

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

Case No: **17327 / 2020**

In the application between:

TREVO CAPITAL LTD

Applicant / Intervening Party

and

HAMILTON BV

First Respondent

HAMILTON 2 BV

Second Respondent

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD

Third Respondent

In re the matter between:

HAMILTON BV

First Applicant

HAMILTON 2 BV

Second Applicant

and

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD

Respondent

FILING SHEET

BE PLEASED TO TAKE NOTICE THAT the Applicant presents herewith for filing the following:

1. Supporting affidavit of Paul Ronald Potter;
2. Supporting affidavit of Michael John Morris;
3. Supporting affidavit of Peter Andrew Berry;
4. Supporting affidavit of Andre Frederick Botha;
5. Supporting affidavit of Francois Johan Malan; and
6. Supporting affidavit of Warren Wendell Steyn.

DATED at **CAPE TOWN** on this **19th** day of **FEBRUARY 2021**.

BOWMAN GILFILLAN INC

Per: 

Deon de Klerk/Juliette de Hutton

Attorneys for the Applicant/
Intervening Party

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TO: THE REGISTRAR
High Court
CAPE TOWN

AND TO: ADAMS AND ADAMS
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Second Applicant

and

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD

Third Respondent

SUPPORTING AFFIDAVIT

I, the undersigned,



PAUL RONALD POTTER

do hereby make oath and say:

1. I am an adult businessman currently residing at 9 Eugene Marais Avenue, 6 Broughton Place, Cape Town.
2. The facts deposed to herein are within my personal knowledge, save where the context indicates the contrary, and are furthermore true and correct. Where I refer to information conveyed to me by others, I verily believe such information to be true.
3. I have read the affidavits in the application for declaratory relief ("*the declaratory application*") instituted by Hamilton BV and Hamilton 2 BV (collectively referred to as "*Hamilton*") against Steinhoff International Holdings (Proprietary) Limited ("*SIHPL*").
4. I have also read the founding affidavit of Johann-Dirk Enslin in support of the urgent application by Trevo Capital Limited ("*Trevo*") for leave to intervene in the declaratory application, and for an order that other creditors be afforded an opportunity to apply to intervene in the declaratory application and to advance submissions concerning the relief sought by Hamilton in the declaratory application.
5. I have not yet had the opportunity to take full legal advice as to whether to intervene in the declaratory application and require an opportunity to do so. For the reasons set out below, however, I support Trevo's application. More



particularly, I agree with the contentions advanced in Mr Enslin's affidavit regarding the approaches adopted by both Hamilton and SIHPL to the determination of classes for the purposes of a compromise in terms of section 155 of the Companies Act 71 of 2008 ("*the Act*").

6. I respectfully submit that I should be afforded the opportunity to intervene in the declaratory application after fully considering my position, should I be so minded and advised, and to advance my case regarding the appropriate determination of classes.

MY CLAIM AGAINST SIHPL

7. Messrs Michael John Morris, Andre Frederick Botha, Peter Andrew Berry, Francois Johan Malan and Warren Wendell Steyn and I contend that we are creditors of SIHPL and have all instituted action against SIHPL, as follows:

7.1. Mr Michael John Morris and I instituted action against SIHPL on 6 December 2019; and

7.2. Mr Andre Frederick Botha, Mr Peter Andrew Berry, Mr Francois Johan Malan and Mr Warren Wendell Steyn instituted action against SIHPL on 15 June 2020.

8. Our claims are premised on a similar cause of action namely that we have suffered damages in consequence of being induced by a misrepresentation made by SIHPL's representatives to conclude certain contractual arrangements and give up certain financial benefits contractually provided for

and which benefits (in particular the payment of a substantial bonus or guarantee hereinafter referred to as "*the underpin*") would, but for the agreement(s) concluded in reliance on the misrepresentation, have accrued to the said plaintiffs (referred to below as "*the underpin creditors*").

9. The underpin creditors claim that they were induced to conclude these contractual arrangements and forego these financial benefits on the basis of a misrepresentation as to the value of their interest in Steinhoff International Holdings NV made in particular by way of the publication of the 2014 annual financial statements of that company's subsidiary and principal asset, SIHPL.
10. Relying on that misrepresentation the underpin creditors agreed to relinquish their entitlement to the underpin, which they would not have done but for the misrepresentation in which event the underpin would have become due and payable to them in a substantial amount.
11. In this regard, at the time that the contractual arrangements and the release of the underpin was being negotiated, SIHPL's representatives, more particularly Mr Markus Jooste (being simultaneously a director of Pepkor), were aware of the negotiations and the reliance that would be placed by the public in general, and by the underpin creditors in particular, upon the representation.
12. In consequence, the underpin creditors suffered damages in amounts equivalent to that which they would, but for the misrepresentation, have received by way of the underpin.



13. The further details of the claim are set out in the particulars of claim annexed hereto as "**PRP1**".

THE DECLARATORY APPLICATION

14. SIHPL intends to propose a compromise of its financial obligations with three classes of its creditors in terms of section 155 of the Act ("*the proposal*"). The "classes" into which SIHPL has purported to divide the aforementioned creditors are dealt with in further detail below.
15. The broad terms of the proposal are set out in a term sheet that has been available on the Steinhoff NV website since 27 July 2020 (annexure **FA2.3** to Hamilton's founding affidavit in the declaratory application). The terms were slightly updated and then republished on Steinhoff NV's website on 9 October 2020. A copy of the updated term sheet ("*the term sheet*") is annexure **JE1** to Mr Enslin's affidavit.
16. The three "classes" of creditor referred to in the term sheet are the SIHPL CPU Creditors ("*the FC class*"), the SIHPL Contractual Claimants ("*the CC class*"), and the SIHPL Market Purchase Claimants ("*the MPC class*").
17. As to the classification of the underpin creditors' claims in the proposal, SIHPL has specifically excluded the underpin creditors from any potential payment to be made in terms of the proposal and has classified the underpin claimants as "*Non-Qualifying Claims*".



18. This is so although the claims of other creditors who are proposed to receive a dividend under the proposal are also disputed. By way of example, SIHPL contends that the claims of both the MPC creditors and the underpin claimants have no prospects of success yet the MPC creditors are proposed to receive a dividend while the underpin creditors are excluded from any dividend and classified as non-qualifying.

19. This is despite the fact that the legal merits of their claims are contended to be identical.

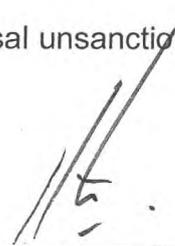
20. Clearly the classification is arbitrary and designed to serve SIHPL's tactical ends. By tactically classifying the claims in this manner SIHPL seeks to manipulate the outcome of the vote to its own ends.

21. By way of the declaratory application, Hamilton seeks relief that would prevent the proposal from being adopted by SIHPL's creditors or from being sanctioned by a court.

22. Hamilton contends in particular that the CC class and the MPC class cannot constitute a "class of creditor" in terms of section 155 of the Act, because both classes comprise concurrent creditors. Instead, says Hamilton, the classes envisaged by section 155 are those recognised in insolvency law: concurrent creditors, secured creditors, and statutory preferent creditors. Moreover, Hamilton contends – in effect – that the proposed settlement with the CC class is unfair and inequitable and thus not sanctionable by a court in due course.

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- 23. I agree with Hamilton that the proposal, as it is currently envisaged in the term sheet, cannot be sanctioned by a court and that it is unfair and inequitable.
- 24. I contend further that the proposal is fundamentally flawed, *inter alia*, for the reasons set out in paragraph 48. of Mr Enslin's affidavit.
- 25. In consequence, I respectfully concur that SIHPL's classification of creditors as currently contained in the proposal renders the proposal unsanctionable by a court.



PAUL RONALD POTTER

I certify that:

- i. The Deponent acknowledged to me that:
 - a. He knows and understands the contents of this declaration;
 - b. He has no objection to taking the prescribed oath; and
 - c. He considers the prescribed oath to be binding on his conscience.
- ii. The Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God."
- iii. The Deponent signed this declaration in my presence at Cafe Town on the 17th day of February 2020.



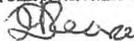

COMMISSIONER OF OATHS

Full names: Dylan Pearce

Designation and area: CA(SA)

Street address: 2 Fir Street, OBSERVATORY, Cafe Town

I certify that the DEPONENT has acknowledged that he/she knows and understands the contents of any objection to taking the oath, and that he/she considers it to be binding on his/her conscience before me at Cafe Town on this the 17th day of February, and that the regulations contained in Government Gazette No. R1258 of July 1972, as amended:



COMMISSIONER OF OATHS (RSA)
Dylan Bradley Pearce CA (SA)



PARTICULARS OF CLAIM

The parties

1. The plaintiff is Paul Ronald Potter, a businessman currently residing at 9 Eugene Marais Avenue, 6 Broughton Place, Cape Town.
2. The defendant is Steinhoff International Holdings (Proprietary) Limited (formerly Steinhoff International Holdings Limited), a company duly incorporated with limited liability in terms of the company laws of South Africa and having its principle place of business at Block D, De Wagenweg Office Park, Stellantia Road, Stellenbosch.

The acquisition of shares and the service agreement

3. In or about April 2010 Plaintiff and a company being Pepkor Holdings (Pty) Ltd ('Pepkor'), commenced negotiations for the acquisition by Pepkor of plaintiff's shareholding in a company being Future Cell Proprietary Limited ('Future Cell') pursuant to which and in or about mid-2010, Pepkor acquired a controlling share in Future Cell.
4. In anticipation, alternatively in consequence of such sale of shares and on or about 1 July 2010, and at Pretoria, the plaintiff concluded a written service agreement with Future Cell, a copy of which is attached marked "A", in terms of

which, inter alia, the plaintiff would (notwithstanding the sale of his shares to Pepkor) continue to provide services to Future Cell ('the service agreement'). In concluding this agreement, the plaintiff acted personally, and Future Cell was represented by Pieter Boucher."

The sale of shares agreement and BVI sale of shares agreement

5. In terms of a written agreement concluded on 30 January 2013 and at Parow, Western Cape ('the sale of shares agreement'), the plaintiff sold all of the shares which he then owned in Future Cell to Pepkor. In concluding the sale of shares agreement; the plaintiff acted personally, Pepkor was represented by Pieter Erasmus and Future Cell was represented by C J Klem.

6. A copy of the sale of shares agreement is annexed marked "B.1".

6A. In terms of a written agreement concluded on or about 31 January 2013 and at Parow, Western Cape ('the BVI sale of shares agreement'), the plaintiff purchased from Pepkor 329 581 ordinary shares in the company Business Venture Investments No 1499 (RF) (Pty) Ltd ('BVI'), which at the time held some 16 104 262 ordinary shares in Pepkor. In concluding the agreement, the plaintiff acted personally, Pepkor was represented by Pieter Erasmus and BVI was represented by Bruce Baisley

7. A copy of the BVI sale of shares agreement is annexed marked "B.2"

The first addendum

8. On or about 21 May 2013, and at Parow, the plaintiff, acting personally, and Future Cell, represented by C J Klem, concluded a written addendum to the service agreement, a copy of which is attached marked "C" ('the first addendum').

9. In terms of annexure "A" to the first addendum, the plaintiff was entitled, *inter alia*, to payment of a special bonus (referred to by the parties, and in what follows, as the 'underpin') in the event that:

9.1. the profit after taxation of Future Cell and two associated entities, Flash Mobile Vending (Pty) Ltd and Flash IP (Pty) Ltd earned during the 2017/2018 financial year, exceeded R104 000 000 ('the PAT') (clause 3.1, read with the definitions in clause 3.2); and

9.2. the value of the BVI shares, calculated as at 30 September 2018 and in accordance with the provisions of a separate Put and Call Option agreement between BVI and the plaintiff was below R50 636 968 (such underpin to be calculated in accordance with the formula set out in clause 3.3 of the said annexure A to the first addendum) (clause 3.3 read with the definitions in clause 3.2).

The second addendum

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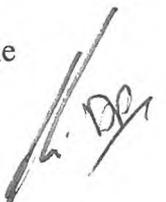
10. On or about 10 July 2014, and at Parow, the plaintiff, acting personally, concluded a second, written addendum to the service agreement, a copy of which is attached marked "D" ('the second addendum').

11. The second addendum was concluded with Flash Mobile Vending (Pty) ('Flash Mobile'), represented by C J Klem, as the business of Future Cell and Flash Mobile had at that time been merged in terms of section 113 of the Companies Act, 71 of 2008 ('the Companies Act'), and the rights and obligations of Future Cell in terms of the service agreement and the first addendum had been transferred to Flash Mobile..

12. The second addendum amended the service agreement (and the first addendum) and provided that the plaintiff was entitled, *inter alia*, to payment of the underpin in the event that:

12.1. the profit after taxation of Future Cell, Flash Mobile and Flash IP (Pty) Ltd earned during the 2017/2018 financial year, exceeded R104 000 000 ('the PAT') (clause 3.1, read with the definitions in clause 3.2); and

12.2. the value of the BVI and BVI2 shares (being the shares referred to in the Put and Call Option agreements referred to below), calculated as at 30 September 2018 and in accordance with the provisions of two separate Put and Call Option agreements between BVI and a related entity, K2013137280 (Pty) Ltd ('BVI2') and the plaintiff, was below R50 636 968 (such underpin to be calculated in accordance with the



formula set out in clause 3.3 of the said annexure A to the second addendum) (clause 3.3 read with the definitions in clause 3.2).

The arrangement between the defendant, Pepkor, BVI and Steinhoff NV

13. During February 2015:

13.1. Pepkor undertook a share buy-back and purchased the shares which BVI held in Pepkor, for an amount of R3 080 242 835;

13.2. BVI subscribed for 32 215 class D ordinary shares in Newshelf 1093 (Pty) Ltd ('Newshelf') at a purchase consideration of R3 080 242 835;

13.3. BVI, the defendant and Steinhoff Africa Holdings (Pty) Ltd concluded an exchange agreement ('the exchange agreement') pursuant to which BVI exchanged its shares in Newshelf for 51 703 157 ordinary shares in the defendant at an issue price of R57 per share;

13.4. The defendant was at the time a public company listed on the main board of the Johannesburg Stock Exchange ('JSE');

13.5. The resultant value ascribed by the parties to the exchange agreement to the ordinary shares in the defendant acquired by BVI as aforesaid, was R2 947 079 949.



14. Pursuant to a scheme of arrangement implemented in or about December 2015:

14.1. the defendant was converted to a private company;

14.2. its listing on the JSE was terminated;

14.3. it became a wholly-owned subsidiary of Steinhoff International Holdings NV ('Steinhoff NV'), a public company listed on the Frankfurt Stock Exchange and inwardly listed on the main board of the JSE; and

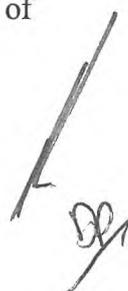
14.4. BVI's 51 703 157 ordinary shares in the defendant were exchanged for an equal number of shares in Steinhoff NV, on the basis that Steinhoff NV's only asset, or only significant asset, was its shareholding in the defendant.

As a result of the aforesaid scheme of arrangement ('the scheme of arrangement'), BVI became a shareholder in Steinhoff NV.

The third addendum

16. Subsequent to the arrangement described above, and on or about 5 May 2015

and at Durban, the plaintiff, acting personally and in reliance on the representation set out below, concluded a written, third addendum to the service agreement with Flash Mobile, represented by C J Klem, ('the third addendum'), which provided for the deletion of the underpin provisions and as a result of which the plaintiff relinquished his right to the underpin. A copy of the third addendum is attached marked "E".



The plaintiff's claim in delict

(i) The representation

17. Prior to and at the time of the conclusion of the third addendum and the deletion of the underpin effected thereby, the defendant represented that its financial position was as it appeared from the defendant's 2014 annual financial statement ('the 2014 AFS') ('the representation').

18. The representation was made by:

18.1. the publication to the general public, including the plaintiff, of the 2014 AFS; and

18.2. the defendant's failure to advise the general public, including the plaintiff, of the false statements included in the 2014 AFS which could or would have constituted price-sensitive information regarding defendant's shares and thus the value of the BVI shares.

19. The defendant was obliged to advise the plaintiff, as member of the general public, of the false statements in the 2014 AFS in that:

19.1. the true facts regarding its financial position were within the defendant's exclusive knowledge;

19.2. the defendant and its executives knew and intended, alternatively ought to have known, that the general public, including the plaintiff, would rely

on the representation of the defendant's financial position as it appeared from the 2014 AFS.

20. The representation was false, in that:

20.1. various transactions had been structured and implemented which had the result of substantially inflating the profit and asset values of the Steinhoff group (until August 2015 the defendant and its subsidiary companies) over an extended period;

20.2. fictitious or irregular transactions were entered into with parties said to be, and made to appear to be third-party entities and independent of the Steinhoff group and its executives, but which were in fact closely related to the defendant's then chief executive officer, Marius Jooste, and other executives of the Steinhoff group or were controlled by Jooste and such other executive;

20.3. within the Steinhoff group, fictitious or irregular income was created at an intermediary level, and then allocated to underperforming operating entities as so-called "contributions" that took different forms and either increased income or reduced expenses in those operating entities;

20.4. documents supporting fictitious or irregular transactions were often created after the fact and backdated;



20.5. the assets and income of certain of the defendant's European subsidiary companies were materially overstated and/or their liabilities materially understated;

20.6. it had the effect of overstating the defendant's and Steinhoff NV's financial position, and thus overvaluing the BVI shares.

21. The representation was:

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

21.2. alternatively, negligent;

21.3. in any event, made wrongfully.

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

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

The revelation of the misrepresentation and the reduced value of the BVI shares

24. The misrepresentation perpetrated in the manner set out above, was revealed as follows:

24.1. On 5 December 2017 Steinhoff NV released an *ad hoc* announcement advising the market that its audited results had been delayed pending further investigation.

24.2. On 6 December 2017 Jooste resigned as chief executive officer of Steinhoff NV, and the price at which Steinhoff NV's shares traded on both the Frankfurt Stock Exchange and the JSE declined significantly.

24.3. On 2 January 2018 Steinhoff NV announced that its audited financial statements for the 2015 and 2016 financial years could not be relied upon and withdrew such statements, thereby confirming media reports regarding misstatements in Steinhoff NV's and the defendant's financial statements, including the 2014 AFS, that had commenced at the approximate time of the *ad hoc* announcement of 5 December 2017.

25. As a result of the aforesaid revelations, the value of BVI's shareholding in Steinhoff NV, and thus the value of the BVI shares, declined dramatically.



The value of the underpin and compliance with the conditions

26. The underpin was to be calculated with reference to clause 3.3 of annexure A to the second addendum, which refers to clause 4.1 of the "BVI put and call option agreement" and clause 4.1 of the "BVI2 put and call option agreement".

27. The 'BVI put and call agreement' referred to in the second addendum was concluded in writing between the plaintiff, C H Wiese, Titan Premier Investments (Pty) Ltd and BVI on or about 31 January 2013 and at Parow, Western Cape ('the BVI put and call option agreement').

27A. In concluding the BVI put and call agreement, the plaintiff and C H Wiese acted personally and Titan Premier Investments (Pty) Ltd and BVI were represented by C H Wiese and Bruce Baisley, respectively. A copy of the BVI put and call option agreement is attached marked "F".

28. The 'BVI2 put and call agreement' referred to in the second addendum was concluded in writing between the plaintiff, C H Wiese, Titan Premier Investments (Pty) Ltd and BVI2 on or about 24 June 2014 and at Parow, Western Cape ('the BVI2 put and call option agreement').

28A. In concluding the BVI2 put and call agreement, the plaintiff and C H Wiese acted personally and Titan Premier Investments (Pty) Ltd and BVI were represented by C H Wiese and Bruce Baisley, respectively. A copy of the BVI2 put and call option agreement is attached marked "G".



29. As at 30 September 2018, the combined value of the BVI and BVI2 shares, calculated with reference to the put and call option agreements (or otherwise) was nil.

30. The conditions for payment of the special bonus in terms of the underpin provisions contained in the second addendum were met in that:

30.1. the PAT (as defined) earned during 2017/2018 exceeded R104 000 000;
and

30.2. the combined value of the BVI and BVI2 shares, calculated with reference to the BVI and BVI2 put and call option agreements (or otherwise) on 30 September 2018, was nil, and therefore less than the R50 636 968 referred to in clause 3.3 of annexure A to the second addendum.

31. But for the representation, the plaintiff would have been entitled to a special bonus of R69 443 527, calculated with reference to the formula set out in clause 3.3 of the second addendum, as set out in annexure "H".

32. In the premises, the plaintiff would, but for the representation and the conclusion of the third addendum, have been entitled to payment of the underpin calculated in accordance with the formula in clause 3.3 of annexure A to the second addendum, in the amount of R69 443 527.



The plaintiff's damages

33. Accordingly and as a result of the defendant's misrepresentation, the plaintiff has suffered damages in the amount of R69 443 527, being the underpin that he would have received had he not concluded the third addendum.

34. Despite demand, the defendant has failed and/or refused and/or neglected to pay the aforesaid amount, or any part thereof.

The plaintiff's alternative claim in terms of section 218 of the Companies Act

35. In terms of section 218(2) of the Companies Act, any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by the latter person as a result of that contravention.

36. By its publication to the general public, including the plaintiff, of the 2014 AFS, and of the material misstatements contained therein (as described above), the defendant contravened various provisions of the Companies Act, including:

36.1. section 22(1), in that the defendant carried on its business recklessly, with gross negligence, with intent to defraud persons (including the plaintiff), and for a fraudulent purpose;

36.2. section 28(1), in that the defendant failed to keep accurate and complete accounting records as necessary to enable it to satisfy its obligations in

terms of the Act with respect to the preparation of financial statements, such obligations being set out in section 29(1) of the Act;

36.3. section 28(3), in that the defendant, with an intention to deceive or mislead the general public, including the plaintiff, failed to keep accurate or complete accounting records and falsified or permitted to be falsified its accounting records;

36.4. section 29(1), in that the defendant provided financial statements, including annual financial statements, to the general public, including the plaintiff, which did not present fairly the state of affairs and business of the defendant and did not accurately explain the transactions and financial position of the business of the defendant and which did not accurately show the defendant's assets, liabilities and equity;

36.5. section 29(2), in that the 2014 AFS prepared by the defendant were false and misleading in material respects, or incomplete in material particulars.

37. The plaintiff has suffered loss or damage as a result of the aforesaid contraventions, as set out in paragraph 33 above.

38. In terms of section 218(2) of the Companies Act, the defendant is liable to the plaintiff for the loss or damage suffered by him, as set out in paragraph 33 above.

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WHEREFORE the plaintiff claims:

- (a) Payment in an amount of R69 443 527;
- (b) Interest on the aforesaid amount at the prescribed rate *a tempora morae* to date of payment;
- (c) Further and/or alternative relief;
- (d) Costs of suit.

DATED at **CAPE TOWN** on this the _____ day of **DECEMBER** 2019.

I C BREMRIDGE SC

M MADDISON
Plaintiff's counsel

C&A FRIEDLANDER
Plaintiff's attorneys

Per: _____

J WILLIAMS

3rd Floor
42 Keerom Street

CAPE TOWN

[Ref.: JAW/MBM/WH8171]

[Tel.: 021 487 7900]

To : **THE REGISTRAR**
HIGH COURT



CAPE TOWN

And to: **STEINHOFF INTERNATIONAL HOLDINGS (PROPRIETARY)
LIMITED**

Defendant

Block D

De Wagenweg Office Park

Stellentia Road

STELLENBOSCH

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First Applicant

HAMILTON 2 BV Second Applicant

Second Applicant

and

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD

Third Respondent

SUPPORTING AFFIDAVIT

I, the undersigned,

MSM
DS

MICHAEL JOHN MORRIS

do hereby make oath and say:

1. I am an adult businessman currently residing at House 2, 45 Rathfelder Avenue, Constania, Western Cape.

2. The facts deposed to herein are within my personal knowledge, save where the context indicates the contrary, and are furthermore true and correct. Where I refer to information conveyed to me by others, I verily believe such information to be true.

3. I have read the affidavits in the application for declaratory relief (*"the declaratory application"*) instituted by Hamilton BV and Hamilton 2 BV against Steinhoff International Holdings (Proprietary) Limited (*"SIHPL"*).

4. I have also read the founding affidavit of Johann Dirk Enslin in support of the urgent application by Trevo Capital Limited (*"Trevo"*) for leave to intervene in the declaratory application, and for an order that other creditors be afforded an opportunity to apply to intervene in the declaratory application and to advance submissions concerning the relief sought by Hamilton in the declaratory application.

5. I have not yet had the opportunity to take full legal advice as to whether to intervene in the declaratory application and require an opportunity to do so. For the reasons set out below, however, I support Trevo's application. More

MSW



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6. I respectfully submit that I should be afforded the opportunity to intervene in the declaratory application after fully considering my position, should I be so minded and advised, and to advance my case regarding the appropriate determination of classes.

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Mr Paul Ronald Potter, and I instituted action against SIHPL on 6 December 2019; and

Mr Andre Frederick Botha, Mr Peter Andrew Berry, Mr Francois Johan Malan and Mr Warren Wendell Steyn instituted action against SIHPL on 15 June 2020.

8. Our claims are premised on a similar cause of action namely that we have suffered damages in consequence of being induced by a misrepresentation made by SIHPL's representatives to conclude certain contractual arrangements and give up certain financial benefits contractually provided for

DP

and which benefits (in particular the payment of a substantial bonus or guarantee hereinafter referred to as "*the underpin*") would, but for the agreement(s) concluded in reliance on the misrepresentation, have accrued to the said plaintiffs (referred to below as "*the underpin creditors*").

9. The underpin creditors claim that they were induced to conclude these contractual arrangements and forego these financial benefits on the basis of a misrepresentation as to the value of their interest in Steinhoff International Holdings NV made in particular by way of the publication of the 2014 annual financial statements of that company's subsidiary and principal asset, SIHPL.

10. Relying on that misrepresentation the underpin creditors agreed to relinquish their entitlement to the underpin, which they would not have done but for the misrepresentation in which event the underpin would have become due and payable to them in a substantial amount.

11. In this regard, at the time that the contractual arrangements and the release of the underpin was being negotiated, SIHPL's representatives, more particularly Mr Merkus Jooste (being simultaneously a director of Pepkor), were aware of the negotiations and the reliance that would be placed by the public in general, and by the underpin creditors in particular, upon the representation.

12. In consequence, the underpin creditors suffered damages in amounts equivalent to that which they would, but for the misrepresentation, have received by way of the underpin.

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13. The further details of the claim are set out in the particulars of claim annexed hereto as "*MJM1*".

THE DECLARATORY APPLICATION

14. SIHPL intends to propose a compromise of its financial obligations with three classes of its creditors in terms of section 155 of the Act ("*the proposal*"). The "classes" into which SIHPL has purported to divide the aforementioned creditors are dealt with in further detail below.

15. The broad terms of the proposal are set out in a term sheet that has been available on the Steinhoff NV website since 27 July 2020 (annexure **FA2.3** to Hamilton's founding affidavit in the declaratory application). The terms were slightly updated and then republished on Steinhoff NV's website on 9 October 2020. A copy of the updated term sheet ("*the term sheet*") is annexure **JE1** to Mr Enslin's affidavit.

16. The three "classes" of creditor referred to in the term sheet are the SIHPL ~~and~~ GPU Creditors ("*the EC class*"), the SIHPL Contractual Claimants ("*the CC class*"), and the SIHPL Market Purchase Claimants ("*the MPC class*").

17. As to the classification of the underpin creditors' claims in the proposal, SIHPL has specifically excluded the underpin creditors from any potential payment to be made in terms of the proposal and has classified the underpin claimants as "*Non-Qualifying Claims*".

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18. This is so although the claims of other creditors who are proposed to receive a dividend under the proposal are also disputed. By way of example, SIHPL contends that the claims of both the MPC creditors and the underpin claimants have no prospects of success yet the MPC creditors are proposed to receive a dividend while the underpin creditors are excluded from any dividend and classified as non-qualifying.

19. This is despite the fact that the legal merits of their claims are contended to be identical.

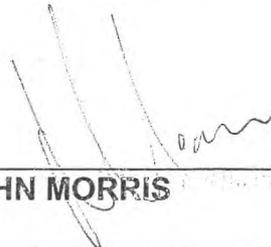
20. Clearly the classification is arbitrary and designed to serve SIHPL's tactical ends. By tactically classifying the claims in this manner SIHPL seeks to manipulate the outcome of the vote to its own ends.

21. By way of the declaratory application, Hamilton seeks relief that would prevent the proposal from being adopted by SIHPL's creditors or from being sanctioned by a court.

22. Hamilton contends in particular that the CC class and the MPC class cannot constitute a "class of creditor" in terms of section 155 of the Act, because both classes comprise concurrent creditors. Instead, says Hamilton, the classes envisaged by section 155 are those recognised in insolvency law: concurrent creditors, secured creditors, and statutory preferent creditors. Moreover, Hamilton contends – in effect – that the proposed settlement with the CC class is unfair and inequitable and thus not sanctionable by a court in due course.

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- 23. I agree with Hamilton that the proposal, as it is currently envisaged in the terms of the proposal sheet, cannot be sanctioned by a court and that it is unfair and inequitable.
- 24. I contend further that the proposal is fundamentally flawed, *inter alia*, for the reasons set out in paragraph 48. of Mr Enslin's affidavit.
- 25. In consequence, I respectfully concur that SIHPL's classification of creditors as currently contained in the proposal renders the proposal unsanctionable by a court.



MICHAEL JOHN MORRIS

I certify that:

i. The Deponent acknowledged to me that:
 a. He knows and understands the contents of this declaration;
 b. He has no objection to taking the prescribed oath; and
 c. He considers the prescribed oath to be binding on his conscience.
 The Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God."
 The Deponent signed this declaration in my presence at Cape Town on the 17th day of February, 2020. *DP*

COMMISSIONER OF OATHS

D Pearce
COMMISSIONER OF OATHS

Full names: Dylan Pearce
 Designation and area: CA (SA)
 Street address: 2 Fir Street, OBSERVATORY, Cape Town

I certify that the DEPONENT has acknowledged that he/she knows and understands the content of any objection to taking the oath, and that he/she considers it to be binding on his/her conscience before me at Cape Town on this the 17th day of February and that the regulations contained in Government Gazette No. R1238 of July 1974, as amended.

D Pearce
COMMISSIONER OF OATHS (R.S.A.)
Dylan Bradley Pearce CA (SA)

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PARTICULARS OF CLAIM

The parties

1. The plaintiff is Michael John Morris, a businessman currently residing at House 2, 45 Rathfelder Avenue, Constanza, Western Cape.
2. The defendant is Steinhoff International Holdings (Proprietary) Limited (formerly Steinhoff International Holdings Limited), a company duly incorporated with limited liability in terms of the company laws of South Africa and having its principle place of business at Block D, De Wagenweg Office Park, Stellenia Road, Stellenbosch.

The acquisition of shares and the service agreement

In or about April 2010 Plaintiff and a company being Pepkor Holdings (Pty) Ltd ('Pepkor'), commenced negotiations for the acquisition by Pepkor of plaintiff's shareholding in a company being Future Cell Proprietary Limited ('Future Cell') pursuant to which and in or about mid-2010, Pepkor acquired a controlling share in Future Cell.

4. In anticipation, alternatively in consequence of such sale of shares and on or about 1 July 2010, and at Pretoria, the plaintiff concluded a written service agreement with Future Cell, a copy of which is attached marked "A", in terms of

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which, inter alia, the plaintiff would (notwithstanding the sale of his shares to Pepkor) continue to provide services to Future Cell ('the service agreement'). In concluding this agreement, the plaintiff acted personally, and Future Cell was represented by Pieter Boucher.

The sale of shares agreement and BVI sale of shares agreement

5. In terms of a written agreement concluded on 30 January 2013 and at Parow, Western Cape ('the sale of shares agreement'), the plaintiff sold all of the shares which he then owned in Future Cell to Pepkor. In concluding the sale of shares agreement, the plaintiff acted personally, Pepkor was represented by Pieter Erasmus and Future Cell was represented by C J Klem.

6. A copy of the sale of shares agreement is annexed marked "B.1".

6A. In terms of a written agreement concluded on or about 31 January 2013 and at Parow, Western Cape ('the BVI sale of shares agreement'), the plaintiff purchased from Pepkor 329 581 ordinary shares in the company Business Ventures Investments No 1499 (RF) (Pty) Ltd ('BVI'), which at the time held some 16 104 262 ordinary shares in Pepkor. In concluding the agreement, the plaintiff acted personally, Pepkor was represented by Pieter Erasmus and BVI was represented by Bruce Baisley.

7. A copy of the BVI sale of shares agreement is annexed marked "B.2".

The first addendum

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8. On or about 21 May 2013, and at Parow, the plaintiff, acting personally, and Future Cell, represented by C J Klem, concluded a written addendum to the service agreement, a copy of which is attached marked "C" ('the first addendum').

9. In terms of annexure "A" to the first addendum, the plaintiff was entitled, *inter alia*, to payment of a special bonus (referred to by the parties, and in what follows, as the 'underpin') in the event that:

9.1. the profit after taxation of Future Cell and two associated entities, Flash Mobile Vending (Pty) Ltd and Flash IP (Pty) Ltd earned during the 2017/2018 financial year, exceeded R104 000 000 ('the PAT') (clause 3.1, read with the definitions in clause 3.2); and

9.2. the value of the BVI shares, calculated as at 30 September 2018 and in accordance with the provisions of a separate Put and Call Option agreement between BVI and the plaintiff was below R50 636 968 (such underpin to be calculated in accordance with the formula set out in clause 3.3 of the said annexure A to the first addendum) (clause 3.3 read with the definitions in clause 3.2).

The second addendum

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10. On or about 10 July 2014, and at Parow, the plaintiff, acting personally, concluded a second, written addendum to the service agreement, a copy of which is attached marked "D" ('the second addendum').

11. The second addendum was concluded with Flash Mobile Vending (Pty) ('Flash Mobile'), represented by C J Klem, as the business of Future Cell and Flash Mobile had at that time been merged in terms of section 113 of the Companies Act, 71 of 2008 ('the Companies Act'), and the rights and obligations of Future Cell in terms of the service agreement and the first addendum had been transferred to Flash Mobile.

12. The second addendum amended the service agreement (and the first addendum) and provided that the plaintiff was entitled, *inter alia*, to payment of the underpin in the event that:

12.1. the profit after taxation of Future Cell, Flash Mobile and Flash IP (Pty) Ltd earned during the 2017/2018 financial year, exceeded R104 000 000 ('the PAT') (clause 3.1, read with the definitions in clause 3.2); and

12.2. the value of the BVI and BVI2 shares (being the shares referred to in the Put and Call Option agreements referred to below), calculated as at 30 September 2018 and in accordance with the provisions of two separate Put and Call Option agreements between BVI and a related entity, K2013137280 (Pty) Ltd ('BVI2') and the plaintiff, was below R50 636 968 (such underpin to be calculated in accordance with the

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formula set out in clause 3.3 of the said annexure A to the second addendum) (clause 3.3 read with the definitions in clause 3.2).

The arrangement between the defendant, Pepkor, BVI and Steinhoff NV

13. During February 2015:

13.1. Pepkor undertook a share buy-back and purchased the shares which BVI held in Pepkor, for an amount of R3 080 242 835;

13.2. BVI subscribed for 32 215 class D ordinary shares in Newshelf 1093 (Pty) Ltd ('Newshelf') at a purchase consideration of R3 080 242 835;

13.3. BVI, the defendant and Steinhoff Africa Holdings (Pty) Ltd concluded an exchange agreement ('the exchange agreement') pursuant to which BVI exchanged its shares in Newshelf for 51 703 157 ordinary shares in the defendant at an issue price of R57 per share;

13.4. The defendant was at the time a public company listed on the main board of the Johannesburg Stock Exchange ('JSE');

13.5. The resultant value ascribed by the parties to the exchange agreement to the ordinary shares in the defendant acquired by BVI as aforesaid, was R2 947 079 949.

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14. Pursuant to a scheme of arrangement implemented in or about December 2015:

14.1. the defendant was converted to a private company;

14.2. its listing on the JSE was terminated;

14.3. it became a wholly-owned subsidiary of Steinhoff International Holdings NV ('Steinhoff NV'), a public company listed on the Frankfurt Stock Exchange and inwardly listed on the main board of the JSE; and

14.4. BVI's 51 703 157 ordinary shares in the defendant were exchanged for an equal number of shares in Steinhoff NV, on the basis that Steinhoff NV's only asset, or only significant asset, was its shareholding in the defendant.

15. As a result of the aforesaid scheme of arrangement ('the scheme of arrangement'), BVI became a shareholder in Steinhoff NV.

The third addendum

16. Subsequent to the arrangement described above, and on or about 5 May 2015 and at Durban, the plaintiff, acting personally and in reliance on the representation set out below, concluded a written, third addendum to the service agreement with Flash Mobile, represented by C J Klem, ('the third addendum'), which provided for the deletion of the underpin provisions and as a result of which the plaintiff relinquished his right to the underpin. A copy of the third addendum is attached marked "E".

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The plaintiff's claim in delict

(i) The representation

17. Prior to and at the time of the conclusion of the third addendum and the deletion of the underpin effected thereby, the defendant represented that its financial position was as it appeared from the defendant's 2014 annual financial statement ('the 2014 AFS') ('the representation').

18. The representation was made by:

18.1. the publication to the general public, including the plaintiff, of the 2014 AFS; and

18.2. the defendant's failure to advise the general public, including the plaintiff, of the false statements included in the 2014 AFS which could or would have constituted price-sensitive information regarding defendant's shares and thus the value of the BVI shares.

19. The defendant was obliged to advise the plaintiff, as member of the general public, of the false statements in the 2014 AFS in that:

19.1. the true facts regarding its financial position were within the defendant's exclusive knowledge;

19.2. the defendant and its executives knew and intended, alternatively ought to have known, that the general public, including the plaintiff, would rely

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on the representation of the defendant's financial position as it appeared from the 2014 AFS.

20. The representation was false, in that:

20.1. various transactions had been structured and implemented which had the result of substantially inflating the profit and asset values of the Steinhoff group (until August 2015 the defendant and its subsidiary companies) over an extended period;

20.2. fictitious or irregular transactions were entered into with parties said to be, and made to appear to be third-party entities and independent of the Steinhoff group and its executives, but which were in fact closely related to the defendant's then chief executive officer, Markus Jooste, and other executives of the Steinhoff group or were controlled by Jooste and such other executive;

20.3. within the Steinhoff group, fictitious or irregular income was created at an intermediary level, and then allocated to underperforming operating entities as so-called "contributions" that took different forms and either increased income or reduced expenses in those operating entities;

20.4. documents supporting fictitious or irregular transactions were often created after the fact and backdated;

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20.5. the assets and income of certain of the defendant's European subsidiary companies were materially overstated and/or their liabilities materially understated;

20.6. it had the effect of overstating the defendant's and Steinhoff NV's financial position, and thus overvaluing the BVI shares.

21. The representation was:

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

21.2. alternatively, negligent;

21.3. in any event, made wrongfully.

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

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

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The revelation of the misrepresentation and the reduced value of the BVI shares

24. The misrepresentation perpetrated in the manner set out above, was revealed as follows:

24.1. On 5 December 2017 Steinhoff NV released an *ad hoc* announcement advising the market that its audited results had been delayed pending further investigation.

24.2. On 6 December 2017 Jooste resigned as chief executive officer of Steinhoff NV, and the price at which Steinhoff NV's shares traded on both the Frankfurt Stock Exchange and the JSE declined significantly.

24.3. On 2 January 2018 Steinhoff NV announced that its audited financial statements for the 2015 and 2016 financial years could not be relied upon and withdrew such statements, thereby confirming media reports regarding misstatements in Steinhoff NV's and the defendant's financial statements, including the 2014 AFS, that had commenced at the approximate time of the *ad hoc* announcement of 5 December 2017.

25. As a result of the aforesaid revelations, the value of BVI's shareholding in Steinhoff NV, and thus the value of the BVI shares, declined dramatically.

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The value of the underpin and compliance with the conditions

26. The underpin was to be calculated with reference to clause 3.3 of annexure A to the second addendum, which refers to clause 4.1 of the "BVI put and call option agreement" and clause 4.1 of the "BVI2 put and call option agreement".

27. The 'BVI put and call agreement' referred to in the second addendum was concluded in writing between the plaintiff, C H Wiese, Titan Premier Investments (Pty) Ltd and BVI on or about 31 January 2013 and at Parow, Western Cape (**'the BVI put and call option agreement'**).

27A In concluding the BVI put and call agreement, the plaintiff and C H Wiese acted personally and Titan Premier Investments (Pty) Ltd and BVI were represented by C H Wiese and Bruce Baisley, respectively. A copy of the BVI put and call option agreement is attached marked "F".

28. The 'BVI2 put and call agreement' referred to in the second addendum was concluded in writing between the plaintiff, C H Wiese, Titan Premier Investments (Pty) Ltd and BVI2 on or about 24 June 2014 and at Parow, Western Cape (**'the BVI2 put and call option agreement'**).

28A In concluding the BVI2 put and call agreement, the plaintiff and C H Wiese acted personally and Titan Premier Investments (Pty) Ltd and BVI were represented by C H Wiese and Bruce Baisley, respectively. A copy of the BVI2 put and call option agreement is attached marked "G".

29. As at 30 September 2018, the combined value of the BVI and BVI2 shares, calculated with reference to the put and call option agreements (or otherwise) was nil.

30. The conditions for payment of the special bonus in terms of the underpin provisions contained in the second addendum were met in that:

30.1. the PAT (as defined) earned during 2017/2018 exceeded R104 000 000;
and

30.2. the combined value of the BVI and BVI2 shares, calculated with reference to the BVI and BVI2 put and call option agreements (or otherwise) on 30 September 2018 was nil, and therefore less than the R50 636 968 referred to in clause 3.3 of annexure A to the second addendum.

31. But for the representation, the plaintiff would have been entitled to a special bonus of R69 443 527, calculated with reference to the formula set out in clause 3.3. of the second addendum, as set out in annexure "H".

32. In the premises, the plaintiff would, but for the representation and the conclusion of the third addendum, have been entitled to payment of the underpin calculated in accordance with the formula in clause 3.3 of annexure A to the second addendum, in the amount of R69 443 527.

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The plaintiff's damages

33. Accordingly and as a result of the defendant's misrepresentation, the plaintiff has suffered damages in the amount of R69 443 527, being the underpin that he would have received had he not concluded the third addendum.

34. Despite demand, the defendant has failed and/or refused and/or neglected to pay the aforesaid amount, or any part thereof.

The plaintiff's alternative claim in terms of section 218 of the Companies Act

35. In terms of section 218(2) of the Companies Act, any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by the latter person as a result of that contravention.

36. By its publication to the general public, including the plaintiff, of the 2014 AFS, and of the material misstatements contained therein (as described above), the defendant contravened various provisions of the Companies Act, including:

36.1 section 22(1), in that the defendant carried on its business recklessly; with gross negligence, with intent to defraud persons (including the plaintiff), and for a fraudulent purpose;

36.2 section 28(1), in that the defendant failed to keep accurate and complete accounting records as necessary to enable it to satisfy its obligations in

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terms of the Act with respect to the preparation of financial statements,
such obligations being set out in section 29(1) of the Act;

36.3. section 28(3), in that the defendant, with an intention to deceive or
mislead the general public, including the plaintiff, failed to keep accurate
or complete accounting records and falsified or permitted to be falsified its
accounting records;

36.4. section 29(1), in that the defendant provided financial statements,
including annual financial statements, to the general public, including the
plaintiff, which did not present fairly the state of affairs and business of
the defendant and did not accurately explain the transactions and financial
position of the business of the defendant and which did not accurately
show the defendant's assets, liabilities and equity;

36.5. section 29(2), in that the 2014 AFS prepared by the defendant were false
and misleading in material respects, or incomplete in material particulars.

37. The plaintiff has suffered loss or damage as a result of the aforesaid
contraventions, as set out in paragraph 33 above.

38. In terms of section 218(2) of the Companies Act, the defendant is liable to the
plaintiff for the loss or damage suffered by him, as set out in paragraph 33 above.

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WHEREFORE the plaintiff claims:

- (a) Payment in an amount of R69 443 527;
- (b) Interest on the aforesaid amount at the prescribed rate *a tempora morae* to date of payment;
- (c) Further and/or alternative relief;
- (d) Costs of suit.

DATED at **CAPE TOWN** on this the _____ day of **DECEMBER** 2019.

I C BREMRIDGE SC

M MADDISON

Plaintiff's counsel

C&A FRIEDLANDER

Plaintiff's attorneys

Per: _____

J WILLIAMS

3rd Floor

42 Keerom Street

CAPE TOWN

[Ref.: JAW/MBM/WH8171]

[Tel.: 021 487 7900]

To : **THE REGISTRAR**
HIGH COURT

OP
M.W.

CAPE TOWN

And to: **STEINHOFF INTERNATIONAL HOLDINGS (PROPRIETARY)
LIMITED**

Defendant

Block D

De Wagenweg Office Park

Stellentia Road

STELLENBOSCH

*DR
man*

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

Case No: 17327 / 2020

In the application between:

TREVO CAPITAL LTD

Applicant / Intervening Party

and

HAMILTON BV

First Respondent

HAMILTON 2 BV

Second Respondent

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD

Third Respondent

In re the matter between:

HAMILTON BV

First Applicant

HAMILTON 2 BV

Second Applicant

and

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD

Third Respondent

SUPPORTING AFFIDAVIT

I, the undersigned,

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PETER ANDREW BERRY

do hereby make oath and say:

1. I am an adult businessman currently residing at 4913 Valley Road, Hout Bay, Western Cape.
2. The facts deposed to herein are within my personal knowledge, save where the context indicates the contrary, and are furthermore true and correct. Where I refer to information conveyed to me by others, I verily believe such information to be true.
3. I have read the affidavits in the application for declaratory relief ("*the declaratory application*") instituted by Hamilton BV and Hamilton 2 BV (collectively referred to as "*Hamilton*") against Steinhoff International Holdings (Proprietary) Limited ("*SIHL*").
4. I have also read the founding affidavit of Johann-Dirk Enslin in support of the urgent application by Trevo Capital Limited ("*Trevo*") for leave to intervene in the declaratory application, and for an order that other creditors be afforded an opportunity to apply to intervene in the declaratory application and to advance submissions concerning the relief sought by Hamilton in the declaratory application.
5. I have not yet had the opportunity to take full legal advice as to whether to intervene in the declaratory application and require an opportunity to do so. For the reasons set out below, however, I support Trevo's application. More



particularly, I agree with the contentions advanced in Mr Enslin's affidavit regarding the approaches adopted by both Hamilton and SIHPL to the determination of classes for the purposes of a compromise in terms of section 155 of the Companies Act 71 of 2008 ("the Act").

6. I respectfully submit that I should be afforded the opportunity to intervene in the declaratory application after fully considering my position, should I be so minded and advised, and to advance my case regarding the appropriate determination of classes.

MY CLAIM AGAINST SIHPL

7. Messrs Michael John Morris, Paul Ronald Potter, Andre Frederick Botha, Francois Johan Malan, Warren Wendell Steyn and I contend that we are creditors of SIHPL and have all instituted action against SIHPL, as follows:

7.1. Mr Paul Ronald Potter and Michael John Morris instituted action against SIHPL on 6 December 2019; and

7.2. Mr Andre Frederick Botha, Mr Francois Johan Malan, Mr Warren Wendell Steyn and I instituted action against SIHPL on 15 June 2020.

8. Our claims are premised on a similar cause of action namely that we have suffered damages in consequence of being induced by a misrepresentation made by SIHPL's representatives to conclude certain contractual arrangements and give up certain financial benefits contractually provided for

and which benefits (in particular the payment of a substantial bonus or guarantee hereinafter referred to as "*the underpin*") would, but for the agreement(s) concluded in reliance on the misrepresentation, have accrued to the said plaintiffs (referred to below as "*the underpin creditors*").

9. The underpin creditors claim that they were induced to conclude these contractual arrangements and forego these financial benefits on the basis of a misrepresentation as to the value of their interest in Steinhoff International Holdings NV made in particular by way of the publication of the 2014 annual financial statements of that company's subsidiary and principal asset, SIHPL.
10. Relying on that misrepresentation the underpin creditors agreed to relinquish their entitlement to the underpin, which they would not have done but for the misrepresentation in which event the underpin would have become due and payable to them in a substantial amount.
11. In this regard, at the time that the contractual arrangements and the release of the underpin was being negotiated, SIHPL's representatives, more particularly Mr. Markus Jooste (being simultaneously a director of Pepkor), were aware of the negotiations and the reliance that would be placed by the public in general and by the underpin creditors in particular, upon the representation.
12. In consequence, the underpin creditors suffered damages in amounts equivalent to that which they would, but for the misrepresentation, have received by way of the underpin.

13. The further details of the claim are set out in the particulars of claim annexed hereto as "**PAB1**".

THE DECLARATORY APPLICATION

14. SIHPL intends to propose a compromise of its financial obligations with three classes of its creditors in terms of section 155 of the Act ("*the proposal*"). The "classes" into which SIHPL has purported to divide the aforementioned creditors are dealt with in further detail below.
15. The broad terms of the proposal are set out in a term sheet that has been available on the Steinhoff NV website since 27 July 2020. (annexure **FA2.3** to Hamilton's founding affidavit in the declaratory application). The terms were slightly updated and then republished on Steinhoff NV's website on 9 October 2020. A copy of the updated term sheet ("*the term sheet*") is annexure **JE1** to Mr Enslin's affidavit.
16. The three "classes" of creditor referred to in the term sheet are the SIHPL CPU Creditors ("*the FC class*"), the SIHPL Contractual Claimants ("*the CC class*"), and the SIHPL Market Purchase Claimants ("*the MPC class*").
17. As to the classification of the underpin creditors' claims in the proposal, SIHPL has specifically excluded the underpin creditors from any potential payment to be made in terms of the proposal and has classified the underpin claimants as "*Non-Qualifying Claims*".


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18. This is so although the claims of other creditors who are proposed to receive a dividend under the proposal are also disputed. By way of example, SIHPL contends that the claims of both the MPC creditors and the underpin claimants have no prospects of success yet the MPC creditors are proposed to receive a dividend while the underpin creditors are excluded from any dividend and classified as non-qualifying.
19. This is despite the fact that the legal merits of their claims are contended to be identical.
20. Clearly the classification is arbitrary and designed to serve SIHPL's tactical ends. By tactically classifying the claims in this manner SIHPL seeks to manipulate the outcome of the vote to its own ends.
21. By way of the declaratory application, Hamilton seeks relief that would prevent the proposal from being adopted by SIHPL's creditors or from being sanctioned by a court.
22. Hamilton contends in particular that the CC class and the MPC class cannot constitute a "class of creditor" in terms of section 155 of the Act, because both classes comprise concurrent creditors. Instead, says Hamilton, the classes envisaged by section 155 are those recognised in insolvency law: concurrent creditors, secured creditors, and statutory preferent creditors. Moreover, Hamilton contends – in effect – that the proposed settlement with the CC class is unfair and inequitable and thus not sanctionable by a court in due course.



- 23. I agree with Hamilton that the proposal, as it is currently envisaged in the term sheet, cannot be sanctioned by a court and that it is unfair and inequitable.
- 24. I contend further that the proposal is fundamentally flawed, *inter alia*, for the reasons set out in paragraph 48. of Mr Enslin's affidavit.
- 25. In consequence, I respectfully concur that SIHPL's classification of creditors as currently contained in the proposal renders the proposal unsanctionable by a court.



PETER ANDREW BERRY

I certify that:

- i. The Deponent acknowledged to me that:
 - a. He knows and understands the contents of this declaration;
 - b. He has no objection to taking the prescribed oath; and
 - c. He considers the prescribed oath to be binding on his conscience.
- ii. The Deponent, thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God."
- iii. The Deponent signed this declaration in my presence at CAPE TOWN on the 16TH day of FEBRUARY 2020 2021



COMMISSIONER OF OATHS

Full names: ELZETTE CRONJE

Designation and area: CHARTERED ACCOUNTANT (SA)

Street address: 62 ONSERWACHT COMPLEX, OFF OFFEN, BELVILLE, 7530.

COMMISSIONER OF OATHS
ELZETTE CRONJE
 CHARTERED ACCOUNTANT (SA)
 SECTION 2
 17 NEW CHURCH STREET
 CAPE TOWN, 8001
 SIGN: 


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PARTICULARS OF CLAIM

The parties

1. The plaintiff is Peter Andrew Berry, a businessman currently residing at 4913 Valley Road, Hout Bay, Western Cape, 7806.
2. The defendant is Steinhoff International Holdings (Proprietary) Limited (formerly Steinhoff International Holdings Limited), a company with limited liability, duly incorporated in terms of the company laws of the Republic of South Africa with its principal place of business at Building B2 Vineyard Office Park, Corner Adam Tas and Devon Valley Roads, Stellenbosch, Western Cape, 7600.

The acquisition of the business and the conclusion of the service agreement

3. In or about December 2011, a company being Pepkor Capital (Proprietary) Ltd, which subsequently changed its name to Flash Mobile Vending (Proprietary) Limited ('Flash Mobile'), commenced negotiations for, inter alia, the acquisition of the business of Flash Mobile Cash (Proprietary) Limited, pursuant to which and in or about late-2011, Flash Mobile became the owner of the aforementioned business ('the business').
4. The plaintiff was a key individual in the business and accordingly, in anticipation alternatively in consequence of the sale of the business to Flash




Mobile and on or about 8 May 2012, at Parow, the plaintiff concluded a service agreement with Flash Mobile (then Pepkor Capital), a copy of which is attached marked "A", in terms of which, *inter alia*, the plaintiff would provide services to Flash Mobile ('the service agreement').

5. In concluding the service agreement the plaintiff acted personally and Flash Mobile was represented by CJ Klem.

The shares exchange agreement

6. As at 31 January 2013, the following companies held shares as set out below:

- 6.1. a company known as Odvest 155 (Proprietary) Limited ('Odvest') held one hundred percent of the issued share capital in Flash Mobile;

- 6.2. a company known as Pepkor Limited ('Pepkor') held seventy five percent of the issued shares in Odvest;

- 6.3. a company known as Little Swift Investment Holdings (Proprietary) Limited ('Little Swift') held twenty five percent of the issued shares in Odvest.

7. On or about 31 January 2013, Little Swift concluded an agreement entitled "Exchange Agreement" ('the shares exchange agreement') with Pepkor, Odvest and the company called Business Venture Investments No 1499 (RF) (Pty) Ltd ('BVI') in terms whereof Little Swift exchanged all of the shares



which it had previously held in Odvest for 480 031 ordinary shares in BVI ('the BVI shares').

8. The shares exchange agreement was concluded at Parow.
9. In concluding the shares exchange agreement the plaintiff represented Little Swift, Pepkor was represented by P J Erasmus, Odvest was represented by CJ Klem and BVI was represented by B Baisley.
10. A copy of the shares exchange agreement is annexed marked "B".
11. At the time of the conclusion of the shares exchange agreement, BVI held some 16 104 262 ordinary shares in Pepkor.

The first addendum

12. On or about 21 May 2013, the plaintiff and Flash Mobile concluded an addendum to the service agreement, a copy of which is attached marked "C" ('the first addendum').

13. The first addendum was concluded at Parow.
14. In concluding the first addendum the plaintiff acted personally and Flash Mobile was represented by CJ Klem.
15. In terms of annexure "A" to the first addendum, the plaintiff was entitled, *inter alia*, to payment of a special bonus, to be calculated in accordance with the formula set out in clause 3.3 of the said annexure A to the first addendum,



(referred to by the parties and in what follows, as the 'underpin') in the event that:

15.1. the profit after taxation of the combined businesses of Flash Mobile Vending (Pty) Ltd and two associated entities, Future Cell (Pty) Ltd and Flash IP (Pty) Ltd, earned during the 2017/2018 financial year ('the PAT'), exceeded R104 000 000 (clause 3.1, read with the definitions in clause 3.2); and

15.2. the value of the BVI shares, calculated as at 30 September 2018 and in accordance with the provisions of a separate Put and Call Option agreement between BVI and Little Swift, was below R96 194 849 (clause 3.3 read with the definitions in clause 3.2).

The second addendum

16. On or about 10 July 2014, the plaintiff and Flash Mobile concluded a second addendum to the service agreement, a copy of which is attached marked "D" ('the second addendum').

17. The second addendum was concluded at Parow.

18. In concluding the second addendum the plaintiff acted personally and Flash Mobile was represented by CJ Klem.



19. The second addendum amended the service agreement (and the first addendum) and provided that the plaintiff was entitled, *inter alia*, to payment of the underpin, in an amount to be calculated in accordance with the formula set out in clause 3.3 of annexure A to the second addendum, in the event that:

19.1. the PAT exceeded R104 000 000 (clause 3.1, read with the definitions in clause 3.2); and

19.2. the value of the BVI shares and BVI2 shares, being 76716 ordinary shares held by Little Swift in the company K2013137280 (Pty) Ltd ('BVI2'), calculated as at 30 September 2018 and in accordance with the provisions of two separate Put and Call Option agreements between BVI, the related entity BVI2 and Little Swift, detailed hereunder, was below R96 194 849 (clause 3.3 read with the definitions in clause 3.2).

The arrangement between the defendant, Pepkor, BVI and Steinhoff NV

20. During February 2015:

20.1. Pepkor undertook a share buy-back and purchased the shares which BVI held in Pepkor, for an amount of R3 080 242 835;

20.2. BVI subscribed for 32 215 class D ordinary shares in Newshelf 1093 (Pty) Ltd ('Newshelf') at a purchase consideration of R3 080 242 835;



20.3. BVI, the defendant and Steinhoff Africa Holdings (Pty) Ltd concluded an exchange agreement ('the exchange agreement') pursuant to which BVI exchanged its shares in Newshelf for 51 703 157 ordinary shares in the defendant at an issue price of R57 per share;

20.4. The defendant was at the time a public company listed on the main board of the Johannesburg Stock Exchange ('JSE');

20.5. The resultant value ascribed by the parties to the exchange agreement to the ordinary shares in the defendant acquired by BVI as aforesaid, was R2 947 079 949.

21. Pursuant to a scheme of arrangement implemented in or about December 2015:

21.1. the defendant was converted to a private company;

21.2. its listing on the JSE was terminated;

21.3. it became a wholly-owned subsidiary of Steinhoff International Holdings NV ('Steinhoff NV'), a public company listed on the Frankfurt Stock Exchange and inwardly listed on the main board of the JSE; and

21.4. BVI's 51 703 157 ordinary shares in the defendant were exchanged for an equal number of shares in Steinhoff NV, on the basis that Steinhoff NV's only asset, or only significant asset, was its shareholding in the defendant.



22. As a result of the aforesaid scheme of arrangement (**'the scheme of arrangement'**), BVI became a shareholder in Steinhoff NV.

The third addendum

23. Subsequent to the arrangement described above, on or about 18 May 2015 and at Cape Town, the plaintiff, acting personally and in reliance on the representation set out below, concluded a third addendum to the service agreement, (**'the third addendum'**), with Flash Mobile, represented by CJ Klem, which provided for the deletion of the underpin provisions and in terms of which the plaintiff relinquished his right to the underpin. A copy of this agreement is attached marked "E".

The plaintiff's claim in delict

(i) The representation

24. Prior to and at the time of the conclusion of the third addendum and the deletion of the underpin effected thereby, the defendant represented that its financial position was as it appeared from the defendant's 2014 annual financial statement (**'the 2014 AFS'**) (**'the representation'**).

25. The representation was made by:

- 25.1. the publication to the general public, including the plaintiff, of the 2014 AFS; and



25.2. the defendant's failure to advise the general public, including the plaintiff, of the false statements included in the 2014 AFS which could or would have constituted price-sensitive information regarding defendant's shares and thus the value of the BVI shares.

26. The defendant was obliged to advise the plaintiff, as member of the general public, of the false statements in the 2014 AFS in that:

26.1. the true facts regarding its financial position were within the defendant's exclusive knowledge;

26.2. the defendant and its executives knew and intended, alternatively ought to have known, that the general public, including the plaintiff, would rely on the representation of the defendant's financial position as it appeared from the 2014 AFS.

27. The representation was false, in that:

27.1. various transactions had been structured and implemented which had the result of substantially inflating the profit and asset values of the Steinhoff group (until August 2015 the defendant and its subsidiary companies) over an extended period;

27.2. fictitious or irregular transactions were entered into with parties said to be, and made to appear to be third-party entities and independent of the Steinhoff group and its executives, but which were in fact closely related



to the defendant's then chief executive officer, Markus Jooste, and other executives of the Steinhoff group or were controlled by Jooste and such other executives;

27.3. within the Steinhoff group, fictitious or irregular income was created at intermediary level, and then allocated to underperforming operating entities as so-called "contributions" that took different forms and either increased income or reduced expenses in those operating entities;

27.4. documents supporting fictitious or irregular transactions were often created after the fact and backdated;

27.5. the assets and income of certain of the defendant's European subsidiary companies were materially overstated and/or their liabilities materially understated;

27.6. it had the effect of overstating the defendant's and Steinhoff NV's financial position, and thus overvaluing the BVI shares.

28. The representation was:

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

28.2. alternatively, negligent;

[Handwritten signature]

28.3. in any event, made wrongfully.

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

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

The revelation of the misrepresentation and the reduced value of the BVI shares

31. The misrepresentation perpetrated in the manner set out above, was revealed as follows:

31.1. On 5 December 2017 Steinhoff NV released an *ad hoc* announcement advising the market that its audited results had been delayed pending further investigation.

31.2. On 6 December 2017 Jooste resigned as chief executive officer of Steinhoff NV, and the price at which Steinhoff NV's shares traded on both the Frankfurt Stock Exchange and the JSE declined significantly.

31.3. On 2 January 2018 Steinhoff NV announced that its audited financial statements for the 2015 and 2016 financial years could not be relied upon and withdrew such statements, thereby confirming media reports

regarding misstatements in Steinhoff NV's and the defendant's financial statements, including the 2014 AFS, that had commenced at the approximate time of the *ad hoc* announcement of 5 December 2017.

32. As a result of the aforesaid revelations, the value of BVI's shareholding in Steinhoff NV, and thus the value of the BVI shares, declined dramatically.

The value of the underpin and compliance with the conditions

33. The underpin was to be calculated with reference to clause 3.3 of annexure A to the second addendum, which refers to clause 4.1 of the "BVI put and call option agreement" and clause 4.1 of the "BVI2 put and call option agreement".

34. The 'BVI put and call option agreement' referred to in the second addendum was concluded in writing between Little Swift, C H Wiese, Titan Premier Investments (Pty) Ltd and BVI at Parow and on or about 31 January 2013 ('the BVI put and call option agreement'). A copy of the BVI put and call option agreement is attached marked "F".

35. In concluding the BVI put and call option agreement Little Swift was represented by the plaintiff, Dr C H Wiese acted personally and also represented Titan Premier Investments (Pty) Ltd and BVI was represented by Mr Bruce Baisley.

36. The 'BVI2 put and call option agreement' referred to in the second addendum was concluded in writing between Little Swift, C H Wiese, Titan Premier

Investments (Pty) Ltd and BVI2 on or about 18 June 2014 ('the BVI2 put and call option agreement'). A copy of the BVI2 put and call option agreement is attached marked "G".

37. In concluding the BVI2 put and call option agreement Little Swift was represented by the plaintiff, Dr C H Wiese acted personally and also represented Titan Premier Investments (Pty) Ltd and BVI2 was represented by Mr Bruce Baisley.

38. The conditions for payment of the special bonus in terms of the underpin provisions contained in the second addendum were met in that:

38.1. the PAT (as defined) earned during 2017/2018 exceeded R104 000 000;

and

38.2. the combined value of the BVI and BVI2 shares, calculated with

reference to the BVI and BVI2 put and call option agreements (or any

otherwise) on 30 September 2018 was nil, and therefore less than the

R96 194 849 referred to in clause 3.3 of annexure A to the second addendum.

39. But for the representation, the plaintiff would have been entitled to a special bonus of R92 337 904, calculated with reference to the formula set out in clause 3.3. of the second addendum, as set out in annexure "H".



40. In the premises, the plaintiff would, but for the representation and the conclusion of the third addendum, have been entitled to payment of the underpin calculated in accordance with the formula in clause 3.3 of annexure A to the second addendum, in the amount of R92 337 904.

The plaintiff's damages

41. Accordingly and as a result of the defendant's misrepresentation, the plaintiff has suffered damages in the amount of R92 337 904, being the underpin or bonus that he would have received had he not concluded the third addendum in reliance on that misrepresentation.

The plaintiff's alternative claim in terms of section 218 of the Companies Act

42. In terms of section 218(2) of the Companies Act, any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by the latter person as a result of that contravention.

43. By its publication to the general public, including the plaintiff, of the 2014 AFS, and of the material misstatements contained therein (as described above), the defendant contravened various provisions of the Companies Act, including:

43.1. section 22(1), in that the defendant carried on its business recklessly, with gross negligence, with intent to defraud persons (including the plaintiff), and for a fraudulent purpose;



43.2. section 28(1), in that the defendant failed to keep accurate and complete accounting records as necessary to enable it to satisfy its obligations in terms of the Act with respect to the preparation of financial statements, such obligations being set out in section 29(1) of the Act;

43.3. section 28(3), in that the defendant, with an intention to deceive or mislead the general public, including the plaintiff, failed to keep accurate or complete accounting records and falsified or permitted to be falsified its accounting records;

43.4. section 29(1), in that the defendant provided financial statements, including annual financial statements, to the general public, including the plaintiff, which did not present fairly the state of affairs and business of the defendant and did not accurately explain the transactions and financial position of the business of the defendant and which did not accurately show the defendant's assets, liabilities and equity;

43.5. section 29(2), in that the 2014 AFS prepared by the defendant were false and misleading in material respects, or incomplete in material particulars.

44. The plaintiff has suffered loss or damage as a result of the aforesaid contraventions, as set out in paragraph 43 above.

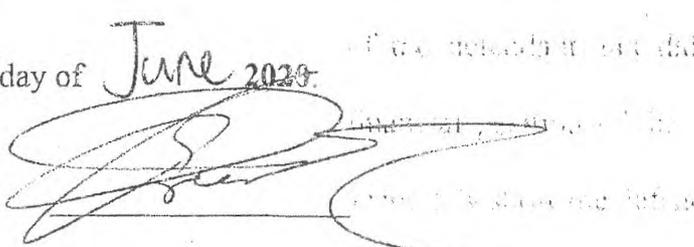
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45. In terms of section 218(2) of the Companies Act, the defendant is liable to the plaintiff for the loss or damage suffered by him, as set out in paragraph 42 above.

WHEREFORE the plaintiff claims:

- (a) Payment in an amount of R92 337 904;
- (b) Interest on the aforesaid amount at the prescribed rate *a tempore morae* to date of payment;
- (c) Further and/or alternative relief;
- (d) Costs of suit.

DATED at CAPE TOWN on this the 11th day of June 2020.



I C BREMRIDGE SC

Plaintiff's counsel

C&A FRIEDLANDER

Plaintiff's attorneys

Per: 
J WILLIAMS

3rd Floor
42 Keerom Street



CAPE TOWN

[Ref.: JAW/MBM/WH0257]

[Tel.: 021 487 7900]

To : **THE REGISTRAR
HIGH COURT
CAPE TOWN**

And to: **STEINHOFF INTERNATIONAL HOLDINGS (PROPRIETARY)
LIMITED
Building B2
Vineyard Office Park
Corner Adam Tas And Devon Valley Road
STELLENBOSCH**

Handwritten signature and initials in the bottom right corner of the page.

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

Case No: 17327 / 2020

In the application between:

TREVO CAPITAL LTD

Applicant / Intervening Party

and

HAMILTON BV

First Respondent

HAMILTON 2 BV

Second Respondent

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD

Third Respondent

In re the matter between:

HAMILTON BV

First Applicant

HAMILTON 2 BV

Second Applicant

and

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD

Third Respondent

SUPPORTING AFFIDAVIT

I, the undersigned,



ANDRE FREDERICK BOTHA

do hereby make oath and say:

1. I am an adult businessman currently residing at 11 Mimosa Crescent, Milnerton, 7441.
2. The facts deposed to herein are within my personal knowledge, save where the context indicates the contrary, and are furthermore true and correct. Where I refer to information conveyed to me by others, I verily believe such information to be true.
3. I have read the affidavits in the application for declaratory relief (*the declaratory application*) instituted by Hamilton BV and Hamilton 2 BV (collectively referred to as *Hamilton*) against Steinhoff International Holdings (Proprietary) Limited (*SIHPL*).
4. I have also read the founding affidavit of Johann-Dirk Enslin in support of the urgent application by Trevo Capital Limited (*Trevo*) for leave to intervene in the declaratory application, and for an order that other creditors be afforded an opportunity to apply to intervene in the declaratory application and to advance submissions concerning the relief sought by Hamilton in the declaratory application.
5. I have not yet had the opportunity to take full legal advice as to whether to intervene in the declaratory application and require an opportunity to do so. For the reasons set out below, however, I support Trevo's application. More



particularly, I agree with the contentions advanced in Mr Enslin's affidavit regarding the approaches adopted by both Hamilton and SIHPL to the determination of classes for the purposes of a compromise in terms of section 155 of the Companies Act 71 of 2008 ("*the Act*").

6. I respectfully submit that I should be afforded the opportunity to intervene in the declaratory application after fully considering my position, should I be so minded and advised, and to advance my case regarding the appropriate determination of classes.

MY CLAIM AGAINST SIHPL

7. Messrs Michael John Morris, Paul Ronald Potter, Peter Andrew Berry, Francois Johan Malan, Warren Wendell Steyn and I contend that we are creditors of SIHPL and have all instituted action against SIHPL, as follows:

7.1. Mr Paul Ronald Potter and Michael John Morris instituted action against SIHPL on 6 December 2019; and

7.2. Mr Peter Andrew Berry, Mr Francois Johan Malan, Mr Warren Wendell Steyn and I instituted action against SIHPL on 15 June 2020.

8. Our claims are premised on a similar cause of action namely that we have suffered damages in consequence of being induced by a misrepresentation made by SIHPL's representatives to conclude certain contractual arrangements and give up certain financial benefits contractually provided for

and which benefits (in particular the payment of a substantial bonus or guarantee hereinafter referred to as "*the underpin*") would, but for the agreement(s) concluded in reliance on the misrepresentation, have accrued to the said plaintiffs (referred to below as "*the underpin creditors*").

9. The underpin creditors claim that they were induced to conclude these contractual arrangements and forego these financial benefits on the basis of a misrepresentation as to the value of their interest in Steinhoff International Holdings NV made in particular by way of the publication of the 2014 annual financial statements of that company's subsidiary and principal asset, SIHPL.

10. Relying on that misrepresentation the underpin creditors agreed to relinquish their entitlement to the underpin, which they would not have done but for the misrepresentation in which event the underpin would have become due and payable to them in a substantial amount.

11. In this regard, at the time that the contractual arrangements and the release of the underpin was being negotiated, SIHPL's representatives, more particularly Mr Markus Jooste (being simultaneously a director of Pepkor), were aware of the negotiations and the reliance that would be placed by the public in general, and by the underpin creditors in particular, upon the representation.

12. In consequence, the underpin creditors suffered damages in amounts equivalent to that which they would, but for the misrepresentation, have received by way of the underpin.

13. The further details of the claim are set out in the particulars of claim annexed hereto as "**AFB1**".

THE DECLARATORY APPLICATION

14. SIHPL intends to propose a compromise of its financial obligations with three classes of its creditors in terms of section 155 of the Act ("*the proposal*"). The "classes" into which SIHPL has purported to divide the aforementioned creditors are dealt with in further detail below.
15. The broad terms of the proposal are set out in a term sheet that has been available on the Steinhoff NV website since 27 July 2020 (annexure **FA2.3** to Hamilton's founding affidavit in the declaratory application). The terms were slightly updated and then republished on Steinhoff NV's website on 9 October 2020. A copy of the updated term sheet ("*the term sheet*") is annexure **JE1** to Mr Enslin's affidavit.
16. The three "classes" of creditor referred to in the term sheet are the SIHPL CPU Creditors ("*the FC class*"), the SIHPL Contractual Claimants ("*the CC class*"), and the SIHPL Market Purchase Claimants ("*the MPC class*").
17. As to the classification of the underpin creditors' claims in the proposal, SIHPL has specifically excluded the underpin creditors from any potential payment to be made in terms of the proposal and has classified the underpin claimants as "*Non-Qualifying Claims*".
- 

18. This is so although the claims of other creditors who are proposed to receive a dividend under the proposal are also disputed. By way of example, SIHPL contends that the claims of both the MPC creditors and the underpin claimants have no prospects of success yet the MPC creditors are proposed to receive a dividend while the underpin creditors are excluded from any dividend and classified as non-qualifying.
19. This is despite the fact that the legal merits of their claims are contended to be identical.
20. Clearly the classification is arbitrary and designed to serve SIHPL's tactical ends. By tactically classifying the claims in this manner, SIHPL seeks to manipulate the outcome of the vote to its own ends.
21. By way of the declaratory application, Hamilton seeks relief that would prevent the proposal from being adopted by SIHPL's creditors or from being sanctioned by a court.
22. Hamilton contends in particular that the CC class and the MPC class cannot constitute a "class of creditor" in terms of section 155 of the Act, because both classes comprise concurrent creditors. Instead, says Hamilton, the classes envisaged by section 155 are those recognised in insolvency law: concurrent creditors, secured creditors, and statutory preferent creditors. Moreover, Hamilton contends – in effect – that the proposed settlement with the CC class is unfair and inequitable and thus not sanctionable by a court in due course.



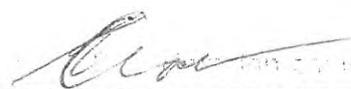
- 23. I agree with Hamilton that the proposal, as it is currently envisaged in the term sheet, cannot be sanctioned by a court and that it is unfair and inequitable.
- 24. I contend further that the proposal is fundamentally flawed, *inter alia*, for the reasons set out in paragraph 48. of Mr Enslin's affidavit.
- 25. In consequence, I respectfully concur that SIHPL's classification of creditors as currently contained in the proposal renders the proposal unsanctionable by a court.



ANDRE FREDERICK BOTHA

I certify that:

- i. The Deponent acknowledged to me that:
 - a. He knows and understands the contents of this declaration;
 - b. He has no objection to taking the prescribed oath; and
 - c. He considers the prescribed oath to be binding on his conscience.
- ii. The Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God."
- iii. The Deponent signed this declaration in my presence at CAPE TOWN on the 16TH day of FEBRUARY, 2020. 2021

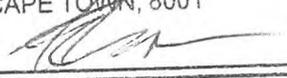


COMMISSIONER OF OATHS

Full names: ELZETTE CRONJE

Designation and area: CHARTERED ACCOUNTANT (SA)

Street address: 42 ONVERWACHT COMPLEX, OAK CREW, BELENVILLE, 7530.

COMMISSIONER OF OATHS
ELZETTE CRONJE
 CHARTERED ACCOUNTANT (SA)
 SECTION 2
 17 NEW CHURCH STREET
 CAPE TOWN, 8001
 SIGN: 



PARTICULARS OF CLAIM

The parties

1. The plaintiff is Andre Frederick Botha, a businessman currently residing at 11 Mimosa Crescent, Milnerton, 7441.

2. The defendant is Steinhoff International Holdings (Proprietary) Limited (formerly Steinhoff International Holdings Limited), a company with limited liability; duly incorporated in terms of the company laws of the Republic of South Africa with its principal place of business at Building B2 Vineyard Office Park, Corner Adam Tas and Devon Valley Roads, Steilenbosch, Western Cape.

The acquisition of the business and the conclusion of the service agreement

3. In or about December 2011, a company being Pepkor Capital (Proprietary) Ltd, which subsequently changed its name to Flash Mobile Vending (Proprietary) Limited ('Flash Mobile'), commenced negotiations for the acquisition of the business of, inter alia, Flash Mobile Cash (Proprietary) Limited, pursuant to which and in or about late-2011, Flash Mobile became the owner of the aforementioned business ('the business').

4. The plaintiff was a key individual in the business and accordingly, in anticipation alternatively, in consequence of the sale of the business to Flash Mobile, on or about 8 May 2012 and at Parow, the plaintiff concluded a service agreement with



Flash Mobile (then Pepkor Capital), a copy of which is attached marked "A", in terms of which, *inter alia*, the plaintiff would provide services to Flash Mobile ("the service agreement").

5. In concluding the service agreement the plaintiff acted personally and Flash Mobile was represented by CJ Klem.

The shares exchange agreement

6. As at 31 January 2013 the following companies held shares as set out below:

- 6.1. a company known as Odvest 155 (Proprietary) Limited ("Odvest") held one hundred percent of the issued share capital in Flash Mobile;

- 6.2. a company known as Pepkor Limited ("Pepkor") held seventy five percent of the issued shares in Odvest;

- 6.3. a company known as Little Swift Investment Holdings (Proprietary) Limited ("Little Swift") held twenty five percent of the issued shares in Odvest.

7. On or about 31 January 2013, Little Swift concluded an agreement entitled "Exchange Agreement" ("the shares exchange agreement") with Pepkor, Odvest and a company called Business Venture Investments No 1499 (RF) (Pty) Ltd ("BVI"), in terms whereof Little Swift exchanged all of the shares which it had previously held in Odvest for 480 031 ordinary shares in BVI ("the BVI shares").

8. The shares exchange agreement was concluded at Parow.
9. In concluding the shares exchange agreement Mr Peter Berry represented Little Swift, Pepkor was represented by P J Erasmus, Odvest was represented by CJ Klem and BVI was represented by B Baisley.
10. A copy of the shares exchange agreement is annexed marked "B".
11. At the time of the conclusion of the shares exchange agreement, BVI held some 16 104 262 ordinary shares in Pepkor.

The first addendum

12. On or about 21 May 2013, the plaintiff and Flash Mobile concluded an addendum to the service agreement, a copy of which is attached marked "C" ('the first addendum').
13. The first addendum was concluded at Parow.
14. In concluding the first addendum the plaintiff acted personally and Flash Mobile was represented by CJ Klem.
15. In terms of annexure "A" to the first addendum, the plaintiff was entitled, *inter alia*, to payment of a special bonus, to be calculated in accordance with the formula set out in clause 3.3 of the said annexure A to the first addendum, (referred to by the parties, and in what follows, as the 'underpin') in the event that:

- 15.1. the profit after taxation of Flash Mobile and two associated entities, Future Cell (Pty) Ltd and Flash IP (Pty) Ltd, earned during the 2017/2018 financial year ('the PAT'), exceeded R104 000 000 (clause 3.1, read with the definitions in clause 3.2); and
- 15.2. the value of the BVI shares, calculated as at 30 September 2018 and in accordance with the provisions of a separate Put and Call Option agreement between BVI and Little Swift, was below R96 194 849 (clause 3.3 read with the definitions in clause 3.2).

The second addendum

16. On or about 10 July 2014, the plaintiff and Flash Mobile concluded a second addendum to the service agreement, a copy of which is attached marked "D" ('the second addendum').
17. The second addendum was concluded at Parow.
18. In concluding the second addendum the plaintiff acted personally and Flash Mobile was represented by CJ Klem.
19. The second addendum amended the service agreement (and the first addendum) and provided that the plaintiff was entitled, *inter alia*, to payment of the underpin, in an amount to be calculated in accordance with the formula set out in clause 3.3 of annexure A to the second addendum, in the event that:

19.1. the PAT exceeded R104 000 000 (clause 3.1, read with the definitions in clause 3.2); and

19.2. the combined value of the BVI shares and the BVI2 shares, being 76716 ordinary shares held by Little Swift in the company K2013137280 (Pty) Ltd ('BVI2'), calculated as at 30 September 2018 and in accordance with the provisions of two separate Put and Call Option agreements between BVI, the related entity BVI2 and Little Swift, detailed hereunder, was below R96 194 849 (clause 3.3 read with the definitions in clause 3.2).

The settlement agreement

20. On or about 8 September 2014 and at Cape Town, the plaintiff, acting personally, concluded a settlement agreement ('the settlement agreement') with Flash Mobile, represented by Paul Potter, in terms whereof it was agreed that the plaintiff's employment with Flash Mobile would be terminated but that, notwithstanding such termination, the underpin provisions as contained in the second addendum would remain of full force and effect and that the plaintiff would retain his right to payment of the underpin in the event of the pre-conditions therefor being satisfied (clause 6. thereof).

21. A copy of the settlement agreement is annexed marked "E".

The arrangement between the defendant, Pepkor, BVI and Steinhoff NV

22. During February 2015:

22.1. Pepkor undertook a share buy-back and purchased the shares which BVI held in Pepkor, for an amount of R3 080 242 835;

22.2. BVI subscribed for 32 215 class D ordinary shares in Newshelf 1093 (Pty) Ltd ('Newshelf') at a purchase consideration of R3 080 242 835;

22.3. BVI, the defendant and Steinhoff Africa Holdings (Pty) Ltd concluded an exchange agreement ('the exchange agreement') pursuant to which BVI exchanged its shares in Newshelf for 51 703 157 ordinary shares in the defendant at an issue price of R57 per share;

22.4. The defendant was at the time a public company listed on the main board of the Johannesburg Stock Exchange ('JSE');

22.5. The resultant value ascribed by the parties to the exchange agreement to the ordinary shares in the defendant acquired by BVI as aforesaid, was R2 947 079 949.

23. Pursuant to a scheme of arrangement implemented in or about December 2015:

23.1. the defendant was converted to a private company;

23.2. its listing on the JSE was terminated;

- 23.3. it became a wholly-owned subsidiary of Steinhoff International Holdings NV ('Steinhoff NV'), a public company listed on the Frankfurt Stock Exchange and inwardly listed on the main board of the JSE; and
- 23.4. BVI's 51 703 157 ordinary shares in the defendant were exchanged for an equal number of shares in Steinhoff NV, on the basis that Steinhoff NV's only asset, or only significant asset, was its shareholding in the defendant.
24. As a result of the aforesaid scheme of arrangement ('the scheme of arrangement'), BVI became a shareholder in Steinhoff NV.

The settlement agreement addendum

25. Subsequent to the arrangement described above, on or about 19 May 2015 and at Cape Town, the plaintiff, acting personally and in reliance on the representation set out below, concluded an addendum to the settlement agreement ('the settlement agreement addendum') with Flash Mobile, represented by CJ Klem, which provided for the deletion of the underpin provisions and in terms of which the plaintiff relinquished his right to the underpin. A copy of this agreement is attached marked "F"

The plaintiff's claim in delict

(i) The representation

26. Prior to and at the time of the conclusion of the settlement agreement addendum and the deletion of the underpin effected thereby, the defendant represented that
- 

its financial position was as it appeared from the defendant's 2014 annual financial statement ('the 2014 AFS') ('the representation').

27. The representation was made by:

27.1. the publication to the general public, including the plaintiff, of the 2014 AFS; and

27.2. the defendant's failure to advise the general public, including the plaintiff, of the false statements included in the 2014 AFS which could or would have constituted price-sensitive information regarding defendant's shares and thus the value of the BVI shares.

28. The defendant was obliged to advise the plaintiff, as member of the general public, of the false statements in the 2014 AFS in that:

28.1. the true facts regarding its financial position were within the defendant's exclusive knowledge;

28.2. the defendant and its executives knew and intended, alternatively ought to have known, that the general public, including the plaintiff, would rely on the representation of the defendant's financial position as it appeared from the 2014 AFS.

29. The representation was false, in that:



- 29.1. various transactions had been structured and implemented which had the result of substantially inflating the profit and asset values of the Steinhoff group (until August 2015 the defendant and its subsidiary companies) over an extended period;
- 29.2. fictitious or irregular transactions were entered into with parties said to be, and made to appear to be third-party entities and independent of the Steinhoff group and its executives, but which were in fact closely related to the defendant's then chief executive officer, Markus Jooste, and other executives of the Steinhoff group or were controlled by Jooste and such other executives;
- 29.3. within the Steinhoff group, fictitious or irregular income was created at intermediary level, and then allocated to underperforming operating entities as so-called "contributions" that took different forms and either increased income or reduced expenses in those operating entities;
- 29.4. documents supporting fictitious or irregular transactions were often created after the fact and backdated;
- 29.5. the assets and income of certain of the defendant's European subsidiary companies were materially overstated and/or their liabilities materially understated;
- 29.6. it had the effect of overstating the defendant's and Steinhoff NV's financial position, and thus overvaluing the BVI shares.

30. The representation was:

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

30.2. alternatively, negligent;

30.3. in any event, made wrongfully.

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

32. But for the representation, the plaintiff would not have concluded the settlement agreement addendum, thereby relinquishing his right to the underpin.

The revelation of the misrepresentation and the reduced value of the BVI shares

33. The misrepresentation perpetrated in the manner set out above, was revealed as follows:

33.1. On 5 December 2017 Steinhoff NV released an *ad hoc* announcement advising the market that its audited results had been delayed pending further investigation.



33.2. On 6 December 2017 Jooste resigned as chief executive officer of Steinhoff NV, and the price at which Steinhoff NV's shares traded on both the Frankfurt Stock Exchange and the JSE declined significantly.

33.3. On 2 January 2018 Steinhoff NV announced that its audited financial statements for the 2015 and 2016 financial years could not be relied upon and withdrew such statements, thereby confirming media reports regarding misstatements in Steinhoff NV's and the defendant's financial statements, including the 2014 AFS, that had commenced at the approximate time of the *ad hoc* announcement of 5 December 2017.

34. As a result of the aforesaid revelations, the value of BVI's shareholding in Steinhoff NV, and thus the value of the BVI shares, declined dramatically.

The value of the underpin and compliance with the conditions

35. The underpin was to be calculated with reference to clause 3.3 of annexure A to the second addendum, which refers to clause 4.1 of the "BVI put and call option agreement" and clause 4.1 of the "BVI2 put and call option agreement".

36. The 'BVI put and call option agreement' referred to in the second addendum was concluded in writing between Little Swift, C H Wiese, Titan Premier Investments (Pty) Ltd and BVI at Parow and on or about 31 January 2013 ('the BVI put and call option agreement'). A copy of the BVI put and call option agreement is attached marked "G".

37. In concluding the BVI put and call option agreement Little Swift was represented by Mr Peter Berry, Dr C H Wiese acted personally and also represented Titan Premier Investments (Pty) Ltd and BVI was represented by Mr Bruce Baisley.

38. The 'BVI2 put and call option agreement' referred to in the second addendum was concluded in writing between Little Swift, C H Wiese, Titan Premier Investments (Pty) Ltd and BVI2 on or about 18 June 2014 ('the BVI2 put and call option agreement'). A copy of the BVI2 put and call option agreement is attached marked "H".

39. In concluding the BVI2 put and call option agreement Little Swift was represented by Mr Peter Berry, Dr C H Wiese acted personally and also represented Titan Premier Investments (Pty) Ltd and BVI2 was represented by Mr Bruce Baisley.

40. The conditions for payment of the special bonus in terms of the underpin provisions contained in the second addendum were met in that:

40.1. the PAT (as defined) earned during 2017/2018 exceeded R104 000 000;

and

40.2. the combined value of the BVI and BVI2 shares, calculated with reference to the BVI and BVI2 put and call option agreements (or otherwise) on 30 September 2018 was nil, and therefore less than the R96 194 849 referred to in clause 3.3 of annexure A to the second addendum.

41. But for the representation, the plaintiff would have been entitled to a special bonus of R13 191 129, calculated with reference to the formula set out in clause 3.3. of the second addendum, as set out in annexure "T".

42. In the premises, the plaintiff would, but for the representation and the conclusion of the settlement agreement addendum, have been entitled to payment of the underpin calculated in accordance with the formula in clause 3.3 of annexure A to the second addendum, in the amount of R13 191 129.

The plaintiff's damages

43. Accordingly and as a result of the defendant's misrepresentation, the plaintiff has suffered damages in the amount of R13 191 129, being the underpin or bonus that he would have received had he not concluded the settlement agreement addendum in reliance on that misrepresentation.

The plaintiff's alternative claim in terms of section 218 of the Companies Act

44. In terms of section 218(2) of the Companies Act, any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by the latter person as a result of that contravention.

45. By its publication to the general public, including the plaintiff, of the 2014 AFS, and of the material misstatements contained therein (as described above), the defendant contravened various provisions of the Companies Act, including:

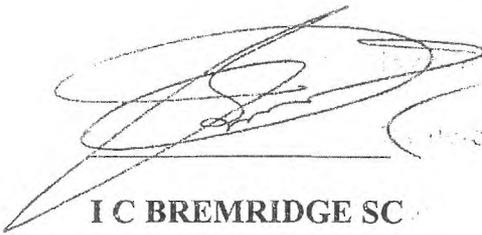
- 45.1. section 22(1), in that the defendant carried on its business recklessly, with gross negligence, with intent to defraud persons (including the plaintiff), and for a fraudulent purpose;
- 45.2. section 28(1), in that the defendant failed to keep accurate and complete accounting records as necessary to enable it to satisfy its obligations in terms of the Act with respect to the preparation of financial statements, such obligations being set out in section 29(1) of the Act;
- 45.3. section 28(3), in that the defendant, with an intention to deceive or mislead the general public, including the plaintiff, failed to keep accurate or complete accounting records and falsified or permitted to be falsified its accounting records;
- 45.4. section 29(1), in that the defendant provided financial statements, including annual financial statements, to the general public, including the plaintiff, which did not present fairly the state of affairs and business of the defendant and did not accurately explain the transactions and financial position of the business of the defendant and which did not accurately show the defendant's assets, liabilities and equity;
- 45.5. section 29(2), in that the 2014 AFS prepared by the defendant were false and misleading in material respects, or incomplete in material particulars.
46. The plaintiff has suffered loss or damage as a result of the aforesaid contraventions, as set out in paragraph 45 above.
- 

47. In terms of section 218(2) of the Companies Act, the defendant is liable to the plaintiff for the loss or damage suffered by him, as set out in paragraph 44 above.

WHEREFORE the plaintiff claims:

- (a) Payment in an amount of R13 191 129;
- (b) Interest on the aforesaid amount at the prescribed rate *a tempora morae* to date of payment;
- (c) Further and/or alternative relief;
- (d) Costs of suit.

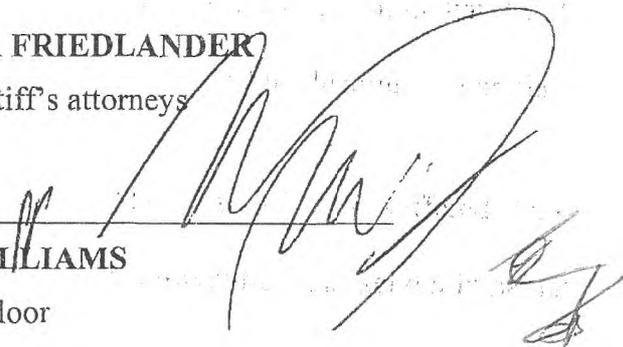
DATED at **CAPE TOWN** on this the 11th day of June 2020.


I C BREMRIDGE SC

Plaintiff's counsel

C&A FRIEDLANDER

Plaintiff's attorneys

Per: 

J WILLIAMS

3rd Floor

42 Keerom Street

CAPE TOWN

[Ref.: JAW/MBM/WH0257]

[Tel.: 021 487 7900]

To : **THE REGISTRAR**
HIGH COURT
CAPE TOWN

And to: **STEINHOFF INTERNATIONAL HOLDINGS (PROPRIETARY)**
LIMITED
Building B2
Vineyard Office Park
Corner Adam Tas And Devon Valley Road
STELLENBOSCH



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

Case No: 17327 / 2020

In the application between:

TREVO CAPITAL LTD

Applicant / Intervening Party

and

HAMILTON BV

First Respondent

HAMILTON 2 BV

Second Respondent

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD

Third Respondent

In re the matter between:

HAMILTON BV

First Applicant

HAMILTON 2 BV

Second Applicant

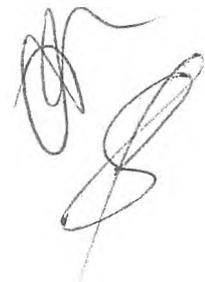
and

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD

Third Respondent

SUPPORTING AFFIDAVIT

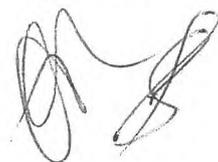
I, the undersigned,



FRANCOIS JOHAN MALAN

do hereby make oath and say:

1. I am an adult businessman currently residing at 7 AP Venter Avenue, Uniepark, Stellenbosch, 7600.
2. The facts deposed to herein are within my personal knowledge, save where the context indicates the contrary, and are furthermore true and correct. Where I refer to information conveyed to me by others, I verily believe such information to be true.
3. I have read the affidavits in the application for declaratory relief (*"the declaratory application"*) instituted by Hamilton BV and Hamilton 2 BV (collectively referred to as *"Hamilton"*) against Steinhoff International Holdings (Proprietary) Limited (*"SIHPL"*).
4. I have also read the founding affidavit of Johann-Dirk Enslin in support of the urgent application by Trevo Capital Limited (*"Trevo"*) for leave to intervene in the declaratory application, and for an order that other creditors be afforded an opportunity to apply to intervene in the declaratory application and to advance submissions concerning the relief sought by Hamilton in the declaratory application.
5. I have not yet had the opportunity to take full legal advice as to whether to intervene in the declaratory application and require an opportunity to do so. For the reasons set out below, however, I support Trevo's application. More



particularly, I agree with the contentions advanced in Mr Enslin's affidavit regarding the approaches adopted by both Hamilton and SIHPL to the determination of classes for the purposes of a compromise in terms of section 155 of the Companies Act 71 of 2008 (*"the Act"*).

6. I respectfully submit that I should be afforded the opportunity to intervene in the declaratory application after fully considering my position, should I be so minded and advised, and to advance my case regarding the appropriate determination of classes.

MY CLAIM AGAINST SIHPL

7. Messrs Michael John Morris, Paul Ronald Potter, Andre Frederick Botha, Peter Andrew Berry, Warren Wendell Steyn and I contend that we are creditors of SIHPL and have all instituted action against SIHPL, as follows:

7.1. Mr Paul Ronald Potter and Michael John Morris instituted action against SIHPL on 6 December 2019; and

7.2. Mr Andre Frederick Botha, Mr Peter Andrew Berry, Mr Warren Wendell Steyn and I instituted action against SIHPL on 15 June 2020.

8. Our claims are premised on a similar cause of action namely that we have suffered damages in consequence of being induced by a misrepresentation made by SIHPL's representatives to conclude certain contractual arrangements and give up certain financial benefits contractually provided for



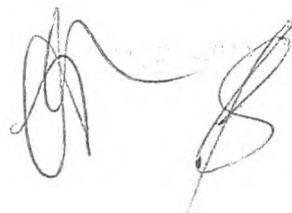
and which benefits (in particular the payment of a substantial bonus or guarantee hereinafter referred to as "*the underpin*") would, but for the agreement(s) concluded in reliance on the misrepresentation, have accrued to the said plaintiffs (referred to below as "*the underpin creditors*").

9. The underpin creditors claim that they were induced to conclude these contractual arrangements and forego these financial benefits on the basis of a misrepresentation as to the value of their interest in Steinhoff International Holdings NV made in particular by way of the publication of the 2014 annual financial statements of that company's subsidiary and principal asset, SIHPL.

10. Relying on that misrepresentation the underpin creditors agreed to relinquish their entitlement to the underpin, which they would not have done but for the misrepresentation in which event the underpin would have become due and payable to them in a substantial amount.

11. In this regard, at the time that the contractual arrangements and the release of the underpin was being negotiated, SIHPL's representatives, more particularly Mr Markus Jooste (being simultaneously a director of Pepkor), were aware of the negotiations and the reliance that would be placed by the public in general, and by the underpin creditors in particular, upon the representation.

12. In consequence, the underpin creditors suffered damages in amounts equivalent to that which they would, but for the misrepresentation, have received by way of the underpin.



13. The further details of the claim are set out in the particulars of claim annexed hereto as "**FJM1**".

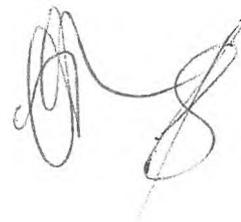
THE DECLARATORY APPLICATION

14. SIHPL intends to propose a compromise of its financial obligations with three classes of its creditors in terms of section 155 of the Act ("*the proposal*"). The "classes" into which SIHPL has purported to divide the aforementioned creditors are dealt with in further detail below.

15. The broad terms of the proposal are set out in a term sheet that has been available on the Steinhoff NV website since 27 July 2020 (annexure **FA2.3** to Hamilton's founding affidavit in the declaratory application). The terms were slightly updated and then republished on Steinhoff NV's website on 9 October 2020. A copy of the updated term sheet ("*the term sheet*") is annexure **JE1** to Mr Enslin's affidavit.

16. The three "classes" of creditor referred to in the term sheet are the SIHPL CPU Creditors ("*the FC class*"), the SIHPL Contractual Claimants ("*the CC class*"); and the SIHPL Market Purchase Claimants ("*the MPC class*").

17. As to the classification of the underpin creditors' claims in the proposal, SIHPL has specifically excluded the underpin creditors from any potential payment to be made in terms of the proposal and has classified the underpin claimants as "*Non-Qualifying Claims*".



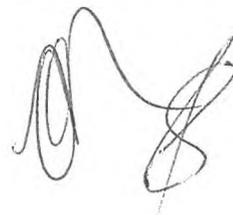
18. This is so although the claims of other creditors who are proposed to receive a dividend under the proposal are also disputed. By way of example, SIHPL contends that the claims of both the MPC creditors and the underpin claimants have no prospects of success yet the MPC creditors are proposed to receive a dividend while the underpin creditors are excluded from any dividend and classified as non-qualifying.

19. This is despite the fact that the legal merits of their claims are contended to be identical.

20. Clearly the classification is arbitrary and designed to serve SIHPL's tactical ends. By tactically classifying the claims in this manner SIHPL seeks to manipulate the outcome of the vote to its own ends.

21. By way of the declaratory application, Hamilton seeks relief that would prevent the proposal from being adopted by SIHPL's creditors or from being sanctioned by a court.

22. Hamilton contends in particular that the CC class and the MPC class cannot constitute a "class of creditor" in terms of section 155 of the Act, because both classes comprise concurrent creditors. Instead, says Hamilton, the classes envisaged by section 155 are those recognised in insolvency law: concurrent creditors, secured creditors, and statutory preferent creditors. Moreover, Hamilton contends – in effect – that the proposed settlement with the CC class is unfair and inequitable and thus not sanctionable by a court in due course.



23. I agree with Hamilton that the proposal, as it is currently envisaged in the termsheet, cannot be sanctioned by a court and that it is unfair and inequitable.

24. I contend further that the proposal is fundamentally flawed, *inter alia*, for the reasons set out in paragraph 48. of Mr Enslin's affidavit.

25. In consequence, I respectfully concur that SIHPL's classification of creditors as currently contained in the proposal renders the proposal unsanctionable by a court.

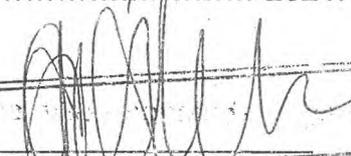

FRANCOIS JOHAN MALAN

I certify that:

- i. The Deponent acknowledged to me that:
 - a. He knows and understands the contents of this declaration;
 - b. He has no objection to taking the prescribed oath; and
 - c. He considers the prescribed oath to be binding on his conscience.
- ii. The Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God."
- iii. The Deponent signed this declaration in my presence at Stellenbosch on the 17 day of February 2021.

COMMISSIONER OF OATHS

COMMISSIONER OF OATHS


Alet Viljoen
Commissioner of Oaths
Admitted Attorney / Tcegelate Prokureur
De Waterkant Building,
10 Helderberg Street, Stellenbosch 7600

Full names:

Designation and area:

Street address:

PARTICULARS OF CLAIM

The parties

1. The plaintiff is Francois Johan Malan, a businessman currently residing at 7 AP Venter Avenue, Uniepark, Stellenbosch, 7600.

2. The defendant is Steinhoff International Holdings (Proprietary) Limited (formerly Steinhoff International Holdings Limited), a company with limited liability, duly incorporated in terms of the company laws of the Republic of South Africa with its principal place of business at Building B2 Vineyard Office Park, Corner Adam Tas and Devon Valley Roads, Stellenbosch, Western Cape, 7600.

The acquisition of the business and the conclusion of the service agreement

3. In or about December 2011, a company being Pepkor Capital (Proprietary) Ltd, which subsequently changed its name to Flash Mobile Vending (Proprietary) Limited ('Flash Mobile'), commenced negotiations for, inter alia, the acquisition of the business of Flash Mobile Cash (Proprietary) Limited, pursuant to which and in or about late-2011, Flash Mobile became the owner of the aforementioned business ('the business').

4. The plaintiff was a key individual in the business and accordingly, in anticipation alternatively, in consequence of the sale of the business to Flash Mobile and on



or about 8 May 2012, at Parow, the plaintiff concluded a service agreement with Flash Mobile (then Pepkor Capital), a copy of which is attached marked "A", in terms of which, *inter alia*, the plaintiff would provide services to Flash Mobile ('the service agreement').

5. In concluding the service agreement the plaintiff acted personally and Flash Mobile was represented by CJ Klem.

The shares exchange agreement

6. As at 31 January 2013, the following companies held shares as set out below:

6.1. a company known as Odvest 155 (Proprietary) Limited ('Odvest') held one hundred percent of the issued share capital in Flash Mobile;

6.2. a company known as Pepkor Limited ('Pepkor') held seventy five percent of the issued shares in Odvest;

6.3. a company known as Little Swift Investment Holdings (Proprietary) Limited ('Little Swift') held twenty five percent of the issued shares in Odvest.

7. On or about 31 January 2013, Little Swift concluded an agreement entitled "*Exchange Agreement*" ('the shares exchange agreement') with Pepkor, Odvest and the company called Business Venture Investments No 1499 (RF) (Pty) Ltd ('BVI') in terms whereof Little Swift exchanged all of the shares which

it had previously held in Odvest for 480 031 ordinary shares in BVI ('the BVI shares').

8. The shares exchange agreement was concluded at Parow.
9. In concluding the shares exchange agreement Mr Peter Berry represented Little Swift, Pepkor was represented by P J Erasmus, Odvest was represented by CJ Klem and BVI was represented by B Baisley.
10. A copy of the shares exchange agreement is annexed marked "B".
11. At the time of the conclusion of the shares exchange agreement, BVI held some 16 104 262 ordinary shares in Pepkor.

The first addendum

12. On or about 21 May 2013, the plaintiff and Flash Mobile concluded an addendum to the service agreement, a copy of which is attached marked "C" ('the first addendum').

13. The first addendum was concluded at Parow.

14. In concluding the first addendum the plaintiff acted personally and Flash Mobile was represented by CJ Klem.

15. In terms of annexure "A" to the first addendum, the plaintiff was entitled, *inter alia*, to payment of a special bonus, to be calculated in accordance with the formula set out in clause 3.3 of the said annexure A to the first addendum.

(referred to by the parties and in what follows, as the 'underpin') in the event that:

15.1. the profit after taxation of the combined businesses of Flash Mobile Vending (Pty) Ltd and two associated entities, Future Cell (Pty) Ltd and Flash IP (Pty) Ltd, earned during the 2017/2018 financial year ('the PAT'), exceeded R104 000 000 (clause 3.1, read with the definitions in clause 3.2); and

15.2. the value of the BVI shares, calculated as at 30 September 2018 and in accordance with the provisions of a separate Put and Call Option agreement between BVI and Little Swift, was below R96 194 849 (clause 3.3 read with the definitions in clause 3.2).

The second addendum

16. On or about 10 July 2014, the plaintiff and Flash Mobile concluded a second addendum to the service agreement, a copy of which is attached marked "D" ('the second addendum').

17. The second addendum was concluded at Parow.

18. In concluding the second addendum the plaintiff acted personally and Flash Mobile was represented by CJ Klem.

19. The second addendum amended the service agreement (and the first addendum) and provided that the plaintiff was entitled, *inter alia*, to payment of the underpin, in an amount to be calculated in accordance with the formula set out in clause 3.3 of annexure A to the second addendum, in the event that:

19.1. the PAT exceeded R104 000 000 (clause 3.1, read with the definitions in clause 3.2); and

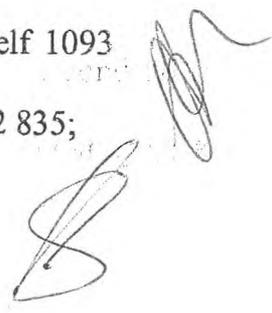
19.2. the value of the BVI shares and BVI2 shares, being 76716 ordinary shares held by Little Swift in the company K2013137280 (Pty) Ltd ('BVI2'), calculated as at 30 September 2018 and in accordance with the provisions of two separate Put and Call Option agreements between BVI, the related entity BVI2 and Little Swift, detailed hereunder, was below R96 194 849 (clause 3.3 read with the definitions in clause 3.2).

The arrangement between the defendant, Pepkor, BVI and Steinhoff NV

20. During February 2015:

20.1. Pepkor undertook a share buy-back and purchased the shares which BVI held in Pepkor, for an amount of R3 080 242 835;

20.2. BVI subscribed for 32 215 class D ordinary shares in Newshelf 1093 (Pty) Ltd ('Newshelf') at a purchase consideration of R3 080 242 835;



20.3. BVI, the defendant and Steinhoff Africa Holdings (Pty) Ltd concluded an exchange agreement ('the exchange agreement') pursuant to which BVI exchanged its shares in Newshelf for 51 703 157 ordinary shares in the defendant at an issue price of R57 per share;

20.4. The defendant was at the time a public company listed on the main board of the Johannesburg Stock Exchange ('JSE');

20.5. The resultant value ascribed by the parties to the exchange agreement to the ordinary shares in the defendant acquired by BVI as aforesaid, was R2 947 079 949.

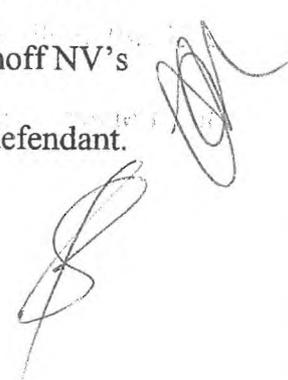
21. Pursuant to a scheme of arrangement implemented in or about December 2015:

21.1. the defendant was converted to a private company;

21.2. its listing on the JSE was terminated;

21.3. it became a wholly-owned subsidiary of Steinhoff International Holdings NV ('Steinhoff NV'), a public company listed on the Frankfurt Stock Exchange and inwardly listed on the main board of the JSE; and

21.4. BVI's 51 703 157 ordinary shares in the defendant were exchanged for an equal number of shares in Steinhoff NV, on the basis that Steinhoff NV's only asset, or only significant asset, was its shareholding in the defendant.



22. As a result of the aforesaid scheme of arrangement ('the scheme of arrangement'), BVI became a shareholder in Steinhoff NV.

The third addendum

23. Subsequent to the arrangement described above, on or about 19 May 2015 and at Cape Town, the plaintiff, acting personally and in reliance on the representation set out below, concluded a third addendum to the service agreement, ('the third addendum'), with Flash Mobile, represented by CJ Klem, which provided for the deletion of the underpin provisions and in terms of which the plaintiff relinquished his right to the underpin. A copy of this agreement is attached marked "E".

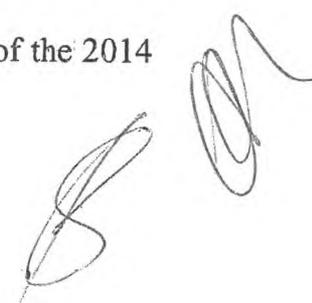
The plaintiff's claim in delict

(i) The representation

24. Prior to and at the time of the conclusion of the third addendum and the deletion of the underpin effected thereby, the defendant represented that its financial position was as it appeared from the defendant's 2014 annual financial statement ('the 2014 AFS') ('the representation').

25. The representation was made by:

- 25.1. the publication to the general public, including the plaintiff, of the 2014 AFS; and



25.2. the defendant's failure to advise the general public, including the plaintiff, of the false statements included in the 2014 AFS which could or would have constituted price-sensitive information regarding defendant's shares and thus the value of the BVI shares.

26. The defendant was obliged to advise the plaintiff, as member of the general public, of the false statements in the 2014 AFS in that:

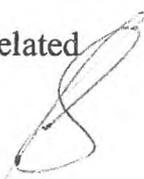
26.1. the true facts regarding its financial position were within the defendant's exclusive knowledge;

26.2. the defendant and its executives knew and intended, alternatively ought to have known, that the general public, including the plaintiff, would rely on the representation of the defendant's financial position as it appeared from the 2014 AFS.

27. The representation was false, in that:

27.1. various transactions had been structured and implemented which had the result of substantially inflating the profit and asset values of the Steinhoff group (until August 2015 the defendant and its subsidiary companies) over an extended period;

27.2. fictitious or irregular transactions were entered into with parties said to be, and made to appear to be third-party entities and independent of the Steinhoff group and its executives, but which were in fact closely related



to the defendant's then chief executive officer, Markus Jooste, and other executives of the Steinhoff group or were controlled by Jooste and such other executives;

27.3. within the Steinhoff group, fictitious or irregular income was created at intermediary level, and then allocated to underperforming operating entities as so-called "contributions" that took different forms and either increased income or reduced expenses in those operating entities;

27.4. documents supporting fictitious or irregular transactions were often created after the fact and backdated;

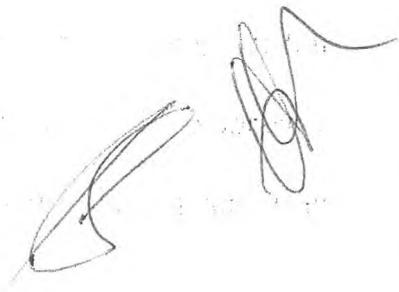
27.5. the assets and income of certain of the defendant's European subsidiary companies were materially overstated and/or their liabilities materially understated;

27.6. it had the effect of overstating the defendant's and Steinhoff NV's financial position, and thus overvaluing the BVI shares.

28. The representation was:

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

28.2. alternatively, negligent;



28.3. in any event, made wrongfully.

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

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

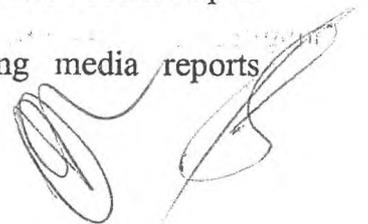
The revelation of the misrepresentation and the reduced value of the BVI shares

31. The misrepresentation perpetrated in the manner set out above, was revealed as follows:

31.1. On 5 December 2017 Steinhoff NV released an *ad hoc* announcement advising the market that its audited results had been delayed pending further investigation.

31.2. On 6 December 2017 Jooste resigned as chief executive officer of Steinhoff NV, and the price at which Steinhoff NV's shares traded on both the Frankfurt Stock Exchange and the JSE declined significantly.

31.3. On 2 January 2018 Steinhoff NV announced that its audited financial statements for the 2015 and 2016 financial years could not be relied upon and withdrew such statements, thereby confirming media reports



regarding misstatements in Steinhoff NV's and the defendant's financial statements, including the 2014 AFS, that had commenced at the approximate time of the *ad hoc* announcement of 5 December 2017.

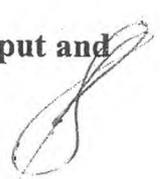
32. As a result of the aforesaid revelations, the value of BVI's shareholding in Steinhoff NV, and thus the value of the BVI shares, declined dramatically.

The value of the underpin and compliance with the conditions

33. The underpin was to be calculated with reference to clause 3.3 of annexure A to the second addendum, which refers to clause 4.1 of the "BVI put and call option agreement" and clause 4.1 of the "BVI2 put and call option agreement".

34. The 'BVI put and call option agreement' referred to in the second addendum was concluded in writing between Little Swift, C H Wiese, Titan Premier Investments (Pty) Ltd and BVI at Parow and on or about 31 January 2013 ('the BVI put and call option agreement'). A copy of the BVI put and call option agreement is attached marked "F".

35. In concluding the BVI put and call option agreement Little Swift was represented by Mr Peter Berry, Dr C H Wiese acted personally and also represented Titan Premier Investments (Pty) Ltd and BVI was represented by Mr Bruce Baisley.

36. The 'BVI2 put and call option agreement' referred to in the second addendum was concluded in writing between Little Swift, C H Wiese, Titan Premier Investments (Pty) Ltd and BVI2 on or about 18 June 2014 ('the BVI2 put and
- 
- 

call option agreement'). A copy of the BVI2 put and call option agreement is attached marked "G".

37. In concluding the BVI2 put and call option agreement Little Swift was represented by Mr Peter Berry, Dr C H Wiese acted personally and also represented Titan Premier Investments (Pty) Ltd and BVI2 was represented by Mr Bruce Baisley.

38. The conditions for payment of the special bonus in terms of the underpin provisions contained in the second addendum were met in that:

38.1. the PAT (as defined) earned during 2017/2018 exceeded R104 000 000;

and

38.2. the combined value of the BVI and BVI2 shares, calculated with reference

to the BVI and BVI2 put and call option agreements (or otherwise) on 30

September 2018 was nil, and therefore less than the R96 194 849 referred

to in clause 3.3 of annexure A to the second addendum.

39. But for the representation, the plaintiff would have been entitled to a special bonus of R13 191 129, calculated with reference to the formula set out in clause 3.3. of the second addendum, as set out in annexure "H".

40. In the premises, the plaintiff would, but for the representation and the conclusion of the third addendum, have been entitled to payment of the underpin calculated



in accordance with the formula in clause 3.3 of annexure 'A' to the second addendum, in the amount of R13 191 129.

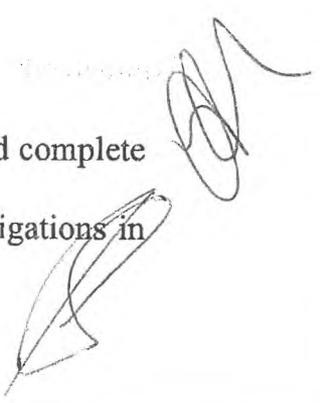
The plaintiff's damages

41. Accordingly and as a result of the defendant's misrepresentation, the plaintiff has suffered damages in the amount of R13 191 129, being the underpin or bonus that he would have received had he not concluded the third addendum in reliance on that misrepresentation.

The plaintiff's alternative claim in terms of section 218 of the Companies Act

42. In terms of section 218(2) of the Companies Act, any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by the latter person as a result of that contravention.

43. By its publication to the general public, including the plaintiff, of the 2014 AFS, and of the material misstatements contained therein (as described above), the defendant contravened various provisions of the Companies Act, including:

- 43.1. section 22(1), in that the defendant carried on its business recklessly, with gross negligence, with intent to defraud persons (including the plaintiff), and for a fraudulent purpose;
 - 43.2. section 28(1), in that the defendant failed to keep accurate and complete accounting records as necessary to enable it to satisfy its obligations in
- 

terms of the Act with respect to the preparation of financial statements, such obligations being set out in section 29(1) of the Act;

43.3. section 28(3), in that the defendant, with an intention to deceive or mislead the general public, including the plaintiff, failed to keep accurate or complete accounting records and falsified or permitted to be falsified its accounting records;

43.4. section 29(1), in that the defendant provided financial statements, including annual financial statements, to the general public, including the plaintiff, which did not present fairly the state of affairs and business of the defendant and did not accurately explain the transactions and financial position of the business of the defendant and which did not accurately show the defendant's assets, liabilities and equity;

43.5. section 29(2), in that the 2014 AFS prepared by the defendant were false and misleading in material respects, or incomplete in material particulars.

44. The plaintiff has suffered loss or damage as a result of the aforesaid contraventions, as set out in paragraph 43 above.

45. In terms of section 218(2) of the Companies Act, the defendant is liable to the plaintiff for the loss or damage suffered by him, as set out in paragraph 42 above.

WHEREFORE the plaintiff claims:

(a) Payment in an amount of R13 191 129;



- (b) Interest on the aforesaid amount at the prescribed rate *a tempora morae* to date of payment;
- (c) Further and/or alternative relief;
- (d) Costs of suit.

DATED at CAPE TOWN on this the 11th day of June 2020.



I C BREMRIDGE SC

Plaintiff's counsel

C&A FRIEDLANDER

Plaintiff's attorneys

Per: 
J WILLIAMS

3rd Floor
42 Keerom Street
CAPE TOWN

[Ref.: JAW/MBM/WH0257]
[Tel.: 021 487 7900]

To : **THE REGISTRAR
HIGH COURT
CAPE TOWN**

And to: **STEINHOFF INTERNATIONAL HOLDINGS (PROPRIETARY)
LIMITED**



Building B2

Vineyard Office Park

Corner Adam Tas And Devon Valley Road

STELLENBOSCH

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 [Handwritten signature]
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AFRICA
E 17 2020
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 17327 / 2020

In the application between:

TREVO CAPITAL LTD

Applicant / Intervening Party

and

HAMILTON BV

First Respondent

HAMILTON 2 BV

Second Respondent

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD

Third Respondent

In re the matter between:

HAMILTON BV

First Applicant

HAMILTON 2 BV

Second Applicant

and

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD

Third Respondent

SUPPORTING AFFIDAVIT

I, the undersigned,

WARREN WENDELL STEYN

do hereby make oath and say:

1. I am an adult businessman currently residing at 19 Olive Lane, Constantia Nek Estate, Hout Bay, 7406.
2. The facts deposed to herein are within my personal knowledge, save where the context indicates the contrary, and are furthermore true and correct. Where I refer to information conveyed to me by others, I verily believe such information to be true.
3. I have read the affidavits in the application for declaratory relief (*the declaratory application*) instituted by Hamilton BV and Hamilton 2 BV (collectively referred to as *Hamilton*) against Steinhoff International Holdings (Proprietary) Limited (*SIHPL*).
4. I have also read the founding affidavit of Johann-Dirk Enslin in support of the urgent application by Trevo Capital Limited (*Trevo*) for leave to intervene in the declaratory application, and for an order that other creditors be afforded an opportunity to apply to intervene in the declaratory application and to advance submissions concerning the relief sought by Hamilton in the declaratory application.
5. I have not yet had the opportunity to take full legal advice as to whether to intervene in the declaratory application and require an opportunity to do so. For the reasons set out below, however, I support Trevo's application. More



particularly, I agree with the contentions advanced in Mr Enslin's affidavit regarding the approaches adopted by both Hamilton and SIHPL to the determination of classes for the purposes of a compromise in terms of section 155 of the Companies Act 71 of 2008 ("*the Act*").

6. I respectfully submit that I should be afforded the opportunity to intervene in the declaratory application after fully considering my position, should I be so minded and advised, and to advance my case regarding the appropriate determination of classes.

MY CLAIM AGAINST SIHPL

7. Messrs Michael John Morris, Paul Ronald Potter, Andre Frederick Botha, Peter Andrew Berry, Francois Johan Malan and I contend that we are creditors of SIHPL and have all instituted action against SIHPL, as follows:

- 7.1. Mr Paul Ronald Potter and Mr Michael John Morris instituted action against SIHPL on 6 December 2019; and

- 7.2. Mr Andre Frederick Botha, Mr Peter Andrew Berry, Mr Francois Johan Malan and I instituted action against SIHPL on 15 June 2020.

8. Our claims are premised on a similar cause of action namely that we have suffered damages in consequence of being induced by a misrepresentation made by SIHPL's representatives to conclude certain contractual arrangements and give up certain financial benefits contractually provided for and which benefits (in particular the payment of a substantial bonus or



guarantee hereinafter referred to as "*the underpin*") would, but for the agreement(s) concluded in reliance on the misrepresentation, have accrued to the said plaintiffs (referred to below as "*the underpin creditors*").

9. The underpin creditors claim that they were induced to conclude these contractual arrangements and forego these financial benefits on the basis of a misrepresentation as to the value of their interest in Steinhoff International Holdings NV made in particular by way of the publication of the 2014 annual financial statements of that company's subsidiary and principal asset, SIHPL.

10. Relying on that misrepresentation the underpin creditors agreed to relinquish their entitlement to the underpin, which they would not have done but for the misrepresentation in which event the underpin would have become due and payable to them in a substantial amount.

11. In this regard, at the time that the contractual arrangements and the release of the underpin was being negotiated, SIHPL's representatives, more particularly Mr Markus Jooste (being simultaneously a director of Pepkor), were aware of the negotiations and the reliance that would be placed by the public in general, and by the underpin creditors in particular, upon the representation.

12. In consequence, the underpin creditors suffered damages in amounts equivalent to that which they would, but for the misrepresentation, have received by way of the underpin.

13. The further details of the claim are set out in the particulars of claim annexed hereto as "**WWS1**".

THE DECLARATORY APPLICATION

14. SIHPL intends to propose a compromise of its financial obligations with three classes of its creditors in terms of section 155 of the Act (*"the proposal"*). The "classes" into which SIHPL has purported to divide the aforementioned creditors are dealt with in further detail below.
15. The broad terms of the proposal are set out in a term sheet that has been available on the Steinhoff NV website since 27 July 2020 (annexure **FA2.3** to Hamilton's founding affidavit in the declaratory application). The terms were slightly updated and then republished on Steinhoff NV's website on 9 October 2020. A copy of the updated term sheet (*"the term sheet"*) is annexure **JE1** to Mr Enslin's affidavit.
16. The three "classes" of creditor referred to in the term sheet are the SIHPL CPU Creditors (*"the FC class"*), the SIHPL Contractual Claimants (*"the CC class"*), and the SIHPL Market Purchase Claimants (*"the MPC class"*).
17. As to the classification of the underpin creditors' claims in the proposal, SIHPL has specifically excluded the underpin creditors from any potential payment to be made in terms of the proposal and has classified the underpin claimants as *"Non-Qualifying Claims"*.
18. This is so although the claims of other creditors who are proposed to receive a dividend under the proposal are also disputed. By way of example, SIHPL contends that the claims of both the MPC creditors and the underpin claimants have no prospects of success yet the MPC creditors are proposed to receive a

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dividend while the underpin creditors are excluded from any dividend and classified as non-qualifying.

19. This is despite the fact that the legal merits of their claims are contended to be identical.

20. Clearly the classification is arbitrary and designed to serve SIHPL's tactical ends. By tactically classifying the claims in this manner SIHPL seeks to manipulate the outcome of the vote to its own ends.

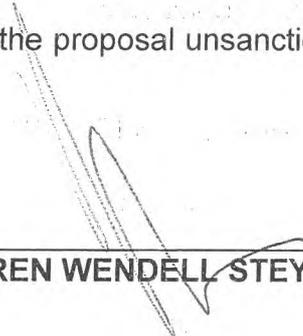
21. By way of the declaratory application, Hamilton seeks relief that would prevent the proposal from being adopted by SIHPL's creditors or from being sanctioned by a court.

22. Hamilton contends in particular that the CC class and the MPC class cannot constitute a "class of creditor" in terms of section 155 of the Act, because both classes comprise concurrent creditors. Instead, says Hamilton, the classes envisaged by section 155 are those recognised in insolvency law: concurrent creditors, secured creditors, and statutory preferent creditors. Moreover, Hamilton contends – in effect – that the proposed settlement with the CC class is unfair and inequitable and thus not sanctionable by a court in due course.

23. I agree with Hamilton that the proposal, as it is currently envisaged in the term sheet, cannot be sanctioned by a court and that it is unfair and inequitable.

24. I contend further that the proposal is fundamentally flawed, *inter alia*, for the reasons set out in paragraph 48. of Mr Enslin's affidavit.

25. In consequence, I respectfully concur that SIHPL's classification of creditors as currently contained in the proposal renders the proposal unsanctionable by a court.


WARREN WENDELL STEYN

I certify that:

- i. The Deponent acknowledged to me that:
 - a. He knows and understands the contents of this declaration;
 - b. He has no objection to taking the prescribed oath; and
 - c. He considers the prescribed oath to be binding on his conscience.
- ii. The Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God."
- iii. The Deponent signed this declaration in my presence at Cape Town on the 17th day of February 2020.

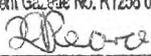

COMMISSIONER OF OATHS

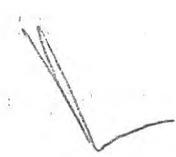
Full names: Dylan Pearce

Designation and area: CA(SA)

Street address: 2 Fr Street, OBSERVATORY, Cape Town

I certify that the DEPONENT has acknowledged that he/she knows and understands the contents of any objection to taking the oath, and that he/she considers it to be binding on his/her conscience before me at Cape Town on this the 17th day of February, and that the regulations contained in Government Gazette No. R1258 of July 1972, as amended.


COMMISSIONER OF OATHS (RSA)
Dylan Bradley Pearce CA (SA)



PARTICULARS OF CLAIM

The parties

1. The plaintiff is Warren Wendell Steyn, a businessman currently residing at 19 Olive Lane, Constantia Nek Estate, Hout Bay, 7406.
2. The defendant is Steinhoff International Holdings (Proprietary) Limited (formerly Steinhoff International Holdings Limited), a company with limited liability, duly incorporated in terms of the company laws of the Republic of South Africa with its principal place of business at Building B2 Vineyard Office Park, Corner Adam Tas and Devon Valley Roads, Stellenbosch, Western Cape, 7600.

The acquisition of the business and the conclusion of the service agreement

3. In or about December 2011, a company being Pepkor Capital (Proprietary) Ltd, which subsequently changed its name to Flash Mobile Vending (Proprietary) Limited ('Flash Mobile'), commenced negotiations for, inter alia, the acquisition of the business of Flash Mobile Cash (Proprietary) Limited, pursuant to which and in or about late-2011, Flash Mobile became the owner of the aforementioned business ('the business').
4. The plaintiff was a key individual in the business and accordingly, in anticipation alternatively, in consequence of the sale of the business to Flash Mobile and on



or about 8 May 2012, at Parow, the plaintiff concluded a service agreement with Flash Mobile (then Pepkor Capital), a copy of which is attached marked "A", in terms of which, *inter alia*, the plaintiff would provide services to Flash Mobile ('the service agreement').

5. In concluding the service agreement the plaintiff acted personally and Flash Mobile was represented by CJ Klem.

The shares exchange agreement

6. As at 31 January 2013, the following companies held shares as set out below:

- 6.1. a company known as Odvest 155 (Proprietary) Limited ('Odvest') held one hundred percent of the issued share capital in Flash Mobile;

- 6.2. a company known as Pepkor Limited ('Pepkor') held seventy five percent of the issued shares in Odvest;

- 6.3. a company known as Little Swift Investment Holdings (Proprietary) Limited ('Little Swift') held twenty five percent of the issued shares in Odvest.

7. On or about 31 January 2013, Little Swift concluded an agreement entitled "*Exchange Agreement*" ('the shares exchange agreement') with Pepkor, Odvest and the company called Business Venture Investments No 1499 (RF) (Pty) Ltd ('BVI') in terms whereof Little Swift exchanged all of the shares which

it had previously held in Odvest for 480 031 ordinary shares in BVI ('the BVI shares').

8. The shares exchange agreement was concluded at Parow.
9. In concluding the shares exchange agreement Mr Peter Berry represented Little Swift, Pepkor was represented by P J Erasmus, Odvest was represented by CJ Klem and BVI was represented by B Baisley.
10. A copy of the shares exchange agreement is annexed marked "B".
11. At the time of the conclusion of the shares exchange agreement, BVI held some 16 104 262 ordinary shares in Pepkor.

The first addendum

12. On or about 21 May 2013, the plaintiff and Flash Mobile concluded an addendum to the service agreement, a copy of which is attached marked "C" ('the first addendum').
13. The first addendum was concluded at Parow.
14. In concluding the first addendum the plaintiff acted personally and Flash Mobile was represented by CJ Klem.
15. In terms of annexure "A" to the first addendum, the plaintiff was entitled, *inter alia*, to payment of a special bonus, to be calculated in accordance with the formula set out in clause 3.3 of the said annexure A to the first addendum,

(referred to by the parties and in what follows, as the 'underpin') in the event that:

15.1. the profit after taxation of the combined businesses of Flash Mobile Vending (Pty) Ltd and two associated entities, Future Cell (Pty) Ltd and Flash IP (Pty) Ltd, earned during the 2017/2018 financial year ('the PAT'), exceeded R104 000 000 (clause 3.1, read with the definitions in clause 3.2); and

15.2. the value of the BVI shares, calculated as at 30 September 2018 and in accordance with the provisions of a separate Put and Call Option agreement between BVI and Little Swift, was below R96 194 849 (clause 3.3 read with the definitions in clause 3.2).

The second addendum

16. On or about 10 July 2014, the plaintiff and Flash Mobile concluded a second addendum to the service agreement, a copy of which is attached marked "D" ('the second addendum').

17. The second addendum was concluded at Parow.

18. In concluding the second addendum the plaintiff acted personally and Flash Mobile was represented by CJ Klem.

19. The second addendum amended the service agreement (and the first addendum) and provided that the plaintiff was entitled, *inter alia*, to payment of the underpin, in an amount to be calculated in accordance with the formula set out in clause 3.3 of annexure A to the second addendum, in the event that:

19.1. the PAT exceeded R104 000 000 (clause 3.1, read with the definitions in clause 3.2); and

19.2. the value of the BVI shares and BVI2 shares, being 76716 ordinary shares held by Little Swift in the company K2013137280 (Pty) Ltd ('BVI2'), calculated as at 30 September 2018 and in accordance with the provisions of two separate Put and Call Option agreements between BVI, the related entity BVI2 and Little Swift, detailed hereunder, was below R96 194 849 (clause 3.3 read with the definitions in clause 3.2).

The arrangement between the defendant, Pepkor, BVI and Steinhoff NV

20. During February 2015:

20.1. Pepkor undertook a share buy-back and purchased the shares which BVI held in Pepkor, for an amount of R3 080 242 835;

20.2. BVI subscribed for 32 215 class D ordinary shares in Newshelf 1093 (Pty) Ltd ('Newshelf') at a purchase consideration of R3 080 242 835;



20.3. BVI, the defendant and Steinhoff Africa Holdings (Pty) Ltd concluded an exchange agreement ('the exchange agreement') pursuant to which BVI exchanged its shares in Newshelf for 51 703 157 ordinary shares in the defendant at an issue price of R57 per share;

20.4. The defendant was at the time a public company listed on the main board of the Johannesburg Stock Exchange ('JSE');

20.5. The resultant value ascribed by the parties to the exchange agreement to the ordinary shares in the defendant acquired by BVI as aforesaid, was R2 947 079 949.

21. Pursuant to a scheme of arrangement implemented in or about December 2015:

21.1. the defendant was converted to a private company;

21.2. its listing on the JSE was terminated;

21.3. it became a wholly-owned subsidiary of Steinhoff International Holdings NV ('Steinhoff NV'), a public company listed on the Frankfurt Stock Exchange and inwardly listed on the main board of the JSE; and

21.4. BVI's 51 703 157 ordinary shares in the defendant were exchanged for an equal number of shares in Steinhoff NV, on the basis that Steinhoff NV's only asset, or only significant asset, was its shareholding in the defendant.



22. As a result of the aforesaid scheme of arrangement ('the scheme of arrangement'), BVI became a shareholder in Steinhoff NV.

The third addendum

23. Subsequent to the arrangement described above, on or about 18 May 2015 and at Cape Town, the plaintiff, acting personally and in reliance on the representation set out below, concluded a third addendum to the service agreement, ('the third addendum'), with Flash Mobile, represented by CJ Klem, which provided for the deletion of the underpin provisions and in terms of which the plaintiff relinquished his right to the underpin. A copy of this agreement is attached marked "E".

The plaintiff's claim in delict

(i) The representation

24. Prior to and at the time of the conclusion of the third addendum and the deletion of the underpin effected thereby, the defendant represented that its financial position was as it appeared from the defendant's 2014 annual financial statement ('the 2014 AFS') ('the representation').

25. The representation was made by:

25.1. the publication to the general public, including the plaintiff, of the 2014 AFS; and



25.2. the defendant's failure to advise the general public, including the plaintiff, of the false statements included in the 2014 AFS which could or would have constituted price-sensitive information regarding defendant's shares and thus the value of the BVI shares.

26. The defendant was obliged to advise the plaintiff, as member of the general public, of the false statements in the 2014 AFS in that:

26.1. the true facts regarding its financial position were within the defendant's exclusive knowledge;

26.2. the defendant and its executives knew and intended, alternatively ought to have known, that the general public, including the plaintiff, would rely on the representation of the defendant's financial position as it appeared from the 2014 AFS.

27. The representation was false, in that:

27.1. various transactions had been structured and implemented which had the result of substantially inflating the profit and asset values of the Steinhoff group (until August 2015 the defendant and its subsidiary companies) over an extended period;

27.2. fictitious or irregular transactions were entered into with parties said to be, and made to appear to be third-party entities and independent of the Steinhoff group and its executives, but which were in fact closely related

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to the defendant's then chief executive officer, Markus Jooste, and other executives of the Steinhoff group or were controlled by Jooste and such other executives;

27.3. within the Steinhoff group, fictitious or irregular income was created at intermediary level, and then allocated to underperforming operating entities as so-called "contributions" that took different forms and either increased income or reduced expenses in those operating entities;

27.4. documents supporting fictitious or irregular transactions were often created after the fact and backdated;

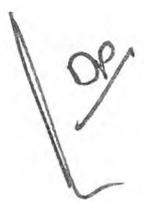
27.5. the assets and income of certain of the defendant's European subsidiary companies were materially overstated and/or their liabilities materially understated;

27.6. it had the effect of overstating the defendant's and Steinhoff NV's financial position, and thus overvaluing the BVI shares.

28. The representation was:

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

28.2. alternatively, negligent;



28.3. in any event, made wrongfully.

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

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

The revelation of the misrepresentation and the reduced value of the BVI shares

31. The misrepresentation perpetrated in the manner set out above, was revealed as follows:

31.1. On 5 December 2017 Steinhoff NV released an *ad hoc* announcement advising the market that its audited results had been delayed pending further investigation.

31.2. On 6 December 2017 Jooste resigned as chief executive officer of Steinhoff NV, and the price at which Steinhoff NV's shares traded on both the Frankfurt Stock Exchange and the JSE declined significantly.

31.3. On 2 January 2018 Steinhoff NV announced that its audited financial statements for the 2015 and 2016 financial years could not be relied upon and withdrew such statements, thereby confirming media reports



regarding misstatements in Steinhoff NV's and the defendant's financial statements, including the 2014 AFS, that had commenced at the approximate time of the *ad hoc* announcement of 5 December 2017.

32. As a result of the aforesaid revelations, the value of BVI's shareholding in Steinhoff NV, and thus the value of the BVI shares, declined dramatically.

The value of the underpin and compliance with the conditions

33. The underpin was to be calculated with reference to clause 3.3 of annexure A to the second addendum, which refers to clause 4.1 of the "BVI put and call option agreement" and clause 4.1 of the "BVI2 put and call option agreement".

34. The 'BVI put and call option agreement' referred to in the second addendum was concluded in writing between Little Swift, C H Wiese, Titan Premier Investments (Pty) Ltd and BVI at Parow and on or about 31 January 2013 ('the BVI put and call option agreement'). A copy of the BVI put and call option agreement is attached marked "F".

35. In concluding the BVI put and call option agreement Little Swift was represented by Mr Peter Berry, Dr C H Wiese acted personally and also represented Titan Premier Investments (Pty) Ltd and BVI was represented by Mr Bruce Baisley.

36. The 'BVI2 put and call option agreement' referred to in the second addendum was concluded in writing between Little Swift, C H Wiese, Titan Premier Investments (Pty) Ltd and BVI2 on or about 18 June 2014 ('the BVI2 put and



call option agreement'). A copy of the BVI2 put and call option agreement is attached marked "G".

37. In concluding the BVI2 put and call option agreement Little Swift was represented by Mr Peter Berry, Dr C H Wiese acted personally and also represented Titan Premier Investments (Pty) Ltd and BVI2 was represented by Mr Bruce Baisley.

38. The conditions for payment of the special bonus in terms of the underpin provisions contained in the second addendum were met in that:

38.1. the PAT (as defined) earned during 2017/2018 exceeded R104 000 000;
and

38.2. the combined value of the BVI and BVI2 shares, calculated with reference to the BVI and BVI2 put and call option agreements (or otherwise) on 30 September 2018 was nil, and therefore less than the R96 194 849 referred to in clause 3.3 of annexure A to the second addendum.

39. But for the representation, the plaintiff would have been entitled to a special bonus of R13 191 129, calculated with reference to the formula set out in clause 3.3. of the second addendum, as set out in annexure "H".

40. In the premises, the plaintiff would, but for the representation and the conclusion of the third addendum, have been entitled to payment of the underpin calculated

in accordance with the formula in clause 3.3 of annexure A to the second addendum, in the amount of R13 191 129.

The plaintiff's damages

41. Accordingly and as a result of the defendant's misrepresentation, the plaintiff has suffered damages in the amount of R13 191 129, being the underpin or bonus that he would have received had he not concluded the third addendum in reliance on that misrepresentation.

The plaintiff's alternative claim in terms of section 218 of the Companies Act

42. In terms of section 218(2) of the Companies Act, any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by the latter person as a result of that contravention.

43. By its publication to the general public, including the plaintiff, of the 2014 AFS, and of the material misstatements contained therein (as described above), the defendant contravened various provisions of the Companies Act, including:

43.1. section 22(1), in that the defendant carried on its business recklessly; with gross negligence, with intent to defraud persons (including the plaintiff), and for a fraudulent purpose;

43.2. section 28(1), in that the defendant failed to keep accurate and complete accounting records as necessary to enable it to satisfy its obligations in

terms of the Act with respect to the preparation of financial statements, such obligations being set out in section 29(1) of the Act;

43.3. section 28(3), in that the defendant, with an intention to deceive or mislead the general public, including the plaintiff, failed to keep accurate or complete accounting records and falsified or permitted to be falsified its accounting records;

43.4. section 29(1), in that the defendant provided financial statements, including annual financial statements, to the general public, including the plaintiff, which did not present fairly the state of affairs and business of the defendant and did not accurately explain the transactions and financial position of the business of the defendant and which did not accurately show the defendant's assets, liabilities and equity;

43.5. section 29(2), in that the 2014 AFS prepared by the defendant were false and misleading in material respects, or incomplete in material particulars.

44. The plaintiff has suffered loss or damage as a result of the aforesaid contraventions, as set out in paragraph 43 above.

45. In terms of section 218(2) of the Companies Act, the defendant is liable to the plaintiff for the loss or damage suffered by him, as set out in paragraph 42 above.

WHEREFORE the plaintiff claims:

(a) Payment in an amount of R13 191 129;



- (b) Interest on the aforesaid amount at the prescribed rate *a tempora morae* to date of payment;
- (c) Further and/or alternative relief;
- (d) Costs of suit.

DATED at CAPE TOWN on this the 11th day of June 2020.

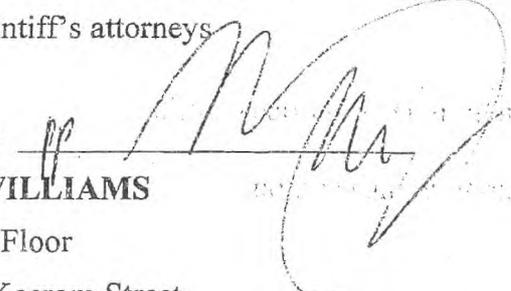


I C BREMRIDGE SC

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Per: 

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CAPE TOWN

[Ref.: JAW/MBM/WH0257]

[Tel.: 021 487 7900]

To : **THE REGISTRAR
HIGH COURT
CAPE TOWN**

And to: **STEINHOFF INTERNATIONAL HOLDINGS (PROPRIETARY)
LIMITED**



Building B2
Vineyard Office Park
Corner Adam Tas And Devon Valley Road
STELLENBOSCH

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