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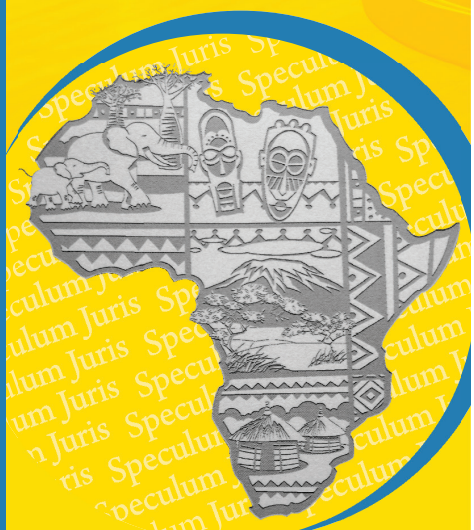

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Determining the "Proper" Application and Scope of Section 45 of the Companies Act through the Lenses of *Trevo Capital Ltd v Steinhoff International Holdings (Pty) Ltd* [2021] 4 All SA 573 (WCC)

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Abstract

The overarching rationales for regulating financial assistance include mitigating the potential abuse of power by a board of directors in extending loans and/or security illegally to their friends or other related companies and/or for self-aggrandisement. It is against this backdrop that this case note seeks to answer the thorny issue of the indeterminacy of the application and scope of section 45 of the Companies Act 71 of 2008, which was raised in the matter of Trevo Capital Ltd v Steinhoff International Holdings (Trevo) in the Western Cape High Court, Cape Town ("WCC" or "court"). In this case, the main issue was whether section 45 of the Companies Act 71 of 2008 regulates the financial assistance that a local company extends to a foreign company. The WCC

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adopted an accommodative approach, factored in the objectives of the Companies Act and concluded that any financial assistance extended by a domestic company to a foreign entity was subject to the provisions of section 45 of the Companies Act. Accordingly, the requirements of extending financial assistance under the Act, namely the solvency and liquidity test and the fairness and reasonableness test, should be satisfied. In conclusion, the contribution concurs with the court's decision, mainly because the fears allayed when a local company is extending financial assistance to another local company are reasonably akin to when such financial assistance is extended to a foreign company. Furthermore, the WCC reasoned that where the financial obligations are reorganised on different terms and conditions of debt, such restructured obligations qualify as new financial assistance and must satisfy the requirements of section 45 of the Companies Act. The WCC was generous in applying section 45 of the Companies Act to protect company stakeholders from the unscrupulous behaviour of their board of directors.

Keywords: foreign company; financial assistance; solvency and liquidity test; fairness and reasonableness test; guarantee

1 INTRODUCTION AND FOUNDATIONAL PRINCIPLES

The Companies Act 2008[1] ("the Companies Act" or "the Act") defines and provides for the concept of "financial assistance" under sections 44 and 45 ("section 44" and "section 45"). Section 45 specifies the requirements that must be complied with before a company may directly or indirectly provide financial assistance to a related or inter-related company. Section 45 specifically defines financial assistance to include lending money,[2] guaranteeing a loan or other obligation, and securing any debt or obligation. The term "includes" in the definition of "financial assistance" implies that the list of ways financial assistance may be extended is inexhaustive.[3] When contemplating the extension of financial assistance, the company's board of directors must be satisfied that the company will meet a statutory solvency and liquidity test immediately after providing the financial assistance.[4] Thus, the board of directors is prohibited from extending financial assistance covertly to avoid compliance with section 45.

There are technical differences between sections 44 and 45 of the Act. In particular, the broader rationale for section 44 is to regulate financial assistance for the subscription of securities, whereas section 45 governs loans or other financial assistance to directors.[5] However, a comprehensive evaluation of sections 44 and 45 reveals some similarities in how these provisions are constructed. The examples dealt with immediately below include how these provisions impose certain prohibitions on the directors when extending financial assistance and enforcement of non-compliance as contemplated immediately below. Section 44 prohibits

1 71 of 2008.

2 Other than in the ordinary course of the company's business.

3 Recently, the Supreme Court of Appeal ("the SCA") grappled with the interpretation of s 45, in *Constantia Insurance Company Limited v The Master of the High Court, Johannesburg and Others* (512/2021) [2022] ZASCA 179; 2023 5 SA88 (SCA) (13 December 2022) para 24 ("*Constantia*"). In the SCA the van Der Merwe, Judge of Appeal, in overturning the reasoning of the High Court held that the Court *a quo*, erred when it held that the list of what constitutes "financial assistance" under s 45 is inexhaustive. In particular, the SCA held that the list of what constitutes financial assistance as contemplated under s 45(1)(a) is exhaustive. We respectfully disagree with the SCA's decision and submit that the SCA erred when it upheld such a position. Regrettably, the Companies Amendment Act 16 of 2024 missed the opportunity to redress the unfortunate precedence set by the Supreme Court of Appeal in *Constantia*.

4 Companies Act 71 of 2008 s 45(3)(b) ("hereinafter the Companies Act").

5 *Ibid* ss 44 and 45.

a company from extending financial assistance in various ways,[6] save for when the board is permitted by the Memorandum of Incorporation (MOI) and/or if the money lent is in the ordinary course of business by a company that is a credit provider.[7] In addition, the board may only authorise any financial assistance[8] provided it is pursuant to an employee share scheme, approved by shareholder special resolution,[9] where it satisfies the solvency and liquidity test[10] and/or is fair and reasonable to the company.[11] Non-compliance with section 44 will render the financial assistance void.[12] The directors present when the resolution was passed, whether they participated in making that decision or did not vote against it, will be liable to the extent set forth in section 77(3)(e)(iv) of the Act.[13]

In a similar vein, the board is restricted under section 45 from extending financial assistance directly or indirectly to several persons,[14] except where the MOI permits and/or if the money lent is in the ordinary course of business by a company that is a credit provider.[15] Section 45 further excludes legal expenses in relation to a matter concerning the company, anticipated costs by a person on behalf of the company, as well as to defray a person's costs for removal at a company's instruction.[16] Furthermore, despite any provision of the company's MOI to the contrary, the board may authorise any financial assistance provided under subsection (2) if it is pursuant to an employee share scheme, subject to approval by shareholder special resolution, satisfies the solvency and liquidity test and/or fair and reasonable to the company.[17] Non-compliance with section 45 renders the financial assistance in question void,[18] and the directors present when the resolution was passed, whether they participated in making that decision or did not vote against it, will be liable to the extent set forth in section 77(3)(e)(iv) of the Act.[19]

It is appropriate to highlight that the Companies Amendment Act[20] ("the Amendment Act of 2024"), amended the Companies Act is now in operation since 27 December 2024. The

6 *Ibid* s 44(2) provided the scope of financial assistance that is prohibited unless permitted under the Memorandum of Incorporation (MOI) covers; "loan, guarantee, the provision of security to any person for the purpose of, or in connection with, the subscription of any option, or any securities, issued or to be issued by the company, or a related or inter-related company, or for purchase of any securities, the company or a related or inter-related company, subject to subsections (3) ad (4)".

7 *Ibid* s 44(1).

8 *Ibid*, as provided for under sub s (2).

9 In South Africa, special resolutions are governed under section 65(9) of the Companies Act and the requisite percentage for special resolution is 75 per cent of the voting rights exercised on the resolution.

10 Companies Act s 4, read together with s 1 of the ; Bradstreet "Should Creditors Rely on the Solvency and Liquidity Threshold For Protection?" 2015 *Journal of African Law* 133 has suggested that besides applying the text in distributions and other related capital reduction transactions, the solvency and liquidity test is of broad general relevance because it is also a model that extends to the analysis of financial institutions and companies against systematic risks.

11 Companies Act s 44(3).

12 *Ibid* s 44(5).

13 *Ibid* s 44(6).

14 *Ibid* s 45(2) prohibits the board of directors to extend financial assistance "directly or indirectly to a director or prescribed officer of the company or of a related or inter-related company, or to 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 subsections (3) and (4)".

15 *Ibid* s 44(1).

16 *Ibid* s 45(1)(b).

17 *Ibid* s 45(3).

18 *Ibid* s 45(6); *Van Den Heerden NO v Van Tonder* (A5076/2018; 407461/2015) 2021 ZAGP JHC 486 (20 April 2022) para 81. *Constantia* para 35.

19 Companies Act s 45(7).

20 Companies Amendment Act 16 of 2024.

Amendment Act of 2024 introduced section 45(2A).[21] Accordingly, section 45(2A) of the Amendment Act of 2024 provides that the requirements of section 45 would no longer be triggered if a holding company provides financial assistance to its subsidiary.[22] The rationale behind this amendment is to facilitate the removal of the compliance burden on companies.[23] The construct of the amendment, however, appears to leave the requirements of section 45 applicable when a subsidiary grants financial assistance to its holding company. Such an amendment might be inadequate from the holding company shareholders' and creditors' perspective because similar issues surrounding the exemption of transactions by holding companies to subsidiaries could be relevant when subsidiaries extend financial assistance to the holding company. On the other hand, this contribution submits that this amendment may allow companies to extend financial assistance without passing the solvency and liquidity test, and this may, as a result, defeat the purpose and rationale of section 45 and section 4 of the Act (solvency and liquidity test) altogether.

A further concern is that the Amendment Act of 2024 fails to clarify the scope of section 45. This indeterminacy regarding the application and scope of section 45 specifically relates to whether the provision includes foreign companies in its ambit. This issue was raised and considered in the Western Cape High Court, Cape Town ("WCC" or "court"),[24] in the matter of *Trevo Capital Ltd v Steinhoff International Holdings* (*Trevo*).[25] The WCC also considered whether the applicants had standing to bring the application. However, this issue will not be evaluated in detail as the WCC confirmed that the applicants did possess the required *locus standi* to approach the court on application. The WCC also clarified whether restructuring existing financial assistance through different terms and conditions could be classified as new or old financial assistance.

The main interpretational issue this contribution seeks to address arose from the provision of financial assistance in section 45. Therefore, this case note will focus first on the analysis of section 45. However, it is, by implication, necessary to also briefly distinguish between the forms of financial assistance regulated under sections 44 and 45. Notably, the reason for briefly contrasting sections 45 and 44 is to demystify these sections and avoid interpretational challenges in the context of financial assistance. The observation is that sections 44 and 45 of the Act have included a disclaimer that financial assistance does not include lending money by a company whose primary business is lending money, in the normal course of business.[26] However, section 45 goes further to provide for other transactions that do not fall under the ambit of the broader definition of financial assistance, namely, legal expenses in relation to a matter concerning the company or anticipated expenses to be incurred by a person on behalf of the company, as well as an amount to defray a person's costs for removal at a company's instruction.[27]

This contribution begins with an introduction to the concept of financial assistance and some foundational basis. It then addresses the functional purposes and the policy rationales behind regulating financial assistance through section 45. The case note also surveys the relevant contentious issues and applicable rules through the *Trevo* case. Subsequently, the *Trevo* judgment

21 *Ibid* s 45(2A).

22 *Ibid*.

23 See para 4.7 of the Background note and explanatory Memorandum on the Companies Amendment Bill 2021 [B-2021]. See the preamble of the Companies Amendment Act 16 of 2024.

24 Per judgment of Bozalek J in *Trevo Capital Ltd v Steinhoff International Holdings* 2021 JOL 50841 (WCC).

25 2021 JOL 50841 (WCC) para 2.

26 Sections 44(1) and 45(1)(a) of the Companies Act.

27 Section 45(1)(b) of the Companies Act.

will be assessed with concluding remarks to follow.

2 FUNCTIONAL PURPOSES AND RATIONALES FOR REGULATING FINANCIAL ASSISTANCE UNDER SECTION 45 OF THE ACT

The Act reaffirms the functionality of companies as vehicles to achieve social and economic benefits.[28] Similarly, it also seeks to provide for efficient and responsible management of companies.[29] Section 45, therefore, places credit regulation into context by seeking to ensure that companies, when extending financial assistance, do not become insolvent and unable to pay their debts as and when they become due and payable. Issuing financial assistance should ensure that companies that offer such assistance remain solvent and liquid, avoiding dire risks and consequences like the loss of investments, bankruptcy, and other financial harm. Accordingly, it is common cause that, when extending such financial assistance, a level of accountability is required by those who authorise such transactions. In enforcing and interpreting provisions of the Act in this context, section 45, such interpretation must align with the promotion of the Act's spirit, purpose, and objects.[30]

Section 45 is intended to mitigate the abuse of control by the board of directors and to ensure disclosure under certain circumstances.[31] In particular, the provision regulates the possibility that directors may compromise the interests of, for example, one company and unjustifiably promote another.[32] Directors may, therefore, unjustifiably compromise the interests of a subsidiary (controlled by the holding company), related or interrelated company, minority shareholders, and creditors by extending financial assistance unlawfully.[33] Secondly, it protects shareholders, creditors and the company, by countering the abuse of power by the board of directors, who may use the company's resources for reasons of self-aggrandisement.[34] Such actions will constitute an abuse of control, which results in the misapplication of the company's funds if the transaction is not calculated to further the company's best interest.[35] The note, therefore, argues that the stringent regulation of such financial assistance is necessary to ensure that companies remain solvent and liquid when extending financial assistance. Accordingly, the contribution is open to the functional purposes and policy rationales for section 45 and the application and scope of section 45 will be assessed against the background of the *Trevo* judgment.[36]

28 Section 7(d) of the Companies Act.

29 Section 7(j) of the Companies Act

30 Section 158(b) of the Companies Act.

31 Delport *et al Henochsberg on the Companies Act 71 of 2008* (2019) 226; for further reading see Botha "Holding and Subsidiary Companies: Fiduciary Duties and Directors" 1983 *De Jure* 235. Cassim and Cassim *Corporate Finance Law* (2021) 361. Cassim *et al Contemporary Company Law* 3 ed (2021) 444; Cassim *et al. Law of Business Structures* 2 ed (2022) 235.

32 See Botha "Recognition of the Group Concept in Company Law" 1982 *De Jure* 108–109. Botha "Holding and Subsidiary Companies: Fiduciary Duties of Directors (Conclusion)" 1984 *De Jure* 167–182. Delport "Company Groups and the Acquisition of Shares" 2001 *SA Merc LJ* 122–128. Bhana "The Company Law Implications of Conferring Power on a Subsidiary to Acquire the Shares of its Holding Company" 2006 *Stell LR* 236–250.

33 Delport *Henochsberg* 226.

34 *Ibid*.

35 McLennan "Loans by Subsidiaries to Holding Companies" 1983 100(3) 417–440.

36 *Trevo* para 2.

3 INDETERMINACY OF THE APPLICATION AND SCOPE OF SECTION 45 OF THE COMPANIES ACT: *TREVO v STEINHOFF*

3 1 Factual Matrix

Trevo Capital Ltd (the first applicant or *Trevo*) instituted action proceedings against the first respondent, Steinhoff International Holdings (Pty) (Ltd) (hereinafter SIHPL), in the WCC, claiming an alleged loss in access of R2 billion being suffered, because of intentional or alternatively, negligent financial reporting.[37] The second and third applicants are Hamilton BV and Hamilton 2 BV (jointly referred to as "Hamilton"), foreign companies purporting and alleging to have been assigned by investors to institute 14 000 claims against SIHPL and Steinhoff International Holdings NV (SIHNV), its Dutch subsidiary.[38] In WCC, Hamilton sought to recover losses allegedly suffered by individual investors due to SIHPL's intentional, alternatively, negligent reporting in its financial statements.[39]

SIHPL was, prior to its delisting and becoming a private company, a registered public company listed on the Johannesburg Stock Exchange (JSE) under the name of Steinhoff International Holdings Ltd (SIHL), a holding company of the Steinhoff Group of companies.[40] SIHL, however, effected a scheme of arrangement in terms of section 114 of the Companies Act[41] to swap its entire share capital for shares in SIHNV, a company listed on both the JSE and Frankfurt Stock Exchange.[42] Hence, by implication, the SIHL security holders became Steinhoff NV's shareholders, the new holding company in the Steinhoff Group.[43] The second respondent is Global Loan Agency Services (GALS), a financial administrative services provider incorporated in terms of the United Kingdom (UK) laws.[44] The third respondents are the financial creditors of SIHPL as defined in a proposal by SIHNV and SIHPL (together Steinhoff) in terms of section 155 of the Act to effect a compromise of their financial obligations with three classes of creditors identified therein, many of whose claims arise from accounting irregularities mentioned earlier.[45] In July 2020, the broad terms of the of Steinhoff's proposed compromise with its creditors were set out in a "term sheet" on SIHNV's website.[46] In October 2020 and March 2021, the terms were updated and published. These involved a compromise of Steinhoff's financial obligations to three classes of creditors commonly known as CPU Creditors (FC or Financial creditors class), Contractual claimants (CC class), and Market Purchase claimants (MPC class).[47]

Most claims, if not all, of the Financial Creditors against SIHPL, emanated from a R465 million convertible bond issued by Steinhoff Finance Holding GMBH (SFHG) in January 2014 (the 2021 Bond).[48] This bond's original maturity date was 30 January 2021, and it was guaranteed by SIHPL (then SIHL) (the 2014 Guarantee).[49] The discovery of accounting irregularities in the Steinhoff Group prompted company voluntary arrangements (CVAs) under the UK Insolvency

37 *Ibid*.
38 *Ibid* para 3.
39 *Ibid*.
40 *Ibid* para 4.
41 Section 114 of the Companies Act.
42 *Trevo* para 4.
43 *Ibid*.
44 *Ibid*.
45 Paragraph 5.
46 *Ibid*.
47 *Ibid*.
48 *Ibid* para 7.
49 *Ibid*.

Act of 1986 concluded within the Steinhoff Group, including SFHG, to restructure its debts.[50] Debt restructuring in the SFHG CVA included a contingent payment undertaking by SIHPL (the CPU or the SIHPL CPU), which, *inter alia*, amended or replaced the 2014 Guarantee of the 2021 Bond.[51]

The applicants averred that the 2014 Guarantee under the 2021 Bond and its amendment or replacement through CPU constituted financial assistance by SIHL/SIHPL to a related or inter-related company, as contemplated in section 45(2) of the Act.[52] In particular, it alleged that, in the first instance, financial assistance was extended to SFHG and also to Steenbok Lux Finco (1) SARL (Lux Finco 1), a private limited company incorporated in Luxembourg.[53] The applicant further alleged that the extension of financial assistance by SIHL to SFHG, the resolution of SIHL's board authorising the 2014 Guarantee, and the 2014 Guarantee itself are void for non-compliance with the provisions of section 45(3) of the Act, namely the solvency and liquidity, and the fairness tests incorporated in that subsection.[54]

The applicants sought an order confirming and/or declaring the 2021 Bond[55] and the resolution of SIHL's board authorising its entry into the 2014 Guarantee void, by virtue of section 45(6) of the Act.[56] The self-same declaratory relief was claimed in relation to the CPU and the resolution of SIHPL's board authorising SIHPL's entry into the CPU.[57] In the alternative to the above relief, the applicants claimed an order declaring that the CPU and the concomitant resolution are void to the extent that the CPU amended or replaced the 2014 Guarantee and the SIHPL CPU resolution authorised its entry into the CPU.[58] The applicants also sought to interdict and restrain SIHPL from making any payments under or arising from the 2014 Guarantee and the CPU and/or any compromise and arrangement proposed by SIHPL in terms of section 155 of the Act and from providing any security in respect thereof.[59] All three respondents opposed the application and initially produced a record of close to 1 000 pages, excluding the section 155 proposal.[60]

In the WCC, Trevo explained in its founding affidavit the origin of many claims that SIHPL proposed to compromise.[61] Trevo relied, among other things, on an 11-page overview of an independent report by PricewaterhouseCoopers (PwC) released by SIHNV on 15 March 2019, revealing profits inflated over several years, resulting in R6.5 billion accounting fraud.[62] In the report, evidence showed that both former executives and non-executive Steinhoff members, led by a senior management executive, structured and implemented various bogus transactions that substantially overstated the profit and asset values of the Steinhoff Group over an extended period.[63] Following those revelations, the Financial Sector Conduct Authority (FSCA) imposed a R53 million fine on Steinhoff for making false, misleading, or deceptive statements to the

50 *Ibid*.
51 *Ibid*.
52 *Ibid* para 8.
53 *Ibid*.
54 *Ibid*.
55 *Ibid* para 9.
56 *Ibid*.
57 *Ibid*.
58 *Ibid*.
59 *Ibid*.
60 *Ibid* para 10.
61 *Ibid* para 15.
62 *Ibid*.
63 *Ibid*.

market.[64] The applicants first explained the origin of SIHPL's obligations to the Financial Creditors.[65] In particular, on 30 January 2014, SFHG issued the 2021 Bond as a "Guaranteed Convertible Bond" to certain bondholders who lent SFHG R465 million, with an original maturity date of 30 January 2021.[66] Similarly, SIHPL guaranteed the 2021 Bond in terms of the 2014 Guarantee, under the terms set out in an Amended and Restated Trust deed dated 23 November 2015.[67] Against the backdrop of the December 2017 accounting revelations, the CVAs, under the United Kingdom Insolvency Act 1986, were concluded in the Steinhoff Group as a scheme of restructuring its debt, which included the SFHG CVA, originally dated 29 November 2018.[68] Accordingly, the maturity date of the SFHG debt in terms of the 2021 Bond was then extended to 31 December 2021.[69]

The applicants further submitted that the 2014 Guarantee ensuring SFHG's debts in terms of the 2021 Bond constituted financial assistance by SIHL to a related or interrelated company in terms of section 45(1)-(2) of the Act because, at the time this was effected, SFHG was a subsidiary of SIHL.[70] Similarly, the applicants asserted that the SIHPL CPU constituted the provision of financial assistance in terms of section 45.[71] The applicants contrasted the SIHPL CPU with the 2014 Guarantee and concluded that SIHPL CPU failed to comply with section 45(3) of the Act in that SIHPL's liabilities at that time exceeded its assets on a consolidated basis.[72]

However, the first and second respondents submitted that at the time the 2014 Guarantee was provided, SIHL's board of directors relied on the financial information that showed that the requirements of section 45(3) of the Act were met.[73] In particular, the respondents averred that after the board's assessment in December 2013, the financial statements reflected that the solvency and liquidity test was met and that the terms and conditions on which the financial assistance was given were fair and reasonable.[74] Furthermore, the respondents alleged that SIHPL relied on PwC's independent assessment and analysis. The findings of this assessment showed that the fairness opinion conducted on 25 January 2014 with respect to the SIHL guaranteed Convertible Bond, to be issued on 30 January 2014, determined that the conditions under which it was issued were fair to SIHL's ordinary shareholders.[75]

The WCC grappled with four main issues. The court was first to establish whether the applicants had *locus standi* and whether foreign companies fall within the ambit of section 45.[76] If this is the case, did SIHL satisfy the requirements of section 45 before concluding the 2014 Guarantee? Lastly, the court needed to determine whether the 2019 CPU constituted the provision of

64 *Ibid*.
65 *Ibid* para 16.
66 *Ibid*.
67 *Ibid*.
68 *Ibid* para 17.
69 *Ibid*.
70 *Ibid* para 19.
71 *Ibid*.
72 *Ibid* para 23.
73 *Ibid* para 24.
74 *Ibid* para 27.
75 *Ibid*.
76 *Ibid* para 32.

financial assistance by SIHPL.[77]

3 2 The WCC's Reasoning and Decision

Both the first and second respondents submitted that the applicants lacked *locus standi* and, thus, were not proper plaintiffs in terms of section 45, since the wrong was done to the company. Therefore, only SIHPL or a shareholder deploying a derivative action was entitled to sue.[78] The respondents relied on the *Hlumisa Investment Holdings RF Ltd v Kirkinis*,[79] where both the High Court and Supreme Court of Appeal (SCA) dealt with the proper plaintiff principle.[80] However, Trevo averred that the proper plaintiff rule was inapplicable in the set of facts since the basis of the relief sought is SIHPL's non-compliance with section 45 and not a wrongdoing against SIHPL.[81] Their contention was substantiated by the fact that the proper plaintiff rule arose when a wrong was perpetrated against the company. The objective was to prevent "double recovery", and such considerations were absent under section 45.[82]

In the present circumstances, the WCC believed that the *Hlumisa* case was significantly different from the present facts in *Trevo*. The WCC opined that the former sought to answer whether section 218(2) of the Act permits shareholders to claim in circumstances where the directors occasioned contraventions of various sections of the Act, thus raising the rule against the recovery of reflective loss.[83] In contrast, in the present matter, the applicants sought to challenge the element of section 155 of the Act, which rests on the lawfulness of financial undertakings purported to have been concluded in breach of section 45.[84]

Secondly, the respondents challenged the applicants' *locus standi* because they did not have valid claims in SIHPL.[85] In particular, Trevo and Hamilton are classed as MPCs in SIHPL's section 155 proposal as they instituted delictual claims against SIHPL arising from the accounting irregularities in the Steinhoff Group.[86] The WCC was of the view that should the applicant succeed in its challenge in terms of section 45 by establishing that there was financial assistance illegally given to SIHL and SIHPL, it was highly likely to directly impact the claims of the Financial Creditors and potentially release further funds to meet the claims of the other two classes of creditors.[87] The WCC concluded that, given these circumstances and the real and substantial interest in the form and outcome of the section 155 proposal, the applicants have *locus standi* in these proceedings.[88]

In answering whether section 45 includes foreign companies in its ambit, the WCC sought the purposes of the Act by cross-referencing sections 5 and 7 of the Companies Act to establish the answer to the question.[89] The preliminary view of the WCC was that a foreign company does not fall within the ordinary definition of a company as provided in the Act.[90] However, the

77 *Ibid*.
78 *Ibid*.
79 (1423/2018) 2020 ZASCA 83 (3 July 2020).
80 *Trevo* para 34.
81 *Ibid*.
82 *Ibid* para 35.
83 *Ibid* para 36.
84 *Ibid*.
85 *Ibid* para 37.
86 *Ibid* para 40.
87 *Ibid*.
88 *Ibid*.
89 *Ibid* paras 44–45.
90 *Ibid*.

WCC was correct in holding that the term "corporation," as provided under section 45(2) of the Act, and in terms of the rules of interpretation and meaning under the Concise Oxford English Dictionary, would include foreign companies.[91] Hence, the WCC held that the legislature was justified in omitting the phrase "foreign company" in section 45 since it is assumed to fall under the category of corporation.[92] The WCC's reasoning offers a proper interpretation of the application of section 45. The court concluded that financial assistance extended to South African and foreign companies can only be lawfully extended if the local company offering the assistance passed the solvency and liquidity test and the fairness and reasonableness test.[93]

Furthermore, on whether SIHPL satisfied the requirements of section 45 to the issuance of the 2014 Guarantee, the WCC held that SIHL in 2014 guaranteed the Convertible Bonds issued by SFHG, a related Australian company, in the amount of R465 million.[94] The bond issue, with an original maturity date of on or about 30 January 2014, was made to creditors, and the Bond had an original maturity date of 30 January 2021.[95] As set out in the "Amended Restated Trust Deed", dated 23 November 2015, the parties to the Trust Deed were SFHG, SIHL, SIHNV, and Citi Corp Trustee Company Ltd.[96] The Guarantee provided that SIHL unconditionally and irrevocably guarantees that if the issuer (SFHG) defaults in paying any sum payable under the Trust Deed of the Bond by the time and on the specified date, SIHL will pay that sum to or to the order of the Trustee.[97] SIHL was, therefore, to be liable as the principal debtor and not merely a surety. Thus, its obligations would remain in full force until every amount was paid to the Trust Deed or the Bond.[98] The applicants argued that the 2014 Guarantee constituted the provision of financial assistance by SIHL to a related or interrelated company in terms of section 45(1)-(2) of the Act at the relevant time, SFHG was a subsidiary of SIHL.[99] They averred that SIHL's board was prohibited from authorising the 2014 Guarantee unless it satisfied the solvency and liquidity test and fairness and reasonableness test.[100] *Trevo* relied on the financial analysis prepared by an expert, Professor Geoff Everingham, and argued that when SIHL's board of directors approved the 2014 Guarantee, the company's liabilities exceeded its assets.[101]

In light of the above, however, SIHPL rebuffed such contention and submitted that when the financial assistance was provided, the company passed the solvency and liquidity test and the fairness and reasonableness test.[102] SIHPL, through its expert (Mr Frederick Nel), provided that they relied on the June 2013 financial statements that showed that SIHL was solvent and reasonably believed that it would satisfy the solvency and liquidity test.[103] However, the applicants challenged the 2014 Guarantee based on the financial irregularities uncovered three years later by arguing that SIHL's board should have uncovered the irregularities had it acted reasonably.[104] SIHPL argued that at the time, evidence showed that the board's judgment was vindicated since the company had sufficient cash on hand to meet any claim under the 2014

91 *Ibid*.
92 *Ibid* para 50.
93 *Ibid* para 51.
94 *Ibid* para 53.
95 *Ibid*.
96 *Ibid*.
97 *Ibid*.
98 *Ibid*.
99 *Ibid* para 54.
100 *Ibid*.
101 *Ibid* para 55.
102 *Ibid* para 58.
103 *Ibid* para 59.
104 *Ibid* para 66.

Guarantee.[105] However, the WCC held that the applicant's version was problematic because it relied on the *ex post facto* analysis of the company's financial position following the revelations of December 2017 and the accounting revisions of 2019.[106] In conclusion, the WCC accepted the version of SIHPL and held that the applicants failed to prove that the board acted reasonably in extending the 2014 Guarantee as both the solvency and liquidity and the fair and reasonable tests were not met.[107] Therefore, the WCC held that the applicants failed to make out a case that the 2014 Guarantee was void for want of compliance with section 45.

In establishing whether SIHPL CPU was void for lack of compliance with section 45, the WCC found that the CPU originated from the 2014 Guarantee and the events of December 2017 that revealed the extent of financial irregularities in the Steinhoff Group.[108] In effect, on behalf of SIHNV, the ultimate holding company of SIHPL, it was argued that when investigations of accounting irregularities within the Steinhoff Group commenced in December 2017, SFH (SFHG) defaulted concerning the Bond and the bondholders called the 2014 Guarantee.[109] As a result, SIPHL concluded the SIHPL Contingent Payment Undertakings (CPU), which merely deferred the existing payment obligations under the 2014 Guarantee.[110] Therefore, the argument on behalf of Steinhoff was that the SIHPL CPU was not the provision of new financial assistance but merely an affirmation of the financial assistance already provided by SIHPL to SFH(G) in 2014.[111] Steinhoff further argued that during 2018 and 2019, Steinhoff Group, *inter alia*, put in place financial restructuring to extend its financings until 2021, including the terms of the CPU, and such did not amount to financial assistance in terms of section 45.[112]

However, Trevo rejected SIHPL's argument that its debt to Financial Creditors under the new SIHPL CPU was similar to that owed under the 2014 Guarantee.[113] Trevo further established that the definition of financial assistance in section 45(1) of the Act is wide enough to include lending money, guaranteeing a loan or other obligation, and securing any debt or obligation.[114] Attention must be given to the contents in clause 5 of the lengthy, complicated CVA agreement. In particular, the existing SFHG Debt was to be reconstituted, for instance, (i) the issuance of the New Lux Finco 1 21/22 Loan and the New Lux Finco 1 23 Loan by Lux Finco 1, and guaranteed by SFHG from the implementation Commencement Date, on a cashless basis to the SFHG creditors *pro rata* to their holdings of Existing SFHG Debt;[115] (ii) Lux Finco 1 will onlend the deemed cashless proceeds from the New Lux Finco 1 21/22 Loan and the New Lux Finco 1 23 Loan to SFHG under the Lux Finco 1 intercompany Agreement;[116] and (iii) The Existing Guarantee given by SIHPL will either be amended or restructured as a contingent payment undertaking, depending on the circumstances applicable to SIHPL.[117]

Considering the above, in entering into SIHPL Guarantee obligation or SIHPL Contingent Payment Undertaking (CPU), the CVA states that nothing in this Proposal (SFHG CVA), including obligations of SFHG pursuant to the Convertible Bonds, shall operate to discharge

105 *Ibid* para 70.
106 *Ibid* para 71.
107 *Ibid*.
108 *Ibid* para 73.
109 *Ibid*.
110 *Ibid*.
111 *Ibid*.
112 *Ibid* paras 74 and 75.
113 *Ibid* para 96.
114 *Ibid* para 99.
115 *Ibid* para 84.
116 *Ibid*.
117 *Ibid*.

or release SIHPL and SIHNV from any liability or obligation in respect of the SFHG 2021 Convertible Bonds.[118] Furthermore, the obligations shall be restructured on the terms set out in the SIHPL Guarantee obligation or SIHPL CPU and SFHG CPU, the conditions of which shall apply following the occurrence of the restructuring date.[119]

The WCC further reasoned that "the construction of the various agreements and the discharge of liabilities under the 2021 Bond would also have discharged SIHPL's obligations under the SIHPL's Guarantee, for otherwise, the Bondholders would have double benefitted, but this would have left the Bondholders with only a claim against Lux Finco 1 in respect of the loan originally provided".[120] Hence, the WCC viewed that the SIHPL CPU replaced the SIHPL Guarantee. Accordingly, the WCC concluded that "this constituted financial assistance by SIHPL to a company or corporation interrelated to it, namely Lux Finco".[121] The WCC correctly found that SIHPL CPU constituted financial assistance to Lux Finco 1, *inter alia*, because SIHPL came under a fresh debt to the Facility A1 Lenders (the Financial Creditors) on different terms and conditions to those that in concluding the CPU, SIHPL gave financial assistance to Lux Finco 1 in breach of the provisions of section 45 of the Act.[122] In the circumstances, "by virtue of section 45(6) of the Act, the resolution of SIHPL's board authorising the conclusion of SIHPL is void as is the CPU itself and the applicants are entitled to a declaration to this effect".[123]

The WCC thus declared that the CPU "concluded between the first respondent (SIHPL) and the second respondent on or about 12 August 2019 ("the SIHPL CPU"), as well as the board resolution authorising the entry by the first respondent into the SIHPL CPU, is void in terms of section 45(6) of the Companies Act of 2008".[124]

3 2 1 A Critical Assessment of the Decision in Trevo

Firstly, the WCC in *Trevo*, established that the extent of the application and the scope of financial assistance in terms of section 45 incorporates foreign companies in its ambit. Financial assistance reduces the capital available to a company; therefore, the authorisation of such transactions must be done in compliance with the solvency and liquidity test. The solvency and liquidity test is regarded as a buffer that seeks to ensure the continued sustainability of the lending company and the protection of company stakeholders, especially creditors and shareholders. The WCC correctly held that a proper interpretation of section 45 confirms its application to both South African and foreign companies, to the extent that these companies may not receive financial assistance unless the local company meets the requirements of section 45.[125] The WCC decision is sensible in that the fears of reducing the company's solvency and liquidity after extending financial assistance to a local company are similar if such assistance is extended to a foreign company. Therefore, the WCC's reasoning was correct, as financial assistance offered by a South African company to its foreign holding or subsidiary company on the one hand and a similar company to its local holding or subsidiary will constitute a false dichotomy that is objectively unjustifiable. However, it could be argued that the fears are more pronounced when foreign companies are included in the ambit of section 45 since enforcing such an agreement against a foreign company might be more complicated than a local company. For instance, the disgorgement of profits gained by a foreign company is difficult or almost impossible compared

118 *Ibid* para 85.

119 *Ibid*.

120 *Ibid* para 136.

121 *Ibid*.

122 *Ibid*.

123 *Ibid* para 137.

124 *Ibid* para 140.

125 *Ibid* paras 50 and 51.

to doing the same in a local company.

It is submitted that an interpretation of section 45 that excludes foreign companies is erroneous since offering financial assistance without satisfying a foreign company's solvency and liquidity test may result in dire consequences to the company extending the financial assistance and its stakeholders. Furthermore, such an expansive interpretation of section 45 confirms that the decision by the WCC is sound in that it promotes the spirit and purport of the Act. This is valid, given that the inclusion of foreign companies into the ambit of section 45 of the Act protects the company stakeholders. Based on the WCC's decision, the legislature was supposed to expressly amend the current section 45 to include the regulation of foreign companies in its ambit. We submit that the legislature missed the opportunity to expand the ambit of section 45 to include foreign companies through the Amendment Act of 2024. The WCC, enjoined by section 158 of the Act, ought to interpret the law to improve the realisation and enjoyment of the rights enshrined in the Act.[126] It is further submitted that the Supreme Court of Appeal, should an appeal follow, would likely concur with the reasoning of WCC.

Secondly, the WCC correctly held that restructuring financial obligations, to the extent that financial assistance flows from a fresh debt facility on different terms and conditions, qualifies as new financial assistance under section 45.[127] The judgment in the WCC provides a necessary safeguard to the company stakeholders who may suffer from unscrupulous debt restructuring transactions by the board of directors. Furthermore, such a conclusion by the WCC is congruent with the overarching objectives of the Act.

4 CONCLUDING REMARKS

In conclusion, the overarching policy rationale behind regulating financial assistance under section 45 is generally to mitigate abuse of control by the board of directors and to ensure disclosure under certain circumstances where an "abuse of control" act is detected.[128] In light of the above rationales, the contribution assessed the application and scope of section 45 against the backdrop of the *Trevo* case.[129] The *Trevo* case has immensely contributed to the jurisprudence of financial assistance by clarifying and extending the application and scope of section 45, read together with section 4 of the Companies Act. It has the potential to remain the *locus classicus* that expands the reach of section 45 to regulate foreign companies. It is submitted that the reasoning of Bozalek J in the WCC is sound and persuasive in that section 45 includes the regulation of foreign companies in its scope. Effectively, the WCC judgment confirms that any financial assistance granted by a domestic company in favour of a foreign entity is subject to the provisions of section 45. The further implication is that any change to the parties' general terms, conditions, and identity regarding the original debt, would probably necessitate the adoption of new financial assistance resolutions.

In our view, this decision was supposed to prompt the legislature to amend section 45 of the Act through the Amendment Act of 2024 to explicitly include foreign companies in its ambit. In our view, such omission by the Amendment of 2024 to amend section 45 in the manner suggested above will result in unintended interpretational and practical consequences when determining whether foreign companies are included under the scope of section 45 of the Act. In particular, we submit that, if and when unregulated, the directors may extend credit to foreign companies without satisfying the requirements of section 45, and such may result in unintended practical consequences of insolvency and inability to pay their debts as and when they become due and

126 *Ibid* s 158.

127 *Trevo* para 136.

128 Delport *Henochsberg* 226.

129 *Trevo* para 2.

payable. The WCC judgment is thus commendable as its interpretation improves the realisation and enjoyment of the rights enshrined in the Act.[130] The WCC judgment incorporates novel, complex factual and legal issues, and only time will tell whether the Supreme Court of Appeal will reach the same conclusion as the WCC if and when grappled with analogous facts.

The judgment in the *Trevo* case thus confirms the functional purposes and the policy rationales of section 45 that aim to ensure that when companies extend financial assistance, they should not be placed in a position where they would fail to pay their debts as and when they become due and payable. The decision makes it peremptory for directors to be accountable to the company when extending such financial assistance to foreign companies and/or when they restructure debt on different terms. Accordingly, the *Trevo* decision confirms the overarching goal of mitigating the abuse of control by the board of directors and ensuring disclosure under certain circumstances.[131] Furthermore, the decision in *Trevo* restricts the possibility that directors may sacrifice the interests of, for example, one company and unjustifiably promote another.[132] Ultimately, the judgment protects shareholders, creditors and the company by countering the abuse of powers by the board of directors, who may use the company's resources for selfish and self-aggrandisement reasons.[133]

130 Companies Act s 158.

131 Delport *Henochsberg* 226. For further reading see Botha 1983 *De Jure* 235.

132 See Botha 1982 *De Jure* 108–109; Botha 1984 *De Jure* 167–182; Delport *SA Merc LJ* 122–128; Bhana *Stell LR* 236–250.

133 Delport *Henochsberg* 226.