



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

Case No: **044345/2023**

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

7 OCTOBER 2024

DATE:

SIGNATURE:

In the matter between:

ZEPHAN PROPERTIES (PTY) LTD

(in business rescue)

First Applicant

ORTHOTOUCH (PTY) LTD

(in business rescue)

Second Applicant

JACQUES DU TOIT N.O.

*(in his capacity as the duly appointed
business rescue practitioner of Zephon Properties*

Third Applicant

(Pty) Ltd (in business rescue))

and

THE PLG AFFECTED CREDITORS GROUP	First Respondent
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THE RT AFFECTED CREDITORS GROUP	Second Respondent
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THE IE AFFECTED CREDITORS GROUP	Third Respondent
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In re:

THE PLG AFFECTED CREDITORS GROUP	First Applicant
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THE RT AFFECTED CREDITORS GROUP	Second Applicant
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THE IE AFFECTED CREDITORS GROUP	Third Applicant
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and

ZEPHAN PROPERTIES (PTY) LTD	First Respondent
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(in business rescue)

ORTHOTOUCH (PTY) LTD	Second Respondent
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(in business rescue)

JACQUES DU TOIT N.O.	Third Respondent
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*(in his capacity as the duly appointed
business rescue practitioner of Zephan Properties
(Pty) Ltd (in business rescue))*

JUDGMENT

COWEN J:

Introduction

1. On 16 May 2024, three applications came before me on the opposed roll under the above case number. I will refer to them as the main application, the Rule 30A application and the postponement application. The postponement application was ultimately not persisted with and, save for costs, I need not deal with it.
2. The main application was initiated by PLG Affected Creditors Group (the first applicant), the RT Affected Creditors Group (the second applicant) and the IE Affected Creditors Group (the third applicant). I refer to the first to third applicants either as the applicants or as the Affected Creditors Groups. They were represented from the outset by Ilzé Eichstädt Attorneys. The respondents in the main application are Zephan Properties (Pty) Ltd (in business rescue) (Zephan), Orthotouch (Pty) Ltd (in business rescue) (Orthotouch) and Jacques du Toit NO (Du Toit NO), the business rescue practitioner of Zephan. The respondents were served with the main application on 31 May 2023 by e-mail.
3. In the notice of motion, the applicants seek relief aimed, in substance, at setting aside the business rescue proceedings and plan in respect of Zephan and the conversion of those proceedings to liquidation proceedings, alternatively seeking leave to enforce judgments against Zephan.¹

¹ The relief sought in the notice of motion is as follows:

1. That leave be granted to the Applicants to institute this application in terms of section 133(1)(b) of the Companies Act 71 of 2008 and to proceed therewith.
2. That the purported approval of the requisite majority of the creditors of Zephan (Pty) Ltd, of the revised business rescue plan proposed by Du Toit, at the meeting of creditors of Zephan (Pty) Ltd, held on 31 March 2023, be and is hereby reviewed and set aside.
3. That the result of the votes in favour of adoption of the revised business rescue plan for Zephan (Pty) Ltd at the meeting of creditors held on 31 March 2023 is set aside in terms of the provisions of section 157(7) of the Companies Act 71 of 2008 on the grounds that it is inappropriate.
4. That it is declared that the business rescue plan proposed in Zephan (Pty) Ltd by the third respondent (Du Toit) is not one contemplated by Parts A to B of Chapter 6 of the Companies Act 71 of 2008 as it unlawfully incorporates a provision that all creditors, including those who opposed the approval of the plan, are obliged to cede their claims.
5. That Du Toit shall file a notice of the termination of the business rescue proceedings as envisaged in section 153(5) of the Companies Act.
6. That the business rescue proceedings in respect of Zephan (Pty) Ltd be converted to liquidation proceedings in terms of section 132(2)(a)(ii) of the Companies Act.

4. On 15 June 2023, the respondents delivered a notice of intention to oppose. However, the respondents have, at no stage, delivered any answering papers. Rather, the respondents pursued an approach which led to them instituting the Rule 30A application. Their approach entailed the delivery of a notice in terms of Rule 7 of the Rules of Court,² followed by the delivery of a notice in terms of Rule 30A³ and thereafter an application under that Rule.
5. The notice in terms of Rule 7 was delivered on the same day as delivery of the notice of intention to oppose the main application, being 15 June 2023. In the notice, the respondents dispute the authority of Ilzé Eichstädt Attorneys to act as the attorneys of record for the applicants. The Rule 7 notice called upon Ilzé

7. Alternatively, that this Court grant leave to the affected creditors listed in Annexures RB 1 to RB 5 hereto, in terms of section 133 of the Act, to enforce their judgments and execution against Zephan (Pty) Ltd.

8. That the costs of the application be paid by Du Toit *de bonis propriis* on a scale of attorney and client alternatively, be part of the costs of administration of the Zephan (Pty) Ltd in the said winding up.

² **7 Power of attorney**

(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.

(2) The registrar shall not set down any appeal at the instance of an attorney unless such attorney has filed with the registrar a power of attorney authorising him to appeal and such power of attorney shall be filed together with the application for a date of hearing.

(3) An attorney instructing an advocate to appear in an appeal on behalf of any party other than a party who has caused the appeal to be set down shall, before the hearing thereof, file with the registrar a power of attorney authorising him so to act.

(4) Every power of attorney filed by an attorney shall be signed by or on behalf of the party giving it, and shall otherwise be duly executed according to law; provided that where a power of attorney is signed on behalf of the party giving it, proof of authority to sign on behalf of such party shall be produced to the registrar who shall note that fact on the said power.

(5)(a) No power of attorney shall be required to be filed by the State Attorney, any deputy state attorney or any professional assistant to the State Attorney or a deputy state attorney or any attorney instructed, in writing, or by telegram by or on behalf of the State Attorney or a deputy state attorney in any matter in which the State Attorney or a deputy state attorney is acting in his capacity as such by virtue of any provision of the State Attorney Act, 1957 (Act 56 of 1957).

³ **30A Non-compliance with Rules and Court Orders**

(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order —

(a) that such rule, notice, request, order or direction be complied with; or

(b) that the claim or defence be struck out.

(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.

Eichstädt Attorneys to provide them with a power of attorney signed by each of the Affected Creditors as listed in annexures to the founding affidavit, authorising Ilzé Eichstädt Attorneys to act on their behalf.

6. On 28 June 2023, the respondents delivered a notice under Rule 30A contending that the Affected Creditors Groups had taken various irregular steps and failed to comply with the Rules of Court in several respects, being:

- 6.1. The applicants do not constitute firms, partnerships or associations as contemplated by Rule 14 yet had failed duly to cite the individuals and entities they represent.

- 6.2. The applicants failed to comply with the Rule 7 notice and had confirmed that they had no intention of producing the requested documentation.

- 6.3. The applicants had delivered a supplementary affidavit without seeking the leave of the Court to do so.

7. The supplementary affidavit referred to in paragraph 6.3 is an affidavit delivered by the Affected Creditor Groups in the main application, dated 6 May 2023, and filed on 11 May 2023 (the supplementary affidavit).

8. On 14 July 2023, the applicants delivered a response to the Rule 7 notice. In doing so, they recorded an objection to the delivery of the Rule 7 notice outside of the 10-day period prescribed by the Rule. However, to prevent delay, they provided a copy of a special power of attorney dated 21 April 2023 signed by Mr Jan Robert Black (the deponent to the founding affidavit) authorising Ilzé Eichstädt Attorneys to act on his behalf and in his representative capacity for members of the PLG, IE and RT Affected Creditor Groups.

9. The respondents instituted a Rule 30A application on 18 July 2023. The relief sought in the notice of motion is:

9.1. An order directing the Affected Creditor Groups to comply with the Rule 30A notice within 5 days.

9.2. Failing compliance, an order striking out the application, with the applicants' legal representative and Mr Robert Black to pay the respondents' costs on an attorney client scale in their personal capacities.

9.3. An order condoning the late filing of the respondents' answering affidavit in the main application and extending the date for its delivery to 15 days following compliance with the Rule 30A notice.

9.4. An order for costs.

10. The Affected Creditor Groups opposed the application and delivered an answering affidavit to which the respondents replied.

11. Prior to the hearing, the parties delivered a joint practice note setting out their respective stances to the applications. The applicants indicated that they sought the relief in the main application on an unopposed basis. The respondents contended that the main application is fatally defective for the reasons dealt with in the Rule 30A application, which concerns the irregular citation and joinder of the applicants and the authority of Ilzé Eichstädt Attorneys to act on their behalf and because of a failure to join all affected parties, being other creditors.

12. In respect of the Rule 30A application, the applicants contend that it is common cause that the Rule 7 notice was delivered late. Moreover, they contend that the

remedy available in a Rule 7 dispute is to be sought via Rule 7 itself and is limited to an order precluding a party from acting further until satisfying a Court that they have authority to do so. Relief cannot be sought under Rule 30A, they contend. The respondents persist with the relief in the Rule 30A application but seek first and foremost, an order setting aside the main application as irregular with costs *de bonis propriis* against Ilzé Eichstädt Attorneys and Mr Black. Only in the alternative, do they seek the relief as framed in the notice of motion.

13. At the commencement of the hearing, Mr Joubert SC (with him Mr de Vries), for the respondents, emphasised that the business rescue plan that the Affected Creditor Groups seek to impugn has been substantially implemented and he submitted that there are approximately 14 000 creditors of Zephan, whose rights, are affected by the relief sought. Only some 130 creditors are included amongst the Affected Creditor Groups and the remaining creditors have not been joined to the proceedings.

14. I deal with the following matters in turn:

- 14.1. The late delivery of the Rule 7 notice;
- 14.2. Non-compliance with the Rule 7 notice and any remedy;
- 14.3. The citation of the applicants;
- 14.4. The supplementary affidavit;
- 14.5. Joinder of creditors;
- 14.6. Relief and costs.

The late delivery of the Rule 7 notice

15. A party seeking to dispute the authority of a person to act on behalf of another party must invoke the mechanism of Rule 7.⁴ However, under Rule 7, a party seeking so to dispute the authority of a person to act must do so within ten days after it has come to the notice of a party that such person is so acting. The dispute may only be raised thereafter with the leave of the Court on good cause shown. The applicants complain that the dispute was raised one day late, specifically on 15 June 2021, in circumstances where the ten days' lapsed on 14 June 2021.

16. In my view this point cannot succeed. The respondents in fact alerted the applicants that they would require proof of authority over a month before the application was sent electronically to the respondents' legal representatives. This was in correspondence dated 21 April 2023 which the respondents' attorneys sent when the applicants' intention to institute the proceedings became known. Although a formal Rule 7 notice was not at that stage sent (as the proceedings had not been served) the concern about authority and the intention to require proof of authority, had already squarely been raised. Nonetheless, even assuming that this conduct does not suffice to bring the respondents within the time frames of Rule 7, and that the respondents were one day late, the interests of justice demand that on the facts and in the circumstances of this case, leave to dispute authority must be given.⁵ Good cause for any lateness of one day, which is minimal, is clearly

⁴ *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705 approved in *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624 - 625.

⁵ For a helpful summation of considerations relevant to 'good cause' see *Royal Bafokeng Nation v Minister of Land Affairs and others* Case No 999/08 (unreported judgment of the North West High Court delivered on 12 December 2013) at para 40; *Lancaster 101 (RF) (Pty) Limited v Steinhoff International Holding NV* [2021] 4 All SA 810 (WCC)

shown. Indeed, any lateness may materially be attributed to the conduct of the applicants who, in the notice of motion erroneously referred to 15 June 2023, and not 14 June 2023, as the relevant date for any opposition. In turn, the respondents diarised 15 June 2023 as the relevant date. There is no prejudice arising from the minimal delay. Indeed, the applicants were fully aware that the authority was to be disputed. Moreover, the respondents' concern about authority raises issues of substance, with potential merit, and is motivated materially by a wish not to incur significant costs, to the potential detriment of creditors of a company in business rescue, defending litigation that may not in fact be authorised by the multitude of persons constituting the applicant groups.

Non-compliance with the Rule 7 notice and any remedy

17. As indicated above, the applicants sought to respond to the Rule 7 notice by delivering a power of attorney from Mr Black. The respondents submit that that does not constitute compliance with the Rule 7 notice. I agree.

18. The applicants cite themselves in the proceedings as the PLG Affected Creditors Group, the RT Affected Creditors Group and the IE Affected Creditors Group. The groups consist of individuals or entities that are named or partially named in Annexures RB1-5 to the founding affidavit in the main application. In respect of the PLG Affected Creditors there are 93 entries in RB1 to RB3. In respect of the RT Affected Creditors Group there is one entry on RB4. In respect of the IE Affected Creditors Group there are 31 entries on RB5. Mr Black explains that each of the individuals or entities are judgment creditors of Zephan. The power of

at para 47. The respondents expressly foreshadowed their request for condonation in their founding affidavit insofar as may be necessary and it was similarly sought during argument.

attorney the applicants supplied, however, confirms only the authority given by Mr Black himself, who is listed in the third entry in RB5. Although he claims to act in a representative capacity, there is no proof of any such mandate from the persons in question. There are three confirmatory affidavits supplied from three attorneys, specifically:

- 18.1. Pieter Louis Le Grange, who states – without further proof of mandate – that he is that instructing attorney for the PLG Affected Creditors Group.
- 18.2. Riekert Terblanche, who states – without further proof of mandate – that he is the instructing attorney for the RT Affected Creditors Group; and
- 18.3. Ilzé Eichstädt, who states – without further proof of mandate – that she is the instructing attorney for the IE Affected Creditors Group; and

19. In circumstances where there is no proof of mandate from the applicants who comprise the Affected Creditor Groups, the applicants have failed to demonstrate that they have mandated either Mr Black, their respective attorneys or, in turn, Ilzé Eichstädt Attorneys, to act on their behalf. In the result, the respondents are entitled to relief for non-compliance with Rule 7.

20. The applicants, however, contend that the only remedy available to the respondents is the remedy provided in Rule 7 itself, which would entail that the firm may no longer act unless the Court is satisfied that the firm has authority and to that extent the Court may postpone the application. In my view, the remedy provided by Rule 7 – while activated when Rule 7 is invoked – does not preclude a party from relying on the remedies in Rule 30A, which provides a general remedy

for non-compliance within the Rules.⁶ At this stage, at the least, this means that the respondents are entitled to an order directing compliance with the Rule 7 notice within a reasonable period of time.

The citation of the applicants

21. In the Rule 30A notice and application, the respondents take issue with the citation of the applicants. They do so on the basis that it is irregular to cite the applicants as groups in circumstances where they do not constitute a partnership, firm or association as contemplated by Rule 14. In oral argument, the submission was more nuanced in that it was contended that while the applicants may legitimately, and for convenience, describe themselves in the form of lists attached to the notice of motion or founding affidavit, these lists must duly describe the individual applicants. On the facts of this case, the applicants submit that that has not occurred.

22. I agree. The lists attached as RB1 to RB5 fall far short of what is required sufficiently to identify parties to proceedings. Various difficulties emerge. First, several of the clients named are trusts. Only Trust names are mentioned, with no reference even to the trustees for the time being, through whom trusts must act.⁷ Secondly, various parties are identified that appear to be incorporated entities without any due citation. Indeed, it is not even clear which creditor applicants, if any, are incorporated entities. Thirdly, while for the most part, the creditors mentioned appear to be individuals, not a single creditor is mentioned with reference to their full names nor indeed are any particulars sufficiently identifying

⁶ Erasmus *Superior Court Practice* RS 23, 2024, D1 Rule 30A-1.

⁷ *Land and Agricultural Development Bank of South Africa v Parker* 2005(2) SA 77 (SCA).

the party supplied.⁸ In some cases, the same name appears more than once without elaboration. Whatever the precise requirements for citing natural persons in motion proceedings, at a minimum, the information must suffice sufficiently to identify the parties. In this case, the information before Court is wholly inadequate. Indeed, Du Toit was effectively placed in a position where he had to trawl through the information that he had to hand in the business rescue process to try to work out who is part of the applicant groupings. These efforts, only partly successful, are detailed on affidavit and in the heads of argument. But it is an applicants' duty to cite themselves when litigating, and the applicants have failed to do so.

23. Indeed, the applicants' counsel conceded that in the ordinary course, the mode of citation would not be regular nor in compliance with the Rules. Rather, he submitted that in this case it was competent because in a previous case, Du Toit himself obtained an order authorising such citation. In my view, this submission cannot assist the applicants, as this is a different case, the parties in question are the applicants and the *dominis litis*, and, in any event, this Court has not been supplied with sufficient information to draw the parallels the applicants rely on.

24. In the result, the respondents are entitled to relief compelling compliance with this aspect of the Rule 30A notice too.

Delivery of the supplementary affidavit

⁸ Rule 17(4)(b) requires a plaintiff to indicate in a summons *inter alia* their full name, sex and occupation and their residence or place of business. In Herbstein and Van Winsen: *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed 2009 Ch 5 p 145, the submission is made that in motion proceedings parties should be cited in accordance with Rule 17. Reliance is placed on the definition of civil summons which is 'a civil summons as defined in the Act.' The Act referred to is the now repealed Supreme Court Act 59 of 1959 (the 1959 Act) which included a notice of motion. The Superior Courts Act 10 of 2013 (the 2013 Act), which repealed the 1959 Act, no longer defines civil summons. However, section 51 of the 2013 Act provides that the rules applicable to the various High Courts immediately before the commencement of this section remain in force to the extent that they are not inconsistent with the Act, until repealed or amended.

25. No substantive argument was addressed on this issue but the point was not abandoned. I am of the view that at this stage, this Court is not in a position to grant the respondents any relief in this regard. In the supplementary affidavit, the applicants sought leave to have the affidavit admitted and the request for its admission may be dealt with accordingly.

Joinder of other creditors

26. The issue of the need to join other creditors is not raised in the Rule 30A notice.

Rather, in the Rule 30A application, the respondents suggest that various *in limine* points will likely be raised and dealt with separately should the applicants address the issues of citation and authority. An issue of jurisdiction is foreshadowed and it is said that the point will be raised that the business rescue plan was approved by the majority of creditors, whose best interests are not advanced by the application.

27. In my view the issue of joinder has not at this stage been squarely raised before me. The issue was ventilated most fully in the affidavits in the postponement application, which was ultimately not persisted with. It was also raised in support of the argument that the Court should, first and foremost, strike the entire application as irregular. I am, however, not persuaded that that relief either can or, if it can, should be granted at this stage. Rather, the applicants should be afforded an opportunity address the Rule 30A notice. Different considerations may apply if they don't. Moreover, although the parties made certain submissions on the issue, and while the authorities the respondents rely on appear clear, the applicants sought to make more detailed submissions on the point in a supplementary note

delivered after the hearing.⁹ Moreover, the issue can be dealt with, separately if warranted, if duly raised in answer. Suffice to emphasise that the applicants should consider themselves duly notified that the point will be a live one, and that unnecessary costs may be incurred if not timeously addressed in accordance with the law, should joinder be required.

Relief and costs

28. In view of my conclusions above, it is not possible to deal with the merits of the main application. Indeed, the respondents, in my view reasonably, objected to the attempt to enrol the main application in circumstances where the Rule 30A application still required to be ventilated.

29. As indicated above, I am not persuaded that the respondents can obtain the primary relief they sought at the hearing and I intend to approach the matter in accordance with the notice of motion delivered in the Rule 30A application. Moreover, it would be premature at this stage to grant such drastic relief. The respondents are, however, entitled to their costs in the Rule 30A application and I am persuaded that Scale C is the appropriate scale due to the complex nature of this matter, viewed in context. Although the specific issues raised in the Rule 30A application are not, on their own, complex, they cannot be viewed in isolation of the matter as a whole and this application is only one matter in a broader set of litigation.

⁹ The respondents contend that the issue has been authoritatively dealt with by the Supreme Court of Appeal in *Absa Bank Limited v Naude and others* [2015] ZASCA 97; 2016(6) SA 540 (SCA) para 9; *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd* [2017] ZASCA 131 at para 16; *Golden Dividend v Absa Bank* [2016] ZASCA 78 at para 9.

30. As to the costs in the postponement application, I am of the view that each party should pay their own costs. Where the applicants effectively sought an indulgence due to their counsels' probable unavailability, it was in my view unreasonable after the application was launched for the applicants to adopt the intransigent stance that they did give the history and circumstances of the case.

Order

31. I make the following order:

- 31.1. Insofar as is necessary, condonation is granted to the respondents for the late filing of the Rule 7 notice and leave is granted to dispute the authority of the applicants in accordance with the Rule 7 notice of 15 June 2023.
- 31.2. The First to Third Applicants are directed to comply with the Respondents' Notice in terms of Rule 30A dated 28 June 2023 within 20 (twenty) court days of the date of this order.
- 31.3. Failing compliance with paragraph 31.2 above, the Applicants' are granted leave to approach this Court on the same papers supplemented where necessary for an order striking out the application and ordering the Applicants' legal representative and Mr Robert Jan Black to pay the Respondents' costs, including the costs in paragraph 31.6 below, on an attorney and client scale in their personal capacities, the one paying the other to be absolved;
- 31.4. The applicants are granted leave to approach this Court on the same papers duly supplemented for any authorisation that may be required pursuant to Rule 7 following compliance with the Rule 30A notice.

31.5. To the extent necessary, the First to Third Respondents' late filing of their answering affidavit is condoned and the time period applicable to the delivery of the answering affidavit is extended to a date fifteen court days following compliance with the Respondents' Notice in terms of Rule 30A dated 28 June 2023.

31.6. The Applicants must pay the Respondents' costs in the Rule 30A application (Scale C being applicable).

31.7. Each party shall pay their own costs in the postponement application.

31.8. The main application is postponed *sine die*.




SJ COWEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Date reserved: 24 May 2024

Date of judgment: 7 October 2024

Appearances:

Applicants: Adv L Bolt instructed by Ilze Eichstadt Attorneys

Respondents: Adv F Joubert SC, J de Vries and A Berkowitz instructed by
Johan Victor Attorneys