REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 2833/2021

In the matter between:

TREVO CAPITAL LTD	**1st Applicant**
HAMILTON BV	**2nd Applicant**
HAMILTON 2 BV	**3rd Applicant**

and

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD	**1st Respondent**
GLOBAL LOAN AGENCY SERVICES	**2nd Respondent**
FINANCIAL CREDITORS OF THE FIRST RESPONDENT AS DEFINED IN THE TERM SHEET	**3rd Respondent**

Coram: **Bozalek J**

Heard: **24 – 26 May 2021; 7 – 9 June 2021**

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14:15 on 2 July 2021.

JUDGMENT

BOZALEK J

[1] On 5 December 2017 the Steinhoff Group announced that its annual financial statements would be delayed and the following day its CEO, Mr Markus Jooste, resigned with immediate effect. What followed were revelations of large scale and longstanding irregularities in the financial statements of the Group which led to a

massive decline in the value of its traded shares as well as acts of default in relation to major loan instruments. In the intervening years a process of debt restructuring was commenced within the Group which is ongoing and numerous legal claims were brought against Steinhoff companies by a variety of claimants whose shares had lost all but a fraction of their previous value.

[2] The applicants in the present matter are two such claimants. The first applicant, Trevo Capital Ltd (hereinafter 'Trevo'), instituted action against the first respondent (Steinhoff International Holdings (Pty) Ltd) (hereinafter 'SIHPL'), claiming in excess of R2bil, being a loss allegedly suffered as a result of SIHPL's alleged intentional, alternatively, negligent misstatements in its 2015 annual financial statements. The action is at an advanced stage but has not yet been certified as *'trial ready'*. Trevo's case is that, but for such statements, it would not have purchased shares by means of a forward sale which it concluded on or about in October 2015 with a related company.

[3] The second and third applicants, Hamilton BV and Hamilton 2 BV, (jointly referred to as 'Hamilton'), are foreign companies which between them allege that they have taken assignment of more than 14 000 claims by investors against SIHPL and Steinhoff International Holdings NV (SIHNV), its Dutch subsidiary. Hamilton has instituted two claims against SIHPL in this Court in which they seek to recover losses allegedly suffered by the individual investors attributable to SIHPL's intentional, alternatively negligent, misstatements in its financial statements.

[4] SIHPL is a now private company. It was previously registered as a public company, Steinhoff International Holdings Ltd ('SIHL'), and listed on the JSE as the holding company of the Steinhoff Group of companies. In December 2015, pursuant to a scheme of arrangement in terms of sec 114 of the Companies Act, 71 of 2008 ('the Act'), SIHL's entire issued share capital was swapped for shares in Steinhoff NV ('SIHNV'), a company listed on both the JSE and the Frankfurt Stock Exchange. Investors who previously held shares in SIHL became shareholders in Steinhoff NV, the new holding company of the Steinhoff Group. The second respondent, Global Loan Agency Services (hereinafter 'GLAS'), is a limited company incorporated in terms of the laws of the United Kingdom and carries on business as a provider of financial administration services.

[5] The third respondents are the financial creditors of SIHPL as defined in a proposal by SIHNV and SIHPL (together 'Steinhoff') in terms of sec 115 of the Act to

effect a compromise of their financial obligations with three classes of creditors identified therein, many of whose claims arise from the accounting irregularities referred to earlier. In July 2020 the broad terms of Steinhoff's proposed compromise with its creditors were set out in a *'term sheet'* on SIHNV's website. That term sheet was updated in October 2020 and has since been formally published by SIHPL pursuant to an order of this Court on 25 January 2021 making provision for publication of the proposal to creditors and all interested parties in terms of sec 155(2) of the Act. The proposal together with annexures runs to some 270 pages and was published on 23 March 2021. It involves the compromise of Steinhoff's financial obligations to three classes of creditors which were initially referred to in the term sheet as the CPU Creditors (FC or Financial Creditors class), Contractual claimants (CC class) and Market Purchase claimants (MPC class).

[6] In separate proceedings the applicants have challenged the sec 155 proposal seeking a declaratory order that two of the classes of creditors identified therein, namely, the Contractual claimants and the MPC claimants, do not constitute a *'class of creditors'* as envisaged by sec 155 of the Act and as such the compromise is not sanctionable by Court under sec 155(7)(b) of the Act. The present proceedings constitute, indirectly, a separate challenge to Steinhoff's sec 155 proposal.

[7] Some further background is necessary. The claims of many if not all of the Financial Creditors against SIHPL originate in a convertible bond to the value of €465mil issued by Steinhoff Finance Holding GMBH ('SFHG') in January 2014 ('the 2021 Bond'). The original maturity date of the 2021 Bond was 30 January 2021 and was guaranteed by SIHPL (then SIHL) ('the 2014 Guarantee'). Following the discovery of the accounting irregularities in the Steinhoff Group, company voluntary arrangements ('CVA's') under the UK Insolvency Act of 1986 were concluded for certain companies in the Steinhoff Group, including SFHG, in order to restructure its debts. The debt restructuring in the SFHG CVA included a contingent payment undertaking by SIHPL ('the CPU' or 'the SIHPL CPU') which *inter alia* amended or replaced the 2014 Guarantee of the 2021 Bond.

[8] The case that the applicants seek to make out in the present proceedings is that both the 2014 Guarantee under the 2021 Bond and its amendment or replacement by way of the CPU constituted the provision of financial assistance by SIHL/SIHPL to a related or interrelated company as contemplated in sec 45(2) of the Act. It is alleged that the financial assistance was provided on the first occasion to

SFHG, and on the second occasion to Steenbok Lux Finco (1) SARL ('Lux Finco 1'), a private limited company incorporated in Luxembourg. The applicants' case further is that SIHL's financial assistance to SFHG, the resolution of SIHL's board authorising it to enter the 2014 Guarantee, and the 2014 Guarantee itself are void for non-compliance with the provisions of sec 45(3) of the Act, namely, the solvency and liquidity and fairness tests incorporated in that sub-section. It is also the applicants' case that the resolution of SIHPL's board authorising the conclusion of the SIHPL CPU and the CPU itself are void for want of compliance with sec 45(3). The applicants' case is that, as claimants proposed to be included in the MPC class of creditors pursuant to the sec 155 proposal, their claims are directly affected by the recognition or non-recognition of the FC class of claimants and they are therefore entitled to the declaratory relief they seek. They contend that they are entitled to interdictory relief restraining SIHPL from making any payments under or arising from the 2014 Guarantee or the CPU and/or any compromise or arrangement proposed by SIHPL in terms of sec 155 of the Act that purports to recognise the claims of those financial creditors founded on either of those two bases.

[9] The applicants accordingly seek the following relief:

i) An order confirming or declaring that the guarantee provided by SIHL in respect of the convertible bond originally issued by SFHG to financial creditors on or about 30 January 2014, with an original maturity date of 30 January 2021, is void by virtue of sec 45(6) of the Act;

ii) Confirming and/or declaring that the resolution of SIHL's board authorising its entry into the 2014 Guarantee is similarly void by virtue of sec 45(6) of the Act;

iii) The self-same declaratory relief in relation to the CPU and the resolution of SIHPL's board authorising SIHPL's entry into the CPU;

iv) In the alternative to the above relief, an order declaring that the CPU and the concomitant resolution are void to the extent that the CPU amended or replaced the 2014 Guarantee and the SIHPL CPU resolution authorised its entry into the CPU;

v) Interdicting and restraining SIHPL from making any payments under or arising from the 2014 Guarantee and the CPU and/or any compromise or arrangement proposed by SIHPL in terms of sec 155 of the Act and from providing any security in respect thereof.

[10] The application was opposed by all three respondents and initially produced a record of close to 1000 pages, excluding the sec 155 proposal. At an advanced

stage during argument, and following the Court's ruling that the UK CVA documentation had not been properly placed before the Court, the respondents successfully applied for leave to supplement their papers, a process which added a further 1300 pages to the record and resulted in a week's delay.

[11] In broad terms the sec 155 proposal is, according to SIHPL, the product of discussions and analysis undertaken over a year to formulate a proposal to achieve the goal of yielding an outcome likely to be materially better and more certain for each of the three classes of Scheme creditors than what it termed a *'no settlement'* scenario i.e. the likelihood of the liquidation of SIHPL. It seeks to compromise firstly, financial obligations which SIHPL admits it owes to certain of its creditors, the Financial Creditors, and secondly, claims that it allegedly owes but which remain disputed and are not legally established, to two groups of litigation claimants being on the one hand the Contractual claimants and on the other the Market Purchase claimants.

[12] The Financial Creditors have, according to SIHPL, undisputed contractual claims against it under the SIHPL CPU with the result that the fact and the amount of SIHPL's liability in that respect are seen by it as certain. Contractual claimants are parties which instituted claims against SIHPL or SIHNV prior to 5 December 2020 in respect of *'arms-length negotiated contractual arrangements'* under which shares in other enterprises were sold or transferred by such claimants or their related parties to SIHPL and who received consideration directly from it by way of the issuance or transfer of SIHNV shares.

[13] The Market Purchase claimants are viewed by SIHPL as being actual or potential litigation claimants who *'otherwise'* purchased SIHPL shares prior to the close of business on 6 December 2015, and continued to hold SIHNV shares (which they then received in exchange for SIHL shares pursuant to the Scheme of Arrangement) at close of business on 5 December 2017. In SIHPL's view the fact and amount of its liability in respect of such MPC claims are also uncertain but for various reasons it considers that they give rise to a much less material risk of liability than those of the Contractual claimants. The proposal identifies the arrangements to be made in satisfaction of the claims of the Financial Creditors which include: certain amendments to the SIHPL CPU, including a maturity extension, the issue by SIHPL of two further loans, the grant of third ranking security by SIHPL over its residual assets for the benefits of the Financial Creditors, the implementation of a quarterly

cash sweep at SIHPL for their benefit and that of other residual secured creditors and a waiver and release of non-contractual claims by the Financial Creditors in favour of SIHPL. According to the applicants the effect of the proposed arrangements will be that financial creditors will to all intents and purposes be paid out in full in respect of their claims.

[14] As far as the second class is concerned i.e. the Contractual claimants, their claims will be settled for a total nominal amount of R9.4bil payable in differing proportions in cash and shares in Pepkor Holdings Ltd (the Steinhoff Group's South African retail subsidiary). The proposal differentiates between various Contractual claimants offering differing levels of settlement in respect of these groupings and with differing conditions attached. Finally, as regards the Market Purchase claimants, SIHPL proposes an undifferentiated approach and advises that the settlement recovery for those MPC claims which are accepted should fall between 4.0 and 6.6 cents in the rand. SIHPL's sec 155 proposal finds no favour with the applicants who, as mentioned, challenge its lawfulness in separate proceedings. Their fundamental objection is to the classes of creditors which have been proposed by SIHPL and which, in their view, results in the unacceptable consequence that the financial creditors are paid in full, the Contractual claimants receive on average of the order of 30 cents in the rand in respect of their claims, whilst the Market Purchase claimants will receive only some five cents in the rand.

Trevo's case

[15] In its founding affidavit Trevo sets out to explain the origin of many of the claims that SIHPL proposes to compromise. It relies *inter alia* on an 11-page overview of an independent report by PricewaterhouseCoopers ('PwC') released by Steinhoff NV on 15 March 2019 which revealed that profits had been overstated over several years in an approximate €6.5bil accounting fraud. That report found that a small group of Steinhoff Group former executives and other non-Steinhoff executives, led by a senior management executive, structured and implemented various transactions over a number of years which had the result of substantially inflating the profit and asset values of the Steinhoff Group over an extended period. Following those revelations, the Financial Sector Conduct Authority ('FSCA') imposed a R53mil fine on Steinhoff for making false misleading or deceptive statements to the market. A further consequence was that Steinhoff NV and SIHPL instituted action against their former chief executive officer, Mr Markus Jooste, and

their former chief financial officer, Mr Ben Le Grange, claiming back salary, bonus and share incentive scheme payments made to them over the course of several years. That litigation is ongoing.

[16] The applicants' case commences with their explanation of the origin of SIHPL's obligations to the Financial Creditors. On 30 January 2014 SFHG issued the 2021 Bond as a *'Guaranteed Convertible Bond'* to certain bondholders who lent SFHG €465mil with an original maturity date of 30 January 2021. At the same time SIHPL guaranteed the 2021 Bond in terms of the 2014 Guarantee, the terms of which were set out in an Amended and Restated Trust deed dated 23 November 2015. In terms of clause 5, headed 'Guarantee and Indemnity by SIHL', *'(a)s between SIHL and the Trustee and the Bondholders but without affecting (SFHG's) obligations, SIHL will be liable under this Clause 5 as if it were the sole principal debtor and not merely as a surety …*'. In terms of paragraph 1(d) of Schedule 4 to the Trust Deed, *'(t)he payment of all amounts payable in respect of the Bonds and all other monies payable under or pursuant to the Trust Deed and the Bonds has been conditionally and irrevocably guaranteed, jointly and severally, by SIHL and Steinhoff NV in the Trust Deed … (the Guarantee)'*.

[17] Following the December 2017 accounting revelations, CVA's under the United Kingdom Insolvency Act of 1986 were concluded in the Steinhoff Group in order to restructure its debt which included the SFHG CVA, originally dated 29 November 2018. In terms of this restructuring the SIHPL CPU was concluded between SIHPL and the second respondent, the latter acting as Agent of the creditors of SFHG, in August 2019 thereby amending or replacing the 2014 Guarantee provided by SIHPL. The background to the SIHPL CPU records that the bondholders in terms of the 2021 Bond agreed to defer and restructure their claims under the 2014 Guarantee, *'such that the debt due under the Original Guarantees will not remain immediately due and payable (and) SIHPL has agreed to repay its indebtedness under each of the Guarantees on the terms set out in this Deed …'*. The maturity date of the SFHG debt in terms of the 2021 Bond was extended to 31 December 2021 and the SFHG debt in terms of the 2021 Bond was restated by way of:

i) the bondholders issuing a loan ('the New Lux Finco 1 21/22 Loan') to Lux Finco 1 on a cashless basis, in terms of a Facilities Agreement;

ii) Lux Finco 1 on-lending the deemed cashless proceeds of the new Lux Finco 1 21/22 Loan to SFHG pursuant to an inter-company loan;

iii) SFHG using the deemed proceeds of the inter-company loan to discharge its obligations to the bondholders under the existing debt.

[18] According to the applicants the net effect of the SFHG CVA is that the bondholders have their debt, which originally arose under the 2021 Bond, restated pursuant to revised terms and maturity date and the existing payment obligations provided to bondholders by SIHPL, originally under the 2014 Guarantee, are deferred in terms of the (SIHPL) CPU. Further, according to the applicants, in terms of the CPU no payment by SIHPL is due until 31 December 2021 (unless a default event occurs) and the aggregate maximum amount that may be recovered from SIHPL may not exceed €1 581 300 000, the aggregate face value of the 2021 Bond issue of €465mil and a similar convertible bond originally issued by SFHG on 11 August 2015 for €1 116 300 000.

[19] This explanation of the origin of the 2014 Guarantee and the CPU is not disputed by the respondents but that is where the parties cases part. According to the applicants the 2014 Guarantee guaranteeing SFHG's debts in terms of the 2021 Bond constituted the provision of financial assistance by SIHL to a related or interrelated company in terms of sec 45(1) and (2) of the Act because at the time the 2021 Bond was issued and the 2014 Guarantee provided, SFHG was a subsidiary of SIHL. The applicants similarly take the view that the SIHPL CPU similarly constituted the provision of financial assistance in terms of sec 45 of the Act.

[20] Insofar as it is relevant sec 45 of the Act provides as follows:

'45. Loans or other financial assistance to directors

(1) In this section, 'financial assistance' –

(a) includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation; but

(b) does not include –

… …

(2) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise a company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or interrelated company, or to a related or interrelated company or corporation, or to a member of a related or interrelated corporation, or to a person related to any such company, corporation, director, prescribed officer or a member, subject to subsections (3) and (4).

(3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless –

(a) the particular provision of financial assistance is –

(ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category for potential recipients, and the specific recipient falls within that category; and

(b) the board is satisfied that –

(i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test, and

(ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

…..

(6) A resolution by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with –

(a) this section; or

(b) a prohibition, condition or requirement contemplated in subsection (4). …'

[21] The applicants aver that both the 2014 Guarantee and the SIHPL CPU are void in terms of sec 45(6) of the Act. As regards the 2014 Guarantee, the applicants' case is that notwithstanding the fact that SIHL purported to apply the provisions of sec 45(3) its board could not, upon a proper analysis of SIHL's financial position at the time, have been satisfied that:

i) immediately after providing the financial assistance in question SIHL satisfied the solvency and liquidity test; and

ii) the terms of the 2014 Guarantee were fair and reasonable to SIHL (now SIHPL).

[22] The applicants aver, in particular, that SIHL was then insolvent in that its liabilities exceeded its assets on a consolidated basis by between €700mil and €1.3bil. In this regard they rely on a financial analysis by Professor G Everingham, an accounting expert.

[23] As regards the SIHPL CPU, the applicants' case is that, in contrast to the 2014

Guarantee, SIHPL did not even purport to comply with sec 45(3) in concluding the CPU and in any event at that time SIHPL was factually and materially insolvent in that its liabilities exceeded its assets on a consolidated basis. Trevo called upon SIHPL to produce its financial statements for the relevant period and any other proof of solvency should it dispute that SIHPL was in fact insolvent.

The first and second respondents' case

[24] The first and second respondents' case is that at the time that the 2014 Guarantee was provided the financial information upon which SIHL's board of directors relied reflected that its financial position was such that the requirements of sec 45(3) were met. SIHPL also avers that the applicants offer no evidence that the financial statements upon which SIHL's directors relied at the time were unreliable. SIHPL emphasises that a determination whether there was compliance with sec 45(3) must be based on the facts, information and documentation available to the board of directors at the time that the decision was made (and upon which reasonable reliance was placed by the directors) and that it is misdirected for the applicants to seek to revisit those financial documents by extrapolating, with retrospective effect, information which had been procured, analysed and interpreted some seven years after the financial information served before the SIHL board.

[25] SIHPL relies on the affidavit of Mr Frederick Nel, a former director of SIHL who held the position of financial director during December 2013. Mr Nel confirms that at a meeting of the board of directors of SIHL it approved the launch by SFHG of a convertible bond issue to foreign investors of up to €465mil and that SIHL would act as guarantor for the obligations of the issuer; further that the board had reviewed SIHL's audited financial statements for the year ending 30 June 2013, the company's working capital requirements, its existing financing and facility arrangements and the tenure of same and had performed and met the solvency and liquidity test.

[26] It is recorded in the relevant minute that the company wished to provide financial assistance to the holders of the convertible bonds, the trustee *'and the other parties to the Relevant Documents'* within the meaning of sec 44 and 45 of the Act; further that the shareholders of the company had in a general meeting held earlier that day approved the provision of such financial assistance by way of a special resolution as contemplated in sec 45 and 45 of the Act. The extract of the minutes goes on to record that the directors of the company were satisfied that:

'6.1 For the purposes of section 44(3)(b)(i) and section 45(3)(b)(i) of the

Companies Act, after considering all reasonable foreseeable financial circumstances of the Company, immediately after providing the Financial Assistance:

6.1.1 the assets of the Company (fairly valued) would equal or exceed the liabilities of the Company (fairly valued) (taking into consideration reasonably foreseeable contingent assets and liabilities of the Company); and

6.1.2 it appears that the Company would be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the date of this resolution;

6.2 For the purposes of section 44(3)(b)(ii) and section 45(3)(b)(ii) of the Companies Act, the terms and conditions on which the proposed Financial Assistance are to be given are fair and reasonable to the Company; and …'

[27] Mr Nel confirms an extract from the minutes of the annual general meeting of the shareholders of SIHL held earlier that day when the necessary resolutions authorising SIHL's directors to vote on the issue were passed in terms of special resolution number 3. He confirms furthermore, that at the time SIHL's board did reasonably believe that SIHL was in fact solvent and liquid as of December 2013 when the board assessed its solvency and liquidity as provided for in sec 4 of the Act. SIHPL also relies on an independent assessment and analysis by PwC, which on 25 January 2014, issued a so-called *'Fairness Opinion'* in respect of the Convertible Bond guaranteed by SIHL to be issued on 30 January 2014 in which they considered *inter alia* whether the terms of the Convertible Bonds were fair and reasonable. The opinion records that PwC reviewed a range of financial documents, including Steinhoff's audited financial statements for the 2013 financial year, and concluded that the terms and conditions in respect of the Convertible Bond were fair to SIHL's ordinary shareholders. SIHPL also relied on legal opinions procured from two legal firms, one dated 30 January 2014 and the other in August 2015 which reviewed all the relevant documentation relating to the issue of Convertible Bonds, including the resolutions referred to above and which concluded *inter alia* that the Guarantor had full corporate power to enter into and perform its obligations under the Contracts and Bonds and to provide the Guarantee.

[28] As regard the SIHPL CPU, the first and second respondents' case is that this was a mere restatement of the terms of SIHPL's obligations to the Bondholders in terms of the 2021 Bond and 2014 Guarantee and did not entail SIHPL assuming any further debt or providing financial assistance. SIHPL does not purport to have

complied with the provision of sec 45 in relation to the CPU since as far as it was concerned it did not constitute a new provision of financial assistance to SFHG.

[29] The first and second respondents explained the genesis of the SIHPL CPU as following after the December 2015 accounting irregularities revelations which led to SFHG being unable to comply with the terms of the 2021 Bond. As a result, in December 2018, the original Bondholders notified SFHG that the bond had become immediately due and payable and, when the latter failed to satisfy their demand for immediate payment, notified SIHPL and demanded payment from it pursuant to its 2014 Guarantee. As a consequence, the respondents state, *'SIHPL became unconditionally liable to discharge the SIHPL payment obligations as Guarantor and principal debtor under the 2021 Bond'*. The respondents explain further that as part of its financial restructuring SIHPL concluded the CPU in terms of which the 2014 Guarantee obligations and its payment obligations were deferred. The respondents averred that the SIHPL CPU was merely a restatement of the terms of SIHPL's original obligations to the bond holders and accordingly the deferred terms under the SIHPL CPU apply without SIHPL having assumed any further debt or providing financial assistance. They aver further that as any payments to the Bondholders pursuant to the SIHPL CPU will serve to reduce SIHPL's *'crystallised debt'* such payments cannot be regarded as providing further financial assistance to SFHG.

Preliminary points

[30] Apart from the substantive issues between the parties the first and second respondents raised three preliminary points. Firstly, they contend that the applicants' reliance on sec 45 of the Act is misplaced because the transaction or transactions sought to be impugned relate to the provision of financial assistance to a *'foreign company'* within the meaning of the Companies Act whereas sec 45 does not apply to a foreign company.

[31] The second preliminary point raised is that Trevo does not have standing to attack the transaction or transactions in issue since it was never a shareholder in SIHPL and thus has no cognizable legal interest entitling it to apply to court for the setting aside the transactions and resolution. A related point is that Trevo does not have a claim against SIHPL and therefore lacks locus standi in these proceedings. As against Hamilton, which were granted leave to intervene in this application, the first and second respondents similarly take the point that since Hamilton was not a shareholder of SIHPL at the time of the 2014 Guarantee, it too has no cognizable

legal interest entitling it to the relief sought. The respondents also contended that Hamilton's participation in the application constitutes an abuse of this Court's process inasmuch as it is allegedly being used to obtain a financial benefit to which Hamilton is not entitled. This point was not pursued in argument and I shall say no more of it.

[32] There was agreement between the parties that the four main issues which fell to be determined were:

1. whether the applicants have standing in these proceedings;
2. whether foreign companies fall within the ambit of sec 45;
3. if so, did SIHL satisfy the requirements of sec 45 prior to concluding the 2014 Guarantee; and
4. whether the 2019 CPU constituted the provision of financial assistance by SIHPL.

[33] I deal with these issues in turn.

Standing

[34] The first and second respondents contend that the applicants are not *'proper plaintiffs'* for the purposes of sec 45 of the Act since a breach of sec 45 is a wrong done to the company and it is only SIHPL or a shareholder deploying a derivative action that is entitled to sue. They contend further that neither applicant has valid claims in law, basing this primarily on an analysis of the as yet unreported judgment by Unterhalter J in *De Bruyn v Steinhoff International Holdings NV and others*.[1] The respondents also rely on the decision in *Hlumisa Investment Holdings KF Ltd v Kirkinis and others,*[2] where the Court dealt with the *'proper plaintiff'* principle. The respondents contend further that when a wrong is done to a company, such as a breach of sec 45, it is the company that is the proper plaintiff and in circumstances where the company refuses to act it is its shareholders, by way of a derivative action, who have the right to act. They contend further that any failure by the directors to satisfy the requirements of sec 45 when granting financial assistance results in such directors being liable in terms of sec 77(3)(e)(v) of the Act which, the respondents contend, points to a breach of sec 45 being properly construed as a wrong done only to the company in which event the company is the proper plaintiff.

[35] Trevo contends that the proper plaintiff rule is inapplicable inasmuch as the

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[1] [2020] ZAGPJHC 145.
[2] 2020 (5) SA 419 (SCA).

basis of the relief sought is SIHPL's own non-compliance with sec 45 and not a wrong committed against SIHPL. They contend further that the present application is distinguishable from a derivative action where the shareholders seeks to compel the company to litigate in respect of a wrong done to the company in order *'to protect the legal interests of the company'*. What is asserted in the present matter is Trevo's own direct and substantial interests. For their part Hamilton contends that the *'proper plaintiff'* rule does not apply in the case of a sec 45 challenge since if a shareholder or creditor were unable to challenge a company's decision to provide financial assistance to a related company it would lead to the unlikely if not absurd result that only the company could take issue with such a decision. They contend furthermore that the *'proper plaintiff'* rule arises in the context of a wrong perpetrated against the company and a need to prevent *'double recovery'*. This is not applicable to sec 45 challenges, not least because there are no considerations of a *'double recovery'*.

[36] In my view the judgment in *Hlumisa* is not of direct application to the present circumstances and does not assist the respondents. That case was concerned with a claim by minority shareholders of a company which suffered a dramatic collapse in its share price. The shareholders sued the company's directors and auditors for damages alleging mismanagement of that company and a subsidiary and a failure by the auditors to adhere to auditing standards in their presentation of the subsidiary's annual financial statements which hid losses. The principal issue was whether sec 218(2) of the Companies Act permitted the shareholders to claim in their capacity as individual shareholders against the directors for their contravention of various other sections of the Companies Act. This in turn raised the applicability of the rule against recovery of reflective loss. In the present proceedings, by contrast, the applicants claim no losses mirroring those which may have been suffered by the company. They seek to challenge a key element of a sec 155 proposal, which rests on the lawfulness of financial undertakings which they contend were concluded in breach of sec 45. These circumstances are far removed from those in *Hlumisa* and do not, I consider, operate to deprive the applicants of standing in the present matter. I was referred to no direct authority dealing with the issue of which party would have standing to challenge the provision by a company of financial assistance to a related party in contravention of sec 45 and can see no reason in principle why a shareholder of a company would not have a sufficient interest to challenge the latter's decision to provide financial assistance to a related or interrelated party.

[37] It is correct that in the present instance Trevo was not a direct shareholder in SIHL or SIHPL. Hamilton however, advances the claims of direct shareholders which they have acquired through assignment. For what it is worth, in Trevo's case its damages claim against SIHPL arises from a contract in terms of which it purchased SIHPL shares in terms of a forward sale in October 2015. In that sense it is by no means a stranger to SIHPL.

[38] The second aspect of the respondents' challenge to the applicants' standing is based on the argument that ultimately neither have valid claims against SIHPL in law. This argument rests on the respondents' interpretation of the judgment in the *De Bruyn* matter which counsel spent much time analysing, dissecting or distinguishing. In my view, it is not necessary to discuss the merits, ratio or points of similarity between the delictual claims of the applicants and the class action sought to be certified in *De Bruyn* for the simple reason that the merits of the applicants' claims are of no direct relevance in the present application. At best for the respondents the validity or otherwise of the applicants' claims are an issue for any trial court seized of their action proceedings. As the applicants contend, their standing in the present application is based on their inclusion in the MPC class of creditors in SIHPL's sec 155 proposal. As I understand the proposal, SIHPL proposes to pay some part of a fund with a starting capital of €370mil to the MPC claimants, including the applicants, notwithstanding any negative view it may have of the merits of their claim, subject, in the case of Hamilton, to proper proof that they lawfully hold such claims on behalf of the original shareholders. In the sec 155 term sheet it was specifically mentioned in an introductory statement that Trevo would be entitled to *'a MPC for shares held on 5 December 2017 purchased from Treemo (Pty) Ltd in cash and preference shares'*. The final sec 155 proposal makes it clear, in paras 2.4 and 2.5 of the introductory section, that if the compromise is approved and sanctioned by Court it will become final and binding on all the company's creditors who will no longer be able to pursue their claims against SIHPL, the audit firm and all directors, officers and other personnel of the Steinhoff Group.

[39] In *Public Protector v Mail and Guardian Ltd and others*[3] Nugent JA stated as follows regarding the question of whether a party has standing to bring litigation:

'The common law has no fixed rule that determines whether a party has standing to

[3] 2011 (4) SA 420 (SCA) para 29.

bring litigation, and the courts have always taken a flexible and practical approach. The right to bring litigation before the Courts is restricted for various reasons; the Courts are not there to pronounce upon academic issues; they are not there to pronounce upon matters that have no significant consequences for the initiating party; they are not there for the benefit of busybodies who wish to harass others; and so on. Thus the Courts have always required that initiating litigants should have an interest in the matter. The interest that is required has been expressed in various forms that are collected in Cabinet of the Transitional Government for the territory of South West Africa v Eins. It has been expressed as "an interest in the subject matter of the dispute [that] must be a direct interest", and as "an interest that is not too remote", and as "some direct interest in the subject matter of the litigation or some grievance special to himself", and as "a direct interest in the matter not merely the interest which all citizens have"".

[40] Trevo and Hamilton have instituted delictual actions against SIHPL arising from the accounting irregularities in the Steinhoff Group and are classed as MPC's in SIHPL's sec 155 proposal. Although SIHPL denies that the MPC claimants have valid claims against it, its proposal nonetheless involves establishing a settlement fund which will be used to settle this class of claims. The sec 155 proposal envisages different terms for the three classes of creditors with Financial Creditors receiving the most favourable treatment, involving payment of approaching 100% of the face value of claims. If the applicants' challenge in terms of sec 45 of the Act to the financial assistance allegedly given by SIHL or SIHPL is successful, it is likely to have a direct impact on the claims of the Financial Creditors and, potentially at least, could release further funds to meet the claims of the other two classes of creditors. In these circumstances, given their real and substantial interest in the form and outcome of the sec 155 proposal, the applicants have standing in these proceedings. They cannot be said to have an interest that is too remote or only one which all citizens have. In the result I find that the applicants have standing to sue for the relief that they seek in the present application.

Does section 45 apply to foreign companies?

[41] As will be seen from the definition of sec 45 cited above, the essential question is whether the phrase *'or to a related or interrelated company or corporation'* in sec 45(2) is properly read as including foreign companies. The question could be asked why, if the legislature intended foreign companies to be subject to the provisions of

sec 45, it did not refer to them in terms. But it might equally be asked why, if the intention of the drafter was to exclude foreign companies from the ambit of sec 45, this was not explicitly stated.

[42] A starting point is to consider certain defined terms in the Act. Before doing so it is to be noted that section 5 of the Act, under the heading 'General interpretation of the Act', provides that it must be interpreted and applied in a manner that gives effect to the purposes of the Act as set out in sec 7 which include to:

'(b) promote the development of the South African economy by-

(i) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;

…

(i) balance the rights and obligations of shareholders and directors within companies;

(j) encourage the efficient and responsible management of companies;

…

(l) provide a predictable and effective environment for the efficient regulation of companies.'

[43] The term *'company'* and *'foreign company'* are defined in the Act. A foreign company *'means an entity incorporated outside the Republic irrespective of whether it is:*

(a) a profit, or non-profit, entity; or

(b) carrying on business or non-profit activities as the case may be, within the Republic'.

whilst a company is defined as meaning:

'*a juristic person incorporated in terms of [the] Act, a domesticated company or a juristic person that, immediately before the effective date –*

(a) was registered in terms of the –

(i) Companies Act, 1973; … or

(ii) Close Corporations Act 1984…., if it has subsequently been converted in terms of Schedule 2.

(b) was in existence and recognised as an "existing company" in terms of the Companies Act, 1973; or

(c) was deregistered in terms of the Companies Act 1973… and has subsequently been re-registered in terms of this Act'.

[44] Clearly a foreign company does not fall within the above definition of a company. If sec 45(2) is to be interpreted as covering foreign companies that leaves only the phrase or word *'corporation'* in sec 45(2) into which the concept of a foreign company can fit. A corporation is not defined in the Act. According to the Concise Oxford English Dictionary it is *'a large company or group of companies authorised to act as a single entity and recognised as such in law'*. On behalf of the applicants it was contended that the ordinary meaning of *'corporation'* namely, a legal entity separate and distinct from its owners, should apply without the restrictions imposed by the definition of *'company'* which limits that term to South African companies. On behalf of SIHPL it was contended that to treat *'corporation'* as a proxy for a *'foreign company'* would be to exceed the permissible bounds of interpretation and stray into the field of legislating. SIHPL contended furthermore that such an interpretation would result in tautology inasmuch as a *'company'* is also a legal entity separate and distinct from its owners.

[45] As has been authoritatively said or restated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[4] and as most recently endorsed by the Constitutional Court in *Democratic Alliance v African National Congress*,[5] the logical point of departure in the interpretation of a document, be it contractual or statutory, is the language itself, read in the context of the overall document, having regard to the purpose of the provision and against the background to the production of the relevant document.

'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words

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[4] 2012 (4) SA 593 (SCA).

[5] 2015 (2) SA 232 (CC) at para 136 and note 138. See also *First Rand Bank v KJ Foods CC* 2017 (5) SA 40 (SCA) at para 75 being an instance of the SCA applying the principle specifically in relation to the construction of the Companies Act. That passage was applied by the Constitutional Court, also construing the Companies Act, in *Diener NO v Minister of Justice* 2019 (4) SA 374 (CC) at para 52.

actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation;'.

[46] Applying these principles to sec 45 and, in particular, to the relevant subsection and the phrase *'or to a related or interrelated company or corporation'*, requires in the first instance recourse being had to the definitions section of the Act. Given the relatively wide definition of *'company'* one has to ask why the apparently tautologous words *'or corporation'* are used as well. On behalf of SIHPL, Mr Smalberger submitted that the word could only be a reference to a close corporation, pointing out that such a juristic person does not fall within the definition of company. However, close corporations are defined in terms of the Act and one would expect they would be referred to as such if the drafter intended, through the use of the word *'corporation'*, to bring them within sec 45(2). Mr Smalberger submitted that the word *'corporation'* was often used as shorthand for *'close corporation'* and referred in this regard to Schedules 2 and 3 to the Act. The only instance of this occurring in Schedule 2 is in item 1(2)(a) in the words *'a written statement of consent approving the conversion of the close corporation signed by members of the corporation holding in aggregate, at least 75% of the members' interest in the corporation;'*. This single instance of such a use in Schedule 2 in my view carries little weight in the interpretation of the term *'corporation'* in sec 45(2) for two reasons. Firstly, Schedule 2 specifically deals with the conversion of a close corporation to a company and so any reference to a corporation therein would be unlikely to be mistaken for anything else other than a close corporation. Secondly, in the subparagraph in question, 1(2)(a), the use of the word *'corporation'* as shorthand for close corporation is clear and merely an instance of not using otiose words. The same considerations apply to the use of the word *'corporation'* in certain headings in Schedule 3.

[47] Mr Smalberger contended that another textual indication that *'corporation'* means a *'close corporation'* is the use of the word *'member'* in sec 45(2) coupled with the word *'corporation'* inasmuch as it is trite that close corporations have members. A close corporation does have members but the term *'member'* also has a wider meaning in relation to juristic persons or corporations. This is recognised in the Act's definitions section which provides that in reference to entities other than a close corporation or non-profit company, *'member'* means *'a person who is a constituent part of that entity'*.

[48] The presumption against superfluity is a well-known doctrine in the

interpretation of statutes. It was crisply stated in *Wellworths Bazaar Ltd v Chandlers Ltd*[6] as follows:

'One who reads a legal document, whether public or private, should not be prompt to ascribe and should not without necessity or some sound reason, impute to its language, tautology or superfluity, and should rather at the outset be inclined to suppose every word intended to have some effect or to be of some use.'

[49] Counsel for the applicants submitted, without contradiction, that the word *'corporation'* is used only once in the 225 sections of the Act, i.e. apart from in Schedules 2 and 3. This too suggests that the word *'corporation'* was used by design in sec 45(2)(a) and not as a form of shorthand for a close corporation. The question arises whether *'close corporations'* are excluded from the provisions of sec 45(2)(a) when they are not mentioned by name which would, on the face of it, be a surprising result. However, if the word *'corporation'* in sec 45(2)(a) is given a wide and inclusive meaning it would include close corporations, resolve other apparent anomalies and render the word *'corporation'* non-tautologous. Such an interpretation would also constitute textual justification for the apparent omission of the phrase *'foreign company'* since such an entity would be subsumed within the category of *'corporation'*.

[50] Of course an examination of the text alone, without having regard to the context in which the provision appears and the apparent purpose to which it is directed, would involve an incomplete interpretation exercise. The mischief which sec 45 seeks to prevent is that of a company's directors abusing their powers by providing financial assistance to external entities or persons on terms which have insufficient regard to the interests of the company's creditors and shareholders. In my view, the purpose of sec 45, as well as those purposes of the Act which I have cited, are served by broadening rather than narrowing the class of related parties to which sec 45 applies and, on the face of it, there appears to be no plausible reason for excluding financial assistance by a local company to a related a foreign company from its operation. If not so interpreted, a company's directors' intent on providing financial assistance to an otherwise affected party, but seeking to avoid the strictures of sec 45(3)(b), could circumvent its provisions by making use of a foreign company in a circuitous manner.

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[6] 1947 (2) SA 37 (AD).

[51] On behalf of SIHPL Mr Smalberger submitted that the exclusion of foreign companies from sec 45's reach is perfectly logical in that its inclusion would be to subject international companies, having no presence or business in South Africa, to South African law. In support of this submission he relied on *CMC Di Ravenna SC and Others v Companies and Intellectual Property Commission and Others.*[7] I do not see the application of sec 45 to foreign companies, however, as amounting to a regulation or over-regulation of foreign companies. On the interpretation which I favour, sec 45's strictures apply only to South African companies and are extended to foreign companies only to the extent that such companies may not be the recipient of financial assistance from South African companies unless the provisions of sec 45 are met by the local company. Seen from this perspective, interpreting sec 45(2) as extending to foreign companies makes sense, is in keeping with apparent purpose of sec 45, provides a sensible and businesslike meaning to the subsection and accords with those purposes of the Act highlighted above.[8]

[52] Having regard to the language used in sec 45(2)(a), eschewing superfluity and having regard to the purpose of sec 45 provisions as a whole, I consider that the legislature indeed intended that foreign companies would fall within the class of persons to whom financial assistance could only be extended by local companies upon compliance by the latter with the provisions of sec 45(3).

Did SIHPL satisfy the requirements of sec 45 prior to the issuance of the 2014 Guarantee?

[53] It is common cause that in 2014 SIHL issued a guarantee for a Convertible Bonds issue by SFHG, a related Austrian company in an amount of €465mil. The bond issue was made to creditors on or about 30 January 2014, the bonds having an original maturity date of 30 January 2021. The 2021 Bond was issued as a *'Guarantee C Bond to the Bondholders'* who lent SFHG €465 million. The terms of the 2014 Guarantee were set out in clause 5 of an Amended Restated Trust Deed, dated 23 November 2015. The parties to the Trust Deed were SFHG, SIHL, SIHNV and Citi Corp Trustee Company Ltd. The relevant portions read as follows:

'*5.* ***Guarantee and Indemnity by SIHL***

[7] 2020 (2) SA 109 (GP).

[8] This interpretation is, moreover supported by academic commentators. See Business Tax and Company Law Quarterly (Vol 4 Issue 1 March 2013), Exploring sections 44 and 45 of the Act: The Perils of providing Financial Assistance' by Milton Seligson SC at page 8 and Commentary on the Companies Act of 2008, Yeats et al, Original Service 2018 2-390 at footnote 5.

5.1 Guarantee: SIHL unconditionally and irrevocably guarantees that if the Issuer (SFHG) does not pay any sum payable by it under this Trust Deed or the Bond by the time and on the date specified for such payment (whether on the normal due date, on acceleration or otherwise), SIHL will pay that sum to or to the order of the Trustee, … in London in euro in immediately available funds) before close of business on that day in the city to which payment is to be made.

…

5.2 ***SIHL as Principal Debtor***

As between SIHL and the Trustee and the Bondholders but without affecting the Issuer's obligations, SIHL will be liable under this Clause 5 as if it were the sole principal debtor and not merely a surety. Accordingly, it will not be discharged, nor will its liability be affected, by anything that would not discharge it or affect its liability if it were the sole principal debtor.

…

5.3 ***Guarantor's Obligations Continuing***

SIHL's obligations under this Trust Deed are and will remain in full force and effect by way of continuing security until no sum remains payable under this Trust Deed or the Bond. …'

[54] The applicants' case is that the 2014 Guarantee constituted the provision of financial assistance by SIHL to a related or interrelated company in terms of sections 45(1) and (2) of the Act because at the relevant time SFHG was a subsidiary of SIHL. I find that sec 45 was applicable to this transaction. They contend further that in terms of sec 45(3) of the Act SIHL's board was prohibited from authorising the 2014 Guarantee unless it was satisfied that:

i) immediately after providing the financial assistance in question SIHL would have satisfied the solvency and liquidity test; and

ii) the terms under which the 2014 Guarantee was proposed to be given were fair and reasonable to SIHL.

[55] The provisions of the solvency and the liquidity test are set out in sec 4 of the Act and provide as follows:

'(1) For any purpose of this Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time -

(a) the assets of the company, as fairly valued, equal or exceed the liabilities of the company, as fairly valued; and

(b) it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of -

(i) 12 months after the date on which the test is considered; …

(2) For the purposes contemplated in subsection (1) -

(a) any financial information to be considered concerning the company must be based on -

(i) accounting records that satisfy the requirements of section 28; and

(ii) financial statements that satisfy the requirements of section 29.

(b) Subject to paragraph (c) the board or any other person applying the solvency and liquidity test to a company -

(i) must consider a fair valuation of the company's assets and liabilities, including any reasonably foreseeable contingent assets and liabilities, irrespective of whether or not arising as a result of the proposed distribution, or otherwise; and

(ii) may consider any other valuation of the company's assets and liabilities that is reasonable in the circumstances; …'

[56] Trevo contends that, notwithstanding the resolution of SIHL's board of directors in January 2014 approving the 2014 Guarantee, SIHL nonetheless failed to comply with the provisions of sec 45 in that at the time it was factually and materially insolvent because its liabilities exceeded its assets on a consolidated basis by between €700mil and €1.3bil. Trevo relies on a financial analysis prepared in February 2021 by Professor Geoff Everingham, an independent accounting expert, in which he expresses the view that at the relevant time SIHL's tangible net asset value as reflected in the relevant balance sheet was negative, and that the value of the intangible assets (comprising goodwill, brands and trade names) was significantly overstated. Trevo contends further that the financial information considered by SIHL's board when authorising the issue of the 2014 Guarantee in January 2014 could not have satisfied the requirements of sec 4(2) of the Act in that its financial statements from 2009 to 2013 were materially misleading as a consequence of fictitious transactions and accounting irregularities and therefore required restatement.

[57] Trevo contends that given the extent of SIHL's insolvency at the time that the 2014 Guarantee was issued and the unreliability of its financial statements from

2009 to 2013, SIHL's board, acting reasonably, could not have satisfied itself that it met the solvency and liquidity test immediately after guaranteeing SFHG's debt in terms of the 2021 Bond. Hamilton aligns itself with the stance adopted by Trevo.

[58] SIHPL's response is to contend that an assessment of SIHL's compliance with sec 45's provisions has to be undertaken with reference to the documentation and information that served before SIHL's board at the time the financial assistance was approved; further, that the board acted reasonably in concluding that immediately after providing the financial assistance to which the 2014 Guarantee related, SIHL satisfied the solvency and liquidity test and, furthermore, that the terms under which the financial assistance was proposed and given were fair and reasonable to SIHL.

[59] In making its case SIHPL relied on the affidavit of Mr Frederick Nel who was financial director of SIHL at the time of the December 2013 meeting. He attended the board meeting on 3 December 2013 and was party to the resolution approving the financial assistance to SFHG. Mr Nel testified that at the time of considering the resolution the board reviewed SIHL's financial statements for the year ending 30 June 2013, its working capital requirements, the solvency and liquidity test and whether the terms on which the financial assistance was to be provided were fair and reasonable to SIHL. The June 2013 financial statements recorded that SIHL was solvent and would be so after providing the financial assistance in question. Mr Nel contended that the board reasonably believed that the solvency and liquidity test were satisfied.

[60] SIHPL also relies on an independent assessment by PwC prior to the bond issue, entitled 'Fairness Opinion' which concluded that the terms and conditions in respect of the Convertible Bond were fair to the ordinary shareholders of SIHL. SIHPL relies too on its published 2013 Integrated Report which confirmed that the net equity value of SIHL as at 30 June 2013 was R66.619bil, i.e. even if SIHL had paid off all its liabilities and debt that amount would be available to its shareholders; that SIHL's cash and cash equivalents at 30 June 2013 was R9.188bil, being an amount that could be converted into cash immediately as at 30 June 2013, and that the solvency and liquidity test required in terms of sec 45 of the Act would thus have been satisfied as at that date. Reliance was also placed on SIHL's unaudited interim results for the 6-month period ending 31 December 2013, i.e. shortly after the resolution was taken, which revealed that its net asset value at that date was R82.148bil and its cash and cash equivalents were R10.947bil.

[61] In argument Trevo contended that given the extent of SIHL's insolvency as at June 2013, as determined by Professor Everingham in his analysis, its directors, acting reasonably, could not have been satisfied that the solvency and liquidity test had been met. Trevo contends that sec 45(3)(b) and in particular the words *'the board is satisfied'* requires something more than a purely subjective belief on the part of the directors and must be interpreted as meaning a subjective satisfaction based on reasonable grounds. This approach carries the approval of the authors of Henochsberg[9] who reason that the expression the *'board is satisfied'* means that the particular board is satisfied, which is a subjective test, but qualified by the objective *'reasonably foreseeable circumstances'* in sec 4. Actual (objective) solvency and liquidity is, therefore, not the test. Support for this interpretation is also to be found in the remarks of Binns-Ward J in *Da Cruz and Others v City of Cape Town and Others*[10] to the effect that in such an instance it is not a matter of pure judgment, however *bona fide* it may be, since the decision-maker is required to have regard to the objectively relevant facts and must make a reasonable judgment on the basis of them. I accept the submission of the applicants that the purely subjective belief of directors can never be a sufficient test since in that event a wilfully, or even negligently, ignorant judgment would suffice in the face of obviously foreseeable circumstances pointing in a different direction.

[62] Trevo contends that SIHL's directors did not act reasonably *inter alia* when they relied on financial statements which were five months old, i.e. the June 2013 annual financial statements; but even accepting those financial statements, the board, acting reasonably, should have interrogated them in which event alarm bells should have sounded in respect of three aspects, namely goodwill and intangibles, liquidity, and an impairment of a loss-making subsidiary, the JD Group. In regard to goodwill and intangibles it was contended that the value attributed thereto should have been more carefully scrutinised and had been overstated by an amount of €4.573mil. In regard to liquidity considerations Trevo contended that SIHL's directors should have utilised widely acceptable financial ratios to assess the liquidity of the Group in which event these would have revealed that the ratios were below those which would generally be considered safe and acceptable. Further, it was submitted, notwithstanding the board's knowledge of the poor financial performance of the JD

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9 Henochsberg on the Companies Act 71 of 2008.
10 2017 (4) SA 107 at paras [34] and [35].

Group, it had not considered any impairment of its investment therein and had they done so they would not have been satisfied that immediately after the financial assistance had been rendered SIHL would have satisfied the solvency and liquidity test in sec 4 of the Act.

[63] Finally, Trevo contends that since both Messrs Markus Jooste and Ben Le Grange, as directors and CEO and CFO respectively, were present at the December 2014 board meeting and that given their knowledge of the irregular and fictitious transactions which had the effect of substantially inflating the profit and asset values of the Steinhoff group over an extended period, they could not have been satisfied that the solvency and liquidity test would have been met or that the 2013 annual financial statements complied with the requirements of sections 28 and 29 of the Act. It was further contended that SIHL could not simultaneously hold a contradictory position within its board of directors.

[64] Professor Everingham, who is well qualified to offer an opinion on accounting matters, prepared a report entitled Opinion as to Solvency of Steinhoff Group Company. He did this based on an analysis prepared by Mr J Enslin, a chartered accountant and the deponent to Trevo's founding affidavit in his capacity as director of the company having beneficial ownership thereof. Mr Enslin appears to have considered the restatements which appear in Steinhoff NV's consolidated financial statements for the period ending 30 December 2017 which corrected prior period errors and disclosure deficiencies following the revelations in December 2017. The conclusion Professor Everingham arrived at is that in truth SIHL was insolvent on the 30 June 2013 and 30 June 2014.

[65] Hamilton generally align themselves with the submissions made by Trevo and likewise contend that the failure by Messrs Jooste and Le Grange, at the meeting in December 2013, to disclose to the remainder of the board that the 2013 annual financial statements were unreliable as not taking into account fictitious and/or irregular transactions which had a material impact on SIHL's financial performance, meant that the SIHL board could not be regarded as having acted reasonably in satisfying itself that the solvency and liquidity test would be met immediately after concluding the SIHPL Guarantee.

Discussion

[66] The applicants' challenge to the 2014 Guarantee is based largely on an accounting exercise in turn premised upon financial irregularities and misstatements

which only came to light some three years later. It presupposes that SIHL's board, were it to have acted reasonably, would have uncovered the irregularities and would have realised that the audited financial statements were inaccurate. The question is whether the assumptions implicit in this argument are realistic and whether there is a *bona fide* factual dispute at play in which event SIHPL's version, if not untenable or far-fetched, cannot be rejected out of hand and must prevail on the basis of the *Plascon-Evans* principles.

[67] The evidence emanating from SIHPL, which in part has been summarised above, is that its board was comprised of a large number of individuals with a wide array of skills and experience, including expertise in accounting, and that it reviewed the June 2013 financial statements and other documentation in considering whether the 2014 Guarantee should be given. SIHPL also presented the evidence of a board member, Mr Nel, who confirmed that the board, acting as a whole, reasonably believed the solvency and liquidity test had been satisfied. Needless to say, this would exclude the two directors, Messrs Jooste and Le Grange, who are alleged to have been implicated in the financial irregularities. The financial statements then available and approved by Deloitte and Touche clearly suggest that SIHL could give the financial assistance in question without any threat to its solvency or liquidity. At the time SIHL's cash and cash equivalents amounted to R9.188bil, many times more than the financial assistance being provided. As has also been mentioned, SIHL's board sought advice on the fairness and reasonableness of the terms of financial assistance from PwC and two reputable law firms. Nor do I consider that the applicants' remaining criticisms of the board's reliance on the 2013 financial statements have sufficient weight to conclude that it acted unreasonably in relying on them and approving the financial assistance.

[68] As far as the over-valuation of intangible assets is concerned, as was pointed out by SIHPL, the 2013 financial statements include R41.5bil of intangible assets. Even if this figure was overstated there would certainly be no basis for a wholesale reduction of this figure based as it was on intangible assets including licences for software patents and trademarks, trade and brand names.

[69] As regards the treatment of the JD Group, it would appear that the directors were well aware that its profits had declined in preceding years, but this was discussed at the board meeting on 3 December 2013 and, in addition, was referred to in the report of the audit committee.

[70] SIHPL's director and CEO, Mr Du Preez, pointed out in his opposing affidavit that the guaranteed amount of the 2014 Guarantee was just less than R6bil, but that as of 30 June 2013 the company held cash and equivalents in excess of R9bil; furthermore, these cash and equivalents increased from R9bil in 2013 to approximately R16.3bil in June 2014 which serves to vindicate the board's judgment, in December 2013, that it had sufficient cash on hand to meet any claim under the 2014 Guarantee.

[71] The fundamental difficulty in the applicants' challenge to the 2014 Guarantee is that it is almost wholly reliant on *ex post facto* analysis of the company's financial position made with the benefit of hindsight following the revelations of December 2017 and the accounting revisions of 2019. Given that the applicants seek final relief in motion proceedings and that there is, in my view, a *bona fide* dispute of fact in regard to this issue I consider that SIHPL's version is certainly not untenable or farfetched and thus cannot be rejected. Finally, I should add that, based on SIHPL's version of the December 2013 board meeting, which on these papers I must accept, at worst for it two members of an eighteen-strong board were, it is alleged, secretly aware of gross financial irregularities which completely distorted and rendered inaccurate SIHPL's financial statements. In my view, however, purely on this scenario it cannot be said that the entire board's decision was thereby tainted and cannot stand.

[72] It follows that the applicants have failed to make out a case that the board, acting reasonably, could or should not have been satisfied that the financial assistance in the form of the 2014 Guarantee satisfied both the solvency and liquidity test and that its terms were fair and reasonable. In the result the applicants have not made out a case that the 2014 Guarantee is void for want of compliance with sec 45.

Is the SIHPL CPU void for lack of compliance with sec 45?

[73] The next issue to be determined is whether SIHPL CPU is void by virtue of sec 45(6) of the Act. The origin of the CPU was the 2014 Guarantee and the events of December 2017 when revelations surfaced about the extent of financial irregularities in the Steinhoff Group. These were described by Steinhoff International Holdings NV's CEO, Mr Du Preez, the ultimate holding company of SIHPL, as follows:

'In December 2017, an investigation into the alleged accounting irregularities within the Steinhoff Group commenced. There were acts of default on the part of SFH (SFHG) with respect to the Bond, and the bond holders called upon the 2014

Guarantee. SIHPL in consequence concluded … the SIHPL CPU, which merely deferred the existing payment obligations under the 2014 Guarantee. The SIHPL CPU was not a new provision of financial assistance. It was an affirmation of the financial assistance already provided by SIHPL to SFH(G) in 2014.'

[74] He describes these developments in further detail as follows:

'During 2018 and 2019, the Steinhoff Group inter alia put in place a financial restructuring to extend its financings until 31 December 2021, including under the terms of what is known as "Contingent Payment Undertakings ('CPU')"*, entered into by inter alia by SIHNV, a Dutch registered company, and the ultimate holding company of the Steinhoff Group, and SIHPL, being a restatement of public payment obligations arising from guarantees previously given (i.e. including the 2014 Guarantee)'.*

[75] Mr Du Preez provides the following rationale for the assertion that the SIHPL CPU did not amount to the provision of financial assistance in terms of sec 45:

'84. Accordingly, the deferred terms under the SIHPL CPU apply without SIHPL assuming any further debt or providing financial assistance. Moreover, as any payments to the bond holders under the Bond pursuant to the SIHPL CPU will serve to reduce SIHPL's crystallised debt, such payments cannot be regarded as providing further financial assistance to SFH. The financial assistance (to the extent that it qualifies as such) was given when the 2014 Guarantee was issued'.

[76] During argument an objection was raised by Hamilton to the use by the respondents of the provisions of the SFHG CVA without it having been properly introduced into evidence. The objection was sustained whereupon the respondents successfully applied to supplement their answering affidavit by introducing the CVA and contextualising it. The applicants filed supplementary replying affidavits, the overall result being that the parties refined their cases in regard to the 2019 CPU.

[77] In summary SIHPL explained the history and meaning of the SFHG CVA as follows. SFHG was an Austrian incorporated company but by November 2018 its *'centre of main interest'* was in England, thus making it eligible to utilise an English law statutory rescue and compromise procedure introduced into law by Part 1 of Chapter 8 of the Insolvency Act, 1986 (c45), called a *'company voluntary arrangement'*, which it did in the form of the SFHG CVA. At the same time, Steinhoff Europe AG ('SEAG') another Austrian company, and a holding company for key

Steinhoff European investments within the Steinhoff Group, also proposed a CVA of its own.

[78] A CVA allows a company, represented by its directors, alternatively by its liquidator or administrator, to make a proposal to its unsecured creditors to resolve its financial liabilities where the alternative is an insolvency procedure such as a liquidation or the English law equivalent of a South African business rescue procedure. Whilst the proposal is being considered, and if the proposal has not been made by the liquidator or administrator of the company concerned, an independent *'Nominee'* or *'Nominees'* (usually licenced insolvency practitioners) are appointed and have to satisfy themselves as to the company's financial position, the proposal's prospects of being implemented successfully and that there is no manifest unfairness. The Nominees report to creditors in writing on any meeting of creditors convened to consider the CVA proposal. For the proposal to pass at a creditors meeting it has to be approved by at least 75% in value of creditors present at the meeting and by at least 50% of the shareholders present at the meeting and voting on the resolution. Once the proposal is approved it binds all creditors and shareholders who were entitled to vote at the meeting or would have been entitled if they had notice. The Nominees become the *'Supervisors'* and their role is to supervise the implementation of the CVA and to scrutinise compliance with its terms.

[79] Mr Du Preez proceeded to explain where the SFHG CVA fitted into the Steinhoff restructuring process. It began with the 5 December 2017 SIHNV public announcement that new information had surfaced relating to possible accounting irregularities and a subsequent investigation by PwC into such irregularities and/or possible violations of laws. This led in time to an overview of the PwC report being published on the Steinhoff Group's website on 15 March 2019 as well as announcements by SIHNV that its 2015 and 2016 financial statements could no longer be relied on and had to be revised and that its financial statements of previous years might also have to be revised.

[80] Following these developments and the related precipitous fall in the Steinhoff share price, various investigations, civil liability proceedings and class actions were initiated against SIHNV or SIHPL in Germany, South Africa and The Netherlands. Several bank loans and (convertible) bonds that Steinhoff Group companies had previously obtained or issued were also on the verge of becoming due and payable or were cancelled whilst guarantees of Group debt given by SIHNV and SIHPL

became capable of being demanded. These and other adverse financial developments occasioned by the 2017 crisis placed the Steinhoff Group in *'severe financial difficulty'* to the extent that in early 2018 the Steinhoff Group debt was estimated to be approximately €10.2bil.

[81] One of the Group's priorities was to stabilise the Steinhoff Group holding companies to prevent *'a widespread multi-jurisdictional insolvency of the group entities'* which would likely cause *'value destruction for all stakeholders'*. SIHNV, SIHPL, SFHG and SEAG, as the key holding companies in the Group, engaged in negotiations with an *ad hoc* group of the Group's financial creditors and their legal and financial advisors in the first half of 2018 with a view to agreeing a medium-term financial restructuring in respect of the Group's holding companies' debt. These negotiations culminated in a Lock-Up Agreement in July 2018 involving an obligation on financial creditors to support and implement the financial restructuring in accordance with appended term sheets.

[82] Key commercial principles in the Lock-Up Agreement were a three-year extension of debt maturity to 31 December 2021, creditors agreeing not to exercise their enforcement rights under all financial instruments and a revised credit and security structure and package of undertakings and events of default to reflect the new state of the Group's affairs. The Lock-Up Agreement contemplated the financial restructuring of SFHG and SEAG through English law CVA's. The SFHG CVA was inter-conditional on the effectiveness of the SEAG CVA and these CVA proposals were approved by the respective boards on 29 November 2018 and published the following day. The CVAs were approved by creditors with the requisite majorities on 14 December 2018.

The terms of the SFHG CVA

[83] The terms of the SFHG CVA became effective following its approval on 14 December 2018 and its completion was specified to occur on 13 August 2019. The SFHG CVA is split into sec 1, which describes the proposal, and section 2, which contains its terms. Section 1 contains, *inter alia*, a summary of the key terms of the restructuring and the SFHG CVA itself. The terms include the conditions precedent to launching the restructuring, the sequence and implementation of steps for the restructuring, the terms for the calculation and receipts of entitlements and various other conditions. According to Mr Du Preez, the first restructuring step was the conclusion of the CPU since the failure to conclude the CPU would have

presented *'an insuperable obstacle to the remainder of the Restructuring Steps'*.

[84] The CVA is a lengthy and detailed document running to more than 300 closely typed pages. In paragraph 5.2 under the heading 'Implementation of the Restructuring by SFHG' the following was explained:

'5.2.2 The Existing SFHG Debt will be reconstituted as follows:

i) The issuance of the New Lux Finco 1 21/22 Loan and the New Lux Finco 1 23 Loan by Lux Finco 1, and guaranteed by SFHG from the Implementation Commencement Date, on a cashless basis to the SFHG creditors pro rata to their holdings of Existing SFHG Debt;

ii) Lux Finco 1 will onlend the deemed cashless proceeds from the New Lux Finco 1 21/22 Loan and the New Lux Finco 1 23 Loan to SFHG pursuant to the Lux Finco 1 Intercompany Agreement; and

iii) The Existing Guarantee given by SIHPL will either be amended or restructured as a contingent payment undertaking depending on the circumstances applicable to SIHPL

…

5.2.4 The net effects of these steps is, in summary, that SFHG Creditors who hold existing SFHG Debt will have such debt … restated pursuant to revised terms and maturity.'

[85] Clause 8.4. in section 2 of the CVA is of importance and, insofar as it is relevant, reads as follows:

'8.4 Treatment of Existing SFHG Debt

8.4.1 Save only for the indemnities provided under (i) clause 12.5 of the Trust Deed dated 23 November 2015, as amended, restated and/or supplemented from time to time in relation to the SFHG 2021 Convertible Bonds and … in respect of the notices of demand and acceleration issued by the relevant SFHG Trustee on 12 December 2018 and for the benefit of the relevant SFHG Trustee only, with effect from the time at which the Lux Finco 1 Inter Company Agreement becomes effective in accordance with its terms, in consideration for the restructuring and the payment terms constituted by the New Lux Finco 1 Loans, ***SFHG shall have no further liabilities or obligations to a SFHG Creditor, arising out of or in connection with the Convertible Bonds, the Support letters and the Lock-up Agreement … under the applicable Convertible Bonds****.* [my highlighting]

8.4.2 In relation to the entry into of either the SIHPL Guarantee obligation or the

SIHPL Contingent Payment Undertaking (as applicable) or the SFHG Contingent Payment Undertakings, nothing in this Proposal or the SFHG CVA, including the restructuring of the obligations of SFHG pursuant to the Convertible Bonds, shall operate to discharge or release SIHPL and SIHNV from any liability or obligation in respect of the SFHG 2021 Convertible Bonds, … which shall be restructured on the terms set out in either the SIHPL Guarantee Obligation or the SIHPL Contingent Payment Undertaking (as applicable) and the SFHG Contingent Payment Undertakings, the conditions of which shall apply following the occurrence of the Restructuring Effect Date.'

[86] Mr Du Preez stated in his supplementary affidavit that he had been advised that the upshot of the CVA was that SFHG's debt to the Bondholders (i.e. the Financial Creditors) was *'restated'* by Lux Finco 1 in the form of the New Lux Finco 1 21/22 Loan. He added that the rationale for the exchange of the Convertible Bonds (listed debt instruments) for private loan instruments was primarily to ensure that the Financial Creditors would be able to benefit from an *'enhanced reporting regime'* more typical under a private debt instrument. '*For this reason and for reasons of preferred jurisdiction and greater certainty, Lux Finco 1 was put in place as the issuer of the new loans which were 'exchanged' for the Convertible Bonds issued by SFHG'*. He explained that SIHPL's obligations in terms of the 2014 Guarantee were accelerated in terms of the notice dated 12 December 2018, the effect of which was to *'crystallise'* SIHPL's obligations to the Financial Creditors.

The SIHPL Contingent Payment Undertaking

[87] The next relevant document is the SIHPL CPU dated 12 August 2019 created by SIHPL in favour of the second respondent acting as agent of the Financial Creditors under the SFHG 21/22 Facilities Agreement and which runs to some 40 closely typed pages. The most relevant portions are the background, certain of the definitions, certain acknowledgments made by SIHPL in paragraph 2, the setting out of its obligations in paragraph 3, as well as the application of payments in paragraph 3.3.

[88] To the extent relevant, the background reads:

'(A). SIHPL provided the SFHG 2021 Guarantee for the benefit of the Original 2021 Bondholders in connection with the financial indebtedness incurred by the Original Issuer (SFHG) pursuant to the SFHG 2021 Convertible Bonds …

(B). By entering into the SFHG 2021 Trust Deed, SIHPL agreed to the following

terms of the SFHG 2021 Guarantee …

(a) … following the occurrence of an event of default under the SFHG 2021 Convertible Bonds and a failure by the Original Issuer to pay the amount due, SIHPL is required to pay such amount to … the … Trustee;

(b) … SIHPL would be liable for such amount as a principal debtor and not merely as a surety, and waived the right for demand to be made on the first Original Issuer;

(c) … the liability of SIHPL pursuant to the Guarantee would be a primary obligation to indemnify the SFHG 2021 Trustee and any holder of the … Convertible Bonds against any loss suffered by them as a consequence of any sum not being paid under the SFHG 2021 Trust Deed on its date for payment.

… …

(D). On 5 December 2017 SIHNV made an announcement regarding an investigation into financial irregularities within the Group. As a consequence of these accounting irregularities, subsequent failures by the Original Issuer and SIHNV to comply with the terms of both the SFHG 2021 Trust Deed … a number of events of default have occurred under each of the SFHG 2021 Trust Deed … or would have occurred if the Lock-Up Agreement had not been entered into …

(E). Prior to the date of this Deed, the SFHG 2021 Trustee on behalf of the Original 2021 Bondholders notified the Original Issuer that the SFHG 2021 Convertible Bonds had, as a consequence … become immediately due and payable.

… …

(G). Following the 2021 Acceleration … and as a condition of the SFHG 21/22 Facility, in consideration of the Original Bondholders deferring and restructuring their claims under the Guarantees and the Subsisting Defaults being waived, ***such that the debt due under the Original Guarantees will not remain immediately due and payable, SIHPL has agreed to repay its indebtedness under each of the Guarantees on the terms set out in this Deed.*** **This agreement shall also be conditional upon the restructuring of the financial indebtedness arising under the Original Financing Agreements and certain other financing agreements pursuant to which the terms applicable to the financial indebtedness incurred by the Original Issuer pursuant to the SFHG 2021 Trust Deed … will be aligned as set out in the Company Voluntary Arrangement.** [my highlighting]

(H). SIHPL and the Agent on behalf of each Creditor enter into this Deed in connection with the SFHG 21/22 Facilities Agreement'.

[89] The following clauses of the CPU are relevant:

'2.2 Acknowledgement of SFHG 2021 Convertible Bonds Debt

…

(b) SIHPL acknowledges that as a consequence of the 2021 Acceleration and the failure by the Original Issuer to pay the sum payable … SIHPL is liable to pay amounts due under the SFHG 2021 Trust Deed as guarantor pursuant to clause 5.1 of the SFHG 2021 Trust Deed and SIHPL is liable as if it were the sole principal debtor pursuant to Clause 5.2.

...

2.4 Terms of deferral of Accelerated Primary 2021 Debt

The Creditors and SIHPL hereby agree to the terms of this Deed in consideration for the deferral of the payment of the Primary 2021 Debt in connection with the 2021 Acceleration … on the terms set out in this Deed including the crystallisation of the Primary 2021 Debt at a fixed amount of the par value of the SFHG 2021 Convertible Bonds.

3. SIHPL Obligations

3.1 Deferred Contingent Payment Undertaking

(a) Subject to paragraphs (b) and (c) below and to clause 3.2 (Liability), SIHPL undertakes to pay to the Agent … the Payment Amount immediately on demand in writing from the Agent … (provided that no such demand may be made by the Agent … before the Maturity Date (and any demand made or instructions given prior to the Maturity Date shall be invalid …)

(b) The Finance Parties acknowledge that SIHPL's obligations to pay under paragraph (a) above is contingent upon the termination date not having occurred.

(c) If the Termination Date has occurred, SIHPL shall cease to be liable to make any payment under paragraph (a) above.

…

3.2 Liability Cap

(a) Notwithstanding any provisions of this Deed or the Finance Documents:

(i) the aggregate maximum amount that may be recovered from SIHPL by the Finance Parties under this Deed shall not exceed the Initial Payment Amount;

The Initial Payment Amount is defined as meaning €1,581 300.00 …'

[90] It is common cause that the above figure represents the sum of the SFHG 2021 Convertible Bonds i.e. €465mil and the SFHG 2022 Convertible Bonds i.e.

€1 116 300 000. The *'Payment Amount'* is defined as meaning an amount equal to the Initial Payment Amount minus an amount equal to the aggregate amount of Cash Payouts made by SIHPL in accordance with Clause 6.9 (SIHPL Cash Payouts). The *'Maturity Date'* is defined as meaning the earlier of 31 December 2021 and the date on which a Notification of Event of Default is delivered to SIHPL in accordance with the Deed containing the CPU.

[91] Clause 3.3 reads, insofar as it is relevant, as follows:

'3.2 Application of Payments

(a) Payments made by SIHPL pursuant to this Deed … shall be applied by the Agent in the following order of priority:

(i) firstly, towards payment of the Agent liabilities;

(ii) secondly, towards repayment pro-rata and pari passu of interest (excluding for the avoidance of doubt, any capitalised interest) accrued on Facility A1 Loans; and

(iii) thirdly, towards repayment pro-rata and pari passu of the outstanding principal amount (including any capitalised interest) of the Facility A1 Loan, provided that the aggregate amount of payments made by SIHPL pursuant to this Deed … shall not exceed the Capital Recovery Cap … and provided further that the aggregate amount of payments made by SIHPL pursuant to this Deed … shall not exceed the Initial Payment Amount'.

[92] Clause 3.8 reads:

'3.8 Deferral of SIHPL's rights

(a) On or prior to the Final Discharge Date relating to Facility A1, … SIHPL will not exercise any rights which it may have by reason of performance by it of its obligations under this Deed or by reason of any amount being payable, or a liability arising, under this Clause 3:

(i) to be indemnified by any Obligor (Lux Finco 1 – my insertion) *or SIHNV;*

(ii) to claim any contribution from any Obligor (including any Obligor or SIHNV in respect of any obligations under the Finance Documents …).

'Obligor' is defined as the meaning given to that term in the SFHG 21/22 Facilities Agreement (described below), which is Lux Finco 1 as borrower (or a guarantor).

[93] The final document relevant to the matter is the so-called Facilities Agreement, the parties to which were SFHG, as *'Parent'*, Lux Finco 1, as *'Borrower'*, the second respondent acting as *'Agent'* and GLAS Trust Corporation Limited acting as *'security Agent'* for the Original Lenders. It too is a lengthy document, in excess of 200 pages,

and was concluded on 12 August 2019. There is no dispute as to its meaning and for present purposes it suffices to quote clause 3 in part:

'3. Purpose

3.1 Purpose

(a) The parties agree that all amounts borrowed under the … Facility A1 … shall be applied towards the restructuring of certain amounts owing to the Lenders by members of the Group (including the SFHG 2021 Convertible Bonds …) in accordance with the terms of Restructuring;

(b) the Borrower (Steenbok Lux Finco 1 SARL) shall apply all amounts borrowed by it … towards the general corporate and working Purposes of the SFHG Group … and/or funding litigation costs of any member of the SFHG Group or SIHPL'.

[94] The supplementary affidavits filed by the parties afforded them the opportunity to refine and restate their case the main elements of which were as follows.

Trevo

[95] Trevo contends that:

1. The Facilities Agreement was a new loan granted by the Financial creditors to Lux Finco 1, a related company to SIHPL, as part of the CVA process and, further, that it is this new debt that SIHPL pays off when it makes payments under the CPU by virtue of clause 3.3 thereof. In form and in substance SIHPL, in terms of the CPU and the Facilities Agreement, grants financial assistance to Lux Finco 1;

2. Lux Finco 1 is a new entity which did not exist at the time SIHPL's board approved financial assistance by it to SFHG in terms of the Original SIHPL Guarantee in 2014 with the obvious result that the Board could not, in 2013, have applied its mind to assisting Lux Finco 1 more than five years later;

3. Lux Finco 1, having no assets of its own (it being described by the Financial creditors in argument as a *'special purpose company')*, other than a subordinated intercompany loan, could never itself realistically have paid its debt but was merely a conduit for a new principal obligation owed, in effect, by SIHPL to the Financial Creditors;

4. The new financial assistance granted by SIHPL to Lux Finco 1 with effect from 12 August 2019 was never approved by SIHPL's board in terms of sec 45.

[96] Trevo contends that SIHPL's case that its debt to the Financial creditors under the new SIHPL CPU was the very same debt as that owed under the 2014 Guarantee, is contrived and overlooks the express terms of the CPU, the CVA and

the Facilities Agreement. Trevo contends also that SIHPL's case also overlooks the fact that the resolution granted by its board on 3 December 2013 could not have authorised assistance by SIHPL from 12 August 2019 onwards to a different entity, Lux Finco 1. It contends, furthermore, that on its analysis of the CPU, SFHG's debt to the Bondholders under the 2021 Bond was replaced by Lux Finco 1's debt to Financial creditors under the Facilities Agreement which SIHPL guaranteed by virtue of the CPU up to a value of €1.6bil.

[97] Trevo argues that the SIHPL CPU and the Facilities Agreement are inextricably interlinked and came into effect simultaneously on 12 August 2019. It contends that the CPU became effective, according to its explicit terms, simultaneously with the Facilities Agreement at which moment Lux Finco 1 received the loan from the Facility A1 Lenders. In support of this conclusion Trevo points out that both the CPU and the Facilities Agreement are dated 12 August 2019 and that in terms of clause 2.1 of the CPU it became effective only once the conditions precedent to the Facilities Agreement were fulfilled.

[98] Trevo points out other aspects which it claims demonstrates that the CPU and the Facilities Agreement are inextricably interlinked. Firstly, the interconditionality is expressly stated in paragraph (G) and (H) of the *'background'* to the CPU[11] bearing in mind *inter alia* that GLAS was party to both agreements and having regard to the statement in (H) that they *'enter into this (CPU) in connection with the SFHG 21/22 Facilities Agreement'*. Secondly, a number of the defined terms in the CPU, for example, *'Total Facility A1 commitments'*, *'Borrower'* and *'Final Discharge Date*' have the meanings given to them in the SFHG 21/22 Facilities Agreement. Thirdly, the CPU definition of *'Agreed Form'* provides that SIHPL's consent is required for various amendments to the Facilities Agreement *'which could reasonably expect it to affect the rights or obligations of SIHPL under this (CPU) … including (i) amendments which have the effect of increasing SIHPL's payment obligations under the (CPU) or reducing the Obligor's (Lux Finco 1) payment obligations under the Facilities Agreement)'*. Fourthly, the final discharge date of the CPU is by reference defined in the Facilities Agreement as meaning *'the first date on which all Liabilities under that Facility have been fully and finally discharged (including … through the (CPU))'*. Finally, the critical CPU clauses 3.3(a)(ii) and (iii) dealing with the

[11] See para 88 above.

application of payments, dovetail exactly with Facilities Agreement Clause 9.7(b) inasmuch as payments made by SIHPL in terms of the CPU are applied *'towards payment of interest and repayment of the outstanding principal amount (owed by Lux Finco 1), in each case, under the Facility A1 Loans'*.

[99] Having regard to the wide ambit of *'financial assistance'* in terms of sec 45(1) of the Act (which) *'includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation'*, and the interconnected nature of the CPU and Facilities Agreement, Trevo contends that SIHPL granted Lux Finco 1 financial assistance in one or more of the following respects:

1. the terms of CPU clause 3.3 whereby SIHPL's payments thereunder reduce Lux Finco 1's liability under the Facilities Agreement constitute SIHPL securing an *'obligation'* in terms of sec 45(1), an obligation, moreover, quite distinct to any obligation owed by SFHG under the Original 2021 Bond if only because there is a new duty-bearer, namely, Lux Finco 1;[12]
2. in terms of CPU clause 3.8(a) [13] whereby SIHPL agrees not to exercise various of its rights against Lux Finco 1 or Steinhoff NV, SIHPL effectively agrees to subordinate its claims against Lux Finco 1 in favour of the Financial creditors;
3. in terms of CPU clause 3.8(c), SIHPL's right of recourse against Lux Finco 1 is limited to certain *'Recourse Assets'* as defined in Facilities Agreement;
4. CPU clause 7.9 ('SFHG *Cross Default*') provides that a failure by Lux Finco 1 to pay an amount under the Facilities Agreement, or any other event of default under that Agreement that accelerates payment thereunder, constitutes an event of default under the CPU which in turn entitles GLAS (the agent of the Financial creditors) to demand immediate payment by SIHPL under the CPU.

[100] Having regard to all these provisions, the conclusion drawn by Trevo is that when the terms of the CPU and the Facilities Agreement are examined closely, and together, the CPU is in substance and effect a guarantee or underwriting by SIHPL of Lux Finco 1's obligations under the Facilities Agreement. Trevo seeks to reinforce this conclusion by pointing out that Steinhoff NV itself, in its 2020 financial statements, expresses exactly this view.

[101] A second major argument made by Trevo is that SIHPL's debt under the SIHPL Guarantee was discharged by virtue of SFHG discharging its own debt under

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[12] See para 91 above.
[13] See para 92 above.

the 2021 Bond, whereupon SIHPL incurred a fresh debt to the Financial creditors capped at the same amount in terms of the CPU. SIHPL's discharge, Trevo contends, was effected in terms of a first principle of both South African and English law, namely, that where a primary obligation is discharged (in this case SFHG's obligation under the 2021 Bond), the obligation of a guarantor is similarly discharged, namely, SIHPL's liability under the 2014 Guarantee. Trevo's deponent summarised what came into effect simultaneously on 12 August 2019 when SIHPL, the Financial Creditors/Lenders (via GLAS), SFHG and Lux Finco 1 concluded the CPU and Facilities Agreements as follows:

'36.1 The flow of deemed cashless payments from (i) The Financial Creditors; (ii) to Steenbok Lux Finco 1; (iii) to SFHG and (iv) back to the Financial Creditors discharged SFHG's debt under the 2021 Bond'.

36.2 That, in turn, had the effect that SIHPL's "crystallised" *obligations under the SIHPL Guarantee was discharged (this being the case whether SIHPL's obligation was merely* "accessory" *or primary, for in either case the debt guaranteed (the non-payment of SFHG's debt to the Bondholders) ceased to exist).*

36.3 Steenbok Lux Finco 1 owed a new debt to the erstwhile Bondholders (now the Facility A1 Lenders/Financial Creditors) under the Facilities Agreement, subject to more onerous terms than those owed by SFHG under the 2021 Bond (for example 10% interest owed by Steenbok Lux Finco 1 – versus 4% interest owed by SFHG -);

36.4 SIHPL owed a new debt to Financial Creditors under the CPU, carefully structured so that SIHPL's paying this debt under the CPU would reduce Steenbok Lux Finco 1's debt under the Facilities Agreement; and

36.5 The CPU and Facilties Agreement are inextricably interlinked, with the inescapable consequence that SIHPL financially assists Steenbok Lux Finco to pay its debt, in circumstances where SIHPL's board never resolved to assist (that company) in compliance with sec 45.

[102] Trevo advances an alternative argument which does not rely on the premise that the effect of the CVA, CPU and Facilities Agreement was to discharge SIHPL's accelerated debt under the SIHPL Guarantee and to replace it with a new debt under the CPU. It contends that even if this was not the case it remains so that the CPU constitutes the granting of unauthorised financial assistance to Lux Finco 1 since no significance attaches to SIHPL's characterisation of its debt under the CPU being the same as its debt under the 2014 Guarantee, albeit *'deferred'*, *'restated'* or

'restructured'. Even if this were legally possible, which Trevo disputes, the CPU nonetheless amounts to unauthorised financial assistance to Lux Finco 1 *inter alia* for the following reasons: SIHPL's board never considered Lux Finco 1 as the beneficiary of financial assistance when it passed its resolution on 3 December 2013 authorising the granting of financial assistance by SIHPL to SFHG by way of the 2014 Guarantee; secondly, Lux Finco 1 owed the Financial Creditors a new debt under the Facilities Agreement; thirdly, several of the terms of the CPU, for reasons already given, amounted to financial assistance in terms of sec 45(1)(a) given by SIHPL to *'guarantee'* and/or *'secure'* Lux Finco 1's new debt or *'obligation under the Facilities Agreement'.* In this regard Trevo refers to the CPU clauses 7.9 (dealing with SFHG's cross default), 3.3 (providing that SIHPL debt payments under the CPU reduce Lux Finco 1's debt under the Facilities Agreement), 3.8(a) (where SIHPL effectively agrees to subordinate its claims against Lux Finco 1 in favour of the Financial Creditors), clause 3.8(c) (which further limits SIHPL's right of recourse against Lux Finco 1 for indemnification or contribution) and clause 3.8(d) which provides for circumstances in which SIHPL is obliged to release Lux Finco 1 from (1) any obligations it may owe SIHPL arising from the CPU.

[103] In light of all these above provisions Trevo contends that even if SIHPL's liability to the Financial Creditors as Bondholders under the 2014 Guarantee is merely *'crystallised'*, *'deferred'* and/or *'restructured'*, the particular terms of the crystallised deferred or restructured debt that SIHPL now owes under the CPU exposes it to different risks in relation to a new entity, Lux Finco 1, which were never considered nor authorised by SIHPL's board in terms of sec 45. SIHL's board's authorisation of the 2014 Guarantee to SFHG cannot, Trevo argues, be *'extended or transferred'* to apply to the different risks attendant upon assisting Lux Finco 1.

Hamilton's contentions

[104] For their part, Hamilton emphasised certain points in their supplementary replying affidavit contending that an examination of the SIHPL CPU, read with relevant clauses of the SFHG CVA and notwithstanding references in the CPU to *'deferral of the payment of the Primary 2021 Debt … including the crystallisation of the Primary 2021 Debt'* (clause 2.4), showed that SIHPL had clearly assumed obligations under separate agreements: first, in relation to the debt owed by SFHG under the 2015 Trust Deed, and then in relation to the debt owed by Lux Finco 1 under the Facility A1 Loan. Hamilton argues further, as does Trevo, that the terms of

the SIHPL CPU do not constitute a deferral of the debt once owed in terms of the 2015 Trust Deed relating to the SFHG 2021 Convertible Bonds for the reasons that such debt agreement, on SIHPL's own version, was exchanged for the debt owed by Lux Finco 1 in terms of the new loans and the SIHPL CPU provides for payment of the debt owed under the Facility A1 Loan. For this reason alone, Hamilton contends, the SIHPL CPU constituted the provision of financial assistance obliging it to comply with sec 45 of the Companies Act. Hamilton points out, furthermore, that the terms of the SIHPL CPU are quite different to the terms of the 2014 Guarantee in the 2015 Trust Deed and refers by way of example to the obligations and restrictions imposed upon SIHPL in terms of clauses 3.8, 6.4, 6.5, 6.6, 6.7, 6.8, 6.9 and 6.11 of the SIHPL CPU. These clauses deal respectively with *'Deferral of SIHPL's Rights'*, *'Financial Indebtedness'*, *Intra-Group Loans', 'Guarantees', Repayment of Intra-Group Loans', 'Amendment of Intra-Group loan agreement'*, *'SIHPL Cash Pay Outs'* and *'Restrictions on Payments'*. A perusal of these clauses reveal that SIHPL agrees to numerous restrictions of its rights to be indemnified, to claim any contribution, to bring legal proceedings, to incur further debt, to make further loans, to amend existing intra-group loans and undertakes obligations to make cash pay outs and accepts restrictions on its ability to make payments other than to its Financial Creditors in terms of the CPU.

[105] Noting that sec 45(3)(b)(ii) of the Companies Act provides that the board of a company may not authorise any financial assistance unless it is satisfied that the terms under which the financial assistance is proposed to be given are fair and reasonable to the company, and that as the terms of the SIHPL CPU are substantially different to the terms of the 2014 Guarantee, Hamilton observes that SIHPL never conducted the analysis required by sec 45. It therefore never assessed whether the terms of the CPU were fair and reasonable to SIHPL. Hamilton contends further that had SIHPL conducted that enquiry it would for example have had to take into account the fact that the effect of the CPU (and the New Lux Finco 1 21/22 Loan) was *inter alia* to *'put the bondholders in line for greater financial recoveries than they stood to receive under the bonds as originally issued and to arm them with access to extensive information, powers and influence over SIHPL's (and SIHNV's) conduct of litigation and broader operations so as to maximise their chances of full recovery and the speed at which that recovery would take place'*.

SIHPL's contentions

[106] SIHPL's case is based on the premise that under the CPU's terms it assumed no further debt (or provided any financial assistance); moreover, as any payments pursuant to CPU would serve to reduce SIHPL's crystallised debt, such payments cannot be regarded as providing further financial assistance to SFHG. The financial assistance was given when the 2014 Guarantee was issued. It follows that the conclusion of the SIHPL CPU, and any payment by SIHPL under the CPU, does not constitute the provision of new financial assistance to SFHG. From this summary it is clear that SIHPL places significance on the fact that its 2018 arrangements incur no further debt than that which it incurred under the 2014 Guarantee and focuses largely upon financial assistance to SFHG alone. I pause to observe that the main thrust of the applicants' case is that the CPU constitutes financial assistance to Lux Finco 1, not SFHG.

[107] In argument SIHPL contended that the question of whether the CPU constitutes the provision of new financial assistance depends largely on an interpretive exercise i.e. an examination of the terms of the CPU read against the provisions of the 2014 Guarantee. It contended that the applicants attempts to characterise the CPU as fresh financial assistance were contrived as demonstrated by the fact that if there were no Guarantee there would have been no CPU.

[108] SIHPL's response to the charge that the CPU is new financial assistance because assistance is now provided to Lux Finco 1 is to contend that this stems from a misunderstanding of the CVA and the failure to appreciate an important issue of timing. The first Restructuring Step was the conclusion of the CPU as evidenced by clause 4.6.1 of the CVA. Thus prior to any other Restructuring Steps the debt in terms of the Guarantee was crystallised and deferred in terms of the CPU. SIHPL refers to clause 8.4 of the CVA *'Treatment of the Existing SFHG Debt'* from which, it contends, emerges two important features: firstly, the CVA did not alter the provisions of the CPU and secondly, the taking on by Lux Finco 1 of SFHG's debt (through the Intercompany Agreement and Loan) did not affect SIHPL's continuing liability under the CPU. Properly interpreted, SIHPL contends, the CPU is an affirmation of SIHPL's existing liability and a deferral thereof and as such is neither fresh nor new. It submitted further that through the terms of the CPU SIHPL obtained *'a better deal for itself'* in relation to a debt already due.

[109] As regards the payments made by SIHPL under the CPU resulting in a reduction of the Lux Finco 1 debt, SIHPL submits that this is in place to prevent a

double recovery. There is thus, SIHPL argues, no extension of '*new financial assistance'* by SIHPL because of the treatment of the payments – rather its old financial assistance is controlled and capped, for its own benefit.

The Financial Creditors' contentions

[110] The Financial Creditors filed no affidavits but presented full argument to the Court. Their case too was that on a proper analysis of the CPU and the SFHG CVA no new financial assistance was provided by SIHPL in 2019, the essence of the transaction being rather to provide *'limited forbearance'* to SIHPL *inter alia* by extending the maturity date for payment of the SIHPL debt. SIHPL received a benefit under the CPU but did not itself grant any benefit or financial assistance. The restructuring of the debt was achieved primarily through the CVA processes which entailed the Bondholders agreeing to exchange the existing bonds, which were listed and publically tradeable, with private debt issued by a new special purpose company (Lux Finco 1) in their favour. This involved no cash being exchanged, the re-financing being facilitated by means of *'deemed cashless payments'* which ultimately resulted in the Bondholders holding debt issued by a new private entity as opposed to the previous listed structure. The refinancing exercise prevented the failure and uncontrolled liquidation of the entire Steinhoff Group. None of this, however, affected the existing SIHPL Debt which was simply deferred and remained due and repayable and, although SFHG's obligations were deemed to have been extinguished, the primary obligation of SIHPL to make payment of the amount of €1.58bil to the Financial Creditors remained intact.

[111] The Financial Creditors argued that the question whether SIHPL granted financial assistance in terms of the CPU must be determined from SIHPL's vantage point and by asking the question whether it gave up something more than that which had originally been approved by its board in December 2013. The answer to this question was that SIHPL's debt had already been accelerated prior to the 2019 restructuring and the CPU merely showed forbearance to SIHPL. The fact that repayments to the Financial Creditors under the CPU are applied to reduce Lux Finco's debt in terms of the Facility A1 Loan did not mean that the CPU constitutes new financial assistance to Lux Finco 1 since if the Financial Creditors were to recover fully under both SIHPL CPU and the Facility A1 Loan this would amount to a double recovery of the amount originally owed.

[112] In summary the Financial Creditors submit the SFHG Debt under the

Convertible Bonds was restated, revised and reissued by Lux Finco in the form of the Facility A1 Loan. That transaction was entered into separately from the CPU and SIHPL's claims against each entity are separate and different. It was contended that as a matter of English law a sanctioned CVA does not discharge the liabilities of the debtors' guarantors unless, properly construed, the CVA provides otherwise and it was not open to this Court to interfere with the English sanctioning of the CVA, including the legal effect thereof in English law which governs both the 2014 Guarantee and the CPU.

Discussion

[113] As a starting point and with reference to jurisdictional point raised on behalf of the Financial Creditors (in para 112 above), it must be said that the present application is concerned with the validity or lawfulness of a guarantee and an undertaking given by a South African company in respect of a foreign company, SFHG, an issue which falls squarely within this Court's jurisdiction. The fact that the foreign company has subsequently concluded a court-sanctioned CVA under English law is of incidental interest and certainly cannot operate to deprive this Court of jurisdiction which it otherwise has.

[114] By way of commencement, it is appropriate to have regard to the purpose of sec 45 in regulating a company's ability to render financial assistance to a related party. The authors of Commentary on the Companies Act of 2008[14] observe that those in control of a company's finances are in a position of power, one that has the potential for abuse, particularly where the company provides the controllers with loans or security. This potential for abuse was recognised in the 1973 Act which prohibited certain loans and provisions of security (sec 226) and imposed strict liabilities on directors in certain circumstances (sec 37). The corresponding provisions of the present Act appear *inter alia* in sec 45, which regulates the giving of financial assistance by prohibiting it unless certain requirements are satisfied. The authors note that the new provisions cast the net far wider, drawing in a far more extensive range of transactions, as well as parties thereto such transactions. They observe that sec 45 of the 2008 Act governs the provision of *'financial assistance'* and that the use of the word *'includes'* in sec 45(1)(a) indicates that the types of transactions referred to are not an exhaustive list of what constitutes financial

[14] Yeats, Volume 1, Juta Original Service, 2018 at 2–403 – 405.

assistance. The term *'financial assistance'* is wide ranging and accordingly sec 45 is generally more extensive in its ambit than the transactions covered by sec 226 of the 1973 Act. Dealing with the *'fair and reasonable'* requirement, the authors note that the solvency and liquidity requirements are already there to protect creditors so it seems unlikely that it is their protection that is the concern of the fair and reasonable test but that '*it seems that it is more likely the shareholders who are being protected'*.

[115] The respondents contend, for many reasons, that SIHPL's primary debt under the CPU was no more than a restatement of its debt under the 2014 Guarantee and accordingly there was no creation of a fresh debt. This is an over-simplification, however, which fails to take into account that the restatement of a debt on different terms and conditions and involving at least one different party, is in terms of law the creation of a fresh debt. SIHPL appears to confuse a specific debt with exposure to debt when it argues that, provided that its maximum liability is no greater than that which it assumed under a prior debt, any further related debt it contracts is not new debt and does not fall foul of the provisions of sec 45. As the applicants argue, the concept of *'restructuring'* a debt has no legal implication in and of itself without a consideration of the manner in which the debt is to be *'restructured'*. If the debt is *'restructured'* on new terms, and is owed to a new and different party (in this case the Facility A1 Lenders) and guarantees the obligation of a new party (Lux Finco 1) it is, axiomatically, a fresh obligation. The mere fact that the new obligation/debt would not have existed but for the old debt does not detract from its character as a new obligation, even if the object of it being incurred was to replace the old debt.

[116] SIHPL's contention is further that, since its debt under the 2014 Guarantee became *'crystallised'* and is *'capped'* at that level in terms of the CPU, the provisions of the CPU cannot be construed as SIHPL giving fresh financial assistance with the corollary that sec 45 of the Act is not triggered. In my view, however, this is based on a misinterpretation of the provisions of sec 45 and in particular sec 45(3). These make it clear that before a board may authorise financial assistance as contemplated in subsec (2) it must ensure that the solvency, liquidity and the fair and reasonable tests are complied with in respect of the proposed financial assistance to the proposed specific recipient or category of potential recipients. A board cannot authorise financial assistance having regard only to the financial ceiling of such assistance but obviously must have regard to the actual or potential recipient and the terms of such assistance. SIHPL's central argument in the present matter is

tantamount to stating that, provided any financial assistance which it gives does not exceed the limit of debt already incurred in terms of the 2014 Guarantee, it is entitled to provide financial assistance to a party other than that authorised by the resolution approving the 2014 Guarantee. It would appear to be for this reason that SIHPL repeatedly seeks to refute the applicants' case by denying that it ever provided *'fresh'* financial assistance which resulted in the creation of a *'fresh'* or *'new'* debt. This approach is, in my view, based on an inappropriately narrow interpretation of sec 45 as permitting the giving of financial assistance to a related party provided only that it does not exceed the ceiling of financial assistance previously authorised in relation to another party.

[117] The minutes of SIHL's board meeting held on 3 December 2013 make it clear that the financial assistance which was authorised was for SIHL to act as Guarantor for the obligations of the issuer (SFHG) in respect of the Convertible Bond issue to foreign investors. SIHL's board did not purport to approve such assistance to a category of potential recipients and even if it had, such authorisation would have lapsed by the time the SIHPL CPU was concluded, falling as it did outside of the two-year term of any resolution as provided by sec 45(3)(b) of the Act.

[118] SIHPL contends that its payments under the CPU in reduction of Lux Finco 1's debt serve merely to prevent a double recovery by the Financial Creditors. However, this raises the question of how the Financial Creditors could obtain recovery from both Lux Finco 1 and SIHPL when ultimately there was only ever one debt, being the €465mil. Furthermore, if Lux Finco 1 repaid its Facility A1 Loan, the Financial Creditors could hardly look to SIHPL to make good on its CPU obligations as well.

[119] In *Treasure-General v Lippert,*[15] Smith J said, in a different context *'the Court should look to what a transaction is intended to be, and really is, rather than what it is described as being'*. Such an approach is particularly appropriate in the present circumstances where the documents recording the parties' obligations are not only complex and voluminous but in key areas are obtuse or confusing. Adopting this approach to a consideration of the CPU, read together with the CVA and the Facilities Agreement, it becomes apparent in my view that the CPU replaces or purports to replace the SIHPL Guarantee and becomes in effect a guarantee for Lux Finco's obligations under the Facility A1 Loans. This must be the case since the

[15] (1880) ISC 29. See also *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530.

agreements expressly provide that SFHG's debt to the Bondholders is discharged and which debt was treated by both the Financial Creditors and SIHPL as having been so discharged. However, the circular flow of funds from the Financial Creditors to Lux Finco 1, to SFGH and back to the Financial Creditors, has in effect replaced one debt with another. Furthermore, having Lux Finco 1 step into the shoes of SFHG is to introduce a new party into the arrangements, one which did not exist at the time that the 2014 Guarantee was approved by SIHPL's board.

[120] The further consequence of these arrangements/agreements is that, by guaranteeing Lux Finco 1's obligations under the Facilities Agreement, SIHPL gave financial assistance to a related company as contemplated by sec 45 of the Act. It matters not in my view that SIHPL's liability in respect of the CPU is capped in an amount so as not to exceed its obligations or liabilities in terms of the 2014 Guarantee. Section 45 contains no qualification to the effect that a local company, pursuant to a prior resolution that financial assistance be given to entity A, can give financial assistance to entity B provided that the company's liability or potential liability to entity B does not exceed the previously approved financial assistance to entity A. To allow or to read in an exception to this effect would, in my view, be to subvert the purpose of sec 45 and in effect to provide the local company with a running account in terms of which it could provide financial assistance on an indefinite basis without complying with the provisions of sec 45. This does not accord with the structure of sec 45 which lays down tight guidelines in terms of which financial assistance is given to a specific party or a certain category of parties, in specific circumstances, for specified purposes and which authorisation does not extend beyond a two-year period.

[121] In this regard it is worth noting that sec 45 regulates the giving of financial assistance which in itself may not necessarily involve the incurring of debt although that may well be a consequence of giving the financial assistance. In the present matter SIHL's board of directors authorised the provision of the 2014 Guarantee which, at worst for SIHPL, could have exposed it to liability for €465mil and in the result did. Nonetheless, the resolution of SIHL's directors in December 2013 neither envisaged nor authorised the company, in the event of SFHG defaulting, negotiating fresh terms in restructuring the debt which would include replacing its co-debtor and the guaranteed party, SFHG, with a special purpose vehicle Lux Finco 1 and, in so doing giving financial assistance to that entity.

[122] In its affidavit and in argument, SIHPL repeatedly contended that through the debt *'restatement'* or *'restructuring'* it had obtained a *'better deal'*. There are at least two answers to this proposition. Firstly, it is by no means evident from the SIHPL CPU that it did in fact obtain more favourable terms. Both Trevo and Hamilton have convincingly argued that, in terms of the CPU, SIHPL is subjected to a series of limitations and deprivations of rights the equivalent of which are not found in the 2014 Guarantee.[16] These include limitations on its rights of recourse against Lux Finco 1, subordinating its claims against Lux Finco 1 to the Financial Creditors and limitations on its ability to make payments other than to the Financial Creditors. Most importantly, in terms of the CPU, SIHPL is now guarantor to a different entity, Lux Finco 1, which appears to be no more than a shelf company without any assets or financial backing other than that provided by SIHPL. Clearly, a capping of liability does not address the prejudice which may be suffered by a guarantor or co-debtor where the original issuer of the Convertible Bonds is replaced by a man of straw. The second answer to the proposition that the CPU offered SIHPL a *'better deal'* is that where its provisions trigger sec 45, that determination is one ultimately to be made by the directors, in particular by applying the *'fair and reasonable'* test in sec 45(3)(b)(ii) and, in so doing, laying themselves open to the consequences of such a decision, as envisaged by sec 45(7) of the Act. Furthermore, even before the directors can authorise the guaranteeing of a new related party's loan obligations, as in the present matter, sec 45(3)(a)(ii) requires that the company's shareholders be given an opportunity to consider the proposed financial assistance and, if they approve same, pass a special resolution to this effect.

[123] Having regard to the substance of the debt restructuring exercise as a whole it would appear that the effect of the SFHG CVA, pursuant to which the SIHPL CPU was concluded, was that the obligations and liabilities of SFHG to the Bondholders under the 2021 Bond were discharged. That Bond was replaced with new obligations owed by Lux Finco 1 to the Bondholders or their successors (the Facility A1 Lenders) pursuant to the latter having advanced the Facility A1 Loan. It is significant that in its notes to the separate financial statements for the period ended 30 September 2020, SIHNV appears to share the above view when it stated as follows:

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[16] See paras 93, 96 and 98 above.

'9. BORROWINGS (CONTINUED)

9.1 Financial liabilities (continued)

Recognition of financial liabilities as determined by CPU's (continued)

9.1.3 SFHG 21/22 CPU

The 2021 and 2022 convertible bond previously issued by SFHG have been replaced by the 21/22 facility held by Steenbok Lux Finco 1 SARL under which €2.0billion (2019: €1.8billion) is outstanding as at 30 September 2020. The 21/22 facility is secured by the SIHPL CPU, whereby SIHPL guarantees €1.6billion, and the SFHG 21/22 CPU, whereby the Company guarantees the principal amount of €1.7billion'. [my underlining]

[124] Both in terms of South and English law, if a party guarantees a debt owed by a second party to a third party and the second party discharges its debt to the third party in full, then the guarantor is discharged from any liability to the third party under the guarantee. In [the English] Law of Guarantees[17], the following appears under the heading 'Discharge of surety by discharge of the principal':

'Since the purpose of a guarantee is to secure the performance of the principal's obligations towards the creditor, the surety will be discharged from his liability under the guarantee if the principal pays the debt or performs the obligation which the surety has guaranteed, or if the principal's liability is forgiven. This is an aspect of the principal of co-extensiveness of liability, discussed elsewhere in this work. The position is different where the contract is on its true construction one of indemnity, under which the surety assumes an independent liability from that of the principal which may often be greater in scope. Accordingly, he may not necessarily be discharged by reason of the performance by the principal of his obligations, or otherwise by its discharge.

[125] Although clause 5 of the original 2014 Guarantee refers to a 'Guarantee and Indemnity by SIHL', the key provision, clause 5.2 does not appear to alter the position that the guarantor would be discharged upon the principal (SFHG) paying the debt or performing the obligation which SIHPL guaranteed. Clause 5.2, insofar as it is relevant, reads '*SIHL will be liable under this Clause 5 as if it were the sole principal debtor and not merely a surety. Accordingly, it will not be discharged, nor will its liability be affected, by anything that would not discharge it or affect its liability*

[17] 7th edition, (Thomson Reuters, 2021) Chapter 9.

if it were the sole principal debtor'. There follow seven instances when it would not be discharged but none which is applicable to the present circumstances.

[126] The position of a surety in South African law was recently discussed in *Van Zyl v Auto Commodities (Pty) Ltd*[18] where the following was stated:

'The General Principle

[11] A contract of suretyship is distinct from the contract or contracts between the principal debtor and the creditor that give rise to the principal indebtedness, but it is accessory to that contractual relationship and the principal debtor's obligations under it. Subject to any specific limitation, such as a suretyship in a limited amount, the surety's obligations are coterminous with those of the principal debtor. Where the surety signs as co-principal debtor, as Mr van Zyl did, the addition of those words shows that the surety is assuming the same obligations as the principal debtor. In other words, the obligation of the surety is the same as that of the principal debtor. It follows from the accessory nature of the surety's undertaking that the liability of the surety is dependent on the obligations of the principal debtor.

[12] A consequence of this is that if the principal debtor's debt is discharged, whether by payment or release, the surety's obligation is likewise discharged. … This will be subject to any terms of the deed of suretyship that preserve the surety's liability notwithstanding the release or discharge of, or any other benefit or remission afforded to, the principal debtor.

[127] Mr Du Preez stated in his supplementary affidavit that:

'(f)ollowing the acceleration, SIHPL's (sic) *incurred a primary obligation to make full and immediate payment of the amount owing'* and that the effect of the CPU was *'simply to defer payment of that debt and restructure it on terms'*.

Mr Du Preez added that *'… it was fundamental that SIHPL was willing to agree that its restructured obligations under the CPU would not be discharged as a result of the subsequent cashless exchange of SFHG's debt to the Bondholders for the New Lux Finco 21/22 Loan. Were it otherwise, the Bondholders would have been left with no claim at all*.'

[128] This latter explanation appears to recognise that in the ordinary course the effect of the granting of a loan by the Financial creditors to Lux Finco 1 which then on-lent it to SFHG which in turn settled its Convertible Bond obligations to the

[18] (279/2020) [2021] ZASCA 67 (3 June 2021) paras 11 and 12.

Financial Creditors by deemed payment of the proceeds of that loan back to the Financial Creditors would, unless special provisions were made, be to discharge SIHPL from its liability or obligations under the SIHPL Guarantee and leave the Financial creditors with no more than their claim against Lux Finco 1 for the loan.

[129] Another major argument made by SIHPL was that the conclusion of the SIHPL CPU, and thus the crystallisation and deferral of SIHPL's debt under the 2014 Guarantee, was the first restructuring step, indicating that the SFHG CVA did not alter the provisions of the CPU. But this flies in the face of the normal consequences of a principal debtor's obligations being discharged. Secondly, finding a sequence of separate steps in the debt restructuring exercise is an artificial exercise. In reality all the key elements or steps are interlinked and to all intents and purposes, simultaneous. This much was convincingly argued by the applicants as set out in paras 91 and 92 above.

[130] A telling indication that SIHPL gives financial assistance to Lux Finco 1 is the provision in clause 3.3 of the CPU whereby SIHPL's payments under the CPU are to be applied to Lux Finco 1's debt to the Lenders. SIHPL sought to rationalise this as being intended to prevent a double recovery by the Financial Creditors, an argument I have already dealt with. It is clear in this regard that had SIHPL not concluded the CPU, Lux Finco 1 would not have been granted the loan funding to advance to SFHG in order to discharge its obligations to the Financial Creditors.

[131] The applicants argue, convincingly in my view, that the CPU and the Facilities Agreement are inextricably linked and came into effect simultaneously on 12 August 2019. They point out that both the CPU and the Facilities Agreement are dated 12 August 2019 and that the CPU became effective – according to its explicit terms – simultaneously with the Facilities Agreement, at which moment Lux Finco 1 received the loan from the Facility A1 Lenders. Also relevant in this regard is that Lux Finco 1 had no assets of its own and realistically could never itself have repaid the loans it was granted. It is clear, furthermore, that the loan would never have been granted to Lux Finco 1 by the Bondholders/Financial Creditors unless its obligations were guaranteed by SIHPL under the CPU.

[132] In attempting to explain the interlinked nature of the CPU and Facilities Agreement, SIHPL contended that *'such terms were desirable from SIHPL's perspective because they meant that, to the extent that the quantum of the debt owed to its CPU Creditors could be satisfied by Lux Finco 1, SIHPL would not have*

liability in that respect'.[19] But this statement is disingenuous in the absence of any indication of an ability on the part of Lux Finco 1 itself to reduce that debt. It was rather a case that, to the extent that the quantum of the debt owed by Lux Finco 1 to its Facilities Agreement's Creditors could be satisfied by SIHPL, Lux Finco 1 would have no liability in that respect. Put differently, SIHPL's payments would redeem Lux Finco 1's debt. SIHPL also contended that *'in short, such terms operated to SIHPL's benefit as a limitation on the quantum of its liability in respect of its restructured debt under the CPU'*. Once again the true position appears to be that the terms of the CPU operated to Lux Finco 1's benefit as a limitation on the quantum of its liability in respect of its newly assumed debt under the Facilities Agreement.

[133] It must be borne in mind that it was always possible for SIHPL to receive the '*forbearance'* which the Financial Creditors were extending to it. Quite why SIHPL needed to *'restate'* its liability in terms of the 2014 Guarantee through the discharging of SFHG's liabilities and *'restating'* them in the form of obligations owed to Lux Finco 1, is unclear. The stated reasons, which include rendering the public tradeable debt private and to provide a better *'reporting regime'*, seem less than compelling. The restructuring appears to have been designed to assist SFHG gain approval of its CVA both from creditors and from the Court (the Nominees). Trevo contends that the CPU was created in its present form (and is contended by SIHPL not to amount to the provision of fresh financial assistance) because SIHPL was aware at the time that it could not pass the solvency and liquidity test in compliance with sec 45 of the Act. It is notable in this regard that a legal opinion obtained by SIHPL from a firm of attorneys as required by the Lux Finco 1 21/22 Loan Agreement was expressly stated to exclude an opinion on sec 45 of the Act.

[134] It appears that at the time of concluding the SIHPL CPU, SIHPL's directors would, at the least, have had difficulty in satisfying themselves, acting reasonably, that the company would satisfy the solvency and liquidity test immediately after replacing or amending the SIHPL Guarantee by way of the SIHPL CPU. In this regard it is noteworthy that SIHPL did not respond to the challenge put up by Trevo to produce financial statements for the relevant period should it dispute that it was in fact insolvent. Be all this as it may, for the purposes of determining whether the CPU breaches sec 45 of the Act it is not necessary for the Court to find what SIHPL's

[19] SIHPL's Supplementary Affidavit, Record page 1406, para 63.

motives were in following the path they did.

[135] If, as SIHPL insists, it obtained a *'better deal'* through the restructuring, it would have had no difficulty in its directors passing a resolution to this effect and in its shareholders approving such a resolution at an annual or special general meeting. At the very least the directors and shareholders would want to apply their minds to the question of whether the new entity, whose debt or obligations the company would now guarantee, presented any risks or advantages in comparison to the previous beneficiary of the guarantee. Here one bears in mind that Lux Finco 1 is a special purpose vehicle, presumably without any existing liabilities or assets. The shareholders and directors would also wish to consider whether the terms of the CPU were fair and reasonable vis-à-vis the company. In this regard it is again disingenuous to suggest that the restructuring really merely replaced one debtor with another without any other terms and conditions being changed. The CPU is replete with provisions dealing with indemnity, recourse assets, cash pay outs, subordination of SIHPL's rights etc, all of which required a determination of whether these terms and conditions were, as SIHPL's directors contend in these papers, more favourable to SIHPL. If this were the case i.e. that such terms were more favourable to SIHPL, then the directors should have no difficulty in being party to a resolution to this effect and untroubled by the prospect of incurring personal liability by virtue of the provisions of sec 45(7).

[136] Returning to the issue of the true construction of the various agreements, the discharge of SFHG's liabilities under the 2021 Bond would also have discharged SIHPL's obligations under the SIHPL Guarantee, for otherwise the Bondholders would have double-benefitted but this would have left the Bondholders with only a claim against Lux Finco 1 in respect of the loan originally provided. Accordingly, the SIHPL Guarantee was replaced with the SIHPL CPU. However, this constituted new financial assistance by SIHPL to a company or corporation related or interrelated to it, namely, Lux Finco 1. I consider thus that the SIHPL CPU constitutes financial assistance to Lux Finco 1 inter alia inasmuch SIHPL came under a fresh debt to the Facility A1 Lenders (the Financial Creditors) on different terms and conditions to those applying in terms of the 2014 Guarantee.

Conclusion

[137] For all these reasons I consider that in concluding the CPU, SIHPL gave financial assistance to Lux Finco 1 in breach of the provisions of sec 45 of the Act. In

the circumstances, by virtue of sec 45(6) of the Act, the resolution of SIHPL's board authorising the conclusion of SIHPL CPU is void as is the CPU itself and the applicants are entitled to a declaration to this effect.

Interdictory relief

[138] The applicants sought an interdict restraining SIHPL from making any payment pursuant to the SIHPL Guarantee, the SIHPL CPU or the compromise proposed by SIHPL in terms of sec 155 of the Companies Act and from providing any security in respect thereof. In terms of this judgment the SIHPL Guarantee stands and clearly no interdictory relief in relation to it can be granted. As far as the balance of the interdictory relief is concerned, the applicants made out no case that any payments pursuant to the SIHPL CPU were imminent. Insofar as any payments made based on the CPU might conceivably follow upon the acceptance of the sec 155 proposal, not only might that proposal be revisited following this judgment, but the sec 155 process has some way to go before it can be sanctioned by a Court. Before that stage is reached the applicants will have adequate opportunity to voice their opposition to any such proposal or interdict any prior payments which they regard as unlawful. Accordingly, the applicants have failed to make out any case for interdictory relief.

Costs

[139] As far as costs are concerned, although the applicants have not succeeded in obtaining any relief in relation to the SIHPL Guarantee nor any interdictory relief, they have obtained substantial and material relief through this Court's declaration that the SIHPL CPU and authorising resolution are void. In the result I consider that the applicants are entitled to their full costs. The papers in this matter were voluminous and raised complex issues of law and fact which justified the applicants employing the services of three counsel.

[140] In the result the following order is made:

1. The Contingent Payment Undertaking concluded between the First Respondent (SIHPL) and the Second Respondent on or about 12 August 2019 (the SIHPL CPU) as well as the board resolution authorising the entry by the First Respondent into the SIHPL CPU are declared void in terms of sec 45(6) of the Companies Act, 71 of 2008;

2. The first and third respondent shall pay the costs of the applicants, including the fees of three counsel.

BOZALEK J

For 1st Applicant	Adv AR Sholto-Douglas SC
	Adv BJ Vaughan
	Adv A Price
As instructed by	Larry Stein Attorneys
For 2nd & 3rd Applicant	Adv W Lüderitz SC
	Adv P Farlam SC
	Adv H Pretorius
	Adv J Moodley
As Instructed by	Adams & Adams
For 1st Respondent	Adv A Subel SC
	Adv AM Smalberger SC
	Adv A Govender
As Instructed by	Werksmans Attorneys
For 3rd Respondent	Adv MJ Fitzgerald SC
As instructed by	Bowman Gilfillan Inc