK PEDOE COHEN N.O.
HANS KLOPPER N.O.

First Respondent
 Second Respondent
 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
NICOLAS GEORGIU	Twelfth Respondent
ZEPHAN PROPERTIES (PTY) LTD	Thirteenth Respondent
NICOLAS GEORGIU N.O.	Fourteenth Respondent
MAUREEN LYNETTE GEORGIU N.O.	Fifteenth Respondent
JOSEPH CHEMALY N.O.	Sixteenth Respondent
GEORGE NICOLAS GEORGIU	Seventeenth Respondent
MICHAEL NICHOLAS GEORGIU	Eighteenth Respondent
HENDRIK JACOBUS 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 PROPERTY COMMISSION OF SOUTH AFRICA (CIPC)	Twenty Seventh Respondent

and

THE HIGHVELD SYNDICATION INVESTORS

Respondent

In re:

The *ex parte* application of:**ORTHOTOUCH LIMITED**
(Registration No: 2010/004096/06)

Application for the sanctioning of a Scheme of arrangement in terms of section 155(7) of the Companies Act, 71 of 2008

JUDGMENT

CRUTCHFIELD J:

- [1] The applicants, Jurie Johannes Geldenhuys and seven others, seek the transfer of the main application, an application for the rescission of an order granted in this Court, to the Gauteng Provincial Division sitting in Pretoria, in terms of s 27(1) of the Superior Courts Act 10 of 2013 ("the Act"), alternatively in terms of the common law ('the transfer application').
- [2] The rescission application, also referred to as the setting aside application, is for the setting aside of the scheme of arrangement in respect of the first respondent, Orthotouch Limited, in terms of Section 155 of the Companies Act of 2008.
- [3] The seventeenth respondent, George Nicolau Georgiou, and the eighteenth respondent, Michael Nicholas Georgiou, oppose the transfer application.

[4] Section 27(1) of the Act provides that:

“If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings –

- (a) should have been instituted in another Division or at another seat of that Division; or
- (b) would be more conveniently or more appropriately heard or determined –
 - (i) at another seat of that Division; or
 - (ii) by another Division,

that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.”

[5] It is evident that s27(1) of the Act grants to a court a discretion in respect of the transfer even if the court finds that it would be more convenient or more appropriate if the matter be determined at another seat of the Division.

[6] The applicants contend that it will be more appropriate and convenient for the rescission application to be dealt with and determined in the Gauteng Division sitting in Pretoria (‘the Pretoria Court’). This, according to the applicants, is because there are allegedly multiple overlapping features between the rescission application and a related matter that is pending in the Pretoria Court, referred to herein as the ‘Smith application.’

[7] On the view that I take of the transfer application, it is not necessary for me to traverse the various alleged overlapping factors relied upon by the applicants before me.

[8] The applicants in the Smith application and the applicants before me, whilst they are all members of the HSAG, the individual applicants themselves differ and the applicants in the Smith application are not the same applicants as those in the setting aside or the transfer application. The respondents in the Smith application however are also respondents in the rescission application.

[9] The Smith application has been case managed by the DJP in the Pretoria Court and is at an advanced stage. The Smith application is ready to be heard and a date has been allocated, so I am told, for that hearing to proceed during May 2024.

[10] The respondents contended that the transfer application is an attempt to derail the hearing of the Smith application in Pretoria. The relief sought in the notice of motion provides simply for an order for the transfer of the rescission application to Pretoria. There is no prayer for the consolidation of the two applications and no prayer for a stay. The applicants conceded proceedings for such relief would have to be brought by them.

[11] This court sanctioned the scheme of arrangement of Orthotouch Ltd on 26 November 2014. The rescission application was issued out of this court during March 2015, some nine years ago. However, the applicants did not afford notice of the rescission application to all the parties whose interests might be affected by the rescission application, being those investors who are bound by the scheme of arrangement in terms of s 155(8) of the Companies Act.

[12] The replying papers in the rescission application were delivered during November 2022. The transfer application was issued during December 2022. Absent the transfer application, the rescission application can be heard in this court approximately six weeks from the delivery of the last set of heads of argument.

[13] The seventeenth respondent drew attention to the fact that the parties affected by the scheme of arrangement had not had notice of the transfer application. This is in addition to them not having had notice of the rescission application, which was dealt with by Spilg J in separate proceedings. The applicants argued that this was irrelevant as the interested parties' rights remained intact including all possible grounds for their opposition to the setting aside regardless of the court in which the matter is heard.

[14] Counsel for the seventeenth respondent argued that the parties having an interest in the setting aside application automatically have an interest in the transfer application. Accordingly, if those interested parties are entitled to notice and service of the setting aside application, then they have an equal interest and are equally entitled to notice and service of the transfer application.

[15] The right to be heard is fundamental to our legal system, even if an interested party chooses not to exercise that right to oppose the relief sought. Such right to be heard is not easily dispensed with and the interested parties ought to have been given notice of these proceedings before me.

[16] It does not lie with the applicants to argue that the interested parties should not receive notice and service, more especially in the face of Spilg J's order that notice of the rescission application be given to them.

[17] The interested parties, in effect, have been deprived of their right to choose to be heard by this Court and to oppose the transfer application if they choose to do so. The applicants cannot make that choice on behalf of the interested parties.

[18] The applicants contend that the rescission application stands in the way of the Smith application and the underlying claims. This argument is of no merit as the rescission application claims the setting aside only of the court order approving the scheme of arrangement. The rescission application does not affect the agreement underlying the scheme of arrangement. As a result, the rescission application is not the panacea to the Smith application that the applicants rely on.

[19] It is not disputed that the first, second and third applicants settled their claims with the twelfth respondent. The judgment in respect thereof was delivered by this court

on 13 March 2017. The settlements between the first, second and third applicants and the twelfth respondent are admitted.

[20] It is long established in our law that a compromise or a settlement is a contract the purpose of which is to prevent or put an end to litigation. As a result of the settlement of the claims between the first, second and third applicants and the twelfth respondent, the first, second and third applicants lack the right to claim the relief sought before me in the setting aside application and also in the interlocutory proceedings before me. Furthermore, that results in the first, second and third applicants not having *locus standi* in the proceedings before me.

[21] As to the alleged convenience, the scheme of arrangement was sanctioned in this court and the rescission application was brought in this court. The rescission application is ready to be heard once the heads of argument are delivered if they have not already been delivered.

[22] The applicant refers to the overlap between the rescission application and the Smith application, yet there is no application for consolidation of the two matters or that they be heard together. Furthermore, the applicants in the two matters are at variance.

[23] The notice of motion seeks only an order in respect of the transfer. In the face of the above-mentioned, there is no convenience in transferring the matter to Pretoria. The convenience lies in dealing with this matter in this Court without further ado.

[24] Furthermore, the first respondent resides in Fourways, making this Court the more convenient forum to the relevant respondent.

[25] The Smith application is set down for hearing in May 2024. By all accounts, the matter is ready to be determined and disposed of. Granting a transfer of the rescission application would serve no convenient purpose in that it would result in a delay of the Smith application, painstakingly case managed to this point since 2019.

[26] The eighteenth respondent seeks that the Smith application proceed to finality as soon as possible. Given that the Smith application has been case managed and is ready for hearing during May 2024, it would be inconvenient in the extreme to the Pretoria Court to order the transfer of the rescission application. It would undoubtedly cause a delay to the Smith application if I were to order the transfer of the rescission application to the Pretoria Court.

[27] In the circumstances, I am not persuaded that it is either appropriate or convenient to transfer the rescission application to the Gauteng Division sitting in Pretoria and I intend to grant such an order.

[28] Both the seventeenth and eighteenth respondents sought costs on the attorney and client scale, one of the reasons being that the applicants failed to comply with Spilg J's judgment in respect of service and notice to the interested parties. I agree that punitive costs are justified in the face of the absence of notice to the interested parties, despite the order of Spilg J in this regard.

[29] In the circumstances set out above, there is no reason why the costs of this application should not follow the order on the merits on the scale as between attorney and client and include costs of two counsel where two counsel were utilised.

[30] In the circumstances, I grant the following order:

1. The application is dismissed with costs as between attorney and client, including the costs of two counsel where two counsel were utilised and one of whom is senior counsel.

I hand down the judgment.



CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 6 May 2024.

COUNSEL FOR THE APPLICANTS:

Mr CHJ Maree.

INSTRUCTED BY:

Theron & Partners.

COUNSEL FOR THE SEVENTEENTH RESPONDENT:

Mr J N van der Walt.

INSTRUCTED BY:

Werksmans Incorporated.

COUNSEL FOR THE EIGHTEENTH RESPONDENT:

Mr PG Cilliers SC and
Mr RJ Groenewald.

INSTRUCTED BY:

Fluxmans Incorporated.

DATE OF THE HEARING:

22 and 23 January 2024.

DATE OF JUDGMENT:

6 May 2024.