Republic of South Africa

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

Before: The Hon. Mr Justice Binns-Ward
Hearing: 2 June 2020
Judgment: 4 June 2020

Case number: 8276/2018

In the matter between:

AJVH HOLDINGS (PTY) LTD First Applicant

FULL TEAM SURE TRADE (PTY) LTD Second Applicant

AQUILAM HOLDINGS (PTY) LTD Third Applicant

LIBER DECIMUS (PTY) LTD Fourth Applicant

XANADU TRADE AND INVESTMENTS 327 (PTY) LTD Fifth Applicant

and

STEINHOFF INTERNATIONAL HOLDINGS NV First Respondent

TOWN INVESTMENTS (PTY) LTD Second Respondent

Case no. 6757/2019

And in the matter between:

AJVH HOLDINGS (PTY) LTD First Applicant

FULL TEAM SURE TRADE (PTY) LTD Second

Applicant
AQUILAM HOLDINGS (PTY) LTD Third Applicant
LIBER DECIMUS (PTY) LTD Fourth Applicant
XANADU TRADE AND INVESTMENTS 327 (PTY) LTD Fifth Applicant

and

STEINHOFF INTERNATIONAL HOLDINGS NV First Respondent
TOWN INVESTMENTS (PTY) LTD Second Respondent
PEPKOR HOLDINGS LTD Third Respondent
PEPKOR SPECIALITY (PTY) LTD Fourth Respondent
TEKKIE TOWN (PTY) LTD Fifth Respondent

JUDGMENT

Delivered by email to the parties and release to SAFLII.

BINNS-WARD J:

[1] In this application, the applicant companies, which are the plaintiffs in case no. 8276/2018 and also in case no. 6757/2019, seek orders in the following terms in their notice of motion dated 11 November 2019:

1. The actions instituted in the above Honourable Court under case number 8276/18 and 6757/19[1] are consolidated under case number 8276/18.
2. The proceedings in case no. 6757/19 shall stand in abeyance and the costs of those proceedings shall be determined in case number 8276/18.
3. The third, fourth and fifth respondents are joined as the third, fourth and fifth defendants in case number 8276/18.
4. The applicants are to deliver all pleadings filed of record under case number 8276/18 on the parties joined in terms of paragraph 3 within 10 days of the date of this order.

[1] I have corrected the consistent misnumbering of case no. 6757/2019 as 6567/19 in the notice of motion.

5. The applicants are to deliver all pleadings filed under case number 6757/19 on (sic) the first and second respondents.
6. The applicants are granted leave to amend the particulars of claim in the action under case number 8276/18 in accordance with the notice of intention to amend annexed hereto marked "A".
7. The costs of this application are to stand over for determination in the action under case number 8276/18, alternatively, if this application is opposed, the costs are to be paid by any party who opposes the application, including the costs of two counsel where employed.

[2] The originally cited defendants in case no. 8276/2018 are Steinhoff International Holdings NV and Town Investments (Pty) Ltd. They are the first and second defendants respectively in that action. Those two companies are also the first and second defendants in case no. 6757/2019 and are cited as the first and second respondents in the current application. The third, fourth and fifth respondents in the current application, viz. Pepkor Holdings Ltd (Pepkor Holdings), Pepkor Speciality (Pty) Ltd and Tekkie Town (Pty) Ltd, are the third, fourth and fifth defendants in case no. 6757/2019. Tekkie Town (Pty) Ltd and Pepkor Speciality (Pty) Ltd are wholly owned subsidiaries of Pepkor Holdings. Those three respondents will henceforward, when referred to collectively in this judgment, be called 'the Pepkor respondents'.

[3] Only the Pepkor respondents played an active part as respondents in the current matter.

[4] It was eventually agreed between the actively participative parties that directions should be given as sought in terms of paragraphs 3, 4 and 6 of the notice of motion, and that the costs related to that part of the application should stand over for determination in case no. 8276/2018. The orders to be made will give effect to that agreement. Accordingly, the only matter in contention at the hearing before me on 2 June 2020 was whether the applicants should be afforded the relief sought in terms of paragraphs 1 and 2 of the notice of motion. (The relief sought in terms of paragraph 5 of the notice of motion would be germane only if the applicant's succeeded in obtaining a ruling in terms of paragraph 1.)

[5] It will suffice for the purpose of determining the issue in contention to describe what the action in case no 8276/2018 is about in simplified terms. It was instituted in May 2018 and concerns a claim by the plaintiffs for the return to them of the Tekkie Town business

consequent upon their rescission of the contract in terms of which they and the second defendant, Town Investments (Pty) Ltd (previously named K2016159084 (South Africa) (Pty) Ltd), disposed of the business as a going concern to Steinhoff International Holdings NV (Steinhoff). The contract was concluded on 29 August 2016. The plaintiffs claim *restitutio in integrum*, alternatively compensation in money, on the grounds that they were entitled to rescind the contract because they had been induced to enter into it by certain fraudulent misrepresentations by Steinhoff's then chief executive officer, one Markus Jooste. As consideration for their disposal of the business, which was effected by means of the transfer to Steinhoff of their respective shares in and claims against Tekkie Town (Pty) Ltd, which was the company in which the Tekkie Town business was conducted, the plaintiffs were individually allotted shares in Steinhoff in numbers directly proportionate to the value of their respective interests in Tekkie Town (Pty) Ltd. Having regard to the ostensible value of the allotted shares, the total consideration given by Steinhoff for the acquisition was in the amount of approximately R3,257 billion.

[6] It is common ground that shortly after its acquisition of the business Steinhoff transferred the shares in Tekkie Town (Pty) Ltd that it had acquired from the applicants to a subsidiary company, Steinhoff Investments Holdings Ltd (SIHL). That transaction occurred for a consideration equal to approximately R2,983 billion. On the same day, 2 February 2017, SIHL in turn transferred the shares to Steinhoff Africa Holdings Ltd (Steinhoff Africa) for the same consideration as it had acquired them. On 1 July 2017, Steinhoff Africa sold the shares to Pepkor Holdings for a purchase consideration of approximately R3,391 billion, which, according to the Pepkor respondents, was discharged by the transfer to the seller of shares of that value in Pepkor Holdings. The shares in Pepkor Holdings became publicly tradeable when that company listed on the Johannesburg Securities Exchange in September 2017. Pepkor subsequently split the operation of the Tekkie Town business by causing the South African based business of Tekkie Town (Pty) Ltd to be sold to Pepkor Speciality (Pty) Ltd.

[7] It is readily understandable in the given context that the applicants would need to join the Pepkor respondents as defendants in their action for restitution under case no. 8276/2018. They intend, in terms of the proposed amendments to their particulars of claim in that action, to overcome any difficulties that the separate juristic personalities of the companies through whose hands ownership of the Tekkie Town business has passed prior to the institution of the action might present to their ability to obtain effective relief by claiming a declaration, in

terms of s 20(9) of the Companies Act 71 of 2008, that Pepkor Holdings and Pepkor Speciality (Pty) be '*deemed not to be* [?separate] *juristic persons in respect of any right, obligation, or liability of those companies or of* [Steinhoff] *to any of the plaintiffs*'. Equally understandably in the circumstances, the Pepkor respondents appreciated that no point would be served by trying to oppose their joinder as defendants in the action, whatever their view of its merits. Hence, the agreement to their joinder as parties in case no. 8276/2018 mentioned at the outset of this judgment.

[8] The action in case no. 6757/2019 (the summons was issued on 23 April 2019), which was instituted almost a year after that of case no. 8276/2018, concerns a claim by the applicants for an interim interdict *pendente lite*. The pending action to which the interim relief sought in case no. 6757/2019 relates is that in case no. 8276/2018. The plaintiffs in case no 6757/2019 seek the following substantive relief '*pending the determination of case number 8276/2018*':

> A. That the first defendant be directed to hold available for delivery to the plaintiffs, alternatively to Steinhoff Investment Holdings NV, the Sale Shares (being the shares in Tekkie Town (Pty) Ltd which Steinhoff Investment Holdings NV obtained from the plaintiffs) with the values, rights and exigibility as they were on the date they were delivered to the first defendant.
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> B. That the second defendant be directed to hold available for delivery to the plaintiffs, alternatively to the third defendant Tekkie Town (Pty) Ltd the South African business and assets it acquired from Tekkie Town (Pty) Ltd, with the same values, rights and exigibility as that business and those assets had at the date they were delivered to the second defendant.
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> C. That the first defendant be interdicted and restrained from alienating, transferring ceding, assigning and/or otherwise encumbering the shares it holds in Tekkie Town (Pty) Ltd.
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> D. That the second defendant be interdicted and restrained from alienating, transferring, ceding, assigning and/or otherwise encumbering the business trading under the name and style of Tekkie Town in South Africa, otherwise than as reasonably required in the normal course of operating a retail business.

[9] The Pepkor respondents have already delivered their pleas in case no. 6757/2019. They pleaded *lis alibi pendens* in a special plea and also pleaded over on the merits. In their general plea the Pepkor respondents deny any knowledge concerning the allegations by the plaintiffs of fraudulent misrepresentation by the chief executive officer of Steinhoff or that company's alleged knowledge thereof, and in any event deny that the alleged knowledge of Steinhoff concerning the misrepresentation or the reliance by the plaintiffs thereon when the contract was concluded was attributable to Pepkor Holdings and Pepkor Speciality (Pty) Ltd.

They put the plaintiffs to the proof of all the alleged facts and rely on their respective separate juristic personalities to distance them from any liability on the part of Steinhoff that might be established.

[10] The context for the Pepkor respondents' special plea of *alibi pendens* was an application for interim interdictory relief *pendente lite* instituted as a matter of urgency by the applicants in the current matter. The Pepkor respondents were cited as the second, third and fourth respondents in that application, which was brought under case no. 5872/2019, and heard by Erasmus J on 25 April 2019. The substantive relief sought in that application was framed as follows in paragraph 2 of the notice of motion:

> 2. Pending the final determination of the action instituted in the Western Cape High Court under case number 8276 2018 [an order]
>
> 2.1 Interdicting and restraining the second respondent from alienating, transferring, ceding, assigning and/or otherwise encumbering its shareholding in the fourth respondent or any part thereof;
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> 2.2 interdicting and restraining the fourth respondent from allotting and or issuing any further shares in the fourth respondent;
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> 2.3 interdicting and restraining the third respondent from alienating, ceding, assigning, or otherwise encumbering the business trading under the name and style Tekkie Town (including the assets thereof), acquired in terms of the sale agreement entered into by the parties with effective date 1 October 2017 (as amended in addendum No. 1), otherwise than as reasonably required in the normal course of operating a retail business;
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> 2.4 interdicting and restraining the first respondent from dealing with the shares in the second respondent in any manner which would result in its loss of control of second respondent or prevent it from giving effect to the relief sought in prayer A in case number 8276/2018.

It was only after the Pepkor respondents' answering papers had been filed in the interim interdict application in case no. 5872/2019 that the interdict action seeking comparable relief was instituted in case no. 6757/2019. I think it may reasonably be inferred that the action was instituted because of an appreciation by the applicants that there were flaws in their application under case no. 5872/2019, but it is not necessary in the current proceedings to make any determination in that regard.

[11] On 26 April 2019, Erasmus J granted interim interdictory relief in case no. 5872/2019 in terms materially different from those in which it had been sought in terms of paragraph 2

of the notice of motion in that case. The learned judge thereafter refused an application by the Pepkor respondents for leave to appeal, but I was advised from the bar that leave to appeal was subsequently granted by the Supreme Court of Appeal, and that the parties are expecting to learn before the end of July this year when the appeal will be scheduled for hearing in that court. I was also advised that there is an interim undertaking by the Pepkor respondents concerning the preservation of the Tekkie Town business in place until the end of July. Ordinarily, an application for leave to appeal, and, *a fortiori*, an order granting such leave, has the effect of suspending the effect of the impugned order until the appeal has been determined. That is, of course, assuming that the order appealed against is an appealable order. Notwithstanding the absence of a fixed rule to that effect, an interim interdict is not usually regarded as appealable,[2] and it is authoritatively established that an order granting to leave to appeal from an interim order does not, of itself, serve as a warrant of appealability.[3] Whether the interim order made in case no. 5872/2019 is in point of fact appealable will therefore only be determined when the appeal court determines whether or not to entertain the appeal. In the circumstances the status of the order made by Erasmus J is currently regarded by the parties as uncertain, although it seems to me on reflection (without making any finding in that regard) that it is effective by reason of s 18(2) of the Superior Courts Act 10 of 2013.

[12] So much for the contextual setting of the current proceedings.

[13] It cannot escape notice that the action for interdictory relief in case no. 6757/2019 is, in itself, a paradoxical phenomenon. While it might be technically unexceptionable, as contended by Mr *Duminy* SC who appeared (together with Mr *Traverso*) for the applicants, to seek interim interdictory relief by way of action proceedings instead of on motion, it is most unusual to do so. So much so, that I cannot recall ever previously encountering such an action in practice. The reasons for this are obvious. Firstly, interim relief *pendente lite* is invariably required urgently, or at least within a short period of time, if it is to be effective. If that were not the case on the given facts, the circumstances would be strongly indicative that there was not a need for it at all. Secondly, it can be obtained without the court having to make final and determinative findings on the facts when those are in dispute. The

[2] Section 18(2) of the Superior Courts Act 10 of 2013 does acknowledge that an appeal against an interlocutory order may be entertained exceptionally, and gives a court the power in exceptional circumstances to order the suspension of an interlocutory order pending the determination of such appeal.

[3] *Cronshaw and Another v Coin Security Group (Pty)* Ltd [1996] ZASCA 38; 1996 (3) SA 686 (SCA), [1996] 2 All SA 435.

combination of those factors makes proceeding on motion the obviously indicated procedure. Proceeding for interim relief *pendente lite* by action is a course that, by reason of the time that it usually takes to bring an action to trial, heightens the risk of the apprehended harm against which interim protection is sought being realised before the remedy can be achieved. For the same reason it also courts the prospect that the claim will be rendered redundant because by the time the interdict proceedings are ready for trial, so also, very feasibly, could be the action in the principal case.

[14] The application for consolidation is brought in terms rule 11 of the Uniform Rules of Court. The test is convenience. The rule provides that a consolidation of actions may be ordered '[w]*here separate actions have been instituted and it appears to the court convenient to do so*'. In urging that a consolidation would be 'convenient', the applicants' counsel stressed that most of the factual issues involved in both actions are in common and submitted that it would result in a saving of time, resources and costs if they were tried together. Mr *Duminy* argued that in addition to these considerations the Pepkor respondents had not identified any cognisable prejudice to which they were likely to be exposed were a consolidation of the actions to be ordered.

[15] Whilst the features identified by Mr *Duminy* are important factors in the ordinary course when it comes to a weighing of convenience for the purposes of rule 11, they have to be judged in their peculiar context in the given case if the wide judicial discretion that is engaged in the adjudication of applications under the rule is to be properly exercised. As acknowledged in *Mpotsha v Road Accident Fund and Another* 2000 (4) SA 696 (C) at 700I-701A, the word 'convenient' connotes not only facility or expedience or ease, but also appropriateness in the sense that a consolidation would be fitting in all the circumstances. Jali J, at the place cited, said '*fitting and fair to the parties concerned*', but his reference 'to the parties' does not, in my view, derogate from the broader essence of what the learned judge was articulating, namely that the word 'convenient' in the given context '*should not be used in the narrow sense*'. A consolidation of actions that would be procedurally inappropriate can never be convenient.

[16] It does not appear to me to be in any sense fitting or appropriate for an action for interim relief pending the determination of a principal case to be consolidated with the action in that principal case so that both actions can be determined contemporaneously. Merely stating the proposition shows it to be a nonsense. There cannot be any prospect of ***interim*** relief ***pendente lite*** being a real issue deserving of a court's attention if the case for it is to be

decided together with, and at the same time as, the principal case. Indeed, Mr *Duminy* was constrained to concede that the action for interim relief would be rendered redundant if an interdict as sought were not granted before the determination of the action in the principal case. His argument therefore did not even try to address the issue that whilst there might well be a commonality of factual issues in the two actions, a court trying them would be called upon to weigh the evidence in respect of them in different ways for the purpose of deciding whether the quite disparate relief sought in each of them should be granted or not. For those reasons, I consider that the contention by Mr *Kuschke* SC, who appeared, together with Mr *Fitzgerald*, for the Pepkor respondents, that all the indications are that the applicants have no real intention, as currently advised, to move for relief in the interdict action has considerable force. The cogency of the contention is supported by the import of the relief sought in terms of paragraph 2 of the notice of motion.

[17] Mr *Kuschke* drew my attention to certain pertinent remarks by Van Wyk J in *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd* 1969 (4) SA 443 (C) at 445B-F, uttered when refusing an application to condone the late delivery of replying affidavits and dismissing the application for an interdict *pendente lite* in relation to which their admission had been sought. They illustrate that the institution of proceedings for interim interdictory relief *pendente lite* imposes a duty on the litigant initiating them to prosecute them with conscientiousness and expedition, failing which they may justly be regarded, in essence, as an abuse of process. The learned judge said the following in that regard:

> Relief *pendente lite* is a special remedy: it grants relief between the time of the order and the final determination of the dispute between the parties in order to avoid undue prejudice while proceedings are pending. In view of the long delay that has not been satisfactorily explained and the other points referred to, I am not prepared to allow the replying affidavits to be filed, and the application must accordingly be refused.
>
> This decision also has a bearing on the issue as to whether the Court should, in the circumstances, allow the applicant to proceed with the application for an interdict *pendente lite*. If one bears in mind the long delays for which no explanation has been given, that as far back as December the applicant had numerous clear cases of copying in its possession, according to the letter written by the applicant, and that up to now no action has been instituted, it seems that the applicant has erred in selecting this method, namely, an application for an interdict pendente lite, but even if it was the appropriate procedure at the time the applicant has, by reason of the facts stated above, forfeited its rights to this temporary relief. Had it issued summons at the time when the notice of motion proceedings were instituted, the trial could already have taken place.

> There is such a thing as the tyranny of litigation, and a Court of law should not allow a party to drag out proceedings unduly. In this case we are considering an application for an interdict *pendente lite*, which, from its very nature, requires the maximum expedition on the part of an applicant.
>
> In these circumstances the application to file replying affidavits is refused, with costs, and the application for an interdict *pendente lite* is dismissed with costs. It is ordered that the costs of two counsel should be allowed.

It is not for this court in these proceedings to determine whether the applicants' action for interim relief should be similarly stigmatised, but the quoted remarks do underscore just how starkly inappropriate it would be to send it off for trial together with the main action in consolidated proceedings.

[18] The applicants' papers acknowledge that they might, depending on developments between now and the determination of the main action, be spurred by circumstances to move for interim relief. In argument, Mr *Duminy* postulated that one such circumstance might be the expiry of the interim undertaking currently provided by the Pepkor respondents to the applicants. He suggested that in such event it would always be possible to undo the consolidation of the actions if relief had been granted in terms of paragraph 1 of the notice of motion in the current proceedings. In this regard, counsel pointed to rules 11(b) and 10(5), which conceive that that which has been joined may be subsequently be separated if that turns out to be appropriate. In my view, quite apart from the inherent inappropriateness of a consolidation of the actions that has already been discussed, the acknowledged prospect that if a consolidation were ordered it very conceivably might need to be undone in terms of rule 10(5) affords further grounds for the court not to be persuaded that a consolidation would be convenient. In addition, in the current matter, were an order granted standing proceedings in case no, 6757/2019 in abeyance, as sought in terms of paragraph 2 of the notice of motion, the applicants would presumably also need to apply for the upliftment of that order before they could proceed. That would add a further element of inconvenience.

[19] If a court is not persuaded that it would appear to be convenient for a consolidation of actions to be effected, the question of the prejudice that might be occasioned to the opposing party by such consolidation does not come up for consideration. It is only when it appears that a consolidation of actions would be convenient that the court considers whether any prejudice occasioned thereby to the opposing party might be substantial enough to outweigh the advantages of the apparent convenience of consolidation; cf. *New Zealand Insurance Co Ltd v Stone* 1963 (3) SA 63 (C) at 69B. The contention that the respondents had not

demonstrated cognisable prejudice, even if it were well founded, as to which I express no opinion, therefore does not advance the applicants' case.

[20] Mr *Duminy* also argued that there were a number of reasons why it would be advantageous for the two actions to be case-managed together. Assuming the good sense in that contention, it does not afford a reason to consolidate the actions. Consolidation within the meaning of rule 11 entails a contemplation that the actions will proceed together as if they were one action.[4] That is by no means intrinsically implicit in the joint case management of two or more matters. Counsel confirmed the correctness of my understanding that all the litigation in this Division concerning the fallout from the discovery of the material misstatement of the Steinhoff Group's financial state, of which the matters in case no.s 8276/18 and 6757/19 reportedly are but a small part, are in event being judicially case-managed by a single judge, Mr Justice Saldanha. The benefits of joint case management have therefore already been made available.

[21] The relief sought in terms of paragraph 2 of the notice of motion is dependent upon that sought in terms of paragraph 1 being granted. As the application for consolidation is to be refused, it follows that paragraph 2 will meet the same fate.

[22] In the result an order will issue in the following terms:

1. The application for a ruling in terms of paragraphs 1 and 2 of the notice of motion dated 11 November 2019 is dismissed with costs, including the fees of two counsel.

2. By agreement between the applicants and the third to fifth respondents, the relief sought in paragraphs 3, 4 and 6 of the notice of motion being unopposed, it is directed that:

    (a) The third, fourth, and fifth respondents are joined as the third, fourth, and fifth defendants, respectively, in the action under case number 8276/18.

    (b) The applicants are to deliver all pleadings filed of record under case number 8276/18 to the parties joined in terms of sub-paragraph (a) within 10 days of the date of this order.

[4] Rule 11(a); and cf. *Qwelane v Minister of Justice and Constitutional Development and Another* [2014] ZAGPJHC 334 (21 November 2014); 2015 (2) SA 493 (GJ), at para 7.

(c) The applicants are granted leave to amend the particulars of claim in the action under case number 8276/18 in accordance with the notice of intention to amend attached to the notice of motion as annex "A".

(d) The costs of the application for relief in terms of paragraphs 3,4 and 6 shall stand over for determination in the action under case number 8276/18.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicants' counsel:	**W.R.E. Duminy SC** **N. Traverso** **(Heads of argument drafted by N. Traverso and D.M. Lubbe)**
Applicants' attorneys:	**Webber Wentzel** **Cape Town**
Third, fourth and fifth Respondents' counsel:	**L.S. Kuschke SC** **R. Fitzgerald**
Third, fourth and fifth Respondents' attorneys:	**Bowman Gilfillan** **Cape Town**