IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBERS 16389/19 and 6578/19

In the matter between:

LANCASTER 101 (RF)(PTY) LIMITED	Applicant/Plaintiff
And	
STEINHOFF INTERNATIONAL HOLDING N.V	Respondent/Defendant
MARKUS JOHANNES JOOSTE	First Third Party/Third Party
ANDRIES BENJAMIN LA GRANGE	Second Third Party

Coram: Kusevitsky, J

Heard: 27 July 2021 (Virtual Hearing)

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date of hand-down is deemed to be 29 September 2021

JUDGMENT

KUSEVITSKY, J

Introduction

[1] I have been seized with a portion of the dispute which relates to Steinhoff International Holdings NV ("Steinhoff") and one of its potential creditors, Lancaster 101(RF) (Pty) Ltd ("Lancaster 101").

[2] This matter involves an application in terms of Rule 7 of the Uniform Rules of Court, where Steinhoff challenges a resolution adopted by Lancaster 101 which purports to grant its director Mr Jayendra Naidoo ("Naidoo") authority to institute legal proceedings against Steinhoff and its affiliates.

[3] It is common cause, that Lancaster 101 instituted an action against Steinhoff on 17 April 2019, in which it seeks *inter alia*, the rescission of a share subscription agreement which Lancaster 101 concluded with Steinhoff on 23 September 2016, and in terms of which Lancaster 101 subscribed for 60 million shares in Steinhoff at a price of R 75.98 per share for the total sum of approximately R 4.5 billion. On 14 September 2019, Lancaster 101 filed an application for the same relief sought in the action, i.e. for the rescission of subscription agreement. It avers that this relief is sought on motion because Steinhoff is ostensibly unable to genuinely dispute the basis upon which Lancaster 101 is entitled to the relief sought.

[4] The adjudication of those matters is not before me. What is however before me is an application[1] pursuant to two Rule 7 notices served by Steinhoff in the action and application proceedings. The relief sought in both applications[2] is the same and will for purposes of expedience be dealt with together. The relief sought is a follows:

1.1 granting the defendant, Steinhoff, condonation for the late delivery of its notice in terms of Rule 7, dated 1 February 2021;
1.2 declaring the Plaintiff's response to the Rule 7 notice, dated 4 February 2021, as its formal response to the Rule 7 notice;
1.3 declaring Lancaster 101's response as being inadequate to satisfy this Court that Lancaster's attorneys of record, have the requisite authority to represent Lancaster 101 in these proceedings;
1.4 staying the proceedings and directing that Lancaster's attorneys may no longer act on behalf of Lancaster 101, until such time as Lancaster 101's attorneys have satisfied this Court that they are so authorised to act;
1.5 Alternatively to the relief sought in 1.1 to 1.4 above, granting Steinhoff leave to serve a new Rule 7 notice on Lancaster 101.

[5] Lancaster 101 has also filed a Conditional Counterclaim, in the event that Steinhoff is successful in the substantive relief sought. The relief claimed is as follows:

> "That the unanimous resolution of Lancaster 101's Board of Directors dated 7 March 2019 is declared to be valid in terms of section 75(7)(b)(ii) read with section 75(8) of the Companies Act,71 of 2008 ("the Companies Act").

Summary of the legal proceedings

[6] Lancaster 101 has two pending proceedings against Steinhoff; action proceedings ("the action proceedings") instituted during April 2019 under case number 6578/19 and application proceedings ("the application proceedings") instituted on 16 September 2019 under case number 16389/19.

[1] In respect of both the action and application matters
[2] Case No. 6578/19 and Case No.16389/19

[7] The action proceedings seek judgment against Steinhoff for various claims, one of which is a claim based on a subscription agreement concluded between Lancaster and Steinhoff. The amount sought in this claim is R 4 558 800 000.00.

[8] The application proceedings, which was initially brought on an urgent basis[3], similarly seeks judgment against Steinhoff in the amount of R 4 558 800 000.00. The claim sought in the application is identical to the claim referenced above in the action proceedings, and is also premised upon the aforesaid subscription agreement that was concluded between Lancaster 101 and Steinhoff. It is common cause that Steinhoff has raised a *lis pendens* defence as a consequence thereof.

[9] According to the founding affidavit deposed to by the company secretary to the Steinhoff Group, Mr Nicholas Lewis ("Lewis"), the issue of authority became pertinent in the application proceedings.

[10] Lewis states that the deponent to the founding affidavit in the Lancaster 101 application proceedings, Naidoo, asserted that he was duly authorised to act on behalf of Lancaster 101 and to depose to the founding affidavit on its behalf. Lewis states that no proof of Naidoo's authority to act was annexed to the founding affidavit.

[3] The matter having been struck off the roll for want of urgency

[11] It is common cause that the authority was not specially raised as an issue in those proceedings, but Lewis relies on a general denial clause[4] which reads as follows:

> "…any assertion and/or allegation contained in the founding affidavit which is not addressed specifically hereunder, which is contrary to what is stated in this answering affidavit is taken to be denied." ("own emphasis")

[12] On this basis, the contention is that Naidoo's authority was denied in those proceedings.

[13] Lewis contends that Naidoo was provided an opportunity to respond to the denial of his authority to act on behalf of Lancaster 101 in the replying affidavit. This he could have done by annexing a copy of the resolution taken by Lancaster 101 to institute the application and / or the action, and which authorised him to represent Lancaster 101 in those proceedings. It is alleged that his failure to do so has now put into question Naidoo's authority to act on behalf of Lancaster 101; Lancaster 101's authority to institute the action and the application proceedings respectively; and by extension the authority of Lancaster's attorneys of record to act on Lancaster 101's behalf.

[14] As a consequence of the above, a Rule 7 Notice was served on Lancaster 101 in both the action and application matters on 4 February 2021 and 1 February 2021 respectively.

[15] On 4 February 2021, Lancaster 101 replied to the Rule 7 Notice by stating that the attorneys ENS Inc. were indeed so authorised to act on behalf of Plaintiff,

[4] In paragraph 192 of the answering affidavit in the application proceedings

Lancaster 101, and annexed the following resolution as proof of such authority which reads as follows:

> "WRITTEN RESOLUTIONS OF THE BOARD OF DIRECTORS OF THE COMPANY
>
> RECORDAL:
>
> The following resolutions have been submitted for consideration in terms of section 74 of the Companies Act, 71 of 2008 (the "Companies Act") to the board of directors of the Company (the "Board or "Directors"). The Directors hereby confirm that each Director has received notice of the matters to be decided in these resolutions.
>
> WHEREAS:
>
> The Company is desirous of instituting legal proceedings against Steinhoff International Holdings NV and/or any of its related affiliates ("Steinhoff") in respect of the loss suffered by the Company due to misrepresentations made by Steinhoff and/or its unauthorised representatives ("Claim")
>
> NOW THEREFORE IT IS RECEORDED THAT THE DIRECTORS HEREBY RESOLVE THAT:
>
> 1. RESOLUTION NO 1: *Authorisation to institute the Claim*
>
> Jayendra Naidoo, in his capacity as a Director of the Company, be and is hereby authorised and mandated to Institute the Claim on behalf of the Company, and is authorised to represent the Company in any legal proceedings of the Claim.
>
> 2. RESOLUTION NO 2: *Authorisation*
>
> Jayendra Naidoo, in his capacity as a Director of the Company or, be and is hereby authorised:
>
> 2.1 to do all such things and sign all such documents as are necessary to give effect to the resolutions set out above and generally do all such things and sign all such documents which may be necessary for the implementation the resolutions above, including, without limitation, to the deposing to of any and all affidavits and the instructing and appointment of the Company's attorneys (being Edward Nathan Sonnenbergs Incorporated); and
>
> 2.2 Insofar as such signature and/or acts occurred before the adoption of this Resolution No. 2, such signature and/or acts are hereby ratified and approved;
>
> provided that if Jayendra Naidoo has disclosed a personal financial interest of a matter or disclosed that he knows that a related person has a personal financial interest in the matter, he is nonetheless authorised to execute any of the aforesaid documents on behalf of the Company as contemplated in section 75(5)(g) of the Companies Act."

[16] Steinhoff disputed the correctness of the aforesaid resolution and denied that it constituted compliance with the Rule 7 notices. It accordingly filed a Rule

30A notice on the basis of the alleged deficiencies. The relevant concerns[5] raised in the Rule 30A notice were *inter alia* as follows:

> *"3.3 section 75 (5) of the Companies Act contemplates that a board meeting must be held to approve any matter in which a director ('**Relevant Director'**) (or a person related to a relevant director) has a personal financial interest. Furthermore, section 75 (5) prescribes the procedure that must be followed at the meeting and requires, inter alia, that the Relevant Director must not take part in the consideration of the matter; other than to disclose material information, observations and insights relating to the matter;*
>
> *3.4 the directors' resolution provided by the applicant indicates that a board meeting was not convened, and instead written resolutions were purportedly 'passed'. The directors' resolution merely confirms that each director 'has received notice of the matters to be decided in these resolutions'. Furthermore, Naidoo took part in the consideration of the matter, as evidenced by the fact that he signed the written resolutions;*
>
> *3.5 the aforementioned directors' resolution does not record whether or not the resolution was either: -*
>
> *3.5.1 subsequently ratified by the ordinary resolution of the shareholders of the applicant, following disclosure of that personal financial interest, as required in terms of section 75 (7) (b) (i) of the Companies Act; or*
>
> *3.5.2 declared to be valid by a Court, as required in terms of section 75 (7) (b) (ii) read with section 75 (8) of the Companies Act."*

[17] In reply to the Rule 30A Notice[6], the attorneys of record for Lancaster 101 raised various objections, *inter alia* disputing that Steinhoff was entitled to deliver a Rule 7 notice at this stage of the proceedings and that it had pertinently disputed Naidoo's authority in its answering affidavit in the application proceedings.

[18] Steinhoff states that Lancaster 101's refusal to comply with section 75 of the Companies Act may arise due to its shareholding. This is because 50% of Lancaster 101's issued shares are held by the Government Employees Pension Fund ("the GEPF"), who is represented by the Public Investment Cooperation ("PIC"), and the remaining 50% is held by entities controlled by Naidoo. This, argues Steinhoff, leads

[5] paragraphs 3.3 to 3.5 of the Rule 30A Notice
[6] Dated 8 March 2021

them to the conclusion that Lancaster 101 is unable to provide proper evidence to gainsay the inference that they are unable to provide proof of:

18.1 Lancaster 101's attorney's authority to act on behalf of Lancaster 101; and

18.2 Lancaster 101's authority to have instituted the aforesaid mentioned proceedings.

[19] This is the basis upon which Steinhoff is *inter alia* seeking condonation for the late delivery of its Rule 7 notice, the two applications having been launched in April 2021.

[20] This is perhaps the most appropriate time to deal with the application for condonation for the late delivery of its notice in terms of Rule 7 dated 1 February 2021.

The condonation application

[21] Rule 7(1) provides that the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or the application.

[22] According to Erasmus[7], the challenge may be brought at any time before judgment and may be raised in a variety of ways, *inter alia* in appropriate circumstances by notice, with or without supporting evidence, in a defendant's plea or special plea; in an answering affidavit or orally at the trial.

[23] In this case, the summons in the action was served on Steinhoff during April 2019, and the notice of motion was served on Steinhoff during September 2019. According to Lancaster 101, Steinhoff would have been aware that ENS represented Lancaster 101 in the action proceedings approximately 22 months before it served its Rule 7(1) notice in those proceedings; and approximately 15 months before it served its Rule 7(1) notice in the application proceedings.

[24] Rule 27 (1)[8] provides as follows:

> "In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time period prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for the doing of any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet."

[25] Rule 27(3) provides that the court may, on good cause shown, condone any non-compliance with these rules.

[26] In dealing with good cause in the context of Rule 27 (1), *inter alia* the following principles have emerged:

> "A full and reasonable explanation, which covers the entire period of delay, must be given. If there has been a long delay, the court should require the party in default to satisfy the court that the relief sought should be granted, especially in a case where the applicant is *dominus litis*. It is not sufficient for the

[7] D1-94
[8] Which makes provision of Extension of time and removal of bar and condonation

> applicant to show that condonation will not result in prejudice to the other party. An applicant for relief under this rule must show good cause; the question of prejudice does not arise if it is unable to do so. The court will *refuse to grant the application where there has been a reckless or intentional disregard of the rules of court, or the court is convinced that the applicant does not seriously* intend to proceed. The application must be bona fide and not made with the intention of delaying the opposite party's claim." [9]

[27] Steinhoff contends in the founding affidavit that when Lancaster 101's action and application were first instituted, there was no reason for Steinhoff to have doubts that Lancaster's attorneys had authority to represent Lancaster 101 in those proceedings. It says that when the PIC report became publicly available, it became apparent that the issue of the underwriting commission evidenced the personal financial interest. Is says that given that Steinhoff's answering affidavit in the Lancaster 101 application was due to be filed shortly thereafter, it was seen as an opportune time to dispute authority in that affidavit.

[28] Steinhoff disputed authority in its answering affidavit. It says that it was only on receipt of Lancaster 101's replying affidavit at the end of January 2021 that it became apparent that the issue of authority was not dealt with by Lancaster 101. This, combined with information which by then had become available pursuant to the Judicial Commission of Inquiry and the PIC Report regarding the underwriting commission and the personal financial interest, that the full weight and import of Lancaster 101's lack of authority became apparent.

[29] Lancaster 101's replying affidavit was served on 25 January 2021. Steinhoff says that it acted without delay thereafter: the Rule 7 notice was served a mere five Court days thereafter. In the circumstances, they contend that they acted with no undue delay.

[9] See *Erasmus* at D1 – 323

[30] They finally contend that the dispute in regard to authority is a recent one, premised on facts that only recently came to light. It says it was not an issue that could have been raised at the outset of this matter, and within the 10-day period contemplated in Rule 7 (1). They aver that it is, however, a point of considerable importance, now that the lack of authority has become clear and that it is in the interests of justice that Steinhoff be permitted to bring this application now.

[31] In support of this contention, reliance was placed on *Ferris v FirstRand Bank Ltd* [10] where the Constitutional Court held that lateness is not the only consideration in determining whether condonation should be granted. A court must also consider whether it is in the interests of justice to grant it, and that in making this determination the applicant's prospects of success and the importance of the issue to be determined are all relevant factors. *Ferris* also stated that one of the factors to be taken into consideration in deciding if condonation should be granted is that of the importance of the issue to be determined. Steinhoff points out that the issue of the authority is clearly of considerable importance.

[32] According to their argument, Lancaster 101 seeks judgment against Steinhoff amounting to many billions of rand. If the issue of authority is determined against Lancaster 101 and the relief in paragraph 1.4 of the notice of motion is granted, then ENS may no longer act on behalf of Lancaster 101 until such time as they have satisfied the Court that they are so authorized to act. It contends that the prejudice that would be suffered by Steinhoff in the event that the Lancaster 101 action and application are not authorized is significant and irremediable. Furthermore, in the

[10] 2014 (3) SA 39 (CC) at 43G – 44A

event that a costs order is granted in favour of Steinhoff, there would be no ability on its part to recover those costs since the plaintiff/applicant, as cited, would not have been party to the proceedings and cannot be held liable. In addition, Steinhoff would bear additional and usually non-recoverable costs in relation to unauthorized litigation against it, for no purpose. It says that is fundamentally important, that the issue of whether the proceedings are authorized needs to be resolved.

[33] Lancaster 101, in opposition to the application for condonation, placed its reliance on a Full Bench decision of this court per Binns-Ward J, which held that a delay in challenging authority in terms of Rule 7(1) is *"inimical to the efficient administration of justice"*, and that such challenges to the authority of an attorney to represent a litigant, *"if they are to be raised at all, should be raised promptly at the earliest opportunity…"*.[11] That Court went on to find that it is for this reason that the rule provides that a challenge must be made promptly, within the 10-day period, save where the party raising the challenge obtains the leave of the court to do so outside of this time period on *"good cause shown"*.[12]

[34] Lancaster 101 states that there is an important distinction drawn in the relevant case law between a challenge to the authority of an attorney to represent a litigant, and a general challenge to the authority of a deponent instituting proceedings on behalf of a juristic person. In *South African Allied Workers' Union v De Klerk NO*[13], the Court held that Rule 7(1) is concerned with the authority which is given by a litigant to an attorney to represent them in proceedings by taking certain

[11] *Janse van Rensburg v Obiang and Another* (A338/2018, 22470/2015) [2019] ZAWCHC 53 (10 May 2019) at para 17.

[12] Ibid.

[13] 1990 (3) SA 425 (E).

formal procedural steps, such as the issuing of court process.[14] Put differently, it contends that it is not concerned with, for example, the authority of a deponent to depose to an affidavit, or to the institution of proceedings on behalf of a juristic person.

[35] Lancaster 101 argues that according to the Supreme Court of Appeal, it has held that if a party wishes to dispute the authority of an attorney to represent a party, they are required to do so in terms of Rule 7(1). It is not to be raised *"based on no more than a textual analysis of the words used by a deponent"*.[15] The party raising the dispute must invoke Rule 7(1).[16] It contends that Steinhoff's purported explanation for the inordinate delay in filing its Rule 7 notices is thus unsustainable.

[36] Lancaster 101 further contends that Steinhoff had no intention of disputing ENS's authority when it filed its answering affidavit in December 2020. It says that if it had intended to do so, it would have expressly stated as much in its answering affidavit, and presumably would have sought to file a Rule 7(1) notice then – i.e. in December 2020. In states that in truth, the challenge to ENS's authority was an after-thought, calculated to delay. They say the explanation that the delay was occasioned by the public release of the PIC report, which alluded to the *personal interest*, is far fetched given that the PIC report became publicly available on 12 March 2020, nearly a year before it filed the Rule 7(1) notices and approximately 9 months before it filed its answering affidavit in the application proceedings. Thus although the deponent, Mr Lewis, stated that *"[g]iven that [Steinhoff's] answering*

[14] *De Klerk NO* (supra) at 435F-I.

[15] *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at para 16.

[16] *Unlawful Occupiers* (supra) at para 15 with reference to the judgment of Flemming DJP in *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705D-H.

affidavit in the L101 application was due to be filed shortly thereafter [i.e. shortly after the PIC report]*, it was an opportune time to dispute authority in that affidavit, and make a determination as to the next steps thereafter, once the replying papers were delivered"*. Steinhoff only filed its answering affidavit some 9 months later on 14 December 2020 after the PIC report became available on 12 March 2020.

[37] Steinhoff did not in its answering affidavit plead that ENS was acting without authority, or that the application had not been properly authorised by Lancaster 101's board of directors.

[38] Lancaster 101 states that it did not respond to Mr Naidoo's allegation in paragraph 3 of Lancaster 101's founding affidavit that he was duly authorised to represent Lancaster 101 and to depose to its founding affidavit. Instead, what Steinhoff did was to *bury* in its affidavit a general "*catch-all*" denial of any allegations contained in the founding affidavit which it chose not to specifically address. This bald and general denial reads as follows:

> "…any assertion and/or allegation contained in the founding affidavit which is not addressed specifically hereunder, which is contrary to what is stated in the answering affidavit is taken to be denied."

[39] In an attempt to explain away its inordinate delay, Steinhoff now contends that when Lancaster 101 did not address the "issue" of authority in its replying affidavit, Steinhoff was prompted to file the Rule 7(1) notices and accordingly has *"good cause"* to explain its delay.

[40] They say it is clear that Steinhoff did not intend in its answering affidavit to dispute ENS's authority, or for that matter the authority of Mr Naidoo. If it had intended to do so it would have stated this in terms. It is in any event contrary to the

well-established principles of pleading that issues such as this are to be raised explicitly on the pleadings.[17] They say that it should accordingly have come as no surprise to Steinhoff that Lancaster 101's replying affidavit did not address the issue of authority. This was because it had not been raised by Steinhoff in its answering affidavit as a point which required a response. It argues that it was not, and could never have been Lancaster 101's replying affidavit which prompted Steinhoff to file the Rule 7(1) notices.

[41] In *Pretoria City Council v Meerlust Investments (Pty) Limited 1962 (1) SA 321* Ogilvie Thompson JA stated as follows[18]:

> "The question of authority having been raised, the *onus* is on the petitioner to show that the prosecution of the appeal in this Court has been duly authorised by the Council; that it is the Council which is prosecuting the appeal, and not some unauthorised person on its behalf (cf. *Mall (Cape) (Pty.) Ltd v Merino Ko-operasie Bpk.*, 1957 (2) SA 347 (C) at pp. 351-2). As was pointed out in that case, since an artificial person, unlike an individual, can only function through its agents, and can only take decisions by the passing of resolutions in the manner prescribed by its constitution, less reason exists to assume, from the mere fact that proceedings have been brought in its name, that those proceedings have in fact been authorised by the artificial person concerned. In order to discharge the abovementioned *onus*, the petitioner ought to have placed before this Court an appropriately worded resolution of the Council. … This the petitioner has failed to do." ("own emphasis")

[42] In *Firstrand Bank v Fillis 2010 (6) SA 565*, the court stated that if an attorney's authority to act on behalf of a party is challenged, then in terms of Rule 7 of the Uniform Rules of Court, the attorney is required to satisfy the court that he is properly authorised to act on behalf of the litigant.[19] Until he has done so, he is precluded

[17] See, for example, *Minister of Land Affairs & Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at para 43; and *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1992 (2) SA 279 (T).

[18] At 325C-F; Pretoria City Council v Meerlust Investments Ltd 1962 (1) AD at 325C-F

[19] At para 12A-B

from acting further. The obligation to establish this authority only arises when the authority to prosecute the process is challenged.[20]

[43] In *South African Allied Workers Union v De Klerk NO 1990 (3) SA 425*, Jansen J referred to *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C)* at 351 D-H, where Justice Watermeyer stated as follows:

> *"I proceed now to consider the case of an artificial person, like a company or co-operative society. In such a case there is judicial precedent for holding that objection may be taken if there is nothing before Court to show that the applicant has duly authorised the institution of notice of motion proceedings. (see for example Royal Worcester Corset Co. v Kesler's Stores, 1927 C.P.D. 143; Langeberg Ko-operasie Beperk v Folscher and Another, 1950 (2) S.A. 618 (C)). Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolution in the manner provided by its constitution. An attorney instructed to commence notice of motion proceedings by, say, the secretary or general manager of a company would not necessarily know whether the company had resolved to do so, nor whether the necessary formalities had been complied with in regard to the passing of the resolution. It seems to me, therefore, that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before the Court or that proceedings which purport to be brought in its name have in fact been authorised by it. There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so (see for example Lurie Brothers Ltd v Archache, 1927 N.P.D 139, and the other cases mentioned in Herbstein and van Winsen, Civil Practice of the Superior Courts in South Africa, at pp. 37, 38). This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance.* ("own emphasis")

[44] Given the above, I am not persuaded by Lancaster 101's argument that a distinction is to be drawn between an attorney's mandate to act, and an authorisation given to an agent that he or she is so authorised by the artificial person, to so act, in this case, to institute legal proceedings.

[20] Id para 13C

[45] Given the above, it is clear that a litigant is entitled, despite the 10-day limit contained in Rule 7(1), to challenge a party's authority at any stage before judgment. Furthermore, if due regard is had to the dictum in *Ferris supra*, then I am of the view that it is in the interest of justice that condonation be granted, given the implications and importance of the matter.

The Applicant's submissions

[46] The basis of Steinhoff's challenge lies in section 75 of the Companies Act. Steinhoff submits that the resolution indicates that a board meeting was not convened, but rather that the resolutions were purportedly *"passed"*. The resolution merely confirms that each director *"has received notice of the matters to be decided in these resolutions"*. They say that Naidoo took part in the consideration of the matter, given that he signed the written resolution.

[47] Section 75 of the Companies Act relates to a Director's personal financial interests. Subsection (4) provides that at any time, a director may disclose any personal financial interest in advance, by delivering to the board, or shareholders in the case of a company contemplated in subsection (3), a notice in writing setting out the nature and extent of that interest, to be used generally for the purposes of that section until changed or withdrawn by further written notice from that director.

[48] Subsection (5) provides that if a director of a company, other than a company contemplated in subsection 2(b) or (3), has a personal interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director (a) must disclose the interest

and its general nature before the matter is considered at the meeting; (b) must disclose at the meeting any material information relating to the matter and known to the director; and ; must not take part in the consideration of the matter, except to the extent contemplated in paragraphs (b) and (c).[21]

[49] According to Steinhoff, by virtue of Naidoo's shareholding in the Lancaster Group, he is defined '*a person related to a director*" of Lancaster 101 as contemplated in the Companies Act, and the disputed subscription agreement is the genesis of this relationship.

[50] In my view, it is necessary to set out the background to the subscription agreement. The subscription by Lancaster 101 occurred in the context of what has been described as a fully funded black economic empowerment transaction, which envisaged the acquisition of Steinhoff shares by Lancaster 101, wholly funded by the PIC and which was Steinhoff's second largest shareholder.

[51] At the time of the conclusion of the subscription agreement, the PIC held 50% of the issued shares in Lancaster 101. The remaining 50% were held by the Lancaster Group and Naidoo is the *sole shareholder* of the Lancaster Group.

[52] It was alleged that the subscription agreement makes no mention of the payment of an underwriting commission to any party. However, when the Steinhoff's capital increase was announced on 28 September 2016, it included a recordal that Lancaster 101 would be paid an underwriting commission of 2.5% of the total subscription price under the subscription agreement. This appears to have been

[21] Subsection (e)

calculated on 60 million shares, although it subsequently became apparent that approximately 51 million shares were subscribed for by Lancaster 101, whilst the GEPF appears to have subscribed for over 8 million of the remaining shares making up the balance of the 60 million shares.

[53] However, matters changed and instead of Lancaster 101 being paid the underwriting commission, from which the PIC would have benefitted indirectly given that it held 50% of Lancaster 101's shares, Steinhoff was informed that the Lancaster Group would invoice Steinhoff for the underwriting commission instead.

[54] The instruction to provide Steinhoff with the bank details of Lancaster Group, as opposed to Lancaster 101, was made by Naidoo *personally*, in an email sent by Naidoo from his Lancaster Group signature, dated 3 October 2016. The invoice was emailed to Steinhoff on 21 October 2016. The latter email followed a reference, in an email from Naidoo dated 18 October 2016, to a discussion between Naidoo and Dr. Dan Matjila ("Matjila"), the chair of the PIC at the time, which states as follows:

> "After further discussions with Dr. Dan, I confirm that the underwriting fee due to Lancaster 101 in respect of the 60m SNH shares is to be paid to the Lancaster Group.
>
> Lancaster Group is in the process of acquiring a Vat registration number which will be available before the end of this week…"

[55] Shortly thereafter, the Lancaster Group invoiced Steinhoff for an 'underwriting commission' in the amount of R129 925 800.00. This amount made up a component for Vat in the amount of R 15 955 800.00 despite the fact that the alleged

announcement made no reference to whether or not the 'underwriting commission' to be paid to the Lancaster Group would be Vat inclusive or Vat exclusive.

[56] What is telling however, is an email sent by Naidoo advising that the Lancaster Group would be registered for Vat before the end of that week of 18 October 2016. It was unknown by the hearing of this matter upon enquiry by the court whether the company had in fact been so registered. This is however not a matter that should detain me.

[57] Steinhoff contends that the payment of the underwriting commission was the subject of criticism in the PIC Report, prepared following the conclusion of a Judicial Commission of Inquiry into events at the PIC.

[58] According to the PIC Report, Matjila denied any knowledge of the underwriting commission, or its basis; and Naidoo took the approach that the underwriting commission was paid by Steinhoff, and not by the PIC, for services rendered in concluding the transaction. It also appears that Naidoo saw no conflict with the position of the PIC, which funded the transaction, and would traditionally have been entitled to the underwriting commission.

[59] According to the founding affidavit, it states that when Naidoo was questioned as to why the Lancaster Group, and not Lancaster 101, had received the payment of the underwriting commission, Naidoo's response was that the commission was paid at the discretion of Steinhoff for the efforts the Lancaster Group had made in contributing to what they saw as capital raising efforts. Steinhoff argues that Naidoo

failed to recognize that Lancaster 101 was a recipient of the capital raise and that the reason for the change in the recipient was not clarified.

[60] It argues that section 75 (7) of the Companies Act will apply to the resolution, which authorizes Naidoo to institute a claim against Steinhoff on behalf of Lancaster 101 (**"**the Relevant Decision**"**), if Naidoo, or a person related to Naidoo, has a personal interest in the Relevant Decision.

[61] Section 1 of the Act defines:

> A "personal financial interest" of a person as "a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed"; and "material" as "significant in the circumstances of a particular matter, to a degree that is –
>
> (a) Of consequence in determining the matter; or
> (b) Might reasonably affect a person's judgment or decision – making in the matter";

[62] Subsection 7 thereof provides that:

> (7) A decision by the board, or a transaction or agreement approved by the board, or by a company as contemplated in subsection (3), is valid despite any personal financial interest of a director or person related to the director, only if-
>
> (a) it was approved following disclosure of that interest in the manner contemplated in this section; or
>
> (b) despite having been approved without disclosure of that interest, it-
>
> (i) has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest; or
>
> (ii) has been declared to be valid by a court in terms of subsection (8).
>
> [Sub-s. (7) substituted by s.48 (*b)* of Act No.3 of 2011.]
>
> (8) A court, on application by any interested person, may declare valid a transaction or agreement that had been approved by the board, or shareholders, as the case may be, despite the failure of the director to satisfy the disclosure requirements of this section.
>
> [Sub-s (8) substituted by s. 48 *(b)* of act No. 3 of 2011.]

[63] The Applicant argues that Naidoo was personally interested in the subscription because the entity of which he was the sole shareholder, Lancaster Group, took an underwriting commission from the transaction. They argue that it is clear that Lancaster Group had a personal financial interest as defined, in the conclusion of the subscription agreement by Lancaster 101 which would have triggered the operation of section 75 of the Companies Act. This, in turn, would have given rise to a conflict between Naidoo's personal interest and his duties as a director of Lancaster 101 in relation to the conclusion of the subscription agreement.

[64] Thus by virtue of Naidoo's shareholding in Lancaster Group, Lancaster Group is '*a person related to a director'* of Lancaster 101, as contemplated in the Companies Act.

[65] Furthermore, so the argument goes, Naidoo had a direct interest of a financial, monetary or economic nature in the Relevant Decision that was significant to a degree that it was of consequence in determining whether to institute a claim against Steinhoff; or might reasonably have affected Naidoo's judgment in relation to the Relevant Decision. The latter point is illustrated by the fact that the pleadings in the proceedings make no reference to the underwriting commission and assert, inaccurately, that 60 million shares were subscribed for. Absent Naidoo's financial interest, there would be no reason to plead in that way, they argue and in any event, no evidence was presented in these proceedings that Naidoo's personal interest was disclosed to the Lancaster 101's Board of Directors when authority, as embodied in the Resolution to bring the action and application proceedings, was granted.

The Respondents' submissions

[66] Lancaster 101 opposes the Rule 7 application and have simultaneously filed a Notice of Conditional Counter-Application. The counter application will only be triggered if it is held that Steinhoff is entitled to the relief in paragraphs 1.1 to 1.5 of its notice of motion, in which case Lancaster 101 will then seek relief that the unanimous resolution of Lancaster's board of directors dated 7 March 2019, is declared to be valid in terms of section 75(7)(b)(ii) read with section 75(8) of the Companies Act, 71 of 2008.

[67] But first I deal with the Respondent's defence - the main contention being that Steinhoff has launched these applications to further delay the finalization of the pending proceedings and that these applications, which form part of various interlocutory steps which Steinhoff has taken, is purely an abuse of process.

Discussion

[68] Rule 7 provides as follows:

> **"7 Power of Attorney**
>
> (1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.
>
> (2) The registrar shall not set down any appeal at the instance of an attorney unless such attorney has filed with the registrar a power of attorney authorising him to appeal and such power of attorney shall be filed together with the application for a date of hearing.

(3) An attorney instructing an advocate to appear in an appeal on behalf of any party other than a party who has caused the appeal to be set down shall, before the hearing thereof, file with the registrar a power of attorney authorising him so to act.

(4) Every power of attorney filed by an attorney shall be signed by or on behalf of the party giving it, and shall otherwise be duly executed according to law; provided that where a power of attorney is signed on behalf of the party giving it, proof of authority to sign on behalf of such party shall be produced to the registrar who shall note that fact on the said power.

(5) *(a)* No power of attorney shall be required to be filed by the State Attorney, any deputy state attorney or any professional assistant to the State Attorney or a deputy state attorney or any attorney instructed, in writing, or by telegram by or on behalf of the State Attorney or a deputy state attorney in any matter in which the State Attorney or a deputy state attorney is acting in his capacity as such by virtue of any provision of the State Attorney Act, 1957 (Act 56 of 1957)." (references omitted)

[69] It is common cause that Rule 7(1) applies to both actions and applications. Erasmus states that the sub-rule does not prescribe the method of establishing authority where such authority is challenged.[22] This point becomes relevant later on. In any event, when such authority is challenged, the requirement of the sub-rule is that the person concerned shall satisfy the court '*that he is so authorised to act*.'[23] This the person concerned may do by adducing any acceptable form of proof and not necessarily by filing a written power of attorney. In the event of any of the parties being a company, such as in this case, a resolution of such company that the proceedings have been properly authorised, may constitute such proof. [24]

[70] I have no difficulty in accepting Steinhoff's proposition that Naidoo has a personal financial interest as defined, in the matter, given his directorship in Lancaster 101 and the subsequent "windfall" that he received as sole shareholder and director of the Lancaster Group, pursuant to the subscription agreement.

[22] Gainsford NNO v Hiab AB 2000 (3) SA 635 (W) at 639J – 640A
[23] FirstRand Bank Ltd v Fillis 2010 (6) SA 565 (ECP) at 569A
[24] Poolquip Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W)

[71] Now turning to the Resolution and an evaluation as to whether Lancaster 101 has placed sufficient evidence before this court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. *See Mall (Cape)(Pty) Ltd v Merino Ko-Operasie Bpk supra*.

[72] If one has regard to the wording of the Resolution, paragraph 2.2 does not *specifically* state that Naidoo disclosed his personal financial interest as required. The relevant portion reads as follows:

> 2.2 Insofar as such signature and/or acts occurred before the adoption of this Resolution No. 2, such signature and/or acts are hereby ratified and approved;
>
> > *provided that if* Jayendra Naidoo has disclosed a personal financial interest of a matter or disclosed that he knows that a related person has a personal financial interest in the matter, he is nonetheless authorised to execute any of the aforesaid documents on behalf of the Company as contemplated in section 75(5)(g) of the Companies Act." ("my emphasis")

[73] This is evident from the word 'provided' contained therein. Section 75(7) specifically provides that a decision of a board is valid despite any personal interest of a director, only if (a) it was approved following disclosure of that interest in the manner contemplated in the section, or (b) despite having been approved without disclosure of that interest, it (*i*) has subsequently been ratified by an ordinary resolution of the shareholders of that interest. If one has regard to subsection (a), the wording of paragraph 2.2 in the resolution does not *specifically* indicate, that there was personal disclosure. The remaining content of that paragraph similarly does not indicate that a disclosure was made. It states the following – "*or disclosed that he knows that a related person has a personal financial interest in the matter*". Whilst clearly the paragraph was crafted so as to cover alternate scenarios, this in my view is insufficient. There is no indication that the personal interest, was in fact disclosed,

so as to fall within the provisions of subsections (a), or (b)(i), which provides that a subsequent ratification by an ordinary resolution of the shareholders *following* disclosure of that interest. As was held in *Pretoria City Counsal v Meerlust supra*, the petitioner ought to have placed before this court an appropriately worded Resolution. This he has failed to do. The resolution, in my view, is therefore invalid and the automatic consequence thereof is that there is no proof before this court that Naidoo has satisfied it that he is so authorised to act. This also means that if he does not have any authority to act, then any instruction that he has given to any legal representative to act on Lancaster 101's behalf, in these proceedings, is similarly invalid.

[74] This then leads me to the remaining provision under section 75(7)(b)(ii), which provides that such a decision, may be valid only if it has been declared to be valid by a court in terms of subsection (8) and Lancaster 101's counter application in terms of section 75 (8) of the Companies Act.

Counter - Application

[75] Section 75 (8) of the Companies Act reads as follows:

> *"A court, on application by any interested party, may declare valid a transaction that had been approved by the board, or shareholders, as the case may be, despite the failure of the director to satisfy the disclosure requirements of this section."*

[76] Lancaster 101 argues that although it is clear from the context of section 75 that section 75(8) refers to a "transaction or agreement", it necessarily includes the power to declare as valid any resolution that a company may take. I agree.

[77] Perhaps it is appropriate to start at the initial response to the Rule 7(1) by Lancaster 101[25]. On 8 March 2021, the attorneys for Lancaster 101 sent a letter to Steinhoff's attorneys. In that letter, they aver that the Rule 7 notices are an abuse of process and defective. They *inter alia* raise the issue of the time periods in which it was filed. They furthermore contend the following[26]:

> "In any event, none of the directors who signed the resolution had a personal financial interest contemplated in section 75(7) of the Companies Act. Furthermore…section 75 of the Companies Act codifies the common law principle that directors are obliged to avoid conflicts of interest on matters where they have a '*direct material interest of a financial, monetary or economic nature, or to which a monetary value may be attributed*.' There is no conceivable conflict of interest in this case. Moreover, and in any event, section 75(2)(a)(i)(aa) of the Companies Act is of application in that the resolution generally affects all of the directors given that they were bound by fiduciary duty to resolve that L101 institute proceedings against Steinhoff for the recovery of L101's losses due to Steinhoff's admitted fraud."

[78] According to the answering affidavit, Naidoo contends that Steinhoff is seeking the relief described on the basis that a unanimous resolution of Lancaster 101's directors on 7 March 2019 authorising the institution of the pending proceedings is purportedly invalid. He states that Lancaster 101 is a private company. Its shareholders are the PIC which holds 50% of Lancaster 101's shares on behalf of the GEPF, the Lancaster Foundation[27] which holds 25% of Lancaster 101's shares and Lancaster Group (Pty) Ltd, which holds the remaining 25% of Lancaster 101's shares. Lancaster 101 has four directors, two of whom represent the

[25] This was also a response to a Rule 30A Notice that was filed
[26] paragraph 3.6
[27] a non-profit company

PIC, one who represents the Lancaster Foundation and one whom represents the Lancaster Group.

[79] Naidoo further states that at the time the resolution was adopted by Lancaster 101's Board, the directors were the following: Naidoo represented the Lancaster Group, his daughter, Ms Parusha Naidoo represented the Lancaster Foundation and Mr Horatius Maluleke and Mr Roshan Morar represented the PIC, with Ms Botsang Morobe acting as an alternate director. He states that at all material times, the directors and shareholders in Lancaster 101 were aware that he held shares in and was a director of the Lancaster Group. As support for this contention, he attached a computer generated document dated 9 February 2018 in which he purports that these interests were disclosed by virtue of the fact that it was signed. He avers that on 7 March 2019, Lancaster 101 held a board meeting at its offices in Johannesburg and the minutes of that meeting recorded that all of the directors were in attendance and that no conflict of interests were declared.[28] According to Naidoo, item 5.2 on the agenda was the institution of legal claims against Steinhoff to recover losses. Given Maluleke's new position at the PIC, he recused himself from the meeting. Naidoo states that the minutes reflect that the claims against Steinhoff were discussed and that Lancaster 101's legal representative addressed the meeting. The minutes were redacted but in any event, that which was not redacted related to the claims process against Steinhoff and at the end of the discussion, the minutes indicate[29] that the Board of Directors resolved to proceed with the Steinhoff claim. It also, in a redacted paragraph[30], indicated that "*the Board proceeded with signing the resolution and agreed to proceed with filing the claim*." The resolution authorising the

[28] other than Mr Maluleke having been appointed as the Acting Head of the PIC Listed Equities
[29] at paragraph 5.2.2.7
[30] 5.2.2.10

institution of these claims and the appointment of ENS was therefore signed by Ms Morobe, Mr Morar, Ms Naidoo and Naidoo himself.

[80] Naidoo contends that the fact that his vehicle, Lancaster Group received a commission is nothing irregular. The underwriting commission was publicly disclosed prior to the Board meeting in a Steinhoff SENS[31] announcement dated 28 September 2016 which announcement referred to the fact that the commission would be paid to Lancaster 101. However, it is common cause that it went to the Lancaster Group and there is no indication that a revised SENS announcement reflecting this change was ever made. Naidoo states that the payment of the commission fee does not mean that he had a '*personal financial interest'* as contemplated in section 75(5) of the Companies Act in the decision of Lancaster 101's Board to institute claims against Steinhoff for the losses suffered by it.

[81] In answer, Steinhoff contends that Naidoo's apparent effort to demonstrate a separation between his personal interests and that of Lancaster 101 is but a ruse. He does so by indicating that Lancaster 101 has four directors, including himself and his daughter. They also contend that it is doubtful that the remaining PIC directors were aware of Naidoo's conduct. They say that this is evident from the particular relation that Naidoo had with Matjila, then head of the PIC and the fact that Naidoo could easily have sought confirmatory affidavits from the PIC directors who attended the relevant board meeting. I am in agreement with this contention – it is perhaps quite telling that both of these directors failed to file a confirmatory affidavit to confirm the contents of the answering affidavit. This deduction, in my view, is supported by correspondence annexed to Steinhoff's answering affidavit and which is a letter

[31] Stock Exchange News Announcement

which was sent by the legal representatives of the PIC to the legal representatives of Lancaster 101 in other proceedings in the Netherlands. I need not concern myself with this either - but what is relevant for these purposes is that most certainly, Lancaster and the PIC do not seem to be singing from the colloquial hymn sheet, which would lend credence to the suspicion that the PIC may not have been aware of Naidoo's conduct, hence the absence of a confirmatory affidavit. The letter, insofar as the content may be relevant *in casu inter alia* states the following:

> "On behalf of my clients the Public Investment Corporation, the Government Employees Pension Fund, the Compensation Fund and the Unemployment Insurance Fund (hereafter jointly referred to as "PIC") I send you this letter.
>
> On 27 April and 2 May 2021, you sent a letter and an information request, purportedly on behalf of Lancaster 101 (Pty) Ltd ("Lancaster") to counsel for Steinhoff International Holdings N.V. ("Steinhoff') and to the administrators of the suspension of payments of Steinhoff. On 3 May 2021, you sent a letter on behalf of Lancaster to the Court of Amsterdam.
>
> The PIC has recently familiarized itself with the contents of these letters and instructed me to request further information, advise you that Lancaster's correspondence to the court is unauthorized, an urge you to stop using the names of the PIC and its clients in your correspondence….
>
> I have been advised that the positions taken in the letters you sent, purportedly on behalf of Lancaster, have not been discussed with the PIC or any of its representatives. As far as the PIC is the aware, no board meeting took place in the board resolved…" ("own emphasis")

[82] In another letter dated 14 May 2021, Baker McKenzie, the Dutch counsel for Lancaster 101 responded to a letter, in which the authority of Naidoo was questioned as follows:

> "It transpires from your letter that you are not aware of the internal board organisation in Lancaster and the powers under which we are being instructed. Mr. Jayendra Naidoo was in fact given authority by the board of Lancaster in 2020 to represent Lancaster in court and other processes in any jurisdiction, which includes the suspension of payments process. Mr. Naidoo is also mandated to instruct legal and other representatives in relation to such processes."

[83] From this letter, it is evident that reliance is placed on another similar resolution made on 20 October 2020 which mandated Naidoo "*to instruct legal and other representatives*".

[84] On 18 May 2021, Bureau Brandeis responded to Baker Mckenzie's letter. Relevant for these proceedings is the fact that another resolution was seemingly passed in 2020, incorporating similar terms as the 7 March 2019 resolution viz; "*authorises Mr Naidoo to institute any claims on behalf of Lancaster 101*" and Resolution 2, authorises him only "*to do all such things…as are necessary to give effect to resolution 1 and … to appoint attorneys for such purpose'.* Whilst that 2020 resolution was not annexed to these papers, one finds it curious that Lancaster 101 sought the need to issue another resolution, purportedly on the same terms, as the 2019 resolution.

[85] Be that as it may, Steinhoff contends that this pattern of conduct reinforces the contention that Naidoo alleges authority in multiple instances where multiple parties deny such authority. It is trite that the reliance by Steinhoff on such conduct amounts to a reliance on similar fact evidence. Authors *Schwikkard and Van der Merwe* describe similar fact evidence as facts that are directed at showing that a party to proceedings has behaved in the same manner as he is alleged to have behaved in the circumstances presently being considered by the court.[32] And our courts have generally erred on the side on disallowing such evidence primarily because of its potential prejudice effect in relation to its probative value. In *S v D 1991 (2) SACR 543 (A)*, FH Grosskopf JA (with Corbett CJ and Kriegler AJA concurring) referred with approval to *DPP v Boardman* and in particular as follows"

> "The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by several witnesses bear

[32] Principles of Evidence 2ed at 66

> to each other such a striking similarltiy that they must be true, or have arisen from a cause common to the witnesses or from pure co-incidence."[33]

[86] In *Savoi and Others v National Director of Public Prosecutions and Another 2014 (1) SACR 541 (CC),* Madlanga referred to *S v D* which stated the following at para 55:

> "The insistence on striking similarity may lead to sophistry and technicality and raise more questions that provide answers. The real question should be whether, when looked at in its totality, evidence of similar fact '*has sufficient probative value to outweigh its prejudicial effects*' and that is a matter of degree in each case."

[87] Given the above I am not inclined to place any weight on the fact that Naidoo's authority has been disputed in other jurisdictions, given the potential prejudicial effect that it may have. Now turning to the fiduciary duty of a director and shareholder.

[88] In *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another 2018 (3) SA 157 (GJ)*[34], the court had to, *inter alia* consider setting aside a board resolution in that case, increasing the number of authorised shares. Van der Linde J set out the general principles of company law. First, courts generally decline to interfere in the running and management of companies unless there is lack of fair dealing or probity. Second, shareholders do not owe their company a fiduciary duty, and may thus vote their selfish interest, unless in doing so a majority acts in a way that is oppressive or unfairly prejudicial of the minority. Third, board power must be exercised *bona fide* and in the best interest of the company as a whole, and if not, it will be set aside, even if technically speaking the power exists.[35]

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[33] at para 444D-E
[34] (22312/2015 [2017] ZAGPJHC 324; [2018] 1 All SA 450 (GJ)
[35] CHD Invest NV v Petrotank South Africa (Pty) Ltd and Another (22312/2015) [2017] ZAGPJHC 324; [2018] 1 All SA 450 (GJ); 2018 (3) SA 157 (GJ) (17 November 2017) At para 44

[89] The court stated as follows:

> "[47] The duty to act *bona fide* and in the best interests of the company, "…*is the fundamental duty which qualifies the exercise of any powers which the directors in fact have …."* The concept of *bona fides* does not, as will appear, have a wholly subjective content: "*But in deciding whether the duty has been observed the Court may properly consider whether in the circumstances a reasonable man could have believed that the particular act was in the interests of the company*." ("My emphasis")
>
> "[53] In Teck Corporation Ltd v Millar et al the British Columbian Supreme Court examined the question as to what the nature of the board's objective in issuing fresh shares would have to be to invite court interference. Berger J was urged to follow Hogg v Cramphorn Ltd which held that even where the board had acted in good faith, believing they were serving the best interests of the company, an issue of shares would be set aside if they issued the shares in order to defeat an attempt to secure control of the company.
>
> [54] The learned judge declined to follow that principle, but posed the following question (emphasis supplied):
>
> "*How can the Court go about determining whether the directors have abused their powers in a given case? How are the Courts to know, in an appropriate case, that the directors were genuinely concerned about the company and not merely pursuing their own selfish interests?"* [36]

[90] The court referred to an Australian court of appeal judgment which dealt with the directors' conduct in issuing shares. Van der Linde J opined that the question whether the director has exercised a power for an improper purpose is an objective assessment, not determined by the subjective belief of the individual director.

[91] With regard to the exercise of power, the court stated the following:

> "[60] In relation to the duty to exercise powers for proper purposes, the learned judge founded its origin in the concept of the prohibition of a fraud on power. He said:
>
> > "*These authorities show that in the context of the fiduciary relationship between directors and their company, the way the law gives meaning and content to a duty and a power of directors, once they are identified as fiduciary ones, is by requiring them to be exercised bona fide for the benefit of the company and for proper purposes."*
>
> [61] Fundamentally important for present purposes, where the s.76 duties are not a codification of the common law fiduciary duties, but rather an affirmation of them, the learned

[36] Footnotes omitted

judge examined whether the duty to act bona fide in the best interests of the company are proscriptive; put differently, perhaps colloquially, whether they are only of the "*Thou shalt not"* kind. He held that they were not so limited:

> "*In my opinion, until the High Court declares the law to be otherwise, long established authority requires the duties of company directors to act bona fide in the interests of the company and to exercise their powers for proper purposes to be accepted as fiduciary ones even though they may require the directors to take positive action. Further, that the directors' own interests may be involved or that they may be in a situation of conflict will not necessarily mean that they have breached their fiduciary obligations in taking such action, if their actions have benefited the company." (footnotes omitted)*

[92] In *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others [2020] ZACC 13*, the court, speaking of the need to infuse the law of contract with constitutional values stated that in *Tuckers Land* Jansen JA developed the law of contract, finding that there is an implied duty not to commit anticipatory breach. This development was based on the requirement that contracts are to be performed in good faith. Similarly, in *BK Tooling*, the Appellate Division developed the law of contract to permit a relaxation of the principle of reciprocity where a party to a reciprocal contract had used the other party's partial performance. It did so on the grounds of fairness. These cases illustrate the development of clear doctrines that brought our law of contract in line with the values of fairness, reasonableness and justice.[37]

[93] Indeed, it is clear that these values play a profound role in our law of contract under our new constitutional dispensation. However, a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unreasonable or unduly harsh. These abstract values have not been

[37] Beadica at para 77; See also Tuckers Land and Development Corporation (Pty) Ltd v Hovis 1980 (1) SA 645 (A) (Tuckers Land) at 652D-F; Bk Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A) (BK Tooling) at 421A-B.

accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law; including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.[38]

[94] At para [81], the court continued as follows:

> "[81] The rule of law requires that the law be clear and ascertainable. As stated by this Court in *Affordable Medicines*: "The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly." The application of the common law rules of contract should result in reasonably predictable outcomes, enabling individuals to enter into contractual relationships with the belief that they will be able to approach a court to enforce their bargain. It is therefore vital that, in developing the common law, courts develop clear and ascertainable rules and doctrines that ensure that our law of contract is substantively fair, whilst at the same time providing predictable outcomes for contracting parties. This is what the rule of law, a foundational constitutional value, requires. The enforcement of contractual terms does not depend on an individual judge's sense of what fairness, reasonableness and justice require. To hold otherwise would be to make the enforcement of contractual terms dependent on the "idiosyncratic inferences of a few judicial minds". This would introduce an unacceptable degree of uncertainty into our law of contract. The resultant uncertainty would be inimical to the rule of law. (footnotes omitted) ("own emphasis")

[95] At para 82, the court referred to *Pridwin*[39], where the Supreme Court of Appeal set out what its views as the "most important principles" governing the judicial control of contracts through the instrument of public policy. It said:

> "(i) Public policy demands that contracts freely and consciously entered into must be honoured;
>
> (ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;

[38] Beadica at para 80
[39] *AB v Pridwin Preparatory School 2018 ZASCA150; 2019(1) SA 32* (SCA) (*Pridwin*) at para 27.

(iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;

(iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;

(v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;

(vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose." ("own emphasis")

[96] Directors act beyond their authority when they act in breach of their duty to perform with good faith and in the interests of the company.[40] Naidoo is a director of Lancaster 101. He had a direct interest of a financial monetary or economic nature in the Relevant Decision that was significant in the determination whether to institute a claim against Steinhoff. In my view, the decision that he exercised was not exercised in good faith and in the best interest of the company. On an objective test, the consequence of the impugned decision would mean that Lancaster 101 would by necessity have to repay the monies advanced as a result of the intended action to set aside the subscription agreement. This will of course also have financial implications for the PIC, who is a 50% shareholder in Lancaster 101. It is common cause that the GEPF is a subsidiary of the PIC, who manages and administers the pensions and benefits of more than a million government employees in South Africa.[41] In my view the subscription transaction would include the subscription commission paid in respect of the capital raised. The payment of the commission

[40] CDH Invest NV v Petrotank South Africa (Pty) Ltd & Others (483/2018) [2019] ZASCA 53 (1 April 2019) at para 24; See also MS Blackman 'Directors' Duties to Exercise their Powers for an Authorised Purpose (1990) 2 S A Merc LJ 1 at 6-8

[41] www.gepf.gov.za

would not have materialised without payment of the share subscription and it therefore follows that if these proceedings, to set aside the share prescription are set aside, then by implication it follows that monies paid to the Lancaster Group would also of necessity be set aside. Of course the plain implication of this would mean that Lancaster Group and Naidoo would need to repay the commission received and therefore it is no wonder that this leg of the transaction was omitted in the pleadings. In my view this is a clear indication that no *bona fides* exist and this court would be slow to condone such actions by a director and shareholder in circumstances such as this. The decision, taken by Naidoo and the Board of Lancaster 101 in my view is contrary to public policy and will result in economic harm to the public as envisaged in *Beadica*.

[97] In my view, Naidoo by his conduct, breached and violated his fiduciary duty. The motivation by Naidoo was purely self-serving and devious. As mentioned above, an indication of this is the obvious failure to include or make mention of the subscription commission that he received as sole shareholder of the Lancaster Group.

[98] With regard to the ratification of the decision, Naidoo has, according a letter from Bowmans, representing the PIC/GEPF dated 28 May 2021, a casting vote in the directors' meeting and whatever objections there may be does not matter, given that his daughter is the fourth director of Lancaster 101 and a co-director in the Lancaster Group. Directors act beyond their authority when they act in breach of their duty to perform with good faith and in the interests of the company.[42]

[42] CDH Invest NV v Petrotank South Africa (Pty) Ltd & Others (483/2018) [2019] ZASCA 53 (1 April 2019) at para 24; See also MS Blackman 'Directors' Duties to Exercise their Powers for an Authorised Purpose (1990) 2 S A Merc LJ 1 at 6-8

[99] In my view, I can find no reason to declare the resolution of 7 March 2019 to be valid in terms of section 75(7)(b)(ii) read with section 75(8) of the Companies Act.

Conclusion

[100] Since Naidoo and by extension, Lancaster 101's authority is derived solely from the impugned resolution, Naidoo was not empowered to authorize ENS to institute legal proceedings.

[101] In so far as relief is sought directing that ENS may no longer act on behalf of Lancaster 101, this seems to be too broad a request. No case has been made for a blanket prohibition for ENS to not represent Lancaster 101. Most certainly, the relief would only be applicable to these proceedings.

[102] Accordingly, the following order is made:

1. The Defendant, Steinhoff, is granted condonation for the late delivery of its notice in terms of Rule 7, dated 1 February 2021.
2. The Plaintiff's response to the Rule 7 notice dated 4 February 2021 is declared its formal response to the Rule 7 Notice.
3. The Plaintiff's response to the notice in terms of Rule 7 is declared inadequate to satisfy this Court that Plaintiff's attorneys of record have the requisite authority to represent Lancaster 101 in these proceedings.
4. The Plaintiff's counter-claim is dismissed.
5. The proceedings in case numbers 16389/19 and 6578/19 are stayed until such time as Lancaster 101's attorneys have satisfied this Court that they are so authorised to act.
6. The Plaintiff (Lancaster 101) is directed to pay the costs of this application, such costs to include the costs of two counsel where employed.

DS KUSEVITSKY

Judge of the High Court, Western Cape Division

Counsel for Applicant/Plaintiff: Advocate SP Rosenberg SC
Advocate C Kelly

Counsel for Respondent/Defendant: Advocate A Subel SC
Advocate AM Smallberger