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Financial Assistance to a Related Company under the Companies Act 71 of 2008: *Trevo Capital Ltd v Steinhoff International Holdings (Pty) Ltd*

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Abstract

This note focuses on the decision of the Western Cape High Court (WCHC) in Trevo Capital Ltd v Steinhoff International Holdings (Pty) Ltd (2833/2021) [2021] ZAWCHC 123 (2 July 2021). At issue in this case was the validity of a guarantee entered into by one company in favour of a related company. Such transactions are regulated by section 45 of the Companies Act 71 of 2008 (the Act). The case is significant because it provides useful interpretation regarding the types of transactions that fall within the scope of section 45, and in respect of the related statutory requirements. This note intends to provide further discussion of section 45 by exploring the Court's decision in Trevo Capital and discussing an important proposed amendment to the Act contained in the Companies Amendment Bill 2021. It is argued that the decision in Trevo Capital was correct, but that the proposed amendment to the Act that would remove subsidiaries from the ambit of section 45 should be adopted.

Keywords: Financial assistance; related parties; subsidiaries; shareholders; creditors; solvency and liquidity; Companies Act 71 of 2008

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1 INTRODUCTION

In *Trevo Capital Ltd v Steinhoff International Holdings (Pty) Ltd* (2833/2021) [2021] ZAWCHC 123 (2 July 2021), the Western Cape High Court (WCHC) delivered a judgment that may have a decisive impact on the Steinhoff group's prospects of avoiding liquidation.[1] Since December 2017, when the share price of Steinhoff International Holdings N.V. (SIHNV) was decimated as a result of revelations of accounting irregularities, the Steinhoff group has been in survival mode, assessing the extent of the deception and consequent liability, negotiating settlements, and defending litigation from several disgruntled investors and creditors.[2] The first applicant in *Trevo Capital*, in a separate action, is suing the first respondent, Steinhoff International Holdings (Pty) Ltd (hereinafter "SIHPL") for more than R2billion, while the second and third applicants represent claims against SIHPL in excess of R14billion.[3] The global debt settlement and restructuring scheme proposed by the Steinhoff group required SIHPL to conclude a restructuring agreement with existing and potential creditors in 2019, which the parties called a contingent payment undertaking (CPU).[4] In *Trevo Capital*, the applicants alleged that the resolutions to conclude the CPU, as well as the CPU itself, were void because of the company's failure to comply with the requirements set for financial assistance to related companies under section 45 of the Companies Act 71 of 2008 (the Act).[5]

This note will explain the legal rules in respect of financial assistance given by a company to a related company. Thereafter, the facts, arguments, and judgment of *Trevo Capital* will be discussed. Finally, the note will analyse the impact of the judgment and provide commentary on the proposed amendment to section 45 in the Companies Bill 2021.

2 THE LAW

The Act stipulates certain rules and procedures for transactions between companies and related persons, including for transactions amounting to financial assistance between a company and a related person.[6] Company A is "related" to Company B if Company B is a subsidiary of Company A; if Company A is able to exercise control over the majority of voting rights associated with Company B's securities; or if Company A is entitled to appoint or elect, or control the appointment or election of directors holding the majority of voting rights on Company B's

1 Crotty "Steinhoff's R15bn Settlement Deal in Jeopardy" Moneyweb (2021) https://www.moneyweb.co.za/news/companies-and-deals/steinhoffs-r15bn-settlement-deal-in-jeopardy/ (accessed 23-07-2021).

2 See, for example, *Du Toit NO v Steinhoff International Holdings (Pty) Limited and Others* [2020] 1 All SA 142 (WCC) para 21.8; *Pepkor Holdings Ltd v AJVH Holdings (Pty) Ltd and Others* [2021] 1 All SA 42 (SCA) para 5 (a case that deals with preliminary issues related to a R1.8billion claim against Steinhoff NV); *De Bruyn v Steinhoff International Holdings N.V. and Others* [2020] ZAGPJHC 145 (26 June 2020) paras 2–4, and *Pepkor Holdings Ltd v AJVH Holdings (Pty) Ltd; Steinhoff International Holdings NV v AJVH Holdings (Pty) Ltd* [2021] 1 All SA 42 (SCA) paras 2–4 and *Trevo Capital* paras 1–2.

3 See *Trevo Capital* paras 2–3, and Mchunu "Steinhoff International Rises on Hamilton's Withdrawal of Appeal" (2021) https://www.iol.co.za/business-report/companies/steinhoff-international-rises-on-hamiltons-withdrawal-of-appeal-ca1f4aad-2277-4a2f-841a-f986587f0d6b#:~:text=Jul%207%2C%202021-,STEINHOFF%20International%20rose%20more%20than%2021%20percent%20on%20the%20JSE,Hamilton%20had%20withdrawn%20its%20appeal, (accessed 23-07-2021). The second and third applicants are companies in a litigation and recovery group based in the Netherlands. See AmaBungane "Steinhoff's Billion Dollar Game of Chicken – the Claimants Clash in Court" in amaB eBooks Vol 1(2) (2021) https://amabhungane.org/wp-content/uploads/2021/03/Steinhoff-Chicken-DesktopV2-March-30.pdf (accessed 09-08-2021) 4 and 8.

4 *Trevo Capital* para 7.

5 *Trevo Capital* para 8.

6 Jooste "Groups of Companies and Related Persons" in Cassim *et al Contemporary Company Law* 2 ed (2012) 208.

board of directors.[7] In essence, the "related" relationship is about control. According to section 45(1)(*a*) of the Act, financial assistance for the purpose of section 45 "includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation". Certain relevant subsections in section 45 should be quoted in full:

> (2) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide direct or indirect financial assistance to a director or prescribed officer of the company of a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to subsection (3) and (4).
>
> (3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2) unless—
>
> (*a*) the particular provision of financial assistance is—
>
> (i) pursuant to an employee share scheme that satisfies the requirements of section 97; or
>
> (ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and
>
> (*b*) the board is satisfied that—
>
> (i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and
>
> (ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.
>
> (6) A resolution by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with—
>
> (*a*) this section.
>
> (7) If a resolution or an agreement is void in terms of subsection (6) a director of a company is liable to the extent set out in section 77(3)(*e*)(v) if the director –
>
> (*a*) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 74; and
>
> *(b)* failed to vote against the resolution or agreement, despite knowing that the provision of financial assistance was inconsistent with this section.

Section 45 of the Act can protect several stakeholders in a company against the misuse of the company's capital through financial assistance granted by the company to related companies.[8] Financial assistance between a company and a related company is allowed, but a company's board of directors may only bind the company to a section 45 transaction if it has complied with

7 Sections 2(1)(*c*) and 2(2) of the Act.

8 The heading of s 45 reads "Financial Assistance to Directors", despite s 45(2) referring to financial assistance to directors *and* persons related to the company.

the requirements in section 45(3).[9] These strict requirements, especially the standard of scrutiny required by the solvency and liquidity test, are capable of protecting a range of stakeholders.[10] Directors may face personal liability for the company's losses if they approved invalid section 45 transactions.[11] Therefore, directors have a financial incentive to ensure proper compliance with the statutory requirements.

3 THE FACTS

In December 2017, news broke about accounting irregularities in the financial statements of the Steinhoff group.[12] Once the ramifications and the extent of the accounting irregularities were revealed, the Steinhoff group began negotiating with creditors and structuring a global settlement agreement in a bid to avoid liquidation, repay creditors and settle litigation.[13]

The proposed global settlement agreement makes provision for three types of creditors: financial creditors (FC class),[14] contractual claimants (CC class),[15] and market purchase claimants (MPC class).[16] The applicants in *Trevo Capital* belong to the MPC class. The first respondent, SIHPL, was previously registered as Steinhoff International Holdings Ltd (SIHL). SIHL was the primary holding company for the Steinhoff group of companies that is now headed by Steinhoff International Holdings N.V. (SIHNV).[17] Under a 2015 scheme of arrangement, all the shares in SIHL were swapped for shares in SIHNV, a Dutch-registered company with shares listed on the Johannesburg Stock Exchange and on the Frankfurt Stock Exchange.[18]

The second respondents are agents representing holders of debt instruments issued by the

9 Jooste "Financial Assistance to Directors – The Companies Act 71 of 2008" (2010) *Acta Juridica* 165.

10 Van der Linde remarks that the solvency and liquidity test has the potential to be a protective mechanism "in a wide range of transactions affecting the rights of creditors". See Van der Linde "The Solvency and Liquidity Approach in the Companies Act 2008" (2009) *Journal of South African Law* 224 and 226. However, prudent usage of capital is desirable for *all* stakeholders, not just creditors or shareholders.

11 Section 45(7) read with s 77(3)(*e*)(v) of the Act.

12 *Trevo Capital* para 1.

13 *Trevo Capital* para 1. The course of events that necessitated debt compromise agreements between SIHPL and its creditors is well summarised in the group's s 155 compromise proposal at 2–8. See "Proposal in terms of section 155(2) of the Companies Act No. 71 of 2008 in respect of Steinhoff International Holdings Proprietary Limited as supported by Steinhoff International Holdings N.V. and Steinhoff Investment Holdings Limited and Steinhoff Africa Holdings Proprietary Limited and Ainsley Holdings Proprietary Limited" (hereinafter "Original s 155 Proposal") (2021) https://steinhoffsettlement.com/media/3254110/original_s155 proposal.pdf (accessed 09-08-2021. See also Steinhoff International Holdings N.V. "Overview of Forensic Investigation" http://www.steinhoffinternational.com/downloads/2019/overview-of-forensic-investigation.pdf, (accessed 10-04-2019) ("Overview of Forensic Investigation") 4.2, AmaBungane (2021) 2, and Olivier "Regulating against False Corporate Accounting: Does the Companies Act 71 of 2008 have Sufficient Teeth?" (2021) 3–6.

14 According to SIHPL, the financial creditors have undisputed contractual claims against it under the SIHPL CPU with the result that the fact and amount of SIHPL's liability in that respect are seen by it as certain. See *Trevo Capital* para 12. The financial creditors would include institutional investors, banks, insurance companies, and asset managers, that had invested in a bond that originally would have matured on 30 January 2021. See *Trevo Capital* para 7.

15 These are "parties which instituted claims against SIHPL or SIHNV prior to 5 December 2020 in respect of "arms-length negotiated contractual arrangements" under which shares in other enterprises were sold or transferred by such claimants or their related parties to SIHPL and who received consideration directly from it by way of the issuance or transfer of SIHNV shares." See *Trevo Capital* para 12 and Original s 155 proposal at 16 and 31.

16 "The Market Purchase claimants are viewed by SIHPL as being actual or potential litigation claimants who '*otherwise*' purchased SIHPL shares prior to the close of business on 6 December 2015, and continued to hold SIHNV shares … at close of business on 5 December 2017." *Trevo Capital* para 13.

17 See "About Steinhoff" http://test.steinhoffinternational.com/group-structure.php, (accessed 29-07-2021. See also Original s 155 proposal 1. SIHPL is a private company, but SIHL was a public company with shares listed on the Johannesburg Stock Exchange (JSE).

18 See *Trevo Capital* para 4. "Schemes of arrangement" are regulated by s 114 of the Act.

group.[19] The third respondents are the financial creditors of SIHPL.[20] The financial creditors are investors in a convertible bond (the 2021 Bond) issued by another company in the Steinhoff group, Austria-registered Steinhoff Finance Holdings GmbH (SFHG).[21] SIHPL (at the time SIHL) assumed liability for the obligations under the 2021 Bond in terms of a guarantee (the 2014 Guarantee).[22] Under the 2014 Guarantee, SIHL promised that if the issuer of the 2021 Bond, SFHG, failed to repay the bondholders in accordance with the terms of the bond, "SIHL will pay that sum".[23]

Another important participant in the alleged financial assistance transactions is Steenbok Lux Finco (1) SARL (Lux Finco 1), a Luxembourg-registered company that is related to SIHPL.[24] Lux Finco 1 is a special purpose vehicle (SPV) with no assets of its own, and its sole purpose was to act as a conduit for the debt owed by SIHPL to the financial creditors.[25] On 12 August 2019, SIHPL and the representative of the financial creditors concluded the CPU.[26] The CPU recognises that SIHPL assumes the role of guarantor in respect of obligations originally owed by SFHG under the 2021 Bond.[27] Bozalek J provides a key description and extract from the SIHPL CPU pertaining to the FC class: "the maturity date of the SFHG debt in terms of the 2021 Bond was extended to 31 December 2021 and the SFHG debt in terms of the 2021 Bond was restated by way of:

> (i) the bondholders issuing a loan ("the New Lux Finco 1 21/22 Loan") to Lux Finco 1 on a cashless basis, in terms of a Facilities Agreement;
>
> (ii) Lux Finco 1 on-lending the deemed cashless proceeds of the new Lux Finco 1 21/22 Loan to SFHG pursuant to an inter-company loan;
>
> (iii) SFHG using the deemed proceeds of the inter-company loan to discharge its obligations to the bondholders under the existing debt.[28]

The board of SIHL (now SIHPL) took steps to comply with section 45(3) in respect of the 2014 Guarantee by passing the relevant resolutions and making the necessary confirmations.[29] However, the board of SIHPL did not even attempt to comply with section 45(3) in respect of the CPU and the resulting obligations towards Lux Finco 1.[30]

3 1 The Arguments

According to the applicants, both the 2014 Guarantee *and* the CPU amounted to the provision

19 *Trevo Capital* para 4.

20 As defined in "Steinhoff Settlement Term Sheet" (October 2020) https://steinhoffsettlement.com/media/3250043/settlement_term_sheet.pdf, (accessed 11-08-2021) at 3–4 and 19. The Steinhoff Settlement Term Sheet defines the financial creditors as creditors in terms of the CPU.

21 See Original s 155 proposal at 15.

22 *Trevo Capital* para 55.

23 *Trevo Capital* para 55.

24 *Trevo Capital* para 120.

25 *Trevo Capital* para 95.

26 *Trevo Capital* para 87.

27 *Trevo Capital* paras 88–89.

28 *Trevo Capital* para 17.

29 *Trevo Capital* para 27.

30 This is because, as will be explained below, SIHPL's board did not regard the CPU as financial assistance.

of financial assistance as contemplated by section 45 of the Act.[31] The applicants argued that the two guarantees made in respect of the European convertible bond, as well as their accompanying resolutions, were all void due to non-compliance with the requirements of section 45 of the Act.[32]

The applicants argued that at the time of the 2014 Guarantee, SIHL was factually insolvent as a result of significant overstatements of assets in its financial statements and that the financial information considered by the SIHL board in 2014, because they were materially misleading and required restatement, *could* not have complied with section 4 of the Act (the solvency and liquidity test).[33] The first applicant argued that the board of SIHL should have more carefully investigated and interrogated the financial statements, in which case they would have discovered inconsistencies and overstatements which would have indicated that they would not be acting reasonably by believing, based on the information available to them, that the solvency and liquidity test had been satisfied.[34]

The respondents' counterargument was that at the time that the 2014 Guarantee was made, the information available and upon which SIHL's board relied indicated that the company *did* in fact comply with section 45(3) and section 4.[35] The respondents rejected the assertion that the financial statements upon which the board relied at the time (in 2013/2014) were unreliable, arguing instead that assessing compliance with section 45(3) required an examination of the facts available to the board *at the time* the decision was made.[36] The respondents argued that the applicants were incorrect to attack the validity of financial reporting information the board had relied upon in reaching its subjective opinion in 2014 on the basis of information and knowledge that would only come to light several years after the fact.[37] The applicants argued that the CPU restated the 2021 Bond with amended terms and a new maturity date, with the effect that SIHPL's liabilities to the financial creditors were postponed.[38] The applicants alleged further that the Facilities Agreement was a new loan granted by the financial creditors to Lux Finco 1, and that SIHPL's guarantee of this loan amounted to financial assistance to a related company.[39] The respondents contended that the CPU "was a mere restatement of the terms of SIHPL's obligations to the Bondholders in terms of the 2021 Bond and 2014 Guarantee and did not entail SIHPL assuming any further debt or providing financial assistance".[40] Indeed, the Steinhoff group has consistently maintained that the reorganisation of the company's main European debt instruments and related guarantees amounts to a "revision" of debt.[41] Consequently, the respondents argued that SIHPL was not required to comply with section 45 in respect of the

31 "Having regard to all these provisions, the conclusion drawn by Trevo is that when the terms of the CPU and the Facilities Agreement are examined closely, and together, the CPU is in substance and effect a guarantee or underwriting by SIHPL of Lux Finco 1's obligations under the Facilities Agreement." *Trevo Capital* para 100.

32 *Trevo Capital* paras 24 and 8.

33 *Trevo Capital* para 56. In making this argument, the applicants relied on expert evidence from an accountant and financial analyst. *Trevo Capital* paras 22 and 61. There is support for the view that the subjective wording of "the board is satisfied" in s 45 is qualified by the objective wording of "reasonably foreseeable" in s 4. See Jooste (2010) *Acta Juridica* 176.

34 *Trevo Capital* paras 62–63. The second applicant was largely in agreement with these arguments. *Trevo Capital* para 65.

35 *Trevo Capital* para 24.

36 *Trevo Capital* para 24.

37 *Trevo Capital* para 24.

38 *Trevo Capital* para 18.

39 *Trevo Capital* para 95.

40 *Trevo Capital* para 28.

41 See SIHNV Annual Report 2018 https://www.steinhoffinternational.com/annual-reports.php (accessed 02-08-2021).

CPU.

4 THE JUDGMENT

The respondents' preliminary arguments, that the applicants have no standing and that section 45 is not applicable at all since the financial assistance was provided to a foreign company, were rejected.[42] The remaining issues were (i) whether SIHL complied with section 45 in respect of the 2014 Guarantee, and (ii) whether the CPU and the 2021 Guarantee amounted to the provision of financial assistance to a related person as contemplated by section 45.[43]

Bozalek J commenced his analysis with a reflection on the purpose of section 45 of the Act.[44] Unfortunately, the judge failed to directly engage with the purposes set out in section 7 of the Act. The judge merely placed reliance on commentary from Jooste pointing out that the persons that control a company's finances are in a powerful position that could be abused.[45] Bozalek J noted that as a consequence of this risk of abuse of company capital, certain loans and provisions of security were prohibited by the Companies Act 61 of 1973.[46]

Bozalek J seemed to accept that the purpose of the solvency and liquidity requirements, which are contemplated by section 45(3)(*b*)(i), is to protect creditors, but remarked that the "fair and reasonable terms" requirement seemed to be aimed more at shareholder protection.[47] Shareholder and creditor protection should definitely be borne in mind when the interpreter approaches the requirements in section 45(3), but there are different and broader purposes mentioned in section 7 of the Act that should be considered as well. Section 7 contemplates several complementary purposes, including:

- promoting compliance between company law and the Bill of Rights;[48]
- encouraging entrepreneurship and enterprise efficiency;[49]
- creating optimum conditions for the aggregation of capital for productive purposes, investment of capital, and spreading of economic risk;[50]
- providing for the efficient rescue and recovery of financially distressed companies, in a way that balances the rights and interests of all relevant stakeholders;[51] and
- encouraging high standards of corporate governance.[52]

Regulation of financial assistance transactions should consider capital control and aim to facilitate stakeholder protection, market efficiency, and commercial certainty, in a way that promotes the values of the Bill of Rights. All these factors should be borne in mind when interpreting section 45 of the Act. It is unfortunate that Bozalek J paid relatively little time to analysing the purpose of section 45 and its requirements, as such a discussion might have

42 *Trevo Capital* paras 34–52.

43 *Trevo Capital* para 32.

44 *Trevo Capital* para 114.

45 *Trevo Capital* para 114; Jooste (2010) 165; Jooste "Groups of Companies and Related Persons" (2012) 335.

46 *Trevo Capital* para 114; Jooste (2010) 165.

47 *Trevo Capital* para 114.

48 Section 7(*a*) of the Act.

49 Section 7(*b*)(i) of the Act.

50 Section 7(*g*) of the Act.

51 Section 7(*k*) of the Act

52 Section 7(*b*)(iii) of the Act.

enriched the judgment.

4 1 The 2014 Guarantee

The judge was not convinced by the applicants' criticism of the board's reliance on the company's financial statements as they appeared in 2013, because "it is almost wholly reliant on *ex post facto* analysis of the company's financial position made with the benefit of hindsight following the revelations of December 2017 and the accounting revisions of 2019."[53] The Court noted that SIHL took steps to comply with all the requirements of section 45, and even went as far as securing external opinions regarding the company's solvency and liquidity and the fairness of the terms of the 2014 Guarantee.[54] The Court was not swayed by the argument that the board had acted unlawfully because, at the time of the 2014 Guarantee, the Chief Financial Officer (CFO) and Chief Executive Officer (CEO) of SIHL were aware of overstatements and accounting irregularities that seriously compromised the company's solvency and liquidity; the judge held that "purely on this scenario it cannot be said that the entire board's decision was thereby tainted".[55] Therefore, the Court held that in respect of the 2014 Guarantee, the applicants had failed to prove that the board of SIHPL had violated the requirements of section 45 of the Act.[56]

4 2 The CPU

The judge was not convinced by the first respondent's argument that the CPU constituted merely a restatement of the 2014 Guarantee, holding that a "restatement" of debt in a way that creates new terms and conditions and that involves at least one new party, is in fact the creation of new debt. Bozalek J was of the view that the financial creditors would never have granted the loan to Lux Finco 1 (an SPV with no assets) if the SPV's obligations were not guaranteed by SIHPL.[57] Therefore, the judge held that the CPU constituted financial assistance from one company (SIHPL) to a related company (Lux Finco 1).[58]

The board of SIHPL had not attempted to comply with the requirements of section 45(3) in respect of the CPU.[59] Therefore, the judge held that SIHPL's financial assistance to Lux Finco 1 through the CPU was done in breach of section 45(3) of the Act. Consequently, the Court declared that the resolution authorising the conclusion of the CPU, as well as the CPU itself, was void.[60]

4 3 Impact of the Judgment

The *Trevo Capital* case involved a range of important and intersecting aspects of corporate and commercial law principles, including capital control, the rules on company groups and related persons, regulatory compliance, solvency and liquidity requirements, and stakeholder (particularly creditor and shareholder) protection. From a legal perspective, academics and practitioners now have useful guidance on what constitutes financial assistance in terms of section 45, and the application of the requirements contained in section 45(3). The judgment

53 *Trevo Capital* para 71.

54 *Trevo Capital* para 67.

55 *Trevo Capital* para 71.

56 *Trevo Capital* para 72.

57 *Trevo Capital* para 131.

58 *Trevo Capital* paras 115 and 136.

59 *Trevo Capital* para 134. Bozalek J remarked that SIHPL's directors would have had some difficulty in becoming satisfied that the solvency and liquidity test had been satisfied.

60 *Trevo Capital* para 137.

has provided some clarity as to the compliance requirements of section 45, and since the requirements of section 44 transactions were drafted in almost exactly the same terms, there is potential guidance regarding financial assistance under section 44 as well.[61] It has been established that the first enquiry when analysing the validity of a transaction like the CPU or the 2014 Guarantee, is to determine whether the transaction does in fact amount to financial assistance for the purpose of section 45. If no such financial assistance has been given, compliance with the section 45 requirements is unnecessary. The judgment provides some further insight into the application of this first step, by holding that a restatement of existing debt on different terms and involving new parties amounts to new financial assistance, and that step two must therefore be completed. If the financial assistance contemplated by the statute *has* been established, the enquiry proceeds to an analysis of whether the requirements of section 45(3) have been complied with. If the requirements have been complied with, the resolutions and resulting transactions are valid. If not, the resolutions and transactions are void in terms of section 45(6) of the Act.

Bozalek J's judgment struck a hammer blow to the prospects of saving the Steinhoff group from liquidation. The entire debt restructuring process seems to have been thwarted by two shareholder claimants on the basis of Steinhoff's non-compliance with a formal requirement regarding its proposed compromise with creditors. The employees of the Steinhoff group, the shareholders of SIHNV, and the group's myriad of current and prospective creditors, could all be prejudiced by the WCHC's decision. It is therefore hardly surprising that SIHPL has indicated its intention to file for leave to appeal the section 45 judgment.[62]

The Steinhoff group and the financial creditors favour the CPU that they had negotiated and agreed to. Unfortunately, it is possible that in light of the precarious financial position that the Steinhoff group is in, SIHPL is simply unable to comply with the section 45 requirements in respect of the CPU, and that any attempt to do so may open the board of directors to personal liability. Arguably, this is the reason why the Steinhoff group prefers to characterise the CPU as a "restatement" of debt. Perhaps another judge in another court may be convinced that the CPU is *not* financial assistance to a related party — Bozalek J certainly was not.

5 COMMENTARY

There are sound corporate governance considerations in favour of enforcing compliance with protectionist requirements for transactions such as the CPU. Bozalek J's remarks in *Trevo Capital* are worth noting:

> At the very least the directors and shareholders would want to apply their minds to the questions of whether the new entity, whose debt or obligations the company would now guarantee, presented any risks or advantages in comparison to the previous beneficiary of the guarantee. Here one bears in mind that Lux Finco 1 is a special purpose vehicle, presumably without any existing liabilities or assets. The shareholders and directors would also wish to consider whether the terms of the CPU were fair and reasonable vis-à-vis the company. In this regard it is again disingenuous to suggest that the restructuring really merely replaced one debtor with another without any other terms and conditions being changed.[63]

Why did SIHPL not simply pass the required resolutions? Could it have been because SIHPL

61 Section 44 of the Act regulates financial assistance granted by a company for the purpose of, or in connection with, the acquisition or purchase of its securities.

62 Several financial creditors also indicated their intention to appeal. See "Steinhoff Investment Holdings Limited – Steinhoff International Holdings N.V. Update on Settlement Implementation Progress and Increased Settlement Proposal" https://irhosted.profiledata.co.za/steinhoff/2017_feeds/SensPopUp.aspx?id=390690, (accessed 11-08-2021).

63 *Trevo Capital* para 133.

knew that the board *could* not comply with section 45(3)? The first applicant was of this view.[64] Bozalek J's comments in this regard also paint a picture of a board trying to creatively avoid the requirements and liabilities in section 45 by calling a spade a hoe:

> If this were the case i.e. that such terms were more favourable to SIHP\L, then the directors should have no difficulty in being party to a resolution to this effect and untroubled by the prospect of incurring personal liability by virtue of the provisions of sec 45(7).[65]

Interestingly, the Companies Amendment Bill 2021 proposes to amend the Act so as to remove the requirements of section 45 in respect of financial assistance from a company to one of its own subsidiaries.[66] If the CPU had taken place under such a dispensation, and if Lux Finco 1 had been a subsidiary of SIHPL, this matter never would have made it to court, and no compliance with any requirements would have been necessary.

It is not clear why subsidiaries are included in section 45, but if their inclusion prevents financial assistance transactions from being executed between companies in groups undergoing financial difficulty, such as the Steinhoff group, it is questionable whether the section gives effect to the statute's aims of promoting enterprise efficiency and creating an environment for efficient rescue and recovery of companies. Jooste is also critical of how remarkably wide the provisions of section 45 are, and the range of transactions that may be affected:

> The extent of this range is such that a vigilant, law-abiding company will be faced with an onerous task in assuring itself that it has complied with the law. It is submitted that the net has been cast too wide, capturing situations that are no threat to the company in question, situations that do not involve any potential abuse of the powerful position of directors.[67]

Jooste correctly notes that the harsh effect of section 45 as it relates to related company financial assistance may be tempered through an avenue made available by the Act that would exempt a person from being regarded as a related or interrelated person.[68] Unfortunately, this exemption will only apply where it can be proven that the persons are acting independently.[69] In a situation like in *Trevo Capital,* where a group of companies utilises an SPV with no trading history, assets, or other function than to act as a conduit for the restructuring of a financing transaction for another company in the group which is aimed at avoiding liquidation of the entire group, it is patently clear that Lux Finco 1 is *not* acting independently; it is a mere tool.

Capital control and stakeholder protection are worthy goals, and the section 45 requirements, on the face of it, go some way in achieving them. However, it is unclear why loans from a company to a director, a scenario that involves a clear potential for conflict of interest, should be placed on the same footing and be subject to the same requirements as a loan from a holding company to a subsidiary. A holding company and its subsidiary will have separate boards of directors, and the holding company would have to account for the recipient of inter-group financial assistance

64 *Trevo Capital* para 133.

65 *Trevo Capital* para 135.

66 Section 11 of the Companies Amendment Bill 2018. Section 11 of the reworked Companies Amendment Bill 2021 proposes to insert section 45(2A) into the Companies Act 71 of 2008, which will read as follows: "The provisions of this section shall not apply to the giving by a company of financial assistance to, or for the benefit of its subsidiaries."

67 Jooste "Groups of Companies and Related Persons" (2012) 336.

68 Jooste "Groups of Companies and Related Persons" (2012) 342. See s 2(3) of the Act.

69 Jooste makes an important observation: "Although s 2(3) provides relief, the onus remains on the company to prove it is acting independently and, even if such an application is not made or proven unnecessary, the directors will need to apply their minds to determine whether a particular transaction falls with the ambit of s 45 or not. This may prove to be difficult, time-consuming and expensive for the company, and may make the practical application of s 45 challenging, without necessarily providing significant additional protection for creditors and shareholders." Jooste "Groups of Companies and Related Persons" (2012) 336.

in consolidated group financial statements in any event.[70] It is not remarkable that there are groups of companies that wish to or may have to enter into transactions involving subsidiary SPVs to extend, amend, guarantee or restate a debt, and it may often be difficult for the board of such a company to in good faith satisfy itself that the company will be solvent and liquid after the transaction. Indeed, financial assistance between related companies might be commonplace even for financially sound groups of companies. As seen in *Trevo Capital*, it may be that one company within a group issues a debt instrument, while another company within the group guarantees it. There are sound and acceptable commercial reasons for doing so, primarily those related to separate legal personality, limited liability, and credit ratings. To require compliance with these requirements every time a company wishes to provide financial assistance to a related company like in *Trevo Capital* is an administrative burden, and does not facilitate investment and the raising and movement of capital, as envisaged by section 7.[71] Therefore, I think that the proposal to exclude financial assistance from a company to a subsidiary from the ambit of section 45 has some merit.

To return to the judgment: It is difficult to argue against Bozalek J's logic. It was perfectly reasonable for the judge to find that the board did not violate section 45 when approving the 2014 Guarantee. The Court's approach regarding the 2014 Guarantee and the board's compliance with section 45(3) cannot be faulted. The section demands a subjective test with objective considerations.[72] The question is, did the board, at the time of making the decision, acting reasonably and considering reasonably relevant information (which includes the company's accounting records and financial statements), subjectively believe that the section 45(3) requirements had been complied with? In *Trevo Capital*, it was common cause that the board had relied upon its audited financial statements and fairness opinions from an external auditor in approving the section 45 requirements in relation to the 2014 Guarantee. At the time that the board applied its mind, passed its resolution, and made the necessary affirmation, there was simply no (or insufficient) credible and reliable evidence in the public domain that refuted the numbers in Steinhoff's financial statements. Therefore, it would be unreasonable to demand that the board itself should have conducted a forensic investigation of the company's financial records and transactions valuations.

Bozalek J's approach was also correct regarding what possible effect the secret knowledge of one or two board members should have on the subjective belief of the rest of the board (that was presumably unaware of the deception). Generally speaking, a company's board acts collectively when making decisions. The Act imposes the section 45 requirements on a company's board as a whole, consistent with the general authority and duty to manage imposed on the board by section 66(1).[73] It cannot be that the secret knowledge of one or two directors, even if such could be proven, should be imputed onto the entire board of directors.

Bozalek J's decision and reasoning regarding the CPU are also persuasive. The CPU was clearly a new debt, not a restatement of existing debt. New section 45 debts should require new compliance with the prescribed requirements. A company should not be able to comply with a requirement to approve a transaction within two years before the transaction by relying on an approval granted more than two years before the transaction and that contemplated a different transaction on different terms and involving different parties.

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70 See s 29(1)(*a*) and s 29(5)(*b*) of the Act read with Regulation 27 of the Regulations to the Companies Act 71 of 2008, and paras 2(a) and 10 of International Financial Reporting Standards.

71 Section 7(*g*) of the Act.

72 *Trevo Capital* para 61.

73 Section 66(1) of the Act confers authority on a company's board of directors, subject to the company's Memorandum of Incorporation (MOI) and other provisions in the Act and *places an obligation* on the board to manage the business of the company.

6 CONCLUSION

The provisions in the Act that regulate financial assistance from a company to a related company can contribute to the achievement of shareholder and creditor protection. Presumably, the protection of shareholders and creditors was the motivation for imposing statutory requirements on companies that wish to provide financial assistance to related companies. Indeed, it may be that there are some shareholders and creditors that were pleased by the outcome in *Trevo Capital* and the derailment of the CPU. At the same time, many other creditors or shareholders may have been extremely disappointed with Bozalek J's judgment.

The question for those considering adopting the proposed amendment to section 45 in the Companies Amendment Bill 2021 that would remove financial assistance between a company and one of its own subsidiaries from the ambit of section 45, is whether the possibility of achieving shareholder and creditor protection through the special resolution requirement and solvency and liquidity standard is worth the administrative burden imposed on companies that contemplate granting financial assistance to a related company. I do not believe this to be the case. The proposed amendment to section 45 contained in the Companies Amendment Bill 2021 is one that may bring relief to companies, improve the movement of capital, and enable holding companies to provide financial support to their subsidiaries without burdensome procedural steps and approvals being required. It must be remembered that these transactions may be desired for various legitimate reasons within company groups, and need not necessarily be prejudicial to the group's shareholders and creditors. It is submitted that the decision in *Trevo Capital* was correct, but that section 45 of the Act should be amended to release companies from the burden of complying with statutory requirements when they contemplate granting financial assistance to a subsidiary.