HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 042753-2023
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 6 SEPTEMBER 2023
SIGNATURE

In the matter between:

STEINHOFF INTERNATIONAL HOLDNGS N V	First Applicant
STEINHOFF RSA HOLDCO LTD	Second Applicant
STEINHOFF TOPCO BV	Third Applicant

and

STEPHANUS JOHANNES GROBLER	First Respondent
STENHOFF INTERNATIONAL HOLDINGS (PTY) LTD	Second Respondent
STEINHOFF AFRICA HOLDINGS (PTY) LTD	Third Respondent
STEENBOK NEWCO 10 SARL	Fourth Respondent
IBEX RETAIL INVESTMENTS LTD	Fifth Respondent

ORDER

1. The plaintiffs are granted leave to amend their particulars of claim in accordance with their notice in terms of Rule 28(1) dated 24 July 2023.

2. The amendment must be effected within five days from date of this order.

3. The plaintiffs remaining in the action after the amendment are ordered to pay the costs occasioned by the amendment, including the costs of opposition thereto, such costs to include the costs of two counsel.

4. The defendant's application in terms of Rule 47(3) is dismissed with costs, such costs to include the costs of two counsel.

5. The plaintiffs remaining in the action are ordered to make the documents requested by the defendant in terms of his notice delivered in terms of Rules 35(12) and (14) available for inspection and copying by the defendant's legal team, within five days from the date upon which the amendment referred to in paragraphs 1 and 2 had been affected.

6. The plaintiffs remaining in the action are ordered to pay the costs of the application to compel, such costs to include the costs of two counsel.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] The issues in this matter are three interrelated interlocutory applications in ongoing litigation in the well-publicized “Steinhoff – saga”. The main issue is an action for the recovery of remuneration, including bonuses and share incentives paid to an erstwhile senior executive of the Steinhoff Group, Mr S. J. Grobler, who has been cited as the defendant in the action. The total of the amount sought to be recovered is in excess of R270 million.

[2] The three interlocutory applications are: an opposed application for leave to amend the plaintiffs’ particulars of claim, an application for the furnishing of security for that application and an application to compel the discovery of certain documents, launched in terms of Rules 35(12) and (14).

Background

[3] Mr Grobler is alleged to have been inter alia employed as a senior executive and director of Steinhoff International Holdings (Pty) Ltd (SIHPL) (previously a listed company known as Steinhoff International Holdings Ltd (SIHL)), a senior executive and member of the governance and sustainability committee of Steinhoff International Holdings N. V. (SIHNV) (a company incorporated and registered in the Netherlands), the company secretary of SIHPL from 6 December 1999 to 23 September 2011, the group treasurer of the Steinhoff Group of companies, the supervisory director and at some stage the managing director of Steinhoff Europe AG (SEAG) (a company incorporated in Austria).

[4] During the course of his employment in the aforesaid various capacities from time to time, Mr Grobler had been paid base salaries, performance bonuses, strategic and project bonuses, relocation bonuses and been granted participation in share incentive schemes (the remuneration).

[5] The remuneration of Mr Grobler had, despite his differing capacities of employment, been paid to him by Steinhoff Africa Holdings (Pty) Ltd (SAHPL), Steinhoff Europe Group Services GmbH (SEGS), being a company incorporated in Germany and SEAG.

[6] The total of the remuneration paid to Mr Grobler by these companies have been pleaded to be:

- SAHPL R 238 176 671.00
- SEGS Euro 1 370 000.00
- SEAG Euro 315 000.00

[7] The plaintiffs allege that the remuneration paid to Grobler, in particular the approvals and authorisations pertaining to bonuses and share incentives, were made in the *bona fide* but mistaken belief that the financial statements and information available to SIHPL and SIHNV at the time and the documentation supporting those financial statements, accurately reflected the true financial positions and that the profitability and performance of the Steinhoff Group had been accurately reflected.

[8] The plaintiffs further pleaded that the financial position and profitability referred to above had not been truthfully and accurately reflected as a result of, inter alia, fictitious or irregular transactions which artificially enhanced the financial position and/or profitability, fictitious or irregular income purportedly created in the Steinhoff Group of entities as well as various “accounting irregularities”. It is not necessary for purpose of this judgment to detail all these instances.

[9] The plaintiffs further pleaded that, had SIHPL and SIHNV been aware of the true factual position, they would not have approved and authorised the payment of remuneration to Mr Grobler. Consequently, so the Particulars of Claim aver, SAHPL, SEGS and SEAG had paid over the remuneration detailed above to Mr Grobler in the *bona fide* but mistaken belief that those payments had been lawfully and properly due to him.

[10] The Particulars of Claim then proceed to plead that SAHPL, SEGS and SEAG were in these premises impoverished by the payments and Mr Grobler was unjustifiably enriched thereby.

[11] The claims of SEGS and SEAG had in terms of certain mergers and business transfer agreements been ceded and transferred to Steenbok Newco 10 SARL (Steenbok) (a company registered in the Grant Duchy of Luxembourg) and Ibex Retail Investments Ltd (Ibex) (a company formerly known as Steenbok Newco 6A Ltd, registered in Jersey) respectively.

[12] The actual claimants in the action are therefore SAHPL, Steenbok and Ibex. They are the third, fourth and fifth plaintiffs. SIHPL features as the former holding company of all the entities in the Steinhoff Group as the first plaintiff. Since the delisting of SIHPL from the South African Stock Exchange, SIHNV instead became the ultimate holding company and it featured in that capacity in the Particulars of Claim as the second plaintiff.

The proposed amendment

[13] Action has been instituted in May 2023 and although a notice to defend has been delivered, Mr Grobler still has to deliver his plea, delivery of which has been delayed by, inter alia, a request by him in terms of Rules 35(12) and (14) for the furnishing of certain documents.

[14] The plaintiffs allege that certain relevant occurrences took place after the institution of the action. These are the following: on 29 June 2023 SIHNV transferred all its assets and liabilities, which include the rights and claims asserted in the action, to Steinhoff Topco BV (Topco), a company incorporated in the Netherlands. On the same day, however, Topco transferred all its assets, including the claims previously asserted by SIHNV, to Steinhoff RSA Holdco Ltd (Steinhoff Holdco), a company incorporated under the laws of England and Wales. Steinhoff Holdco is referred to in the papers as Steinhoff RSA but, in order to avoid the impression that it is a South African company, I prefer the reference Steinhoff Holdco. This also accords with the factual position that Steinhoff Holdco is now the replacement holding company of those companies in the Steinhoff Group which feature in this litigation, in the stead of SIHNV.

[15] Pursuant to the above and, in order to bring the plaintiffs' pleadings in line with the factual situation, they proposed to amend their particulars of claim to delete the name of SIHNV as second plaintiff and to replace it with the name of Steinhoff Holdco and to plead the facts referred to in par [14] above and to annex the relevant agreements reflecting the transfers of assets and liabilities (referred to as the Dutch business transfer agreement involving Topco (the Dutch BTA)) and the English business transfer agreement involving Steinhoff Holdco (the English BTA)).

[16] Mr Grobler objected to the amendment, necessitating the first interlocutory application, being one for leave to amend. Although nothing turns on it, the notice of intention to amend had been delivered by the plaintiffs referred to in paragraph 12 above while the actual application for leave to amend was launched in the name of SIHNV, Steinhoff Holdco and Steinhoff Topco. I shall refer to all these parties jointly as plaintiffs and by their abbreviated names or acronyms where appropriate.

[17] The principal objection to the proposed amendment is the complaint that, should the amendment be granted, SIHNV would no longer be a party to the action. The factual situation is however that SIHNV never featured as a claimant in the action and was only cited insofar as it may have had an interest in the litigation. Once all its assets, including any "claims" which it may have asserted in the action had been transferred to Topco and from there to the new holding company, Steinhoff Holdco, it would no longer have any interest in the litigation.

[18] Moreover, the factual position is that a substantial restructuring of the Steinhoff Group had been taking place since 2022, which restructuring was implemented in this year (2023). Details of the restructuring plan together with all its schedules and annexures have been made available on w[...] under the "Investor Relations" and "WHOA Restructuring Plan" tabs and described as "Exhibit 1".

[19] The consequences of the restructuring would result in SIHNV being liquidated (in respect of certain excluded assets and liabilities not transferred to Topco) and, subsequent to a ruling by a Dutch court on 21 June 2023, ceasing to exist in terms of Dutch law on 29 September 2023 (this cessation is also part of the urgency in the finalization of the amendment).

[20] Part of the objection to the amendment was the argument advanced on behalf of Mr Grobler that it would deprive him of a counter-claim against SIHNV. When the court enquired as to the nature of this counterclaim, it was informed that it was a "claim" that Grobler had rendered services in return for his remuneration and that whoever had paid him, had therefore not been impoverished by such payment. The nature of this purported counter-claim is misconstrued. These assertions (which can be pleaded in due course) do not constitute a claim in the true sense of the word, but a defence to the enrichment claim. Whether or not SIHNV remains a party to the litigation or not, will have no impact on such a defence.

[21] There were two further answers to Mr Grobler's fears. The first was that if he genuinely believed that he had a real claim against SIHNV (as opposed to a defence to an enrichment claim by SAHPL, Steenbok or Ibex), he could still pursue it by submitting a claim in SIHNV's final liquidation proceedings before it ceases to exist. The second answer was that Steinhoff Holdco has assumed all the obligations of SIHNV which it may have had in this litigation. Should there be any doubt whether this had taken place in terms of the various business transfer agreements, the deponent to the founding affidavit to the application for leave to amend, has put it beyond doubt as follows: "*Steinhoff RSA [Steinhoff Holdco] has taken assignment and transfer of all rights, assets, claims, liabilities and obligations that were held by SIHNV and thus any claim that Grobler may have sought to assert against SIHNV, can be asserted against Steinhoff RSA [Steinhoff Holdco]. Grobler's rights to assert and prosecute a counter-claim are unchanged*".

[22] During the course of argument it became apparent that the second objection to the amendment was Mr Grobler's greater concern. It related to the availability of documentation belonging to SIHNV and which also forms part of the subject-matter of Mr Grobler's notice in terms of Rules 35(12) and (14) as well as his application to compel discovery of the documents called for in that notice.

[23] Again, this concern or fear of prejudice has, to my mind, been conclusively addressed by the plaintiffs. In the words of the current Chief Compliance and Risk Officer of the Steinhoff Group, Mr Louis Strydom, in dealing with the objection that

Mr Grobler "*… in order to establish certain assertions/defences, would need means and remedies to procure evidence and particulars … that could be exercised against SIHNV and, if Steinhoff RSA [Steinhoff Holdco] becomes a plaintiff in the stead of SIHNV, such means and remedies will be rendered useless as Steinhoff RSA [Steinhoff Holdco] will not have the required records, documents control …*" denied this by stating that "*… any and all records, documents and information and the like, that were held by SIHNV, are available to and under the control of Steinhoff RSA [Steinhoff Holdco] on an unfettered and unconditional basis. Steinhoff RSA [Steinhoff Holdco], as the party that is responsible for inter alia the performance and fulfillment of all discovery obligations in this matter, means that any procedural mechanisms that would previously have been used against SIHNV to procure discovery, can now be used against Steinhoff RSA [Steinhoff Holdco]. Grobler's procedural rights therefore are unchanged*".

[24] The legal principles governing applications for amendment of pleadings have been summarised many times, but perhaps not as succinctly as in *Commercial Union Assurance Co Ltd v Waymark NO*[1]. These are the following:

1. The court has a discretion whether to grant or refuse an amendment.

2. An amendment cannot be granted for the mere asking; some explanation must be offered therefor.

3. The applicant must show that *prima facie* the amendment 'has something deserving of consideration, a triable issue'.

4. The modern tendency lies in favour of an amendment if such 'facilitates the proper ventilation of the dispute between the parties'.

5. The party seeking the amendment must not be *mala fide*.

[1] 1995 (2) SA 69 (TKGD).

6. The amendment must not ‘cause an injustice to the other side which cannot compensated by costs’.

7. The amendment should not be refused simply to punish the applicant for neglect.

8. A mere loss of (the opportunity of gaining) time is no reason, in itself, for refusing the application.

9. It the amendment is not sought timeously, some reason must be given for the delay.

[25] When the above principles are applied to the application for amendment under consideration, one finds that there is a cogent explanation for the amendment – the factual landscape has changed and the plaintiffs seek leave to have their pleadings accord with the facts. The triable issues, namely the claims of the actual claimants already referred to above, are left intact. Also no *mala fides* can be ascribed to the plaintiffs in seeking the amendment. There was also no neglect on the part of the plaintiffs. The amendment is sought timeously, in fact before Mr Grobler had even delivered a plea. He therefore has every opportunity still left to set out his defence and he need not “adjust” his position or effect a consequential amendment as is often the case. Any possible prejudice appears to have been removed or addressed as I have already indicated above. I shall deal with the issue of costs hereinlater.

[26] Having considered all of the above, in the exercise of the court’s discretion and in order to have the matter progress to a stage where the parties can ventilate their disputes, leave to amend should be granted to the plaintiffs.

The Rule 35(12) and (14) discovery

[27] Approximately a month prior to the delivery of the plaintiffs’ notice of intention to amend, Mr Grobler had delivered a notice in terms of Rules 35(12) and (14). With reference to an extensive list of paragraphs of the particulars of claim, numerous documents were called to be furnished. Notably, with the exception of one sub-

paragraph (par 9.2) none of the paragraphs that the plaintiffs now seek to amend, feature in this notice and the amendment of par 9.2 is immaterial and it still retains a reference to SIHNV. Non-compliance with this notice, led to an application to compel, which is the second application this court has to deal with.

[28] Apart from the disputes as to whether Mr Grobler is entitled to all the documents called for in the notice or whether some of those called for exceed the bounds of Rules 35(12) and (14) and amount to an attempt at obtaining an early general discovery, there is no real reason why no response had yet been delivered. While repeatedly confirming on oath in the Steinhoff Group's answering affidavit to the application to compel, that "*there was never an intention not to respond to the Rule35 notice*" and that the plaintiffs *"… do not deny their obligation to respond to the Rule 35 notice*", in two months since the delivery of the notice, no response has been delivered.

[29] The excuse tendered was that the sifting thought thousands of pages of documents and considering which of Mr Grobler's requests were overbroad and which were not and preparing redacted versions of those documents falling under Dutch anti-disclosure provisions, were "time-consuming". This is an unconvincing reply. One would justifiably have expected of plaintiffs who have delivered extensive Particulars of Claim, containing equally elaborately formulated claims, based on specific periods of employment and the like, to have had the documentation relevant to those claims (and possible defences thereto) readily at hand.

[30] In respect to this issue and as part of the plaintiffs' guarantee not to cause Mr Grobler any procedural prejudice, Adv Swart SC (who appeared for the plaintiffs together with advocates Burger and Lengane), tendered a response to the Rules 35(12) and (14) notice within 10 days. Upon prompting from the court, he also indicated no objection, should an order to compel be granted, that it be granted against the "new" set of plaintiffs. That would in any event accord with the undertakings furnished by Mr Strydom on behalf of the Steinhoff Group as already referred to above.

[31] I further find that such an order to compel would provide additional comfort for Mr Grobler and serve to remove any procedural prejudice which he had feared.

The application for security for costs

[32] On 24 August 2023, that is on the Thursday preceding the Tuesday of 29 August 2023, being the day on which the application for amendment had been set down for argument, Mr Grobler launched an application in terms of Rule 47(3) for an order compelling the applicants in the application to amend, to furnish security for his costs of that application in the amount of R750 000.00.

[33] The basis for the application was that all three those applicants were peregrini of South Africa and that the first applicant (SIHNV) has, on its own version, "demonstrated a lack solvency". The allegation is made that Steinhoff Holdco and Steinhoff Topco "… inherited no better position".

[34] The allegation regarding SIHNV appears to have some merit, but it is difficult to understand Mr Grobler's concern about an ability to pay costs when that soon-to-be dissolved company is to be replaced by Steinhoff Holdco, a company which, according to the opposing affidavit read with the business transfer agreements, has assets exceeding Euro 1,1 million. The Steinhoff Group Chief Compliance and Risk Officer indicated that there should be more than sufficient funds to cover the costs of the application to amend (including the costs occasioned by SIHNV and Steinhoff Topco, both of which would no longer feature as parties in the main action).

[35] As things worked out and, due to the joint hearing of all three interlocutory applications in the urgent court, the issue of security for costs prior to the hearing of the other two applications, largely became moot. In light of the view I took in respect of the other two matters, I do not believe that Mr Grobler had been prejudiced thereby. Very little discernable extra costs came into play by way of the application for leave to amend, which had not already been incurred in respect of the hearing and argument of the other two applications. As pointed out above, Mr Grobler's application for delivery of documents and his concern about that aspect was so intertwined with the amendment itself that it is inconceivable on what basis he would need the protection of security of R3/4 million for any marginal extra costs to argue

the application for leave to amend. In fact, the plaintiffs have gone so far as to label this application an abuse of court or a delaying and frustrating mechanism.

[36] Be that as it may and apart from the apparent mootness thereof, the belated application for security or costs faced its own hurdles. The requirements of the furnishing of security for costs by a corporate entity is no longer part of our statutory law[2]. A claim for such security against a peregrinus company is also not, as Mr Grobler appeared to contend, merely for the asking.

[37] The relevant legal principles applicable to the furnishing of security has most recently been summarized as follows[3]:

> "*Security for costs is a discretionary remedy that a court may grant to a defendant who has a reasonable apprehension that the plaintiff will not be able to pay the costs of litigation of the plaintiff's claim fails. An incola is not, as a matter of course, entitled to demand security from a peregrinus claimant. It is at the discretion of the court to make such an order after an investigation of the circumstances and if equity and fairness to both litigants dictate that such an order be made. There is no justification for requiring the court to exercise its discretion in favour of a peregrinus only sparingly*". \

[38] With reference to *Shepstone & Wylie and Others v Geyser NO*[4], the court in *Mystic River* explained that a court should not fetter its own discretion and should decide each case upon consideration of all the circumstances either in favour or against granting security.

[39] In this case, most of the costs attached to the application for leave to amend, including notices, affidavits and heads of argument, have already been incurred prior to the launching of the application to furnish security. All that was left, was the

---

[2] *Siemens Telecommunications (Pty) Ltd v Datagenics (Pty) Ltd* 2013 (1) SA 65 (GNP) and *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA)
[3] In *Mystic River Investment 45 (Pty) Ltd v Zayeed Paruk Inc* 2023 (4) SA 500 (SCA) at par7 (*Mystic River*).
[4] 1998 (3) SA 1036 (SCA); [1998] 3 All SA 349 (SCA) at 1045C – 1045I

argument. This was, however, considered together with the argument in the application to furnish security itself as well as the application to compel discovery in term of Rules 35(12) and (14). The latter was, as inextricably intertwined with the application for leave to amend itself. Furthermore, the second applicant, Steinhoff Holdco, as the holding company of the first plaintiff, a South African company, has assets against which execution could be levied in the event of non-payment of the costs of occasioned by the amendment.

[40] In all these circumstances, I decline, in the exercise of the court's discretion, to grant the relief sought at his stage of the proceedings in Mr Grobler's application in terms of Rule 47(3).

Costs

[41] It is trite that an order for costs involves the exercise of a discretion of the court. The general principle is that costs should follow the success of a proceeding unless there are factors militating against such an order. The further principle is that a party seeking an indulgence should pay all the costs occasioned thereby, including the costs of such opposition as is in the circumstances reasonable and not vexatious or frivolous[5].

[42] Although unsuccessful, I do not find Mr Grobler's opposition to the proposed amendment so unreasonable as to justify the deprivation of costs. The application for the furnishing of security for costs was, however unnecessary in the circumstances and costs should follow its event. In respect of the application to compel discovery, even though the relief to be granted therein will now have to be amended to cater for the plaintiffs' substitution of parties, they could (and should) have responded to the preceeding notice long ago. The application was already justified prior to the recent events and costs should follow its eventual success.

Order

[43] In the premises, the following orders are granted:

---

[5] See Van Loggerenberg*, Erasmus Superior Court Practice*, Second Edition D5-8 and the cases cited in footnote 4.

1. The plaintiffs are granted leave to amend their particulars of claim in accordance with their notice in terms of Rule 28(1) dated 24 July 2023.

2. The amendment must be effected within five days from date of this order.

3. The plaintiffs remaining in the action after the amendment are ordered to pay the costs occasioned by the amendment, including the costs of opposition thereto, such costs to include the costs of two counsel.

4. The defendant's application in terms of Rule 47(3) is dismissed with costs, such costs to include the costs of two counsel.

5. The plaintiffs remaining in the action are ordered to make the documents requested by the defendant in terms of his notice delivered in terms of Rules 35(12) and (14) available for inspection and copying by the defendant's legal team, within five days from the date upon which the amendment referred to in paragraphs 1 and 2 had been affected.

6. The plaintiffs remaining in the action are ordered to pay the costs of the application to compel, such costs to include the costs of two counsel.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 30 August 2023
Judgment delivered: 6 September 2023

APPEARANCES:
For the Applicants: Adv Swart SC together with
Adv S W Burger & Adv M Lengane

Attorney for the Applicant:	Werksman Attorneys, Pretoria c/o Brazington and McConnell Attorneys, Pretoria
For the Second Respondent:	Adv E J Ferreira SC together with Adv P L Uys
Attorney for the Second Respondent:	Savage Jooste and Adams, Pretoria