HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 4049/2021

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 8 DECEMBER 2022

SIGNATURE

In the matter between:

JACQUES DU TOIT N. O.	Applicant
and	
THERON & PARTNERS N. O.	First Respondent
LE GRANGE INCORPORATED N. O.	Second Respondent
ENSLIN & FOURIE ATTORNEYS N. O.	Third Respondent
THE N GEORGIOU TRUST	Fourth Respondent
NICOLAS GEORGIOU N. O.	Fifth Respondent
JOE CHEMALY N. O.	Sixth Respondent
MAUREEN LYNETTE GEORGIOU N. O.	Seven Respondent
ILZE EICHSTADT ATTORNEYS	Eighth Respondent
HENDRICK KRUGER TERBLANCHE	Ninth Respondent

THE PLG AFFECTED CREDITORS GROUP Tenth Respondent

THE IE AFFECTED CREDITORS GROUP Eleventh Respondent

THE RT AFFECTED CREDITORS GROUP Twelfth Respondent

Summary: Business Rescue Practitioner (BRP) seeking declaratory orders from the court as to how to proceed in dealing with "buy-back" agreements of shares in circumstances where the company in which shares were held placed in business rescue and where a business rescue plan had been approved – further contention that a scheme of arrangement sanctioned at the instance of the proposer in the plan, upon his failure to implement the plan, had changed the nature of the shares – principles of *res judicata* discussed and applied in respect of prior orders of court, including the Supreme Court of Appeal, in favour of investors seeking to enforce the buy-back agreements.

ORDER

The application is dismissed with costs on the scale as between attorney and client, including the costs of two counsel, where employed.

J U D G M E N T

DAVIS, J

Introduction

[1] The business rescue practitioner (BRP) of two companies is seeking declaratory orders from this court regarding the validity of "buy-back" agreements of shares in two property syndication companies (which are also in business rescue). The validity of these agreements have already been pronounced on by courts, including the Supreme Court of Appeal, in favour of investors seeking to enforce the "buy-back" agreements, in prior litigation. The BRP contends that those decisions were made, in his words, "without the court applying their minds" to the consequences of the business rescue plan or a subsequent scheme of arrangement sanctioned by the Johannesburg Division of this court.

Background

[2] A number of sequentially numbered property syndication companies, Highveld Syndication No 1 (Pty) Ltd – Highveld Syndication No 22 (Pty) Ltd were formed, offering shares to the public by way of prospectuses. They shall respectively be referred to as HS 1, HS 2 and so forth up to HS 22.

[3] The boards of directors of these syndication companies would identify commercial properties which would be purchased from sellers and registered in the name of the syndication companies. The funds raised by members of the public purchasing shares (and making loans to the syndication companies) would be utilized to purchase and develop these properties which would in turn be let out to commercial tenants with large retailers often being anchor tenants. From the rental income investors would be paid returns on their investments in the form of interest. It was envisaged that these properties or their developments would have trading lifespans of 5 – 7 years whereafter they would have to be renewed or refurnished. The properties were then sold and the investors repaid their capital.

[4] In respect of HS 1-14 the scheme worked well and all the investors had been repaid their capital and interest. HS 15-20 are not strictly relevant to this litigation, except for the fact that the properties were by and large no longer acquired from third party sellers but principally at first, and later exclusively, from Zelpy 2095 (Pty) Ltd, which later became Zephan (Pty) Ltd (Zephan). Due to disputes between the syndication companies and their promotors and/or the developers, these latter properties were never transferred to the syndication companies but remained registered in the name of Zephan. In respect of HS 18, there was a "buy-back" agreement in respect of the properties, but this is to be distinguished from the shares buy-back agreements which form the crux of the BRP's purported dilemma.

[5] In the applications for acquisition of shares by members of the public in HS 21 and HS 22 and in each company's respective prospectuses, provision was made for the buy-back of the shares of investors. This was made by the so-called "Georgiou interest group", consisting of Zephan (then still known as Zelpy 2095 (Pty) Ltd) or its nominee, the N Georgiou Trust, both represented by Mr N Georgiou and Mr N Georgiou personally. Mr Georgiou has recently passed away in September 2022.

[6] The buy-back agreement in HS 21 reads as follows: "*The second, third and fourth party, jointly and severally, hereby irrevocably undertakes to re-purchase all the shares sold by the first party to the original purchasers of the shares five years after the individual purchase dates ... at R1,00 per share with a loan account of R999.00 (hereinafter referred to as the "repurchase price")*". The "first party" referred to HS 21 and the "second" "third" and "fourth" parties referred to the members of the Georgiou interest group.

[7] The buy-back agreement in HS 22 reads virtually identical, save that the repurchase price is R 1001.00 per share together with a R999.00 share premium.

[8] The reason why the repurchase price in HS 21 was only for return of the initial investment while in HS 22 it was for double that, was that in HS 21 investors received 12.5% annual interest on their investments and in HS 22 they did not.

[9] The offer of shares in HS 21 was oversubscribed and the promoter accommodated the oversubscription by issuing shares in HS 22, but on the same terms as for investors in HS 21. The remainder of investors who had only subscribed to HS 22, received the buy-back benefits of double their investments as described above. All this took place as long ago as around 2008.

[10] Subsequent to investments having been made by literally thousands of investors, the economy took a downturn and in September 2011 HS 15 to HS 22 were placed in voluntary business rescue. One Mr J F Klopper was appointed as their BRP.

[11] In terms of a combined business rescue plan adopted in the aforementioned HS group of companies on 14 December 2011, a new player entered the scene, Orthotouch (Pty) Ltd (Orthotouch). The plan was to the effect that Orthotouch would procure the transfer and registration of all the properties in question from Zephan into its own name and pay investors interest of 6% in the first year, 6.25% in years two and three, 6.75% in year four and 7% in the fifth year. Hereafter all the investors' shares would be redeemed.

[12] Although Orthoctouch is alleged to have paid investors an amount of more than R807 million, it became unable to fulfill its obligations in terms of the business rescue plan and proposed a scheme of arrangement in terms of section 155 of the Companies Act 71 of 2008.

[13] The scheme dealt with Orthotouch's "trade creditors" but also purported to affect the rights of HS investors. Not only is the scheme an intricate document, but the clauses dealing with the rights of HS investors are fraught with interpretational hurdles and labarynthine provisions. This appears from the principal clause in the scheme relied on by Orthotouch, quoted in the applicant's papers and heads of argument delivered on his behalf. It reads as follows: "*2.2.4. The arrangement proposed by the company [Orthotouch] to HS investors specifically, is recorded in this paragraph 2.2.4 read together with 2.2.5 below, and companies of the rights of HS investors to obtain, in full and final settlement and full substitution of their rights, the rights against and in respect of the company, the HS company and the other parties recorded in 2.2.2.2, 2.2.2.3, 2.2.2.4, and 2.2.2.5 above, as proposed to them in this arrangement, the specific restricting arrangements being recorded in this paragraph 2.2.4 and further, in 2.2.5 below, with effect from the effective date, but subject to the arrival of the final date ...*". Provisions are then made for proxies, voting and ancillary matters, together with an election option to choose from three different scenario's. In the event of a failure to exercise an election, the default position would be that HS investors would "*become entitled to be paid their pro rata shares of the full amount of their historical investments on the tenth anniversary of the final date and during the period from such acceptance until the tenth anniversary, HS investors having elected this Alternative I will receive interest calculated and payable at 4% per annum, monthly in arrears on the perceived value as from the final date, the capital being payable on the tenth anniversary as envisaged in paragraph 2.2.5.3 of the Arrangement*". The "perceived value" meant "*the value of the properties as same was perceived by Georgiou and the HS companies as at 24 March 2011 and for purposes of the initial Orthotouch agreement in the aggregate amount of some R2.6 billion ...*".

[14] There is a huge dispute as to how voting went for the approval of this scheme and what the percentage approval for it was on the part of HS investors. The applicant alleges that 3082 investors voted in favour of the scheme, representing 93.44% of the total of those who voted. The opposing respondents contend that it is improper to rely on this figure as those who voted only represent a fraction of all the investors. This is illustrated by the 46 pending actions against the Georgiou group, the matters that came before the Supreme Court of Appeal as referred to hereinlater and the intended class action by disgruntled investors, sanctioned by this court on 10 December 2019 in case no 80811/2014.

[15] Shortly before the class action was authorised, Zephan and Orthotouch were placed in business rescue on 7 November 2019. The applicant in the current application is the BRP of both these companies. Despite the passage of some three years, the business rescue plans for these companies are not, in the words of the BRP, "complete".

Relief sought

[16] It is against the above background, that the BRP now seeks the court's "guidance" (in his words) by providing the following declaratory orders:

> *"1.1 That the Judgment in the Case of Eravin Construction CC v Bekker NO and Others 2016 (6) SA 589 (SCA) is to be followed by the Applicant in his capacity as the Business Rescue Practitioner, seized with the affairs of Orthotouch Limited 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 "BB-21" and "BB-22", 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, 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 rights 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 2.2.3.13.2 of the Scheme of Arrangement.*

Alternatively:

1.5 *That in the event of the Court deeming it equitable that the content of this Notice of Motion be brought to the attention of all creditors and investors in the manner described hereunder:*

1.5.1 the investors by publication on Orthotouch's website.

1.5.2 the investors by electronic transfer to the electronic mail addresses of those investors, whose electronic mails are on the database to which the Applicant has access.

1.5.3 the public at large, by one publication in an Afrikaans Newspaper and one publication in an English Newspaper,

which has country wide circulation within the Republic of South Africa.

1.5.4 that this application be served on the Respondents by way of electronic communication by transmitting a copy thereof to their electronic mail addresses set out in paragraph 2 below".

[17] The reasons why the BRP seeks the declarators is the perceived horns of a dilemma on which he finds himself perched. He put it as follows: "*The scheme of arrangement was adopted by creditors. The result whereof is a further dilution of creditors' rights, including the rights against Zephan and Orthotouch, arising from the business rescue plan, as well as the buy-back agreement as against Zephan. It is submitted that the rights have thus far substantially been changed to such an extent that it cannot be resold to the purchasers identified in the buy-back agreement, because they are not the same rights, which existed at the time of the conclusion of the buy-back agreement. I am advised that the impact of the scheme of arrangement, confirmed by the court and lodged with the CIPC, is that it further compromises such rights of investors that arose from the duly adopted business rescue plan of HS 15-22. The original investors hold a differing view. This is why the guidance of the court is sought*".

[18] In a later paragraph, the BRP labelled the changes in the benefits attaching to the investors' investments, inter alia dropping interest payments to 4%, postponing their returns of capital by a further 10 years and by attaching a value to their shares as adjudged by Georgiou, as an "evolution of rights".

Is this issue *res judicata*? (i.e. has a court already decided thereon?)

[19] The common law principle of the *exceptio rei judicatae* finds application where it could be demonstrated that a judgment in an earlier case in a dispute

between the same parties, has resolved the issue or finally made a determination on the same cause of action.[1]

[20] The basis underpinning this principle is "*founded in public policy, which requires that litigation should not be endless, and on the requirement of good faith, which does not permit of the same thing being demanded more than once*".[2] This would also mean that the same defence cannot be raised a second time if a court had already dismissed it previously.

[21] The *exceptio* is based on the irrebuttable presumption that a final judgment on a claim submitted to a competent court is correct.[3]

[22] The "same parties" requirement referred to in paragraph 19 above has been taken to not always mean the exact same or identical parties.[4] In the present case, this would mean that if a court had already pronounced on the rights of an individual HS 22 investor to enforce the buy-back agreement against any of the Georgiou interest group members, then such a pronouncement should put an end to that dispute vis-a-vis all other HS investors in the exact same position. This is subject, to course, that the defence decided on by the court, is the same.

[23] The BRP acknowledged that the "same parties" requirement would apply to all HS 21 and HS 22 investors. In fact, the first, second, and third respondents in the present matter have been, by agreement, cited as firms of attorneys, representing groups of HS investors as their clients. In similar fashion, the tenth respondent is the "PLG Affected creditors group", the eleventh respondent is the "IE Affected creditors group" and the twelfth respondent is the "RT Affected

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[1] *National Sorghum Breweries (Pty) Ltd t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 239F-H and *Prinsloo NO v Geldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) (*Geldex*) at para 10.
[2] Harms, *Amler's Precedents of Pleadings*, Ninth Ed, under the topic "*Res Judicata*".
[3] *African Farms & Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564B-G.
[4] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 654 and *MAN Truck & Bus SA (Pty) Ltd v Dusbus Leasing CC* 2004 (1) SA 454 (W).

creditors group". These HS investors are all treated by the BRP as the "same parties" for purposes of the *res judicata* argument.

[24] What the BRP seeks to do, however, is to criticize the previous judgments granted in favour of individual HS investors. The BRP states on oath that the two high court judgments and the subsequent two judgments of the Supreme Court of Appeal, being the *De Lange*[5] and *Noormahomed*[6] judgments respectively, suffer from the following deficiencies (quoting from the founding affidavit): "*The court, in Noormohamed, did not apply its mind to the provisions of the Scheme of Arrangement, particularly Section 155 (8) or the Business Rescue Plan or the provisions of the Companies Act in Section 152(4), which is often referred to as a "cram-down" provision*"; "*The fact that the respondent, Noormahomed, disputed the defence claiming ignorance, in paragraph 5 of the judgment, is not sound";* and the question of novation "*... was not answered by the court in a motivated manner ... it merely makes a bald, unmotivated statement ...*". In respect of the SCA judgment regarding the display of a triable issue on summary judgment proceedings the BRP says that "*the court did not apply its mind and was not asked to apply its mind to how the shares were affected by the Scheme of Arrangement and the Business Rescue Plan ...*" and "*the court also did not consider whether the parties claiming payment in terms of the buy-back agreement was in a position to deliver the share ... considering that the share had been restructured ... The certificate evidences the share, but it is not the share*". Based on this criticism, being somewhat intemperate, the BRP argues that the previous decisions are distinguishable and not binding.

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[5] *De Lange v Zephan (Pty) Ltd, ML Georgiou NO, J Chemaly NO and N Georgiou* (Case No 82322/14) (a quo) and *Zephan v De Lange* (1068/2015) [2016] ZASCA 195 (2 December 2016). (on appeal).

[6] *Zephan (Pty) Ltd, ML Georgiou NO, J Chemaly NO and N Georgiou v Noormahomed* (Case no 1303/18) (a quo) and [2019] ZASCA 162 (29 November 2019) (on appeal)

[25] In *De Lange* in this court as court of first instance, it featured that 44 HS investors had instituted action against the members of the Georgiou interest group based on the buy-back agreements. At the time the actions were instituted, the HS companies were already in business rescue, the business rescue plan had already been adopted and the scheme of arrangement had already been sanctioned by the court. The parties, through their legal representatives, agreed that the *De Lange* matter, representing investors in both HS 21 and HS 22 would be determinative of all the other instituted matters. The late N Georgiou, representing all the defendants, relied on a number of technical defences to the buy-back agreements in opposition to on application for summary judgment and relied on the contention that the provisions of the business rescue plan, adopted by the HS investors had resulted therein that their "*rights ... have been restructured ... and been novated*". The effect of this was alleged to be that "*Orthotouch ... would purchase the properties and take over the obligations of the defendants to repurchase the shares ...*". The court a quo rejected these defences and expressly found that the business rescue plan did not constitute a novation.

[26] On appeal, the SCA observed and found that "*the appellant's argument was essentially a revamp of the defences raised in the court a quo ... the third argument was that the finding of the court a quo, that the BRP did not restructure Ms. De Lange's rights under the buy-back agreement was wrong ... [12] Nowhere in the answering affidavits do the appellants allege, as basis of their defences, facts that are not contained in the buy-back agreement. All their defences are legal points founded on the agreed terms of the buy-back agreement and the contents of the BRP. ... If there were any facts which could disclose a further defence, it was incumbent upon them to disclose such facts. ... The appellants did not even attempt to suggest what such further evidence or facts could be. ... [19] the BRP relates only to the restructuring of the business of the*

HS Companies and not the appellants. When the HS Companies went into business rescue, the appellants were the primarily carries of the obligation to buy back Mrs De Lange's shares. The fact that the HS companies might have been in business rescue was irrelevant to the appellants' discharge of their obligations under the buy-back agreement".

[27] In the *Noormahomed*, the HS investor had four years after the institution of the *De Lange* matter obtained default judgment in this court against the members of the Georgiou interest group, also based on the buy-back agreement. In an application for rescission, the Georgiou interest group advanced defences described by the court a quo as follows: "... *that the business rescue plan had ... resulted in the novation of the Respondent's (Noormahomed's) rights in terms of the buy-back agreement; 23.4 That the subsequent arrangement had re-arranged the obligations of the parties, and that the Respondent had accepted the terms thereof by accepting interest payments paid in terms of the arrangement resulting in the buy-back agreement being novated. 24. In the argument counsel for the applicants indicated that the applicants relied only ... on the argument that the arrangement between HS 22 Investors and Orthotouch had novated the original buy-back agreement. It was contended by the Respondent that subsequent to the BRP being implemented, an arrangement was entered into in terms of which the obligations of Orthotouch were restricted which resulted in a novation of Noormahomed's rights in terms of the buy-back agreement. It was further contended that by accepting interest payments in terms of the arrangement, Noormahomed's rights in terms of the buy-back agreement became novated*". These arguments were rejected and the application for rescission of the judgement was dismissed.

[28] When *Noormahomed* was taken on appeal by the Georgiou interest group, being disgruntled that they could not rescind the default judgment, the SCA held

as follows: "*The appellants' reliance on the arrangement and in particular the provisions of section 155 of the Act for the assertion that the respondent's claim against the first appellant (Zephan) was novated under business rescue or when the arrangement was sanctioned, is misconceived*".

[29] Following on these decisions, numerous other judgments were granted unopposed in favour of HS investors, based on the buy-back agreements. The current opposing respondents contend this was done pursuant to the agreement referred to in paragraph 25 above. The BRP contends that he is not bound by that agreement and that these judgments, even though obtained by consent, were given during the period of operation of the moratorium on legal proceedings, contemplated in section 133 of the Companies Act as part of the business rescue process.

[30] It is clear however, that the Supreme Court of Appeal had found that the Georgiou interest group (which includes Zephan) cannot rely on the existence or contents of the business rescue plan in respect of the HS companies or on the existence or contents of the scheme of arrangement between Orthotouch and the HS companies (or their business rescue practitioner) and its creditors as defences to the enforcement of the buy-back agreements.

[31] Is it then still open for the BRP of Zephan to contend that, due to certain elements of the scheme of arrangement or sections of the Companies Act, not having expressly previously featured as defences by the Georgiou interest group, that it should now afresh be entertained? I think not. To allow this to happen, would be to continuously allow a back-door to appeals to be opened. The effect of the BRP's contention is to allow him to argue that although the SCA had previously, on more than one occasion, found against the company of which he is now the business rescue practitioner, it has not done so on new or fresh legal contentions which he extracted from the same scheme of arrangement which had

already served before the SCA. This, in effect, results in new legal argument in respect of the same causes of action already previously decided by a court of competent jurisdiction. This kind of back-door appeal resulting in a re-hearing of matters already decided would undermine all the policy considerations of finality which underpin the *res judicata* principle. I find that this cannot and should not be done in the circumstances of this case.

[32] It is also difficult to understand why the BRP simply did not follow the existing judgments regarding the specific buy-back agreements in the context of the specific facts of this matter. In his founding affidavit, he claims to be conflicted as to whether he should follow the specific SCA judgment in *Noormahomed* or whether he should follow an earlier, more generalized approach set out in *Eravin Construction CC v Bekker NO & Others* 2016 (6) SA 589 (SCA) (*Eravin*). The purported neutrality of the BRP is also in question. While he portrays being unconcerned about which way the decision goes, he was very partisan in his founding affidavit, exceeding 60 pages, later supported by a belated replying affidavit, as to why the buy-back agreements should not be enforced. Even the relief claimed is framed in a one-sided fashion. The explanation for this approach might be the following: should HS investors no longer have buy-back claims against Zephan, it would be to the benefit of Zephan. No particulars have been given how the opposite thereof would (or would not) feature in any proposed business plan. Similarly, should the HS investors be left with (only) the reduced and diluted claims provided for in the scheme of arrangement, that would suit Orthotouch although, yet again, no particulars have been furnished as to how this would feature in any proposed business rescue plan. The BRP also contended that Zephan holds all of the HS investors claims and that he need not consult the investors any longer but need only to consult with himself (wearing the hat of the BRP of Zephan) and the receiver of creditors whilst structuring the business rescue plan of Orthotouch (wearing the hat of the

Orthotouch BRP). There might well be some conflict between these two positions. Ordinarily there should be no conflict apparent in respect of a BRP merely claiming declaratory orders to "clarify" a position. A conflict is, however, manifested in the manner in which the BRP in this matter slanted his application directly against the HS investors. I shall revisit this aspect again when dealing with the issue of costs.

The *exceptio adimpleti non contractus* (the defence that the buy-back agreement cannot be fulfilled by the HS investors)

[33] The BRP, who made the point in his founding affidavit that he is legally trained, explained that there is a principle in our law, known by the abovementioned Roman law term, that "*in the case of a reciprocal agreement [the principle] requires that he who claims and is also obliged to deliver must, deliver and tender to deliver the thing sold/purchased simultaneously with a claim, for the repurchase thereof on failure thereof the claim cannot be executed. The share to be delivered in terms of the "Buy-Back" agreement, is no longer the share which was originally acquired and which the three (3) identified purchasers can be obliged to "buy back", the nature of the share, having been materially altered*".

[34] The BRP then continued in his founding affidavit to lecture the court as to the nature of a share, consisting of a "bundle of rights", by quoting various case law. Based hereon, the BRP argued that these "bundles of rights" are no longer the same as those that existed at the time the buy-back agreement had been entered into. The BRP might be right that the rights have been diluted and that they might have decreased in value. This in any event happened once the HS companies became financially distressed, resulting in them placing themselves in business rescue. This risk in the success or profitability of the syndication scheme proposed by each HS company already existed when it sought to raise funds from

the public. It is exactly in order to limit or avert that risk that the guaranteed buy-back agreements promoted in the prospectuses of HS 21 and HS 22 made an investment attractive. It made the investments fail-proof and even gave (in the case of HS 22) a guarantee of double profits. "Invest now and double your money in five years time" is what the HS 22 buy-back agreement promoted. These guarantees were, as the SCA has already found, separate and independent of what may happen to the HS companies, including their subsequent business rescue plans. It must follow that, however the shares may have been "restructured" or devalued, the buy-back agreements still stand. The fact that the shares may have become "altered" by being reduced in value, is no bar to the return thereof against payment of those amounts mentioned in the buy-back agreements. The *exeptio* must therefore fail on this aspect.

[35] As a last-ditch attempt, the BRP contends that the shares can no longer be returned or tendered to Zephan, because they have been ceded, notably, not to a third party, but to Zephan itself. This in itself creates an absurdity: one cannot claim non-deliverability of something in respect of which delivery to oneself has already taken place.

[36] Apart from this absurdity, for purposes of the contention that the shares had been ceded, the BRP relies on the following clause in the scheme of arrangement with Orthotouch:

> "*2.2.3.13.1 the claims of all trade creditors and HS Investors against the Company as the effective date ("the ceded claims") reduced by an amount equal to one cent in the Rand thereon, shall be deemed to have been purchased by and ceded to the financial proposer or a nominee of the financial proposer, with effect from the effective date ...*". The "Financial proposer" is a reference to Zephan.

[37] The reference to "company" in the above clause, is to Orthotouch. The claims so ceded, are apparently the claims to payment by HS investors from Orthotouch in terms of the business rescue plan of the HS companies. It is in this sense that the HS investors qualified as creditors as contemplated in section 155(2) of the Companies Act in terms of which the scheme of arrangement was proposed by Orthotouch. These claims were, due to Orthotouch's inability to fully comply with the business rescue plan, now reduced to 1 cent in the Rand. Of importance, is that the shares themselves were not ceded, but only the rights to claim payment from Orthotouch. These were but one of the rights constituting part of the "bundle of rights" attached to each share.

[38] The BRP contended, based on the fact that the scheme has been sanctioned by court and filed in terms of section 155(8)(A) of the Companies Act, that: "*The investors who now call upon the purchasers to purchase the shares in terms of the Buy-Back Agreement, can no longer deliver the shares because they have been ceded to the beneficial owner, as has been demonstrated above*". This contention is simply incorrect. No shares have been ceded, only claims

[39] Pursuant to the cession of claims provided for in clause 2.2.3.13.1 of the scheme of arrangement, the BRP further placed heavy reliance on the following clause, being 2.2.3.13.2 which reads as follows:

> "*the rights of all creditors and HS Investors shall be confined to the right to claim payment or exercise other rights in terms of this arrangement, and no trade creditor and no HS Investor shall have any other claims of whatsoever nature and howsoever arising against the Company, the HS Companies or any of their number, Georgiou, the Georgiou Family, the directors, or sureties for debts of the Company and/or the HS Companies, after the final date by*

virtue of the full and final settlement nature of this arrangement as envisaged in 2.2.2.2".

[40] This reliance is also misplaced insofar as the buy-back agreements are concerned. The scheme of arrangement is one between a company (Orthotouch, in this case) and its creditors, entered into in terms of the Companies Act. The SCA has already found that the scheme has nothing to do with the separate, independent guarantee of comfort for investors, reflected in the buy-back agreements, as also explained in paragraphs 30 and 34 above, which deal with shares, not claims.

[41] It follows that also this "defence" must fail.

[42] The above also illustrates why the BRP's reliance on *Eravin* must also fail. *Eravin* merely confirms that pre-business plan claims cannot thereafter be enforced against the company in business rescue. In the present matter, HS investors cannot enforce their pre-business rescue claims against the HS companies. This is no bar to those investors insisting that their shares be bought back by Zephan in terms of the independent buy-back agreements. This is expressly what the SCA had already found.

Conclusion

[43] It follows that there is no "conflict" or uncertainty regarding the principles set out in *Eravin* and in the present matter. The BRP must simply follow *Noormahomed.*

[44] Insofar as the BRP hinted that there might have been an investor interested in Zephan in 2020 who needed to have the rights and obligations of "various stakeholders" clarified, this has already been done. To remove any doubt, it is reiterated: all HS 21 and HS 22 investors are entitled to rely on their respective

share buy-back agreements against all or any of the Georgiou interest group members, jointly or severally.

[45] The declarators therefore sought by the BRP which would result in the extinguishing of the HS Investors' claims against Zephan based on their buy-back agreements, must be refused.

[46] There is also no need to grant any of the remaining relief. In the scheme of arrangement, a "Receiver of Creditors" had been appointed, being a Mr Cohen, who represented all Orthotouch's creditors. In respect of the claims by the HS investors for the buy-back of their shares, which are not claims against Orthotouch, the investors themselves and not Mr Cohen (who has since in any event resigned) need to be approached. Some of these investors are represented by some of the respondents in this matter and who may or may not include those who have already instituted action or obtained judgments based on the buy-back agreements (totaling claims of some R30 million). The BRP has reported that he has, apparently by monthly electronic mail, updated and kept some 12 700 investors informed of the progress (or lack thereof) in the business rescue proceedings. I therefore find no further need for directions as claimed in the notice of motion. The BRP must simply do what is required to inform all relevant parties of the business rescue plan in Zephan, once it is "completed".

[47] In respect of costs, I find that the opposing respondents have been substantially successful and I find no cogent reasons why the customary rule that costs follow the event, should not apply. As to the scale of costs, the HS investors have been embroiled in litigation for many years. Despite certainty having been provided in respect of their position as long ago as in the *De Lange* and *Noormahomed* judgments, no progress has been made in respect of their buy-back claims or in the advancement of the business rescue plans of Zephan. If this is not alone grounds for a court displaying its displeasure at the conduct of the

BRP as litigant, the partisan attitude displayed by the BRP in this application, which necessitated the HS investors in having to oppose the application in order to secure their rights, certainly is. Had there been a purely neutral approach with a genuine wish to abide whatever declarator a court might give, the investors might have adopted a similar approach. Instead, they have been forced to expend costs "*which they ought not to have incurred*".[7] In these circumstances, in the exercise of my discretion, they should not be put "out of pocket" and be limited to costs on the scale as between party and party. Some of the respondents have claimed that these costs should be awarded against the BRP personally, but having regard to the judgment of the Constitutional Court in the *Public Protector v South African Reserve Bank*,[8] particularly the principles set out in the minority judgment therein, I am of the view that this is not an appropriate case to grant such an order.

[48] Order

The application is dismissed with costs on the scale as between attorney and client, including the costs of two counsel, where employed.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

[7] Or "ought not to bear". See *Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and Another* 1997 (1) SA 157 (A) at 177C-G and the cases quoted there.
[8] 2019 (6) SA 253 (CC).

Date of hearing: 5 and 6 October 2022

Judgment delivered: 8 December 2022

APPEARANCES:

For the Applicant:	Adv E C Labuschagne SC
Attorney for the Applicant:	Polson Attorneys, Johannesburg c/o Jennings Incorporate, Pretoria
For the 1st Respondent:	Adv C Marree
Attorneys for the 1st Respondent:	R T Terblanche Attorney, Bela-Bela
For the 2nd to 12th Respondents:	Adv L Bolt
Attorneys for the 2nd to 12th Respondents:	Le Grange Attorneys, Pretoria