REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER:29290/2018

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

26 June 2020 DATE — **D. UNTERHALTER** SIGNATURE

In the matter between:

DORETHEA DE BRUYN **APPLICANT**

and

STEINHOFF INTERNATIONAL HOLDINGS N.V. **1st RESPONDENT**
(CCI Registration number: 63570173)
(CIPC Registration number: 2015/285685/10)

STEINHOFF INTERNATIONAL **2nd RESPONDENT**
HOLDINGS (PROPRIETARY) LIMITED
(CIPC Registration number: 1998/003951/07)

DELOITTE & TOUCHE **(IRBA practice number: 902276)**	**3rd RESPONDENT**
MARTHINUS THEUNIS LATEGAN	**4th RESPONDENT**
HEATHER JOAN SONN	**5th RESPONDENT**
STEFANES FRANCOIS BOOYSEN	**6th RESPONDENT**
DEENADAYALEN KONAR	**7th RESPONDENT**
DANIËL MAREE VAN DER MERWE	**8th RESPONDENT**
DAVID CHARLES BRINK	**9th RESPONDENT**
PAUL DENIS JULIA VANDEN BOSCH	**10th RESPONDENT**
CHRISTOFFEL HENDRIK WIESE	**11th RESPONDENT**
JOHANNES FREDERICUS MOUTON	**12th RESPONDENT**
ANDRIES BENJAMIN LA GRANGE	**13th RESPONDENT**
MARKUS JOHANNES JOOSTE	**14th RESPONDENT**
STEPHANUS JOHANNES GROBLER	**15th RESPONDENT**
CLAAS EDMUND DAUN	**16th RESPONDENT**
BRUNO EWALD STEINHOFF	**17th RESPONDENT**

ANGELA KRÜGER-STEINHOFF	**18th RESPONDENT**
THIERRY LOUIS JOSEPH GUIBERT	**19th RESPONDENT**
JOHAN VAN ZYL	**20th RESPONDENT**
JAYENDRA NAIDOO	**21st RESPONDENT**
JACOB DANIEL WIESE	**22nd RESPONDENT**
ROBERT HARMZEN	**23rd RESPONDENT**
MARIZA NEL	**24th RESPONDENT**
FREDERIK JOHANNES NEL	**25th RESPONDENT**
DIRK EMIL ACKERMAN	**26th RESPONDENT**
FRANKLIN ABRAHAM SONN	**27th RESPONDENT**
JOHANNES HENOCH NEETHLING VAN DER MERWE	**28th RESPONDENT**
JOHANNES NICOLAAS STEPHANUS DU PLESSIS	**29th RESPONDENT**
YOLANDA ZOLEKA CUBA	**30th RESPONDENT**
KAREL JOHAN GROVE	**31st RESPONDENT**
HENDRIK JOHAN KAREL FERREIRA	**32nd RESPONDENT**

NADINE BIRD **33rd RESPONDENT**

FRANS JOHANNES GELDENHUYS **34th RESPONDENT**

RODNEY HOWARD WALKER **35th RESPONDENT**

IAN MICHAEL TOPPING **36th RESPONDENT**

STANDARD CHARTERED BANK LLC **37th RESPONDENT**
(CIPC Registration number: 2003/020177/10)

RÖDL & PARTNER GMBH **38th RESPONDENT**
WIRTSCHAFTSPRÜFUNGSGESELLSCHAFT
STEUERBERATUNGSGESELLSCHAFT
(Registration number: 201167i)

COMMERZBANK AKTIENGESELLSCHAFT **39th RESPONDENT**
(Registration number: HRB 32000)

PSG CAPITAL (PTY) LTD **40th RESPONDENT**
(CIPC Registration number: 2006/015817/07)

ABSA BANK LIMITED **41st RESPONDENT**
(CIPC Registration number: 1986/004794/06)

STEINHOFF SECRETARIAL SERVICES **42nd RESPONDENT**
PROPRIETARY LIMITED
(CIPC Registration number: 1992/004646/07)

J U D G M E N T

UNTERHALTER J

INTRODUCTION

1. The Applicant, Ms De Bruyn, is a retired pensioner. In the period 2013 – 2016, Ms De Bruyn purchased shares in two companies: Steinhoff International Holdings (Pty) Ltd ("SIHL"), the Second Respondent, and Steinhoff International Holdings NV ("Steinhoff NV"), the First Respondent. The shares purchased by Ms De Bruyn were listed on the Johannesburg Stock Exchange. Her investment in these companies amounted to some R 80 000.

2. On 5 December 2017, Steinhoff NV issued a press release. The company disclosed that information had come to light concerning accounting irregularities. This required an independent investigation by external auditors, and that Price Waterhouse Coopers ("PWC") had been approached by the company to undertake the investigation. It was also announced that the CEO of the company, Markus Jooste, was resigning and that Steinhoff NV was postponing the publication of its 2017 results until the completion of the external audit. A SENS announcement, to like effect, was issued on 6 December 2017.

3. On 5 December 2017, the share price of Steinhoff NV shares, listed on the Johannesburg Stock Exchange ("JSE") and the Frankfurt Stock Exchange ("FSE") suffered a dramatic fall, from which the shares have not recovered. The Financial Times of 6 December 2017 reported a 62% fall in the price of Steinhoff NV shares. Ms De Bruyn and many other shareholders lost the greater part of their investment in Steinhoff NV. The scale of these losses is considerable.

4. Criminal and regulatory investigations have commenced in South Africa and elsewhere. Parliamentary scrutiny has followed. And law suits have been instituted, both in this jurisdiction and abroad.

5. Ms De Bruyn seeks authorization in the notice of motion to represent three classes of shareholders in a class action. This application is the first shareholder class action that is brought for certification before the South African courts. That shareholders should seek redress, given the scale of their losses, is unsurprising. That this is sought to be done by way of a class action entails some novelty. The premise of the application for certification is that many retail investors, who have suffered losses important to them, will not be able to bring their cases to court, if these claims are brought by each shareholder. Like Ms De Bruyn, their claims are too modest to justify the cost of complex litigation. A class action, however, would secure access to the courts and the prospect of redress for thousands of individual shareholders who lack the resources of institutional investors.

6. The application was initially formulated on the basis of three proposed classes described as follows. The first class (JSE 1 Class) comprises persons who purchased or held shares in SIHL, registered on the JSE, as at 26 June 2013 and exchanged those shares on 7 December 2015 under the terms of a scheme of arrangement for shares that came to be listed as Steinhoff NV shares, and continue to hold these shares or sold them on or after 5 December 2017. The second class (JSE 2 Class) comprises persons who purchased shares in Steinhoff NV, registered on the JSE, between 7 December 2015 and 5 December 2017, and continue to hold those shares or sold them on or after 5 December 2017. The third class (the FSE class) comprises persons who purchased shares in Steinhoff NV, registered on the FSE, between 7 December 2015 and 5 December 2017, and continue to hold these shares or sold them on or after 5 December 2017. As I shall explain, these classes exclude certain persons.

7. The class action is to be brought against three classes of defendants: the Steinhoff holding companies (SIHL and Steinhoff NV) and Steinhoff Secretarial Services (Pty) Ltd (the 42nd Respondent); the auditors of the Steinhoff companies, Deloitte and Touche (the third Respondent (" Deloitte ")) and various directors of Steinhoff.

8. Of the respondents cited in this application, the Applicant has withdrawn against 21 respondents, principally respondents domiciled or resident abroad. Ten respondents abide the decision of this court. Those respondents who oppose the application are as follows: the Steinhoff companies (1st, 2nd and 42nd respondents " the company respondents"), Deloitte (the 3rd respondent), certain of the directors of the Steinhoff companies (8th, 11th ,15th and 22nd respondents collectively " the opposing directors ") . The 5th respondent opposed on a narrow basis that has been resolved.

9. The opposing respondents oppose certification on various grounds, some common and others distinctive. I propose therefore to consider the case for and against certification under the organizing considerations laid down in the leading cases that have recognized class actions.

10. I commence with a brief recitation of these now well-established considerations and a somewhat more detailed treatment of the standard that is of application in considering whether the class action raises a triable issue.

THE CERTIFICATION OF A CLASS ACTION

11. In *Children's Resources*[1], the Supreme Court of Appeal set out the factors that should be weighed in deciding whether to certify a class action. These factors are as follows: the existence of a class identifiable by reference to objective criteria; the proposed class representative is suitable to conduct the action and represent the class; a cause of action raising a triable issue; the right to relief requires the determination of issues of fact or law, or both, common to all members of the class; the relief sought or damages claimed flow from the cause of action and are ascertainable and capable of determination; where damages are claimed, there is a procedure by which to allocate

[1] *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) at para 26

the damages to members of the class given the composition of the class and the nature of the proposed action; and that a class action is the most appropriate means by which the claims of the class may be determined.

12. *Children's Resources* recognized that these factors may not be exhaustive, but required that a court should be satisfied that the factors are present before granting certification.[2] In *Mukaddam*[3], the Constitutional Court clarified the position. The factors referenced by the Supreme Court of Appeal are not prerequisites for the grant of certification. Rather, they are considerations to be weighed under the overarching principle of what is required by the interests of justice.

13. The parties are not in agreement as to how the courts should consider whether the proposed class action gives rise to triable issues. Counsel for Ms De Bruyn understand *Children's Resources* to propose a standard that the class action warrants certification if it is not a hopeless case. The opposing respondents interpret *Children's Resources* to adhere to a more rigorous assessment. In essence, if the cause of action upon which the class action relies cannot survive an exception, there is no triable issue. And if the evidence available and potentially available will not make out a *prima facie* case, then there are no triable issues of fact.

14. The treatment in *Children's Trust* [4] as to whether a cause of action raises a triable issue bears out the interpretation of the opposing respondents. If a cause of action is not supportable as a matter of law, there is no case to try. If there is no *prima facie* case, then there is insufficient evidence which, even if accepted, will establish the cause of action.

15. Two further issues require clarification. First, if the cause of action raises a novel question of law, is certification warranted because the issue is arguable? Counsel for

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[2] At para 28
[3] *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) at paras 34 - 40
[4] At paras 35 - 42

Ms De Bruyn submit that this is the correct approach, and sought support from the judgment of Froneman J (Skweyiya J concurring) in *Mukaddam*[5].

16. A novel proposition of law may be arguable, but if a court is asked to determine whether a cause of action is legally tenable, this is not a matter of degree. The cause of action is either good in law or it is not. Questions of law may be hard to decide , but they ultimately admit of a binary determination: the law either recognizes the cause of action or it does not.

17. The issue is then whether a class action predicated upon a novel question of law should be assessed under the standard of whether the cause of action is legally tenable or whether it is merely arguable. The less rigorous standard would leave it to the trial court to determine the exception, the more rigorous standard requires the certification court to decide the question of law as it would on exception.

18. In my view, whether a class action raises a triable issue must be considered by the certification court by asking whether the cause of action proposed is tenable in law. The trial court is in no better position to decide this issue. If there is a question of law to be decided, the sooner it is decided the better. There is little to be gained by triggering the procedural machinery of a class action, only to have a trial court pronounce on the matter and bring the process to a halt, upon a successful exception being taken.

19. Nor do I consider that this position is discordant with what was decided in *Mukaddam.* As the court in *Children's Resources*[6] emphasized, there are certain questions of law that can be answered on the pleadings as they stand. In certification proceedings that may also be so, assisted by the evidence that an applicant for certification places before the court or indicates will become available at trial. Assuming then that on the case pleaded and, to the extent it is helpful, on the evidence adduced or indicated,

[5] Paras 71 – 77
[6] At para 38

there are questions of law that can be decided by the certification court, there is no reason why the certification court should not do so. That in turn will be important to decide whether there are triable issues that warrant a class action going forward.

20. But it may be that the issue of law is not so readily capable of determination. That may be so because the issues of law and fact are not readily prised apart or because the question of law would benefit from a more comprehensive exploration of evidence that is best left for the trial court.

21. These matters are well understood in exception proceedings and they are no less of application for the purpose of considering whether there are triable issues in an application for certification. When a court is asked to consider whether there are triable issues in a certification application, and a novel question of law arises, the court should decide the question of law, if it can do so. A determination by the certification court of the question of law will then inform its consideration of whether there are triable issues. If the certification court cannot determine the question of law because it is best left to the trial court to do so, then that conclusion will also inform the consideration as to whether there are triable issues. It is in this situation that it may be said that if the point of law is arguable and is best determined at trial with the benefit of evidence heard by the trial court, then that will weigh in favour of the conclusion that there are triable issues for the purposes of assessing certification.

22. So understood, the position is harmonious with the observations made by Froneman J in *Mukaddam.* In that case, questions arose concerning damages in an action arising from a proven infringement of the Competition Act - novel territory where difficult issues of fact and law were considered best left to the trial. In such a case, it may be concluded that there are triable issues because there is an arguable question of law that is best determined at trial. But that is not always the case. There may be a question of law that the certification court is as well placed to decide as would be the trial court. In such a case, the certification court should decide the question of law and its answer may be decisive in determining whether there are triable issues.

23. There remains a further point that warrants clarification. *Mukaddam* has made it plain, as indicated, that the factors relevant to the consideration of a certification application are not requirements that must all be satisfied before certification may be granted. Put simply, the factors are considerations that must be weighed together so as to make a final judgment, against the overarching standard of the interests of justice, as to whether certification should be granted, and if so, on what terms.

24. If, then, a class action is predicated upon a cause of action that is not tenable in law, and there is consequently not a triable issue to take forward to trial, is the class action nevertheless capable of certification? *Mukaddam* allows that it could be. But that would be so in unusual circumstances, not altogether easy to foresee. If the certification court can and has decided a question of law and concluded that there is no cause of action that supports the class action, then there is no triable issue. If the point of law is novel and has not been authoritatively determined by our highest courts; that may warrant the attention of these courts on appeal from the certification court. But from the vantage point of the certification court, if the point of law is dispositive of the applicant's cause of action, then there is no triable issue to go forward. And that would bear much weight in determining the ultimate question, because, if the certification court decides there is no cause of action, then there is nothing for the trial court to determine. In such circumstances, whatever other virtues the certification application may have, it is difficult to see what would justify certification.

25. This analysis simply emphasizes that in a particular case certain factors relevant to certification may weigh in different ways. Certain factors may weigh with the certification court to incline the decision one way or another. Other factors may be so weighty that the scales tip decisively. Every factor is to be weighed, and none displaces the ultimate exercise of weighing all in the balance to determine where the interests of justice lie. But that does not mean that a factor in a particular case may weigh so heavily that it points clearly to what the interests of justice require.

26. With these observations as to the framework by reference to which a certification application is to be considered, I turn to the first consideration: class definition.

CLASS DEFINITION

27. Class definition provides the foundation for a class action. As *Children's Resources* makes plain, the class or classes should be defined with sufficient precision to ensure that membership of the class can be determined by reference to objective criteria. There are good reasons for this. The rights of members of the class are affected by certification. They are bound by the outcome of the class action if they have not chosen to opt out or, in some species of class action, they have elected to opt in. The members of the class must thus be determined or determinable. The membership of the class should have an identity of interest. Furthermore, the definition of the class will be relevant to other considerations that the certification court is required to consider. Thus, by way of example, the heterogeneity of a class may impact upon the common issues capable of determination in a class action, the suitability of a class representative and the complexity of the proposed litigation. So too, a class that is under-inclusive may lack utility, because the joinder of individual plaintiffs in a single action may be quite as effective as the certification of a class action. In other cases, a class may over-extensive and lack coherence which gives rise to other infirmities.

28. As originally conceived, the application proposed three classes, referenced above, and styled JSE 1 class, JSE 2 Class and the FSE class. The definition of these classes excluded certain persons. The excluded persons in each class are similarly specified. They are the past or present subsidiaries of Steinhoff NV, SIHL, and Steinhoff Africa Retail Limited and their past or present directors, officers, affiliates, legal representatives, heirs, predecessors, assigns; and all members of the families of individual defendants; and any entity in which any of the individual defendants has or had a controlling interest. I shall refer to these persons as "the excluded persons".

29. Since launching the application, and responsive to criticisms levelled by the opposing respondents, the class definitions proposed by the applicant have undergone some change. The most recent iteration, proposed by way of a draft order filed after the hearing, reflects the following changes. First, classes JSE 1, JSE 2 and the FSE Class are limited to persons ordinarily resident or domiciled in South Africa. Second, a fourth class is proposed and named "the Foreign Shareholders Class ". This fourth class comprises persons who are not ordinarily resident or domiciled in South Africa, but otherwise qualify for membership of JSE 1 Class, JSE 2 Class, and the FSE Class and expressly opt in to the class action. Third, the definition of excluded persons is expanded to include persons who have commenced litigation against any of the respondents in South Africa or any jurisdiction outside of South Africa.

30. Ms De Bruyn submits that these class definitions permit the membership of the classes to be determined by recourse to objective criteria. The shares in issue, when the shares were purchased, where they were registered and when they were sold (if no longer held) are all matters of fact that define whether a person is a member of a class. So too, the excluded persons can be identified on an objective basis. It is also said that the classes meet the consideration of numerosity. There are a large number of shareholders who would constitute the members of the classes, as a large number of shares form part of the public float of Steinhoff shares. That is to say, the shares were widely held and traded.

31. The opposing respondents, and in particular the company respondents and Deloitte, raise difficulties with the class definitions as originally proposed. These difficulties may be summarized as follows. First, the classes are overbroad because they include persons who are foreigners. Foreigners who are members of the classes are not subject, as plaintiffs, to the jurisdiction of this court and would be free to engage in multi-jurisdictional litigation, with the risk of jurisdictional arbitrage. Second, the classes do not exclude shareholders who have already instituted proceedings, whether in South Africa or abroad, to claim the very losses that are the subject of the

proposed class action. Such shareholders should be excluded. Third, the class definitions are said to be imprecise and tautologous. Finally, the definitions are under inclusive because categories of "insiders" are treated as excluded persons when they should not be.

32. The further draft orders proposed by Ms De Bruyn have sought to deal with these difficulties.

33. The complaint of overbreadth proceeds from the observation that class members are bound by the outcome of the litigation. However, while certification binds *incolae*, it does not bind *peregrini* who are not, absent submission, subject to the jurisdiction of this court. This would permit *peregrini* who are members of the classes in the South African litigation to pursue litigation in multiple jurisdictions. An adverse outcome before the courts in South Africa would not be binding upon *peregrini* who would be at liberty to seek a different outcome in other jurisdictions. This is unfair, wasteful and potentially oppressive of respondents who would be required to defend the same action in multiple jurisdictions.

34. Although these matters were much debated before me, the issue has been simplified. Ms De Bruyn's counsel have proposed revised class definitions. Membership of JSE 1 Class, JSE 2 Class and the FSE Class requires that persons are ordinarily resident or domiciled in South Africa. The Foreign Shareholders' Class requires persons who are not domiciled or ordinarily domiciled in South Africa to opt in to be counted as members of this class. These revised definitions are intended to cure the jurisdictional difficulties raised by the respondents.

35. The principle of our law is that a plaintiff always submits to the jurisdiction in which she brings her action.[7] It follows that if *peregrini* opt in to the Foreign Shareholders' Class, they intend to bring the class action, submit to the jurisdiction of this court and

[7] *Mediterranean Shipping Co v Speedwell Shipping CO Ltd* 1986 (4) SA 329 (D) at 333 H

will be bound by the outcome before this court. This cures the jurisdictional complaint in respect of the Foreign Shareholders' class.

36. Plainly, the same result was intended by the modifications of the other three classes. The intention is to ensure that the members of these classes are *incolae* of the court and bound by the outcome of the litigation before this court. In an action sounding in money, a court has jurisdiction over a defendant who is domiciled or resident in the area over which the court exercises jurisdiction. This gives expression to the principle of effectiveness that lies at the foundation of the law of jurisdiction.

37. The modification of the three classes as reflected in earlier iterations of the draft order was both too narrow and too wide to achieve its purpose. Too wide because the prior modifications referred to South African citizens. Nationality is not consistent with the principle of effectiveness. A person may be a citizen of South Africa but have no connection to the country. Accordingly, nationality, without more, does not confer jurisdiction on this court.[8] Domicile, however, within the area over which the court exercises jurisdiction, is consistent with the principle of effectiveness. But so too is residence. These propositions, developed in oral argument, have been cured in the final draft order proposed by Ms De Bruyn.

38. The Applicant seeks to ensure that the members of a class are bound by the outcome of the litigation before this court. This requires either submission or some other basis upon which this court enjoys jurisdiction under the principle of effectiveness. The principle of effectiveness is satisfied where class members are domiciled or resident within the area over which this court exercises jurisdiction, but it is not satisfied on grounds of South African nationality alone.

39. Counsel for the Applicant indicated that further modifications would be made to the definition of the classes to bring them into conformity with the principle of effectiveness

[8] *Foord v Foord* 1924 WLD 81 at 87-88

and thereby ensure that the members of the classes proposed by the Applicant will be bound by the outcome of the litigation. This has been done.

40. I observe that this conformity with the principle of effectiveness will give rise to choice of law questions should foreign shareholders who bought their shares on the FSE opt to litigate in this jurisdiction. Their cause of action may be governed by German law and this complication may give rise to fragmentation of the class action. I will revert to this aspect of the matter when considering commonality.

41. As to the other difficulties raised by the Respondents, the company respondents complain that the classes should exclude persons already litigating claims for their losses as shareholders. The Applicant has now cured this complaint. The definition of excluded persons has been extended to include persons who have commenced litigation against any of the respondents (presumably, in respect of shareholder losses) either in South Africa or elsewhere.

42. Deloitte complains that the class definitions lack precision and allow for tautology because persons who have bought shares in Steinhoff NV will not know if they form part of JSE 2 Class or the FSE Class or both. This comes about because the shares are dual listed on the JSE and FSE. However, membership of the class is determined by reference to where the shares are registered. The same share is not registered on both the JSE and the FSE. Registration will determine membership and thus eliminate uncertainty.

43. Deloitte also draws attention to what is said to be a problem of under-inclusivity. Among the excluded persons are company “insiders”. They are excluded, it is said, without adequate justification. This difficulty is insufficiently specified. The definition of excluded persons is intended to capture those who have held positions in the Steinhoff group, members of their families and others with a close connection to the management of the Steinhoff companies. Deloitte does not identify those excluded who should not be, why this is so, and where the exclusionary line should be drawn.

44. It is possible to imagine that the exclusions may be too widely cast in some particular cases. And certain of the exclusions lack precision. For example, who are the predecessors and assigns? But no case has been made out that there is a sub-class of excluded persons who suffer prejudice from exclusion so as to warrant redefinition.

45. In sum, the class definitions, as now proposed, adequately cure the difficulties raised. The consequences of the classes so defined for the assessment of other considerations relevant to certification will be treated by me in what is to follow.

SUITABILITY

46. I turn to the consideration of suitability. Our law recognizes, under the guiding principle of s38(c) of the Constitution that a person may act as a member or in the interests of a class. This principle of representation is not confined to cases in which the Bill of Rights provides the basis of a cause of action.[9] Three overarching issues require consideration.

47. First, is the representative plaintiff in a position to represent the proposed class either because she is so situated as to typify the class or is otherwise qualified to represent the class? Typicality may permit of the conclusion that the representative plaintiff has an identity of interest with the members of the class and for this reason may be suitable to represent the class. But typicality does not exhaust the reasons that may support the suitability of a class representative. The representative plaintiff may be in a position to act in the interests of a class of which she is not a member.

48. Second, as *Children's Resources* makes plain, the representative of the class must not have a conflict of interest with those whom she wishes to represent.

[9] *Children's Resources* para 46

49. Third, the class representative must also have the capacity to conduct the litigation on behalf of the class. This has a number of entailments, also set out in *Children's Resources*[10]. Among the relevant questions are these. Does the representative plaintiff have the time, commitment and ability to conduct the litigation? With what financial means? Does the representative plaintiff have an understanding of the case so as to instruct the lawyers who will act in the matter? Are there competent lawyers willing and able to undertake the litigation? If so, what are the funding arrangements? If by way of contingency, on what terms? What secures the independence of the representative plaintiff and the lawyers appointed to the case to act in the interests of the class?

50. Fourth, will the litigation be conducted not only in the interests of the class, but in such a way as to avoid opportunistic outcomes that may work harshly upon the defendants?

51. The opposing respondents have raised wide-ranging concerns as to the suitability of Ms De Bruyn as a representative plaintiff, her attorneys of record and the funding arrangements in terms of which it is proposed to conduct the litigation.

52. I sound a note of caution in approaching these matters. Suitability must be judged on the facts. Suitability matters. To bind over a large class of persons to the outcome of a class action pursued under defective stewardship does not serve justice. However, there are aspects of suitability that necessarily require judgments of comparison. We should all want a representative plaintiff whose interests chime clearly with those of the class. A representative who has the desire, time and resources (of both insight and finance) to give to the litigation what is required; and a representative plaintiff who acts independently in the best interests of the class, with access to lawyers of skill, dedication and repute. The real word is however an imperfect place. Suitability will often require a weighing of what is possible to permit of access to the courts, as against the hazards of what such access may bring in its wake. The pursuit of perfection is so often the enemy of the good.

[10] *Children's Resources para 46*

53. I consider first the suitability of Ms De Bruyn as the class representative. The class representative should have the capacity to prosecute the class action. This entails an ability to give instructions to the legal representatives as to the conduct of the litigation. This in turn requires some knowledge of the facts. In addition, a representative should be in a position to be able to communicate with the members of the classes that she represents.[11]

54. The company respondents submit that Ms De Bruyn does not satisfy these criteria. She is a retired pensioner, without the knowledge and expertise of an investor who would be able to give instructions in the proposed litigation. Nor is a case properly made out as to the composition of the classes Ms De Bruyn would seek to represent, the numerosity of these classes, the necessity for a class action in respect of these classes and her suitability as their representative. The company respondents draw attention to the fact that Ms De Bruyn is not a member of the FSE class. They have concerns as to whether she would be able to act in the best interests of the classes or would simply be a nominal plaintiff, used by the funders to profit from the class action.

55. It would certainly be helpful if there were additional class representatives who included investors of some experience and expertise. However, the justification for the class action that is proposed is that there are numerous retail investors who have made relatively modest investments in Steinhoff shares who would not be able to litigate their claims, absent a class action. Retail investors of this kind will often lack investment expertise. But I should be reluctant to attribute much weight to this deficit. The detail of the transactions that are said to have laid the Steinhoff companies low are clearly complex and will require expert consideration. However, I do not see why Ms De Bruyn is not in a position to appreciate the essential facts that make up the cause of action upon which she and other members of the classes will rely and apply

[11] *Mukaddam at para 18 and Nkala and Others v Harmony Gold Mining Co Ltd and Others* 2016 (5) SA 240 (GJ) para 130

the common sense of an ordinary litigant. There are cases in which the cause of loss is outside the ordinary competence of a litigant. The litigant will of course have to rely upon the expertise and independence of her legal representatives and qualified experts. That does not mean that the position of Ms De Bruyn, as a modest retail investor who has suffered loss, will not allow her to identify with investors who suffered a similar fate. Nor is Ms De Bruyn's appreciation of the facts likely to be markedly different from other retail investors. They bought Steinhoff shares believing the Steinhoff companies to have sound assets and earnings when, it appears, they did not. I do not consider Ms De Bruyn by reason of her want of expertise and limited appreciation of the facts to be ill suited as a class representative.

56. Ms De Bruyn is not a member of the FSE class. The company respondents have referred me to the decision in *Falcon*[12], a decision of the US Supreme Court, that requires a class representative to be a member of the class. That is not our law. It suffices, as *Children's Resources* has explained, that the class representative can act in the interests of the class.

57. The company respondents doubt that Ms De Bruyn can do so because she lacks knowledge of the members of the FSE class and their interests, not least because of the extra-territorial reach of this class. Indeed, they say, this is simply an incident of a more general infirmity of the application – that the composition of the classes, their numerosity and the need for bringing a class action is not established.

58. It is important to know who is to be represented and with what necessity before deciding whether Ms De Bruyn is a worthy representative. The application lacks details of these matters, beyond the rather general reference to retail investors and the thousands of enquiries the attorneys of Ms De Bruyn have received. More evidence should have been adduced.

[12] *General Telephone Co of the Southwest v Falcon457 US 147 at p156*

59. I am inclined to think however that these deficiencies are not fatal to the application for certification. Some time has passed since the dramatic fall in the share price of Steinhoff shares. This has led to extensive media coverage both in South Africa and abroad. It is probable that institutional investors and other significant shareholders that suffered losses and wish to institute proceedings have done so. The papers indicate that there has been Steinhoff litigation initiated in South Africa and abroad. Steinhoff shares were widely traded. In these circumstances, it is probable that those shareholders who wished to litigate and had the means to do so have initiated proceedings. But there is little to contradict the claim that there are indeed numerous retail investors who invested in Steinhoff shares and like Ms De Bruyn are not well placed to bring individual suits for their losses. It is likely therefore that there is a need for a class action for retail investors in Steinhoff shares and that the membership of the proposed classes meets a plausible threshold of numerosity.

60. It would perhaps have been preferable to attempt a class definition that more narrowly focuses upon retail investors. Quite how to do so is far from clear. That larger institutional investors have in all likelihood already taken steps to institute proceedings renders the need for a narrower class definition less acute. The classes that are proposed are thus more likely to be populated with members less able to initiate proceedings for themselves.

61. Once this is so, Ms De Bruyn does not appear to be an unsuitable representative. She has suffered losses by reason of the fall in the price of Steinhoff shares in just the way that has afflicted other retail investors. She has an identity of interest with other retail investors. And her account as to why she made the investment in Steinhoff shares is likely to have resonance with other retail investors. That Ms De Bruyn did not purchase Steinhoff shares registered on the FSE does not oust her identity of interest with such shareholders. There is little reason to think that their reasons for buying Steinhoff shares is any different, nor that their losses have a different significance. Since the members of the FSE class is now made up of persons domiciled or ordinarily resident in South Africa, there are additional linkages to Ms De Bruyn. The Foreign

Shareholders' class will be required to opt in and can therefore choose whether Ms De Bruyn is a suitable representative.

62. Deloitte says that Ms De Bruyn has a conflict of interest that disqualifies her from representing the classes, as they are now defined. Ms De Bruyn has retained her Steinhoff shares. But all four classes comprise persons who sold their shares after 5 December 2017, and others who retained their shares. Those shareholders, like Ms De Bruyn, who have retained their shares have an interest that Steinhoff continues as a profitable enterprise. They want to have their claims met and they want their shares to provide returns. Those shareholders who have sold their shares seek to maximize their claims, they have no interest in the future returns Steinhoff may afford its shareholders. Deloitte submits these two classes of shareholders have conflicting interests because shareholders who have retained their shares will be more willing to compromise their claims to secure the viability of Steinhoff and hence secure a return on their shares. Those who have sold care not at all for future returns, they would seek to maximize their claims. So, the argument goes, Ms De Bruyn cannot act as a class representative for those members of the classes who have sold their shares.

63. This problem of intra-class conflict is less fundamental than Deloitte asserts it to be. Both shareholders who have retained their shares and those who have sold them would look to the Steinhoff defendants to satisfy their claims, in whole or in part. That would require viable companies. It is hard to imagine that remaining shareholders would significantly compromise their proven damages or the quantum of any settlement against the speculative prospect of future dividends or capital appreciation. If there are different incentives, they are likely to operate at the margin, and that margin is likely to be modest. If the conflict should assume greater significance than I suppose, then the trial court can exercise a supervisory function to differentiate classes into sub-classes with separate representatives for the purposes of any settlement. That is posited in *McKenna*[13]*,* and appears to me to be a sufficient safeguard against the prospective risk of intra-class conflict.

[13] *Mckenna v Gammon Gold Inc (2010) ONSC 1951 para 183*

64. In sum, it would have been better to have more representative plaintiffs to share the burden and with more varied expertise, but I do not find that Ms De Bruyn is so unsuitable that she cannot act as the representative plaintiff for the proposed classes.

65. The opposing respondents do not confine their criticisms to the suitability to Ms De Bruyn as a representative plaintiff. They say that the attorneys who will be the legal representatives in bringing the class action are ill-suited to the task, and the funding arrangements are problematic.

66. The company respondents, in particular, say that LHL Attorneys Inc ("LHL") are neither competent, independent, nor ethically trustworthy, and as a result should not be permitted to act as the legal representatives of the class.

67. The company respondents adopt this position on the following basis. The certification court must be told how the class action is to be funded and what arrangements have been made.[14] The founding papers do not provide this information. The company respondents, in their answering affidavits, accuse LHL of a lack of candour in failing to disclose the funding arrangements which, they say, calls into question the firm's suitability to be appointed the class lawyers. The replying affidavit discloses the following. The funders are DRRT Limited and Therium. Both companies are said to be successful funders of large class actions. Therium is one of the largest funders of cases in the world. The funders have indemnified the representative plaintiff against adverse costs orders. The funders will earn a reasonable percentage of the monetary damages recovered on behalf of the class. LHL's fees are paid by the funders.

68. The company respondents and other opposing respondents were not satisfied with these disclosures, which they considered vague, and left many questions unanswered - not least, how LHL's fees were to be paid and whether LHL had complied with the

[14] *Children's Resources para 48,*

provisions of the Contingency Fees Act 66 if 1997 ("CFA") . These matters were raised in the company respondents' heads of argument.

69. Certain of the opposing respondents brought proceedings to secure the documents evidencing the funding arrangements. Ms De Bruyn opposed this relief, initially on the basis of privilege, confidentiality and prejudice. This stance was taken by reason of the reticence of the funders. On advice, this opposition was withdrawn. I gave an order requiring the disclosure of certain documents relevant to the funding arrangements.

70. This gave rise to an application by Ms De Bruyn to file a further supplementary affidavit to explain the documents disclosed and further elaborate upon the funding arrangements. Ms Hassan, an attorney and director of LHL, offers an explanation as to why the funding arrangements were not fully set out in the affidavits already filed. Although aware of the need to satisfy the court that the action would be adequately funded, Ms Hassan fell into error because she could not find authority as to how what she describes as "*out-and out funding*" was to be disclosed; she apprehended that funders may resist disclosure; and that it would be extraordinary to disclose this aspect of the applicant's litigation strategy. She had thought disclosure could be resisted on grounds of confidentiality and privilege. But after taking advice from counsel, Ms Hassan recognized the need fully to disclose the funding arrangements and bring them into compliance with "South *African legal prescripts*". She also sought to cure misunderstandings by the respondents as to the funding arrangements. Her failure to disclose the funding arrangements in her founding and replying affidavits was an error which she attributes to the novelty of class action litigation in South African practice.

71. What follows in Ms Hassan's supplementary affidavit is a description of the funders DRRT and Therium, the funding agreements and the extent of the funders' commitments. These agreements have given rise to sustained criticism on the part of the opposing respondents. To this I will return. Ms Hassan also provides the details of LHL's fees. One important feature of these agreements is that LHL agreed to reduce

their fees in consideration of their participation in the proceeds accruing from the European and South African class actions.

72. Ms Hassan took advice on LHL's fee agreements. Counsel expressed concern that LHL's participation in the proceeds of the class actions may amount to a contingency fee arrangement and could also impair LHL's ability to advise the class in an independent manner. This, Ms Hassan says, was never the intention. The intention of LHL was to comply with the law, and, if errors were made, they were made in good faith.

73. Ms Hassan explains that she then set about remedying the position. She wrote to the Legal Practice Council to explain that the LHL's funding arrangements*, "may not be strictly compliant with South African law*". After discussions with Ms De Bruyn and the funders, the agreements were amended. LHL waived its participation in the proceeds of the class action and agreed to be paid their ordinary fees at the certification stage of the proceedings and reduced fees thereafter.

74. Counsel's concern as to LHL's funding arrangement is well founded. S2(2) of the CFA stipulates that the success fee of a legal practitioner may not exceed 100% of the practitioner's normal fee. The LHL funding arrangement, before the waiver, was not calculated on this basis. Rather, it allowed LHL 50% of the proceeds of the South African class action (that is 50% of 25% recovered in terms of the agreement with Ms De Bruyn) and 5% of the proceeds of the European class action. That does not ensure conformity with the limit imposed by s2(2) of the CFA.

75. The company respondents do not view the conduct of LHL to be benign error. They say, rather, that the failure to make full disclosure of the funding arrangements in the founding affidavits and replying affidavit was at best inept and at worst deliberate concealment. It was only the efforts of the opposing respondents to procure documents under compulsion that finally required candour. LHL's arrangements to participate in the proceeds of the class actions, both in this country and in Europe, is

unethical, quite likely unlawful, and comprises LHL's independence. LHL's notification to the Legal Practice Council is formulaic and evasive. LHL was all too quick to do the funders bidding in resisting disclosure of the funding documents. LHL has demonstrated poor judgment on matters of importance. Its agreements to participate in the proceeds of the South African and European litigation bound LHL to a business arrangement that compromised its independence. Understood in this way, the company respondents contend that LHL cannot act as the class attorneys.

76. Counsel for Ms De Bruyn submits that this account is too uncharitable. That mistakes were made is not to be doubted, but LHL was not dishonest. Errors were corrected when they were pointed out. The funding agreements were always predicated upon the court ultimately agreeing to them. There was no effort to avoid scrutiny. The initial refusal to provide the funding documents on the grounds of privilege, confidentiality and prejudice was driven by the funders. Ms De Bruyn does not seek LHL's replacement, and such replacement would be prejudicial.

77. The conduct of LHL does, in my estimation, give reason for concern. The funding arrangements were of self-evident importance. LHL, together with the funders, had spent time fashioning them. It is difficult to understand how LHL thought they deserved cursory treatment. The most likely explanation is that the funders hoped to avoid scrutiny of the arrangements in the course of the certification proceedings. That LHL went along with this, even in the face of the misgivings of the opposing respondents, does indicate that the funders have exercised unwarranted influence over the decision making of LHL. This was made plain in the grounds of opposition offered to resist the production of the funding documents. It should not require that the clarifying light of litigation be cast before attorneys who would act for a class make independent judgments. The agreement that LHL shares in the rewards of any success of the class actions also shows a lack of judgment as to whether this might compromise LHL's independence. The need to consider the legality of any such agreement is obvious. But was not done.

78. I recognize that this is complex litigation in which there are many moving parts, and errors occur. The errors that were made, regrettably, implicate matters of great importance: independence, legality, and disclosure. I weigh this against the considerable efforts that LHL has made to bring this matter to court, their understanding of the matter, their acknowledgement of mistakes, and a willingness to correct them. I have also to consider the consequences if LHL were to be removed from acting as class attorneys. To do so would not end the prospect of certification, if other considerations favoured its grant, but without other attorneys to take their place, the class action might flounder. There is no indication that other attorneys are willing to replace of LHL as class attorneys.

79. The answer it appears to me is for the court to appoint a supervising attorney who will be required to ensure that LHL at all times acts independently, and in the best interests of the members of the classes for whom the litigation is brought. If the supervising attorney should have any concern that there is any want of independence, candour or professional ethics on the part of LHL in its conduct of the litigation, the supervising attorney will be required to report the matter to the trial court. The trial court would then take appropriate action. This acknowledges the warranted concerns that the company respondents have raised, while permitting LHL to continue to act, under a form of scrutiny that will ensure that LHL's past errors do not recur.

FUNDING

80. A further aspect of judging suitability concerns the funding arrangements. Of importance in this case are the arrangements that have been secured to obtain third party funding. LHL, the prospective class attorneys, were originally to participate in the proceeds of the class actions and compromise the fees they would charge to bring the case. That arrangement has been abandoned by LHL, and hence LHL no longer offers their services for a stake in the successful outcome of the proceedings. The funding of the class action is to be provided by third party funders. And it is to those arrangements that I now turn.

81. In *Children's Resources,* the court drew attention to the question as to how the class action was to be funded. The funding arrangements must not compromise the requirement that the litigation is conducted in the interests of class members. The appeal court was exercised by the risk that the contingency arrangements of lawyers might compromise the interests of the class members. Here the question is whether third party funding arrangements place at unwarranted risk the interests of the class representative, the class members or the interests of the defendants. The Supreme Court of Appeal has warned that third party funders, incentivized by profit, should not be able to take over litigation for their own benefit.[15] Hence, as I have emphasized, the need for the class attorneys to be independent of third party funders, and exercise that independence in the interests of the class.

82. A helpful account as how the courts should assess third party funding arrangements is to be found in the Canadian case of *Houle*[16]*.* The funding arrangements should be necessary to provide access to justice; they should be fair and reasonable in doing so (which includes protecting the interests of the defendants) ; the access provided must be meaningful; the arrangement must not over-compensate the funders for assuming the risks of the litigation; the funding arrangements must not interfere with the duty of the class lawyers to act in the best interests of their clients; and the class representative must be able to give instructions and exercise control over the litigation in the best interests of class members.

83. Regrettably, the third party funding arrangements were not disclosed in the founding affidavit. As I have explained, the agreements were disclosed under compulsion, and the detail of the funding arrangements was then set out in a supplementary affidavit as the matter approached the hearing date. Even during the course of the hearing, and responsive to criticisms offered by the respondents, yet further documents and

[15] *Price Waterhouse Coopers Inc and others v National Potato Co-Operative Limited [2004} 3 All SA 20 (SCA) at para 41*
[16] *Houle v St Jude Medical Inc 2018 ONSC 6352 para 33*

explanations have been put up. This is unsatisfactory. But I have afforded the respondents an opportunity to make further submissions. I consider it preferable to consider this aspect of the matter on the basis of the documents and information now made available.

84. The essential features of the funding arrangements are as follows. The class action is to be funded by the firm DRRT that has had considerable experience in funding significant litigation. DRRT has undertaken to pay the expenses incurred in the litigation and to indemnify Ms De Bruyn from adverse costs orders. Under the terms of a cooperation agreement, DRRT has assigned part of its funding obligations to another firm, Therium. Therium commits to fund the South African class action in an amount of EUR 700 000 and to provide for adverse costs insurance in an amount of EUR 1 000 000. In terms of the addendum to the Litigation Funding and Indemnity Agreement, the funders will seek 25% of the class wide recovery, subject to the court determining the acceptability of this funding fee percentage. DRRT will be liable for the fees of LHL, which fees are now agreed on a revised basis that eliminates LHL's participation in any damages award. DRRT may cease to fund the litigation if it believes that there are not reasonable prospects of success in the litigation. However, DRRT will be required to pay the fees and costs of the litigation up to the point of its withdrawal. The addendum also clarifies that DRRT's assignment of funding obligations to Therium does not relieve DRRT of its primary obligation to fund the litigation.

85. It is plain that absent these funding arrangements there is no basis to suppose that the proposed class action could go forward. Ms De Bruyn cannot fund the litigation and no alternative funders have been found. There is no suggestion that the classes proposed would be able by other means to procure funding. LHL does not say that the firm would undertake the litigation under the terms of the CFA. The funding arrangements are thus necessary to permit the class action to proceed. The access

that the funding provides is meaningful. LHL and counsel, already steeped in the matter, will be funded to take the class action forward.

86. There are three issues that require further analysis. First, are the funding arrangements fair and reasonable, most especially, in securing the interests of the class members and the defendants? Second, are the funders compensated on a reasonable basis? Third, do the funding arrangements preserve the independence of the legal representatives and the ability of the class representative to carry out her duties? The greater part of the respondents' objections fall under one or other of these issues. Where they do not, I will give them separate treatment.

87. I commence with the proposed compensation of the funders from any recovery that results from the class action. The draft order that is sought reflects in prayer 6 that the litigation funders agree to fund the running costs of the litigation and to indemnify the class members from adverse costs orders. In consideration of this obligation, the funders will be entitled to 25% of the proceeds of any damages awarded or settlement reached, and the party and party costs awarded to the representative plaintiff.

88. A cap of 25% is consistent with the provisions of the CFA. It was not suggested that it is not a figure that provides a reasonable ceiling to the success fee that might become payable to the funders. The proposed class action is complex and it is likely to be costly and endure for some time. However, neither the funding agreements, nor prayer 6 of the draft order, seek 25% as a cap, but rather as a determined reward for success.

89. This gives rise to some difficulty. The company respondents point to the following conundrum. If 25% of the proceeds is required as a condition of the funding, and its approval is sought from the certification court, how is this to be squared with the requirement that it is for the trial court to determine what is a justifiable success fee, either in approving a settlement or at the conclusion of the trial, should the class action be successful. The success fee that is justifiable will depend on many factors. But of

course, the costs incurred by the funder, the risks assumed, and the outcome achieved will be salient. These matters are not known at the stage of certification. The certification should not usurp the role of the trial court, yet that is what is sought.

90. This conundrum reflects a deeper difficulty. Third party funding is a commercial proposition. Its virtue is that it commits funding to litigation that would not otherwise be brought. But as with most commercial ventures, the possible reward is a function of the risk that is assumed at the outset. Profit is a function of ex post determination, once the risk has been run and success results. Yet the courts, by seeking to retain the power of the trial court to determine the ultimate reward for the funder, undermine the funding model of risk taking by third party funders.

91. This problem of risk and reward is compounded by the need to consider the interests of class members and bind them to the outcome of the litigation. The reward made to the funders diminishes the compensation that is paid to class members, should the class action be successful. This trade off may appear best made by the trial court when the interests of the funders and class members can best be assessed. But to do so erodes the commercial basis of a funding model that is predicated on prospective risk and reward.

92. The difficulty is reflected in the draft order proposed. While prayer 6 stipulates the reward that will be due to the funders, prayer 8 recognizes that the funder's entitlements whether under a settlement or final award will be subject to the approval of the trial court. Some recognition of this appears in the funding agreement between DRRT and Ms De Bruyn: clause 6 states that a settlement must be approved by the court, after it conducts a hearing to determine whether the settlement is fair, reasonable and adequate.

93. Ultimately, there is a conflict of ends. The funder requires certainty as to the reward for taking the risks of the litigation and providing the funding. The interests of class members require that the trial court should retain the competence to determine what

constitutes a fair and reasonable reward for the funding provided and the risk assumed. The *ex ante* commitment and the *ex post* judgment cannot be reconciled.

94. There is however a way of giving some recognition to both sets of interests. The funders must recognize that the certification cannot stipulate for the reward that will be due, in the event of success. That is for the trial court. However, the certification court can stipulate that a particular reward is, *ex ante,* a reasonable return for the risk assumed by the funder in funding the litigation. The downside risk assumed by the funders is the cost of funding the litigation in the event that the litigation fails or yields a very modest award. Of course, there are other possibilities: a large settlement, for example, after incurring little cost. But ultimately, the certification court can and should indicate what the reasonable *ex ante* reward for the funder should be. That figure will be taken into account by the trial court in determining the reward to paid to the funder. It will assume no small measure of importance because an essential metric of what the funder deserves is what it was willing to risk to fund litigation that would not otherwise have materialized.

95. This has entailments. First, there can be no certification on the basis that the funders will be entitled to 25% of any settlement or award of damages. Second, there will have to be an acknowledgement by the funders that their funding commitments remain in place notwithstanding this limitation. Third, should there be certification, the order should reflect this. Fourth, to take account of the interests of the funders, the certification court should stipulate for an *ex ante* risk/return ratio that is warranted.

96. Following this approach allows that third party funding can be secured, with commercial viability, that permits the class action to proceed, while continuing to recognize the final decision-making competence enjoyed by the trial court. I am aware that this approach to the matter was not known to the parties at the time the matter was argued. Should the need arise, an opportunity will be given to Ms De Bruyn to meet its requirements, and provide reasons why 25% (or some revised figure) is a

reasonable *ex ante* return for the risk assumed. Opposing respondents will be permitted to make their own submissions.

97. The opposing respondents draw attention to a further feature of the funding arrangements that they consider problematic. The funding must be secure to ensure that the litigation can proceed and that meaningful access is provided to the courts. The opposing respondents have queried the "walk away" provisions in the funding arrangements that would permit the funders to abandon their funding commitments. If the funders can walk away, then the funding is insecure and meaningful access to the courts is not secured.

98. The most recent iteration of the draft order reads in relevant part as follows:

> *"subject to consultation with the class members, the litigation funders reserve the right to cancel the funding agreements where they are of the view that the matter lacks reasonable prospects of success. The litigation funders will remain liable for expenses and adverse costs orders incurred until the date of cancellation "(prayer 6.3)*

99. The opposing respondents submit that this allows the funders to cancel the funding agreements if the funders form the view that the matter lacks reasonable prospects and this gives considerable discretion to the funders to terminate the funding. Ms De Bruyn submits that it would amount to an abuse for the funders to be required to fund unmeritorious litigation.

100. The funders cannot act without constraint in deciding to terminate their funding of the class action. Class members must be consulted. There would also have to be a basis to believe that the matter lacks reasonable prospects. It is the prospects of the litigation that signify, and not any overall assessment of risk and reward. But there may be a basis that would permit of termination, even though it is a view that perhaps only a minority would share. That does give the funders a margin of appreciation on

the question of prospects to permit of lawful termination. That margin of appreciation may differ from the assessment made by a disinterested but informed person.

101. No one would reasonably resist the proposition that if litigation reaches a point where it lacks reasonable prospects of success, the litigation should not be continued. A view as to reasonable prospects is standardly required of counsel and attorneys, and that view must be objectively rendered in the best interests of the client. The funders however may form their view with greater latitude and in their own interests.

102. One option is to permit the funders to terminate their funding on an assessment by counsel and the attorneys of Ms De Bruyn that the class action lacks reasonable prospects. They have professional duties to make the assessment on a disinterested and informed basis. The other option is to permit the funders to form the view, but put in place protections. The funders would be required to obtain the opinion of the class attorneys and counsel as to the reasonable prospects of the litigation. The funders would be required to consider that opinion. If the opinion thought there were reasonable prospects, the funders would have to provide reasons to the supervising attorney as to why they took a different view. If the supervising attorney considered the funders' view to lack a proper foundation, then the funders would only be permitted to withdraw funding if the trial court, upon consideration of the matter, decided that the position of the funders as to reasonable prospects indeed had a proper foundation.

103. The second option is more cumbersome but it allows the funders, who undertake the funding obligation , to enjoy a margin of discretion to have a reasonable difference of opinion as to the reasonable prospects. Either option would in my view create sufficient safeguards that the funding commitments cannot be capriciously withdrawn and that funding will remain available to maintain access to the courts. One further consideration is this. As the litigation proceeds, the funders will have invested ever more in the litigation. Their sunk costs will at a point exceed the marginal incremental cost of seeing the litigation through to completion. The further the litigation proceeds,

the smaller is the incremental cost to secure a successful result. That too provides structural incentives that render the funding more secure.

104. Whichever option is chosen, this will require some alteration to the draft order and the funders' commitments. But provided they are agreed, this aspect of the funding arrangements can be rendered sufficiently secure.

105. I turn to consider a number of interrelated issues raised principally by Deloitte. Deloitte is concerned that the funding arrangements do too little to protect the defendants in the event that adverse costs orders are granted in their favour. The unsatisfactory manner in which the funding agreements were disclosed left Deloitte, and other opposing respondents, with questions that Ms De Bruyn's attorneys sought to answer during and indeed after the hearing. I have permitted this in the interests of having a complete picture and by allowing the opposing respondents to make post hearing submissions.

106. Certain matters have been clarified. First, Therium is not the sole funder of the class action. DRRT has committed to fund the litigation, over and above the specific sum put up by Therium and its undertaking to provide adverse costs insurance. DRRT has agreed to pay the fees of LHL and is liable for adverse costs orders. DRRT's liability stands unless the funding agreement comes to an end or DRRT lawfully withdraws. Although the financials of DRRT have not been produced, the affidavits indicate that the firm is a significant funder of litigation in various parts of the world. The DRRT funding commitments, taken together with those of Therium, provide a reasonable basis to suppose that the class action will be adequately funded.

107. Second, Deloitte raises the concern that the walk-away provisions would allow DRRT to exit the litigation, avoiding liability for adverse costs orders made up to that point. This concern has been met by an addendum to the funding arrangements and the draft order in terms of which DDRT will remain liable for the expenses and adverse

costs orders incurred up until the date of cancellation of the funding agreement or DDRT's lawful withdrawal of funding. This cures the concern.

108. Third, Deloitte raises issues concerning the indemnity cover that Therium has secured in respect of adverse costs orders. Therium has undertaken to take out adverse cost insurance with cover of EUR 1000 000. The policy was however not provided, and Deloitte questioned whether the cover was in place, whether DRRT was a beneficiary of the policy, what exclusions were provided under the policy, and whether the policy in fact applied to the proposed South African litigation. These concerns have largely been dealt with. The policy (containing its exclusions) has been provided, as also the endorsements to the policy. Correspondence from the insurer confirms coverage of the South African litigation and that Therium has secured cover. It appears that Therium has honoured its undertaking to take out adverse cost insurance.

109. Deloitte placed some reliance upon the *Petersen* case, decided in the Federal Court of Australia.[17] There the question was whether an insurance policy provided sufficient security for the costs of litigation funded by a third party funder. Although the case is of some interest in the scrutiny it gave to the policy of insurance, class certification does not require that security for costs be provided by an applicant or those who fund her. Rather, the interests of the defendants figure as one set of interests among others that warrant consideration when the funding arrangements are scrutinized. To the extent that adverse costs orders made in favour of the defendants are likely to be honoured, this counts in favour of certification. It is, with much else, a factor to be weighed. Given DRRT's funding commitments, taken together with the insurance cover secured by Therium, defendants are not placed at significant risk that adverse cost orders will not be paid, for so long as the funders continue to fund the litigation.

[17] *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited [2017] FCA 699.*

110. That gives rise to a further concern expressed by Deloitte. If the funders depart the scene, is Ms De Bruyn not exposed to the adverse costs orders that might be made, and by extension, are the defendants then not at risk? There can be little doubt that this is so. But I do not consider that it is an eventuality that needs to be considered at the stage of certification. The proposed class action is funded by third party funders. If that should change, Ms De Bruyn , as class representative, would have to consider carefully whether the litigation should or could proceed. We cannot anticipate what she would do because there are so many matters that are unknown and would have a bearing on her decision. In these changed circumstances, should they ever come about, the defendants could apply to the trial court to revisit the regime under which the class action was being litigated. There is no cause to anticipate these matters for the purposes of certification.

111. These considerations permit me to return to the broad criteria, referenced above, against which the funding arrangements stand to be judged. The funding is necessary to permit the litigation to proceed. It funds legal representation that will allow for meaningful access to court. The funding, it appears to me, strikes a fair balance between protecting the interests of defendants, the funders and the class members. There is funding and insurance cover to secure the payment of adverse costs orders made in favour of the defendants. The funders may withdraw, but under conditions that permit of some scrutiny of their evaluation of the prospects of success. As to the interests of class members, any payment to the funders from an award or settlement will require the sanction of the trial court. The funders' assumption of risk will be taken into account, but so too will the interests of class members. That class members are bound by the terms of these funding arrangements is an incident of certification. But there is a likelihood, as I have already observed, that the great majority of these class members are retail investors who would otherwise be unlikely to be able to litigate their claims. This class action gives them an opportunity to do so on terms that do not appear to me unfavourable to them. Those who think otherwise may opt out of the class. The funding agreements should be made available to class members so that

they can make an informed choice as to whether to opt out. The funding arrangement thus appear to me fair and reasonable.

112. That leaves over for consideration two further criteria of importance. First, do the funding arrangements compromise the duty of the class lawyers to act in the best interests of their clients? Second, do the arrangements interfere with the ability of the class representative to exercise control over the litigation and give instructions in the interests of the class she represents? Formally, the funding arrangements do not interfere with the duties of the lawyers and the class representative. But it must be recognized that a formal separation of powers, does not mean that the funders may not *de facto* exercise unwarranted influence. Regrettably, the funders have already shown a propensity to do so and the attorneys a willingness to yield to the wishes of the funders, contrary to the requirements of the law as to disclosure and candour.

113. It is unavoidable that third party funders, by reason of their position, can seek to influence matters outside their remit. The funders' commercial stake in the outcome of the litigation can make undue influence a singular temptation. That risk is not best dealt with by banishing third party funding. That would have the perverse result of limiting access to the courts in cases that might be deserving. Rather, the risk is mitigated by requiring that class lawyers do their duty to their clients, and that the class representative is reminded of the important duties she owes to the members of the class to act in their interests. I have already indicated that a supervising attorney is to be appointed by the court. Among the matters the attorney would be required to supervise is the sedulous adherence to duty by the class lawyers and the class representative. The very presence of the supervising attorney should act to deter the funders from exercising undue influence. Under these conditions, the funding arrangements adequately meet the consideration of suitability.

114. The 15th Respondent initially opposed certification on the narrow basis that the class definitions permitted of a duplication of claims. That issue has since been

resolved. However, the 15th Respondent maintains that there remains a problem of duplication because South African residents who have instituted claims are not excluded persons. The most recent draft order includes in the definition of excluded persons all persons who have instituted claims against the respondents in South Africa and abroad. There is no duplication.

115. The 15th Respondent then broadened its opposition on two bases: that the funding arrangements are inadequate and the class attorneys are not suitable. These matters have been dealt with. The 15th Respondent makes a number of further submissions. He opposes the introduction of the affidavit of Mr Reus, filed as an attachment to the supplementary founding affidavit of Ms Hassan. The affidavit was sworn before a notary in the state of Florida who is not a commissioner of oaths under South African law. That may be so. But even if the evidence is hearsay, I allow its consideration because under the stringent conditions of lock down that exist across the world, to insist upon compliance with formalities would deprive the court of evidence that there is no reason to think does not reflect the testimony of Mr Reus.

116. The 15th Respondent raises two other matters that are distinctive. First, he says that the funding arrangements offend against the exchange control regulations in two respects. The funding provided by the funders to conduct the litigation in South Africa requires the permission of Treasury or a person authorized by Treasury. So too permission is required to pay to the funders the percentage of an award or settlement that is contemplated by the funding arrangements. The relevant provisions of Regulation 3 of the Exchange Control Regulations preclude payment to the funders, should that eventuate, without permission. The payments by the funders to LHL and counsel are not so clearly impermissible under Regulation 3. But I need not take a definitive position on this because nothing about this court's certification is a sanction for any infringement of the Exchange Control Regulations. Should certification take place and permission is needed, it will be for the parties concerned to obtain the required permission. Treasury will decide. Treasury permission is not a condition that

must be in place for the grant of certification. It may become necessary for the implementation of the class action, if it is certified. That contingency does not render the funding arrangements incapable of certification.

117. Lastly, 15th Respondent contends that the agreement between Ms De Bruyn and DRRT is a contract of insurance in terms of which DRRT provides indemnity insurance to Ms De Bruyn in consideration of DRRT being paid a premium, being a percentage of the ultimate award. However, DRRT is not licensed to conduct insurance business in terms of the Insurance Act 18 of 2017, and hence the funding arrangement is unlawful and cannot be sanctioned.

118. In my view, the contention is incorrect. The agreement between Ms De Bruyn and DRRT is not a contract of indemnity insurance. Any payment to DRRT is an uncertain event. A contingent undertaking to make a payment is not an obligation to pay a premium, as that term is defined in the Insurance Act. Nor, upon proper characterization, is the agreement one of insurance. The central feature of the agreement is that DDRT, in consideration of its funding of the class action, will be entitled to a percentage of any award or settlement, as sanctioned by the trial court. The indemnification of Ms De Bruyn is an important but ancillary feature of an agreement to fund litigation on risk for a return. That is not a contract of insurance.

119. By way of conclusion , I find that a case has been made that the considerations relevant to suitability have been adequately satisfied, with some required modifications to the order under which certification would take place.. I have noted some significant reservations. But none that in my view should prevent certification on this dimension of judgment.

A TRIABLE ISSUE

120. I turn to consider whether the proposed class action raises a triable issue. *Children's Resources*, to recall, sets the standard as to what constitutes a triable

issue. First, the cause action must survive the test on exception, that is to say, can the opposing respondents satisfy the certification court that on every interpretation that can be put on the facts to be proven at trial, the applicant has made out no cause of action. Second, has the applicant shown that there is evidence which, if accepted, will establish the cause of action relied upon, that is to say, there is a prima facie case?

121. Ms De Bruyn has attached revised draft particulars of claim to the replying affidavit. Although counsel for Ms De Bruyn made it plain that this draft remained a work in progress, it is a voluminous document from which the central features of the cause of action may be discerned.

122. The case that is sought to be taken to trial, shorn of elaboration, is this. The Steinhoff shareholders allege that SIHL, Steinhoff NV, the directors of these companies (collectively "the Steinhoff directors "), and the auditors, Deloitte, failed to carry out their duties. These duties are both statutory and common law duties of care.

123. In essence, SIHL and Steinhoff NV, through the actions of the Steinhoff directors, engaged in unlawful transaction, styled the "impugned transactions". The effect of the impugned transactions was to overstate the assets, income and profits of SIHL and Steinhoff NV in the financial statements of these companies and to understate their liabilities and expenses. SIHL, Steinhoff NV and the Steinhoff directors were required to disclose the true nature of the impugned transactions and reflect the true position in the financial statements of the companies for the benefit of existing and potential shareholders. SIHL and Steinhoff NV, acting through the Steinhoff directors, failed to do so. As a result, the financial statements of the companies did not comply with prescribed financial reporting standards and failed fairly to present the state of affairs and business of SIHL and Steinhoff NV. The financial statements were false, falsified, misleading, and incomplete; they failed accurately to show the assets, liabilities, equity, income and expenses of the companies; and failed to reference matters that would permit shareholders to appreciate the companies' financial state of affairs and solvency.

124. The auditors, Deloitte, conducted an audit of the financial statements of SIHL in the period June 2013 to December 2015. Deloitte is alleged to have either become aware of the impugned transactions or should, by the exercise of reasonable care, have done so. Deloitte is then said to have made auditors' reports, representing that the financial statements of SIHL were reasonably free of material misstatement, when this was not the case.

125. This conduct of the Steinhoff directors, SIHL and Steinhoff NV is alleged to contravene the Companies Act 71 of 2008 ("the Companies Act ') and give rise to liability in terms of s 218(2) or s 20 (6) the Companies Act for the damages suffered by shareholders who are members of the proposed classes. Alternatively, the Steinhoff directors, SIHL and Steinhoff NV, deliberately or negligently breached their duties of care, and became liable to the class members for damages suffered by them.

126. The conduct of Deloitte is alleged to contravene the Companies Act, the Auditing Profession Act 26 of 2005 (" the APA ") and the International Financial Reporting Standards ("IFRIS") which gives rise to Deloitte's liability for damages suffered by class members in terms of s 218(2) and s 20(6) of the Companies Act and s 46(7) of the APA. In the alternative, Deloitte was negligent, breached its duty of care to shareholders and is liable to class members for the damages suffered by them.

127. A claim is also made on the basis that an offer was made to the public of securities in Steinhoff NV for subscription or sale, pursuant to a prospectus. (" the prospectus claim"). One or more shareholders are alleged to have acquired securities on the faith of the prospectus. The prospectus and its attachments contained untrue statements as contemplated in ss 104 and 105 of the Companies Act. The directors (or certain of them) and the auditors in terms of ss 104 and 105 are alleged to be jointly and severally liable to class members for damages suffered as a result of the untrue statements.

128. The draft particulars of claim then deal with causation and damages. It is alleged that at various stages the class members acquired securities in SIHL or Steinhoff NV. The securities were traded on the JSE and the FSE. The price at which securities traded was based on the market's perception of the underlying value of SIHL and Steinhoff NV. This perception was causally connected to the unlawful conduct of the defendants, sketched above. Class members who purchased shares suffered damages. This occurred in the following way. First, class members bought their shares at a price in excess of the true value of the shares, the price having been inflated as a result of the unlawful conduct of the defendants. Second, class members decided to hold their shares, the price of those shares having been inflated as a result of the unlawful conduct of the defendants, whereas class members would have sold their shares had they known of the defendants' unlawful conduct. The precise quantification of the class members' entitlement to damages is said to stand over for later determination.

129. The director respondents and Deloitte submit that the revised draft particulars of claim, taken together with what is said in the affidavits filed on behalf of Ms De Bruyn, do not disclose a cause of action. The class action should not be certified because the test set out in *Children's Resources* as to whether there is a triable issue is not met. The director respondents also contend that a prima facie case has not been made out, at the very least against the directors opposing the application.

130. The claims against the directors and Deloitte may be categorized in the following way. First, SIHL and Steinhoff NV ("the Steinhoff companies"), their directors and Deloitte owed shareholders in these companies a duty of care at common law. These prospective defendants made negligent (and in some instances grossly negligent) misstatements concerning the Steinhoff companies. These misstatements caused the price of the shares in the Steinhoff companies, traded on the JSE and FSE, to be bid up to inflated levels. Shareholders bought the shares at these inflated price levels and retained the shares because of the prices at which the shares continued to trade. When the falsity of the misstatements was made public, the shares suffered a

dramatic fall, occasioning loss to the Steinhoff shareholders. That loss is actionable as a common law delict (“ the common law claims”)

131. Second, the Steinhoff companies, their directors and Deloitte have breached their statutory duties and this gives rise to statutory liability for the losses suffered by shareholders. I shall reference these claims as the “statutory claims” which include the prospectus claim.

COMMON LAW CLAIMS

132. I commence with the common law claims. Do they give rise to a triable cause of action? The logical starting point is to consider whether the misstatements that are alleged to have issued from SIHL, Steinhoff NV, the directors and Deloitte constitute wrongful conduct as against the shareholders. This requires some analysis. To whom were the alleged misstatements made? The draft particulars of claim offer two answers. First it is said that the misstatements were made so as to influence the price of the shares which in turn influenced persons who were prospective purchasers of Steinhoff shares to buy the shares in the relevant periods. Second, the misstatements influenced the price of the shares which in turn influenced shareholders who had purchased the shares to retain.

133. The issue that then arises is whether SIHL, Steinhoff NV, their directors or Deloitte owe any duty of care to prospective purchasers of Steinhoff shares who go on to buy the shares or to shareholders who decide to hold their shares, rather than to sell them over the relevant period ?

134. The Constitutional Court in *Country Cloud* has explained the general principle of the law of delict: conduct causing pure economic loss is not prima facie wrongful, wrongfulness must be positively established. Negligent misstatements causing pure economic loss is a category of case where wrongfulness is recognized where the plaintiff can show a right or legally recognized interest that the defendant has infringed.

The enquiry into the question of wrongfulness is one of policy and the legal convictions of the community.[18] *Loureico*[19], framed the matter as one of the duty not to cause harm, to respect rights and the reasonableness of imposing liability. These are principles stated at the highest level of generality.

135. The issue may be framed, following *Country Cloud, as follows:* what right or legally recognized interest do the shareholders enjoy that has been infringed by the Steinhoff companies, the directors and Deloitte? This warrants a consideration of certain fundamental principles of company law.

136. In general, directors of a company owe fiduciary duties to the company and not to its members. This is an incident of the *Salomon* principle that a company is distinct from its members. Directors control and manage the affairs and assets of the company. They do not control or manage the affairs or assets of the members. It is this legal relationship between the directors and the company that requires that the fiduciary duties of directors are owed to the company. That this is so is a matter of high and durable authority. A director is a trustee for the company and is required as a result to show the utmost good faith towards the company[20] .

137. That the fiduciary duties of directors are owed to the company is also an entailment of the rule in *Foss v Harbottle (1843) 2 Hare 461.* The rule requires that the company and not its shareholders have an action for wrongs done to the company and losses suffered by the company. It is the company that may seek redress for breach by the directors of their duties because these duties are owed to the company.[21]

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[18] *Country Cloud Trading CC v MEC, Department of Infrastructure 2014 (12) BCLR 1397 (CC) at [22] – [25]*
[19] *Loureico v Imvula Quality Protection (Pty) Ltd 2014(3) SA 394 (CC) at para [53]*
[20] *Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 216; Howard v Herrigel 1991 (2) SA 660 (A) at 678; SIbex Construction(SA) (Pty) Ltd v Injectaseal CC 1988 (2) SA 54 (T) at 65; Peskin v Anderson[2001] 1 BCLC 372 at para 33*
[21] *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 2 SA 173 (T) at 200 - 201*

138. These propositions are well established. The question that has occasioned more debate is whether the fiduciary duties of directors may also be owed to shareholders, and perhaps to other persons, such as creditors. The holding in *Percival v Wright*[22] that the directors of a company are not trustees for individual shareholders was sometimes understood to mean that a director could not owe fiduciary duties to shareholders, whether collectively or individually. Such an absolutist position was questioned in our law in *Sage*[23], and has not been followed in English law[24]. The position that has developed since *Percival v Wright* is this. The legal relationship between the directors and the company gives rise to fiduciary duties owed by the directors to the company. That relationship does not give rise to fiduciary duties owed by the directors to the shareholders of the company. However, the directors may owe fiduciary duties to shareholders in special circumstances, in addition to their fiduciary duties owing to the company. The duties owed by directors to the company does not preclude duties that may also be owed to shareholders. However, the duty that a director may owe to a shareholder is not based upon the relationship between a director and the company, nor is there any general duty that is owed by directors to shareholders.

139. What is required for directors to owe duties to shareholders has been described as a special factual relationship subsisting between the directors and the shareholders.[25] There is no closed list of these special factual relationships. A fiduciary duty owed by directors to shareholders has been recognized in certain cases where directors have persuaded outside shareholders to sell their shares in the company to the directors. In family companies where shareholders reposed trust and confidence in a family member and sought advice and information, a fiduciary duty was recognized.[26] So too, in circumstances where directors had made representations to

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[22] *Percival v Wright [1902] 2 Ch 421*
[23] *Sage Holdings Ltd v The Unisec Group Ltd and Others 1982 (1) SA 337 (W) at 365*
[24] *Peskin v Anderson [2001] 1 BCLC 372 at [30] – [37]*
[25] *Peskin at para [33]*
[26] *Coleman v Myers [1977] 2 NZLR 225 at 328 -330; Brunninghausen v Glavanics [1999] 46 NSWLR 538 at 547-560; Chez Nico (Restaurants)Ltd [1992]BCLC 192*

shareholders to secure options, undertaking to sell the shares of shareholders, the directors assumed a position of agency and were accountable to the shareholders.[27]

140. In *Sharp*[28], the 5800 claimants were shareholders of Lloyds Bank. They pleaded fiduciary and tortious duties owed by directors of Lloyds Bank to the bank's shareholders. The directors had recommended to the shareholders the takeover by Lloyds of HBOS ("the acquisition"). The acquisition was approved by the shareholders at an extraordinary general meeting. The acquisition did not turn out well, and the claimants sought damages from the directors. The defendants conceded that the directors were under a duty to take reasonable care that the statements made in the circular to shareholders were true and that there were reasonable grounds for the opinions expressed. The issue that arose was this. Beyond the duty of the directors to provide sufficient information to the shareholders to enable them to make an informed decision as to how to vote on the acquisition ("the sufficient information duty"), was there a more general fiduciary duty owing by the directors to the shareholders? The court held that there was no such duty. There was no special relationship between the directors and shareholders. The directors certainly knew more than the shareholders, but that gave rise to no fiduciary duty to act on behalf of the shareholders or to put the interests of shareholders first.[29]

141. The following propositions may be derived from these cases. First, appointment to the office of director gives rise to fiduciary duties owed by a director to the company. It is the company that enforces these duties and seeks to remedy their breach. Second, there is no general fiduciary duty owed by directors to shareholders of the company. The assumption of office and the relationship between the directors and the company entails no such duty. A fiduciary duty is predicated upon a duty of loyalty. The director owes that duty to the company. And that requires the director to act in the interests of the company. Third, the fiduciary duties of directors to the company may

[27] *Allen v Hyatt 919140 30 TLR 444 , a decision of the Privy Council.*
[28] *Sharp & Others v Blank [2015] EWHC 3220 (Ch)*
[29] *At para [15]*

cohabit with a fiduciary duty owed by directors to the shareholders. Fourth, the recognition of a fiduciary duty owed by a director to the shareholders (whether individually or collectively) requires the showing of a special factual relationship between the directors and the shareholders. This will usually require a personal relationship with the shareholders or some specific dealing between the directors and the shareholders. That may come about because the directors have purchased shares from the shareholders or acted as the agent of the shareholders to sell their shares or sought the approval of the shareholders for a transaction giving rise to a duty to provide sufficient information to the shareholders.

142. It is also important to recognize the attributes of directors that do not give rise to a duty by the directors to the shareholders. That directors will generally have more information, and of better quality, concerning the company provides no basis for imputing a fiduciary duty to shareholders. This asymmetry of information is a structural outcome as to how the directors are positioned in the company. But their advantageous position requires directors to use the information for the benefit of the company. It does entail a general fiduciary duty to shareholders to bring about symmetry of information. There are particular circumstances in which the directors may be required to provide information to shareholders. One such circumstance is where the directors provide advice to shareholders as to how they should vote on a proposed transaction, as occurred in *Sharp.* That does not entail a general duty to shareholders to bring about symmetry of information. It goes no further, as was conceded in *Sharp,* than this: if there is a duty to provide information, reasonable care should be taken to ensure that the information is correct and there are reasonable grounds for the opinions expressed.

143. The issue that then arises is whether the proposed cause of action, as set out in the draft particulars and the affidavits, provides a basis to support a fiduciary duty owing by the Steinhoff directors to the shareholders of Steinhoff. The draft particulars make the following allegations. The Steinhoff directors, and through them, SIHL and Steinhoff NV, engaged in the impugned transactions. The transactions were unlawful

and gave rise to a duty to disclose to existing and potential shareholders the true nature of these transactions and reflect them in the companies' financial statements. This the Steinhoff directors, and hence SIHL and Steinhoff NV, failed to do. They were negligent in not doing so.

144. The proposed cause of action pleads no special factual relationship between the Steinhoff directors and the shareholders or prospective shareholders of Steinhoff. SIHL and Steinhoff NV are not small companies, akin to a family business, with closely held shares. Nor have the Steinhoff directors sought to acquire shares from Steinhoff shareholders or held themselves to be agents of the shareholders. The only transaction that was proposed by the Steinhoff directors was the scheme of arrangement proposed to SIHL shareholders. That transaction is the subject of the prospectus claim; it is not the basis upon which the claim in delict is brought.

145. The draft particulars and affidavits do not set out facts that, if proven at trial, would give rise to a special factual relationship between the Steinhoff directors and the Steinhoff shareholders, much less, prospective Steinhoff shareholders. The Steinhoff directors' relationship was with the companies to which they were appointed, and hence, their fiduciary duties were owed to SIHL and Steinhoff NV. The draft particulars do not state that the directors had undertaken to act for the shareholders or had forged a particular relationship with shareholders by reason of some special dealing with the shareholders or proposal made to the shareholders.

146. The consequence, on the authorities that I have cited, is that no foundation has been laid for the proposition that the Steinhoff directors owed fiduciary duties to the shareholders. If that is so, then the shareholders and prospective shareholders have no right or legal interest to assert against the Steinhoff directors Nor, on this analysis, is any duty owed by SIHL or Steinhoff NV to the shareholders. As I have explained, the fiduciary duties of the directors are owed to the companies. The companies enjoy the right to enforce these duties, seek redress and claim damages against the directors, in the event of breach. The companies are the beneficiaries of the fiduciary

duties owed to them. No benefit accruing to the companies, nor right vesting in them requires or entails any duty owed to the shareholders. Absent a duty owed to the shareholders or prospective shareholders, the cause of action against the Steinhoff directors, SIHL and Steinhoff NV fails to establish wrongfulness.

147. What the draft pleadings rely upon is this. The Steinhoff directors, SIHL and Steinhoff NV "engaged *in*" the impugned transactions. These transactions were unlawful. The impugned transactions were reflected in the financial statements of SIHL and Steinhoff NV. As a result, the assets, income and profits of SIHL and Steinhoff NV were overstated and their liabilities and expenses were understated. This it is alleged gave rise to a duty on the part of SIHL, Steinhoff NV and the Steinhoff directors to disclose to existing and potential shareholders of these companies the "t*rue nature*" of the impugned transactions and reflect this in the financial statements of the companies. I shall refer to this as "the disclosure duty".

148. This case rests upon the proposition that the complicity of the Steinhoff directors in orchestrating the impugned transactions required these directors to disclose the true facts concerning the impugned transactions in the companies' financial statements for the benefit of the shareholders and prospective shareholders.

149. The alleged complicity of the Steinhoff directors in concluding or permitting unlawful transactions is a breach of their fiduciary duties. If then the Steinhoff directors failed to cure this breach by making sure that the transactions were properly disclosed in the financial statements; that would be a compounding breach. The difficulty however is not the identification of the duties breached, but to whom the duties are owed. The draft pleading assumes that the duty is owed to the shareholders, and even to prospective shareholders. But the basis of the disclosure duty is not explained, other than to state that the price of the shares was based on the perception of the market as to the underlying value of the shares. That perception was impacted by the failure of the directors to disclose accurate information in the financial statements of

the companies concerning the impugned transactions. This led shareholders and prospective shareholders to be misled by the pricing of the shares in the market at inflated levels, which in turn led these investors to buy shares at prices in excess of their true value or to hold the shares when they would have sold them.

150. The difficulty with this chain of reasoning is not that it is implausible to posit that the mispricing of shares as a result of non-disclosure could give rise to loss, but rather that the cause of loss is not a sufficient basis to decide wrongfulness; and more particularly, to whom the duty of disclosure is owed. The heart of the enquiry as to wrongfulness in cases of pure economic loss is to determine whether the loss should lie where it falls, and it is for the plaintiff to persuade the court that this presumptive allocative principle should not prevail. That is not done, in cases such as this, by pleading that the conduct of the directors caused the shares to be mispriced, which in turn, caused purchasers of the shares to suffer loss.

151. In my view, the case advanced has this difficulty. A case can be pleaded that the conduct of the Steinhoff directors is in breach of the directors' fiduciary duties. But In accordance with the standard account of directors' fiduciary duties, those duties are owed to the company. Any harm suffered as a result of the breach is actionable by the company to whom the duties are owed. The breach may also cause harm to shareholders, and indeed potentially to other classes of persons: creditors, employees, suppliers and customers. The harm does not establish that the duty is owed to all persons who suffer harm. On the contrary, and as the cases show, there must be a special relationship that subsists between the directors and the plaintiffs so as to require that the fiduciary duties owing to the company are also due to other persons. The prospective action fails to make that case. And compounds the problem by alleging that the Steinhoff companies to whom fiduciary duties are owed also owes those duties to the shareholders. I find no basis on the pleaded case, read with the affidavits, that permit me to find that the Steinhoff directors, SIHL or Steinhoff NV owe fiduciary duties to the shareholders. Without such a case, I cannot find that there is a cause of action because, absent wrongfulness, there is no delict.

152. Wrongfulness, as our courts have emphasized, is of course a wide-ranging enquiry. It may be argued that the consideration of fiduciary duty is to focus too narrowly. Wrongfulness is determined by a reasoned judgment as to what policy and the legal convictions of the community require. Our courts have emphasized a number of considerations that inform this enquiry[30] . They may be summarized as follows. First, cases of this kind give rise to the twin dangers of numerous plaintiffs and indeterminate liability. What is the regulating principle that differentiates deserving plaintiffs from the plurality of persons who may have suffered foreseeable loss? Second, what kind of losses are suffered by different classes of persons? Where should the risk of that loss lie, and what are the costs and benefits to society of imposing liability or declining to do so? Third, does the conduct infringe important rights that we value? Fourth, was the representation made in a commercial setting in response to a request, in circumstances where the plaintiff was dependent upon the defendant for the information provided? Fifth, could the plaintiff reasonably have taken steps to avoid the risk of harm: often styled the vulnerability to risk principle? These considerations are by no means exhaustive, nor of application in every case.

153. The claims of shareholders for the loss of value of their shares certainly gives rise to the problem of numerous plaintiffs and indeterminate liability. Steinhoff shares were widely traded on the JSE and FSE. The variety of types of trading that takes place on financial markets by means of different financial instruments is legion. These trades take place in response to price signals in the market. Those price signals, as the particulars of claim allege, are responsive to what is said in the company's financial statements. It is difficult to imagine that directors should potentially be liable to every person who trades in a share or a derivative financial instrument because the quoted price is in some measure reflective of financial information concerning the company that has been made public by the directors. Nor is it clear how to differentiate the

[30] *Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) s 13 and 14; Cape Empowerment Trust Ltd v Fisher Hoffman Sithole 2013(5) SA 183 (SCA) paras 21 and 25;Van der Byl v Featherbrooke Estate Home Owners' Association 2019 (1) SA 642 (GJ) at paras 11 -20*

claims of those who have traded the share. The natural sympathy that might be extended to small retail investors is not a principled basis of differentiation because it is not the size or skill of the person who makes the trade, but the fact that the price is distorted by misinformation that affects all who buy and sell shares and other instruments in the market.

154. This difficulty is compounded by the problem of consistent extension. If there is liability to shareholders, the particulars of claim already contend for a duty owed to persons who were considering the purchase of Steinhoff shares, and then did so. The novelty of this claim is that it is the price of the share that influences the decision to purchase, even before the person has bought the share and become a shareholder. But if there is liability to prospective purchasers who buy the share is there liability for prospective purchasers who decide not to do so because of distorted price signals? And what of other classes of person who rely upon the share price of a company or even more directly upon the company's published financial statements? Are directors also to be held liable for the losses incurred by creditors, suppliers, customers? It is hard to imagine that liability on this scale could be justified.

155. There is little doubt that if directors were to be held liable to shareholders and prospective shareholders, this would operate as a powerful deterrent against negligent misstatements made in the financial statements of the company. It is certainly a public good that transactions in the market should be informed by information that is accurate. But the risk thereby assumed by directors of huge liabilities to large numbers of investors is likely to be so great that it would deter many from assuming office in listed companies to the detriment of these companies, capital markets, and the economy as a whole. The balance of harm suggests that the risk of loss should remain with those who suffered it.

156. There is a further matter of public policy that goes to the conceptual foundations of the company and the compact upon which it is based. The investment by a shareholder in a company is capital placed at risk. The shareholder looks to the

company to secure a return. The shareholder enjoys the great benefit that, save in exceptional circumstances, no risk, beyond the equity stake, is assumed for the liabilities of the company. If the directors breach their duties and the company suffers loss, the company can claim damages from the directors. That permits of redress to make good the loss, and the shareholders secure the benefit of this through their investment in the company. What the cause of action proposed by Ms De Bruyn would do is to permit both the company and the shareholders to claim for the directors' breach of duty. This would render the directors liable not just for the loss to the company but directly to the shareholders for the loss of value of their shares. Quite apart from the question as to whether these losses are different and hence whether the recognition of directors' liability to shareholders is double counting, why should shareholders enjoy the risks and rewards of the limited liability company, but in addition be entitled to look to the directors of the company to underpin the value of their shares? The better view is that shareholders must rely on the company to claim for any loss caused to the company by the directors' breach of duty and enjoy any benefit thereof through the company. By investing in the company, shareholders take the risk that the value of their shares may be affected by misconduct on the part of directors. In order to mitigate this risk, shareholders must look to the company to claim for any loss caused to the company. Beyond this, and save in special circumstances where directors have assumed particular risks by reason of a special relationship forged with shareholders , the diminution in the value of shares caused by the impact of the directors' conduct upon the pricing of shares is simply one of many risks assumed by investors when they acquire risk assets in a market.

157. Adjusting the balance of risk to favour investors and burden the directors of the company in which shareholders have chosen to invest is not self-evidently welfare enhancing. Nor it plain that such risk adjustment is required as an incident of any fundamental right enjoyed by shareholders to invest in risk assets on a market.

158. There are of course situations in which shareholders may have sought specific information from the company and its directors or where directors provide the

information to permit the shareholders to vote on a particular transaction. These situations may forge a special and particular relationship between the shareholders and the company that gives rise to a dependency by the shareholders on the information given to them. And here the shareholders may be able to show that they could not otherwise have protected their position by procuring accurate information.

159. But that is not the proposed case before me. It is not said that the Steinhoff shareholders forged any such relationship. Indeed, they did not because their reliance was based on price signals in the market. Those who buy and sell in markets do depend on the prices reflected in the market and there may be limited ways to identify and verify information that influences market prices, including what is stated in published financial statements. That is why those who invest in shares do so on risk as to the many factors that influence the quoted price of traded shares and the law of delict should not in general be used to attenuate that risk.

160. For these reasons, I find that Ms De Bruyn has failed to plead a case that makes out the requirement of wrongfulness. Absent such a case, there is no common law liability in delict against the Steinhoff directors, SIHL and Steinhoff NV, and hence the reliance on this cause of action gives rise to no triable issue.

161. The opposing Steinhoff directors raised other issues which they submitted rendered the cause of action in delict excipiable. Important among them is the question whether the reliance by shareholders and prospective shareholders on the price of quoted shares, influenced by the published financial statements of the Steinhoff companies, provides a tenable basis upon which to establish detrimental reliance, and hence causation, in an action based upon negligent misstatements. I find it unnecessary to express a view of these matters, given the conclusion I have reached on the question of wrongfulness.

162. For the same reason, it is also unnecessary for me to determine whether there is a *prima facie* case in delict that has been made against the opposing Steinhoff

directors or indeed more generally. There is simply no showing on the draft particulars and affidavits that members of the class have a cause of action that is recognized as a matter of law.

THE COMMON LAW CLAIM AGAINST DELOITTE

163. Ms De Bruyn seeks to hold Deloitte liable for the damages caused to shareholders and prospective shareholders as a result of Deloitte's negligent performance of the audit of SIHL. The auditors negligently represented that the financial statements were reasonably free of error when they were not; the quoted share price of the shares was influenced by what was contained in the financial statements; and shareholders and prospective shareholders relied upon the price to acquire shares or maintain their holding of Steinhoff shares.

164. As with the claim against the Steinhoff directors, this cause of action requires a showing of wrongfulness in respect of a claim for negligent misstatement causing pure economic loss. In a claim against an auditor for pure economic loss wrongfulness is not presumed. [31] More is required, and whether wrongfulness can be established is a question of public and legal policy. Our courts have taken the position that the mere fact that it was foreseeable that the financial statements would be used in a commercial transaction between the company for whom the audit was performed and a third party does not give rise to duty of care by the auditors to the third party, with whom the auditors enjoyed no relationship.[32]

[31] *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole at para [21]*
[32] Axiam Holdings Ltd v Deloitte &Touche 2006 (1) SA 237 (SCA) para 18

165. The auditors are not the functionaries of the company. The auditors are appointed to discharge an independent function to report to the shareholders as to whether the financial statements of the company give a true and fair view of the company's financial position.[33] It might be thought that this places the auditors in a proximate relationship to the shareholders that could give rise to a duty of care. This issue was very fully explored in *Caparo*[34], a decision of the House of Lords. The appellants had audited the accounts of a company, Fidelity Plc ("Fidelity"), approved by the directors of Fidelity. The accounts were issued to the shareholders. The accounts reported profits below predictions and the share price of Fidelity dropped. Caparo Industries Plc ("Caparo"), already a shareholder when the accounts were issued, purchased additional shares in Fidelity and then made a successful take-over bid. Caparo complained that its purchase of shares and bid were made in reliance on the accounts which were misleading in overvaluing the stock and undervaluing the after-sales credits. Caparo sued the auditors for negligently certifying that the accounts showed a true and fair view of Fidelity's financial position, when they did not.

166. Lord Bridge examined the relationship between an auditor and the shareholders of a company. The interest of the shareholders that an auditor has a duty to protect is their collective interest in the proper management of the company. If the negligent audit of a company were to deprive the shareholders of their powers in general meeting to call the directors to account that might give rise to a cause of action. However, there was no basis to find that the scope of the duty of an auditor to a shareholder extends to a decision to purchase additional shares. That decision is one taken by an existing shareholder from a position no different to any other member of the investing public.

167. There is much in *Caparo* that is of persuasive value. First, there is no duty of care to the public that relies upon the audited accounts of a company. Such liability is far too diffuse and indeterminate. Second, in order to find that the auditors owe a duty of

[33] *Powertech Industries Ltd v Mayberry and another 1996 (2) SA 742 (W) at 746*
[34] *Caparo Industries PLC v Dickman[1990] 2 AC 605*

care to shareholders the auditors must apprehend or reasonably apprehend that their advice will be relied upon by a particular class of shareholder for a particular purpose or transaction. Whether described as proximity or a special relationship, unless advice is sought and given to specific persons who depend upon it for a particular purpose, it is hard to see how auditors may be held responsible to all shareholders for anything they may decide to do on the strength of the company accounts. Third, in most circumstances, the harm done by the auditors' negligence is done to the company and any loss may be claimed by the company to the indirect benefit of shareholders through their shareholding. If the shareholders have suffered a distinctive loss as a result of the shares they have bought in the company or shares they did not sell, absent a special advisory relationship, shareholders are in no different position to other members of the investing public to whom auditors of a company owe no duty of care.

168. The reasoning in *Caparo* and its explication of the proximity test has been applied by the Appellate Division in *Standard Chartered Bank of Canada*[35]*,* a case concerning a bank's liability for negligent misstatement. There is every reason to think that *Caparo* is just as availing (if not more so) where, as here, we are concerned with auditors' liability for negligent misstatements.

169. Counsel for Ms De Bruyn sought to counter the persuasive reasoning in *Caparo,* referencing the more recent decision of the Supreme Court of Canada in *Livent.*[36] Livent was a publicly listed company. It employed Deloitte as its auditors. Deloitte identified irregularities in Livent's accounting of profits. Instead of resigning and reporting the matter, Deloitte helped to prepare a press release which misrepresented the basis for the reporting of profit and continued to support Livent, providing a comfort letter for the underwriting of a sizeable debenture. A new management team discovered fraud and irregularities, giving rise to a restatement of Livent's financial

[35] *Standard Chartered Bank of Canada v NedPerm Bank Ltd 1994(4) SA 747 (A) at 772 -773*
[36] *Deloitte & Touche v Livent Inc 2017 SCC 63*

statements. This caused the share price to fall and the company went into receivership.

170. The issue for determination in *Livent* was whether Deloitte owed a duty of care to Livent and the scope of that duty. The majority of the court held that Deloitte owed and breached its duty of care to Livent in relation to the company's statutory audit. The purpose of the statutory audit was to protect the company from undetected error and wrongdoing and to give shareholders reliable information to permit of their oversight of the company. The negligent audit by Deloitte exposed Livent to reasonably foreseeable risk of financial loss that could have been avoided had Deloitte conducted a proper audit.

171. Although *Livent* provides an account of the duty of care of auditors that is broadly consonant with our law, it is of no comfort to Ms De Bruyn's case. First, the claim was made by the company against its erstwhile auditors for the losses caused to Livent. The case has nothing to say about a duty of care owed by Deloitte to shareholders who invested in the company. Second, the court found that there may be a proximate relationship between an auditor and its corporate client giving rise to a duty of care, but the scope of that duty is constrained by the purpose for which the services of the auditor were rendered and the reliance that the client places on the advice or service rendered. Third, the court drew a distinction between Deloitte's participation in the press release and comfort letter which was undertaken for the purpose of soliciting investment and Deloitte's preparation of the audit which was prepared to assist shareholder oversight. The inability of shareholders to engage in oversight gave rise to reasonably foreseeable injury, the solicitation of investment did not.

172. What *Livent* entails, of relevance to the case before me, is the following. The duty of care of auditors in the preparation of a company's statutory audit is owed to the company. The purpose of the audit is to protect the company from error and wrongdoing and to provide reliable information to shareholders to permit of their oversight. These purposes do not render the duty one that is also owed by the auditors

to the shareholders. Rather, the shareholders benefit from compliance with the duty so as to exercise their rights of oversight by way of the governance of the company. The shareholders do not enjoy rights against the auditors for their audit of the company. And even where the auditors participated in representations that sought to solicit investments for the company, the issue of liability in *Levant* was not to recognize the liability of auditors to investors but rather the extent of the auditors' duty to the company in respect of the efforts to solicit investment.

173. *Livent* offers no support for the claim against Deloitte in the case before me.

174. The revised draft pleadings, taken together with the affidavits, in my view fail to disclose a cause of action against Deloitte. First, there is no case pleaded that Deloitte's opinion concerning the accounts of SIHL was sought by Steinhoff shareholders, nor that there was any special relationship that subsisted between Deloitte and the Steinhoff shareholders; nor that Deloitte had any reason to apprehend that the Steinhoff shareholders (or a subset of them) would rely upon Deloitte's opinion concerning the accounts when making investment decisions about the acquisition or disposal of Steinhoff shares. This is so because the proposed class is made up of persons, as to one subset of the class, who relied upon the quoted price of Steinhoff shares in deciding to purchase share. These persons were either not shareholders when they made the acquisition or, if they were, that was entirely incidental to the acquisition. Thus, they were indistinguishable from members of the investing public. As to the other subset of the class, this is made up of persons who were shareholders but did not sell their shares in reliance on the elevated price of the shares. Here too, there is no proximate or special relationship that would extend to these persons a duty of care owed by Deloitte when these persons made investment decisions.

175. Second, while it is important to recognize that auditors, appointed to report as to whether the company's accounts give a true and fair view of the company's financial position, have a duty to discharge that is independent of the company, the scope of

that duty requires careful delineation. This duty is owed to permit shareholders to exercise their rights as shareholders in respect of the governance of the company. It is not owed to permit shareholders to make investment decisions as to whether or when to buy or sell shares in the company. Much less is it owed to persons deciding whether to purchase shares in the company who then decide to do so.

176. Third, whatever the desirability of securing conditions that foster making investment decisions by reference to undistorted price signals, this does not rise to the level of a right, constitutional or otherwise, that requires protection.

177. Fourth, and for reasons already explained in respect of directors, there is no compelling basis to suppose that the transfer to auditors of the risks associated with investment decisions made by persons paying regard to distorted price signals would yield some net social benefit, even if the auditors' incorrect opinion may have contributed to that distortion. An investment in shares is an investment in a risk asset. Many factors may influence the price of a share, including information that turns out to be false. That is one of the risks that inheres in this type of asset. Better in my estimation, as a matter of policy, to let the risk of faulty opinions lie with those who invest in traded equities and enjoy the returns of their risk-taking.

178. I conclude on this aspect of the pleadings and affidavits that rely upon a common law claim in delict by shareholders and prospective shareholders against Deloitte, based on the failure to conduct a proper audit of SIHL and Deloitte's publicly stated opinions, that cause of action along these lines is recognized in our law.

179. Deloitte submitted that a claim for negligent misstatement that rests upon the effect of the misstatement upon the price of the shares in the market and the decisions by investors to buy or sell shares cannot meet the requirement of legal causation – the causal connection is too remote. Given the conclusion that I have reached as to wrongfulness in respect of the auditors' liability claim, there is no need to determine

this criticism of the proposed cause of action. For the same reason, I do not need to determine whether there is a *prima facie* case in delict made against Deloitte.

THE STATUTORY CLAIMS

180. The essential features of the cause of action that is proposed on behalf of class members has been summarized above. The statutory claims against the Steinhoff directors, SIHL and Steinhoff NV rest upon three claims: a claim in terms of s218(2) of the Companies Act, a claim in terms of s20(6) of the Companies Act, and a prospectus claim in terms of ss 104 and 105 of the Companies Act. I turn to consider these claims.

181. The draft pleadings allege that the Steinhoff directors, and through them, SIHL and Steinhoff NV, having engaged in the impugned transactions, failed to state the true financial position of the companies in their financial statements, and contravened the following sections of the Companies Act: ss 22, 28, 29, 30, 40 and 76. These contraventions give rise to liability to the class members, jointly and severally, for any damages suffered by them in terms of s218(2) and s20(6).

182. Section 218(2) reads as follows:

> *"Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention."*

183. Counsel for Ms De Bruyn submits that the language is clear. While the provision establishes liability in the widest terms, if that is what the legislature decided, the Steinhoff shareholders have a claim against SIHL, Steinhoff NV and the Steinhoff directors for their contraventions of the Companies Act.

184. Two cases were cited in support of the proposition that s218(2) does impose liability upon directors for contraventions of the Companies Act at the instance of third parties. In *Rabinowitz*[37], the court, citing the interpretations of two commentaries on the Companies Act, found, on exception, that the directors can be held personally liable in terms of s218(2) for acquiescing in or knowing about conduct that falls within the ambit of s22(1) – the prohibition against reckless trading. In *Sanlam*[38], it was held that a person induced to enter a transaction could sue for damages in terms of s218(2) as a result of the contraventions by directors of s 76(3).

185. A different conclusion was reached, *obiter,* in *Hlumisa*[39]. Here shareholders of African Bank Investment Limited (ABIL) sought to have ABIL's directors and auditors held liable on the basis of the devaluation of their shares. The shareholders' claim relied upon s218(2) and the conduct of the directors in contravening s22(1) and s76(3). The court did not accept that s218(2) could be interpreted on the radical premise that the legislature intended to dispense with the requirement of fault, to place no limit on third party claimants, nor restrict the provisions of the Companies Act that could be relied upon to establish a contravention. Nor is there is there reason to interpret s218(2) on the basis that it discards the common law requirements of fault, foreseeability, causation and a proper plaintiff. Indeed, the court did not consider that s218(2) was intended to change the common law.

186. The decision was ultimately decided on the basis that shareholders had no claim for a loss that was suffered by the company. And since it was not the plaintiffs' case that they suffered a loss separate and distinct from the loss suffered by the company, the plaintiffs had no cause of action. This, it is submitted on behalf of Ms De Bruyn, renders *Hlumisa* distinguishable because the class members in the present case have suffered a loss that is distinctive and it is questionable whether SIHL and Steinhoff NV have suffered any loss at all. That submission as to what loss is alleged in the present

[37] *Rabinowitz v Van Graan & others 2013(3)SA 315 (GJ)*
[38] *Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd & Others [2014] 3 All SA 454 (GJ)*
[39] *Hlumisa Investment Holdings(RF)Limited and Another v Kirkinis and Others 2019 (4) SA 569 (GP)*

case was much debated. However, what is plain is that *Hlumisa* provides a strong endorsement of the need to interpret s218(2) so as to chime with the common law and the limitations upon liability imposed by the common law, including the *Prudential*[40] principle of reflective loss: a shareholder cannot sue for the diminution in value of his or her shares where that loss is simply a reflection of the loss suffered by the company.

187. The interpretation of s218(2) must commence with the question of interpretation posed in *Steenkamp*[41] : does the statute give rise to a claim for damages for breach of a statutory duty? If so, that ordinarily excludes a common law claim for breach of statutory duty. If the statute indicates that there is no liability for a breach of statutory duty, that would ordinarily support the conclusion that there is no common law claim for breach of statutory duty. If the statute is neutral as to the question of liability for statutory breach that may indicate that no common law claim can be made. The issue is ultimately one of the interpretation of the statute (text, context and purpose) so as to decide whether the statute confers a right of action or provides the basis for a legal duty at common law.[42]

188. The plain language of s218(2) imposes liability for loss or damage suffered as a result of a contravention of any provision of the Companies Act. This has led certain courts to interpret the provision literally and in the widest of terms. However, the very generality of the language does not answer two questions, without irresoluble circularity. First, what obligation arises from the contravention that gives rise to liability? Second, to whom is the obligation owed?

189. The literalist interpretation may be tested in this way. Section 77 (2) (a) holds directors liable for breach of fiduciary duty, in accordance with the principles of the common law, for loss, damages or costs sustained by the company caused by any breach by a director of a duty imposed upon directors in ss 75, 76(2) or 76(3)(a) or

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[40] *Prudential Assurance Co Ltd v Newman Industries Ltd (No2) [1982] 1 Ch 204 (CA)*
[41] *Steenkamp NO v The Provincial Tender Board of the Eastern Cape [2006]1 All SA 478 (SCA) at paras [21] and [22]*
[42] *Olitzki Property Holdings v State Tender Board and Another 2001 (3) SA 1247 (SCA) at para [12]*

(b). I have found that the common law does not hold directors liable to shareholders who suffer the loss of value of their shares, even if, as alleged, that loss was sustained by reason of the contraventions by the Steinhoff directors of the standards required of them as laid down in s76(3). Section 218(2) cannot be read to render directors liable to shareholders for breach of their duties under s 76(3), when the common law, incorporated by reference in s 77 (2) (a), recognizes no such liability. To interpret s218(2) in a literal way would give rise to incurable contradiction. Section 218(2) would be read to impose liability upon a director who contravened the standards in s76(3) in favour of shareholders who sustained loss, whereas, s 77(2)(a) imposes no such liability.

190. This point of interpretation is further illustrated by considering s22. Section 22 states that a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. A company contravenes s22 only if it carries on its business with one or other of the specified species of fault. Any liability that arises under s22 is determined under the disciplining concepts of fault to be found in this provision. No coherent interpretation would suggest that because s218(2) provides for liability without reference to fault, s22 can be read to impose strict liability. On the contrary, fault is constitutive of the contravention.

191. Section 218(2) should not be interpreted in a literal way. Rather, the provision recognizes that liability for loss or damage may arise from contraventions of the Companies Act. And so the statute confers a right of action. But what that right consists of, who enjoys the right, and against whom the right may exercised are all issues to be resolved by reference to the substantive provisions of the Companies Act.

192. Such an interpretation answers another difficulty that the literal interpretation of s218(2) does not. As *Hlumisa* observed, can s218(2) be understood to impose liability without the regulating concepts of fault, foreseeability and remoteness; and an

undifferentiated conception of permissible plaintiffs. Such an understanding would require an interpretation of s218(2) that gives rise to wholesale liability at the instance of all persons who sustained loss or damage as a result of the contravention. That is to place a burden of liability and hence risk upon directors so great that it is hard to imagine who would accept office on these terms. And if that is what the legislature intended it would be expected to have made the imposition of so great a burden clear. The better interpretation is that the legislature intended that the specific requirements of any liability are to be found in the substantive provisions of the Companies Act. Section 218(2) has a different function. It determines the question posed in *Steenkamp:* contraventions do permit of a right of action. Whether there is a right of action, who enjoys the right, and on what basis are all matters regulated by the substantive provisions of the Companies Act.

193. I am however in respectful disagreement with the central holding in *Hlumisa* that s218(2) imports common law concepts of liability. Although it is a durable and well established principle of interpretation that legislation must be interpreted in conformity with the common law, s218(2), read with the substantive provisions of the Companies Act, give rise to a statutory scheme of liability. This does not displace the common law, save in respect of the common law claim for breach of statutory duty. Rather the statutory scheme of liability exists alongside liability recognized at common law, for example in delict for a director's breach of a duty of care.

194. This is so for the following reasons. First, as *Steenkamp* makes plain, once a statute provides for a claim for the contravention of a statutory duty, that ordinarily excludes a common law claim for breach of statutory duty. Second, where the Companies Act intends directly to import the principles of the common law for the purposes of imposing liability for contraventions of the Act, it states this expressly. This appears plainly in s 77(2). Third, the common law may still inform how the courts interpret the statutory scheme of liability, but that is not the same as either equating the statutory scheme to the common law or importing the common law into the statutory scheme, save where the statute so directs.

195. This interpretation of s218(2) requires that the substantive provisions of the Companies Act must be considered to determine whether the statutory claims of the class members can be sustained.

196. The amended draft particulars are pleaded in the following way. The impugned transactions are alleged to be unlawful in various ways. The impugned transactions caused the assets, income and profits of SIHL and Steinhoff NV to be overstated in the financial statements, and the liabilities of these companies to be understated. The directors of SIHL and Steinhoff NV were under a duty to disclose to existing and potential shareholders the true nature of the impugned transactions in the companies' financial statements. The directors were negligent in failing to do so. Had they done so the value of the shares in SIHL and Steinhoff NV would have reflected their true value.

197. These allegations provide the foundation upon which specific contraventions of the Companies Act are pleaded as follows. SIHL and Steinhoff NV, acting through their directors:

(i) failed to keep accurate or complete accounting records as required by s28(1);

(ii) falsified or permitted the falsification of the companies' accounting records in contravention of s28(3)(b);

(iii) failed fairly to present the state of affairs and business (including transactions) of the companies as required by s28(1)(b)

(iv) failed accurately to show the assets, liabilities, equity, income and expenses of the companies as required by s29(1)(c) and s29(6)(a);

(v) prepared financial statements that were false, misleading and materially incomplete in contravention of s29(2)(a) and (b);

(vi) prepared annual financial statements that failed to include in the reports of the directors matters material for the shareholders to appreciate the state of the companies' financial affairs in contravention of s30(3)(b);

(vii) carried on the business of the companies recklessly, with gross negligence in breach of s22.

(I shall refer to the contraventions listed in (i) – (vi) collectively as the financial statement contraventions, and the contravention in (vii) as the reckless trading contravention)

198. As against the SIHL directors and Steinhoff NV directors the following contraventions of s76(2) and s76(3) are alleged:

(i) The directors failed to communicate to the boards of SIHL and Steinhoff NV at the earliest practicable opportunity, material information that came to their attention;

(ii) failed to exercise the powers and perform the functions of directors in good faith and for a proper purpose, in the best interests of the companies, with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the functions of a director and having the general knowledge, skill and experience of that director.

(I refer to these contravention collectively as the s76 contraventions)

199. A special case is pleaded against Mr Jooste, the 14th Respondent. He is alleged to have acted with intent to deceive or mislead shareholders in contravention of s28(3)(a)(i) and thus to have committed an offence. Mr Jooste is also alleged to have carried on the business of SIHL and Steinhoff NV with intent to defraud any person in contravention of s22.

200. The case is then pleaded that this conduct of SIHL, Steinhoff NV and their directors constitutes contraventions of ss 22,28,29,30,40, and 76, and that in terms of s218(2) SIHL, Steinhoff NV and their directors are jointly and severally liable to class members for any damages suffered by them.

201. I consider first the s76 contraventions. Section 76 sets the standards of conduct required of directors. The liability of directors for failing to meet these standards is set out in s77. The pleaded case relies upon contraventions of s76(2) and s76(3). Section 77 treats of the liability for breach differently for different categories of duty. A breach of the duties described in s76(2) or 76(3)(a) or (b) allows that a director of a company may be held liable , to use the statutory language, "*in accordance with the principles of the common law relating to breach of a fiduciary duty for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty …".*

202. The importation of the principles of the common law into this species of statutory liability disciplines the ambit of liability and, more especially, answers this central issue: to whom are these duties owed so as to exact liability for breach? No liability attaches that is not in accordance with the principles of the common relating to breach of fiduciary duty.

203. I have found that the principles of the common law do not, save in special circumstances not pleaded or relied upon in this case, hold that the directors of a company owe fiduciary duties to the shareholders. Once that is so, the case that is sought to be made out in terms of s76(2) and s76(3) (a) and (b) has no basis in law because these duties are in no way distinctive and are subject to the principle of the common law that the fiduciary duties of directors are not owed to the shareholders.

204. A breach of a duty specified in s76(3)(c) may render a director liable in terms of s77(2)(b) " *in accordance with the principles of the common law relating to delict for any loss damage or costs sustained by the company as a consequence of any breach by the director …".* Here too, common law principles discipline liability, but in accordance with the law of delict. I have found that the law of delict does not recognize that a duty of care is owed by the directors to the shareholders, save where there is a

special relationship that is not here pleaded or relied upon. It follows that the case sought to made out in terms of s76(3)(c) has no basis in law.

205. I consider next the reckless trading contravention. Section 22(1) requires that a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. Section 77(3)(b) provides, *that a director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having… acquiesced in the carrying on of the company's business despite knowing it was being conducted in a manner prohibited in a manner prohibited by s22(1)."*

206. Section 22(1) prohibits a company from carrying on business in stated ways. Since the directors have the central responsibility to manage a company and how it carries on business, s77(3)(b) determines the liability of a director when a company has infringed the prohibition. For liability to arise, the director must have known that the business of the company was being conducted in this way, and acquiesced.

207. Two features of this scheme of liability are apparent. First, the company must carry on its business with one or other attributable type of fault. The fault must be attributable to the company by reason of how those who act for the company have conducted its business. It is however not assumed that every director is complicit. That depends on a director satisfying the twin requirements of knowledge and acquiescence. Second, this is a nuanced regime which limits liability by recourse to company fault and the failure by a director to act in virtue of their knowledge. Liability is individual not collective. These provisions further reinforce the observation, referenced above, that s218(2) is not a self-contained provision that determines liability for contraventions of the Companies Act.

208. Section 77(3) also answers this central question: to whom is a director liable for knowing acquiescing in the company's reckless trading? Put differently, who enjoys a right of action against a director? The introductory language of s77(3) provides the

answer. A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director's knowing acquiescence. It is the company's loss that is claimed and it is the company that is the obvious person upon whom the right is conferred to make good its loss. Such a construction is also consistent with the interpretative force of the common law that directors owe their duties to the company, and if they fail in those duties by knowingly acquiescing in the company's reckless conduct, it is the company that exacts compensation for its loss.

209. It follows that the reckless trading contravention cannot be made out, as a matter of law, because the shareholders have no right of action.

210. There is a further reason that leads to the same conclusion. Section 77(3) renders a director liable for the loss sustained by the company. Counsel for Ms De Bruyn emphasized that class members do not seek to claim for the loss inflicted on the Steinhoff companies, but for their own distinctive losses occasioned by the fall in the value of their shares. This submission was necessitated by the acceptance of the reflective loss principle that proved decisive in *Hlumisa.* But on the basis of the premise that class members wish to claim for their own losses, they enjoy no right to do so in terms of s77(3)(b), which confers a right of action confined to loss sustained by the company.

211. I turn to the financial statement contraventions. These contraventions are an important part of the case the class members wish to make because it was the publication of false and misleading financial statements that, it is alleged, informed the inflated prices at which shares were acquired and decisions were taken by shareholders to retain their Steinhoff shares.

212. The financial statement contraventions fall into three categories. The first concerns the failure by SIHL and Steinhoff NV to keep accurate and complete accounting records, as required by s28. The second concerns the duties resting upon a company

to prepare and provide financial statements that show the company's financial position and that are neither false, misleading, nor incomplete in any material respect. These duties are set out in s29. Third, s30(3)(b) requires that the annual financial statements of a company must include a report by the directors with respect to the state of affairs, the business, and profit or loss of the company and this was not done.

213. The statutory scheme of liability under the Companies Act does not attach a singular consequence for a contravention of the Act. Rather, the Companies Act attaches a regime of liability for particular contraventions. I have already observed that this is so in respect of the contravention of s76 and s22. This is a systemic feature of the Companies Act. A breach of duty may exact compliance by the Commission (s22(3)); a breach may be an offence (s32(5)); and a breach may give rise to liability to make good a loss as a consequence of the breach (s77). Certain breaches are visited with more than one permissible consequence. Thus, s22 permits the Commission to issue a compliance notice. In addition, a director may be held liable to the company for reckless trading (s 22(1) read with s77(3)(b)) .

214. The more general point of interpretation is that the legislature has been careful to stipulate what form of liability, civil, criminal or regulatory, may result from different contraventions. There is no coherent reading of the Companies Act that would subordinate this specification of differentiated liability for the recognition under s218(2) of general liability of all persons who contravene the Companies Act in favour of all who suffer loss as a result thereof.

215. Contraventions of s28 and s29 may give rise to criminal liability (s28(3) and 29(6)), In addition the Commission may issue a compliance notice. (s28(4)). Significantly, s77(3)(d)(i) provides that: " *a director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having ….signed, consented to, or authorized the publication of any financial statements that were false or misleading in a material respect*". This provision imposes liability upon a director for loss or damages suffered by the company as a result of a

director's contravention of s29(2)(a) – the requirement that the financial statements prepared by the company must not be false or misleading in any material respect.

216. This is a clear indication that the legislature gave specific consideration to the question of civil liability in respect of financial statements and decided to provide for a right of action as it did in s77(3)(d)(i). There is no direct imposition of civil liability for a contravention of s28, rather criminal liability may result. That is a legislative choice that must be respected. But civil liability may arise indirectly from a contravention of s28 because a failure to keep accurate and complete accounting records may result in the preparation and publication of false or misleading financial statements and the imposition of civil liability under s29(2)(a) read with s77(3)(d)(i).

217. Section 30 does provide that a contravention may result in civil liability. It does so in a particular form. The obligation resting on a company not to publish financial statements that are false or misleading extends by direct reference to annual financial statements contemplated in s30 (see the introductory language of s29(2))

218. The financial statement contraventions that are to be relied upon by class members to found statutory claims have no basis in the Companies Act. The civil liability that is recognized for such contraventions is to be found in s77(3)(d)(i). As I have already found, this species of liability is imposed upon directors at the instance of the company that has suffered loss. And further, it will be recalled, that the class members seek compensation for the losses they have suffered and not those of the Steinhoff companies. That is not the kind of loss that is contemplated by s77(3)(d)(i). No other civil liability is recognized for the financial statement contraventions. Consequently, the statutory claims based on the financial contraventions have no basis in law.

219. I conclude also that the statutory claim predicated upon s218(2) cannot be sustained because the specific contraventions relied upon do not accord shareholders a right of action against SIHL, Steinhoff NV or the Steinhoff directors.

SECTION 20 (6)

220. The second leg of the statutory claim is based upon s20(6).

221. Section 20(6) reads as follows:

> " *Each shareholder of a company has a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with –*
> *(a) this Act; or*
> *(b) a limitation, restriction or qualification contemplated in this section, unless that action has been ratified by the shareholders in terms of subsection (2)."*

222. The draft particulars make a claim in terms of s20(6) in the following way. The same specific contraventions are relied upon, as is the case in respect of the claims under s218(2). In this claim, it is alleged that the directors of SIHL, Steinhoff NV with gross negligence (and in the case of Mr Jooste intentionally, alternatively fraudulently) caused SIHL and Steinhoff NV to conduct themselves in a manner inconsistent with the Companies Act, alternatively, inconsistent with a limitation, restriction or qualification contemplated in s20. The following sections of the Companies Act are then referenced as being the provisions, limitations, restrictions or qualifications relied upon: 22,28,29,30,40 and 76. This, it is alleged, in terms of 20(6) renders SIHL, Steinhoff NV, and their directors liable to class members, jointly and severally, for any damages suffered by class members.

223. Section 20(6), unlike s218(2), confers a right of action on each shareholder of a company. The provision also specifies the various species of fault that the defendant

must be shown to have had for liability to accrue. This too distinguishes s20(6) from s218(2). The class of defendants upon whom liability is cast is not indefinite. It is any person who, intentionally, fraudulently or due to gross negligence, causes the company to do anything inconsistent with the Act or *ultra vires* the powers of the company.

224. Does s20(6) then confer a right of action upon Steinhoff shareholders to claim from the directors of SIHL, Steinhoff NV and the Steinhoff for damages suffered by the shareholders for causing SIHL and Steinhoff to act inconsistently with the Companies Act or *ultra vires* the powers of the companies?

225. One issue may be resolved with little difficulty. Section 20(6) cannot, logically, be of any application to confer a right of action against SIHL or Steinhoff NV. Section 20(6) confers a claim against any person who causes the company to do anything inconsistent with the Companies Act or *ultra vires* the powers of the company. A company cannot cause itself to do something. As the provision makes plain, it is persons who cause the company to act. Of course, there are circumstances in which the company may be liable for what persons cause it to do. But that is not what s20(6) provides, either expressly or by implication. Liability under s20(6) rests with the persons who cause the company to act, and not with the company that acts as a result of what persons cause it to do. This interpretation is further borne out by the other remedial provisions of s20 that make it clear when the company may be made subject to an order. It follows that no claim can be made by the Steinhoff shareholders against SIHL and Steinhoff NV in terms of s20(6).

226. One ambiguity in the framing of s20(6) is the specification as to whose damages the shareholders have a right to claim. On one reading, it is the damages suffered by the shareholder who enjoys the right to claim. On another reading, it is the damages suffered by the company. It is necessary to interpret s20(6) by recourse to the oft-stated principles of interpretation[43] to resolve this ambiguity.

[43] *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA)*

227. On one interpretation, the content of the right should be understood on the premise that the right is conferred on shareholders for their benefit. That benefit is to hold persons liable in damages for causing the company to act so as to cause loss to the shareholders. So interpreted, shareholders have the right to claim damages for losses suffered by them.

228. There is another way to interpret s20(6). Section 20(6) does not state what causal link must be established between what the company is caused to do and the damages that are claimed. This omission stands in contrast to other provisions in the Companies Act that impose statutory liability. For example, as I have observed, the liability of directors imposed in terms of s77 (2) and (3) refers to loss, damages or costs sustained by the company. Section 20(6) is also at odds with that most basic tenet of liability for civil wrongs: determine who has suffered the loss caused by the wrong to decide who must be compensated.

229. To the extent that s20(6) references causation, it does so by marking out what a person causes the company to do. If, for example, a director of a company, with gross negligence, causes the company to carry on business recklessly in contravention of, and thus inconsistently with, the Companies Act that may do much harm to the company. It may, in terms of s22(3), lead the Commission to issue a compliance notice, requiring the company to cease trading. That would be likely also to cause the price of the shares of a listed company to fall, occasioning loss to shareholders. The point of significance is that it is the harm done to the company that gives rise to the loss suffered by its shareholders. Does s20(6) render persons liable to compensate the company at the instance of the shareholders or to compensate the shareholders, or to compensate both the company and the shareholders?

230. In the face of the omission from s20(6) as to whose loss is compensable, it appears to me that the correct interpretation of s20(6) is that it imposes liability on persons who cause loss to the company. This is so for the following reasons.

231. First, it is important to situate s20(6) within the scheme of s20 as a whole. Section 20 is concerned with the consequences of actions taken by the company outside the limits, restrictions or qualifications of the purposes, powers or activities of the company, set out in the company's Memorandum. I refer to such actions as the *ultra vires* actions. Section 20 gives treatment to the consequences of *ultra vires* actions. This includes the following: when an *ultra vires* action is void (s20(1)); the ratification of an *ultra vires* action (s20(20 and (3)) ; who may restrain the company from doing anything inconsistent with the limitations, restrictions and qualifications of the company's Memorandum (s20(5)); and the position of persons dealing with the company, other than directors, prescribed officers or shareholders (s20(7)). And s20(4), in similar vein, allows that shareholders, directors or prescribed officers of a company may restrain the company from actions inconsistent with the Companies Act.

232. Section 20 is thus concerned with two remedial functions: to empower named classes of person to apply to court to restore the company to a state of affairs where it acts within its powers and lawfully in terms of the Companies Act; and to secure the position of third parties who deal with a company that is acting *ultra vires.* It would be discordant, in the light of these features of s20, if s20(6) were to be interpreted to provide the shareholders of a company with a right of action to claim for damages suffered by them as a result of the *ultra vires* and unlawful actions of the company. A reading of s20(6) that coheres rather better with s20 is this. Section 20 recognizes that persons charged with managing the business of the company, and most especially the directors, may cause the company to act *ultra vires* or unlawfully. Sections 20(4) and (5) provide a statutory remedy to restore the company to legality because its deviance is prejudicial to the company. Section 20(6) is simply a further statutory remedy, of a piece with the restorative objects of ss20(4) and (5). Section 20(6) requires those who have caused the company to act *ultra vires* or unlawfully to make good to the company by way of damages the loss they have caused to the company.

233. This restorative claim for loss caused to the company is a right of action given to the shareholders, and it might be considered an oddity that the right of action was not also bestowed upon directors and prescribed officers, as is the case in ss20(4) and (5). The omission may be prudential. Section 20(6) is likely to focus liability for the losses of a company upon directors, above others, and this renders directors implausible plaintiffs because to bring a case to compensate the company may turn out to be an action of self-harm. Shareholders, on the other hand, do not manage or direct the affairs of the company, and they have an interest in seeking compensation for losses suffered by the company because that will be to the indirect benefit of the value of their shares.

234. Second, the interpretation of s20(6) that I favour avoids incongruity. There seems no reason why the legislature should wish to compensate shareholders for what others have caused the company to do, whilst not compensating the company itself. So, for example, if the company is held to a loss making contract with a third party that is *ultra vires* the company, it would be passing strange that shareholders could claim for a loss that derives from the harm done to the company, but the company could not be compensated. No such incongruity arises if the company is compensated for its loss at the instance of the shareholders because to do so will indirectly benefit the shareholders.

235. Third, there is no obvious rationale as to why the legislature would decide to compensate shareholders, not only to the exclusion of the company, but indeed to the exclusion of other persons who might suffer loss as a result of the company acting *ultra vires* or unlawfully.

236. Fourth, the common law provides helpful interpretative guidance in deciding upon the meaning of s20(6). As I have explained, the common law, save in special circumstances, has set its face against a shareholders' action for pure economic loss caused to shareholders by the actions of directors, and through them, by the company. Yet that is precisely what Ms De Bruyn contends that s20(6) recognizes. There is

however an interpretation of s20(6) that is consistent with the strictures of common law liability. And that, other things equal, is the interpretation that should prevail.

237. Once, as I find, that s20(6) gives rise to no liability for the damages that shareholders may have suffered by reason of the *ultra vires* or unlawful actions of SIHL or Steinhoff NV, the cause of action that founds upon s20(6) is not , as a matter of law, supportable. Recalling that ,as with the claim in terms of s218(2), the cause of action is based on the claim that the class members have suffered a loss distinct from that of the company. Section 20(6) does not afford shareholders a claim for losses of this kind.

THE PROSPECTUS CLAIM

238. The last of the statutory claims against SIHL, Steinhoff NV and the Steinhoff directors is the prospectus claim.

239. In the amended draft particulars it is alleged that on 7 August 2015 Steinhoff NV offered securities in Steinhoff NV to the public for subscription or sale pursuant to a prospectus as contemplated in ss104 and 105 of the Companies Act. The prospectus is said to have contained untrue statements. During the period 7 August 2015 to 5 December 2017, one or more of the shareholders acquired shares in Steinhoff NV on the faith of the prospectus. The directors who fall within the categories defined in s104 (1) are jointly and severally liable for any damages suffered by the class members as a result of the untrue statements.

240. The predicate for liability in terms of s104 is that securities are offered to the public for subscription or sale pursuant to a prospectus. An offer to the public is defined in s95. Section 96(1)(c) states that an offer is not an offer to the public if it is a non-renounceable offer made only to existing holders of the company's securities or persons related to existing holders of the company's securities. Section 96(1)(c) is a carve out from the wide definition of an offer to the public in s 95. That is made plain

in the definition of an offer to the public which does not include an offer made in any of the circumstances contemplated in s96. Accordingly, an offer to the public includes an offer of securities to be issued by a company to any section of the public, whether selected as holders of that companies securities or as holders of any particular class of property, but does not include a non-renounceable offer made only to existing holders of the company's securities.

241. Deloitte and the Opposing Steinhoff directors contend, relying upon the *Goldfields*[44], a decision pertaining to the position under the Companies Act 61 of 1973,that in terms of the Steinhoff prospectus and the Genesis International prospectus there was not an offer made to the public because the offer was a non-renounceable offer made to existing holders of the company's securities. It is common ground that on 7 August 2015, SIHL received an offer from Steinhoff NV to acquire the entire issued share capital of SIHL by way of a scheme of arrangement in terms of s110. The scheme consideration was one Steinhoff NV share for each SIHL share. The offer, it is submitted, was made only to existing holders of the company's securities, and is thus not an offer to the public.

242. Counsel for Ms De Bruyn accepted that the prospectuses did not make an offer to the public. The prospectus claim cannot be pursued. No more needs be said about it.

THE STATUTORY CLAIMS AGAINST DELOITTE

243. The draft particulars plead statutory claims against Deloitte. It is alleged that Deloitte has contravened s30 of the companies Act, ss44(2) and (3), and 45 of the APA and IFRS. These contraventions are said give rise to liability on the part of Deloitte to the class members for any damages they may have suffered. This liability rests upon s218(2) and 20(6) of the Companies Act, and s46(7) of the APA. The draft particulars also bring a prospectus claim against Deloitte in terms of ss 104 and 105.

[44] *Goldfields Ltd & Another v Harmony Gold Mining CO Ltd and Others 2005 (2) SA 506 (SCA)*

244. I have found that s218(2) requires that the substantive provisions of the Companies Act must be considered to determine whether the statutory claims of the class members can be sustained. Section 30 requires that the annual financial statements of a public company must be audited and must include an auditor's report. The claim against Deloitte is that Deloitte failed to conduct a proper audit. Section 30 requires the company to prepare annual financial statements. It is the company and not its auditors who must satisfy the requirements of s30. Section 30 does not impose any statutory liability upon auditors, whether at the instance of shareholders or otherwise, for a contravention of s30. Accordingly, s218(2) provides no basis for a claim against Deloitte.

245. The reliance placed upon contraventions of the APA and IFRS cannot sustain a claim under s218(2). Section 218(2) references, in the clearest terms, a contravention of any provision of the Companies Act. Contraventions of the APA and IFRS are not contraventions of the Companies Act. Section 218(2) does not provide a remedy for such contraventions.

246. Nor is s20(6) of assistance to make a claim against Deloitte. I have already found that s20(6) provides a remedy to make good a loss suffered by the company and not by its shareholders.

247. What then of the statutory claim founded upon the APA and IFRS? Section 46(2) of the APA stipulates as follows :

> " *In respect of any opinion expressed or report or statement made by a registered auditor in the ordinary course of duties the registered auditor does not incur liability to a client or any third party, unless it is proved that the opinion was expressed or the report or statement made, maliciously, fraudulently or pursuant to the negligent performance of the registered auditor's duties."*

248. The oddity of this stipulation is that it is framed on the basis that without proof of certain matters there is no liability. It does not provide, in plain terms, that proof of these matters establishes liability, and hence an independent basis of liability.

249. What signifies however is the limitation of liability introduced by s46(3). The first limitation is that a registered auditor incurs liability to third parties who have relied on an opinion, report or statement of that auditor and suffered financial loss as a result of such reliance. I shall refer to this as the detrimental reliance limitation. The second limitation, in relevant part, is that the auditor must know or could reasonably have been expected to know at the relevant time that the opinion, report or statement would be used by the client to induce a third party to act or refrain from acting or to enter into a transaction, which the third party has concluded with the client or any other person. Alternatively, the auditor knew or could reasonably have been expected to know that the third party would rely upon the opinion, report or statement to act or refrain from acting or to enter a transaction with the client or any other person. I shall refer to this as the limitation as to knowledge.

250. The evident difficulty is that the cause of action against Deloitte does not seek to make out a case predicated upon the detrimental reliance of the shareholders or prospective shareholders upon the opinions of Deloitte expressed in the financial statements. Rather, the cause of action relies upon the allegation that class members bought shares at inflated prices or held shares as a result of the inflated prices of the shares. Class members did not rely to their detriment upon the opinions expressed by Deloitte in the financial statements. That has never been the theory of liability advanced. The cause of action seeks to rely upon an account of causation that is indirect. The falsity of the opinions expressed in the financial statements forms part of the information in the public domain that gave rise to the setting of prices in the market for Steinhoff shares. It is the prices quoted on the exchanges upon which shareholders and prospective shareholders relied.

251. Whatever the validity of this account of causation in order to make out a case at common law based on negligent misstatements (an issue I have not found it necessary to determine), it is not causation in the form of detrimental reliance required in s46(3). Once that is so, there can be no statutory liability that Deloitte incurs to class members by reason of any breach of duty in terms of s44 , even if, *arguendo,* s46(2) establishes an independent species of statutory liability.

252. Nor does the cause of action against Deloitte satisfy the limitation as to knowledge specified in s46(3)(a). The draft particulars do not allege that Deloitte knew or could reasonably have been expected to know that class members would rely upon the opinions expressed in the financial statements. That is simply not the case that is sought to be advanced. Class members did not rely on the opinions expressed, and as a result it is unsurprising that it is not pleaded that Deloitte knew or could reasonably have known that class members did so. Without such a case, there is no liability that can be made out against Deloitte in terms of s46(3)(a).

253. The claim against Deloitte also relies upon a failure by Deloitte of its duty to report irregularities in terms of s45 of the APA, and the contention that such failure results in liability to class members in terms of s46(7). The draft particulars make no allegations that the failure to report irregularities in the Steinhoff companies was causally implicated in the losses suffered by class members. This much is clear from paragraph 178 of the draft particulars that is referred to in paragraph 185 of the draft. The counterfactual as to what would have occurred had a report been made and with what consequences for the quoted price of the shares is left unexplored.

254. But in any event, s46(7) simply indicates that a registered auditor may incur liability to a shareholder for failure to report. Section 46(7) does not say what requirements must be met for this to take place, nor what liability may be incurred. This may be an instance where the legislature had it mind that a failure to report may be wrongful for the purposes of common law liability. But whatever its meaning, it is not a self-standing basis for imposing liability upon Deloitte.

255. Finally, the contraventions of IFRS are advanced as part of the claims made under s218(2) and s20(6) of the Companies Act. These claims, I have found, do not assist to make out a supportable cause of action. The IFRS standards may inform the application of the criteria set out in s44(3) of the APA. No independent cause of action is pleaded based upon the contraventions of IFRS. For this reason also, the draft particulars do not disclose a cause of action.

CONCLUSION: TRIABLE ISSUES

256. The draft particulars, taken together with the affidavits filed on behalf of Ms De Bruyn, do not disclose a cause of action. The consequences of this finding is a matter I will consider in my final consideration as to what the interests of justice require.

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COMMONALITY

257. I turn to the issue of commonality. The utility of a class action depends upon questions of law and fact that are common to members of the class and can be determined in one action.[45] Not every issue of law and fact that will determine a claim must be common. Issues may be common to the class as a whole or to subclasses. *Children's Trust* indicates that there should be common issues that once determined would dispose of all or a significant part of the claims of the class or a subclass. *Nkala* proposes a more forgiving standard: does the determination of the common issues move forward the case of the class?

258. These cases may be reconciled in this way. In a simple case, there is a claim and there are issues that require proof to establish the claim. If there are central issues

[45] *Children's Resources para 44*

upon which the claim turns that are common, then there is a strong showing of commonality for the purposes of certification. The fewer the issues of centrality that are common the weaker is the case. Common issues that are more peripheral carry little weight.

259. Where, as here, there are multiple claims brought against different defendants, the assessment of commonality is made more complex. But the approach does not differ in principle. The judgment of commonality is a question of degree. In a case of multiple claims, there must be a coherent way of understanding the claims so as to decide whether central features of the claims are common to members of the class or subclasses. If this is shown, the more compelling is the showing of commonality. It is possible that certain claims exhibit strong features of commonality and others less so. It is then a question of deciding whether there is nevertheless utility in certifying all the claims. In a complex case of multiple claims, there is no requirement that the court must reach a binary judgment as to whether commonality is satisfied. Claims measure up to the standard of commonality by degree. It is then a question of deciding in respect of the claims whether there are common issues of sufficient centrality to warrant their determination in a single class action or whether certain claims would be better determined in another way or whether the claims lack commonality to a degree that weighs against certification altogether.

260. Attached to the founding affidavit is a schedule of common issues. Ms De Bruyn relies upon the schedule in support of her contention that commonality is adequately satisfied. One feature of the claims that is emphasized by counsel for Ms De Bruyn is this. The class members are all shareholders. They are similarly situated as shareholders in relation to the Steinhoff directors, SIHL, Steinhoff NV and Deloitte. They make the same claims, raising in large measure the same issues, against the proposed defendants.

261. As I have explained at some length, the draft particulars set out the claims that class members propose to make. The draft particulars can be analyzed in different

ways. But in essence, the shareholders seek to hold the Steinhoff companies, their directors and Deloitte liable by recourse to two types of claim. First, at common law, for the losses caused to shareholders for the negligent misstatements contained in the financial statements. Second, by way of statutory liability for contraventions of statutory duty that caused loss to the shareholders. For the purpose of my consideration of commonality, I make the assumption that the claims set out in the draft particulars are valid in law, an assumption that in my view does not hold when considering the question as to whether there are triable issues.

262. There are most certainly issues of law and fact that are common to all class members. The factual foundations upon which all the claims are built are common. SIHL, Steinhoff NV and the Steinhoff directors engaged in the unlawful impugned transactions. The impugned transactions were not disclosed and this caused the assets, income and profits of SIHL and Steinhoff NV to be overstated in the financial statements and the liabilities and expenses to be understated. The financial statements were, in a variety of ways, misstated.

263. So too the attributions of duty, both common law and statutory, that arise from what the directors did and failed to do, and hence what is attributable to SIHL and Steinhoff NV also mark out a significant set of issues that are common. The claims of wrongfulness, in delict or in terms of the Companies Act, rest upon issues of fact and law that are common to the class members as shareholders. That is true also of the varieties of fault that are relied upon. The claims of negligence, gross negligence, and recklessness are common. The position of Mr Jooste, the 14th Respondent, is distinctive in that he is alleged to have committed a fraud. But what is said of Mr Jooste is a feature of the case to be made by all the members of the class.

264. As against these common features of the case sought to be brought, a number of issues are raised. Deloitte submits that the liability of the auditors concerns a very different enquiry from the liability of the directors, even if the facts concerning the impugned transactions are common. That is so. But it is not that different claims are

made against different prospective defendants that counts decisively against commonality, but rather whether the determination of the claim resolves the issue across the class.

265. Commonality is judged by asking whether the issue of law or fact, once determined, resolves the issue for the class. If, by contrast, the determination of the issue requires multiple individual determinations, then commonality is lacking. It is a different question as to whether two or more distinctive claims against different prospective defendants warrant certification in a single class action. If the claims are very different, it may be that there is commonality in that the determination of each claim (as to facts and law) resolves the claim for the class, but there is little overlap as between claims. I will refer to this distinction as the difference between class commonality and claim commonality. Whether Deloitte's actions were wrongful and culpably so and whether it contravened statutory duties are issues of class commonality. They are issues resolved for or against the class as a whole. There are allegations of fact giving rise to claims against Deloitte and the Steinhoff companies that are common. However, the claim against the auditors rests upon distinct duties and actions. There is thus some want of claim commonality. Whether that warrants two class actions is a matter to which I will return.

266. Both Deloitte and the opposing Steinhoff directors also raise the question of causation, and in particular, that individual shareholders will each be required to prove their detrimental reliance upon the misstatements that led them to buy or retain Steinhoff shares. That, they submit, is a necessary requirement of an action for negligent misstatement causing pure economic loss. Such proof would require the trial court to make a multiplicity of individual determinations on the question of causation – the very antithesis of class commonality. This they submit has led, in other jurisdictions, to the dismissal of class certification in like cases.

267. These submissions led to an extensive exchange as to how the courts in other jurisdictions deal with this question. I consider that this aspect of the case can be

resolved on a different basis. I have not found it necessary to decide whether the cause of action advanced on behalf of the class members requires, in our law, a showing of detrimental reliance by each shareholder or whether imputed reliance suffices if shareholders relied upon the price at which they bought or retained their shares. Counsel for Ms De Bruyn has made it plain that their case rests squarely on imputed reliance. If such a case is cognizable in our law, then the want of class communality advanced by Deloitte and the opposing Steinhoff directors is not present. Class members will not make a case predicated upon each member's detrimental reliance upon the misstatements made by the Steinhoff directors or the auditors. Hence, any certification that is ordered is postulated upon a case resting upon imputed reliance. Such a case would not impede class communality on the basis of a need to determine each shareholder's detrimental reliance because members of the class would all stand or fall on imputed reliance based upon the pricing of the shares in the market.

268. That raises a further issue as to how and when the misstatements influenced the price. This issue may not yield a singular conclusion, and that, in turn, may have differential affects upon members of the class, depending upon when they bought their shares or over what period they chose to retain them. This may have some adverse impact upon class commonality. But there is a likelihood that this may well be less problematic for class commonality than the spectre of having to prove each shareholder's detrimental reliance because imputed reliance is concerned with causation and not loss. The price effects of the sustained failure to reflect the impugned transactions in the published financial statements may have given rise to structural price expectations in the market for Steinhoff shares, resulting in predictable price effects upon which class members may be taken to have relied. In any event, the impact of imputed reliance is likely to offer less of a problem to class commonality than if each shareholder's detrimental reliance must be proven because it seems improbable that the quoted price was not material to the decisions of the shareholders to buy and hold; and improbable also that over time the price of the shares did not

reflect the market's understanding of the assets, liabilities and earnings of SIHL and Steinhoff NV. These features are likely to hold over the class as a whole.

269. The opposing Steinhoff directors raise the following challenge to commonality. The draft particulars distinguish the position of Mr Jooste from the other directors. However, the liability of directors, other than Mr Jooste, cannot be treated *en bloc.* This is illustrated by the position of the 22nd Respondent who was never a director of SIHL and only became a director of Steinhoff NV in mid-2016, after the impugned transactions had taken place. The position of other directors may well also evidence variability as to when they took office; what involvement, if any, they had in approving the impugned transactions and the financial statements; and what information they were given and what reliance they placed on internal advisors and the external auditors.

270. There is some merit in this submission. The decision of each prospective shareholder to buy shares and the decision of each shareholder to hold shares will be distinctive. Each shareholder bought their shares at a particular time. Which directors were in office at relevant times and with what responsibility for the misstatements of SIHL or Steinhoff NV so as to influence the share price is likely to be a matter of some variability. When individual shareholders would have sold their shares, rather than hold them, as against a counterfactual of proper disclosure, may exhibit the same difficulty. This will impact on class commonality because the variable circumstances of each shareholder will require differentiated proof to establish liability against particular directors. The degree to which class commonality is likely to be affected is not altogether easy to determine because it is not clear whether the position of the 22nd respondent is typical of high variability or whether there was substantial continuity of directors and clear demarcations of responsibility, in which event class commonality may be less affected.

271. In my assessment, while this source of variability poses some risk to class commonality on this aspect of the case, there remain sufficient issues of commonality

as to the liability of directors such that central features of the case may be determined on a class-wide basis. In particular, what duties were owed by the directors is largely a question of law, common to members of the class. The conclusion of the impugned transactions, how they came to be approved, and who was responsible for their treatment in the financial statements is likely to fit a pattern of corporate organization and responsibility, given that the impugned transactions are alleged to be numerous, to have taken place over time and are said to have led to a systemic failure to reflect the impugned transactions fairly and correctly in the financial statements. These issues are central to the question of the liability of the Steinhoff directors and the Steinhoff companies. They may be determined on a class wide basis. This, in my view, permits of an outcome where commonality is sufficiently served.

272. I have referenced the possibility that the claims of foreign shareholders who hold shares on the FSE but elect to litigate in this jurisdiction may be determined under choice of law rules that would apply German law. This holds some risk of legal fragmentation that is inimical to commonality. But the risk is mitigated by two factors. First, the fact pattern relevant to liability for local and foreign shareholders is likely to be very similar. Second, there is no showing that the legal regimes of liability are so different as to pose a significant threat to class commonality. It may be that foreign shareholders who purchased shares on the FSE may need to be treated as a sub-class. But the determination of their claims will apply across this sub-class, with sufficient overlaps, at least as to common issues of fact, with the class as a whole.

273. There is finally the issue of claim commonality in respect of the claims against Deloitte, adverted to above. On balance, there would be greater disutility in certifying two class actions by uncoupling the claims against Deloitte from those against the Steinhoff directors and the Steinhoff companies. This is so because the evidence as to what occurred, and who knew what and when, is likely to reflect an interconnected set of actions and actors that should be recounted and tested in one proceeding.

274. For these reasons, I conclude on this aspect of the matter that there is sufficient to support class commonality, and not to have two class actions, or require that the claims of shareholders should be pursued by each shareholder.

DAMAGES: ASCERTAINABLE, DETERMINABLE AND CAPABLE OF ALLOCATION?

275. I turn to the following issues: do the damages claimed flow from the cause of action relied upon; are the damages ascertainable and capable of determination; and is there an appropriate procedure for allocating the damages to members of the class?

276. It will be recalled that the cause of action relied upon rests upon a theory of causation that it is the prices in the market that caused the shareholders to buy or retain their shares, and it is price formation in the market that is influenced by the misstatements. If this market based theory of causation is cognizable in our law (a matter I have found it unnecessary to decide), then, and if such causation is proven, the damages do flow from the cause of action because shareholders will have acquired shares at a price above the price at which the shares would have been priced, but for the misstatements. The loss caused by the retention of shares is rather more difficult to conceptualize. Under the counterfactual that the shares were never mispriced, the shares would have been acquired at fair value and their retention would have been at the shareholder's own risk. If the shares were acquired at an inflated price, then the loss accrues at the time of purchase. The failure to exit when the share price remained inflated would not add to the loss initially suffered, but would simply have caused the shareholder to lose the opportunity to mitigate the loss by selling at an inflated price. There is a further category of shareholder who buys at fair value and is then induced to retain the shares by reason of their inflated price, when she would otherwise have sold the shares, and suffers loss as a result. It is not clear that the draft particulars seek to develop this species of liability. But is the draft particulars do

so, then it remain difficult to see how the loss arises because the opportunity to sell profitably appears to be inextricably connected to the inflated price of the Steinhoff shares attributable to the misstatements.

277. However, on the theory of causation proposed, I do find that damages flow from the cause of action in respect of the acquisition of the shares at inflated prices.

278. On behalf of Ms De Bruyn, the expert report of Mr Pansari is relied upon. Mr Pansari is offered as an expert to demonstrate that there are methodologies available to determine aggregate damages on a class-wide basis. Mr Pansari's report rests on the postulate that the JSE is an efficient market. It seeks to show that the price of Steinhoff shares was affected by the public disclosure of company-specific information and how methodologies may be used to calculate the difference between the artificially inflated price of the shares caused by the misstatements and the true value of the shares.

279. The opposing Steinhoff directors and Deloitte have emphasized that a cause of action based upon negligent misstatements causing pure economic loss requires that class members must allege that each shareholder who makes a claim was induced by the misstatements to buy or retain shares. As we have seen, that is not the case sought to be made on behalf of class members. Their case rests upon a market - based theory of causation.

280. The draft particulars state and certain submissions made on behalf of Ms De Bruyn contend that damages may be determined on an individual basis or on an aggregate basis. Plainly, if class members were each required to prove their detrimental reliance and individual loss, that would be possible, but it would diminish some, but by no means all, of the utility of a class action. However, as I understand the case that is sought to be made, it rests squarely upon the market based theory of causation. On that premise, a basis has been set out as to how damages can be calculated on an

aggregate basis. The calculation is clearly complex and quite likely contestable. But complexity and contestability does not establish that an aggregative approach to the calculation of damages is not possible. Mr Pansari's report, despite its occasional forays into questions of law, shows otherwise.

281. Ultimately, Mr Pansari comes up with an estimate of aggregate damages in an amount of R36.35 billion. I am not required to say anything as to whether that is a plausible estimate. It suffices to show for the purposes of certification that aggregate damages are capable of calculation. There was nothing to show that what Mr Pansari has offered is so methodologically flawed as to be entirely speculative. Rather, the opposition was directed to the theory of causation. I find however that if the market-based theory of causation is legally supportable, there is a basis upon which damages are susceptible of calculation on an aggregative basis.

282. That then leaves the issue as to whether damages calculated on an aggregative basis are then capable of being allocated to members of the class. On behalf of Ms De Bruyn a methodology of allocation to class members is set out in a litigation plan. The replying affidavit relies upon an allocation procedure based on a US securities case. That procedure references a plan of allocation and a formula to calculate each individual claim.

283. I make three observations concerning the plan and the procedure referenced. First, outside the flexibilities which might be permitted under a settlement, allocation to class members will ordinarily require proof that meets a threshold of adequacy that the allocation of damages approximates individual loss. Second, that, in turn, requires some process of individual assessment. The loss that accrues to a class member will be variable depending, at the very least, on when the shares were bought and the inflation of the share price at different points in time. Third, it does appear, both from the example of the allocation plan and what Mr Pansari has explained, that it is possible to locate an individual's purchase of shares on a time series that will roughly reflect the difference between the true value of the shares and the inflated purchase

price. Doubtless there is much complexity, and a need for individual determinations, but it does appear that there is a methodology available to put in place a rational scheme of allocation.

284. Deloitte submits that the position of Ms De Bruyn is too indeterminate on important issues concerning damages. In particular, the position allows for the aggregative or individual assessment of damages; it is short on detail as to what would be entailed if damages required individual assessment; and its procedural suggestions as to the appointment of administrators or referees, contained in the litigation plan, specifies who might be used to decide certain matters but not how they would do so.

285. There is certainly some equivocation as to what is said on this score on behalf of Ms De Bruyn. However, the role of the court considering certification is not to determine damages but to gauge whether they are capable of determination and allocation. Once it is clear that the claim to be made on behalf of class members is predicated upon market-based causation, then, as I have explained, it is the effects on the market that count. This permits of an aggregative approach to the assessment of how far market prices deviated from a conception of true value. And once that is so, it is a lesser task to locate the position of individual members in the market so as to permit of allocation. Once the aggregative methodology generates a time series of inflated pricing, locating an individual on the time series would not appear to be an insurmountable task.

THE INTERESTS OF JUSTICE: IS CERTIFICATION APPROPRIATE?

286. I must decide, in the light of all that appears in the record and the extensive submissions that have been made to me, whether certification should be ordered, and if so, on what terms. That is a question of weighing all the issues and deciding, ultimately, what the interests of justice require. When doing so, it is necessary to consider what access to justice class members would enjoy absent certification, and what would be gained and lost, and by whom, if certification is ordered.

287. Few will disagree that the precipitous fall of the Steinhoff group of companies amounts to a corporate failure of significant proportions. There is quite understandable sympathy for investors who have lost the greater part of their investment, most especially for small retail investors and the many individuals who may have placed their savings and pension money with institutional investors who bought Steinhoff shares. That they seek compensation for the losses they have suffered is entirely understandable.

288. Given the large the number of persons who bought Steinhoff shares and suffered losses, there is every reason to consider that a class action may be an appropriate means by which these persons may gain access to the courts so as to litigate against those they would hold responsible. As I was often reminded by counsel for Ms De Bruyn, absent a class action, many shareholders would go uncompensated because the size of their claims would never permit them to institute an action, given the complexities of such litigation. So too, it is said, if a class action is not certified in this case, given the scale of the losses suffered by Steinhoff shareholders, then the shareholders' class action is destined to extinction in this jurisdiction.

289. These are important considerations. It will be apparent from my analysis that, in weighing the factors that bear upon certification in this case, there is much that favours certification.

290. First, the identification of the classes has undergone significant modification to avoid or mitigate many of the criticisms levelled against their original definition. The proposed classes are identifiable by reference to objective criteria.

291. Second, while Ms De Bruyn is not, in certain respects, an optimal class representative (through no fault on her part), she is a Steinhoff shareholder who has suffered a loss that doubtless permits her to enjoy an identity of interest with the class she would represent. Ms De Bruyn, though plainly willing to undertake the role of class

representative, is not possessed of some of the technical expertise that would be advantageous to a representative who is required to take important and often difficult decisions in complex litigation. However, this deficiency should not be exaggerated. Ordinary litigants in complex cases have ample common sense to take decisions in their own interests and those of the class, if they are properly guided by their legal representatives.

292. Third, there was a considerable case made to impugn the suitability of LHL as the legal representatives of the class and the funding arrangements that have been secured. LHL has not always acted as it should have. It has allowed the funders undue influence. But the avowed recognition of error on the part of LHL, its exit from participation in any award of damages, and the role to be played by a supervisory attorney do permit LHL to act without undue risk. There was also much uncertainty as to the funding arrangements which were, regrettably, revealed in a piecemeal way, with a retentive predilection that served neither the court, nor the litigants. However, with the benefit of the information now available, there is funding available that will permit the litigation to proceed, on tolerable terms, that offer a measure of protection to the prospective defendants in respect of costs awarded in their favour. No funding on better terms was said to be available. Here too, with proper scrutiny by the trial court, and with the assistance of the supervising attorney, I do not find that the funding arrangements are so inimical to the interests of justice that they cannot be permitted to support the proposed class action.

293. Fourth, the extent to which the proposed action depends upon the determination of issues of law or fact common to all members of the class is not resolved with definitive singularity. There are however significant factual foundations of the proposed case that are common to the claims against SIHL, Steinhoff NV, the Steinhoff directors and Deloitte. This is so in virtue of the impugned transactions and the alleged misstatements in the published financial statements. The claims against SIHL, Steinhoff NV and the Steinhoff directors, on the one hand, and the claims against Deloitte, on the other, rest upon distinct duties. Their resolution, as a matter

of law, would certainly bind all class members. There are nevertheless complexities that arise from the scope of the cause of action proposed. Claim commonality is compromised by the distinctive duties that are said to be owed by Deloitte. There is a risk that class commonality will be fractured because of the distinctive responsibilities discharged by individual directors at different times. And causation, even on market-based postulates, may nevertheless require some proof that is to be provided by individual class members. On this aspect of the matter, a judgment is required as to whether a class action remains the most appropriate means of determining the claims of class members. For the reasons given, on balance, I consider that a class action is appropriate. The alternative, that many shareholders would not be able to bring claims at all or if they could do so, would institute multiple actions involving considerable duplication of resources and decision-making, appears to me a decidedly worse outcome.

294. Fifth, I have found that the damages sought in respect of the acquisition of shares does flow from the cause of action relied upon. And while an aggregative computation of damages is complex it is capable of proof. So too, the procedure for allocating damages, though not without difficulty, does not weigh decisively against certification.

295. There remains one consideration of very great salience to the determination of this case – is there a cause of action raising a triable issue? It will be recalled that counsel for Ms De Bruyn sought to persuade me that this consideration should be assessed on the undemanding basis that the cause of action proposed is not hopeless.

296. I have rejected this standard. It is inconsistent with my understanding of what binding precedent has determined. Even if this were not so, for the reasons I have given, the standard cannot be accepted. It would allow a class action to go forward, with its significant entailments of cost to the parties and burdens upon the court, in circumstances where the certification court considered the cause of action implausible but not unarguable.

297. That is an unusual judgment to ask of a court on a question of law. Questions of law ultimately have a right answer. That answer may not always be easy to give, but it is the function of courts to decide questions of law in a binary way: a cause of action is either allowed by law or it is repugnant to the law. A cause of action is not to some degree recognized by law. That being so, there is no reason to defer true questions of law to the trial court, and for two principal reasons. First, the trial court is in no better position to determine a true question of law. Of course, as our courts have observed, there may be circumstances in which evidence may assist in deciding a question of law. Then it may be prudent to leave the decision to the trial. But where that is not so, the certification court should decide the question of law. Second, class actions, as in this case, often involve complex litigation, of importance to many, with significant consequences of both expense and expectation. For this reason also, the interests of justice require that a certification court should not permit a class action to proceed on the minimal premise that the cause of action is not hopeless. Too many, risk too much to proceed on this basis.

298. I have found that the each of the component parts of the cause of action that is proposed against SIHL, Steinhoff NV, the Steinhoff directors and Deloitte have no basis in law. As a result, I find that the class action rests upon a cause of action that fails to raise a triable issue.

299. I have already referenced the holding in *Makaddam* that the factors relevant to the consideration of a certification application are not requirements but matters to be weighed in making a final decision, judged against the overarching standard of the interests of justice. I have also observed that different weight may attach to the factors that require consideration. How then should the finding that there are no triable issues be weighed in deciding whether to certify the proposed class action? If, as I have found, the law does not recognize the cause of action that is the basis of the class action, then there is nothing to take forward to trial.

300. In these circumstances, whatever the other virtues of the class action, without a cause of action, the application for certification must fail. The matter may be framed as one of weight: the absence of a cause of action weighs too heavily to permit of certification. It is also a matter of logic. Why would a court trigger the machinery of a class of action to determine something that does not exist in law. To do so would be to place a ghost in the machinery of justice.

301. I am aware that this conclusion will disappoint the expectations of Steinhoff shareholders that the law must be able to compensate them for their losses. I have found that the law does not do so by recourse to the cause of action relied upon in this application. This does not mean that the shareholders are without remedy. It is for the Steinhoff companies to hold the Steinhoff directors and Deloitte liable for any breach of duty to the companies that caused loss. If the Steinhoff companies will not do so, the Companies Act makes generous provision in s165 for shareholders to require the Steinhoff companies to commence legal proceedings. Any compensation that is due to the Steinhoff companies will redound to the benefit of those shareholders who have retained their shares.

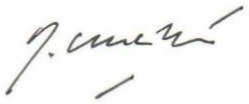
302. I turn then finally to the question of costs. I have found that certification cannot be granted. The application fails because the claims relied upon do not, in law, disclose a cause of action. The class action does not raise triable issues. On other aspects of consideration, I consider a class action to be supportable. However, as will be apparent, the questions of law concerning the cause of action have been a very significant part of the contestation in this case. Their resolution has turned out to be decisive, and has determined the application. That outcome ordinarily determines the question of costs. In some matters of public interest that is not so. But here, the litigation is funded on a commercial basis. In these circumstances, I cannot find a basis to deviate from the position that the costs should follow the result. The matter is one of some scope and complexity that has quite understandably led to the employment of more than two counsel. However, I am inclined to think that given the

employment of two counsel by Ms De Bruyn, that is a fair basis upon which to make a determination of costs.

In the result:

(i) The application is dismissed

(ii) The Applicant shall pay the costs of the Respondents who have opposed the application, including the costs of two counsel, where two counsel were employed.



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Unterhalter J
Judge of the High Court
Gauteng Local Division: Johannesburg
Date of Hearing: 20 - 24 APRIL 2020
Date of Judgment: 26 JUNE 2020

APPEARANCES

APPLICANT: Advocates Andy Bester SC and Mabasa Sibanda instructed by LHL Attorneys Inc.

1st, 2nd & 42nd RESPONDENTS: Arnold Subel SC, Andre Smalberger SC, Kate Hofmeyr and Musatondwa Musandiwa instructed by Werksmans Attorneys.

3rd RESPONDENT: Wim Trengove SC, M Van der Nest SC,DJ Smit and T Scott instructed by Webber Wentzel.

4th RESPONDENT:

Law firm: Tugendhaft Wapnick Banchetti & Partners.

5th RESPONDENT:

Law firm: Anneke Whelan Attorneys

C/O Shepstone & Wylie.

6th RESPONDENT:

Law firm: Tim Du Toit & Co Inc (Pretoria)

C/O Tim Du Toit & Co Inc. (Johannesburg).

8th RESPONDENT:

CM Eloff SC and A Morrissey instructed by ER Swanepoel & Associates

C/O Hector North Inc.

9th RESPONDENT:

Law firm: Michael Krawitz & Co.

11th & 22nd RESPONDENTS:

CM Eloff SC and A Morrissey instructed by Tinus Slabber & Associates

Attorneys:

C/O Oosthuizen & Co (Cape Town)

C/O Pieter Moolman Attorneys (Johannesburg).

12th RESPONDENT:

Law firm: Cliffe Dekker Hofmeyr Inc (Cape Town)

C/O Cliffe Dekker Hofmeyr Inc (Johannesburg).

13th RESPONDENT:

Law firm: Bernadt Vukic Potash & Getz.

14th RESPONDENT:

Law firm: De Klerk & Van Gend.

15th RESPONDENT:

PL Uys instructed by Savage Jooste & Adams Inc.

C/O SKV Attorneys.

24th RESPONDENT:

Law firm: Ashersons Attorneys

C/O Tugendhaft Wapnick Banchetti & Partners.

20th & 25th RESPONDENTS:

PA Botha SC instructed by Cluver Markotter Inc

C/O Swanepoel Attorneys.

32nd RESPONDENT:

Alfred Cockrell SC and Isabella Kentridge instructed by Cliffe Dekker Hofmeyr Inc.