IN THE KWAZULU NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA (REPORTABLE)

CASE NO. 10442/2011

In the matter between:

KENNETH HANSEN MOURITZEN APPLICANT

and

GREYSTONES ENTERPRISES (PTY) LTD FIRST RESPONDENT

DIGBY HALL MOURITZEN SECOND RESPONDENT

J U D G M E N T

NDLOVU J

Introduction

[1] This matter is brought in terms of section 165(5) of the new Companies Act[1] (the Act) read with the related subsections thereof. It is opposed only by the second respondent.

Factual Background

[2] The applicant, Kennneth Hansen Mouritzen, and the second respondent, Digby Hall Mouritzen, are brothers and the only directors of the first respondent,

1 Act 71 of 2008. The Act came into effect on 1 May 2011.

Greystones Enterprises (Pty) Limited (the company). The company has 198 shares in issue, all of which rank *pari passu* and 98 of these are held by the Mouritzen Family Trust, which is a trust established for the benefit of the Mouritzen family, that is, the family of both the applicant and the second respondent. The second respondent and his wife, Agnes, each hold 49 shares (a total of 98) and the remaining 2 are held by Shirley Johnston and Merle Larkan who are the sisters of the applicant and the second respondent. The trustees of the Mouritzen Family Trust are the applicant and one Lance Kenneth Cobrough.

[3] In terms of the notice of motion the applicant seeks relief against the respondents in the following terms:

> "The Applicant is given leave to institute action in the name of Greystones Enterprises (Pty) Limited against the Second Respondent claiming the following relief:
>
> "1. Digby Hall Mouritzen is ordered to render a full account of his expenditure on his First National Bank Limited credit card? number for a period of three years prior to the date of this order;
> 2. such account is to be delivered within ten days of the date of this order;
> 3. a debatement of the said account;
> 4. payment to the applicant of whatever amount appears to be due to the applicant upon debatement of the account;
> 5. costs of suit …"

[4] The applicant and the second respondent, as co-directors, are paid equal monthly salaries by the company. In addition to their salaries an arrangement was put in place in terms of which personal credit cards were issued in the names of each one of them. The credit cards were linked to the company's First National Bank account in the sense that all credit card transactions are automatically debited to, and paid by, the company. To the extent that the applicant alleges gross abuse of the personal credit card used by the second respondent to the detriment and prejudice of both the company and its shareholders, particularly the Mouritzen Family Trust, of which the applicant is the trustee, the applicant now seeks an order granting him leave to institute an

action in the name of the company against the second respondent for the relief set out in the notice of motion.

Submissions and arguments

[5] It was common cause that the applicant and the second respondent were at loggerheads and that the relationship between them has been strained for a long time. As a result a number of disputes have arisen between them, some of which have culminated in court litigation. The second respondent alleges that this application is only a ploy that the applicant is now employing to further his personal vendetta against the second respondent, which the applicant denies.

[6] In his founding papers the applicant alleges that in or about March 2010 a certain staff member of the company drew to his attention that several fee notes issued by a firm of attorneys, namely Barkers Attorneys, in respect of professional services rendered to the second respondent in his personal capacity had been paid for by the company. Upon receiving this information the applicant approached his attorneys of record (Cox Yeats Attorneys) to investigate the matter, which the attorneys did. A letter dated 19 March 2010 was addressed by the applicant's attorneys to Barkers Attorneys.

[7] In their email reply dated 23 April 2009 Barkers Attorneys (*per* Mr Julian Murdoch) explained that since May 2009 the firm had from time to time acted for the second respondent and that initially the account for the services rendered was addressed to the second respondent personally. However, on 17 August 2009 the second respondent had instructed the attorneys to forward the accounts to the company for payment. In any event, Mr Murdoch indicated that "*Barkers will cause its records to be amended so that Digby* (the second respondent) *is once again reflected as the account holder for the entire period."* This reply did not satisfy the applicant but, instead, it only served to motivate him to pursue the matter to a further level.

[8] The applicant further submits that the expenses charged to the company by the second respondent for the use of his personal credit card have in recent months escalated out of all proportion as to what might be regarded as reasonable expenditure for a director and have reached a point where they are having an impact on the financial results of the company, a situation which is prejudicial to the company's shareholders, more especially the Mouritzen Family Trust.

[9] As a result, the applicant, through his attorneys, delivered by post to the company a letter dated 23 May 2011, which letter served as a demand in terms of section 165 of the Act ("the demand")[2]. The demand was responded to by the second respondent by an email dated 30 May 2011 which he addressed to Mr Graham Cox, the applicant's attorney[3]. In the email the second respondent disputed any suggestion that he was cheating the company and alleged that he had been *"paying legitimate company expenses using the credit card",* contrary to the applicant whom he accused of being the culprit in that regard. Concluding his email communication to the applicant's attorney, the second respondent said: *"I suggest you ask your client to tell the truth."*

[10] It is after this email response by the second respondent to the demand that the applicant has instituted this application. The applicant contends that he is acting in good faith and in the best interests of the company.

[11] In his answering papers the second respondent has set out a detailed background of the personal conflicts and hostilities that have been in existence and still continuing between him and the applicant. According to him it has been the applicant who has for many years abused his credit card facility by charging to the company many expenses which were not related to the company's

2 Annexure "D" to the applicant's founding affidavit.
3 Annexure "E" to the applicant's founding affidavit.

business. In this regard he quoted the following instances in which he alleged the company was caused to pay for the applicant's personal expenses:

1. Luxurious world travel, unrelated to the company, undertaken by the applicant and his life partner, Jo Ann Mellon.
2. Entertainment unrelated to the company.
3. Payment of expenses on behalf of entities other than the company in which the applicant had a direct or indirect interest.
4. Purchase of spares on behalf of entities in which the applicant or Jo Ann Mellon had a direct or indirect interest.
5. Payment of general personal expenses, including the dental and medical bills for the applicant and Jo Ann Mellon.

[12] The second respondent has insisted that every expense transacted through his personal credit card and paid for by the company was the expense which he incurred on behalf of the company or whilst acting in his capacity as director of the company. He denies that the company paid for any expenses which he incurred in his personal capacity for his own private purposes.

[13] A preliminary legal point was taken by Mr *Harrison*, who appeared for the second respondent, that the demand does not meet the requirement envisaged in subsection (2) of section 165 of the Act which prescribes that the demand has to be *served* on the company. Mr *Harrison* argued that, in this context, the word "*serve*" can only be understood to mean *service* on the company at its registered office or at its principal place of business. He pointed out that in this instance the demand was merely posted by ordinary mail to a postal address. This was neither service at the registered office of the company nor its principal place of business. In support of his proposition Mr *Harrison* referred me to the decisions in *Phase Electric*[4] and *Afric Oil*[5]. He submitted that the fact of the demand having come to the notice of the second respondent was irrelevant, because he received

4 *Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W).
5 *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N).

it in his personal capacity.

[14] Mr *Broster SC,* appearing for the applicant, submitted that the demand was properly served on the company. There was no dispute that the postal address to which the demand was forwarded was that of the company. Moreover, he observed that in the last two lines of the document it was reflected that copies of the demand were sent to the email addresses of both the then company's attorneys (Barkers Attorneys) and the applicant. Mr *Broster* further argued that the sole purpose of service was to notify the respondent to come to court and that once the court is satisfied that the company received the document it is immaterial how, in technical terms, the document was served. He referred me to the decision in *Odendaalsrus Municipality*[6] in support of his argument.

[15] On the merits, Mr *Harrison* submitted that this application is not being instituted in good faith and that the applicant has been driven by an ulterior motive occasioned by the animosity which exists between them. He pointed out, for instance, that in the auditors' report for the year ended 31 January 2009 it was reported, amongst other things, that "*a director of the company may have breached his duty to act in good faith by enriching himself at the company's expense by causing management fees of R720 000 in the 2008 year, payable by the joint venture company, Greystones Cargo Systems (Pty) Ltd, to be paid to an entity other than the company.*"[7] He stated that the director referred to in the report was in fact the applicant and that as a result of this accusation a civil action for the recovery of the management fees aforesaid was instituted against the applicant. That matter was already part-heard before this Court, the next trial dates being on 11 to 15 June 2012. He contended that this application was nothing more than a counter-charge which has no honesty in it.

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6 *Odendaalsrus Municipality v Odendaalsrus Gold, General Investment and Extensions Ltd* 1959 (1) SA 374 (A).

7 See the Auditor's Report dated 15 May 2009, at p90 of the indexed papers.

[16] However, Mr *Broster* argued that the sour relationship between the applicant and the second respondent has nothing to do with this case. What has to do with it was the question whether or not the company was being cheated. He pointed out that the second respondent was free to request the inspection of the applicant's credit card account and that the applicant was willing to accede to such a request. Specifically, Mr *Broster* referred to the applicant's founding papers where the applicant stated, in part, as follows:

> "I deny that I have refused to make details of the debits appearing on my credit card available to the Respondent. In this regard I tender to supply to the respondents with whatever details they or either of them may request in relation to transactions financed through the use of my credit card."[8]

The Issues

[17] I am satisfied that the issues for determination can be defined as follows[9]:

1. Whether the demand dated 23 May 2011 was properly served on the company in compliance with section 165(2) of the Act;
2. Whether, in seeking to have proceedings commenced against the second respondent –
   2.1 the applicant is acting in good faith; and
   2.2 it is in the best interests of the company that the applicant be granted leave to commence such proceedings in the name of the company.

Analysis and evaluation

[18] Under common law the director of a company was entitled to institute legal

8 See para 20 thereof, at p9 of the indexed papers.
9 See also 2nd respondent's Practice Note, at para 3.

proceedings either personally or in the name of the company in order to gain access to the books of account and records of the company. In *Randfontein Township Syndicate's Directors*[10] the Court (per Innes CJ) said:

> "No one director is entitled to retain the books of the company of which he is a director as against his colleagues, any more than one trustee in insolvency can hold the books of the insolvent estate as against his co-trustees. *Prima facie* the proper person to have the custody of the books of a company is the secretary, and all directors have access to the books. If any director is impeded in the exercise of his right to such access he may take action to establish it. The onus is on the respondent to show why the books should not be in the custody of the secretary",[11]

However, this common law position has since been changed by the introduction of section 165 of the Act.

[19] The Act stipulates that its provisions "*must be interpreted and applied in a manner that gives effect to the purposes set out in section 7".*[12] In turn, section 7 provides, in part, as follows:

> "The purposes of this Act are to –
>
> a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;
>
> b) promote the development of the South African economy by –
>
> i) …. ;
>
> ii) …. ;
>
> iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
>
> (c)-(h) …. ;
>
> i) balance the rights and obligations of shareholders and directors within companies;
>
> j) encourage the efficient and responsible management of companies …."

[20] In line with the principle of transparency in the management and governance of companies the Act seeks to enforce the right of access to

10 *Randfontein Township Syndicate's Directors v De Kock* 1910 TH 30.
11 *Randfontein Township,* at 32.
12 Section 5(1) of the Act.

company records, financial statements or related information by *"[any] person who holds or has a beneficial interest in any securities issued by a company*…"[13]

[21] To the extent relevant, section 165 of the Act provides:

> "(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.
>
> (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 –
>
> (a) is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;
>
> (b) is a director or prescribed officer of the company or of a related company;
>
> (c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or
>
> (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.
>
> (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.
>
> (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 (3), or the court does not set aside the demand in terms of that subsection, the company must -
>
> (a) appoint an independent and impartial person or committee to investigate the demand, and report to the board on -
>
> (i) any facts or circumstances –
>
> (aa) that may give rise to a cause of action contemplated in the demand or;
>
> (bb) that may relate to any proceedings contemplated in the demand;
>
> (ii) the probable costs that would be incurred if the company pursued any such cause of action or continued any such proceedings; and

13 Section 26 . See also section 31 of the Act.

(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

(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 –

(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

(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."

[22] The demand envisaged in section 165(2) of the Act is a precursor to an

application instituted under subsection (5) of that section. In the present instance the demand is in the form of a letter dated 23 May 2011 from the applicant's attorneys which was sent by post to the company at its postal address, namely, P.O. Box 22034, Glenashley, 4022 (Fax 031-5726099). The demand is worded as follows:

> "Dear Sirs
>
> CREDIT CARDS
>
> We act for one of your two directors, namely Mr KH Mouritzen. Your other director, namely Mr DH Mouritzen, has been causing the company to pay significant debits appearing on his personal credit card statements. The credit card in question is an FNB platinum credit card.
>
> Our client has reason to believe that some of the credit card liabilities incurred by Mr DH Mouritzen which have been charged to the company should not have been paid by the company as they were not expenses in respect of which the company was obliged to reimburse Mr DH Mouritzen. On the contrary they were personal expenses of Mr DH Mouritzen which should have been discharged by him.
>
> Mr DH Mouritzen has refused to make his credit card records available to Mr KH Mouritzen.
>
> Acting in terms of section 165 of the Companies Act our client hereby demands that you commence legal proceedings against Mr DH Mouritzen to compel him to produce and make available for inspection by Mr KH Mouritzen in his capacity as a director of the company-;
>
> 1. his monthly credit card statements from January 1999 to date; and
>
> 2. in respect of every debit appearing on those statements which has been charged to and paid by the company, a supporting voucher containing sufficient information to enable the company to determine whether or not the debit in question was a legitimate charge against the company.
>
> Your failure to comply with this demand within a period of fifteen business days of the date upon which you receive this letter will result in proceedings being instituted in accordance with the provisions of section 165(5) of the Companies Act.
>
> Yours faithfully
>
> GC COX
>
> COX YEATS"
> Direct Tel: 031 – 536 8519

E-mail gcox@coxyeats.co.za

Cc Barkers, jmurcoch@barkers.co.za

Mr K H Mouritzen, ken@cargo.greystones.co.za

[23] It is obvious from the face of the demand that copies thereof were sent to the email addresses of Barkers Attorneys (who were then representing the company) and the applicant.

Whether the demand was properly served on the company in compliance with section 165(2) of the Act

[24] The preliminary technical point raised by Mr *Harrison* related to his challenge of the manner of service of the demand on the company in that the service was not effected at the company's registered office or at its principal place of business. But before I deal with that specific point, it is important to examine section 165(2) with a view to clarifying what may otherwise amount to an anomaly or absurdity. The section provides: *"A person may serve a demand upon a company …"* (Underlined for emphasis). The use of the word 'may' has the potential of obscuring the legislative intent in this regard, to the extent that the Legislature might be perceived to have intended to confer some degree of discretion on the person concerned. However, I observe that the service of the demand on the company is an essential prerequisite for the institution of an application under section 165(5) and without which such person is obviously barred from launching the application. Given this observation, it is imperative and compulsory that a prospective applicant *must* comply with the service requirement before proceeding in terms of section 165(5). On this basis, the section ought, in my view, to be understood in the context that an applicant 'must' serve the demand on the company. It is a peremptory provision.

[25] There is a long catalogue of cases, to which I do not need to refer

exhaustively, dealing with the concept of "service" in the particular context of delivery of process or other documents to a party in legal proceedings or contemplated legal proceedings. In *Odendaalsrus Municipality*[14], above, the Court stated:

> "I shall at the outset deal with the phrase 'serve notice upon'. In my opinion the words, taken by themselves signify no more than that the subject-matter of the notice shall be communicated in writing to the person intended to be affected thereby. As the section contains no express directions or indications to the contrary, any informal mode of communication may be employed. Even personal notification is not essential provided only that the notice reaches the person concerned and effectually conveys to him the information sought to be brought to his knowledge."

[26] In both *Phase Electric* and *Afric Oil,* above*,* the issue at point related to the service of a demand contemplated in section 345(1)(a)(i) of the Companies Act[15] and section 69(1)(a) of the Close Corporations Act[16], respectively. These provisions were basically and substantially similar. In both cases the Court found that the provisions were peremptory in that strict compliance therewith was essential and prerequisite for an applicant to rely on the deeming provisions that the company or the close corporation, as the case might be, was unable to pay its debts. However, in my view, these two decisions are distinguishable. In both those instances the Act concerned particularly stipulated that the demand was to be served on the company or close corporation, as the case may be, *"by leaving the same at its registered office"*, which particularity is absent in section 165(2) of the Act.

[27] To my mind, there is no legal or logical basis to read into section 165(2) words to the effect that service of the demand must be made necessarily *'at its registered office or principal place of business'* when the ordinary grammatical

14 At 380 B-D.
15 Act 61 of 1973.
16 Act 69 of 1984.

reading of the section does not support such suggestion. If the Legislature had intended that to be the case it would have clearly done so as it did in respect of section 345(1)(a)(i) of the Companies Act, 1973 and section 69(1)(a) of the Close Corporations Act, 1984. The rules of statutory interpretation do not permit the insertion or addition into legislation by the Court what is not there provided, a *casus omissus*, for it is the function of the Legislature to do so, unless without such insertion or addition the legislative instrument concerned becomes meaningless or results in absurdity, in which case the Court's interpretation amounts only to an expression of the intention of the Legislature.[17] In this regard, Kellaway[18] submits:

> "Although the omission of certain words in a provision in an amending statute, which were there before, may well appear to be an oversight, a court should *not*, it is submitted, construe the provision as if the words were still there, particularly if the inclusion would clearly conflict with the intention or purpose of the amending Act."

I respectfully agree with the learned author's submission.

[28] In general terms, the purpose of 'service', in the present context, is clear: It is, firstly, to notify the person intended to be served of the nature, contents and exigency of the process of court or other document served upon such person and, secondly, to return to the court proof of such service in the manner prescribed by the law. Indeed, the Appellate Division (now the Supreme Court of Appeal) once observed in *S v Watson*[19] that the term: *"'Served' … has the ordinary connotation of 'legally delivered', i.e. delivered in accordance with the law so as to notify the person on whom it is served of its contents."*[20]

17 See: *Union Government (Minister of Mines) v Thompson* 1919 AD 404 at 425; *Osaka Mercantile Steamship Co Ltd v South African Railways and Harbours* 1938 AD 146 at 180; *Walker v Carlton Hotels (SA) Ltd* 1946 AD 321 at 330; *Minister van Waterwese v Von During* 1971(1) SA 858 (A) at 876E-F*; Joint Liquidators of Glen Anil Development Corporation Ltd (in Liquidation) v Hill Samuel (SA) Ltd* 1982 (1) SA 103(A); *Stafford v Special Investigating Unit* 1999 (2) SA 130 (E) at 140H-I.
18 Kellaway, *Principles of Legal Interpretation: Statutes, Contracts and Wills,* at 144.(footnote omitted)
19 1969 (3) SA 405 (A).
20 *Watson*, at 410 A-C.

[29] Rule 4 of the uniform rules provides, to the extent relevant, as follows:

> "(1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:
>
> (i)-(iv) ….
>
> (v) in the case of a corporation or company, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there be no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by the law; …
>
> (aA) Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings.

[30] As a precursor to the section 165(5) application, the demand qualified, in my view, to be treated on the same basis as a *'document initiating application proceedings'* in the sense that, as the company was then represented by Barkers Attorneys, the demand would, alternatively, be validly served upon those attorneys. The applicant's attorneys did not only post the demand to the company's postal address but they also emailed a copy thereof to the company's then attorney, Mr Julian Murdoch of Barkers Attorneys, to what clearly appears to be his official email address. These attorneys had subsequently proceeded to file, on behalf of the company, a notice to oppose the present application, which notice was served on the applicant's attorneys on 14 October 2011. Mr *Harrison* questioned the applicant's purported reliance on the notice of opposition for the reason that the applicant himself had, by his notice in terms of rule 7(1) dated 21 October 2011, disputed the authority of Barkers Attorneys to act on behalf of the company.

[31] The authority of Barkers Attorneys to act on behalf of the company was indeed challenged by the applicant at the stage when the application was launched. The fact of the matter, however, is that I am dealing here with the stage when service of the demand was to be effected on the company. There was no dispute by anyone, including the second respondent, to the effect that the company was, at that stage, represented by Barkers Attorneys. Instead, in his answering affidavit the second respondent simply confirmed the apparent long-standing relationship between the company and this law firm when he said:

- *"The First Respondent has used the services of Barkers Attorneys since early 2004."*[21]
- *"Barkers Attorneys rendered invoices from January 2004 to December 2007 on behalf of the First Respondent …."*[22]
- *"From January 2008 to August 2009, Barkers Attorneys rendered invoices in respect of work done on the same basis to me personally, because the Applicant suddenly and out of the blue disputed Barkers Attorneys' authority to act on behalf of the First Respondent."*[23]
- *"From September 2009 to date, Barkers Attorneys has (sic) invoiced the First Respondent, because Barkers Attorneys' authority to represent the First Respondent was again confirmed at a shareholder level and conceded by the Applicant."*[24]

[32] I am not persuaded by Mr *Harrison's* contention that the second respondent received, and attended to, the demand in his personal capacity when the second respondent responded to the demand by his email dated 30 May 2011.[25] It is significant to bear in mind that the demand was posted to the company's postal address and copies thereof emailed only to Barkers Attorneys (under circumstances alluded to above) and the applicant. *Ex facie* the demand there was no copy delivered to the second respondent in his personal capacity.

21 Para 28 of the 2nd respondent's answering affidavit.
22 Para 34.1 of the 2nd respondent's answering affidavit.
23 Para 34.2 of the 2nd respondent's answering affidavit.
24 Para 34.3 of the 2nd respondent's answering affidavit.
25 Annexure "E" to the applicant's founding affidavit.

Therefore, the second respondent could only have received and responded to the demand in his representative capacity as the director of the company.

[33] Accordingly, I find that the purposive interpretation of section 165(2) does not require that a demand referred to in that section must necessarily be served on a company by delivering it at its registered office or its principal place of business. In my view, any legally recognizable manner of service of any court process or document initiating application proceedings shall be adequate, provided that the court considering the matter, in the exercise of its discretion, is satisfied that the demand was duly served on the company for which it was intended. In the present instance, I am satisfied that the applicant's demand was properly and validly served on the company in the manner envisaged in section 165(2) of the Act.

[34] I have already found that when the second respondent responded to the demand, by his email dated 30 May 2011, he did so in his representative capacity as the director of the company. I am also satisfied, from the context and tone of the response, that the response constituted a notice of refusal on the part of the company to comply with the demand, as envisaged in section 165(4)(b)(ii) of the Act.

[35] I now turn to deal with the merits of the application. I have indicated that section 165 of the Act introduces a new regime which has overhauled completely the common law system governing the aspect of litigation by any person on behalf, and in the name, of a company. At the time of this judgment I am not aware of any existing domestic case law authority on the issue. As pointed out earlier, the purposes of the Act include promotion of compliance with the Bill of Rights and the development of the country's economy by encouraging

transparency and high standards of corporate governance.[26] The Constitution of the Republic provides, amongst others, as follows:

> "34. Access to courts
>
> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where applicable, another independent and impartial tribunal or forum."[27]

And:

> "39. Interpretation of Bill of Rights
>
> (1) When interpreting the Bill of Rights, a court, tribunal or forum -
>
> a) …
>
> b) must consider international law; and
>
> c) may consider foreign law."[28]

Hence, guidance has been sought in authorities from foreign jurisdictions.

[36] It appears that section 165 is a typical model of section 237 of the Australian Corporations Act of 2001 which, in turn, derived from section 165 of the New Zealand Companies Act of 1993. The latter was itself a derivative of section 239 of the Canada Business Corporations Act of 1985. I propose to refer to these foreign legislations.

Section 239 of the Canada Business Corporations Act, 1985

> **Commencing derivative action**
> 239. (1) Subject to subsection (2), a complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

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26 Section 7(a) and (b)(iii) of the Act.
27 Section 34 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution).
28 Section 39(1)(b) and (c) of the Constitution.

Conditions precedent
(2) No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that

(a) the complainant has given notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court under subsection (1) not less than fourteen days before bringing the application, or as otherwise ordered by the court, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;

(b) the complainant is acting in good faith; and

(c) <u>it appears to be in the interests</u> of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued. (Underlined for emphasis)

Section 165 of the New Zealand Companies Act, 1993

165 Derivative actions

1) Subject to subsection (3), the court may, on the application of a shareholder or director of a company, grant leave to that shareholder or director to—

(a) bring proceedings in the name and on behalf of the company or any related company; or
(b) intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending, or discontinuing the proceedings on behalf of the company or related company, as the case may be.

(2) Without limiting subsection (1), in determining whether to grant leave under that subsection, the court shall have regard to—
(a) the likelihood of the proceedings succeeding:
(b) the costs of the proceedings in relation to the relief likely to be obtained:
(c) any action already taken by the company or related company to obtain relief:
(d) the interests of the company or related company in the proceedings being commenced, continued, defended, or discontinued, as the case may be.

(3) Leave to bring proceedings or intervene in proceedings may be granted under subsection (1), only if the court is satisfied that either—
(a) the company or related company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or
(b) <u>it is in the interests</u> of the company or related company

that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole. (Underlined for emphasis.)

(4) Notice of the application must be served on the company or related company.

(5) The company or related company—
(a) may appear and be heard; and
(b) must inform the court, whether or not it intends to bring, continue, defend, or discontinue the proceedings, as the case may be.

(6) Except as provided in this section, a shareholder is not entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company or a related company.

Sections 236 and 237 of the Australian Corporations Act, 2001

"236(1)**[Person may bring proceedings on behalf company]** A person may bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if:

a) the person is:

i) a member, former member, or a person entitled to be registered as a member, of the company or of a related body corporate; or

ii) an officer or former officer of the company; and

b) the person is acting with leave granted under section 237.

…

237(1) A person referred to in paragraph 236(1)(a) may apply to the Court for leave to bring, or to intervene in, proceedings.

(2) The Court must grant the application if it is satisfied that;

(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and

(b) the applicant is acting in good faith; and

(c) <u>it is in the best interests</u> of the company that the applicant be granted leave; and

(d) if the applicant is applying for leave to bring proceedings – there is a serious question to be tried; and

(e) either;

(i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or

(ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied. (Underlined for emphasis)

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

(a) the proceedings are:

(i) by the company against a third party; or

(ii) by a third party against the company; and

(b) the company has decided:

(i) not to bring the proceedings; or

(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; and

(ii) did not have a material personal interest in the decision; and

(iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and

(iv) rationally believed that the decision was in the best interests of the company.

The director's belief that the decision was in the best interests of the company is a rational one unless the belief is one that no reasonable person in their position would hold.

(4) For the purposes of subsection (3):

(a) a person is a third party if;

(i) the company is a public company and the person is not a related party of the company; or

(ii) the company is not a public company and the person would not be a related party of the company if the company were a public company; and

(b) proceedings by or against the company include any appeal from a decision made in proceedings by or against the company."

[37] It is common cause that prior to the applicant instituting this application there had been a long-standing serious personal feud between him and the second respondent. In fact evidence has shown that this is not the only occasion in recent times that they are involved in a legal tussle. As already pointed out elsewhere, there is currently a protracted civil trial in which the applicant is being sued by the company for the recovery of certain management fees. It is this admitted personal animosity between the parties which the second respondent seeks to demonstrate to be the motive behind the applicant's decision to launch this application.

[38] There are two main Australian court decisions, the principles enunciated in which I have followed in this judgment. It seems to me apposite to set out a brief summary of facts alleged and conclusions reached in each of those cases.

A brief outline of the decision in Swansson v Pratt[29]

[39] The parties were Ms Swansson (the plaintiff/applicant), RA Pratt Properties (RAPP) (the first defendant/respondent) and Mr Peter Highland (the second defendant/respondent). Swansson and Highland were formerly married but divorced in May 1997. RAPP was incorporated by Swansson's parents as a

29 *[2002] NSWSC* 583 (3 July 2002) (*per* Palmer J).

family investment company. Originally the directors of RAPP were Swansson's parents, Mr and Mrs Pratt Snr, who together with Swansson, and her brother Mr Ian Pratt, were equal shareholders. In December 1992 Swansson and Highland became the sole directors of RAPP. However, Swansson claimed that she was not aware of the existence of RAPP until in or about March or April 1999.

[40] The current RAPP's directors were Swansson and her brother Ian Pratt, whilst the shareholders were Swansson's mother at 50% and the remaining shares being held equally by Swansson and Ian Pratt at 25% each. There were two other companies of which Swansson and Highland were shareholders and directors, during the subsistence of their marriage, namely PHP Construction Pty Ltd and Peter Highland Projects Pty Ltd (collectively "the two companies").

[41] At some point when both Swansson and Highland were RAPP's co-directors, RAPP sold its one-third interest in a certain property to a third party for the sum of $800,000 by means of a Memorandum of Transfer dated 28 October 1994 duly signed by Swansson in her capacity as the director. In terms of the Memorandum of Transfer at least $420,580 of the purchase price was payable to the two companies.

[42] Swansson later claimed that she was not aware when she signed the Memorandum of Transfer that the two companies were to receive at least $420,580 as stated and that she discovered about this transaction through an investigation by her solicitor, Mr Symonds, in or about June or July 2001. She alleged that Highland had a habit of making her sign documents without her knowing and understanding the contents and implications thereof.

[43] Accordingly, Swansson submitted that Highland, as RAPP's director at that time, had breached both his statutory duties under sections 180 and 181 of the then equivalent Corporations Act and his fiduciary duties under the general law of Australia and, on this basis, he was liable to compensate RAPP. She then sought RAPP to commence legal proceedings against Highland. However, Swansson's mother and Ian Pratt did not support her idea. Hence, Swansson approached the Court, in terms of section 237 of the Corporations Act of 2001, seeking leave to commence proceedings in the name of RAPP against Highland.

[44] Ian Pratt, who was a chartered accountant, filed an affidavit supporting Highland's case. He stated that he was engaged by Swansson to advise her in relation to her property settlement with Highland during their divorce proceedings. He said he also investigated the financial affairs of Highland and advised both Swansson and Symonds accordingly. The full background surrounding the payment of $420,580 to the two companies was clearly explained to Swansson which, according to Pratt, she understood and accepted. As a result, that payment of $420,580 was taken into account in working out the provisions of the deed of divorce settlement between Swansson and Highland, which was ultimately approved by the Family Court[30] on 3 September 1996.

[45] The Supreme Court of New South Wales took into account, amongst others, the following factors and evidence in determining whether or not to grant the application under section 237:

1. The majority of shareholders (75% held by Swansson's mother and Ian Pratt) did not approve of Swansson's idea for RAPP to commence legal proceedings against Highland.

2. The improbability of Swansson's version that she discovered only in March 1999 of the existence of RAPP (despite the fact that she was its

30 In terms of section 87 of the Family Law Act, 1975 (Cth).

director since December 1992) and, in any event, as to what it was, on the part of Swansson and Symonds, that prompted the said discovery.

3. The improbability that Ian Pratt would not have advised Swansson and Symonds of the results of his (Pratt's) investigation of Highland's financial affairs, particularly about the payment aforesaid made by RAPP to the two companies.

4. It was clear that Symonds was involved in one way or the other in the settlement of the sale of RAPP's interest in the property and, therefore, it was improbable that he knew nothing at all about the facts and circumstances underlying the sale and his client's (Swansson's) right to participate in its proceeds.

5. Swansson was entitled to apply to the Family Court[31] for an order revoking the Court's approval of the deed of settlement dated 3 September 1996 on the ground that it had been fraudulently obtained. In other words, an application under section 237 was not the only remedy that she had.

[46] On these and other reasons, the application under section 237 by Swansson, was dismissed.

A brief outline of the decision in Ragless v IPA Holdings[32]

[47] An application was made under section 237 of the Australian Corporations Act of 2001, whereby leave was sought to commence proceedings in the name of the defendant company, IPA Holdings (the company) for the recovery of certain assets, earnings and profits belonging to and due to the company. For some 12 years, since 1970, Mr Clive Lindsay Ragless and Mr Daron Jon Carnie

31 In terms of section 87(8)(a) of the Family Law Act.
32 *Ragless v IPA Holdings Pty Ltd (In Liquidation)* [2008] SASC 90 (Sulan J and Vanstone J concurred in the judgment of Debelle J).

engaged in a partnership business whose operation was to manufacture and sell pyrometers. A pyrometer was a device for measuring and controlling temperature in an industrial environment and it consisted of two parts, namely, ‘the sensor’ and ‘the controller.’ The partnership’s business only manufactured sensors to which controllers had been fixed.

[48] On 30 June 1982 the partnership was dissolved when Ragless and Carnie incorporated the company, which then took over the partnership’s business operations. Ragless and Carnie were the only directors of the company. On 1 July 1982 they established a business trust known as the IPA Trust which issued two units, one of which was held by a Ragless-controlled company, IPA Manufacturing Pty Ltd (“Manufacturing”) as trustee of the Ragless Family Trust. The other unit was held by a Carnie-controlled company, Onetemp Pty Ltd (“Onetemp”) (which was formerly known as Carnie Nominees Pty Ltd and later Industrial Pyrometers (Aust) Pty Ltd) as trustee of the Carnie Family Trust. The terms of the IPA Trust included the wishes and intentions of Ragless and Carnie in relation to the running and destiny of the company. Amongst others, the IPA Trust provided that its vesting day was to be 1 June 2003 when both Ragless and Carnies would retire after attaining the age of 60 years. On vesting day the IPA Trust would terminate and the company would be wound up. The assets and goodwill of the company business would be sold and the proceeds distributed to the unit holders.

[49] Late in 1990 an oral agreement was concluded between Ragless and Carnie whereby the company operation was restructured and separated into two divisions, namely, the manufacturing division which fell under the control of Manufacturing and the sales division which fell under the control of the then Industrial Pyrometers (Aust) Pty Ltd (later Onetemp). The manufacturing division was responsible for manufacturing sensors and the sales division responsible for

selling sensors and controllers. The 1990 agreement was executed in February 1991.

[50] On 25 June 1999 a written agreement (the 1999 Deed) was concluded between the company, Ragless, Carnie and others, whereby the manufacturing assets and sales assets (together with operating licences thereof) of the company were leased by the company to Manufacturing and Industrial Pyrometers (later Onetemp) respectively, on an annual consideration of $75,000 payable to the company. The goodwill of the business was, however, retained by the company.

[51] The 1999 Deed provided that the arrangement in terms thereof was to remain in force for a period of two years with effect from 1 July 1997. Further, that upon the expiration of the two year period either the company, Manufacturing or Industrial Pyrometers (later Onetemp) was entitled to terminate the agreement on three months' written notice.

[52] Significantly, it transpired subsequently that no provision was made either in the IPA Trust or in the 1999 Deed in relation to how the assets of the company, including the assets leased to Manufacturing and Industrial Pyrometers, would be disposed of in the event of termination of the 1999 Deed and the IPA Trust prior to the vesting day of the IPA Trust. In the meantime, on 8 December 1999, just over five months after the 1999 Deed had expired, Carnie and Industrial Pyrometers served a notice terminating the agreement. The disputes between Ragless and Carnie then started. The notice expired on 3 March 2000. Since then the acrimony between Ragless and Carnie gained momentum. Ragless asserted that, in terms of the 1999 Deed, they had agreed that the assets were to be leased to each division and thus, on termination of the

agreement, the two divisions would merge in order that the business would be sold as a whole, unless the parties agreed otherwise. On the other hand, Carnie averred that, with the exception of the goodwill, all assets of the company were transferred to each division. As a result of this misunderstanding each division continued to operate on its own without regard to what was due and payable to the company by each division.

[53] On 1 June 2003 the IPA Trust vested but the company was not wound up due to the disputes between Ragless and Carnie. However, on 28 November 2005 and at the instance of Ragless, the company was wound up by the Court. A liquidator, Mr John Hart, was appointed to conduct the winding up process. In due course Mr Hart, as liquidator, considered that there might be potential claims which the company was entitled to institute against either or both divisions. On 4 September 2006 the liquidator's solicitor notified the solicitors for both Ragless and Carnie that the liquidator was proposing to sell the company and that an offer was being made to them to purchase the assets. In his reply of 6 September 2006 Ragless stated his intention to seek leave of the Court, in terms of section 237, to bring an action on behalf of the company for the recovery of assets, earnings and profits (plus interest) acquired by any party, including Manufacturing and Onetemp, consequent upon any unauthorized use of the company's assets. On 3 November 2006 the application was filed. Carnie was granted leave to intervene on 12 December 2006.

[54] On 2 July 2007 the Master of the Court granted leave to Ragless to commence proceedings in the name of the company in terms of section 237. Carnie appealed the decision of the Master, hence the matter appeared, as an appeal, before the South Australia Supreme Court.

[55] The Court referred to various authorities and, in particular referred extensively, in approval, to *Swansson v Pratt*, above. For instance, on the requirement of 'good faith' the Court had the following to say, in part:

> "In Swansson at [38] to [41] Palmer J considered the kinds of conduct that might or might not satisfy the requirement of good faith. One instance of conduct which would satisfy the requirement is where the application is made by a current shareholder of a company who has more than a token shareholding and the derivative action seeks the recovery of property so that the value of the applicant's shares would be increased."[33]

[56] In considering the appeal the Court took into account the following evidence and factors:

1. The Master had accepted the liquidator's explanation that the company would not itself commence proceedings due to the fact that it had no funds. That explanation satisfied the requirement in s.237(2)(a).

2. The letter from the liquidator's solicitor dated 13 June 2006 indicated that the liquidator had investigated and considered that there were potentially valid claims which the company had against both Manufacturing and Onetemp pursuant to the 1999 Deed.

3. It was not in dispute that Ragless had, through his solicitor, stated to the Master in open court *"that he was ready, willing and able to account to Holdings for the assets of Manufacturing but believed that he should not have to do so until the claim by Holdings against Onetemp and Carnie had been resolved."*[34]

4. Ragless honestly believed that he had a good cause of action and reasonable prospects of success. He was therefore acting in good faith and in compliance with the requirement of s.237(2)(b)[35].

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33 *Ragless v IPA Holdings*, para 29.
34 *Ragless v IPA Holdings*, at para 30.
35 *Ragless v IPA Holdings*, at para 31.

5. The differences between Ragless and Carnie had frustrated the liquidator in his assignment of winding up IPA Holdings. The proposed action was aimed at resolving the stalemate thus created by the said differences and that the action would, in the circumstances, be in the best interests of IPA Holdings.[36]

6. Counsel for Carnie "*did not demonstrate any error on the part of the Master"* when the Master granted leave to Ragless to commence action in the name of IPA Holdings.

For these and other reasons the Court dismissed the appeal.

[57] It is clear from these two Australian cases that although the Court in *Ragless* dismissed the appeal (which was a decision essentially in favour of granting leave under section 237, contrary to the decision in *Swansson*) the principles enunciated in *Swansson* were followed and applied in every respect in *Ragless*. The reason for this was simply because the facts in *Ragless* were distinguished from those in *Swansson*. It seems to me that the facts in the present case are rather comparable to those in the former decision than in the latter.

Whether the applicant is acting 'in good faith' as envisaged in section 165(5)(b)(i) of the Act

[58] It is necessary to determine whether, on the facts of this case, the acrimony between these two brothers was the cause of the applicant seeking to have proceedings instituted against the second respondent in the name of the company. It is important that there must be a demonstration of good conscience

36 *Ragless v IPA Holdings,* at para 36.

and sincere belief on the existence of reasonable prospects of success in the proposed litigation and, therefore, absence of ulterior motive, on the part of an applicant. In *Swansson v Pratt* the leaned Judge stated:[37]

> "[I]n my opinion, there are at least two interrelated factors to which the Courts will always have regard to in determining whether the good faith requirement of s.237(2)(b) is satisfied. The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. Clearly, whether 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. The second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process.
>
> These two factors will in most, but not all, cases entirely overlap: if the Court is not satisfied that the applicant actually holds the requisite belief, that fact alone would be sufficient to lead to the conclusion that the application must be made for a collateral purpose, as to be an abuse of process. The applicant may, however, believe that the company has a good cause of action with a reasonable prospect of success but nevertheless may be intent on bringing the derivative action, not to prosecute it to a conclusion, but to use it as a means for obtaining some advantage for which the action is not designed or for some collateral advantage beyond what the law offers. If that is shown, the application and the derivative suit itself would be an abuse of the Court's process: *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509, at 526. The applicant would fail the requirement of s.237(2)(b)."

[59] In my view, factual proof of any pre-existing personal animosity between the parties, such as in the present instance, does not *per se* serve as conclusive proof that any person referred to in section 165(2) of the Act is not acting in good faith in serving a demand under that subsection, or instituting an application under section 165(5). However, personal animosity between the opposed parties is an important factor which the Court will always take into account together with other relevant evidentiary material presented before the Court in a given situation, in determining whether or not an applicant has, on a balance of probabilities, satisfied the 'good faith' requirement. In *Swansson v Pratt* the Court pointed out:

> "To take another example: a derivative action sought to be instituted by a current

37 Swanson v Pratt, Par 36-37.

> shareholder for the purpose of restoring value to his or her shares in the company would not be an abuse of process even if the applicant is spurred on by intense personal animosity, even malice, against the defendant: it is not the law that only a plaintiff who feels goodwill towards the defendant is entitled to sue: see eg Dowling v Colonial Mutual Life Assurance Society [1915] HCA 56; (1915) 20 CLR 509 at 521-2; 21 ALR 425 at 433; IOC Australia Pty Ltd v Mobil Oil Australia Ltd [1905] HCA 28; (1975) 11 ALR 417, at 426-7. On the other hand, an action sought to be instituted by a former shareholder with a history of grievances against the current majority of shareholders or the current board may be easier to characterize as brought for the purpose of satisfying nothing more than the applicant's private vendetta. An applicant with such a purpose would not be acting in good faith."[38]

[60] Indeed, there is no requirement in law that the directors of a company need to be friends or even to be in talking terms. What is of utmost fundamental importance, amongst others, is the fiduciary duty which they individually owe to the company of which they are the directors. This aspect of a director's responsibility *vis-à-vis* his or her company is equally relevantly important in relation to this application, in that such fiduciary duty entails, on the part of every director, the same duty as required of an applicant under section 165(5)(b), namely, to *'act in good faith'* and *'in the best interests of the company'.* Recently, in *Da Silva v CH Chemicals*[39] the Supreme Court of Appeal (*per* Scott JA) reminded all concerned that *"[i]t is a well-established rule of company law that directors have a fiduciary duty to exercise their powers in good faith and in the best interests of the company."*[40]

[61] I further take regard of the fact that the applicant has himself offered to have his own credit card account examined in the same way as he seeks to be done to the second respondent's account. Therefore, on this basis, the applicant is demonstrating that he has nothing to hide. Generally, such conduct would be consistent to a person who is acting in good faith.[41] Accordingly, I find that the

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38 *Swansson v Pratt*, para 41.
39 *Da Silva and others v CH Chemicals (Pty) Ltd 2008 (6) 620 (SCA).*
40 *Da Silva*, para 18.
41 Compare *Ragless v IPA Holdings*, at para 30. (See footnote 34 above).

applicant has succeeded to demonstrate on a preponderance of probabilities that he is acting in good faith.

Whether the proposed legal action is in the best interests of the company as envisaged in section 165(5)(b)(iii) of the Act

[62] The Act requires the Court to be satisfied that granting leave to commence the proposed proceedings *"is in the best interests of the company …".*[42] The learned Judge in *Swansson v Pratt*[43] made an observation which obviously equally applies in relation to section 165(5)(b)(iii):

> "At the outset, it is important to note that s.237(2)(c) requires the Court to be satisfied, not that the proposed derivative action ***may be, appears to be,*** or ***is likely to be,*** in the best interests of the company but, that it ***is*** in the best interests. In this respect, s.237(2) differs significantly from its counterpart in the Canadian legislation, which requires the Court to be satisfied that the proposed derivative action "appears to be" in the interests of the company, and from s.165(3) of the New Zealand Act which requires that the Court "have regard to … the interests of the company. These provisions seem to have led the Courts of those countries to the view that the best interests of a company need to be considered only in a prima facie way: see e.g. *Re Bellman and Western Approaches Ltd* (1981) 130 DLR (3d) 193,at 201; *Vrij v Boyle* (1995) 3 NZLR 763, at 765; *Techflow (NZ) Ltd v Techflow Pty Ltd* (1996) 7 NZCLC 261, 138."

[63] In most, but not all, instances this requirement will overlap with the requirement of good faith. An instance where a person does not act in good faith but is driven by an ulterior motive, such as personal vendetta, will generally not be in the best interests of the company. Of course, as indicated above, this assertion is made in the context and understanding that personal animosity *per se* is not conclusive proof of lack of good faith towards a respondent in the 165(5) application[44].

42 Section 165(5)(b)(iii).
43 *Swansson v Pratt*, at para 55.
44 *Swansson v Pratt*, para 41; *Ragless v IPA Holdings*, para 29.

[64] The applicant is a trustee of the Mouritzen Family Trust which has the majority shareholding in the company. Any financial maladministration and mismanagement of a company will naturally adversely affect the financial condition of that company. Therefore, as a representative of the majority shareholder, the applicant is entitled to call for a proper investigation of any suspected irregularities and abuse of the company's assets. The Mouritzen Family Trust has a direct and substantial interest in the success and prosperity of the company in that if the allegations against the second respondent are proven, that would have a direct negative impact on the value of the Mouritzen Family Trust's shareholding in the company.

[65] There is no dispute that in a period of 14 months (between May 2010 and July 2011) the second respondent has run up on his credit card 49013688665000 with First National Bank debits in the amount of R1,178,326.03.[45] The second respondent insists that all these expenses, charged to the company from his credit card account, were expenses rightfully incurred by him on behalf of the company or in his capacity as the director of the company. However, besides his say so, there is no proof that the expenses were indeed incurred on behalf of the company and for its benefit.

[66] The second respondent has not launched any counter-application in this matter. However, he is at liberty to demand similar information from the applicant in relation to the applicant's credit card account. If the applicant does not co-operate, as he has undertaken he will, then the second respondent may institute his own suit under the same statutory provisions. In my view, an order in terms of section 165(5) would be the most effective and expeditious way to resolve this matter in the best interests of the company.

45 See paragraph 16 of the applicant's founding affidavit.

[67] For the aforementioned reasons I find that the applicant has made out a case for the relief that he seeks. On the question of costs, it seems to me appropriate that costs be reserved for determination by the Court hearing the action which the applicant seeks leave to institute.

[68] Accordingly, the following order is made:

The applicant is given leave, in terms of section 165(5) of the Companies Act 71 of 2008, to institute action in the name of Greystones Enterprises (Pty) Limited against the second respondent, claiming the following relief:

1. Digby Hall Mouritzen is ordered to render a full account of his expenditure on his First National Bank Limited credit card number 4901368288665000 for a period of three years prior to the date of this order.
2. Such account is to be delivered within ten days of the date of this order.
3. A debatement of the said account is to be conducted.
4. Payment is to be made to the applicant of whatever amount appears to be due to the applicant upon debatement of the account.
5. The costs of this application shall be reserved for determination by the Court hearing the action referred to above.

Application heard on :	18 May 2012
Counsel for the applicant :	Mr LB Broster SC
Instructed by :	Cox Yeats
Counsel for the first respondent :	No appearance
Counsel for the second respondent :	Mr GM Harrison
Instructed by :	Sanan & Watts
Judgment handed down on :	8 June 2012