IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 17327 / 2020

In the application between:-

TREVO CAPITAL LTD	Applicant / Intervening Party

and

HAMILTON BV	First Respondent
HAMILTON 2 BV	Second Respondent
STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD	Third Respondent

In re the matter between:-

HAMILTON BV	First Applicant
HAMILTON 2 BV	Second Applicant

and

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD	Third Respondent

THE THIRD RESPONDENT'S ANSWERING AFFIDAVIT IN THE INTERVENTION APPLICATION

I, the undersigned

LOUIS JACOBUS DU PREEZ

do hereby make oath and say as follows:-

Deponent and authority

1 I am an adult male businessman and an executive director of the applicant. I am also the chief executive officer and a managing director of Steinhoff International Holdings N.V., the ultimate holding company of the third respondent. I am duly authorised to depose to this founding affidavit on behalf of the applicant.

2 The facts contained herein are to the best of my knowledge true and correct and within my personal knowledge unless the context indicates to the contrary.

The purpose of this answering affidavit, and definitions employed herein

3 I depose to this answering affidavit in opposition to certain relief that the intervening applicant seeks in its intervention application.

4 In doing so:-

4.1 any allegation in the founding affidavit not specifically admitted in this answering affidavit must be taken to be denied;

4.2 a reference to:-

4.2.1 **"the Declaratory Application"** or **"the Hamilton Declaratory Application"** shall mean the application brought by Hamilton (where SIHPL is the respondent), in which certain declaratory relief is sought by Hamilton;

4.2.2 **"Hamilton"** shall mean the first and second respondents in this Intervention Application, and the applicants in the Declaratory Application;

4.2.3 **"the Intervention Application"** shall mean this application, in which Trevo seeks to intervene, as a respondent, in the Declaratory Application;

4.2.4 **"SIHPL"** shall mean the third respondent in this intervention application, and the respondent in the Declaratory Application; and

4.2.5 **"Trevo"** shall mean the applicant in the Intervention Application, which seeks to intervene, as a respondent, in the Declaratory Application.

SIHPL's position in regard to the Intervention Application and the Declaratory Application

Overview

5 SIHPL's position in regard to the Intervention Application, and the Declaratory Application, may be summarised as follows:-

5.1 Hamilton's Declaratory Application is fundamentally flawed and ought to be dismissed;

5.2 similarly, Trevo fails to make out any case for relief in the Declaratory Application even were it to be permitted to intervene. The classing in the proposed section 155 proposal (defined below) is clearly appropriate and on no possible basis can either Hamilton or Trevo contest the classing. Their attempt to derail the section 155 process is a transparent strategic move to exert maximum pressure in the hope of improving their financial treatment. There is simply no basis for this. Since they cannot satisfy the test for a *prima facie* right in the Declaratory Application, there is no basis for Trevo to be permitted to intervene;

5.3 Trevo (as too Hamilton) is in fact unable to demonstrate that it holds a valid and legally cognisable claim against SIHPL. It therefore lacks *locus standi* in the Declaratory Application. This aspect is developed fully below with reference to the current state of the law.

5.4 in addition:-

5.4.1 the relief sought by Trevo in prayer 4 of the notice of motion is incompetent. Trevo has brought the Intervention Application without giving notice of the Intervention Application to all interested parties, including the claimants in the section 155 process referred to below (**"the claimants"**). and

5.4.2 many of the allegations made by Trevo in its founding affidavit relate to the steps taken by SIHPL, and consist of criticism of the section 155 proposal (which allegations are wholly unnecessary for the purposes of the principal relief sought in the intervention application). SIHPL has already filed its answering affidavit in the Hamilton Declaratory Application, and if Trevo is permitted to intervene in that application as a respondent (as it requests in the Intervention Application), then SIHPL will have no opportunity (save in the Intervention Application) to respond to those allegations. Consequently, whilst SIHPL does not wish unnecessarily to overburden the papers, it is important that SIHPL responds herein to the allegations raised.

<u>The nature of Hamilton's Declaratory Application</u>

6 In paragraph 7.4 of the founding affidavit, Trevo states that every member of the three classes envisaged in the proposal (**"the section 155 proposal"**) that

SIHPL has published in terms of a statutory compromise pursuant to section 155 of the Companies Act 71 of 2008, as amended ("**the Companies Act**"), namely the **"Financial Creditors"** class, **"the Contractual Claimants"** class, and the **"MPC"** class (market purchase claimants class), *"has a direct and substantial interest"* in Hamilton's Declaratory Application.

7 It is correct that the Declaratory Application affects all members of all three classes. This is so because Hamilton, in the Declaratory Application, seeks *inter alia* an Order declaring that the classes in the section 155 proposal are invalid. The ramifications for the various members of each class are obvious – if Hamilton is successful in the relief that it seeks, the section 155 proposal in its entirety will need to be withdrawn or substantially amended, and either way the expected returns to each member of the classes will be significantly different to that presently envisaged.

8 It is, therefore, incomprehensible that Hamilton elected to cite only SIHPL as a respondent in the Declaratory Application, and failed to give notice of the Declaratory Application to all other persons who may have an interest in the outcome of the Declaratory Application (which would obviously include all of the members constituting the three classes).

9 SIHPL has opposed the Hamilton Application, and has delivered a comprehensive answering affidavit setting out its opposition to the Declaratory Application and the contentions it advances as to why the Declaratory

Application makes out no case for the relief sought, is premature, and ought to be dismissed.

10 The SIHPL answering affidavit in the Declaratory Application is already before this Court, and I pray that the contents thereof be read as if specifically incorporated in this answering affidavit.

The nature of the Intervention Application

11 Whilst not agreeing with Hamilton's contentions regarding the 'correct' classing to be employed in the section 155 proposal, in reality Trevo has raised similar, but distinct, contentions to those raised by Hamilton in the Declaratory Application, and SIHPL is entitled to respond to those contentions in this answering affidavit. It is imperative, moreover, that SIHPL do so now, given that it appears that – certainly in the Declaratory Application – it will not have a further opportunity to do so (as Trevo seeks to intervene as a respondent rather than as an applicant).

12 Moreover, and while SIHPL agrees that other claimants have an interest in the relief sought in Hamilton's Declaratory Application, the effect of both the Declaratory Application, and the Intervention Application, is that the Declaratory Application will become a forum where various parties may seek either to set aside or substantially alter the section 155 proposal (which has now been published globally) before the vast majority of claimants have had an

opportunity to consider the section 155 proposal, and before all of the claimants have had the opportunity to vote on the section 155 proposal.

13 Trevo in fact goes further. In paragraph 6 of its notice of motion, Trevo seeks an Order from this Court (assuming that it is permitted to intervene in the Declaratory Application) that the Declaratory Application be postponed to allow other claimants to intervene in the Declaratory Application. The effect of this is that the Declaratory Application has the potential to become a forum to debate, and seek this Court's judgment on, the contents of the section 155 proposal before claimants are entitled to exercise their statutory rights and vote on the section 155 proposal, and before this Court assesses the section 155 proposal, as it has the power to do under section 155 of the Companies Act, when SIHPL makes application to this Court to seek this Court's sanction of the section 155 proposal, in the event that the section 155 proposal is approved by the claimants.

14 It follows that both the Declaratory Application and the Intervention Application are premature and effectively require this Court to ignore the statutory process envisaged in terms of section 155, which process permits the involvement of <u>all</u> claimants, and not just those who have the means to approach this Court.

15 The premature and unnecessary nature of the Declaratory Application is dealt with in SIHPL's answering affidavit in the Declaratory Application, where SIHPL records certain incontrovertible facts:-

15.1 Hamilton, to the extent that it is able to verify its status as a creditor in terms of the process regulated by the section 155 proposal, will have the opportunity, during the course of the process envisaged in terms of section 155 of the Companies Act, to vote against the approval of the section 155 proposal; and

15.2 even if the section 155 proposal is approved by the requisite statutory majorities as set out in the Companies Act, Hamilton can oppose SIHPL's application to this Court in due course to sanction the approved proposal (which Hamilton acknowledges in paragraph 34 of its founding affidavit).

16 Both of these contentions of course apply equally to Trevo as a claimant.

17 I refer this Court, further, to paragraphs 8 to 11 of SIHPL's answering affidavit in the Declaratory Application.

18 Accordingly, there are other, more appropriate, opportunities, within the section 155 process, where Hamilton and Trevo (as well as any other claimant or claimants) are afforded an opportunity to raise 'objections'.

19 Trevo's Intervention Application is equally unnecessary and premature. Trevo's arguments raised against the section 155 proposal can also be heard at the appropriate times and in the manner referred to above.

20 SIHPL submits, in short, that there is no need nor justification for the Declaratory Application (and, by extension, for Trevo's Intervention Application). The legislature foresaw the possibility that a claimant may seek to vote against a proposal under section 155 of the Companies Act, and provided an additional mechanism for a minority claimant, whose dissenting vote did not prevent the approval of the proposal within its class, to seek relief thereafter from this Court (i.e. at the sanction hearing following the creditors' vote).

21 For the reasons set out above, SIHPL submits that this Court should ultimately dismiss the Declaratory Application (and any relief sought by Trevo, should it be given leave to intervene).

The failure to provide notice

22 As set out below, during the course of a hearing of the notice application on 21 January 2021 (referred to in greater detail below), Mr Justice Saldanha recognised that many claimants have an interest in the Declaratory Application, and directed Hamilton to provide notice of the Declaratory Application to such persons.

23 Despite allegedly taking up the cudgels on behalf of other creditors (a justification employed by both Hamilton and Trevo in support of the relief each seeks), and despite the fact that SIHPL notified numerous parties of the hearing of the notice application at Mr Justice Saldanha's direction, and sought and obtained what is described below as the Notice Order, neither Hamilton nor

Trevo has taken any steps to notify any interested parties of their applications, save for an e-mail sent by Trevo's attorneys to a handful of alleged claimants' attorneys on 8 February 2021 (**"A"**), which was sent only (a) after the service by Trevo on Hamilton and SIHPL of the Intervention Application, and (b) after SIHPL's attorneys invited Trevo's attorneys to do so on 6 February 2021 (**"B"**).

24 In this regard:-

24.1 SIHPL raised this issue with Hamilton in the answering affidavits which it filed both in the Declaratory Application (filed in early December 2020), and in Hamilton's subsequent attempt to intervene in, and postpone SIHPL's Notice Application (filed shortly after mid-January 2021); and

24.2 Trevo simply seeks to transfer the notice / service obligations (of both Hamilton in the Declaratory Application, and Trevo in the Intervention Application) to SIHPL.

<u>The true basis for the Declaratory Application and the Intervention Application</u>

25 I emphasise that:-

25.1 Hamilton and Trevo both fall within the MPC class in the section 155 proposal, subject to them being able to verify their alleged claims in accordance with the requirements of the section 155 proposal;

25.2 the MPC class stands to receive a lower return than the Contractual Claimants' class for the reasons set out in the section 155 proposal (which has now been published);

25.3 both Hamilton and Trevo are aggrieved, and want a higher return than what it is anticipated they will receive as members of the MPC class. Simply put, they both want more money from the section 155 process then they are presently entitled to receive should they be able to verify their alleged claims;

25.4 neither Hamilton nor Trevo qualifies to be placed in the Contractual Class (which envisages a higher return to members of that class than is the case with the MPC class), and the alleged claims of Hamilton and Trevo are highly doubtful as a matter of law in light of the judgment handed down by Mr Justice Unterhalter in the *De Bruyn* matter (which is referred to extensively in SIHPL's answering affidavit in the Declaratory Application, and to which I refer in some detail below);

25.5 instead of voting against the section 155 proposal, and / or opposing the sanctioning of an approved section 155 proposal (to the extent that they verify their alleged claims), Hamilton and Trevo have turned to the Courts in a premature and impermissible attempt to frustrate the section 155 process, and to seek a commercial benefit (no doubt in the hope that these Court challenges will result in SIHPL offering them a higher return than as prescribed in the section 155 proposal). Hamilton also

unsuccessfully attempted to intervene in, and postpone, the Notice Application (referred to below), which would have resulted in the postponement of the commencement of the section 155 process;

25.6 Hamilton and Trevo are therefore both abusing this Court's process, in order to attempt to obtain a commercial benefit at the expense, ultimately, of other claimants under the section 155 proposal. They do so in different ways:-

25.6.1 Hamilton has brought the Declaratory Application, where it unjustifiably seeks an Order from this Court that the classes in the section 155 proposal be changed to liquidation classes, which would result in a higher return to Hamilton;

25.6.2 Trevo seeks to intervene in the Declaratory Application, and, again unjustifiably, seeks to be classed within the Contractual Class, and thus obtain a higher return (despite the fact that Trevo does not qualify as a Contractual Claimant, a fact of which Trevo is well aware). It is no secret that Trevo wishes to be placed within the Contractual Claimant class – on 20 January 2021, Trevo directed correspondence to SIHPL (**"C"**), proposing to cease its opposition to the section 155 proposal, provided that it is placed in the Contractual Claimants class. Put differently, Trevo is suggesting a trade-off whereby its (unwarranted) change in creditor status would result in its supporting the section 155

proposal. SIHPL refused to accede to this proposal, and Trevo has now turned to this Court in a bid to achieve this self-serving and unjustified financial windfall at the expense, ultimately, of other creditors;

25.7 if Hamilton and Trevo were confident of the merits of the arguments they seek to advance:-

25.7.1 they would permit the section 155 process to proceed; and

25.7.2 they would confine their opposition to voting against the section 155 proposal, and / or opposing its subsequent sanction by this Court, and could raise their complaints regarding 'classing' at that stage.

26 Hamilton and Trevo hold themselves out as creditors under the section 155 proposal in circumstances where their claims have not been verified and, using this asserted, but disputed, platform, they wish to delay or stop (or at least threaten to derail) the section 155 process, in the hope that they will be offered more favourable returns by SIHPL. The approach they have adopted is both selfish and potentially irreparably prejudicial to all of the other claimants of SIHPL (who, I reiterate, neither Hamilton nor Trevo have joined to their respective applications or notified of their respective applications).

Urgency

27 Subsequent to bringing the Declaratory Application, and as I have mentioned, Hamilton attempted to intervene in, and postpone, SIHPL's *ex parte* application (in terms of which SIHPL sought this Court's consent to publish notices, in terms of section 155 of the Companies Act, to certain parties by way of 'other means' (**"the Notice Application"**), which was set down for hearing by Mr Justice Saldanha, the learned Judge who has been appointed by the Judge President of this Division as the case managing Judge of all Steinhoff-related matters instituted in this Court.

28 The Notice Application was heard by way of a virtual hearing on 21 January 2021. At that hearing:-

28.1 numerous representatives of parties who have instituted proceedings against Steinhoff group entities, as well as other interested parties, were present (including the legal representatives of both Hamilton and Trevo);

28.2 Hamilton's attempts to intervene in, and postpone, the Notice Application, were unsuccessful – Judge Saldanha's view was that the Notice Application was procedural in nature, and that the merits of the section 155 proposal would be determined in due course; and

28.3 Hamilton and SIHPL's legal representatives informed Mr Justice Saldanha that they would be available to argue the Declaratory

Application on 8 or 9 February 2021, a fact that was communicated to every representative present at that hearing (including Trevo's legal representatives).

29 Accordingly, by 21 January 2021 Trevo was aware that the Declaratory Application would be heard on 8 or 9 February 2021.

30 On 29 January 2021, Hamilton's representatives and SIHPL's representatives were informed that:-

30.1 Mr Justice Bozalek had been allocated to hear the Declaratory Application; and

30.2 Mr Justice Bozalek was unavailable to hear the Declaratory Application on 8 or 9 February 2021, and an alternative date would need to be arranged.

31 On 29 January 2021, Hamilton's attorneys informed SIHPL's attorneys that Hamilton intended to supplement its papers in the Declaratory Application, and that, as a consequence, the hearing on 8 or 9 February 2021 could in any event not proceed on those dates.

32 Trevo's attorneys were aware, prior to the institution of Trevo's Intervention Application), that the Declaratory Application would not proceed on 8 or 9

February 2021, that Hamilton intended to supplement its papers, and that no hearing date has yet been set.

33 Regardless, the issue of urgency, in circumstances where a Judge has been allocated to hear this matter, and has directed the parties to set agreed-upon filing deadlines, has become largely irrelevant.

The unjustified attempts to shift the notice obligations to a respondent (paragraphs 49 to 57 of the Trevo founding affidavit)

34 As aforementioned:-

34.1 Hamilton is the applicant in the Declaratory Application; and

34.2 Trevo is the applicant in the Intervention Application.

35 SIHPL is a respondent in both applications.

36 In paragraph 4 of the notice of motion, Trevo seeks an Order from this Court, directing SIHPL to give notice of both the Declaratory Application, and the Intervention Application, *"directly to all creditors and potential creditors of SIHPL"*, in terms of the Court Order granted pursuant to the Notice Application.

37 Hamilton's Declaratory Application is one which seeks relief that will affect the rights and interests of every claimant of SIHPL who is party to the section 155

proposal. Notwithstanding this, Hamilton conveniently elected not to cite any other party in the Declaratory Application, and failed to give notice of the Declaratory Application to any other person whose interests may be affected by the relief sought therein.

38 Mr Justice Saldanha correctly pointed out that Hamilton, having brought an application in which other interested parties have an interest, bore the responsibility to notify those parties of its application.

39 The same principle relates to Trevo's Intervention Application. Trevo, too, is responsible for notifying all necessary persons of the Intervention Application.

40 Trevo and Hamilton have no right to shift the obligation to give notice to a respondent (in this case, SIHPL). Both Trevo and Hamilton are in possession of the Court Order granted pursuant to the Notice Application (**"the Notice Order"**). They are well aware of which parties are required to be given notice. If Trevo and Hamilton have brought applications where the giving of notice, through traditional means, is difficult or impossible, then it falls to them to take the necessary steps to approach this Court to seek this Court's leave to give notice by alternative means, and nothing prevents either of them from doing so – they have simply elected not to do so.

41 In short, Trevo and Hamilton are quite capable of approaching this Court for leave to effect service / notice of their applications, and thereafter to provide notice of their respective applications in terms of the Orders that they obtain.

42 However, Trevo and Hamilton appear not to want to incur the time and expense of doing so, and thus impermissibly seek to shift their service / notice obligations to SIHPL. There is no basis for them to do so.

43 Trevo acknowledges that other parties should be notified of the Declaratory Application and the Intervention Application (Trevo founding affidavit, paragraph 50), and Mr Justice Saldanha directed that Hamilton notify interested parties of its Declaratory Application. It is their responsibility to do so.

44 Moreover, and despite attempting to shift the burden of notice / service to SIHPL, Trevo (with no apparent objection from Hamilton) fails to tender the costs that SIHPL would incur if SIHPL were in fact to be saddled with other parties' service obligations. The costs of *inter alia* providing physical copies to identified officials, and indeed to unknown members of the public, the costs of newspaper advertisements in multiple countries, the costs of online advertisements and website maintenance and updates, the costs of the additional 'global circuits' and expanded media outlets (used to expand the number of media and financial outlets that are notified), the costs of translations of notices in up to 27 different languages, and the costs associated with managing and coordinating these steps, are astronomical. Nevertheless, Trevo (and presumably Hamilton) expects SIHPL to carry these significant costs of SIHPL having to perform Trevo's and Hamilton's service and notice obligations.

45 In the premises, SIHPL submits that the Intervention Application ought to be dismissed with costs.

Factual background (paragraphs 14 to 21 of Trevo's founding affidavit)

46 In paragraphs 14 to 21 of the Trevo founding affidavit, Trevo sets out what it regards as the 'factual background' to the Intervention Application.

47 Much of that background is irrelevant to the relief sought in the Intervention Application.

48 To the extent that these paragraphs contain accurate recordals from documents that have been published by SIHPL / the Steinhoff Group, those recordals are admitted. To the extent that the allegations made in these paragraphs are not answered herein, and / or are contrary to what is said herein (and in *inter alia* SIHPL's answering affidavit in the Hamilton Declaratory Application), they are denied, and SIHPL reserves the right to respond thereto at a later stage, should that be necessary.

49 What is of relevance, as background to both the section 155 process and the Intervention Application, are certain averments made by SIHPL in the Notice Application, including the following:-

49.1 a number of individuals and entities have instituted legal proceedings against *inter alia* SIHPL. The majority, if not all, of these claims are centred on assertions of alleged accounting irregularities, alleged misstatements, alleged misrepresentations, and alleged failures relating to statutory duties and financial reporting;

49.2 SIHPL has defended, and continues to defend, all of the aforesaid legal proceedings, and has denied, and continues to deny, liability and wrong-doing as alleged therein. To date, no judgment on the merits, and giving rise to the liability as alleged in the various legal proceedings, has been granted, and in fact, certain claims have been dismissed;

49.3 nevertheless, SIHPL faces claims in South Africa, amounting to billions of Rands. In addition, claims have been instituted against SIHPL in European jurisdictions;

49.4 since the departure of its former chief executive officer, and in light of the aforesaid legal proceedings and assertions made in the legal proceedings, the Steinhoff Group, under its new management, has had to work hard to restore confidence by protecting the Steinhoff Group's underlying businesses, commissioning and undertaking a widespread investigation, and stabilising its financial position;

49.5 during 2018 and 2019, the Steinhoff Group *inter alia* put in place a financial restructuring to extend its financings until 31 December 2021, including under the terms of what is known as 'Contingent Payment Undertakings', entered into by *inter alia* Steinhoff International Holdings N.V. (**"SIHNV"**), a Dutch-registered company, and the ultimate holding company of the Steinhoff Group, and SIHPL, being a restatement of guarantees previously given (**"the Financial Restructuring"**);

49.6 non-core assets have been sold, and the businesses within the Steinhoff Group have been streamlined and adjusted, in an attempt to place the Steinhoff Group onto an even keel;

49.7 however, despite the Financial Restructuring with lenders, it has, to date, not been possible to resolve all of the critical issues facing the Steinhoff Group at the same time as putting in place the Financial Restructuring. A critical issue that has not been resolved, is that of the aforesaid myriad of legal proceedings (**"the Litigation"**);

49.8 SIHPL, together with SIHNV and various creditor group and claimant group representatives, has been proactively exploring the possibility of substantially resolving the Litigation, as well as other unsecured, non-preferred, claims against SIHNV and SIHPL;

49.9 these discussions and negotiations, conducted over a period of many months, have brought the Steinhoff Group to the present point, where SIHPL has 'launched' a section 155 proposal (published globally, in terms of the provisions of the Notice Order), and SIHNV has commenced a statutory, creditor-supported, Court-sanctioned process, initiated in the Netherlands, where SIHNV will seek to compromise and settle the majority of its alleged claimants (**"the Dutch Process"**). These processes seek a full and final settlement of most of the alleged claims against SIHNV and / or SIHPL. These are dual, inter-dependent, and inter-conditional processes;

49.10 the importance of the section 155 process cannot be overstated. It has direct ramifications not only for SIHPL, but for the wider Steinhoff Group, which operates almost 8780 stores (excluding those stores operating within its Mattress Firm unit) in over 30 countries, and presently employs almost 110 000 people. Billions of Rands, and potentially tens of thousands of jobs, are at stake;

49.11 moreover, the section 155 process and the Dutch Process will be inter-conditional: both will have to be approved by claimants and the relevant Court, in order to be of force and effect. The two processes are planned to be pursued and implemented concurrently;

49.12 the section 155 process was foreshadowed in a press release dated 27 July 2020, issued by SIHPL and SIHNV;

49.13 the section 155 process seeks to compromise SIHPL's alleged financial obligations, allegedly owed to a number of alleged claimants (i.e. the Financial Creditors, the Contractual Claimants, and the MPCs);

49.14 MPCs (the class in which both Hamilton and Trevo are classified) assert claims which SIHPL disputes and contends have no basis in law, but which SIHPL is including in the section 155 proposal for the purposes of finality;

49.15 specifically, MPCs are those alleged claimants who had no contractual relationship with SIHPL, but who acquired and held SIHPL shares immediately prior to a 2015 scheme of arrangement, and who continued to hold all or some of such shares (which, following the 2015 scheme of arrangement, had been effectively converted to shares in SIHNV) as at 5 December 2017, and who assert alleged damages. Such MPCs would largely have acquired the SIHPL shares (which, at the time, were listed shares) on the open market. There are potentially tens of thousands of MPCs – SIHPL estimates that there are in excess of 35 000 MPCs that may seek to participate in the section 155 process;

49.16 as alluded to above, the purpose of the twin processes (i.e. the Dutch Process and the section 155 process) is to further stabilise the Steinhoff Group and to maximise what is available to be distributed in terms of *inter alia* the section 155 proposal, by marshalling cash, preserving the going concern value of the Steinhoff Group's businesses and avoiding further litigation costs;

49.17 the two processes also seek to ensure the continuity of the Steinhoff Group's operations in order to safeguard the jobs of the thousands of employees of the Steinhoff Group's underlying businesses and, by preserving the value of those underlying businesses, to protect the broader universe of Steinhoff Group stakeholders. They seek to do so by concluding and implementing *inter alia* the section 155 process, on

commercially viable terms, as soon as reasonably and practically possible; and

49.18 it is only aggrieved, MPC claimants, such as Hamilton and Trevo, that have brought and persist with proceedings in this Court in an attempt to derail the section 155 process – no other claimant has done so. As mentioned above, the rationale behind Hamilton and Trevo's attempts is a simple one: the desire to get more money.

50 Specifically:-

50.1 Hamilton unsuccessfully sought to intervene in, and postpone, the Notice Application, which would have prevented the commencement of the section 155 process; and

50.2 Hamilton and Trevo seek to derail the now-launched section 155 process by attacking / seeking substantially to amend the classing utilised therein (and thereby seeking effectively to stymie the section 155 process). Both do so in circumstances where there are, as I have explained above, other opportunities to voice their concerns and raise their arguments, and in circumstances where their self-serving actions affect thousands of other claimants who have not been notified of their applications.

51 If Hamilton and Trevo wish to vote against the section 155 proposal at a meeting of creditors, and to the extent that they qualify as creditors under the section 155 proposal then they are free to do so.

52 If their votes against the section 155 proposal, to the extent they qualify as creditors thereunder, do not prevent the approval of the section 155 proposal by the creditors, they have a second opportunity – they can oppose the sanction of the approved proposal when this Court is approached to sanction the approved proposal. What Hamilton has sought to do (and now Trevo seeks in effect to do) is to create for themselves a third opportunity to attack the section 155 proposal and process. Moreover, they are doing so by abusing this Court's process, bypassing other claimants' interests and rights, and denying them the opportunity to consider and vote on the section 155 proposal.

53 The Declaratory Application is nothing more than an attempt to force a re-formulation of the proposed commercial terms which are designed to achieve an equitable global settlement, so that Hamilton (and now Trevo) can obtain an undue commercial benefit (to the detriment of the overwhelming majority of stakeholders and claimants).

54 This constitutes a clear abuse.

The difficulties with the claims asserted by Hamilton and Trevo

55 Hamilton and Trevo face insuperable additional difficulties in respect of their alleged claims against SIHPL. They fail to satisfy the requirement of a valid cause of action against SIHPL.

56 These difficulties were fully set out and dealt with in SIHPL's answering affidavit in the Declaratory Application, and were raised in the context of the Hamilton claim, but are equally applicable to the Trevo claim.

57 Both Hamilton and Trevo assert two types of claim, namely a delictual claim, and a further / alternative claim for damages based upon alleged statutory breaches, which are premised on allegations *inter alia* that:-

57.1 damages were allegedly suffered as a result of the alleged deliberate publication of alleged false and misleading financial statements (and accounting records), with the intention that they would be acted on by investors to their prejudice; alternatively

57.2 damages were allegedly suffered as a result of the alleged negligence on the part of SIHPL in presenting its financial affairs and in publishing alleged incorrect and misleading financial statements, where SIHPL allegedly ought reasonably to have known that they were allegedly misleading, inaccurate and incomplete, and that with due care and diligence it could have reasonably produced accurate statements;

57.3 the alleged deliberate alternatively negligent conduct was wrongful, on the basis that SIHPL allegedly owed the investors a legal duty of care, and causation is alleged;

57.4 the alleged misrepresentations and non-disclosures induced investors to purchase SIHPL shares, when they would otherwise not have done so, or would not have done so for the relevant price. It is on this basis that Hamilton and Trevo assert a delictual damages claim; and

57.5 there were alleged breaches of various statutory provisions contained in the Companies Act, including section 22(1), section 28(1), section 28(3), and section 29 of the Companies Act, allegedly giving rise to liability under section 218(2) of the Companies Act.

58 Hamilton and Trevo are not the only alleged MPC claimants that have sought to institute damages claims against SIHPL based upon *inter alia* alleged statutory breaches by *inter alia* SIHPL, and based upon alleged damages suffered as a result of purchasing SIHPL shares on the open market (i.e. where the shares were not acquired as a result of a direct contractual relationship with SIHPL).

59 During 2018, class action certification proceedings were instituted against *inter alia* SIHPL by a representative claimant, Ms Dorethea De Bruyn (**"the De Bruyn Case"**) in the Gauteng Local Division of the High Court, under case number 29290/2018. The nature of the claims alleged in Ms De Bruyn's draft

particulars of claim was identical in all substantive respects to the claims that are advanced in each of the Hamilton and Trevo action proceedings.

60 A copy of the Judgment handed down by Mr Justice Unterhalter in the De Bruyn Case, (**"the Unterhalter J Judgment"**), which determined whether or not the De Bruyn claim should be certified for the purposes of class action proceedings, is annexed to SIHPL's answering affidavit in the Declaratory Application.

61 The common law / delictual claim asserted in the De Bruyn Case can be summarised as follows:-

61.1 shareholders alleged *inter alia* that SIHPL failed to carry out common law and statutory duties of care (paragraph 122 of the Unterhalter J Judgment);

61.2 near-identical allegations were made (paragraph 123 of the Unterhalter J Judgment) as are advanced by Hamilton and Trevo with respect to the consequences of the alleged breaches of common law and statutory duties of care;

61.3 near-identical allegations were made (paragraph 125 of the Unterhalter J Judgment) as are advanced by Hamilton and Trevo with respect to damages allegedly suffered as a result of alleged breaches of provisions of the Companies Act, alternatively as a result of alleged deliberate or negligent breaches of duties of care; and

61.4 allegations of causation that were made (paragraph 128 of the Unterhalter J Judgment) are on all fours with those made by Hamilton and Trevo.

62 The Unterhalter J Judgment found *inter alia* as follows:-

62.1 directors of a company owe fiduciary duties to the company, and not to shareholders (paragraph 136);

62.2 the company, and not its shareholders, has an action for wrongs done to the company and losses suffered by the company (paragraph 137);

62.3 whilst the legal relationship between the directors and a company gives rise to fiduciary duties owed by the directors to the company, that relationship does not give rise to fiduciary duties owed by directors to shareholders (paragraph 138), and there is no general fiduciary duty owed by directors to shareholders (paragraph 141) unless there is a special factual relationship between the directors and shareholders, as described in paragraph 139 of the Unterhalter J Judgment; and

62.4 in considering whether or not the De Bruyn Case's draft particulars of claim made out a 'special factual relationship' between the directors and the shareholders, the Unterhalter J Judgment found that there were no such allegations made. This is indisputably the case in the Hamilton and Trevo action proceedings.

63 On this basis, the Unterhalter J Judgment found as follows:-

> *"145. The draft particulars and affidavits do not set out facts that, if proven at trial, would give rise to a special factual relationship between the Steinhoff directors and the Steinhoff shareholders, much less, prospective Steinhoff shareholders. The Steinhoff directors' relationship was with the companies to which they were appointed, and hence, their fiduciary duties were owed to [SIHPL] and Steinhoff NV. The draft particulars do not state that the directors had undertaken to act for the shareholders or had forged a particular relationship with shareholders by reason of some special dealing with the shareholders or proposal made to the shareholders.*
>
> *146. The consequence, on the authorities that I have cited, is that no foundation has been laid for the proposition that the Steinhoff directors owed fiduciary duties to the shareholders. If that is so, then the shareholders and prospective shareholders have no right or legal interest to assert against the Steinhoff directors. Nor, on this analysis, is any duty owed by [SIHPL] or Steinhoff NV to the shareholders. As I have explained, the fiduciary duties of the directors are owed to the companies. The companies enjoy the right to enforce these duties, seek redress and claim damages against the directors, in the event of breach. The companies are the beneficiaries of the fiduciary duties owed to them. No benefit accruing to the companies, nor right vesting in them requires or entails any duty owed to the shareholders. Absent a duty owed to the shareholders or prospective shareholders, the cause of action against the Steinhoff directors, [SIHPL] and Steinhoff NV fails to establish wrongfulness."*
> (emphasis added)

64 And further:-

"151.The harm does not establish that the duty is owed to all persons who suffer harm. On the contrary, and as the cases show, there must be a special relationship that subsists between the directors and the plaintiffs so as to require that the fiduciary duties owing to the company are also due to other persons. The prospective action fails to make that case. And compounds the problem by alleging that the Steinhoff companies to whom fiduciary duties are owed also owes those duties to the shareholders. I find no basis on the pleaded case, read with the affidavits, that permit me to find that the Steinhoff directors, [SIHPL] or Steinhoff NV owe fiduciary duties to the shareholders. Without such a case, I cannot find that there is a cause of action because, absent wrongfulness, there is no delict.

159. But that is not the proposed case before me. It is not said that the Steinhoff shareholders forged any such relationship. Indeed, they did not because their reliance was based on price signals in the market. Those who buy and sell in markets do depend on the prices reflected in the market and there may be limited ways to identify and verify information that influences market prices, including what is stated in published financial statements. That is why those who invest in shares do so on risk as to the many factors that influence the quoted price of traded shares and the law of delict should not in general be used to attenuate that risk.

160. For these reasons, I find that Ms De Bruyn has failed to plead a case that makes out the requirement of wrongfulness. Absent such a case, there is no common law liability in delict against the Steinhoff directors, [SIHPL] and Steinhoff NV, and

hence the reliance on this cause of action gives rise to no triable issue."

65 Accordingly, the Unterhalter J Judgment found that there was no legal duty of care, there was a failure to prove wrongfulness, and thus no delictual claim arose.

66 There is no discernible difference between the claim advanced by De Bruyn (and rejected by Mr Justice Unterhalter in the Unterhalter J Judgment) and the claims asserted by Hamilton and Trevo, and thus no reason why those claims should not suffer the same fate.

67 This is also the case with the alleged statutory claims advanced by Hamilton and Trevo. Claims based on the same statutory provisions were advanced in the De Bruyn Case, and the Unterhalter J Judgment determined that no such claims exist in the hands of a shareholder:-

67.1 with respect to section 22(1) of the Companies Act Mr Justice Unterhalter found:-

"209. It follows that the reckless trading contravention cannot be made out, as a matter of law, because the shareholders have no right of action."

67.2 with respect to all of the statutory claims Mr Justice Unterhalter found:-

"218. The financial statement contraventions that are to be relied upon by class members to found statutory claims

have no basis in the Companies Act. The civil liability that is recognized for such contraventions is to be found in s77(3)(d)(i). As I have already found, this species of liability is imposed upon directors at the instance of the company that has suffered loss. And further, it will be recalled, that the class members seek compensation for the losses they have suffered and not those of the Steinhoff companies. That is not the kind of loss that is contemplated by s77(3)(d)(i). No other civil liability is recognized for the financial statement contraventions. Consequently, the statutory claims based on the financial contraventions have no basis in law."

68 On the basis of the Unterhalter J Judgment, Hamilton and Trevo's alleged claims are doomed to fail.

69 SIHPL reiterates that based on the Unterhalter J Judgment, market purchase claimants, under South African law, have no common law / delictual, or statutory claims, against SIHPL. This was, moreover, largely confirmed by the Supreme Court of Appeal in the judgment in *Hlumisa*. An attempt by the disappointed parties in *Hlumisa* to take the matter to the Constitutional Court recently failed.

70 MPC claims are included in the section 155 proposal, only for the purposes of finality and out of an abundance of caution.

71 Accordingly, this Court is now faced with applications brought by two MPC claimants, asserting at best doubtful claims, but whose alleged claims are

nonetheless catered for in the section 155 proposal (which envisages payment to them, in circumstances where the law as it presently stands demonstrates that they have no claims and are thus not entitled to receive payment at all). However, it is these claimants who impermissibly and baselessly seek to attack and alter the classes contained in the section 155 proposal, with the sole aim of seeking to obtain a greater financial benefit to which they are not entitled in fact or in law.

The arguments and proposals advanced by Hamilton and Trevo

72 Hamilton's approach to bypass the difficulties inherent in its claim have been two-fold:-

72.1 first, Hamilton baselessly attempts to distinguish itself from the De Bruyn Case and thus to escape the conclusions reached in the Unterhalter J Judgment; and

72.2 secondly, Hamilton, seemingly conscious of the fact that it can never break out of the MPC class, and does not qualify for inclusion in another class in the section 155 proposal, seeks in the Declaratory Application to set aside the existing classes and replace them with liquidation classes (which would, if the section 155 proposal was reformulated on that basis, result in Hamilton receiving a higher return). This is a self-serving approach which has no basis in law, and which denies other claimants (many thousands of which are in the same class as Hamilton

and Trevo) the opportunity to vote on the section 155 proposal at the voting stage.

73 Trevo's approach is slightly different. It seeks to keep the classes envisaged in terms of SIHPL's section 155 proposal, save for one important alteration: it seeks to move Trevo from the MPC class to the Contractual Claimants class (which would, assuming SIHPL was prepared to proceed with the section 155 proposal on that basis, result in Trevo receiving a higher return).

74 In attempting to justify its 'migration' from the MPC class to the Contractual Claimants class, Trevo:-

74.1 sets out the bases why it contends that its alleged claim should be treated as a Contractual Claim (which contentions are denied by SIHPL for the reasons set out below);

74.2 relies upon the support of two other 'sets' of Contractual Claimants, namely **"BVI"** and **"the Cronje Claimants"** (there are seven individual 'Cronje claimants'), both of whom are represented by the same firm (Bowmans) that represents Trevo; and

74.3 asserts that if Trevo is moved to the Contractual Claimants class, the existing Contractual Claimants should not be paid less than they would be paid, had Trevo remained in the MPC class.

75 One of the primary reasons for this approach relates to the relationship between Trevo, another MPC claimant (**"Mantessa"**) and the aforementioned two 'sets' of Contractual Claimant class parties, being BVI and the Cronje Claimants, and those who represent them.

76 Trevo, BVI, the Cronje Claimants and Mantessa are all represented by Bowmans, and by the same attorneys at Bowmans. Bowmans accordingly represents two claimants that fall within the MPC class (Trevo and Mantessa) and two sets of claimants that fall within the Contractual Claimants class (BVI and the Cronje Claimants).

77 Trevo asserts that the facts surrounding its acquisition of Steinhoff shares (i.e. the basis for its alleged loss) justify Trevo's removal from the MPC class, and its insertion into the Contractual Claimants class. For the reasons set out below, SIHPL denies this assertion.

78 As aforesaid, the motivation is obvious: Trevo would get substantially more money if it was placed in the Contractual Claimants class (assuming that SIHPL was prepared to proceed with the section 155 proposal on that basis). Moreover, that benefit would not come at the cost of BVI and the Cronje Claimants if the level of payment to them was maintained (again, assuming that SIHPL was prepared to proceed with the section 155 proposal on that basis).

79 These assumptions as to the basis on which SIHPL might be prepared to proceed if Trevo were to me moved into the Contractual Claimants class are

convenient for Trevo but are in fact wholly speculative. If, for example, Trevo was included in the Contractual Claimants class on the basis that the total settlement amount offered in terms of the section 155 proposal was not increased, the section 155 proposal's total settlement 'pot' and the settlement rate proposed to be paid to other Contractual Claimants would logically reduce, resulting in all of the existing Contractual Claimants receiving a lower return (i.e. in order to accommodate the extra payment needed to be made to Trevo). If that was the case, then BVI and the Cronje Claimants would automatically receive a lower dividend if Trevo 'joined' the Contractual Claimants class.

80 It is highly unlikely that those claimants would support Trevo's inclusion in the Contractual Claimants class if the result of this would be that those claimants would receive a lower return.

81 Accordingly, Trevo needs to find a way of justifying Trevo's inclusion in the Contractual Claimants class, and the payment to Trevo as a Contractual Claimant (which would ordinarily be to the prejudice of BVI and the Cronje Claimants), but which does not result in a prejudice to BVI and the Cronje Claimants.

82 As referenced above, the solution that Trevo finds (presumably with the support of BVI and the Cronje Claimants) is contained in paragraph 6.1.1 of the aforesaid letter from Bowmans dated 20 January 2021 (**"the Trevo Letter"**):-

"include Trevo in the Contractual Claimants class and allocate sufficient funds to the settlement of this class so as not to dilute the settlement consideration to be received by each Contractual Claimant as a result of Trevo's inclusion in that class..."

83 In other words, Trevo's proposal is as follows:-

83.1 remove Trevo from the MPC class, and place it in the Contractual Claimants class;

83.2 continue to pay all of the existing Contractual Claimants the same return that they would be paid had Trevo not been included in the Contractual Claimants class (i.e. simply allocate more funds to the Contractual Claimant class' settlement 'pot'); and

83.3 find the additional money, needed to pay Trevo as a Contractual Claimant, elsewhere – SIHPL is simply asked to *"allocate"* funds to prevent the dilution to existing Contractual Claimants class members that would occur by placing Trevo in that class. No suggestion is made by Trevo regarding from where the additional funds that are to be 'allocated' should be sourced.

84 It is not legally tenable or justifiable for Trevo (and BVI, and the Cronje Claimants, for that matter) to ask a Court to effectively direct SIHPL to increase its overall settlement 'pot' for the section 155 proposal, in order to accommodate

Trevo's inclusion in the Contractual Claimants class. A Court has no power to do so.

85 Indeed, the fact that Trevo has not specifically asked this Court to do so implies that it accepts that it has no basis, in law, to seek relief of this nature.

86 Just as the Court has no power to direct SIHPL to make the settlement more expensive overall, it has no power to direct that SIHPL increase its offer to any one or more claimants by taking money off other claimants. This is significant, as an alternative interpretation that can be given to Trevo's proposal, as set out in the Trevo Letter, is that Trevo wants SIHPL to fund Trevo's inclusion in the Contractual Claimants class, without any cost to other Contractual Claimants, by:-

86.1 reducing the settlement amount allocated to the Financial Creditors' settlement 'pot'; and / or

86.2 reducing the settlement amount allocated to the MPC class' settlement 'pot'.

87 The Court is not competent to make an order giving effect to such a proposition. If any event, if the requisite funds needed to fund Trevo's inclusion in the Contractual Claimant class were required to be deducted from the financial creditor or MPC settlement 'pots', SIHPL expects that such claimants would cry

foul at the consequent financial prejudice that they would sustain (to Trevo's advantage).

88 More generally, the Trevo proposal is problematic in that:-

88.1 first, and for the reasons set out fully below, Trevo is not a Contractual Claimant, and does not qualify as such. It potentially qualifies only as an MPC claimant (and thus the second proposal made in the Trevo Letter, that Trevo be placed in its own class, and effectively treated as a Contractual Claimant, is also untenable); and

88.2 secondly, it follows that if Trevo is permitted to simply 'move classes' on the basis of threatening to oppose the sanction of the section 155 proposal, then nothing would stop other MPC claimants from seeking to follow suit (eg. the same rationale could be advanced with respect to Mantessa, unless Trevo is of the view that Mantessa can simply be 'left' in the MPC class).

89 In light of the above, the Trevo proposal casts doubt on the extent to which reliance can be placed on the affidavits of support for the Intervention Application (and for Trevo's proposal that it be treated as a Contractual Claimant): if the effect of Trevo's proposal could only be that BVI and the Cronje Claimants would not be financially prejudiced, then there is no risk whatsoever to BVI and the Cronje Claimants in supporting Trevo's inclusion as a Contractual Claimant. The fact that other parties will lose, is irrelevant to Trevo,

BVI and the Cronje Claimants. But that is simply speculation – if SIHPL's current proposal were instead to be stopped, SIHPL could either choose not to proceed with it, or to proceed on a basis that paid Contractual Claimants a lower rate – both of which would be to the detriment of BVI and the Cronje Claimants.

90 Again, a Court does not have jurisdiction to compel an increased total settlement, or a reduction in settlement amounts proposed to be paid to classes – only SIHPL can formulate a proposal. The best Trevo can do is seek to halt or threaten the current proposal, and hope that SIHPL will reformulate it to its liking – with no assurance that it would do so or that if it did so it would not be to the prejudice of BVI and the Cronje Claimants (whose support is based on a specific reformulation which cannot be compelled).

91 I add that what Trevo has not disclosed to this Court is that (a) Trevo, BVI, and the Cronje Claimants have formed a 'group', and that they have largely stood together, and (b) they, along with Mantessa and certain of the Financial Creditors (i.e. claimants in all three classes), are represented by the same law firm. It is thus unsurprising that Trevo asserts that no prejudice should be suffered by existing Contractual Claimants from 'moving' Trevo to that class, and yet Trevo is silent on how the funding (of its 'migration') is to be met.

92 Instead, Trevo seeks to tip-toe around the difficulties associated with the proposal, and contrive an artificial solution in an attempt to avoid prejudice to, and thus secure the support of, BVI and the Cronje Claimants.

93 Finally, I point out that in paragraph 6.2 of the Trevo Letter, the following is stated:-

> *"Should SIHPL fail to do so, Trevo will oppose any application by SIHPL in terms of section 155(7) for an order approving the Proposal on the grounds that it is not just and equitable and is contrary to commercial morality."*

94 This is, I submit, a confirmation that Trevo recognises that apart from its right to vote in favour of or against the section 155 proposal, the forum in which Trevo can object to the classing contained in the section 155 proposal is at the sanction hearing before this Court, and not through the present litigation / the Declaratory Application.

Trevo's claim is not one which qualifies as a Contractual Claimant

95 There is in any event no basis on which it could be suggested that it would be appropriate that SIHPL should reformulate its proposal on the basis alleged by Trevo, or that it would be fair to other claimants to do so.

96 The section 155 proposal records the following:-

96.1 the Contractual Claimants class is comprised of those parties who had contractual dealings with SIHPL, culminating in their acquisition of shares. They are claimants who have instituted claims against SIHPL

prior to 5 December 2020, in respect of arms-length, negotiated contractual arrangements, under which shares in other enterprises were sold or transferred by such claimants or their related parties to SIHPL, and received consideration directly from SIHPL by way of issuance, or transfer, of SIHPL Shares; and

96.2 the MPC class is comprised of parties who otherwise purchased SIHPL Shares listed on the JSE between the opening of business on 2 March 2009 and prior to close of business on 6 December 2015 (which were subsequently converted to SIHNV Shares pursuant to the scheme of arrangement), and who held such SIHNV Shares at close of business on 5 December 2017, or who purchased SIHPL Shares listed on the JSE prior to open of business on 2 March 2009 (which were subsequently converted to SIHNV Shares pursuant to the scheme of arrangement) and held such SIHNV Shares at close of business on 5 December 2017.

97 Although the claim alleged by Trevo is more fully set out in paragraph 22 of Trevo's founding affidavit (and in its particulars of claim), an overview of the facts, as SIHPL understands them and as asserted by Trevo, upon which Trevo's alleged claim is premised, is important:-

97.1 during October 2015, Trevo entered into a forward contract with Treemo Proprietary Limited (**"Treemo"**) for the sale of 56 578 213 shares in SIHPL. The terms of sale permitted Trevo to settle the purchase price

through a combination of a cash payment and by issuing preference shares to Treemo;

97.2 Treemo delivered the shares (which by then had 'converted' from SIHPL shares, to SIHNV shares, pursuant to the 2015 scheme of arrangement) to Trevo;

97.3 on 3 November 2015, Treemo entered a put option with its parent company Upitgoes, for any Trevo shares that it received as part of the forward agreement with Trevo. Treemo also declared a dividend of approximately R4.1 billion in favour of Upitgoes;

97.4 on 4 November 2015, prior to the settlement of the forward contract, Trevo acquired Treemo (i.e. Treemo became a subsidiary company of Trevo);

97.5 on 1 December 2015, Upitgoes entered a put option agreement with its parent company **Blackriver View Trust**, and declared a dividend of R3.6 billion in its favour;

97.6 following the SIHPL / SIHNV scheme of arrangement, Trevo issued its preference share consideration directly to Upitgoes and Blackriver View Trust (rather than Treemo), in order to satisfy the obligations of Treemo and Upitgoes under the respective put options, which had been exercised. The consideration respectively payable by Upitgoes and Blackriver View Trust under their options was set-off against the

dividends that Treemo and Upitgoes had respectively declared to them; and

97.7 the remaining consideration, payable by Trevo to Treemo, was paid in cash.

98 Importantly:-

98.1 It appears clear that Treemo received valuable consideration (from its former parent company, Upitgoes, by way of the price payable under its put option), from the onward transactions in the preference share consideration it was entitled to receive from Trevo in exchange for the SIHNV shares; and

98.2 Treemo has since been dissolved, and no steps have been taken to restore it.

99 More importantly, at no stage was there ever a contractual relationship between SIHPL and Trevo. It is simply impossible for Trevo to assert that Trevo had a direct contractual relationship with SIHPL which led to Trevo acquiring shares in SIHPL, directly from SIHPL (or in the context above, in SIHNV). Accordingly, Trevo can never qualify as a Contractual Claimant.

100 On the other hand, Trevo, may meet the definition of a MPC claimant as it purchased shares from a third party (Treemo), and held such shares, within the periods mentioned above.

101 In this respect, whether or not Trevo purchased shares on the 'open market' (as alluded to in paragraph 35 of Trevo's founding affidavit) is irrelevant – the fact of the matter is that the shares were acquired from a third party (regardless of whether it was acquired on an open exchange, or pursuant to contractual arrangements with the third party), and not from, and not pursuant to, any agreement with SIHPL.

102 It is of course true that Treemo had a direct contractual nexus with SIHPL. Had Treemo continued to hold the SIHPL (and then resulting SIHNV) shares, it is possible that Treemo would have a Contractual Claim against SIHPL. However, this did not occur – Treemo and Trevo independently agreed to the share sale.

103 In this respect, if the Treemo-Trevo agreement was *"no more than a restructuring of Erasmus's affairs"* (as alleged in paragraph 35 of Trevo's founding affidavit), then one would imagine that this restructuring could have been reversed and / or that Trevo could have instituted proceedings against Treemo. However:-

103.1 As referenced above, what is not disclosed in the Trevo founding affidavit is that Treemo was fully paid (as aforesaid), and Treemo has subsequently been liquidated; and

103.2 one assumes that any value that Treemo received from Trevo would have been transferred from Treemo prior to its voluntary liquidation, and that the funds are elsewhere. Accordingly, even if Trevo sought to 'undo' the restructuring and *inter alia* return the shares to Treemo (to possibly enable a Contractual Claim to be instituted by Treemo, which would in any event be faced with the issue of prescription), Treemo could not return the purchase price to Trevo.

104 Accordingly, Trevo cannot hope to establish anything more than a MPC claim.

105 Recognising this difficulty, it is unsurprising that Trevo asserts that the shares forming the basis for Trevo's claim were:-

> *"as a matter of economic substance, acquired from [Treemo's] exchanges of [Pepkor] shares exactly as the case with most of the claimants currently classified in the [Contractual Claimants] class".*

106 This is an assertion that is legally and factually untenable. The fact that:-

106.1 Treemo may have originally acquired the shares through contractual exchanges involving Pepkor shares, does not mean that Trevo 'inherits' the same rights, if any, to sue that Treemo may have once held (and there is no claim or evidence that such rights, which would now be

subject to prescription in any event, were assigned to Trevo with the shares); and

106.2 Mr Erasmus may have had economic interests in Treemo as well as Trevo does not convert Trevo's MPC claim to that of a Contractual Claim or entitle it to conflate its standing with any standing that Treemo might have had. Were that the case, any party that acquired shares from a Contractual Claimant could claim to stand in its shoes.

107 What Trevo in effect requires is that this Court close its eyes to the intervening contractual arrangements between Treemo and Trevo and the consequences thereof, and ignores the fact that *inter alia* Trevo did not acquire shares from SIHPL and had no contractual relationship with SIHPL.

108 Mr Erasmus and Trevo cannot wish away the restructuring of Mr Erasmus's affairs (which was presumably executed for a purpose, and had legal, tax and other related implications) and now allege that certain legal consequences flowing from such restructuring can be ignored, and that a Contractual Claim can be asserted (as if that restructuring did not take place) in the hands of a party that does not hold such a Contractual Claim.

109 In summary, Trevo needs to 'thread the needle' in order to justify Trevo's stance herein:-

109.1 it is unable to agree with Hamilton that the classes are invalidly constituted, as the result would be to eliminate the Contractual Claimants class (or the proposal entirely), and would thus prejudice the rights and interests of BVI and the Cronje Claimants;

109.2 it cannot seek relief, the effect of which would be that the Contractual Class settlement 'pot' be reduced to accommodate Trevo in the Contractual Claimants class, as (leaving aside the fact that such relief cannot be granted) such an approach would prejudice the rights and interests of BVI and the Cronje Claimants (and would presumably lead to the withdrawal of the support of the BVI and the Cronje Claimants for the Intervention Application);

109.3 it cannot suggest that the funds needed to accommodate Trevo in the Contractual Class, be 'taken' from the Financial Creditors Class and / or the MPC class (such relief cannot be granted, and would in any event prejudice claimants within those classes);

109.4 it is unable to specifically state that the funds needed to accommodate Trevo in the Contractual Claimants class should be funded by SIHPL (in addition to the current settlement amount; and

109.5 it has to justify why an MPC claimant should be entitled to be treated as a Contractual Claimant, in circumstances where there is no basis to do so.

110 In short, there is no basis for Trevo to be treated as a Contractual Claimant.

Recent developments

111 There is another significant fact that demonstrates that Trevo is using every means at its disposal (including abusing this Court's process) in an attempt to seek more money from the global settlement.

112 Whilst simultaneously agreeing, in general terms, with the classing envisaged in the section 155 proposal, save for Trevo's 'placement' therein, and requesting, in terms of the Trevo Letter, that Trevo be treated as a Contractual Claimant, Trevo simultaneously has taken steps that attack the very heart of the section 155 process and the section 155 proposal, and (if successful) are likely to be fatal to the global settlement.

113 On Monday 15 February 2021, Trevo instituted urgent application proceedings pursuant to which Trevo seeks an Order from this Court declaring that resolutions passed by SIHPL's board of directors, approving guarantees granted, and thereafter the Financial Restructuring, ought to be set aside on the alleged basis that they are void as the requirements of section 45 of the Companies Act were allegedly not met. A copy of the notice of motion in this application is annexed marked **"D"**. A copy of the papers in that application are voluminous (in excess of 400 pages), and are not annexed to this answering affidavit, but will be made available to this Court should it require sight thereof.

114 SIHPL denies that there is any merit in that application, and will shortly file its answering affidavits in which its grounds of opposition will be set out.

115 What Trevo is seeking in that application is to attack and set aside the very basis for the claims that the Financial Creditors have against SIHPL. This, too, is an action by Trevo which is unquestionably designed to place the entire global settlement at risk.

116 The intention of Trevo is clear: it seeks to imperil the global settlement, and to threaten a whole class of claimants, in an attempt to have its way: to be treated as a Contractual Claimant (when there is no justification for such treatment), and to 'squeeze' more money out of the settlement, either from SIHPL, and / or from existing claimants (such as the Financial Creditors), whose payment in terms of the section 155 proposal is now at risk due to Trevo's actions.

117 The motivation is self-serving and transparent – in adopting this approach, Trevo is seeking a self-serving commercial advantage that might flow to it as a result of its Court proceedings. SIHPL has no intention to advantage Trevo, to the prejudice of other claimants, nor, indeed, is there any factual or legal basis for it to do so.

***Ad seriatim* answer**

118 I turn now to deal, to the extent necessary, with the averments made in the founding affidavit. Any failure to deal with any particular averment should not

be construed as an admission of the averment concerned, and that averment should be taken to be denied. SIHPL reiterates that this answering affidavit has been prepared under unnecessary and unjustified pressure of time, and SIHPL reserves the right to amplify its response to this application, should it be necessary in due course to do so.

Ad paragraphs 1 to 4

119 SIHPL denies that the deponent (who is a director of BVI) is duly authorised, as alleged, and denies that the contents of the founding affidavit all fall within the deponent's knowledge.

Ad paragraphs 6.1 and 6.3

120 The section 155 proposal has now been published in terms of the Notice Order.

Ad paragraph 7

121 SIHPL agrees that every claimant has an interest in the relief sought in both the Hamilton Declaratory Application, and the Trevo Intervention Application. This was recognised by Mr Justice Saldanha, and is admitted by Trevo.

Ad paragraph 17

122 Save to admit that the *"(k)ey findings"* of the PwC report appear from the overview referenced in this paragraph, the assertions in this paragraph are denied.

Ad paragraphs 18 and 20

123 The contents hereof are incorrect and misleading, and designed to give this Court the impression that SIHPL / SIHNV / the Steinhoff Group has admitted fraud in Court papers, which is not the case. The true position is that the claims instituted against Messrs Jooste and La Grange are premised on the fact that those defendants were remunerated on the basis of the financial performance and results of the Steinhoff Group. It has subsequently transpired that those financial performances and results may in fact not have been as represented and thus those defendants may have been unjustifiably enriched by the payments that they received. This is still required to be proven in Court proceedings.

Ad paragraph 19

124 Save to state that a fine was imposed on SIHNV by the FSCA, the assertions in this paragraph are inaccurate and denied.

Ad paragraphs 28, 29 and 32

125 These allegations are denied.

126 Claimants who fall within the Contractual Claimants class are those that meet the definition of that class, and not necessarily because of the nature of their alleged claims in pleadings. This is an attempt by Trevo to conceal the fact that, unlike the Contractual Claimants, it does not meet the class' requirements, as it did not have a contractual nexus involving SIHPL.

127 The section 155 proposal proposes settlement terms to Contractual Claimants. The 'Wiese Group' claimants have voluntarily agreed (subject to *inter alia* the approval and sanction of the section 155 proposal) to accept a lower return than other Contractual Claimants (which is to the advantage of the latter). There is nothing that prevents a member of a class from agreeing to receive a lower 'dividend' than other members of the same class.

128 The claims of BVI and the Cronje Claimants are proposed to receive the same percentage return as all of the other Contractual Claimants, save for the 'Wiese Group' claimants (which are proposed to receive a lower percentage).

Ad paragraphs 33 to 35

129 The basis for treating Trevo as a (potential) MPC is set out in detail above. Allegations in support of a contrary treatment are denied for the reasons already traversed.

Ad paragraphs 36, 37 and 38.6

130 SIHPL does not deny that Trevo, like every claimant, has a direct and substantial interest in the Hamilton Declaratory Application. It is for that reason that both Hamilton and Trevo were required to give notice of their applications to the claimants. The fact that they elected not to do so has nothing to do with SIHPL.

131 The *"well-established practice with regard to liquidation applications"* is irrelevant. There are no such proceedings before this Court.

Ad paragraph 38.1

132 Trevo's claim in its action proceedings have been denied by SIHPL, and Trevo has been put to the proof of the allegations that it has made in those proceedings.

Ad paragraph 38.3

133 SIHPL denies the assertion in this paragraph that the Financial Creditors class's claims will not be compromised under the section 155 proposal.

134 Section 155 of the Companies Act provides for a company to propose a compromise of the financial obligations owing to its creditors or a class/es of its creditors. It does not require that a distribution be made, or that the quantum of a creditor's claim be reduced, but rather that the financial obligations of the company are in some way *compromised*.

135 By voting in favour of the section 155 proposal, the Financial Creditors will:-

135.1 extend the date of maturity of debts owing to them by SIHPL on the basis set out in the section 155 proposal;

135.2 consent to the issuing by SIHPL of certain loan notes;

135.3 accept the grant of third-ranking security by SIHPL over its residual assets for the benefit of the Financial Creditors (ranking *pari passu* with the claims of the Non-Qualifying Claimants, as defined in the section 155 proposal, and behind the claims of the creditors in respect of the aforementioned loan notes); and

135.4 agree that the enforceability of their claims will be on a limited recourse basis to such assets (so that SIHPL is thereby protected from being rendered insolvent by being unable to pay such claims in full).

136 In this respect, it is important to note that payment to the MPCs and the Contractual Claimants will result in a reduction of SIHPL's residual assets, which leaves fewer assets available for the payment of the admitted liabilities owing to the Financial Creditors.

137 The granting of these indulgences and the amendments of the SIHPL CPU agreed to by the Financial Creditors (if they vote in favour of the Proposal) do, as a matter of fact, compromise the financial obligations owing to the Financial Creditors by SIHPL.

Ad paragraph 47

138 Trevo's position with respect to the relief sought in the Hamilton Declaratory Application is unclear. In paragraph 7.3, Trevo states that Hamilton's declaratory relief should be granted.

Ad paragraph 48

139 It is difficult to understand why Trevo believed it necessary to include these allegations in an intervention application. In any event, these allegations are denied.

140 As aforesaid, those with a direct contractual nexus with SIHPL fall within the Contractual Claimants class. All are proposed to receive the same percentage return, save for claimants who have voluntarily agreed to accept a lower percentage return. This in itself does not mean that the members of the class are disparate, or that they are not sufficiently similar.

141 In fact, there is a clear and obvious similarity between all of them: as aforesaid, all had a contractual nexus with SIHPL, and all have claims that, in principle, are capable of being enforced. This is not the case with respect to Hamilton, Trevo and the other MPCs who, as the law presently stands, do not have valid claims against SIHPL.

142 Differentiating between alleged claimants that, in principle, have enforceable claims (albeit denied in those proceedings), and alleged claimants who have no valid claims, can never be said to be *"tactical"* or a classing which *"arbitrarily and inconsistently places different parties in [different classes] for [SIHPL's] own tactical ends"*.

143 Moreover, as the law presently stands, Trevo (like Hamilton) has no claim against SIHPL. It cannot be said (and is denied) that Trevo and Hamilton have alleged claims whose *"legal merits or prospects of success are identical"* to those of the Contractual Claimants.

144 Non-Qualifying Claimants are those alleged claimants whose alleged claims have been disputed (and are not subject to the section 155 proposal) because

they not only do not fall into any of the three classes (they do not have contractual relationships with SIHPL, and their claims are not premised on the holding of shares) but also because SIHPL believes that their claims are bad in law and cannot succeed.

145 A company proposing a compromise in terms of section 155 of the Companies Act is not obliged to propose the compromise to every alleged creditor, or to every class of alleged creditors.

146 The so-called *"tiny dividend"* being proposed to MPCs takes into account *inter alia* the significant burden of proof that such alleged claimants would face, as well as the fact that they have no valid claims against SIHPL. The dividend is more than reasonable in the circumstances.

147 Careful consideration was given to the delineation of the classes envisaged in terms of the section 155 proposal. The classing was not 'designed' to serve an alleged tactical agenda to ensure the success of the section 155 proposal. The reality is that Trevo, like Hamilton, holds no valid claim against SIHPL.

148 For the reasons set out above, SIHPL denies that Trevo's alleged claim is *"indistinguishable"* from those of BVI and the Cronje Claimants. There is no *"divide and rule strategy"* – as aforesaid, BVI and the Cronje Claimants, in principle, have legally tenable (albeit disputed) claims, whereas Trevo does not.

149 A further irony is that Trevo asserts that the alleged claims of MPCs who have not instituted proceedings have prescribed, in circumstances where Trevo has no valid claim. Not satisfied with attempting to eliminate the Financial Creditors class, and obtain unjustifiable and untenable treatment, Trevo now seeks to eliminate fellow MPCs, many of whom are individual investors who are unable to bear the expense of costly legal proceedings (unlike Mr Erasmus), and who (like Trevo and Hamilton) are included in the section 155 proposal for the sake of finality and out of an abundance of caution.

150 If Trevo is outvoted at the statutory meeting of creditors, Trevo's remedy (as recorded by Trevo in the Trevo Letter) is to oppose the sanction application that will thereafter be brought before this Court, and not to seek to create a third opportunity for itself by intervening in and supporting the relief sought in the Hamilton Declaratory Application.

151 The balance of the allegations contained in this paragraph are denied.

Ad paragraphs 49 to 53

152 The contents hereof (being *inter alia* the justification to shift, to SIHPL, Trevo's obligation to give notice of its application, and Hamilton of its application) are dealt with above, and are in consequence denied.

Ad paragraphs 54 and 55

153 These allegations are denied, for the reasons set out in this answering affidavit, in SIHPL's answering papers filed in both the Hamilton Declaratory Application, and in Hamilton's unsuccessful application to intervene in, and postpone, the Notice Application.

154 The fact that section 311 of the previous Companies Act has been repealed, and that the Legislature has elected, in the (new) Companies Act, to jettison the requirement for a prior convening application, is precisely why attempts to approach this Court for relief prior to the mechanisms and procedures set out in the existing legislation, is premature and baseless.

155 It is incorrect to say that an alleged creditor *"now has no alterative remedy at the present stage other than a declaratory application"* – as stated above, the alternative remedies are clearly prescribed by the provisions of section 155 of the Companies Act. Alleged creditors can vote against the approval of the section 155 proposal at a meeting of creditors, and even if outvoted can seek to oppose the sanctioning of the approved proposal.

Ad paragraphs 56 and 57

156 These allegations are denied.

157 There is no merit to an aggrieved creditor, holding a dubious claim, and operating out of self-interest and abusing *inter alia* this Court's process in seeking an unjustifiable commercial benefit (to the prejudice of other claimants), being permitted to seek a halt, or a substantial amendment, to a process, in circumstances where:-

157.1 tens of thousands of alleged claimants that SIHPL seeks to pay are not notified of the Court proceedings that are apparently brought on their behalf and for their benefit;

157.2 all of the other claimants are denied their statutorily-mandated right to vote on the section 155 proposal, and instead are expected to expend significant amounts of time and money to join and participate in legal proceedings which they did not institute, in circumstances where they are not possessed of the means that Trevo possesses; and

157.3 there are already statutory mechanisms in place to provide the opportunity to 'have a say' on the section 155 proposal.

158 Trevo has access to substantial resources, and is prepared to employ those resources in the pursuit of a greater financial benefit to itself (to which it is not entitled). To suggest that such an approach is justified as being for the 'greater good' of other claimants (claimants which, I may add, Trevo and Hamilton seem unwilling to allow to exercise their statutory rights) is a transparent attempt at hiding the self-interest that pervades these applications.

Ad paragraphs 58 to 74

159 The issue of urgency is dealt with above.

160 SIHPL does not intend to respond to the contents of paragraphs 60 to 72 of Trevo's founding affidavit, and SIHPL and its representatives reserve the right to do so at a later stage, or in separate correspondence. The allegations made herein are an unnecessary and in parts, incomplete recordal of allegations.

Additional documents

161 When this answering affidavit is delivered, the following will also be served on Trevo's legal representatives:-

161.1 a notice in terms of Rule 7, disputing Bowmans' authority to act herein on behalf of Trevo, given that the deponent has elected not to attach his alleged authority from Trevo; and

161.2 a Rule 47 demand for security for costs, on the basis that Trevo is a *peregrinus*, and that for the reasons set out herein, this application is brought *mala fide*, and is an abuse of this Court's process.

162 These will be delivered simultaneously with this answering affidavit, in light of the alleged urgency of this application, the truncated filing deadlines, and

SIHPL's desire to meet the agreed-upon deadline for the delivery of this affidavit.

The supporting affidavits

BVI and the Cronje Claimants

163 As aforesaid, BVI and the Cronje Claimants have filed affidavits in support of the Intervention Application.

164 To the extent that the contents of those supporting affidavits:-

164.1 repeat the allegations made in their respective action proceedings, SIHPL repeats the contents of the pleas filed in those matters; and

164.2 relate to allegations made in Trevo's founding affidavit which have been denied herein,

such allegations are denied.

165 Despite asserting a right to intervene in the Hamilton Declaratory Application, BVI and the Cronje Claimants have elected not to do so. It is only Trevo, being the claimant that wishes to be placed in a different class, that seeks leave to intervene.

166 BVI and the Cronje Claimants are, unsurprisingly, satisfied with their classing in the section 155 proposal, and it would certainly not be to their advantage, or in their interests, to support the arguments advanced by Hamilton in the Declaratory Application.

167 The support given to Trevo by BVI and the Cronje Claimants must be seen in this context:-

167.1 BVI and the Cronje Claimants offer their support presumably only to the extent that their returns, as Contractual Claimants, are not reduced. In circumstances, however, where SIHPL has no intention to increase the total settlement amount proposed in terms of the section 155 proposal, and in circumstances where this Court has no power to Order SIHPL to do so (and, as a corollary, to Order that the settlement amounts proposed to other classes be reduced), the amounts proposed to Contractual Claimants (including BVI and the Cronje Claimants) will in fact be reduced;

167.2 this will also be the case if Hamilton is successful in its Declaratory Application – if liquidation classifications are required to be employed by SIHPL, then both the Financial Creditors and the Contractual Claimants will suffer significant prejudice – only the MPCs, who have no valid claims against SIHPL as the law presently stands, will be advantaged;

167.3 if the Hamilton and / or Trevo positions ultimately prevail, then, the section 155 proposal, in its entirety, will need to be withdrawn or substantially amended. Either way the expected returns to each member of the classes will be different significantly to that presently envisaged; and

167.4 as aforesaid, the deponent to the Trevo founding affidavit is in fact a director of BVI.

The additional supporting affidavits – 'Non-Qualifying Claimants'

168 During the course of the afternoon of Friday 19 February 2021 (i.e. one day prior to the agreed-upon deadline for the delivery of this answering affidavit), a second set of 'supporting affidavits' was served on SIHPL's legal representatives.

169 Those further supporting affidavits were delivered by alleged claimants who are described in the section 155 Proposal as Non-Qualifying Claimants (**"NQCs"**), being claimants who do not fall into any of the three classes envisaged in the section 155 Proposal, and thus to whom the compromise is not being proposed.

170 It is plain from the wording of section 155 of the Companies Act that a company is not required or obliged to propose a compromise to all of its alleged creditors or all of its classes of alleged creditors. SIHPL has considered the alleged

claims of the NQCs, and has determined that there are good and proper reasons to exclude the NQCs from the compromise that is being proposed.

171 Like BVI and the Cronje Claimants, to the extent that the contents of the NQCs' affidavits:-

171.1 repeat the allegations made in their respective action proceedings, SIHPL repeats the contents of the pleas filed in those matters; and

171.2 relate to allegations made in Trevo's founding affidavit which have been denied herein, then such allegations contained in the supporting affidavits are denied.

172 It merits mention, moreover, that none of the NQCs has actually sought to intervene in the Declaratory Application.

173 It is simply not true that the NQCs' claims are *"premised on a similar cause of action"* to either the Contractual Claimants and MPCs. They do not qualify as Contractual Claimants or as MPCs.

174 Instead, the alleged claims of the NQCs are premised upon contractual elections made, involving third parties. The alleged cause of action, like that of the MPC's, has been demonstrated by the Unterhalter J Judgment to be bad in law.

175 What distinguishes the NCQs' claims from those of the MPCs is that:-

175.1 their alleged claims are not premised on the acquisition of SIHPL shares;

175.2 even if the Unterhalter J Judgment were not to be applied:-

175.2.1 their alleged claims would still be bad in law, as they are too remote; and

175.2.2 their alleged claims would still not qualify as a MPC.

176 SIHPL has defended all six of the NQCs' action proceedings. Near-identical Rule 23 notices have been filed in all of those matters, and the NQCs have taken no steps whatsoever to advance their action proceedings. A copy of one of the Rule 23 notices is annexed marked **"E"**.

177 What the NQCs do not alert this Court to is the following: as they are not party to the section 155 Proposal, their alleged claims will not be compromised in terms thereof. They are accordingly free to continue to pursue their alleged claims in this Court (although they appear to be unwilling to do so). In the unlikely event that they are successful in those proceedings then they would be entitled to seek payment from SIHPL of whatever part of their alleged claims they are able to prove.

178 Trevo, by presenting the supporting affidavits to this Court, attempts to demonstrate 'support' for the relief that it seeks. This is misleading:-

178.1 BVI and the Cronje Claimants' support is premised on the assumption that they have 'nothing to lose' if Trevo's relief is granted. This is in fact not the case, as stated above; and

178.2 the NQCs are not party to the section 155 Proposal.

Conclusion

179 In the premises the Intervention Application should be dismissed with costs, including the costs of two counsel where employed.

LOUIS JACOBUS DU PREEZ

I certify that the above signature is the true signature of **LOUIS JACOBUS DU PREEZ** and that he acknowledged to me that he knows and understands the contents of the above affidavit, which affidavit was signed and sworn to before me at T.B. Harbour on the **22nd** day of **FEBRUARY 2021** in accordance with the requirements of Regulation R.1258 dated 21st July, 1972, as amended by Regulation No. 1648 dated 19th August 1977, as further amended by Regulation no. 1428 dated 11th July 1988.

COMMISSIONER OF OATHS

FULL NAMES IN BLOCK LETTERS: Const ARENDSE S
BUSINESS ADDRESS: 01 Duncan Road, T.B. Harbour
CAPACITY: Const.
AREA: V&A Waterfront.

SOUTH AFRICAN POLICE SERVICE
Community Service Centre
22 FEB 2021
TABLE BAY HARBOUR
SOUTH AFRICAN POLICE SERVICE

"A"

Brendan Olivier

From: Juliette de Hutton <juliette.dehutton@bowmanslaw.com>
Sent: 08 February 2021 14:15
To: Brendan Olivier; Michael-James Currie; Jac Marais
Cc: jeffrey.kron@nortonrosefulbright.com; busisiwe.nhlapo@nortonrosefulbright.com; John Oxenham; jaw@caf.co.za; miles@caf.co.za; mschaefer@fairbridges.co.za; Kelly Mzobe; Tshiamo Ntuli; Mia de Jager
Subject: RE: CASE NUMBER 17327/2020 - HAMILTON B.V AND HAMILTON 2 B.V / STEINHOFF INTERNATIONAL HOLDINGS PROPRIETARY LIMITED [IWOV-Litigation.FID539990]

Dear all

With reference to Mr Olivier's email on Saturday (below): Kindly note that our client, Trevo Capital Ltd, has applied to intervene in the application (in support of the relief sought by Hamilton, albeit for different reasons to those stated by Hamilton in its application).

As stated by Mr Olivier, as yet no date has been allocated for the hearing of the application.

Kind regards

Juliette de Hutton
Partner

BOWMANS

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"B"

From: Brendan Olivier <bolivier@werksmans.com>
Sent: Saturday, 06 February 2021 09:20
To: Michael-James Currie <michael@nortonsinc.com>; Jac Marais <Jac.Marais@adams.africa>
Cc: Juliette de Hutton <juliette.dehutton@bowmanslaw.com>; jeffrey.kron@nortonrosefulbright.com; busisiwe.nhlapo@nortonrosefulbright.com; John Oxenham <john@nortonsinc.com>; jaw@caf.co.za; miles@caf.co.za; mschaefer@fairbridges.co.za; Kelly Mzobe <Kelly.Mzobe@adams.africa>; Tshiamo Ntuli <Tshiamo.Ntuli@adams.africa>; Mia de Jager <Mia.deJager@adams.africa>
Subject: RE: CASE NUMBER 17327/2020 - HAMILTON B.V AND HAMILTON 2 B.V / STEINHOFF INTERNATIONAL HOLDINGS PROPRIETARY LIMITED [IWOV-Litigation.FID539990]

Dear Michael-James

Judge Bozalek was appointed as the Judge to hear this matter, but advised that he was not available on 8/9 February 2021. A hearing date has not been set.

Jac can confirm this, and Jac and Juliette, should they wish to do so, can respond with any further updates, with respect to the Hamilton declaratory application, as they see fit.

Kind regards

Brendan Olivier
Director
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From: Michael-James Currie <michael@nortonsinc.com>
Sent: 05 February 2021 18:06 PM
To: Jac Marais <Jac.Marais@adams.africa>
Cc: Juliette de Hutton <juliette.dehutton@bowmanslaw.com>; jeffrey.kron@nortonrosefulbright.com; busisiwe.nhlapo@nortonrosefulbright.com; John Oxenham <john@nortonsinc.com>; jaw@caf.co.za; miles@caf.co.za; mschaefer@fairbridges.co.za; Kelly Mzobe <Kelly.Mzobe@adams.africa>; Tshiamo Ntuli <Tshiamo.Ntuli@adams.africa>; Mia de Jager <Mia.deJager@adams.africa>; Brendan Olivier <bolivier@werksmans.com>
Subject: Re: CASE NUMBER 17327/2020 - HAMILTON B.V AND HAMILTON 2 B.V / STEINHOFF INTERNATIONAL HOLDINGS PROPRIETARY LIMITED

Dear Jac

Could you kindly forward the link (assuming it's a virtual hearing) to Monday's hearing?

Kind regards,
Mike

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Senior Associate
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"C"

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Our Reference:	D de Klerk/J de Hutton/6186596	Your Reference:	B Olivier
Direct Line:	021 480 7934/021 480 7817	Date:	20 January 2021
Email Address:	juliette.dehutton@bowmanslaw.com/deon.deklerk@bowmanslaw.com		

Werksmans Attorneys
Attention: Brendan Olivier

by email: bolivier@werksmans.com

Dear Sir

STEINHOFF INTERNATIONAL HOLDINGS PROPRIETARY LIMITED: SECTION 155 COMPROMISE PROPOSAL

1. As you are aware, we act for Trevo Capital Limited (**Trevo**).

2. On 22 December 2020 you provided us with a draft proposal dated 18 December 2020 (**the Proposal**) in terms of section 155 of the Companies Act 71 of 2008 (**the Act**) by Steinhoff International Holdings Pty Ltd (**SIHPL**) to its creditors.

3. **The Proposal and section 155 of the Act**

3.1. The Proposal distinguishes between three classes of creditor who are to participate in the proposed compromise, namely Financial Creditors, Contractual Claimants, and Market Purchase Claimants, and proposes different settlement terms for each class.

3.2. The Proposal defines Contractual Claimants (in relevant part) as Litigation claimants which instituted claims against SIHPL prior to 5 December 2020 in accordance with the terms of arms-length negotiated contractual arrangements under which shares in other enterprises were sold or transferred by such claimants or their related parties to SIHPL, received consideration directly from SIHPL by way of issuance, or transfer, of SIHPL shares and whose details are set out in Annexure G to the Proposal (para 2.23 of Annexure A to the Proposal). The class includes causes of action in delict (Proposal para 16.2.2).

3.3. A Market Purchase Claimant is defined (in relevant part) to include SIHPL Market Purchase Claimants and SIHNV Market Purchase Claimants, with the former being persons who are *'actual*

or potential Litigation claimants' (i) in relation to the Events and Allegations and arising as a result of their acquisition of SIHPL Shares prior to close of business on 6 December 2015 who continued to hold SIHNV Shares they then received in exchange for such SIHPL Shares at close of business on 5 December 2017; and (ii) with a positive 'MPC Claim Value' calculated in accordance with the Inflation Methodology, and the latter being as defined in the SIHNV Composition Plan (para 2.37 read with paragraphs 2.74 and 2.79 of Annexure A to the Proposal).

3.4. If the Proposal is duly adopted by the creditors in terms of section 155(6), SIHPL may apply for a court order approving the Proposal in terms of section 155(7)(a). The court order sanctioning the compromise as set out in the adopted Proposal is final and binding on all members of the relevant classes of creditors as of the date on which it is filed (section 155(8)(c) of the Act).

4. **Legal principles applicable to classes and sanction**

4.1. A 'class' of SIHPL's creditors in terms of section 155(2) is properly constituted only if the Proposal will not result in confiscation and injustice, the class being confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interests.

4.2. The court may sanction the compromise if it considers it 'just and equitable' to do so, having regard to the number of creditors of the three classes who were present or represented at the meeting(s) and who voted in favour of the proposal (section 155(7)(b)).

4.3. When the court is asked to sanction the compromise, the court will also be guided by public policy, which includes considerations of 'commercial morality'.

5. **Classification of Trevo as a Market Purchase Claimant**

5.1. We understand, from prior engagements with you and Linklaters, that it is intended that Trevo shall be classified as a Market Purchase Claimant. The Proposal's definition of 'SIHPL Market Purchase Claimants' further confirms and supports our understanding that Trevo is to be classified as a Market Purchase Claimant.

5.2. We also know from prior engagements with you and Linklaters, although it is not evident from the Proposal, that Market Purchase Claimants will only receive a small fraction (approximately 8%) of what Contractual Claimants are to receive under the proposed compromise.

5.3. Including Trevo in the Market Purchase Claimant class is wholly unjustified.

5.4. The Market Purchase Class consists largely of persons whose claims originate from the acquisition of SIHPL shares on the open market.

5.5. In the *De Bruyn* judgment, an application to certify a class action representing such claimants against *(inter alia)* SIHPL was dismissed on the ground that their proposed cause of action had no basis in law and thus the proposed class action raised no triable issue.

5.6. For this reason, the Proposal opines that the claims of Market Purchase Claimants 'are not viable under South African law' and that, 'assuming there were to be a consistent outcome in all South African litigation in that respect', such claimants would receive a 'zero' percentage recovery in a liquidation of SIHPL (Proposal para 32.18.2).

5.7. The Market Purchase Claimant class therefore consists of thousands of claimants whose claims (i) have been rejected in *De Bruyn* or (ii) have not been instituted (see the reference to "potential claimants" in the definition of "SIHPL Market Purchase Claimants" in Annexure A to the Proposal, as well as paras 4.9.3 and 20.3.2) and which have therefore prescribed.

5.8. Trevo's claim against SIHPL for R2,157,791,016.00 is materially different to those of the Market Purchase Claimant class:

5.8.1. Trevo's claim has been validly instituted in the High Court and has neither been excepted to nor rejected by the courts.

5.8.2. The cause of action pleaded by the Market Purchase Claimants in the *De Bruyn* case was (*inter alia*) for pure economic loss suffered as a result of buying or retaining SIHPL shares due to *negligent misrepresentations* on the part of SIHPL's directors. The *De Bruyn* judgment made no findings in respect of the distinguishable cause of action pleaded by Trevo, namely for loss occasioned by an intentional misrepresentation attributable to SIHPL itself, as opposed to by Mr Markus Jooste in respect of whom a *'special case'* was pleaded (*De Bruyn* paras 199 and 263).

5.8.3. Unlike the Market Purchase Claimants, Trevo did not purchase SIHPL shares on the open market. Instead, Trevo purchased SIHPL shares from Treemo Pty Ltd (**Treemo**) in circumstances where both Treemo and Trevo (with the full knowledge of Steinhoff) held the shares for the economic benefit of Pieter Erasmus (**Erasmus**) and his family. The SIHPL shares in question have their origin in contractual exchanges of Pepkor shares, which had been accumulated by Erasmus while he was the CEO of Pepkor via Treemo, a company of which he was the ultimate beneficial owner. The forward sale of SIHPL shares from Treemo to Trevo, both companies ultimately owned by Erasmus, amounted, to the knowledge of Steinhoff, to no more than a restructuring of Erasmus's affairs. Given that the SIHPL shares forming the basis of Trevo's claim were, as a matter of economic substance, acquired from exchanges of Pepkor shares exactly as was the case with most of the claimants currently classified as Contractual Claimants, Trevo should be treated, in order to be consistent and fair, as a Contractual Claimant. To use the fact that the loss in question was suffered by an entity other than the entity which initially held the Pepkor shares as a basis of placing Trevo in a separate class is to elevate the technical form of Erasmus' restructuring of his affairs above the economic substance of the relevant entities, all being ultimately beneficially owned by him. Given that the anticipated settlement amount payable to Market Purchase Claimants is materially lower than that of Contractual Claimants, this misclassification of Trevo as a Market Purchase

Claimant would cause severe financial prejudice to Trevo and would result in the very confiscation and injustice which the courts are at pains to avoid. It would self- evidently not be just and equitable as required by section 155(7) of the Act.

5.9. Moreover, unlike any other Market Purchase Claimant, Erasmus interacted directly with directors and other executives of SIHPL and relied on intentional misrepresentations made by them that were attributable to SIHPL as well as intentional misrepresentations by SIHPL. By way of example:

5.9.1. Erasmus had regard to the publicly available financial information in respect of SIHPL from June 2014, when he was first engaged as the CEO of Pepkor, in relation to the potential acquisition of Pepkor by SIHPL. This included:

5.9.1.1. the audited financial statements of SIHPL for the 2014 financial year published on 9 September 2014;

5.9.1.2. the public announcement of the Steinhoff/Pepkor transaction on 25 November 2014 and the SIHPL circular in relation to that transaction dated 15 December 2014;

5.9.1.3. the interim results of SIHPL released on 3 March 2015;

5.9.1.4. the circular to Steinhoff's shareholders and the prospectus pertaining to the scheme of arrangement; and

5.9.1.5. SIHPL's 2015 audited annual financial statements published on 8 September 2015.

5.9.2. In addition, Erasmus relied on the contents of the 2014 integrated report for SIHPL, including:

5.9.2.1. the Chairman's report;

5.9.2.2. the CEO's review of the Steinhoff Group; and

5.9.2.3. the finance report written jointly by the CFO and Finance Director.

5.10. These facts are clearly in stark contrast with the factual circumstances under which the other Market Purchase Claimants acquired their shares in the open market.

5.11. In the premises, we dispute that there is *'much less material risk of liability'* for SIHPL in respect of Trevo's claim (para 4.9.3) and that Trevo would be likely to receive *'zero'* in a liquidation of SIHPL (para 32.18.2). Contrary to the claims rejected in *De Bruyn*, Trevo's claim is sound and, if prosecuted to finality, bears substantial prospects of success.

5.12. It follows that Trevo cannot lawfully be included in the Market Purchase Claimant class. Trevo's rights are materially distinguishable from other members of that class. Consequently, it will be impossible for Trevo to consult meaningfully with other class members.

5.13. As explained, Trevo's claim is far more closely analogous to those of members of the Contractual Claimants class. In any event, like Trevo, members of this class are merely concurrent creditors and their pleaded causes of action include claims for delictual damages (para 16.2.2). Certain members of this class also interacted, ironically represented at all material times by Erasmus, directly with SIHPL, as did Erasmus prior to restructuring his affairs via Treemo and Trevo. Moreover, Trevo's claim is as likely to succeed as the claims of the other Contractual Claimants

5.14. In sum, including Trevo in the Market Purchase Class would result in confiscation and injustice. The proposal is no *'compromise'* between SIHPL and Trevo at all. Instead, it appears to amount to an effective expropriation of Trevo's claim.

6. **Trevo's Proposals**

6.1. In the circumstances, Trevo proposes that SIHPL revise the class categorisations in the Proposal and:

6.1.1. include Trevo in the Contractual Claimants class and allocate sufficient funds to the settlement of this class so as not to dilute the settlement consideration to be received by each Contractual Claimant as a result of Trevo's inclusion in that class; or

6.1.2. constitute Trevo as a distinct and separate class, in terms of which Trevo's settlement consideration will be calculated using a methodology which ensures that Trevo receive a settlement consideration substantially similar to the Contractual Claimants; or

6.1.3. treat Trevo as a Non-Qualifying Claimant with, as is the case in respect of the other Non - Qualifying Claimants, suitable arrangements for the satisfaction of its claim if it is ultimately successful, which shall include *inter alia* the entitlement to have recourse to SIHPL's residual assets (Proposal paras 5.2 and 13).

6.2. Should SIHPL fail to do so, Trevo will oppose any application by SIHPL in terms of section 155(7) for an order approving the Proposal on the grounds that it is not just and equitable and is contrary to commercial morality.

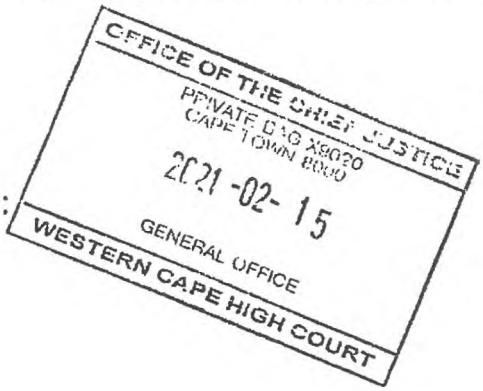
6.3. All Trevo's rights are reserved.

Yours faithfully

Bowman Gilfillan
per:
Deon de Klerk and Juliette de Hutton
(sent electronically without signature)

"D"

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)



Case No: 7833/2021

In the application between:

TREVO CAPITAL LTD	Applicant
and	
STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD	First Respondent
GLOBAL LOAN AGENCY SERVICES LTD	Second Respondent
FINANCIAL CREDITORS OF THE FIRST RESPONDENT AS DEFINED IN THE TERM SHEET	Third Respondents

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NOTICE OF MOTION

PLEASE TAKE NOTICE THAT application will be made on behalf of the above-named Applicant, on **TUESDAY, 16 MARCH 2021** to be arranged with the Registrar of the above Honourable Court, for orders in the following terms:

1. Dispensing with the forms, time periods and service requirements in the Uniform Rules of Court and directing that the matter be heard as one of urgency in terms of Rule 6(12).

2. Confirming and/or declaring that the guarantee provided by the First Respondent ('**SIHPL Guarantee**') in respect of a convertible bond originally issued by Steinhoff Finance Holding GMBH to financial creditors on or about 30 January 2014, with original maturity date of 30 January 2021, which SIHPL Guarantee was amended or replaced on or about 12 August 2019 by a Contingent Payment Undertaking concluded between the First Respondent and Second Respondent ('**SIHPL CPU**'), is void by virtue of section 45(6) of the Companies Act 71 of 2008.

3. Confirming and/or declaring that the resolution of the board of the First Respondent authorising the entry by the First Respondent into the SIHPL Guarantee is similarly void by virtue of section 45(6) of the Companies Act 71 of 2008.

4. Confirming and/or declaring that the SIHPL CPU is void by virtue of section 45(6) of the Companies Act 71 of 2008.

5. Confirming and/or declaring that the resolution of the board of the First Respondent authorising the entry by the First Respondent into the SIHPL CPU ('**the SIHPL CPU resolution**'), is similarly void by virtue of section 45(6) of the Companies Act 71 of 2008.

6. In the alternative to paragraphs 4 and 5 above, confirming and/or declaring that the SIHPL CPU and the SIHPL CPU resolution are void to the extent that the SIHPL CPU amended or replaced the SIHPL Guarantee, and the SIHPL CPU resolution authorised the entry into the SIHPL CPU to amend or replace the SIHPL Guarantee.

7. Interdicting and restraining the First Respondent from making any payments under or arising from the SIHPL Guarantee (as amended) and the SIHPL CPU, (alternatively pursuant to the SIHPL CPU to the extent that it amends or replaces the SIHPL Guarantee) and/or any compromise or arrangement proposed by the First Respondent in terms of section 155 of the Companies Act 71 of 2008, and from providing any security in respect thereof.

8. Costs in the event of opposition.

9. Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the affidavit of **JOHANN-DIRK ENSLIN** and **GEOFFREY KEITH EVERINGHAM** together with annexures will be used in support of this application.

TAKE NOTICE FURTHER THAT the Applicant has appointed the office of its attorneys of record as set out below as the place at which it will accept notice and service of all process in these proceedings.

The Applicant agrees to service via email directed to larry@corporatelaw.co.za

TAKE NOTICE FURTHER THAT if you intend opposing this application you are required:

(a) to notify the Applicant's attorney in writing on or before **22 FEBRUARY 2021** ;

(b) to file your answering affidavits, if any; by **5 MARCH 2021;**

and further that you are required to appoint in such notification an address referred to in rule 6(5)(*b*) at which you will accept notice and service of all documents in these proceedings.

If no such notice of intention to oppose be given, the application will be made on **1 MARCH 2021.**

KINDLY PLACE THE MATTER ON THE ROLL ACCORDINGLY.

Dated at **CAPE TOWN** this **15th** day of **FEBRUARY 2021**.

LARRY STEIN ATTORNEY

Per Larry Stein
Attorney for the Applicant
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TO: **THE REGISTRAR**
High Court
CAPE TOWN

AND TO: **STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD**
First Respondent
Building B2

Vineyard Office Park
Cnr Adams Tas and Devon Valley Road
STELLENBOSCH
Email: louis.dupreez@steinhoff.co.za
bolivier@werksmans.com

AND TO: **GLOBAL LOAN AGENCY SERVICES LTD**
Second Respondent
c/o BOWMAN GILFILLAN INC
22 Bree Street
CAPE TOWN
Ref: James McKinnell
Email: james.mckinnell@bowmanslaw.com
Email: emea@glas.agency

AND TO: **FINANCIAL CREDITORS OF THE FIRST RESPONDENT AS DEFINED IN THE TERM SHEET**
Third Respondent
Addresses unknown

"E" Werksmans

STEI3570.90

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **7158/2020**

In the matter between:

FRANCOIS JOHAN MALAN Plaintiff

and

STEINHOFF INTERNATIONAL HOLDINGS (PROPRIETARY) LIMITED Defendant

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THE DEFENDANT'S NOTICE IN TERMS OF RULE 23

TAKE NOTICE that the defendant intends taking exception to the plaintiff's particulars of claim (**"the POC"**) on the basis that the POC lack averments necessary to sustain a cause of action, alternatively the POC are vague and embarrassing, as set out below:

The First Cause of Complaint

1. At paragraph 20.3 of the POC the conclusion of an exchange agreement is pleaded.

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Werksmans
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2. Paragraph 20.3 of the POC does not comply with the requirements of Rule 18(6) of the Rules in that:

2.1. the plaintiff fails to plead where, when and by whom on behalf of the parties thereto, the exchange agreement was concluded; and

2.2. the plaintiff has failed to annex the exchange agreement to the POC.

3. The allegations contained in paragraph 20.3 of the POC are accordingly vague and embarrassing, and the defendant will be prejudiced in having to plead thereto.

The Second Cause of Complaint

4. At paragraph 30 of the POC the plaintiff pleads as follows:

> *"But for the representation, the plaintiff would not have concluded the third addendum, thereby relinquishing his right to the underpin."*

5. The third addendum *inter alia* records the following:

> *"**WHEREAS** the Parties have agreed to remove the provision for a special bonus (also referred to between the parties as 'the underpin')"*

(Emphasis added)

6. "*The Parties*" referred to in the third addendum are Flash Mobile Vending (Proprietary) Limited and the plaintiff, the defendant not being a party to the third addendum.

7 The decision to remove the underpin was, in the premises, a decision taken between two contracting parties (neither of which was the defendant), after negotiations between them, and in circumstances where the third addendum:

7.1 is not a document to which the defendant was a party;

7.2 does not refer to or rely on, in any manner, the 2014 Annual Financial Statements ("**AFS**") or any other AFS of the defendant; and

7.3 does not contain any reference whatsoever to the plaintiff placing any reliance on the 2014 AFS or any other AFS of the defendant, or being required contractually to place any reliance thereon.

8. In the premises:

8.1 the representation allegedly relied upon by the plaintiff is legally irrelevant to the agreement reached between the plaintiff and Flash Mobile Vending (Proprietary) Limited to *"remove the provision of the special bonus (also referred to between the parties as 'the underpin')"*, which agreement is embodied in the third addendum, and the motivation for concluding the third addendum; and

8.2 the POC accordingly lacks averments necessary to sustain a cause of action against the defendant.

The Third Cause of Complaint

9. In paragraph 38.2 of the POC, the plaintiff alleges that the combined value of the BVI and BVI2 shares, as at 30 September 2018, *"was nil"*.

10. In paragraph 33 read with paragraph 38.2 of the POC, the plaintiff alleges that the agreements annexed to the POC as **"F"** and **"G"** purport to value the BVI shares and the BVI2 shares in accordance with clause 4.1 of those agreements.

11 Clause 4.1 of those agreements purports to provide a valuation not of the BVI shares, but rather of a *"transfer price"*. Moreover, the *"transfer price"* would only be calculated:

11.1 in circumstances where a put option had been exercised (clause 4.1); and

11.2 on *"the option date"* (clause 4.1.4), being the date of the exercise of the put option that results in the sale of shares (clause 4.1.3).

12. The plaintiff has failed to allege *inter alia* whether or not (a) a *"transfer price"* has been calculated (b) on an *"option date"* and (c) on the basis that a put option has been exercised.

13. The allegations contained in the paragraphs of the POC referenced above are accordingly vague and embarrassing, and the defendant will be prejudiced in having to plead thereto.

The Fourth Cause of Complaint

14. The facts pleaded by the plaintiff in support of his claim against the defendant in the POC do not establish a sufficiently close causal connection between the alleged misrepresentations, and alleged harm suffered, and are accordingly remote.

15. In this regard, *inter alia*, the agreements relied upon by the plaintiff in support of his claim are not agreements to which the defendant was a party, nor do they contain any reference, whatsoever, to the plaintiff placing any reliance on the 2014 AFS or any other AFS of the defendant.

16. In the premises, the plaintiff has failed properly to establish the requisite legal elements of his alleged claim against the defendant, and accordingly the POC lacks averments necessary to sustain a cause of action against the defendant.

The Fifth Cause of Complaint

17. From paragraphs 24 to 30 of the POC the plaintiff pleads an alleged claim in delict.

18. At paragraph 26 of the POC, the plaintiff pleads as follows:-

> "*26. The defendant was obliged to advise the plaintiff, as a member of the general public, of the false statements in the 2014 AFS in that:*
>
> *26.1. the true facts regarding its financial position were within the defendant's exclusive knowledge;*
>
> *26.2. the defendant and its executives knew and intended, alternatively ought to have known, that the general public, including the plaintiff, would rely on the representation of the defendant's financial position as it appeared from the 2014 AFS."*

19. The plaintiff further pleads at paragraphs 28 to 30 of the POC as follows:-

> "*28. The representation was:*

28.1. false, to the knowledge of the defendant and its executives; alternatively they made the representations aware of the possible lack of truth thereof, and recklessly;

28.2. alternatively, negligent;

28.3. in any event, made wrongfully.

29. The representation was material and was relied upon by the plaintiff and misled him when considering whether to release the underpin, as to the value of BVI's shareholding in the defendant and the consequent value of the BVI shares, and thus the need for, and the value of, the underpin.

30. But for the representation, the plaintiff would not have concluded the third addendum, thereby relinquishing his rights to the underpin."

20. The legal relationship between the directors of a company, and the company itself, gives rise to fiduciary duties owed by the directors to the company, and not fiduciary duties owed by the directors to the shareholders of the company.

21. No factual or legal basis is pleaded or arises for there to have been a legal duty of care allegedly owed by the defendant to the plaintiff and, accordingly the

plaintiff is unable to sustain an allegation of wrongfulness in relation to the defendant.

22. In the premises, the POC lacks averments necessary to sustain a cause of action against the defendant.

The Sixth Cause of Complaint

23. From paragraphs 42 to 45 of the POC, the plaintiff pleads an alleged claim in terms of section 218 of the Companies Act (**"the Act"**).

24. In particular, the plaintiff asserts contraventions by the defendant of sections 22, 28 and 29 of the Act.

Section 22 of the Act

25. Section 22 of the Act prohibits the company (i.e. the defendant) from carrying on business in stated ways.

26. Section 77(3)(b) of the Act determines the liability of a director when the company has infringed the prohibition.

27. A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director's knowing

acquiescence. It is the company's loss that is claimed and it is the company upon which the right is conferred to make good its loss.

28. In the premises, the plaintiff enjoys no right of action against the defendant arising from the alleged breach of section 22 of the Act.

Sections 28 and 29

29. Section 77(3)(d)(i) of the Act provides *inter alia* that:

> *"A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having ... signed, consented to, or authorised the publication of any financial statements that were false or misleading in a material respect."*

30. This provision of the Act imposes liability upon a director for loss of damages suffered by the company (i.e. the defendant) as a result of a director's proscribed conduct.

31. It is the company that is afforded a remedy in the circumstances contemplated in section 77(3)(d)(i) of the Act and no reliance may be placed by the plaintiff thereon.

32. The particulars of claim fail to sustain any basis in law for a claim in the plaintiff's favour based upon or arising from sections 28 and/or 29 of the Act.

33. The plaintiff's statutory claim predicated upon section 218(2) of the Act cannot therefore be sustained.

34. In the premises, the plaintiff's POC lacks averments necessary to sustain a cause of action against the defendant.

TAKE NOTICE FURTHER that, unless the plaintiff removes the causes of complaint within 15 (fifteen) days of delivery of this notice, the defendant will deliver its exception.

DATED at **CAPE TOWN** on this the 21 day of **JULY 2020.**

WERKSMANS

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TO:
THE REGISTRAR
High Court
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AND TO:

C & A FRIEDLANDER

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RECEIVED: [signature]

NAME: B. Van Niekerk

DATE: 22/07/2020

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