IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO: EL1139/2013
DATE HEARD: 15/11/2018
DATE DELIVERED: 11/12/2018

In the matter between

GLYNIS BEVERLY LARRETT	**APPLICANT**
and	
COEGA DEVELOPMENT CORPORATION (PTY) LTD	**1ST RESPONDENT**
THE STANDARD BANK OF SOUTH AFRICA LIMITED	**2ND RESPONDENT**
MR K B NDZIMELA	**3RD RESPONDENT**
INDEPENDENT CRUSHERS CONSORTIUM (PTY) LTD	**4TH RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] The applicant (Larrett) and the third respondent (Ndzimela) are the directors of the fourth respondent (the company). On 6 September 2013 Larrett instructed her attorney to institute proceedings whereby the company as plaintiff claimed payment of R2 089 002.88 from the first respondent (Coega) in terms of a contract allegedly concluded between the company and Coega. In the alternative the company claimed, in delict, payment of the same sum from the second respondent (Standard Bank). It is common cause that at the time the summons was issued the institution of the proceedings had not been authorised because there was no resolution to that effect by the board of directors.

[2] In this application, Larrett seeks an order from this court authorising her to continue with the proceedings in the name of and on behalf of the company, in terms

of s 165 (5) of the Companies Act 71 of 2008 (the Act). The application is opposed by Standard Bank. Section 165 of the Act provides:

> **“Derivative actions**
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> (1) Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.
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> (2) A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person-
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> (a) is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;
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> (b) is a director or prescribed officer of the company or of a related company;
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> (c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or
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> (d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.
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> (3) A company that has been served with a demand in terms of subsection (2) may apply within 15 business days to a court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit.
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> (4) If a company does not make an application contemplated in subsection (3), or the court does not set aside the demand in terms of that subsection, the company must-
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> (a) appoint an independent and impartial person or committee to investigate the demand, and report to the board on-
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> (i) any facts or circumstances-
>
> (aa) that may gave rise to a cause of action contemplated in
>
> (bb) that may relate to any proceedings contemplated in the demand;
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> (ii) the probable costs that would be incurred if the company pursued any such cause of action or continued any such proceedings; and
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> (iii) whether it appears to be in the best interests of the company to pursue any such cause of action or continue any such proceedings; and
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> (b) within 60 business days after being served with the demand, or within a longer time as a court, on application by the company, may allow, either-
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> (i) initiate or continue legal proceedings, or take related legal steps to protect the legal interests of the company, as contemplated in the demand; or
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> (ii) serve a notice on the person who made the demand, refusing to comply with it.

(5) A person who has made a demand in terms of subsection (2) may apply to a court for leave to bring or continue proceedings in the name and on behalf of the company, and the court may grant leave only if-

(a) the company-

(i) has failed to take any particular step required by subsection (4);

(ii) appointed an investigator or committee who was not independent and impartial;

(iii) accepted a report that was inadequate in its preparation, or was irrational or unreasonable in its conclusions or recommendations;

(iv) acted in a manner that was inconsistent with the reasonable report of an independent, impartial investigator or committee; or

(v) has served a notice refusing to comply with the demand as contemplated in subsection (4) (b) (ii); and

(b) the court is satisfied that-

(i) the applicant is acting in good faith;

(ii) the proposed or continuing proceedings involve the trial of a serious question of material consequence to the company; and

(iii) it is in the best interests of the company that the applicant be granted leave to commence the proposed proceedings or continue the proceedings, as the case may be.

(6) In exceptional circumstances, a person contemplated in subsection (2) may apply to a court for leave to bring proceedings in the name and on behalf of the company without making a demand as contemplated in that subsection, or without affording the company time to respond to the demand in accordance with subsection (4), and the court may grant leave only if the court is satisfied that-

(a) the delay required for the procedures contemplated in subsections (3) to (5) to be completed may result in-

(i) irreparable harm to the company; or

(ii) substantial prejudice to the interests of the applicant or another person;

(b) there is a reasonable probability that the company may not act to prevent that harm or prejudice, or act to protect the company's interests that the applicant seeks to protect; and

(c) that the requirements of subsection (5) (b) are satisfied.

(7) A rebuttable presumption that granting leave is not in the best interests of the company arises if it is established that-

(a) the proposed or continuing proceedings are by-

(i) the company against a third party; or

(ii) a third party against the company;

(b) the company has decided-

(i) not to bring the proceedings;

(ii) not to defend the proceedings; or

(iii) to discontinue, settle or compromise the proceedings; and

(c) all of the directors who participated in that decision-

(i) acted in good faith for a proper purpose;

(ii) did not have a personal financial interest in the decision, and were not related to a person who had a personal financial interest in the decision;
(iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and
(iv) reasonably believed that the decision was in the best interests of the company.

(8) For the purposes of subsection (7)-
(a) a person is a third party if the company and that person are not related or inter-related; and
(b) proceedings by or against the company include any appeal from a decision made in proceedings by or against the company.

(9) If a court grants leave to a person under this section-
(a) the court must also make an order stating who is liable for the remuneration and expenses of the person appointed;
(b) the court may vary the order at any time;
(c) the persons who may be made liable under the order, or the order as varied, are-
(i) all or any of the parties to the proceedings or application; and
(ii) the company;
(d) if the order, or the order as varied, makes two or more persons liable, the order may also determine the nature and extent of the liability of each of those persons; and
(e) the person to whom leave has been granted is entitled, on giving reasonable notice to the company, to inspect any books of the company for any purpose connected with the legal proceedings.

(10) At any time, a court may make any order it considers appropriate about the costs of the following persons in relation to proceedings brought or intervened in with leave under this section, or in respect of an application for leave under this section:
(a) The person who applied for or was granted leave;
(b) the company; or
(c) any other party to the proceedings or application.

(11) An order under this section may require security for costs.

(12) At any time after a court has granted leave in terms of this section, a person contemplated in subsection (2) may apply to a court for an order that they be substituted for the person to whom leave was originally granted, and the court may make the order applied for if it is satisfied that-
(a) the applicant is acting in good faith; and
(b) it is appropriate to make the order in all the circumstances.

(13) An order substituting one person for another has the effect that-
(a) the grant of leave is taken to have been made in favour of the substituting person; and
(b) if the person originally granted leave has already brought the proceedings, the substituting person is taken to have brought those proceedings or to have made that intervention.

(14) If the shareholders of a company have ratified or approved any particular conduct of the company-
(a) the ratification or approval-

(i) does not prevent a person from making a demand, applying for leave, or bringing or intervening in proceedings with leave under this section; and

(ii) does not prejudice the outcome of any application for leave, or proceedings brought or intervened in with leave under this section; or

(b) the court may take that ratification or approval into account in making any judgment or order.

(15) Proceedings brought or intervened in with leave under this section must not be discontinued, compromised or settled without the leave of the court.

(16) For greater certainty, the right of a person in terms of this section to serve a demand on a company, or apply to a court for leave, may be exercised by that person directly, or by the Commission or Panel, or another person on behalf of that first person, in the manner permitted by section 157."

[3] In her founding affidavit, Larrett stated that the company was formed in order to secure various tenders for road surfacing contracts from Coega. The consortium consisted of four entities: Independent Mobile Crushers CC, Sinoku Trading CC (Sinoku), Mbalelanga Trading CC, and Satiolinx (Pty) Ltd. Ndzimela is also a director of Satiolinx (Pty) Ltd. Annexed to the founding affidavit was a copy of the memorandum of agreement between these four entities. It recorded *inter alia* that the company had issued share capital of 100 shares and that each entity was allotted 25 shares. The agreement also provided for arbitration in the event of a dispute or difference arising between the parties.

[4] According to Larrett, in 2011 the company was awarded certain road surfacing contracts by Coega. The actual contractor was Asphalt Services CC (Asphalt). Asphalt would do the work and invoice the company, and the company would in turn invoice Coega. The company instructed Coega to make payments into Asphalt's First National Bank account because the company did not yet have its own bank account. On 1 April 2011 a pre-payment of R9 400 928.07 was made into Asphalt's bank account. Work to

the value of R11 490 092.84 was performed, leaving a balance of R2 089 164.77 which was to be paid into Asphalt's bank account. This amount was not paid into Asphalt's bank account. Instead, Sinoku's member, Ms N Gcanga, and Ndzimela fraudulently arranged for this amount to be paid into Sinoku's account with Standard Bank. The money has since been withdrawn from Sinoku's account.

[5] Larrett said that in terms of written instructions to Standard Bank, any official documents were to be signed by both directors of the company. Coega provided a document to the company which was endorsed by Standard Bank, verifying that the bank account of the company had been changed to an account which was held by Sinoku. In the particulars of claim in the action it is alleged that Standard Bank owed the company a duty of care to ensure that an account which was endorsed as that of the company, was indeed the account of the company. This duty of care was allegedly breached by Standard Bank in endorsing Coega's "supplier information sheet" by affixing its stamp to the document.[1]

[6] Larrett initially pursued a criminal charge against Ndzimela. He appeared in the Regional Court and the matter was postponed from time to time, the last dates being 13-15 June 2016 for trial. Larrett knows Ndzimela's residential address but says that he avoids contact with his former business associates and keeps a low profile. In particular he has avoided communication between him and Larrett in relation to the company's financial crisis caused by him. Larrett says that there is no purpose in trying to make contact with him

[1] This document was an annexure to Standard Bank's answering affidavit. It does not reflect that there was a change of bank account details. The supplier is named as Independent Crushers Consortium and the directors are named as Gcanga and Ndzimela. The Standard Bank account details are inserted and Ndzimela, in his capacity as director of Independent Crushers Consortium, signed the document and declared that the information was correct.

because he would, as a result of his conduct, be hostile and not inclined to pursue the company's civil claim. When he was previously asked when he was going to pay the balance of the payment on the contract, he offered to explain the next day but did not do so. Despite ongoing attempts to meet with Ndzimela in his capacity as a director of the company in order to obtain the necessary resolution to institute the action, he has refused to make himself available for a directors' meeting or to communicate in relation to the company's claim.

[7] A decision was taken in 2014 to bring an application in terms of s 163 of the Act, for an order similar to the one sought in the present application. Section 163 enables a court to grant a wide range of relief where a shareholder or director applies for relief from oppressive or prejudicial conduct. On 13 March 2015 Stretch J dismissed the application, finding that the correct section to have been invoked was s 165 and not s 163.

[8] Larrett said that she had served a demand on the company in accordance with s 165 (2) of the Act and that the company had not applied to set it aside in terms of s 165 (3), nor had it appointed an independent person or committee to investigate the demand in terms of s 165 (4).

[9] Standard Bank's answering affidavit was deposed to by Ms Sharmaine Deonarain, Standard Bank's Group Legal Division Head of Legal Advisory Services. She maintained that s 165 (5) did not empower a court to ratify proceedings which were unauthorised at the outset and that it only empowered a court to authorise the continuation of proceedings which were originally authorised by a company but not prosecuted further. According to Deonarain, Larrett failed to follow any procedure in order to obtain the

necessary authorisation for the institution of the action, either by way of s 165 or by convening a meeting of shareholders or directors. Nor did Larrett utilise the arbitration clause in the memorandum of agreement. Deonarain further raised the defence of prescription in that if s 165 was applicable, it would involve the *ex post facto* ratification of the process by the court after the debt had already prescribed. She said that Larrett and the company knew the identity of Standard Bank and the facts giving rise to the claim no later than 29 August 2012 when Larrett's attorney had written to Standard Bank demanding payment. The debt therefore prescribed no later than 28 August 2015. The summons issued on 6 September 2013 was a nullity and did not interrupt prescription.

[10] Deonarain recounted some events which occurred after Standard Bank entered an appearance to defend the action. Standard Bank's attorneys disputed Larrett's attorney's authority to act on behalf of the company in instituting the action. In response Larrett's attorney said that Larrett intended pursuing the action and if Standard Bank persisted with the challenge to his authority an application in terms of s 163 of the Act would be brought. Standard Bank's attorneys advised Larrett's attorney to bring such an application, without conceding that the provisions of s 163 were wide enough to authorise the continuation of the action. In this letter they requested that Larrett include in her application details of the request for proposals or tenders received by her from Coega and copies of documents submitted in response. In addition she was to mention who it was from Coega who had requested confirmation from Standard Bank concerning the details on the supplier information sheet. Deonarain said that this information was important in light

of certain of the contents of the service level agreement (the SLA) concluded with Coega, a copy of which was annexed to the answering affidavit.

[11] The first page of the SLA reflected that the agreement was entered into between Coega and "Independent Crushers Consortium hereinafter referred to as 'the Quarry Operator'". Under the heading "Definitions and Interpretations", "Quarry Operator" meant "Independent Crushers Consortium, Registration Number 2008/201319/23". Deonarain pointed out that this registration number was, according to a Lexis Nexis search, the registration number of Sinoku. In the search deed, annexed to the answering affidavit, the member of Sinoku was named as Nobom Lissom Gcanga. Deonarain said that when Sinoku's account was opened with Standard Bank, its sole member was reflected as Mr N L Gcanga and it was represented that Sinoku traded as Independent Crushers Consortium. Deonarain further pointed out that the SLA did not provide for advance payments but rather for payment of invoices to be made 30 days after submission. Larrett did not include the requested information in her s 163 application.

[12] Following the dismissal of the s 163 application, Larrett was requested to withdraw the action. On 30 March 2015 Larrett's attorney informed Standard Bank's attorneys that at a shareholders meeting of the company held on 16 January 2015, the shareholders resolved to remove Ndzimela as a director of the company, and authorisation for the institution of the action was ratified with retrospective effect. The purported resolution was annexed to Deonarain's affidavit. It recorded that the shareholders present at the meeting were Larrett and Xolani Mampunye. The resolution to remove Ndzimela as a director was signed by Larrett on behalf of Independent Mobile Crushers CC

and by Mampunye on behalf of Mbalelanga Trading CC. The resolution that the institution of the action should be ratified was signed by Larrett on behalf of the company. Standard Bank's attorneys wrote to Larrett's attorney saying that it appeared that the meeting had not been properly convened because only two of four shareholders were present and any resolution passed was invalid. The attorneys also expressed the view that ratification at this stage would prejudice Standard Bank. There was no response from Larrett's attorney.

[13] During October 2015 Standard Bank's attorneys were informed that Larrett was taking the necessary steps in terms of s 165 of the Act to obtain authorisation for the continuation of the proceedings. The attorneys pointed out in response that s 165 of the Act could not be resorted to where the proceedings were unauthorised.

[14] Deonarain expressed the view that it could be inferred from Larrett's omission to include the requested information in the s 163 application (see paragraph [11] above) that the tender had not been awarded to the company and consequently Larrett could not satisfy the court that she was acting in good faith. Further with regard to good faith Deonarain said that Larrett had failed to make a full and frank disclosure to the court. In the present application Larrett contended that the shareholders of the company were as per the memorandum of agreement, whereas in the s 163 application she said that she personally was a 51% shareholder in the company. Deonarain also pointed to the delay in bringing this application some 18 months after judgment was delivered in the s 163 application, while Larrett knew at all times that the action was unauthorised, and had known that her attorney's

authority to institute the proceedings had been disputed at least since March 2014. A further example of lack of good faith, according to Deonarain, was Larrett's failure to produce a copy of the company's alleged written instructions to Standard Bank concerning the signature of official documents and to disclose the details of the company's bank account. Larrett had made the same allegation in the s 163 application and Standard Bank had denied that it had received written instructions or that the company had a bank account with Standard Bank. Yet a further example of a lack of good faith was Larrett's failure to provide further details of the criminal proceedings against Ndzimela.

[15] In her replying affidavit, in response to the contents of the SLA highlighted by Deonarain, and Standard Bank's request that information pertaining to the tender documents be included in the s 163 application, Larrett said that she had no knowledge of what importance Standard Bank attached to the contents of the founding affidavit or how it interpreted the SLA and the relationship between the parties. She said it was not for Standard Bank to prescribe what allegations in the founding affidavit should be made merely because it regarded certain allegations as important. She said that in her s 163 application she provided the details which she considered to be necessary and declined the invitation to provide the requested information which she regarded as irrelevant to the cause of action. Larrett did not deal with the contents of the SLA referred to by Deonarain, namely the successful tenderer's registration number being that of Sinoku, and the lack of provision for an advance payment. She maintained that the tender was awarded to the company.

[16] Larrett had no response to the allegations regarding the invalidity of resolutions taken at the shareholders' meeting. She had no response to the averment that in the s 163 application she had said she was personally a 51% shareholder and maintained that the shareholdings were as per the memorandum of agreement. Her response to the allegation that she had failed to make a full disclosure concerning the company's alleged written instructions to Standard Bank and the company's bank details with Standard Bank, was to deny such a lack of disclosure and to maintain that all steps had been taken in good faith.

[17] It was submitted on behalf of Standard Bank that there were three unassailable grounds of resistance to the application, without considering its merits. The first was *res judicata* (the judgment in the s 163 application); the second was prescription; and the third was that the structure and purpose of s 165 was such that it could not be resorted to where the proceedings sought to be continued were at inception unauthorised. Of these three grounds I intend only to deal with the third.

[18] Counsel for Standard Bank dealt comprehensively with the provisions of s 165 in his heads of argument, emphasising that according to a number of its provisions the court acts as a gatekeeper. It may, in terms of s 165 (3), set aside a demand made in terms of s 165 (2) on the grounds that it is frivolous, vexatious or without merit. Leave to institute and continue proceedings on behalf of the company in terms of s 165 (5) may only be granted in defined circumstances. The person granted leave to institute or continue proceedings may be substituted by another person only if the court is satisfied that the applicant is acting in good faith and it is appropriate to make such an order in

all the circumstances (s 165 (12)). A court may grant leave for a derivative action even if the shareholders have ratified the conduct of the directors which is in issue (s 165 (14)). Once the court has authorised a derivative action, the action cannot be discontinued, compromised, or settled without the leave of the court (s 165 (15)).

[19] It was submitted on behalf of Standard Bank that prior to the institution of the unauthorised proceedings, Larrett did not follow any of the steps contained in the section, thereby preventing the court from exercising its gatekeeper role and undermining the purpose of the section. She went ahead without the authority of the company or the court. Larrett did not challenge the assertion that the resolution taken at the shareholders' meeting was invalid and did not rely on it.

[20] Insofar as Larrett now wants authorisation to continue proceedings on behalf of the company, they must, as submitted on behalf of Standard Bank, be proceedings which were properly authorised at inception. If not, the court would effectively be ratifying the institution of the proceedings on behalf of the company, which s 165 does not authorise a court to do, and would do so without the strict requirements of s 165 first having been met. The authorities to which Counsel for Larrett referred in support of ratification were, as pointed out on behalf of Standard Bank, cases where the company itself had ratified unauthorised conduct.[2]

[21] Counsel for Standard Bank gave the example of an action which was authorised by the board of directors, but thereafter the directors in bad faith

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[2] For example *Johannesburg City Council v Elesander Investments and Others* 1979 (3) SA 1273 (T), *Carlkim (Pty) Ltd and Others v Shaffer and Others* 1986 (3) SA 619 (N), and *Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd and Another* 1994 (1) SA 659 (C).

were unwilling to continue with the action. In such a case it would be open to the person with *locus standi* to apply for authorisation to continue with the action. The strict requirements of the section would have to be complied with and the court would have to exercise its gatekeeper and oversight role. Reference was made to the judgment of Binns-Ward J in *Lewis Group v Woollam and Others* 2017 (2) SA 547 (WCC) where the learned judge said at paragraph [51]:

> "An example that suggests itself as a possibility is a case in which the company has already instituted proceedings for a declaration of delinquency, but for reasons that do not bear scrutiny has failed to prosecute them to conclusion. In those circumstances the best interests of the company might be served by the continuation of the proceedings derivatively. The costs incurred by the company in taking the case to the stage that had been reached when proceedings had stalled would be squandered were the complainant shareholder to initiate proceedings afresh for the same relief on the same facts in its own name. A sensible basis in the company's best interests for the granting of derivative standing to a shareholder could conceivably be demonstrable in the postulated example."

[22] I am in respectful agreement with these examples. It would simply not be a sensible interpretation of the section to allow a person to have instituted unauthorised proceedings, purportedly on behalf of the company, without first complying with the provisions of the section. One cannot bypass the section. The effect of the section is that the institution of a derivative action must be authorised by a court. The logical corollary to this is that the proceedings which are sought to be continued must have been properly authorised at inception.

[23] Counsel for Standard Bank expressed the position as follows: the fact that s 165 allows for the continuation of proceedings is not a licence to avoid the strict requirements of the section and unilaterally institute unauthorised proceedings, hoping that the court will sanction them at a later stage. Such

conduct would be subversive of the plain and ordinary meaning of the section and its intention.

[24] I agree with the submissions made on behalf of Standard Bank. In my view to interpret s 165 so as to allow for the authorisation of the continuation of unauthorised proceedings would allow the avoidance of the requirements of the section and negate its purpose.

[25] It was submitted on behalf of Larrett that s 165 should be read in a manner that promotes the spirit, purport and objects of the Bill of Rights, and that remedial statutes should be generously interpreted. The section should also be interpreted in the context of the mischief it seeks to remedy. Section 165 (5) does not, so it was submitted, limit the continuation of proceedings to properly authorised proceedings, and includes proceedings which have not been properly authorised. I am of the view that this argument does not take into account that, even if Ndzimela was uncooperative and may not have attended a directors meeting if requested, s 165 was always available to Larrett, and would be to a person in a similar position, before the institution of proceedings. There is therefore no need for such an extended interpretation of the section. Further, as was submitted on behalf of Standard Bank, the principles of interpretation in this respect, namely in the context of the mischief which is sought to be avoided, preclude the seeking of ratification after the event.

[26] I conclude therefore that the proceedings in respect of which Larrett seeks leave to continue, are not proceedings contemplated in terms of s 165 (5) of the Act. The application therefore cannot succeed.

[27] In any event, even if authorisation could be granted in such circumstances, in my view the applicant has not established the requirements of s 165 (5) (b) (i), (ii) and (iii).

[28] In *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA), Swain JA dealt with the onus on an applicant with regard to these requirements at paragraphs [16] and [17] as follows:

> "[16] It is clear that an applicant seeking to advance a derivative action, whether at common law or in terms of s 266 of the 1973 Act, bore an onus. At common law the contemplated action related to the existence of the right relied upon and the breach of the duty owed to the member, by the company. In the statutory action this related to the existence of a prima facie cause of action against the wrongdoer. In either case, the court exercised an overriding discretion whether or not to grant leave to institute the derivative action. The imposition of an onus on an applicant, together with the exercise of a discretion by the court, had as its objective not only the need to protect the rights of members of the company, but also the need to protect the administration of the business of the company, against frivolous or vexatious claims, or claims which were not in the interests of the company.
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> [17] Although the statutory derivative action provided for in s 165 of the Act is wider in scope than the common-law action, as well as that under the former statutory regime, a need to strike the appropriate balance between these same interests, remains of paramount importance in determining not only the nature and extent of the onus resting upon an applicant, but also the nature and extent of the discretion vested in the court. There is accordingly no basis for the submission by appellant's counsel that the provisions of s 165(5)(b) of the Act require an applicant to satisfy the requirements of the section on a lesser standard than proof on a balance of probabilities."

[29] Further with regard to these requirements Swain JA said at paragraph [19]:

> "Although the individual requirements of s 165(5)(b)(i), (ii) and (iii) of the Act are conjunctive, this does not mean that they are to be considered in isolation. For example, in considering whether the 'proceedings involve the trial of a serious question of material consequence to the company', a finding that the applicant possesses a collateral or ulterior purpose, will also be of relevance in deciding whether the applicant acts in good faith. Similarly, evidence which suggests that the proceedings are not 'in the best interests of the company', may establish an absence of good faith on the part of the applicant."

[30] With regard to the requirement of good faith, at paragraph [20] the learned Judge said:

> "I turn to examine the meaning of the requirement that an applicant must act 'in good faith'. In *Swansson supra* para 36, the first factor in determining whether the good-faith requirement was satisfied was held to be —
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> > 'whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success'.
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> In addition it was also held that, whether —
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> > 'the applicant honestly holds such a belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief'.
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> In our law it would not be a matter of mere assertion by an applicant that he possesses the requirement of good faith. Although the test for good faith is subjective, relating as it does to the state of mind of an applicant, it is nevertheless subject to an objective control. The state of mind of an applicant has to be determined by drawing inferences from the objective facts, as revealed by the evidence."

[31] In her founding affidavit Larrett stated that she was acting in good faith, that the continuation of the proceedings involved a trial of a question of material consequence to the company and that it was in the best interests of the company if she was to be granted the necessary leave.

[32] Standard Bank was understandably limited in what it could uncover in relation to the tender award but the aspects of the SLA to which it referred were in my view significant. The SLA objectively indicates that the tender was awarded to a corporate entity with Sinoku's registration number. Deonarain said that when Sinoku's bank account was opened it was represented that it traded as Independent Crushers Consortium. These factors and Standard Bank's denial that the company had an account with it, which must be accepted, required an explanation from Larrett, which she could have provided. They were factors crucial to her claim that the company was awarded the tender,

and consequently crucial to her assertion that the action involved a serious question of material consequence to the company and that continuation was in the best interests of the company. As pointed out above, she failed to deal with a number of other matters raised by Standard Bank in the answering affidavit which were within her knowledge, for example in what capacity she was a shareholder in the company, the company's written instructions to Standard Bank concerning official documents, and the details of the bank account alleged to be held by the company with Standard Bank. Her failure to deal with these crucial factors raised by Standard Bank forms part of the evidence from which inferences can be drawn in relation to her assertion of good faith.

[33] In my view, an inference that there are matters which she does not want to reveal and that she has not been frank with the court, is warranted. This must reflect adversely on her assertion of good faith, especially considering the significance of what was raised by Standard Bank. The significance of what was raised by Standard Bank also relates to whether or not Larrett has established the other two requirements of s 165 (5) (b). Similarly, her failure to deal with what was raised reflects adversely on her assertions concerning these two requirements. Consequently Larrett has not satisfied the requirements of s 165 (b) on a balance of probabilities. On this ground too, the application would fail.

[34] The following order will issue:

The application is dismissed with costs, including the costs of Senior Counsel.

J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: Adv S Cole, instructed by Don Maree Attorneys, East London

For the Respondents: Adv S Symon SC, Edward Nathan Sonnenbergs Inc, Sandton c/o Bax Kaplan Russell Inc, East London