decision

AMSTERDAM COURT OF APPEAL

civil and tax law division

case number : 200.295.374/01

District Court case number : C/l 3/21/4-S

decision of the three-judge division for civil matters dated 29 June 2021

in the matter between:

1. **HAMILTON B.V.,** and
2. **HAMILTON 2 B.V.,**

both with their respective corporate seats in Amsterdam,
appellants,
counsel: J. de Jong, practising in The Hague,

and

Fréderic VERHOEVEN and Christiaan ZIJDERVELD, in their capacity as administrators in the suspension of payments of STEINHOFF INTERNATIONAL HOLDINGS N.V.,
with its registered office in Amsterdam,
respondents,
counsel: D.G.J. Heems, practising in Amsterdam.

1. The proceedings on appeal

The appellants are referred to hereinafter as Hamilton et al., the respondents as the administrators. Steinhoff International Holdings is referred to as Steinhoff.

By notice of appeal received by the Court of Appeal's registry on 4 June 2021, Hamilton et al. appealed the decision rendered by the Amsterdam District Court on 28 May 2021 under the above case number.

By letter of 8 June 2021, in response to being prohibited from appealing the Amsterdam District Court's decision of 28 May 2021, the administrators requested the Court of Appeal to assess first whether the case involved a ground that would justify overturning that prohibition. By letter of 10 June 2021, the Court of Appeal informed the parties that an oral hearing of the appeal would be held on 22 June 2021, and that this hearing would be devoted solely to ascertaining whether the case involved grounds that would justify overturning the prohibition Hamilton et al. assert. The letter also afforded the administrators and the interested parties the opportunity to submit statements of defence by no later than 16 June 2021. The parties availed themselves of that opportunity.

Appearing on behalf of Hamilton et al. at the hearing before the Court of Appeal on 22 June 2021 were the aforementioned attorney De Jong and H.J.T. Kolstee, an attorney practising in The Hague, who explained the notice of appeal in more detail using written notes that were submitted to the Court of Appeal.

Appearing on behalf of the administrators were the aforementioned Mr Zijderveld, assisted by the

aforementioned Heems, as well as L.V. van Gardingen, both of whom are attorneys practising in Amsterdam, who explained the administrators' position in more detail using memoranda of oral arguments that were submitted to the Court of Appeal.
Appearing on behalf of Steinhoff at the hearing were D.A.M.H.W. Strik and J. van der Kraan, both of whom are attorneys practising in Amsterdam. Attorney Strik spoke on behalf of Steinhoff using the memorandum of oral arguments that was submitted to the Court of Appeal. The following persons also appeared as interested parties:
- R. van den Berg, O. Salah and F.S. Hinse, all of whom are attorneys practising in Amsterdam, on behalf of Lancaster 101 (Rf)(Pty) Ltd (hereinafter: Lancaster), Q.L.C.M. Bongaerts, an attorney practising in Amsterdam, on behalf of Alexander Reus and Stichting Steinhoff International Compensation Claims; K. Ruiten, an attorney practising in Utrecht, on behalf of Deminor Recovery Services (Luxembourg) SA, DRS Belgium SRL 127 investors; J. de Rooij, an attorney practising in Amsterdam, on behalf of Burford Capital LLC; V.R. Vroom and A.J. Dunki Jacobs, attorneys practising in Amsterdam, on behalf of Baupost Capital LLC, Farallon Capital Europe LLP, Sculptor Investments IV S.a.r.1. and Silver Point Capital L.P. (hereinafter: G4) who explained G4's position in more detail using notes that were submitted to the Court of Appeal.

The Court of Appeal has taken cognisance of:
- the notice of appeal, with appendices (Exhibits 12 through 16);
- the documents in the proceedings in the first instance, including the official record of the hearings held on 19 May 2021 and 4 June 2021, as well as the District Court's decision of 15 June 2021;
- letter dated 9 June 2021 from the aforementioned attorney Heems, on behalf of the administrators, to the Court of Appeal;
- the administrators' statement of defence dated 16 June 2021, with appendices;
- Steinhoff's statement of defence dated 16 June 2021, with an appendix;
- Burford Capital LLC's statement of defence, received by the court clerk's office on 16 June 2021;
- G4's statement of defence dated 16 June 2021;
- Alexander Reus and Stichting Steinhoff International Compensation Claims's statement of defence dated 16 June 2021;
- Conservatorium Holdings LLC's brief, received by the court clerk's office on 16 June 2016;
- Hamilton et al.'s brief dated 18 June 2021, submitting additional exhibits.

The parties and the interested parties affirmed that they had taken cognisance of the aforementioned documents.

2. The facts

2.1 By decision of 15 February 2021, the Amsterdam District Court granted Steinhoff a provisional suspension of payments, assigning attorneys K.M. van Hassel and C.H. Rombouts, members of the Amsterdam District Court, as supervisory judges and appointing F. Verhoeven as administrator. By decision of 18 February 2021, C.R. Zijderveld was appointed as second administrator.

2.2 On 15 February 2021, SIHNV filed a composition within the definition of Article 214(3) Dutch Bankruptcy Act with the court clerk's office. The District Court set the date by which the bankruptcy claims must be submitted on 15 June 2021. The date of the consultation and voting on the composition was set at 30 June 2021.

2.3 On 23 April 2021, the administrators requested the District Court, with due observance of the provisions of Article 281b, read in conjunction with Articles 28ld and 281e Dutch Bankruptcy Act, as well as Article 225 Dutch Bankruptcy Act, to:
(i) rule with regard to the list of claims that must be drawn up based on Article 259 Bankruptcy

Act and of which a copy must be filed with the Court Clerk based on which Article 263 Bankruptcy Act that:

a. the administrators do not have to place several of the claims they referred to on the list as referred to in Article 259 Dutch Bankruptcy Act;
b. the administrators are entitled to place the claims of the other creditors on the list as referred to in Article 259 Dutch Bankruptcy Act in anonymized form, by only including a claim number to be assigned by the claims agent and the amount of the claims in question;

(ii) to appoint a committee of representation (hereinafter: the committee) consisting of the members named in the revised Appendix 5 to the application.

2.4 Via these requests, the administrators requested the District Court to declare Steinhoff's provisional suspension of payments to be subject to the Brandaris Scheme. The Brandaris Scheme as currently set out in Articles 281a et seq. Dutch Bankruptcy Act was written for large-scale suspension of payments proceedings. When a debtor has more than 5,000 creditors, this scheme offers several statutory simplifications for certain ordinary formalities associated with the suspension of payments scheme which allows a time-consuming, expensive and inefficient process – and one which the legislature considers undesirable – to be avoided. This enables the District Court to decide, among other things, that certain claims need not be placed on the list of debt claims and that a committee of representation will vote on a proposed composition.

2.5 The District Court set the oral hearing of the administrators' application for 19 May 2021 and afforded the interested parties the opportunity to submit statements of defence. Hamilton et al., among others, submitted a statement of defence. In this statement of defence, they also submitted independent applications pursuant to Article 225 Bankruptcy Act.

2.6 On 14 May 2021, the District Court determined that Hamilton et al.'s independent applications would not be heard at the hearing on 19 May 2021. To the extent relevant, the court clerk's e-mail of 14 May 2021 stated the following about this issue:

"On behalf of the District Court, please be informed that the hearing to be held on Wednesday, 19 May 2021, will hear the application submitted by the administrators by letter of 23 April 2021 seeking the relief referred to in Article 281b, read in conjunction with Articles 281d and 281e Bankruptcy Act, that being measures to secure the interests of the creditors as referred to in Article 225 Bankruptcy Act, in the context of the provisional suspension of payments of Steinhoff International Holdings N. V. The applications filed separately by the other parties involved will not be heard at that time. Whether and how these applications will be heard will be determined later. "

2.7 The administrators notified all known interested parties of this message from the District Court and posted it on the website at www.steinhoffsettlement.com.

2.8 By e-mail of 17 May 2021, attorney P.W. Scheurs, counsel for Hamilton et al., asked the District Court whether the notification in the e-mail of 14 May 2021 also applied to the counter-applications independently filed by Hamilton et al. He also requested that the District Court to hear these counter-applications at the hearing on 19 May 2021. In this respect, he wrote, among other things:

"I note in this respect that this application ties in with the 225 application filed by the administrators (in addition to their 28Id and e application) and the administrators did not object to this in their procedural application. Hamilton's application addresses the problems which underlie the administrators' application, but is less far-reaching when it comes to limiting the rights of creditors."

2.9 By e-mail of 17 May 2021 on behalf of the District Court, the clerk wrote Hamilton et al.'s counsel indicating that Hamilton et al.'s applications would not be heard at the hearing on 19 May 2021. To the extent relevant, this e-mail reads as follows:

"As we just discussed, I hereby confirm in response to your e-mail of today's date that in the matter of the provisional suspension of payments of Steinhoff International Holdings N.V., the independently filed applications will not be heard at the hearing on 19 May 2021, or at any rate that they will be assessed in accordance with Articles 281a et seq. Bankruptcy Act. In this respect, it is expressly not the intention for this to restrict the parties/interested parties in asserting their defences."

2.10 The oral hearing of the administrators' application was held on 19 May 2021. Hamilton et al., among others, availed themselves of the opportunity they were offered to address the court and explain their positions using memoranda of oral arguments that were submitted to the court.

2.11 On 25 May 2021, further to the e-mail of 14 May 2021, the District Court announced that, among other things, Hamilton et al.'s Article 225 applications and those of Lancaster would be heard at the hearing on 4 June 2021 and that any statements of defence in response to these applications would have to be submitted by no later than 1 June 2021.

2.12 In the challenged decision, the District Court granted the applications referred to in para. 2.3 under (i)(a) and (ii).

2.13 On 3 June 2021, Hamilton et al. nominated Oscar McLaren, director of Hamilton, to become a member of the committee.

2.14 The oral hearing of Hamilton et al.'s and Lancaster's independent counter-applications was held on 4 June 2021. Lancaster withdrew all its applications at the hearing.

2.15 By decision of 15 June 2021, the District Court dismissed Hamilton et al.'s independent applications.

3. Assessment

3.1 Hamilton et al. are requesting the Court of Appeal to vacate the challenged decision and to readjudicate the matter, dismissing all the administrators' applications and granting Hamilton et al.'s counter-applications, all of this to be declared immediately enforceable in so far as possible regardless of appeal, with costs to be assessed by the court. The premise underlying their application is that the District Court so blatantly disregarded fundamental principles of law, and in particular the principle of hearing both sides of an argument and the principle of equality of arms – as laid down in Article 19 DCCP and Article 6 ECHR, respectively – that the case cannot be said to have been handled fairly. According to Hamilton et al., this failure constitutes a ground for overturning the legal remedies prohibition laid down in Article 282 Bankruptcy Act, such that the Court of Appeal can hear the matter on appeal. Hamilton et al. have also asserted various substantive arguments for their position that the District Court erred in granting the administrators' applications.

3.2 The administrators concluded that there was no such ground for overturning the prohibition and that Hamilton et al.'s appeal would have to be dismissed. All the interested parties who appeared in the appeal concurred with the administrators.

3.3 Since Hamilton et al. are relying on one or more of the 'grounds for overturning the prohibition' developed in case law, their appeal is admissible. It must then be examined whether Hamilton et al. are properly relying on the District Court having violated fundamental principles of law, such as the principle of equality of arms referred to in Article 6 ECHR and the principle of hearing both sides of an argument referred to in Article 19 DCCP.

3.4 It is noted at the outset that the legal remedies prohibition laid down in Article 282 Bankruptcy Act only regards decisions which the court is expressly required to render based on any

provision of the second title of the Bankruptcy Act. Article 281b, read in conjunction with Articles 281d and 281e, as well as Article 225 Bankruptcy Act are part of the second title of the Bankruptcy Act and are provisions which expressly require the District Court to render decisions. Given the foregoing, judicial decisions referred to in the aforementioned articles fall within the scope of the legal remedies prohibition of Article 282 Bankruptcy Act unless statutory law provides otherwise. The latter situation is not the case here.

3.5 According to established case law, a statutory legal remedies prohibition can be overturned based one of the grounds which case law has established for overturning that prohibition, those being that the court: exceeded the scope of application of the scheme in question, erred in failing to apply this scheme or so blatantly disregarded a fundamental principle of law that the case cannot be said to have been handled fairly and impartially. There is no reason for ruling otherwise regarding the legal remedies prohibition of Article 282 Bankruptcy Act.

3.6 Hamilton et al.'s argument provides no reason to conclude that a fundamental principle of law was so blatantly disregarded that the case cannot be said to have been handled fairly and impartially. for the following reasons. Hamilton et al. were afforded the opportunity to assert a defence against the administrators' applications in the first instance and they were present at the hearing in the first instance, where they heard the court through counsel and submitted a memorandum of oral arguments in that context. In response to a question posed to them during the appellate hearing, Hamilton et al. acknowledged that they were not restricted in any way in asserting a defence against the administrators' applicants. As indicated in para. 2.9, the District Court made it clear to Hamilton et al.'s counsel on 17 May 2021 that Hamilton et al. were free to address the Article 225 applications – which the District Court had already determined would not be heard at the hearing on 19 May 2021 – in the context of the defence against the administrators' applications. Hamilton et al. actually availed themselves of this opportunity and, in its decision, the District Court stated its reasoning regarding the defences that had been asserted. As Hamilton et al. explained – on appeal – they submitted the Article 225 applications because their position was that the administrators' applications were overly broad and that their Article 225 applications did more justice to the interests of the individual creditors, or that the administrators' applications were disproportionate in comparison to the counter-applications which were similar in purport. In para. 4.7 of the challenged decision on this point, the District Court held that *"there are serious reasons in this case that justify the institution of a committee in order to resolve these suspension of payments proceedings in an effective manner without disproportionately violating the rights of the individual shareholders".* At the hearing on 19 May 2021, in any event, Hamilton et al. had the opportunity to assert their defences, where necessary using an explanation of the independent Article 225 applications, and to convince the District Court that the administrators' application did not satisfy the requirements of proportionality and subsidiarity and that the obstacles identified by the administrators could better be avoided by the Article 225 applications submitted by Hamilton et al.

3.7 It must thus be held that whatever else may be said of the District Court's decision to hear the administrators' applications separately from the independent counter-applications filed by Hamilton et al., it cannot be said that the principle of hearing both sides of an argument was violated. Hamilton et al.'s argument that the District Court actually dismissed the independent counter-applications, and in so doing rendered a surprise decision, fails. As the findings above indicate, the District Court set the date for hearing the counter-applications at 4 June 2021. After the hearing had been held on that date, the District Court rendered a decision dismissing those counter-applications on 15 June 2021. The counter-applications, therefore, were not dismissed by the challenged decision. To the extent that Hamilton et al. assert that they assumed that the decision on the administrators' applications would not be rendered before the decision on their counter-applications, or at least that the decisions would be rendered simultaneously, that assertion is rejected. At the appellate hearing, sufficient proof was adduced that, at the end of the hearing on 19 May 2021, the District Court announced that a decision would be rendered within a week, and that was done on 28 May 2021. Hamilton et al. thus knew that they could expect a decision even before the date for which the oral hearing of their counter-applications had been set – 4 June 2021

– of which date they were informed on 25 May 2021.

3.8 The findings above also indicate that the principle of equality of arms was also not violated. Even leaving aside the fact that Hamilton et al. failed to provide sufficient substantiation and explanation regarding their assertion on this point, there are no facts or circumstances that could lead to any other finding.

3.9 The conclusion is that Hamilton et al.'s appeal will be dismissed and that Hamilton et al., as the non-prevailing parties, will be ordered to pay the costs of the proceedings incurred by Steinhoff, Alexander Reus and Stichting Steinhoff International Compensation Claims, as well as Burford Capital LLC.

4. Decision

The Court of Appeal:

- dismisses the appeal;

- orders Hamilton et al. to pay the costs of the proceedings on appeal, estimated on the part of Steinhoff up to this point at EUR 2,228 in salary;

- orders Hamilton et al. to pay the costs of the proceedings on appeal, estimated on the part of Alexander Reus and Stichting Steinhoff International Compensation Claims at this point at EUR 2,228 in salary;

- orders Hamilton et al. to pay the costs of the proceedings on appeal, estimated on the part of Steinhoff point at EUR 2,228 in salary.

This decision was rendered by judges M.L.D. Akkaya, A.J. Wolfs, and L.T.L.G. Pellis and pronounced in open court on 29 June 2021 in the presence of the court clerk.

ISSUED AS A FIRST
BAILIFF'S COPY TO:
ATTORNEY D.G.J.
HEEMS THE COURT
CLERK