IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 16244/2018

In the matters between:

JACOB DE VOS DU TOIT N.O.	First Plaintiff
THEO WERNER BIESENBACH N.O.	Second Plaintiff
MAGDA DE WET N.O.	Third Plaintiff

cited in their capacity as trustees for the time being of the
LE TOIT TRUST (IT2108/95)

and

STEINHOFF INTERNATIONAL HOLDINGS (PTY) LIMITED	First Defendant
MARKUS JOHANNES JOOSTE	Second Defendant
ANDRIES BENJAMIN LA GRANGE	Third Defendant
STEINHOFF INTERNATIONAL HOLDINGS N.V.	Fourth Defendant
STEINHOF INVESTMENT HOLDINGS LIMITED	Fifth Defendant

and

MARKUS JOHANNES JOOSTE Third Party

and

Case No: 47916/2019

JACOB DE VOS DU TOIT N.O. First Plaintiff

THEO WERNER BIESENBACH N.O. Second Plaintiff

MAGDA DE WET N.O. Third Plaintiff

cited in their capacity as trustees for the time being of the
LE TOIT TRUST (IT2108/95)

and

MARKUS JOHANNES JOOSTE Defendant

JUDGEMENT DELIVERED ON 30 SEPTEMBER 2019

FRANCIS, AJ

INTRODUCTION

1. The Plaintiffs, trustees of the Le Toit Trust ("the Trust"), have instituted two separate actions in which they claim damages in an amount of R 740 407 680 in each.

2. The two actions are based largely on the same facts and follow upon the much-publicised collapse, in early December 2017, of the share price of Steinhoff International Holdings N.V.

3. The first of the actions instituted under Case No. 16244/18 ("the Steinhoff action") includes the following defendants:

3.1 Steinhoff International Holdings (Pty) Ltd ("SIH-SA"), First Defendant, Steinhoff International Holdings N.V. ("SIH-NV"), Fourth Defendant, and Steinhoff Investment Holdings Limited, Fifth Defendant. SIH-SA, SIH-NV, and Steinhoff Investment Holdings Limited; all of who are here after collectively referred to as "the Steinhoff defendants".

3.2 Markus Johannes Jooste ("Mr Jooste"), the former CEO of the Steinhoff Group, was cited as the Second Defendant (the action was subsequently withdrawn against him by the Plaintiffs).

3.3 Mr Andries Benjamin La Grange ("La Grange"), a former Steinhoff Director and CFO, was cited as the Third Defendant.

4. The Plaintiffs claim for damages arises from alleged misrepresentations made by Mr Jooste and La Grange. The cause of action is based on fraudulent misrepresentation and on the alleged breach of various provisions of the Companies Act 71 of 2008 ("the Companies Act").

5. In the second action, under Case No. 47912/19 ("the second action"), the Plaintiffs claim from Mr Jooste, as the only defendant, damages arising from the same set of circumstances and on the same causes of action as the Steinhoff action, together with an additional cause of action based on a breach of his fiduciary duties.

6. In both actions, the Plaintiffs claim that but for the unlawful conduct of the defendants, the Plaintiffs would not have swopped their shares in the PSG Group for shares in the SIH-SA that Plaintiffs' contend were in reality almost worthless. They claim as damages the difference in value between the two sets of shares.

7. This interlocutory application concerns two exceptions – both by Mr Jooste in the Steinhoff action and in the second action.

8. Mr Jooste contends that the particulars of claim in both of the actions are vague and embarrassing and that some of the claims made by the plaintiffs lack the necessary averments to sustain the various causes of action. For a better

appreciation of Mr Jooste's contentions, it is necessary to provide a brief background to the procedural history leading up to, and underlying, the exceptions lodged by him.

PROCEDURAL HISTORY

9. The Steinhoff action was brought on 31 August 2018. As indicated, Mr Jooste was cited as the Second Defendant.

10. On 25 October 2018, the Steinhoff defendants filed their plea to the particulars of claim, and La Grange filed his plea on 29 October 2018.

11. In October 2018, Mr Jooste's legal team informed the Plaintiffs legal team of their instruction to file an exception in terms of Rule 23(1) of the Uniform Rules of Court, to the particulars of claim. A copy of the proposed Rule 23(1) notice was e-mailed to the Plaintiffs' attorneys, but not formally served on them nor filed at court.

12. In an attempt at addressing the proposed exception, the Plaintiffs sought to amend the particulars of claim and, on 14 February 2019, pre-emptively served a notice of intention to amend in terms of Rule 28 of the Uniform Rules of Court.

13. On 27 February 2019, the Steinhoff defendants delivered an objection to the proposed amendment in terms of Rule 28(3). The basis of the objection was that

the content of the proposed amendment would render excipiable the particulars for being vague and embarrassing.

14. In an attempt at avoiding the exception and an opposed application for the amendment, the Plaintiffs withdrew the notice of intention to amend as well as the action against Mr Jooste on 11 March 2019.

15. The Plaintiffs thereafter instituted a fresh action against Mr Jooste as the sole defendant on 25 March 2019 (the second action).

16. According to Mr Muller SC, acting on behalf of Mr Jooste, the particulars of claim in the second action follow and incorporate the very allegations in the Plaintiff's proposed – although aborted – amendment in the Steinhoff action with the result that the Plaintiffs' proposed amendments, aimed at addressing Mr Jooste's exception in the Steinhoff action, are now incorporated in the particulars in the second action – but not in the particulars in the Steinhoff action.

17. On 2 May 2019, La Grange served a third party notice on Mr Jooste claiming a contribution towards any amount for which the former might be found to be liable to the Plaintiffs in the Steinhoff action. As a result of this step taken by La Grange, Mr Jooste, once again, became a party to the Steinhoff action.

18. On 24 May 2019, Mr Jooste excepted to the second action and, on 21 June

2019, excepted to the Steinhoff action and delivered a plea to the annexure to La Grange's third party notice.

ISSUES

19. The factual allegations and causes of action laid out in the particulars of claim in both the Steinhoff and the second actions are substantially similar. In each exception, Mr Jooste claims that the relevant particulars of claim are vague and embarrassing, and that some of the causes of action lack necessary averments. The Plaintiffs deny that either of the particulars of claim are excipiable.

20. Mr Schalk Burger SC (with Mr Piet Olivier) represented the Plaintiffs whilst Mr Jeremy Muller SC (with Mr Matthew Blumberg) represented Mr Jooste. Counsel filed comprehensive heads of argument which admirably condensed the voluminous documentation before this court and simplified the often intricate and complex issues canvassed in both exceptions; for this, the court expresses its gratitude to both counsel.

THE PLEADED CASE AGAINST MR JOOSTE

21. **THE FACTS**

21.1 The summons, particulars of claim, and annexures thereto, comprise 195 pages

in the Steinhoff action and 209 pages in the second action.

21.2 For present purposes, I only summarise below the Plaintiffs' pleaded case in both actions that are immediately relevant to the exceptions.

21.3 On 24 June 2015, Messrs Jooste and La Grange, acting on behalf of SIH-SA, the First Defendant in the Steinhoff action, entered into a written agreement ("the exchange agreement") with the Trust represented by the First Plaintiff, Mr Du Toit, one of the trustees of the Trust.

21.4 In terms of the exchange agreement, the Trust exchanged 3 840 000 shares held by it in PSG Group Limited ("the PSG shares") in return for 10 176 000 shares in SIH-SA ("the Steinhoff shares") to be issued by SIH-SA to the Trust. The agreed exchange rate ratio was 2.65: the Trust received 2.65 Steinhoff shares for every PSG share it transferred to SIH-SA. This exchange ratio was calculated on the basis of, on the one hand, a consideration of R196.18 per PSG share and, on the other hand, an issue price of R74.03 per Steinhoff share.

21.5 It is the Plaintiffs pleaded case that the Steinhoff shares in fact had a far lower market value than the issued price of R 74.03 that was agreed and recorded in the exchange agreement. The Plaintiffs plead in this regard that they were induced to enter into the exchange agreement by alleged

misrepresentations made by Messrs Jooste and La Grange. The gist of the pleaded misrepresentations are as follows:

21.5.1 First, Mr Jooste and La Grange represented that R74.03 represented the fair market value of 1 Steinhoff share when, in truth, the market value of the Steinhoff shares at the time of the representation, properly valued, was no more than R1.27 per share.

21.5.2 Second, Mr Jooste and La Grange represented that the then published consolidated financial statements of SIH-SA ("the 2014 financial statements") contained an accurate and fair representation of SIH-SA's financial affairs when, in truth, the 2014 financial statements were materially inaccurate in that they overstated SIH-SA's profits, net assets, and cash flow position.

21.6 At the time of making the representations, Mr Jooste was an employee, director, and CEO of SIH-SA, and knew that the representations were false and misleading.

21.7 Had the Trust known the true value of the SIH-SA shares and the true state of SIH-SA's financial affairs, the Trust would not have entered into the exchange agreement.

21.8 On the basis of the pleaded facts, the Plaintiffs claim, in damages, the difference in value between the PSG shares and the SIH-SA shares exchanged in terms of the exchange agreement. A claim for restitution is not possible in the circumstances because none of the companies in the Steinhoff Group, nor Mr Jooste, hold any PSG shares. The Plaintiffs quantify the difference in value, and hence their damages, at R740 407 680. The quantum of damages is computed on the basis that the SIH-SA shares at the time of the exchange agreement was R1.27 per share instead of the share price assumed at R74.03. The Plaintiffs compute their damages on a delictual basis given that the factual premise of the claim is that of fraudulent misrepresentation.

21.9 In summary, then, the Plaintiffs pleaded case is that during 2015, Mr Jooste made fraudulent misrepresentations that induced the Plaintiffs to conclude the exchange agreement, as a result of which the Plaintiffs suffered damages in the amount of R740 407 680.

CAUSES OF ACTION

22. The pleaded facts give rise to several cause of action against Mr Jooste in terms of the common law and the Companies Act.

23. The first in common law is that of fraudulent misrepresentation inducing a contract – had Mr Jooste not made the representations, which he knew to be false, the Trust would not have entered into the exchange agreement and traded its PSG shares for near-worthless SIH-SA shares.

24. The second is the alleged violation of the prohibition on trading with a fraudulent purpose in terms of section 22(1) of the Companies Act which gives rise to liability on the part of Mr Jooste under sections 20(6)(a) and/or 218(2) of the Act. Section 20(6)(a) of the Companies Act grants a shareholder of a company "*a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with… [the Companies] Act*". Section 218(2) provides that *"[a]ny person who contravenes any provision of (the Companies Act) is liable to any other person for any loss or damage suffered by that person as a result of that contravention*". It is averred that Mr Jooste was in breach of the aforesaid statutory provisions and is, on that basis, liable to the Plaintiffs for the damages sustained by them as a result of the exchange agreement in the amount of R740 407 680 ("the claim based on trading for a fraudulent purpose").

25. The third claim arises from the provisions in the Companies Act that require accurate financial statements. The Plaintiffs allege that the 2014 financial statements:

25.1 failed to present fairly the state of affairs and business of SIH-SA and failed to explain the transactions and financial position of its business, as contemplated in section 29(1)(b) of the Companies Act;

25.2 were false and/or misleading in material respects, as contemplated in section 29(2)(a); and/or

25.3 were incomplete in material particulars, as contemplated in section 29(2)(b).

Mr Jooste who was a party to the preparation, approval, dissemination, and/or publication of the 2014 financial statements, knew that it did not comply with sub-section 29(1) and sub-section 29(2), and would accordingly be criminally liable under section 29(6)(a) of the Companies Act.

The 2014 financial statements, together with the alleged misrepresentations, induced the Trust to enter into the exchange agreement, as a result of which they suffered damages. Accordingly, so it is claimed, Mr Jooste on that basis, too is liable to the Plaintiffs for the damages sustained by them as a result of the exchange agreement in the amount of R 740 407 680 ("the claim based on the 2014 financial statements").

26. The aforementioned causes of action are common to both the Steinhoff and second actions. However, the second action contains a further cause of action, namely that Mr Jooste's breached his fiduciary duties. In this regard, it is alleged that:

26.1 Mr Jooste, a director at the relevant time, violated his statutory fiduciary duties towards SIH-SA and other companies in its group in that he:

26.1.1 Used his position as a director to cause SIH-SA or other companies in its group to enter into transactions with which Jooste had an undisclosed interest, thereby gaining an advantage in violation of section 76(2)(a)(i) of the Companies Act.

26.1.2 Used his position as a director to cause SIH-SA or other companies in its groups to enter into transactions or engage in conduct that gave rise to the alleged false or misleading representations, thereby rendering the 2014 financial statements materially inaccurate, exposing SIH-SA or other companies in its group to legal liability and, thereby, knowingly causing them harm in violation of sections 76(2)(a)(ii), 76(3)(a), 76(3)(b), and 76(3)(c) of the Companies Act.

26.1.3 Mr Jooste failed to communicate to the board of SIH-SA or other companies in its group the alleged misconduct at the earliest practicable opportunity,

in violation of section 76(2)(b) of the Companies Act.

26.1.4 Had Mr Jooste not contravened his statutory fiduciary duties, the Plaintiffs would not have entered into the exchange agreement, in that the 2014 financial statements would have accurately reflected a far lower market-value for the sale of shares; and

26.1.5 Mr Jooste is, therefore, liable to the Trust for all the damages sustained by it as a result of the exchange agreement in the amount of R740 407 680 ("the claim based on the breach of fiduciary duties").

THE RELEVANT LEGAL PRINCIPLES RELATING TO EXCEPTIONS

27. In terms of Rule 18(4) of the Uniform Rules of Court, every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for the claim, defence, or answer to any pleading, with sufficient particularity to enable the opposite party to reply thereto. As the court observed in ***Trope v South African Reserve Bank and Two Other Cases 1992 (3) SA 208 (T)*** at 210G-H, the particulars of claim must be framed in a form that is lucid, logical and intelligible, and the cause of action must appear clearly from the factual allegations made. The particulars of claim should be so phrased that the issues are clearly identified and the defendant is placed in a position to reasonably and fairly plead

thereto.

28. If the requisite standard required by Rule 18(4) of the Uniform Rules is not met, the defendant has an option of excepting to the particulars of claim. As the court noted in ***Colonial Industries Ltd v Provincial Insurance Co Ltd 1920 CPD 627*** at 630,

> "*Now the form of pleading known as an exception is a valuable part of our system of procedure if legitimately employed: its principle use is to raise and obtain speed and economical decision of questions of law which are apparent on the face of the pleadings: it also serves as a means of taking objection to pleadings which are not sufficiently detailed or otherwise lacks lucidity and are thus embarrassing*".

29. Exceptions provide a useful procedural tool to weed out bad claims at an early stage but they must be dealt with sensibly. An over-technical approach destroys its utility and must be avoided (***Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)*** at para 465H).

30. In ***South African National Parks v Ras 2002 (2) SA 537*** at 541J – 542A, Van Heerden J quoted with approval an extract from Joubert (ed) Law of South Africa Vol 3 Part 1, para 186 on the approach of the courts with regard to exceptions:

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

31. In ***Pretorius and Another v Transport Pension Fund and Others 2018 ZACC 10*** at para [15], Froneman J succinctly summarised the process for assessing an exception in relation to a particulars of claim as follows:

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

32. In so far as an exception on the basis that a pleading is vague and embarrassing is concerned, the following general principles apply:

32.1 For an exception to be upheld, the excipient has a duty to persuade the court that

upon every interpretation of a pleading it can reasonably bear, particularly the document upon which it is based, the pleading does not disclose a cause of action or defence. (***Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd and Others 2014 (2) SA 157 (GNP)*** at 161E)

32.2 An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration: firstly, whether the pleading lacks particularity to the extent that it is vague and, secondly, whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced (***Trope v South African Reserve Bank***, *supra*, at 211A-B).

32.3 A statement is vague when it is either meaningless or capable of more than one meaning (***Lockhat & Other v Minister of the Interior 1960 (3) SA 765 (D)*** at 777C-D) or can be read in any one of a number of ways (see, ***General Commercial and Industrial Finance Corporation Limited v Pretoria Portland Cement CO Limited 1944 AD*** 444 at 454).

32.4 Particulars of claim would be "embarrassing" if it is not possible for the pleader to determine what the actual meaning (if any) is conveyed by the pleading (see ***Trope v South African Reserve Bank***, *supra,* at 211E).

32.5 As long as particulars of claim state the nature, extent, and grounds of the cause

of action, the court will not as a rule strike out a paragraph as being vague and embarrassing as long as reasonably sufficient information has been provided for the defendant to plead thereto (***Lockhat & Other v Minister of the Interior***, *supra*, at 777D-E).

33. In so far as the degree of particularity that is required in particulars of claim is concerned, the following general principles apply:

33.1 A plaintiff need only plead "*every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved"* (see, ***McKenzie v Farmers Co-operative Meat Industries Limited 1922 AD 16*** at 23).

33.2 In ***Evins v Shield Insurance Company Ltd 1980 (2) SA 814 (A)*** at 825F, the court stated that "cause of action" is ordinarily used to *"describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action"* (own underlining). The requirement that the cause of action be contained in the pleading can and should, therefore, be read into the words "material facts", which would, in turn, imply that only facts which serve to establish the cause of action would be regarded as "material". The converse also applies, namely that allegations that do not serve to

establish the cause of action would not qualify as being "material" (***Inzinger v Hofmeyer and Others (75/2010) [2010] ZAGBJSC 104 (4 November 2010).***

33.3 The word "material", in my view, defines the character of the facts which must be pleaded in an action and, as such, must be ascertained by reference to the particular claim which is made in the action, the issues raised thereon, as well as by reference to the general propositions of law (see, ***Evins v Shield Insurance Company Limited***, *supra*, at 825E-G). Material facts, in essence, establish a right and that is all that is required for the purpose of pleading. Those facts which prove the right, i.e. the evidence (the *facta probantia)*, are not necessary to be canvassed in the pleadings.

33.4 The excipient bears the onus of proving that the alleged lack of sufficient particularity is such that it would be embarrassed in pleading thereto. When the particularity pertains to mere detail, the defendant can either plead to the averment made or the defendant's remedy is to utilise the Uniform Rules of Court to obtain the necessary information required by means of discovery in terms of the Rules or by means of a request for further particulars for trial if those particulars are strictly necessary to enable the defendant to prepare for trial (see, ***Jowell v Bramwell-Jones & Others****,* supra, at 844H-I). As the court remarked in ***Venter and Others v Wolfsberg Arch Investments (Pty) Ltd 2 2008 (4) SA 639 (CPD)*** at

644G:

> "*The exception stage is not the time for the defendant to complain that he does not have enough information to prepare for trial or may be taken by surprise at the trial. That comes later in the (often long and cumbersome) journey to the doors of the court, after, inter alia, discovery of documents and requests for trial particulars had been made."*

34. In ***Trope v South African Reserve Bank***, *supra*, at 210G-H, the court stated that:

> "*It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise.*"

34.1 Relying on the above *dictum*, Mr Muller argued that the requisite degree of particularity demands not only that the other party may reasonably and fairly be required to plead but also that the other party may come to trial prepared to meet the case of the other and not be taken by surprise.

Where a plaintiff's pleading falls short of that standard, so he argued, the fact that the defendant can simply deny the allegation in question is no answer to an exception since then the object of pleadings may well be defeated.

34.2 In my view, the quoted passage in ***Trope v South African Reserve Bank***, simply means that at the time the matter is ripe for hearing, the pleadings are such that the parties are fully aware of what case they have to meet so that none of them are ambushed at trial. With respect, it would be impose too high a burden on a plaintiff to insist that the initial particulars of claim (or declaration) must be such that it completely sets out the case the defendant has to meet at trial. The filing of a declaration or particulars of claim and the corresponding plea the opening salvoes fired by each of the protagonists. It is likely that there will be many twists and turns during the course of litigation and the pleadings may well evolve to resemble something different to the initial pleadings filed by all the parties. Thus, for example, the plaintiff may wish to amend its particulars of claim by introducing a new cause of action which would then necessitate an amendment to the plea and the possible filing of a replication. It is also possible that new information may come to light during the discovery process which may necessitate an amendment to the pleadings or, even at the pre-trial stage, the parties may further define their issues which could necessitate an amendment to the pleadings. In my view, all that

really is required of a plaintiff, in so far as the particulars of claim is concerned, is that the defendant must have a clear enough exposition of the plaintiff's case to enable the defendant to take instructions from a client (and witnesses where necessary) and file an adequate response to the claim in the form of a plea (cf. ***Venter v Wolfsberg Arch Investments***, *supra*, at 645B).

THE EXCEPTIONS IN THE SECOND ACTION

35. As noted earlier, Mr Jooste has raised two exceptions in his capacity as a third party in the Steinhoff action as well as in his capacity as defendant in the second action. The grounds of the two sets of exceptions overlap substantially. In their heads of argument and during the course of the hearing, the parties decided to first argue the exception in the second action as it predates the exception in the Steinhoff action and also covers most of the issues raised in the latter action. The parties thereafter argued the limited, remaining grounds of complaint raised in the exception in the Steinhoff action. This is a convenient way to deal with both exceptions and I now proceed to do so.

DAMAGES

36. The excipient has taken issue with the characterisation and computation by the Plaintiffs of their damages in three respects:

36.1 **True market-value of the Steinhoff shares**

As was noted, the Plaintiffs alleged that the "true market-value" of each Steinhoff share was R1.27. Mr Jooste's first complaint is that it is not clear what the Plaintiffs means by "true market-value", a concept which underpins the entire damages claim. According to Mr Jooste, the market-value of shares that are publicly traded on a stock exchange is determined with reference to the trading ruling price of such shares. He submits that whilst it is manifestly clear that this is not what is intended by the Plaintiffs, it is equally unclear from the particulars of claim what this concept, "true market-value", is intended to denote and he is left to speculate. However, as the Plaintiffs point out, Mr Jooste himself provides the only possible meaning of this term: namely, had the market been aware of the true state of SIH-SA's financial affairs (as opposed to the state of affairs presented in the 2014 financial statements), the trading price of the Steinhoff shares in June 2015 would have been R1.27 and not R74.03. In other words, "true market-value" refers to what the SIH-SA shares would have been worth had the market known the true state of SIH-SA's financial affairs – the state of which has been canvassed in the particulars of claim in the Steinhoff action and the second action. It is, thus, apparent to me that it is possible to determine a clear and sensible meaning of the term "true market-value" from the particulars of claim in both actions: a meaning

which Mr Jooste himself appears to understand and which was proffered during argument before me. I, accordingly, find no substance in this ground of exception.

36.2 **Computation of the "true market-value" of the Steinhoff shares**

36.2.1 Mr Jooste states that if the meaning of the "true-market value" is as stated in paragraph 36.1 above, then the particulars are excipiable on the basis that the Plaintiffs have not pleaded the material facts on which they rely for the conclusion that the Steinhoff shares would have traded at R1.27 rather than R74.03. Mr Jooste avers that while the Plaintiffs allege that SIH-SA's asset values were "grossly overstated", liabilities were "grossly understated", income was "grossly overstated", expenses were "grossly understated", costs of sales were "grossly understated", reported cash flow was "overstated", and margins were "overstated", the Plaintiffs generally do not seek to quantify, or even estimate, the quantum of the alleged understatement or overstatement. Mr Jooste's complaint is that the Plaintiffs have failed to quantify the value attached to each of the alleged understatements and overstatements in the financial statements and how these values collectively constituted the reconstructed share value of R 1.27. Thus, according to Mr Jooste, the Plaintiffs' computation of damages lacks in averments

necessary to found a cause of action for damages in the amount of R740 407 680 or, alternatively, the computation of damages is vague and Mr Jooste is prejudiced in pleading thereto.

36.2.2 The Plaintiffs' response is that Mr Jooste wants what is not required – how the Trust arrived at R1.27 per share (in other words, whether or not the Plaintiffs' assessment of quantum is correct). Mr Burger submitted that all Mr Jooste is entitled to is sufficient details to enable him to determine what a reasonable assessment of the damages are. I am in agreement with the submissions advanced by Mr Burger. Rule 18(10) of the Uniform Rules of Court stipulates the level of pleaded detail required in damages claims: a plaintiff suing for damages shall set them out in such a manner that it will enable a defendant reasonably to assess the quantum thereof. This means that a plaintiff is not required to set out his claim in such a manner as will enable the defendant to ascertain whether or not the Plaintiffs assessment of the quantum is correct; the defendant has a duty himself to work out what is a reasonable assessment of the damages sustained by the plaintiff (see, ***Durban Picture Frame Co (Pty) Ltd v Jeena 1976 (1) SA 329 (D)*** at 337F).

36.2.3 In any event, the particulars of claim provides sufficient detail to indicate how the damages claimed are arrived at. Indeed, the calculation of the

difference between the value of the PSG shares and the true market-value of the SIH-SA shares at the time of the exchange agreement is expressed in an elaborate formula set out in the particulars of claim in the second action. In my view, the formula together with the particulars provided in relation to the alleged over- and understatements in the 2014 financial statements, provides Mr Jooste with sufficient information to enable him to come up with his own assessment of the Plaintiffs damages in order to enable him to plead thereto. This is particularly so given that Mr Jooste appears to have played an integral part, as employee, CEO, and shareholder, in the Steinhoff group of companies (cf. the comments of the court in a similar context in ***Venter v Wolfsberg***, *supra*, at page 647A).

36.2.4 Mr Jooste has also alleged that he is embarrassed to plead because the manner in which the Plaintiffs plead the computation of their damages is internally contradictory; the Plaintiffs compute their damages on a reconstructed share value (R1.27 per share) while at the same time conceding that the true state of SIH-SA's financial affairs at the relevant time of the claim is still being determined. In other words, the Plaintiffs' case is premised on the true state of SIH-SA's financial affairs but the Plaintiffs state that they do not yet know what this is or was. However, as I read the particulars of claim, all

this averment conveys is that at the stage the summons is issued, the reconstructed share value is determined to be R1.27 but that the value may change given the fact that the full extent of the alleged fraudulent conduct of Mr Jooste is not yet known because *inter alia* the report of the forensic investigation conducted into the Steinhoff group of companies is not yet publicly available. In my view, the relative tentativeness of the full extent of the damages sought to be claimed is not a bar to instituting action. All that is required at this stage is that the Plaintiffs make up their mind on what basis they intend asking the trial court to assess damages and to convey this to Mr Jooste (cf. ***Margau v King 1948 (1) SA 124 (W)*** at 129). In my view, the Plaintiffs have done so. A measure of conjecture in the circumstances is undoubtedly both permissible and proper provided that the pleading is not composed entirely of conjectural and speculative hypothesis which lack any real foundation, which is not the case (see, ***Davenport Corner Tearoom (Pty) Ltd v Joubert 1962 (2) SA 709 (D)*** at 716C-E which was quoted with approval in ***Telematrix (Pty) Ltd v Advertising Standards Authority SA***, supra, at 466B).

36.3 **Inconsistent computation of the "true market-value" of the Steinhoff shares**

36.3.1 Mr Jooste avers that the Plaintiffs' damages is vague and that he is prejudiced in pleading thereto because the quantum claimed in the particulars of claim differs from the quantum as expressed in the Trust's letter of demand of 14 June 2018.

36.3.2 In my view, there is no substance to this complaint. The Plaintiffs are clearly not claiming the amount in the letter of demand but the amount in the particulars of claim. All that the letter of demand denotes is that a demand was in fact made. Certainly, it is apparent from the particulars of claim that no reliance is placed on the amount stated in the letter of demand.

THE REPRESENTATIONS

37. The Plaintiffs allege in paragraph 6 of their particulars of claim that Mr Jooste (together with La Grange) made several material representations which induced the Plaintiffs to enter into the exchange agreement. These representations are more fully set out in paragraph 21.5 above.

38. Mr Jooste's complaint in relation to the representations is two-fold: firstly, he complains that the averment that he "made representations" is a conclusion of law in respect of which the Plaintiffs must plead the material facts on which they rely for the conclusion sought to be drawn and, secondly, he complains that the

Plaintiffs fail to specify how, where, or when in June 2015 the representations were made and whether they were made by words and/or conduct, expressly or tacitly, or orally or in writing. The failure to provide these particulars, according to Mr Jooste, results in the Plaintiffs' claim lacking in averments necessary to found the cause of action or, alternatively, the formulation of the claim is manifestly vague and he is prejudiced in pleading thereto.

39. I find no substance in Mr Jooste's contentions. The Plaintiffs' claim is one of fraudulent misrepresentation inducing a contract. In order to substantiate this cause of action, one must plead that representations were made and what their content and effect was (see, ***Standard Bank of South Africa v Coetsee 1981 (1) SA 1131 (A)*** at 1145D-E).

40. The particulars of claim contain the *facta probanda* relating to the representations that are required to sustain the cause of action:

40.1 who made the representations (Messrs Jooste and La Grange);

40.2 to whom they were made (Mr Du Toit);

40.3 when they were made (June 2015); and

40.4 their content (that Steinhoff was about to issue shares, that R 74.03 was a fair

price for each share, that they were listed on Johannesburg Stock Exchange, that the 2014 financial statements were accurate and that an exchange ratio of 2.65 Steinhoff shares for each PSG share was a like-for-like exchange). How, where, and when the representations were made is not information that is strictly necessary to plead and the failure to specify this information cannot prejudice Mr Jooste. As Mr Burger correctly argued, Mr Jooste cannot seriously contend that he is unable to plead to the Plaintiffs' averments regarding the representations: either he met with Mr Du Toit in June 2015, or he did not. If he did, he knows what he said and the context in which he made the representations and is, therefore, able plead accordingly.

THE FALSITY OF THE REPRESENTATIONS

41. In their particulars of claim, the Plaintiffs set out the manner in which they allege SIH-SA manipulated its financial records so as to represent the company in a far more positive light than was factually the case at the time. Mr Jooste's complaint is that the pleaded formulation of the Plaintiffs' claim based on the alleged falsity of the 2014 financial statements is vague and he is prejudiced in pleading thereto.

42. In this regard, Mr Jooste states that in the course of its exposition of the alleged

financial misconduct perpetrated by Mr Jooste, the Plaintiffs make reference to *inter alia* the "other companies" in the SIH-SA group without naming them, makes reference to certain structures and transactions without identifying or describing the structures and transactions, and makes reference to certain transactions which have not been entered into at an arm's length basis between SIH-SA or "other companies" in the Group without providing any detail or identifying the said parties. Reference is also made to certain transactions which have not been concluded at market-related prices; that assets were overstated without affording a value to such overstatements; that the liabilities of SIH-SA or "other companies" in the Group were understated without specifying the level of the understatement or identifying the "other companies" in the Group referred to; that the income earned by SIH-SA or other groups or companies "were grossly overstated" without identifying the sources of income or the categories of income allegedly overstated; that the expenses of SIH-SA or "other companies" in its Group were "grossly overstated" without indicating the sources or categories of expenditure and the amount of the overstatement; and the alleged structures, events and financial-reporting methodologies that gave rise to the representations are not specified with any degree of particularity.

43. Given the nature and extent of Mr Jooste's complaint in relation to the alleged falsity of the representations, it is difficult not to draw the conclusion that he knows and understands the cause of action the Plaintiffs rely on: Mr Jooste's real complaint seems to be aimed at the degree of particularity with which the cause

of action is pleaded. Having regard to the extensive detail provided in the particulars of claim in substantiation of the cause of action, it seems to me that the averments in the particulars of claim set out the Plaintiffs' cause of action clearly and with sufficient detail for him to plead thereto. The particulars of claim certainly contain the necessary *facta probanda* (the facts necessary to make out a cause of action). What Mr Jooste appears to require is in the nature of *facta probantia* (the evidence that together proves those facts). However, it is not necessary to plead *facta probantia* (see, ***McKenzie v Farmers Co-operative**, supra*, at 23). As Mr Burger correctly points out, the specific structures and transactions, assets and liabilities that allegedly "bloated" the 2014 financial statements will be specified in evidence. It is not now necessary for the Plaintiffs to specify them. Indeed, it seems to me that the type of particularity, or details, required by Mr Jooste is best dealt with as requests for further particulars for trial, if necessary.

44. Mr Burger submitted that even if it were assumed for the sake of argument that the particulars are vague, they are not embarrassing and Mr Jooste can plead to them. Thus, if Mr Jooste is sure that SIH-SA was "ship-shape" in 2014, he can deny *in toto* that the 2014 financial statements were inaccurate. If he does not know of any wrongdoing, he can plead no knowledge of these paragraphs and put the Plaintiffs to the proof thereof. If Mr Jooste knows of some wrongdoing, he can admit it and deny the rest. I am likewise persuaded by Mr Burger's arguments. As the court remarked in ***Venter v Wolfsberg**, supra*, at 647D:

"*Lack of particularity cannot sustain an exception that particulars of claim were vague and embarrassing if the cause of action is clearly and unambiguously set out and all the necessary averments to sustain that cause of action are made*".

BREACH OF FIDUCIARY DUTIES

45. The basis pleaded of the alleged breach of fiduciary duties is summarised in paragraph 26 above.

46. Mr Jooste contends that the Plaintiffs have failed to identify or specify the companies in the Steinhoff Group which Mr Jooste allegedly "harnessed" to violate his fiduciary duties, to specify the nature and extent of the advantage that he gained, and the manner in which he failed to fulfil his fiduciary duties. Mr Jooste's complaint is that the pleading of the claim based on the breach of fiduciary duties is vague and he is prejudiced in having to plead thereto.

47. I have already indicated that the particulars contain sufficient averments relating to Mr Jooste's alleged malfeasance. In my view, the particulars are such that they enable Mr Jooste to know what case he has to meet in relation to the alleged breach of his fiduciary duties and to plead thereto. The claim may not contain the level of particularity that he desires but that is no reason why, on the available

particulars, he cannot plead, even if his plea consists of a denial *seriatim* of all the averments in relation to this claim, as long as there is no ambiguity in such denial (cf. ***Lockhat and Others v Minister of Interior***, *supra,* at 778A).

THE JUNE-2018 REPORT

48. In paragraph 8 of the particulars, the Plaintiffs refer to, and annex as “”POC1”, the unaudited half-year results of SIH-NV for the 6 months ending 31 March 2018 and published on 29 June 2018 (“the June-2018 report”), and plead that “*the letter of the chairperson of the Supervisory Board on page, the Management Board report on page 7 and the Financial Review on pages 35 and 43 should be read as if repeated herein*”.

49. Mr Jooste’s complaint is that the Plaintiffs have failed to identify, and spell out, the facts in “POC1” upon which reliance is placed, as well as any inferences or conclusions sought to be drawn from those facts. In support of this submission, reference is made to ***Port Nolloth Municipality v Xhalisa and Others***; ***Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 (C***) at 111A/B – C; ***National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)*** para 47; and ***Botha v Guardian Insurance Co Ltd 1949 (2) SA 223 (GWLD)*** at 227.

50. The case authority relied on by Mr Jooste deals essentially with applications. It is indeed so that in application proceedings, if a party wishes to make reference to

an annexure, it has to identify and spell out the relevant portions sought to be relied on and the inferences or conclusions sought to be drawn from the relevant portions of the document. As Harms DP explained in ***National Director of Public Prosecutions v Zuma***, *supra,* at 299A-B:

> *"Judgement by ambush is not permitted. It is not proper for a court in motion proceedings to base its judgment on passages in documents which have been annexed to the papers and the conclusion sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. A party cannot be expected to trawl through annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained".*

51. While there might be good reason for such a rule or practice in application proceedings, I am doubtful whether this rule or practice can be applied uncritically to action proceedings. Thus, for example, a plaintiff may make reference to a document, other than a contract, without annexing it to the particulars of claim. In terms of Rule 35(12) of the Uniform Rules of Court, a defendant may then call for this document before pleading. If that document is provided, there is no need for the plaintiff to then specify, before providing the document, on which portion of the document it relies on in its pleading or the inferences or conclusions to be drawn from the relevant portion of the document. Nor is it required of the plaintiff in such

circumstances to amend its pleading consequentially after the provision of the document.

52. It seems to me that the basic principle still applies even if documents are annexed to a particulars of claim: whether or not the defendant is aware of what case he has to meet and there are sufficient particulars in order to enable him to do so. In this case, specific reference is made to pages 3, 7, 35 and 43 of "POC1". Moreover, the reference to "POC1" is in paragraph 8 of the particulars in the second action, which follows the averment that the 2014 statements were false and misleading in various respects. It must, therefore, be apparent that the Plaintiffs are relying upon "POC1" to show that the 2014 financial statements are false and misleading in the respects pleaded in paragraph 7 of the particulars of claim. In any event, there certainly is no suggestion that aspects of "POC1" either contradicts or is at variance with any statement in the particulars of claim so as to render the pleading embarrassing.

53. I, accordingly, find no substance in this ground of exception.

THE EXCEPTIONS IN THE STEINHOFF ACTION

54. The grounds of exception in the Steinhoff action are very much in line with those advanced in the exception in the second action, save that the Steinhoff action includes four additional grounds that do not form part of the exception in the

second action. I now turn to consider these four additional grounds of exception:

54.1 "***INTER ALIA"***

54.1.1 The exceptions to paragraphs 38 and 44 to 45 of the Steinhoff particulars can be dealt with together. In both, Mr Jooste claims that the use of the phase "*inter alia*" in paragraphs 34 and 35 of the Steinhoff particulars of claim renders the entire particulars vague and embarrassing.

54.1.2 Paragraphs 34 and 35 of the Steinhoff particulars read as follows:

> "*34. The exchange agreement, alternatively the exchange agreement in combination with the scheme of arrangement, constitute the carrying on of the business of the First Defendant and/or of the Fourth Defendant with an intent to defraud and/or for a fraudulent purpose, contrary to the prohibition in section 22(1) of the Companies Act ("the prohibited conduct"), because* ***inter alia*** *the exchange agreement was induced by fraudulent misrepresentation, as set out in paragraphs 10 to 22 above.*

35. Jooste and LA Grange caused the First and Fourth Defendants to conduct the prohibited conducted as they, ***inter alia*** *–*

35.1 were the CEO and CFO respectively of the First and Forth Defendants at the relevant times;

35.2 were the agents of the First Defendant in making the Defendants' representations, and Jooste represented it in concluding the exchange agreement; and

35.3 were the operating minds behind the scheme of arrangement, assisted in implementing it, and represented both the First and Fourth defendants in the process."

54.1.3 It appears to me that this complaint, relating to the use of the word "*inter alia"* in paragraphs 34 and 35 of the Steinhoff particulars, is overly technical. A plain reading of paragraphs 34 and 35 clearly indicates that each paragraph admits to only one

meaning. Paragraph 34 avers that the exchange agreement violates section 22(1) of the Companies Act, at least because it was induced by a fraudulent representation. In paragraph 35, it is averred that Mr Jooste and La Grange caused SIH-SA and the SIH-NV to violate section 22(1) for at least the reasons set out in paragraphs 35(1) – 35(3). The pleadings must be accepted as they stand and, as paragraphs 34 and 35 are presently worded, they are neither vague nor embarrassing as each paragraph admits of a distinct and discreet averment capable of one meaning.

54.1.4 I, therefore, find no substance in this ground of exception.

54.2 "**OPERATING MINDS"**

54.2.1 The Plaintiffs allege in paragraph 35 of the particulars that:

"*35. Jooste and La Grange caused the First and Fourth Defendants to conduct the prohibited conducted as they, inter alia –*

35.1 were the CEO and CFO respectively of the First and Forth Defendants at the relevant times;

35.2 were the agents of the First Defendant in making the Defendants' representations, and Jooste represented it in concluding the exchange agreement; and

35.3 were the operating minds behind the scheme of arrangement, assisted in implementing it, and represented both the First and Fourth defendants in the process."

54.2.2 Mr Jooste takes issue with the use of the words "*the operating minds*" in paragraph 35.3, complaining that this phrase is imprecise and unclear and that, accordingly, he is prejudiced in pleading thereto.

54.2.3 The Plaintiffs have submitted that the averment that Messrs Jooste and La Grange were "*the operating minds behind the scheme of arrangement"* simply means that they planned the scheme of arrangement and controlled its implementation.

54.2.4 Section 22(1) of the Companies Act prohibits fraudulent trading and, as Mr Burger has correctly pointed out, this complaint goes nowhere near the heart of the Plaintiffs' cause of action – a requirement for a

vague and embarrassing exception. In my view, honing in on the phrase "*operating minds*" is merely a distraction. The particulars aver that Messrs Jooste and La Grange, when allegedly causing SIH-SA and the SIH-NV to violate section 22(1) of the Companies Act, acted as CEO and CFO, respectively. It is also claimed that they acted as agents of SIH-SA when making the representations, and Mr Jooste represented SIH-SA in concluding the exchange agreement. Both these individuals are also alleged to have assisted in implementing the scheme of arrangement and represented both SIH-SA and the Fourth Defendant in the process. In my view, the particulars of claim sufficiently identify the issues which Mr Jooste is required to plead to. He cannot be embarrassed for lack of detail. Mr Jooste ought to know if he was involved with the scheme of arrangement and, if so, to what extent. He can, therefore, plead to the averment that he planned, assisted with, and implemented the scheme of arrangement, and represented SIH-SA and the SIH-NV in the process.

54.3 **ABUSE OF JURISTIC PERSONALITY**

54.3.1 The Plaintiffs allege in paragraph 33.4 of the particulars that:

"Jooste and LA Grange treated the Fourth Defendant, the

Fifth Defendant, the First Defendant and their subsidiaries in the way that drew no distinction between the separate juristic personalities of these companies."

54.3.2 Mr Jooste's complaint is that the quoted averment is a conclusion of law and the Plaintiffs have not pleaded the material facts upon which they rely for the conclusion sought to be drawn. As such, so complains Mr Jooste, the pleading of this claim lacks in averments necessary to found a cause of action or, alternatively, the formulation of the claim is vague and he is prejudiced in pleading thereto.

54.3.3 Once again, Mr Jooste appears to have honed in on a particular sub-paragraph of the particulars of claim without considering the particulars of claim in its entirety. In paragraphs 28 and 29 of the Steinhoff particulars, the Plaintiffs aver that between October 2017 and March 2018, Steinhoff Finance Investments (Pty) Ltd, an indirect subsidiary of SIH-NV, caused 55.5 million PSG shares to be sold. The proceeds of this sale were used to settle the debts of SIH-NV, SIH-SA, and the Fifth Defendant. Between October 2017 and December 2017, Messrs Jooste and La Grange were still CEO and CFO, respectively, of the Steinhoff Group. By permitting the PSG shares held by one company in the Steinhoff Group, to be sold to

settle the debts of SIH-SA, SIH-NV, and the Fifth Defendant, they failed to distinguish between these companies as separate juristic entities. Read within the context of the particulars as a whole, the complaint levelled by the Mr Jooste is without merit. Paragraph 34.4 of the Steinhoff particulars is certainly not vague and contains sufficient particulars to alert Mr Jooste to what the case is against him in order to enable him to plead thereto. Accordingly, there is no substance in this complaint as well.

CONCLUSION

55. Having regard to the particulars of claim as a whole, both in the Steinhoff action and the second action, the exceptions:

55.1 do not raise a substantive question of law which may have the effect of settling the dispute between the parties;

55.2 do not in any real sense bring an end to any distinct part of the case;

55.3 do not go to the root of the whole cause of action but are merely directed at specific paragraphs in the respective particulars of claim;

55.4 do not establish vagueness or embarrassment in the sense of rendering the

particulars of claim meaningless or capable of more than one meaning and, accordingly, no prejudice has been demonstrated; and

55.5 in the main, do not amount to a complaint against the *facta probanda* (the facts which need to be proved) but are rather aimed at the *facta probantia (*the evidence necessary to prove each fact); in my view, both particulars of claim sets out the material facts upon which the Plaintiffs seek to rely on for their claim with sufficient particularity to enable Mr Jooste to plead thereto.

ORDER

56. I make the following order.

56.1 The exceptions lodged by Mr Jooste under Case Nos. 16244/2018 and 47916/19 are dismissed.

56.2 Mr Jooste is ordered to pay the Plaintiffs' costs, such costs shall include the costs of two counsel (where so employed).

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FRANCIS, AJ