

Could Steinhoff and the likes face a class action suit?

The abrupt and devastating wipe-out of 80% market value in the multi-national retailer, Steinhoff, has without any doubt brought about more questions than answers in the area of corporate law. Naturally, the question on investors' lips was whether Steinhoff can be held accountable for the massive damages they suffered. The mutual sentiment shared between individual and institutional investors alike, naturally leads one's thoughts to the possibility of instituting a class action lawsuit in which all parties can claim their damages against a single scapegoat.



Stephan Haynes

Stephan Haynes, of Gillan and Veldhuizen Attorneys, explains: "In basic terms, a 'class action' is merely multi-party litigation which can also be referred to as a collective lawsuit. A class action concerns a group or class of persons who share a sufficient common right or interest that is being infringed by a common perpetrator. By grouping these individual interests, one has a single lawsuit on the same merits."

The dramatized class action which we have become accustomed to thanks to Hollywood seems far-fetched and is not intrinsic to our Common Law. According to our South African case law, a party or parties have 'standing' (loci standi) if the matter relates to a direct and substantive interest in the right of a person or persons who institute legal proceedings that concern the subject matter and outcome of litigation. Despite our common law following a rather restricted approach to locus standi, enter the Constitution. Section 38(c) relaxed the position by giving anyone, including a group or class, standing in instances concerning the infringement of a right set out in the Bill of Rights. It must, however, be noted that this acknowledgement of class action is confined to circumstances in which Constitutional rights are infringed.

Locus standi in the case of Steinhoff:

Haynes suggests that "one must first establish whether the recent developments regarding Steinhoff influenced or infringed either (i) a direct or substantive right or sufficient interest, or (ii) a right as provided for in the Bill of Rights. The latter seems to be unlikely, at face value, even in the most generous terms. Therefore, we would need to look at The Companies Act*, The Consumer Protection Act* and Common Law* for Clarity."

Application to the case of Steinhoff:

Since Steinhoff is a multi-national company registered in South Africa, has its primary listing in Frankfurt, and registered office in Amsterdam, its liability is not restricted to a single jurisdiction. Consequentially, class action has been initiated in the Netherlands for the recovery of damages caused by Steinhoff's actions misleading investors by providing incomplete market information.

Recent reports have pointed to South African investors approaching European law firms in the hope of joining their class action suits. Given the unestablished status of class action law suits in South Africa, this option might be preferable to testing the willingness of our courts to firstly allow such action and secondly award large-scale damages on such grounds.

Summing up the plausibility of a successful class action, Haynes says: “The information currently available to the public leaves one to speculate and consider far-reaching legal remedies. It is important to be mindful of the fact that the actions of the free-market trade caused share prices and investor values to plummet. It is therefore difficult to determine the significance of the damage that was truly caused by the actions of Steinhoff. As stocks are still trading, investors’ so-called ‘damages’ may be temporary. It is important to consider that a company cannot be held liable for harm suffered by investors who sold their shareholding at a reduced price, as that is how the exchange works.

It nevertheless seems evident that Steinhoff has committed corporate governance contraventions, specifically with regard to its accounting practices, and may have contravened the Companies Act in various ways. These causes of action will indeed provide legal standing against the company or its directors, and could very well be dealt with by means of collective litigation.”

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