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

Case Number: 16919/2020

In the matter between:

STEINHOFF INTERNATIONAL HOLDINGS PROPRIETARY LIMITED	First Plaintiff
STEINHOFF INTERNATIONAL HOLDINGS N.V.	Second Plaintiff
STEINHOFF AFRICA HOLDINGS PROPRIETARY LIMITED	Third Plaintiff
STEENBOK NEWCO 10 SARL	Fourth Plaintiff
IBEX RETAIL INVESTMENTS LIMITED	Fifth Plaintiff

and

MARKUS JOHANNES JOOSTE	First Defendant
ANDRIES BENJAMIN LA GRANGE	Second Defendant

JUDGMENT

(Delivered electronically on 27 October 2021)

FRANCIS, J

INTRODUCTION

[1] In this matter, the first defendant ("Jooste") and the second defendant ("La Grange") have raised exceptions in the context of action proceedings instituted against them for the repayment of remuneration paid to them over the period 2009 to 2017/2018 in their capacities as senior executives of the first plaintiff ("SIHPL") and the second plaintiff ("SIHNV") (collectively referred as the "Steinhoff companies").

[2] The remuneration was not paid to the defendants by the Steinhoff companies but was instead paid by:

[2.1] in the case of Jooste, the third plaintiff, Steinhoff Holdings Poister GmbH ("Poister"), Steinhoff Europe Group Services GmbH ("SEGS"), BST Enterprises GmbH ("BST") and Steinhoff Europe AGH ("SEAG"); and

[2.2] in the case of La Grange, the third plaintiff, SEGS and SEAG.

[3] The third plaintiff remains a holder of its claims while the claims of Poister, BST, and SEGS have been transferred to the fourth plaintiff and SEAG's claims have been transferred to the fifth plaintiff (the third, fourth, and fifth plaintiffs shall collectively be referred to as the "Paying Entities").

[4] The plaintiffs assert that the Paying Entities enjoy claims for the recovery of the amounts paid by them to the defendants based on unjustified enrichment, alternatively delict.

[5] Jooste raised 9 exceptions. Exceptions 1 to 6 and 9 are essentially "technical" in nature and the cause of complaint is that certain aspects of the particulars of claim are vague, contradictory, or omit relevant and material statements of fact that are necessary in relation to the plaintiffs' causes of action. Exceptions 7 and 8 are more "substantive" in nature in the sense that in these exceptions, Jooste asserts that the pleaded facts do not sustain the unjustified enrichment or delictual claims.

[6] La Grange has sought to impugn the particulars of claim on the basis that it lacks sufficient averments to disclose causes of action in relation to the unjustified enrichment and delictual claims and, to this extent, the particulars are vague and embarrassing.

THE PLAINTIFFS' PLEADED CASE AGAINST THE DEFENDANTS

[7] Summons was issued on 16 November 2020, accompanied by detailed particulars of claim setting out the background to the case. I provide a brief summary thereof. A more detailed refence to the relevant paragraphs of the particulars will be provided when I address each exception.

[8] The claims advanced against the defendants are as follows:

[8.1] The third plaintiff claims payment of R600 256 651 against Jooste and R237 049 842 against La Grange;

[8.2] The fourth plaintiff claims payment of €10 668 475 against Jooste and €1,653,026 against La Grange; and

[8.3] The fifth plaintiff claims payment of €5 729 341 against Jooste and €816 667 against La Grange.

[9] During the period 2009 to 2017, in the case of Jooste, and 2015 to early 2018, in the case of La Grange, and in their capacity as senior executives of SIHPL (in the period from 2009 to 2015), and immediately thereafter, of SIHNV (in the period from 2015 to 2017 in the case of Jooste, and 2015 to early 2018 in the case of La Grange), Jooste and La Grange were paid remuneration for the services rendered by them as senior executives of SIHPL and SIHNV respectively, which remuneration comprised *inter alia*;

[9.1] base salary (including any back pay that might be due);

[9.2] performance bonuses;

[9.3] strategic / project bonuses;

[9.4] relocation bonuses; and

[9.5] participation in the share incentive scheme in operation from time to time ("long term incentives");

(collectively referred to as "the defendants' remuneration").

[10] The defendants' remuneration, based on the application of various criteria, was determined as follows:

[10.1] in the case of SIHPL, and for the period from 2009 to 2015:

[10.1.1] in regard to base salary, performance bonuses and strategic / project bonuses, on the recommendation of its Human Resources and Remuneration Committee ("the SIH Remcom"), which was established as a committee of the board of directors of SIHPL;

[10.1.2] in regard to the long-term incentives, on the recommendation of SIH Remcom, as approved at each annual general meeting of SIHPL;

[10.2] in the case of SIHNV, for the period from 2015 to early 2018:

[10.2.1] in regard to base salary, performance bonuses and strategic / project bonuses, on the recommendation of its Human Resources and Remuneration Committee ("the NV Remcom"); and

[10.2.2] in regard to the long-term incentives, on the recommendation of the NV Remcom, as approved at each annual general meeting of SIHNV.

[11] During the period from 2009 to 2018:

[11.1] the board of directors of SIHPL, and, subsequently, the supervisory board of SIHNV, approved the payment of base salary, performance bonuses and strategic bonuses to Jooste and La Grange;

[11.2] the award of the long-term incentives to Jooste and La Grange was approved at each of the annual general meetings of SIHPL and, subsequently, SIHNV; and

[11.3] Jooste and La Grange elected to receive and did receive their remuneration in South African Rand, Euro, or a combination of both.

[12] The approvals and awards were made in the *bona fide* reasonable, but mistaken belief that during the relevant period the financial statements and information available of the Steinhoff companies, and the documentation supporting those financial statements, accurately reflected the financial position of these companies and their profitability and/or performance had been accurately reflected in the relevant financial statements.

[13] In truth, the true financial position of the Steinhoff companies, and their profitability, was not accurately reflected and recorded in the relevant financial statements, in the respects summarised below.

[14] During the period 2009 to 2017:

[14.1] "*various transactions*" were structured and implemented which had the result of substantially, falsely and artificially inflating the profit and asset values of SIHPL, during the period 2009 to 2105, and of SIHNV during the period 2015 to 2017.

[14.2] ""*fictitious and/or irregular transactions*" were ostensibly entered into with parties said to be, and made to appear, independent of the Steinhoff companies but which were not in fact genuine or independent; and

[14.3] "*fictitious and/or irregular income*" was created which had the effect of either increasing income or reducing expenses.

[15] In the result, the fictitious transactions and accounting irregularities had a material impact on the financial performance of the Steinhoff companies in respect of *inter alia* the period from 2009 to 2017 and required restatement.

[16] Had SIHPL, and thereafter SIHNV, been aware of the true factual position:

[16.1] SIHPL, and SIHNV, would not have approved the payment of base salary, backpay, relocation bonuses, performance bonuses and strategic bonuses to Jooste and La Grange, nor would they have approved of and made recommendations to the third plaintiff, Poister, SEGS, SEAG and BST for payment by them to Jooste and La Grange.

[16.2] the award of the long-term incentives to Jooste and La Grange would not have been approved at each of the annual general meetings of SIHPL and, subsequently, SIHNV; and

[16.3] Jooste and La Grange would not have received any remuneration, either in South African Rand or euro, or a combination of both.

[17] In making payment to the defendants of their remuneration, each of the third plaintiff, Poister, SEGS, BST and SEAG placed reliance on the truth of the representations and are, accordingly, required to repay the various amounts paid to them.

[18] In summary, the allegations in support of the unjustified enrichment claim are that the Paying Entities made payments to the defendants in the *bona fide* but mistaken belief that such payments were due them, the defendants were unjustifiably enriched at the expense of each of the Paying Entities who were impoverished to the extent of such enrichment, and the Paying Entities are, therefore, entitled to recover such enrichment from the defendants.

[19] The plaintiffs alternative claim in delict, based on negligent misrepresentation causing economic loss, is derived from the same factual matrix described above with regard to the plaintiffs' unjustified enrichment claim.

[20] In summary, the allegations pleaded in support of this claim is that the defendants misrepresented to the Steinhoff companies that their financial statements accurately reflected their financial position and profitability and/or performance, that these representations were false and were made negligently by the defendants who owed the Steinhoff companies and the Paying Entities a duty to ensure that the relevant financial statements accurately reflected the financial position and the profitability and/or performance of the Steinhoff companies. The Paying Entities relied on the truth of the defendants' representations when paying

the latter their remuneration and, consequently, have suffered damages in the amounts claimed.

RELEVANT PRINCIPLES APPLICABLE TO THE EXCEPTIONS

[21] Before addressing the defendants' grounds of exception, it is perhaps appropriate to briefly set out the principles pertaining to exceptions of the kind raised by the defendants. I have discussed these principles extensively in a similar context in ***Du Toit NO and Others v Steinhoff International Holdings (Pty) Limited and Others***[1] and draw heavily on this judgment in what follows.

[22] Exceptions provide a useful procedural tool to weed out bad claims at an early stage but they must be dealt with sensibly. An over-technical approach destroys their utility and must be avoided[2].

[23] In ***South African National Parks v Ras***[3], van Heerden J quoted with approval an extract from Joubert (ed) Law of South Africa Vol 3 Part 1, para 186 on the approach of the courts with regard to exceptions:

> "*The court should not look at a pleading with a magnifying glass of too high a power. It is the duty of the court when an exception is taken to a pleading first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is embarrassment which is real as a result of the faults in the pleadings to which exception is taken. Unless the excipient can satisfy*

[1] [2020] 1 All SA 142 (WCC).
[2] ***Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)*** at para 465H.
[3] ***2002 (2) SA 537*** at 541J – 542A.

the court that there is such a point of law or such real embarrassment the exception should be dismissed."

[24] In ***Pretorius and Another v Transport Pension Fund and Others***[4], Froneman J succinctly summarised the process for assessing an exception in relation to a particulars of claim as follows:

> *"In deciding an exception a court must accept all allegations of the facts made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts."*

[25] In order to disclose a cause of action in the particulars of claim, it is necessary for a plaintiff to plead every material fact that would be necessary for the plaintiff to prove in order to obtain judgment. This exception to a pleading will entail an analysis of whether the facts are present to sustain the cause of action and, as such, is a matter of substantive law. The excipient must show that based on allegations in the plaintiffs' particulars of claim which are presumed to be true and correct, that the plaintiffs have not pleaded a cognisable or sustainable case.

[26] In so far as an exception on the basis that a pleading is vague and embarrassing is concerned, this type of exception strikes at the formulation of the claim, not the legal validity of the cause of action, and the following general principles apply:

[26.1] For an exception to be upheld, the excipient has a duty to persuade

[4] ***2018 ZACC 10*** at para [15].

the court that upon every interpretation of a pleading it can reasonably bear, particularly the document upon which it is based, the pleading does not disclose a cause of action or defence[5].

[26.2] An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration: firstly, whether the pleading lacks particularity to the extent that it is vague and, secondly, whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced[6].

[26.3] A statement is vague when it is either meaningless or capable of more than one meaning[7] or can be read in any one of a number of ways[8].

[26.4] Particulars of claim would be embarrassing if it is not possible for the pleader to determine what the actual meaning (if any) is conveyed by the pleading[9].

[26.5] As long as particulars of claim state the nature, extent, and grounds of the cause of action, the court will not as a rule strike out a paragraph as being vague and embarrassing as long as reasonably sufficient information has been provided for the defendant to plead thereto[10].

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[5] ***Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd and Others 2014 (2) SA 157 (GNP)*** at 161E.
[6] ***Trope v South African Reserve Bank and Two Others 1992 (3) SA 208 (T)*** at 211A-B.
[7] ***Lockhat & Other v Minister of the Interior 1960 (3) SA 765 (D)*** at 777C-D.
[8] See, ***General Commercial and Industrial Finance Corporation Limited v Pretoria Portland Cement CO Limited 1944 AD 444*** at 454)
[9] See, ***Trope v South African Reserve Bank, supra,*** at 211E.
[10] ***Lockhat & Other v Minister of the Interior, supra,*** at 777D-E.

[26.6] A defendant will be embarrassed (i.e. prejudiced) where the plaintiff asserts a conclusion but fails to plead the material facts relied upon to found that conclusion – since then the defendant does not know on what basis the plaintiff relies for the conclusion in question and the defendant will be embarrassed by the vagueness or insufficiency of the facts averred[11].

[27] In so far as the degree of particularity that is required, the following general principles apply:

[27.1] A plaintiff need only plead "*every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved*".[12]

[27.2] In ***Evins v Shield Insurance Company Ltd***[13], the court stated that "cause of action" is ordinarily used to "*describe the factual basis, the set of material facts that begets the plaintiff's legal right of action*" (own emphasis). The requirement that the cause of action be contained in the pleading can and should, therefore, be read into the words "material facts", which would, in turn, imply that only facts which serve to establish the cause of action would be regarded as material. The converse also applies, namely that allegations that do

[11] See, ***South African Motor Industry Employers' Association v South African Bank of Athens Ltd*** 1980 (3) SA 91 (A) at 97B to D.
[12] See, ***McKenzie v Farmers Co-operative Meat Industries Limited 1922 AD 16*** at 23.
[13] ***1980 (2) SA 814 (A)*** at 825F.

not serve to establish the cause of action would not qualify as being material.[14]

[27.3] The word "material", in my view, defines the character of the facts which must be pleaded in an action and, as such, must be ascertained by reference to the particular claim which is made in the action, the issues raised thereon, as well as by reference to the general propositions of law[15]. Material facts, in essence, establish a right and that is all that is required for the purpose of pleading. Those facts which prove the right, i.e. the evidence (the *facta probantia)*, are not necessary to be canvassed in the pleadings.

[27.4] The excipient bears the onus of proving that the alleged lack of sufficient particularity is such that it would be embarrassed in pleading thereto. When the particularity pertains to mere detail, the defendant can either plead to the averment made or the defendant's remedy is to utilise the Uniform Rules of Court to obtain the necessary information required by means of discovery in terms of the Rules or by means of a request for further particulars for trial if those particulars are strictly necessary to enable the defendant to prepare for trial[16]. As the court remarked in ***Venter and Others v Wolfsberg Arch Investments (Pty) Ltd***[17]:

"*The exception stage is not the time for the defendant to complain that he does not have enough information to prepare for trial or may be taken by*

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[14] ***Inzinger v Hofmeyer and Others (75/2010) [2010] ZAGBJSC 104 (4 November 2010).***
[15] See, ***Evins v Shield Insurance Company Limited,*** *supra*, at 825E-G.
[16] See, ***Jowell v Bramwell-Jones & Others,*** *supra*, at 844H-I.
[17] ***2008 (4) SA 639 (CPD)*** at 644G.

surprise at the trial. That comes later in the (often long and cumbersome) journey to the doors of the court, after, inter alia, discovery of documents and requests for trial particulars had been made."

[28] In my view, all that really is required of a plaintiff in so far as the particulars of claim is concerned, is that the defendant must have a clear enough exposition of the plaintiff's case to enable the defendant to take instructions from a client (and witnesses where necessary) to file an adequate response to the claim in the form of a plea[18].

DISCUSSION

[29] The grounds of exception raised by the defendants in relation to the unjustified enrichment and delictual claims are similar in nature, although Jooste's grounds of objection are more wide-ranging. For the purpose of this judgment, I find it convenient to deal with both defendants' exceptions together but will highlight those exceptions which have been advanced by Jooste only.

Jooste's first exception

[30] Jooste contends that certain paragraphs in the particulars of claim are contradictory. In paragraph 14 of the particulars, the plaintiffs plead that the remuneration to be paid was made on the "recommendation" of the Remcoms of the respective Steinhoff companies, which recommendations were then approved by the relevant board of directors or at the annual general meeting of the Steinhoff

[18] Cf. ***Venter v Wolfsberg Arch Investments***, *supra*, at 645B).

companies. On the other hand, paragraph 15 of the particulars contain the allegation that the respective Remcoms "approved" the defendants' remuneration, whilst paragraphs 16.2 and paragraph 40.1 also state that the approvals (in respect of the remuneration) was given by the board of directors and not the respective Remcoms.

[31] The essence of this ground of exception confirms the principle that pleadings ought to be read as a whole and not as individual paragraphs, in isolation. In my view, there is nothing contradictory with regard to the aforementioned paragraphs or sub-paragraphs of the particulars. It is apparent, if the particulars are read as a whole, that it is the Remcoms that recommended the remuneration to be paid and that those recommendations were acted upon by the relevant boards of directors or at the general meetings of the Steinhoff companies. The reference in paragraph 15 of the particulars to "determining" and "approving" must be read in context and simply refers to the decision-making process undertaken by the respective Remcoms when formulating their recommendations to the board of directors or the annual general meetings of the respective Steinhoff companies.

Jooste's second exception

[32] Paragraph 15 of the particulars sets out the various elements that were taken into account in determining the defendants' remuneration, such as the "financial performance" of the respective Steinhoff companies. Based on these criteria, it is stated in paragraph 16 of the particulars that the remuneration and long-term awards of the defendants were subsequently approved by the relevant board of

directors and at the annual general meetings of the respective Steinhoff companies.

[33] Paragraph 17 of the particulars of claim states that the remuneration and long-term awards were based on the belief that the financial statements and information available of the Steinhoff companies at the time, and the documentation supporting those financial statements, accurately reflected the financial position of the Steinhoff companies, and that the profitability and/or "performance" of the Steinhoff companies had been accurately reflected in the relevant financial statements. Paragraph 18 of the particulars states further that, in truth, the true financial position of the Steinhoff Companies and their profitability were not accurately reflected and recorded in the relevant financial statements.

[34] Jooste opines that the terms "financial performance" and "performance" are not defined or described and that the allegations made about the financial performance of the Steinhoff companies are not adequately pleaded, making the allegations in the aforementioned paragraphs vague to such an extent that he is embarrassed to plead thereto.

[35] Jooste also has difficulty with paragraph 18. It is submitted that there is no allegation in paragraph 18 that the "financial performance" or "performance" of the Steinhoff companies were not accurately reflected and recorded in the financial statements. Accordingly, the relevance of the allegations concerning financial performance or performance is not apparent. Jooste submits that the particulars of claim are, as a consequence, vague and he is embarrassed in pleading thereto.

[36] This ground of exception, too, confirms the principle that pleadings ought to be read as a whole and paragraphs should not be read in isolation. Paragraphs 15, 16, and 17 deal with distinct averments. In any event, in my view, these specific paragraphs contain a sufficient level of detail, and explanation, to enable Jooste to plead thereto. These paragraphs also provide a logical lead-up to paragraph 18. Contrary to what is stated by Jooste, the term "profitability" is used in paragraph 17 and, while it is indeed so that paragraph 18 does not contain the terms "financial performance" or "performance", it does contain the terms "financial position" which, in context, could cover the terms "the financial performance" or "performance".

[37] This type of objection is over technical and, in my view, without merit.

Jooste's third exception

[38] Jooste's complaint is that in paragraphs 19.2, 21 and 22, the plaintiffs plead that certain transactions were "ostensibly" entered into with the Talgarth Group, the Campion/Fulcrum Group, the TG Group and Tulett Holdings, or entities forming part of those groups or entities. Relying on the New Oxford Dictionary of English, Jooste avers that those transactions "ostensibly" entered into connote transactions which are apparent but not real and, in keeping with this notion, are described in paragraph 19 as "fictitious transactions". However, according to Jooste, it appears that the "fictitious transactions" might be real transactions which were either accounted for as settled through set-off arrangements or reclassified into different assets. In the result, the allegations in the particulars of claim are vague and contradictory and Jooste is prejudiced in pleading thereto.

[39] In my view, there is no substance to this objection to the pleadings. If one has regard to the paragraphs mentioned, the meaning of "ostensible" or "fictitious transactions" is clear in context. Indeed, these terms correspond with the definition of the word "ostensible" as cited by the first defendant with reference to the New Oxford Dictionary of English: the term "ostensible" is defined as *"stated or appearing to be true, but not necessarily so"*. This is in fact a theme that permeates the particulars of claim - the defendants *inter alia* disguised the true financial position of the Steinhoff companies.

Jooste's fourth and fifth exceptions

[40] These exceptions deal with the allegations in paragraphs 21 to 25 of the particulars of claim. These paragraphs expand on the allegation that the true financial position of the Steinhoff companies was not accurately reflected and recorded in the relevant financial statements. These paragraphs provide details of the manner in which the alleged deception was effected, which included *inter alia* the recordal of fictitious transactions as well as various accounting irregularities.

[41] Jooste's complaint is that the aforementioned paragraphs do not adequately set out the details of the transactions involved in respect of their type, volume, value, dates or periods when the transactions were entered into, and with whom these transactions were concluded. The consequence of failing to provide these sort of particulars, so it was argued, is that the impugned paragraphs do not contain a clear and concise statement of the material facts relied on by the plaintiffs. As such, the particulars are vague and Jooste is embarrassed in pleading thereto.

[42] Having regard to the level of detail provided in the particulars of claim relating to the allegations of the fictitious transactions and accounting irregularities, it seems to me that what Jooste appears to require is in the nature of *facta probantia.* However, in my view, sufficient detail has been provided to enable the defendant to plead. It seems to be that the type of particularity, or details, required by the first defendant is best dealt with as requests for further particulars for trial, if necessary. What is not required, at this stage of the pleadings process, is the minutia of each and every alleged fictitious transaction or accounting irregularity.

Jooste's sixth exception

[43] In paragraphs 26 to 31 of the particulars of claim, the plaintiffs plead allegations concerning the alleged consequences of the fictitious transactions and accounting irregularities on the financial position of the Steinhoff companies and the consequent restatements required.

[44] The categories of restatements include the following:

[44.1] Property transactions – properties which were transferred between entities are now considered internal to the Steinhoff companies and should not have impacted on the consolidated financial statements.

[44.2] Intangible asset transactions – the Steinhoff companies purportedly sold internally generated intangible assets to ostensibly but not genuinely independent parties, which were then reacquired resulting in the recognition of the internally generated intangible as a

purchased intangible measured at fair value, and the sale and re-purchase of certain intangible assets acquired from third parties were stepped up which resulted in alleged profit and assets that were overstated; and

[44.3] Contributions and "cash equivalents" – the Steinhoff companies previously recognised certain contributions arising from the so-called sale of no-how and supply of volume rebates that lacked economic substance and did not result in cash flows into the Steinhoff companies, which, in turn, resulted in an overstatement of profit. A restatement was therefore required to reverse the aforementioned contributions recognised in profit together with the related receivables, which in some cases have been incorrectly classified as "cash and cash equivalents".

[45] Paragraph 30.5 of the particulars of claim deals with the consequential effects of the accounting irregularities and the consequent restatements required. These impacts relate *inter alia* to the following:

[45.1] the impairment of goodwill and brands due to the revision of inputs using value-in-use calculations of cash generating units as a result of incorrect forecast information and revised weighted average cost of capital rates;

[45.2] the taxation impact of fictitious income and expenses; and

[45.3] the re-assessment of vesting criteria based on restated financial information relating to employee share grants, the classification of external debt as short-term as a result of the technical breach of financial governance, and the recognition of adjustments not previously considered material to the Steinhoff companies.

[46] In paragraph 31, the plaintiffs produced a table summarising the effect of the restatements, including restatements in respect of "share transactions" in order to correct prior period errors.

[47] Jooste submits that the allegations in the aforementioned paragraphs lack particularity, are confusing and, accordingly, are vague and he is embarrassed in pleading thereto in that:

[47.1] The audited results for the year ended 30 September 2017 are not annexed or otherwise pleaded or set out. In my view, while reference is made to the audited results in the particulars, it was not necessary to annex this document to the particulars of claim. This document may be accessed immediately in terms of Uniform Rule 35(14)[19] or later by way of the general discovery process or even a request for further particulars (if necessary), when the trial is imminent.

[47.2] Details are not provided with regard to issues such as the identity of

[19] Rule 35(14) reads as follows: *"After appearance to defend has been entered, any party to any action may, for purposes of pleading, require any other party to make available for inspection within 5 days a clearly specified document or tape recording in his possession which is relevant to a reasonably anticipated issue in the action and to allow a copy or transcription to be made thereof"*.

the intangible assets for independent parties, the intangible assets or identity of third parties, no details are provided of the contributions or the cases incorrectly classified as "cash and cash equivalents", or particulars relating to "the impairment and goodwill and brands", taxation impacts, or "employee share grants" or the classification of external debt as short term.

[47.3] Again, in my view, the first defendant requires detail and a level of particularity that goes far beyond what is reasonably required to plead. There is nothing embarrassing about these paragraphs and the defendant should clearly be able to plead thereto. Indeed, it is perhaps not surprising that La Grange has not raised any quibbles in this regard. The type of particularity required is in the nature of evidence which has to be proved at trial or, alternatively, may be obtained by way of further particulars for the purposes of preparing for trial.

[47.4] Jooste also opines that the table in para 31 of the particulars of claim includes a reference to "share transactions" but no such reference is made to share transactions in paragraph 30 which deals with the categories of restatements. While this may be an omission in the categorisation of restatements, it cannot, in my view, be reasonably argued that this omission, on its own, renders the entire pleading vague or embarrassing to the extent that it prejudices the defendant in pleading to the relevant paragraph.

Jooste's seventh exception and La Grange's exception relating to the claim for unjustified enrichment

[48] In his seventh exception, Jooste raises a number of objections with how the enrichment claim is formulated and whether sufficient particulars have been disclosed to sustain this cause of action. A similar complaint was raised by La Grange.

[49] The particulars relating to the plaintiffs' enrichment claim have been summarised in paragraph 18 above. They are based on the *condictio indebiti*, the requirements of which are as follows[20]:

[49.1] The payment must have been *sine causa / in debite* – that is, made without any legal or natural obligation.

[49.2] The payment must have been made in the mistaken belief that it was owing.

[49.3] The error must have been excusable.

[49.4] The defendant must have been enriched at the expense of the plaintiff (and not some third party).

[50] Central to the defendants' objections to this claim relates to the contractual relationship between the Steinhoff companies and the defendants. For example, in paragraph 13 of the particulars of claim, the plaintiffs plead that the defendants

[20] Harms *Amler's Precedents of Pleading* 9ed 89-90.

were "*remunerated for the services rendered by (them as) … senior executives of SIHPL and SIHNV…*".

[51] Both defendants aver that the implicit premise of paragraph 13 is that there was a contract between the defendants and the Steinhoff companies. However, the plaintiffs have failed to plead any further facts in relation to the existence or otherwise of such a contract.

[52] If such a contract exists, so argue the defendants, the plaintiffs failed to comply with rule 18(6) and rule 18(4) which, taken together, obliges a plaintiff to plead whether such a contract is written or oral and when, where and by whom it was concluded, and a true copy of the contract, or the relevant parts thereof, must be furnished with the plaintiffs' pleading.

[53] According to both defendants, the existence and terms of the contract between the defendants and the Steinhoff companies are material facts necessary to sustain the plaintiffs' pleaded conclusion of law that the remuneration paid to the defendants was not "due" but was paid in the *bona fide* and reasonable, but mistaken, belief that it was due. At the very least, so it was argued, these facts are relevant and material to the aforementioned conclusion of law.

[54] The plaintiffs, on the other hand, contend that their claim is one for unjustified enrichment and not breach of contract. Accordingly, it was not necessary for the Paying Entities to plead the terms of the contract of employment between the defendants and the Steinhoff companies or to annex a copy of any contract (or extracts thereof) that may exist. I agree with the plaintiffs if regard is had to the

requirements for an enrichment claim, as pleaded by the plaintiffs. A party "relies upon a contract" when that party uses a contract as a "link in the chain of his cause of action"[21]. In this matter, the relationship between the Steinhoff companies and the defendants was referred to by way of historical background and is severed from the enrichment claim. Accordingly, the omission of the terms of employment, or the employment contract (should such exist), cannot embarrass or prejudice the defendants.

[55] A further ground of objection to the enrichment claim advanced by Jooste is that the historical background contained in paragraphs 13 to 16 of the particulars of claim is not brought forward by the Paying Entities in their allegations in respect of their enrichment claims. In the aforementioned paragraphs, the plaintiffs plead that the defendants were remunerated for services rendered to the Steinhoff companies, the factors taken into account in arriving at the appropriate remuneration to be paid, and the decision-making process for paying the remuneration. In addition, Jooste submits that it is not indicated in the particulars of claim in what respects he is alleged to have fallen short of the various criteria that were taken into account when determining his remuneration. Given that the contract of employment is not relevant to the enrichment claim as pleaded, these objections, in my view, are without merit.

[56] Jooste further avers that the particulars in relation to the enrichment claim are defective in that the plaintiffs have failed to plead the basis on which the Paying Entities made payments in discharge of the debts owed by the Steinhoff

[21] See, ***Moosa and Others NNO v Hassam and Others NNO*** **2010 (2) SA 410 (KZP)** at 413B-C, which cited with approval from the decision of ***South African Railways and Harbours v Deal Enterprises (Pty) Ltd*** **1975 (3) SA 944 (W)** at 953A, and ***Van Tonder v Western Credit Ltd 1966 (1) SA 189 (C)*** at 193H).

companies. The argument is that in the context of enrichment liability, "three-cornered situations" are difficult and uncertain[22], such as the present one which involves the Steinhoff companies, the defendants, and the paying entities. In such situations, it is necessary to establish whether the Paying Entities acted as a conduit or agent when paying the remuneration to the defendants who were employees of the Steinhoff companies. Thus, according to the defendants, facts ought to have been pleaded to indicate the basis on which the Paying Entities made payments in discharge of the debts owed by the Steinhoff companies.

[57] In response, the plaintiffs submitted that the assertions by the defendants in respect of the Paying Entities acting as conduits or agents, or purportedly being involved in a three-cornered contractual relationship, is of no consequence given the manner in which the enrichment claim was pleaded. The submissions of the defendants ignore what is pleaded in paragraphs 34 and 35 of the particulars of claim where it is expressly stated that remuneration was paid by the Paying Entities: *ex facie* the particulars of claim, the Paying Entities paid the remuneration of their own accord and not on behalf of the Steinhoff companies.

[58] At the hearing, Counsel for La Grange argued that the submission by the plaintiffs that the Paying Entities made payments to the defendants of their own accord is a facile proposition and is irreconcilable with the particulars of claim which expressly state that the defendants were employed by the Steinhoff companies, rendered services to these companies, and their remuneration was determined by, and with the approval of, the Steinhoff companies.

[22] See, Visser *Unjustified Enrichment* page 78.

[59] In my view, while the defendants' argument may harbour some merit, the fact of the matter is that the particulars of claim indicate that the Paying Entities paid of their own accord. The court must accept this proposition as correct. Of course, it remains to be seen, as the litigation process unfolds, how the plaintiffs deal with the issues raised by the defendants in relation to the employment status of the defendants *vis-à-vis* the Steinhoff companies and the contractual arrangement (if any) between the defendants and the Paying Entities.

[60] Jooste's final complaint in respect of the enrichment action is that the plaintiffs do not adequately plead or identify the *causa* or putative *causa* pursuant to which remuneration payments were made to him. Having failed to do so, it is argued that the plaintiffs have not pleaded a sufficient, or any, basis for the conclusion that the remuneration payments were not due to Jooste and that the remuneration payments were made by the plaintiffs in the *bona fide* and reasonable, but mistaken belief that they were due to him. A similar argument was proffered by Counsel for La Grange at the hearing of this matter.

[61] The plaintiffs' response is that the particulars of claim adequately deal with these issues. Payment was made on the recommendation of the Steinhoff companies on the basis of the defendants' representations that the financial position of the Steinhoff companies was accurately recorded in the relevant financial statements. The defendants intended that these representations were also to be relied upon by the Paying Entities. Subsequent events proved that the factual position was incorrect. Had the Paying Entities known what the true position was, they would not have made payment.

[62] I am in agreement with the plaintiffs' submissions in this regard. The pleaded facts, which the court must accept as correct for the purposes of the exception, demonstrate the factual basis for a claim based on enrichment. Accordingly, I am of the view that Jooste's seventh exception and La Grange's exception to the enrichment claims, are without merit.

Jooste's eight exception and La Grange's exception in relation to the delictual claims

[63] In the alternative to the enrichment claims, the plaintiffs' plead claims in delict based on negligent misrepresentation.

[64] The pleaded allegations in support of the delictual claim are summarised in paragraph 20 above.

[65] The requirements for a delictual claim based on a negligent misrepresentation or statement are that the plaintiff must allege and prove a representation or statement that was false, and wrongful (in that the defendant owed the plaintiff a legal duty not to make a misrepresentation or misstatement), and made negligently, causing the plaintiff patrimonial loss, and the plaintiff must allege and prove the extent of the damages suffered[23].

[23] See, ***Bayer South Africa (Pty) Ltd v Frost 1991 (4) SA 559(AD)*** at 568B.

[66] Both defendants advanced a number of arguments in support of the exception that the particulars lacked averments necessary to sustain a legally cognisable delictual claim. They submitted that the particulars of claim contain no allegations in support of the contention that the defendants owed a duty to the Paying Entities to ensure that the financial statements accurately reflected the financial position of the Steinhoff companies and that the profitability and/or performance were accurately reflected in the relevant financial statements. Further, the defendants submitted that the particulars of claim are deficient in that no allegations are made of the grounds on which it is alleged that the Paying Entities suffered damages by reason of the alleged representations given the plaintiffs' failure to plead the basis on which the Paying Entities sought to discharge the debts of the Steinhoff companies: if the Paying Entities acted as agent or conduit for and on behalf of the Steinhoff companies, then it is difficult to conceive of any basis for the pleaded conclusion that the damages in question were suffered by the Paying Entities (as opposed to the Steinhoff companies). In this regard, Counsel for La Grange further submitted that the overpayment of remuneration is not recoverable by parties other than the employers.

[67] According to the plaintiffs, they have fully pleaded all the material facts necessary to sustain a delictual claim on the basis of a negligent misrepresentation or a statement. They aver that the fundamental difficulty with the defendants' objections is that the exceptions are premised on the plaintiffs' failure to plead the contract between the defendants and the Steinhoff companies. This is evident, according to the plaintiffs, in relation to the Paying Entities claim for damages. It is assumed by the defendants that the Paying Entities discharged the remuneration obligations

of the Steinhoff companies and, accordingly, the Paying Entities did so in their capacities as an agent or a conduit since the primary obligation to pay remuneration rests with the employer. However, this is not so if one has regard to what is in fact pleaded. I agree with the plaintiffs on this aspect. In the particulars of claim it is averred that payments were not made on behalf of the Steinhoff companies but by the Paying Entities of their own accord. If this is so, it is the Paying Entities who would suffer any loss in the form of damages.

[68] The plaintiffs have, however, failed to address the defendants' complaint relating to the lack of particularity on the duty allegedly owed by the defendants to the Paying Entities to ensure *inter alia* that the financial statements accurately reflected the financial position of the Steinhoff companies and that the profitability and/or performance of these companies were accurately reflected in the relevant financial statements.

[69] I agree with the defendants that the pleading in relation to the delictual claim is deficient with regard to the element of "wrongfulness", i.e. the existence, and breach, of a legal duty. The plaintiffs have pleaded that the defendants owed the Paying Entities a duty. However, this assertion, relating to the existence of a legal duty and the party to whom it is owed, is a conclusion of law, not an allegation of fact.

[70] The delictual claims are for pure economic loss and, unlike harm to a person or property, causing economic loss is not *prima facie* wrongful[24]. In the context of

[24] ***Hlumisa Investment Holdings RF Ltd v Kirkinis*** **2020 (5) SA 419 (SCA)** paras 58 and 59. In the Steinhoff context, see the Judgment of Unterhalter J in ***De Bruyn v Steinhoff International Holdings NV and Others*** (case no: 290/2018) [2020] ZAGPJHC 145, para 134.

economic loss, wrongfulness will only be established where the defendant acted in breach of a legal duty[25]. Put differently, wrongfulness is not simply inferred from the fact that the plaintiff in question suffered loss. Moreover, as argued by Counsel for Jooste, in a claim for economic loss, it is insufficient for the claimant concerned to allege that the conduct complained of was wrongful in some general sense.[26] In my view, the Paying Entities have failed to allege sufficient facts to support the allegation that the conduct complained of was wrongful *vis-à-vis* they themselves.[27]

[71] A party claiming economic loss is expected to know at the pleading stage, the material facts on which he/she relies to establish wrongfulness.[28] Tested against the requirements for a delictual claim based on misrepresentation or misstatement, one must agree with the defendants that the plaintiffs failed to substantiate their pleaded conclusion with regard to the supposed duty owed to the Paying Entities. This is a material omission in the particulars of claim.

Jooste's ninth exception

[72] Jooste submitted that the particulars of claim are vague and embarrassing in that insufficient particularity is provided with regard to the manner in which he is said to have made the alleged representations to each of the Paying Entities, on what occasions such alleged representations were made, to whom on behalf of the Paying Entities the alleged representations were made, and the grounds on which

[25] ***Hlumisa*** *supra* para 58-71.
[26] See also, ***Jake Trading CC v Rambore (Pty) Ltd t/a Rambore Specialist Contractors and Another*** **(11909/2017) [2019] ZAWCHC 27** at para [27].
[27] Cf. ***Itzikowitz v Absa Bank*** **2016 (4) SA 432 (SCA)** para 13.
[28] ***Jake Trading CC, supra,*** at para 31.

he is alleged to have been under a duty to these entities to *inter alia* ensure the accuracy of the financial statements and that the profitability and/or performance of the Steinhoff companies was properly recorded.

[73] The lack of particularity with regard to the duty allegedly owed to the Paying Entities was also referred to by Jooste under his eight exception and has been dealt with above. I am of the view that there is no substance in the remaining parts of this exception. The particulars of claim do not allege that the representations were made directly to the Paying Entities. Instead, the allegation is that the defendants intended that the representations made to the Steinhoff companies would be acted upon by the Paying Entities.

[74] Indeed, in his heads of argument, Jooste diverted his attention in this regard to the Steinhoff companies. He submitted that the plaintiffs failed to allege sufficient particularity with regard to the manner in which the alleged representations were made to the Steinhoff companies, on what occasions these representations were made, and to whom on behalf of the companies the alleged representations were made. Leaving aside that this complaint was not mentioned in the notice of exception, in my view, the sort of details required by Jooste are in the nature of *facta probantia*. Jooste cannot seriously contend that he is unable to plead to the plaintiffs' averments regarding the representations made to the Steinhoff companies. The particulars of claim set out in great detail what representations were made and the context in which these representations were made. Jooste can plead thereto: either he made the representations as alleged or he did not.

[75] Accordingly, apart from the issue relating to whether or not a duty was owed to the Paying Entities (already dealt with in the eight exception), I find no substance in this exception.

COSTS

[76] In the exercise of my discretion on costs, I have taken into account that each of the defendants and the plaintiffs have enjoyed a measure of success. While most of Jooste's exceptions dealing with the formulation of the plaintiffs' claims (exceptions 1 to 6, and 9) were dismissed, the plaintiffs did not provide much by way of argument on these exceptions. In the circumstances, the fairest order would be that each party pay their own costs.

ORDER

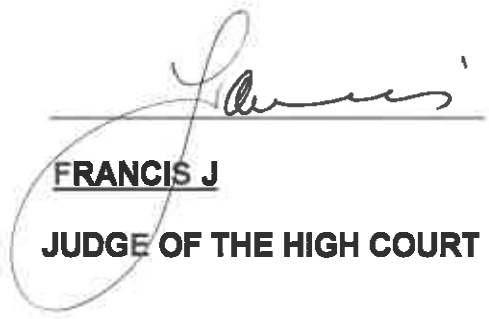
In the premises, I make an order in the following terms:

1. The first and second defendants' exceptions are dismissed, subject to paragraph 2 below.

2. Paragraph 38 of the particulars of claim is vague and embarrassing in that insufficient facts are provided in support of the allegation that a duty was owed to the third, fourth, and fifth plaintiffs.

3. The plaintiffs are given leave to cure the aforesaid defect in their particulars of claim by filing a notice of amendment to be delivered within 20 days of the date of this order.

4. Each party shall bear their own costs.



FRANCIS J

JUDGE OF THE HIGH COURT

Hearing Date:	2 September 2021
Counsel for Plaintiffs:	Adv A Subel SC Adv A Smalberger SC
Attorney for the First to Fifth Plaintiffs:	Mr Brendan Olivier Werksmans Attorneys
Counsel for First Defendant:	Adv J Muller SC Adv M Blumberg SC
Attorneys for the First Defendant:	Mr Callie Albertyn and Mr Stephan Haynes De Klerk & Van Gend Inc.
Counsel for Second Defendant:	Adv John Dickerson SC Adv Saul Miller
Attorneys for the Second Defendant:	Mr Grant Ford and Mr Jacques Odendaal Bernadt Vukic Potash & Getz