IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 9272/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED:

19/09/2023 .....

DATE SIGNATURE

In the matter between:

BRIAN JOHN WAXHAM	First Applicant
CHRIS NEL	Second Applicant
HYMIE PINSHAW	Third Applicant
FRANCOIS STRAUSS	Fourth Applicant
LEA MAGDALENA MEYER	Fifth Applicant

And

LUKE BERNARD SAFFY N.O.	First Respondent
ZEPHAN PROPERTIES (PTY) LTD	Second Respondent
NICOLAS GEORGIOU N.O.	Third Respondent

MAUREEN LYNETTE GEORGIOU N.O. Fourth Respondent

JOSEPH CHEMALY N.O. Fifth Respondent

JUDGMENT

TOLMAY, J

1. This is an interlocutory application brought by the respondents in the main application in terms of Rule 30 of the Uniform Rules of Court and a conditional counter application to the Rule 30 application. The main application is a class application in which the applicants seek to enforce contractual rights, and which was instituted by the applicants pursuant to a class certification order (the expedited certification application) granted on 10 December 2019.

2. The respondents seek a declaratory order that the applicants' delivery of the notice of motion dated 15 December 2020 with the sub-heading "Leave to rely on additional grounds for 21B investors" and the affidavit dated 27 November 2020 named "Further Supplementary Founding Affidavit Re: details of opt- in claimants" delivered therewith constitutes an irregular step and must be set aside. The applicants, in the conditional counter application, seek certain declaratory relief. The respondents ask that this court declares that an order granted on 27 May 2015, under case number 80811/14 be not applicable to and will not be violated by the filing of opposing papers, which was prohibited by that order. In the

alternative, an order is sought that the existing order be varied or amended to allow for the filing of opposing papers to the relief sought in this application. In prayer 2 of the counter application the applicants seek to broaden the scope of the certification relief granted in the expedited certification application to include, a new class of litigants comprising the so-called 21B investors, as well as claims based on new causes of action other than the certified causes of action relating to contractual enforcement of the buy-back agreements.

3. The parties have a long and litigious history. The certification process started in October 2014 when an application was launched applying for the certification of, and for leave to institute class actions against, inter alia, the respondents on behalf of shareholders in four companies jointly known as the Highveld Syndication Companies, based on various causes of action (the original certification application). Due to unresolved pending interlocutory disputes in the original certification application, an order was granted (the suspension order) suspending the dies for the delivery of the respondents' answering affidavits in the original certification application. The suspension order which was granted on 27 May 2015 is still in place. Included in the causes of action relied on in the certification application, were the contractual claims of shareholders in two of the four Highveld Syndication Companies, namely Highveld Syndication No. 21 Ltd (HS21) and Highveld Syndication No.22 Ltd (HS22), which claims are based on agreements known as buy-back agreements. After a variation of the suspension order was obtained, the applicants successfully pursued the expedited certification

application in respect of the claims of shareholders in HS21 and HS22 based on the buy-back agreements.

4. The certification order in the expedited certification application was granted on 10 December 2019. This order provides for the following:

4.1 The shareholders in HS21 and HS22 were certified as two classes for the purposes of initiating class litigation on behalf of the members of the classes.

4.2 The applicants were given leave to be assisted by their current attorneys of record, who were certified as class representatives, and were granted leave to institute a class application in a representative capacity in order to litigate on behalf of members of the two classes certified.

4.3 The applicants were authorized to litigate on behalf of members of the two classes as certified in respect of the enforcement of contractual claims for specific performance of the buy-back agreements.

5. Pursuant to the certification order being granted the applicants instituted the main application in accordance with the terms of the certification order. The respondents delivered an answering affidavit in the main application on 4 September 2020 and the applicants delivered a replying affidavit on 22 September 2020. On 30 October 2020 the respondents delivered a further affidavit dealing with new matter raised

in the applicants' replying affidavit and applied in terms of rule 6(15) of the Uniform Rules for certain matter to be struck from the applicants' replying affidavit. On 1 December 2020 the applicants delivered the 27 November 2020 affidavit, named "Further Supplementary Founding Affidavit". In this affidavit, the applicants pursue claims on behalf of individuals who may not be members of the certified classes and further sought to advance claims based on causes of action other than the certified causes of action for specific performance of the buy-back agreements. A perusal of the affidavit reveals that the applicants seek to initiate litigation on behalf of an uncertified class of litigants, who attempted to purchase shares in HS21, but who allegedly never received such shares, and were therefore not shareholders in HS21 as contemplated in the certification order. Further consideration of the affidavit reveals that the applicants rely on causes of action other than the buy-back agreements, which causes of action have not been certified in terms of the certification order. This resulted in the respondents delivering a notice in terms of rule 30(2)(b) on 14 December 2020.

6. The applicants then withdrew the further supplementary founding affidavit on 15 December 2020. On the same day the applicants delivered an application (the impugned application), compromising the 15 December 2020 notice of motion, supported by the same 27 November 2020 affidavit. After this, the respondents delivered a notice in terms of Rule 30(2)(b) setting out the reasons why they allege the impugned application constitutes an irregular step and afforded the applicants an opportunity to withdraw the impugned application, failing which the respondents

would apply to the court to set it aside. The applicants failed to comply with the respondents' second rule 30(2)(b) notice as a result the respondents brought the rule 30(1) application.

7. In terms of Rule (30) (1), a party to a cause in which an irregular step has been taken may apply to court to set it aside. It was argued by the respondents in this matter, that the applicants' delivery of the impugned application constitutes both an irregular step and an abuse of process. It was argued that the notice of motion purports to give notice that certain relief will be sought by unidentified investors as claimants in circumstances where the litigation is a class application and only the existing applicants in the class application have been certified as representatives of the two defined classes. It was alleged on behalf of the respondents that the" investors" who will ostensibly be applying for relief as "claimants" have not been certified as class representatives and as a result cannot pursue any relief in the pending class application. It was furthermore argued that the notice of motion purports to seek relief on behalf of individuals who have "opted in" as class members in circumstances where the affidavit states that these individuals do not have contracts with the respondents, thereby identifying the individuals, on behalf of whom relief is purportedly sought, as individuals who do not fall within the two defined and certified classes.

8. It was submitted on behalf of the applicants that the two crucial questions to be adjudicated is firstly whether or not the further claims or grounds are suitable for

class litigation and, if so, whether the respondents would suffer actual prejudice, due to the procedure adopted by the applicants to include such grounds i.e., through either the impugned application or through the counter application. It was argued on behalf of the applicants that the claims are suitable for class litigation because of their nature and especially since such claimants and claims are already part of the same broader litigation stemming from the same Highveld Property Investment Scheme. It was furthermore argued that there exists no reason why the procedure adopted by the applicants by means of the impugned application, or by means of the conditional counter application, should not be allowed to seek such leave to regularize the status of the 21B investors and to expand the grounds of their claim, or even to have a new class or grounds certified.

9. However, by filing the impugned application, the applicants seek to broaden both the causes of action as well as the potential claimants in the main application. In *Children's Resources Centre*[1] the Supreme Court of Appeal made it clear that certification is required before an applicant issue summons or an application[2] .In this instance the applicants attempt to expand the certification in circumstances where the affidavits in the main application had already been filed. This is impermissible on strength of what was said in Children's Resources Centre. This must also be seen in the broader context of the litigation between the parties which already spans over nearly a decade. The expedited certification application was, in my view, an attempt to get finality, at least regarding some clearly defined

[1] Children's Resources Centre Trust v Pioneer Food 2013 (2) SA 213 SCA.
[2] Ibid at para 23 – 24.

disputes and certain identified shareholders. The applicants do not deal in any discernible way with the requirements for the certification of a class in the affidavit supporting the impugned application as was set down in Childre's Resources Centre and later clarified in *Mukkaddam v Pioneer Foods (Pty) Ltd* [3](Mukkaddam).

10. The applicants argued that it would be in the interest of justice to allow the expansion of the class and causes of action but fail to set out clearly why this would be so. On strength of Mukkaddam, the interest of justice should be considered, but I do not understand it to mean that the interest of justice should be considered without a proper foundation having been laid for the assertion. The applicants failed to explain why it would be in the interest of justice to grant the relief sought. It must also be kept in mind that Mukkaddam confirmed the requirement that the class should be certified before the issuing of summons or the application." [4]

11. In order to succeed in the Rule 30(1) application, the respondents need to prove that an irregular step has been taken and that they will suffer prejudice if the step is not set aside. The Rule does not define what would constitute an irregular step, but the court has a wide discretion in this regard. [5] In *SA Metropolitan Lewensversekeringsmaatskappy v Louw NO* [6] it was held that rule 30(1) is intended as a procedure whereby a hindrance to the future conduct of litigation, whether it is created by non-compliance with the rules of court or otherwise is

---

[3] 2013 (5) SA 89(CC) at para 35.
[4] Ibid at para 38.
[5] Gardiner v Survey Engineering (Pty) Ltd 1993 (3) SA 549 (SE).
[6] 1981 (4) SA 329(O) at 333G-H.

removed. The certification process is by its nature a procedural requirement.[7] The inevitable conclusion is that the filing of the impugned application could constitute an irregular step.

12. As far as the interest of justice is concerned the following should be considered, if the impugned application is allowed, the respondents will be faced with a pending class application where the persons who constitute the class have not been properly certified prior to the institution of the application. The timing of the delivery of the impugned application is also problematic, as the applicants waited until after the delivery of both the respondents' answering affidavit, as well as the applicants' replying affidavit in the pending class application, before approaching the court to introduce the new uncertified claims on behalf of an uncertified class of litigants. As a result, relief will be sought on behalf of persons who are not members of any certified class. The same applies to the causes of action as they have not been certified by the court. This must also be considered against the background that the suspension order still precludes the delivery of answering affidavits in opposition to the pending certification relief in respect of all causes of action other than the contractual claims based on the specific performance of the buy-back agreements.

13. The papers as it presently stands make no provision for relief in respect of a class of investors known as the 21B investors and there are no pending certification

[7] Also see Nguxuza and Others v Permanent Secretary, Department Welfare, Eastern Cape & Another 2001 (2) SA at 609(E) 624D-E , Children's Resources Centre at para 17, Nkala and Others v Harmony Gold Mining Co Ltd & others 2016 (5) SA 240 GJ at para 30.

proceedings in respect of persons who do not hold shares in any of the Highveld Syndication Companies. The notice of motion in the original certification application only seeks relief in respect of investors in the four Highveld Syndication Companies and no reference is made of the new class the applicants seek to certify, nor the cause of action on which the claim is based. In addition to all of the above it must also be noted that allowing the certification of a new class and cause of action at this belated stage will delay the finalization of the main application even further. The conclusion is that it will not be in the interest of justice to allow the impugned application. As a result, the filing of the impugned application constitutes an irregular step.

14. In the light of the aforesaid conclusion, the conditional counter application should be considered. In this application the applicants seek that the court order granted on 27 May 2015 be declared not to be applicable and will not be violated by the filing of opposing papers. In the alternative they seek that the order be varied or amended to allow for the filing of opposing papers to the relief sought in prayer 2 of the counter application. In prayer 2 the applicants claim firstly that leave be granted to investors who have opted in as claimants in the expedited certification application, to also rely for their claims in that class application on grounds other than the buy-back agreements. Alternatively, insofar as it may be necessary that the order granted on 19 December 2019 be varied, to allow for the claims of 21B investors to be brought as part of the class application. The applicants did not make out any case based on any facts why this court should find that the 27 May 2015 order will not be violated by the filing of opposing papers, neither did they set

out any facts which support a variation of that order. In prayer 2 they seek an expansion of both the class and the causes of action in the main application and in the light of what was set out above this is legally untenable. As a result, the conditional counter application stands to be dismissed.

15. After the hearing of the application, my registrar received an e-mail from the applicants requesting that I consider certain arguments regarding costs. The respondents opposed the consideration of any further arguments. Taking into consideration that the parties had ample time to address the court during the hearing I did not take these further arguments into consideration. The determination of costs falls ultimately in the discretion of the court and taking into consideration the nature of the disputes, as well as the nearly decade long litigation between the parties, I regard it as fair and reasonable that the costs of this application should follow the costs in the main application.

The following order is made:

1. It is declared that the applicants' delivery of the notice of motion dated 15 December 2020, with the subheading "Leave to rely on additional grounds for 21B investors" and the affidavit dated 27 November 2022 styled "Further Supplementary Founding Affidavit Re: details of opt-in claimants" delivered therewith constitutes an irregular step and is set aside.

2. The conditional counter application is dismissed.

3. The costs in this application will be costs in the main application.

R G Tolmay

Judge of the High Court of South Africa

Gauteng Division, Pretoria

Appearances:

Counsel for Applicants:	C Maree
Attorney for Applicants:	Theron & Partners
Counsel for 1st to 3rd & 5th Respondents:	A Bester SC
Attorney for 1st to 3rd & 5th Respondents:	Kyriacou Incorporated
Date of Hearing:	18 May 2023
Date of Judgment:	19 September 2023