Corporate & Commercial
ALERT

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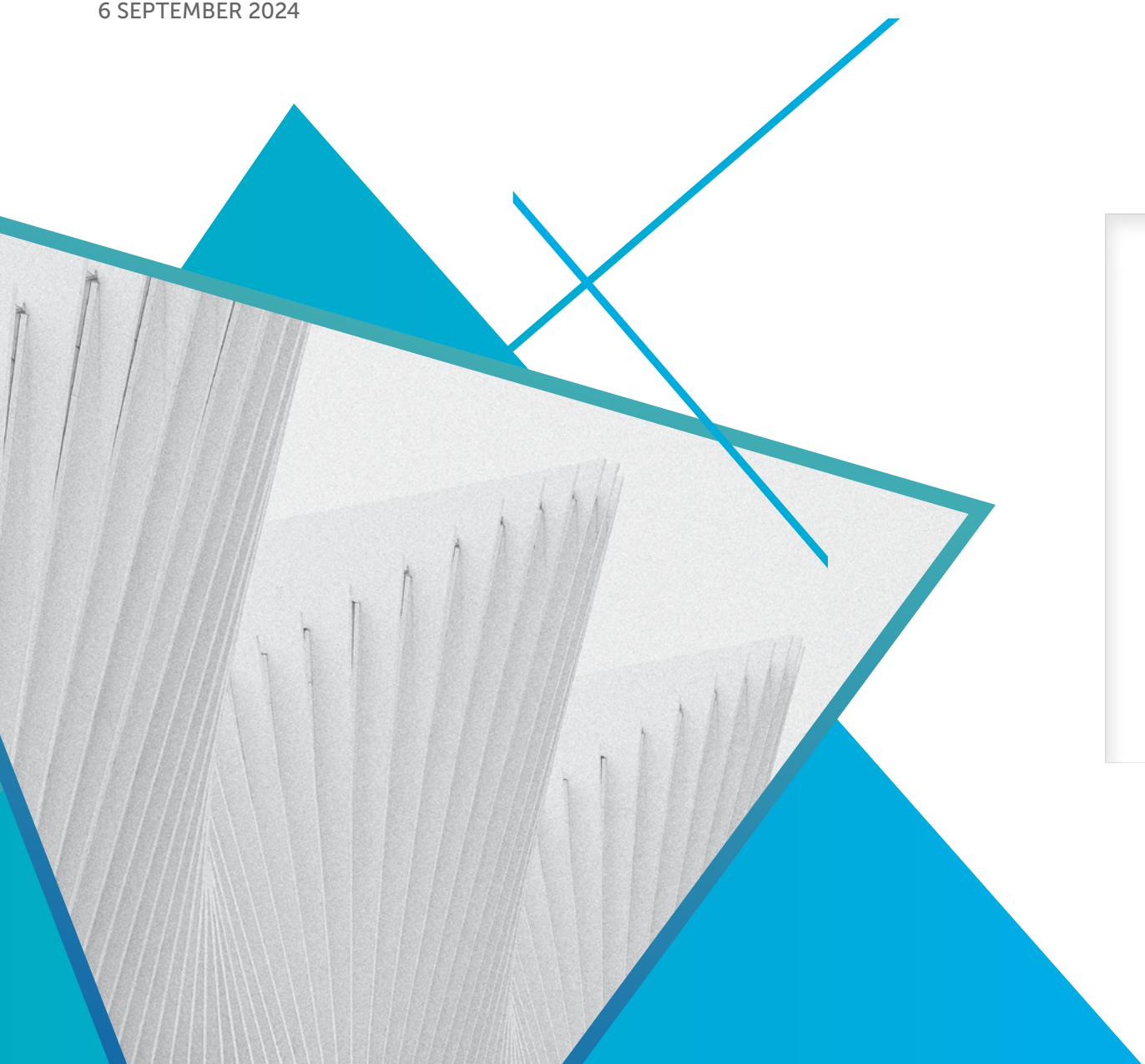
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA



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According to the plaintiffs, a verbal agreement was concluded in November 2011 between Wiese and Jooste (who purported to represent a consortium of unnamed investors), in terms of which they agreed that the interests of Wiese and other companies associated with Wiese in various businesses, assets and entities known as "*Lanzerac*" would be acquired by the consortium at their agreed combined value of R220 million in exchange for shares in Steinhoff International Holdings Limited of equivalent value. This agreement was later reduced to writing and implemented in terms of five separate written contracts.

It is alleged that Jooste knew at the time that Wiese reasonably believed that the price at which the shares in Steinhoff International were trading fairly reflected their market value, and that the financial reports of Steinhoff International had materially misstated its income, profits and assets. Jooste's representation that he was acting on behalf of a consortium was also said to be a fabrication in that he was really acting on his own behalf to acquire Lanzerac through his indirect interest in the first defendant (Lanzerac Estate Investments).

Wiese and the other sellers subsequently sold the Steinhoff International shares that each of them had acquired in terms of the Lanzerac transaction to Wiesfam Trust (Pty) Ltd. The plaintiffs claimed that this transaction was part of an intra-group reorganisation and was concluded while the parties thereto remained tainted by Jooste's fraudulent non-disclosure.

In December 2015, a scheme of arrangement was implemented in terms of which Steinhoff NV (Steinhoff International Holdings NV) acquired all of the issued shares in Steinhoff International in exchange for an equal number of shares in Steinhoff NV. Consequently, Wiesfam Trust acquired the same number of shares in Steinhoff NV as the number of shares in Steinhoff International purchased by it pursuant to the

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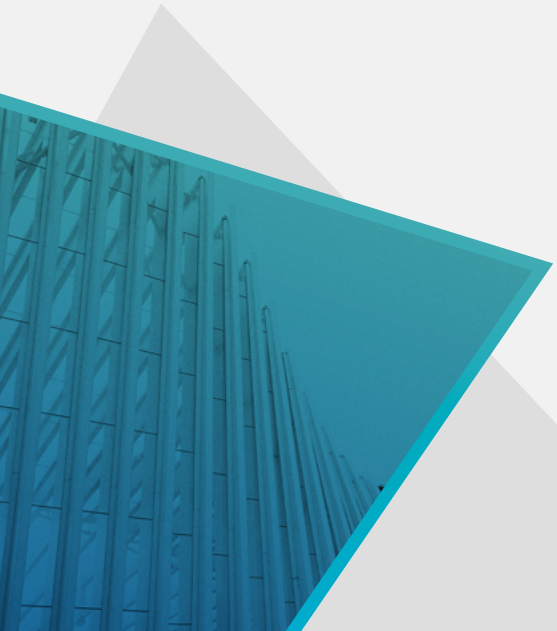

intra-group reorganisation. It is further alleged that while Wiesfam Trust still held the Steinhoff NV shares, the fraudulent misrepresentation of Steinhoff's financial position became public knowledge and as a result, the value of the Steinhoff NV shares was reduced to a negligible amount.

On the basis of Jooste's fraudulent inducement, the plaintiffs elected to rescind the contracts in terms of which they had acquired the shares in Steinhoff International and sought, *inter alia*, restitution of the assets transferred to the first defendant by each plaintiff against a tender to deliver to the first defendant Steinhoff NV shares equivalent in number to the number of Steinhoff International shares received under the contracts.

The *Titan Asset Management* case involved the adjudication of exceptions which the first defendant raised to the plaintiffs' particulars of claim.

Exclusion of cancellation and rescission

One of the exceptions raised by the first defendant was that cancellation and rescission were precluded by the terms of the contracts. The clauses regulating cancellation and termination of the contracts provided that:

> *"The agreements constituting the Transaction form an indivisible transaction and are interdependent upon one another. If one or more of the aforesaid agreements are not implemented, do not come into existence or is cancelled or terminated for whatever reason any of the Parties may terminate the remainder of the agreements comprising the Transaction* ***except that no agreement may be cancelled or terminated after the assets sold in terms thereof have been transferred to the purchaser thereof****."* and
>
> *"**Neither Party shall be entitled to cancel this Agreement**:*
>
> 1. ***after the Transfer Date**; or*
> 2. *before the Transfer Date unless the breach is breach of a material term, and the remedy of specific performance or damages would not adequately prevent the Aggrieved Party from being prejudiced and the cancellation takes place before the Transfer Date."*

The effect of an innocent party resiling from a contract induced by fraud is that the agreement is regarded as being void *ab initio*, and the innocent party is accordingly not bound by any of its terms. In light of the plaintiffs' election to resile from the contracts, the court stated that the anti-cancellation clauses on which the first defendant sought to rely on were for all practical purposes non-existent in law.

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In any event, even if the anti-cancellation clauses were to be treated as effective exclusion clauses, they would not be enforceable in the event of cancellation by the innocent party based on fraud. Although a clause which excludes a party's right to cancel a contract by reason of the other party's breach is not ordinarily considered to be against public policy and is therefore generally enforceable, such a clause will not be enforced if its effect is to exclude liability for fraud. Binns-Ward J found that the first defendant's exception *"effectively postulates that the clauses upon which it relies exclude the innocent parties' right to terminate the contracts even when it was discovered that they had been induced by fraud"*. This exception was accordingly dismissed.

Tender of restitution

A further exception noted by the first defendant was that the claims for recission and restitution were invalid because on their pleaded case the plaintiffs were unable to tender or make restitution of what they obtained in the transactions. It was contended that the pleaded tender neither sought to restore what was delivered under the contracts (i.e. Steinhoff International shares) nor did it place the first defendant in the same financial position that it was in prior to the conclusion of the contracts.

Binns-Ward J found that the plaintiffs had unmistakably pleaded a tender and that the issue was therefore not the making of a tender, but rather its adequacy. The adequacy of the pleaded tender was held to be an issue for trial.

The general rule is that a party seeking restitution must first be willing and able to restore what it received under the rescinded contract. However, the court may relax or dispense with the requirement of restitution if considerations of equity and justice require it. As Marais AJ observed in *Davidson v Bonafede* 1981 (2) SA 501 (C), *"... the Court is expected to do the best it can to restore the parties to their respective positions ante quo. A meticulously accurate restoration of the parties to that position will seldom be possible. Pragmatism will have to play a large role in the process"*.

Binns-Ward J commented that the notion that the required tender had to place the first defendant in the same financial position that it was in prior to the conclusion of the affected transaction seemed misplaced and

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appeared to be based on the first defendant's perception that the tender had to provide it with something of equivalent value to the agreed *"purchase price"* of R220 million. He went on to state that application of *"the contractual standard"* might be appropriate in certain circumstances but for the most part, it would not apply. The following example demonstrates the point well:

> *"... by considering the case of the restitution by the innocent party of physical goods that have deteriorated through no fault on its part. The innocent party will not be expected in such a case to make up the original value of the goods by monetary compensation. Return of the goods in their altered state will be sufficient."*

In the present case, Binns-Ward J noted that to apply the contractual standard for the purposes of any form of substituted restitution (i.e. Steinhoff NV shares) would amount to making the first defendant the beneficiary of its agent's (Jooste) inducing fraudulent non-disclosure. In his view, the first defendant should only be entitled to the fraud-tainted Steinhoff International shares given in exchange for the sellers' interests in Lanzerac, or an appropriate substitute. He explained:

> *"The relevant value of the consideration given by the first defendant for 'Lanzerac' for the purposes of the plaintiffs' tender of restitution is the value of the fraud-tainted shares, not the false value attributed to them by a market or contracting party that was ignorant of the fraud. On the pleading, the value of the fraud-tainted shares was negligible. If the defendants take issue with that allegation it will give rise to a triable issue. It is sufficient for present purposes merely to state that the pleaded tender is not obviously inadequate. The intragroup character of the transactions meant that it was not beyond the seller-plaintiffs' ability to make an effective tender of restitution."*

This exception was similarly dismissed.

This matter is now expected to proceed to trial.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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