THE REPUBLIC OF SOUTH AFRICA

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

Case No: 8276/2018

In the matter between:

AJVH HOLDINGS (PTY) LTD	**1st Plaintiff**
FULL TEAM SURE TRADE (PTY) LTD	**2nd Plaintiff**
AQUILAM HOLDINGS (PTY) LTD	**3rd Plaintiff**
LIBER DECIMUS (PTY) LTD	**4th Plaintiff**
XANADO TRADE AND INVEST 327 (PTY) LTD	**5th Plaintiff**

and

STEINHOFF INTERNATIONAL HOLDINGS N.V.	**1st Defendant**
TOWN INVESTMENTS (PTY) LTD	**2nd Defendant**
PEPKOR HOLDINGS LTD	**3rd Defendant**
PEPKOR SPECIALITY (PTY) LTD	**4th Defendant**
TEKKIE TOWN (PTY) LTD	**5th Defendant**

Coram: Bozalek J

Heard: 29 October 2020

Delivered: 27 January 2021

JUDGMENT

BOZALEK J

[1] This is an exception brought by the third, fourth and fifth defendants to the

plaintiffs' amended particulars of claim on the basis that it lacks the averments necessary to sustain a cause of action. The third and fourth defendants/excipients are two Pepkor companies, Pepkor Holdings Limited ('Pepkor Holdings') and Pepkor Speciality (Pty) Ltd ('Pepkor Speciality') with the fifth defendant, Tekkie Town (Pty) Ltd ('Tekkie Town'), being the remaining excipient.

[2] The plaintiffs are four companies which were the erstwhile owners of the shares in and claims against Tekkie Town which conducted a nation-wide retail shoe outlet business known as Tekkie Town. The plaintiffs' cause of action lies in the first place against the first defendant, Steinhoff International Holdings NV ('Steinhoff NV'), and arises out of an agreement of sale concluded on 29 August 2016 in terms of which the plaintiffs and the second defendant sold all of the issued share capital of Tekkie Town and ceded all claims of whatever nature they had against that company to Steinhoff NV in return for shares in that latter company. The plaintiffs plead that on a proper construction of the contract its subject matter was the whole of Tekkie Town including its business as a going concern.

[3] The plaintiffs' primary cause of action arises from a series of alleged fraudulent misrepresentations made by Steinhoff NV, represented by its then CEO, Mr Marcus Jooste. They allege that these misrepresentations induced the contract in terms of which the issued share capital of Tekkie Town ('the sale shares') and all claims which they held against that company ('the sale claims') were sold and delivered to Steinhoff NV. The plaintiffs plead further that as a result of those misrepresentations they elected to resile from the contract which they did on 11 May 2018.

[4] The plaintiffs' case against the excipients arises from the post-contract transfers from Steinhoff NV of the sale shares and sale claims to Pepkor Holdings, and of the South African business of Tekkie Town to Pepkor Speciality. The main relief sought by the plaintiffs is firstly the restitution by Steinhoff NV and Pepkor Holdings of the subject matter of the sale i.e. the sale shares and the sale claims '*in the condition and with the values, rights and exigibility'* as these instruments had at the date of conclusion of the contract. Secondly, the plaintiffs seek the delivery by Steinhoff NV and Pepkor Speciality to Tekkie Town of the business that was transferred as a going concern pursuant to the sale agreement.

[5] Under prayer E the plaintiffs further seek payment by Pepkor Speciality to Tekkie Town of a sum to compensate the latter for any reduction of its nett asset value in the event of Pepkor Speciality not making return of any part of the business that was transferred as a going concern. The plaintiffs also seek ancillary relief under prayers A and B, namely, a declaration that the Pepkor companies are deemed not to be juristic persons *'in respect of any right, obligation or liability'* of those companies or of Steinhoff NV to any of the plaintiffs and further that, for the purposes of giving effect to the main relief set out above, the Pepkor companies and Steinhoff NV are to be regarded *'as a single juristic entity'*. In the alternative to all the main relief sought the plaintiffs seek the payment of various sums to each of them by Steinhoff NV and Pepkor Holdings to the extent that full restitution is not made.

[6] The exception is based on three grounds. The <u>first</u> ground relates to the basis upon which plaintiffs attribute to the third, fourth and fifth defendants the *'reckless conduct of Steinhoff NV'* and certain knowledge which Steinhoff NV allegedly had, essentially

knowledge of concealed facts, which constitutes the subject matter of the alleged misrepresentations made by Steinhoff to the plaintiffs. The attribution of this knowledge to the Pepkor companies is clearly critical for the relief which the plaintiffs seek against those parties.

[7] The second ground of exception concerns the plaintiffs' allegation that the transfer by Steinhoff NV of the sale shares and claims and the business of Tekkie Town to various of its subsidiary companies and ultimately to the Pepkor companies constituted the use by Steinhoff NV of, or acts by or on behalf of, one or more of its wholly owned subsidiaries. The plaintiffs plead that to the extent that Steinhoff or any one of the defendants relies on the separate juristic personality of one or more companies in the Steinhoff group in opposing the relief sought by plaintiffs, *'that is an unconscionable abuse of the juristic personality of that or those companies as contemplated in sec 20(9) of the Companies Act, 71 of 2008'*. In other words, the plaintiffs purport to *'pierce the corporate veil'* in relation to any such acts or use of those companies.

[8] The third ground of exception relates to the relief sought by the plaintiffs, more particularly the claim that in the event of the sale shares and sale claims not being returned to the plaintiffs at all or with a reduced value to that which they had at the time of delivery, Steinhoff NV and/or the Pepkor companies would be unjustifiably enriched and the applicable plaintiffs correspondingly impoverished and to such extent each plaintiff will be entitled to payment of a sum proportionate to the extent of the non-restitution.

The first ground of exception

[9] In paragraph 35 of the particulars of claim the plaintiffs plead that after delivery of the sale shares and sales claims, also referred to as *'the equity'*, Steinhoff NV caused the sale shares and the business of Tekkie Town to be delivered to various of its subsidiary companies in the period February to October 2017.

[10] Amongst these averments are that:

> *'35.3. With effect from 1 July 2017, the Sale shares were transferred by SAH (Steinhoff Africa Holdings Ltd) to Pepkor Holdings, since which date Tekkie Town has been a wholly owned subsidiary of Pepkor Holdings*
>
> *35.4. With effect from 1 October 2017, the South African Business of Tekkie Town was transferred to Pepkor Speciality which is now in possession and de facto control of the South African assets and business of Tekkie Town'.*

[11] In paragraph 36 the plaintiffs plead that at the time of each of the transfers the Pepkor companies and Tekkie Town were wholly owned subsidiaries of Steinhoff NV; furthermore, that at the said time Steinhoff NV '*had knowledge of the misrepresentations and that the plaintiffs had relied on the truth of the misrepresentations in concluding the contract and delivering the Equity to Steinhoff NV'*.

[12] In paragraph 36.3 the plaintiffs plead that Steinhoff NV foresaw or should reasonably have foreseen that the plaintiffs would cancel the contract and seek restitution on the grounds of the misrepresentations. There follows the key paragraph:

> *'37. The aforesaid knowledge or reckless conduct of Steinhoff NV was and remains attributable to each of the other defendants, and in the case of Tekkie Town, from the date on which the Equity was delivered to Steinhoff*

NV'.

[13] In their exception the excipients note that the pleaded causes of action for relief against them are extensions of the centrally pleaded cause of action against Steinhoff NV for *restitutio in integrum* following their resiling from the contract based on Steinhoff NV's alleged fraudulent misrepresentations. The case against the excipients arises from the subsequent transfers of the sale shares and Tekkie Town's business to Pepkor Holdings and Pepkor Speciality respectively as well as the corporate relationship between Steinhoff NV and those companies at the time of those transfers.

General Principles

[14] In terms of Uniform Rule of Court 23(1) where any pleading lacks averments which are necessary to sustain an action or defence the opposing party may deliver an exception thereto. The object of an exception is to dispose of the case or a portion thereof thereby providing a useful mechanism for weeding out cases without legal merit[1]. The Court must look at the pleading excepted to as it stands on the basis that the allegations made therein are true. An exception can be taken to particular sections of a pleading provided that they are self-contained and amount in themselves to a separate claim or a separate defence[2]. If the same claim is based on alternative causes of action, an exception can be taken against one or more of the alternatives[3]. The pleading must be looked at as a whole[4] and an excipient has the duty to persuade the Court that upon every interpretation which the particulars of claim could reasonably bear, no cause of action is disclosed[5].

[1] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 461 (SCA) at 465 H and see generally the commentary on Rule 23 at D1 – 294/5 in Erasmus, Superior Court Practice.
[2] *Barret v Rewi Bulawayo Development Syndicate* 1922 AD 457 at 459.
[3] *Du Preez v Boetsap Stores (Pty) Ltd* 1978 (2) SA 177 (NC) at 181 F.
[4] *Nel and Others NNO v McArthur* 2003 (4) SA 142 (T) at 149 F.
[5] *Amalgamated Footwear and Leather Industries v Jordan and Co Ltd* 1948 (2) SA 891 (C) at 893.

The first ground of exception

[15] Following the key averments in paragraph 37 that Steinhoff NV's knowledge (of the misrepresentations) or reckless conduct was attributable to the excipients the plaintiffs plead in paragraph 38:

> *'38. SIH, SAH* (other Steinhoff companies) *and Pepkor Holdings acquired the shares in Tekkie Town and, Pepkor Speciality acquired the South African business of Tekkie Town, with such knowledge'.*

[16] In the following paragraph they plead that, in the premises, Pepkor Holdings, (which ultimately acquired the shares) jointly and severally with Steinhoff NV, is obliged to make restitution to each of the plaintiffs, in the appropriate portions, of the sale shares and sale claims as are presently under their control and that Pepkor Speciality is obliged to restore to Tekkie Town, again jointly and severally with Steinhoff NV, the business and assets it acquired from Tekkie Town.

[17] Thus a key linking element for the liability of the excipients to make restitution of the sale shares, sales claims and business of Tekkie Town to the plaintiffs is the attribution to them of Steinhoff NV's knowledge or reckless conduct.

[18] The excipients aver however that the plaintiffs have failed to plead the facts necessary to sustain the pleaded conclusion that such knowledge or conduct was attributable to them. They contend that it is insufficient to rely only on the fact of their alleged status as wholly owned subsidiaries of Steinhoff NV at the relevant time and the fact of the transfers to sustain the conclusion sought to be drawn. They argue that more must be pleaded in relation to the *'directing mind and will'* of the excipients since these are corporations and can only function through human agency, ultimately its board of

directors or a director or person with delegated authority to act on its behalf. Such a person or persons would have to be identified as possessing such knowledge or, one presumes, at least having knowingly assented to such conduct.

[19] In *Mostert NO v Old Mutual Life Assurance Co*[6] Blignault J quoted with approval the following passage from LAWSA, First Re-issue, Vol 4 (1) sv Company para 35:

> *'Acts and states of mind*
>
> *The acts and omissions, intentions, purposes and knowledge of certain persons are the company's act and omissions, intentions, purposes and knowledge. That is to say, because the company as such – as a mere legal* persona *– has no physical existence and hence cannot act and has no mind or will of its own, the law attributes acts and states of mind of certain persons to the company. Such persons do not act or think on behalf of, or for, the company, that is as representatives, agents or delegates or servants. Rather, within their appropriate sphere they are an embodiment of the company: they act and know and form intentions through the* persona *of the company. Their minds are its mind; their knowledge its knowledge, their intentions its intention. This theory, '*the directing mind' *or* 'alter ego' *doctrine, has been developed, with no divergence of approach, in both civil and criminal jurisdictions, the authorities in each being cited indifferently in the other.*
>
> *The need for the doctrine always arises where the law requires personal fault as a condition for liability. Whenever liability depends upon the performance of an act or an omission by the company itself, or possession by the company of a particular state of mind, the law treats the acts or states of mind of those who represent and*

[6] [2001] 2 All SA 465 (C) at paragraph 25.

control the company as the acts and states of mind as the company itself. … The doctrine is however not limited to questions of criminal or delictual liability. It is of general application, and applies whenever it is necessary to attribute acts and states of mind to a company'.

This statement of law is repeated in LAWSA, 2nd Edition Vol 4 part 1, para 79.

[20] The excipients contend that the fact that they are wholly owned subsidiaries of Steinhoff NV does not alter the fact that they are separately registered companies with their own boards of directors. Ultimately, they argue, the plaintiffs have not pleaded any factual basis for the attribution of the knowledge which Steinhoff NV allegedly had to its subsidiaries and as such have not pleaded the necessary factual averments to make out a cause of action to hold the excipients liable on the basis of the attribution of such knowledge or conduct.

[21] The plaintiffs seek to counter these arguments by submitting that the relevant *factum probandum* is that the Pepkor companies acquired the sale shares and business with the knowledge pleaded in relation to Steinhoff NV and that the basis for the principal relief against the Pepkor companies is the fact that they knew of the misrepresentations (and their impact on the plaintiffs) when those acquisitions took place. They contend that these allegations are pleaded in paragraph 38 of the particulars of claim and for present purposes they must be taken as proven. The means by which those subsidiaries acquired that knowledge, they contend, is a matter for evidence.

[22] When the plaintiffs use the word or the concept *'attribute'* in the particulars however they are clearly saying something other than that the relevant party had direct knowledge. The primary meaning of *'attribute'*, as in *'attribute something to'*, in the

Concise Oxford English dictionary, tenth edition revised, is to *'regard something as belonging to or being caused by'* [my underlining], a meaning which highlights the presumptive nature of the process.

[23] The difficulty I have with the plaintiffs' argument is that neither paragraph 37 nor 38, nor the two taken together can reasonably be understood as pleading that the Pepkor companies actually had the knowledge in question nor do they set up a basis for the averment that Steinhoff NV's alleged reckless conduct is *'attributable'* to each or either of them. Paragraph 37 uses the concept of the attribution of knowledge (a presumptive process) and does not state that the Pepkor companies had the knowledge in question. Nor in my view does paragraph 38 save the situation for the plaintiffs insofar as it pleads, more directly, that Pepkor Holdings acquired the shares and Pepkor Speciality acquired the business of Tekkie Town *'with such knowledge'*. Mr Duminy SC, on behalf of the plaintiffs, contended this was a clear statement to the effect that the Pepkor companies had actual knowledge of the misrepresentations or reckless conduct of Steinhoff NV and thus that any difficulty arising from the bald assertion in the preceding paragraph that such knowledge or conduct was *'attributable'* to the Pepkor companies was moot.

[24] However, the two paragraphs must be read in context and together. In paragraph 37 the plaintiffs base their case on the *'attribution'* of knowledge or conduct to the Pepkor companies, an averment which would be superfluous if paragraph 38 is read as an averment of actual knowledge on the part of the Pepkor companies. Furthermore, the *'knowledge'* referred to in paragraph 38 as *'such knowledge'* is not specified therein and logically must be read as the knowledge of the misrepresentations or reckless conduct imputed to Steinhoff NV at the time of the various transfers as referred to in paragraphs

23, 26 and 36.2 of the particulars of claim. It is also of significance that para 36 does not aver that the Pepkor companies had such knowledge at such time. Finally, and in any event, even if paragraph 38 were to be read as asserting that the Pepkor companies had actual knowledge of the alleged misrepresentations and reckless conduct on the part of Steinhoff NV at the relevant time, no factual or legal basis is laid for this assertion. As such the pleading offends a basic rule of pleading, namely, that it *'shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim ... with sufficient particularity to enable to opposite party to reply thereto'*.

[25] In the absence of a clear statement that the Pepkor companies acquired the shares and business with direct knowledge of the alleged misrepresentations and reckless conduct the only reasonable interpretation of paragraphs 37 and 38 is that the plaintiffs rely on that knowledge being attributed to such companies. In my view, in the absence of any allegation as to the basis upon which such knowledge is attributed to the Pepkor companies, the basis for their liability is unclear and as such fails to disclose a cause of action.

The second ground of exception

[26] The second ground of exception focuses on paragraphs 40 and 41 of the particulars of claim which, under the heading of ***'Abuse of corporate personality'***, invoke the provisions of 20(9) of the Companies Act, 71 of 2008 with a view to *'piercing the veil'* in regard to Steinhoff NV's conduct in transferring the sale shares and the business of Tekkie Town to the Pepkor companies.

[27] Insofar as they are relevant paragraphs 40 and 41 reads as follows:

'40. The conduct set out in paragraphs 35 and 36 above constitutes the use by

Steinhoff NV of, alternatively acts by or on behalf of, one or more or all of SIH, SAH, Pepkor Holdings, and Pepkor Speciality (the Steinhoff Africa group) and Tekkie Town.

41. To the extent that Steinhoff NV or any one of the defendants relies on the separate juristic personalities of any one or more of the companies in the Steinhoff Africa group in opposing any of the relief sought by the plaintiffs herein, that is an unconscionable abuse of the juristic personality of (such companies), as contemplated in sec 20(9) of the Companies Act, 71 of 2008'.

[28] By way of relief it is pleaded in paragraph 42 that:

'42. In the premises in terms of sec 20(9) of the Companies Act 71 of 2008:

42.1 Pepkor Holdings and Pepkor Speciality should be deemed not to be juristic persons in respect of any right, obligation, or liability of those companies or of Steinhoff NV to any of the plaintiffs; and

42.2 Steinhoff NV, jointly and severally with Pepkor Holdings and Pepkor Speciality (where applicable) should be directed to deliver:

*42.2.1 To the plaintiffs, the Equity, ... and (*in the condition in which they were delivered in or about between August 2016 and October 2017)*;*

42.2.2. ... the business acquired from Tekkie Town ...'

[29] The conduct set out in paragraphs 35 and 36 refers to the transfer of the sales shares and the South African business of Tekkie Town to various of Steinhoff NV's subsidiary companies and ultimately to one or other of the excipients. Paragraph 36 avers that Steinhoff NV, having knowledge of the misrepresentations and that the plaintiffs had

relied thereon in concluding the contract, foresaw or should have reasonably have foreseen that the plaintiffs would cancel the contract and seek restitution or had reconciled itself with that prospect.

[30] In their notice of exception the excipients contend that in alleging in paragraph 41 that the separate juristic personalities of companies within the *'Steinhoff Africa group'* must be disregarded, the plaintiffs had pleaded a conclusion of law, alternatively a conclusion of fact and law, without having pleaded the necessary facts in order to sustain that conclusion. In making this contention the excipients rely on the basic principle of company law that a company is a legal persona distinct from the members who compose it, a principle which applies also where the company is a subsidiary of another company. In *Wambach v Maizecor*[7] it was contended that, because the plaintiff's board of directors held a full right of disposal of an asset, the ownership thereof vested in the plaintiff. The Court held however that the fact that the board of a controlling company could effectively take decisions concerning an asset of a subsidiary did not entail the asset thereby becoming an asset of the controlling company: as far as alienation specifically was concerned, the property in question remained an asset of the subsidiary until effect was given to a decision to alienate it.

[31] Our Courts have reaffirmed at the highest level the importance of keeping the property rights of a company and those of its shareholders distinct. In *Shipping Corporation of India Limited v Evdomon Corporation and Another*[8] Corbett CJ confirmed that the only permissible deviation from this rule is where the circumstances justify piercing or lifting the corporate veil. Crucially, the learned judge held that doing

[7] 1993 (2) SA 669 (A) at 647 – 675.
[8] 1994 (1) SA 550 (A) at 565 I – 566 F.

so *'would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words* "device", "stratagem", "cloak" *and* "sham" *have been used'*.

[32] The Court in *Shipping Corporation of India Limited* also referred to the then recent decision in the case of *Adams and Others v Cape Industries PLC and Another*[9] where at page 1022 the following passage appears: *'If and so far as the judge intended to say that the motive behind the new arrangements was irrelevant as a matter of law, we would respectfully differ from him. In our judgment, as Mr Morison submitted, whenever a device or sham or cloak is alleged in cases such as this, the motive of the alleged perpetrator must be legally relevant, and indeed this no doubt is the reason why the question of motive was examined extensively at the trial'*. In the same passage the Court quoted with approval the following passage from the judgment in *Woolfson v Strathclyde Regional Council* 1978 SLT 159 to the following effect: *'I have some doubts whether in this respect the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts'.*

[33] The test for *'piercing the corporate veil'* was formulated in *Hulse-Reutter v Godde*[10] as follows: *'There must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter'*. As was held in *Ex Parte Gore NO and Others*[11] ownership and control of a company are not of themselves sufficient to justify piercing the veil and a Court cannot do so, even when no unconnected third party is involved,

[9] [1991] 1 ALL ER 929 (CH and CA).
[10] 2001 (4) SA 1336 (SCA).
[11] 2013 (3) SA 382 (WCC).

merely because it is perceived that to do so is necessary in the interests of justice. The Court went further, adding the following criteria for piercing the corporate veil:

> *'31.3 The corporate veil can only be pierced when there is some impropriety;*
>
> *31.4 The company's involvement in an impropriety will not by itself justify a piercing of its veil: (furthermore) the impropriety must be linked to use of the company structure to avoid or conceal liability;*
>
> *31.5 If the Court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer and impropriety in a sense of a misuse of the company as a device or façade to conceal wrongdoings;'.*

[34] Section 20(9) of the Companies Act was recently discussed in *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St. Clair Cooper and Others*[12] where the following was stated:

> *'[28] On its plain wording, sec 20(9) permits a court to disregard the separate juristic personality of the company where its incorporation, use or an act performed by or on its behalf* "constitutes an unconscionable abuse of the juristic personality of the company as a separate entity". *The term* "unconscionable abuse" *is not defined in the 2008 Act and must therefore be given its ordinary meaning.*
>
> *[29] The meaning of* "unconscionable" *in the Oxford English Dictionary includes,* "Showing no regard for conscience … Unreasonably excessive … egregious, blatant … unscrupulous." *It is in my view undesirable to attempt to lay down any definition of* "unconscionable abuse". *It suffices to say that the unconscionable abuse of the juristic personality of a company within the meaning of sec 20(9) of the 2008 Act, includes the use of, or an act by, a company to*

[12] 2018 (4) SA 71 (SCA).

commit fraud; or for a dishonest or improper purpose; or where the company is used as a device or facade to conceal the true facts'.

[35] In support of their argument that the plaintiffs failed to plead sufficient factual allegations to warrant the conclusion that an unconscionable abuse had taken place as contemplated by sec 20(9) of the Companies Act, the excipients noted that an assertion of separate juristic personality per se can never constitute an *'unconscionable abuse'* and that it was for the plaintiffs to plead conduct alleged to constitute such an abuse. In essence, they contend, the particulars do not allege that the transfers to the wholly owned subsidiaries were effected by Steinhoff NV or the Steinhoff Africa group for a fraudulent or improper purpose.

[36] The plaintiffs' response to the complaint and the supporting arguments based on this ground of the exception was that in the first place the key allegation, namely, the unconscionable abuse of juristic personality, was not even predicated on the allegation or fact that the excipients were wholly owned subsidiaries of Steinhoff NV at the time of the transfers or that they were members of the Steinhoff Africa group. They contend further that whether the facts warrant a piercing of the veil is something to be decided on the evidence in the trial. This, however, begs the question as to what the material facts the evidence must cover. Put differently, the plaintiffs' argument is that the circumstances in which a company's juristic personality may be disregarded need not necessarily involve fraud or improper conduct although these may be important considerations. In this regard the plaintiffs contend that the nature of the corporate structure is also a relevant factor. None of this, however, answers the excipients' essential complaint which is that no material facts other than the status of the Pepkor companies as wholly owned subsidiaries

of Steinhoff NV were pleaded as a possible basis for the invocation of sec 20(9) of the Act. Ironically, as mentioned, the plaintiffs disavow reliance even on that status as a basis for the Court to intervene or pierce the veil in terms of sec 20(9) of the Act.

[37] On behalf of the plaintiffs' counsel argued that to the extent that this ground of the exception required the plaintiffs to allege that the use of the Pepkor companies constituted an evasion or a concealment on the part of Steinhoff NV, this unjustifiably required the plaintiffs to plead *facto probantia* rather than no more than was necessary, namely, the *factum probandum* that such use of the companies was an unconscionable abuse of their corporate personality. In support of this argument counsel referred to the terms of sec 20(9) and contended that the jurisdictional requirements set out therein were adequately pleaded in the relevant portion of the particulars of claim. In my view, however, it does not follow that simply because the basic requirements for the invocation of the piercing of the veil doctrine (as statutorily incorporated in sec 20(9) of 2008 Act) have been pleaded that this is sufficient to constitute a cause of action. Regard must be had to the provisions of Rule 23(1) which require that every material fact must be pleaded, as well as the case law which has developed around the concept of the piercing of the veil.

[38] The cases cited by the plaintiffs' counsel in this regard, *Ex Parte Gore* and *Prest v Petrodel Resources Ltd*[13] lend no support to his argument. As far as *Ex Parte Gore* is concerned the extract cited in paragraph 35 above clearly illustrates the point, namely, that ownership and control of a company are not of themselves sufficient to piercing the veil nor will a Court pierce the veil based simply on the perception that this will serve the

[13] [2013] UKSC 34.

interests of justice.

[39] In *Prest v Petrodel* Lord Sumption dwelt on the difficulty of identifying irrelevant wrongdoings and concluded *'it seems to me that two distinct principles lie behind these protean terms (*"façade" *or* "sham") *and that much confusion has been caused by failure to distinguish between them. They can conveniently be called the concealment principle and the evasion principle'*. In his speech Lord Neuberger largely agreed with the conclusions reached by Lord Sumption stating as follows: *'Having read what Lord Sumption says in his judgment … I am persuaded by his formulation in para 35, namely, that the doctrine should only be invoked where "a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control'*.

[40] In my view the statements in *Prest v Petrodel* to which I have referred lend support to the proposition that the piercing of the veil doctrine is not properly pleaded by merely making a bald allegation that such a step is justified or by simply reciting the requirements set out in sec 20(9) of the Companies Act. The element of a deliberate evasion, frustration or concealment must necessarily be pleaded in order that the party against whom it is invoked can know and meet the case made against it.

[41] Further support for the excipients on this ground is be found in a leading case dealing with piercing or lifting of the veil: *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others*[14]. There it was held, through the judgment of Smalberger JA, that it is a salutary principle that the Court should not lightly disregard a

[14] 1995 (4) SA 790 (A).

company's separate personality and should strive to give effect to it but where fraud, dishonesty or other improper conduct is found to be present, other considerations come into play. If a company, otherwise legitimately established and operated, is misused in a particular instance to perpetuate a fraud or for a dishonest or improper purpose, there is no reason in principle or logic why its separate personality cannot be disregarded in relation to the transaction in question.

[42] In my view in order to establish a cause of action it is insufficient for the plaintiffs to merely allege that the use of the companies or acts on their behalf constituted an unconscionable abuse of their juristic personality. That is a conclusion of law and fact to be determined upon a hearing of the evidence. The doctrine of piercing the veil cannot be successfully invoked in the absence of some underlying improper motive, purpose or intent to abuse the corporate personality of the relevant company. In the circumstances I find that this ground of the exception is also well-founded.

The third ground of exception

[43] This ground focuses on an alternative basis of claim, namely, that of unjustified enrichment which is pleaded in paragraph 43 under that heading, the relevant part reading: *'In the event of the applicable proportion of the Sale Shares and Sale Claims not being returned to any of the plaintiffs as aforesaid, either wholly or in part or the South African business and assets of Tekkie Town as at 1 October 2017 not being returned to Tekkie Town at all or with less than the value they had at the time of delivery ("the non-restitution"), the plaintiffs plead as follows:*'.

[44] There follow allegations that to the extent of any non-restitution: Steinhoff NV or Pepkor Holdings, in respect of the Tekkie Town shares, will have been unjustifiably

enriched and the applicable plaintiff correspondingly impoverished in proportion to its purchase price aliquot share; or in respect of the South African business and assets of Tekkie Town, that Steinhoff NV or Pepkor Speciality will have been unjustifiably enriched and each plaintiff impoverished in the same proportions as above in respect of the reduction in Tekkie Town's nett asset value. It is further pleaded that each plaintiff will be entitled to payment by Steinhoff NV and Pepkor Holdings, jointly and severally, of sums proportionate to the extent of such non-restitution and, in the case of Tekkie Town, to payment by Pepkor Speciality to it of a sum to compensate it for any resultant reduction in its nett asset value.

[45] A further alternative is then pleaded to the effect that, to the extent there is less that complete restitution, each plaintiff will be entitled to compensation by Steinhoff NV (but not the excipients) in an amount deemed fair and reasonable by the Court.

[46] In its notice of exception, the excipients contend that the plaintiffs' claim for *restitutio in integrum*, the basis of its principal claim arising from their decision to rescind the contract, is a separate and distinct remedy from that of an unjustified enrichment. They contend further that the plaintiffs have not pleaded the necessary facts to justify a claim based against the excipients based on unjustified enrichment. In particular, they contend that delivery of the sale shares and sale claims by the plaintiffs to Steinhoff NV are not pleaded to have been *'sine causa'* but rather to have been made pursuant to the contract from which the plaintiffs alleged they *'were entitled to resile … which they did on 11 May 2018'*; nor was it pleaded that the excipients' alleged enrichment was at the expense of the plaintiffs.

[47] The excipients' counsel contended that the plaintiffs had failed to heed the warning in *Davidson v Bonafede*[15] and *Yarona Health Care v Medshield*[16] emphasising the distinction between a claim for *restitutio in integrum* and unjustified enrichment.

[48] In disputing this ground of the exception the plaintiffs argue that it is based on a misreading of the particulars of claim inasmuch as the primary relief sought is restitution based on allegations of fraud whilst the principles of enrichment are invoked only to the extent that full restitution could not be made by one or more of the defendants. This, it was submitted, is clearly expressed in the introductory wording used in paragraph 43 of the particulars of claim quoted above, whereupon follows the claim based on principles of unjustified enrichment. Accordingly, contend the plaintiffs, on a proper reading a conditional, ancillary ground for relief was pleaded to address any failure to make full restitution and not as an alternative for restitution.

[49] At this level the plaintiffs' contentions in this regard are correct but the question remains whether, in the event of their main claim succeeding but yielding less than full restitution, they are entitled to claim the difference by way of relief as framed in the form of a (conditional) unjustified enrichment action.

[50] It is indeed so that our courts have repeatedly emphasised the distinction between an action for restitution and a claim for unjustified enrichment. In *Davidson v Bonafede* Marais AJ (as he then was) cited with approval an academic authority to the effect that the action for *restitutio in integrum* is a separate and distinct remedy and not an enrichment action. More recently this distinction was emphasised by the Supreme Court of Appeal in *Yarona Health Care v Medshield* where the Court stated as follows at

[15] 1981 (2) SA 501 (CPD).
[16] 2018 (1) SA 513 (SCA).

paragraph 8:

> *'It is as well to begin by emphasising that Medshield's claim was not a claim for restitutio in integrum. That is a special remedy accorded by our law when contracts are rescinded on certain recognised grounds'.*

[51] It is uncontroversial that where a Court has ordered *restitutio in integrum* the Court is expected to do the best it can to restore the parties to their respective positions *ante quo* (as was expressed by Marais AJ in *Davidson v Bonafede).* In so doing it can award compensation or damages. The learned judge said in this regard:

> *'In a sense, I suppose, it could be said that the award of damages is really only one facet of an entire process, namely, the process of restoring the parties to their pre-contractual positions but it is probably more correct to regard such an award as a separate and distinct claim for damages. In the end it seems to me to be a question of degree as to whether any particular financial adjustment that falls to be made is one which is an integral element in the granting of restitutio in integrum, or is one which is collateral to it, and so should form the subject of distinct claim for damages'.*

[52] In the present case the plaintiffs plead (in paragraph 43 and prayer G) a fall-back claim against Steinhoff NV for compensation in a sum that the Court *'deems fair and reasonable'* in the event of less than full restitution. As I have noted however this alternative basis for 'top up' relief is not asserted against the excipients. The only basis upon which the plaintiffs seek so-called 'top up' relief against them is by way of a claim for unjustified enrichment. However, such a claim is not brought as an alternative to the plaintiffs' main claim for *restitutio in integrum* but is framed as co-existing with it. Given

the frequent statements by our Courts that these are two distinct remedies, a distinction which should not be lost, I consider that these claims cannot co-exist except as full alternatives i.e. in the event that the claim for restitution fails on its merits. Put differently, it is not open to the plaintiffs to claim restitution based on their resiling from a contract allegedly induced by fraud and, on the other hand, whilst relying on the same factual matrix, to claim (albeit conditionally) a portion of their damage based on a claim for unjustified enrichment. This is particularly so where our law does provide for a 'top up' claim for damages in cases where restitution is claimed but falls short of full restitution.

[53] Besides contending that the plaintiffs are not entitled to rely on a conditional claim based on unjustified enrichment for the balance of any damages they have suffered where their main claim is based on *restitutio in integrum*, the excipients advance other reasons why they contend the unjustified enrichment claim is excipiable, namely, in that on its own terms it has not been properly pleaded.

[54] Although there is no general action based on enrichment in our law there are nonetheless certain general requirements for any such action which are as follows: firstly, the defendant must be enriched; secondly, the plaintiff must be impoverished; thirdly, the defendant's enrichment must be at the expense of the plaintiff; and, fourthly, the enrichment must be unjustified (*sine causa*).

[55] In explaining this ground of their exception the excipients identify the first shortcoming as being that the delivery of the sale shares and sale claims by the plaintiffs to Steinhoff NV were not, and are not pleaded to be, *sine causa*, but rather to have been made pursuant to the contract from which the plaintiffs allegedly were *'entitled to resile*

... '. This in indeed so – no such averment was made vis-à-vis Steinhoff NV, let alone in relation to the excipients. As is stated in the discussion in LAWSA on this topic if the mere fact that one person was enriched at the expense of another were to give rise to an enrichment action, liability would be so wide as to put an end to all profit making. It is consequently required that the enrichment must be unjustified (*sine causa*) i.e. without any sufficient ground recognised by law to justify the transfer or retention of value which has passed from the plaintiff to the defendant.

[56] The second shortcoming identified by the excipients is that the plaintiffs have not pleaded that the excipients' alleged enrichment was at the expense of the plaintiffs. This argument was met by the plaintiffs pointing out that the averments that they were impoverished and the defendants/excipients commensurately enriched were in fact made. This is so but, as I understand the excipients' criticism, the plaintiffs have failed to plead a causal link between the plaintiffs' impoverishment and the enrichment of those defendants. Again it is stated in LAWSA that it is not sufficient that the defendant has been enriched and the plaintiff impoverished. There must be a causal link between the enrichment and the impoverishment. I am not persuaded that such a causal link has been pleaded by the plaintiffs either directly or by implication. Furthermore, the claim for unjustified enrichment is based on the eventuality that the subject matter of the sale agreement i.e. the sale shares and claims and the nett asset value of Tekkie Town's business may, on restitution, be found to be worth less than their value at the time of the sale agreement. It is left unexplained why any such reduction in these values should inevitably lead to liability on the parts of the excipients based on unjustified enrichment.

General

[57] In the exception as originally filed the excipients included no prayer for relief. At the hearing, however, they successfully moved for an amendment to their notice of exception adding a prayer for relief, namely, dismissing the plaintiffs' claim/s alternatively granting them leave to amend their particulars within ten (10) days of such order as this Court may grant in order to render their particulars unexcipiable, as well as a prayer for costs. Some argument followed this amendment, the point being made by plaintiffs' counsel that such a generalised prayer for relief did not necessarily meet the situation where not all of the grounds of exception impacted equally on all the defendants or were upheld. Counsel for the excipients undertook to furnish a draft order to meet the differing situations and to afford plaintiffs' counsel an opportunity to comment thereon if needs be. Draft orders based on which grounds of exception might be upheld were placed before me by both the excipients and the plaintiffs. Many of the variations identified which paragraphs of the particulars required amendment failing which identified prayers for relief would be dismissed.

[58] I do not consider it necessary, particularly where the particulars of claim involve multiple parties and claims, to identify precisely which paragraphs require to be amended by the plaintiffs since this can be determined by the pleader having regard to this judgment. It is sufficient to identify which claims fall to be dismissed in the event that any amendment by the plaintiffs fails to render such claim unexcipiable. The upholding of the first ground of the exception renders the plaintiffs' claim in respect of prayers C, D, E and, arguably, F excipiable. Prayers A and B are hit by the upholding of the second ground of the exception. The upholding of the third ground of the exception also affects prayers E and F. Since in sum the successful grounds of exception affect all of the claims

against the third to fifth defendants, I consider that the standard form of relief should apply.

[59] Having been successful in respect of all three grounds of their exception the excipients are entitled to their costs. Each of the contending parties used more than one counsel and in the circumstances there can be no quarrel with an order that the costs will include those of two counsel.

Order

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

1. The exception is upheld with costs, including the costs of two counsel;
2. The plaintiffs are afforded a period of 20 days from the date of this order within which to amend their particulars of claim, failing which the plaintiffs' claims against the third, fourth and fifth defendants are dismissed with costs, including the costs of two counsel.

BOZALEK J

For Excipients/Third to Fifth Defendants	Adv Sholto-Douglas SC Adv BJ Vaughn
As Instructed by	Bowman Gilfillan Inc
For Plaintiffs/Respondents	Adv W Duminy SC Adv D Irish SC Adv N Traverso
As Instructed by	C & A Friedlander