IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 80811/2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

....
DATE SIGNATURE

In the matter between:

SHARON ANN VLOK	**1ST APPLICANT**
DANIEL EARNEST LAMPBRECHT	**2ND APPLICANT**
CHARLENE ESMAY JORDAAN	**3RD APPLICANT**
JEAN PAPANDONIS	**4TH APPLICANT**
BRIAN JOHN WAXHAM	**5TH APPLICANT**
CHRIS NEL	**6TH APPLICANT**
HYMIE PINSHAW	**7TH APPLICANT**
FRANCOIS STRAUSS	**8TH APPLICANT**
LEA MAGDALENA MEYER	**9TH APPLICANT**

AND

NICOLAS GEORGIOU	1ST RESPONDENT
ZEPHAN PROPERTIES (PTY) LTD	2ND REPONDENT
NICOLAS GEORIOU N.O.	3RD RESPONDENT
MAUREEN LYNETTE GEORGIOU N.O.	4TH RESPONDENT
JOSEPH CHEMALY N.O.	5TH RESPONDENT
GEORGE NICOLAS GEORGIOU	6TH RESPONDENT
MICHAEL NICOLAS GEORIOU	7TH RESPONDENT
HENDRIK JACOBUS MYBURGH	8TH RESPONDENT
BOSMAN & VISSER (PTY) LTD	9TH RESPONDENT
PICKWEST (PTY) LTD	10TH RESPONDENT
HEINRICH PIETER MOLLER	11TH RESPONDENT
WILLEM MORKEL STEYN	12TH RESPONDENT
BAREND STEFANUS VAN DER LINDE	13TH RESPONDENT
FREDERICK JULIUS REICHEL	14TH RESPONDENT
EUGENE KRUGER INC	15TH RESPONDENT
HANS KLOPPER	16TH RESPONDENT
ORTHOTOUCH LTD	17TH RESPONDENT
HIGHVELD SYNDICATION NO 19 LTD	18TH RESPONDENT
HIGHVELD SYNDICATION NO 20 LTD	19TH RESPONDENT
HIGHVELD SYNDICATION 21 LTD	20TH RESPONDENT
HIGHVELD SYNDICATION NO 22 LTD	21ST RESPONDENT

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The first to fourth applicants launched an application under the above case number on 31 October 2014, applying for the certification of, and for leave to institute, class actions on behalf of investors in four companies known as Highveld Syndication No. 19 Limited (HS 19), Highveld Syndication No. 20 Limited (HS 20), Highveld Syndication No. 21 Limited (HS 21), and Highveld Syndication No. 22 Limited (HS 22).

[2] Due to ongoing pending disputes ancillary to the 31 October 2014 application, the outcome of which will have a bearing on the application, the first to fifth respondents applied for and were granted an order on 27 May 2015 in terms of which the *dies* for the delivery of their answering affidavits were suspended, pending the final determination of such ancillary disputes.

[3] Following further interlocutory developments, the fifth to ninth applicants were joined to the proceedings on 7 April 2017.[1] The first

[1] *Vlok & Others v Georgiou & Others*, Case No 80811/14, delivered 7 April 2017.

to fourth applicants are effectively no longer parties to this application.

[4] On 27 July 2018 the fifth to ninth applicants launched the current application in which:

4.1 They applied, in Part A, for a variation of the 27 May 2015 order, to allow for the filing of answering affidavits by the first to fifth respondents in respect of a limited portion of the certification relief applied for, namely the alleged contractual claims of investors in HS 21 and HS 22. Part A therefore effectively sought to excise the proposed contractual claims from the rest of the proposed claims relied on in the certification application, and to expedite the certification hearing (the fast tract application) in respect of such contractual claims. The contemplated contractual claims are based on two agreements referred to as *"buy-back agreements"*.

4.2 They apply, in Part B, for the certification of, and for leave to institute, two class applications, *alternatively* class actions (the class action), on behalf of investors in HS 21 and HS 22, on the strength of the respective buy-back agreements.

[5] At the hearing of Part A the parties agreed to an order in terms of which the first to fifth respondents would deliver their answering affidavits in respect of the certification sought relating to the proposed claims based on the buy-back agreements, and in terms of which the *dies* for the delivery of further affidavits for purposes of Part B were regulated. Part B of the application, the fast track application in respect of the proposed claims based on the buy-back agreements only, forms the subject matter of the current hearing. As a result, the first to fifth respondents are effectively the only respondents in Part B.

[6] An application currently pending in the Gauteng Local Division of the High Court under case number 42334/2014, in which the applicants apply for the rescission, *alternatively* for leave to appeal against, a court order sanctioning a scheme of arrangement in terms of section 155 of the Companies Act, is referred to as *"the rescission application"*.

[7] The relief in this application (the certification application), sought to fast track a portion of the original relief sought under the initial Notice of Motion issued almost 5 years ago on 31 October 2014.

THE APPLICATION TO STRIKE OUT IN TERMS OF RULE 6(15)

[8] The respondents brought an application in terms of Uniform Rule 6(15) in order for certain passages of the applicants' replying affidavit

to be struck out on the basis that they were irrelevant, scandalous and/or vexatious.

[9] The notice in terms of Uniform Rule 6(15) comprises a Part A and a Part B. Part B was conditional, and would only have been proceeded with in the event of the respondents being unsuccessful in an application in terms of Uniform Rule 6(5)(e), in which they applied for leave to deliver a further affidavit. The applicants conceded the respondents' application in terms of Uniform Rule 6(5)(e), and consented to the respondents' delivery of a further affidavit. The applicants in turn delivered a further affidavit in response.

[10] In the premises only Part A of the applicants' application in terms of Uniform Rule 6(15) remained relevant.

[11] Those allegations pertaining to the purported delays experienced by the applicants, raised in support of the fast track application in respect of the buy-back claims, were dealt with in Part A, and became moot pursuant to Part A being finalised.

[12] Of relevance for purposes of Part B is whether the applicants have made out a case for certification relief in respect of the proposed claims based on the buy-back agreements.

[13] The respondents alleged that despite the narrow ambit of Part B of the application before this Court, that the Applicant's replying affidavit sought to introduce new facts and/or expand on allegations already made in the founding affidavit, pertaining to alleged strategies to delay and/or derail the class action, undermine support for the class actions, make litigation unaffordable and to discredit the respondent's attorney of record. The respondents alleged that the allegations are irrelevant and do not purport to address the certification. The unfortunate situation in this matter is that dispersions and personal attacks were launched by all parties, which extended to their legal representatives.

[14] Two elements must be satisfied before an application to strike out will succeed. Firstly the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. Secondly the court must be satisfied that the party seeking such relief would be prejudiced.[2]

[15] Due to the fact that the allegations made against the respondents and their legal representatives, stem from allegations made against the applicants and their legal representatives, the response by the applicants seemingly attempted to set the record straight. In my view, due to the fact that this Court regarded the content of the paragraphs that the respondent sought to strike out, as irrelevant for purposes of the adjudication of the certification procedure and did not take these

[2] Erasmus, Superior Court Practice, 2nd ed, Van Loggerenberg 2nd ed, vol 2, D1 – 92 and footnote 7 thereof.

allegations into account, when determining the certification application, there was no prejudice for the respondents and as a result the respondents did not prove the second requirement. It was submitted by counsel for the respondents, that if this was the approach that the Court was going to follow, no order was needed and that rather than dismissing the application, no order should be made and that costs should be cost in the cause. This seems to be a sensible approach under the circumstances.

THE APPLICATION TO DELIVER A FURTHER AFFIDAVIT

[16] On 23 October 2019 the respondents delivered a further affidavit. The further affidavit, deposed to by the first respondent, sought to introduce evidence on a single point, namely the most recent newsletter by the Highveld Syndication Action Group (HSAG), dated September 2019.

[17] One of the central issues in this application, addressed in more detail below, is the suitability of the applicants and their legal representatives as class representatives, and the appropriateness of the relief sought in this application. Central to that is the complaint by the respondents that the applicants effectively seek to obtain certification of classes limited to those investors who can afford to make payments to the applicants' attorneys. This aspect is dealt with in detail below.

[18] The respondents explained that the newsletter was only published after this Court's directive made on 12 September 2019, during case management, which set time limits for further affidavits to be filed. As the respondents further explained, the newsletter came to the respondents' attention when their legal representatives were preparing for this matter.

[19] A Court has a discretion to allow further affidavits. This discretion should be exercised against the consideration that a matter should be adjudicated upon all relevant facts.[3] It is trite that it is ultimately a question of fairness.[4] The reason for the evidence not being placed before Court should be set out.[5]

[20] As already stated in this instance the letter only became available at a late stage and due to the fact that the content ultimately just reiterated the point made in the other affidavits, namely to question the suitability of the applicants and their legal representatives as representatives in the class actions. I allowed the affidavit.

APPLICATION FOR INTERVENTION

[21] An application to intervene was brought by a Mrs Van Der Sandt. The applicants agreed to the intervention, on the basis that they did not

[3] *Cohen NO v Nel* 1975(3) SA 963 (W) at 970 B.
[4] *Milne NO v Fabric House (Pty) Ltd* 1957(3) SA 63 (N) at 65A.
[5] *Transvaal Racing Club v Jockey Club of South Africa* 1958(3) SA 599 (W) at 604 A-E.

want to delay the hearing of the matter, but stated that Mrs Van Der Sandt did not have any *locus standi* or any interest in the matter. It was clear from the onset that Mrs Van Der Sandt did not have any *locus standi* in this matter as she is not an investor in either HS 21 or 22. She was an investor in HS 15 and entered into an agreement with the respondents and was paid by the respondents in terms of that agreement. Counsel who appeared for her on the first day of the hearing withdrew the application and conceded that he could not argue that there was any merit in the application, but no offer was made by her to pay the costs of the application for intervention.

[22] Although a Court has a discretion, the general principle is that the party should pay the costs, if it withdraws the proceedings, as an unsuccessful litigant.[6] Applicants contended for attorney and client costs due to the fact that she was aware of the fact that she had neither any interest nor *locus standi* and I am of the view that this application was an abuse and that such an order should be granted.

BACKGROUND TO THE CERTIFICATION APPLICATION

[23] In the initial application (main application) leave was sought to institute four related class actions on behalf of some 9 000 investors, who bought shares in one or more, of four separate property syndication companies, known as HS 19 to 22. No opposing papers

[6] Erasmus, Superior Court Practice, Services -2017,D1551.

had been filed in the main application, due to various delays. The intended claims are against various directors and individuals involved in the property schemes. The claims are based on buy-back agreements, alleged fraudulent and reckless dealings and misrepresentations.

[24] More than R3.6 billion was invested by investors in the syndication schemes already mentioned. HS 15 to HS 22 (the Highveld Companies) had in the meantime all been placed under business rescue.

[25] The prospectuses in which members of the public were invited to invest in the property syndication schemes all reflected that unencumbered immovable properties, as identified therein, would be transferred to the Highveld Companies. However, no such transfer of the properties ever occurred. This was confirmed in the report of the business rescue practitioner, Mr Klopper, who was cited as the seventeenth respondent.

[26] The applicants alleged that over 7 000 investors had already joined the class action litigation by giving mandates to applicants' attorney of record (Theron & Partners) and had contributed money in support of the class action. HSAG was established for this purpose. HSAG is a voluntary organisation without legal personality. The members include investors in HS 15 to 18, the issuing of an application for

leave to institute class action on behalf of them is according to the applicants envisaged and will apparently be issued in due course.

[27] The total number of investors in the eight Highveld Companies are over 18 000 according to the applicants.

[28] The applicants alleged that one of the reasons why the class action was delayed, was that a Scheme of Arrangement, under section 155 of the Companies Act of 2008 was proposed during November 2014. The terms of the Arrangement absolved all the Highveld Companies and individuals from liability for the failed scheme.

[29] The Arrangement was proposed after the Highveld Companies were placed under business rescue during 2011. The business rescue plan entailed that a new company, the Eighteen Respondent (Orthotouch) would acquire all properties and then assume some of the Highveld Companies liability towards investors, although scaled down.

[30] The First Respondent (Mr Georgiou) controls Orthotouch. After Orthotouch failed to meet its obligations under the business rescue plan, the Arrangement was proposed, which further watered down the obligations towards investors. The general structure of the syndication schemes under the Arrangement was the same as the one under the business rescue plan, namely that the immovable properties, which were earmarked for transfer to the Highveld

Companies, were to be transferred to Orthotouch, which would be the new vehicle through which the properties would be consolidated and grown to the benefit of investors, whilst still paying the investors monthly interest and/or income.

[31] Shortly after the issuing of the main application, Orthotouch obtained an *ex parte* order in the Gauteng Local Division of the High Court, sanctioning the Arrangement in terms of section 158(7) of the Companies Act. Orthotouch did not disclose to that Court that the main application was issued in this Court. It also failed to disclose to the Court that the Arrangement purported to absolve it from any liability to investors. The applicants launched a setting aside application and in that application allegations of fraud and misrepresentation of investors were made.

[32] None of the applicants voted in favour of the Arrangement, nor were they all at the meeting where voting took place. An application setting aside the aforementioned *ex parte* application was launched by applicants, who were investors and members of HSAG, in March 2015.

[33] There were numerous delays and the setting aside application has still not been finalised. The delays, and who caused it (the parties blame each other) are not relevant to the determination of this application.

[34] This Court made a conscious decision not to pay any heed to the allegations and counter-allegations between the parties of inappropriate conduct. These allegations will only be dealt with insofar as it may be relevant to the determination of this application.

[35] It was decided, despite the various grounds for the claims in the proposed class action, to fast track the claims based on the so-called buy-back agreements, in terms of which HS 21 and HS 22 undertook to buy back the shares from investors, after five years. These buy-back agreements were entered into with all the investors in HS 21 and 22, and effected more than 8 000 investors. This approach was decided upon given the delays in the progression of the litigation, it was also decided to progress in this way after judgment was given in **Zephan Properties vs Noormahomed**.[7] In that judgment it was held that the said Arrangement did not hamper or preclude a claim under the buy-back agreements. Zephan Properties appealed this decision and this matter was argued in the Supreme Court of Appeal a week after this application was heard. The SCA dismissed the appeal.[8] Reference was also made in Noormahomed to the judgment of **De Lange v Zephan Properties**[9] where Hiemstra J held that the buy-back agreements remained intact despite the Business Rescue Plan. It was held that, not only was there a non-variation clause in the buy-back agreement, but there was also no resolution by 75% of the

[7] (2017/26036) [2018] ZAGPPHC 346 (14 May 2018).
[8] [2019] ZASCA 162 delivered 29 November 2019.
[9] 82322/14 [2015] ZAGPPHC 540 (22 July 2015).

shareholders of the relevant Highveld Companies approving such cancellation, as required in clause 6 of the buy-back agreement.

[36] The SCA upheld the judgment in **De Lange** and confirmed that the plan only related to the restructuring of the business of the Highveld Companies and not that of the Appellants (the Respondents in this case) and that there was no basis for finding that the investor concerned had compromised her rights under the buy-back agreements. [10]

[37] In dealing with the Arrangement, in **Noormohamed**[11] the same reasoning was followed as in **De Lange**, namely that the non-variation clause and the 75% voting requirement caused the buy-backs to be unscathed and therefore still enforceable despite the Arrangement which purported to restructure the legal relationships. In the matter of **Cohen e.a. In re Pretoriuis v Zephan**[12] it was also held that the Arrangement did not influence the rights under the buy-back agreement.

[38] It was alleged by the Applicants that the total combined claims in respect of the buy-back agreements exceeded R3.2 billion and involved thousands of investors. It accordingly involved a conservable portion of the intended class action. In the case of HS 21 the total

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[10] Supra.
[11] Supra.
[12] Case number 5943/17, delivered on 5 October 2018, Free State Division, Bloemfontein, par 14.

investments subject to the buy-back agreements are R1.332 billion and in HS 22 it totals R888 million.

LEGAL PRINCIPLES IN RELATION TO CLASS ACTION

[39] In **Children's Resources Centre Trust and Others v Pioneer Food (Pty) Ltd & Others**[13] the definition of the concept of a class action as defined by Professor Mulheron was confirmed, it was stated as follows:

"*[16]* ....

'A class action is a legal procedure which enables the claims (or parts of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons ("representative plaintiff") may sue on his or her own behalf and of a number of other persons ("the class") who have a claim to a remedy for the same or similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff ("common issues"). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.'[14]

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[13] 2013(2) SA 213 SCA.
[14] *Ibid* par 16.

[40] The aim is ultimately to bring a number of separate claims together in one procedure and such an action is a representational device.[15]

[41] A class action may be brought, not only in terms of section 38(c) of the Constitution in relation to the infringement or potential infringement of a right guaranteed in the Bill of Rights. It was said that "*The procedural requirements that will be determined in relation to the one type of case can equally easily be applied in the other. Class actions are a particularly appropriate way in which to vindicate some types of constitutional rights, but they are equally useful in the context of mass personal-injury cases or consumer litigation*".[16]

[42] In **Children's Resources** the factors that should be considered in the event of a proposed class action were set out as follows:

> "*[23] All of the parties accepted that it is desirable in class actions for the court to be asked at the outset, and before issue of summons, to certify the action as a class action. This involves the definition of the class; the identification of some common claim or issue that can be determined by way of a class action; some evidence of the existence of a valid cause of action; the court being satisfied that the representative is suitable to represent the members of the class; and the court being satisfied that a class*

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[15] *Ibid* par 17.
[16] *Ibid* par 21.

action is the most appropriate procedure to adopt for the adjudication of the underlying claims. In my view they were correct to do so and we should lay it down as a requirement for a class action that the party seeking to represent the class should first apply to court for authority to do so."[17]

[43] However in **Mukaddam v Pioneer Foods (Pty) Ltd & others**[18] a more flexible approach was laid down and it was held that the factors mentioned should not be elevated to constitute rigid prerequisites, but that the guiding principle should be the interests of justice. It was also held that these factors were not conditions precedent, jurisdictional facts or exhaustive.[19] As a result a Court when exercising its discretion to either grant an application for certification or refuse it may take into account any factor which may be relevant or material to the determination of the matter.

[44] In order to establish whether this application should be granted and the class action be certified, it is appropriate to consider the factors set out above, the interests of justice and any factor that may be relevant to this specific application.

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[17] *Ibid* par 23, See also *Nguxuza & others v Permanent Secretary Department of Welfare Eastern Cape & another* 2001(4)(SA 624D-E; *First Rand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008(2) SA 592 (C)
[18] 2013(5) SA 89 CC.
[19] *Ibid* par 15 – 18, 34 – 35, 47.

IDENTIFIABILITY OF CLASSES

[45] The Applicants have to show that there exist classes identifiable by objective criteria.[20] It is not necessary to identify all the members of the class. It is, however, necessary that the class be defined with sufficient precision in order for a particular individual's membership to be objectively determinable, by examining their situation in the light of the class definition. This is important for the following reasons:

1. It will affect the manner in which notice will be given to the members of the class;

2. It is necessary for people to know whether they can commence their own litigation against a defendant or defendants in the class action;

3. It is essential for the identification of those who are bound by the judgment that may follow in the class action.

[46] The Respondents did not contend that the proposed classes were not identifiable by objective criteria pertaining to this application. They however argued that the Applicants sought to exclude certain members by their insistence that only those who could contribute financially should be included. I will deal with this aspect later on in the judgment.

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[20] Children's Resource Centre *supra* at par 29 and 34.

DETERMINATION OF TRIABLE ISSUES

[47] The applicants have to demonstrate that they have a cause or causes of action raising triable issues.[21]

[48] The standard to be applied in assessing whether a proposed class action reflects a cause of action raising a triable issue, is firstly whether the cause of action is legally tenable, and secondly whether the facts put forth by the applicant set out a *prima facie* case. A case is legally hopeless if it could be the subject of a successful exception, and a case is factually hopeless if the evidence available and potentially available, after discovery and other steps directed at procuring evidence, will not sustain the cause of action on which the claim is based.[22]

[49] In order for a court to be able to make an appropriate assessment, **Children's Resource Centre**[23] prescribes that a party seeking certification will have to set out in a draft pleading and in affidavits the basis for the proposed action. This will enable a court to have more material available to determine the cause of action and ultimately whether there exists a triable issue and will further enable a court to make a proper assessment of the legal merits of the claim.

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[21] **Children's Resource Centre** *supra* at par 35 to 36 and 38 to 42.
[22] **Children's Resource Centre** *supra* at par 35.
[23] **Children's Resource Centre** *Supra* at par 39.

[50] Unless it is plain that the claim is not legally tenable, certification should not be refused. The granting of certification however does not in any way foreclose an exception, or answer the question of the claim's legal merit in the affirmative.[24]

[51] The Respondents did not contend that the proposed claims on the buy-back agreements were not legally tenable, and correctly so, especially in the light of the **De Lange** and **Noormohammed** matters previously referred to.

COMMONALITY

[52] The right to relief relied on by the applicants must depend on the determination of issues of fact, or law, or both, common to all members of the proposed classes.[25]

[53] A court is therefore called upon to determine whether there are indeed sufficient points of commonality in relation to questions of law or fact that bind the members of a class together and make it appropriate to deal with their combined interests in a class action, as opposed to separate actions. In this regard it is to be noted that the class action does not have to dispose of every aspect of the claim in order to obtain certification.[26] The question in respect of any class is always whether there are common issues that can be determined that

[24] **Children's Resource Centre** *supra* at par 39.
[25] **Children's Resource Centre** *supra* at par 44 -45.
[26] *Ibid.*

will dispose of all or a significant part of the claims by the members of the class.[27]

[54] In order to satisfy the requirement of commonality the applicants had to demonstrate that the relief that they will ultimately seek in the proposed class actions depends on the determination of questions of fact, or law, or both, common to all members of the alleged classes.[28]

[55] Absolute commonality is not required. There merely needs to be sufficient points of commonality in relation to the question of law or fact that bind the members of a class together and make it appropriate to deal with their combined interest in the case in a class action, as opposed to in separate actions.[29]

[56] This was confirmed in **Children's Resources Centre** where the following is said:

> *"[44] This [the requirement of commonality] does not require that every claim advanced in the class action, save possibly in relation to quantum, be identical. It requires that there be issues of fact, or law, or both fact and law, that are common to all members of the class and can appropriately be determined in one action. Dealing with the issue of commonality in Wal-Mart Scalia J said 4 that the claims-*

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[27] *Ibid.*
[28] **Children's Resource Centre** *supra* at par 44 - 45.
[29] See Max Du Plessis: Class Action Litigation in south Africa, p 26 – 27 par 2.2 and 3.3

'must depend upon a common contention. . .. That common contention, moreover, must be of such a nature that it must be capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'

In my view that is correct. The simplest example of such a common issue would be the issue of negligence in a case involving the derailment of a train. That could give rise to different claims, such as damages for personal injuries by passengers, dependants' claims for loss of support in respect of those killed, claims for loss of or damage to goods being carried on the train and damage to other property arising as a result of the derailment, but there would be sufficient commonality on the issue of negligence to sustain a class action.

[45] That highlights the point that the class action does not have to dispose of every aspect of the claim in order to obtain certification. It might in an appropriate case be restricted to the primary issue of liability, leaving quantum to be dealt with by individual claimants. Certain common issues could be certified for the entire class, and other subsidiary issues certified in respect of defined subclasses. But the question in respect of any class or subclass is always whether there are common issues that can be determined that will

dispose of all or a significant part of the claims by the members of the class or subclass".[30]

[57] The respondents argued that there did not exist sufficient commonality between the investors. This argument was based on the fact that different factual circumstances apply to different investors. As a result it was argued the different factual circumstances will determine the merits of the respondents' defence based on the *stipulation alteri* contained in the Arrangement as well as an array of individualised issues.

[58] In my view the Respondents overemphasised the differences, between the individual investors. There exist sufficient commonality between the investors in this case, in that they are all parties to the buy-back agreements and the terms of those agreements.

[59] In all probability identification of sub-classes may in future arise and the trial Court may determine it if needs be. As was stated in **Nkala v Harmony Gold Mining Co Ltd**:[31]

"[49] In our view there simply is no need for the entire class membership to be determined before the common issues of fact or law can be determined, or before relevant evidence common to all class members, and which advances the cases of each class

[30] Children Resources *supra* at par 44.
[31] *Nkala v Harmony Gold Mining Co Ltd* 2016(5) SA 240.

member, is entertained. This approach is consistent with the practice adopted in the Australian and Ontario statues, whose practical utility is well captured in the following dictum of Cummings J sitting in the Ontario Superior Court:

> *'(T)he undoubted complexity of follow-on individual issues does not detract from the merit in resolving a preliminary common issue ...'*

[50] In terms of this approach there is no need to identify individual class members during the first stage of the class action. As the learned author Professor Mulheron reminds us:

> *'It must simply be accepted that the determination of whether each individual is a member of the class can only properly be made at some stage after the resolution of the common issues ... (T)he class most certainly does not have to be built at the very commencement of the proceedings'."*[32]

THE DILINEATION OF CLASSES (THE OPT IN OR OPT OUT PRINCIPLE)

[60] In the notice of motion in the original certification application, the original applicants applied to have four classes of litigants certified, each comprising the investors in a particular Highveld Syndication Company. An investor in the respective Highveld Syndication Companies would automatically become a member of the relevant

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[32] Nkala *supra* at par 49 – 50.

class once certification took place, unless an investor expressly elected to *"opt out"* of the class.

[61] Originally, Part B of the notice of motion in the fast track application applied for certification relief along the same lines, but only in respect of HS 21 and HS 22. It therefore seemed that the applicants intended all investors in HS 21 and HS 22 to become members of the classes once certified, unless investors specifically opted out.

[62] The applicants however amended their notice of motion by initially requiring that class members opt in by registering at a web-based registration site and providing certain information. As part of the registration any investor in HS21 or HS22 who invested R100 000-00 or less was required to contribute R4 500-00 and investors of more than R100 000-00 was required to pay a registration fee of R6 500-00 fully paid up members of HSAG as at 30 January 2020 will be exempted from registration fee. Initially applicants required class members to be members of HSAG but during argument Applicant abandoned this requirement.

[63] Accordingly, the applicants changed its position from a principle that investors could "opt out" to a principle that investors could "opt in" subject to the aforementioned payment. This will have the unfortunate effect that some investors may be excluded from this litigation. The applicants however argued that this is unavoidable, as without funds

they cannot proceed with litigation. The litigation commenced in 2014 and up to date some 23 applications have been brought and the legal costs so far incurred do not allow for any other option, but to require some fee to be paid in order to ensure that litigation can proceed. In the past HG 15 – 22 cross funded each other, but as far as this fast track application is concerned such cross funding will not apply, in order to prevent any prejudice to investors who have no interest in HS 21 and HS 22.

[64] According to applicants' proposal those investors who do not opt in and contribute will not be a member of the class. Unfortunate as this may be, one is faced with the situation that if no funds are raised, it will result in the litigation not proceeding at all, and many investors will be deprived from proceeding with litigation against the respondents, unless they fund it themselves. This will unavoidably lead to greater costs having to be incurred by individual litigants, and ultimately to the exclusion of all investors who cannot afford independent litigation. It must at all times be kept in mind that the investors are mostly over 75 years and invested pension monies in these property syndications.

[65] It would seem that the option of "opt in" and the payment of a registration fee will be the most just scenario under the circumstances, imperfect as it may be, it is the only viable option, that will ensure that at least a significant group of the investors will be in a

position to proceed with litigation against the respondents. The respondents stressed that vulnerable people will be excluded, that is true, but with no other viable option available one will have to apply the lesser of two evils.

SUITABILITY AS TO REPRESENTATION

[66] The applicants had to satisfy the court that the proposed representatives are suitable to be permitted to conduct the class litigation and represent the classes.[33] This factor principally interrogates two inter-related issues: [34]

1) The appropriateness of the class representatives, i.e. the named plaintiffs who represent the classes; and

2) The appropriateness of the legal representatives acting on the class's behalf.

[67] The respondent challenged the suitability of both the proposed applicants and the legal representatives.

[68] In evaluating the suitability of representatives, the court must be satisfied that the representatives do not have a conflict of interest with those who they wish to represent. A conflict of interest arises when

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[33] Children's Resource Centre *supra* at par 46 to 48.
[34] Du Plessis et al at 2.2.3.6, p30.

the purpose of litigation is to enrich the representatives, or to serve interests other than those of the class. There was no indication of any of these two elements on the papers. The other enquiry is whether the representatives have the capacity to conduct litigation properly on behalf of the class, including funding the litigation.[35] The capacity to conduct the litigation has a number of aspects that must be considered during the certification application. It was defined as follows in Children's Resources:[36]

> "*[48] ... First, has the representative the time, the inclination and the means to procure the evidence necessary to conduct the litigation? Second, has the representative the financial means to conduct the litigation and, if not, how is it going to be financed? This will involve making some assessment of the likely costs. Third, does the representatives have access to lawyers who have the capacity to run the litigation properly? This will require some consideration of the likely magnitude of the case and the resources involved in dealing with it. Fourth, on what basis are those lawyers going to be funded? Fifth, if the litigation is to be funded on a contingency fee basis, details of the funding arrangements must be disclosed to ensure that they do not give rise to a conflict between the lawyers and the members of the class. The court must also be satisfied that the litigation is not being pursued at the instance of the lawyers for their own gain rather than in the genuine interest of*

[35] Children's Resources Centre *supra* at par 47, See also Mukaddam at par 18.
[36] Children's Resource Centre *supra* at par 48.

class members, as the risk of conflicts of interest is inherent in that situation. It is for this reason that in other jurisdictions the court's approval of any settlement is required. Whilst that issue does not arise in these proceedings, so that it is unnecessary for us to be prescriptive, some similar requirement will need to be imposed when that situation does arise."

[69] In this case six of the nominal applicants are investors in Highveld 21 and 22. Their particulars are set out in affidavits and there is nothing on the papers to contradict their credentials. They will obviously have to rely on their legal representatives to do the necessary to procure the evidence and who would advise on the appropriate course of action. It cannot be that a greater burden will be placed on a litigant in a class action, than on any litigant who approaches a legal representative to act on his behalf. In my view the fact that the nominal applicants brought the litigation to this point, with the assistance of their legal representatives point to their ability to conduct the litigation on behalf of the class. The legal representatives had been involved in this matter for more than 5 years and are obviously in a position to see that the necessary is done. A funding model was proposed, which takes care of the financial aspects of the litigation, ie. the payment of registration fees and the possibility to approach investors if more funding is required. The question of whether they have the means to proceed with the litigation is addressed by the proposed funding model.

[70] The Respondents also launched an attack on the suitability of the Applicant's attorneys to represent them. Unfortunately the legal representatives made themselves guilty of mudslinging and attempted to discredit each other. In my view this type of behaviour from legal representatives should be discouraged. I ignored these allegations and determine the matter on the objective facts.

[71] The attorneys of the applicants, Theron and Partners had been representing them for nearly five years. During this period about twenty three applications were launched, and in most of them the applicants were successful. This must point to both their commitment to and ability to conduct the litigation. Furthermore they are admitted attorneys who are subject to the Legal Practice Act and the rules and regulations of the Legal Practice Council. The allegations made against them by the Respondent and their legal representatives seem to be without any legitimate basis or any merit.

[72] The attorneys had been instrumental in creating HSAG and a funding model. It also stands uncontested that they have worked whilst only having been paid their full fees, until the third term of 2016. Certainly this must be an indication of their commitment to their clients. It will not serve the interest of the applicants to substitute them at this stage. A lot of work had already been done by them and to replace them will prejudice the applicants and will obviously give the

respondents a tactical advantage. It could also in all probability lead to the silent death of the applicants' claim if they are removed. The chances of any other legal practitioner taking on the protracted and costly litigation at this point are negligible.

[73] The respondents also complained about the present funding model. They criticised the funding model and suggested that other ways of financing the litigation should be pursued, third party funding was *inter alia* suggested. However, in this instance third party funding seems to be rather farfetched, as the respondents are private individuals, trustees and companies. On the first day of the hearing the Court was informed that Orthotouch had applied for business rescue. It is very unlikely that any third party would choose to fund litigation, without some certainty that they will get their money back. With business rescue looming on the horizon such a possibility seem to be in the realm of fantasy.

[74] The funding model is transparent and contributions will be made voluntarily. In any event the Court will give directions that all the monies raised for litigation be paid into a trust account of Theron & Partners and that an independent auditor, audit the account and report to the trial Court regarding the funding. In this way the rights of contributors will be protected.

THE INTEREST OF JUSTICE

[75] A perusal of all the facts seem to lead to the unavoidable conclusion that the certification of the class application/action will be in the interest of justice and will ensure that a large group of elderly investors be given an opportunity to bring their case before a Court for determination.

CONCLUSION

[76] In the light of all the circumstances I am of the view that the application for certification should be granted.

[77] The following order is made:

1. **Subject to the paragraphs below, leave is granted to the Fifth to Ninth Applicants to institute a class application /class action assisted and represented by their current attorneys of record (Theron & Partners) – as representatives of the investors (i.e. the holders of shares and/or units) in Highveld Syndication 21 Ltd (20th Respondent – "HS21") and Highveld Syndication Ltd 22 (21st Respondent – "HS 22") against First to Fifth Respondents on the strength of the buy-back agreement**

forming part of the relevant prospectuses issued in relation to HS 21 and HS 22, copies of which agreements are attached as annexure "SV1" and "SV2" to the founding affidavit of First Applicant dated 30 October 2014 filed under the above case number;

2. Such class application or class action is to be issued within 40 days of the granting of this order or such later date as the court may allow upon application.

3. Fifth to Ninth applicants are hereby permitted to act as representatives of those investors in HS 21 and HS 22 who "opt in" for purposes of such class application in the manner described in paragraph 4 below.

4. Each investor in HS21 and HS22 who wishes to be part of the class application is required to "opt in" by means of the following:

   (a) By registering at/on a web-based registration site/form – the URL (website address) which will be communicated and published as referred to below. For purposes of such registration, an investor shall provide the following:

(i) Full name and surname of the investor - or the name of Trust or company/close corporation) or of the investor's representative (for instance executor or curator of the investor);

(ii) identity number of investor (or registration number in the case of a company or close corporation being the investor);

(iii) the total amount invested in HS21 and/or HS22;

(iv) an email address for purposes of correspondence with the investor.

(v) A cell phone contact number (in the event of communication by means of email is or may become impractical or if an email address does not exist);

(b) Subject to subparagraph (c) below, by paying the following registration fee into a dedicated (separate) trust account of Theron & Partners Attorneys (Stellenbosch):

(i) In the case of an investor who has an investment in HS21 and/or HS22 of R100,000.00 *or less*: a registration fee of R4,500;

(ii) In the case of an investor who has an investment

in HS21 and/or HS22 of *more* than R100,000.00 : a registration fee of R6,500;

(c) Investors in HS21 and HS22 and/or who are also fully paid up members of the Highveld Syndication Action Group ("HSAG") as at 31 January 2020 are exempted from the above registration and payment of the fee. Such HSAG members will be automatically regarded as having "opted in" for purposes of the class application;

(d) Investors who opt in shall be entitled to request to pay the registration fee over a period of six months, which request the applicants will reasonably consider

(e) No cross-funding across different syndication groups shall take place from date of this order.

5. All payments made by investors in terms of this order shall be paid into a separate and distinct trust account of Theron and Partners. An independent auditor will be appointed by the Applicants to audit the aforementioned trust account and such auditor will report to the trial Court regarding the funding of the litigation.

6. Such registration (to "opt in") is to occur on a date not later

than 65 days from the granting of this order. Such period may be extended by the court upon good cause shown;

7. **Within fifteen days from the opting in period expiring, the applicants shall notify the first to fifth respondents of the aggregate value of the claims of investors who opted in.**

8. **Should it appear during the course of the litigation that the aforementioned registration fees received are insufficient to fund the litigation; the Applicants may request additional payments to be made by class members.**

9. **The Seventeenth Respondent (Klopper) is hereby ordered to furnish the Applicant's legal representative, within 15 days of certification of any or all of the above class actions, with the details of the investors in each of the abovementioned Highveld companies;**

10. **The detail to be provided by the Seventeenth Respondent in terms of prayer 9 shall be furnished by the First and Second Respondents in suitable electronic format and shall be limited to the following, wherever known or on record: Full name and surname of the investor; Identity number (or applicable registration number in the case of, for instance, a trust); last known address; telephone numbers; e-mail address/es; the**

number of shares or units bought (and for how much money); in which Highveld company were such shares (or units) bought; when was such shares/units bought; and the date on which the purchase price was paid by the relevant investor;

11. The Applicants are directed to, in so far as may be reasonably possible, give notice to the investors by means of email or other electronic communication of the envisaged class actions to be instituted by the Fifth to Ninth Applicant;

12. Such communication to investors are to include the following:

- **A reference or link to the website of the HSAG where a copy of this order is to be displayed or made available;**
- **A reference or link to the so-called web based registration process/form referred to above to "opt in";**
- **a brief description of:**

  (i) who the class members are who can join the class action (i.e. who can "opt in") and;

  (ii) the cause of action involved and the grounds thereof;
- **The details of the attorneys (Theron & Partners), including the banking details of the bank account into which the registration fee is to be paid".**

13. The applicants shall file a report with the Registrar of this Court setting out any difficulties experienced by them in their efforts to give notice to investors.

14. Any settlements reached in respect of the class application, action or the subject matter thereof shall be subject to confirmation by a Judge in chambers.

15. The First to Fifth Respondents are ordered to pay the costs of this application under Part A and B, jointly and severally the one paying the other to be absolved (including the cost of two counsel where applicable).

16. The costs of the application to transfer the matter to the Johannesburg Commercial Court, is declared to be the costs in the application under Part A and B;

17. The intervening party (Van der Sandt) is ordered to pay the Applicants' wasted costs of the intervention application and withdrawal of her opposition to the main application on an attorney and client scale.

R G TOLMAY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE OF HEARING:	**13 NOVEMBER 2019**
DATE OF JUDGMENT:	**10 DECEMBER 2019**
ATTORNEY FOR APPLICANTS:	**THERON AND PARTNERS**
ADVOCATE FOR APPLICANTS:	**CHJ MAREE**
ATTORNEY FOR RESPONDENTS:	**KYRIACOU INCORPORATED (1ST TO 5TH RESPONDENTS)** **EG COOPER MAJIEDT ATTORNEYS (6TH AND 7TH RESPONDENTS)** **NLA LEGAL INC (8TH RESPONDENT)** **POLSON ATTORNEYS (19TH, 20TH, 21TH, 25TH, & 26TH)**

	GILDENHUYS MALATJI INC (22ND RESPONDENT)
	ANDRE VLOK ATTORNEYS (12TH RESPONDENT)
	ADAMS AND ADAMS (INTERVENING PARTY)
ADVOCATE FOR RESPONDENT:	**ANDY BESTER & MIAS MOSTERT (1ST TO 5TH RESPONDENTS)**
	BEN STEYN (INTERVENING PARTY)