KEITH E HOBAN
Notary Public
B.A., Dip.Ed., L.L.B., Grad. Dip. Not. Prac., FSNV, FANZCN
[redacted]

DESTINATION: REPUBLIC OF SOUTH AFRICA

CERTIFICATE AS TO MAKING OF AFFIDAVIT

I, **KEITH EDMOND HOBAN**, Notary Public, practising in the City of Melbourne in the State of Victoria in the Commonwealth of Australia **CERTIFY** that:

1. On 10th December 2020, at Melbourne, Australia, **MARTIN HYDE**, of [redacted] (***"the Deponent"***) who identified himself to me by the production of [redacted] personally appeared before me and after making his oath before me in proper form of law, the Deponent swore before me as to the truth of the several matters and things therein mentioned in the annexed Affidavit;
2. The signature on the Affidavit purporting to be the Deponent's signature is his true signature and proper handwriting;
3. The Deponent is of full age and appears to me to be of full capacity and executed the document of his own free will; and
4. The ten (10) exhibits marked **"RA 1"** to **"RA 10"** respectively, which are attached to the said Affidavit have each been marked by me for the purposes of identification are the annexures referred to in the Affidavit.

IN WITNESS of which I have subscribed my name and affixed my seal of office this 10th day of December 2020.

.....
KEITH EDMOND HOBAN
Notary Public
Melbourne, Victoria, Australia
My appointment is not limited by time.

SCIENTIA ET PROBITAS

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 17327/2020

In the matter between:

HAMILTON B.V.	First Applicant
HAMILTON 2 B.V.	Second Applicant
and	
STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD	Respondent

REPLYING AFFIDAVIT

I, the undersigned,

Martin Hyde

do hereby make oath and state that:

1. I am a former director of, and current advisor to, the applicants and Claims Funding Europe, which wholly owns the applicants. I am duly authorised to depose this affidavit on behalf of the applicants.

2. The facts contained herein fall within my personal knowledge, unless otherwise stated or appears from the context, and are true and correct.

3. In swearing and filing this affidavit, it is not my intention to waive privilege of any kind, and no such waiver should be regarded as having occurred.

4. I am deposing to this affidavit in the place of the deponent to the founding affidavit, Oscar McLaren, because he is presently on paternity leave.

5. The nomenclature of the founding affidavit is also employed in this affidavit. In line with the approach adopted in the answering affidavit, I shall also, where convenient, refer to the applicants cumulatively as "**Hamilton**".

6. I have read the answering affidavit of Louis Jacobus Du Preez, filed on behalf of the respondent.

7. I structure my response to the answering affidavit as follows:

   7.1. First, I reply thematically to the grounds of opposition raised by the respondent;

   7.2. Second, I reply serially, to the extent necessary, to specific paragraphs of the answering affidavit. All allegations in the answering affidavit which are inconsistent with the contents of the founding affidavit and this affidavit are denied.

8. Given the respondent's approach in the answering affidavit, it is important to emphasise at the outset what this application is, and is not, about. Contrary to the impression which the respondent seeks to create, this application concerns a relatively crisp issue: *viz*. whether in the section 155 compromise

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proposal the respondent contemplates making, the respondent has followed an incorrect approach to class delineation, and whether, if the proposal is adopted, it can therefore ever be sanctioned by the court. This Court is thus not called upon in this application to make an assessment of the merits of the claim(s) which the applicants pursue in the Hamilton action, or for that matter the merits of the various claims which have been brought by other claimants (whether classified as SIHPL Contractual Claimants or SIHPL MPC Claimants). The various claims must be assessed by the Courts seized with those matters (by means of exceptions or at trial, or both).

9. The question of whether the respondent has adopted a class delineation which is permitted by section 155 of the Companies Act is clearly a fundamental threshold question insofar as the proposed compromise is concerned. No purpose would be served by the respondent proceeding with the proposed section 155 compromise if, as the applicants contend, it is fatally flawed as a result of an incompetent classification methodology. The respondent's directors would in fact be reckless to do that. It was therefore hoped that the respondent would engage with the merits of the matter in order that a resolution of that key issue could be achieved, to the benefit of the respondent and all its creditors. When the respondent, through its attorneys, pressed for an exceedingly urgent hearing of this application, it was also expected that the respondent's answering affidavit would embrace the substantive questions raised by this application. The respondent has, however, instead devoted much of its attention in its answer to technical matters, which are both unsustainable and in large part inconsistent with its

prior stance and statements, as well as to extraneous issues.

RESPONDENT'S GROUNDS OF OPPOSITION

(i) Introduction

10. The respondent seeks the dismissal of this application on the following grounds:

10.1. *First*, that the applicants purportedly lack *locus standi* (or thus the standing to bring this application), as they have not (yet) provided sufficient evidence in their pending action (the Hamilton action) of the assignments to them of the rights of the Injured Investors;

10.2. *Second*, that the applicants have supposedly brought this application prematurely, as the procedures under section 155 of the Companies Act will afford the applicants two opportunities to object to the envisaged section 155 compromise proposal (or Scheme to use the respondent's preferred terminology): the first through voting on the proposal, and the second by opposing an application for the sanction of the proposal, if adopted;

10.3. *Third*, that the applicants allegedly pursue this application for the ulterior purpose of gaining a commercial benefit to which they have no entitlement; and

10.4. *Fourth*, that the applicants wrongly contend that, in a section 155

compromise proposal, creditors must be classified according to the preference they would qualify for in terms of insolvency laws, and that the respondent's proposed basis of classification, which separates claimant groups on the basis of the respondent's supposed perception of the varying prospects of success of the claims, is permissible under section 155 of the Companies Act.

11. I deal in turn with each of the grounds of opposition below.

(ii) *Locus Standi*

12. As is alleged in the founding affidavit, the applicants aver that the Injured Investors (who represent a sizeable number of the investors who acquired listed shares in the respondent and thereafter became shareholders of Steinhoff N.V.) sustained significant damages as a result of alleged materially false and misleading financial information provided by the respondent, and have transferred their asserted rights to pursue those damages claims against the respondent and Steinhoff N.V. to one or other of the applicants by way of an assignment agreement. In the Hamilton action, a list of the Injured Investors was provided with the particulars of claim, while copies of the assignment agreements were produced pursuant to a notice by the respondent in terms of rule 35(12).

13. The respondent states that "*Hamilton is one of the parties to which a proposal in terms of section 155 of the Companies Act, is presently envisaged might be delivered*" [see AA para 9]. The respondent nevertheless does not concede

in this application that the applicants have taken assignment of the rights of the Injured Investors. The respondent places that in dispute on the basis that Hamilton has not provided documentary evidence "*reflecting that it holds the alleged claims that it asserts it does*" [see AA para 10.1].

14. The respondent contends that the assignment agreements provided by the applicants do not support the assertion that the applicants have taken assignment of the claims of the Injured Investors, because the assignment agreements were not signed by the Injured Investors themselves, but were signed by an agent on behalf of the Injured Investors, and no documents evidencing the authority of the agents have been provided, despite the respondent having requested such documents under a further rule 35(12) and (14) notice. As a consequence, so the respondent contends, the applicants have not to date provided "*an unimpeachable 'chain' of authority*" to demonstrate that the asserted assignment of Injured Investors' claims to the applicants has taken place, with the result that there is "*no certainty as to whether Hamilton in fact validly holds the alleged claims' of the individual investors*" [see AA paras 27 – 36.2].

15. It is both surprising and unexpected that the respondent has seen fit to place in issue in these proceedings that the applicants took assignment of the damages claims which the Injured Investors assert against the respondent. This is not least because of the following:

15.1. In the correspondence exchanged by the parties' respective attorneys prior to the launch of this application, the respondent's attorneys

focussed squarely on the classifications of the envisaged section 155 compromise proposal, setting out the reasons the respondent contends the differentiation between SIHPL Contractual Claimants and SIHPL MPC Claimants to be appropriate. The respondent did not take issue at all with the assignments asserted by the applicants.

15.2. In fact, the respondent's attorneys indicated unequivocally that the applicants will be among the claimants included in the envisaged section 155 compromise proposal, thereby indicating that the asserted assignments to the applicants of Injured Investors' claims were not in issue. This is evidenced by paragraphs 6, 7, 8 and 11 of the respondent's attorneys' letter dated 1 October 2020 (annexure FA6 to the founding affidavit), which read in relevant part as follows:

> *"6. We deny that your clients will be prejudiced by the proposed s 155 proposal …. With respect, critical aspects that your clients have conveniently ignored include the following: …*
>
> *6.2 your clients' alleged claims face a higher burden of proof than those of (for instance) the contractual claimants; …*
>
> *6.4 it is only out of an abundance of caution, and for purposes of certainty and finality, that your client's alleged claims are being considered to be included within the s 155 proposal."*
>
> *"7. … Your clients will be afforded equal treatment to other claimants within your clients' class."*

> *"8. The directors of SIHPL are well aware of the possible consequences should the global settlement not substantially succeed. It is for this reason that there has been and continues to be daily discussions with claimants' representatives … Our clients urge your clients to work with our clients in order to achieve this, rather than to raise objections to the proposed global settlement."*
>
> *"11. … your clients are adequately 'protected' by their statutory rights. This is the remedy that your clients have, and which the Companies Act envisages and provides. Your clients' remedy does not lie in the High Court, but rather in the process set out in section 155 of the Companies Act."*

15.3. After the launching of this application, the respondent's attorneys addressed a further letter to the applicants' attorneys on 23 November 2020 (attached as **"RA1**"). The respondent's attorneys' letter again indicated that there was no issue with the applicants' assertion that they had taken assignment of the claims of the Injured Investors. This is apparent from the respondent's statement that the applicants' "*have alternative means to express any dissatisfaction that they may have with inter alia the classes that may be proposed … by vot[ing] against the section 155 proposal; and/or … oppos[ing] [the respondent's] stated intention to approach the Court for its sanction and approval of the s155 proposal …*".

15.4. The respondent's attorneys further contended in that letter that this application and the section 155 compromise proposal "*can be*

conducted concurrently", though it recognised that it was in the interests of all parties that this application be determined as soon as possible. The respondent therefore proposed extremely tight time periods for the exchange of papers and the hearing of this application, proposing a hearing as early as the week commencing 7 December 2020.

15.5. That letter, read with the respondent's attorneys' earlier letter, indicated that the respondent understandably did not intend to cavil with the assignments asserted by the applicants, but intended to deal with the merits of this application, as that approach would serve the best interests of all the parties. There would have been no basis for the proposal in the second letter – which involved burdening this honourable Court on extremely short notice, in the last week of the last term, with an opposed application running to many pages– if the respondent was desirous of having the application dismissed for lack of standing, as opposed to ventilated on the merits, as no benefit would be derived from a judgment which held that the applicants had in these proceedings not provided sufficient proof of the assignments which underlie the Hamilton action (as opposed to a judgment dealing with, and disposing of, the real, substantive issue in dispute).

15.6. The respondent's attorneys' letters aside, what makes the denial of the applicants' *locus standi* even more perplexing is the clear indication in the respondent's Global Settlement Term Sheet (annexure FA2.3 to the founding affidavit) that the applicants will be

among the offerees in the envisaged compromise proposal. On page 3 thereof, "*Settlement Effective Date*" is defined as "*the date on which the settlement becomes effective in accordance with its terms*"; and on page 5, when dealing with the proposed terms of settlement of MPC claims, one of those terms is indicated to be that "*On the Settlement Effective Date, the written undertakings provided by SIHPL to Adams & Adams (on behalf of Hamilton) dated 8 August 2019 … will terminate and SIHPL shall be unconditionally and irrevocably released from such undertakings*". A copy of this undertaking to Hamilton, which *inter alia* provided that the respondent would notify the applicants if it intended to pay any settlements, is attached as **"RA2"**. Thus, not only the respondent's attorneys, but the respondent itself, expressly recognised prior to the launch of this application that the applicant would be among the SIHPL MPC Claimants to whom the compromise proposal would be made.

16. It is, I submit, dispositive of the *locus standi* question that the applicants have been informed by the respondent that it would be presented with, and be entitled to participate in, the contemplated compromise proposal. Whatever reservations the respondent might now profess about the applicants' standing in the Hamilton action, the fact is that the applicants were advised that they would be parties to the proposed compromise. That being so, the respondent can hardly contend that the applicants do not have standing to challenge aspects of the proposal which they consider to be contrary to the Companies Act and, in the applicants' view, destined to doom the proposal as a result.

17. It is noteworthy, too, that, despite similar claims being advanced by the applicants against SHIPL (and Steinhoff N.V.) in the Netherlands, pursuant to proceedings launched in June 2019, and those proceedings also being premised on the same assignment model, which was explained in some detail in an exhibit to the summons, neither Steinhoff N.V. nor SIHPL have to date challenged the assignments or even requested that they be provided with the underlying executed assignment documents. The indications to date have instead been that the same assignments as are relied upon in the Hamilton action are accepted in those proceedings as conferring on the applicants the right to prosecute the claims of the Injured Investors. Steinhoff N.V. and the applicant have confirmed publicly that they have been in active discussions with litigants and I should add that, in my numerous meetings and telephone calls with Mr Du Preez over the last several years as a representative of Hamilton, he has never once questioned the *locus standi* of Hamilton in relation to the assignors.

18. In the face of those statements by the respondent and its attorneys, and the implied concessions contained therein, as well as the respondent's interactions with the applicants more generally, the respondent cannot in good faith assert (as it has done in the answering affidavit) that this application should be dismissed, on the basis of a lack of standing on the part of the applicants, because the applicants have not yet provided the respondent with sufficient proof of the assignments in the Hamilton action.

19. I submit that the denial that the applicants have authority to pursue this application, premised on the refusal to admit that the applicants have taken

assignment of the claims of the Injured Investors, does not raise a genuine or *bona fide* dispute regarding the assignments that the applicants have asserted. I reiterate that, prior to the launch of this application, the respondent and its attorneys had indicated through statements that the applicants will participate in the contemplated section 155 compromise proposal and will have adequate remedies there, thereby indicating that the respondent was satisfied that the applicants had taken assignment of the claims they contend they hold (or at least that it was not minded to dispute this). Having adopted that position prior to the launch of this application, the respondent's denial of the assignments in this application, simply on the basis that more proof is required, should not be countenanced.

20. Moreover, the respondent has been provided with both a list of the names of the Injured Investors and copies of the assignment agreements, which provided the identity of the authorised agents who concluded the assignment agreements on behalf of the Injured Investors. If the respondent had any reservations as to the authenticity of the assignment agreements (which, I reiterate, it did not articulate until the answering affidavit), it could have requested the applicants' consent to contact any of the Injured Investors, or their agents (who are by and large well-known asset managers in South Africa), to verify that the agent was authorised to conclude the assignment agreement on their behalf. I should add that the notion that leading asset managers such as Coronation, Investec, Allan Gray, Old Mutual, Foord etc. would have signed assignment agreements without being satisfied that they were duly authorised to do so, and also have allowed the applicants to

represent that they held assignments from the Injured Investors (via the asset managers) when they did not, is far-fetched in the extreme (indeed preposterous). (That the applicants were asserting their right to represent those asset managers and their clients is well-known, and was for example expressly stated in the press release issued by Claims Funding Europe (CFE) and BarentsKrans on 28 September 2018 (a copy of which is attached marked "**RA3**"). The respondent opted not to contact any of the large asset managers in question, or any other agent, or any of the Injured Investors. Instead, it has chosen to refuse to admit the applicants' standing, and moreover place that issue in dispute, not on the basis of any facts capable of substantiating an argument that the assignment agreements are not authentic or were not validly concluded, but purely on the basis that the respondent now (notwithstanding its earlier contrary position) allegedly requires more proof to be satisfied about the assignments. For this reason, too, the denial of the assignments does not raise a genuine or *bona fide* dispute.

21. The fact that the applicants had not previously provided the powers of attorney by which each of the Injured Investors authorised an agent (in most instances a manager of the asset managers through which the Injured Investors acquired shares) to conclude an assignment agreement with the applicants is also, in any event, not a basis for criticism.

21.1. After the launching of the Hamilton action, the respondent lodged a request, in terms of rule 35(12), to inspect the assignment agreements. Copies of those agreements were duly provided to the respondent. The respondent then, in a further rule 35(12) and (14)

notice, requested documents evidencing the authorising of the agents named in the assignment agreements (or, in other words, documents referred to in the documents it had obtained pursuant to rule 35(12)).

21.2. This request was made at the stage when the respondent had already delivered its exception to the applicants' particulars of claim in the Hamilton action. Whether or not the respondent was strictly within its rights to deliver the further rule 35(12) and (14) notice, which related to issues not covered by the exception, the further notice confirmed the impression which had already been created by the respondent's attorneys' actions in response to the Hamilton action (which had included raising an unmeritorious argument about the supposed lack of a mediation notice, as well as making an extraordinarily exorbitant demand for security for costs) that the respondent's general approach to litigation against it is to take every conceivable technical point and interlocutory step at its disposal (either consecutively or cumulatively).

21.3. That inference was independently justified in respect of the rule 35(12) and (14) notice because the powers of attorney sought therein were in no way needed by the respondent to plead (the defendant having excepted), nor to enable the defendant to prepare for the exception hearing, as well as because the (second) rule 35(12) and (14) notice ran to some five pages, requesting a range of documents unconnected with the exception.

21.4. Coupled with the other indications the that assignments were not in

issue (which included the fact that both the respondent and the respondent's attorneys had given clear indications that the applicants would be participants in the envisaged section 155 proposal), the applicants felt justified in instructing their attorney to inform the respondent's attorneys that the powers of attorney would not be provided immediately, but after the Hamilton action has survived the respondent's exceptions (and thus when the matter progressed to a hearing on the merits, with discovery, further particulars and so forth).

22. It was not foreseen at the time, or at any stage prior to the bringing of the application, that, despite the contents of its attorneys' letters and the other indications that the respondent was not taking issue with the assignments, the respondent would contest the applicants' standing in any court application which the applicants were to bring against the respondent arising out of the Hamilton action, on the basis of having insufficient information to check the assignments itself. Now that the respondent has seen fit to do so, the applicants will provide the powers of attorneys which have been sought by the respondent. I again submit that, in the light of the respondent's indications that the assignments were not being disputed, the applicants cannot reasonably be faulted for not having produced those documents earlier. (I note that the respondent does not contend that the powers of attorney should have been included in the founding papers; its complaint instead being that the powers of attorneys have not yet been produced in the Hamilton action.) It will take some time for the applicants' representatives to collate and produce all the relevant powers of attorney. For present purposes, I attach, by way of

an example, one representative power of attorney granted by the Cape Municipal Pension Fund ("**CMPF**") to Abax Investments (Pty) Ltd ("**Abax**") (attached marked "**RA4(a)**"), a resolution of the Trustees of CMPF and a letter and resolution of the board of ABAX relating to signing authority (attached marked **"RA4(b)**", "**RA4(c)**" and "**RA4(d)**") and the assignment agreement concluded on the strength of the aforesaid power of attorney (attached marked "**RA4(e)**").

23. In the premises, I submit that, not only do the applicants have standing because of the respondent's indications that they would be included in the compromise proposal, but there cannot in any event be a *bona fide* dispute regarding the fact that the applicants have taken assignment of the claims of the Injured Investors against the respondent (and certainly not a genuine disputation any longer in the light of the documents which are attached and which will be produced in response to the rule 35(12) and (14) notice in the Hamilton action).

(iii) **Prematurity**

24. The respondent alleges that this application has been brought prematurely, because there will be opportunities, once the envisaged section 155 proposal is made, for the applicants to object to the implementation of the proposal. More particularly, states the respondent, the applicants (*i*) would be able to vote against the implementation of the proposal when the proposal is to be voted upon by creditors, and, (*ii*) could oppose an application brought by the respondent to court to sanction the proposal, if adopted by creditors.

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(As I have pointed out above, that stance cannot coexist with the respondent's disputation of the applicants' *locus standi*. The respondent's second *in limine* defence is thus incompatible with its first.)

25. Linked to the allegation that this application is brought prematurely, and by way of motivation for why the issues in question supposedly need not be determined now, the respondent alleges that the applicants will face no prejudice if the issues the applicants raise in this application are only considered at the sanctioning stage, as the proposal will not be implemented until sanctioned and approved by the court [see AA paras 5.1.2, 10.1, 10.2]. The respondent further contends that this application is premature on the basis that the compromise proposal has not yet been launched and the applicants are thus in no position to properly consider it [see AA para 13]. In addition, it contends that "*other affected parties and creditors*" of the respondent, who are alleged to have a direct and substantial interest in the relief claimed by the applicants, ought also to be heard "*at the relevant time*" on their views on the envisaged compromise proposal [see AA para 12].

26. As is alleged in the founding affidavit, and also pointed out above, there is a live dispute between the applicants and the respondent as to whether the classes of the intended compromise proposal are classes as envisaged by section 155 of the Companies Act. This much is clear from the answering affidavit, too. As a result, the applicants are permitted to approach this court for declaratory relief. The prematurity opposition raised by the respondent raises a different issue (which I submit is not properly described as a prematurity or ripeness one): namely, whether, given that section 155 of the

Companies Act affords the applicants an opportunity to vote on the intended compromise proposal, and to oppose its sanctioning by the Court should it be adopted, the class delineation dispute should be heard now, rather than dealt with in other proceedings later. I agree with the respondent that this issue ultimately turns on issues of prejudice. But I disagree with the respondent's allegation that the applicants will face no prejudice if the class delineation dispute is not heard now, as well as that other interested parties will be prejudiced if it is (or in other words, if fatal impediments to the success of the compromise proposal are addressed up front, so that the respondent can present a statutorily compliant proposal to creditors). I submit that, on the contrary, it is clearly in the best interests of all concerned if the legal issue raised by this application is clarified at the outset.

27. The fundamentals of the envisaged compromise proposal are known. The respondent will classify according to its professed view of the prospects of claimants proving their asserted debts against the respondent, and, more particularly, will provide vastly more favourable settlements to the SIHPL Contractual Claimants than to the SIHPL MPC Claimants (and thus prefer the former "class" over the latter), on the basis that the respondent purportedly perceives SIHPL Contractual Claimants to have greater prospects of success than SIHPL MPC Claimants. This is sufficient information about the intended compromise proposal to enable this Court to determine whether the proposed classes pass muster under section 155 of the Companies Act. It has also since become known that the South African Reserve Bank has consented to cross-border payments being made as part of the proposed section 155

compromise proposal.

28. If the applicants are correct that the respondent's proposed classifications do not accord with what section 155 envisages, then the respondent will be pursuing an unsanctionable proposal. If the proposal is adopted but ultimately not sanctioned by the court, the respondent is bound to end up in liquidation, given its dire financial position. In the Steinhoff FAQs it is stated that, if the respondent fails to secure a settlement of the outstanding litigation claims, then further restructuring of Steinhoff "*could be in doubt*". This is an understatement. The Steinhoff Group's liabilities exceed its assets by EUR 9 billion and it is facing legal claims of EUR 10 billion.[1] The respondent needs to settle litigation claims to have any chance of avoiding liquidation. On the respondent's own version "*liquidation will be a bad outcome for stakeholders which would materially impair the value of assets available for distribution and likely diminish the amount of the claimants' recoveries relative to the settlement*" and "*[t]his is why Steinhoff is urging all claimants to take this opportunity to agree a settlement*".

29. Not hearing this application now – and also not considering the merits of the claim at this time – would be prejudicial to the applicants, as well as the respondent and its other creditors. The consequence of not deciding the issues raised by the applicants in this application, but only hearing them at the sanctioning stage, would be that, should that court find that the applicants correctly contend that the respondent's proposed classes are unlawful and

[1] Steinhoff FAQ6 page 6

unsanctionable, the respondent's liquidation is the likely outcome – a scenario which the respondent admits would be the worst outcome for claimants.

30. If the respondent were genuinely concerned with providing a fair and better recovery to claimants through a settlement, then it should agree that a proposal that will inevitably fail should not be advanced at all (as well as that a dispute on this score should be addressed at the outset). The prejudice otherwise is obvious.

31. As for other claimants: the applicants seek no relief in this application against other claimants. I am advised that none of the other claimants have a direct and substantial interest in the relief the applicants pursue and that no rights of other claimants will be infringed by an order to the effect that the respondent's envisaged compromise proposal will not comply with or be sanctionable in terms of section 155 of the Companies Act.

32. In the premises, I submit this application has not been brought prematurely and that it would be appropriate, and indeed necessary, to hear this application at this juncture.

(iv) Abuse of process

33. The respondent alleges that, based on the Unterhalter and *Hlumisa* Judgments, the claims pursued by the applicants in the Hamilton action are bad in law. The respondent also contends that the applicants face a number of further difficulties in those proceedings, on the basis of exceptions that have been raised, security that has been requested, perceived difficulties the

applicants will face in evidencing they hold the asserted claims, and proving in respect of every Injured Investor a causal nexus between the alleged wrongdoing and the alleged harm. Based on these assertions, the respondent contends the applicants have no prospect of success in the Hamilton action, and that the applicants are consequently, through this application, trying to escape the difficulties of that action so as to procure a benefit to which they are not entitled [see AA para 6.2, 46, 48, 51, 61, 62, 67.2].

34. The respondent's reasoning is not only wrong, but counter-intuitive. If the applicants' case were as utterly hopeless as the respondent contends, the applicants would certainly not have objected to any proposed settlement. (They would instead have been grateful to have been included at all.)

35. There is moreover an even more significant problem with the respondent's reasoning as to why this application is purportedly an abuse. According to the respondent, it is not just that the SIHPL MPC Claimants have poor prospects of success, they in fact (according to the respondent) have no claim in law and no prospect of holding the respondent liable. Yet, despite these strong statements, the respondent says it is willing to settle the claims of SIHPL MPC Claimants "*for the sake of finality and out of an abundance of caution*" [AA para 67.2]. Those two positions cannot be reconciled.

36. The respondent's contentions about abuse of process and an alleged "*ulterior motive*" are also flawed for another fundamental reason:

36.1. If the respondent proceeds to make a section 155 compromise

proposal to the SIHPL MPC Claimants, and if the proposal is adopted, any of the MPC Claimants who are dissatisfied can oppose the respondent's court application to sanction the proposal. If an MPC Claimant were to raise in that application the issues the applicants have raised here, the respondent could not then assert that the opposition is an abuse because the MPC Claimant in fact has no claim against the respondent. If the respondent proposes a settlement to a class, any member of the proposed class would have standing to object to the proposal, regardless of what the respondent may think of the merits of that claimant's claim.

36.2. Thus, because the applicant intends to propose a compromise proposal to SIHPL MPC Claimants, a "class" in which (as the respondent acknowledges) the applicants will fall, the applicants will be fully entitled to object to the sanctioning of such proposal (if approved), regardless of what the respondent makes of (or claims to make of) the applicants' prospects of success in the Hamilton action. The reasons why the applicants have (justifiably) chosen to raise at this stage the points they would also be entitled to raise at a sanctioning stage have been addressed above. Whatever the respondent makes of those reasons, it cannot reasonably contend that the applicant's challenge to the scheme, on the same grounds that it could advance in due course, is an abuse or demonstrative of an ulterior motive. Simply put, because the applicants will have a right to object to the compromise proposal at the sanctioning stage

(regardless of what the respondent purports to make of the applicants' claims in the Hamilton action), it does not survive logical scrutiny for the respondent to reason that this application (which articulates the objections which the respondent agrees the applicants could make) is an abuse because the applicants' claims purportedly lack merit.

37. The allegation that the applicants are seeking through this application to secure a preference for themselves is in any event baseless and contrived. The applicants are complaining about the inequity of the envisaged section 155 proposal, on the basis that the proposal contemplates an undue preference to a very select group of creditors (essentially certain well-connected businessmen), who do not constitute a class as envisaged by section 155 of the Companies Act, and where that select group would get to vote on their own on the offer made to them. The applicants' contention is that those claimants who would in a liquidation be concurrent creditors must form one class. The applicants have not in any way intimated that they should be offered a settlement preferential to those of any other concurrent creditor.

38. In the premises, there is clearly no substance to the contention that this application is an abuse of process.

(v) Respondent's approach to classification

39. As is apparent from the founding affidavit, the applicants contend that section 155 of the Companies Act requires that creditors of a company be classified according to the preference for which they would qualify if the company were

to be liquidated. This is indicated by the wording of section 155(3) and I am advised that this is also a necessary consequence of the similarity of rights approach which underpins section 155 (the similarity of rights approach requiring creditors with similar rights – or, in other words, creditors who will enjoy a similar preference under insolvency laws – to come together to discuss the acceptance of the offer of compromise, with a view to protecting their common interests).

40. The respondent, on the other hand, alleges that a section 155 compromise proposal must be contrasted with liquidation proceedings, and that, because a section 155 compromise is an alternative to liquidation, liquidation classifications do not apply to a section 155 compromise proposal. The respondent alleges further that its envisaged classifications, which are said to delineate classes according to the (respondent's) perception of the claimants' prospects of proving they are creditors, are appropriate. The respondent consequently contends that it is permissible to separate financial creditors (to whom the respondent admits liability but in respect of whom no claims have been filed and no payment from the envisaged Scheme is proposed), SIHPL Contractual Claimants (in respect of whom liability is disputed, although the respondent purportedly considers their claims to enjoy better prospects of success than those of the SIHPL MPC Claimants), and the SIHPL MPC Claimants (whose claims are not only denied but also allegedly regarded as weak) [see AA para 65, 70, 71, 73, 105, 115, 117.2].

41. The applicants have in the founding affidavit summarised their key submissions as to what is meant by a "*class*" of creditors under section 155

of the Companies Act. I shall not repeat those submissions here, as I submit that they are already sufficiently clearly advanced in the founding affidavit, and, as they involve a legal issue (the interpretation of section 155 of the Companies Act), and are in any event appropriately addressed in argument. I shall merely make a few points by way of rebuttal. I should also emphasize that the applicants both take issue with the respondent's interpretation of section 155 of the Companies Act and dispute that the respondent's proposed classifications align with section 155 and the similarity of rights approach. I am advised that the respondent's proposed classifications are in fact contrary to the wording of section 155 of the Companies Act, as well as inconsistent with the similarity of rights approach as enunciated by case law, and would fail to achieve a meeting of all those creditors who should consult and vote together in respect of an offer of compromise which affects them.

42. The respondent's argument that the class(es) of creditors envisaged by section 155 are intended to be different to the classification of creditors on liquidation is, as mentioned, controverted by section 155(3). Not only does section 155(3)(*a*)(ii) require a proposed compromise to indicate "which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency", but section 155(3)(*a*)(iii) requires the proposal also to indicate "*the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation*". In addition section 155(3)(*b*)(vi) stipulates that the proposal must include "*the benefits of adopting the proposal as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation*". Section 155 thus

makes it clear that, because a compromise under that section is an alternative to liquidation, the consequences of liquidation for the various classes of creditors on liquidation must be made spelt out in the proposal. I am advised that this also necessarily means that the creditor classes contemplated by section 155 are the same as those which apply on liquidation.

43. The distinction which the respondent now seeks to draw between contractual claimants and market purchase claimants is moreover contrary to the approach which SIHPL and Steinhoff N.V. have adopted in other court proceedings – more particularly, the proceedings which the applicants initiated against those companies in the Netherlands. In the course of an argument as to why the Dutch proceedings should supposedly be stayed in the light of a range of proceedings in South Africa, which were said to involve overlapping claims, SIHPL and Steinhoff N.V. referred to the *De Bruyn* class action as well as other South African proceedings, including the actions by GT Ferreira, Thibault Square and the Wiesfam Trust, Trevo, BVI and Cronje, and stated the following (the translation below is from the Dutch, with the assistance of a lawyer at BarentsKrans, Jan-Willem de Jong; the relevant pages of the original submissions, made by Linklaters, on behalf of SIHPL and Steinhoff N.V. (pages 1-3, and 74-79) are attached marked "**RA5**"):

- *the Other South African Proceedings focus on the <u>same subject</u>, namely the alleged liability of SIHNV and/or SIHPL for damages suffered by Steinhoff shareholders, as a result of the allegedly misleading statements and accounting irregularities in the period prior to 6 December 2017;*

***That plaintiffs in some of the Other South African Proceedings have acquired SIHNV shares in another way (i.e. through exchange as a result of entering into 'share exchange' or 'share swap' agreements) does not detract from that. The way in which shares are acquired is after all not relevant. What matters is that the plaintiffs claim to be misled in the same way as a result of the allegedly incorrect presentation of Steinhoff's financial position – in the published annual accounts of Steinhoff. Both in the present proceedings and in the Other South African Proceedings the plaintiffs allege that (i) as a result of the deception they have entered into agreements (whether through purchase or for exchange), and (ii) they would not have entered into such agreements if the deception had not taken place – in other words, if they had been aware of the alleged actual financial position of Steinhoff. The questions that therefore arise in the proceedings at hand and the Other South African Proceedings are therefore exactly the same (has deception taken place, have shareholders suffered damages as a result etc.)**. *Since exactly the same questions are pending before the South African courts in the Other South African Proceedings and before your court in the proceedings at hand, there is clearly a situation in which there is a danger of contradictory decisions.*

- ...

- ***there is a strong overlap between <u>the legal basis of the claims</u>. Hamilton states that the claims against SIHPL are based on South African law and states that SIHPL would have violated sections 22, 28 and 29 of the South African Companies Act. Also in the Other South African Proceedings plaintiffs take the view that their claims are based on South African law and they claim that SIHPL would have violated exactly the same provisions of the South African Companies Act***. *See for example para 17.1 of the 'combined summons' in the Trevo case (Exhibit 27) and para 27 of the "combined summons" in the Cronje and other case (Exhibit 29).*

[underlining in original; bold emphasis added]

44. In addition, the respondent's proposed classification is internally inconsistent and unsustainable even on its own terms. It will be recalled that it was stated in the founding affidavit that the respondent's proposed classes do not even appear to accord with the respondent's asserted basis of classification, as the BVI and Cronje and Others claimants (who are in the proposed SIHPL Contractual Claimants group) pursue delictual and statutory claims, not claims for rescission or cancellation of a contract, which is how the respondent characterises the "*demonstrably stronger*" Contractual Claimants' claims. (The overlap between the particulars of claim of Cronje and Others and Hamilton's claim under South African law in the Netherlands was in fact remarked upon by SIHPL and Steinhoff N.V. in the Dutch proceedings quoted immediately above, where Steinhoff also mentioned the overlap with the *Trevo* claim). It was pointed out in the founding affidavit that the inclusion of the BVI and Cronje and Others claimants as SIHPL Contractual Claimants means the respondent's assertion that the SIHPL MPC Claimants' claims must be treated with more circumspection than the SIHPL Contractual Claimants' claims is unsustainable on the respondent's own version. The respondent has not even attempted to deal in answer with this fundamental impediment to its classification, let alone explained the glaring inconsistency. (The respondent has contented itself with a worthless bare denial.) Nor has the respondent explained how there are differentiations even between its own classes.

45. If the applicants are correct that the section 155 class delineation cannot be

done on the basis of the offerors' alleged perception of the varying prospects enjoyed by the members of the different claimant groups, then the applicants are necessarily also correct that the merits of the applicants' claim in the Hamilton action is not relevant to this application – which, I reiterate, is concerned with what constitutes a class of creditors for purposes of section 155 of the Companies Act, and how classes of creditors can be framed when a proposed compromise is drawn up.

46. While the applicants maintain that the merits of the claim in the Hamilton action are irrelevant to the issues in this application, I should nevertheless make it clear that the applicants disagree with the respondent's views on the strength of the applicants' claim and submit that the applicants have good prospects of ultimately succeeding against the respondent. The respondent's contentions to the contrary are based on a number of erroneous propositions and assumptions.

47. For example, the respondent alleges that there is no discernible difference between the claim advanced by De Bruyn (found to be excipiable in the Unterhalter Judgment) and the claim in the Hamilton action. This is incorrect. There are various important differences between the two actions. One fundamental difference is that the claims asserted by the applicants include a claim based on common-law fraud (intentional misrepresentations by the respondent - see FA1 para 19), whereas the *De Bruyn* claim did not contain a cause of action based in fraud. I annex a copy of the draft particulars of claim in *De Bruyn* as "**RA6**". I submit that the considerations with regard to the wrongfulness criterion (the component of the delictual action in which the

De Bruyn claim was found to be deficient) are materially different when a claim is based on fraud, as opposed to negligence (as in *De Bruyn*). I submit that fraudulent actions, unlike negligence, actions are at least *prima facie* wrongful. The applicants accordingly believe that wrongfulness will be established if the applicants succeed in proving the alleged intentional (and thus fraudulent) misrepresentations by the respondent.

48. The respondent can also hardly contest that there is a sound basis to assert fraud against the respondent. This is not only because of what is apparent from the publicly available summary of PwC's forensic investigation, but also because Steinhoff has itself referred to "*fictitious transactions*" and other apparently deliberate accounting irregularities involving the Steinhoff Group in its claim against its former chief executive officer, Markus Jooste, and its former chief financial officer, Andries Benjamin la Grange, and alleged that, "*[a]s a consequence of the fictitious transactions and the accounting irregularities, the financial position of [SIHPL], and [Steinhoff N.V.] during the period 2015 to 2017, was materially overstated and required restatement*". I annex, in this regard marked "**RA7**" a copy of the particulars of claim in the action instituted by SIHPL and Steinhoff N.V. against Messrs Jooste and La Grange, and refer specifically to paragraphs 18 and 27 thereof. (As is apparent therefrom, SIHPL and Steinhoff N.V. were essentially alleging fraud when referring to the "*fictitious transactions*", "*fictitious or irregular income*" and other accounting irregularities.) I also attach marked **"RA8**" an extract (page 26) from the Steinhoff Group's Annual Report for the year ended 30 September 2019, where reference is made to the FSCA investigation into

the Steinhoff Group and the findings of fraud perpetrated by former employees.

49. While there is some substance in the respondent's contention that the Unterhalter Judgment poses difficulties for the applicants' claim against the respondent based on section 218(2) of the Companies Act, the respondent's submissions ignore the difference between the applicants' pleaded case and the cause of action pleaded in the draft *De Bruyn* particulars of claim, as well as the fact that the applicants' claim is based in the first instance on fraud (whereas the *De Bruyn* claim was based on negligence). The position is therefore not nearly as clear-cut as the respondent submits. Furthermore, it would, with respect, be perilous to assume that the Unterhalter Judgment would be the last word on the precise boundaries of shareholder claims brought against a company, or directors of a company, under the Companies Act as a result of diminution in the value of the company's shares. Nor is the Supreme Court of Appeal ("**SCA**") judgment in the *Hlumisa* matter (which is also again distinguishable from the Hamilton action) necessarily final. I am informed by the applicants' attorneys that application for leave to appeal has been made to the Constitutional Court against the SCA's decision. I attach a copy of that application for leave to appeal as **"RA9**". As is evident therefrom, the applicants take issue with the SCA's interpretation of section 218(2) of the Companies Act and seek to persuade the Constitutional Court that it should adopt a wider construction of the section than the SCA did.

50. The applicants intend in due course to deal properly and fully with the various exceptions filed by the defendants in the Hamilton action. For present

purposes, it suffices to record at this juncture that the applicants deny (insofar as the relevant allegation is directed at the Hamilton action) that the causes of action in the Hamilton action are "*factually and legally bereft of merit*" [AA para 6.1]; take issue with the respondent's demonstrably incorrect contention that the claim in the *De Bruyn* draft particulars of claim "*was identical in all substantive respects to the claim … in the Hamilton action*" [AA para 41] or that "*near-identical allegations were made in the De Bruyn Case*" [AA para 42.2]; disagree that the applicants' statutory and negligent misrepresentation causes of action are doomed to fail because of the *Unterhalter* and *Hlumisa* Judgments [AA para 48]; and dispute the respondent's allegations about the supposed procedural and evidentiary difficulties facing the applicants in the Hamilton action. For example, not only are the defendants' security for costs demands eye-wateringly inflated, but they are inconsistent with one of the respondent's central premises in these proceedings: that the Hamilton action is purportedly legally unsustainable. The respondent has demanded security for costs in the amount of R83.5 million [AA par 56]; but the respondent cannot both contend that its exception will be upheld (as Hamilton's assigned claims are purportedly baseless) and also demand security to cover the supposed costs of running an exceptionally long trial. The respondent's demands for security for costs are a further indication of the respondent's obstructive and stone-walling approach to litigation against it by persons who were misled by the false representations in its annual financial statements.

51. I again submit that the applicants have good prospects of proving their claim against the respondent, on one or more of the causes of action on which the

claim is predicated.

52. In the premises, the applicants persist in their submission that no court could sanction or approve the section 155 compromise proposal which the respondent contemplates making, because (*i*) it envisages an incorrect approach to class delineation, which will result in a group of claimants (who would qualify as concurrent creditors) being called to meet and vote separately from other claimants (who would also qualify as concurrent creditors) in respect of a settlement proposal that is considerably better for one of those groups (and thus one segment of the concurrent creditors) than for the other group of claimants; and (*ii*) the proposal is also in any event arbitrary because the class delineation is not justifiable even on the basis of the approach the respondent purports to have adopted.

SERIATIM REPLY

53. I now turn to dealing with individual paragraphs or allegations in the answering affidavit which warrant a specific reply. As indicated, allegations which are not expressly addressed should be regarded as denied, unless that would be inconsistent with what is contained in the founding affidavit or in this affidavit. Responses to particular averments should also be regarded as applying to similar averments elsewhere in the affidavit.

Ad paragraph 2

54. I deny that all the allegations in the answering affidavit are true and correct.

Ad paragraph 5.1

55. I deny that this application is "*unjustified and premat*ure". This application should be heard for the reasons set out in the founding affidavit and above.

Ad paragraph 5.2.1

56. I deny that the applicants are "*unable to respond to formal Court notices*". I have explained why the applicants did not respond earlier to the respondent's further rule 35(12) and (14) notice.

Ad paragraph 5.2.2

57. This paragraph is denied. The respondent's characterisation of the applicants' conduct in the Hamilton action is false. The applicants have certainly advanced their claim. Following the exceptions raised by the defendants in the Hamilton action, the applicants deemed it fit to make minor adjustments to their particulars of claim, following which the fourth defendant (but not the respondent, as the first defendant) objected and the applicants delivered an application for leave to amend. I attach a copy of that application (which includes the Rule 28(1) notice as an attachment) marked "**RA10**". As for security for costs, the respondent delivered a request for security for costs in the absurd amount of R83 million, after which the applicants tendered security of R2 million (R500 000 per defendant) and indicated their willingness to revisit the security after the exception stage.

Ad paragraph 6.2

58. The respondent alleges that the "*commercial arrangement*" has not been challenged by the vast majority (both in number and value) of the remaining parties who have asserted claims against the respondent. That statement seems somewhat exaggerated given the relative size of the Hamilton claims and the number of claimants who have associated themselves with the Hamilton position. I take that statement to mean, though, that there are other parties who have also expressed an objection to the proposed compromise proposal. What is also apparent from this statement is that the respondent has solicited many other creditors' views about the proposed compromise and believes that the proposal would be adopted by the "*majority (both in number and value)*" of the respondent's creditors. This neatly illustrates how, notwithstanding the respondent's claims of prematurity, the proposed compromise which is addressed in this application is one which the respondent appears to be serious about pursuing, and which it believes will be adopted. As mentioned, that is not however the end of the enquiry; the fact that the majority of claimants might agree with a proposed settlement does not mean that it can, or should, be approved by the court, certainly not where all those who should consult and vote together on an offer to be made to them have not been constituted in a single class (with the result that only a small part of the class will have been able to vote on the offer to the SIHPL Contractual Claimants).

Ad paragraph 6.2.1, as read with paragraph 6.2

59. It is denied that the applicants have brought these proceedings in attempt to procure "*a more advantageous and indeed preferential financial and commercial benefit (to which they are not entitled)*", or "*to try and obtain a financial benefit to which [Hamilton] is not entitled, and thus for an ulterior motive*". It is consequently also denied that the application "*constitutes an abuse of this Court's process*". It is difficult to see on what basis this contention can even be made. As mentioned above:

59.1. The respondent contends the applicants and other SIHPL Contractual Claimants have no claim, yet the respondent intends to propose a material settlement to them. This is illogical.

59.2. Any of the claimants which the respondent includes in a class will moreover be permitted to oppose the sanctioning of the proposal, if adopted. The applicants have simply chosen to raise at this juncture (for reasons that have been explained) the same points which the applicants could permissibly raise at the sanctioning stage. This can hardly be criticised as an abuse or demonstrative of an ulterior motive.

59.3. The applicants have also stated that the concurrent creditors must form one class and must consult together in respect of an offer made to them. It therefore does not follow that the applicants are somehow through this application attempting to procure for themselves a preferential offer (let alone one to which they are not entitled). They

are clearly not. (By contrast, the current proposal would unduly favour certain well-connected businessmen at the expense of the South African investing public. (I reiterate the glaring disparity between the envisaged offers to the SIHPL Contractual Claimants and the SIHPL MPC Claimants as set out in paragraph 39 of the founding affidavit.)

Ad paragraphs 6.2.2 – 6.2.3

60. The allegations in these paragraphs are denied. Pursuing a compromise proposal that does not comply with section 155 of the Companies Act, and cannot be sanctioned by the Court, will be detrimental to creditors of the respondent. The respondent's creditors should be called upon to consult and vote on a compromise proposal that complies with section 155 of the Companies Act. Particularly where time is of the essence for a company in financial distress, devoting valuable time and resources to pursuing a non-compliant (and thus doomed) compromise is not only prejudicial to all creditors, but irresponsible.

Ad paragraph 9

61. Despite the guarded language employed in this paragraph, the intention to include the applicants in the SIHPL MPC Claimants class is clear from the respondent's attorneys' correspondence and the Steinhoff Global Settlement Term Sheet. The reality is that the applicants are among the parties whom the respondent has been intending to deliver the proposed compromise.

Ad paragraph 10.1

62. The SIHPL MPC Claimants will not be permitted to vote on the (significantly better) proposal the respondent intends making to the SIHPL Contractual Claimants. It therefore does not follow that the applicants would, through a vote, be able to stop "*the Scheme*". They certainly could not vote down the offer to be made to the SIHPL Contractual Claimants.

Ad paragraph 13

63. The information about the envisaged compromise proposal that is known – more particularly as a result of the extensive information in the Global Settlement documents – provides sufficient information to enable this Court to consider whether the proposed classes would be classes as envisaged by section 155 of the Companies Act, and whether the proposal could be sanctioned by a court in that respect (or would instead have to be rejected for that reason).

Ad paragraph 14

64. It is not correct that the applicants have only had sight of the "*percentage payment*" that is envisaged to be offered to SIHPL MPC Claimants. There is a wealth of information in the Global Settlement documents, providing more than adequate information about the proposed compromise proposal. That information clearly indicates that, for the reasons given in the founding affidavit, the proposal will not pass muster under section 155 of the Companies Act.

Ad paragraph 25

65. I deny that the assignment and mandate agreements are not supportive of the assertion that Hamilton has taken assignment of the claims of the Injured Investors. As mentioned, this is shown by the fact that the respondent has, prior to this application, apparently accepted that the applicants advanced the claims of, and for, the Injured Investors (as represented by their agents, who for the most part are well-known asset managers).

Ad paragraph 26.1

66. Most of the Injured Investors provided a power of attorney to the asset managers through which they invested, empowering the latter to conclude an assignment agreement (or more precisely, an assignment and mandate agreement) with the applicants. Annexure A to the particulars of claim provides the names of those asset managers in the column titled "*Agent*", next to the names of those Injured Investors (the asset managers including among others Coronation Asset Management (Pty) Ltd, Sanlam Private Wealth (Pty) Ltd, and Allan Gray South Africa (Pty) Ltd). For those Injured Investors, representatives of the asset managers concluded the assignment agreements. The remaining Injured Investors were not represented by asset managers. These are identified in the "*Agent*" column by the entry "*Direct Participant*".

Ad paragraph 29

67. I admit that the 28 October 2020 letter from the respondent's attorneys was

received and that it correctly pointed out that some of the assignment agreements had been omitted. As can be seen from annexure A to the particulars of claim, there are many Injured Investors. There were some assignment agreements which were inadvertently omitted (those referred to in the 28 October 2020 letter). The applicants will provide these to the respondent. Those omissions can obviously have no bearing on the standing issue, given the vast number of Injured Investors for whom assignment and mandate agreements were provided.

Ad paragraph 34

68. I deny that the powers of attorney signed by the agents of the Injured Investors are "*critical to a determination of this application*". I also again take issue with the respondent's conflation of what might ultimately be needed by way of proof in the Hamilton action and what suffices for standing in the present application. I reiterate that the respondent indicated unequivocally prior to the launch of this application that the applicants would be an offeree in the envisaged compromise proposal, and by implication that no issue was being taken with the assignment of the Injured Investors' claims to the applicants. In the circumstances, the applicants' standing cannot seriously be in dispute; while, in any event, for the reasons I have given, there is not a *bona fide* dispute about the efficacy of the assignments.

Ad paragraph 38 (including subparagraphs 38.1 – 38.6)

69. The contents of this paragraph provide a generally accurate paraphrasing of

the contents of the particulars of claim in the Hamilton action. A copy of the particulars of claim is annexed to the founding affidavit, and the exact formulation of the causes of action can be seen there.

Ad paragraph 40

70. I do not understand on what basis it is alleged that the applicants "*belatedly*" advanced the claims in the Hamilton action. I dispute that characterisation.

Ad paragraph 42

71. I disagree with the contention that "*near-identical allegations*" are made in the *De Bruyn* Case and the Hamilton action. I have already, for example, dealt with the fact that fraud is alleged in the Hamilton action, but was not pleaded in the draft *De Bruyn* particulars of claim. It is correct that, like *De Bruyn*, the applicants have formulated causes of action against the respondent based on negligent misrepresentation and section 218(2) of the Companies Act; but, as pointed out above, that does not mean that the two actions are to all intents and purposes the same.

Ad paragraphs 51 – 52

72. The allegations in paragraph 51 are denied. While I reiterate that the merits of the claims in the Hamilton action are not relevant to the issues in question in this application, the applicants disagree with the respondent's contentions about the applicants' prospect of success in the Hamilton action. The applicants disagree, in particular, with the respondent's submissions as to

whether the applicants can prove a claim against the respondent under South African law, as well as with the respondent's assertion that their particulars of claim in the Hamilton action (either as issued, or proposed to be amended) fall within the "*ambit of the Unterhalter Judgment*".

Ad paragraphs 54 – 55

73. Unreasonable amounts of security have been requested by the defendants in the Hamilton action. I repeat that the applicants have tendered R500 000 as security for costs per defendant during the exception proceedings (an amount which I submit is eminently reasonable), and have also indicated their willingness to revisit the amount after the exception proceedings.

74. As for the exceptions themselves: I admit that the exceptions that have been delivered and, further, that the applicants have sought to make an amendment to the particulars of claim, to which the fourth defendant objected, and that the applicants have launched an application for leave to amend.

75. None of the aspects raised in these paragraphs are remotely relevant to the issues in this application.

Ad paragraph 56.1

76. It is correct that the respondent's demand for security for costs in the amount of R83,5 million made reference to proceedings the applicant has instituted against Steinhoff N.V. and the respondent in the Netherlands, in which the applicants seek substantially the same relief as they do against the

respondent in South Africa. In those proceedings, the respondent and Steinhoff N.V. have asserted that the action should be stayed on the basis of, among other things, the proceedings instituted in South Africa; while in the Hamilton action, the demand for security, as well as the allegations in this paragraph, indicate that the respondent will contend that the South African proceedings must be stayed owing to the proceedings in the Netherlands. This supports the point I made earlier about the respondent's approach to litigation, and the fact that it is evidently minded to raise every conceivable technical point in opposition to claims, regardless of whether they are meritorious or consistent with other, or prior, actions. I point out, too, that, if the respondent is minded to file a special plea of *lis pendens*, as is confirmed in the paragraph under reply, the respondent can hardly also in good faith demand security for costs of R83,5 million.

Ad paragraph 59

77. I do not agree with the respondent's view as to what will be required of the applicants from an evidentiary perspective in order to prove the causality element of the claims which they have asserted in the Hamilton action. This is in any event irrelevant to the issues in this application.

Ad paragraph 65

78. It is so that the Injured Investors and other SIHPL MPC Claimants did not contract with the respondent. But the respondent has not only described SIHPL Contractual Claimants as claimants who contracted with the

respondent. As I have stated, the Steinhoff FAQs states that Contractual Claimants assert "*legal entitlements to rescind or cancel contracts*". That is not true of BVI and Cronje and Others, yet they are to be included in the SIHPL Contractual Claimants group. I also refer to what is stated in paragraph 43 above about how the respondent and Steinhoff N.V. have previously downplayed or minimised the differences between the claims of the contractual claimants and the market purchase claimants.

Ad paragraph 70.3

79. The applicants' understanding is that no settlement will be offered to the financial creditors group, but that their consent to the settlement proposal will be sought. I thus do not see how the financial creditors form part of the compromise proposal. Be that as it may, if they are to be taken as a class of the compromise proposal, and if some or all of those creditors are concurrent creditors too, then certainly it would also be inappropriate for those creditors to be in a separate class from other concurrent creditors.

Ad paragraph 71

80. I again specifically deny the allegation that the applicants do not have a claim against the respondent.

Ad paragraph 79

81. As indicated, I deny that the respondent's purported perceptions about the varying prospects of success of the claimants' claims is a permissible basis

for delineating classes, and distinguishing between concurrent creditors, for purposes of a section 155 compromise proposal. The respondent's views about the perceived weaker prospects of success of the claims of the SIHPL MPC Claimants, compared with those of SIHPL Contractual Claimants, are therefore not relevant to issues in question in this application. As I have also pointed out, it is moreover not denied by the respondent that there is no material basis of distinction between the SIHPL MPC Claimants and some of the SIHPL Contractual Claimants; while the respondent has moreover, in the Dutch proceedings, submitted that the differences between the contractual and market purchase claims are ultimately not material.

Ad paragraph 82

82. This paragraph is denied. I am advised that the respondent misunderstands the test applicable to determining a similarity of rights among creditors. This is a legal matter that will be dealt with in argument.

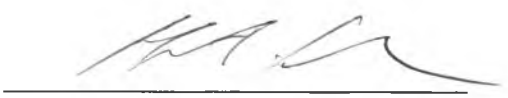
Ad paragraph 98

83. I repeat that this application is plainly not the appropriate proceedings in which to assess and determine if the claims asserted by the applicants in the Hamilton action are sustainable or will be proven. It would neither be appropriate for this Court to decide in this application "*whether Hamilton's alleged claims are sustainable as a matter of law*", nor necessary to do so. Indeed, I again stress that the merits, or demerits, of the various claims cannot be assessed by the respondent or the court at this point, and that issue is also

irrelevant to the question of whether the respondent can adopt the classifications indicated in the proposed compromise.

84. The respondent contends that it may define or delineate classes in a section 155 proposal based on the perceived strength or weakness of claimants' claims. That is why the respondent has at some length set out its views on the claims of MPC Claimants, in an attempt to persuade this Court that (should it agree that class delineation can be done on this basis) there is merit to distinguishing between SIHPL Contractual Claimants and SIHPL MPC Claimants in the envisaged section 155 compromise proposal. But I am advised that the respondent is wrong in its assertions that this is a permissible basis to delineate classes under section 155 of the Companies Act. Accordingly, the respondent's professed views on the merits of the applicants' claims (and those of other MPC Claimants) are entirely irrelevant to the issues in this application.

WHEREFORE the applicants persist with seeking the relief set out in the notice of motion.



THE DEPONENT
M HYDE

I CERTIFY THAT THIS AFFIDAVIT WAS SIGNED AND SWORN TO BEFORE ME IN MELBOURNE ON THIS THE 10TH DAY OF DECEMBER 2020 BY THE DEPONENT, WHO ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH, CONSIDERS THE PRESCRIBED OATH TO BE BINDING ON HIS CONSCIENCE AND UTTERED THE FOLLOWING WORDS: "I SWEAR THAT THE CONTENTS OF THIS AFFIDAVIT ARE BOTH TRUE AND CORRECT, SO HELP ME GOD."

Full Names: KEITH EDMOND HOBAN
Notary Public
Melbourne, Victoria, Australia
My appointment is not limited by time

Capacity: _____

Address: [redacted]

RA 1

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23 November 2020

Dear Jac

YOUR CLIENTS: HAMILTON B.V. & HAMILTON 2 B.V.
OUR CLIENT: STEINHOFF INTERNATIONAL HOLDINGS PROPRIETARY LIMITED

1 We refer to your letter dated 20 November 2020.

2 We take note of the relief sought in your clients' application for declaratory relief. It is not our intention to debate, in correspondence, the merits of your clients' application, and our client's rights are reserved.

3 However, it is readily apparent that your clients' application is misconceived, and ignores the fact that your clients have alternative means to express any dissatisfaction that they might have with *inter alia* the classes that may be proposed in a proposal in terms of section 155 of the Companies Act 71 of 2008, as amended (**"the Companies Act"**). In this regard, your clients are free to:-

3.1 vote against the section 155 proposal; and / or

3.2 oppose our client's stated intention to approach the Court for its sanction and approval of the s155 proposal, in terms of section 155(7) of the Companies Act.

4 There are accordingly statutory mechanisms in place, which provide your clients with an opportunity of asserting their position. Instead, your clients have sought to unpick the proposed terms of a section 155 proposal, which has not yet been launched.

5 Your clients' stance, that the section 155 process should not even be launched until such time as your clients' application is finally determined, is ill-conceived. Your clients cannot, in disregard of the rights of the other claimants who will be part of the section 155 process, delay the institution of what constitutes a genuine attempt by our client to reach a global settlement. Your clients seek to act only in their own self-interest, and to the detriment of all other claimants.

6 In the circumstances:-

6.1 the undertaking sought by your clients will not be provided; and

6.2 in the event that your clients seek to bring proceedings to *inter alia* interdict the launch of the section 155 proposal, such proceedings will be opposed, *inter alia* as constituting an abuse of process.

7 Whilst our client believes that the prosecution of your clients' application and the launch of the section 155 process can be conducted concurrently, our client recognises that it is in the best interests of all parties that your clients' application be determined as soon as possible. Accordingly, our client proposes in regard to your clients' application that:-

7.1 it delivers its answering papers by 18h00 on Monday 30 November 2020;

7.2 your clients deliver their replying papers by 18h00 on Friday 4 December 2020; and

7.3 the parties forthwith approach the case management Judge, Mr Justice Saldanha, to immediately inform him of this application, and to obtain a hearing date during the course of the week commencing 7 December 2020.

8 We await your urgent response.

Yours faithfully
WERKSMANS ATTORNEYS

Per: Brendan Olivier

RA 2

WERKSMANS
ATTORNEYS

DELIVERED BY EMAIL

Adams & Adams
Pretoria
Email: jac.marais@adams.africa
Email: andrew.molver@adams.africa

CC: Brendan Olivier : bolivier@werksmans.com
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YOUR REFERENCE: J Marais and A Molver/ml/LT4506
OUR REFERENCE: Mr D Hertz/bo/STEI3570.72/#6349349v1
DIRECT PHONE: +27 11 535 8283
DIRECT FAX: +27 11 535 8683
EMAIL ADDRESS: dhertz@werksmans.com

7 August 2019 **WITHOUT PREJUDICE**

Dear Sirs

STEINHOFF INTERNATIONAL HOLDINGS PROPRIETARY LIMITED ("our client") // HAMILTON B.V. AND HAMILTON 2 B.V. ("your clients")

1 We refer to your letter ("your letter") dated 2 August 2019 and to our reply thereof of even date.

2 We have been instructed by our client to provide you with a further undertaking on the terms recorded below. Prior to doing so, it is necessary to record the incontrovertible fact that your clients' threatened winding-up application will, if launched, prejudice all our client's creditors (whatever the basis of their alleged claims), and will imperil the Group wide restructuring which is currently in process, causing irreparable harm and loss to our client, for which your clients will be responsible.

3 Our client has instructed us to undertake, on its behalf, as we hereby do, that it will not make any payments, in cash or otherwise, to the "Original Bondholders" or "Creditors" (as those terms are defined in the draft "SIHPL contingent payment undertaking", a copy of which, we understand, is attached to your clients' founding affidavit as annexure "HAM7") irrespective of whether the obligation to make payment arises pursuant to the contingent payment undertaking, or from the guarantees referred to in the contingent payment undertaking, without first providing your clients with 5 (five) business days' notice of its intention so to do.

4 The undertaking in paragraph 3 above is provided:-

4.1 without conceding any obligation in this regard; and

4.2 on the express condition that your clients reciprocally agree to provide our client with five (5) business days' notice of its intention to launch any proceedings against our client, save for the proceedings which follow receipt of the five (5) business days' notice referenced in paragraph 3 above, in respect of which no such notice is required to be given.

5 The failure to address the remaining assertions in your letter at this stage should not be construed as a waiver or as an admission thereof, and our client's rights remain fully reserved.

Yours faithfully
Werksmans Attorneys
THIS LETTER HAS BEEN ELECTRONICALLY TRANSMITTED WITH NO SIGNATURE.

Claims Funding Europe

BarentsKrans

FOR IMMEDIATE RELEASE

28 September 2018

South African Institutions back Steinhoff class action run by leading Dutch law firm

Many of the largest institutions in South Africa have decided to pursue claims on behalf of their clients and funds that suffered losses as a result of the collapse in the share price of global retailer Steinhoff[1] in December 2017.

The institutions include Abax Investments, Allan Gray, Bateleur Capital, Coronation, Denker, Electus, Eskom, Investec Asset Management, Investec Wealth & Investment, Momentum, Old Mutual, Sanlam, Tantalum Capital, Truffle and Visio Capital.

These institutions, whose clients' and funds' holdings collectively represented approximately 20% of the total shareholding in Steinhoff at the time the company's share price collapsed, are engaging their respective clients. They are informing their clients that they have concluded that the 'class action' case being run in the Netherlands by the Dutch law firm BarentsKrans, is their preferred legal route. The institutions are proposing to their clients that they participate in the BarentsKrans case, which they have concluded is aimed at achieving an outcome that is in their clients' best interests.

The BarentsKrans case will be heard by the District Court of Amsterdam. It covers shareholders that acquired shares in Steinhoff or its predecessor entity from 26 June 2013 to 6 December 2017.

Martijn van Maanen, a partner at BarentsKrans, said:

> *"The decision by many of South Africa's largest institutional investors to participate in the BarentsKrans Steinhoff litigation, follows a long evaluation process by many of them.*
>
> *We are pleased that so many of South Africa's largest asset managers have chosen the BarentsKrans Steinhoff shareholder case as the most appropriate option for their clients".*

The BarentsKrans Steinhoff shareholder case is being fully funded by Claims Funding Europe, a litigation funding company based in Dublin, Ireland.

Martin Hyde, who is the director of Claims Funding Europe, said:

> *"Institutions that participate in the BarentsKrans Steinhoff shareholder case will have the benefit of the combined experience of BarentsKrans and CFE at successfully running and resolving large class actions".*

[1] Steinhoff International Holdings N.V. (Steinhoff)

Registration now open to other Steinhoff investors

Shareholders who bought shares in Steinhoff or its predecessor entity, Steinhoff International Holdings Limited (SIHL), on either the Johannesburg Stock Exchange or the Frankfurt Stock Exchange, between 26 June 2013 and 6 December 2017 (both dates inclusive) and who held some shares on 5 or 6 December 2017, are able to join the BarentsKrans claim.

Shareholders who bought Steinhoff shares in this period and are not clients of South African institutions that have elected to participate in the BarentsKrans case, can register at steinhoffclassaction.com.

BarentsKrans[2] is one of Europe's leading mass litigation law firms.

Claims Funding Europe[3] is a litigation funding company which is co-owned by Maurice Blackburn Lawyers[4], the most successful plaintiff class action law firm in Australia.

ENDS

Claims Funding Europe and BarentsKrans are available for further comment:

Martin Hyde, Director, Claims Funding Europe
E: mhyde@claimsfundingeurope.eu | T: +353 1775 9506 or (m) +353 87 052 3980

Martijn van Maanen, Partner, BarentsKrans
E: martijn.vanmaanen@barentskrans.nl | T: +31 70 3760 684

Jan-Willem de Jong, Senior Associate, BarentsKrans
E: janwillem.dejong@barentskrans.nl | T: +31 70 3760 698

[2] BarentsKrans: https://www.barentskrans.nl/en/expertises/mass-litigation/
[3] Claims Funding Europe: http://claimsfundingeurope.eu/
[4] Maurice Blackburn Lawyers: https://www.mauriceblackburn.com.au/general-law/class-actions/

CONFIDENTIAL

POWER OF ATTORNEY

Introduction

1. This document, when signed by the Investor shall constitute a power of attorney granted by :

1.1. the "**Investor**", being

Cape Municipal Pension Fund

[insert full name of the Investor]

with registration number: 128909

[insert the registration number of the Investor]

of 18th Floor, Towers South, The Towers, 2 Heerengracht Street, Cape Town, 8001

[insert physical address of the Investor]

to and in favour of

1.2 the Agent, being **Abax Investments Proprietary Limited (Company Registration Number: 2000/008606/07).**

2. The Investor notes the following:

2.1. The Investor has appointed the Agent as its investment manager to manage one or more portfolios of assets for and on behalf of the Investor (the "**Investment Mandate(s)**").

2.2. Pursuant to the Investment Mandate(s), the Investor held shares in Steinhoff International Holdings N.V. ("**Steinhoff**") and/or Steinhoff International Holdings Limited ("**SIHL**") as managed by the Agent for and on behalf of the Investor ("**Shares**") in the period between 7 September 2010 and 1 February 2018.

2.3. The Investor may have claims against certain parties including but not limited to Steinhoff, SIHL, certain of its directors and its auditors, and other parties involved in the affairs of Steinhoff and SIHL (the "**Involved Parties**") arising out of and/or in relation to the acquisition and/or holding of Shares from time to time in one or more portfolios managed by the Agent on behalf of the Investor. It is believed that in the context of the irregularities referred to in announcements by Steinhoff in December 2017 and the beginning of January 2018 (and subsequent information that has or may become available with regard to these or related irregularities), the Investor may hold the Involved Parties liable for any economic and financial loss or damage the Investor has incurred that is related to and/or the result of - inter alia - (i) fraud, (ii) misrepresentations, (iii) the (untimely) disclosure of certain facts, circumstances and information and/or (iv) any (other) improper performance of duties or infringement of obligations (hereinafter referred to as the "**Losses**").

2.4. The Investor has rights, in terms of a range of potential causes of action, to recover compensation for the Losses arising out of and/or in relation to the acquisition and/or holding of the Shares from time to time against all or any of the Involved Parties (the "**Rights**").

2.5. In addition to the Rights, the Investor enjoys all rights accessory to or otherwise necessary for the effective resolution and enforcement of the Rights, including (but not limited to) the right to bring various legal proceedings for damages in an appropriate jurisdiction against all or any of the Involved Parties, the right to settle or compromise the Rights in negotiation with all or any of the Involved Parties and the right to be paid damages, settlement monies, interest, costs and all other forms of compensation recoverable in respect of the Rights (the "**Accessory Rights**").

2.6. The Investor wishes to assign and transfer the Rights and Accessory Rights to Hamilton 2 B.V. (the "**Assignment**") in order for Hamilton 2 B.V. ("**Hamilton**") to resolve and enforce the Rights and Accessory Rights through an action for damages and/or a settlement. The Investor further wishes to irrevocably grant Hamilton, at the discretion of Hamilton, a mandate to act on its behalf in relation to the Rights and Accessory Rights should the Assignment be invalid for any reason (the "**Mandate**").

2.7. The Investor wishes to grant the Agent all necessary authorities to conclude an agreement on the Investor's behalf with Hamilton titled "Assignment of Rights and Mandate Agreement" (to regulate the Assignment and/or the Mandate regarding the Rights and Accessory Rights related to Shares managed pursuant to the Investment Mandate(s) (the "**Assignment Agreement**") and to act on behalf of the Investor in all matters related thereto, on the basis that:

2.7.1. Hamilton will, subject to the terms of the Assignment Agreement, bear all the costs and risks of resolving and enforcing the Rights and Accessory Rights assigned to it; and

2.7.2. the purchase price for the Rights and Accessory Rights payable to the Investor will be a share of any payment that may be made by the Involved Parties to Hamilton pursuant to a settlement or judgment or outcome of alternative resolution in relation to the Rights and Accessory Rights.

Power of Attorney - grant of powers and authorities

3. The Investor hereby appoints the Agent as its lawful attorney and agent, to act for it, in its name, place and stead, and on its behalf in (i) negotiating and settling, at the Agent's discretion, the terms of the Assignment Agreement (including but not limited to the fees and compensation payable under the Assignment), (ii) concluding the Assignment Agreement with Hamilton (with the consequence that once the Agent has signed the Assignment Agreement on behalf of the Investor, the Investor will become party to the Assignment Agreement and will have the rights, entitlements, duties and obligations of an "Investor" as defined in the Assignment Agreement) (iii) providing all required instructions, authorisations, documentation and information to Hamilton as required under the Assignment Agreement and liaising with Hamilton in respect of all matters related to the Assignment,

the Mandate and/or the Assignment Agreement. Without limiting the generality of the aforegoing, the Investor hereby authorises the Agent to:

3.1. grant waivers and consents in respect of the Assignment Agreement, agree to amendments of the Assignment Agreement (including but not limited to the fees and compensation payable under the Assignment) and issue and receive notices in respect of the Assignment Agreement, in each case as the Agent deems fit in its discretion;

3.2. provide to Hamilton or its agents any information and documentation relating to the Investor required to give effect to the terms and/or the intent of the Assignment Agreement or this power of attorney and to obtain such information on behalf of the Investor from any financial services provider, authorised user (stockbroker), nominee company, custodian or other person (and, in doing so, to grant any release that may be required by any of them);

3.3. exercise and enforce, whether in a court or other appropriate forum, the rights and entitlements of the Investor against Hamilton;

3.4. represent the Investor, and/or in its sole discretion appoint attorneys or agents to represent the Investor, in applying for and obtaining any regulatory or other approval that may be required under the applicable law of any jurisdiction to ensure the legality, validity, enforceability or admissibility in evidence of the Assignment Agreement and this power of attorney and the lawful performance of the Investor, the Agent or Hamilton of any of their rights, entitlement, duties and/or obligations under the Assignment Agreement and this power of attorney (and, in doing so, to grant any release that may be required);

3.5. receive, on behalf of the Investor, all amounts payable to the Investor under the Assignment Agreement, and to distribute to the Investor the amount so received or to appoint an appropriate trustee or service provider to do so;

3.6. draw up and sign the necessary deeds and documents if the assignment provided for in the Assignment Agreement for any reason turns out to be not or no longer legally valid or is unenforceable and, moreover, in such case to perform all acts as in the sole opinion of the Agent are necessary or useful to assign the Rights and Accessory Rights of the Investor to Hamilton; and

3.7. on behalf of the Investor, do any other act or thing or give any instruction that is necessary or desirable or which the Agent deems fit in order to give effect to the terms and/or the intent of the Assignment Agreement and this power of attorney, including but not limited to the opting-out of any class action or comparable collective action in relation to any and all of the Involved Parties and/or related matters.

4. The Agent may sub-delegate any of its powers and authorities under this power of attorney to any person or persons that the Agent deems fit in its sole discretion.

5. The Investor does not undertake to pay any fees to the Agent on account of the Agent acting as agent under this power of attorney or to reimburse the Agent for any costs so incurred. By exercising any of the powers and authorities granted in this power of attorney the Agent shall be deemed to waive any right to remuneration or reimbursement the Agent would be entitled to on account of its

position as agent under this power of attorney but for the provisions of this clause 5.

6. If the Investor is a person or entity other than a natural person, the Investor hereby warrants that:

6.1. the Investor has the capacity, power and authority to enter into this power of attorney and the Investor has full power to validly assign the Rights and the Accessory Rights to Hamilton under the terms of the Assignment Agreement;

6.2. this power of attorney and, once duly signed, the Assignment Agreement shall each be legal, valid and enforceable in accordance with their terms;

6.3. there is no security cession, charge, lien, attachment or other encumbrance on the Rights or the Accessory Rights as at the date hereof and the Investor shall not at any time after the date hereof encumber the Rights or Accessory Rights or any money or property which may comprise the Investor's share of any compensation received under the terms of the Assignment Agreement;

6.4. the Investor shall not communicate with the Involved Parties in relation to the Rights and Accessory Rights, any compensation due in respect of the Losses, the proceedings instituted by Hamilton or any alternative resolution; and

6.5. the Investor shall not take any steps which may adversely affect the value or recoverability of the Rights and Accessory Rights, provided that nothing in this power of attorney shall prevent the Investor from trading in or disposing of the Shares or any part thereof.

7. The Investor hereby exempts the Agent, its sub-delegates and agents, and its or their officers or employees from liability for any damages, costs or losses to any person (including without limitation to the Investor), any diminution in value, or any liability whatsoever arising as a result of its acting as Agent under this power of attorney or taking or not taking any action under or in connection with this power of attorney, unless such damages, cost, losses, diminution in value or liability is directly caused by the gross negligence or wilful misconduct of such person. This clause 7 shall constitute a stipulation in favour of the Agent and the persons other than the Agent mentioned above, the benefit of which will have been deemed to be accepted by the Agent if the Agent exercises any of the powers and authorities granted in this power of attorney and the benefit of which may be accepted by any of the persons other than the Agent mentioned above at any time and in any manner. This clause 7 shall survive the termination of this power of attorney irrespective of the reason for such termination.

8. The Investor consents to the Agent obtaining, keeping and otherwise processing the personal information of the Investor and sending such personal information to any entity in South Africa and any entity in any jurisdiction outside the borders of South Africa, regardless of whether such jurisdiction has data protection laws similar to those of South Africa, in order to give effect to the terms and/or the intent of the Assignment Agreement and this power of attorney.

9. The Investor consents to the Agent acting as an agent of other persons who may have claims against the Involved Parties (including, without limitation, persons who are affiliates of the Agent or in which the Agent has a beneficial interest).

10. The Investor acknowledges that:

10.1. the Agent does not represent Hamilton;

10.2. should the Agent act pursuant to this power of attorney then it must act within the terms of this power of attorney and shall be entitled to rely on the terms thereof, but the Agent does not give any undertakings in this document; and

10.3. it understands the terms of this power of attorney and the legal consequences of granting this power of attorney.

11. The granting of any specific authority or power in this power of attorney shall not in any way be construed to limit any general power or authority.

12. This power of attorney will in all respects be governed and construed in accordance with the laws of South Africa.

13. All of the terms governing this power of attorney have been recorded in this document and no other agreement concluded between the Investor and the Agent shall in any way affect the interpretation of or amend or cause the termination of this power of attorney, save if such agreement expressly refers to this power of attorney.

14. No amendment to or termination of this power of attorney by the Investor shall be effective unless recorded in writing by the Investor and unless the Agent has, following notification thereof to the Agent, acknowledged receipt.

15. If a provision or provisions of this power of attorney is or are held to be invalid or unenforceable, the remaining provisions shall not be affected and each remaining provision shall be valid and enforceable to the full extent permitted by the law.

16. If more than one signatory signs this power of attorney on behalf of the Investor, then this power of attorney may be executed in counterparts.

17. Without limiting any other warranties contained herein, the Investor warrants that the signatory/ies hereto is/are duly authorised to execute this power of attorney on behalf of the Investor.

For the Investor

Signature:

who warrants that he / she is duly authorised thereto

Name: LAYLA SAVAHL

Date: 30.10.2018

Place: CAPE TOWN

Signature:

who warrants that he / she is duly authorised thereto

Name: KEVIN GALLAGHER

Date: 30.10.2018

Place: CAPE TOWN

Cape Municipal Pension Fund (insert full name),

Registration Number: 1289092 (insert registration number) ("the Investor")

WRITTEN RESOLUTION ADOPTED BY THE GOVERNING BODY OF THE INVESTOR

EXTRACT FROM THE MINUTES OF A MEETING OF THE GOVERNING BODY OF THE INVESTOR HELD AT Cape Town ON THE 26th DAY OF October 2018

BACKGROUND:

1. The Investor held or holds shares in Steinhoff International Holdings N.V (**"Steinhoff"**) and/or Steinhoff International Holdings Limited (**"SIHL"**) in one or more portfolios (**"the Shares"**) managed or being managed by the following investment manager(s):

   Abax Investments Proprietary Limited (Company Registration Number: 2000/008606/06)

   _____

   _____

   _____ (insert full name) (**"the Agent(s)"**)

   and wishes to grant the/each Agent the requisite authority, by way of a power of attorney (the applicable power of attorney to be given to each Agent separately, **"the Power of Attorney"**), to do all things on behalf of the Investor as is necessary and desirable for the Investor to participate in a group/class action that will be instituted by BarentsKrans attorneys in the Netherlands to seek to claim damages for losses suffered in respect of the Shares held in portfolio(s) and managed by each Agent(s) and for the Agent to act in all respects on behalf of the Investor in relation to such group/class action, including without limitation in respect of the assignment by the Investor of the Investor's claims for compensation as aforesaid to a special purpose vehicle known as Hamilton 2 B.V. (a company incorporated under Dutch law) (**"Hamilton"**) that has been established for purposes of instituting the group/class action (**"the Assignment"**).

RECORDAL:

2. Reference is made to the following documents:

2.1. a letter ("**Letter**") from the Agent(s) to the Investor setting out the proposal to seek compensation for damages suffered on account of the Investor's shareholdings in Steinhoff and/or SIHL; and

2.2. the unsigned document(s) titled "Power of Attorney" to be signed by the Investor in order to grant to the/ each Agent the power and authority to sign and enter into a written agreement setting out the terms of the Assignment and various other matters ("**Assignment Agreement**") as agent on behalf of the Investor and, in addition, such other powers and authorities as are set out in the Power of Attorney.

3. The Letter, and the Power of Attorney are available to the members of the Governing Body[1] of the Investor.

4. Each member of the Governing Body signing this document or voting for it at a meeting of the Governing Body consents to the proposed resolution. The proposed resolution will have been duly approved if the majority of the members of the Governing Body (or, if the Investor's Founding Document(s)[2] so require, all of the members of the Governing Body) of the Investor have signed this document. This document may be signed in counterparts. Members of the Governing Body who do not consent to the adoption of the proposed resolution must not sign this document.

5. By signing this document:

5.1. the members of the Governing Body signing confirm:

5.1.1. that there is no legal impediment to them or the Governing Body of the Investor making this resolution;

5.1.2. that no additional authorities or consents are required under the terms of the Investor's Founding Document(s) or any other agreement binding the Investor or its assets in order to permit the due approval of the Investor's entry into the Power of Attorney or the Agent's entry on the Investor's behalf into the Assignment Agreement, or the execution by the Agent of the Assignment Agreement;

[1] The "**Governing Body**" of the investor is defined in Schedule A to the resolution.
[2] The Investor's "**Founding Document(s)**" is defined in Schedule A to the resolution.

5.1.3. that there is no charge, lien, attachment or other encumbrance binding on the Investor or its assets that would prevent the transactions contemplated in the Letter and the Power of Attorney; and

5.1.4. that the Investor was the beneficial owner of shares in Steinhoff and/or SIHL acquired at some point in the period 7 September 2010 to 1 February 2018.

RESOLUTION:

6. Resolved that:

6.1. the transactions contemplated by the Letter and the terms of the Power of Attorney(s) are hereby approved:

6.2. any **2** (*insert number*) of the following persons:

6.3.

Layla Savahl	**Principal Officer**
(Full names)	(Capacity)
Brian Richard William Watkyns	**Chairperson of Board of Fund**
(Full names)	(Capacity)
Millicent Patricia Collins	**Deputy Chairperson of Board of Fund**
(Full names)	(Capacity)
Clive Richard Justus	**Chairperson of the Fund's Investment Sub-Committee**
(Full names)	(Capacity)
Kevin Allister Gallagher	**Chairperson of the Fund's Rules, Benefits, Administration and Staff Sub-Committee**
(Full names)	(Capacity)

are hereby authorised and empowered to, on behalf of the Investor:

6.3.1. settle and sign the Power of Attorney(s) (and, if an Agent so requests, any document in respect of the Assignment);

6.3.2. settle and sign any amendments to the Power of Attorney(s); and

6.3.3. settle the terms and conditions of and sign all such other documents, give any instructions and do all such things as may be necessary or desirable to give effect to the Assignment;

and insofar as any abovenamed persons may have signed any document on behalf of the Investor or performed any of the actions contemplated by this resolution prior to its approval, such signature and/or acts are hereby ratified and approved.

(A) IF THE RESOLUTION IS MADE AS A WRITTEN RESOLUTION:

Consents to the adoption of the proposed resolution and the confirmations set out in paragraph 5:

MEMBERS OF GOVERNING BODY	SIGNATURE	DATE

(B) IF THE RESOLUTION IS MADE AT A MEETING OF THE GOVERNING BODY:

Certified correct

I, the undersigned, being the Trustee / Principal Officer / Director / Partner (delete whichever is not applicable).....of the Investor hereby certify that notice of the above resolution was duly given to each member of the Governing Body of the Investor and that the above resolution has been duly approved and adopted by the Governing Body of the Investor.

K Gallagher (KEVIN GALLAGHER)

Name of signatory: LAYLA SAVAHL

Date: 30 10 2018

SCHEDULE A

The Governing Body of the Investor is:

1. In the case of a pension fund, pension preservation fund or provident fund, the trustees of such fund.
2. In the case of a company (for profit or non-profit), the board of directors;
3. In the case of a trust (for profit or non-profit), the trustees for the time being;
4. In the case of a partnership, the partners of the partnership[3];
5. In the case of a collective investment scheme, the manager acting in respect of the relevant portfolio[4];
6. In the case of a medical scheme, the trustees of the medical scheme;
7. In the case of a public university, the council of the university or a duly authorised committee of the council of the university;
8. In the case of a foundation that is not a trust or a non-profit company, the persons or governing bodies so authorised in the constitution of the foundation;
9. In the case of a charitable institution that is a juristic person referred to in (2), (3) or (8) above, the relevant governing bodies described in such paragraphs (whichever is applicable);

The Investor's founding document(s) is defined as:

1. In the case of a pension fund pension preservation fund or provident fund, the rules of the said fund.
2. In the case of a company, the memorandum of incorporation of the company;
3. In the case of a trust, the trust deed of the trust[5];
4. In the case of a partnership, the partnership agreement;
5. In the case of a collective management scheme, the deed governing the collective management scheme and the relevant portfolios;
6. In the case of a medical scheme, the rules of the medical scheme;
7. In the case of a public university, the institutional statute of the university;
8. In the case of a foundation that is not a trust or a non-profit company, the constitution of the foundation;
9. In the case of a charitable institution, either of the documents referred to in (2), (3) or (8) above, depending on the juristic nature of the charitable institution.

---

[3] To the extent that any partner of the Partnership is a juristic entity, a separate resolution, substantially on the terms of this resolution must be passed by the particular juristic partner's governing body. However, to the extent that the Partnership is an *en commandite* partnership, only the general partner (rather than all partners of the partnership) need pass a resolution, substantially on the terms of this resolution.

[4] If the Investor is a Collective Investment Scheme, in addition to a resolution being passed by the manager, a separate resolution, substantially on the terms of this resolution, should also be obtained from the Trustees/Custodian of the Collective Investment Scheme unless the founding documentation of the Collective Investment Scheme provides otherwise.

[5] In the event the letter of authority issued by the Master of the High Court listing the current trustees has been updated and has not yet been provided to the Agent, please provide the latest version to the Agent.

ABAX investments

RESOLUTION OF DIRECTORS
Passed at Newlands on 15th April 2015

GENERAL SIGNING AUTHORITY

It was resolved that:

1. The executive directors and officers of the Company, as set out in Appendix A to this resolution, are hereby granted the powers to enter into transactions and / or to perform the acts on behalf of the company as set out hereunder:

   1.1 All agreements, mandates, deeds, contracts, consents, documents, writings and declarations as deemed necessary or expedient for the transaction of business of the company, and specifically:

      a) cheques or any form of instruction for payment drawn on any accounts of the Company, and

      b) the payment of withdrawal instructions to any bank on any account requires two (2) authorised signatories.

      c) the signing of all agreements, mandates, deeds, contracts, consents which have a financial implication for the Company requires two Category A signatures.

   1.2 The following rules shall apply in the execution of the requirement that two signatories must sign:

      a) Category A signatories may sign with each other or with any other category;

      b) No two signatories from category B may sign together;

   1.3 The following exemptions apply to the signing authorities given above for Category A only;

      a) One signatory may sign letters of a general nature that do not commit the Company to a financial impact;

b) One signatory may sign a deal sheet if such a signatory is an authorised dealer in the normal course of business;

1.4 At all times, **without exception,** two signatories for cheques or any form of instruction for payment drawn on any of the accounts of the Company and any mandates or agreements entered into by the Company which have financial implications for the company are require. The directors are, therefore, not authorised to relax this requirement.

Signed at NEWLANDS on 15 APRIL 2015:

Anthony Sedgwick – Director

Marius Van Rooyen – Director

Rashaad Tayob – Director

Estelle Cloete – Director

Edel Little - Director

ABAX investments

APPENDIX A

General Signing Authority – Abax Investments (Pty) Ltd.

Category A

Anthony Sedgwick

Marius Van Rooyen

Omri Thomas

Steve Minnaar

Rashaad Tayob

Edel Little

Category B

Tracey Pace

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ABAX investments

RA 4(c)

CAPE MUNICIPAL PENSION FUND

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Fund Registration No: 1289092

RECORD OF AMENDED RESOLUTION OF THE BOARD OF TRUSTEES OF THE CAPE MUNICIPAL PENSION FUND (P.F. 909) ("the Fund")

The Trustees confirm that instructions to the Fund's investment managers may be given on the signature of any TWO of the following persons:

1. The Principal Officer
2. The Chairperson of the Board of Fund
3. The Deputy Chairperson of the Board of Fund
4. The Chairperson of the Fund's Investment, Audit and Finance Sub-Committee
5. The Chairperson of the Fund's Rules, Benefits, Administration and Staff Sub-Committee

This supplements and does not replace any mandate in terms of which authorized signatories of Alexander Forbes Financial Services (Pty) Ltd (the Fund's duly appointed administrator) may invest and disinvest funds on behalf of the Fund.

Specimen signatures are as follows:

Ms L Savahl (Principal Officer)

Alderman BRW Watkyns (Chairperson, Board of Trustees)

Ms MP Collins (Deputy Chairperson, Board of Trustees)

Alderman CR Justus (Chairperson of the Fund's Investment Sub-Committee)

Mr KA Gallagher (Chairperson of the Fund's Rules, Benefits, Administration and Staff Sub-Committee)

Resolution signed at Cape Town on 26 May 2017.

Ms L Savahl (Principal Officer)

Ald BRW Watkyns (Chairperson, Board of Trustees)

Ms MP Collins (Deputy Chairperson, Board of Trustees)

RA 4(d)

ABAX
investments

10 June 2019

To whom it may concern,

Re: Signing Authority for Assignment of Rights and Mandate Agreements

We confirm that Anthony Sedgwick, a director at Abax Investments (Pty) Ltd, has signing authority for Assignment of Rights and Mandate Agreements on behalf of Abax Investments (Pty) Ltd.

Yours faithfully,

Rashaad Tayob
Director

Marius Van Rooyen
Director

Abax Investments (Pty) Ltd.
Registration number: 2000/008606/07 · Licensed FSP No. 856
2nd Floor · Colinton House · 1 Oakdale Road · Newlands 7700 · PO Box 23851 · Claremont · 7735 · South Africa
Tel: (021) 670-8960 · Email: anthony@abax.co.za
Directors: Marius van Rooyen · Anthony Sedgwick · Edel Little · Rashaad Tayob · Estelle Cloete
Alternate Directors: Omri Thomas · Steve Minnaar

ASSIGNMENT OF RIGHTS AND MANDATE AGREEMENT

BETWEEN

(1) Clients of Abax Investments Proprietary Limited listed in Annexure 1 of this agreement, all having their registered office, physical or residential address listed in Annexure 1 of this agreement, in this matter legally represented by Abax Investments Proprietary Limited, having its offices at 2nd floor, Colinton House, The Oval, 1 Oakdale Road, Newlands, Cape Town, South Africa, 7700 (hereinafter referred to as the "**Agent**"), with each single client of the Agent listed in Annexure 1 of this agreement hereinafter referred to as the "**Investor**",

and

(2) **HAMILTON 2 B.V.**, incorporated under Dutch law, having its registered office at 28 Fitzwilliam Place, Dublin 2, Hamilton House, D02 P283, Ireland, in this matter legally represented by Martin Hyde, hereinafter "**Hamilton**".

The parties will collectively be referred to as the "**Parties**" and each of them as a "**Party**". This Assignment of Rights and Mandate Agreement will be referred to as the **"Agreement**".

AS

WHEREAS

(A) Steinhoff International Holdings N.V. ("**Steinhoff**") is the top holding company of the Steinhoff group, which is a global retailer. Steinhoff is incorporated under Dutch law and is listed on the Frankfurt Stock Exchange (the "**FSE**") (primary listing) and the Johannesburg Stock Exchange (the "**JSE**") (secondary listing) Steinhoff International Holdings Limited ("**SIHL**") was the former holding company of the Steinhoff group and was listed on the JSE before Steinhoff was listed on the FSE and the JSE in December 2015. Shares in Steinhoff or its predecessor SIHL listed on either the JSE or the FSE and that were or are held in one or more portfolios managed by the Agent on behalf of the Investor hereafter will be referred to as the "**Shares**". Steinhoff, SIHL and all (in)direct subsidiaries of Steinhoff and SIHL will be referred to as the "**Steinhoff Group**".

(B) In December 2017 and the beginning of January 2018 Steinhoff published various announcements (hereafter collectively referred to as the "**Announcements**"):

- In an announcement dated 5 December 2017, Steinhoff informed the capital markets that its CEO had tendered his resignation with immediate effect and that information concerning '*accounting irregularities requiring further investigation*' had come to the attention of the supervisory board. This announcement also informed the market that '*the company will determine whether any prior years' financial statements will need to be restated*'.
- In an announcement dated 6 December 2017, Steinhoff informed the market that the Supervisory Board had given further consideration '*to the validity and recoverability of certain non-South African assets of the Company which amount to circa €6bn*'
- In an announcement dated 13 December 2017, Steinhoff informed the capital markets that '*issues concerning the validity and recoverability of certain Steinhoff Europe balance sheet assets*' are also relevant to the 2016 consolidated financial statements. Steinhoff further announced that its 2016 consolidated financial statements '*will need to be restated and can no longer be relied upon*'.
- In a presentation dated 19 December 2017, Steinhoff informed the capital markets that it was not possible to provide further detail regarding '*the magnitude of accounting irregularities that are under scrutiny*' or '*whether any additional years financial statements may require restatement*'.
- In an announcement dated 2 January 2018, Steinhoff confirmed that the 2015 and 2016 accounts of SIHL will also need to be restated and that "*the restatement of the financial statements of [SIHL] for years prior to 2015 is likely to be required*".

(C) Following Steinhoff's announcements dated 5 and 6 December 2017 the price of the Shares plummeted.

(D) The financial statements of SIHL were audited by Deloitte & Touche, Chartered Accountants (SA). The financial statements of Steinhoff were audited by Deloitte Accountants B.V., Deloitte & Touche, Chartered Accountants (SA), Deloitte Accountants B.V. and other related companies involved in providing these services to SIHL and/or Steinhoff are together referred to as "**Deloitte**". Deloitte has also been involved in preparing the prospectus for the admission of trading of the Shares on the FSE.

(E) Executive board members of SIHL and/or Steinhoff in the period 7 September 2010 – 1 February 2018 included Mr. M.J. Jooste, Mr. A.B. la Grange, Mr. D.M. van der Merwe, Mr. H.J.K. Ferreira, Mr. S.J. Grobler, Mr. F.J. Nel and Mr. T.L.J. Guibert. The executive board members of SIHL and Steinhoff in the period 7 September 2010 – 1 February 2018 hereafter are collectively referred to as the "**Directors**".

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(F) Steinhoff, SIHL, Steinhoff Group, Deloitte and the Directors will hereafter collectively be referred to as the "**Involved Parties**"

(G) The Investor has acquired and/or held Shares in the period between 7 September 2010 and 1 February 2018 (the "**Relevant Period**").

(H) The Investor may have claims against the Involved Parties arising out of and/or in relation to the acquisition and/or holding of Shares from time to time in one or more portfolios managed by the Agent on behalf of the Investor. It is believed that in the context of the irregularities referred to in the Announcements (and subsequent information that has or may become available with regard to these or related irregularities), the Investor may hold the Involved Parties liable for any economic and financial loss or damage the Investor has incurred that is related to and/or the result of - inter alia - (i) fraud, (ii) misrepresentations, (iii) the (untimely) disclosure of the facts, circumstances and information and/or (iv) any (other) improper performance of duties or infringement of obligations (hereinafter referred to as the "**Losses**").

(I) The Investor has rights, in terms of a range of potential causes of action, to recover compensation for the Losses arising out of and/or in relation to the acquisition and/or holding of Shares from time to time in one or more portfolios managed by the Agent on behalf of the Investor during the Relevant Period against all or any of the Involved Parties (the "**Rights**"). The Rights may differ including in respect of the applicable law, their legal status and the applicable limitation periods.

(J) In addition to the Rights, the Investor enjoys all rights accessory to or otherwise necessary for the effective resolution and enforcement of the Rights, including (but not limited to) the right to bring various legal proceedings for damages in an appropriate jurisdiction against all or any of the Involved Parties, the right to settle or compromise the Rights in negotiation with all or any of the Involved Parties and the right to be paid damages, settlement monies, interest, costs and all other forms of compensation whatsoever which may be payable or recoverable in respect of the Rights (the "**Accessory Rights**").

(K) The Parties recognize that the effective resolution and enforcement of rights to compensation of individual injured parties against the Involved Parties is burdensome in many ways and that there are considerable benefits to bundling rights to compensation.

(L) The Investor has authorised the Agent to represent the Investor in the context of the assignment of the Rights and Accessory Rights to Hamilton on the terms and conditions of this Agreement. The Investor has provided the Agent a power of attorney authorising the Agent to represent the Investor in the context of this Agreement and to act as an intermediary in the communication between the Investor and Hamilton.

(M) The Parties have therefore agreed that the Investor shall assign the Rights and Accessory Rights to Hamilton (the "**Assignment**") on the terms and conditions of this Agreement, in order for Hamilton to resolve and enforce the Rights and Accessory Rights through an action for damages and/or a settlement. Hamilton will, subject to the terms of this Agreement, bear all the costs and risks of resolving and enforcing the Rights and Accessory Rights assigned to it The purchase price for the Rights and Accessory Rights is a share of any payment that may be made by the Involved Parties to Hamilton pursuant to a settlement or judgment or outcome of Alternative Resolution (as defined below) in relation to the Rights and Accessory Rights

(N) To address the situation that the Assignment for any reason turns out to be not or no longer legally valid, the Investor wishes to, on the same terms and conditions, grant an exclusive mandate ("*Privatieve Last*") under Article 7:414 in connection with Article 7:423 Dutch Civil Code to Hamilton, pursuant to which Hamilton in its own name will be allowed to do all that is deemed legally necessary or desirable to resolve or enforce the Rights and Accessory Rights, including, but not limited to, interrupting the applicable limitation period and the filing of proceedings

(O) The Investor also wishes to grant an irrevocable power of attorney to Hamilton to assign the Rights and Accessory Rights of the Investor to Hamilton on the same terms and conditions as

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set out in this Agreement, if the Assignment pursuant to this Agreement turns out to be not or no longer legally valid.

(P) This Agreement is governed by Dutch law; for this reason all assignments laid down in this Agreement are in accordance with Dutch law, more specifically in accordance with Article 3:84 in conjunction with 3:94 Dutch Civil Code.

Initials

THE PARTIES AGREE AS FOLLOWS

1. Definitions

In this Agreement, in addition to the terms in bold which are defined elsewhere in this Agreement:

"**Adverse Costs**" mean any costs order made by the Court in favour of the Involved Parties in Proceedings in which Hamilton seeks to resolve or enforce the Rights and Accessory Rights;

"**Alternative Resolution**" means any type of mechanism sought for the resolution of the Rights and Accessory Rights, such as mediation, negotiation, arbitration and expert-determination, other than Proceedings;

"**Compensation**" includes all forms of monetary relief which Hamilton effectively receives in respect of the Rights and Accessory Rights, including: damages, ex gratia payments, any settlement or negotiated payments and any other form of redress or compensation whatsoever and including any interest and costs which Hamilton receives with respect to the Rights and Accessory Rights, pursuant to a final Judgment, or other final outcomes of an Alternative Resolution, or through a final Settlement;

"**Court**" means a court of competent jurisdiction selected by Hamilton (having regard to the advice of its Lawyers) in which Proceedings to enforce the Rights and Accessory Rights assigned to it can be commenced, conducted, resolved and enforced including the competent Court of Appeals, the Supreme Court, and courts handling relevant subsequent or connected proceedings;

"**Default**" means, on the part of Hamilton, (i) committing a serious breach of this Agreement and not remedying the breach within one month after receiving written notice from the Investor requiring it to do so or (ii) being declared bankrupt or filing for suspension of payment;

"**Distribution Date**" means the date on which the Price is paid to the Investor pursuant to this Agreement;

"**Enforcement Costs**" mean the Investor's pro-rata share of all costs and expenses of Hamilton (from the Filing Date to the Distribution Date, inclusive) which have been reasonably incurred and/or paid in order to assess, value, resolve, enforce and obtain payment for the Rights and Accessory Rights, and includes the Investor's pro-rata share of all Court costs, all Lawyers' and Experts' fees and expenses and all other direct out-of-pocket expenses of Hamilton incurred in relation to the Rights and Accessory Rights and all Adverse Costs, provided that (i) the total of all deductible costs and expenses of Hamilton is capped at an amount of one million euro (€1,000,000) per year; (ii) when applying the cap, any costs and expenses of Hamilton incurred in respect of any year which exceed one million euro (€1,000,000) shall not be applied to any other year; and (iii) where the Distribution Date falls part way through a year, when applying the cap the total amount of costs and expenses of Hamilton during that part-year will be calculated on a pro-rata basis;

"**Experts**" mean appropriately qualified economists, accountants, financial experts and legal experts (other than the Lawyers) appointed by Hamilton to assist in assessing, resolving and enforcing the Rights and Accessory Rights;

"**Filing Date**" means the date on which Proceedings are filed with the Court;

"**Judgment**" means a decision of a Court;

"**Lawyers**" mean any appropriately qualified and experienced lawyers retained by Hamilton to assess, advise on, resolve and enforce the Rights and Accessory Rights, including through any Proceedings or Alternative Resolution;

"**Price**" means 85.5% of the remaining amount of Compensation after deduction of Enforcement Costs;

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"**Proceedings**" means legal proceedings brought before the Court to resolve and/or enforce the Rights and Accessory Rights assigned, including any appeals;

"**Settlement**" means any type of binding settlement agreement entered into by Hamilton and all or any of the Involved Parties, resolving some or all of the Rights and Accessory Rights

2. Acquisition of the Rights and Accessory Rights

2.1 Hamilton hereby agrees to fully and finally acquire from the Investor any and all Rights and Accessory Rights. The Investor hereby agrees to fully and finally sell, transfer and assign to Hamilton any and all of the Rights and Accessory Rights. Hamilton agrees to accept the sale, transfer and assignment of such Rights and Accessory Rights by the Investor.

3. Assignment of the Rights and Accessory Rights

3.1. The Investor hereby assigns to Hamilton the Rights and Accessory Rights and Hamilton hereby accepts the assignment of the Rights and Accessory Rights.

4. Notification of Assignment

4.1. Hamilton shall, in order to complete the Assignment, at its own discretion, either register this deed (in accordance with art. 3:94(3) Dutch Civil Code) or notify the Involved Parties (in accordance with art. 3:94(1) Dutch Civil Code).

4.2. The Investor will not notify the Involved Parties of the Assignment without Hamilton's prior written consent.

5. Price of the Assignment

5.1. In consideration for the Assignment, the Investor will be entitled to receive from Hamilton the Price

5.2. The Investor acknowledges that the quantum and payment of the Price depend on Hamilton successfully resolving and enforcing the Rights and Accessory Rights for value through Proceedings, Alternative Resolution or Settlement and the Price is not payable until after the Compensation on which it is based is received.

6. Hamilton's rights and obligations

6.1. Subject to clause 6.2, and provided the Investor continuously fulfils its obligations as set out in clause 7, Hamilton shall, in order to resolve or enforce the Rights and Accessory Rights, either commence Proceedings or seek Alternative Resolution.

6.2. At any time Hamilton may decide not to seek to resolve or enforce the Rights and Accessory Rights or continue to do so if it considers there is insufficient damages to render the Proceedings viable or if, in the Lawyers' and/or Experts' opinion, one or more of the following factors apply (the "**Negative Opinion**"):

a. the Rights are not meritorious;

b. the Losses are not legally recoverable; and/or

c. there is insufficient evidence to prove the Losses.

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In the event that Hamilton decides not to seek to resolve or enforce the Rights and Accessory Rights or continue to do so, Hamilton shall notify the Investor in writing, within a reasonable period of time, that it shall be entitled to exercise its Buy-Back Option in accordance with clause 10.

6.3 In order to perform its obligations under this Agreement and to resolve or enforce the Rights and Accessory Rights, Hamilton:

a. may as it deems necessary retain the Lawyers and Experts;

b. may as it deems necessary ask the Investor to provide Hamilton, its Lawyers and Experts, with certain documents and other information that the Investor has or may reasonably gain access to, to assess, support and, if appropriate, use to resolve or enforce the Rights and Accessory Rights, and the cost of locating and providing such documents and information shall be borne by the Investor provided that the Investor shall not be required to incur unreasonable third party costs in this regard;

c. may as it deems necessary instruct the Experts and the Lawyers to review all the aforesaid documents and information provided by the Investor and undertake an analysis of the merits and value of the Rights and Accessory Rights;

d shall be solely responsible for paying and bearing all Enforcement Costs;

e. will update the Agent in writing from time to time, and at least quarterly, on all relevant matters relating to the resolution and enforcement of the Rights and Accessory Rights, such updates not needing to be made by Formal Notices (within the meaning of clause 17);

f. will communicate with the Agent in relation to (the enforcement of) the Rights and Accessory Rights, the Compensation, the Proceedings or the Alternative Resolution;

g will establish an escrow account at a major bank of good standing and ensure that the Compensation received pursuant to a final Judgment, a final outcome in Alternative Resolution or a Settlement will be transferred without delay to such escrow account. All interest accruing on the Compensation once it is transferred to the escrow account (or transferred to Hamilton by any other means) shall be for the benefit of the Investor; and

h. will ensure that the Price will be properly calculated, administered and distributed (provided that the necessary information to effect this is provided to Hamilton by the Investor). Upon request by the Agent, Hamilton shall provide the Agent for the benefit of the Investor with an explanation of the calculation method that is used to determine the Price. This explanation will be provided on a confidential basis. Unless the Agent advises Hamilton to the contrary in writing, the Price will be payable directly to the Investor by electronic funds transfer into such bank account/s as the Agent may designate in writing to Hamilton, which payment is for the sole benefit of the Investor and which shall be made free from any withholding, deduction or set-off of any nature whatsoever. All the aforementioned payments of the Price due to any Investor that is a South African resident (as defined under the South African exchange control regulations) shall only be made by Hamilton into South African bank accounts in ZAR.

6.4. In performing the Agreement Hamilton, using its best-efforts, shall seek to resolve and enforce the Rights and Accessory Rights for the maximum value, in the shortest time possible, with the least risk in the jurisdiction determined to be appropriate by Hamilton.

6.5. Hamilton shall decide against which Involved Parties it wishes to resolve or enforce the Rights and Accessory Rights, and whether to commence Proceedings and/or seek Alternative Resolution. The Parties acknowledge that the best strategy for resolving or enforcing the Rights and Accessory Rights may be to first resolve and/or enforce rights of other parties injured against one or more Involved Parties.

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7. The Investor's obligations

7.1. The Investor shall;

a. determine the Investor's Share position(s), and changes thereto, in the Relevant Period The Investor will be provided with a data template to be used for this purpose. The Investor will - assisted by the Agent - use its best endeavours to send the duly filled data template to Hamilton not later than three months (or such longer period as may be reasonable in the circumstances) after the date of this Agreement as this information is also relevant for Hamilton in potential settlement negotiations;

b. continuously use its reasonable efforts to – at its own expense – truthfully collect, keep safe and make available to Hamilton in a utilizable format its data on the Investor's Share positions;

c. promptly execute and/or procure the execution of all documents and do all things which are reasonably necessary to resolve or enforce the Rights and Accessory Rights and for such purpose only;

d. not communicate, directly or indirectly, with the Involved Parties or their representatives in relation to the Rights and Accessory Rights, the Compensation, the Proceedings or the Alternative Resolution without Hamilton's prior written consent, which will not be unreasonably withheld;

e. promptly inform Hamilton of any change in the Investor's contact details (as set out in clause 17);

f not take any steps which may adversely affect the value or recoverability of the Rights and Accessory Rights, provided that this shall not in any way restrict the Investor from exercising any rights (other than the Rights and Accessory Rights) it may have in relation to the Shares or any other shares or other investments the Investors holds and may hold from time to time in Steinhoff, and whether or not the Rights and Accessory Rights flow from such holdings, including the disposal, trading or in otherwise managing of shares and other investments; and

g. not cause or permit any charge, lien, attachment (to the extent possible) or other encumbrance to be granted or to arise over or otherwise attach to the Rights or Accessory Rights or to any money or property which may comprise its share of the Compensation after the date of this Agreement, except with the prior written consent of Hamilton, which consent shall not be unreasonably withheld.

7.2 Hamilton is prepared to render advice and assistance to the Investor regarding its compliance with the obligations of the Investor under the foregoing clause 7.1.

8. The Investor's warranties

8.1. The Investor warrants that:

a. there is no charge, lien, attachment or other encumbrance on the Rights or the Accessory Rights as at the date of this Agreement;

b. it has full power to validly assign the Rights and the Accessory Rights to Hamilton under the terms of this Agreement;

c. it has acquired and/or held Shares during the Relevant Period; and

d. the information it has provided to Hamilton is to the best of its knowledge true and accurate.

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9. Hamilton's warranties

9.1 Hamilton warrants that:

a. it is in no way related to or otherwise acting in favour of or on behalf of the Involved Parties;

b. it has been duly incorporated and validly exists as a private company with limited liability under the laws of The Netherlands;

c. it is duly registered under applicable laws. All necessary statements with respect to Hamilton to the relevant authorities, supervisory authorities or public registers have been made fully and in time;

d. it has not been dissolved, no resolution to dissolve Hamilton has been adopted and there is no action or request pending or threatened to accomplish such dissolution and there are no facts or circumstances which could lead to such action or request or dissolution;

e. it has neither been (i) declared bankrupt, (ii) granted (preliminary) suspension of payment, (iii) made subject to any insolvency or reorganisation proceedings or (iv) can no longer pay its due and payable debts, nor (v) has Hamilton taken any other step with a view to the readjustment or rescheduling of all or part of its debts, nor is any action or request pending or threatened under the laws of any applicable jurisdiction; and

f. no proposal has been made or resolution adopted for a statutory merger or split-up of Hamilton, or a similar arrangement under the laws of any applicable jurisdiction.

10. Buy-Back Option

10 1. With respect to the Rights and Accessory Rights, should Hamilton;

a decide (i) not to seek to resolve or enforce the Rights and Accessory Rights or (ii) not to continue to do so following a Negative Opinion notified to the Investor (clause 6.2); or

b. cause an event of Default;

Hamilton hereby grants the Investor the right to buy back the Rights and the Accessory Rights (the "**Buy-Back Option**") in accordance with clause 10.2 below.

10 2. The Buy-Back Option may be exercised by the Investor by a notice to Hamilton:

a. in the event contemplated by clause 10 1a, in the thirty days following the notice by Hamilton to the Investor of the Negative Opinion.

b. in the events contemplated by clause 10.1b, in the thirty days following the Default (or the awareness thereof in the event of insolvency).

10.3. Should the Investor exercise its Buy-Back Option within the applicable time period, the Parties will negotiate in good faith and execute, within two weeks of the notice by the Investor of the exercise of the Buy-Back Option, an appropriate agreement for the reverse assignment of the Rights and Accessory Rights. In the event contemplated by clause 10.1a, the purchase price for the reverse assignment of the Rights and Accessory Rights will be fixed at zero

10.4. In case Hamilton decides (i) not to seek to resolve or enforce the Rights and Accessory Rights or (ii) not to continue to do so because of the Negative Opinion (clause 6.2) and the Investor does not exercise its Buy-Back Option, Hamilton will no longer be bound by its best-efforts obligations/duties under this Agreement towards the Investor.

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10.5 The Parties agree that the Investor may approach Hamilton with the request to buy-back the Investor's Rights and Accessory Rights (a) in order to pursue a unilateral settlement with one or more of the Involved Parties or (b) in the event that a material conflict of interest between the enforcement of the Rights and Accessory Rights by Hamilton and the position of the Investor as a shareholder of Steinhoff arises. Hamilton is prepared to consider such a request in good faith. If the Parties agree on a buy-back Hamilton will be entitled to fair compensation ("Fair Compensation"). The Fair Compensation shall reflect the payment, if any, to the Investor, of compensation by or on behalf of one or more Involved Parties under a settlement, and the Enforcement Costs of Hamilton and shall be in compliance with the economic result as set forth in clause 5.1 on the Price. Should the Parties not be able to agree on the Fair Compensation, the Fair Compensation shall be determined by an independent firm of registered accountants to be agreed upon between them or, in default of such agreement, to be selected (at the instance of either party) by the president of the Koninklijke Nederlandse Beroepsorganisatie van Accountants who shall act as an expert ("Independent Accounting Expert") The determination of the Independent Accounting Expert shall be binding on both Parties.

11. Mandate and power of attorney

Mandate

11.1. To address the situation that the Assignment for any reason turns out to be not or no longer legally valid or is unenforceable, the Investor hereby, *mutatis mutandis* under the same terms and conditions applicable to the Assignment, grants Hamilton an exclusive mandate ("*privatieve last*") pursuant to Article 7:414 in connection with 7:423 Dutch Civil Code to, in its own name but for the benefit of the Investor, perform all that is legally necessary or desirable in order to find compensation for the Rights and Accessory Rights, including, but not limited to, interrupting the applicable limitation period and the filing of proceedings. Hamilton hereby accepts this exclusive mandate. In the event that Hamilton relies on this exclusive mandate, the identity of the Investor as the mandator will be disclosed to the extent required in law.

11.2. In its capacity as mandatee of the Investor, Hamilton will be entitled to a wage equivalent to the difference between the Price and the Compensation (or what the Price and Compensation would have been had the Assignment been enforceable) or the Buy-Back Option price which it would have been entitled to receive under section 10.3 had the Assignment been enforceable, as applicable.

11.3. In its capacity as mandatee, Hamilton is allowed to act as counterparty to the Investor (art. 7:416 Dutch Civil Code) and to act as mandatee for other mandators.

11.4. Hamilton has notified the Investor that it has a direct or indirect interest (as referred to in art. 7:418(1) Dutch Civil Code) in finding compensation for the Rights and the Accessory Rights, considering that its wage (clause 11.2) is based on the Compensation.

11.5 This mandate does not end as a result of the liquidation of the Investor (art. 7:423(2) Dutch Civil Code) and cannot be terminated by the Investor (art. 7.422(2) Dutch Civil Code). This mandate is solely governed by the law of the Netherlands.

Power of Attorney

11.6. If the Assignment for any reason turns out to be not or no longer legally valid or is unenforceable, the Investor hereby also grants a power of attorney to Hamilton to, under the same terms and conditions, have the necessary deeds and documents drawn up and to sign these and, moreover, to perform all acts as in the sole opinion of Hamilton are necessary or useful to assign the Rights

Initials

and Accessory Rights of the Investor to Hamilton. This power of attorney is irrevocable and shall include the power of substitution as well as the permission for Hamilton to act as counterparty to the Investor This power of attorney is solely governed by the law of the Netherlands.

11.7. Hamilton shall decide at its own discretion whether it wishes to make use of the exclusive mandate (clause 11.1) or the power of attorney (clause 11.6), or a combination of both.

12. The Investor's consent to this Agreement

12 1. The Investor has entered into this Agreement freely and acknowledging that it has had an opportunity to obtain independent legal advice on the terms of this Agreement.

13. Limitation of liability

13 1 The Investor agrees that Hamilton's obligations are best-efforts obligations. The Parties' individual liability, whether for breach of any term of this Agreement, in negligence or for breach of any other obligation or duty Parties may or may be held to owe to the other Party will be limited to damages caused negligently, deliberately or by gross negligence.

14. Confidentiality

14 1. Hamilton will not collect personal information of the Investor and the Agent unless it is strictly necessary for the performance of this Agreement

14.2. Parties will keep confidential all legally privileged information, including all communications, legal advice or other written documents relating to the Rights and Accessory Rights (including this Agreement and any written assessments) and the details of any negotiations and legal proceedings concerning the Rights and Accessory Rights, and will not reveal them at any time except:

a. as may be required by law (in which case the disclosing party will advise the other party without delay);

b. in respect of disclosure by the Investor, with the express written consent of Hamilton;

c. in respect of disclosure by Hamilton, to the Involved Parties or their advisers, the Court or to any other person solely for the performance of this Agreement; or

d. if the information has been made anonymous and consolidated with information obtained from other parties assumed to be damaged by the Involved Parties.

15. Governing law and arbitration

15.1. This Agreement shall be construed in accordance with and governed by the law of the Netherlands (with the exclusion of conflict of laws rules). All disputes arising in connection with the Agreement, or further agreements resulting therefrom, shall be settled in accordance with the

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Arbitration Rules of the Netherlands Arbitration Institute. The place of arbitration shall be The Hague.

16. Amendment

16.1. Subject to clause 16.2, the written terms of this Agreement constitute the entire agreement between the parties and no other representation, promise, warranty or statement is binding on either party

16.2 This Agreement may only be varied in writing signed by both parties

17. Formal Notices

17.1. Any notice required or authorised to be given hereunder and any process to be served in relation to or arising out of this Agreement shall be in writing and in the English language and shall only be deemed given:

a. if delivered by hand or post; or

b. if transmitted by e-mail, with confirmation of receipt, provided that a copy is delivered by hand or post within 5 (five) business days thereafter,

to the address, as the case may be, of the relevant Party as specified below or to such other address as the relevant Party may from time to time notify to the other Parties by notice.

Addresses and e-mail addresses of the Parties:

Investor:
Abax Investments Proprietary Limited
2nd floor, Colinton House
The Oval
1 Oakdale Road
Newlands
Cape Town, South Africa
7700
Email Address:edel@abax.co.za

Hamilton
Hamilton 2 B.V.
Attn. Mr. Martin Hyde
Hamilton House
28 Fitzwilliam Place
Dublin 2
D02 P283
Ireland
Email Address: mhyde@claimsfundingeurope.eu

17.2. Any notice served personally shall be deemed to have been given upon such service, any notice delivered to the address specified in clause 17.1 shall be deemed to have been given when delivered. Any process ("*exploot*") or summons ("*dagvaarding*") in relation to or arising out of this Agreement can be served validly to a Party to the address set out in clause 17.1 or to such other address in The Netherlands as the relevant Party may from time to time notify to the other Parties by notice.

Initials AS

18. Severability of this Agreement

18.1. If a provision or provisions of this Agreement is or are held to be invalid or unenforceable, the remaining provisions shall not be affected and each remaining provision shall be valid and enforceable to the full extent permitted by the law.

18.2. If this Agreement or any part of it is held to be invalid or unenforceable the Parties will be under a best-efforts obligation to sign any further agreement, deed or other document, to ensure that the Parties achieve the object of their agreement as recorded in this Agreement.

19. Counterparts

19.1. This Agreement may be executed in any number of counterparts and such counterparts taken together shall have the same effect as if execution of this Agreement would have occurred in one single copy. The date of this Agreement shall be the date of the last signature.

Agent on behalf of the Investor:

Name signatory: Anthony Sedgwick

who warrants his/her authority to sign

A. Sedgwick

For the Agent on behalf of the Investor

11/06/2019

Date

Hamilton 2 B.V:

Name signatory: Oscar McLaren authorised by Martin Hyde

For Hamilton 2 B.V.

14/6/19

Date

Initials AS

Annexure 1

Client Name	Client Registered Office, Physical Address or Residential Address.
Cape Municipal Pension Fund	18th Floor, Towers South, The Towers, 2 Heerengracht Street, Cape Town, 8001, South Africa
Denel Retirement Fund	Brooklyn Bridge 1st Floor - Steven House, 570 Fehrsen Street, Brooklyn, 0184, South Africa
FirstRand Retirement Fund	6th Floor - 3 First Place Bank City, corner Simmonds & Pritchard Street, Johannesburg, 2008, South Africa
Government Institutions Pension Fund	cnr. Dr. Kenneth David Kaunda and Goethe Street, Windhoek, Republic of Namibia
Prescient Management Company (RF) (PTY) LTD	Prescient House, Westlake Business Park, Otto Close, Westlake, 7945, South Africa
Printing Industry Pension Fund for SATU Members	4 Estcourt Avenue, Weirdapark, Centurion, South Africa
Professional Provident Society Multi Managers Proprietary Limited	1 PPS House, Boundary Terraces, Mariendahl Lane, Newlands, Cape Town, South Africa
SATU National Provident Fund	4 Estcourt Avenue, Weirdapark, Centurion, South Africa
Stellenbosch University	Victoria Street, Stellenbosch, 7600, South Africa
Telkom Retirement Fund	61 Oak Avenue, Telkom Park, Centurion, 0157, South Africa
Transnet Retirement Fund	Tower 2, 13th Floor, 102 Rivonia Road, Sandton, 2146, South Africa
University of Pretoria	Room No. 3-19, Central Administration Building, cnr Roper Street and Lynwood Road, Hatfield, Pretoria, 0083, South Africa
University of South Africa Retirement Fund	OR Tambo (Admin) Building, 7th Floor Room 12, UNISA Main Campus, Muckleneuk, Pretoria, 002, South Africa

Initials

Linklaters

RA 5

Rechtbank Amsterdam

Zaakkenmerk: C/13/675121

Roldatum: 1 april 2020

INCIDENTELE CONCLUSIE HOUDENDE EXCEPTIEVE VERWEER TOT ONBEVOEGDHEID VAN DE RECHTBANK, VERZOEK TOT AANHOUDING EN VERZOEK TOT OPROEPING IN VRIJWARING, TEVENS AKTE UITLATING TOEPASSELIJK RECHT

inzake:

de naamloze vennootschap
STEINHOFF INTERNATIONAL HOLDINGS N.V.,
gevestigd te Stellenbosch (Zuid-Afrika),

gedaagde in de hoofdzaak, eiseres in het incident,

advocaat: mr. D.A.M.H.W. Strik

en

de vennootschap naar buitenlands recht
STEINHOFF INTERNATIONAL HOLDINGS (PROPRIETARY) LIMITED,
gevestigd te Stellenbosch (Zuid-Afrika),

gedaagde in de hoofdzaak, eiseres in het incident,

advocaat: mr. D.A.M.H.W. Strik

tegen:

de besloten vennootschap met beperkte aansprakelijkheid **HAMILTON B.V.**,
gevestigd te Amsterdam,

eiseressen in de hoofdzaak, gedaagden in het incident,

advocaat: mr. J. de Jong

en

de besloten vennootschap met beperkte aansprakelijkheid **HAMILTON 2 B.V.,**
gevestigd te Amsterdam,

eiseressen in de hoofdzaak, gedaagden in het incident,

advocaat: mr. J. de Jong

overige partijen:

de heer **MARKUS JOHANNES JOOSTE**,
wonende te Stellenbosch (Zuid-Afrika)

advocaat: mr. Y. Borrius

de heer **ANDRIES BENJAMIN LA GRANGE**,
wonende te Stellenbosch (Zuid-Afrika)

advocaat: mr. M.P.P. van Buuren

de heer **DANIËL MAREE VAN DER MERWE**,
wonende te Stellenbosch (Zuid-Afrika)

advocaat: mr. C.M. Harmsen

de heer **STEPHANUS JOHANNES GROBLER**,
wonende te Stellenbosch (Zuid-Afrika)

advocaat: mr. A.N. Stoop

de heer **FREDERIK JOHANNES NEL**,
wonende te Kaapstad (Zuid-Afrika)

advocaat: mr. J.A. van de Hel

de heer **THIERRY LOUIS JOSEPH GUIBERT**,
wonende te Clamart (Frankrijk)

advocaat: mr. A.F.J.A. Leijten

de heer **ROBERT HARMZEN**,
wonende te Lisse (Nederland)

advocaat: mr. M.J. Drop

gedaagden in de hoofdzaak

Linklaters

Inhoudsopgave

boekhouding) en art. 29 (verplichting tot het voldoen aan verslaggevingsstandaarden en het geven van een getrouw beeld van de financiële toestand van een vennootschap).

5.4.2 Subsidiair: art. 34 lid 1 EEX-Vo II

259. Voorzover uw Rechtbank zou menen dat SIHNV geen geslaagd beroep kan doen op art. 33 lid 1 EEX-Vo II terzake de De Bruyn-procedure, doet Steinhoff een beroep op art. 34 lid 1 EEX Vo-II. Voorts doet SIHNV een beroep op art. 34 EEX-Vo II op aanhouding van de procedure in verband met samenhang met de Overige Zuid-Afrikaanse Procedures.

260. Deze bepaling is een aan art. 33 lid 1 EEX Vo-II vergelijkbare regeling voor samenhangende vorderingen. Het artikel bepaalt als volgt:

> "*Wanneer de bevoegdheid voortvloeit uit artikel 4 of de artikelen 7, 8 of 9, en op het moment dat een vordering wordt aangebracht voor een gerecht van een lidstaat een samenhangende vordering aanhangig is voor een gerecht van een derde land, kan het gerecht van de lidstaat de uitspraak aanhouden indien:*
>
> *a) gezamenlijke behandeling van en beslissing op de samenhangende vorderingen passend is, teneinde te vermijden dat bij afzonderlijke behandeling van de zaken onverenigbare beslissingen worden gegeven;*
>
> *b) te verwachten is dat het gerecht van het derde land een beslissing zal geven die kan worden erkend en, in voorkomend geval, ten uitvoer gelegd in die lidstaat, en*
>
> *c) het gerecht van de lidstaat van mening is dat het aanhouden nodig is voor een goede rechtsbedeling.*"

261. Een aangezochte rechter kan een procedure op grond van art. 34 lid 1 EEX-Vo II aanhouden indien voldaan is aan de volgende vereisten:

(a) de bevoegdheid van uw Rechtbank vloeit voort uit art. 4 of art. 7, 8 of 9 EEX-Vo II;

(b) de zaak voor de rechter van het derde land is eerder aanhangig gemaakt;

(c) te verwachten is dat in de buitenlandse zaak beslissing gegeven wordt die kan worden erkend en, in voorkomend geval, voor tenuitvoerlegging in Nederland vatbaar is;

(d) de aangezochte rechter is ervan overtuigd dat aanhouding nodig is voor een goede rechtsbedeling;

(e) er is sprake van samenhangende vorderingen; en

(f) een gezamenlijke behandeling van en beslissing op de samenhangende vorderingen is passend, teneinde te vermijden dat bij afzonderlijke behandeling van de zaken onverenigbare beslissingen worden gegeven.

262. Steinhoff zal op ieder van de vereisten hierna ingaan.

(i) De bevoegdheid van uw Rechtbank vloeit voort uit art. 4 EEX-Vo II

263. Dat aan dit vereiste voldaan is heeft Steinhoff reeds besproken in par. 230-234 hiervoor.

(ii) De De Bruyn-procedure en de Overige Zuid-Afrikaanse Procedures zijn eerder aanhangig gemaakt

264. Dat de De Bruyn-procedure eerder aanhangig is gemaakt dan de onderhavige procedure volgt reeds uit par. 235-243 hiervoor.

265. Ook de Overige Zuid-Afrikaanse Procedures zijn evident eerder aanhangig gemaakt dan de onderhavige procedure. Alle Overige Zuid-Afrikaanse Procedures zijn ruim voorafgaand aan 20 juni 2019 van start gegaan, te weten:

- Lancaster: 17 april 2019
- Tekkie Town: 11 mei 2018
- GT Ferreira: 1 juni 2018
- Du Toit: 31 augustus 2018
- Thibault: 26 april 2018
- Wiesfam Trust: 26 juni 2018
- Greyling: 13 februari 2019
- Trevo Capital Limited (TCL): 20 maart 2019
- Business Venture N.O.: 25 maart 2019
- Cronjé e.a.: 29 maart 2019

(iii) Erkenning en tenuitvoerlegging

266. Met betrekking tot de De Bruyn-procedure heeft Steinhoff in par. 244-246 betoogd dat aan dit vereiste is voldaan.

267. Ook ten aanzien van de Overige Zuid-Afrikaanse Procedures geldt dat te verwachten is dat in die zaken beslissingen gegeven kunnen worden die kunnen worden erkend en, in voorkomend geval, voor tenuitvoerlegging in Nederland vatbaar zijn. Net als de De Bruyn-procedure zijn ook de Overige Zuid-Afrikaanse Procedures in Zuid-Afrika aanhangig, waardoor toetsing aan de uit het *Gazprombank*-arrest genoemde eisen dient plaats te vinden. Het is aannemelijk dat (veroordelende) eindvonnissen in de Overige Zuid-Afrikaanse Procedures aan deze voorwaarden kunnen voldoen:

(i) SIHPL is gedaagde in alle Overige Zuid-Afrikaanse Procedures, SIHNV is gedaagde in een groot aantal van de Overige Zuid-Afrikaanse Procedures (*Lancaster, Tekkie Town, Du Toit, Thibault* en *Wiesfam Trust*). Dat de bevoegdheid van de Zuid-Afrikaanse rechter om kennis te nemen van vorderingen jegens SIHPL en/of SIHNV gebaseerd zal zijn op internationaal erkende bevoegdheidsgronden is hiervoor in par. 245(iii) betoogd;

(ii) het is aannemelijk dat de Overige Zuid-Afrikaanse Procedures zullen resulteren in (eind)vonnissen die tot stand zijn gekomen met inachtneming van de beginselen van een behoorlijke en met voldoende waarborgen omgeven procesgang. SIHNV en/of SIHPL zijn in alle Overige Zuid-Afrikaanse Procedures geldig opgeroepen en hebben verweer gevoerd;

(iii) er zijn geen aanwijzingen dat een beslissing in de Overige Zuid-Afrikaanse Procedures in strijd zouden zijn met de Nederlandse openbare orde;

(iv) er is thans geen sprake van een beslissing van de Nederlandse of een buitenlandse rechter tussen dezelfde partijen die op dezelfde oorzaak berust en (formeel) in Nederland voor erkenning vatbaar is.

(iv) Aanhouding is nodig voor een goede rechtsbedeling

268. Dat aanhouding in verband met de De Bruyn-procedure nodig is voor een goede rechtsbedeling heeft Steinhoff reeds hiervoor in par. 247-248 betoogd.

269. Ook met betrekking tot de Overige Zuid-Afrikaanse Procedures geldt dat, alle omstandigheden in aanmerking genomen – en specifiek die genoemd in par. 24 van de considerans van de EEX-Vo II – in het onderhavige geval aanhouding nodig is voor een goede rechtsbedeling:

- De verbanden tussen de feiten van de zaak en de partijen en Zuid-Afrika: De Overige Zuid-Afrikaanse Procedures zijn allen aanhangig in Zuid-Afrika. Dat onderhavige zaak sterk verbonden is met Zuid-Afrika heeft Steinhoff reeds hiervoor in par. 248 betoogd;

- De stand van de Overige Zuid-Afrikaanse Procedures: De Overige Zuid-Afrikaanse Procedures bevinden zich allen in een vergevorderd stadium. In alle Overige Zuid-Afrikaanse Procedures zijn alle schriftelijke processtukken (*pleadings*) reeds gewisseld. In een aantal van de procedures zal spoedig de *discovery*-fase aanbreken (zoals *Thibault, Wiesfam Trust*, *Trevo*), waarna de zaak in beginsel voor finale zitting (*trial*) zal worden gezet;

- Uitspraak binnen redelijke termijn: Aangezien de Overige Zuid-Afrikaanse Procedures zich in een veel verder gevorderd stadium bevinden dan onderhavige procedure, is aan te nemen dat in deze procedures binnen een redelijke termijn, en sneller dan in onderhavige procedure, een uitspraak zal komen. Immers, het debat over de merites van de zaak is in de Overige Zuid-Afrikaanse Procedures reeds vergevorderd, terwijl onderhavige procedure zich nog bevindt in de fase waarin over de bevoegdheid van uw Rechtbank wordt gedebatteerd, aanhoudingsverzoeken zijn ingediend en er vrijwaringsincidenten zijn opgeworpen die moeten worden doorlopen.

(v) er is sprake van samenhangende vorderingen, en een gezamenlijke behandeling van en beslissing op de samenhangende vorderingen is passend, teneinde te vermijden dat bij afzonderlijke behandeling van de zaken onverenigbare beslissingen worden gegeven.

270. Anders dan voor art. 33 lid 1 EEX-Vo II is voor art. 34 lid 1 EEX-Vo II niet vereist dat de zaak dezelfde partijen en hetzelfde onderwerp betreft en berusten op dezelfde oorzaak. Voor een succesvol beroep op art. 34 lid 1 EEX-Vo II is vereist dat er sprake is van (i) samenhangende vorderingen en (ii) dat een gezamenlijke behandeling van en beslissing op de samenhangende vorderingen passend is, teneinde te vermijden dat bij afzonderlijke behandeling van de zaken onverenigbare beslissingen worden gegeven.

271. Art. 34 EEX-Vo II kent grote gelijkenis met art. 30 EEX-Vo II. Art. 30 EEX-Vo II voorziet in een bepaling om een zaak aan te houden in geval van samenhangende vorderingen die aanhangig zijn voor gerechten van verschillende lidstaten; art. 34 EEX-Vo II doet hetzelfde voor samenhangende vorderingen die aanhangig zijn in een lidstaat en een derde staat. Beide bepalingen hebben als doel te vermijden dat bij afzonderlijke behandeling van de zaken onverenigbare beslissingen worden gegeven. Gezien de sterke overeenstemming tussen art. 30 EEX-Vo II en art. 34 EEX-Vo II is jurisprudentie gewezen in het kader van art. 30 EEX-Vo II ook relevant voor art. 34 EEX-Vo II. Dit volgt ook uit de literatuur in het kader van art. 34 EEX-Vo II:[213]

> "*This provision has its analogue in Art 30 and uses the same wording. The concept of related proceedings should arguably therefore be the same as that developed in relation to Art. 28 of the 2001 Regulation.*"

272. In par. 165-170 en par. 180-186 hiervoor is betoogd wanneer sprake is van samenhangende vorderingen in de zin van art. 30 EEX-Vo II. Het begrip "samenhang" moet autonoom worden uitgelegd. De uitlegging van het begrip moet ruim zijn en alle gevallen omvatten waarin er gevaar voor tegenstrijdige uitspraak bestaat, ook al kunnen de uitspraken afzonderlijk ten uitvoer worden gelegd en sluiten de rechtsgevolgen ervan elkaar niet.[214] Het gaat dus om de toets of de zaken kunnen leiden tot onverenigbare uitspraken. Het gaat er dus niet om dat moet kunnen worden vastgesteld dat de zaken ook daadwerkelijk zullen leiden tot onverenigbare beslissingen

273. Dat de vorderingen die voorliggen in de onderhavige procedure en de De Bruyn-procedure samenhangend volgt uit hetgeen Steinhoff hiervoor heeft betoogd in het kader van art. 33 EEX-Vo II, namelijk (i) er is sprake van dezelfde gedaagde partijen (zie par. 252 hiervoor), (ii) er bestaat overlap tussen de eisende partijen (zie par. 253 e.v. hiervoor), (iii) de procedures hebben hetzelfde doel (par. 255 e.v. hiervoor) en (iv) de procedures gaan uit van

[213] Francisco Garcimartin, '*Lis Pendens and Related Actions*' in: Andrew Dickinson and Eva Lein (eds), The Brussels I Regulation Recast (Oxford University Press 2015), p. 354.

[214] HvJ 6 december 1994, C-406/92, ECLI:EU:C:1994:400 (*Tatry*), r.o. 52-53.

hetzelfde feitencomplex (zie par. 257 hiervoor) en (vi) de rechtsgrondslag van de vorderingen is grotendeels hetzelfde (zie par. 258 hiervoor).

274. Ook de vorderingen die voorliggen in de onderhavige procedure en de vorderingen die vorderingen in de Overige Zuid-Afrikaanse Procedures zijn dermate samenhangend dat een gevaar bestaat voor tegenstrijdige uitspraken:

- de gedaagde partijen zijn hetzelfde: in de zaken *GT Ferreira, Du Toit, Thibault en Wiesfam Trust* zijn – net als in de onderhavige procedure – zowel SIHNV als SIHPL betrokken. In alle Overige Zuid-Afrikaanse Procedures zijn in ieder geval SIHNV of SIHPL partij. Daarnaast zijn in de *Du Toit*-zaak ook Jooste en La Grange betrokken, die ook partij zijn in onderhavige procedure;

- de Overige Zuid-Afrikaanse Procedures zien op hetzelfde onderwerp, te weten de vermeende aansprakelijk van SIHNV en/of SIHPL voor door Steinhoff-aandeelhouders geleden schade als gevolg van de beweerdelijk misleidende uitlatingen en boekhoudkundige onregelmatigheden in de periode voorafgaand aan 6 december 2017;

  Dat eisers in sommige van de Overige Zuid-Afrikaanse Procedures hun aandelen SIHNV op een andere manier hebben verworven (te weten door middel van ruil als gevolg van het aangaan van "*share exchange-*" of "*share swap-*"overeenkomsten) doet daaraan niet af. De manier van verwerving van aandelen is immers niet relevant. Het gaat erom dat de eisers in die procedures stellen op eenzelfde manier te zijn misleid als gevolg van de vermeend onjuiste – in de jaarrekeningen van Steinhoff weergegeven – voorstelling van de financiële positie van Steinhoff. Zowel in de onderhavige procedure als in de Overige Zuid-Afrikaanse Procedures stellen de eisers dat zij (i) als gevolg van de misleiding zouden zijn overgegaan tot het aangaan van overeenkomsten (terzake koop dan wel ruil), en (ii) die overeenkomsten niet zouden zijn aangegaan indien die misleiding niet had plaats gevonden – met andere woorden indien zij op de hoogte zouden zijn geweest van de vermeende werkelijke financiële positie van Steinhoff. De vragen die derhalve voorliggen in de onderhavige procedure en Overige Zuid-Afrikaanse Procedure zijn daarmee exact hetzelfde (heeft misleiding plaatsgevonden, hebben aandeelhouders daardoor schade geleden etc.). Aangezien exact dezelfde vragen voorliggen bij de Zuid-Afrikaanse rechtbanken in de Overige Zuid-Afrikaanse Procedures en aan uw Rechtbank in de onderhavige procedure, is evident sprake van een situatie waarin een gevaar bestaat voor tegenstrijdige uitspraken.

- de procedures gaan uit van hetzelfde feitencomplex, gevormd door de boekhoudkundige onregelmatigheden bij Steinhoff. De gestelde schadeveroorzakende feiten zijn identiek;

- er is sprake van sterke overlap tussen de rechtsgrondslag van de vorderingen. Hamilton stelt dat de vorderingen jegens SIHPL gebaseerd zijn op Zuid-Afrikaans

recht en stelt dat SIHPL art. 22, 28 en 29 van de Zuid-Afrikaanse Companies Act geschonden zou hebben. Ook in de Overige Zuid-Afrikaanse Procedures stellen eisers zich op het standpunt dat hun vorderingen gebaseerd zijn op Zuid-Afrikaans recht en stellen zij dat SIHPL exact diezelfde bepalingen uit de Zuid-Afrikaanse Companies Act zou hebben geschonden. Zie bijvoorbeeld art. 17.1 van de "*combined summons*" in de *Trevo*-zaak (Productie 27) en art. 27 van de "*combined summons*" in de *Cronjé e.a.*-zaak (Productie 29).

275. Gezien deze sterke samenhang is er een groot risico dat onverenigbare beslissingen worden genomen indien de onderhavige procedure afzonderlijk wordt behandeld van de De Bruyn-procedure, dan wel de Overige Zuid-Afrikaanse Procedures. Een gezamenlijke behandeling van en beslissing op de samenhangende vorderingen is derhalve passend.

5.4.3 Met betrekking tot SIHPL: art. 12 Rv

276. Met betrekking tot SIHPL, die haar statutaire vestigingsplaats heeft in Zuid-Afrika, baseert Steinhoff haar onderhavige incidentele vorderingen tot aanhouding in verband met de De Bruyn-procedure op art. 12 Rv. Art. 12 Rv luidt als volgt:

> "*Indien een zaak voor een rechter van een vreemde staat aanhangig is gemaakt en daarin een beslissing kan worden gegeven die voor erkenning en, in voorkomend geval, voor tenuitvoerlegging in Nederland vatbaar is, kan de Nederlandse rechter bij wie nadien een zaak tussen dezelfde partijen over hetzelfde onderwerp is aangebracht, de behandeling aanhouden totdat daarin door eerstbedoelde rechter is beslist. Indien die beslissing voor erkenning en, in voorkomend geval, voor tenuitvoerlegging in Nederland vatbaar blijkt te zijn, verklaart de Nederlandse rechter zich onbevoegd.*"
>
> Onderstr. toeg., adv.

277. Hieruit volgt dat de Nederlandse rechter haar beslissing kan aanhouden indien (i) de zaak voor de rechter van de vreemde staat eerder aanhangig is gemaakt; (ii) de zaak dezelfde partijen en hetzelfde onderwerp betreft; en (iii) in de buitenlandse zaak een beslissing gegeven kan worden die voor erkenning en, in voorkomend geval, voor tenuitvoerlegging in Nederland vatbaar is. Dat aan deze vereisten voldaan is en er aanleiding is op grond waarvan uw Rechtbank de onderhavige procedure tegen SIHPL dient aan te houden heeft Steinhoff reeds in het voorgaande toegelicht. Steinhoff verwijst naar hoofdstuk 5.4.1 hiervoor. Indien en zodra er een vonnis is gewezen in de De Bruyn-procedure die ook daadwerkelijk voor erkenning en, in voorkomend geval, voor tenuitvoerlegging in Nederland vatbaar blijkt te zijn, dient Uw Rechtbank zich bovendien onbevoegd te verklaren.

ANNEXURE

PARTICULARS OF CLAIM

CONTENTS

I. THE PLAINTIFF

1. The representative plaintiff is **DORETHEA DE BRUYN** an adult female pensioner residing at Kempton Park, Gauteng.

2. The representative plaintiff brings this action as representative of the following three classes of persons ("the class members"), certified by the above Honourable Court on _____.

3. The first class comprises:

"All persons who purchased or held shares in Steinhoff International Holdings Limited ("SIHL") registered to the Johannesburg Stock Exchange ("JSE") from or as at 26 June 2013 and, in terms of a scheme of arrangement concluded on 7 December 2015, exchanged those shares for shares in Genesis Holdings NV, which subsequently became Steinhoff International Holdings NV ("Steinhoff NV"), and —

3.1 *who continue to hold securities in Steinhoff NV; or*

3.2 *sold their shares on or after 5 December 2017;*

excluding SIHL's and Steinhoff NV's and Steinhoff Africa Retail Limited's ("STAR") past or present subsidiaries, officers, directors, affiliates, legal representatives, heirs, predecessors, assigns, and all members of the individual defendants' families and any entity in which any of the individual defendants has or had a controlling interest. (the "JSE 1 Class")"

4. The second class comprises:

"All persons who purchased shares in Steinhoff NV registered to the Johannesburg Stock Exchange between 7 December 2015 and 5 December 2017, and —

4.1 *who continue to hold securities in Steinhoff NV; and/or*

4.2 *sold their shares on or after 5 December 2017;*

excluding SIHL's, Steinhoff NV's and STAR's past or present subsidiaries, officers, directors, affiliates, legal representatives, heirs, predecessors, assigns, and all members of the individual defendants' families and any entity in which any of the individual defendants has or had a controlling interest. (the "JSE 2 Class")"

5. The third class comprises:

"All persons who purchased securities of Steinhoff International Holdings NV ("Steinhoff NV") registered to the Frankfurt Stock Exchange between 7 December 2015 and 5 December 2017, and —

5.1 *who continue to hold securities in Steinhoff NV; and/or*

5.2 *sold their shares on or after 5 December 2017;*

excluding Steinhoff NV's past or present subsidiaries, officers, directors, affiliates, legal representatives, heirs, predecessors, assigns, and all

members of the individual defendants' families and any entity in which any of the individual defendants has or had a controlling interest. (the "FSE Class")"

II. THE DEFENDANTS

Steinhoff Companies

6. The first defendant is **STEINHOFF INTERNATIONAL HOLDINGS NV** ("Steinhoff NV"), a company:

6.1 duly incorporated in accordance with the company laws of the Kingdom of the Netherlands with registration number 63570173;

6.2 duly registered as an external company in terms of section 23 of the Companies Act 71 of 2008 ("the Companies Act") with CIPC registration number 2015/285685/10;

6.3 with its registered address in the Netherlands at Herengracht 466, 1017 CA, Amsterdam;

6.4 with its registered postal address in the Republic of South Africa as PO Box 1955, Bramley, Gauteng;

6.5 with its principal place of business at Block D, De Wagen Office Park, Stellentia Road, Stellenbosch;

6.6 with the primary listing of its securities on the Frankfurt Stock Exchange ("FSE"), and the secondary listing of its securities on the Johannesburg Stock Exchange ("JSE").

7. The second defendant is **STEINHOFF INTERNATIONAL HOLDINGS (PROPRIETARY) LIMITED** ("SIHL"), a private company duly incorporated in accordance with the company laws of the Republic of South Africa, with its registered address situated at 28 Sixth Street, Wynberg, Sandton, Gauteng. Until 2015, the second defendant was listed on the JSE as a public company called Steinhoff International Holdings Limited.

Auditors

8. The third defendant is **DELOITTE & TOUCHE** trading as Deloitte ("the auditors") a partnership carrying out business in the Republic of South Africa, with registered addresses at The Woodlands, 20 Woodlands Drive, Woodmead, Johannesburg and Block B, Riverwalk Office Park, 41 Matroosberg Rd, Ashlea Gardens, Pretoria.

Directors of SIHL and Steinhoff NV

9. The fourth defendant is **MARTHINUS THEUNIS LATEGAN** an adult businessman with [redacted] and who was, at all material times hereto, a director of SIHL and Steinhoff NV.

10. The fifth defendant is **HEATHER JOAN SONN** an adult businesswoman, resident at [redacted] and who was, at all material times hereto, a director of SIHL and Steinhoff NV.

11. The sixth defendant is **STEFANES FRANCOIS BOOYSEN** an adult businessman, [redacted] and who was, at all material times hereto, a director of SIHL and Steinhoff NV.

12. The seventh defendant is **DEENADAYALEN KONAR** an adult businessman, resident at [redacted] and who was, at all material times hereto, a director of SIHL and Steinhoff NV.

13. The eighth defendant is **DANIËL MAREE VAN DER MERWE** an adult businessman, resident at [redacted], and who was, at all material times hereto, a director of SIHL and Steinhoff NV.

14. The ninth defendant is **DAVID CHARLES BRINK** an adult businessman, resident at [redacted] and who was, at all material times hereto, a director of SIHL and Steinhoff NV.

15. The tenth defendant is **PAUL DENIS JULIA VANDEN BOSCH** an adult businessman, resident at [redacted] and who was, at all material times hereto, a director of SIHL and Steinhoff NV.

16. The eleventh defendant is **CHRISTOFFEL HENDRIK WIESE** an adult businessman, resident at [redacted] and who was, at all material times hereto, a director of SIHL and Steinhoff NV.

17. The twelfth defendant is **JOHANNES FREDERICUS MOUTON** an adult businessman, resident at [redacted] and who was, at all material times hereto, a director of SIHL and Steinhoff NV.

18. The thirteenth defendant is **ANDRIES BENJAMIN LA GRANGE** an adult businessman, resident at [redacted] and who was, at all material times hereto, a director of SIHL and Steinhoff NV.

19. The fourteenth defendant is **MARKUS JOHANNES JOOSTE** ("Jooste") an adult businessman, resident at [redacted] and who was, at all material times hereto, a director of SIHL and Steinhoff NV.

20. The fifteenth defendant is **STEPHANUS JOHANNES GROBLER** an adult businessman, resident at [redacted] and who was, at all material times hereto, a director of SIHL and Steinhoff NV.

21. The sixteenth defendant is **CLAAS EDMUND DAUN** an adult businessman, resident at [redacted] and who was, at all material times hereto, a director of SIHL and Steinhoff NV.

22. The seventeenth defendant is **BRUNO EWALD STEINHOFF** an adult businessman, resident at [redacted] who was, at all material times hereto, a director of SIHL and Steinhoff NV.

23. The eighteenth defendant is **ANGELA KRÜGER-STEINHOFF**, an adult businesswoman, resident at [redacted] who was, at all material times hereto, a director of SIHL and Steinhoff NV.

24. The nineteenth defendant is **THIERRY LOUIS JOSEPH GUIBERT**, an adult businessman, resident at [redacted] who was, at all material times hereto, a director of SIHL and Steinhoff NV.

Directors of Steinhoff NV

25. The twentieth defendant is **JOHAN VAN ZYL** an adult businessman, resident at [redacted] who was, at all material times hereto, a director of Steinhoff NV.

26. The twenty-first defendant is **JAYENDRA NAIDOO**, an adult businessman, resident at [redacted] who was, at all material times hereto, a director of Steinhoff NV.

27. The twenty-second defendant is **JACOB DANIEL WIESE**, an adult businessman, resident at [redacted] who was, at all material times hereto, a director of Steinhoff NV.

28. The twenty-third defendant is **ROBERT HARMZEN**, an adult businessman, resident at [redacted] who was, at all material times hereto, a director of Steinhoff NV.

Directors of SIHL

29. The twenty-fourth defendant is **MARIZA NEL**, an adult businesswoman resident at [redacted] who was, at all material times hereto, a director of SIHL.

30. The twenty-fifth defendant is **FREDERIK JOHANNES NEL**, an adult businessman resident at [redacted] who was, at all material times hereto, a director of SIHL.

31. The twenty-sixth defendant is **DIRK EMIL ACKERMAN**, an adult businessman resident at [redacted] who was, at all material times hereto, a director of SIHL.

32. The twenty-seventh defendant is **FRANKLIN ABRAHAM SONN**, an adult businessman resident at [redacted] who was, at all material times hereto, a director of SIHL.

33. The twenty-eighth defendant is **JOHANNES HENOCH NEETHLING VAN DER MERWE**, an adult businessman resident at [redacted] who was, at all material times hereto, a director of SIHL.

34. The twenty-ninth defendant is **JOHANNES NICOLAAS STEPHANUS DU PLESSIS**, an adult businessman resident at [redacted] who was, at all material times hereto, a director of SIHL.

35. The thirtieth defendant is **YOLANDA ZOLEKA CUBA** an adult businesswoman resident at [redacted] who was, at all material times hereto, a director of SIHL.

36. The thirty-first defendant is **KAREL JOHAN GROVE**, an adult businessman resident at [redacted] who was, at all material times hereto, a director of SIHL.

37. The thirty-second defendant is **HENDRIK JOHAN KAREL FERREIRA**, an adult businessman resident at [redacted] who was, at all material times hereto, a director of SIHL.

38. The thirty-third defendant is **NADINE BIRD**, an adult businesswoman resident at [redacted] who was, at all material times hereto, a director of SIHL.

39. The thirty-fourth defendant is **FRANS JOHANNES GELDENHUYS**, an adult businessman resident at [redacted] who was, at all material times hereto, a director of SIHL.

40. The thirty-fifth defendant is **RODNEY HOWARD WALKER**, an adult businessman, resident at [redacted] who was, at all material times hereto, a director of SIHL.

41. The thirty-sixth defendant is **IAN MICHAEL TOPPING**, an adult businessman, resident at [redacted] who was, at all material times hereto, a director of SIHL.

42. The defendants referred to in:

42.1 paragraphs 9 to 24 above will hereinafter be collectively referred to as *"the directors"*;

42.2 paragraphs 25 to 28 above will hereinafter be collectively referred to as *"the Steinhoff NV directors"*;

42.3 paragraphs 29 to 41 above will hereinafter be collectively referred to as *"the SIHL directors"*.

43. The directors' tenure as directors of SIHL and Steinhoff NV is set out in annexure **"POC1"** hereto.

Other Companies

44. The thirty-seventh defendant is **STANDARD CHARTERED BANK LLC** a company duly registered and incorporated in accordance with the company

laws of England, with registered address at 5th Floor, 4 Sandown Valley Crescent, Sandton.

45. The thirty-eighth defendant is **RÖDL & PARTNER GMBH WIRTSCHAFTSPRÜFUNGSGESELLSCHAFT STEUERBERATUNGSGESELLSCHAFT**, a company duly registered and incorporated in accordance with the company laws of Austria, with registered address at Zaunergasse 4-6, 4. Stock 1030 Vienna, Austria.

46. The thirty-ninth defendant is **COMMERZBANK AKTIENGESELLSCHAFT (GERMANY)**, a company with registration number HRB 32000 duly registered and incorporated in accordance with the company laws of Germany with registered address at Kaiserplatz, 60311 Frankfurt am Main, Germany.

47. The fortieth defendant is **PSG CAPITAL (PTY) LTD** a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa with registered address at 1st Floor, Ou Kollege, 35 Kerk Street, Stellenbosch, 7600 and with CIPC registration number 2006/015817/07.

48. The forty-first defendant is **ABSA BANK LIMITED** a public company duly registered and incorporated in accordance with the company laws of the Republic of South Africa with registered address at 7th Floor, ABSA Towers West, 15 Troye Street, Johannesburg, Gauteng.

49. The forty-second defendant is **STEINHOFF SECRETARIAL SERVICES PROPRIETARY LIMITED** a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa, with registered address at 28 Sixth Street, Wynberg, Sandton and with CIPC registration number 1992/004646/07.

50. The defendants referred to in paragraphs 44 to 49 above are hereinafter referred to as "*the promoters*".

III. JURISDICTION

51. The above Honourable Court has jurisdiction to adjudicate the class members' claims for one or more or all of the following reasons, each of which apply to one or other of the defendants:

51.1 The class members' causes of action against one or more of the defendants arose within the territorial jurisdiction of the above Honourable Court;

51.2 one or more of the defendants are resident within the above Honourable Court's jurisdiction;

51.3 in respect of the defendants that are foreign *perigrini*: -

51.3.1 such defendants have consented to the jurisdiction of the above Honourable Court; *alternatively*

51.3.2 the above Honourable Court has granted an order of attachment to found, *alternatively* confirm jurisdiction.

IV. THE DEFENDANTS' STATUTORY AND COMMON LAW DUTIES

52. At all material times:

52.1 the directors were required to comply and act consistently with, *inter alia,* the following provisions of the Companies Act:

52.1.1 section 22;

52.1.2 section 28;

52.1.3 section 29;

52.1.4 section 30;

52.1.5 section 40; and

52.1.6 section 76;

52.2 SIHL and Steinhoff NV were required to comply and act consistently with, *inter alia,* the following provisions of the Companies Act:

52.2.1 section 22;

52.2.2 section 28;

52.2.3 section 29;

52.2.4 section 30; and

52.2.5 section 40.

52.3 the auditors were required to comply and act consistently with section 30 of the Companies Act, which, in turn, required the auditors to comply and act consistently with, *inter alia*, the following:

52.3.1 Sections 44(2) and (3) of the Auditing Professions Act 26 of 2005 ("the APA");

52.3.2 Section 45 of the APA;

52.3.3 International Financial Reporting Standards ("IFRS") on Audit as issued by the International Auditing and Assurance Standards Board ("IFRS on Auditing") or its equivalent.

52.4 the directors, in their dealings with shareholders of SIHL and Steinhoff NV, owed to such shareholders a duty of care which required them, *inter alia*, to:

52.4.1 act honestly;

52.4.2 ensure that any information which is provided to such shareholders, whether directly or indirectly, is clear and comprehensible, not misleading and does not hide material particulars;

52.4.3 disclose to the general public, at the earliest possible opportunity, such information which may come to their attention which may have a material adverse effect in the value of their shareholding;

52.4.4 to comply with the prevailing rules of the JSE, as amended from time to time;

52.4.5 not to misrepresent the financial affairs of SIHL or Steinhoff NV and, more particularly:

52.4.5.1 not overstate the assets of SIHL or Steinhoff NV;

52.4.5.2 not understate the liabilities of SIHL or Steinhoff NV.

V. THE IMPUGNED TRANSACTIONS

53. The directors, SIHL and Steinhoff engaged in transactions which relate to the unlawful conduct particularised in paragraphs 107 to 109 below, including the following transactions which are presently known to the plaintiff:

53.1 the Kika-Liener transaction, which were conducted without obtaining the necessary shareholder approval, as prescribed in the JSE Listings Requirements;

53.2 the GT Branding transactions, in terms whereof, related parties were not disclosed in SIHL's accounting records and where income was reflected without having been earned;

53.3 the JD Consumer Finance transactions, in terms whereof a loss-making entity was reflected as a *"discontinued operation"* and thereafter transferred to a related party, without disclosure of such related party's losses in SIHL's accounting records; and

53.4 the Southern View Finance transactions, which enabled the Steinhoff group to:

53.4.1 reflect, in accounting records, sales through predatory consumer loans;

53.4.2 reflect, in accounting records, interest income on loans used by Campion to purchase financing facilities;

53.4.3 obscure impairment losses visible in related parties' accounting records.

54. However:

54.1 on or about 5 December 2017 SIHL and Steinhoff NV announced:

54.1.1 that they were launching an investigation into "*accounting irregularities*" relating to their accounting records and financial statements;

54.1.2 that CEO, Markus Jooste, was resigning from the companies with immediate effect; and

54.1.3 the postponement of the publication of their 2017 full year results until completion of a forensic audit by PricewaterhouseCoopers.

54.2 Further transactions, which give rise to the unlawful conduct referred to in paragraphs 107 to 109 below, are yet to be uncovered or disclosed by the defendants;

54.3 when more transactions and/or other unlawful conduct is/are uncovered as a result of the aforegoing, the plaintiff will amend her

particulars of claim so as to detail same, insofar as it may be necessary.

55. The transactions set out in paragraphs 56 to 106 below and such further transactions as are uncovered and which will be incorporated herein by way of amendment, are hereinafter referred to as "*the impugned transactions*".

Kika-Liener

56. Between 1999 to 2013, Siegmar Schmidt served as chief financial officer and chief executive officer of Steinhoff Europe AG.

57. During March 2013, Schmidt resigned from Steinhoff Europe and was appointed as managing director of Genesis Investment Holdings GmbH ("Genesis"). Genesis was incorporated on or about 21 February 2013, with a share capital of €35 000.

58. On 26 June 2013, the directors of SIHL issued an announcement on the Johannesburg Stock Exchange News Service ("SENS"). In this announcement, they stated that "*...agreements were concluded, which if implemented, would result in Steinhoff Europe AG or its nominee acquiring the entire issued share capital of the Kieker and Liener Group of companies.*"

59. During November 2013, the Kika-Leiner transaction became unconditional.

60. To finance the Kika-Leiner transaction, on 1 December 2013, the directors of SIHL issued 120 000 000 shares in SIHL at €3,12 per share, the total value of which was €375 000 000,00.

61. Despite SIHL's representations to the market, via the SENS announcement, that SIHL would acquire Kika-Leiner, Genesis instead acquired Kika-Leiner. SIHL financed Genesis's acquisition of Kika-Leiner.

62. Steinhoff Europe was subsequently appointed by the shareholder of Genesis to assist and manage in the evaluation and repositioning of the Kika Leiner businesses in Austria and eastern Europe.

63. On or about 30 June 2014, SIHL announced that it had acquired Kika Leiner's entire property portfolio for €452million.

64. The net effect of this transaction was as follows:

64.1 SIHL, in effect, financed the purchase of Kika Leiner by Genesis for no value to the shareholders;

64.2 After financing the purchase of Kika Leiner, SIHL injected further money into Genesis by purchasing Kika Leiner's property portfolio, for an amount in excess of the finance amount.

64.3 Shareholders of SIHL suffered a dilution in the value of their shares.

65. Given that Schmidt was a director of Steinhoff Europe less than a year before the Kika-Liener deal commenced, Steinhoff SA's transaction with Genesis was a related-party transaction as contemplated in the JSE rules.

66. SIHL and its directors failed to:

66.1 announce the transaction;

66.2 send a circular to shareholders in relation to the true nature of the transaction;

66.3 obtain approval of the transaction by resolution of its shareholders, before it was entered into, or prior to its conclusion; and

66.4 obtain a "fairness opinion" and include a statement by the Board indicating that the shareholders had been advised by an independent expert acceptable to the JSE.

GT Branding

67. Campion Capital Societe Anonyme ("Campion") is a private equity firm operating in Switzerland.

68. At all material times, SIHL exercised direct or indirect control of Campion and its subsidiaries, as contemplated in section 2 of the Companies Act.

69. Campion and its subsidiaries, in the circumstances, were related persons, *vis-à-vis* SIHL and the entities in the Steinhoff group of companies.

70. Campion has two subsidiaries:

70.1 Fulcrum Financials Services SA; and

70.2 Fulcrum Investment Partners SA ("Fulcrum Investment Partners").

71. Fulcrum Investment Partners, in turn, is a 55% shareholder in GT Branding Holdings ("GT Branding") -the other 45% is owned by Steinhoff Möbel Holdings Alpha, a wholly owned subsidiary of SIHL.

72. GT Branding is a Swiss business that holds several brands under the Steinhoff catalogue.

73. GT Global Trademarks was a Steinhoff subsidiary which held several trademarks used by the Steinhoff group of companies.

74. During or about 2015, SIHL facilitated the sale of GT Global Trademarks to GT Branding Holdings through a CHF 809 million (€673 million) loan from Steinhoff Mobel Holdings Alpha to GT Branding.

75. However:

75.1 GT Branding was not consolidated in SIHL's accounts, nor was its related party status disclosed; and

75.2 subsidiaries of SIHL reflected income arising from transactions conducted with GT Branding, designated as "*promotion of brands*" under circumstances where no income was received from GT Branding.

76. GT Branding's 2015 accounts reflected related party debts of CHF 809 million (€673 million). The related party was reflected as SIHL subsidiary Steinhoff Mobel Holdings Alpha.

77. Therefore, GT Branding's accounts reflect Steinhoff Mobel Holdings Alpha as a related party but SIHL's accounts did not reflect GT Branding as a related entity.

78. As GT Branding Holding was not consolidated in SIHL's accounts, its operating losses and debts were not consolidated. This allowed SIHL to:

78.1 reflect significant interest revenue on its loans to the business; and

78.2 record increased 'phantom' income from a loan to an undisclosed off-balance sheet entity.

79. There was no economic benefit to SIHL or its investors from the sale of GT Global Trademarks to GT Branding Holding and ultimately, Campion Capital.

80. Steinhoff SA's transaction with Campion in respect of GT Branding Holding, was a related-party transaction as contemplated in the JSE rules.

81. Steinhoff SA and its directors failed to:

81.1 announce the transaction;

81.2 send a circular to shareholders disclosing the true nature of the transaction;

81.3 obtain approval of the transaction by resolution of its shareholders, before it was entered into;

81.4 obtain a "fairness opinion" and include a statement by the Board indicating that the shareholders had been advised by an independent expert acceptable to the JSE.

JD Consumer Finance

82. During or about 2012, SIHL's subsidiary, Steinhoff Africa Holdings (Pty) Ltd ("Steinhoff Africa") acquired a majority stake of African furniture retailer JD Group Limited ("JD Group"). JD Group's subsidiary (through JDG Trading (Pty) Ltd), JD Consumer Finance (Pty) Ltd ("JD Consumer Finance"), is a South Africa-based business which provides unsecured consumer loans to JD Group customers at Point of Sale ("POS") facilities.

83. During or about January 2016, JD Consumer Finance was sold to Campion subsidiary, Fulcrum Financial Services, through a vehicle owned by it, namely Wands Investments (Pty) Ltd ("Wands").

84. As SIHL and Steinhoff Africa were negotiating the sale of JD Consumer Finance, SIHL listed the entity in its September 2016 accounts as a "*discontinued operation*" whose losses were not reflected in SIHL's "*continuing operations*" financials. JD Consumer Finance's accounts showed that it was consistently loss-making, incurring losses of €155 million in 2015.

85. As a result of the transfer of JD Consumer Finance to Fulcrum Financial Services, Campion now owned and controlled the loss-making consumer finance provider and it did not appear on SIHL's consolidated balance sheet.

86. SIHL financed the acquisition of JD Consumer Finance to Fulcrum Financial Services (Campion) through loans.

Southern View Finance (Capfin)

87. During or about January 2013, Southern View Finance ("SVF") was incorporated and listed in Bermuda with the initial purpose of providing cost-effective unsecured lending services in South Africa under the name "Capfin". SVF established three wholly owned subsidiaries:

87.1 Southern View Finance UK ("SVF UK");

87.2 Southern View Finance Mauritius ("SVF Mauritius"); and

87.3 Southern View Finance SA Pty Ltd ("SVF SA").

88. SVF UK carried out unsecured lending services in South Africa under the name "Capfin".

89. SVF UK entered into an exclusive agreement with Wiese entity Pepkor Retail for the exclusive provisioning of financial services products across 1600 PEP retail outlets as well as 528 Ackerman's retail outlets whose target market were low-income earners. Steinhoff NV acquired Pepkor Holdings in November 2014 and the exclusive agreement, continued through to at least late 2016.

90. The provision of unsecured lending to customers of Pepkor and Ackermans and the "*high risk*" nature of sales did not appear on SIHL or Steinhoff's NV's balance sheet.

91. SVF UK's accounts reflect that it:

91.1 had significant debt delinquencies;

91.2 provided significant numbers of loans through POS transactions at various retail outlets falling part of the Steinhoff stable;

91.3 wrote off delinquent loans on an annual basis to such an extent as to equal the value of all new loans concluded over the period.

92. In August 2014, the South African National Credit Regulator ("NCR") launched a compliance investigation into SVF UK in regard to its lending practices. The key issue was that Capfin had not documented any proof of income for its lending customers.

93. Following a January 2015 inspection, the NCR cancelled Capfin's license in February 2015. This led to litigation which culminated in a settlement agreement between SVF UK and the NCR.

94. In October 2015, SVF sold all its subsidiaries (including SVF UK) and loan claims against its subsidiaries to Campion subsidiary Fulcrum Financial Services.

95. Fulcrum Financial Services' purchase was not settled in cash but by the creation of a R4.6 billion (€321 million) loan claim in favour of SVF. On 19 October 2015 SVF UK announced that it would distribute this loan claim to its shareholder companies, the ultimate beneficiary of which is Wiese.

96. Although neither SIHL nor Steinhoff NV had any direct ownership interest in SVF UK or its affiliates, it provided significant funding to the business during the 2015 and 2016 financial years through its subsidiaries, Steinhoff Finance Investments and Retail Interests Limited.

97. SIHL took over SVF UK's ZAR 500 million loan facility previously extended by FirstRand Bank Limited and Standard Bank Ltd in July 2015 as well as the senior note under a securitization facility on 21 August 2015. This was shortly before the transfer of ownership to Fulcrum and during the pending cancellation of SVF UK's license in South Africa for its lending business. The securitisation facility was issued to Retail Interests Limited, a fully owned subsidiary of Steinhoff Europe AG.

98. Steinhoff repaid these loan balances on the last business day of the 2016 financial year.

99. The average total loan balance from Steinhoff to Southern View Finance UK was ZAR 554.85m (EUR 33.91m).

100. The effect of the aforegoing was that SIHL ensured Campion was acquiring a debt-free business, a transaction with no clear benefit to the Steinhoff entity or its shareholders.

101. With effect from 1 July 2016, SVF UK sold its entire loan book and consumer finance business to JD Consumer Finance, which changed its name to Century Capital, for an amount of R1.36 billion.

102. Century Capital (formerly JD Consumer Finance) now owned Capfin's loan book and all operations of the JD Consumer Finance business.

103. SIHL purchased Southern View Finance SA and Van As associates from Campion Capital in late 2016. Southern View Finance SA provides call centre and administration to Capfin and Van As acts as a collection agency for Capfin. These agencies are essentially responsible for debt collection and their acquisition by the Steinhoff group allowed it to reflect income from its consumer loans without the need to hold or recognise delinquent loans.

104. Steinhoff UK Holdings Limited (wholly owned Steinhoff subsidiary) later re-acquired SVF UK for a sum not disclosed in filings to-date.

105. SVF UK was purchased by SIHL in order to offset losses incurred by Campion Capital through its subsidiaries.

106. The transfer of consumer finance entities off-balance sheet allowed the Steinhoff group to:

106.1 boost sales through predatory consumer loans;

106.2 recognise interest income on loans used by Campion to purchase said financing facilities;

106.3 capitalize on non-delinquent loans through the acquisition of consumer loans debt collection facility; and

106.4 obscure impairment losses visible in SVF UK and JD Consumer Finance's accounts.

VI. THE DEFENDANTS' UNLAWFUL CONDUCT

Companies, Directors and Other Parties

107. The transactions referred to in paragraphs 67 to 106 above:

107.1 were unlawful;

107.2 were comprised of off-balance sheet structures and transactions;

107.3 were not arm's length transactions;

107.4 were not at market-related prices;

107.5 caused the assets, income and profit of SIHL and Steinhoff NV to be overstated in their financial statements;

107.6 caused the liabilities and expenses of SIHL and Steinhoff NV to be understated in their financial statements;

107.7 gave rise to an obligation on the part of SIHL and Steinhoff NV's respective directors:

107.7.1 to disclose to existing and potential shareholders in those entities, the true nature of such transactions;

107.7.2 to reflect the true nature of those transactions in their respective financial statements;

107.8 as a result of the conduct of the directors, which was negligent, were not reflected in SIHL's or Steinhoff NV's accounting records or financial statements, *alternatively*, were reflected in their respective accounting records or financial statements in a manner which did not disclose the true nature of such transactions;

107.9 would, if their true nature had been disclosed to existing and potential shareholders, have a detrimental effect on the value of the shares in SIHL and Steinhoff NV respectively;

108. In the result:

108.1 SIHL and Steinhoff NV, acting through the SIHL directors and the Steinhoff NV directors respectively,:

108.1.1 failed to keep accurate or complete accounting records, comprised of internal information concerning their financial affairs, including but not limited to SIHL and Steinhoff NV's purchase and sales records, general and subsidiary ledgers and other documents and books used in the preparation of financial statements ("*accounting records*"), as required in terms of section 28(1) of the Companies Act (and, in the case of Jooste with an intention deceive or mislead shareholders), as prohibited in section 28(3)(i) of the Companies Act;

108.1.2 falsified or permitted the falsification of its accounting records, as prohibited by section 28(3)(a)(ii) and section 28(3)(b) of the Companies Act;

108.1.3 provided financial statements to shareholders which:

108.1.3.1 did not satisfy prescribed financial reporting standards, as required in section 29(1)(a) of the Companies Act;

108.1.3.2 did not present fairly the state of affairs and business of SIHL and Steinhoff NV, and explain the transactions and financial position of the business of the SIHL and Steinhoff NV, as required by section 28(1)(b) if the Companies Act;

108.1.3.3 did not accurately show SIHL and Steinhoff NV's assets, liabilities and equity, as well as their income and expenses, as required by section 29(1)(c) of the Companies Act and in contravention of section 29(6)(a) of the Companies Act;

108.1.3.4 were false or misleading, as contemplated in section 29(2)(a) of the Companies Act and in

contravention of section 29(6)(a) of the Companies Act;

108.1.3.5 were incomplete in material respects, as contemplated in section 29(2)(b) of the Companies Act and in contravention of section 29(6)(b) of the Companies Act;

108.1.3.6 included a report by the SIHL directors and the Steinhoff NV directors with respect to the state of affairs, the business and profit or loss of SIHL and Steinhoff NV and of the group of companies of which they both formed part, but which report, in contravention of section 30(3)(b) of the Companies Act, did not include:

108.1.3.6.1 matters material for the shareholders to appreciate the companies' state of affairs.

108.1.4 represented that SIHL and Steinhoff NV were both factually and commercially solvent, when they were neither factually nor commercially solvent;

108.1.5 carried on the business of SIHL and Steinhoff NV recklessly, with gross negligence and, in the case of Jooste, with intent to defraud any person or for a fraudulent purpose, in breach of section 22 of the Companies Act;

108.2 the SIHL directors and the Steinhoff NV directors, in contravention of section 76(2) and (3) of the Companies Act:

108.2.1 failed to communicate to the boards of SIHL and Steinhoff NV at the earliest practicable opportunity, material information that came to their attention;

108.2.2 failed to exercise the powers and perform the functions of directors:

108.2.2.1 in good faith and for a proper purpose;

108.2.2.2 in the best interests of the companies; and

108.2.2.3 with the degree of care, skill and diligence that may reasonably be expected of a person:

108.2.2.3.1 carrying out the same functions in relation to the companies as

those carried out by that director; and

108.2.2.3.2 having the general knowledge, skill and experience of that director.

Auditors

109. During the period:

109.1 June 2013 to December 2015, the auditors:

109.1.1 conducted an audit of the financial statements of SIHL;

109.1.2 became aware of the facts and circumstances set out in paragraphs 56-106 &108 above, *alternatively*, did not become aware of such facts and circumstances where, with the exercise of reasonable care, they should and would have become aware of such facts and circumstances; and

109.1.3 delivered auditor's reports representing that the financial misstatement of SIHL were reasonably free of material misstatement.

VII. CLAIMS ARISING FROM THE DEFENDANTS' CONDUCT

Sections 218(2) and 20(6) and Delict: Claims Against Directors and Against SIHL and Steinhoff NV

110. In conducting themselves as set out in paragraph 108 above, the directors of SIHL and Steinhoff NV, as well as SIHL and Steinhoff NV themselves, contravened the following provisions of the Companies Act:

110.1 section 22;

110.2 section 28;

110.3 section 29;

110.4 section 30;

110.5 section 40; and

110.6 section 76.

111. In terms of section 218(2) of the Companies Act, the directors of SIHL and Steinhoff NV, as well as SIHL and Steinhoff NV themselves, are accordingly jointly and severally liable to the class members for any damages suffered by them as a result of the contraventions referred to in paragraph 110 above.

112. *Alternatively* to paragraphs 110 and 111 above, the plaintiff pleads that:

112.1 in conducting themselves as set out in paragraph 108 above, the directors of SIHL and Steinhoff NV, due to their gross negligence (and, in the case of Jooste, intentionally, *alternatively*, fraudulently) caused SIHL and Steinhoff NV to conduct themselves in a manner which was inconsistent with:

112.1.1 the Companies Act; *alternatively*

112.1.2 a limitation, restriction or qualification contemplated in section 20 of the Companies Act, which had not been ratified by the shareholders of SIHL and Steinhoff NV in terms of section 20(2) of the Companies Act;

112.2 the provisions, limitations, restrictions or qualifications in terms of the Act which are referred to in paragraph 112.1 above are the following:

112.2.1 section 22;

112.2.2 section 28;

112.2.3 section 29;

112.2.4 section 30;

112.2.5 section 40; and

112.2.6 section 76.

112.3 In terms of section 20(6) of the Companies Act, the directors of SIHL and Steinhoff NV are accordingly liable to the class members, jointly and severally, for any damages suffered by the class members as a result of such conduct.

113. In the *further alternative* to paragraphs 110 to 112 above, the plaintiff pleads that:

113.1 at all material times, the directors were officers of SIHL, *alternatively* of Steinhoff NV, *further alternatively* both SIHL and Steinhoff NV and, in conducting themselves as set out in paragraphs 53 to 108 above, were acting within the course and scope of their appointment as directors and officers of SIHL, *alternatively* of Steinhoff NV, *further alternatively* both SIHL and Steinhoff NV;

113.2 in conducting themselves as set out in paragraphs 53 to 108 above, the directors of SIHL and Steinhoff NV, as well as SIHL and Steinhoff NV themselves negligently, *alternatively,* deliberately breached the duties of care referred to in paragraph 52.4 above;

113.3 the directors of SIHL and Steinhoff NV, as well as SIHL and Steinhoff NV themselves are accordingly jointly and severally

liable to the class members for any damages suffered by the class members as a result of such conduct.

Sections 218(2) and 20(6): Claims Against the Auditors

114. In conducting themselves as set out in paragraph 109 above, the auditors contravened the provisions of:

114.1 Section 30 of the Companies Act;

114.2 Sections 44(2) and (3) of the APA;

114.3 Section 45 of the APA; and

114.4 IFRS.

115. In terms of section 218(2) of the Companies Act, the auditors are accordingly jointly and severally liable to the class members for any damages suffered by them as a result of the contraventions referred to in paragraph 114 above.

116. *Alternatively* to paragraphs 114 and 115 above, the plaintiff pleads that:

116.1 In conducting themselves as set out in paragraphs 109 above, the auditors, due to their gross negligence, caused SIHL and Steinhoff NV to conduct themselves in a manner which was inconsistent with:

116.1.1 the Companies Act; *alternatively*

116.1.2 a limitation, restriction or qualification contemplated in section 20 of the Companies Act, which had not been ratified by the shareholders of SIHL and Steinhoff NV in terms of section 20(2) of the Companies Act;

116.2 the provisions, limitations, restrictions or qualifications in terms of the Act which are referred to in paragraph 116.1 above are the following:

116.2.1 30 of the Companies Act;

116.2.2 Sections 44(2) and (3) of the APA;

116.2.3 Section 45 of the APA; and

116.2.4 IFRS.

117. In terms of section 20(6) of the Companies Act, the auditors are accordingly liable to the class members, jointly and severally, for any damages suffered by the class members as a result of such conduct.

Sections 104 and 105 of the Companies Act

118. On or about 7 August 2015, Steinhoff NV offered securities in Steinhoff NV to the public for subscription or sale pursuant to a prospectus ("the

prospectus"), as contemplated in sections 104 and 105 of the Companies Act.

119. A copy of the prospectus is annexed hereto and marked **"POC2"**.

120. During the period 7 August 2015 to 5 December 2017, one or more of the shareholders acquired securities on the faith of the prospectus.

121. The prospectus contained *inter aila* the following annexures:

121.1 SIHL's historical financial results for the fiscal years ended 30 June 2012, 30 June 2013 and 30 June 2014;

121.2 Unaudited and unreviewed interim financial statements of SIHL as at 31 December 2014;

121.1 6 months' unaudited and unreviewed historical financial information on Steinhoff NV for the half year ended 31 December 2014;

121.1 a pro forma statement of financial position and income statement of the Steinhoff NV subsequent to the implementation of a scheme of arrangement, as if for the statement of financial position purposes the scheme had been implemented on 31 December 2014, and for income statement purposes on 1 July 2014;

121.2 a report by the auditors on the pro forma financial information included in the prospectus;

121.3 a report by the auditors in terms of regulation 78 of the regulations promulgated under the Companies Act ("the Companies Regulations");

121.4 a report by the auditors on the historical financial information of Steinhoff NV.

122. The annexures referred to in paragraph 121 above contained untrue statements, as contemplated in sections 104 and 105 of the Companies Act, in that they:

122.1 did not present fairly the state of affairs and business of SIHL and Steinhoff NV, and accurately explain the transactions and financial position of the business of SIHL and Steinhoff NV;

122.2 did not accurately show SIHL and Steinhoff NV's assets, liabilities and equity, as well as their income and expenses;

122.3 were false or misleading;

122.4 were incomplete in material respects;

122.5 did not include—

122.5.1 matters material for the shareholders to appreciate the companies' state of affairs.

123. Moreover, the prospectus, *alternatively*, the reports or memoranda appearing on the face of, issued with or incorporated by reference in the prospectus, contained the following statements:

123.1 that annexure 1 thereto constituted an accurate representation of the consolidated annual financial statements of the group of companies of which SIHL was a part;

123.2 that SIHL had lodged with the Companies and Intellectual Property Commission ("the CIPC"), all such returns as were required for a public company in terms of the Companies Act and that all such returns were true, correct and up to date;

123.1 that the group annual financial statements had been prepared in accordance with International Financial Reporting Standards ("IFRS"), the interpretations adopted by the International Accounting Standards Board ("IASB"), the IFRS Interpretations Committee of the IASB ("IFRIC"), the requirements of the Companies Act and that they had been audited in compliance with all the requirements of section 29(1) of the Companies Act, as required;

123.1 that references therein to "*an associate company*" constituted a reference to an entity over which the group was in a position to exercise significant influence, through participation in the financial and operating policy decisions of the entity, but which it does not control or jointly control.

124. The aforesaid statements were untrue in that:

124.1 annexure 1 thereto did not constitute an accurate representation of the consolidated annual financial statements of the group of companies of which SIHL was a part;

124.2 SIHL had not lodged with the Companies and Intellectual Property Commission ("the CIPC"), such returns as were required to be lodged;

124.3 such returns as were lodged were not true, correct or up to date;

124.4 the group annual financial statements had not been prepared in accordance with IFRS, the interpretations adopted by the IASB or IFRIC, or the requirements of the Companies Act;

124.5 the group annual financial statements had not been audited in compliance with all the requirements of section 29(1) of the Companies Act;

124.6 not all entities meeting the definition of "*an associate company*" had been disclosed.

125. The untrue statements referred to in paragraphs 121 to 124 above are hereinafter referred to as "*the untrue statements*".

126. The directors are:

126.1 persons who became directors between the issuing of the prospectuses and the holding of the first general shareholders meeting at which directors were elected or appointed;

126.2 persons who consented to be named in the prospectuses as directors, or as having agreed to become directors either immediately or after an interval of time;

126.3 persons who: -

126.3.1 authorised the issue of the prospectuses or, are regarded as having authorised the issue of the prospectus in terms of the Companies Act; or

126.3.2 made an offer to the public for subscription or sale of securities.

127. The promoters are promoters of the companies named in the prospectuses, as defined in section 95(1)(j) of the Companies Act.

128. *Ex facie* the prospectuses, the untrue statements were purportedly made by the auditors as experts.

129. Therefore, in terms of sections 104 and 105 of the Companies Act, the directors, the auditors and the defendants referred to in paragraphs 44 to 49 above are accordingly jointly and severally liable to the class members for any damages suffered by the class members as a result of the untrue statements.

VIII. DAMAGES

Nature of Damages Suffered

130. At various stages, the class members acquired securities in SIHL or Steinhoff NV.

131. The first class comprises:

"*All persons purchased or held shares in SIHL registered on the JSE from 26 June 2013, and in terms of a scheme of arrangement concluded on 7 December 2015, exchanged those shares for shares in Steinhoff NV, and:*

131.1 *continue to hold securities in Steinhoff NV; or*

131.2 *sold their shares on or after 5 December 2017*;

excluding SIHL's, Steinhoff NV's and STAR's past or present subsidiaries, officers, directors, affiliates, legal representatives, heirs, predecessors,

assigns, and all members of the individual defendants' families and any entity in which any of the individual defendants has or had a controlling interest. (the "JSE 1 Class")"

132. The second class comprises:

"All persons who purchased shares in Steinhoff NV registered to the Johannesburg Stock Exchange between 7 December 2015 and 5 December 2017, and —

132.1 *who continue to hold securities in Steinhoff NV; and/or*

132.2 *sold their shares on or after 5 December 2017;*

excluding SIHL's, Steinhoff NV's and STAR's past or present subsidiaries, officers, directors, affiliates, legal representatives, heirs, predecessors, assigns, and all members of the individual defendants' families and any entity in which any of the individual defendants has or had a controlling interest. (the "JSE 2 Class")"

133. The third class comprises:

"All persons who purchased securities of Steinhoff International Holdings NV ("Steinhoff NV") registered to the Frankfurt Stock Exchange between 7 December 2015 and 5 December 2017, and —

133.1 *who continue to hold securities in Steinhoff NV; and/or*

133.2 *sold their shares on or after 5 December 2017;*

134. *excluding Steinhoff NV's past or present subsidiaries, officers, directors, affiliates, legal representatives, heirs, predecessors, assigns, and all members of the individual defendants' families and any entity in which any of the individual defendants has or had a controlling interest. (the "FSE Class")"*

135. In 2015, pursuant to the scheme of arrangement, the securities in SIHL were exchanged for securities in Steinhoff NV.

136. During the second class period, class members purchased securities of Steinhoff NV registered on the JSE between 7 December 2015 and 5 December 2017 and:

136.1 continue to hold securities in Steinhoff NV; or

136.2 sold their shares on or after 5 December 2017.

137. During the third class period, class members purchased securities of Steinhoff NV registered on the FSE between 7 December 2015 and 5 December 2017, and:

137.1 continue to hold securities in Steinhoff NV; or

137.2 sold their shares on or after 5 December 2017.

NA

138. Securities in SIHL and, thereafter, in Steinhoff NV were publicly traded on the JSE and the FSE from time to time.

139. The price at which the securities in SIHL and Steinhoff NV were traded depended upon the market's view of the price of those securities.

140. In turn, the market's view of the price of those securities was based upon the market perception of the underlying value of SIHL and Steinhoff NV. This market perception was causally connected to the defendants' conduct, as set out above, such that the market price at which the SIHL and Steinhoff NV shares traded was impacted.

141. Class members acquired those securities at the prices at which they were traded from time to time, and:

141.1 sold these shares after the SENS announcement of 6 December 2017;

141.2 retained them to date; or

141.3 sold part of their shareholding and retained the remainder.

142. The class members suffered damages when they purchased their shares and/or when they traded their shares or retained them after the SENS announcement of 6 December 2017.

143. The damages suffered by the class members arose in one or more of the following ways:

143.1 Class members bought their shares at a price in excess of the true value of the shares, as a result of the price of those shares having been inflated as a consequence of the defendant's unlawful conduct;

143.2 Class members decided to hold their shares as a result of the price of those shares having been inflated in consequence of the defendant's unlawful conduct when they would have sold them if they had acquired knowledge of the defendants' unlawful conduct. When the defendant's conduct became public knowledge, they suffered a diminution in the value of their shares.

144. The conduct of the defendants as set out above, accordingly caused the class members to suffer damages.

Deferment of Quantification of Damages

145. At this stage, the plaintiff seeks an order declaring that the defendants are liable to the class members on the basis of the claims advanced by her and that the quantification of the class members' entitlements stand over for later determination.

IX. PRAYERS

WHEREFORE the plaintiff prays for an order in the following terms:

1. It is declared that the defendants are liable to the class members, jointly and severally, the one paying the others to be absolved, for damages found to have been suffered by her as a result of the defendants' conduct;

2. The registrar of this court is directed to fix a date for an inquiry to be conducted by way of a High Court Trial for the purposes of:

   2.1 the determination of the amounts to be paid by the defendants as damages arising from the unlawful conduct;

   2.2 the payment by the defendants, jointly and severally, the one paying the others to be absolved, to the applicant of the amount of compensation found to be due to the class members pursuant to the determination, together with interest on such amount at the prescribed rate of interest from the date of such determination until the date of payment, and the costs of the determination;

3. The plaintiff shall serve upon the defendants and file a declaration particularising the damages allegedly suffered by her as a result of the unlawful conduct;

4. The defendants, if so advised, shall within 20 days of the service of the plaintiff's declaration, file a plea thereto.

5. The Uniform Rules of Court relating to discovery, inspection and all other matters of procedure shall apply to the determination.

6. The parties are authorised, on notice to the other parties, and should it be required by one or both of them, to make application to this Court to add to, or vary the above order so as to facilitate the conducting of the determination, and generally to make application for further directions in regard thereto.

7. The defendants shall pay the plaintiff's costs of suit on an attorney and client scale, including the costs consequent upon the employment of three counsel.

8. Further and/or alternative relief.

Dated at _____ on

ADV J J BRETT SC

ADV D MAHON

ADV M SIBANDA

LHL ATTORNEYS INC.
Plaintiff's Attorneys
6 Grant Ave
Norwood
Johannesburg
2192
c/o
Tel: 011 483 0540
Fax: 011 483 0542
zain@lhllaw.co.za
Ref: CA7 - Steinhoff Class Action : Mr. Zain Lundell & Ms. Rabia Hassan

TO:
THE REGISTRAR OF THE HIGH COURT

MH/MH
13062019/STEI3570.51
Combined Summons (14062019)#6244914v1

19.06.19.
15:28.

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BOX 31

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 10187/19

In the matter between:

STEINHOFF INTERNATIONAL HOLDINGS PROPRIETARY LIMITED	First Plaintiff
STEINHOFF INTERNATIONAL HOLDINGS N.V.	Second Plaintiff

OFFICE OF THE CHIEF JUSTICE
PRIVATE BAG X9020
CAPE TOWN 8000
2019 -06- 14
GENERAL OFFICE
WESTERN CAPE HIGH COURT

and

MARKUS JOHANNES JOOSTE	First Defendant
ANDRIES BENJAMIN LA GRANGE	Second Defendant

BALJU SHERIFF
19 JUN 2019
BUS BOX 192
GOODWOOD

COMBINED SUMMONS

TO: THE SHERIFF OR HIS/HER DEPUTY

INFORM:

MARKUS JOHANNES JOOSTE, an adult male businessman who presently resides at [redacted] (hereinafter called "the First Defendant").

and

Filed by Werksmans Attorneys
Ref : David Hertz / Robert Driman / STEI3570.51
Tel : 011 535 8283 / 021 405 5134
E-mail : dhertz@werksmans.com / rdriman@werksmans.com

ANDRIES BENJAMIN LA GRANGE, an adult male businessman who until recently resided at [redacted] (hereinafter called "the Second Defendant").

THAT

STEINHOFF INTERNATIONAL HOLDINGS PROPRIETARY LIMITED (formerly Steinhoff International Holdings Limited), a private company incorporated and registered as such in terms of the company laws of the Republic of South Africa, with its registered address at 28 Sixth Street, Wynberg, Sandton, Gauteng (hereinafter called "the First Plaintiff").

and

STEINHOFF INTERNATIONAL HOLDINGS N.V., a company incorporated and registered as such in accordance with the laws of the Netherlands, having its European office at Heerengracht 466, 1017 CA Amsterdam, Netherlands, duly registered in the Republic of South Africa as an external company, and which has its principal place of business in the Republic of South Africa at Block D, De Wagen Office Park, Stellentia Road, Stellenbosch (hereinafter called "the Second Plaintiff").

Hereby institutes action against the Defendants in which the Plaintiffs claims the relief on the grounds set out in the particulars of claim attached hereto.

INFORM the Defendants further that if the Defendants dispute the claim and wish to defend the action, the Defendants shall:-

i) With regard to the First Defendant, within **TEN (10) days** of the service upon the First Defendant of this summons, file with the Registrar of this Court at **KEEROM STREET**, Cape Town, Notice of Defendant's intention to defend and serve a copy thereof on the Attorneys of the Plaintiff, which notice shall give an

address (not being a post office or poste restante) referred to in Rule 19(3) for the service upon the Defendants of all notice and documents in the action.

ii) With regard to the Second Defendant, within **ONE (1) MONTH** of the service upon the Second Defendant of this summons, file with the Registrar of this Court at **KEEROM STREET**, Cape Town, Notice of Defendant's intention to defend and serve a copy thereof on the Attorneys of the Plaintiff, which notice shall give an address (not being a post office or poste restante) referred to in Rule 19(3) for the service upon the Defendants of all notice and documents in the action.

iii) Thereafter and within **TWENTY (20) days** after filing and serving notice of intention to defend as aforesaid, file with the Registrar and serve upon the Plaintiff a Plea, Exception, Notice to strike out, with or without a Counterclaim.

INFORM the Defendants further that if the Defendants fail to file and serve notice as aforesaid, Judgment as claimed may be given against the Defendants without further notice to the Defendants, or if having filed and served such notice, the Defendants fail to plea, except, make application to strike out or counter-claim, Judgment may be given against the Defendants.

AND immediately thereafter serve on the Defendants a copy of this Summons and return the same to the Registrar with whatsoever you have done thereupon.

OFFICE OF THE CHIEF JUSTICE
PRIVATE BAG X9020
CAPE TOWN 8000
2019 -06- 14
GENERAL OFFICE
WESTERN CAPE HIGH COURT

DATED AT **CAPE TOWN** ON THIS 14TH DAY OF **JUNE 2019**.

REGISTRAR OF THE HIGH COURT

WERKSMANS ATTORNEYS
Per: Robert Driman
Attorneys for the First and Second Plaintiffs
Level 1, No 5 Silo Square
V & A Waterfront
CAPE TOWN
Tel: 021 405 5134
Email: rdriman@werksmans.com
Email: dhertz@werksmans.com
(Ref: D Hertz/ R Driman/ STEI3570.51)

BOX 31

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO:

In the matter between:

STEINHOFF INTERNATIONAL HOLDINGS PROPRIETARY LIMITED	First Plaintiff
STEINHOFF INTERNATIONAL HOLDINGS N.V.	Second Plaintiff
and	
MARKUS JOHANNES JOOSTE	First Defendant
ANDRIES BENJAMIN LA GRANGE	Second Defendant

THE FIRST AND SECOND PLAINTIFFS' PARTICULARS OF CLAIM

---

1 The first plaintiff is **Steinhoff International Holdings Proprietary Limited** (formerly Steinhoff International Holdings Limited), a private company incorporated and registered as such in terms of the company laws of the

Filed by Werksmans Attorneys
Ref : David Hertz / Robert Driman / STEI3570.51
Tel : 011 535 8283 / 021 405 5134
E-mail : dhertz@werksmans.com / rdriman@werksmans.com

Republic of South Africa, with its registered address at 28 Sixth Street, Wynberg, Sandton, Gauteng.

2 The second plaintiff is **Steinhoff International Holdings N.V.**, a company incorporated and registered as such in accordance with the laws of the Netherlands, having its European office at Heerengracht 466, 1017 CA Amsterdam, Netherlands, duly registered in the Republic of South Africa as an external company, and which has its principal place of business in the Republic of South Africa at Block D, De Wagen Office Park, Stellentia Road, Stellenbosch.

3 The first defendant is **Markus Johannes Jooste**, an adult male businessman who presently resides at [redacted].

4 The first defendant became an employee of the first plaintiff with effect from 31 March 2001, and was an employee and senior executive of:

4.1 the first plaintiff, during the period 2009 to 2015; and

4.2 the second plaintiff, during the period 2015 to 2017.

5 On 15 March 2001 the first defendant signed a document styled *"APPOINTMENT LETTER"* with the first plaintiff, a copy of which is annexed marked **"POC 1"**.

6 The second defendant is **Andries Benjamin La Grange**, an adult male businessman who [redacted].

7 The second defendant became an employee of the Steinhoff Group on 1 July 2003, and was an employee and senior executive of:

7.1 the first plaintiff, during the period 2009 to 2015; and

7.2 the second plaintiff, during the period 2015 to early 2018.

8 On 1 July 2003 the second defendant signed a document styled *"LETTER OF APPOINTMENT"* with an entity known as Steinhoff Africa Holdings (Pty) Limited, a copy of which is annexed marked **"POC 2"**.

9 This court has the requisite jurisdiction to hear and determine this matter, and it is in the interests of justice, and it is convenient, that this court hear and determine this matter, for the following reasons:

9.1 the first defendant is presently resident within the territorial jurisdiction of this court;

9.2 until recently, and in any event, at all material times relevant to these action proceedings, the second defendant was resident within this court's territorial jurisdiction;

9.3 all, alternatively substantially all of the material facts giving rise to these action proceedings, occurred within this court's territorial jurisdiction;

9.4 it is convenient to this court that the claims against the first defendant and the second defendant are prosecuted in the same action proceedings; and

9.5 at all times material to these action proceedings, the management, administration and operation of the plaintiffs (and thus the facts relevant to and upon which these action proceedings are based) was conducted from, and took place in, Stellenbosch, Western Cape Province.

Claim A

10 During the period 2009 to 2015, in the case of the first defendant, and 2015 to early 2018, in the case of the second defendant ("the relevant period"), and in their capacity as employees and senior executives of the first plaintiff (in the period from 2009 to 2015), and immediately thereafter the second plaintiff (in the period from 2015 to 2018), the first and second defendants were remunerated for the services rendered by them to the first and second plaintiffs, respectively, which remuneration comprised *inter alia*:

10.1 base salary;

10.2 performance bonuses;

10.3 strategic / project bonuses; and

10.4 participation in the share incentive scheme in operation from time to time ("the long-term incentives");

(collectively, "the defendants' remuneration").

11 It was an express alternatively implied further alternatively tacit term of the employment relationship between the first plaintiff and the first defendant, and the first plaintiff and the second defendant, that the first defendant and the second defendant would be bound to the decisions of the SIH Remcom, as

defined below, in regard to the defendants' remuneration, and would be bound by any decision of the annual general meeting of the first plaintiff relevant to the defendants' remuneration.

12 It was an express alternatively implied further alternatively tacit term of the employment relationship between the second plaintiff and the first defendant, and the second plaintiff and the second defendant, that the first defendant and the second defendant would be bound by the decisions of the NV Remcom, as defined below, in regard to the defendants' remuneration, and would be bound by any decision of the annual general meeting of the second plaintiff relevant to the defendants' remuneration.

13 Moreover, and in any event, the defendants' remuneration was paid to them, over the relevant period, by the first plaintiff, and thereafter the second plaintiff, as detailed more fully below, and was accepted by them without demur.

14 The defendants' remuneration was determined, during the relevant period, by the first and second plaintiffs' as follows:

14.1 in the case of the first plaintiff:

14.1.1 in regard to base salary, performance bonuses and strategic / project bonuses, on the recommendation of its Human Resources and Remuneration Committee ("the SIH Remcom"), which was established pursuant to the first plaintiff's obligations under the

King Reports on Corporate Governance, read together with the listing requirements of the JSE Limited in place from time to time, and which was established as a committee of the board of directors of the first plaintiff; and

14.1.2 in regard to the long-term incentives, on the recommendation of the SIH Remcom, as approved at each annual general meeting of the first plaintiff;

14.2 in the case of the second plaintiff:

14.2.1 in regard to base salary, performance bonuses and strategic / project bonuses, on the recommendation of its Human Resources and Remuneration Committee ("the NV Remcom"), which was established pursuant to the second plaintiff's obligations under the Dutch Civil Code, and regulated by the provisions of the Regulations of the Human Resources and Remuneration Committee, adopted by the supervisory board of the second plaintiff on 1 December 2015, and annexed marked **"POC 3"**; and

14.2.2 in regard to the long-term incentives, on the recommendation of the NV Remcom, as approved at each annual general meeting of the second plaintiff.

15 In determining the various elements of the defendants' remuneration, the SIH Remcom and, subsequently, the NV Remcom, took into consideration *inter alia* the following:

15.1 in regard to base salary, such base salary was determined taking into consideration comparative salaries paid to senior executives in comparative businesses, taking into consideration the size and profitability of such comparative businesses, as also the financial performance of the first plaintiff, and the second plaintiff, as the case may be;

15.2 in regard to performance bonuses, such bonuses were set on an individual basis each year based on a percentage of annual base salary, with the SIH Remcom and the NV Remcom, as the case may be, retaining the discretion to make adjustments to bonuses earned at the end of the financial year, taking into account, in particular, the financial performance of the first plaintiff and the second plaintiff, as the case may be, and the overall and specific contribution of individuals to meeting the objective of the broader Steinhoff Group of companies ("the Steinhoff Group");

15.3 in regard to strategic / project bonuses, such bonuses were set on the basis that the first and second defendants had each contributed to the success of specific projects outside of what was expected from each of

the first and second defendants in the normal execution of their duties; and

15.4 in regard to the long-term incentives, such long term-incentives were recommended by the SIH Remcom, and subsequently the NV Remcom, approved at each annual general meeting, and were allocated to employees of the first plaintiff and the second plaintiff (including the first and second defendants) based *inter alia* on the following criteria –

15.4.1 rewarding individuals who were key to driving the Steinhoff Group's business strategy;

15.4.2 the retention of key talent and scarce skills;

15.4.3 talent management strategy and succession plans; and

15.4.4 the financial performance of the first plaintiff and the second plaintiff, as the case may be.

16 During the relevant period, and *inter alia* based on the application of the criteria referred to in paragraph 15 above:

16.1 the board of directors of the first plaintiff, and, subsequently, the supervisory board of the second plaintiff, approved the payment of base

salary, performance bonuses and strategic bonuses to the first and second defendants, as more fully detailed below;

16.2 the award of the long-term incentives to the first and second defendants was approved at each of the annual general meetings of the first plaintiff and, subsequently, the second plaintiff; and

16.3 the defendants elected to receive their performance and strategic bonuses in Euro, South African Rand, or a combination of both.

17 It was an express alternatively implied further alternatively tacit term of the first and second defendants' employment relationship with the first plaintiff and, thereafter, the second plaintiff that:

17.1 payment of base salaries, payment of performance bonuses and payment of strategic / project bonuses by the first plaintiff and the second plaintiff, as the case may be, was dependent, *inter alia*, on the sound and successful financial performance of the first plaintiff, and thereafter the second plaintiff, during each year making up the relevant period; and

17.2 the approval of the long-term incentives would not be sought at the annual general meetings of the first plaintiff, and thereafter the second plaintiff, in the absence of sound and successful financial performance by those entities.

18 During the relevant period:

18.1 various transactions (particulars whereof appear below) were structured and implemented which had the result of substantially, and artificially, inflating the profit and asset values of:

18.1.1 the first plaintiff during the period 2009 to 2015; and

18.1.2 the second plaintiff during the period 2015 to 2017;

18.2 fictitious and/or irregular transactions were ostensibly entered into with parties said to be, and made to appear to be, independent of the first and second plaintiffs (collectively "the Steinhoff Group") but which were, in fact, not genuine or independent of the first and second plaintiffs; and

18.3 fictitious and/or irregular income was created at intermediary Steinhoff Group holding company level, by transacting with purportedly independent parties and then allocating such income to underperforming operating entities within the Steinhoff Group as so-called "contributions", which had the effect of either increasing income or reducing expenses;

(collectively "the fictitious transactions" and "the accounting irregularities").

19 The fictitious transactions and the accounting irregularities included those pleaded in paragraph 20 to 24 below.

20 Transactions were ostensibly entered into with:

20.1 entities forming part of the Campion/Fulcrum Group;

20.2 entities forming part of the Talgarth Group; and

20.3 entities forming part of the TG Group;

having little or no economic value, and not at arms length.

21 Transactions resulting in apparent profit and loss creation involving the sale and purchase of entities, trademarks, brands, intellectual property, rebates and know-how, were ostensibly entered into with:

21.1 the Talgarth Group;

21.2 the Campion/Fulcrum Group;

21.3 the TG Group; and

21.4 Tulett Holdings;

with income from these transactions not being paid, resulting in loans or other receivables owed to the Steinhoff Group that had little or no economic value and which were never settled.

22 Non-recoverable loans and receivables from fictitious transactions or accounting irregularities were either accounted for as settled through set-off arrangements or re-classified into different assets, in the following ways:

22.1 by set-off using intergroup payments and by the assignment of debt, which had the effect that loans and receivables were moved between entities in the Steinhoff Group and among purportedly independent entities, resulting in the movement of loans and receivables, which were accounted for as being repayments by the original party;

22.2 by reclassifying non-recoverable loans and receivables into different classes of assets, for example cash equivalents, increases in the value of fixed properties, increases in the value of trademarks, or increases in the value of acquired goodwill, the effect of which was to create the impression that the non-recoverable loans and receivables had been settled, and resulting in other asset values being inflated;

22.3 reclassifications in connection with the property portfolio within the Kika Leiner business of the Steinhoff Group, resulting in an artificial inflation of those asset values; and

22.4 reclassifications in connection with the Steinhoff Group's Hemisphere property portfolio, resulting in an artificial inflation of those asset values.

23 Support was provided for the inflated asset values by:

23.1 increasing the rental paid in terms of Steinhoff Group intergroup rental contracts for properties based on valuations that may not have been reliable;

23.2 increasing the royalties to be paid under Steinhoff Group intergroup royalty agreements for trademarks;

23.3 increasing rebates, reimbursements, interest charges, management and advisory fees; and

23.4 orchestrating Steinhoff Group intergroup payment and assignments of debt to demonstrate the settlement of the cash equivalents.

24 Mitigation of losses was reflected in operating entities by the Steinhoff Group making an onward distribution of the fictitious or irregular income, created via contributions, creating the impression that this had substance, and which had the effect of:

24.1 operating entities potentially appearing more profitable than they actually were;

24.2 enabling forecasts made to support the price paid for acquired entities to be met; and

24.3 enabling operating entity budgets to be met.

25 As a consequence of the fictitious transactions and the accounting irregularities, the financial position of the first plaintiff during the period 2009 to 2015, and second plaintiff during the period 2015 to 2017, was materially overstated and required restatement.

26 The required restatements included, but were not limited to:

26.1 restatement and impairment of historical goodwill;

26.2 restatement and impairment of trade marks and brands;

26.3 restatement and impairment of property, plant and equipment;

26.4 adjustments to accounting treatment specifically relating to consolidation principles and correcting the application of Steinhoff Group accounting principles;

26.5 restatement of inflated income which previously resulted in both operating profit and assets (including cash and cash equivalents) being overstated;

26.6 restatement of loans granted by the Steinhoff Group to third parties who were purportedly independent, without appropriate security, to enable them to acquire shares in the Steinhoff Group and which now appear unrecoverable;

26.7 adjustments being required due to loans having been granted to entities that were purportedly independent, without appropriate security having been secured and which now appear unrecoverable; and

26.8 reclassifying non-current liabilities to current as a result of the impact of other restatements on debt covenants;

(collectively "the restatements").

27 The financial effect of the fictitious transactions and accounting irregularities during the relevant period:

27.1 appears from the audited results for the year ended 30 September 2017, which includes restated figures for both 2016 and the opening balance of 2016; and

27.2 required the 2016 consolidated financial statements and its statement of financial position as at 1 July 2015 to be restated to correct prior period errors, including errors that would have manifested themselves, and impacted the financial performance of the first plaintiff and the second plaintiff, during the relevant period.

28 As a result of the extent and complexity of the restatements required to correct the prior period errors, the restated transactions have been grouped according to type and impact on the consolidated financial statements.

29 The categories of restatements include, but are not limited to, the following:

29.1 **Property transactions**

29.1.1 a number of transactions in which properties were transferred between entities are now considered internal to the Steinhoff Group and, therefore, should not have impacted the consolidated financial statements; and

29.1.2 the aforegoing resulted in the reversal of certain significant step ups in the value of properties.

29.2 **Intangible asset transactions**

29.2.1 in prior years, the Steinhoff Group purportedly sold internally generated intangible assets (or entities owning these assets) to so called independent parties, which were then reacquired resulting in the recognition of the internally generated intangible as a purchased intangible measured at fair value;

29.2.2 the sale and repurchase of certain intangible assets acquired from third parties were stepped up; and

29.2.3 the aforegoing resulted in profit, and assets, that was overstated, since the risks and rewards of ownership of the intangible assets always remained within the Steinhoff Group.

29.3 **Accounting for Steinhoff Group or related entities**

29.3.1 the Steinhoff Group was required to revise its assessment of the appropriate method of recognising some of its investments.

29.4 **Contributions and 'cash equivalents'**

29.4.1 the Steinhoff Group previously recognised certain contributions arising from the so-called sale of know-how and supplier volume rebates that lacked economic substance and did not result in cash

flows into the Steinhoff Group, which in turn resulted in an overstatement of profit; and

29.4.2 a restatement was therefore required to reverse the aforementioned contributions recognised in profit together with the related receivables, which in some cases had been incorrectly classified as "cash and cash equivalents".

29.5 **Consequential effects of accounting irregularities**

29.5.1 as a consequence of the restatements required flowing from the accounting irregularities, there has been an impact on various other assets and liabilities of the Steinhoff Group;

29.5.2 these impacts relate *inter alia* to the following:

29.5.2.1 the impairment of goodwill and brands due to the revision of inputs used in value-in-use calculations of cash-generating units as a result of incorrect forecast information and revised weighted average cost of capital rates;

29.5.2.2 the taxation impact of fictitious income and expenses; and

29.5.2.3 the reassessment of vesting criteria based on restated financial information relating to employee share grants, the classification of external debt as short term as a result of the technical breach of financial covenants, and the recognition of adjustments not previously considered material to the Steinhoff Group.

30 The table below summarises the effect of restatements, pleaded above, and recognised by the Steinhoff Group, including restatements in respect of share transactions, in order to correct prior period errors in respect of the 15 months ended 30 September 2016, and at 1 July 2015 ("the table").

				Equity			
Categories of restatement	Asset Decrease	Liability Decrease	Decrease In profit	Other equity move-ments (increase)/ decrease	Opening balance (increase)/ Decrease	Asset decrease	Liability (increase) decrease
Property transactions	(429)	–	41	(18)	406	(406)	–
Intangible asset transactions	(5 801)	703	1 013	(19)	4 104	(3 778)	(326)
Accounting for Group or related entities	(1 376)	802	240	153	181	(348)	167
Contributions and 'cash equivalents'	(1 179)	11	288	35	845	(845)	–
Share transactions	(241)	–	62	(40)	219	(219)	–
Consequential effects of accounting irregularities	(2 406)	41	35	(209)	2 539	(2 600)	61
Total impact relating to accounting irregularities	(11 432)	1 557	1 679	(98)	8 294	(8 196)	(98)

31 In the result, the fictitious transactions and accounting irregularities had a material impact on the financial performance of the first plaintiff, and thereafter the second plaintiff, in respect of the entire relevant period.

32 Had the first plaintiff and thereafter the second plaintiff been aware of the true facts as they pertain to the financial performance of the first plaintiff, and

thereafter the second plaintiff, during the relevant period (and as reflected *inter alia* in the table), and in regard to both the first defendant and the second defendant:

32.1 no base salary would have been recommended by the SIH Remcom and the NV Remcom, as the case may be, and approved by the board of directors of the first plaintiff and the supervisory board of the second plaintiff, and no base salary would have been paid by either of the plaintiffs, to either of the defendants;

32.2 no bonuses, whether performance or strategic / project, would have been recommended by the SIH Remcom and the NV Remcom, as the case may be, and approved by the board of directors of the first plaintiff and the supervisory board of the second plaintiff, and paid by either of the plaintiffs to either of the defendants; and

32.3 no award of shares, in terms of the long-term incentive scheme in operation at the relevant time, would have been recommended by the SIH Remcom and the NV Remcom, as the case may be, and placed before the relevant annual general meetings for approval.

33 In the premises all base salaries paid, all performance bonuses paid, all strategic / project bonuses paid, and all shares awarded to the defendants by the plaintiffs during the relevant period, were paid and/or awarded on the *bona fide* reasonable, but mistaken, belief that such base salaries were due, such

bonuses were due, and that such shares were required to be awarded to the defendants.

34 The defendants are accordingly required to repay to the first plaintiff, and the second plaintiff, as the case may be, all base salaries paid, all bonuses paid, and the then value of the shares so awarded.

35 Annexed marked **"POC 4"** is a schedule detailing in each of the years constituting the relevant period:

35.1 the base salary paid to the first defendant, and the currency in which such base salary was paid;

35.2 the performance bonuses paid to the first defendant, and the currency in which such bonuses were paid;

35.3 strategic / project bonuses paid to the first defendant, including any portion of the strategic / project bonus which was paid on a deferred basis, and the currency in which such bonuses were paid;

35.4 the entity, being the first plaintiff or the second plaintiff, as the case may be, which paid the strategic / project bonuses to the first defendant; and

35.5 the number and value of shares awarded by the first and second plaintiffs, as the case may be, to the first defendant.

36 Annexed marked **"POC 4"** is a schedule detailing in each of the years constituting the relevant period:

36.1 the base salary paid to the second defendant, and the currency in which such base salary was paid;

36.2 the performance bonuses paid to the second defendant, and the currency in which such bonuses were paid;

36.3 strategic / project bonuses paid to the second defendant, including any portion of the strategic / project bonus which was paid on a deferred basis, and the currency in which such bonuses were paid;

36.4 the entity, being the first plaintiff or the second plaintiff, as the case may be, which paid the strategic / project bonuses to the second defendant; and

36.5 the number and value of shares awarded by the first and second plaintiffs, as the case may be, to the second defendant.

Claim B

37 The second plaintiff repeats paragraphs 18 to 34 above.

38 In respect of the 2015 financial year, the NV Remcom recommended, and the supervisory board of the second plaintiff approved, a strategic / project bonus of R20 000 000.00 to the first defendant ("the 2015 strategic bonus").

39 The 2015 strategic bonus was ostensibly payable to the first defendant as follows:

39.1 R6 666 667.67 during November 2015;

39.2 R6 666 667.67 during October 2016; and

39.3 R6 666 667.67 during November 2017.

40 In respect of the 2016 financial year, the NV Remcom recommended, and the supervisory board of the second plaintiff approved, a strategic / project bonus of R25 000 000.00 to the first defendant ("the 2016 strategic bonus").

41 The 2016 strategic bonus was ostensibly payable to the first defendant as follows:

41.1 R8 333 333.33 during October 2016;

41.2 R8 333 333.33 during October 2017; and

41.3 R8 333 333.33 during October 2018.

42 On 31 May 2017 the first defendant unlawfully procured that the second plaintiff pay him an amount of Euro 1 571 008.00, the then South African Rand equivalent of R23 333 333.33, calculated and arrived at as follows:

42.1 R6 666 666.67, being the tranche of the 2015 strategic bonus which was only due for payment during November 2017;

42.2 R8 333 333.33, being the tranche of the 2016 strategic bonus which was only due for payment during October 2017; and

42.3 R8 333 333.33, being the tranche of the 2016 strategic bonus which was only due for payment during October 2018;

("the accelerated payments").

43 The accelerated payments:

43.1 were not authorised by the NV Remcom and / or the supervisory board of the second plaintiff, and the first defendant had no lawful right or entitlement to receive payment of the accelerated payments on 31 May 2017; and

43.2 were, in any event, not due and payable to the first defendant, for the reasons pleaded *inter alia* in paragraphs 18 to 34 above.

44 In the premises, the first defendant is obliged to repay the amount of Euro 1 571 008 to the second plaintiff.

Claim C

45 The second plaintiff repeats paragraphs 18 to 34 above.

46 During March 2017 the first defendant unlawfully procured that the second plaintiff pay him an amount of Euro 500 000, ostensibly in respect of a bonus payment due to him ("the Euro 500 000 bonus").

47 The Euro 500 000 bonus:

47.1 was not authorised by the NV Remcom and / or the supervisory board of the second plaintiff, and the first defendant had no lawful right or entitlement to receive payment of the Euro 500 000 bonus during March 2017; and

47.2 was, in any event, not due and payable to the first defendant, for the reasons pleaded *inter alia* in paragraphs 18 to 34 above.

48 In the premises, the first defendant is obliged to repay the Euro 500 000 bonus to the second plaintiff.

Wherefore the first plaintiff claims, in respect of Claim A:

As against the first defendant:

(a) payment in the amount of **R43 626 082.75** and **Euro 7 540 729.29** in respect of base salary payments;

(b) payment in the amount of **R56 323 508.25**and **Euro 927 500.00** in respect of performance bonus payments;

(c) payment in the amount of **R28 666 666.67** in respect of strategic / project bonus payments;

(d) payment in the amount of **R175 016 556.76** in respect of the long-term incentive scheme;

(e) interest on the amounts in (a) to (d) above, at the legal rate, *a tempore morae*;

(f) costs of suit; and

(g) further and / or alternative relief.

As against the second defendant:

(h) payment in the amount of **R18 925 377.98** and **Euro 1 045 192.30** in respect of base salary payments;

(i) payment in the amount of **R18 320 000.00** in respect of performance bonus payments;

(j) payment in the amount of **R16 666 666.67** in respect of strategic / project bonus payments;

(k) payment in the amount **of R46 306 341.75** in respect of the share incentive scheme;

(l) interest on the amounts in (h) to (k) above at the legal rate, *a tempore morae*;

(m) costs of suit; and

(n) further and / or alternative relief.

Wherefore the second plaintiff claims, in respect of Claim A:

As against the first defendant:

(o) payment in the amount of **R41 581 909.01**and **Euro 2 486 388.78** in respect of base salary payments;

(p) payment in the amount of **Euro 4 180 000.00** in respect of performance bonus payments;

(q) payment in the amount of **R28 333 333.33** and **Euro 476 190.48** in respect of strategic / project bonus payments;

(r) payment in the amount of **R208 387 998.13** in respect of the share incentive scheme;

(s) interest on the amounts in (o) to (r) above, at the legal rate, *a tempore morae*;

(t) costs of suit; and

(u) further and / or alternative relief.

As against the second defendant:

(v) payment in the amount of **R10 880 730.00** and **Euros 1 366 666.67** in respect of base salary payments;

(w) payment in the amount of **R21 451 235.00** in respect of performance bonus payments;

(x) payment in the amount of **R35 000 000.00** in respect of strategic / project bonus payments;

(y) payment in the amount of **R64 458 173.90** in respect of the long-term incentive scheme;

(z) interest on the amounts in (v) to (y) above, at the legal rate, *a tempore morae*;

(aa) costs of suit; and

(bb) further and / or alternative relief.

Wherefore the second plaintiff claims in respect of Claim B, as against the first defendant:

(cc) payment in the amount of **Euro 1 571 008.00**;

(dd) interest on the amount of **Euro 1 571 008.00**, at the legal rate, *a tempore morae*;

(ee) costs of suit; and

(ff) further and / or alternative relief.

Wherefore the second plaintiff claims in respect of Claim C, as against the first defendant:

(gg) payment in the amount of **Euro 500 000.00**;

(hh) interest on the amount of **Euro 500 000.00**, at the legal rate, *a tempore morae*;

(ii) costs of suit; and

(jj) further and / or alternative relief.

DATED AT CAPE TOWN THIS 14th DAY OF JUNE 2019.

A Subel SC

A M Smalberger SC

Counsel for the First and Second Plaintiffs

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(Ref: D Hertz/ R Driman/ STEI3570.51)

TO:

THE REGISTRAR
High Court
CAPE TOWN

AND TO:

MARKUS JOHANNES JOOSTE
First Defendant
[redacted]

Alternatively:

[redacted]

Alternatively:

[redacted]

AND TO:

ANDRIES BENJAMIN LA GRANGE
Second Defendant
[redacted]

"POC1"

Steinhoff International Holdings Ltd

15 March 2001

Mr MJ JOOSTE

APPOINTMENT LETTER

Dear Markus

We have pleasure in confirming your appointment as Group Managing Executive for Steinhoff International Holdings Limited.

Your signature in the space provided at the end of this document will constitute a formal agreement of service with the Company.

Your appointment is pursuant to:

- Prior to the listing of Steinhoff International on the JSE Securities South Africa, Stafric Investments and Management Services (Pty) Limited ("Stafric"), who facilitated the merger of Steinhoff Africa Holdings (Pty) Limited (at the time Gommagomma Holdings Limited) (which included Vic Lewis Group, Roadway Group, Iqbal Bam Investment Group and a 35% interest in Megacor) and the interest of Bruno Steinhoff being Steinhoff Germany GmbH and Steinhoff Europe AG, committed your services in managing the merged group on and after listing;

- In the Prospectus dated 28 August 1998, Steinhoff International committed Stafric to provide extended management and consultancy services and committed the Group to provide above average growth for the stakeholders;

- Subsequent to the listing, Steinhoff Africa Group took over and/or merged with Megacor, Cornick Group (which included Afcol) and several smaller operations in Southern Africa as well as extensive

28 6th Street, Wynberg, Sandton 2090. P.O. Box 1955, Bramley 2018. Tel: +27 (0)11 445-3000, Fax: +27 (0)11 445-3099

international and global restructuring and further offshore acquisitions;

- The appointment of Stafric in providing these management services had been reported in the annual report and the role of Stafric in executing these services and therefore your commitment to the Group had been invaluable;

- As a result of statutory and regulatory provisions which had been amended taking into account the possible unnecessary increase in costs and possible risks, Steinhoff and Stafric had reached Agreement to terminate the management agreement in terms of the provisions of such agreement. Your appointment has therefore been procured by Stafric taking into account your specific skills and attributes and current employment terms for similar positions within the Group; and

- As part of the management agreement it had been agreed with Stafric for the executives to enter in suitable restraints and so far as required you undertake to execute further restraint undertakings.

We confirm the following terms and conditions, which form the basis of your appointment:

1. Your annual package will be on the basis of total cost to Company as reflected on the attached benefit statement.

2. You will be eligible to participate in the Annual Incentive Bonus Scheme based on the rules of the Scheme.

3. You are entitled to 20 working days leave per annum. Your original date of employment will act as the start to your annual leave cycle. Leave will accrue in accordance with the leave regulations of the Company in force from time to time. It is compulsory to take all 20 working days leave per annum. Leave days not taken within six months from anniversary date will be forfeited. In general, leave is taken during the December/January factory closure period. It is however the intention to, where possible, take a short break during the course of the calendar year.

4. You will qualify for 30 working days sick leave per every three years working cycle as per the applicable legislation.

5. In order for you to carry out your duties you will be required to perform a significant amount of business travel. For this purpose, you will be entitled to structure, as part of your total package;

   a) a car allowance and
   b) a subsistence allowance

You may claim a refund for both the abovementioned by submitting a substantiated claim with your tax return.

6. You will be required to become a member of the Steinhoff Africa Group approved Provident Fund. As part of your package, the Company will be responsible for the full monthly contributions in respect of the Provident Fund.

7. The Steinhoff Africa Group, through your retirement fund, provides insurance cover against any form of permanent disability and or death. Any amounts payable and agreed to under the aforementioned policy shall be deemed to represent the total and entire settlement of any claim, demand and right of action by you against the Fund and/or its trustees.

   You are advised to seek professional advice to ensure adequate cover based on your personal circumstances and needs.

8. You will be required to become a member of the current or future Steinhoff Africa Group's applicable medical scheme for you and your dependants. Due to your total cost of employment package, you will be responsible to restructure any future medical rate contributions within the constraints of your total package on the abovementioned basis. The company will therefore not be under any obligation to increase your package to accommodate any increased contributions.

9. Employees, who remain with the Steinhoff Group until retirement, will be eligible for continued medical scheme membership subject to the rules of the applicable scheme. The Company will not be responsible for such continued membership contributions.

10. As part of your duties, you will be required to entertain clients and business associates both during and after business hours. The Company regards such entertainment as being in the interests of its business. You are consequently entitled to the payment of a taxable entertainment allowance as a component of your total package. The Company is required to deduct normal tax from this amount, and you will have the opportunity to claim a refund by submitting a substantiated claim with your tax return.

11. Based on your seniority in the Company, you will be required to maintain a home office for satisfying the operational requirements of your position. This will enable you to maintain constant communication with Company operations through telephone, telefax and e-mail, and to attend to urgent work as it arises after normal business hours. You are therefore entitled to a taxable home office allowance as part of your total package, and you will have the opportunity to claim a refund by submitting a substantiated claim with your tax return.

12. You will participate in the Steinhoff Share Incentive Scheme according to the applicable rules and arrangements. Your current allocated number of Steinhoff International share options are reflected as per record of proof copied to you.

13. The Company conducts its business on a principle of meeting predetermined operational requirements. This may, when applicable, require additional hours in excess of normal working hours to be worked. In accepting this offer you will be agreeing to this principle as a condition of employment.

14. You will be required to conform to the customs, rules and regulations of the Company now or at any time hereafter in force.

15. You will be required to act in good faith and in accordance with your fiduciary duties to the Company and its board. You will treat all sensitive information and trade secrets as confidential and will not make use, divulge or transfer such information to any third party without prior written approval from your managing director. All intellectual property, designs or trademarks produced by you in the course of your employment will remain the property of the Company or the Steinhoff Group.

16. Unless full disclosure is made to the Board, you may not utilise your position in the Company to influence the placing of business with any organisation in which you have a direct or indirect interest, as a result of which you may derive benefits. You may not engage in any business or work for profit, whether while on leave of absence or otherwise, except on behalf of the Company, unless the Board has given specific prior written consent for such work. Under no circumstances will permission be given if any such business or work would conflict with the interests of any Steinhoff International Company or, cause your efficiency to be impaired. In the event of any breach by you of the provision of this clause, the Company shall be entitled to terminate your employment with immediate effect.

17. It is recorded that you have entered into restraint of trade undertaking with Stafric in favour of Steinhoff Group which will remain in force. Should it be required you undertake to execute further documents to ensure the enforceability of the restraint undertaking.

18. Either party may terminate service with the Company upon giving 30 days written notice. However, you may be instantly discharged without any notice whatsoever and your salary package paid up to date of dismissal in the event of you being found guilty of conduct, which, in terms of the law, would justify summary termination. This includes, but is not confined to, willfully causing damage to the image of the Steinhoff Group.

In order to clarify any further arrangements in terms of your employment conditions, kindly contact the Human Resources Department who will assist you in this regard.

Yours faithfully

B.E. STEINHOFF
CHAIRMAN

I, (Full Names) MARTUS JOHANNES JOOSTE

(ID No.) [redacted] understand and accept the revised conditions outlined to me, and acknowledge that this document will constitute a formal agreement of service between the Company and myself, which replaces all previous contractual arrangements between us.

Signature : _____

Date : 21/2/2001

"POC2"

Steinhoff
Africa Holdings (Pty) Ltd

STRICTLY CONFIDENTIAL

1 July 2003

Mr Ben La Grange

LETTER OF APPOINTMENT

Dear Ben

We have pleasure in confirming your appointment as Manager Corporate Tax with Steinhoff Africa Group Services, a subsidiary of the Steinhoff Africa Group with effect 1 July 2003.

Your signature in the space provided at the end of this document will constitute a formal agreement of service with the Company.

We confirm the following terms and conditions, which form the basis of your appointment:

1. Your annual package will be on the basis of a total budgeted cost to Company as reflected on the attached benefit statement.

2. You will be eligible to participate in the Annual Incentive Bonus Scheme (AIB Scheme) based on the rules and criteria of the Scheme.

3. You are entitled to 20 working days leave per annum. Your date of employment will act as the start to your annual leave cycle. Leave will accrue in accordance with the leave regulations of the Company in force from time to time. It is compulsory to take all 20 working days leave per annum. Leave days not taken within six months from anniversary date will be forfeited. In general, leave is taken during the December/January factory closure period. It is however the intention to, where possible, take a short break during the course of the calendar year.

   Further leave regulations are:

   3.1 Should your services be terminated for any reason whatsoever, before these leave days having been utilised, you will be paid out the remaining cash value as determined by your last package increase.

   3.2 Leave days accrued will be at the value of your total cost of employment.

   3.3 The Company will not approve applications for extended pre retirement leave.

28 6TH STREET , WYNBERG , SANDTON 2090, P.O. BOX 1955, BRAMLEY 2018. TEL: +27 (0)11 445-3000, FAX: +27 (0)11 445-3094/7/9/135
Directors: M.J. JOOSTE (Chairman), D.M. van der MERWE (Managing), R.W. COPLEY, R.H. COX, M.J. HERR, J.D. KRIGE, M.I. LAWRENCE, D.O. MATTHEW, A.R. RAPP, J.H.N. van der MERWE, J.J. van der MERWE, A.W. YORK.
Company Secretary: S.J. GROBLER
Steinhoff Africa Holdings (Pty) Ltd, Registration No: 1969/015042/07
Website: http://www.steinhoffinternational.com

3.3 The Company will not approve applications for extended pre retirement leave.

3.4 When public holidays fall within leave periods, such days will not be considered as leave days.

4. You will qualify for 30 working days sick leave per every three years working cycle as per the applicable legislation.

5. In order for you to carry out your duties you will be required to perform a significant amount of business travel. For this purpose, you will be entitled to structure, as part of your total package, a taxable travel allowance.

   You will also be entitled to structure a taxable subsistence allowance for business travel as part of your total package.

   You may claim a refund for both the above-mentioned by submitting a substantiated claim with your tax return.

6. You will be required to become a member of the Steinhoff Africa Group approved Provident Fund. As part of your package, the Company will be responsible for the full monthly contributions in respect of the Provident Fund.

7. The Steinhoff Africa Group, through your retirement fund, provides insurance cover against any form of permanent disability and or death. Any amounts payable and agreed to under the aforementioned policy shall be deemed to represent the total and entire settlement of any claim, demand and right of action by you against the Fund and/or its trustees.

   You are advised to seek professional advice to ensure adequate cover based on your personal circumstances and needs.

8. You will be required to become a member of the current or future Steinhoff Africa Group's applicable medical scheme/s for you and your dependants. Should you belong to your spouse's medical aid then you would be required to provide the company with proof to this effect. In the event of you ceasing to be a member of your spouse's medical aid, then the onus would be on you to notify the company accordingly so that you can join the company's applicable medical scheme/s.

   As part of your total package, the Company will be responsible for 2/3 (two thirds) of the monthly contributions to the Scheme and 1/3 (one third) will be born by yourself. Due to your total cost of employment package conversion, you will be responsible to restructure any future medical rate contributions within the constraints of your total package on the above-mentioned basis. The company will therefore not be under any obligation to increase your package to accommodate any increased contributions.

9. Employees, who remain with the Steinhoff Africa Group until retirement, will be eligible for continued medical scheme membership subject to the rules of the applicable scheme. The Company will not be responsible for such continued membership contributions.

10. As part of your duties, you will be required to entertain clients and business associates both during and after business hours. The Company regards such entertainment as being in the interests of its business. You are consequently entitled to the payment of a taxable entertainment allowance as a component of your total package. The Company is required to

deduct normal tax from this amount, and you will have the opportunity to claim a refund by submitting a substantiated claim with your tax return.

11. Based on your seniority in the Company, you will be required to maintain a home office for satisfying the operational requirements of your position. This will enable you to maintain constant communication with Company operations through telephone, telefax and e-mail, and to attend to urgent work as it arises after normal business hours. You are therefore entitled to a taxable home office allowance as part of your total package, and you will have the opportunity to claim a refund by submitting a substantiated claim with your tax return.

12. The Company conducts its business on a principle of meeting predetermined operational requirements. This may, when applicable, require additional hours in excess of normal working hours to be worked. In accepting this offer you will be agreeing to this principle as a condition of employment.

13. You will be required to conform to the customs, rules and regulations of the Company now or at any time hereafter in force.

14. You will be required to act in good faith and in accordance with your fiduciary duties to the Company and its board. You will treat all sensitive information and trade secrets as confidential and will not make use, divulge or transfer such information to any third party without prior written approval from your managing director. All intellectual property, designs or trademarks produced by you in the course of your employment will remain the property of the Company or the Steinhoff Africa Group.

15. Unless full disclosure is made to your managing director, you may not utilise your position in the Company to influence the placing of business with any organisation in which you have a direct or indirect interest, as a result of which you may derive benefits. You may not engage in any business or work for profit, whether while on leave of absence or otherwise, except on behalf of the Company, unless the Company has given specific prior written consent for such work. Under no circumstances will permission be given if any such business or work would conflict with the interests of the Company and or Steinhoff Africa Holdings or, cause your efficiency to be impaired. In the event of any breach by you of the provision of this clause, the Company shall be entitled to terminate your employment with immediate effect.

16. Either party may terminate service with the Company upon giving 30 days written notice. However, you may be instantly discharged without any notice whatsoever and your salary package paid up to date of dismissal in the event of you being found guilty of conduct, which, in terms of the law, would justify summary termination. This includes, but is not confined to, willfully causing damage to the image of the Company and or the Steinhoff Africa Group.

In order to clarify any further arrangements in terms of your restructured package, kindly contact your payroll administrator who will assist you in this regard.

Yours faithfully

JHN VAN DER MERWE
MANAGING DIRECTOR

I, (Full Names) ANDRIES BENJAMIN LA GRANGE [redacted] understand and accept the conditions outlined to me, and acknowledge that this document will constitute a formal agreement of service between the Company and myself.

Signature : _____

Date : 25/06/2003

"POC3"

Steinhoff International Holdings N.V.

REGULATIONS OF THE HUMAN RESOURCES AND REMUNERATION COMMITTEE

Adopted by the Supervisory Board on 1 December 2015

Linklaters

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World Trade Centre Amsterdam
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1077 XV Amsterdam

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Facsimile (+31) 20 799 6340

Ref L-221356

Table of Contents

1 Introduction

1.1 These regulations have been adopted by the Supervisory Board pursuant to clause 9.5 of the Regulations of the Supervisory Board.

1.2 The Human Resources and Remuneration Committee is a standing committee of the Supervisory Board.

1.3 These regulations are complementary to the provisions regarding the Supervisory Board and its Committees as contained in applicable laws and regulations and the Articles.

1.4 The terms used in these regulations shall have the same meaning as ascribed thereto in the Regulations of the Supervisory Board, except where expressly indicated otherwise.

2 Responsibilities

The Human Resources and Remuneration Committee shall be responsible for advising the Supervisory Board as well as preparing the decision-making of the Supervisory Board in relation to any of the responsibilities and proposed resolutions as referred to in clause 4.1 of these regulations.

3 Composition

3.1 The Human Resources and Remuneration Committee shall consist of at least three (3) members.

3.2 All members of the Human Resources and Remuneration Committee must be Supervisory Directors.

3.3 All members of the Human Resources and Remuneration Committee shall be independent within the meaning of clause 4.4 of the Regulations.

3.4 The members of the Human Resources and Remuneration Committee shall be appointed and may be replaced at any time by the Supervisory Board.

3.5 The Supervisory Board shall appoint one (1) of the members of the Human Resources and Remuneration Committee as chairman of the Human Resources and Remuneration Committee. The Human Resources and Remuneration Committee shall not be presided over by the Chairman or by a former Managing Director, or by a Supervisory Director who is a member of the management board or a managing director of another listed company.

3.6 The term of office of a member of the Human Resources and Remuneration Committee will generally not be set beforehand. It will, *inter alia*, depend on the composition of the Supervisory Board as a whole and that of other Committees from time to time.

3.7 The Company Secretary shall act as secretary to the Human Resources and Remuneration Committee.

3.8 In absence of the Company Secretary, his duties and powers under applicable laws, as well as these regulations or the Articles, or parts thereof, are exercised by his deputy, to be designated by the Management Board subject to approval of the Supervisory Board.

4 Duties and powers

4.1 The Human Resources and Remuneration Committee has the following duties:

4.1.1 drafting proposals to the Supervisory Board for the remuneration policy, which policy, as well as any changes thereto, shall be submitted to the General Meeting for adoption by the General Meeting;

4.1.2 drafting a proposal for a framework regarding the remuneration of Senior Managers in the form of Shares or rights to subscribe for Shares which is to be submitted by the Supervisory Board to the General Meeting for its approval. The framework must, at a minimum, state the number of Shares or rights to subscribe for Shares that may be granted and the criteria that shall apply to the granting of such Shares or rights to subscribe for Shares or the alteration of such arrangements. Remuneration of Senior Managers in the form of Shares or rights to subscribe for Shares within the boundaries of the framework approved by the General Meeting shall be determined by the Supervisory Board upon proposal by the Human Resources and Remuneration Committee. Remuneration of Senior Managers in the form of Shares or rights to subscribe for Shares outside the framework so approved, shall be submitted by the Supervisory Board, upon proposal of the Human Resources and Remuneration Committee, to the General Meeting for its approval;

4.1.3 drafting proposals for the remuneration of the individual Managing Directors and the members of the executive committee designated as such in clause 6 of the Regulations of the Management Board (the Managing Directors and members of the executive committee together the "**Senior Management**" and each a "**Senior Manager**") or changes or additions to such remunerations taking into account the remuneration policy adopted by the General Meeting and the framework regarding the remuneration of Senior Managers in the form of Shares or rights to subscribe for Shares; such proposals shall be submitted to the Supervisory Board and shall in any event, deal with:

(i) the remuneration structure;

(ii) the components of the remuneration package set forth in the remuneration policy adopted by the General Meeting (as amended from time to time);

(iii) if and to the extent applicable, other forms of compensation awarded; and

(iv) the performance criteria and their application.

4.1.4 prepare the remuneration report regarding the remuneration policy of the Company as drawn up by the Human Resources and Remuneration Committee (the "**Remuneration Report**");

4.1.5 with regard to the Company's Share based incentive plans:

(i) appoint trustees and compliance officers; and

(ii) approve amendments after prior consultation with the General Meeting;

4.1.6 approve the appointments and promotions of Senior Managers and their terms and conditions of employment or service other than with regard to the remuneration referred to under clause 4.1.3 of these Regulations and, if applicable, the terms and conditions of severance of employment or service of those persons;

4.1.7 review incidents of unethical behaviour by Senior Managers and key and senior executives of it's the Company's Subsidiaries;

4.1.8 annually review the Company's code of conduct and propose amendments to the Management Board;

4.1.9 annually appraise the performance of the Managing Directors and the Supervisory Directors (both as members of the Supervisory Board and as members of a specific Committee), and report the outcome of these appraisals to the Supervisory Board;

4.1.10 review the regulations of the Company's significant Subsidiaries' remuneration committees annually as well as those committees' compliance with these regulations;

4.1.11 undertake an annual assessment of the functioning of the Human Resources and Remuneration Committee, report these findings to the Supervisory Board;

4.1.12 to prepare the decision-making of the Supervisory Board in relation to any of the responsibilities and proposed resolutions as referred to in this clause 4.1; and

4.1.13 to supervise the policy of the Management Board on the selection criteria and appointment procedures for the Senior Management (other than Managing Directors), or other managers who report to the Management Board.

4.2 In drawing up the remuneration policy and offering advice to the Supervisory Board as referred to in clause 4.1 of these regulations, the Human Resources and Remuneration Committee shall ensure that the remuneration structure, including severance pay, shall be simple and transparent. It shall promote the interests of the Company in the medium and long term, shall take in consideration the position of the Company in the market, may not encourage Senior Managers to act in their own interests or take risks that are not compliant with the adopted strategy and may not 'reward' failing Senior Managers upon termination of their service.

4.3 The level and structure of the remuneration to be awarded to Senior Managers must be such that qualified and expert Senior Managers can be recruited and retained. When the overall remuneration is fixed, its impact on pay differentials within the enterprise shall be taken into account. If the remuneration consists of a fixed component and a variable component, the Supervisory Board shall ensure that the variable component shall be linked to pre-determined, assessable and objective targets, which are predominantly of a long-term nature. The variable component of the remuneration must be appropriate in relation to the fixed component. The proposals made by the Human Resources and Remuneration Committee for the remuneration policy shall at least address the subjects described in Sections 2:383c through 2:383e of the Dutch Civil Code, insofar as these relate to Managing Directors.

4.4 The Remuneration Report shall contain an account of the manner in which the remuneration policy has been implemented in the past financial year, as well as an overview of the remuneration policy that is foreseen by the Supervisory Board for the next financial year and subsequent years. The Remuneration Report shall explain how the chosen remuneration policy contributes to the achievement of the long-term objectives of the Company and the business connected with it in keeping with the risk profile. The Remuneration Report shall be posted on the Company's website either as a separate document or as part of the Management Report.

4.5 The Remuneration Report shall at least contain the following information:

4.5.1 an overview of the costs incurred by the Company in the financial year in relation to the Management Board's remuneration; this overview shall provide a breakdown showing fixed salary, annual cash bonus, Shares, rights to subscribe for Shares and pension rights that have been awarded and other emoluments; Shares, rights to subscribe for Shares and pension rights must be recognised in accordance with the accounting standards;

4.5.2 for each Managing Director the maximum and minimum number of Shares conditionally granted in the financial year or other share-based remuneration components that the Managing Director may acquire if the specified performance criteria are achieved;

4.5.3 a table showing the following information for incumbent Managing Directors at year-end for each year in which Shares, rights to subscribe for Shares and/or other share-based remuneration components have been awarded over which the Managing Director did not yet have unrestricted control at the start of the financial year, with respect to such Shares, rights to subscribe for Shares and/or other share-based remuneration components:

(i) the value and number on the date of granting;

(ii) the present status: whether they are conditional or unconditional and the year in which vesting period and/or lock-up period ends;

(iii) if and to the extent conditionally awarded, the value and number at the time the Managing Director obtains ownership of them (end of vesting period); and

(iv) to the extent applicable, the value and number at the time when the Managing Director obtains unrestricted control over them (end of lock-up period);

4.5.4 if applicable: the composition of the peer group of companies whose remuneration policy determines in part the level and composition of the remuneration of the Managing Directors;

4.5.5 a description of the performance criteria on which any right of the Managing Directors to Shares, rights to subscribe for Shares or other variable remuneration components is dependent;

4.5.6 a summary and account of the methods that will be applied in order to determine whether the performance criteria have been fulfilled;

4.5.7 an ex-ante and ex-post account of the relationship between the chosen performance criteria and the strategic objectives applied, and of the relationship between remuneration and performance;

4.5.8 current pension schemes and the related finance costs; and

4.5.9 agreed arrangements for the early retirement of Managing Directors.

4.6 The Human Resources and Remuneration Committee shall ensure that the main elements of the contract of a Managing Director with the Company shall be made public after it has been concluded, and in any event no later than the date of the notice convening the

General Meeting where the appointment of that Managing Director will be proposed, except if and to the extent the main elements have been disclosed in the Remuneration Report and/or the Management Report before such General Meeting. These elements shall at least include:

4.6.1 the amount of the fixed salary;

4.6.2 the structure and amount of the variable remuneration component;

4.6.3 any agreed redundancy scheme and/or severance pay;

4.6.4 any conditions of a change-of-control clause in the contract with a Managing Director and any other remuneration components promised to the Managing Director; and

4.6.5 pension arrangements and performance criteria to be applied.

4.7 If a Managing Director or a former Managing Director is paid severance pay or other special remuneration during a given financial year, an account and an explanation of this remuneration shall be included in the Remuneration Report.

4.8 The Human Resources and Remuneration Committee may only exercise such powers as are explicitly attributed or delegated to it by the Supervisory Board and may never exercise powers beyond those exercisable by the Supervisory Board as a whole. The Supervisory Board remains collectively responsible for decisions prepared by the Human Resources and Remuneration Committee.

4.9 The Human Resources and Remuneration Committee shall be provided with the information it needs to perform its duties properly. The Human Resources and Remuneration Committee may be assisted by experts, officers or other external advisors. The reasonable costs of such assistance shall be for the account of the Company, provided that the Management Board has granted its approval thereto, which approval shall not unreasonable be withheld.

4.10 If the Human Resources and Remuneration Committee makes use of the services of a remuneration consultant in carrying out its duties, it shall verify that the consultant concerned does not provide advice to the Managing Directors.

5 Meetings

5.1 The Human Resources and Remuneration Committee shall meet as often as deemed necessary for the proper functioning of the Human Resources and Remuneration Committee. The Human Resources and Remuneration Committee shall meet at least twice (2) each financial year. Meetings shall, as much as possible, be scheduled annually in advance. The Human Resources and Remuneration Committee shall also meet earlier than scheduled if this is deemed necessary by the chairman of the Human Resources and Remuneration Committee, the Company Secretary, the Management Board or the Supervisory Board.

5.2 Meetings of the Human Resources and Remuneration Committee are in principle called by the chairman of the Human Resources and Remuneration Committee or the Company Secretary in consultation with the chairman of the Human Resources and Remuneration Committee. Save in urgent cases to be determined by the chairman of the Human Resources and Remuneration Committee the agenda for a meeting shall be sent to all members of the Human Resources and Remuneration Committee at least three (3)

calendar days before the meeting. For each item on the agenda an explanation in writing shall be provided, where possible, and/or other related documentation will be attached.

5.3 The chairman of the Human Resources and Remuneration Committee shall set the agenda and preside the meeting of the Human Resources and Remuneration Committee and shall also ensure and actively promote the proper functioning of the Human Resources and Remuneration Committee.

5.4 With due observance of these regulations, each member of the Human Resources and Remuneration Committee has the right to request that a Human Resources and Remuneration Committee meeting be called and/or that an item be placed on the agenda for a Human Resources and Remuneration Committee meeting. The Company Secretary shall assist in relation thereto.

5.5 Meetings of the Human Resources and Remuneration Committee may be held by means of an assembly of members of the Human Resources and Remuneration Committee in a formal meeting or by conference call, video conference or by any other means of communication, provided that all members of the Human Resources and Remuneration Committee participating in such meeting are able to communicate with each other simultaneously. Participation in a meeting held in any of the above ways shall constitute presence at such meeting.

5.6 The Human Resources and Remuneration Committee shall decide if and when a Managing Director should attend its meetings. A Managing Director shall not attend meetings of the Human Resources and Remuneration Committee where his own remuneration is discussed. In addition, the head of the HR department of the Company and/or independent experts may be invited to attend meetings of the Human Resources and Remuneration Committee. Each Supervisory Director may attend meetings of the Human Resources and Remuneration Committee.

5.7 The meetings of the Human Resources and Remuneration Committee shall be conducted in the English language.

5.8 The Company Secretary or any other person designated for such purpose by the chairman of the meeting shall draw up minutes of the proceedings at the meeting of the Human Resources and Remuneration Committee. The minutes or report should provide insight into the decision-making process at the meeting. The minutes or report shall be adopted by the Human Resources and Remuneration Committee at the same meeting or, if it is not possible to adopt the minutes in the same meeting, at the next meeting.

5.9 The Human Resources and Remuneration Committee shall exercise utmost discretion when making written records of its deliberations and recommendations.

6 Decision Making

6.1 The Human Resources and Remuneration Committee members shall endeavour to achieve that resolutions are, as much as possible, adopted unanimously.

6.2 Each Human Resources and Remuneration Committee member has the right to cast one (1) vote.

6.3 The Human Resources and Remuneration Committee may only adopt valid resolutions in a meeting if at least two (2) members of the Human Resources and Remuneration Committee are present at the relevant meeting in person.

6.4 Where unanimity cannot be reached and applicable laws, the Articles or these regulations do not prescribe a larger majority, all resolutions of the Human Resources and Remuneration Committee are adopted by a simple majority of the votes cast.

6.5 Resolutions of the Human Resources and Remuneration Committee can be adopted either in or outside a meeting. In general, resolutions of the Human Resources and Remuneration Committee are adopted in a Human Resources and Remuneration Committee meeting.

6.6 A resolution of the Human Resources and Remuneration Committee can be adopted in writing other than at a meeting, provided that the proposal concerned is submitted to all Human Resources and Remuneration Committee members and none of them has objected to the relevant manner of adopting resolutions, as evidenced by written statements from all Human Resources and Remuneration Committee members then in office. In the next meeting of the Human Resources and Remuneration Committee held after such consultation of Human Resources and Remuneration Committee members, the chairman of that meeting shall set out the results of the consultation.

7 Reporting to the Supervisory Board

7.1 The Human Resources and Remuneration Committee must inform the Supervisory Board in a clear and timely manner about the way it has used delegated powers and of major developments in the area of its responsibilities.

7.2 The Supervisory Board shall receive a report from the Human Resources and Remuneration Committee of its deliberations and findings. The minutes of the meetings of the Human Resources and Remuneration Committee shall be circulated among all Supervisory Directors as soon as possible after the relevant meeting.

7.3 If requested, the chairman of the Human Resources and Remuneration Committee shall at meetings of the Supervisory Board provide the Supervisory Board with further information on the outcome of the discussions of the Human Resources and Remuneration Committee.

7.4 All Supervisory Directors have unrestricted access to all records of the Human Resources and Remuneration Committee.

8 Miscellaneous

8.1 The chairman of the Human Resources and Remuneration Committee (or one of the other Human Resources and Remuneration Committee members) shall be available to answer questions regarding the Human Resources and Remuneration Committee's activities at the annual General Meeting.

8.2 The Human Resources and Remuneration Committee, in consultation with the Chairman, may occasionally decide not to comply with these regulations, with due observance of applicable laws and regulations.

8.3 The Human Resources and Remuneration Committee shall review and re-assess the adequacy of these regulations annually, report its assessment to the Supervisory Board and recommend, where appropriate, any proposed changes to the Supervisory Board.

8.4 The Supervisory Board can at all times amend these regulations and/or revoke any powers granted by it to the Human Resources and Remuneration Committee.

8.5 Clauses 22.4 through 22.7 of the Regulations of the Supervisory Board shall apply by analogy to the Human Resources and Remuneration Committee.

8.6 The Management Report shall state the composition of the Human Resources and Remuneration Committee, the number of meetings held by the Human Resources and Remuneration Committee and the main issues discussed at these meetings.

8.7 These regulations and the composition of the Human Resources and Remuneration Committee shall be posted on the Company's website.

*****

First Plaintiff - Ltd

Base Salary	1st Defendant ZAR	1st Defendant EUR	2nd Defendant ZAR	2nd Defendant EUR
FY 2009	1,518,000.00	1,102,000.00		
FY 2010	1,574,000.00	1,151,000.00	1,459,000.00	25,000.00
FY 2011	1,926,000.00	1,225,000.00	3,560,000.00	87,000.00
FY 2012	1,621,000.00	1,308,000.00	3,375,000.00	113,000.00
FY 2013	11,487,100.00	600,000.00	3,375,000.00	262,500.00
FY 2014	11,918,125.00	1,667,684.62	3,375,000.04	278,846.15
FY 2015	13,581,857.75	1,087,044.68	3,781,377.94	278,846.15
	43,626,082.75	7,540,729.29	18,925,377.98	1,045,192.30

Annual / Performance Bonus	1st Defendant ZAR	1st Defendant EUR	2nd Defendant ZAR	2nd Defendant EUR
FY 2009				
FY 2010				
FY 2011	5,114,000.00		1,070,000.00	
FY 2012	6,750,000.00		2,000,000.00	
FY 2013	7,500,000.00		2,250,000.00	
FY 2014	11,305,787.50		3,000,000.00	
FY 2015	25,653,720.75	927,500.00	10,000,000.00	
	56,323,508.25	927,500.00	18,320,000.00	-

Project / Strategic Bonus	1st Defendant ZAR	1st Defendant EUR	2nd Defendant ZAR	2nd Defendant EUR
FY 2009				
FY 2010				
FY 2011				
FY 2012	13,500,000.00		7,500,000.00	
FY 2013	8,500,000.00		2,500,000.00	
FY 2014	-		-	
FY 2015	6,666,666.67		6,666,666.67	
	28,666,666.67	-	16,666,666.67	-

Vested shares	1st Defendant ZAR	1st Defendant EUR	2nd Defendant ZAR	2nd Defendant EUR
FY 2009	869,004.00			
FY 2010	**		**	
FY 2011	**		**	
FY 2012	**		**	
FY 2013	33,618,718.78		10,906,752.78	
FY 2014	50,831,265.10		14,214,906.75	
FY 2015	89,697,568.88		21,184,682.22	
	175,016,556.76	-	46,306,341.75	-

** Shares were forfeited

Second Plaintiff - NV

Base Salary	1st Defendant ZAR	1st Defendant EUR	2nd Defendant ZAR	2nd Defendant EUR
FY 2016	18,922,494.25	1,211,388.78	5,250,000.00	641,666.67
FY 2017	22,659,414.76	1,275,000.00	5,630,730.00	725,000.00
	41,581,909.01	2,486,388.78	10,880,730.00	1,366,666.67

Annual / Performance Bonus	1st Defendant ZAR	1st Defendant EUR	2nd Defendant ZAR	2nd Defendant EUR
FY 2016		1,980,000.00	7,750,000.00	
FY 2017		2,200,000.00	13,701,235.00	
	-	4,180,000.00	21,451,235.00	-

Project / Strategic Bonus	1st Defendant ZAR	1st Defendant EUR	2nd Defendant ZAR	2nd Defendant EUR
FY 2016	6,666,666.67	476,190.48	13,333,333.33	
FY 2017	21,666,666.67		21,666,666.67	
	28,333,333.33	476,190.48	35,000,000.00	-

Vested shares	1st Defendant ZAR	1st Defendant EUR	2nd Defendant ZAR	2nd Defendant EUR
FY 2016	91,361,578.00		30,280,250.00	
FY 2017	117,026,420.13		34,177,923.90	
	208,387,998.13	-	64,458,173.90	-

"POC 4"

STEINHOFF
INTERNATIONAL HOLDINGS N.V.

AUDITED RESULTS

FOR THE YEAR ENDED 30 SEPTEMBER 2019

The financial year ended 30 September 2019 was a pivotal period for the Group, during which we made tangible progress, bringing our financial reporting back up to date and implementing our financial restructuring.

The final months of the 2019 financial year marked the successful completion of phase one of the three-phase recovery process, with the implementation of the debt restructuring. In the period that followed we have been concentrating on possible solutions to the litigation faced by entities within the Group and debt reduction initiatives.

Subsequent to year-end the Group has been severely impacted by the outbreak of the COVID-19 pandemic. The long-term impact on both the supply and demand sides of our businesses is as yet unknown but has the potential to be significant.

2019

Regulatory engagement and listing

The Group continues to engage with regulators and, through this process, has received and addressed various notices of regulatory investigations.

Steinhoff was invited to present to the South African Parliament on several occasions during 2018 and 2019 and used these opportunities to update parliamentary committees on the progress made since the announcements in December 2017.

The Company remains in contact with the Company's principal stock-market regulators regarding its listings: the AFM in the Netherlands, the FSE and the Federal Financial Supervisory Authority of Germany (Bundesanstalt für Finanzdienstleistungsaufsicht) and the JSE and the Financial Sector Conduct Authority (FSCA) in South Africa.

On 12 September 2019 the FSCA informed the market that it had concluded its investigation into the Steinhoff Group and found that the Group had contravened the Financial Markets Act No 19 of 2012 in the period prior to the discovery of significant accounting irregularities at the Company in December 2017. The FSCA imposed an administrative penalty of R1.5 billion on Steinhoff but resolved to remit a portion of the administrative penalty resulting in Steinhoff paying a penalty of ZAR53 million. The FSCA took into account, inter alia, the need to avoid penalising innocent shareholders further, in recognition of the fact that the fraud was perpetrated by former employees and acknowledging the co-operation of the current management team. There are no further enforcement FSCA actions outstanding against the Steinhoff Group.

Steinhoff is co-operating with the various prosecution authorities and regulators in South Africa and other jurisdictions as they continue their investigations into individuals and entities implicated in relation to the events uncovered in December 2017. The South African authorities have approached PwC, which completed the independent forensic report commissioned by Steinhoff, and engaged them to perform additional expert forensic work to assist in the criminal investigation. Steinhoff supports this initiative and has agreed to contribute funds to cover a substantial portion of the costs of the PwC work, due to the size and complexity of the investigation required. Steinhoff's role is limited to co-operation and providing a portion of funding for the project only. The funding is to be provided on an arms-length basis, with Steinhoff having no ongoing involvement in the investigation, the extent thereof and report-back process.

The Group remains committed to co-operating and maintaining open communication lines, with all regulators and this approach forms an integral part of the Group's Remediation Plan.

Shareholder meetings

A general meeting of shareholders was held in Amsterdam on 30 August 2019. At this meeting all resolutions proposed, including the appointment of the two new members of the Supervisory Board, Paul Copley and David Pauker, were approved. Steve Booysen and Angela Krüger-Steinhoff both stepped down as members of the Supervisory Board at the conclusion of the meeting.

At the extraordinary general meeting held on 12 November 2019 Mazars Netherlands was appointed as the external auditor for the Steinhoff Group for the financial year ended 30 September 2019.

COVID-19

The COVID-19 pandemic has had a material impact on the Group's retail businesses in the period since the 2019 year-end, most notably from mid-March 2020 when lockdowns were initiated in Europe and South Africa. These measures resulted in the partial or full closure of many of our general merchandise stores, or restrictions on trading hours, and the closure of our offices.

Given the significant impact on revenues and consequent adverse impact on cash, in mid-March management acted swiftly to implement a definitive COVID-19 response strategy. Initially, this focused on ensuring employee and customer safety, securing liquidity and preserving and maximising the Group's cash position. Thereafter, attention turned to the actions necessary to return to a more normal trading position, particularly with regard to enhanced online trading (where regulations allowed), securing seasonal inventory, and to positioning the businesses to take advantage of the longer term opportunities resulting from the changed competitive environment.

The Group's liquidity position was addressed at operating entity level, in co-operation with the respective financiers where applicable. Cash positions were maximised through the immediate draw down of committed facilities, working collaboratively with key suppliers to defer or cancel stock commitments, appropriate use of government support and funding schemes in territories where criteria were met and reducing discretionary expenditure.

Throughout this period, the safety of our employees and customers has been paramount. Significant operational changes have been made in our stores and offices including PPE provision where relevant for colleagues and customers, the installation of Perspex screens at till points, introduction of sanitisation stations, adoption of rigorous social distancing practices and encouraging payment by card. All of this has been achieved while adhering strictly to country specific government regulations and has required clear communication to our customers.

RA 9

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No:

SCA Case No: 1423/2018

GP Case No: 100380/15

In the matter between:

HLUMISA INVESTMENT HOLDINGS (RF) LTD	First Applicant
EYOMHLABA INVESTMENT HOLDINGS (RF) LTD	Second Applicant

And

LEONIDAS KIRKINIS	First Respondent
NITHIANANTHAN NALLIAH	Second Respondent
MOJANKUNYANE FLORENCE GUMBI	Third Respondent
MORRIS MTHOMBENI	Fourth Respondent
MUTLE CONSTANTINE MOGASE	Fifth Respondent
NOMALISO LANGA-ROYDS	Sixth Respondent
NICHOLAS ADAMS	Seventh Respondent
SAMUEL SITHOLE	Eighth Respondent
ANTONIO FOURIE	Ninth Respondent
ROBERT JOHN SYMMONDS	Tenth Respondent
DELOITTE & TOUCHE	Eleventh Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the Applicants herewith applies, in terms of Rule 19 of the Constitutional Court Rules 2003, read with the Practice Directives of 17 March 2015, for an order in the following terms:

1. that the Applicants be granted leave to appeal to the Constitutional Court against the whole of the judgment and order of the Supreme Court of Appeal in Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and others (Case no 1423/2018) [2020] ZASCA 83 (3 July 2020) handed down on 3 July 2020 in terms whereof the Applicants' appeal against the judgment and order of Molopa-Sethosa J delivered on 31 August 2018 in case number: 100380/15 in the Gauteng Division of the High Court, Pretoria was dismissed.

2. That the costs of this application be costs in the appeal.

3. Further and/or such alternative relief as the Court deems fit.

TAKE FURTHER NOTICE that the founding affidavit deposed to by DIAAN GUY ORANGE ELLIS is attached in support of this application.

TAKE FURTHER NOTICE that the Applicants have appointed the following address of its attorney of record as the address at which the Applicants will accept notice and service of all process in these proceedings, namely:

FABER GOËRTZ ELLIS AUSTEN INC
Applicants' Attorneys
Ground Floor, East View
Bryanston Place Office Park
199 Bryanston Drive, Bryanston
Tel: 010 590 3378
Ref: Mr D Ellis/HLU1/0001
E-mail: diaan@fgea.co.za / jared@fgea.co.za
c/o JOHN BROIDO ATTORNEYS
1724 Marble Towers
206/214 Jeppe Street
Johannesburg

TAKE FURTHER NOTICE that if you intend to oppose this application, you are required within ten (10) days from the date upon which the application for leave to appeal is lodged, in writing to indicate whether or not the application for leave to appeal is being opposed.

AND FURTHER that you are required to appoint an address at which you will receive all documents and notices in these proceedings.

TAKE NOTICE FURTHER THAT, in the event that any Respondent notifies the applicant of his or her intention to oppose the application, he or she is required to lodge his

or her answering affidavit, together with any relevant documents within fifteen (15) days of notifying the applicant of his or her intention to oppose.

TAKE NOTICE FURTHER THAT if no such notice of intention to oppose is given, the applicants will request the Registrar to place the matter before the Chief Justice to be dealt with in terms of Rule 11(4) of the Constitutional Court Rules, 2003.

DATED AT **BRYANSTON** ON **THIS 23RD** DAY OF **JULY 2020.**

FABER GOËRTZ ELLIS AUSTEN INC
Applicants' Attorneys
Ground Floor, East View
Bryanston Place Office Park
199 Bryanston Drive, Bryanston
Tel: 010 590 3378
Ref: Mr D Ellis/HLU1/0001
E-mail: diaan@fgea.co.za
jared@fgea.co.za
c/o **JOHN BROIDO ATTORNEYS**
1724 Marble Towers
206/214 Jeppe Street
Johannesburg

TO:

The Registrar of the Constitutional Court

CONSTITUTIONAL COURT OF SOUTH AFRICA

BRAAMFONTEIN

Email: generaloffice@concourt.org.za

TO:

The Registrar of the Supreme Court of Appeal

SUPREME COURT OF APPEAL

BLOEMFONTEIN

Email: PAMyburgh@sca.judiciary.org.za **(SERVICE BY EMAIL)**

TO:

The Appeals Registrar of the High Court

Gauteng Division of the High Court of South Africa

PRETORIA

Email: LDreyer@judiciary.org.za

BBhana@judiciary.org.za **(SERVICE BY EMAIL)**

AND TO:

CLYDE & CO

(t/a DANIEL LE ROUX & ASSOCIATES INC)

Attorneys for First to Tenth Respondents

6th Floor, Katherine & West Building

114 West Street, Sandton

Ref: 1425070/Mr D B Le Roux

E-mail: Christopher.MacRoberts@clydeco.com **(SERVICE BY EMAIL)**

Daniel.LeRoux@clydeco.com

AND TO:

WEBBER WENTZEL

Attorneys for Eleventh Respondent

90 Rivonia Road

Sandton

Ref Ms K Gawith/3011830

Email: Kathryn.Gawith@webberwentzel.com **(SERVICE BY EMAIL)**

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No:

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NICHOLAS ADAMS	Seventh Respondent
SAMUEL SITHOLE	Eighth Respondent
ANTONIO FOURIE	Ninth Respondent
ROBERT JOHN SYMMONDS	Tenth Respondent
DELOITTE & TOUCHE	Eleventh Respondent

FOUNDING AFFIDAVIT

I, the undersigned

DIAAN GUY ORANGE ELLIS

do hereby make oath and say that:

INTRODUCTION

1. I am an attorney of the High Court practicing as such as a director of Faber Goërtz Ellis Austin Inc. at Ground Floor. East View, Bryanston Place Office Park, 199 Bryanston Drive, Bryanston, Johannesburg.

2. The facts set out herein fall within my own knowledge – save where the contrary is stated or appears from the context – and they are to the best of my knowledge and belief both true and correct.

3. I am the applicants' attorney of record and have represented the applicants in this matter to date. I am duly authorised to bring this application on the applicants' behalf.

4. This affidavit is filed in support of an application for leave to appeal to this Court the judgment (*"the SCA Judgment"*) and order *("the SCA order")* of the Supreme Court of Appeal delivered on 3 July 2020 under case number: 1423/2018.

5. In terms of the SCA order. the applicants' appeal against the judgment and order of Molopa-Sethosa J delivered on 31 August 2018 in case number: 100380/15 in the Gauteng Division of the High Court, Pretoria (*"the court a quo")* was dismissed.

6. The judgment and order of the court *a quo*, had the effect of upholding exceptions that were delivered by both the first to tenth and the eleventh defendants to both claims A and B in the plaintiffs' particulars of claim.[1]

7. A copy of the SCA Judgment and order is attached as annexure "**DE1**".

8. It is submitted that the issues raised in this application for leave to appeal (a) raise an arguable point of law of general public importance which (b) ought to be considered by this Court in the interests of justice. as contemplated in terms of Section 167(3)(b)(ii) of the Constitution of the Republic of South Africa, 1996 (*"the Constitution"*).

ARGUABLE POINT OF LAW OF GENERAL PUBLIC IMPORTANCE

9. As is evident from what is set out below. the points of law raised in this matter principally concern:

   9.1. the statutory interpretation of section 218(2) of the Companies Act 71 of 2008 ("the Companies Act") and whether or not section 218(2) can found a claim by a shareholder of a company, against the company's directors, for damages suffered by the shareholder as a result of the diminution in the value of its shares caused by the misconduct of the company's directors;

   9.2. whether negligent conduct by the auditors of the company, which results in the diminution of the value of its shares as held by a shareholder. is actionable in delict in the hands of the shareholder. and in particular whether policy

[1] The judgment of the court *a quo* is reported *sub nom* *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkinis and Others* [2018] ZAGPPHC 676; 2019 (4) SA 569 (GP).

considerations recognise that the element of wrongfulness can be established in this context.

10. In short, the Supreme Court of Appeal upheld the decision of the court *a quo* upholding the exceptions raised by the respondents and found *inter alia* that:-

10.1. section 218(2) of the Companies Act does not found a cause of action contemplated in paragraph 9.1 above, since such a claim is quintessentially a claim for so called "reflective loss", (a loss reflective of a loss suffered by the company), which is not recognised in terms of our common law (the so-called "rule against reflective loss")[2]. Rather, the company is the proper plaintiff in respect of its loss and section 218(2) does not provide a new remedy for shareholders in this context;

10.2. the shareholders' claim was not one of the two instances recognised in the House of Lord judgment in *Johnson v Gore Wood and Co. (a firm)*[3] *("Johnson")* where such a claim would lie against the directors at common law, namely where the company itself has no cause of action, or where the loss is one which is distinct from the loss suffered by the company, in relation to a breach of a duty independently owed by the directors to the shareholder;

10.3. no delictual claim for pure economic loss exists in the hands of the applicants, as shareholders, as a result of the loss suffered by them on account of the auditors' alleged negligent misstatements made in expressing audit opinions and reports in respect of the financial statements of African Bank. This is because no

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[2] See the conclusion at para 37, after an exposition of the South African and English law authorities on "reflective loss" and the rationale for the rule, at paragraphs 24 - 32

[3] [2000] UKHL 65. [2001] 1 ALL ER 481; [2002] 2 AC1 (HL).

legal duty exists upon them not to do so *vis-à-vis* individual shareholders (ie. such conduct is not wrongful)[4] and the company would in any event be the proper plaintiff in such a claim. Section 218(2) can also not found a cause of action against the auditors in the circumstances.

11. I respectfully say that the points of law raised are of general public importance as they implicate the scope of potential liability of a company's directors and/or auditors to the company's shareholders. In a corresponding manner, they implicate a possible cause of action in term of section 218(2) of the Companies Act, which has, thus far, not been recognised at common law. These questions self-evidently affect a broad spectrum of the South African public engaged in commercial, investment and economic activities and they concern the rights and obligations of shareholders, companies and directors.

12. In recent times, the devastating losses suffered by shareholders in the diminution of the value of their shareholding as a result of directors' conduct in relation to, in particular, public companies, has been well-publicised. The matter at hand is one such example. It arises out of the collapse of African Bank and the reasons for that collapse as established in terms of the report published by Advocate JF Myburgh SC in relation to such collapse, *inter alia* that the board of African Bank and its holding company African Bank Investments Ltd ("ABIL") acted negligently and conducted the business of the bank recklessly. It is a matter which received nationwide attention.

13. Similarly, the well-publicised collapse of the share price of Steinhoff International in December 2017 after the departure of its CEO Markus Jooste amid an accounting scandal has spawned a plethora of litigation by shareholders seeking to recover their

[4] SCA Judgment, paras [66] – [71]

losses as a result of the diminution of the value of their shares flowing from the revelation of accounting irregularities, misstatements in the company's annual financial statements and alleged directors' misconduct. In the event, Unterhalter, J in terms of an order made on 26 June 2020, refused to certify a class action sought to be brought by shareholders against directors and auditors, and based his conclusions adverse to the shareholders substantially on the principles at issue in this application[5].

14. In many instances, and for a variety of reasons, shareholders are not able to be compensated, or fully compensated, for their loss by the company itself. The ostensible remedies which are to be found in either the statutory or common law derivative actions or the statutory unfair prejudice remedy are largely ineffectual and, in practice, entirely unfeasible. The potential recognition of a statutory cause of action upon which shareholders can seek redress in these circumstances from the directors whose malfeasance has caused the company, and its shareholders, to suffer loss, is thus critically important for both shareholders and directors alike.

INTERESTS OF JUSTICE

15. I respectfully say that it is in the interests of justice for this matter to be determined by the Constitutional Court:

    15.1. It involves the statutory interpretation of a novel provision in the Companies Act (which appears to have no counterpart in any other common law jurisdiction), which is increasingly sought to be relied upon in litigation by third parties, such as creditors and shareholders, in attempting to hold persons

[5] See *De Bruyn v Steinhoff International Holdings NV and others*, case no 29290/2018, Gauteng Local Division (Johannesburg).

liable for losses suffered by such third parties for contraventions of the Companies Act.

15.2. The statutory interpretation must take place in the context of constitutional values, and the common law must be developed to promote the spirit, purport and objects of the Bill of Rights.[6]

15.3. Section 218(2) establishes a *sui generis* liability.[7] It provides a general remedy to any person, which could obviously include the company, shareholder, creditors etc, to hold any person to who contravenes any provision of the Act liable for any loss or damage suffered as a result of the contravention.[8] Such liability ensues as a result of any contravention, and therefore the ordinary common law requirements for liability as fault or wrongfulness are dispensed with.[9] The extent and ambit of section 218(2) is increasingly becoming the subject of a number of court decisions and academic writing.

15.4. The principal rationale of the Supreme Court of Appeal in finding that section 218(2) does not provide a remedy to shareholders in these circumstances (either against the directors or the company's auditors) was the importance that the Supreme Court of Appeal ascribed to the fact that so-called reflective loss claims are not recognised at common law.

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6 Section 39(2) of the Constitution.

7 *Chemfit Fine Chemicals (Pty) Ltd v Maake* 2017 JDR 1473 (LP) at para 30.

8 *Chemfit Fine Chemicals* (*supra*) at para 30. The decision was reversed on appeal by a full bench in *Maake v Chemfit Fine Chemicals (Pty) Ltd* (5772/2016/HCAA04/20018) [2018] ZALMPPHC (22 November 2018). but the appeal did not appear to implicate this section and the Court also stated that a creditor could sue under section 218(2) (at paras 27 and 28)

9 see *Chemfit Fine Chemicals (Pty) Ltd trading as SA Premix v Maake and Others* 2017 JDR 1473 (LP) at [30].

15.5. The rule against reflective loss claims was established in English law in the case of *Prudential Assurance Co Ltd v Newman Industries Ltd (No2)*[10] *("Prudential")*, refined further in *Johnson* and subsequently recognised in South African law in a number of cases (most recently, prior to the SCA Judgment, in the Supreme Court of Appeal in *Itzikowitz v Absa Bank Limited Ltd*[11] *("Itzikowitz")*).

15.6. The rule against reflective loss claims, its stated rationale and the effect of its application has been the subject of great controversy and substantial criticism in England almost from its inception.[12]

15.7. The SCA Judgment also recognised the fact that the rule has been criticised by commentators as a result of injustices that can arise from its application.[13]

15.8. Other criticisms of the so-called "reflective loss" principle were noted and endorsed in the very recent judgment of the United Kingdom Supreme Court ("*UKSC*") in *Sevilleja v Marex Financial Ltd ("Marex")*, delivered on 15 July 2020[14] and referred to below. One example was the likening by Professor Andrew Tettenborn[15] of the reflective loss principle to *"some ghastly legal*

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10 [1982] 1 All ER 354 (HL)

11 2016 (4) SA 432 (SCA)

12 As noted most recently in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31 (15 July 2020) reported at https://www.bailii.org/uk/cases/UKSC/2020/31.html (see Lord Reed's judgment at para 12) where the Supreme Court was *"invited to clarify, and if necessary depart from, the approach adopted in Johnson, and to overrule some later authorities"* and to *"examine the rationale and effect of the decision in Prudential.."* (Lord Reed's judgement, para 13)

13 SCA Judgement, para 35.

14 [2020] UKSC 31 (15 July 2020) reported at https://www.bailii.org/uk/cases/UKSC/2020/31.html

15 In a case note in (2019) 135 Law Quarterly Review 182.183

Japanese knotweed " whose tentacles have spread alarmingly and which threatens to distort large areas of the ordinary law of obligations[16].

15.9. Another example of such criticism appears in an article placed before the UKSC in *Marex*, where Alan Steinfield QC contends that *"[t]he law took a seriously wrong turn when in Prudential the court elevated what was a relatively simple everyday problem concerned with an assessment of damages into a principle of causation"*; he urged that the UKSC should *"now think it over and wonder why it was ever thought to be necessary or just to have this rule at all"*[17].

15.10. For the purposes of considering the rule against reflective loss claims in *Marex* the UKSC convened *"a large panel with the object of examining the rationale for the reflective loss principle and the coherence of the law in this area"*[18]. In view of the significance of the case the All Party Parliamentary Group of Fair Business Banking was granted permission to intervene in support of the appeal[19].

15.11. All seven members of the panel sitting in *Marex* upheld the appeal. In the SCA Judgment[20] the Court relied on the (now overturned) judgment of the Court of Appeal in *Marex*, clearly without the benefit of the as yet undelivered UKSC judgment. With hindsight it is clear that the judgment of the Court of Appeal was not safe, and so too, it is respectfully submitted, the SCA Judgment.

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[16] Referred to by Lord Reed in *Marex* at paragraph 77 and by Lord Sales at paragraph 121
[17] (2016) 22 Trusts & Trustees 277, at 285, cited by Lord Sales in *Marex* at paragraph 121
[18] Judgement of Lord Sales, paragraph 115
[19] *Mare* at paragraph 114
[20] SCA judgment paragraph [30]

15.12. It is therefore respectfully submitted that the reliance by the Supreme Court of Appeal on the common law, as a rationale for unnecessarily limiting the ambit of a cause of action created by section 218(2) was flawed, alternatively that the common law should be developed to recognise claims of this nature in order to ensure the equitable treatment of shareholders, by the recognition of the loss suffered by them in these circumstances, and to prevent injustices.

15.13. For the reasons set out herein it is submitted that the applicants have good prospects of success on appeal to this Court.

16. It is thus respectfully submitted that it is in the interests of justice for the Court to consider the appeal.

EXCEPTIONS

17. It is relevant to bear in mind that the court a quo was called upon to decide matters on exception. Consequently, all that the applicants need to show is that the meaning they attribute to section 218(2) is one that is reasonably possible.[21] For the purposes of the exceptions, the allegations in the applicants' amended particulars of claim must be accepted as being correct.

18. It is for the respondents, as excipients, to satisfy the Court that the conclusion of law set out in the particulars of claim is unsustainable. The Court may uphold an exception

[21] *Fairlands (Pty) Ltd v Inter-Continental Motors (Pty) Ltd* 1972 (2) SA 270 (A) cited *Blue Farm Fashion Ltd v Rapitrade 6 (Pty) Ltd and Others* (2288/2014) [2016] ZA WCHC 35 (1 April 2016).

only if it is satisfied that the cause of action or conclusion of law cannot be sustained on every interpretation that can be put on those facts.[22]

BACKGROUND AND THE PLEADINGS

19. The first applicant and the second applicant (as plaintiffs in the court *a quo*) were shareholders in African Bank Investments Ltd ("ABIL"), which was listed on the Johannesburg Securities Exchange ("JSE"). The first applicant owned 1.73% and the second applicant owned 3.24% of the issued share capital of ABIL.

20. African Bank Ltd ("African Bank"), which carried on the business of a bank under the Banks Act 94 of 1990, was a wholly owned subsidiary of ABIL. The first to tenth respondents are all either former or current directors of ABIL and African Bank ("the directors"). At all material times they were all directors of both. The eleventh respondent, Deloitte and Touche ("the auditors") was the auditor of both ABIL and African Bank.

21. The applicants pleaded that, in consequence of ABIL being the sole shareholder of African Bank, any acts or omissions by third parties causing patrimonial loss to African Bank would consequently result in ABIL suffering patrimonial loss.

22. The amended particulars of claim ("the particulars of claim") set out two claims referred to as claim A and claim B. Claim A is advanced against the directors and claim B is advanced against the auditors. The plaintiffs claim the sum of R721 384 512

[22] A *quo* judgment paragraph 22 with reference to *Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others* [2012] ZASCA 182: 2013 (2) SA 213 (SCA) para 36 cited with approval in *HV Fetal Assessment Centre* [2014] ZACC 34: 2015 (2) SA 193 (CC) para 10.

and R1 342 224 294.40 respectively as damages, from the directors and the auditors, jointly and severally.

CLAIM A – AGAINST THE DIRECTORS

23. In claim A, the applicants alleged that between 2012 and 2014. and in breach of section 76(3) of the Companies Act, the directors had failed to exercise their powers in good faith and in the best interests of ABIL and African Bank which resulted in the business of ABIL and African Bank being carried out recklessly or with gross negligence in contravention of the provisions of section 22(1) of the Companies Act.

24. The particulars of claim set out a number of instances of the directors' misconduct, including the publication of false financial statements in respect of both entities; the authorisation of the publication, in relation to a rights issue, of a prospectus containing false financial statements and other financial information that was misleading; the authorisation of a loan, at meetings or in terms of section 74 of the Companies Act, in contravention of section 45 in circumstances where it could be foreseen that the loan would not be repaid; the appointment of an executive director who did not have the necessary skills and expertise; failing to make provision for loss as sustained as a result of bad business decisions; utilising flawed credit provisioning models; pursuing aggressive and reckless accounting practices; and pursuing a rights offer on behalf of ABIL on false premises.

25. The applicants' pleaded that the directors' conduct as aforesaid:

25.1. constituted a breach of the provisions of section 76(3) of the Companies Act and resulted in the business of ABIL and African Bank being carried out

recklessly or with gross negligence. in contravention of the provisions of section 22(1) of the Act, and

25.2. resulted in significant losses on the part of African Bank, and ABIL, which in turn caused the share price of the ABIL shares, being listed on the Johannesburg Securities Exchange to drop from R 28.15 per ABIL share in April 2013 to 31 cents per ABIL share in August 2014, when the JSE suspended trading of the ABIL shares (which suspension is still operative), being a total diminution of R 27.84 per share.

26. The applicants therefore pleaded that, as a result, the first and second applicants, suffered a diminution in value of the ABIL shares held by them; that the losses were foreseen by the directors alternatively ought reasonably to have been foreseen by them.

27. The applicants cause of action was then founded in paragraph 24 of the particulars of claim in terms of which the applicants pleaded that *"in the circumstances, and by reason of section 218(2) of the Act. the directors are liable to compensate the first and second plaintiffs for the damages that they have suffered in the amounts of R 721,384,512.00 and R 1,341,224,294.40."*.

28. The directors raised three exceptions to the particulars of claim, namely:

28.1. That the loss in respect of which the plaintiffs' claim is a loss which is reflected in the share price of ABIL, as a result of the loss sustained by ABIL and African Bank in consequence of the directors' conduct and that the plaintiffs had not set out facts or alleged any basis entitling them to recover the losses suffered by them in consequence of the diminution in the share price of

ABIL (this the SCA Judgment held constituted the "no reflective loss claims" exception):

28.2. That the applicants had not alleged the damages which they had suffered were "as a result of" the contraventions of various provisions of the Companies Act but instead pleaded that the damages were suffered as a consequence of a diminution in value of the ABIL shares. which diminution resulted from losses sustained by African Bank and ABIL. As a result they contended that the amended particulars of claim did not contain allegations entitling the plaintiffs to rely on section 218(2) of the Companies Act; and

28.3. That the amended particulars of claim, in relation to the details set out in respect of the false and misleading information contained in the prospectus. did not contain sufficient particularity to sustain a cause of action, because the applicants did not allege that they relied on that representation, acted upon it or suffered damages as a result of it.

CLAIM B – CLAIM AGAINST THE AUDITORS

29. The applicants pleaded that the auditors were. during the period of December 2012 to December 2014, tasked by ABIL to audit and report upon the financial standing of ABIL and African Bank. The applicants then averred that the auditors, due to the facts pleaded, owed them as shareholders of ABIL a duty of care not to make negligent misstatements in relation to ABIL or African Bank.

30. They pleaded further that the auditors audited African Bank's annual financial statements ("AFS") for the years ending December 2012 and December 2013 and also

signed the auditor's reports contained in such AFS. The auditors made statements (expressed opinions) in their reports relating to the said AFS, which were false, while they had a duty not to make such statements, arising from certain facts and circumstances pleaded.

31. The applicants pleaded that they relied on the contents of the auditor's reports (including the false statements) and, in so doing, did not take any steps to remove the directors of ABIL or African Bank or to prevent further losses being sustained by ABIL, alternatively to take steps to mitigate such losses and, in the result, they suffered the losses referred to in the particulars of claim. In addition to the delictual claim articulated against the auditors, the applicants also relied on a cause of action against the auditors based on the provisions of section 218(2) of the Companies Act (which cause of action they argued could be implied from the pleading)

32. The auditors raised two exceptions:

    32.1. First, that any culpable failure by the auditors to discharge their duties pursuant to their appointment as African Bank's statutory auditor constituted a breach of their duties to ABIL and/or African Bank, and not to individual shareholders of ABIL in their capacity as such; and may have caused for loss to African Bank – not for ABIL for to ABIL's shareholders in their capacity as such. The diminution of the value of the shares held by ABIL in African Bank or by the applicants was merely a reflection of the loss suffered by African Bank and thus the particulars of claim lacked averments necessary to sustain a cause of action

32.2. Second, that, at common law, a statutory auditor of a company owed a legal duty to the company and to the shareholders in general meeting, but owed no legal duty to individual shareholders (such as the applicants) in their capacity as such.

THE DIRECTORS' EXCEPTIONS

33. It is submitted that the Supreme Court of Appeal erred in finding that section 218(2) of the Companies Act does not establish a statutory cause of action by the applicants in relation to the loss they have suffered as a result of the diminution of the value of their shares resulting from the directors' misconduct, which also occasioned loss to the company.

34. Section 218(2) of the Companies Act states as follows:

"Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention".

35. Thus, the section, on its plain wording, provides a remedy:

35.1. to any person (whether directors, shareholders, or third parties unrelated to the company);

35.2. against any person:

35.3. who contravenes any provision of the Companies Act;

35.4. for any loss or damage suffered by that person.

35.5. as a result of the contravention.

36. In this regard the applicants have pleaded:

36.1. That they are shareholders of ABIL, the sole shareholder of African Bank;

36.2. a contravention of sections 76 and 22 of the Companies Act;

36.3. by the directors;

36.4. which resulted in the diminution of their share value;

36.5. thereby causing them loss as a result of such contravention.

37. The Supreme Court of Appeal began its consideration of the exceptions by revisiting the rule against claims by shareholders for so-called "reflective loss".[23] After an exposition of the common law position relating to claims for reflective loss, including English law and the law in other commonwealth jurisdictions , the Court found that there are sound policy and jurisprudential reasons for the rule[24] (although recognising that there are differing opinions as to the correct rationale for the rule against reflective loss).

38. In doing so, the Court recognised [25]that there were cases where, despite the recognition of the rule against reflective loss, the Courts had nevertheless permitted a shareholders' claim, to *"mitigate the inflexible proper plaintiff rule set out more than 175 years ago in Foss v Harbottle"*.

[23] Paragraph [24], page 15 and following.
[24] Para [31] page 19.
[25] At paragraph 34 of the SCA Judgment, with reference of *Giles v Rhind [2002] 4 All ER 977*. See also paragraph 35 of the SCA Judgment.

39. In relation to what was later[26] described in the SCA Judgment as the "basis" of the rule against the claim for reflective loss, namely that property vesting in the company does not vest in any or all of its members, the Court cited the following statement in *LAWSA* with apparent approval:

> *"Since the shareholder's shares are merely the right to participate in the company on the terms of the memorandum of incorporation, which remains unaffected by a wrong done to the company, a personal claim by a shareholder against the wrongdoer to recover a sum equal to the diminution in the market value of his or her shares, or equal to the likely diminution in dividend, is misconceived."*

40. The view was expressed that the passage quoted above *"captured"*[27] the basis of the no reflective loss principle, being the non-vesting of company property in any of its members.

41. The Court went on to recognise the genesis of the rule in our law as being the House of Lords' decision in *Prudential*, which, in dealing with *Foss v Harbottle* . placed the rule in its historical perspective in relation to derivative claims and said the following:[28]

> *"What [a shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a loss is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His own "loss" is*

[26] Paragraph [42] page 25
[27] Paragraph [42] of the SCA Judgment
[28] At 222 to 223.

through the company, in the diminution in the value of the net assets of the company in which he has ..... shareholding".

42. As discussed further below, as is evident from the detailed discussion of the *Prudential* decision in Lord Sale's judgment in *Marex*, this basic premise (that the shareholder's loss is merely "reflective" of the company's loss and not a personal loss), which was accepted unquestioningly by the Supreme Court of Appeal in the present case, is indeed questionable, and, I respectfully submit, a wrong premise

43. The rule against reflective loss as postulated in *Prudential* was given greater clarity in the judgment of the House of Lords in *Johnson*[29] where Lord Bingham set out the following:[30]

"(1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of shareholders suing in that capacity and no other to make good a diminution in the value of the shareholders shareholding where that merely reflects a loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss...

(2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a

[29] [2000] UKHL 65; [2001] 1 ALL ER 481; [2002] 2 AC 1 (HL).
[30] At 35E to 36B.

cause of action to do so), even though the loss is diminution in the value of the shareholding...

(3) Where a company suffers loss caused by a breach of the duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other"

44. *Johnson* therefore recognised that a shareholder would not have claim against a wrongdoer in instance (1) [a "reflective loss" claim *simpliciter*], but would have a claim in instance (2) or (3).

45. In *Johnson* it was well accepted by Lord Hutton [31] that there was force in the criticism that the fact that a share is valuable because it is a right of participation in a company does not preclude one as a matter of logic from regarding it as a piece of property, and thus an item of personal property in respect of which a shareholder could be allowed to sue for injury to it. It is submitted that this is correct, and shows that the issue is not whether company property vests in the shareholder, but whether property of the shareholder has diminished in value by reason of a wrongful act. If so, it will be unjust to deprive the shareholder of a personal remedy.

46. In *Stellenbosch Farmers' Winery v Distillers Corp & Another*[32], the recognition by AJA Wessels that a shareholder owns a financial interest in the business conducted by the company is based on the rationale that, merely because the shareholder has no

[31] [2001] 1 All ER at 521
[32] 1962 (1) 458 (AD)

proprietary interest in the business of the company does not mean he has no financial interest therein.[33] He acquires such an interest as of right when he acquires *"a proprietary interest in the company"* though the acquisition of shares.[34] By the acquisition of shares (the shareholder's property) the shareholder may relate his own financial interest to the financial interest of the company. but it remains his interest, and his property.

47. And the proper plaintiff for redress for an injury suffered by a shareholder to his own property is the shareholder. This has been recognised in England. In *Heron v Lord Grade*[35] the Court of Appeal, with reliance on *Foss v Harbottle* said that no claim arises for a shareholder out of reckless conduct by a director where there is a theoretical possibility of the market value of the relevant share falling as a result of that conduct. However. the Court went on to say[36]:

> *"Foss v Harbottle has nothing to do with a shareholder's right of action for a direct loss caused to his own pocket as distinct from a loss caused to the coffers of the company"*

48. It is submitted that on no account can it be said that a diminution in a company's market capitalisation is a loss caused to the coffers of the company. The shareholders own the shares which constitute the market capitalisation, not the company. In short, the proper plaintiff is the shareholder.

49. I return to the SCA Judgment. The Court noted, there has been statutory and judicial intervention to address concerns against injustices resulting from the rule against claims

[33] At 485F – 486A.
[34] At 486A
[35] [1983] BCLC 244. CA at 261h-262b.
[36] At 263b

for reflective loss being applied inflexibly.[37] The Supreme Court of Appeal quoted from P Koh's contribution on "The Shareholders Personal Claim: Allowing Recovery for Reflective Losses"[38] where she notes that the policy reasons underlying the no reflective loss principle are not always applicable nor are they in themselves unassailable. "*As the task of any Court should be to achieve justice and fairness on the particular facts before it there is much to be said for retaining discretion over whether to allow personal suit or not. Justice is necessarily context-driven. To apply a rigid rule regardless of context, therefore, raises the real risk of denying the wrong party appropriate remedy.*" The Court nevertheless remarked that, although commentators had voiced concerns, they had not suggested it be abolished.

50. It is respectfully submitted that the Supreme Court of Appeal failed to sufficiently interrogate the rule, and its professed rationale, as formulated in ***Prudential*** and clarified in ***Johnson.*** The exclusion of a claim in the hands of shareholders for the diminution of the value of their shareholding is only justified on the basis that such a loss is merely a reflection of the diminution of the company's assets, and the company is thus the proper plaintiff.[39]

51. The recognition of the rule in such circumstances is said to avoid potential double recovery.[40] This was referred to the Supreme Court of Appeal in its reasoning in the present case[41]. The soundness of the double recovery barrier was doubted[42], but the Court nevertheless thought that there was "*no doubt that there are sound policy and jurisprudential reasons for the rule*" against recovery of reflective loss. As it turns out,

[37] Para [35] page 21
[38] P Koh "The Shareholders Personal Claim: Allowing Recovery for Reflective Losses" (2011) 23 *Singapore Academy of Law Journal 863 - 889*
[39] See Lord Millet's judgment in ***Johnson v Gore Wood & Co*** [2002] 2 AC 1 (HL) at 66B-D
[40] See Lord Millet's judgment in ***Johnson*** at 62D-G
[41] At paragraphs [28],[30] and [31]
[42] At paragraph [31]

there was good reason for the Court to doubt the reliability of the concern about double recovery as a policy issue underpinning the reflective loss principle, given that it was criticised by the UKSC in *Marex*. Lord Reed said[43] that "*the principle that double recovery should be avoided is not itself a satisfactory explanation of the rule in* Prudential."

52. It is also evident from the judgment of Lord Sales in *Marex*, as discussed further below, the diminution in value of a shareholder's shareholding is not the same loss as that suffered by the company in the sense that it cannot be equated with the diminution of the net asset value of the company, and that the risk of a double recovery does not arise or can be greatly ameliorated. This is aptly illustrated by the fact that the recovery of loss by the company will not necessarily result in the restoration of the full value of the shareholder's shares.

53. In short, it is submitted that the rule against reflective loss claims is premised on a flawed and overly simplistic view of the nature of the loss suffered by shareholders in this context, and does not accommodate the growing sophistication, nuance and complexity of corporate activity and shareholding. It operates to deprive a shareholder of a right to recover his loss by failing to recognise that it is a different loss to that suffered by the company, and the fact that a company may have a right of action against the wrongdoers (as a notional asset to which the shareholder may have a right to participate) cannot in many circumstances off-set the personal loss suffered by the shareholder as a result of the diminution in value of his shareholding. There is, in many instances, no exact correlation between the company's net asset value, and the value of the shareholder's shares. This is clearly the underlying rationale for the departure of

[43] At paragraph [51]

three of the seven Law Lords in the United Kingdom Supreme Court case of *Marex* [44], from the rule against reflective loss. It warrants specific attention, and is addressed below.

Marex

54. In *Marex* the members of the UKSC were divided on the approach to the reflective loss principle.

55. The division emanated from a disagreement as to whether or not the Court of Appeal, in *Prudential*, laid down a rule of law that the shareholder is deemed not to have suffered a loss different from that suffered by the company, or whether it only purported to reason why a shareholder in fact in such a case suffered no loss [45] Both judgements undertook an extensive discussion and review of the previous decisions of the English Courts in relation to the reflective loss principle, as well as decisions in other common law jurisdictions, in particular Australia and New Zealand.

56. Lord Reed (with whom Lady Black and Lord Lloyd-Jones agreed) and Lord Hodge, in a separate judgment, endorsed the "no reflective loss" rule as a rule of law, as adopted in *Prudential* and by Lord Bingham in *Johnson*. Lord Reed held that the rule is limited to claims by shareholders that, as a result of action or loss suffered by their company, the value of their shares, of the distributions they received as shareholders, has been diminished.[46]

[44] [2020] UKSC 31 (15 July 2020)
[45] Lord Sales judgment, para 117 – 118.
[46] Lord Reed's judgment is from paragraphs 1 – 94.

57. The separate judgment of Lord Sales (with whom Lady Hale and Lord Kitchin agreed) criticised the adoption of a "bright line legal rule" that loss suffered by a shareholder is regarded as irrecoverable. If it is a rule of law that the shareholder is deemed not to have suffered a loss different from that suffered by the company then it is not a matter of evidence whether he has or has not in fact suffered such a loss.[47] Lord Sales took the view that the Court of Appeal in *Prudential* "*did not lay down a rule of law that a shareholder with a claim against the third party defendant in parallel with, and reflective of, a claim by the company against the same defendant simply had to be deemed to suffer no different loss of his own which he could recover, whatever the true position on the facts. It did not purport to do so, but rather the Court set out reasoning why it thought the shareholder in such a case in fact suffered no loss*".

58. Lord Sales expressed the view that the reasoning in *Prudential* could not be supported as there were clearly some cases where a shareholder does suffer a loss which is different from the loss suffered by the company. He held that it would be incorrect to consider it a matter of law and that, if a shareholder has a valid cause of action against a third party defendant in respect of different loss which he has in fact suffered, it was not open to a Court to rule it out.[48]

59. Lord Sales in paragraph 122 set out the following "*basic points*":

"A company is a legal person distinct from its shareholders, which has its own assets which are distinct from theirs. A share in a company is an item of property owned by the shareholder, which is distinct from the assets owned by the company. Typically, or at least very often, a share in the company has a market value which reflects the

[47] Para 117
[48] Para 118.

market's estimation of the future business prospects of the company, not what its net asset position happens to be at any given point in time. There is no simple correspondence between the value of a 1% shareholding and a 1% of the net assets of a company. This is true both in respect of companies whose shares are publicly traded and in respect of a small private company". He thereby expressly disagreed with the observation of Lord Millet in ***Johnson*** in this regard.[49] He continued: "*The shares in both public and private companies are marketable and their value reflects the view of the relevant market about the future prospects of the company....*"[50]

60. What Lord Sales recognised is that the loss suffered by the shareholder is not the same as the loss suffered by the company, simply because the shareholder's personal loss, being a diminution in the value of his shareholding, bore some relationship to the loss suffered by the company. There is not necessarily a direct correlation between the two. The loss suffered by the shareholder does not reflect the loss suffered by the company, in the strict sense of there being a one-to-one correspondence between them.[51]

61. Lord Sales indicated that the absence of any necessary correspondence between the loss to a shareholder and the loss to the company which follows from the wrong done to the company which also forms part of the parallel wrong done to the shareholder could be demonstrated in various ways.[52] By way of example, knowledge in the market that the company had been made a victim of the wrong might have the effect of undermining market confidence in its management, thereby reducing the market value of shares in it even if the company made a full recovery of what it had lost.[53] The effect of Lord

[49] At para 62A-D
[50] At para 122
[51] At para 132
[52] At para 153
[53] Para 153.

Sales' observation demonstrates that a simplistic approach had been taken in *Prudential* in adopting the "cash box example"[54] and equating the loss suffered by the shareholder as "the same" as the loss suffered by the company.

62. Lord Sale reasoned further: One could envisage a situation where a claimant shareholder decided to sell his shares in a company and in consequence of a defendant's wrongdoing received less than he otherwise would have done.[55] In such a case the claimant could recover for the crystalised loss he had suffered by way of diminution in the share value due to the wrong committed by the defendant.[56] In this situation, what the claimant has received for his shares by selling them in the market will have affected the market's view of the value of the company's claims against the defendant (alongside its other assets and its general trading prospects).[57] The company's claims against the defendant will have been brought into account for the credit of the defendant in this way, to the extent that they are material to valuing the claimant's loss, and it would not be unjust to allow the claimant to recover the full amount of his crystalised loss.[58] "*It should not make any difference to the position whether the claimant has sold his shares or has decided to retain them*" [59]

63. Lord Sales postulated that the concern that there was a risk of a defendant being liable twice over by virtue of the relationship between the company's loss and the loss suffered by the claimant shareholder, had to be balanced against the concern that if one excludes the liability of the defendant, then the claimant may well be

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[55] Para 158
[56] Ibid
[57] Ibid
[58] Ibid
[59] Para 158.

undercompensated in respect of a real and different loss which he has suffered as a result of the defendant's wrong against him.[60] He recognised that a Court could take steps to manage the coincidence of claims by the claimant and by the company by procedural means[61] and that there were no reasons of public policy why the shareholder's cause of action should be eliminated altogether in order to ensure priority for the company's claim. There were, in his view, no sound reasons why the shareholders personal cause of action should be eliminated in this way.[62]

64. Fundamentally, Lord Sales appreciated the attraction of a rule of law since it would reduce complexity. But since the rule only achieved this if it was deemed that the shareholder had suffered no loss, when in fact he has, and by deeming that the shareholder does not have a cause of action, when according to ordinary common law principles he should have.[63] The Court was of the view that that would work serious injustice in relation to a shareholder who (apart from the rule) had a good cause of action and had suffered loss which is real and different from any loss suffered by the company.[64]

65. He did not view the fact that this would introduce complexity as a reason not to adopt this approach. He stated as follows[65]: *"Common Law Courts are used to working through complex situations in nuanced and pragmatic ways, to achieve practical justice. In my opinion, the fact that the interaction between the company's causes of action in respect of its loss and the shareholders cause of action in respect of its own loss gives rise to complexity is more a reason for not adopting a crude bright line rule*

[60] Para 159
[61] Para 161
[62] Para 165.
[63] Para 167
[64] Ibid
[65] Ibid

which will inevitably produce injustice, and requiring instead that the position be fully explored case by case in light of all the facts, with a benefit of expert evidence in relation to valuation of shares and with due sensitivity to the procedural options which are available."[66]

66. Lord Sales also referred to the decision in ***Christensen v Scott*** of the New Zealand Court of Appeal, in which that court declined to apply the reflective loss principle on reasoning which he found to have "*considerable force*".[67] The Court of Appeal held that the personal claims advanced by the shareholders against the accounting and legal advisors of the company should not be struck out on the basis of the reflective loss principle and should proceed to trial, recognising that the diminution in their shares is, by definition, a personal loss and not a corporate loss.

67. It is accordingly submitted that the rule against reflective loss should not be followed as a rule of law, but rather that what should be recognised is that the shareholders' loss and the company's loss cannot be equated, even if there is some correspondence in their value. Due allowance can be made for this fact in the valuation process, but this is something that would require a factual investigation in every particular case.

68. It is also submitted that, in this case, the Supreme Court of Appeal should not have decided this matter at the exception stage, since that by doing so, it excluded the possibility that evidence could be led which would allow for a relaxation of the rule; alternatively which evidence may indicate that the shareholder's claim was a personal one, and not merely reflective of the company's loss. The Supreme Court of Appeal

[66] Para 167.
[67] Para 169

should have allowed the matter to proceed to trial for the relevant facts and circumstances to be investigated.

69. In particular, in this context, the allegation by the applicants pleaded in the particulars of claim of the directors' misconduct in relation to the rights offer announced by the directors for R 5.5 billion is important. The plaintiffs pleaded that, by means of the rights offer the directors *"publicly represented to inter alia the plaintiffs"* that:

69.1. The consequence of the successful rights offer would be that ABIL and African Bank would both enjoy the status of a going concern;

69.2. The auditors would be entitled on the basis of the proposed rights offer to reasonably reflect an opinion to the effect that both ABIL and African Bank constituted going concerns;

69.3. The amounts sought by the rights offer would be sufficient to fully and properly recapitalise ABIL and African Bank.

70. The applicants then pleaded that the representations were, to the knowledge of the directors, false and that the anticipated capital amount to be raised as a consequence of the rights offers was wholly insufficient to result in:

70.1. either ABIL or African Bank enjoying the status of going concerns; or

70.2. properly and adequately recapitalising ABIL or African Bank; or

70.3. the auditors being entitled, on the basis of the proposed rights offer, to reasonably reflect an opinion to the effect that both ABIL and African Bank constituted going concerns.

71. A rights offer is made only to the existing shareholders of the company and thus, in making such a representation to the shareholders, I respectfully say that the directors would have owed a personal duty to the shareholders not to make these false misrepresentations. It is therefore also submitted that the Court erred in finding that the pleadings could not sustain a claim as envisaged in (3) of *Johnson* particularly given the direct representations made to the shareholders, in relation to the rights offer.

72. I also respectfully say that the Supreme Court of Appeal erred in finding that section 218(2) did not create a potential statutory right of action for the shareholders in the circumstances. The Supreme Court of Appeal considered the purpose of the Companies Act[68], *inter alia* to promote compliance with the constitution; to provide for the creation and use of companies in a manner that enhances the economic welfare of South Africa as a partner within the global economy; to promote the development of the South African economy by encouraging transparency and high standards of corporate governance as well to balance the rights and obligations of shareholders and directors within in companies. However, it is submitted that these purposes would be better served by recognising a right of action in terms of section 218(2). Certainly, high standards of corporate governance would be enhanced in recognising a direct claim by shareholders against directors who act in contravention of their statutory obligations.

[68] Para 41, page 25

73. It is also submitted that, when considering *Itzikowitz*[69]. The Supreme Court of Appeal should have noted that claim B, which was based on a breach of section 22 of the Companies Act and from which it was alleged that the defendant was liable in terms of section 218(2). had been found by the trial court to fall within the ambit of section 218(2) read with section 22(1) of the Companies Act. Claim B was accordingly allowed to proceed to trial in order for the averments made in the claim to be proved. That Court did not deal with this aspect because it did not entertain the cross-appeal on the basis that the dismissal of an exception was unappealable.

74. A third party can hold a director personally liable in terms of section 218(2) of the Companies Act for acquiescing in or knowing about conduct that falls within the ambit of section 22(1), or for a breach of their duties under section 76.[70] While it is accepted that there is a presumption that statutory provisions are not intended to alter or exclude the common law unless they do so expressly or by necessary implication[71], and that (where possible) statutes must be read in conformity with the common law[72] it is submitted that the necessary implication of the wide wording of section 218(2) is to found a cause of action in the hands of a shareholder against a director where contraventions by that person results in loss by the shareholder. Certainly, the wording of the section supports this construction.

75. The Supreme Court of Appeal correctly found that the word "contravenes" in section 218(2) would include a breach or an infringement of any provision of the Companies Act which is by nature prescriptive or in which in some way regulates conduct and that

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[69] 2016 (4) SA 432 (SCA)

[70] *Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ) at para [22]; *Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd and Others* [2014] 3 ALL SA 454 (GJ) at [42].

[71] *Attorney-General, Transvaal v Botha* 1994 (1) SA 306 (A) at 330 I to J.

[72] *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) para 16.

sections 22(1), 74, 45 and 76(3), being the sections relied upon *in casu* fall into this category.[73]

76. Section 22(1)(a) provides that:

"A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose"

77. Section 76(3) provides:

"Subject to sub-sections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers or perform the functions of a director –

(a) in good faith and for proper purpose

(b) in the best interest of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person

(i) carrying out the same functions in relation to the company as those carried out by that directors; and

(ii) having the general knowledge, skill and experience of that director".

78. The Supreme Court of Appeal found that, since the duties owed by directors in terms of section 76(3) are owed to the company, not to individual shareholders, the company, in the event of a wrong done to it in terms of any of the provisions of that section, can sue

[73] Para 45, page 26

to recover damages. The company would be the proper plaintiff.[74] The court found support for its view in the provisions of section 77(2)(a), 77(2)(b) and 77(3)(b), which the court found made it clear that the legislature decided where liability should lie for conduct of directors by directors in contravention of certain sections of the Act and who could recover the resultant loss: the company.

79. The Court found that the words "as a result of that contravention" in section 218(2) did not need to be given an extended meaning so as to ignore the conventional meaning of a consequence flowing from the misconduct. "*Simply put, there must be a link between the contravention and the loss allegedly suffered.*"[75]

80. In this instance therefore, the Court found that the loss was occasioned to the company and the company was the entity with a right of action. But it is respectfully submitted that this finding is wrong, for the reasons set out above. There is a personal loss suffered by the shareholder as well.

81. It is respectfully submitted that the interpretation of the relevant sections of the Companies Act by the Supreme Court of Appeal, do not detract from the wording of section 218(2). There is no reason in principle, simply because the sections discussed by the Court made provision for a right of action in the hands of the company, to find that section 218 (2) cannot therefore find a right of action in the hands of the shareholder. Section 218(2) affords standing to "any person" who has suffered loss as a result of the contravention. Contrary to the Supreme Court of Appeal's finding that section 218(3) reinforced its conclusion in this regard (which reads that that "*the provisions of this section do not affect the right to any remedy that a person may*

[74] Para 48.
[75] Para 51, page 29

otherwise have "), this section would support a wider construction, in recognising that it exists apart from and in addition to other remedies which a person may have either at common law or as provided in the statute.[76] Simply because a company has an established right to claim damages from directors in terms of the Act, this does not have the effect of precluding a claim from being recognised in the hands of the shareholders *per se*.

82. In a case of a statutory cause of action, the Court is required to interpret the statutory provision in question, having regard to the ordinary grammatical meaning of the words, its purpose, and both intra-contextual and extra-contextual aids to interpretation as one unitary exercise.[77]

83. It is therefore submitted that the solution to the causal inquiry needs to be arrived at on a simple application of the terms of the statute and that, having regard to all the circumstances, the conduct complained of is patently of the nature of which the statute intended to provide a remedy, the inquiry need go no further.[78]

84. It is respectfully submitted that the Court should have construed section 218(2) as being additional to remedies available under the common law and should have recognised that section 218(2) was solely relied upon in this context. This section provides a new remedy which did not exist under common law.

85. Section 158 of the Companies Act enjoins the Court to *"develop the common law as necessary to improve the realization and enjoyment of rights established by this Act"*. It is submitted that the rights of shareholders will be properly recognised on a broad

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[76] Para 52, page 29.
[77] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18 to 23.
[78] See: In re *Kranspoort Community 2000* (2) SA 124 (LCC) at par (72).

interpretation of section 218(2) which recognises their loss in diminution of their shareholding against the directors.

THE AUDITOR'S EXEPTION

86. I respectfully refer this Court to what has been said above in relation the Supreme Court's approach to the "no reflective loss" rule and why it should not have held that it operated as a bar to the applicant's claim in this regard, at common law. The Court should have recognised that the loss was a personal loss which was actionable, and altered and developed the common law on this basis.

87. As regards the second exception, while it is so that our law is generally reluctant to recognise pure economic loss claims, it is trite that it has done so and in such instances the criterion of wrongfulness assumes special importance.[79]

88. Certain categories of liability per economic loss have however been recognised. In *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) the Court had regard to the context in which the alleged negligent misstatement in that case was made, the purpose for which it was sought and made, the reliance placed on it by the third party, the relationship between the parties and public policy and fairness. In *Axiam Holdings Ltd v Deloitte and Touche* 2006 (1) SA 237 (SCA) the Court found that having regard to those factors, the question of wrongfulness could not be decided at exception stage.

89. It is submitted that a Court must be loathe, at exception stage, to hold that it is inconceivable that an auditor who knew of a misstatement in the AFS and audit opinion

[79] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) paras 22 to 24.

and knew that reliance would be placed on the correctness thereof would not have a duty to speak.[80]

90. In particular, the applicant did not rely on the general duty of care owed by auditors to shareholders merely by virtue of the appointment as auditors and the applicants' status as shareholders. Rather, the applicants relied on specific, unique and particular facts and circumstances giving rise to a duty of care as pleaded in the particulars of claim. The applicants sought to rely on an independent duty of care owed to them as shareholders in ABIL, not merely as a result of their status as such, but arising peculiarly as a result of the auditor's knowledge of the facts and circumstances set out in paragraphs 19 and 20 of the particulars of claim, being the directors' misconduct.

91. It is therefore respectfully submitted that the Supreme Court of Appeal erred in holding that the matter should be decided at exception stage.

92. The Supreme Court of Appeal found that section 218(2) did not apply in relation to the applicants' case against the auditors, once again on the basis that the proper plaintiff would be the company. For the reasons already set out above, it is submitted that this is incorrect.

CONCLUSION

93. In all of the above circumstances, I respectfully say that this matter is deserving of the attention of this Court for consideration of the proper interpretation of section 218(2) of the Companies Act, and whether it founds a cause of action as formulated in this matter, and whether the common law should be developed to depart from the reflective

[80] *Axiam Holdings Ltd v Deloitte and Touche* 2006 (1) SA 237 (SCA) at [12].

loss principle, to the necessary extent. I respectfully submit that the applicants have good prospects of success of this Court coming to a different conclusion to that of the Supreme Court of Appeal, and that the exceptions to the applicants' particulars of claim should not have been upheld.

DIAAN GUY ORANGE ELLIS

Thus signed and sworn to before me at Bryanston on this the **23rd** day of **July 2020**, the deponent having acknowledged that he knows and understands the contents of this affidavit and having declared that he has no objection to taking the prescribed oath and that he considers the oath to be final and binding on her conscience.

COMMISSIONER OF OATHS

CARL COETZEE
Petersen, Hertog & Associates
Commissioner of Oaths Ex Officio
[redacted]
Practising Attorney RSA

"DE1"

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JUDGMENT: HLUMISA INVESTMENT HOLDINGS (RF) LTD & ANOTHER v LEONIDAS KIRKINIS & OTHERS

Attached please find a copy of the court order and judgment.

P.S. W MYBURGH (Mr.)
REGISTRAR

SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 1423/2018
GP CASE NO: 100380/2015

On FRIDAY the 3RD OF JULY 2020
BEFORE:

THE HONOURABLE MR. JUSTICE NAVSA	**JA**
THE HONOURABLE MR. JUSTICE MAKGOKA	**JA**
THE HONOURABLE MR. JUSTICE SCHIPPERS	**JA**
THE HONOURABLE MR. JUSTICE MOJAPELO	**AJA**
THE HONOURABLE MR. JUSTICE KOEN	**AJA**

In the appeal:

HLUMISA INVESTMENT HOLDINGS (RF) LTD	**First Appellant**
EYOMHLABA INVESTMENT HOLDINGS (RF) LTD	**Second Appellant**
and	
LEONIDAS KIRKINIS	**First Respondent**
NITHIANANTHAN NALLIAH	**Second Respondent**
MOJANKUNYANE FLORENCE GUMBI	**Third Respondent**
MORRIS MTHOMBENI	**Fourth Respondent**
MUTLE CONSTANTINE MOGASE	**Fifth Respondent**
NOMALISO LANGA-ROYDS	**Sixth Respondent**
NICHOLOAS ADAMS	**Seventh Respondent**
SAMUEL SITHOLE	**Eighth Respondent**
ANTONIO FOURIE	**Ninth Respondent**
ROBERT JOHN SYMMONDS	**Tenth Respondent**
DELOITTE & TOUCHE	**Eleventh Respondent**

Having heard counsel on 9 MARCH 2020 on an appeal from the judgment of the Gauteng Division of the High Court of South Africa, Pretoria delivered on the 31st of August 2018 and having read the record of the proceedings in the said Court (Case number 100380/2015).

JUDGMENT WAS RESERVED,

THEREAFTER, on this day, the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

BY ORDER OF THIS COURT

COURT REGISTRAR
P.S.W. MYBURGH (Mr.)

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 1423/2018

In the matter between:

HLUMISA INVESTMENT HOLDINGS (RF) LTD	**First Appellant**
EYOMHLABA INVESTMENT HOLDINGS (RF) LTD	**Second Appellant**
and	
LEONIDAS KIRKINIS	**First Respondent**
NITHIANANTHAN NALLIAH	**Second Respondent**
MOJANKUNYANE FLORENCE GUMBI	**Third Respondent**
MORRIS MTHOMBENI	**Fourth Respondent**
MUTLE CONSTANTINE MOGASE	**Fifth Respondent**
NOMALISO LANGA-ROYDS	**Sixth Respondent**
NICHOLOAS ADAMS	**Seventh Respondent**

SAMUEL SITHOLE **Eighth Respondent**

ANTONIO FOURIE **Ninth Respondent**

ROBERT JOHN SYMMONDS **Tenth Respondent**

DELOITTE & TOUCHE **Eleventh Respondent**

Neutral citation: *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* (Case no 1423/2018) [2020] ZASCA 83 (03 July 2020)

Coram: NAVSA, MAKGOKA and SCHIPPERS JJA and MOJAPELO and KOEN AJJA

Heard: 9 March 2020

Delivered: This judgment was handed down electronically via e-mail to the parties' legal representatives on 03 July 2020. It has been published on the Supreme Court of Appeal website.

Summary: Company Law – s 218(2) of the Companies Act 71 of 2008 – claim by shareholders of company against directors and auditors for damages related to diminution in value of shares – directors alleged to have acted in bad faith, for ulterior purposes and without the requisite degree of care, skill and diligence, in breach of provisions of the Act – company, rather than shareholders, proper plaintiff in respect of claim against directors – essentially a claim for reflective loss – claim against auditors based on alleged negligence in the manner in which they conducted an audit of the company, in breach of their legal duty – proper plaintiff the company – claim for pure economic loss – wrongfulness requirement not met – exceptions rightly upheld by court below – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Molopa-Sethosa J sitting as court of first instance): judgment reported *sub nom Hlumisa Investment Holdings RF Limited and Another v Kirkinis and Others* [2018] ZAGPPHC 676; 2019 (4) SA 569 (GP).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Navsa JA and Schippers JA (Makgoka JA and Mojapelo and Koen AJJA concurring):

[1] This appeal, with the leave of the Gauteng Division of the High Court, Pretoria (Molopa-Sethosa J, sitting as court of first instance), concerns principally the question whether s 218(2) of the Companies Act 71 of 2008 (the Companies Act) enables a claim by a shareholder in relation to the diminution in the value of shares due to misconduct by directors. The appeal also concerns the viability of a shareholder's claim based on a diminution in share value related to alleged misconduct by auditors in auditing the company's financial statements. It follows on the upholding of exceptions to the appellants' particulars of claim in an action for damages, brought against the respondents in the court below.

[2] The first appellant, Hlumisa Investment Holdings (RF) Ltd (the first plaintiff in the court below), and the second appellant, Eyomhlaba Investment Holdings (the second plaintiff in the court below), are shareholders in African Bank Investments Limited (ABIL), which is listed on the Johannesburg Securities Exchange. The first appellant owns 1.73%, and the second appellant 3.24%, of the issued share capital of

ABIL. African Bank Limited (African Bank or 'the Bank'), which carries on the business of a bank under the Banks Act 94 of 1990, is a wholly-owned subsidiary of ABIL. The first to tenth respondents are all either former or current directors of ABIL and African Bank (the directors). At all material times they were all directors of both. The eleventh respondent, Deloitte & Touche (Deloitte), was the auditor of both ABIL and African Bank.

[3] In the action instituted by the appellants in the court below in 2015, they sued the directors and Deloitte, jointly and severally, for damages allegedly suffered as a result of the diminution in the value of their shares in ABIL, on account of the directors' alleged misconduct in relation to the affairs of both African Bank and ABIL and on account of Deloitte failing to conduct audits in accordance with generally recognised auditing standards.

[4] In their claim against the directors (Claim A), the appellants alleged that between 2012 and 2014, and in breach of s 76(3) of the Companies Act, the directors had failed to exercise their powers in good faith and in the best interests of ABIL and African Bank, which 'resulted in the business of ABIL and African Bank being carried out recklessly or with gross negligence in contravention of the provisions of section 22(1) of the Act'. This caused the Bank and ABIL to suffer significant losses, which, in turn, caused the ABIL share price to drop from R28.15 per share as at April 2013 to R0.31 per share as at August 2014, a total diminution in the price per share of R27.84. The appellants' damages, according to the pleadings, arose from this diminution in value of the ABIL shares, multiplied by the number of shares that they held, which resulted in the first appellant allegedly suffering a loss of R721 384 512, and the second appellant, a loss of R1 341 224 294.

[5] The particulars of claim set out numerous instances of the directors' alleged misconduct. They include the publication of false financial statements in respect of both entities; the authorisation of the publication, in relation to a rights issue, of a prospectus containing false financial statements and other financial information that was misleading; the authorisation of a loan, at meetings or in terms of s 74 of the Companies Act, in contravention of s 45 in circumstances where it could be foreseen that the loan would not be repaid; the appointment of an executive director who did

not possess the necessary skills and expertise; failing to make provision for losses sustained as a result of bad business decisions; utilising flawed credit provisioning models; pursuing aggressive and reckless accounting practices; and pursuing a rights offer on behalf of ABIL on false premises. In para 24 of the particulars of claim the appellants locate the statutory basis for their claim against the directors.

'In the circumstances, and by reason of section 218(2) of the Act, the directors are liable to compensate the first and second plaintiffs for the damages they have suffered. . . .'

[6] The directors excepted to the particulars of claim on three bases, the relevant parts of which are reproduced hereunder:

'EXCEPTION 1

The plaintiffs' claim is premised on the defendants, in their capacities as directors of ABIL and African Bank, having conducted themselves in a particular manner . . . .

The directors' conduct is alleged to have resulted in losses on the part of African Bank and ABIL "which in turn caused the share price of the ABIL shares . . . to drop. . .".

The loss which the plaintiffs claim is the reduction in the value of the shares in ABIL.

On the basis advanced by the plaintiffs the entities which suffered loss as a result of the directors' conduct were African Bank and ABIL . . . .

The loss in respect of which the plaintiffs claim is a loss which is reflected in the share price of ABIL, as a result of the loss sustained by ABIL and African Bank in consequence of the directors' conduct.

The plaintiffs have not set out facts, or alleged any basis, entitling them to recover the losses suffered by them in consequence of the diminution in the share price of ABIL.

In the result the plaintiffs' claim against the defendants lack averments necessary to sustain a cause of action.

EXCEPTION 2

The plaintiffs rely on section 218(2) of the Companies Act . . .

Section 218(2) of the Companies Act provides:

"Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention."

The only provisions of the Companies Act identified by the plaintiffs are section 76(3) and section 22(1) . . . and sections 74 and 45.

The plaintiffs have not alleged that the damages which they claim were suffered "*as a result of*" the contravention of sections 45, 74, 76(3) or section 22(1) of the Companies Act. Instead the plaintiffs allege that the damages which they suffered are the consequence of a diminution

in the value of the ABIL shares, which diminution resulted from losses sustained by African Bank and ABIL.

In the result the amended particulars of claim do not contain allegations entitling the plaintiffs to rely on section 218(2) of the Companies Act and the particulars of claim are accordingly excipiable.

EXCEPTION 3

In the amended particulars of claim the plaintiffs allege that the defendants authorised the publication of a prospectus containing false or misleading information . . . .

In the amended particulars of claim the plaintiffs set out certain details in respect of the false and misleading information in the prospectus . . . .

The authorisation of the prospectus is alleged to be a misrepresentation . . . .

The plaintiffs do not allege that they relied on the representation allegedly made by the defendants, or that they acted on the strength of the representation . . . or that they have suffered damages as a result of the representation . . .

In the result the plaintiffs' particulars of claim do not contain sufficient averments to sustain a cause of action based on the representations . . . and the particulars of claim are accordingly excipiable.'

[7] In respect of the claim against Deloitte (claim B), the appellants alleged that during the period between December 2012 and December 2014, Deloitte was tasked by ABIL to audit and report on the financial standing of ABIL and African Bank. The appellants alleged that Deloitte had, in respect of African Bank's annual financial statements for the years ending December 2012 and December 2013, reported that the financial statements fairly presented the Bank's financial position. The reports were 'false', so the appellants said, in that the financial statements did not reveal the true state of affairs at the Bank. The falsity arose, so it was alleged, as a result of:

'[T]he deliberate, *alternatively*, negligent failure on the part of the auditors to take sufficient steps to rectify and disclose to the investors and shareholders of African Bank and ABIL, including the plaintiffs (the plaintiffs constituting third parties as contemplated in section 46(3) of the [Auditing Profession Act 26 of 2005]) the true state of affairs at African Bank in the financial statements.'

The appellants went on to state that Deloitte deliberately failed to qualify the financial statements.

[8] The appellants alleged that Deloitte knew, or could reasonably have been expected to know that the audit reports would induce them to act or refrain from acting in some way, as contemplated in s 46(3) of the Auditing Profession Act 26 of 2005 (the APA).[1] Had Deloitte performed proper audits, the appellants would have convened a meeting of the shareholders of ABIL and caused the removal of the errant directors. That would have put an end to their mismanagement of African Bank and prevented further losses. As a result of Deloitte's audit reports, so it was asserted, the appellants did not take these preventive measures the directors continued to mismanage the Bank and it continued to suffer loss. The ongoing losses suffered by the Bank caused ABIL to suffer loss in that its shares in the Bank diminished in value; and in turn, the plaintiffs suffered losses in the amounts set out at the end of para 4 above.

[9] Deloitte, like the directors, excepted to the particulars of claim. Its exceptions read as follows:

'FIRST EXCEPTION: THE ALLEGED WRONG WAS COMMITTED AGAINST AFRICAN BANK, NOT AGAINST THE PLAINTIFFS

The plaintiffs are shareholders of ABIL, the holding company of African Bank.

According to the plaintiffs, ABIL "*tasked*" Deloitte to audit and report on the financial standing of ABIL and African Bank . . . .

ABIL'S shareholders have no claim over any assets of ABIL and/or African Bank and merely have a personal right to participate in ABIL on the terms of its memorandum of incorporation.

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[1] Section 46(3) of the Auditing Profession Act provides.

'Despite subsection (2), a registered auditor incurs liability to third parties who have relied on an opinion, report or statement of that registered auditor for financial loss suffered as a result of having relied thereon, only if it is proved that the opinion was expressed, or the report or statement was made, pursuant to a negligent performance of the registered auditor's duties and the registered auditor—

(a) knew, or could in the particular circumstances reasonably have been expected to know, at the time when the negligence occurred in the performance of the duties pursuant to which the opinion was expressed or the report or statement was made-

(i) that the opinion, report or statement would be used by a client to induce the third party to act or refrain from acting in some way or to enter into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person; or

(ii) that the third party would rely on the opinion, report or statement for the purpose of acting or refraining from acting in some way or of entering into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person; or

(b) in any way represented, at any time after the opinion was expressed or the report or statement was made, to the third party that the opinion, report or statement was correct, while at that time the registered auditor knew or could in the particular circumstances reasonably have been expected to know that the third party would rely on that representation for the purpose of acting or refraining from acting in some way or of entering into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person.'

Consequently, any culpable failure by Deloitte to discharge its duties pursuant to its appointment as African Bank's statutory auditor:

Constitutes a breach of its duties to ABIL and/or African Bank, not to individual shareholders of ABIL in their capacity as such; and

May have caused a loss for African Bank – not for ABIL or for ABIL'S shareholders, in their capacity as such.

Shareholders of ABIL have no claim in law against a third party which caused any loss which African Bank may have suffered. The diminution of the value of the shares held by ABIL in African Bank and by the plaintiffs in ABIL is merely a reflection of the loss suffered by African Bank.

In the premises, [the claim against Deloitte] lacks allegations necessary to sustain a cause of action.

SECOND EXCEPTION: DELOITTE OWED NO LEGAL DUTY TO THE PLAINTIFFS AS INDIVIDUAL ABIL SHAREHOLDERS

The plaintiffs' claim against Deloitte is a delictual claim for pure economic loss.

The plaintiffs' claim is based upon negligent misstatements allegedly made by Deloitte in expressing audit opinions in respect of the financial statements of African Bank.

At common law, a statutory auditor of a company owes its legal duties to the company itself and to the shareholders in general meeting; it owes no legal duty to individual shareholders in their capacity as such.

Further, the purpose of statutory audit of financial statements is to enable shareholders acting as a collective to oversee management; not to enable individual shareholders from acting or refraining to act in any way, whether in connection to their oversight over management or otherwise

The plaintiffs rely on section 46(3) of [the APA] to found a legal duty to them, based on the alleged knowledge of Deloitte that the directors would use the [annual financial statements] to induce them to refrain from exercising their rights as shareholders in a specific way.

Section 46 – the heading of which is "*limitation of liability*" – does not change the common-law position and provides in subsection (4) that:

"Nothing in subsections (2) or (3) confers upon any person a right of action against a registered auditor which, but for the provisions of those subsections, the person would not have had."

In the premises, [the claim against Deloitte] lacks allegations necessary to sustain a cause of action.'

[10] In short, the directors and Deloitte adopted the position that the claims by the appellants – which, if proven, enured only to the company – were unsustainable at common law, at the instance of shareholders in their capacity as such and could also not be brought in terms of s 218(2) of the Companies Act. Deloitte was adamant that it owed a legal duty to the company but not to the appellants in their capacities as individual shareholders in the company.

[11] The court below, in adjudicating the exceptions in relation to Claim A, had regard to s 218(2) of the Companies Act which, although appearing in the exceptions set out above, we restate for convenience:

'Any person who contravenes any provisions of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.'

Alongside this provision, Molopa-Sethosa J considered s 76(3) of the Act, which the appellants contended the directors had contravened in conducting the affairs of the company as alleged. Section 76, which concerns the standards of conduct expected from company directors . . . is, in essence, a codification of the common law on fiduciary duties. Section 76(3) essentially provides that directors must exercise their powers and perform their functions in good faith and for a proper purpose; in the best interests of the company; and with the degree of skill, care and diligence reasonably expected of directors. Section 76(3) reads as follows in relevant part:

'(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director—

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person—

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.'

[12] At para 26 of the judgment, the following appears concerning s 218(2) of the Companies Act:

'Section 218(2) is worded widely in respect of individuals who fall within its ambit; however, it is restricted in its application and applies only to "damage *suffered by that person* as a result of that contravention". This restriction requires a particular person to have suffered damage as a result of a particular contravention What this means is that the particular person who has

suffered damage must be a person who is able to invoke a claim for damages as a result of a particular contravention of the Companies Act. In para 21 of the amended particulars of claim, the plaintiffs' recourse to s 218(2) is articulated as follows:

"21 The directors' conduct as aforesaid.

21.1 constituted a breach of the provisions of section 76(3) of the Companies Act and resulted in the business of ABIL and African Bank being carried out recklessly or with gross negligence, in contravention of the provisions of section 22(1) of the Act . . . .'

Noting that s 76(3) sets the standard of conduct expected of a director, the court below stated that the subsection does not, however, 'deal with the liability of a director'. That subject, said the court below, is dealt with in s 77 of the Companies Act, which reads as follows:

'77 Liability of directors and prescribed officers—

. . .

(2) A director of a company may be held liable—

(a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75,[2] 76(2) or 76(3)*(a)* or *(b)* . . . .'

[13] Molopa-Sethosa J reached the following conclusion:

'Therefore, a claim that alleges that directors are liable for damages as a result of a breach of s 76(3) must be brought in terms of s 77(2), which specifically creates the liability for a breach of s 76(3).'[3]

The court went on to state the following:

'Where a statute expressly and specifically creates liability for the breach of a section, then a general section in the same statute cannot be invoked to establish a co-ordinate liability; see *Gentiruco AG V Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 603. This is the result of the *generalia specialibus non derogant* maxim in terms of which general provisions do not derogate from special provisions.'[4]

[14] The court below stated that if s 218(2) had the breadth ascribed to it by the appellants, it 'would be a drastic departure from a core principle of company law'.[5]

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[2] Section 75 deals with the personal financial interests of directors and is of no relevance in relation to the present dispute.

[3] *Hlumisa Investment Holdings RF Limited and Another v Kirkinis and Others* [2018] ZAGPPHC 676; 2019 (4) SA 569 (GP) para 29.

[4] Ibid para 30.

[5] Ibid para 31.

Molopa-Sethosa J then embarked on an extensive examination of case law, dealing with the well-established principle of statutory interpretation that a statute should not be taken to alter the common law unless it is clear that that is what was intended; and even then, no more than what is necessary. She dealt with the qualification that statutes must be interpreted in the context of constitutional values and that the common law must be developed to promote the spirit, purport and objects of the Bill of Rights and referred to Constitutional Court authority in that regard. The court below proceeded to hold as follows:

'It cannot be said that there is anything in s 218(2) to indicate that the legislature intended to alter the common law and allow reflective-loss claims to be brought under that section.'[6]

It was emphasised that s 77(2) required claims for a breach of s 76(3) to be brought 'in accordance with the principles of the common law'.[7] Molopa-Sethosa J concluded on this score by holding that 'a reflective-loss claim cannot be brought under s 77(2), because the common law does not permit such a claim. What the plaintiffs' argument involves is a finding that the Companies Act allows a reflective-loss claim which the common law prohibits if the claim is brought under s 76(3)'.[8]

[15] In respect of the appellants' reliance on s 22 of the Companies Act the court below referred to the provisions of s 77(3)*(b)*,[9] which deal explicitly with losses suffered by a company as a consequence of a director having acquiesced in the carrying on of the company's business, despite knowing that it was being conducted in a manner prohibited by s 22. Thus, it held, as in the case of their reliance on s 76, the appellants' reliance on s 22 was misconceived.

[16] Dealing with the contention on behalf of the appellants that the words 'as a result of' in s 218(2) do not import a legal causative requirement, the court below held as follows:

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[6] Ibid para 39.
[7] Ibid para 40.
[8] Ibid para 41.
[9] Section 77(3)*(b)* reads as follows: '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—

. . .

(b) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1) . . .'

'Basically, what the plaintiffs suggest in their interpretation of s 218(2) is that all the requirements of the common law relating to fault, foreseeability, causation and the proper plaintiff should be discarded, and this cannot be so.'[10]

In arriving at that conclusion, the court below rejected the appellants' reliance on the decision of the Constitutional Court in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC). The Constitutional Court was there dealing with causation in relation to the application of the Restitution of Land Rights Act 22 of 1994 and the meaning of the phrase 'as a result of' in s 2(1) of that Act. It gave that expression an extended meaning because it was considering a remedial measure to redress past imbalances and the effects of historical dispossession of rights in land.[11] The court below held that the comparison with s 218(2) of the Companies Act was untenable.[12]

[17] Late in its judgment,[13] the court below considered the judgment of this court in *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43; 2016 (4) SA 432 (SCA) where there is a discussion of the principle against reflective loss in relation to companies and their shareholders.[14] The underlying principles that find application are, first, that a company has a distinct legal personality. Secondly, holding shares in a company merely gives shareholders the right to participate in the company on the terms of the memorandum of incorporation, which right remains unaffected by a wrong done to the company and, in the light thereof, a personal claim by a shareholder against a wrongdoer who caused loss to the company is misconceived.[15] Thus, the court below was fortified in its view that the appellants could not rely on s 218(2) of the Companies Act for their reflective-loss claim.

[18] The court below went on to consider the appellants' claim against Deloitte and the related exceptions. It considered the appellants' 'pivotal' allegation to be the following: 'In consequence of ABIL being the sole shareholder of African Bank, any

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[10] *Hlumisa Investment Holdings* above fn 3 para 44.
[11] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC) para 47.
[12] *Hlumisa Investment Holdings* above fn 3 paras 47-48.
[13] Ibid para 50.
[14] See especially paras 9-20 of Ponnan JA's judgment in *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43; 2016 (4) SA 432 (SCA)
[15] Ibid paras 9-12.

acts or omissions by third parties causing patrimonial loss to African Bank would *consequently* result in ABIL suffering patrimonial loss'.[16] It held as follows:

'It is clear that the plaintiffs sue for a loss caused by a third party (Deloitte) to African Bank which allegedly resulted in an equivalent loss to ABIL. By parity of this reasoning, ABIL's minority shareholders would then also have suffered patrimonial loss due to ABIL's loss.

This analysis is not correct. African Bank suffered the loss and it is the proper plaintiff. In circumstances where African Bank has a claim against the third party, the shareholders of African Bank (or of its shareholder) have no claim in their own name.'[17]

[19] Consequently, the court below upheld the exceptions by the directors and Deloitte in respect of both Claims A and B with costs, and granted the plaintiffs an opportunity to amend their particulars of claim, if so advised. It is against the order based on the conclusions set out above, that the present appeal is directed.

[20] Deloitte was given leave to cross-appeal conditionally, ostensibly on the basis that if this court found that liability attached to the directors in terms of s 218(2), it did not follow that there was liability on the part of Deloitte, located either statutorily or otherwise. It must be borne in mind that in their claim against Deloitte, the appellants did not rely expressly on s 218(2).

[21] In considering whether the essential conclusions of the court below are correct it is necessary, at the outset to deal with the contention by the appellants, near the commencement of their heads of argument, that the directors' reliance on the legally recognised bar against a reflective loss claim is nowhere to be found in their exceptions and, consequently, the court below erred in having regard to submissions in that regard. This was all the more so, it was contended, if regard is had to rule 23(3) of the Uniform Rules of Court, which provides that the grounds upon which an exception is founded 'shall be clearly and concisely stated'. That contention can be disposed of briefly. The rule against claims for reflective loss will be examined in some detail later in this judgment. For present purposes it suffices to state its essentials: Where a wrong is done to a company, only the company may sue for damage caused to it. This does not mean that the shareholders of a company do not consequently

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[16] *Hlumisa Investment Holdings* above fn 3 para 68. (Emphasis original.)
[17] Ibid paras 69-70.

suffer any loss. for any negative impact the wrongdoing may have on the company is likely also to affect its net asset value and thus the value of its shares. The shareholders, however, do not have a direct cause of action against the wrongdoer. The company alone has a right of action. In their exceptions, the directors contended that ABIL and/or African Bank ought to have brought an action, if one was sustainable, and not the appellants as shareholders in ABIL. The exceptions accordingly encompassed the no reflective loss principle. There is thus no merit in this point.

[22] In deciding an exception a court must take the facts alleged in the pleading as being correct. It is for the excipient to satisfy the court that the conclusion of law set out in the particulars of claim is unsustainable. The court may uphold the exception only if it is satisfied that the cause of action or conclusion of law cannot be sustained on every interpretation that can be put on those facts.[18] As Harms JA noted in *Telematrix*, exceptions are a useful tool to 'weed out' bad claims at an early stage and an unnecessarily technical approach is to be avoided.[19] The facts are what must be accepted as correct; not the conclusions of law.

[23] In the present case one must therefore accept that there was a diminution in value of the shares held by the appellants; that losses were caused to both ABIL and African Bank; and that these losses were due to the alleged misconduct on the part of the directors. What is in issue, is whether s 218(2) of the Companies Act provides a basis for a claim by the appellants, in their capacity as individual shareholders in ABIL, against the directors based on contraventions by the directors of ss 22(1), 45 and 74 and breaches of s 76(3) of the Companies Act. In respect of the auditors the issue is whether, in the circumstances pleaded, they owed the appellants, as individual shareholders in ABIL, legal duties not to have made misrepresentations in African Bank's financial statements and to have qualified the audit; and whether, in that regard, reliance could be placed on s 46(3) of the APA and s 218(2) of the Companies Act to sustain a cause of action. To that end one must accept that there were

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[18] *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA) para 36, cited with approval in *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC) para 10

[19] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 3, obtaining the Constitutional Court's imprimatur in *Pretorius and Another v Transport Pension Fund and Others* [2018] ZACC 10; 2019 (2) SA 37 (CC) para 15.

misrepresentations by Deloitte relating to African Bank's financial statements, as well as a failure to qualify the financial statements, and that this commission and omission caused loss to African Bank and consequently a diminution in value of the appellants' shares.

[24] A good starting point in considering whether the exceptions were correctly upheld, is a revisiting of the rule against claims by shareholders for reflective loss. In *Itzikowitz*[20] this court restated, with reference to the prevailing authorities, the following established principle:

'The notion of a company as a distinct legal personality is no mere technicality – a company is an entity separate and distinct from its members and property vested in a company is not and cannot be regarded as vested in all or any of its members. . . . A shareholder's general right of participation in the assets of the company is deferred until winding-up, and then only subject to the claims of creditors.'

[25] Ponnan JA then went on to consider the following statement in *Lawsa*[21] concerning our law on the rights of shareholders to sue personally when a wrong is perpetrated against a company:

'Since the shareholder's shares are merely the right to participate in the company on the terms of the memorandum of incorporation, which right remains unaffected by a wrong done to the company, a personal claim by a shareholder against the wrongdoer to recover a sum equal to the diminution in the market value of his or her shares, or equal to the likely diminution in dividend, is misconceived.'

[26] Ponnan JA recognised that for that proposition in *Lawsa* reliance was placed on *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*,[22] where the following was stated at 222-223:

'[W]hat [a shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not

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[20] *Itzikowitz* above fn 14 para 9. (Citations omitted.)
[21] 4(1) *Lawsa* 2 ed (2012) para 67. (Citations omitted.)
[22] *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 Ch 204; [1982] 1 All ER 354 (HL).

suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has . . . shareholding.'

[27] *Itzikowtiz* also referred to the more recent judgment of the House of Lords in *Johnson v Gore Wood & Co (a firm)* [2000] UKHL 65; [2001] 1 All ER 481; [2002] 2 AC 1 (HL), where Lord Bingham observed:

'(1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. . . (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. . . . (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other.'[23]

[28] Dealing with the first principle, Lord Millett stated that the rationale for the rule was to avoid double recovery:

'The position is, however, different where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder. In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of

[23] *Johnson v Gore Wood & Co (a firm)* [2000] UKHL 65; [2001] 1 All ER 481; [2002] 2 AC 1 (HL) at 35E-36B.

the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder.'[24]

He went on to say the following.

'It is of course correct that the diminution in the value of the plaintiffs' shares was by definition a personal loss and not the company's loss, but that is not the point. The point is that it merely reflected the diminution of the company's assets. The test is not whether the company could have made a claim in respect of the loss in question; the question is whether, treating the company and the shareholder as one for this purpose, the shareholder's loss is franked by that of the company. If so, such reflected loss is recoverable by the company and not by the shareholders.'[25]

[29] More recently, in *Novatrust Limited v Kea Investments Limited and Others* [2014] EWHC 4061 (Ch), with reference to *Johnson v Gore Wood & Co*,[26] *Day v Cook* [2003] BCC 256 para 39 and *Gardner v Parker* [2004] EWCA Civ 781; [2004] 2 BCLC 554 para 49, the rule against a claim by a shareholder that was purely reflective of a loss suffered by the company was reaffirmed in paras 54 and 55.

[30] In 2018 the Court of Appeal considered the scope of the rule against reflective loss in *Garcia v Marex Financial Ltd* [2018] EWCA Civ 1468; [2018] 3 WLR 1412; [2019] QB 173. Flaux LJ observed that the justification for the rule is fourfold:

'The four aspects or considerations justifying the rule which emerge from the authorities, in particular Lord Millett's speech in *Johnson v Gore Wood & Co* [2002] 2 AC 1, are: (i) the need to avoid double recovery by the claimant and the company from the defendant ...; (ii) causation, in the sense that if the company chooses not to claim against the wrongdoer, the loss to the claimant is caused by the company's decision not by the defendant's wrongdoing ...; (iii) the public policy of avoiding conflicts of interest particularly that if the claimant had a separate right to claim it would discourage the company from making settlements ...; and (iv) the need to preserve company autonomy and avoid prejudice to minority shareholders and other creditors.'[27]

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[24] Ibid at 62D-G.
[25] Ibid at 66B-D.
[26] Ibid.
[27] *Garcia v Marex Financial Ltd* [2018] EWCA Civ 1468; [2018] 3 WLR 1412; [2019] QB 173 at 188-189.

[31] Blackman, Jooste and Everingham provide a slightly different rationale for the rule against reflective loss in their *Commentary on the Companies Act*,[28] which is perhaps more convincing. On the 'double recovery' justification for the rule, and the view that allowing a personal action would subvert the rule in *Foss v Harbottle*,[29] the authors say the following:

'This explanation is misleading. When the value of shares is depreciated or destroyed as a consequence of harm done to the company, the shareholders suffer harm, albeit that the harm is "indirect". A person who suffers indirect harm, suffers harm. And there is no principle of law that denies a person a claim for damages merely because the harm he suffered was "indirect harm", although of course the question of remoteness of damage may arise.

The principle is that where harm is wrongfully caused directly to A (eg the company) and indirectly to B (eg the company's shareholders), the law gives the right of action to claim compensation to A. It does so because if, instead, the right were given to B, A and A's creditors would be prejudiced. What is more, B's action would involve a determination of A's loss. In the case of a company, each shareholder would have an action, and consequently there would be a multiplicity of actions, many of which would be for very small sums. If, instead, the cause of action is given to A, the law will not only ensure that A suffers no loss: it will also ensure that B suffers no loss. This is not because B will, then, merely suffer "indirect" or "incidental" harm. It is because B suffers no harm at all. A's right of action is an asset which, itself, compensates A for his loss. If A (eg the company) is able to obtain full compensation from the wrongdoer, A's financial position is unaffected. And therefore B's financial position (eg the value of the company's shareholders' shares) is also unaffected.'

And, in a later paragraph:

'It is usually said that if *both* the company *and* the shareholder were given the right to recover, the wrongdoer would suffer "double jeopardy" and the shareholder might receive "double compensation". If the shareholder sued first, the wrongdoer would be placed in double jeopardy because, after paying the shareholder, he would still be liable to the company; and if, then, the company obtained recovery, the shareholder would receive double compensation. However, despite the frequency with which this argument has been advanced, it is mistaken. If the company has the right of action, the wrong done to it causes its shareholders no harm. Hence the shareholder can have no action. The problem of "double jeopardy" and "double compensation" simply does not arise. Thus, it is not merely the company's existence as a separate legal person that deprives the shareholder of an action

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[28] 'Remedies of Members' in MS Blackman, RD Jooste & GK Everingham *Commentary on the Companies Act* (RS 9 2012) at 9-67 – 9-68-1. (Citations omitted; emphasis original)

[29] *Foss v Harbottle* (1843) 67 ER 189; (1843) 2 Hare 461.

against the wrongdoer. What deprives the shareholder of a right of action is the fact that *the company has a right to recover damages for the loss it has suffered.*'

There can however be no doubt that there are sound policy and jurisprudential reasons for the rule.

[32] We pause to note that *Novatrust* also dealt with derivative claims. In a situation where wrongdoers themselves control the company, so that they can prevent the taking of the necessary steps, any one or more of its members may bring what is known as a derivative action, that is, an action by an individual shareholder, in own name, against the wrongdoers for relief to be granted to the company, the action being one on the company's behalf.[30] In England and Wales derivative actions are comprehensively regulated by Part 11 of Chapter 1 of the Companies Act 2006. In South Africa it is regulated by s 165 of the Companies Act. In both statutes there are requirements that must be met before such a claim may be brought. Derivative claims are not in issue in this appeal.

[33] In *Giles v Rhind* [2002] 4 All ER 977; [2002] EWCA Civ 1428, the Court of Appeal gave effect to the third policy consideration set out by Lord Bingham in *Johnson*, referred to in para 27 above. It held that the rule against claims for reflective loss did not operate to exclude a shareholder's personal action for reflective loss against a wrongdoer who had deprived the company of funds and who successfully obtained security for costs against the company, essentially stifling the company's claim so that its directors discontinued the company's action against him. The shareholder then moved to litigate in the company's stead. In those circumstances the Court of Appeal permitted a shareholder's personal claim, notwithstanding the shareholder's loss being, in part, a reflection of the loss suffered by the company. Waller LJ (paras 33-35) justified the exception as follows:

'In *Johnson v Gore Wood & Co* there was no difficulty about the company having a cause of action and being able to recover on the cause of action. I also think that in the light of Lord Bingham's observation that it is important for the "court to be astute to ensure that the party

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[30] See 'Derivative actions' in PA Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (SI 21 2019) 587-593 for a useful discussion on the proper plaintiff rule in *Foss v Harbottle* (above fn 29) and the progression to derivative actions. *Foss v Harbottle* was the genesis of the rule against claims for reflective loss and is referred to in subsequent cases, such as *Prudential Assurance* (above fn 22), in terms of which the principle was refined, exceptions were developed and the rule was also relaxed as against the development of the law in general.

who has in fact suffered loss is not arbitrarily denied compensation", it is clear that he had the particular facts in *Johnson v Gore Wood & Co* in mind, ie that there had been nothing to stop the company continuing with its action if it had so chosen.

One situation which is not addressed is the situation in which the wrongdoer by the breach of duty owed to the shareholder has actually disabled the company from pursuing such cause of action as the company had. It seems hardly right that the wrongdoer who is in breach of contract to a shareholder can answer the shareholder by saying "the company had a cause of action which it is true I prevented it from bringing, but that fact alone means that I the wrongdoer do not have to pay anybody".

In my view there are two aspects of the case which [Giles] seeks to bring which point to [him] being entitled to pursue his claim for the loss of his investment. First, as it seems to me, part of that loss is not reflective at all. It is a personal loss which would have been suffered at least in some measure even if the company had pursued its claim for damages. Secondly, even in relation to that part of the claim for diminution which could be said to be reflective of the company's loss, since, if the company had no cause of action to recover that loss the shareholder could bring a claim, the same should be true of a situation in which the wrongdoer has disabled the company from pursuing that cause of action. I accept that on the language of Lord Millett's speech there are difficulties with this second proposition, but I am doubtful whether he intended to go so far as his literal words would take him. Furthermore it seems to me that on Lord Bingham's speech supported by the others, it would not be right to conclude that the second proposition is unarguable.'

[34] The approach taken in *Giles v Rhind* was, of course, to mitigate the inflexible proper plaintiff rule set out more than 175 years ago in *Foss v Harbottle*.[31] *Prudential Assurance* set that case, which is the genesis of the rule against claims for reflective loss by shareholders, in historic perspective and in relation to derivative claims. In *Prudential Assurance* (at 210-212), the Court of Appeal stated the following:

'A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B for to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the rule in *Foss v Harbottle* (1843) 2 Hare 461 when applied to corporations, but it has a wider scope and is fundamental to any rational system of jurisprudence. The rule in *Foss v Harbottle* also embraces a related principle, that an individual shareholder cannot bring an action in the

[31] Above fn 29.

courts to complain of an irregularity (as distinct from an illegality) in the conduct of the company's internal affairs if the irregularity is one which can be cured by a vote of a company in general meeting.

The classic definition of the rule in *Foss v Harbottle* is stated in the judgment of Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064 at 1066-7 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation. (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, *cadit quaestio*; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is *ultra vires* the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of the greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.'

[35] As indicated above, there has been statutory and judicial intervention to address concerns against injustices resulting from the rule against claims for reflective loss being applied inflexibly. Commentators, whilst also voicing concerns that an inflexible application of the rule might lead to injustice, have not suggested that it be abolished. In P Koh's contribution on 'The Shareholder's Personal Claim: Allowing Recovery for Reflective Losses'[32] she concludes as follows at 888-889:

Undoubtedly, the no reflective loss principle, as laid down in *Prudential Assurance* and as clarified in *Johnson*, is driven by sound policy reasons. However, these policy reasons are not always applicable nor are they in themselves unassailable. As the task of any court should be to achieve justice and fairness on the particular facts before it, there is much to be said for retaining discretion over whether to allow a personal suit or not. Justice is necessarily context-

[32] P Koh 'The Shareholder's Personal Claim: Allowing Recovery for Reflective Losses' (2011) 23 *Singapore Academy of Law Journal* 863-889.

driven. To apply a rigid rule regardless of context, therefore, raises the real risk of denying the wronged party appropriate remedy. ...

However, to ensure that the cause brought by a shareholder is indeed *genuine*, the asserted claim must, in the first place, be one that can properly be classified as a personal one, taking account of the source and nature of the right asserted. Only then should the court entertain the shareholder's claim and proceed to consider whether the policy concerns that support the rule may be adequately dealt with in the particular case.'[33]

[36] In New Zealand, the legislature has provided for shareholders to bring an action in instances where there is a duty owed to *them*. It also set out, though not exhaustively, duties of directors that are owed to shareholders and not to the company, and conversely, those owed to the company and not to shareholders (which include the instances relied on by the appellants in the present case). It was emphatic that an action may not be brought to recover any loss in the form of a diminution in the value of shares in the company by reason of loss suffered by the company. Thus, s 169 of the Companies Act 1993 (New Zealand) provides:

'169 Personal actions by shareholders against directors

(1) A shareholder or former shareholder may bring an action against a director for breach of a duty owed to him or her as a shareholder.

(2) An action may not be brought under subsection (1) to recover any loss in the form of a reduction in the value of shares in the company or a failure of the shares to increase in value by reason only of a loss suffered, or a gain forgone, by the company.

(3) Without limiting subsection (1), the duties of directors set out in—

(a) section 90 (which relates to the duty to supervise the share register); and

(b) section 140 (which relates to the duty to disclose interests); and

(c) section 148 (which relates to the duty to disclose share dealings)—

are duties owed to shareholders, while the duties of directors set out in—

(d) section 131 (which relates to the duty of directors to act in good faith and in the best interests of the company); and

(e) section 133 (which relates to the duty to exercise powers for a proper purpose); and

(f) section 135 (which relates to reckless trading); and

(g) section 136 (which relates to the duty not to agree to a company incurring certain obligations); and

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[33] Emphasis original. See also the views of R Samuel in 'Reflective loss reconsidered (Pt 1)' (2019) *NLJ* 17-18, and 'Reflective loss reconsidered (Pt 2)' (2019) *NLJ* 17-18.

(h) section 137 (which relates to a director's duty of care); and

(i) section 145 (which relates to the use of company information)—

are duties owed to the company and not to shareholders.'

[37] There can be no doubt that when the Companies Act became operative on 1 May 2011, and thereafter, our law recognised the rule against claims for reflective loss, more particularly, in respect of claims by shareholders for compensation for a diminution in the value of their shares due to loss occasioned to the company by a wrongdoer. That much is clear from what is set out in paras 24 to 27 above. Our courts applied the law as applied by English courts over time. See, in addition to the South African judgments already referred to, *Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35; (SCA) 2017 (2) 337 (SCA) paras 107-112 and *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others* [2016] ZASCA 62; 2016 (6) SA 181 (SCA) para 41 and the cases there cited.

[38] The appellants' claims against the directors are quintessentially reflective loss claims. The essentials of the particulars of claim are that:

(a) The plaintiffs are shareholders of ABIL.

(b) The directors were at all material times directors of ABIL.

(c) African Bank was a wholly owned subsidiary of ABIL.

(d) African Bank carried out the business of a bank.

(e) The directors in their capacity as directors of ABIL conducted the business of ABIL and African Bank recklessly and in contravention of ss 22(1), 74 and 45 of the Companies Act and in breach of s 76(3) of that Act.

(f) The breach of the aforesaid provisions resulted in significant losses on the part of African Bank and consequently ABIL.

(g) As a result of the loss suffered by ABIL, the appellants suffered a diminution in the value of their ABIL shares. The losses 'in turn caused the share price... to drop from R28.15 ... to ... 31 cents ... being a total diminution of R27.84 per share'.

Simply put, the wrong done to the company (ABIL) is the basis of the appellants' claim and the diminution in share value is directly correlated to the losses suffered by ABIL. The belated attempt in a submission before us, namely, that the diminution in value of the appellant's shares, although arising from a chain of events which includes the losses suffered by African Bank and ABIL, is a loss distinct from the losses suffered

by African Bank and ABIL, is fallacious. Linked to that submission is one concerning the manner in which listed shares are valued, that is, the price a willing buyer is prepared to pay to a willing seller. That ignores the very basis of the rule referred to in the first principle stated by Lord Bingham in *Johnson* and captured in the passage from *Lawsa*, cited in para 25 above. In any event, that is not how the loss and its cause were pleaded by the appellants. There can be no doubt, on the appellants' version of events, that ABIL would have a claim against the directors and that at common law, the existence and viability of that claim precluded a personal claim by the shareholders. In the present case there is no hint by the appellants of a derivative claim and no assertion of oppression by the majority of shareholders, or that ABIL was in some way, hindered or obstructed in pursuing a claim against the directors.

[39] There is no independent cause of action as submitted on behalf of the appellants and no justification of any kind as to why the appellants' claim fell within any of the recognised exceptions, or why it would be unjust to deny the claim or why allowing it would not do violence to the sound policy reasons for the retention of the rule, including a multiplicity of claims by aggrieved shareholders.

[40] There is simply no basis in fact for the contention on the part of the appellants that the claim against the directors falls with the second or third principles set out by Lord Bingham in *Johnson*, cited in para 27 above. We repeat them here for convenience:

'(2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. . . . (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other.'[34]

The appellants' claim against the directors do not even begin to approximate the claims envisaged in (2) and (3).

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[34] *Johnson* above fn 23 at 35G-36B.

[41] Does s 218(2) save the day for the appellants in relation to the claim against the directors? The short answer is no. The reasons are set out hereafter. It is necessary first to have regard to the purposes of the Companies Act within which s 218(2) is located. The Act came into effect on 1 May 2011.The purposes of the Act are, inter alia, to promote compliance with the Constitution; to provide for the creation and use of companies in a manner that enhances the economic welfare of South Africa as a partner within the global economy; to promote the development of the South African economy by encouraging transparency and high standards of corporate governance; and to re-affirm the concept of the company as a means of achieving economic and social benefits. It was also enacted to balance the rights and obligations of shareholders and directors within companies. The full list of the purposes of the Act are set out in s 7. Whilst the Act was structured to deal with South African conditions, the legislature was conscious of the global economy. In the interpretation of the Act regard is also to be had to foreign law, to the extent that this would be appropriate. In this regard see s 5(2) of the Act.

[42] A company is defined in s 1 of the Act as a distinct juristic person. This distinct personality is no mere technicality.[35] It is foundational to company law. As observed in *Itzikowitz,* referred to in para 24 above, property vesting in the company does not vest in any or all of its members. It is the basis of the rule against the claim for reflective loss, as referred to in *Prudential*, *Johnson*, *Itzikowitz* and captured in the statement in *Lawsa*, referred to in para 25 above.

[43] Importantly, the legislature must have been aware of the need to retain those principles of the common law that had been applied under preceding legislation that were consonant with our constitutional values and in line with international company law. The following statement in a policy paper published by the Department of Trade and Industry, entitled 'South African Company Law for the 21st Century – Guidelines for Corporate Law Reform',[36] which is quoted in the Companies Bill,[37] is elucidating:
'It is not the aim of the [Department of Trade and Industry] simply to write a new Act by unreasonably jettisoning the body of jurisprudence built up over more than a century. The

[35] *Itzikowitz* above fn 14 para 9.
[36] See GN 1183 in *GG* 26493 of 23-06-2004.
[37] See the Companies Bill B 61-2008, an explanatory summary of which was published in *GG* 31104 of 30-05-2008.

objective of the review is to ensure that the new legislation is appropriate to the legal, economic and social context of South Africa as a constitutional democracy and an open economy. Where the current law meets these objectives, it should remain as part of company law.'

[44] A further factor to bear in mind is the presumption that statutory provisions are not intended to alter or exclude the common law unless they do so expressly or by necessary implication.[38] Where possible, statutes must be read in conformity with the common law.[39] This enhances legal certainty and recognises the value of the common law, which has developed systematically over time.[40]

[45] It is in that context that s 218(2) falls to be considered. Section 218(2) reads as follows:

'Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.'

When a wrongdoer 'contravenes' the Act and causes loss to a person, the wrongdoer is liable to that person. The ordinary meaning of 'contravene' is 'to go counter to; to transgress, infringe (a law, provision, etc); to act in defiance or disregard of'.[41] The decriminalisation of company law sanctions was one of the principles of the policy underlying the Act.[42] This indicates that the contravention envisaged in s 218(2) need not be a criminal offence.[43] It suffices to say that the word 'contravenes' in s 218(2) includes a breach or an infringement of any provision of the Act, 'which is by nature prescriptive or which in some way regulates conduct'.[44] Sections 22(1), 74, 45 and 76(3), which in the present case the appellants contend trigger the operation of s 218(2), clearly fall into this category.

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[38] *Casserley v Stubbs* 1916 TPD 310 at 312; *Dhanabakium v Subramanium* 1943 AD 160 at 167; *Attorney-General, Transvaal v Botha* 1994 (1) SA 306 (A) at 330I-J.
[39] *Ngqukumba v Minister of Safety and Security and Others* [2014] ZACC 14; 2014 (5) SA 112 (CC) para 16
[40] 25(1) *Lawsa* 2 ed para 340.
[41] *Oxford English Dictionary* (2008).
[42] See para 4.7 of the policy paper. *South African Company Law for the 21st Century – Guidelines for Corporate Law Reform*, at 44.
[43] *Henochsberg* op cit fn 28 at 642.
[44] R Stevens and P De Beer *The Duty of Care and Skill, and Reckless Trading: Remedies in Flux?* (2016) 28 *SA Merc LJ* 250 at 274.

[46] Section 22(1)*(a)* provides that '[a] company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose'. Section 76(3) provides:

'Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director—

(a) in good faith and for proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person—

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge skill and experience of that director.'

Section 45 is another section of the Companies Act on which the appellants relied. That section regulates loans or other financial assistance to directors or prescribed officers of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member. In the appellants' particulars of claim it was alleged that the directors failed to vote against the granting of loans to certain corporations and that these loans were in contravention of section 45. In not resisting the granting of the loans the directors were said to have acted in contravention of s 22(1) of the Act and, consequently, the appellants were entitled to bring a claim against them in terms of s 218(2) of the Act.

[47] *Henochsberg*,[45] in the commentary on s 76(3) of the Companies Act, states the following:

'The common law position is that a director has to act *bona fide* and in the best interests of the company. This is the fundamental duty which qualifies the exercise of any powers which the directors in fact have . . . The duties to act *bona fide* and in the best interests of the company are now entrenched in the Act . . . . With regard to the duty to act in the best interests of the company and who the beneficiary of a director's duty is, the common law position is as follows: At common law *directors owe fiduciary duties to the company* . . . Such duties are owed even by non-executive directors . . . . Where, therefore, a director acts in breach of a

[45] 'In good faith, in the best interests of the company for a proper purpose' in *Henochsberg* op cit fn 28 at 298-9 – 298-11, 298-15 – 298-16, and 298-17.

fiduciary duty he may, depending on the circumstances, also act in breach of his duty of care, skill and diligence . . . .

. . .

The duty of good faith and the duty to act for the benefit/interests of the company are two separate duties . . . . The "interests", in this context, are only those of the company itself as a corporate entity and those of its members as such as a body (*Alexander v Automatic Telephone Co* [1900] 2 Ch 56 (CA) at 67, 72; *Coronation Syndicate Ltd v Lilienfeld* 1903 TS 489 at 497; *Parke v Daily News Ltd* [1962] Ch 927 at 963; [1962] 2 All ER 929 at 948 . . . .

. . .

The "proper purpose" duty entails in the first instance that the director must not exceed the limitations of his own authority and must not exceed the limitations of the company . . . .
In the second instance a director must exercise the duties only for the purpose for which they were conferred and not for an "improper" purpose . . . .
Directors as such owe no fiduciary duty to the members/shareholders individually (*Percival v Wright* [1902] 2 Ch 421; *Pergamon Press Ltd v Maxwell* [1970] 2 All ER 809 (Ch) at 814), not even to a member who is the majority shareholder (*Bell v Lever Brothers Ltd* [1932] AC 161 (HL) at 228); their fundamental duty is to act only in the *bona fide* interests of the company and its shareholders *as a body* (*SA Fabrics Ltd v Millman NO* 1972 (4) SA 592 (A); *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W) para 16 . . .'
(Emphasis added and some authorities omitted.)

[48] Returning to the provisions of s 218(2) of the Companies Act, the duties owed by directors in terms of s 76(3) are owed to the company, not to individual shareholders. The company, in the event of a wrong done to it in terms of any of the provisions of that subsection, can sue to recover damages. The company would be the proper plaintiff. It is no coincidence, then, that s 77(2)*(a)* provides that a director of a company may be held liable for breaches of fiduciary duties resulting in any loss or damage sustained by the company. Similarly, in respect of the particular wrongdoer and claimant, s 77(2)*(b)* of the Act provides that:

'A director of a company may be held liable—

. . .

(b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of—

(i) a duty contemplated in section 76(3)*(c)*;

(ii) any provision of this Act not otherwise mentioned in this section; or

(iii) any provision of the company's Memorandum of Incorporation.'

[49] Even more significant are the provisions of s 77(3)*(b)*, which read as follows:
'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—

. . .

(b) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1) . . .'

[50] These provisions of the Companies Act make it clear that the legislature decided where liability should lie for conduct by directors in contravention of certain sections of the Act and who could recover the resultant loss. It is also clear that the legislature was astute to preserve certain common law principles. It makes for a harmonious blend.

[51] There is no need to give the words 'as a result of that contravention' in s 218(2) an extended meaning, as submitted on behalf of the appellants, so as to ignore the conventional meaning of a consequence flowing from the misconduct. The provisions referred to in the preceding paragraphs abound with recovery of loss resulting from misconduct on the part of directors. There is no indication in the scheme of the Companies Act or any of its relevant provisions that the words quoted at the beginning of this paragraph should carry a different meaning. On the contrary, all indications lead to the ineluctable conclusion that it was meant to have the conventional meaning and that the person who can sue to recover loss is the one to whom harm was caused. Simply put, there must be a link between the contravention and the loss allegedly suffered. In the present case, loss was occasioned to the company and the company is the entity with the right of action.

[52] From what is set out above it is clear that the rule against claims for reflective loss has not expressly been abolished by s 218(2), nor does it follow by necessary implication. Section 218(3) does not assist the appellants. It reads as follows:
'The provisions of this section do not affect the right to any remedy that a person may otherwise have.'

The provision thus provides a statutory remedy to 'any person' who can bring themselves within its ambit. Subsection (3) does not detract from any existing rights to sue but is, rather, an affirmation of those rights. The remedy is available to avoid injustice where that would otherwise ensue. It is not necessary in this case to make any findings in relation to the precise contours of this remedy and we deliberately eschew doing so. However, we must accept that allowing individual shareholders in their capacities as such to bring claims against miscreant company directors for a diminution in the value of their shareholding may very likely prejudice companies (and/or its creditors and/or other shareholders). Furthermore, we are constrained to accept that a company has an established right to claim damages from its directors for any losses sustained as a result of those directors' breach of a duty owed to the company. It follows that s 218(3) entrenches also the company's right. If one were to accede to the appellants' claim based on a diminution in the value of their shares, it would impinge on the company's right preserved by s 218(3). This proves the fallacy of the appellants' claim.

[53] Finally, in relation to the directors' third exception, it will be recalled that the appellants alleged that the directors had authorised the publication of a prospectus containing false or misleading information. In the exception the directors pointed out that the appellants did not allege that they had acted on or relied on the misrepresentations or the falsehoods and that they suffered loss in consequence of such reliance. One cannot tell from the particulars of claim whether the appellants were already shareholders at the time that the prospectus was published. It is no answer to contend, as the appellants do, that the misrepresentation was pleaded in support of their assertion that the directors had breached s 76(3) of the Companies Act. The appellants' claim based on the breach of s 76(3) has, in any event, been demonstrated to be unsustainable.

[54] It follows that the essential findings of the court below in relation to the exceptions by the directors cannot be faulted. They were correctly upheld. It is to the claim against Deloitte and the related exceptions that we now turn.

[55] It is necessary to revisit the basis of the appellants' claim against Deloitte. As already recorded, the appellants were shareholders in ABIL, which was African Bank's

sole shareholder. The directors, so the appellants said, mismanaged the affairs of the Bank which caused it to sustain significant losses. Deloitte was the Bank's auditor and was obliged to perform its function with reasonable care and skill. Deloitte, in its presentation of the Bank's 2012 and 2013 annual financial statements, reported that they fairly represented the Bank's financial position. The audit reports were false in that the financial statements did not reveal the losses the bank had sustained as a result of the directors' mismanagement. The false reports were due to the failure to perform the audit with the requisite reasonable care and skill. The appellants stated that Deloitte's negligent audit caused the appellants to suffer loss as follows:

(a) If Deloitte had performed proper audits, it would have withheld or qualified the audit reports.

(b) Had Deloitte withheld or qualified the reports, the appellants would have convened a meeting of ABIL's shareholders, and caused ABIL to remove the Bank's directors from office, which would have put an end to the mismanagement of the Bank and would have prevented further losses.

(c) Because of Deloitte's false audit reports, the preventative measures were not taken, the mismanagement of the Bank continued and it continued to suffer loss,

(d) The ongoing losses suffered by the Bank caused ABIL to suffer loss in that its shares in the Bank diminished in value, which then led to ABIL's own share price diminishing in the amounts stated above and the appellants suffering a total loss as calculated above.

[56] The basis of the appellants' claim reveals that the Bank suffered the primary loss. Against that, one must accept that Deloitte wrongfully and negligently or deliberately caused the loss. In the ordinary course, the Bank would have had statutory and contractual claims against the directors and Deloitte for the recovery of the loss. As pleaded, ABIL suffered loss in the second degree. Its loss is a reflection of the Bank's loss. ABIL did not suffer any loss of its own. The appellants, as shareholders of ABIL, thus suffered loss in the third degree. They suffered loss only because of ABIL's loss.

[57] As pointed out by Deloitte's counsel, this 'cascade' of reflective losses on which the claim is based does not end with the appellants. They were minority shareholders of ABIL, holding 1.73% and 3.24% of ABIL's shares, respectively. The reflective losses

sustained by the appellants would have been suffered by everyone else who held shares in ABIL. There must have been thousands of shareholders, if not more, who suffered the same third-degree losses as the appellants. And these reflective losses would be reversed if the Bank enforced its claim against the directors and was thereby compensated for its loss.

[58] As was discussed earlier, in relation to claims against directors, a claim for reflective loss by a shareholder is generally untenable. Furthermore, what has to be borne in mind is that the claim against Deloitte is one for pure economic loss. As a general rule our law does not allow for the recovery of pure economic loss. In *Country Cloud Trading CC v MEC, Department of Infrastructure Development*,[46] the Constitutional Court said the following:

'Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful. However, in cases of pure economic loss – that is to say, where financial loss is sustained by a plaintiff with no accompanying physical harm to her person or property – the criterion of wrongfulness assumes special importance. In contrast to cases of physical harm, conduct causing pure economic loss is not prima facie wrongful. Our law of delict protects rights and, in cases of non-physical invasion, the infringement of rights may not be as clearly apparent as in direct physical infringement. There is no general right not to be caused pure economic loss.

So our law is generally reluctant to recognise pure economic loss claims. especially where it would constitute an extension of the law of delict. . . .

In addition, if claims for pure economic loss are too freely recognised, there is the risk of "liability in an indeterminate amount for an indeterminate time to an indeterminate class".'

[59] In *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* [2017] ZASCA 77; 2018 (1) SA 391 (SCA) para 1, the following appears:

'The first principle of the law of delict, as Harms JA pointed out in *Telematrix*, is that everyone has to bear the loss that he or she suffers. And, in contrast to instances of physical harm, conduct causing pure economic loss is not prima facie wrongful Accordingly, a plaintiff suing for the recovery of pure economic loss, is in no position to rely on an inference of wrongfulness flowing from an allegation of physical damage to property (or injury to person), because "the negligent causation of pure economic loss is prima facie not wrongful in the delictual sense

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[46] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) paras 22-24. (Citations omitted.)

and does not give rise to liability for damages *unless policy considerations require* that the plaintiff should be recompensed by the defendant for the loss suffered".' (Emphasis added and citations omitted.)

[60] Some categories of liability for pure economic loss have, as pointed out on behalf of Deloitte, crystallised. However, the categories do not in general terms include the liability of auditors. In *Axiam Holdings Ltd v Deloitte & Touche* [2005] ZASCA 61; 2006 (1) SA 237 (SCA) para 18, the following appears:

'It is universally accepted in common-law countries that auditors ought not to bear liability simply because it might be foreseen in general terms that audit reports and financial statements are frequently used in commercial transactions involving the party for whom the audit was conducted (and audit reports completed) and third parties. In general, auditors have no duty to third parties with whom there is no relationship or where the factors set out in the *Standard Chartered Bank* case are absent.'[47]

[61] In *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) this Court had regard to the context in which the alleged negligent misstatement in that case was made, the purpose for which it was sought and made, the reliance placed on it by the third party, the relationship between the parties and, finally, and significantly for present purposes, public policy and fairness. It is true that in *Axiam*, having regard to those factors, it was held that the question of wrongfulness could not be decided at exception stage. The minority in *Axiam* held that the exception ought to have been upheld. As in *Standard Chartered Bank*, this Court in *Axiam* did not find any policy factors that militated against a finding at that stage against the auditors being held liable. The facts in *Standard Chartered* and *Axiam* are far removed from the facts in this case. In *Axiam* the question was whether the auditors of one company owed legal duties to other companies, who were in the process of negotiating agreements for share purchases and business financing and for this purpose relied on the audit statements and opinion which allegedly misrepresented the company's financial position. In both cases there was no claim by shareholders based on a diminution in share value.

[47] (Citations omitted.) See also *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* [2013] ZASCA 16; 2013 (5) SA 183 (SCA) para 21.

[62] Wrongfulness is an element of delictual liability. The test for wrongfulness was set out in *Le Roux and Others v Dey*, as follows:

'[I]n the context of the law of delict: *(a)* the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and *(b)* that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms.'[48]

[63] The test for wrongfulness should not be confused with the fault requirement. The test assumes that the defendant acted negligently or wilfully and asks whether, in the light thereof, liability should follow.[49]

[64] The appellants submitted that it would not be appropriate to decide wrongfulness on exception. In this case, as in all cases in which a plaintiff claims damages for pure economic loss, it is incumbent that the facts upon which such a plaintiff relies for its contention that the loss was wrongfully caused be pleaded. The pleadings are thus the high-water mark of its case on wrongfulness. In *Telematrix (Pty) Ltd t/a Matrix Vehicle Trading v Advertising Standards Authority* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 2 this court noted that it has often determined wrongfulness on exception.[50]

[65] In *Telematrix*, para 3, Harms JA said that '[s]ome public policy considerations can be decided without a detailed factual matrix, which by contrast is essential for deciding negligence and causation'. In *AB Ventures Ltd v Siemens Ltd* [2011] ZASCA 58; 2011 (4) SA 614 (SCA) para 5, Nugent JA noted that in a case such as this, the issue of wrongfulness is 'quintessentially a matter that is capable of being decided on exception'. In the present case all the policy factors upon which a decision would rest are known.

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[48] *Le Roux and Others v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC) para 122. (Citations omitted.)
[49] See *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2005] ZASCA 109; 2006 (3) SA 138 (SCA) para 12.
[50] See *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A); and *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A). See also *Fourway Haulage SA v National Roads Agency* [2008] ZASCA 134; 2009 (2) SA 150 (SCA).

[66] The question to be addressed on the issue of wrongfulness is whether public and legal policy considerations dictate that the auditors of African Bank be held liable to the shareholders of ABIL for the reflective losses they sustained as a result of the underlying losses suffered by the Bank. As the extensive discussion on the rule against claims for reflective losses above reveals, the appellants' claims are barred by the rule. Moreover, as noted in para 60 above, in general, auditors have no duty to third parties with whom there is no relationship. In 4(3) *Lawsa* 2 ed para 4 the following appears:

'If the auditors perform their work negligently, it is the company, and not its members, that is the proper plaintiff to sue for any loss caused to it by that negligence '

[67] Auditors are accountable to shareholders collectively, as a body, ie as the company. Put differently, when auditors make negligent misstatements concerning the company's financial statements, individual shareholders do not have claims against the auditors, because financial statements are not prepared for the benefit of shareholders' individual investment decisions. Instead, the primary purpose of auditing accounts is to report on the stewardship of the directors to the shareholders as a body, in order 'to provide shareholders with reliable intelligence for the purpose of enabling them to scrutinise the conduct of the company's affairs and to exercise their collective powers to reward or control or remove those to whom that conduct has been confided' (*Caparo Industries plc v Dickman* [1990] 2 AC 605 at 630). The purpose of audit reports is neither to protect the interests of investors nor individual shareholders.

[68] Imposing a legal duty on auditors in a case such as this raises the spectre of indeterminate liability. Policy considerations require that liability in delict be confined to reasonably predictable limits (15 *Lawsa* 3 ed para 87). Limitation of liability is therefore a key policy consideration in deciding whether pure economic loss should be actionable. This court, citing Gaudron J in *Perre v Apand (Pty) Ltd* (1999) 198 CLR 180 (HC of A) para 32, in *Fourway Haulage*,[51] said that '[t]he first policy consideration is the law's concern to avoid the imposition of liability in an indeterminate amount for an indeterminate time to an indeterminate class'; and that liability would be more

[51] Ibid paras 23-24

readily imposed for 'a single loss of a single identifiable plaintiff occurring but once and which is unlikely to bring in its train a multiplicity of actions'.

[69] If the appellants' claims were to be recognised despite the fact that their loss is merely a reflection of the underlying loss suffered by the Bank and ABIL, there is no reason to prevent all others who suffered reflective losses from pursuing similar claims. They would include all other shareholders of both the Bank and ABIL (of whom there are likely to be many) and, in the case of corporate shareholders like the plaintiffs, their shareholders up the corporate chain who ultimately include natural persons. This would expose the auditors to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'. The courts have frequently held that this risk disqualifies the recognition of a new category of claim.[52] (). And, if an action were granted to shareholders to claim compensation directly from the wrongdoers, the Bank's creditors would demand the same facility, particularly if it is insolvent.

[70] In the latter circumstances, if only the Bank is allowed to claim from the wrongdoers for the loss sustained the amount recovered is, in the ordinary course, distributed amongst its creditors pro rata to their claims. ABIL and its shareholders do not share in the recovery unless there is a residue after all the bank's creditors have been paid in full. However, if ABIL and its shareholders are also allowed to sue the wrongdoers, the ranking of claims gets distorted. Questions of undue preferences might arise. This consideration is part of the policy reasons for the retention of the rule against claims for reflective losses as set out in *Johnson* at 14C-D. Under insolvency law, any damages recovered from the wrongdoers should in the first place go to creditors before there is any distribution to shareholders. But what if ABIL or its shareholders have already recovered the full amount of the loss: does it mean that they circumvented the order of distribution to the prejudice of other creditors? To allow the claim would have a result that cannot be countenanced.

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[52] *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar and Others* [2010] ZASCA 85; 2010 (5) SA 499 (SCA) para 25; *Country Cloud* above fn 46 para 24; *Fourway Haulage* above fn 50 paras 23-24; *South African Hang and Paragliding Association and Another v Bewick* [2015] ZASCA 34; 2015 (3) SA 449 (SCA) para 32.

[71] In addition to the aforesaid factors, it is so that the plaintiffs are not vulnerable to the risk of harm, and have another remedy. In *Cape Empowerment Trust*,[53] this Court held that the extent to which a plaintiff was vulnerable to the risk of harm was an important indicator in determining whether liability should be imposed on the defendant; and considered the extent to which a plaintiff, which pursued a delictual claim against auditors, was able to recover its loss by means of a contractual claim. In the present matter the plaintiffs could protect themselves against the risk of harm by way of a derivative action under s 165 of the Companies Act. If Deloitte is indeed guilty of professional misconduct, it might be subject to sanction by the relevant regulatory body. But that is not what this appeal is about.

[72] We turn, now, to deal with the appellants' reliance on s 46(3) of the APA. In para 28 of their particulars of claim, they cite the following parts of that subsection:

'(3) Despite subsection (2), a registered auditor incurs liability to third parties who have relied on an opinion, report or statement of that registered auditor for financial loss suffered as a result of having relied thereon, *only if it is proved* that the opinion was expressed, or the report or statement was made, pursuant to a negligent performance of the registered auditor's duties and the registered auditor—

(a) knew, or could in the particular circumstances reasonably have been expected to know, at the time when the negligence occurred in the performance of the duties pursuant to which the opinion was expressed or the report or statement was made—

(i) that the opinion, report or statement would be used by a client to induce the third party to act or refrain from acting in some way or to enter into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person; or

. . .

(b) in any way represented, at any time after the opinion was expressed or the report or statement was made, to the third party that the opinion, report or statement was correct, while at that time the registered auditor knew or could in the particular circumstances reasonably have been expected to know that the third party would rely on that representation for the purpose of acting or refraining from acting in some way or of entering into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or any other person.'(Emphasis added.)

[53] *Cape Empowerment Trust* above fn 47 paras 28 and 30.

Nothing further is said by the appellants about the significance of these provisions, with the appellants going on to state that the omission to qualify the Bank's financial statements was deliberate and that Deloitte negligently misrepresented the Bank's financial position and 'had a duty' not to make the statements, thus incurring liability towards the appellants. A third party might be able to rely on this subsection in circumstances such as those in *Standard Chartered* or in *Axiam*. The third party would have to state facts that would bring it within the subsection's field of operation. The appellants did not say how or why their claims fell within the ambit of the subsection. s 46(4) of the APA is of significance. It reads as follows:

'Nothing in subsections (2) or (3) confers upon any person a right of action against a registered auditor which, but for the provisions of those subsections, the person would not have had.'

This means that ss 46(2) and 46(3) do not found a claim where none existed before. The discussion above shows why, in the circumstances of this case, a claim should not be held to exist. For the aforesaid reasons, the appellants have not established wrongfulness. The high court thus correctly upheld Deloitte's exception to the appellants' particulars of claim.

[73] In their pleaded case against Deloitte, the appellants did not rely on the provisions of s 218(2) of the Companies Act. Before us, however, they contended that they were entitled to rely on that subsection if such reliance could be inferred. For this proposition they referred to s 30(2)*(a)* of the Act, which provides that the annual financial statements of companies like ABIL and African Bank must be audited and, if read with the definition of 'audit' in s 1 of the Act, it must mean in accordance with prescribed or applicable auditing standards. It was contended on behalf of the appellants that the auditors contravened s 30(2)*(a)*. Thus, so they argued, they were entitled to rely on s 218(2). This is fallacious. The duty to have its annual financial statements audited rests on the company. In relation to liability on the part of Deloitte for contraventions of the Act, the discussion earlier in this judgment applies. The duty of the auditors is owed primarily to the company. For all the stated reasons, liability by Deloitte to shareholders in the circumstances of this case is untenable.

[74] For all the aforesaid reasons, the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

M S Navsa
Judge of Appeal

A Schippers
Judge of Appeal

Appearances

For Appellants	A Subel SC with D Mahon
Instructed by	Faber, Goertz, Austen Inc Johannesburg McIntyre & Van der Post, Bloemfontein
For First to Tenth Respondents	C D A Loxton SC, I P Green SC and N K Nxumalo
	Instructed by Clyde and Company, Johannesburg Webber Attorneys, Bloemfontein
For Eleventh Respondent	W Trengove SC, M du P van der Nest SC, D J Smit and L Zikalala
Instructed by	Webber Wentzel, Johannesburg Honey Attorneys Bloemfontein

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

CASE NO: 7367/2020

In the matter between:

HAMILTON B.V	First Plaintiff/Applicant
HAMILTON 2 B.V	Second Plaintiff/Applicant

and

STEINHOFF INTERNATONAL HOLDINGS PROPRIETARY LIMITED	First Defendant/Respondent
MARKUS JOHANNES JOOSTE	Second Defendant/Respondent
ANDRIES BENJAMIN LA GRANGE	Third Defendant/Respondent
FREDERICK JOHANNES NEL	Fourth Defendant/Respondent

NOTICE OF APPLICATION:

APPLICATION FOR LEAVE TO AMEND

TAKE NOTICE that the plaintiffs intend to make application to this Court for the following order:

1. That the plaintiffs be granted leave to amend their particulars of claim in the action instituted under case number 7367/2020 as per the plaintiffs' notice of intention to amend dated 8 September 2020, and served electronically on 11

September 2020, a copy of which is annexed and marked "**A**".

2. That any defendant who opposes this application pay the costs of this application; *alternatively*, and in the event of no opposition, that there be no order as to costs;

3. Further and/or alternative relief.

TAKE NOTICE FURTHER that if any of the defendants intend opposing the relief sought herein, those defendants are required:

a) to notify the plaintiffs' attorneys of their intention to oppose this application, in writing, within 5 days of this application being served upon them; and

b) within 15 days after having so given notice of their intention to oppose this application, to file their answering affidavits, if any.

KINDLY enrol the matter for hearing accordingly.

DATED AT PRETORIA ON THIS THE 16th DAY OF OCTOBER 2020.

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CAPE TOWN

AND TO: **WERKSMANS ATTORNEYS**
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SERVED ELECTRONICALLY ON 16 OCTOBER 2020

Annexure A

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

CASE NO: 7367/2020

In the matter between:

HAMILTON B.V	First Plaintiff
HAMILTON 2 B.V	Second Plaintiff
and	
STEINHOFF INTERNATONAL HOLDINGS PROPRIETARY LIMITED	First Defendant
MARKUS JOHANNES JOOSTE	Second Defendant
ANDRIES BENJAMIN LA GRANGE	Third Defendant
FREDERICK JOHANNES NEL	Fourth Defendant

PLAINTIFFS' NOTICE OF INTENTION TO AMEND IN TERMS OF RULE 28(1)

TAKE NOTICE that the plaintiffs intend to amend their particulars of claim, as indicated by the tracked changes to the particulars of claim which will be served with this notice.

TAKE NOTICE THAT unless written objection to the proposed amendment is delivered within 10 days of delivery of this notice, the amendment will be affected.

DATED AT PRETORIA ON THIS THE 8th DAY OF SEPTEMBER 2020.

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CAPE TOWN

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SERVED ELECTRONICALLY

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

Case no.

In the matter between:

HAMILTON B.V.	First Plaintiff
HAMILTON 2 B.V.	Second Plaintiff
and	
STEINHOFF INTERNATIONAL HOLDINGS PROPRIETARY LIMITED	First Defendant
MARKUS JOHANNES JOOSTE	Second Defendant
ANDRIES BENJAMIN LA GRANGE	Third Defendant
FREDERIK JOHANNES NEL	Fourth Defendant

PARTICULARS OF CLAIM

THE PARTIES

1. The first plaintiff is **HAMILTON B.V.**, a private limited company with its registered office in Amsterdam and its principal place of business at Hamilton House, 28 Fitzwilliam Place, Dublin, Ireland.

2. The second plaintiff is **HAMILTON 2 B.V.**, a private limited company with its registered office in Amsterdam, which also has its principal place of business at Hamilton House, 28 Fitzwilliam Place, Dublin, Ireland.

3. The first defendant is **STEINHOFF INTERNATIONAL HOLDINGS PROPRIETARY LIMITED** ("**SIHPL**"), previously known as Steinhoff International Holdings Limited, a company duly incorporated under the company laws of the Republic of South Africa, with its principal place of business at Building B2 Vineyard Office Park; Cnr Adam Tas and Devon Valley Road; Stellenbosch, Western Cape, 7600

4. The second defendant is **MARKUS JOHANNES JOOSTE** ("**Jooste**"), a businessman who resides at [redacted]. From 2000 until December 2017, Jooste was the chief executive officer and an executive director of SIHPL (which as mentioned below was for a long time the top listed company of the Steinhoff group). Jooste also held the same positions at Steinhoff International Holdings N.V. ("**Steinhoff N.V.**") (referred to below) from the commencement of its operations in 2015 until December 2017.

5. The third defendant is **ANDRIES BENJAMIN LA GRANGE** ("**La Grange**"), a businessman who resides at [redacted] La Grange commenced working for the Steinhoff group in 1998, and from March 2013 was the chief financial officer and an executive director of SIHPL. La Grange also became an executive director and the chief financial officer of Steinhoff N.V. in 2015 and still held those offices in December 2017.

6. The fourth defendant is **FREDERIK JOHANNES NEL** ("**Nel**"), a businessman who resides at [redacted] From August 1998 to December 2017, Nel was a director of SIHPL and for the period covered by this proceeding (*i*) was referred to as the "Financial Director" of SIHPL and (*ii*) was a member of its executive committee. In addition, Nel became an executive director and a member of the executive committee of Steinhoff N.V. in 2015 and still held those positions in December 2017.

FACTUAL BACKGROUND

7. SIHPL, which was listed on the Johannesburg Stock Exchange ("**JSE**") on 23 September 1998, was the top holding company in the Steinhoff Group, prior to the establishment of Steinhoff International Holdings N.V. (defined above as "Steinhoff N.V.") and the swapping of the entire issued share capital of SIHPL for shares in the capital of Steinhoff N.V. pursuant to a scheme of arrangement in terms of section 114 of the Companies Act, 71 of 2008, in 2015.

8. As a result of the aforesaid scheme of arrangement, investors who had previously held shares in SIHPL held shares in Steinhoff N.V., a company listed on both the JSE and the Frankfurt Stock Exchange (FSE), from December 2015.

9. Investors who purchased shares in SIHPL, as a listed company on the JSE, prior to December 2015, including the "Injured Investors" referred to below, relied on SIHPL's annual financial statements and other financial information and prospectuses published by SIHPL, which had been produced and certified by the second to fourth defendants ("**the directors**"), when making their share

purchases, and reasonably assumed and accepted that the information contained therein was correct.

10. Investors who purchased shares in SIHPL in 2015, including the "Injured Investors", also relied on the prospectuses and other financial information produced by Steinhoff N.V. for the purposes of its listings in 2015, which contained information generated by the second to fourth defendants ("**the directors**"), as executive directors of SIHPL, with the board of SIHPL expressly stating in the August 2015 prospectus that they collectively and individually accepted full responsibility for the accuracy of the information contained therein insofar as it related to SIHPL.

11. In December 2017, Steinhoff N.V. revealed for the first time that the financial information which had previously been disseminated by Steinhoff N.V. and SIHPL, and on which investors and their advisers had hitherto relied, was not accurate. More particularly, Steinhoff N.V:

11.1. announced, on 5 December 2017, that accounting irregularities had been discovered which required further investigation, that Jooste had resigned as chief executive officer with immediate effect, that the audited 2017 consolidated annual financial statements would be delayed, and that it would be determined whether any prior years' financial statements would need to be restated;

11.2. indicated, after close of trade on 6 December 2017, that the irregularities related to the valuation of assets amounting to approximately € 6 billion;

11.3. stated, after closing of trade on 8 December 2017, that PwC had been engaged to carry out a forensic investigation into the irregularities, which had already commenced;

11.4. reported, after close of trade on 1-3 December 2017, that the irregularities that had been discovered had also affected the annual accounts for 2016, which consequently had such serious shortcomings that they would need to be restated.

12. On 2 January 2018, Steinhoff N.V. reported that the 2015 annual accounts for SIHPL could also no longer be relied upon and expressed an expectation that the annual accounts for SIHPL for previous years would also have to be restated.

13. The investigation of PwC, which resulted in a detailed report in early 2019, of which a summary was published on 15 March 2019, revealed *inter alia* that:

13.1. the Steinhoff group had not given a true and fair view of SIHPL's financial position since the financial year 2009,

13.2. between 2009 and December 2017, the Steinhoff Group recognised transactions totalling € 6.5 billion that lacked merit,

13.3. substantial amounts of at least € 325 million worth of transactions which lacked any legal basis were incorporated into the annual accounts in every financial year since 2009, and

13.4. at the heart of the wrongdoings which resulted in an incorrect and misleading communication to investors were fictitious and/or irregular transactions that had the effect of inflating the profits and/or asset values of the Steinhoff group, which were entered into with parties said to be third party entities independent of the Steinhoff group and its executives but which actually were closely related to the executives involved in the wrongdoing, including Jooste, La Grange and- Nel~~Grobler~~.

14. As a result of the revelations from Steinhoff N.V. in December 2017, the share price of Steinhoff N.V. dropped precipitously (by over 80%), representing a loss of billions of Euros, almost overnight. The further information which has come to light has moreover ensured that the shares in Steinhoff N.V. have no more than nominal value and have essentially become virtually worthless.

15. Persons who had acquired listed shares in SIHPL and thereafter became shareholders in Steinhoff N.V. and still held some or all of their shares in the latter at the close of trade on 5 / 6 December 2017 have consequently sustained significant damages as a result of the materially incorrect and misleading financial information from SIHPL, on the strength of which they made their investments.

ASSIGNMENT OF CLAIMS AND MANDATE TO THE PLAINTIFFS

16. A significant number of investors who were misled by the provision of incorrect and misleading information from SIHPL, and acquired listed shares in SIHPL, and subsequently (by virtue of the share swap pursuant to the scheme of arrangement) Steinhoff N.V., on the basis thereof and still held shares in the latter

at the close of trade on 5 or 6 December 2017, have transferred their associated damages claims against the defendants to one or other of the plaintiffs by means of an assignment.

17. The assignors have also, and to cater for a contingency in which the assignments are for some or other reason not considered to be valid or efficacious, granted one or other of the plaintiffs an exclusive mandate to pursue the damages claims on their behalf.

18. Attached hereto marked "**A**" is a list of all the individuals and legal entities (the "**Injured Investors**") who have claims against the defendants arising out of the aforementioned incorrect and misleading information, as well as the statutory breaches referred to below, and who have assigned their damages claims to one or both of the plaintiffs and granted them an exclusive mandate. A copy of the kind of assignment and mandate agreement concluded by the Injured Investors with the plaintiffs is attached marked "**B**".

CLAIMS AGAINST SIHPL

Common law claim against SIHPL

19. SIHPL deliberately, *alternatively* wrongfully and negligently, misled the Injured Investors by:

19.1. deliberately, *alternatively* negligently, publishing materially incorrect financial statements, in particular the annual accounts for SIHPL in years from 2009 to 2015, with the intention that such materially incorrect

financial statements be acted upon *inter alia* by the Injured Investors to their prejudice;

19.2. deliberately, *alternatively* negligently, failing to disclose material facts relevant to the price of its shares from 2009 to 2015 to *inter alia* the Injured Investors, with the intention that the omission of such material facts would cause the Injured Investors to act to their prejudice; and

19.3. deliberately, *alternatively* negligently, issuing materially misleading announcements on the Stock Exchange News Service (SENS) of the JSE between 2009 and 2015, with the intention that the omission of the true material facts would cause the Injured Investors to act to their prejudice.

20. SIHPL's audited financial statements and its press releases from 2009 to 2015, were false or misleading in at least the following material respects:

20.1. They recorded fictitious and/or irregular transactions in respect of sales, benefits or income with entities that were purportedly independent of the Steinhoff group of companies, but which were in truth and in fact either closely related to or controlled by the Steinhoff group, or certain of its former executives. The income from such transactions in many instances were not paid by these related parties, resulting in the reflection of these transactions as loans or other receivables to the Steinhoff group that had little or no economic substance, and which were never settled;

20.2. This fictitious and/or irregular income was recorded in the group accounts of SIHPL as originating from independent entities and thus materially

influenced the recordal of the assets, income and profits of the Steinhoff group;

20.3. The aforesaid non-recoverable receivables resulting from the fictitious or irregular income created by the transactions set out above were either purportedly settled in set-off arrangements or reclassified into different assets, the effect of which was to move such indebtedness both within the Steinhoff group and around the purportedly independent entities, which SIHPL falsely accounted for as being repayments by the original indebted party;

20.4. Non-recoverable receivables were reclassified into different classes of assets to create the impression that non-recoverable receivables had been settled and resulted in other asset values being inflated.

21. SIHPL also compounded the false and misleading statements in various ways. For example:

21.1. The impact of the increased asset values was magnified through SIHPL falsely increasing:

21.1.1. intergroup rentals to underpin these false increased asset values;

21.1.2. intergroup royalty payments in order to underpin falsely inflated trademark values; and

21.1.3. costs across the Steinhoff group's subsidiaries, all of which were designed to fictionalise increased group income but which at subsidiary level resulted in losses in the operating entities.

21.2. The losses in the operating entities were fictionally mitigated in the financial statements through the purported distribution of the fictitious or irregular income referred to above.

22. The effect of the aforementioned conduct was to falsely depict the operating subsidiaries as more profitable than they actually were, enabling false forecasts to be made to support the prices paid for acquired entities, enabling the false forecasts allegedly to be met, and falsely depicting operating entity budgets as being capable of being met.

23. SIHPL knew that the published presentation of the financial affairs of the company and its subsidiaries was false and misleading in material respects and did not fairly present the state of affairs and business (and assets and liabilities) of the company or the group, as well as that shareholders and potential shareholders, and their financial advisers and asset managers would rely on those public presentations; but it deliberately made or caused such wrongful statements or announcements to be published with the intention that they would be acted upon by investors to their prejudice, when considering the making, holding, or increasing of investments in SIHPL. SIHPL also falsified its accounting records with a similar intention.

24. *In the alternative to paragraph 23 above*, SIHPL was negligent with regard to the presentation of the financial affairs of the company and the publication of incorrect and misleading financial statements and press releases, in that it ought reasonably to have known that the statements and announcements were misleading, inaccurate and incomplete; it could with due care and diligence have produced accurate statements and reports; and any reasonable person in the position of SIHPL would have done so, not least because it knew that shareholders and potential shareholders, and their financial advisers and asset managers would rely on those public statements and announcements.

25. SIHPL's deliberate, *alternatively* negligent, conduct was wrongful in that SIHPL owed a legal duty to investors to ensure that its financial statements and announcements were accurate and sufficient in all respects, not least because of:

25.1. the duties imposed by the Companies Act 71 of 2008, as amended ("**the Act**") and the Financial Markets Act, 19 of 2012, as well as the relevant Listing Requirements of the JSE;

25.2. the fact that investors would, to SIHPL's knowledge, rely on SIHPL to ensure it published accurate information;

25.3. the trust that investors such as the Injured Investors were obliged to repose in SIHPL as a listed company to only publish information about the company that was accurate and complete, and thereby ensure that its share price was based on accurate information;

25.4. the foreseeability of a harm to persons in the position of investors such as the Injured Investors and the relative ease with which SIHPL could have prevented it; and

25.5. public policy and the *boni mores* of the community.

26. The aforementioned misrepresentations and non-disclosures induced the Injured Investors (*a*) to consider the shares of SIHPL to be good investments and accordingly to purchase them in circumstances where they would otherwise, and but for the aforementioned misrepresentations and non-disclosures, not have done so; and (*b*) alternatively and in any event, to purchase the shares of SIHPL at an inflated price and value and also retain them (or at least some of them) under the same inaccurate supposition.

27. The deliberate, alternatively wrongful and negligent misrepresentations by SIHPL accordingly caused the Injured Investors to suffer damages as pleaded in paragraphs 444444 to 474747 below.

Further or Alternative Claim against SIHPL on the basis of section 218(2) of the Act

28. Section 218(2) of the Act provides that any person (a term defined in section 1 of the Act as including a juristic person) who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of such contravention.

29. SIHPL contravened at least the following provisions of the Act:

29.1. section 22, in terms of which SIHPL was prohibited from carrying on its business either recklessly, with gross negligence or with the intent to defraud any person, or for any fraudulent purpose;

29.2. section 28(1), pursuant to which SIHPL was obliged to keep accurate and complete accounting records to enable it to satisfy its obligations in terms of the Act and any other law with respect to the preparation of financial statements;

29.3. section 28(3), which prohibits SIHPL from failing to keep accurate or complete accounting records, with an intention to deceive or mislead any person, or keeping records other than in the prescribed manner and form or falsifying any of its accounting records or permit any person to do so;

29.4. section 29, which requires SIHPL's financial statements *inter alia*:

29.4.1. to satisfy the prescribed financial reporting standards as to form and content;

29.4.2. to present fairly the state of affairs and business of the company, and to explain the transactions and financial position of the business of the company;

29.4.3. to show the company's assets, liabilities and equity as well as its income and expenses, and any other prescribed information;

29.4.4. not to be false or misleading in any material respect, or incomplete in any material particular.

30. The facts and circumstances upon which the Injured Investors rely for the contravention by SIHPL of the aforesaid sections of the Act appear from paragraphs 20 to 24 above.

31. The foregoing contraventions of the Act by SIHPL (which in the case of the breaches of sections 22 and 28(3) were by their nature fraudulent, reckless or negligent, and in the case of the breaches of sections 28(1) and 29 were also deliberate, alternatively negligent) caused the Injured Investors to consider the shares of SIHPL to be good investments and accordingly to purchase them when they would not have done so had the correct information about SIHPL been disclosed in its financial statements and press releases, and had the aforementioned statutory provisions not been contravened.

CLAIMS AGAINST THE DIRECTORS (SECOND TO FOURTH DEFENDANTS)

Section 218(2) of the Act

32. As pleaded above, in terms of section 218(2) of the Act, any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of the contravention.

33. The second and third defendants (Jooste and La Grange) contravened *inter alia* the following sections of the Act, as directors of SIHPL – in the case of Jooste 2009 and 2015, and in the case of La Grange from March 2013 to 2015:

33.1. section 29(6) (as read with the remaining provisions of section 29 of the Act), which provides that (subject to section 214(2) of the Act) a person is guilty of an offence if the person is a party to the preparation, approval, dissemination or publication of:

33.1.1. any financial statements including annual financial statements, knowing that those statements fail in a material way to comply with the requirements of subsection 29(1) of the Act, or are materially false or misleading as contemplated in subsection 29(2), or

33.1.2. the summary of any financial statements, knowing that the statements that have been summarised do not comply with the material requirements of section 29(1) of the Act, or are materially false or misleading as contemplated in subsection 29(2) of the Act, or the summary does not comply with the requirements of subsection 29(3) of the Act, or is materially false or misleading;

33.2. section 76(2) of the Act, which provides that a director of the company must not knowingly cause harm to the company or a subsidiary of the company;

33.3. section 76(3) of the Act, which provides that a director of the company while acting in that capacity must exercise the powers and perform the functions of a director in good faith and for a proper purpose, in the best

interests of the company, and with the degree of care, skill and diligence that may reasonably be expected of a person carrying out such functions and having the general knowledge, skill and experience of that director.

34. The fourth defendant (Nel) contravened section 76(3) of the Act, as a director of SIHPL, from March 2009 to 2015.

35. The facts and circumstances upon which the Injured Investors rely for the contravention by the directors of the aforesaid sections of the Act appear from paragraphs 20 to 24 above, inasmuch as the directors were directly involved in the preparation and finalisation of the financial statements and other public announcements, with the references in those paragraphs to the knowledge or negligence of SIHPL also applying to the directors.

36. ~~The~~ As would have been foreseen by the directors, the abovementioned contraventions of the Act by Jooste, La Grange and Nel caused the Injured Investors to consider the shares of SIHPL to be good investments and accordingly to purchase them in circumstances where they otherwise would not have.

Section 20(6) of the Act

37. In addition, section 20(6) of the Act provides that a person who was a shareholder at the time when any person, including a director, intentionally, fraudulently or due to gross negligence caused the company to do anything in conflict with the Act, has a claim for damages against that person.

38. The second to fourth defendants, as employees and directors of SIHPL, holding the positions pleaded in paragraphs 4 to 6 above, were responsible for drawing up SIHPL's financial figures from at least 2009. In that capacity:

38.1. the second and third defendants intentionally caused SIHPL to breach section 29 of the Act in the respects set out above; *alternatively* acted grossly negligently and thereby resulted in those breaches by SIHPL;

38.2. the fourth defendant caused the aforementioned breaches by SIHPL as a result of his gross negligence.

39. As pleaded in paragraph 29.4 above, section 29 of the Act requires a company providing any financial statements, including any annual financial statements, to any person for any reason to ensure that those statements *inter alia*:

39.1. satisfy the prescribed financial reporting standards as to form and content;

39.2. present fairly the state of affairs and business of the company, and to explain the transactions and financial position of the business of the company;

39.3. show the company's assets, liabilities and equity as well as its income and expenses, and any other prescribed information;

39.4. are not false or misleading in any material respect, or incomplete in any material particular.

40. As would have been foreseen by the directors, the ~~The~~ aforesaid breaches of the Act – attributable to the second to fourth defendants' intentional, fraudulent or grossly negligent conduct – caused the Injured Investors to consider the shares of SIHPL to be good investments and accordingly to purchase them in circumstances where they otherwise would not have.

41. Jooste, La Grange and Nel are jointly and severally liable to the Injured Investors for payment of damages pursuant to the provisions of section 218(2) of the Act, *alternatively* section 20(6) of the Act, as read with the breaches by each of the directors of each of the sections of the Act set out above.

DAMAGES

42. As indicated above:

42.1. the inaccurate and misleading misrepresentations by the defendants of the financial position of SIHPL as aforesaid, and their breaches of relevant provisions of the Act, caused the Injured Investors to acquire shares in SIHPL and still hold shares in Steinhoff N.V. for which they had been swapped (or some of those shares) when the news about the irregularities in the financial reporting was disclosed in early December 2017;

42.2. as soon as the materially misleading misrepresentations and statutory breaches came to light this immediately had a significantly negative impact on the listed share price of the Steinhoff N.V. shares for which the Injured Investors' SIHPL shares had been swapped, and effectively rendered them worthless.

43. But for the inaccurate and misleading misrepresentations by the defendants and their actionable non-disclosures and breaches of the Act, the Injured Investors would not have considered the shares of SIHPL to be appropriate investments, more particularly at the quoted prices, and would not have purchased them.

44. As a result of the aforementioned misrepresentations, non-disclosures and statutory breaches, the Injured Investors have suffered damages equating to their total expenditure on the SIHPL shares at the time of purchase, ~~*alternatively* the total expenditure at the time adjusted to reflect the current value of the money so expended,~~ less:

44.1. any amounts that they received on subsequently selling any of those shares or any Steinhoff N.V. shares for which the SIHPL shares had been swapped (any Steinhoff N.V shares still held by them essentially having only nominal value),

44.2. *alternatively* and in the event that it is disputed that any remaining Steinhoff N.V. shares are essentially worthless, any amounts that they received on subsequently selling any of those shares, or any Steinhoff N.V. shares for which the SIHPL shares had been swapped, and in the event that shares continue to be retained, the amount of R2.43 per share, being the VWAP for Steinhoff N.V. shares listed on the JSE for the 30 days after 29 June 2018, being the date on which Steinhoff N.V.'s 2018 half-year results for the 2018 financial year were released.

45. *Alternatively*, and by virtue of the fact that the Injured Investors would have purchased other apparently promising shares on the JSE Top 40 at the time, instead of purchasing their SIHPL shares, the Injured Investors have suffered damages, as a result of the aforementioned misrepresentations, non-disclosures and statutory breaches, which would, on a best estimate, be an amount calculated on the following basis –

45.1. in respect of any Steinhoff N.V. share (received in exchange for SIHPL shares pursuant to the scheme of arrangement) still retained, the price paid for the SIHPL share multiplied by the closing price of the JSE Top 40 Index on the date of judgment, divided by the closing price of the JSE Top 40 Index on the date of purchase (any remaining Steinhoff N.V. shares, received in exchange for their SIHPL shares, which are still held by them essentially only having nominal value); *alternatively*, and in the event of it being disputed that any remaining Steinhoff N.V. share is essentially worthless, the figure per share calculated pursuant to the method described immediately above, less R2.43 per share,

45.2. in respect of any SIHPL share, or any Steinhoff N.V. share for which the SIHPL share had been swapped, which was subsequently sold, the price paid for the SIHPL share multiplied by the closing price of the JSE Top 40 Index on the date of sale and divided by the closing price of the JSE Top 40 Index on the date of purchase, less the amount received for the sale of the SIHPL shares or Steinhoff N.V. shares for which the SIHPL shares had been swapped.

46. The defendants are jointly and severally liable to the plaintiffs (as the assignees of the Injured Investors, *alternatively* the Injured Investors' mandatees) for the total of all the damages sustained by all the Injured Investors ~~from 7 September 2010 to 7 December 2015 (when the scheme of arrangement took effect)~~.

47. On the plaintiffs' best estimate at present, and on the basis of what is pleaded in the primary claim in paragraph 44 above, the total damages suffered by the Injured Investors and claimable by the plaintiffs on their behalf or in their stead ~~from September 2010 onwards~~ is R 14,163,675,343.07.

48. An estimation of the total damages suffered by the Injured Investors calculated on the bases set out in paragraph 45 above cannot be made at present, because the calculation must be made with reference to *inter alia* the closing price of the JSE Top 40 Index on the date of judgment. The plaintiffs will provide such estimation in due course, once reasonably able to estimate when judgment is likely to be given.

~~47.~~49. The total damages suffered by the Injured Investors as a result of the aforementioned misrepresentations, non-disclosures and statutory breaches, are separate and distinct, and not a reflection of, any losses that SIHPL or Steinhoff N.V. may have suffered as a result of such misrepresentations, non-disclosures and statutory breaches.

WHEREFORE the plaintiffs claim as against the defendants, jointly and severally –

(i) Payment of damages of R 14,163,675,343.07.~~, *alternatively* in an another amount calculated on the bases set out in paragraph 44 above.,~~

(ii) Alternatively, payment of damages in an amount calculated on the bases set out in paragraph 45 above.

(iii) Interest on the amount of damages awarded, calculated at the prescribed rate (currently 9.75% per annum) from the date of judgment.

(iv) Costs of suit.

(v) Further and/or alternative relief.

DATED at CAPE TOWN on this the day of ~~JUNE~~ SEPTEMBER~~AUGUST~~ 2020.

PAUL FARLAM S.C.

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To: **The Registrar**
High Court (Western Cape Division)
Cape Town

To: **Steinhoff International Holdings Proprietary Limited**
First DefendantBuilding B2 Vineyard Office Park
Cnr Adam Tas and Devon Valley Road
Stellenbosch
Western Cape
7600

Received a copy hereof on this the
_____ day of June 2020.

_____
For: First Defendant

AND TO: **Markus Johannes Jooste**
[redacted]

Received a copy hereof on this the
_____ day of June 2020.

_____
For: Second Defendant

AND TO: **Andries Benjamin La Grange**

[redacted]

Received a copy hereof on this the _____ day of June 2020.

_____

For: Third Defendant

AND TO: **Frederik Johannes Nel**

[redacted]

Received a copy hereof on this the _____ day of June 2020.

_____

For: Fourth Defendant