THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 205/2020

In the matter between:

PEPKOR HOLDINGS LTD	**FIRST APPELLANT**
PEPKOR SPECIALITY (PTY) LTD	**SECOND APPELLANT**
TEKKIE TOWN (PTY) LTD	**THIRD APPELLANT**

and

AJVH HOLDINGS (PTY) LTD	**FIRST RESPONDENT**
FULL TEAM SURE TRADE (PTY) LTD	**SECOND RESPONDENT**
AQUILAM HOLDINGS (PTY) LTD	**THIRD RESPONDENT**
LIBER DECIMUS (PTY) LTD	**FOURTH RESPONDENT**
XANADO TRADE AND INVESTMENTS 327	**FIFTH RESPONDENT**
STEINHOFF INTERNATIONAL HOLDINGS NV	**SIXTH RESPONDENT**
TOWN INVESTMENTS (PTY) LTD	**SEVENTH RESPONDENT**

Case no: 217/2020

In the matter between:

STEINHOFF INTERNATIONAL HOLDINGS NV	**FIRST APPELLANT**
TOWN INVESTMENTS (PTY) LTD	**SECOND APPELLANT**

and

AJVH HOLDINGS (PTY) LTD	**FIRST RESPONDENT**
FULL TEAM SURE TRADE (PTY) LTD	**SECOND RESPONDENT**
AQUILAM HOLDINGS (PTY) LTD	**THIRD RESPONDENT**
LIBER DECIMUS (PTY) LTD	**FOURTH RESPONDENT**
XANADO TRADE AND INVESTMENTS 327	**FIFTH RESPONDENT**
PEPKOR HOLDINGS LTD	**SIXTH RESPONDENT**
PEPKOR SPECIALITY (PTY) LTD	**SEVENTH RESPONDENT**
TEKKIE TOWN (PTY) LTD	**EIGHTH RESPONDENT**

Neutral citation: *Pepkor Holdings Ltd and Others v AJVH Holdings (Pty) Ltd and Others; and Steinhoff International Holdings NV and Another v AJVH Holdings (Pty) Ltd and Others* (205/2020 and 217/2020) [2020] ZASCA 134 (21 October 2020)

Coram: CACHALIA, ZONDI, MOCUMIE and SCHIPPERS JJA and GOOSEN AJA

Heard: 24 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 09h45 on 21 October 2020.

Summary: Interim interdict – preserving property *pendente lite* – based on *res litigiosa* – requirements not met – fraud – inappropriate to make findings on motion – company law – companies in a group of companies are separate legal entities even if wholly-owned – no case made out for order restraining company holding majority shares in subsidiary from freely dealing with shares – nor directing company to exercise control in a particular manner.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Erasmus J sitting as court of first instance):

1 The application to adduce further evidence on appeal is dismissed with costs, including the costs of two counsel.

2 The appeals under case numbers 205/2020 and 217/2020 are upheld with costs, including the costs of two counsel.

3 The order of the high court is set aside and replaced with the following:

'The application is dismissed with costs, including the costs of two counsel.'

JUDGMENT

Schippers JA: (Cachalia, Zondi, Mocumie JJA and Goosen AJA concurring):

[1] These are two appeals, with the leave of this Court, against an urgent interim interdict issued by the Western Cape Division of the High Court, Cape Town (the high court). The interdict restrained the appellant companies from dealing freely with their property, pending the determination of an action which was instituted in the high court under case number 8276/2018 by the first to fifth respondents, namely, AJVH Holdings (Pty) Ltd, Full Team Sure Trade (Pty) Ltd,

Aquilam Holdings (Pty) Ltd, Liber Decimus (Pty) Ltd, and Xanado Trade and Investments 327 (the respondents). The appellants in the first appeal (case no 205/2020), namely Pepkor Holdings Ltd (Pepkor), Pepkor Speciality (Pty) Ltd (Speciality), Tekkie Town (Pty) Ltd (Tekkie Town), where appropriate, are collectively referred to as 'the Pepkor entities'. The appellants in the second appeal (case no 217/2020) are Steinhoff International Holdings NV (Steinhoff NV) and Town Investments (Pty) Ltd (Town Investments).

Facts

[1] The basic facts can be shortly stated. Tekkie Town formerly conducted a footwear retail chain store business with 230 stores countrywide (the Tekkie Town business), and stores in Namibia and Lesotho. In 2015 Mr Markus Jooste, the former CEO of Steinhoff NV, approached Mr Abraham van Huyssteen, the founder of the Tekkie Town business, for the acquisition of that business by Steinhoff NV. Following negotiations, by April 2016 an agreement was concluded in terms of which Steinhoff NV agreed to pay the then existing shareholders of Tekkie Town an earn-out bonus, based on the financial results of Speciality (the bonus scheme agreement). It was anticipated that the Tekkie Town business would be included in Speciality's footwear business. The bonus scheme agreement was subject to the conclusion of a sale agreement of the Tekkie Town shares, the business and other assets.

[2] On 29 August 2016 the respondents and Steinhoff NV entered into a written agreement, entitled 'Sale of Shares and Claims Agreement' in terms of which they sold in aggregate, 56.94% of their shares in, and ceded their claims against, Tekkie Town (collectively, 'the Tekkie Town shares') to Steinhoff NV, for a purchase price of R3 257 250 000 (the sale agreement). On 17 January 2017 the purchase price was discharged by the issue of consideration shares in

Steinhoff NV to each of the respondents, in proportion to its aliquot share as defined in the sale agreement.

[3] Following the sale agreement, Steinhoff NV transferred the Tekkie Town shares it had acquired from the respondents to Steinhoff Investments Holdings Ltd (SIH) for a consideration equal to R2 983 856 000. On the same day, SIH transferred the Tekkie Town shares to Steinhoff Africa Holdings (Pty) Ltd (Steinhoff Africa) for a consideration equal to R2 983 856 000. On 1 July 2017 Pepkor bought the Tekkie Town shares from Steinhoff Africa for a purchase price of R3 391 974 152. Pepkor listed on the Johannesburg Securities Exchange (the JSE) in September 2017. On 1 October 2017 Speciality purchased the Tekkie Town business. Thus, through a series of transactions, the Tekkie Town shares were ultimately transferred to Pepkor which has held the shares with effect from 1 July 2017. The Tekkie Town business has been integrated with Speciality's own retail business and conducted as such since October 2017.

[4] By March 2018 the respondents claimed that the value of the consideration shares had been overstated and were but a fraction of their value when the sale agreement was concluded. They alleged that Mr Jooste had fraudulently misrepresented and concealed Steinhoff NV's true financial position, to induce them to enter into the sale agreement. On 28 March 2018 they proposed the return of the consideration shares to Steinhoff NV in exchange for shares in Steinhoff Africa Retail Ltd (STAR), to the value of the consideration shares at the time of implementation of the sale agreement. Steinhoff NV was the controlling majority shareholder in STAR. The proposal was declined.

[5] On 11 May 2018 the respondents instituted the action under case number 8276/2018 against Steinhoff NV and Town Investments in the high court, in which they claim redelivery of the equity, defined in the sale agreement as 'the

Sale Shares and the Sale Claims', according to the respondents' purchase price aliquot shares 'in the condition and with their values, rights and exigibility as the Sale Shares and Sale Claims had' at the date of the conclusion of the agreement (the main action). The alternative claim is one for damages in a cumulative amount of R1 854 678 150. The claims in the main action are founded on an alleged fraudulent misrepresentation by Mr Jooste concerning Steinhoff NV's financial position, which induced the respondents to enter into the sale agreement. They allege in the particulars of claim that they have resiled from the agreement.

[6] Pepkor (the present owner of the Tekkie Town shares) and Speciality (the present owner of the Tekkie Town business), were not parties to the main action when the high court issued the interdict. This, despite the fact that the respondents were at all times aware that Steinhoff NV no longer owns the Tekkie Town shares, the return of which they seek as the principal form of relief in the main action. The Pepkor entities were joined as parties in the main action after the high court granted the interdict.

[7] In June 2018 the respondents instituted a separate action in the high court against STAR in which they seek a declaratory order that it is bound by the bonus scheme agreement and liable for the payment of bonuses to the respondents, based inter alia on Speciality's financial results (the bonus scheme action).

[8] In April 2019, almost a year after they had instituted the main action, the respondents launched an urgent application in which they sought the following relief:

'2 Pending the final determination of the action instituted in the Western High Court under case number 8276/2018

2.1 interdicting and restraining the second respondent [Pepkor] from alienating, transferring, ceding, assigning, and/or otherwise encumbering its shareholding in the fourth respondent [Tekkie Town], or any part thereof;

2.2 interdicting and restraining the fourth respondent [Tekkie Town] from allotting and/or issuing any further shares in the fourth respondent;

2.3 interdicting and restraining the third respondent [Speciality] from alienating, ceding, assigning, or otherwise encumbering the business trading under the name and style *Tekkie Town* (including the assets thereof), acquired in terms of the sale agreement entered into by the parties with the effective date 1 October 2017 (as amended in addendum No 1), otherwise than as reasonably required in the normal course of operating a retail business;

2.4 interdicting and restraining the first respondent [Steinhoff NV] from dealing with its shares in the second respondent [Pepkor] in any manner which would result in loss of control of second respondent or prevent it from giving effect to the relief sought in prayer A in case number 8276/2018.'

[9] The purpose and grounds of the application for the interdict were stated as follows in the founding affidavit:

'This application seeks to preserve the aforesaid property in the ownership of the current owners and free of any hindrance, encumbrance or alteration which would serve to diminish their value or prevent or delay their return to the applicants as plaintiffs, should the . . . Court in due course so order. The pleadings in the said action having closed, both the shares and the other assets, the restoration of which are sought in the action, are *res litigiosa* until the final determination of the action by the . . . Court. . . .'

The first respondent [Steinhoff NV] holds 71% of the shares in the second respondent [Pepkor] which, through a series of wholly-owned subsidiaries, owns and controls all of the shares in the third respondent [Specialty]. In fact, the first respondent controls and directs all of the corporate actions and activities within the Steinhoff Group. There can be no disposal of the shares in or held by any company within the Group, or the disposal of any business or business unit, without the approval of the board of directors of the first respondent. Similarly, the first respondent is able to require that any of the shares in or held by any of the companies within the Steinhoff Group, and any of those companies' businesses or business units, be disposed of.'

[10] The appellants opposed the application, principally on the following grounds. The *res litigiosa* doctrine was inapplicable. The companies within the Steinhoff Group are all separate corporate entities, each with their own board of directors which manages their business and affairs. Steinhoff NV does not control Pepkor. The former is listed on the Frankfurt Stock Exchange and the latter, on the JSE. Pepkor purchased the Tekkie Town shares bona fide and for value (some R3.4 billion). Speciality acquired the Tekkie Town business in good faith and for value. It was factually impossible to restore the Tekkie Town business which had materially changed in the intervening period. The number of stores had grown from 230 to 398 and numerous members of staff had left the business, which had been integrated into the much larger business of Speciality.

[11] The application came before Erasmus J on 25 April 2019. The judge said that he would hand down an order the following morning. After the court had adjourned, the judge invited the parties to send him a proposed draft order in the terms sought by them, via email. The respondents sent a draft order to Erasmus J at 23h22 on 25 April 2019. It was materially different from the order sought in the notice of motion. The next morning, without granting the appellants an opportunity to be heard or to make written submissions, the judge issued an order in terms of the draft. I revert to these aspects below. The relevant part of the order reads as follows:

'2 Pending the final determination of the action instituted in the Western Cape High Court under case number 8276/2018:

2.1 the first respondent [Steinhoff NV] is interdicted and restrained from dealing with the shares it holds directly or indirectly in any of its subsidiaries or any juristic persons related to it, or permitting them to be dealt with, in any manner which would result in it being unable to give effect to the relief in para 2.2 below, and that sought in prayer A in case number 8276/2018;

2.2 the first respondent [Steinhoff NV] is directed to exercise the control it has over the second [Pepkor], third [Speciality] and fourth [Tekkie Town] respondents respectively, in such a manner that:

2.2.1 the shareholding of the second respondent [Pepkor] in the fourth respondent [Tekkie Town] is preserved and prevented from being alienated, and/or encumbered in whole or in part;

2.2.2 the fourth respondent [Tekkie Town] is prevented from issuing any further shares in itself;

2.2.3 the business trading under the name and style of *Tekkie Town* acquired in terms of the sale agreement entered into by the first respondent [Steinhoff NV] and the third respondent [Speciality] with effective date 1 October 2017 (as amended in addendum No 1), is preserved, and third respondent [Speciality] is prevented from alienating or encumbering the said business or its assets otherwise than as reasonably required in the normal course of operating the retail business of *Tekkie Town*.

2.2 should –

2.3.1 the second respondent [Pepkor] intend to alienate, and/or encumber in whole or in part the shares it holds in the fourth respondent [Tekkie Town], and/or

2.3.2 the third respondent [Speciality] intend to alienate and/or encumber in whole or in part the business trading under the aforesaid name and style of *Tekkie Town*,

the second and/or the third respondent be directed to notify in writing all parties to the intended transaction that the aforesaid shares and/or business, as the case may be, are the subject-matter of claims by the present applicants in case number 8276/2018 in this Court, and to furnish a copy of such notification to the applicants' attorneys of record not later than 10 days prior to the conclusion of any agreement having such effect.

3. Costs to stand over for later determination.'

[12] The order issued by Erasmus J came to the attention of the appellants via an email sent by the judge's registrar on 29 April 2019, and the parties were requested to indicate within five days whether they required 'full reasons' for the

order. On 30 April 2019 the appellants requested the reasons for the order. These reasons had not been given by 10 May 2019 when the appellants had filed their applications for leave to appeal.

[13] The reasons for the order were given orally by Erasmus J – more than three months later, on 20 August 2019. The reason given for this delay was simply that for 'some or other reason there were crossed lines'. The judge granted the parties permission to record the reasons given in court. This recording was transcribed and given to the judge to assist him in providing the reasons in written form, in accordance with rule 49 of the Uniform Rules of Court. However, the judge's registrar enquired of the attorney representing the Pepkor entities whether the unedited transcript of the reasons could be circulated, to which they consented. Erasmus J did not furnish written reasons and the unedited transcript of the oral reasons, utilised in the application for leave to appeal, constitutes the reasons for the order issued on 26 April 2019 (the transcript). According to the transcript, the draft order tendered by the respondents was made an order of court 'overnight'.

[14] At this point it is convenient to deal with the submission by counsel for the Pepkor entities that the failure by Erasmus J to grant the appellants an opportunity to make written or oral submissions on the draft order, which was very different from the relief sought in the notice of motion, was inappropriate and likely to bring the administration of justice into disrepute. The submission has merit. It is axiomatic that a hearing should be fair. This lies at the heart of our system, is common sense and is enshrined in the Constitution.[1] As the litigants, the appellants should have been given an opportunity to raise with the court, any concerns they might have had in relation to the draft order. Secondly, as part of

[1] Section 34 of the Constitution provides:
'Everyone has the right to any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.'

the decision-making process, their legal representatives were entitled to make written or oral submissions regarding the draft order. This may well have obviated the need for an appeal. The issuance of the order in the circumstances is regrettable.

[15] The application for leave to appeal was heard on 13 September 2019 and the judgment in that application delivered on 16 September 2019. The high court concluded that there was no reasonable prospect that another court would come to a different conclusion on the facts, and that the order was not final in effect.

Is the order appealable?

[16] The respondents submitted, on the authority of *Zweni v Minister of Law and Order*,[2] that the order is not appealable because it is not final in effect, does not dispose of any relief claimed in the main action, and is not definitive of the rights of the parties. However, these traditional requirements have now been subsumed under the broader constitutional 'interests of justice' standard.[3] This standard applies both to appealability and the grant of leave to appeal, regardless of the existence of pre-constitutional common law impediments.[4]

[17] In my view, it is in the interests of justice that the order granted against the appellants is appealable, not least because it is final in effect and not susceptible to alteration by the high court or the court hearing the main application.[5] The issues upon which final pronouncements have been made are not matters that will arise for determination in the main action, on the pleadings as they stood at the

[2] *Zweni v Minister of Law and Order* [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) at 536A-C.

[3] *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA); [2010] 1 All SA 459 (SCA) para 20; *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) para 40.

[4] *City of Tshwane City* fn 3 para 41.

[5] *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohne Corporation and Others* [2017] ZASCA 134; [2017] 4 All SA 605 (SCA); 2018 (6) SA 440 (SCA) para 47.

time, in particular: the application of the *res litigiosa* doctrine; Steinhoff NV's alleged control of the Pepkor appellants; fraud in relation to the transactions following the sale agreement; and whether Pepkor bought the Tekkie Town shares in good faith and for value. Likewise, the order restraining Steinhoff NV from dealing with its shares at will, and directing it to exercise the control it has over the Pepkor entities in a particular manner, will also not be revisited in the main action, on the pleadings as they stood at the time.

[18] After the interdict was issued, the respondents joined the Pepkor entities as parties in the main action, and delivered amended particulars of claim on 9 June 2020, in which they allege the abuse of corporate personality by the defendants in that action. These subsequent events are however irrelevant, since this Court must decide 'whether the judgment appealed from is right or wrong, according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards'.[6]

Res litigiosa

[19] *Res litigiosa* is property which is the subject of litigation. A plaintiff may in principle apply to preserve *res litigiosa*, *pendente lite*.[7] The requirements are those for an ordinary interim interdict. As a general principle, there are two additional inherent features: the first is that the property which is the subject of the interim interdict is the subject of the action; and the second, that the action and the interim application are between the same parties.

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[6] *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd and Others* [1992] 4 All SA 453 (AD); 1992 (2) SA 489 (A) at 507D-E.

[7] *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town City Council* [1986] 4 All SA 120 (C); 1986 (2) SA 656 (C) at 656C; *Knox D'Arcy Ltd and Others v Jamieson and Others* [1996] 3 All SA 669 (A); 1996 (4) SA 348 (A) at 371H.

[20] In *Knox D'Arcy Ltd and Others v Jamieson and Others* E M Grosskopf JA referred to a same-parties same-property type interdict as 'the usual case where its purpose is to preserve an asset which is in issue between the parties'.[8] Since the applicants in that case did not apply to preserve property 'in issue between the parties' and laid no claim to the respondent's assets in the anticipated action, the judge said that '(t)he interdict sought was therefore of an unusual nature'.[9]

[21] In this case the order issued by the high court does not preserve the property in issue in the main action, but affects Steinhoff NV's right to deal with *different* property, ie the shares which Steinhoff NV holds directly and indirectly in any of its subsidiaries, or any juristic persons related to it. The order was granted against the Pepkor entities despite the fact that they were not parties to the main action. Although the respondents asserted that Steinhoff NV was disposing of non-core assets, which would frustrate their chances of obtaining redress in due course, they stated that 'the application is not one for an anti-dissipation order'. Their case, instead, was that the Tekkie Town shares and business became *res litigiosa*, which entitled them to an interdict pending the final determination of the main action.

[22] The stage at which property becomes *res litigiosa*, is stated in *Silberberg and Schoeman's The Law of Property*,[10] as follows:

'In Roman law, broadly speaking, a *res* became *litigiosa* at the stage of *litis contestatio*, which in our law arises upon the closing of pleadings. In Roman-Dutch law a distinction was drawn between real actions (*in rem*) and personal actions (*in personam*). Where a real action with regard to the thing was instituted, the thing became *litigiosa* when the defendant was informed

[8] *Knox D'Arcy* fn 7 at 371H.
[9] *Knox D'Arcy* fn 7 at 371H-I.
[10] P J Badenhorst, J Pienaar and H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) at 268, footnotes omitted.

of the summons issued against him or her. In the case of a personal action the thing became *litigiosa* at the close of pleadings.'

[23] The high court concluded that it would defeat the relief granted against Steinhoff NV (in the main action), if no relief was granted against the Pepkor entities, since they were 'the possessors and/or current owners' of the Tekkie Town shares and business. The transcript is however opaque as to the reasons for reaching this conclusion. The judge appears to have concluded, without any factual basis, that when one has regard to 'the nature of the relationship *inter se* in the Steinhoff Group', the transfer of the Tekkie Town shares and business was 'clearly plotted'; some decisions were made the day before a transaction took place; and it was stated on behalf of the Pepkor entities that the sale of the shares and business was part of an internal restructuring. This reasoning however bears no relation to the *res litigiosa* doctrine.

[24] Before us, counsel for the respondents submitted that the property claimed in the main action is one *in rem*, since the respondents are seeking restoration of their ownership and possession of the equity. The property thus became *res litigiosa* upon the service of the summons in the main action.[11] Alternatively, if this Court regards the main action as being one *in personam*, the equity would nevertheless have become *res litigiosa* by virtue of *litis contestatio* having been reached. Further alternatively, it was submitted that 'the doctrine of *res litigiosa* in modern South African law should be revisited in the light of the alteration in status of contracts induced by fraud from being void *ab initio* to merely voidable'.

[25] In my view these submissions do not withstand scrutiny. The doctrine of *res litigiosa* is inapplicable for three reasons. First, the doctrine could not apply

[11] *Blue-Cliff Investments (Pty) Ltd and Another v Griessel and Others* [1971] 2 All SA 523 (C); 1971 (3) SA 93 (C) at 96C-F; *Opera House* fn 7 at 659G-660B.

to Pepkor and Speciality as the current owners of the Tekkie Town shares and business respectively, since the *res* described in the particulars of claim in the main action was not *litigiosa* in relation to them. They were not parties to the main action. There was no *lis* between the respondents and Pepkor and Speciality, the subject matter of which was the Tekkie Town shares which the respondents sold to Steinhoff NV. The doctrine of *res litigiosa* only applies where there is a *lis* between the plaintiff enforcing a right to or ownership of property and the possessor thereof.[12] Further, there was no question of property subject to litigation in the main action being transferred to the Pepkor entities while those proceedings were pending. It is common ground that the Tekkie Town shares and business were transferred to Pepkor and Speciality respectively, well before the main action was instituted, and thus before the Tekkie Town shares or the Tekkie Town business could become *res litigiosa* in the main action.

[26] Second, the high court's order restrains the appellants from dealing with property that is self-evidently not the subject matter of the main action. In this regard the court referred to *Van Heerden v Sentrale Kunsmis Korporasie*,[13] on which the respondents had relied, but gave no reasons for apparently following this decision, as is clear from the transcript. Erasmus J said:

'The Applicants relied on the dicta of Rumpff JA, as well as another matter of Holmes JA, in the matter of van Heerden v Sentrale Kunsmis Korporasie at paragraph 31H and further in the old style of reporting under 1973 (1) SA 17 AD. I do not deem it necessary to repeat the quotations from these cases that were contained in the heads of argument and presented to me. I mention this because when counsel prepare their leave to appeal application they can read it at their own time and see what it says.'

[12] *Opera House* fn 7 at 661C.

[13] *Van Heerden en Andere v Sentrale Kunsmis Korporasie (Edms) Bpk* [1973] 1 All SA 150 (A); 1973 (1) SA 17 (A).

[27] This statement is both unusual and unfortunate, particularly in the light of the judge's observation that one of the litigants was present in court when it was made. The duty to give reasons for a decision, in my opinion, is a function of due process, embodied in the right to a fair hearing enshrined in s 34 of the Constitution. Fairness requires that the parties – especially the losing party – should be left in no doubt as to the reasons for an order and consequently, why they have won or lost. The explanation by Buckley LJ in *Capital and Suburban Properties Ltd v Swycher and Others*,[14] concerning the appropriateness of reasons in a case such as the present, is instructive:

'There are some sorts of interlocutory applications, mainly of a purely procedural kind, on which a judge exercising his discretion on some such question as whether a matter should be expedited or adjourned or extra time should be allowed for a party to take some procedural step, or possibly whether relief by way of injunction should have been granted or refused, can properly make an order without giving reasons. This, being an application involving questions of law, is in my opinion clearly not such a case. Litigants are entitled to know on what grounds their cases are decided. It is of importance that the legal profession should know on what grounds cases are decided, particularly when questions of law are involved. And this court is entitled to the assistance of the judge of first instance by an explicit statement of his reasons for deciding as he did.'

[28] We were informed by counsel for the appellants that the respondents had relied on *Van Heerden* in support of an argument that they were entitled to claim the return of the Tekkie Town shares and business wherever they were then housed. *Van Heerden* arose from the sale of a going concern, effected by transfer of 100% of the issued share capital of a company. The purchaser reclaimed the purchase price and tendered return of the sale shares. The question was whether the tender was sufficient. Rumpff JA explained that the purpose of restitution was to place the parties in the same position as they would have been had the contract not been concluded. The judge said that in a case where the sale of shares was

[14] [1976] 1 All ER 881 at 884, [1976] Ch 319 at 325-326.

simply a formal means of effecting the sale of a business as a going concern, and the purchaser was responsible for the diminution in value or destruction of the business assets, a tender to return the shares would not suffice as restitution.[15]

[29] *Van Heerden* does not support the argument that the respondents were entitled to claim the return of the Tekkie Town shares and business wherever they were located. The respondents did not make this claim in the main action. The argument could not assist them to preserve assets in advance of a claim they did not make.[16] Apart from this, the respondents did not sell 100% of the shares in Tekkie Town: they sold only 56,94% and there is no basis in law for a restitution claim for more than what was in fact delivered by them. There was consequently no entitlement to preserve that which never served as the *res vendita* in terms of the sale agreement.

[30] The third reason why the *res litigiosa* doctrine finds no application is that on the pleadings before the high court, the main action was not one *in rem*, but an action *in personam*, and pleadings had not closed when the interdict was granted. As stated earlier, the cause of action is an alleged fraudulent misrepresentation by Mr Jooste that induced the respondents to enter into the sale agreement. This was confirmed in the founding affidavit in the interdict application. The relief claimed is rescission of the sale agreement and *restitutio in integrum*; alternatively, damages in the event that Steinhoff NV is unable to make restitution. The source of the right asserted is a legal relationship between the plaintiffs and the defendants in the main action – not a legal relationship between the plaintiffs and

[15] *Van Heerden* fn 13 at 32H-33A.

[16] In an attempt to align their case with the approach in *Van Heerden*, the respondents served a notice of intention to amend their particulars of claim shortly before the hearing of the application and well after it was launched. According to the amendment, 'the subject matter of the contract was the whole of Tekkie Town, including its business as a going concern'. However, the amendment had not been effected when the application was heard. In any event, the amendment did not alter the relief claimed – restitution of the applicable proportion of the sale shares and sale claims as defined in the sale agreement; alternatively, damages.

the property itself.[17] The claim for rescission and restitution is one in contract: the remedy of rescission to an aggrieved contracting party is a contractual remedy.[18] This is reinforced by the alternative claim for damages: the respondents recognise that Steinhoff NV may not be able to make restitution.

[31] Given that the respondents' claim in the main action is one *in personam* against Steinhoff NV, the relevant property would have become *res litigiosa* only after *litis contestatio*.[19] Pleadings in the main action had not closed when the interdict was granted, as the respondents had delivered a notice of intention to amend their particulars of claim.[20]

[32] Finally, on this aspect of the case, the principle that a contract induced by improper means, such as a fraudulent misrepresentation, is valid until it is set aside and not void but voidable at the election of the innocent contracting party, is well-settled.[21] There is accordingly, in my view, no reason for the law in this regard to be extended so as to enable a defrauded former owner to reclaim, in a vindicatory action, things lost as a result of a contract induced by fraud.

Fraud and the issue of control

[33] In the founding affidavit the respondents' main deponent, Mr Bernard Mostert, a director of the first and fifth respondents, alleged that the sales and transfers of the shares in Tekkie Town were 'simulated transactions' forming part

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[17] Examples of an action *in rem* are claims of ownership, of *usus*, usufruct or a servitude. See in this regard G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 4.

[18] *Baker v Probert* [1985] 2 All SA 263 (A); 1985 (3) SA (A) at 439A-B;
S W J van der Merwe et al *Contract: General Principles* 4 ed (2012) at 354.

[19] *Blue Cliff Investments* fn 11 at 94B- 95C.

[20] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) paras 14-16.

[21] *Preller v Jordaan* 1956 (1) SA 483 (A) at 494H; *North West Provincial Government and Another v Tswaing Consulting CC and Others* [2006] ZASCA 108; [2007] 2 All SA 365 (SCA); 2007 (4) SA 452 (SCA) paras 11-12.

of a ‘labyrinthine fraud’, perpetrated by those in charge of Steinhoff NV and its controlled subsidiaries.

[34] The allegation of fraud was based on submissions by Steinhoff NV’s representatives before parliamentary committees concerning accounting irregularities by directors and officers of Steinhoff NV. The committees were informed that owing to these irregularities, Steinhoff NV’s annual financial statements for the 2015 and 2016 financial years had to be restated. The respondents also relied on a report by Pricewaterhouse Coopers Advisory Service Proprietary Ltd (PwC) dated 15 March 2019, concerning an investigation into accounting irregularities and non-compliance with laws and regulations made against various Steinhoff entities and former executives, in South Africa and other jurisdictions.

[35] The PwC report states that a small group of Steinhoff NV’s executives and other non-executives had structured and implemented various fictitious and irregular transactions over a number of years, which resulted in false profits and asset values of the Steinhoff Group of some €4.5 billion over an extended period, whilst simultaneously diminishing the Group’s liabilities. The main transactions in which this was done – of which no details are given in the report – relate to fictitious profit and asset creation; asset overstatement and reclassification; false asset and entity support; and mitigating losses through sham contributions by companies in the Steinhoff Group. The PwC report concludes with remedial actions that were required to be taken. These included ensuring that the findings in the report were treated appropriately in the preparation of the Steinhoff Group’s financial statements for the 2017 and 2018 financial years; and recovery of the losses incurred and damages suffered by the Group.

[36] The appellants denied the allegation of a web of fraud. It was not pleaded in the main action in which the respondents relied only on the alleged fraud by Mr Jooste, representing Steinhoff NV, that induced the sale agreement. The appellants' answer to the alleged fraud was this. The very transactions which the respondents say are fraudulent, form the basis of their claims to an earn-out bonus in the bonus scheme action. Mr Mostert and Mr Van Huyssteen were directly involved in the pre-listing statement of Pepkor and its listing on the JSE in September 2017. They knew the rationale for the listing and the context in which it occurred. Mr Mostert had informed Mr Van Huyssteen in an email on 10 January 2018 that the latter had no claim against STAR to recover his losses or the Tekkie Town business, because 'STAR is an independent company that bought TT at exactly the same price from SHNV [as] what you were paid'. The respondents were thus aware of the integrity of the transactions in terms of which the Tekkie Town shares were transferred to Pepkor, and the Tekkie Town business, to Speciality. These were transactions in good faith and for value.

[37] Regarding the appellants' defence that they had obtained the Tekkie Town shares for value and had grown the business substantially since the time of takeover, the high court concluded that '(t)hese assertions lose sight of the nature of the relationship *inter se* in the Steinhoff Group. That, it seems, might also not be always what it [is] portrayed to be at first sight'. There is however no factual basis for this conclusion. Erasmus J stated that the 'flow of this transaction' was set out in the papers and annexures. The judge went on to say:

'The transfer passed of the Tekkie Town business and its shares was clearly plotted, having regard to the timeline before the first transfer took place. These timelines are common cause. Some of the decisions were made the day before the transaction would take place and on the same day the flow would go from one subsidiary to another at either the same price and/or an inflated price, and there is still an issue of the missing millions on the first transfer'.

[38] This conclusion at an interim stage of the proceedings and the reasons for it – that suggest some sort of preconceived, co-ordinated and deceitful conduct by entities involved in transactions resulting in 'missing millions' of Rands – are however at odds with the following statement by the judge in the transcript:

'I do not deem it necessary nor prudent to delve into the details of the transactions that led to the business of Tekkie Town ultimately being placed in the third respondent, that's Pepkor Speciality (Pty) Limited, nor the issues of control and/or the placement of the shares in the second respondent [Pepkor] by the first respondent [Steinhoff NV] or any of its subsidiaries, as I am aware that these matters might be the subject of further litigation before this and potentially other courts.'

[39] Despite this, paragraph 2 of the order, which restrains Steinhoff NV from dealing freely with its shares in any of its subsidiaries or related companies, and directs Steinhoff NV 'to exercise the control it has' over the Pepkor entities in a particular manner, is based entirely on the alleged control by Steinhoff NV of the corporate actions within the Steinhoff Group. And the cases make it clear that it is inappropriate and unwise for findings of fraud or deceit to be made on the basis of untested allegations on motion, which are denied on grounds that cannot be described as far-fetched or untenable. This is based not only on common sense, but also on 'many years of collective judicial experience'.[22]

[40] The high court erred. To begin with, the respondents produced no evidence to substantiate fraud in the application for the interdict, other than the fact of the transactions subsequent to the sale agreement themselves, and the accounting irregularities in relation to the Steinhoff Group. Instead, the respondents merely referred to submissions before parliamentary committees by company officers of Steinhoff NV; liquidation proceedings and other claims instituted against it in South Africa and foreign jurisdictions; and the PwC report. Then Mr Mostert

[22] *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) paras 19-20.

made the sweeping allegation that it 'would appear to be self-evident' that the sales and transfers of the Tekkie Town shares were simulated transactions; and 'entirely in accordance with the scheme' of the PWC report. In this regard, the respondents failed to identify in the founding affidavit, the parts of the PwC report on which they relied, nor the case they sought to make out on the strength thereof. This is impermissible.[23]

[41] On the papers in the interdict application, the allegation in the founding affidavit that Steinhoff NV controls and directs all corporate actions and activities within the Steinhoff group, is wrong both in fact and in law. The facts before the high court were these. Pepkor is a listed company. Steinhoff NV owns 71% of its shares. The remaining 29% of the shares, valued at some R19.5 billion, are listed, publicly tradable shares held by independent investors. Pepkor's interests are not synonymous with those of Steinhoff NV and it is not wholly-owned by the latter.

[42] The answering affidavit states that the parties are all separate corporate entities, each with their own board of directors who have discrete obligations and fiduciary duties to the companies on which boards they serve. These allegations were not contradicted. Further, Pepkor, as an entity listed on the JSE, is obliged to comply with the King IV Code on Corporate Governance, in terms of which the board of a company must act in the best interests of the company as a separate entity, taking into account the interests of various stakeholders and not merely those of its shareholders. Pepkor would thus breach the Code were Steinhoff NV to control all of Pepkor's corporate actions.

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[23] *Van Zyl and Others v Government of the Republic of South Africa and Others* [2007] ZASCA 109; [2008] 1 All SA 102 (SCA); 2008 (3) SA 294 (SCA) para 40, approving *Swissbourgh Diamond Mines (Pty) Ltd v Government of the RSA and Others* 1999 (2) SA 279 (T) at 323F-325C.

[43] More fundamentally, it is an established principle that a company is a legal entity distinct from its shareholders and that property owned by a company is not that of its shareholders. This principle was recently affirmed by this Court in *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others.*[24] The principle applies equally where the company is a subsidiary or even a wholly-owned subsidiary of another company.[25] The principle that each company in a group has a separate legal existence of its own was stated in *Adams v Cape Industries PLC*,[26] as follows:

'Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.'

[44] The board of a holding company is thus not able to dictate the decisions of the board of a subsidiary, even if that subsidiary is a direct, wholly-owned subsidiary. In terms of s 66(1) of the Companies Act 71 of 2008, the board of a subsidiary must independently manage and direct the business and affairs of the subsidiary company.[27]

[45] In *Shipping Corporation of India Ltd v Evdomon Corporation and Another*,[28] Corbett CJ affirmed the principle that a company has a separate juristic personality, and said that the only permissible deviation from this rule known to

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[24] *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* [2020] ZASCA 83; [2020] 3 All SA 650 (SCA) paras 17 and 24.

[25] *Wambach v Maizecor Industries (Edms) Bpk* [1993] 2 All SA 158 (A); 1993 (2) SA 669 (A) at 674H- 675C.

[26] *Adams v Cape Industries PLC* [1991] 1 All ER 929 (Ch D) at 1019.

[27] Section 66(1) of the Companies Act 71 of 2008 provides:

'66 Board, directors and prescribed officers

(1) The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.'

[28] *Shipping Corporation of India Ltd v Evdomon Corporation and Another* [1994] 2 All SA 11 (A); 1994 (1) SA 550 (A).

our law occurs in those rare cases (in practice) where the circumstances justify piercing or lifting the corporate veil. Those circumstances generally must include an element of fraud or other improper conduct in the establishment or use of the company, or the conduct of its affairs.[29] No such case was made out in the founding affidavit in the application for the interdict.

[46] The respondents' allegations that the sales and transfers of the shares in Tekkie Town were simulated transactions and that Steinhoff NV controlled all corporate actions within the Steinhoff Group, were simply not established on the papers in the interdict application. Neither did they make out a case on those papers for the high court to disregard the separate corporate personalities of the appellants. It follows that the high court's order must be set aside.

[47] I expressly refrain from deciding the validity or otherwise of the appellants' defences to the alleged fraud referred to in paragraph 37 above, for two reasons. First, the appellants' defences, and the alleged abuse of corporate personality by Steinhoff NV, Tekkie Town and the Pepkor entities, are triable issues in the main action according to the respondents' amended particulars of claim. Second, it is unnecessary to decide the defences by reason of the conclusion to which I have come.

The application to adduce evidence on appeal

[48] At the inception of the hearing of this appeal the respondents applied to adduce further evidence on affidavit. The new evidence sought to be introduced was the respondents' notice of intention to amend their particulars of claim in the main action; the amended particulars of claim dated 9 June 2020; and the exception to the latter pleading by Pepkor and Speciality, following their joinder

[29] *Shipping Corporation of India* fn 27 at 565I-566F.

as parties in the main action. The application was refused and we indicated that reasons would be given in this judgment. These are the reasons.

[49] In terms of s 19*(b)* of the Superior Courts Act 10 of 2013, this Court is empowered to receive further evidence on appeal.[30] According to the cases, the following criteria must be met. The general principle, as stated earlier, is that an appellate court does not decide an appeal according to new circumstances that came into existence after the judgment appealed against.[31] There may be exceptional circumstances where an appellate court might be able to take cognisance of subsequent events.[32] The power to admit evidence on appeal should be exercised sparingly.[33] There must be a reasonably sufficient explanation why the evidence was not tendered earlier in the proceedings.[34] The evidence 'must be weighty and material and presumably to be believed'.[35] These criteria were confirmed by the Constitutional Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*,[36] concerning the power of an appellate court to admit evidence on appeal under s 22*(a)* of the Supreme Courts Act 59 of 1959, the precursor to s 19*(b)* of the Superior Courts Act.

[50] The new evidence sought to be introduced by the respondents is neither weighty nor material to the case that served before the high court. It comprises court process delivered after the high court issued the order restraining the

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[30] Section 19 of the Superior Courts Act provides in the relevant part:
'The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law–
(b) receive further evidence. . . .'

[31] *Weber-Stephen Products* fn 6 at 507C-D.

[32] *Goodrich v Botha and Others* [1954] 3 All SA 40 (A); 1954 (2) SA 540 (A) at 545G-546C; *S v Louw* [1990] 4 All SA 703 (AD); 1990 (3) SA 116 (A) at 123H.

[33] *Van Eeden v Van Eeden* 1999 (2) SA 448 (C) at 450J-451A.

[34] *S v Louw* fn 31 at 123-124.

[35] *Colman v Dunbar* 1933 AD 141 at 161-163.

[36] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (4) BCLR 301 (CC); 2005 (2) SA 359 (CC) paras 42 and 43. See also *Moor and Another v Tongaat-Hulett Pension Fund and Others* [2018] ZASCA 83; [2018] 3 All SA 326 (SCA); 2019 (3) SA 465 (SCA) para 36.

appellants from dealing with their property; and is entirely irrelevant to that order. Quite apart from this, there is no explanation for the delay in launching the application to adduce the new evidence. The respondents delivered their amended particulars of claim on 10 June 2020. The application to adduce further evidence was launched only on 13 August 2020. For these reasons the application was refused and there is no reason why costs should not follow the result.

[51] The following order is issued:

1 The application to adduce further evidence on appeal is dismissed with costs, including the costs of two counsel.

2 The appeals under case numbers 205/2020 and 217/2020 are upheld with costs, including the costs of two counsel.

3 The order of the high court is set aside and replaced with the following:

‘The application is dismissed with costs, including the costs of two counsel.’

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A SCHIPPERS

JUDGE OF APPEAL

APPEARANCES

For Appellants (case no 205/2020)	A Sholto-Douglas SC and B J Vaughan
Instructed by	Bowman Gilfillan Inc, Cape Town Matsepes Inc, Bloemfontein
For Appellants (case no 217/2020)	A M Smalberger SC and R Patrick
Instructed by	Werksmans Attorneys, Cape Town Lovius Block, Bloemfontein
For First to Fifth Respondents (case no 217/2020)	D F Irish SC, W Duminy SC and D M Lubbe
Instructed by	C&A Friedlander, Cape Town Symington De Kok Attorneys, Bloemfontein.