BOX 47

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

Case No: 7978 /2021

In the matter between:

AJVH HOLDINGS (PTY) LTD	First Applicant
FULL TEAM SURE TRADE (PTY) LTD	Second Applicant
AQUILAM HOLDINGS (PTY) LTD	Third Applicant
LIBER DECIMUS (PTY) LTD	Fourth Applicant
XANADO TRADE AND INVEST 327 (PTY) LTD	Fifth Applicant

and

STEINHOFF INTERNATIONAL HOLDINGS N.V. Registration No: 2015/285685/10	Respondent

Registered address: Building B2, Vineyard Office Park, Corner Adam Tas and Devon Valley Road, Stellenbosch

Liquidation Application

NOTICE OF MOTION

Filed by: C&A Friedlander Inc.
Per: P Katzeff
Email: gavin@caf.co.za
Tel: 021 487 7900 / 084 351 6211

BE PLEASED TO TAKE NOTICE THAT application will be made to the above Honourable Court on 24 May 2021 at **10h00** or so soon thereafter as counsel may be heard for an order in the following terms:

1. that this application be heard as a matter of urgency in terms of Uniform Rule of Court 6(12)(a) and that the Court condone the Applicants' failure to comply with the time limits and forms of service;

2. that the respondent be provisionally wound up;

3. that a rule *nisi* be issued calling upon the respondent and all interested persons to show cause, if any, to the Court on a date to be fixed by the Court, why: -

   3.1 the respondent should not be finally wound up; and

   3.2 the costs of this application should not be costs in the winding up;

4. that service of the order be effected:

   4.1 on the respondent at its abovementioned registered address;

   4.2 on the respondent's employees at its registered address;

   4.3 on any registered trade union(s) representing the respondent's employees;

   4.4 on the South African Revenue Services at 22 Hans Strijdom Avenue, Cape Town;

4.5 by one publication in each of the *Cape Times* and *Die Burger* newspapers;

5. for such further and/or alternative relief as the Court may deem fit.

TAKE NOTICE FURTHER THAT the affidavit of **BERNARD EUGENE MOSTERT** will be used in support of this application.

TAKE NOTICE FURTHER THAT the applicants have appointed the offices of C&A Friedlander Attorneys, 3rd Floor, 42 Keerom Street, Cape Town, as the address where they will accept notice and service of all process in these proceedings.

KINDLY ENROL THE MATTER FOR HEARING ACCORDINGLY.

DATED AT **CAPE TOWN** ON THE **12th** DAY OF **MAY 2021.**

P KATZEFF
(As attorney certified in terms of s4(2) of Act 62 of 1995 and as attorney)

C&A FRIEDLANDER
attorneys

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(Ref: PK/nf/Wi1872)

TO: **THE REGISTRAR**
Western Cape High Court
CAPE TOWN

AND TO: **STEINHOFF INTERNATIONAL HOLDINGS N.V.**
Respondent
Building B2, Vineyard Office Park
Corner Adam Tas and Devon Valley Road
STELLENBOSCH **[By sheriff]**

AND TO: **THE EMPLOYEES OF THE RESPONDENT**
Building B2, Vineyard Office Park
Corner Adam Tas and Devon Valley Road
STELLENBOSCH **[By sheriff]**

AND TO: **ANY TRADE UNION(S) REPRESENTING THE EMPLOYEES OF THE RESPONDENT**
Building B2, Vineyard Office Park
Corner Adam Tas and Devon Valley Road
STELLENBOSCH **[By sheriff]**

AND TO: **THE MASTER OF THE HIGH COURT**
Dullah Omar Building
45 Castle Street
CAPE TOWN **[By sheriff]**

AND TO: **THE SOUTH AFRICAN REVENUE SERVICES**
17 Lower Long Street
CAPE TOWN **[By sheriff]**

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **/2021**

In the matter between:

AJVH HOLDINGS (PTY) LTD	First Applicant
FULL TEAM SURE TRADE (PTY) LTD	Second Applicant
AQUILAM HOLDINGS (PTY) LTD	Third Applicant
LIBER DECIMUS (PTY) LTD	Fourth Applicant
XANADO TRADE AND INVEST 327 (PTY) LTD	Fifth Applicant

and

STEINHOFF INTERNATIONAL HOLDINGS N.V.	Respondent

Registration No: 2015/285685/10

Registered address: Building B2, Vineyard Office Park,
Corner Adam Tas and Devon Valley Road, Stellenbosch

FOUNDING AFFIDAVIT

I, the undersigned,

BERNARD EUGENE MOSTERT,

do hereby make oath and say that:

1 I am an adult male businessman and a director of the first and fifth applicant. My business address is at 1 Saagmeul Street, George Industria, George, Western Cape.

2 The facts deposed herein are within my personal knowledge and belief, except where the context indicates the contrary, and are true and correct. Where I refer to information conveyed to me by others, I believe such information to be true.

3 I have been authorised to bring this application by the applicants, as is evident from the resolutions, copies of which are annexed marked "**BM1A-E**".

THE APPLICANTS

4 The first applicant is **AJVH HOLDINGS (PTY) LTD**, a company duly incorporated under the laws of South Africa, with registration number 2010/004418/07, of Dynarc House, 1st Floor, Meade and Courtnay Streets, George, Western Cape.

5 The second applicant is **FULL TEAM SURE TRADE (PTY) LTD**, a company duly incorporated under the laws of South Africa, with registration number 2012/127389/07, of 16 Heather Avenue, Heatherlands, George, Western Cape.

6 The third applicant is **AQUILAM HOLDINGS (PTY) LTD**, previously named K2016134478 (South Africa) (Pty) Ltd, a company duly incorporated under the laws of South Africa, with registration number 2016/134478/07, of 23 Eagle Drive, Fancourt Blanco, George, Western Cape.

7 The fourth applicant is **LIBER DECIMUS (PARTLY) LTD**, a company duly incorporated under the laws of South Africa, with registration number 2014/016614/07, of 16 Eagle Close, Fancourt Blanco, George, Western Cape.

8 The fifth applicant is **XANADO TRADE AND INVEST 327 (PTY) LTD**, a company duly incorporated under the laws of South Africa, with registration number 2016/065035/07, of Dynarc House, 1st Floor, Corner Meade and Courtnay Streets, George, Western Cape.

9 The applicants are investment-holding companies.

THE RESPONDENT

10 The respondent is **STEINHOFF INTERNATIONAL HOLDINGS N.V.**, an external company duly registered as such under the laws of South Africa with registration number 2015/285685/10, and its registered address at Building B2, Vineyard Office Park, Corner Adam Tas and Devon Valley Road, Stellenbosch, within the jurisdiction of the Court ("**the Stellenbosch registered office**"). The respondent's principal place of business is at the same address.

11 The respondent currently has only two executive directors, Louis Jacobus Du Preez ("**Du Preez**"), appointed on 19 December 2017, and Theodore Le Roux De Klerk ("**De Klerk**"), appointed on 20 April 2018. The residential addresses of both Du Preez and De Klerk are in the Western Cape.

12 The aforesaid information regarding the respondent is evident from a Windeed company report, a copy of which is annexed marked "**BM2**".

13 Although the respondent is incorporated in the Netherlands, its operations and corporate actions are conducted and controlled from its principal place of business in Stellenbosch.

THE APPLICATION

14 This is an application for the liquidation of the respondent on the bases that it is unable to pay its debts, its liabilities exceed its assets by such a margin that it has lost more than 75% of its share capital, and that it is just and equitable that it be wound up as contemplated in section 344(h) of the Companies Act 61 of 1973 ("**the 1973 Act**"), still in force in terms of item 9(1) of schedule 5 of the Companies Act 71 of 2008 ("**the Companies Act**").

LOCUS STANDI

15 The applicants are contingent or prospective creditors of the respondent as contemplated in section 346(1)(b) of the 1973 Act. They are the plaintiffs in an action instituted in this Court under Case No. 8276/2018 in which they claim restitution of shares and claims obtained from them by fraud, alternatively payment of compensation ("**the restitution action**"). This is expanded upon below.

THE APPLICANTS' CASE IN SUMMARY

16 The claims arise from the applicants having been fraudulently induced to conclude a contract ("**the contract**") in August 2016. In terms of the contract they disposed of their interests in Tekkie Town (Pty) Ltd ("**Tekkie Town**") to the respondent. Consequent upon discovery of the fraud, the applicants in

May 2018 rescinded the contract and instituted action for restitution, alternatively compensation.

17 The restitution action lies against the respondent and three of its subsidiaries. The assets of which restitution is claimed represent the shares in and business of Tekkie Town as it was in August 2016. At the time, the agreed purchase price for shares in and claims against Tekkie Town (collectively "**the Equity**") was R3 257 250 000 (abbreviated to R3,25 bn) and the applicants' proportion thereof amounted to R1 854 678 150 (abbreviated to R1,85 bn).

18 The claim in the restitution action is for restitution of the applicants' part of the Equity, or monetary compensation to the extent of any non-restitution. I refer below to aspects of the relief being claimed.

19 In exchange for the Equity the applicants received shares in the respondent. In terms of the contract they were precluded from selling those shares for three years.

20 I annex a copy of the plaintiffs' amended and consolidated particulars of claim in the restitution action marked "**BM3**", and the contract, annexure "**POC1**" to it.

21 I was present when the representations described in paragraphs 19 and 20 of annexure **BM3** were made and confirm that those paragraphs are true

and correct. I also confirm the truth and correctness of the allegations in paragraphs 13, 14, 23.2 and 28 (and all its sub-paragraphs).

22 For present purposes I emphasise the following representations made on behalf of the respondent, as expressed in **BM3:**

> "*20.2 That there had at all times been proper compliance with all accounting and financial reporting obligations and standards applicable to Steinhoff NV;*
>
> *"20.3 That Steinhoff NV's published financial statements, and those of Steinhoff Investment Holdings Limited ("SIH") fairly reflected their assets and liabilities;*
>
> *'20.4 That Jooste knew of no facts or circumstances, which, if they became known, might have a material adverse effect on the publicly traded price of the ordinary shares in Steinhoff NV.*"

23 During December 2017, the respondent disclosed that it would not be able to publish its interim financial statements for 2017, that its CEO, Markus Jooste ("**Jooste**") had resigned with immediate effect, that it had commenced an investigation into accounting irregularities, and that its audited financial statements for 2016 could not be relied on and would have to be restated.

24 In consequence, the respondent's share price on the JSE dropped dramatically by about 90% within days.

25 It thus became evident that the representations referred to above had been false, and that Jooste and other representatives of the respondent had known that and concealed it from the applicants.

26 In the interim, between February and October 2017, the respondent had transferred the shares in Tekkie Town and the Tekkie Town business to various of its subsidiaries (the remaining defendants in the action, that were wholly-owned and fully controlled subsidiaries at the time), as described in paragraphs 35 to 37 of **BM3**.

27 The fact of the respondent's euphemistically termed "accounting irregularities" is notorious. They were the subject matter of an investigation by the accounting firm PwC. The respondent caused a summary of the PwC report to be published on 15 March 2019. A copy thereof is annexed marked "**BM4**". It shows irregularities based on falsified and non-existent transactions running into hundreds of millions of Euros, to the extent that they had been uncovered and reported on at that time. The falsification of records and attendant accounting irregularities had been going on for many years, since at least the respondent's 2009 financial year. This was well before the contract between the applicants and the respondent was concluded in 2016.

28 The respondent has resisted disclosing the complete PwC report. It is evident from page 201 of its 2020 Annual Report (a copy of which page is annexed marked "**BM5**"), that there have been three court applications brought by (1) Tiso Blackstar (owners of prominent South African media, including the *Sunday Times*), (2) the PIC (the Public Investment Corporation of South Africa) and (3) Jayendra Naidoo ("**Naidoo**"), all in an attempt to gain access in the public interest to the PwC forensic report. Naidoo lost his application in the Amsterdam District Court on 18 February 2021. The other two applications, presumably pending before South African courts, are ongoing. As far as I am aware, Jooste also brought such an application, which was also opposed.

29 I respectfully aver that **BM4** itself is sufficient to show that the applicants' cause of action against the respondent in the restitution action is well-founded. The respondent's plea in the action contains no more than a bald denial of the fraud allegations. Despite having had many opportunities to do so, the respondent has not engaged with the applicants' substantive allegations, nor suggested that it has a serious or *bona fide* defence to their claims. **BM4** indeed shows the contrary.

30 It is, however, apparent that the respondent is both factually and commercially insolvent and cannot pay its debts, and has publicly admitted that. This will be elaborated upon below.

BM

31 The respondent has now proposed a scheme that purports to achieve a multi-jurisdictional compulsory compromise ("**The Steinhoff Global Settlement**"), part of which is taking place in the Netherlands under Dutch Law ("**the Scheme**" or "**the Composition Plan**"). I annex a copy of the Scheme, as published on the respondent's website dedicated to its settlement efforts, marked "**BM6**". In addition, there is a scheme of arrangement between the respondent and so-called "Financial Creditors" in England and there is a further compromise proposed in South Africa under section 155 of the Companies Act between Steinhoff International Holdings (Pty) Ltd, a subsidiary of the respondent, and its creditors ("**the s155 Proposal**").

32 The applicants reject the proposals contained in the Scheme. The respondent evidently wishes to compel those creditors who reject the Scheme, to accept that offer and to forego all claims, however legitimate, against the respondent and its subsidiaries.

33 At face value, the Scheme is calculated to rid the respondent and its subsidiaries of the inconvenience and inevitable embarrassment of having to continue to defend, *inter alia*, the applicants' restitution action, and to secure for themselves the benefit of retaining the Tekkie Town business, obtained from the applicants by fraud, at a risible fraction of its agreed price and value.

34 Section 2.1 of the Explanatory Memorandum that forms part of **BM6**, refers to negotiations between the respondent and various groups of creditors and claimants, and suggests that the Scheme resulted from that process. None of the applicants were a party to such negotiations, and at no stage was the consent of any of the applicants sought to the proposed Scheme.

35 It is apparent from paragraphs 20 to 22 of the Explanatory Memorandum, though, that the respondent sought consent from certain of its so-called "*Financial Creditors*", and that where it failed to secure sufficient support, it successfully undertook a Scheme of Arrangement in England to compel their cooperation.

36 The Scheme differentiates between creditors of the respondent that would all otherwise be concurrent creditors in insolvency or winding-up (under South African law) by treating the "*Financial Creditors*" on a different and more favourable footing than others (the so-called "Contractual Claimants" and market purchase claimants, the "MPCs"). The applicants are separately identified in **BM6** as "the Tekkie Town Claimants", and fall within a category named "the SIHNV Claimants", which is a sub-set of the "Contractual Claimants".

37 In terms of the Scheme, the "Financial Creditors" stand to be paid in full, albeit later than their entitlement, but the "Contractual Claimants" are set to receive but a meagre dividend. Payment is to be in cash and shares in Pepkor Holdings Limited ("**Pepkor Holdings**"), a subsidiary of the

respondent and a defendant in the restitution action. According to illustrations at p 14 of the Scheme documents (annexure **BM6**), the dividend to Contractual Claimants – to the extent that their claims are "recognised" - may be 5% or 6%, but it *may be* less than that.

38 The Scheme involves the creation of a so-called SOP Settlement Fund controlled by a foundation (a "*Stichting*") in the Netherlands ("**the SRF**"). According to paragraph 6.2 of the Composition Plan (at p 34 of **BM6**) the respondent is "to procure" various contributions to this Fund. One such contribution is to be made by Ainsley Holdings (Pty) Ltd, a wholly-owned subsidiary of the respondent, which is, in turn, the holding company of Pepkor Holdings.

39 Section 10 of the Explanatory Memorandum deals with the supposed benefits of the Scheme. In paragraph 120 there is a simplified overview of the estimated recoveries of *inter alia* the so-called Contractual Claimants (including the applicants) in liquidation ranging from 4,2% to 5,8%, compared with supposed "Recovery if Settlement Effective Date occurs" of 4,6% to 7,6%. The latter projection is considerably more optimistic than the illustration at page 14. I take these illustrations at face value, but cannot assess their correctness.

40 Regardless, it is evident that under the Scheme the applicants stand to achieve a paltry dividend. Thus, despite the repeated (self-fulfilling) claims in the Scheme documents that the respondent considers it to be beneficial

not only to itself and its subsidiaries, but also to the claimants, the Scheme does not offer the present applicants any meaningful benefits.

41 Under the Scheme, the Contractual Claimants are expected to share *pro rata* with the so-called MPC claimants in the SOP Settlement Fund. The MPC claimants are parties who assert claims for damages against the respondent or its subsidiaries, directors and officers, arising from their purchasing of shares in group companies on the Johannesburg or Frankfurt stock exchanges on the strength of the group's false financial reporting.

42 An attempt to advance such claims in South Africa by means of a class action, failed. The court held that they had no prospects of success. Under the Scheme the so-called MPC claimants will, however, not have to persuade an objective South African Court of the merits or validity of the claims, but the directors of the respondent and the Dutch administrators of the SRF.

43 Moreover, it is evident that the MPC claims would lie not only against the respondent, but, notionally, against all those who must take responsibility for the publication of the false financial statements. That could include directors, officers and accountants (auditors). It is also evident from the Scheme that those parties, and in some cases their insurers, have undertaken to make contributions to the so-called SOP Settlement Fund from which the claims of the Contractual and MPC claimants are to be paid.

In return, the Scheme provides for all of those parties to be discharged from further possible liability.

44 In addition to the Financial Creditors being treated disproportionately favourably under the Scheme, there are two so-called "Intra—Group Creditors" that will also receive preferential treatment. They are Steinhoff Africa Holdings (Pty) Ltd, and a company called Steenbok Newco 2A Ltd. Their claims are said to arise from loans concluded "in the ordinary course" of the respondent's business. Nothing more is known about them, but it is safe to say that they were concluded after the present applicants had been defrauded by the respondent and the Tekkie Town business absorbed into the respondent and its subsidiaries. The Intra-Group Creditors stand to be paid in full.

45 In summary, the Financial Creditors and the Intra-Group Creditors stand to be paid in full, despite holding no security and having no more than concurrent claims in insolvency.

46 By contrast, the applicants' claims are equated with others of dubious legal validity, and stand to be heavily discounted. They lose the opportunity to obtain restitution through the South African courts. The applicants also stand to lose their claims against any companies in the Steinhoff Group.

47 In the latter regard, once sanctioned, the Scheme purports to embody a waiver and a "*full, final and irrevocable discharge* (*volledige en finale*

kwijting) *of any unsecured and non-preferred Claim of any Distribution Creditor against SIHNV [i.e. the respondent], regardless of whether such Distribution Creditor has filed (or has authorised a party to file) its Claim with the Claims Administrator for admission in the SoP (the "Waivers")*" (clause 5.1 of the Composition Plan, which is part of BM6). It also purports to constitute a waiver of any further claims against any Steinhoff Group Company (clause 14.1).

48 Voting under the Scheme will be dominated by the "*Financial Creditors*" (discussed in more detail below).

49 There are further provisions of the Scheme purporting to entrench the waivers (clause 12 of the Composition Plan) and to make them applicable to all claims against companies in the Steinhoff Group, including the other defendants in the restitution action.

50 From the applicants' perspective, the Scheme has been calculated to divest them of the claims they are pursuing in the restitution action, for no better than a meagre dividend, if the Scheme is given effect in South Africa. This will occur regardless of whether the applicants file claims under the Scheme, and will leave them at the mercy of other concurrent creditors who stand to benefit from preferential treatment under the Scheme.

51 The Dutch Bankruptcy Act, which can be accessed on the respondent's settlement website, provides that for the respondent to have obtained a

provisional moratorium on payment, as it did on 15 February 2021, the respondent had to declare that it was unable to pay its debts ("*opeisbare schulden*"). I elaborate on this below.

52 In the circumstances, I respectfully aver that the respondent has publicly and officially admitted that it is factually and commercially insolvent.

53 It seems likely that the Scheme will be approved. Creditors will not vote in separate classes according to the preference accorded to them by the Scheme. The Financial Creditors have the voting power to ensure that the Scheme is approved by creditors overall. The Scheme documents explain that the Financial Creditors have already irrevocably consented to it in advance.

54 Because of this, the applicants now run the risk of being precluded from exercising their Constitutional rights to have their disputes with the respondent and any of its subsidiaries decided in a fair public hearing before a Court in South Africa, and/or for the winding-up of the respondent to be undertaken under the supervision of the High Court in accordance with the law, and fair and just administrative action. In addition, South African law applies in terms of the contract.

55 The Tekkie Town shares and business were passed on to the respondent's subsidiaries as described in paragraphs 35 to 37 of **BM3**. Those assets are bolstering the respondent's group asset position, and form part of the value

underlying the Pepkor Holdings shares (referred to as the "**PPH Shares**" in the Scheme) offered as part payment to creditors under the Scheme.

56 Thus, the respondent's actions have compelled the applicants to bring this application to protect their interests in South Africa and the applicants have instituted this application for that purpose.

57 Winding-up proceedings would enable South African liquidators to deal effectively and immediately with the respondent's South African assets for the benefit of South African creditors in terms of a proper *concursus creditorum*, rather than as proposed in terms of the Scheme, and allowing local assets to be used to pay the respondent's local creditors.

58 South African liquidators would also be able to convene an inquiry, which might well be appropriate in this case.

59 In the premises, the applicants respectfully submit that it would be just and equitable to wind up the respondent as contemplated in section 344(h) of the 1973 Act.

THE RESPONDENT'S FINANCIAL POSITION

60 It is evident that the respondent is insolvent.

61 In the explanatory statement of the scheme of arrangement in England ("**the UK memorandum**"), the respondent said the following about its financial position (footnotes omitted, emphasis added, at page 24):

"1.4 The Steinhoff Group Settlement

1.4.1 ***The Scheme Company's liabilities exceeds (sic) its assets and, as such, it has negative shareholders' equity.*** *The Scheme Company's assets mainly consist of financial assets (shares in subsidiaries) and long-term receivables from the Group Companies and are largely illiquid. On the other hand, the Scheme Company has very significant indebtedness under the NV Contingent Payment Undertakings, which may be demanded from (i) 31 December 2021 if the borrowers under the underlying Facilities Agreements have not themselves discharged all relevant sums due by that date or (ii) the date on which an Event of Default (as defined in NV Contingent Payment Undertaking) has occurred and notice of such had been validly served on the Scheme Company.*

1.4.2 ***In addition, the Scheme Company is involved in numerous legal proceedings in respect of MPCs, Contractual Claims and Non-Qualifying Claims. If any of these proceedings (or other such proceedings that might yet be brought) were to be successful in establishing***

liability on the part of the Scheme Company, the Scheme Company would be at material risk of damages assessments and awards. *Without admitting any liability in respect of the same, the Scheme Company estimates that such awards could, collectively, run into the billions of EUR. As described above, the methodologies proposed by the Scheme Company (without any admission of liability and solely for the purposes of the Steinhoff Group Settlement) for the calculation of the claims of MPC Claimants and Contractual Claimants of the Scheme Company for settlement purposes yield sums of approximately €2.807 billion and €1.869 billion respectively.* ***On no analysis could the Scheme Company afford to pay sums of such magnitude.***

1.4.3 Whilst the various proceedings brought against the Scheme Company in South Africa, the Netherlands and Germany are at different procedural stages, the Scheme Company is of the view that ***there is a material risk that adverse judgments as to liability may start to be rendered in the latter part of 2021****."*

62 Footnote 12 to paragraph 1.4.1 of the UK memorandum (page 24) explains this in more detail:

> *"As set out in the latest separate financial statements of the Scheme Company for the period ended 30 September 2019 (forming part of the audited results of the Group for the 2019 financial year), the* ***negative equity of the Scheme Company was EUR 910 683 000*** *as at 30 September 2019. As set out in the latest unaudited results of the Group for the 6 months ended 31 March 2020,* ***the negative equity of the Group (on a consolidated basis) was EUR 3.449 billion as of 31 March 2020.****"* (emphasis added)

63 With regard to the NV Contingent Payment Undertakings, the respondent's stated position is as follows (the UK memorandum page 31 paragraph 3.3.2):

> *"... there is a material risk that adverse judgments in litigation proceedings may start to be obtained against the Scheme Company from the latter part of 2021. In such circumstances, the Scheme Company would not be in a position to refinance its financial indebtedness under the NV Contingent Payment Undertakings (approx. EUR 9.179 billion), which will mature on 31 December 2021."*

64 The respondent summarised the position on page 32 paragraph 3.3.5(ii) of the UK memorandum:

> *"In any event, the value of the financial debt of the Scheme Company and potential value of contingent litigation claims (estimated on the*

basis of methodology of the Scheme Company and its advisors) very significantly exceed the value of the assets of the Scheme Company…"

65 A copy of the UK memorandum (without all its appendices to avoid prolixity) is annexed marked "**BM7**".

66 I also refer to a copy of the respondent's "*Separate Financial Statements for the period ended 30 September 2020*" annexed as "**BM8**" (these are separate financial statements for the respondent that form part of the Annual Report).

67 As is evident from pages 2 and 3 thereof, the respondent has total comprehensive losses in the amount of €1,489 billion and if one has regard to its balance sheet i.e. the "*separate statement of financial position*", the respondent is insolvent in that its liabilities exceed its assets by a substantial margin.

68 If one has regard to the "*Financial and Business Review*" which forms part of the Annual Report, a copy of which is annexed as "**BM9**", the following is stated in relation to the group's debt position on page 2 under the heading "*Net Debt and Cash Flow*":

"The net debt for the Group at the Reporting date, at €9,461 million (2019: €9,575 million), calculated as total debt (€11,444 million) less

cash and cash equivalents (€1,983 million), remains high. The OpCos have all raised their own external debt and do not rely on the Group for funding. At the operational level the total debt decreased significantly from €2,183 million to €1,573 million over the Reporting Period as positive cash flow and resulting debt repayments exceeded the interest and fee accruals. Total Group debt, however, increased further from €9,187 million to €9,871 million as the interest accrued exceeded the amount of debt repaid." (emphasis added).

THE GROUP STRUCTURE OF THE RESPONDENT

69 The respondent is the apex holding company of the Steinhoff group.

70 It holds its South African assets in the following structure:

70.1 it owns all of the issued shares in Steinhoff Investment Holdings Ltd ("**SIHL**");

70.2 SIHL owns all of the issued shares in:

70.2.1 Steinhoff International Holdings (Pty) Ltd ("**SIHPL**"); and

70.2.2 Steinhoff Africa Holdings (Pty) Ltd ("**SAHPL**");

70.3 SIHPL does not have any subsidiaries.

70.4 SAHPL owns:

70.4.1 73,82 per cent of the issued shares in Ainsley Holdings (Pty) Ltd ("**Ainsley**");

70.4.2 all of the issued shares in Newshelf 1093 (Pty) Ltd ("**Newshelf 1093**"); and

70.4.3 100 per cent of a "SA Real Estate Portfolio" and a "*23% stake*" in the Bud Group, which is a South African operational services, manufacturing and distribution group;

70.5 Newshelf 1093 owns 26,18 per cent of the issued shares in Ainsley, making Ainsley a wholly-owned subsidiary of SAHPL;

70.6 Ainsley owns 67,75 per cent of the issued shares in Pepkor Holdings;

70.7 Pepkor Holdings owns, through two wholly-owned subsidiaries, all of the issued shares in Pepkor (Pty) Ltd;

70.8 Pepkor (Pty) Ltd owns 100 per cent of the issued shares in various trading companies, including WM Twee (Pty) Ltd ("**WM Twee**");

70.9 Pepkor Trading (Pty) Ltd owns:

70.9.1 a suite of well-known valuable South African businesses, being PEP, Ackermans, Russells, Bradlows, Rochester, and Sleepmasters; and

70.9.2 100 per cent in the issued shares in Profurn (Pty) Ltd;

70.10 Profurn (Pty) Ltd owns 100 per cent of the issued shares in JD Consumer Electronics and Appliances (Pty) Ltd, which owns two valuable South African businesses, being Incredible Connection and HiFi Corporation;

70.11 WM Twee owns 100 per cent of the issued shares in Pepkor Speciality (Pty) Ltd ("**Pepkor Speciality**"), which owns five valuable businesses, including John Craig, Shoe City, Refinery, Dunns, and Tekkie Town.

71 I have obtained this information from:

71.1 a "*Simplified Group Structure as at 30 September 2020*", which is appendix G to the UK Memorandum (annexure **BM7** hereto)

(defined as "**the debt organogram**"), which is a document the respondent produced and published. I annex a copy of the debt organogram marked "**BM7A**" ; and

71.2 an "*Information Statement*" that Pepkor Holdings issued on 2 March 2020 to support a domestic medium-term note programme it was then proposing, which is attached as "**BM10**". Although this document contains a helpful overview of the extent of the respondent's operations in South Africa, I have not included it verbatim, to avoid prolixity, but ask that it be incorporated here.

72 The companies referred to above have registered addresses in South Africa and conduct their business from here.

THE RESPONDENT'S ASSOCIATION WITH SOUTH AFRICA

73 Although the respondent was incorporated in the Netherlands during 2015, it has no real connection to that country. Instead, it is a chimera created to enable a group of South African companies and individuals to export financial assets from South Africa to the perceived safer waters of the Frankfurt stock exchange and, notionally, to provide the respondent with a means to access European financial markets.

74 Thus, under a scheme of arrangement in terms of section 114 of the Companies Act implemented in or about December 2015:

74.1 SIHL, the then top or ultimate holding company of the Steinhoff group, was converted into a private company, i.e., it became SIHPL.

74.2 its listing was duly terminated on the Johannesburg Securities Exchange ("**the JSE**");

74.3 it became a wholly-owned subsidiary of the respondent, a public company incorporated in the Netherlands and listed on the Frankfurt Stock Exchange, as well as being listed on the JSE; and

74.4 ordinary shares in SIHPL were exchanged for an equal number of ordinary shares in the respondent, on the basis that the respondent's only asset, or only significant asset, was its shareholding in SIHPL.

75 In other words, as a result of the above scheme of arrangement, being a shareholder in SIHPL resulted in the holder of those shares becoming a shareholder in the respondent; and the respondent (a company incorporated in the Netherlands) became the apex holding company of the Steinhoff group.

76 The respondent has no material business in the Netherlands. In this regard, I refer to page 120 of the Annual Report, note 2, a copy of which page is annexed as "**BM11**" which states:

"The Company is domiciled in the Netherlands. ***Negligible revenues are generated by the Group's Netherlands operations and therefore none are disclosed.*** *The Group is primarily a global holding company with investments in retail businesses. The amount of its revenue from external customers is presented below based on the geographies that contribute materially to the group's revenue."* (emphasis added)

77 Furthermore:

77.1 if one has regard to the figures cited in annexure BM11, it is apparent that revenues generated out of South Africa exceed any other geographical area by at least 100%;

77.2 it has but one non-executive director residing in the Netherlands out of a board of 10 directors (annexure BM2);

77.3 the address of its company secretarial function is the Stellenbosch registered office; and

77.4 the respondent's tax residency is in South Africa (see page 1 of annexure BM9).

78 This is borne out in the applicants' dealings with the respondent:

78.1 all negotiations between the parties preceding the conclusion of the contract in 2016 took place in South Africa;

78.2 the contract was concluded in Stellenbosch; and

78.3 the parties expressly chose that the contract would be governed by South African law and that the courts of South Africa would have exclusive jurisdiction to determine any dispute arising from the contract.

79 According to the respondent's Annual Report for the period ended 30 September 2020 ("**the Annual Report**"), its tax residency is in South Africa. I do not annex a copy of the Annual Report to this affidavit as it runs to hundreds of pages and would make this affidavit unnecessarily bulky.

THE OFFICERS OF THE RESPONDENT

80 Since the respondent's announcements in December 2017 the composition of its board has changed significantly. The respondent currently has only two executive directors, Du Preez and De Klerk, appointed on 19 December 2017 and on 20 April 2018 respectively (annexure BM2). They reside in the Western Cape.

81 They are currently the CEO and CFO respectively of the respondent. They are both long-time employees of companies within the Steinhoff group and

held senior executive positions in the respondent until the announcement of the investigation into accounting irregularities. During their tenure with the Steinhoff group, they performed the aforesaid functions chiefly from the respondent's principal place of business in Stellenbosch.

82 Du Preez and De Klerk (together with David Pauker who also sits on the respondent's board and is resident in the United States) are also the current directors of SIHPL and Ainsley.

83 The respondent's company secretary is Sarah Radema ("**Radema**"), and her residential address is in Leiden in the Netherlands.

84 Additionally, the respondent has seven non-executive directors and one representative director. Of these directors, three reside overseas (one in the Netherlands, one in New York and one in the United Kingdom), while five reside in South Africa (three of them in the Western Cape) (see annexure BM2).

85 A copy of the quarterly update of the respondent for the three months ended 31 December 2020 is annexed as "**BM12**". As is evident from page 9 thereof, "*Corporate and Contact Information*", the respondent's Dutch registration number is 63570173, its registered office is the Stellenbosch registered office, its auditors are Mazars Accountants N.V. in the Netherlands, Radema is listed as company secretary, its sponsor and transfer secretaries are listed as being South African companies in

Stellenbosch and Johannesburg. Its commercial bank is a division of the Standard Bank of South Africa Limited in Johannesburg.

86 On page 16 of the notice of the Annual General Meeting of the respondent held on Friday, 30 April 2021 (which notice is available on the respondent's website), Radema's address **as company secretary** is given as that of the Stellenbosch registered office, despite her residential address being in Leiden. A copy of the relevant page is annexed as "**BM13**".

THE SCHEME IN DETAIL

87 The Scheme consists of two parts: an Explanatory Memorandum ("**the Explanatory Memorandum**", already referred to above) (Part A) and the Composition Plan itself (Part B) ("**the Composition Plan**").

88 The s155 Proposal and the Composition Plan are interdependent. Each depends on the other being approved by creditors and sanctioned by the courts in South Africa and the Netherlands respectively. It is a suspensive condition of both plans that the other come into effect (see clause 3.1.2 of the Composition Plan and clause 33.1.1 of the s155 Proposal).

The "classification" of creditors

89 Both plans identify three categories of creditors (the categories being identical in both plans):

89.1 the MPC class: these are market purchase claimants, i.e. those parties who bought shares on the Johannesburg or Frankfurt stock exchanges whether in the respondent (or previously in SIHPL), based on *inter alia* "*alleged*" misstated financial disclosures;

89.2 the Contractual Claimants: these are parties who, in terms of contractual arrangements, sold businesses, shares or otherwise received consideration directly from the relevant Steinhoff company by way of the issuance or transfer of shares in the respondent and/or SIHPL; and

89.3 the Financial Creditors: since the events of December 2017, the respondent and SIHPL have engaged in a financial restructuring. In this process some of the group's existing debt was bought, with knowledge of the events of December 2017. The buyers are classed as the Financial Creditors in the Scheme.

90 The respondent has "*offered*" the Composition Plan to what it terms "*the SoP Creditors*", who are the creditors listed in the definition of SoP creditors on page 71 of Schedule 1 of the Composition Plan, and constitute **all** of its creditors except for its trade creditors, advisors, and the Financial Services Conduct Authority of South Africa (see Schedule 5 of the Compromise Plan).

91 The effect is that the applicants' vote will be counted together with, *inter alia*, that of the Financial Creditors, who (as I explain below) are the respondent's largest creditors, who will be paid in full if the Composition Plan is effected, and have already consented to the Global Steinhoff Settlement, or deemed to have done so pursuant to the implementation of the UK scheme of arrangement.

92 In any event, at this juncture, it is not clear whether the applicants would be able to exercise their vote at all. Paragraph 30 of the Explanatory Memorandum records that:

> *"The SoP Administrators are considering a request to the District of Amsterdam for the appointment a SoP Committee of Representation. If appointed by the District Court of Amsterdam, the SoP Committee of Representation, instead of individual SoP Creditors, will vote on this SIHNV Composition Plan in a Voting Hearing on 30 June 2021 at 10.00 (CET)…"*

93 The District Court of Amsterdam has decided to hear the SoP Administrator's application to appoint a committee of representation on 19 May 2021. The outcome of that application will be known by the time the applicants prepare their replying affidavit and will be included in it.

The waivers imposed by the Scheme i.e. the Composition Plan

94 The Composition Plan purports to bind the applicants, even if they do not file a claim or otherwise participate in it. This is provided in clause 4:

> *"As of the SoP effective date, each Distribution Creditor is bound by the Claim Value attributed to its Claim in accordance with the Valuation Principles, regardless of whether such Distribution Creditor holds an Admitted Claim, has filed (or has authorised a party to file) its Claim with the Claims Administrator for admission in the SOP."*

95 In this regard, two provisions are particularly prejudicial to the applicants.

95.1 In terms of clause 5.1 of the Composition Plan:

> *"As of the date the conditions set out in clause 14.1 have occurred, this SIHNV Composition Plan constitutes a waiver of and is a full, final and irrevocable discharge … of any unsecured and non-preferred Claim of any Distribution Creditor against SIHNV, regardless of whether such Distribution Creditor has filed (or authorised a party to file) its Claim with the Claims Administrator for admission in the SoP (the **"Waiver"**)."*

95.2 In terms of clause 12.1.3 of the Composition Plan:

> *"Subject to clause 12.1.6, all SoP Creditors hereby fully, finally and irrevocably release … on a several basis and waive any and all of their rights in connection with (i) subject to clause 12.1.2: any and all Claims they may have against* ***SIHNV, SIHPL and any other current and/or former Steinhoff Group Company****, regardless of whether relating to the acquisition of shares, bonds or other securitities or debt instruments issued by any current and/or former Steinhoff Group company at any time, in respect of all matters relating (directly or indirectly) to the Events and/or the Allegations".* (emphasis supplied)

96 Although both the applicants and the Financial Creditors are SoP creditors, the applicant is a Distribution Creditor, whereas the Financial Creditors are not.

97 Cause 14.1 of the Composition Plan contains similar provisions purporting to expressly extinguish the applicants' recourse against "*SIHNV, SIHPL, SRF or any Steinhoff Group Company*".

The foreign law imposed by the Dutch Composition Plan

98 The Composition Plan would bind the applicants to its provisions, including those that would be illegal, invalid, or unenforceable in South Africa. The

respondent has set this out in plain terms in clause 5.4 of the Composition Plan:

> *"This SIHNV Composition Plan constitutes the acceptance by each Distribution Creditor of the SoP Consideration to which it is entitled under this SIHNV Composition Plan and that it is bound by the terms and conditions of this SIHNV Composition Plan,* ***regardless of any of the terms and conditions of this SIHNV Composition Plan being illegal, invalid or unenforceable in any respect under any law of any jurisdiction"*** (emphasis added)

99 It would also require the applicants to have their disputes determined in terms of Dutch Law, in terms of clause 16.1:

> *"This SIHNV Composition Plan and any non-contractual obligation arising out of or in connection with it shall be governed and construed exclusively in accordance with Dutch Law."*

100 Not only that, but the applicants' claim would be subject to the multi-stage dispute resolution process as set out in clause 16.2.1:

> *"Any disputes exclusively arising out of or in connection with this SIHNV Composition Plan, including its existence, its validity and any non-contractual obligations, which do not fall under the jurisdiction of (i) the Dutch Committee; or (ii) the competent court in respect of a*

request to set aside ... this SIHNV Composition Plan within the meaning of Section 280(1) in conjunction with Section 165 DBA [Dutch Bankruptcy Act], will be finally and exclusively dealt with by an arbitration in accordance with the Arbitration Rules of the Netherlands Arbitration Institute".

101 In terms of clause 8.4, the "*Dutch Committee*" appointed in terms of the Composition Plan:

> *"... shall have the exclusive jurisdiction to decide on all matters and disputes between SRF, and SIHNV MPC Claimant, an SIHNV Contractual Claimant and/or SIHNV in relation to the question of whether and to what extent an SIHNV MPC Claimant or SIHNV Contractual Claimant is entitled to compensation from the SoP Settlement Fund pursuant to this SIHNV Composition Plan."*

The SRF

102 The SRF and "*certain related infrastructure in South Africa*" will distribute payments to the respondent's creditors in terms of the Composition Plan (see paragraph 89 of the Explanatory Memorandum). The SRF's funds will also be used to repay SIPHL's creditors in terms of the s155 Proposal. This is set out in paragraph 21 (and its subparagraphs) of the s155 Proposal.

103 The SRF is a highly complex vehicle. In essence, it will collect cash and shares from, among other things, the respondent and its subsidiaries and then use those assets to pay Distribution Creditors once the respondent's Claims Administrator has determined the value of those creditor's respective claims.

104 The respondent explained this in paragraph 89 of the Explanatory Memorandum:

> *"SRF will be the claim and administration distribution vehicle, set up as an independent entity governed by a board of newly appointed directors, with two directors being entirely independent of the Steinhoff Group."*

105 The SRF will administer two funds (see clause 6.1.1 of the Composition Plan):

105.1 the Gross Settlement Fund, which the SRF will use to pay MPC Claimants and Contractual Claimants under the Composition Plan; and

105.2 the Reserve Fund, which the SRF will use to pay Non-Qualifying Claimants and the Contingent Creditors.

106 The respondent also refers to the Gross Settlement Fund as, having taking certain costs and expenses into account, "**the SoP Settlement Fund**".

107 The respondent has recorded this arrangement in clauses 6.1 to 6.3 of the Composition Plan. To avoid prolixity, I have not included these provisions here but request that they be considered incorporated.

108 In paragraphs 91 and 92 of the Explanatory Memorandum, the respondent disclosed the amounts that it intends to contribute to the SRF. It explained that, to enable the SRF to constitute the Gross Settlement Fund, it has agreed that it will:

108.1 procure payment to SRF of EUR 118 700 000;

108.2 procure payment to SRF of R 1 206 400 000; and

108.3 cause Ainsley to make 224 300 000 of the issued shares in Pepkor Holdings shares available to SRF.

109 The respondent will make or procure its contribution to the SRF half in cash and half in Pepkor Holdings shares. This is recorded in clause 6.1.2 of the Composition Plan, which provides that the respondent:

> *"[s]hall make each of the Gross Settlement Fund and the Reserve Fund available in equal proportions of cash and PPH Shares, at a*

deemed value of ZAR 15 per PPH share as at the Settlement Effective Date."

110 As far as the cash payments are concerned, clause 6.2.1 of the Composition Plan provides that the respondent:

> *"[S]hall deposit or procure the deposit of the cash portion of the Gross Settlement Fund into (i) a EUR bank account with a leading bank controlled by, maintained by or held in the name of SRF with respect to the EUR portion of the Gross Settlement Fund in accordance with the SRF and Claims Administration Conditions; and (ii) a ZAR escrow account controlled by SRF with respect to the ZAR portion of the Gross Settlement Funds in accordance with the SRF and Claims Administration Conditions."*

111 As far as the Pepkor Holdings shares, clause 6.2.2 of the Composition Plan provides that:

> *"SIHNV shall procure that Ainsley makes available any share portion of the Gross Settlement Fund for the benefit of the SIHNV MPC Claimants and SIHNV Contractual Claimants by way of the establishment of a security arrangement under South African law under the terms of an agreement between Ainsley and SBG Securities Proprietary Limited,* ***so as to enable SRF to effectively***

deal with the PPH shares in question in accordance with the provisions of this SIHNV Composition Plan." (emphasis added).

112 The respondent has not revealed the source (or sources) of the cash it proposes to use to meet its payment obligations to SRF. However, it has disclosed that there is (or will soon be) a contractual arrangement between the Steinhoff group and SRF for this purpose (Explanatory Memorandum paragraphs 99 and 100):

> *"In order to put SIHNV, SIHPL and other relevant entities within the Steinhoff Group in the position necessary to fulfil their respective obligations under each of the SIHPL Section 155 Proposal and this SIHNV Composition Plan, a funds flow process comprising a series of steps has been prepared by Moelis & Company UK LLP in consultation with the Steinhoff Group's internal tax team and internal and external counsel (the* ***"Funds Flow Process"****)*
>
> *"The Steinhoff Group Companies involved in the Funds Flow Process (the* ***"Funds Flow Entities"****) are SIHNV, SIHL, SIHPL, SAHPL, Newshelf 1093 (Proprietary) Limited, Ainsley and PPH. The Funds Flow Entities and SRF have concluded (or will conclude) an umbrella implementation agreement setting out each of the steps necessary to implement the Funds Flow Process, the documents to be executed and the resolutions to be passed in terms of each step and the result of the implementation of each step."* (Original emphasis.)

113 As far as the timing of the payments to the SRF is concerned, clause 6.3.1 of the Composition Plan provides that:

> *"SIHNV shall procure that the deposit of the cash portion, and establishment of the security arrangement in respect of the share portion (if applicable), of the Gross Settlement Fund referred to in Clauses 6.2.1 and 6.2.2 to SRF occurs ultimately* ***2 Business Days before the Settlement Effective Date.*** *"* (Emphasis supplied.)

114 The Settlement Effective Date will occur once the following conditions precedent are met (see the definition thereof in Schedule 1 and clause 3.1 of the Composition Plan):

114.1 the judgment of confirmation (*homologatie*) of this SIHNV Composition Plan has become final and unappealable (*in kracht van gewijsde*), resulting in a termination of the SoP pursuant to section 276 DBA;

114.2 the SIHPL Section 155 Proposal has been approved and sanctioned by a South African Court as contemplated in section 155(7) of the South African Companies Act (2008), and the court order becoming final in effect and not subject to any further appeal of review; and

114.3 the continuing unconditional approval from the South African Reserve Bank for the transfer and release of funds from South Africa

to pay any required part of the cash portion of the Gross Settlement Fund to or at the direction of SRF after the Settlement Date.

115 Thus, the respondent, an admittedly insolvent company, intends to either dispose of assets (to the extent it makes cash payments to SRF) and diminish the value of its assets (to the extent its subsidiaries make cash payments or transfer shares to SRF). It proposes to do so in terms of a multi-party contractual arrangement that will effectively sweep assets from its South African subsidiaries (under the Funds Flow Process) into the SRF, which, I emphasise, is a Dutch trust that the respondent does not control.

116 The SRF will then use those assets to pay the respondent's creditors – all of whom are concurrent – in terms of the artificial preference created by the Composition Plan, which I have explained elsewhere in this affidavit.

117 Notably, the respondent will be able to implement the Funds Flow Process – i.e. make the payments and enter into the share arrangements I have mentioned above – without having to apply for a South African Court to recognise a foreign order. Its directors will presumably be able to instruct its banks to effect the necessary payments. It will similarly be able to procure that Ainsley enters into the necessary contracts in respect of the Pepkor Holdings shares.

118 In this regard, according to the Annual Report, permission has already been obtained from the South African Reserve Bank to export assets to the

Netherlands in order to make the above payments. The respondent's former auditors Deloitte and its directors' and officers' (D&O) insurers have also agreed to pay in amounts of €55,34 million and €55.5 million respectively into the fund (see clause 24 of the Explanatory Memorandum).

The proposed implementation of the Dutch Composition Plan

119 A creditor who receives a distribution from the SRF is bound to irrevocably acknowledge that the Financial Creditors and Intra-Group Creditors maintain their claims and rights against the respondent and/or SIHPL. These creditors will not receive any distribution from the Settlement Fund, but will remain entitled to payment in terms of their existing contractual arrangements with the respondent, which will not be compromised (clause 65 of the Explanatory Memorandum).

120 However, the actual recovery of each claimant will depend on the total value of claims that are timeously filed and accepted in terms of the plans (clause 59 of the Explanatory Memorandum).

121 Each creditor paid out of the SoP Settlement Fund will be paid in accordance with the percentage each creditor represents in relation to the total claims lodged and accepted (this is the effect of the calculation table and formula set out on page 14 of the Explanatory Memorandum).

122 However, if one has regard to Schedule 6 to the Composition Plan, the "*Summary of Recoveries to Creditors in a Liquidation Scenario*", a copy of which is annexed as "**BM14**", it is apparent that the Tekkie Town Claimants' Contractual Claim is anticipated to receive only a 1% return in liquidation.

123 The value of the claims of the MPC Creditors in both the respondent and SIHPL will be determined via the same methodology allegedly providing consistency, simplicity and fairness relative to the merits of the MPC claimants where:

> *"complex questions arise as to matters of liability, causation, remoteness and loss, and such matters are inevitably affected in each case by the particular facts relevant to a given claim".*

124 I draw the Court's attention to the fact that no particular benefit is alleged for the Contractual Claimants (such as the applicants) other than an allegedly marginal better return in terms of the plan than in liquidation.

THE FINANCIAL CREDITORS

125 After the collapse of the respondent's share price, the Steinhoff group's financiers suspended or threatened to suspend the banking facilities that the Steinhoff group relied on to conduct its operations. In the UK Memorandum (see page 22, paragraph 1.1.2, annexure BM7), the respondent explained the extent of the danger that this posed:

(i) *lenders of various entities within the Group ceased the provision of new loans and expressly reserved their rights regarding the cancellation of enforcement of the existing loans. Various bank loans and (convertible) bonds that the Group Companies had previously obtained or issued were also on the verge of becoming due and payable or were cancelled. The Scheme Company was a guarantor under a number of these loans and bonds and could be held directly liable for their performance;*

(ii) *banks offering cash pooling arrangements for the benefit of Group Companies froze the mutual settlements between bank accounts in the cash pool. As a result, these Group Companies were no longer able to dispose of liquid assets of other Group Companies within the cash pool; and*

(iii) *credit insurers of operating Group Companies threatened to cancel and/or reduce their insurance policies, creating the risk that suppliers of inventory would demand advance payments for future deliveries.*

126 The "*Scheme Company*" referred to above is the respondent.

127 Given the attitude of its financiers, the respondent was compelled to attempt to obtain financial facilities from new bankers. As a preliminary step, during

July 2018, the Steinhoff group concluded so-called "*Lock-Up Agreements*" that provided it with time to determine whether it would be possible to do so.

128 Ultimately, the Steinhoff group's attempts to implement a restructuring were successful and led to the conclusion of a suite of agreements between two of the respondent's subsidiaries, Steinhoff Europe AG ("**SEAG**") and Steinhoff Finance Holding GmbH ("**SFGH**"), on the one hand, and a consortium of lenders on the other now, the Financial Creditors. A summary of this restructuring process appears in Part 2 of the Explanatory Memorandum that the respondent prepared to accompany a Scheme of Arrangement proposed to these lenders in England (see UK memorandum annexure BM7 pages 15 – 21).

129 The respondent did not directly hold the Steinhoff group's debt. Instead, the respondent acted as a guarantor, concluding, in respect of each subsidiary's debt, an instrument known as a Contingent Payment Undertaking ("**CPU**"). In essence, as the respondent explained in paragraph 1.3(iii) of the UK memorandum (annexure BM7 page 23):

> "*... financial creditors who had previously benefited from the Scheme Company's guarantee would instead be entitled to payment by the Scheme Company under separate contingent payment undertakings, but no earlier than 31 December 2021 (unless an Event of Default (as defined in the relevant NV Contingent Payment Undertaking) had*

occurred and notice of such had been validly served on the Scheme Company".

130 According to the respondent (as set out in paragraph 2.3 of UK Memorandum page 18), a CPU is:

> *"... a bespoke instrument that was entered into by the Scheme Company in consideration for, among other things, the restatement of the Scheme Company's guarantee obligations in respect of the underlying facilities. As detailed above, and in broad terms, each instrument provides the relevant beneficiary creditors with an independent and self-standing claim against the Scheme Company ..."*

131 I emphasise that CPUs are akin to guarantees; however, they are not and do not amount to security for ranking claims against an insolvent company. The respondent recognises this at the end of paragraph 2.4 of the UK memorandum (page 18):

> *"... each of the NV Contingent Payment Undertakings expressly provides that the obligations under it rank at least parri passu with* ***other unsecured obligations of the Scheme Company*** *not mandatorily preferred by law, reflecting the fact that the Scheme Company's obligations under all of the NV Contingent Payment*

Undertakings (including the Hemisphere CPU) rank equally." (emphasis added)

132 In clause 2.2 (pages 16 - 17) of the UK memorandum, the respondent explained that it is "*the obligor*" in terms of four CPUs:

132.1 the SEAG CPU, dated 12 August 2019, entered into by the respondent with Lucid Trustee Services, maturing on 31 December 2021, paid in initial tranches of EUR 1.9 billion and EUR 3.6 billion;

132.2 the 21/22 SFHG CPU, dated 12 August 2019, entered into by the respondent with Global Loan Agency Services Limited, maturing on 31 December 2021, for an initial amount of EUR 1.7 billion;

132.3 the 23 SFHG CPU, dated 12 August 2019, entered into by the respondent with Global Loan Agency Services Limited, maturing on 31 December 2021, for an initial amount of EUR 1.2 billion; and

132.4 the Hamilton CPU, dated 5 September 2019, entered into by the respondent with Lucid Agency Services Limited, maturing on 31 December 2021, for EUR 772 500 000.

133 The UK memorandum includes (as Appendix G) an organogram entitled the "*Simplified Group Structure as at 30 September 2020*" that depicts the debt arrangements within the Steinhoff group, including the amounts owed to

entities outside of the group – i.e. external debt (what I have defined above as "**the debt organogram**", annexure BM7A).

134 The debt organogram shows that:

134.1 although not expressly, the SEAG CPU is probably for the obligations of Steenbok Lux Finco 2 SARL ("**Lux Finco 2**");

134.2 the 21/22 and 23 CPUs are for the obligations of Steenbok Lux Finco 1 SARL ("**Lux Finco 1**"); and

134.3 the Hemisphere CPU is for the obligations of Hemisphere International Properties BV ("**Hemisphere**").

135 It also shows that as of 30 September 2020:

135.1 Lux Finco 2's external debt was EUR 6.312 billion, and NV's maximum liability under the 23 CPU is EUR 5.504 billion;

135.2 Lux Finco 1's external debt was EUR 3.301 billion, and NV's maximum liability under the 21/22 CPU is EUR 1.722 billion and under the 23 CPU is EUR 1.179; and

135.3 Hemisphere's external debt was EUR 219 million, and NV's maximum liability under the Hamilton CPU is EUR 772.50 million.

136 In summary, the UK memorandum (annexure BM7) discloses that, as of 30 September 2020, external creditors had claims under the above CPUs for which the respondent is directly liable.

137 On page 19 of the UK memorandum, the respondent summarised the extent of its debt to its external creditors and its subsidiaries. It recorded that:

137.1 its total maximum indebtedness under the SEAG CPU was EUR 5.504 billion;

137.2 its total maximum indebtedness under the NV CPUs was EUR 9.179 billion; and

137.3 its total debt to Group Companies stood at approximately EUR 906 million.

138 The respondent has categorised these external creditors as Financial Creditors in terms of the (Dutch) Composition Plan.

139 The Composition Plan does not identify the Financial Creditors, nor does it set out the extent of its liability to them. Instead, it relies on the somewhat elliptical definition contained in its Schedule 1:

> *"**'Financial Creditors'** means the beneficiaries of obligations of SIHNV or SIPHL pursuant to the Contingent Payment Undertakings."*

140 In Schedule 1 of the Composition Plan, these CPUs are defined collectively as the "*SIHNV Contingent Payment Undertakings*" ("**the SIHNV CPUs**") and "*the SIPHL Contingent Payment Undertaking*" ("**the SIPHL CPU**") (page 61 annexure BM6).

141 The Composition Plan defines the SIHNV CPUs as (Schedule 1 page 66 annexure BM6):

141.1 the "*NV/Hemisphere Contingent Payment Undertaking*";

141.2 the "*NV/SEAG Contingent Payment Undertaking*";

141.3 the "*NV/SFHG 21/22 Contingent Payment Undertaking*"; and

141.4 the "*NV/SFGH 23 Contingent Payment Undertaking*".

142 The Composition Plan defines the above terms (Schedule 1 page 66 annexure BM6). These CPUs are the same CPUs the respondent identified in clause 2.2 of the UK memorandum (see page 19 of the UK memorandum annexure BM7 and referred to 5 paragraphs above) given the commonality of parties and dates of execution.

143 The SIHPL CPU is defined (Schedule 1 page 70 annexure BM6) as:

"... the contingent payment undertaking originally dated on or about 12 August 2019 and as amended by an "Amendment Deed" dated 21 August 2019, between SIHPL and Global Loan Agency Services Limited in respect of the facility agreement between, amongst others, Steenbok Lux Finco 1 S.a.r.l. and Global Loan Agency Services Limited, as amended from time to time."

144 The debt organogram shows that SIPHL's maximum liability for Luxfinco 1's SIHPL CPU is EUR 1 581 300 000.

145 Therefore, the beneficiaries of the CPUs (and therefore Financial Creditors under the Dutch Composition Plan) are as follows:

145.1 Lucid Agency Services Limited is the beneficiary of NV's obligations in terms of the Hamilton CPU;

145.2 Lucid Trustee Services, as security agent in respect of a lien agreement between Lux Finco 2 and Lucid Agency Services Limited as agent, is the beneficiary of NV's obligations in terms of the SEAG CPU;

145.3 Global Loan Agency Services Limited is the beneficiary of NV's obligations in terms of the 21/22 and 23 CPUs; and

145.4 Global Loan Agency Services Limited is the beneficiary of SIPHL's obligations in terms of the SIHPL CPU.

146 In short, the Financial Creditors collectively have a Claim (as defined in Schedule 1) of EUR 14.683 billion (being the sum of the SEAG CPU and the NV CPUs according to the respondent's UK memorandum referred to above (annexure BM7).

147 Against this, the respondent has, in terms of Schedule 7 of the Composition Plan (annexure BM6 page 80):

147.1 not quantified the value of the Claims of the MPC Claimants;

147.2 quantified the total value of the Claim of the Contractual Claimants as EUR 1.950 billion (page 85);

147.3 quantified the value of each the Non-Qualified Claimants as EUR 1, on the basis that it "disputes the existence and validity of the Non-Qualifying Claims against SIHNV (regardless of whether they have yet been asserted against SIHNV, whether formally or informally)" (clauses 4.2 and 4.4 page 87); and

147.4 quantified the value of each of the Contingent Creditors as EUR 1, on the same basis (page 88).

148 However, the respondent estimated the value of the MPC Claims in paragraph 3.4.2 of the UK memorandum (page 20 annexure BM7):

> *" … Based on such methodology, the Scheme Company estimates that the universe of actual and potential MPC Claimants (including comparable claims against SIHPL) consists of approximately 90,000 parties (out of which 65,000 are at the Scheme Company) and the aggregate value of their alleged claims may amount to approximately € 4.840 billion* ***(out of which €2.807 billion are MPCs against the Scheme Company)*** *as at 5 December 2017. This is an estimate only for the purpose of the Steinhoff Group Settlement and is neither an admission nor quantification of any actual liability on the part of the Scheme Company or any other party in that respect."* (emphasis added)

149 I emphasise that this estimate was on 5 December 2017. Since then, the Claims Administrators have published the first Public Report under the SoP dated 23 April 2021, a copy of which is attached marked **BM15**, which records at paragraph 4.2 (page 5) that they *"understand the creditor base of SIHNV is comprised as follows"*:

149.1 up to 66 000 MPC Claimants who together may assert claims of approximately EUR 2.8 billion;

149.2 eight Contractual Claimants who together may assert claims of approximately EUR 1.9 billion;

149.3 approximately 400 Financial Creditors that may assert a total claim amount of approximately EUR 9.2 billion;

149.4 two Other Unsecured Creditors with claims of approximately EUR 5.3 million; and

149.5 two intra-group creditors for a total amount of approximately EUR 930 million.

150 Notwithstanding the difference in the respondent's total debt as reported in the UK memorandum and in the Claim Administrator's first report, the respondent recognises that it will default on its obligations in terms of the CPUs if it is required to defend itself from the litigation presently facing it (UK memorandum annexure BM7 paragraph 3.3.2 page 31):

> *" ... there is a material risk that adverse judgments in litigation proceedings may start to be obtained against the Scheme Company from the latter part of 2021. In such circumstances, the Scheme Company would not be in a position to refinance its financial indebtedness under the NV Contingent Payment Undertakings (approx. EUR 9.179 billion), which will mature on 31 December 2021."*

151 It is clear that the Financial Creditors also appreciate this. They have already consented to the Dutch Composition Plan and bound themselves to vote for it, in particular, by agreeing to "*support the statutory processes*" by, *inter alia* (UK memorandum page 35 paragraph 5.2.3(iv):

> *"voting and exercising any powers or rights available to it (or authorising a party to do so on its behalf) irrevocably and unconditionally in favour of (a) any proposals, arrangements or composition plan consistent with the Steinhoff Group Settlement".*

152 This is hardly surprising, given the favourable treatment the respondent has afforded to the Financial Creditors under the Composition Plan.

153 They will be paid in full, albeit two years later than would otherwise be the case. As the respondent explained in paragraph 45(iv) of the Explanatory Memorandum (annexure BM6 page 10), the Composition Plan will establish:

> *"the preservation of: (a) the SIHNV CPU Claims of the SIHNV Financial Creditors in accordance with the terms of such SIHNV CPU terms; (b) the Intra-Group Claims of the Intra-Group Claims; and (c) the Other Unsecured Claims of Other Unsecured Creditors in accordance with the terms of Other Unsecured Claims."*

154 To this end, paragraph 65 of the Explanatory Memorandum provides that:

"The SIHNV Financial Creditors and the Intra-Group Creditors (who are listed in Schedule 4 (List of Intra-Group Creditors)) will not be eligible to receive any distribution from the SoP Settlement Fund or Reserve Fund in respect of their SIHNV CPU Claims and their Intra-Group Claims, respectively. Instead, they will maintain certain contractual rights against SIHNV under the terms and conditions of the SIHNV Contingent Payment Undertakings and the Intra-Group Loans (as applicable)."

155 Clause 5.1 of the Composition Plan effects this proposal. It provides that only Distribution Creditors will waive their rights against the respondent. The definition of Distribution Creditors (in clause 51 of Explanatory Memorandum, incorporated into the Composition Plan by the definition of Schedule 1) excludes the Financial Creditors.

156 The Composition Plan also provides that NV/Hemisphere CPU will, on the Settlement Effective Date (the date on which the court's sanction of the Composition Plan has become final and not appealable resulting in the termination of the SoP), become entitled to receive payment of EUR 40 million (Explanatory Memorandum clause 103(iii) page 24 annexure BM6).

157 The rights of the Finance Creditors under the CPUs will be preserved in their entirety (Composition Plan clause 12.1.6 page 49 annexure BM6):

"The SoP Creditor Waivers and Releases with respect to SIHNV, SIHPL and any other current and/or former Steinhoff Group Company shall not apply to (i) the SIHNV CPU claims; (ii) the Intra-Group Claims …"

158 The definition of "*SIHNV CPU claim*" is expansive. It means (Schedule 1 page 69):

"… any contractual Claim of an SIHNV Financial Creditor against any relevant Steinhoff Group Company for payment under, to enforce contractual rights under, or Claim for any breach of the terms of the SIHNV Contingent Payment Undertaking or any of the 'Finance Documents' (as that term is respectively defined in each of the SIHNV Payment Undertakings)."

159 The Financial Creditors will be afforded real security (Explanatory Memorandum paragraph 104 page 24 annexure BM6):

"In exchange for the consents, extensions, releases and waivers to be granted under Clause 12 of this SIHNV Composition Plan, with effect from the fulfilment of the Settlement Effective Date, SIHNV will grant to the SIHNV Financial Creditors and the Intra-Group Creditors first ranking security over its shares in SIHL and any loan payable by SIHL to SIHNV…"

160 The Financial Creditors **are also entitled to claim as MPC claimants**, in respect of any claims that fall outside of their claims under the CPUs (Explanatory Memorandum clause 71):

> *"For the avoidance of doubt, to the extent an SIHNV Financial Creditor is also an SIHNV MPC Claimant, it will have the right to receive settlement consideration from the SoP Settlement Fund in its capacity as SIHNV MPC Claimant under the terms of the SIHNV Composition Plan."*

161 Essentially, the Composition Plan is a pre-pack between the respondent and its financiers that was conceived and is being executed, having regard only to their interests. This is apparent from paragraph 1.4.7 of the UK memorandum (annexure BM7 page 25):

> *"It was clear to both the Scheme Company and its financial creditors that, in order to arrive at a workable solution that would enable the Group to continue as a going concern in the long term, a 'universal solution' would be needed, involving an overall settlement of all or substantially all of the legal proceedings, including the MPCs and the Contractual Claims (and comparable claims at SIHPL)."*

162 As far as I am aware, many of the Financial Creditors bought old debt from previous creditors the respondent at a discounted rate. Accordingly, they will be receiving substantial returns on their investment in exchange for

which they only have to wait slightly longer to be paid. Security may have been furnished to Financial Creditors in respect of 'old debt', which security may be voidable in a liquidation scenario.

THE POSITION OF THE EMPLOYEES

163 In SIPHL's opposing affidavits in the Hamilton application, it is contended that employees of the Steinhoff group will lose their jobs in a liquidation of the holding companies (i.e. in the liquidation of the respondent and/or of SIHPL, also merely a holding company) if the Steinhoff Global Settlement fails. This argument will no doubt also be raised against the applicants in this liquidation application.

164 In fact, SIHPL and the respondent employ hardly anyone.

165 SIHPL has no employees, as it states in the s155 Proposal (clause 34.1).

166 I have not been able to find any information relating to the number of employees employed directly by the respondent, but I doubt the respondent has very many more employees than Du Preez, De Klerk and Radema.

167 The employees in the Steinhoff group are employed by the subsidiaries which are sustainable businesses (see for example annexure **BM12**, the respondent's quarterly statements to 31 December 2020, which includes

reporting on the subsidiaries). There is no reason that the position of the subsidiaries' employees would be imperilled if the respondent is wound up.

THE POSITION UNDER DUTCH LAW

168 I have referred above to various aspects of Dutch law and how that might affect the applicants, particularly under the Scheme. Due to the fact that the respondent is registered as a company under Dutch law as well as being registered as an external company under South African law, the implications of the Scheme, and various complications that may arise if the respondent were to be liquidated under Dutch law, the applicants sought advice regarding relevant aspects of Dutch law from Borsboom & Hamm Advocaten Borsboom & Hamm N.V. of Weena 614 3012, CN, Rotterdam in the Netherlands, a firm that specialises in commercial and insolvency law. Its website may be viewed at www.borsboomhamm.nl.

169 The summary of the relevant Dutch legal provisions which I set out below, and which informed the references to Dutch law that have already been made, is derived from their advices.

170 The governing legislation is referred to in the Scheme as the Dutch Bankruptcy Act (*Wet van 30 September 1893, op het Faillissement en de Surséance van Betaling*), as amended (hereinafter "the Dutch Bankruptcy Act" or the "DBA").

171 *Title II* of the DBA deals with *Suspension of Payments* (surseance van betalings). I annex a copy of that Title as **"BM16"**. It comprises articles 214 to 283 of the DBA, as amended.

172 Article 214 provides that a debtor who foresees that he will not be able to pay his due debts (opeisbare schulden) may apply for a suspension of payments. The debtor must provide the court with evidence of his financial situation including, but not limited to, a schedule of his assets and liabilities. The debtor may choose to include a draft creditor composition plan with his petition (or later). If the statutory conditions have been met, the court will immediately grant a provisional suspension of payments without evaluation of the merits.

173 One or more administrators will be appointed to act alongside the company directors. An administrator is an independent third person (usually an attorney-at-law) who will periodically report on the status of the company to the supervisory judges in a report that is also available for the public. Although the debtor will stay in possession, the cooperation of the administrator is mandatory for almost all binding legal acts of the debtor.

174 Under Dutch law all unsecured and non-preferential creditors at the date the suspension of payment was granted are bound by the order, whether identified in the application for suspension or not.

175 If, as in the case of the respondent, the application for a provisional suspension of payments was accompanied by a draft creditor composition plan, the court will schedule a meeting of the unsecured, non-preferential creditors to consider the proposal.

176 If a majority of the admitted creditors representing at least half (50%) of the total amount of the admitted claims approve the composition, it is agreed and must then be submitted to the court for approval. Provided that the court finds the existence of prospects that, in accordance with the provisions of the composition, the debtor would once again be able to meet its obligations, the court may approve the composition plan and grant a "definitive" (final) order of suspension of payments other than as provided for in the composition plan.

177 The DBA provides for a "representative committee" of creditors to be appointed by the court, on the request of the Administrator. If approved, it will be the members of this committee, instead of individual creditors, who vote on the proposed composition plan. In the present case, such an application is pending.

178 The Representative Committee shall consist of not less than nine (9) members and must consist of persons who may be regarded to represent the most important groups of creditors.

179 In a matter in which a Representative Committee has been appointed, the draft proposal for a final composition must be approved by three-quarters (75%) of the members of the committee present at the meeting which is held for that purpose.

180 During a suspension of payments regime (whether provisional or final), the unsecured creditors are barred from recovering their claims against the debtor's assets and enforcement measures already initiated are suspended by operation of law. Any attachments levied by such creditors against the debtor's assets are lifted.

181 Secured creditors and certain preferential creditors (such as tax and social security authorities) are generally excluded from the operation of an order of suspension of payments. In consequence, secured creditors who hold pledges or mortgages are still able to enforce those rights and seek recourse for their claims. This applies also to certain preferential creditors and, in principle, for those who seek to vindicate their property in the possession of the debtor.

182 The DBA does not prescribe what is permissible in in a composition plan. The debtor is in general at liberty to structure the composition plan as it wishes. The plan can, for example, provide for the full or only partial payment of claims, or a debt-for-equity swap or similar counter performances.

183 Even if a proposed composition plan was rejected by the creditors, it may still be approved by the court on application, if at least three quarters (75%) of the admitted creditors by number that were present at the meeting voted in favour of the composition; and also if the rejection of the composition plan was the result of creditors voting against the composition on unreasonable grounds.

184 On the other hand, a court will not approve a composition plan, even if accepted by the requisite number of creditors:

184.1 if the assets (minus liabilities) of the estate considerably exceed the amount offered in the composition;

184.2 if a successful implementation of the composition is insufficiently guaranteed;

184.3 if the composition involves fraud or the like; or

184.4 if the fees and disbursements of the administrator and experts (engaged by the administrator) are not taken into account.

185 The court may base its decision to refuse approval on other grounds as well.

186 The decision of the court either to approve or to reject the composition plan is subject to appeal to the High Court.

187 Once approved, all creditors of the debtor who were affected by the suspension of payments are equally bound by the approved composition plan.

188 As soon as the decision of the court to approve the composition has become final and binding, the suspension of payments comes to an end. The administrators will stand down and will have to comply with the approved composition plan.

189 A suspension of payments can be converted by the court into a bankruptcy at its own initiative or at the request of a supervisory judge, of the court-appointed administrator or of one or more creditors, if there is no longer exists any reasonable expectation that the creditors will be satisfied.

190 In this case, the respondent was granted provisional suspension of payments by the Amsterdam District Court on 15 February 2021. Mr. F. Verhoeven and Mr. C.R. Zijderveld were appointed as the administrators ('the Administrators') and Ms K.M. van Hassel and Ms C.H. Rombouts of the Amsterdam District Court as supervisory judges. The respondent did include a proposed composition plan in its application.

191 The court set a timetable for the consideration of the proposed composition plan. Claims of creditors must be submitted to the Administrators by 15 June 2021. On 30 June 2021 at 10:00h, the consultations and voting on the

proposed composition plan will take place at a hearing convened before the supervisory judges.

192 The relevant procedure for the meeting is that the Administrators will prepare a list of claims that are timely submitted, listing the names and addresses of the creditors, the amount and the description of the claims and whether and to what extent the claims are admitted or contested by the Administrators or those permitted so to do. The list will be available for public inspection at the District Court during the seven days preceding the voting hearing of 30 June 2021 ('the Voting Hearing').

193 Votes are permitted only in respect of admitted claims. Apart from the Administrators, the debtor (in this case the respondent) and other creditors can dispute any submitted claim at the Voting Hearing. The supervisory judges decide whether, and if so, to what value of claim creditors whose claims are disputed will be allowed to vote at the Voting Hearing.

194 In this case, the Administrators submitted a first public report dated 23 April 2021 (annexure **BM15** above). It refers to the fact that the Administrators filed a petition to the Amsterdam Court on 23 April 2021 requesting the Court to appoint a Representative Committee that will vote on the composition plan instead of the individual creditors of SIHNV.

195 In annexure 2 to the report, the composition plan is summarised. The following is stated regarding the applicants:

195.1 "*the Tekkie Town Claimants have commenced proceedings against SIHNV in South Africa asserting a rescissionary claim in respect of 25,047,500 SIHNV shares issued to them in exchange for shares in Tekkie Town (Pty) Ltd. for an original transaction value of ZAR 75,75 per share and seeking payment of, among other things, ZAR 1,854,678,150*;

195.2 "*this claim is considered to be a claim based on contractual liability*;

195.3 "*the cash value of the claim is to be estimated*;

195.4 "*the claim value will be determined using the method described in clause 3.4 of schedule 7*;

195.5 "*this leads to a pleaded claim value of the Tekkie Town Claim of EUR 105,977,975.*"

196 The Administrators state that they will request the supervisory judges to apply the Valuation Principles to all claims that are submitted in the suspension of payments. On that basis, all claims submitted in the suspension of payments can only be admitted for a value as determined in accordance with the Valuation Principles. At the Voting Hearing on 30 June 2021, the respondent and the Administrators may contest any claim submitted by claimants for a value higher than as determined in accordance

with the Valuation Principles (as well as on other grounds). (Emphasis added.)

197 It is apparent that if they participate in the Scheme the applicants' claims will be treated as monetary claims and will be admitted only if valued according to the Valuation Principles. Regardless of the submission of a claim or not, the applicants will be deemed to have waived any claim, not only against SIHNV, but also against any current and former Steinhoff Group Company, audit firms, D&O Beneficiaries and advisers. This would effectively obliterate the applicants' claims against both Pepkor and Pepkor Speciality. As "consideration" for this deemed waiver, the applicants will be allowed to participate in the SoP Settlement Fund to extent permitted by the composition plan.

198 For the sake of completeness, I record that I am informed that under Dutch international private law insolvency proceedings in the Netherlands have universal effect. The Scheme has been proposed under the DBA, and it is not clear to the applicants whether it is considered to be an insolvency proceeding under Dutch law.

199 However, this can be limited by the laws of a foreign state. Thus, it is recognised under Dutch law that South African law may impose conditions and limitations on the effects of Dutch insolvency proceedings on assets

located in South Africa and the Dutch administrators would be bound by such.

200 Equally significant is the consideration that it is in principle not possible to enforce a claim for the return of specific property against a company placed into bankruptcy or granted a suspension of payments in the Netherlands, even if the property was transferred to the insolvent before the provisional suspension of payment, if the insolvent became owner thereof. In such circumstances it is in principle only possible to submit a monetary claim.

201 It would be different if a creditor enjoyed aclaim based on the nullification with retroactive effect of a contract and could accordingly claim that it always remained the owner of property. In that case, the creditor could assert that the property it claims is excluded from the insolvent estate and it retains a vindicatory right against the insolvent estate for the return of the property. The administrators would be bound to honour such a claim, if admitted, since they themselves are only authorized and entitled to property which belongs to the insolvent estate. However, as is apparent from the particulars of claim, the applicants do not make such an averment as against SIHNV or the other defendants in the action.

202 As far as the applicants' alternative monetary claim against SIHNV is concerned, the debtor's estate would only be bound by any judgment if the Administrators (or any administrators in bankruptcy) had opposed (or

participated in any other way) in the South African proceedings. If they had not, the judgment would not be binding on them.

203 For completeness' sake, I point out that in the Netherlands, a judgment of a foreign court cannot be enforced directly, unless on the basis of either a treaty or EU law. If neither of these requirements has been met – as would be the case with a South African judgment - enforcement would only be possible by initiating recognition proceedings before a Dutch court. The court may take into consideration that the parties have already litigated the same matter before another court, and apply only a test of reasonableness. Dutch courts will recognise a foreign judgment that meets the following criteria:

203.1 the foreign court assumed jurisdiction based on an internationally accepted principles;

203.2 decision was reached after a fair trial; and

203.3 the foreign judgment does not conflict with Dutch public order.

204 The third of these requirements might give rise to difficulties should a South African monetary award conflict with an approved compromise plan. In bankruptcy, any such judgment, if recognized, would constitute a concurrent claim.

205 As regards any compensation that the applicants may be granted in their South African action, I am advised that under Dutch law the Dutch insolvency provisions would take preference over the recognition of a South African judgment, since such would constitute a concurrent claim which would in itself be subject to the suspension of payments (whether provisional of final) and to any compromise plan approved in respect of such claims.

206 If, however, at the time of the ending of the suspension of payments there was not as yet a judgment from a South African court on the claim for compensation, such claim would have to be determined on its merits, as would also occur in ordinary proceedings as between a debtor and a creditor after the ending of the suspension of payments and the composition plan being approved and implemented by the debtor.

207 If a claim is submitted to the administrators during the period of suspension of payments but disputed by the administrators, the debtor or other creditors, the supervisory judge can decide if and to what extent the creditor shall be admitted to vote. If the composition is accepted and approved, it must include a guarantee that the disputed claim shall be paid if awarded, the creditor, however, being bound by the composition.

208 Once a composition plan has been accepted by the requisite majority of creditors and approved by the court (and that decision has become final and conclusive), the composition, in general, cannot be set aside.

209 It is also important to note that, once the suspension of payments procedure is initiated, a somewhat inexorable process is commenced and there are very few possibilities of either delaying the conclusion of such, or frustrating it. The legislative provisions are intended to achieve a fairly rapid compromise, or a discharge from the suspension of payments with the company either having to fend off further likely applications for bankruptcy, or being put into bankruptcy forthwith by the court.

210 Accordingly, on 30 June 2021 at 10:00h the consultations and voting on the proposed composition plan will be held before the supervisory judges. If a majority of the admitted creditors representing at least half (50%) of the total amount of the admitted claims approve the proposed composition, it will be accepted and will subsequently be submitted to the court for approval. The decision of the court to approve or refuse the composition is subject to an appeal to the High Court, failing which it will be final.

211 However, it should be borne in mind in the respondent's case, that as recorded above, the Administrators have asked the court to appoint a committee of representation to vote on the composition plan. Accordingly, whether individual creditors may have voted for or may have voted against the composition, they will be bound by it if adopted by the committee and approved by the court; and all creditors affected by the suspension of payments will be bound by the composition, including – although this may be subject to constitutional challenge - the valuation dispute provisions.

212 The preceding paragraphs proceed largely on the basis of there being an approved final suspension of payments with a composition plan being approved by the court. If, however, that should not occur, the suspension of payments will likely end (in the absence of a renewed proposal). In that event, the court could of itself declare the respondent bankrupt, if it finds that the company can no longer meet its financial obligations towards more than one creditor. This seems probable. In that case, the respondent would no longer be in possession of its assets (the trustee in bankruptcy assuming control) and a rigid regime of liquidation, verification of claims and winding up will follow. Even if the court did not do so, the suspension of payments would end automatically eight days after the publication of the order rejecting the composition (if not appealed).

213 If the suspension of payments is lifted (or ended) without the company being declared bankrupt, any creditor can apply for it to be declared bankrupt if such creditor can demonstrate that the company is no longer paying its debts to more than one creditor. Such a declaration could follow within only a few weeks. In addition, the company itself could file for bankruptcy, which would also follow within a few days.

URGENCY

214 The Scheme has been published and the approval process is already underway. Claims are to be filed by 15 June 2021, and the voting hearing in the Scheme is set for 30 June 2021.

215 Thereafter the Scheme must be submitted to the District Court of Amsterdam for approval. On the present timetable, it appears that this could take place by July 2021.

216 Should the Scheme be approved and Dutch receivers appointed, this may have a significant effect on dealings with the respondent's assets in South Africa, to the great potential prejudice of the applicants.

217 Steps ae required urgently to ensure that South African law governs the winding-up of the respondent in South Africa, and that the applicants and other South African creditors who do not agree to it, are not bound into the prejudicial Dutch Scheme.

218 Should this application not be determined before the Scheme comes into effect under Dutch law, the applicants will probably not be able to obtain substantial redress at a hearing in due course, and they run the risk of their rights having been irrevocably altered and diminished under the Scheme.

SERVICE ON THE RESPONDENT, ITS EMPLOYEES AND ANY REGISTERED TRADE UNION/S, THE MASTER AND SARS

219 A copy of this application will be furnished to the respondent at its registered address; to its employees and to any registered trade union(s) which represents any of the respondent's employees (after the relevant enquiries have been made); to the Master of the High Court, Western Cape division

("**the Master**"); and to SARS. This will be evident from the service affidavit filed by the applicants' attorneys.

SECURITY TO THE MASTER

220 A certificate will be issued by the Master to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and all costs of administering the respondent until a liquidator has been appointed, or, if no liquidator is appointed, for all fees and charges necessary for the discharge of the respondent from winding-up.

MASTER'S REPORT

221 The applicants' attorneys will lodge the required bond of security and a copy of this application with the Master, as will appear from the Master's Report that will be filed of record.

RELIEF SOUGHT

222 In the premises, the applicants request that an order be granted in terms of the notice of motion to which this affidavit is annexed.

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BERNARD EUGENE MOSTERT

I certify that:-

1 The deponent has acknowledged that:-

1.1 he knows and understands the contents of this declaration;

1.2 he has no objection to taking prescribed oath; and

1.3 he considers the prescribed oath to be binding on his conscience.

2 The deponent thereafter uttered the words: "I swear that the contents of this declaration are true, so help me God".

3 The deponent signed this declaration in my presence at the address set out hereunder on this 11th day of May 2021.

COMMISSIONER OF OATHS

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