THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 503/2016

In the matter between:

LAZARUS MBETHE **APPELLANT**

and

UNITED MANGANESE OF KALAHARI (PTY) LIMITED **RESPONDENT**

Neutral citation: *Lazarus Mbethe v United Manganese of Kalahari* (503/2016) [2017] ZASCA 67 (30 May 2017)

Coram: Navsa, Theron and Swain JJA and Gorven and Mbatha AJJA

Heard: 10 May 2017

Delivered: 30 May 2017

Summary: Derivative action: Section 165(5)*(b)* of the Companies Act 71 of 2008: requirement of 'good faith': proof by applicant on a balance of probabilities: test subjective with objective control: state of mind of applicant determined by drawing inferences from objective facts: absence of collateral purpose not a self-standing requirement of good faith: relevant to determine whether issue 'of material consequence to the company': all of requirements of subsec to be satisfied: court retains controlling discretion whether to grant relief: alternative means to obtain the same relief: relevant to determine whether action in best interests of company.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Wentzel AJ sitting as court of first instance): judgment reported *sub nom Mbethe v United Manganese of Kalahari (Pty) Ltd* [2016] ZAGPJHC 8 (11 February 2016); 2016 (5) SA 414 (GJ).

The appeal is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

Swain JA (Navsa and Theron JJA and Gorven and Mbatha AJJA concurring):

[1] The appellant, Mr Lazarus Mbethe, was the chairperson and a director of the respondent, United Manganese of Kalahari (Pty) Ltd. The respondent is one of the largest producers of manganese ore in the world and conducts business as an open-cast miner of manganese ore, which it crushes and screens at a fixed crushing and screening plant, before export to purchasers internationally.

[2] During 2012, the appellant introduced the board of the respondent to Zastrospace (Pty) Ltd (Zastrospace), a mobile crushing and screening contractor. The reason for this was that in order to satisfy the then relatively high global demand for manganese ore, the respondent identified a need for the services of mobile crushing and screening contractors to process manganese ore, to supplement the production capacity of the respondent. The appellant promoted the services of Zastrospace on the basis that it had been established to benefit the local community in the Northern Cape Province, where the respondent conducts its mining

operations. The appellant contended that by appointing Zastrospace, the respondent would obtain the services it needed at a competitive cost and at the same time provide substantial financial benefits to the local community. As will be seen, the consequent contract that the respondent concluded with Zastrospace was a lucrative one.

[3] However, by the end of the first quarter of 2014 the market for the respondent's product deteriorated rapidly, and the respondent had to reduce its projected production. The need for mobile crushing and screening services diminished and the respondent's board resolved on 19 November 2014, to terminate the contract with Zastrospace.

[4] Aggrieved at the decision to terminate the contract with Zastrospace, as well as certain perceived deficiencies in the management of the respondent, the appellant, in his capacity as the chairperson and a director of the respondent, launched an application before the Gauteng Local Division (Johannesburg). The appellant sought an order granting leave to institute and prosecute to finality, legal proceedings in the name and on behalf of the respondent, in terms of s 165(5) of the Companies Act 71 of 2008 (the Act). The court a quo (Wentzel AJ) dismissed the application with costs, concluding that the appellant had failed to discharge the onus of establishing the requirements of the Act. The appeal is with the leave of the court a quo.

[5] The demands served upon the respondent in terms of s 165(2) of the Act[1], which formed the basis for the proposed derivative action were as follows:

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[1] '(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;

(a) The first demand alleged that the shareholders' agreement of the respondent was in conflict with the provisions of the Act and the Third Report on Corporate Governance in South Africa (King III[2]) in relation to the activities, authority and quorate decision-making process of the board committees of the respondent. It was alleged that these committees, acting in accordance with the shareholders' agreement, took decisions despite committee members not being board members. It was alleged that they acted autonomously and not in accordance with the delegated authority of the board. As a result, they effectively managed the business of the company with the board abdicating the business and affairs of the respondent to these committees. It was alleged that the shareholders' agreement was bad in law, rendering void or voidable all matters decided by these committees, to the extent that they were in conflict with the Act and King III. It was demanded that the necessary steps be taken by the respondent to have all board committee meetings of the respondent interdicted and suspended, pending the amendment of the shareholders' agreement to comply with the provisions of the Act and King III. A further demand was that steps be taken by the respondent to declare all decisions taken by any board committee of the respondent in conflict with the law, null and void and of no force or effect.

(b) The second demand alleged that the appellant in his capacity as the chairperson and a director of the respondent, suspended the holding of all committee meetings of the respondent on 21 July 2014, in an attempt to prevent the continued abdication of the board's authority to the board committees. It was alleged that Mr J Kriek, the CEO of the respondent, and Mr R Ramaite, a member of certain board committees of the respondent, wilfully defied this instruction of the appellant and proceeded to hold board committee meetings, at which binding decisions were taken. It was demanded that steps be taken by the respondent to interdict and

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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

(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.'

[2] King Code on Governance for South Africa 2009.

restrain them from convening, holding and taking any decisions at any committee meetings of the respondent. In addition, it was demanded that Mr Kriek be interdicted and restrained from acting as the CEO of the respondent with immediate effect, pending the outcome of disciplinary proceedings for his suspension or dismissal, on various grounds.

(c) The third demand was that steps be taken by the respondent for Mr Ramaite to be interdicted and restrained from acting as a member of any committee. The grounds for the demand were that he was not a director of the respondent and disobeyed the instruction of the appellant not to convene committee meetings. It was also alleged that he decided to terminate the Zastrospace contract, knowing that it was unlawful and to the prejudice of the respondent and its shareholders to do so.

(d) The fourth demand alleged that Mr I Letshalo had been duly appointed to replace Mr Ramaite as the deputy CEO of the respondent, who refused to relinquish this position. It was demanded that steps be taken by the respondent to interdict and restrain Mr Ramaite from purporting to act as the deputy CEO, and for an order declaring that Mr Letshalo was the duly appointed deputy CEO of the respondent.

(e) The fifth demand alleged that the termination of the contract with Zastrospace was unlawful and in breach of the contract in a number of respects. It was demanded that steps be taken by the respondent to reinstate the contract with immediate effect, or to have the purported termination declared unlawful and of no force or effect.

[6] Whether the appellant should be entitled to advance these demands by way of a derivative action, requires an interpretation of the provisions of s 165 of the Act. Differing interpretations by the parties of the provisions of subsec (5)*(b)*, lie at the heart of the dispute. The section makes provision for a statutory derivative action to commence or continue legal proceedings in the name and on behalf of a company, on the part of defined individuals and representatives or employees of the company. The section abolishes any right at common law of a person other than a company, to bring or prosecute legal proceedings on behalf of that company and is in substitution for the right at common law to bring a derivative action. In addition, the provisions of s 266 of the Companies Act 61 of 1973 (the 1973 Act), which made limited provision for a statutory derivative action, were repealed by the Act.

[7] It is not in dispute that the appellant has locus standi to seek leave to bring or continue proceedings in the name and on behalf of the respondent in terms of s 165(5) of the Act. The portions of the section which are relevant to a resolution of the present dispute, provide that a court may grant leave only if:

'*(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.'

[8] Central to the dispute between the parties is a divergence of their views on the nature of the onus which an applicant for relief in terms of the section has to discharge, in order to satisfy the court that the applicant 'is acting in good faith'. The appellant initially submitted in heads of argument, that good faith by an applicant who has shown the existence of a triable cause of action with a reasonable prospect of success, is presumed. However, at the hearing of the appeal counsel for the appellant correctly withdrew this submission. Section 165(7) of the Act provides that '[a] rebuttable presumption that granting leave is not in the best interests of the company arises . . .' where the proposed proceedings by the company are against a third party, or by a third party against the company and certain requirements are satisfied. Consequently, if the legislature intended a presumption to operate within the context of s 165(5) it would have said so. It was accordingly common cause that the appellant bore the onus of proving each of the requirements of s 165(5)*(b)* of the Act, on a balance of probabilities.

[9] However, the parties disagreed upon the correctness of the court a quo's conclusion as to what had to be proved to establish the requirement of good faith. The court a quo, relying upon the decision in the Australian case of *Swansson v Pratt* [2002] NSWSC 583 (3 July 2002), as approved in *Mouritzen v Greystones Enterprises (Pty) Ltd & another* 2012 (5) SA 74 (KZD) para 51, held that there were two interrelated questions in determining good faith:

'First, the applicant must honestly believe that a good cause of action exists and that it has a reasonable prospect of success. As a converse of this, the applicant must also show that the application is not brought for a collateral purpose.'

In addition the court a quo held that:

'The legislature has quite clearly placed a substantive onus on an applicant seeking to bring a derivative action to show that he is acting in good faith, which requires his establishing both elements of the requirement of good faith set out in *Swansson*. This is a substantive self-standing requirement for relief.' (*Mbethe v United Manganese of Kalahari (Pty) Ltd* [2016] ZAGPJHC 8 (11 February 2016); 2016 (5) SA 414 (GJ) para 170).

[10] The dispute concerned the elevation of the absence of a collateral purpose to the status of an element or criteria of the good faith requirement, to be proved by an applicant as part of the substantive onus relating to good faith. The appellant argued that this was incorrect. The respondent however, supported the interpretation of the court a quo, on the basis that the proper purpose component requires the appellant to establish his good faith by proving that he is motivated by a desire to protect the legal interest of the company and not the ulterior purpose of pursuing his own private interest.

[11] The importation from Australian law of the requirement that an applicant in order to establish good faith must in addition prove the absence of a collateral purpose, is unjustified when the provisions of s 237(2) of the Australian Corporations Act 2001 are compared with the provisions of s 165(5) of the Act. Section 237(2) provides that a court must grant the application if it is satisfied, inter alia that 'the applicant is acting in good faith' and 'it is in the best interests of the company that the applicants be granted leave' and 'if the applicant is applying for leave to bring proceedings – there is a serious question to be tried.' Notably absent from the Australian statute is the provision that the proceedings must involve the trial of a serious question 'of material consequence to the company' as is required by s 165(5)*(b)*(ii) of the Act. The presence or absence of a collateral or ulterior purpose on the part of an applicant, is clearly comprehended by the requirement that the question to be resolved is of material consequence to the company. It is therefore unnecessary to import this requirement as a self-standing requirement of the good

faith enquiry, when it more appropriately arises in determining whether the question in issue is of material consequence to the company. However, as will be seen, the determination of the presence or absence of a collateral or ulterior purpose on the part of an applicant, may in itself constitute cogent evidence of an absence of good faith. The court a quo accordingly erred in concluding that an applicant in terms of s 165(5) of the Act bore an onus of proving the absence of a collateral purpose, as a self-standing requirement of the good faith enquiry.

[12] Counsel for the appellant, although conceding that the appellant had to prove his good faith on a balance of probabilities, submitted that the threshold to discharge this onus should be a low one. It was submitted that this was necessary in order 'to give teeth' to s 165 of the Act and that to place a heavy and restrictive onus upon an applicant, would discourage prospective litigants to seek leave to institute the derivative action. To achieve this, an interpretation of the section was required which was consonant with the purpose of the legislation, outlined in s 7 of the Act. Compliance with the Bill of Rights, as well as encouraging transparency and high standards of corporate governance and the efficient and responsible management of companies, had to be considered when interpreting the section.

[13] In order to place the nature of the onus to be discharged by an applicant in terms of s 165(5)*(b)* of the Act in context, it is necessary to briefly examine the requirements of the common law derivative action abolished by the Act, as well as the repealed provisions of the statutory derivative action contained in s 266 of the 1973 Act.

[14] The common law derivative action owed its origin to the so-called exceptions, set out in *Foss v Harbottle* (1843) 67 ER 189, to the general principle that the company is the correct party to bring an action to redress a wrong done to it. One such exception arose where a fraud on minority shareholders was perpetrated and the claim was a wrongful failure on the part of the company to institute action, in breach of its duty to a minority shareholder. A member seeking to advance a common law derivative action against the company, bore the onus of proving not only the existence of the right of the company relied upon, but in addition the breach of the duty owed to the member by the company. The member's right to proceed

with the action was not unqualified as the court possessed a discretion whether to grant the remedy, or not.

[15] Section 266 of the 1973 Act introduced a statutory derivative action which enabled a member to bring an action to enforce the company's rights against wrongdoing directors and officers. An applicant bore the onus of satisfying a court of the existence of a prima facie case of wrongdoing to justify the appointment of a provisional curator ad litem to investigate whether the alleged wrong had been committed, and whether it was desirable to involve the company in such proceedings. On the return date the court would either discharge the provisional order, or confirm the appointment of the curator and issue further instructions as to the institution and conduct of the proceedings.

[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.

[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.

[18] For the same reason there is no basis for the obiter conclusion reached by the court a quo that the discretion to be exercised by the court is limited by the provisions of s 165(5) of the Act. The relevant portion of the subsec provides that '. . . the court may grant leave only if – . . .' the requirements of subsecs *(a)* and *(b)* are satisfied. The court a quo held that:

'The use of the word "may" in this context does not confer discretion but rather authority to the Court to only grant relief if the requirements of the subsection are satisfied. Where they are satisfied, there is no residual discretion conferred upon the court not to grant relief.'

Whilst it is correct that relief may only be granted if the requirements of the subsec are satisfied, this does not mean that the court is compelled to grant relief, if they are. If this were not so, the exercise by the court of a discretion would be precluded.

[19] Although the individual requirements of subsecs 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.

[20] 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[3] in determining whether the good faith requirement was satisfied was held to be:

'. . . whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success.'

In addition it was also held that, whether:

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[3] As pointed out above, the second factor was whether the applicant was seeking to bring the derivative action for a collateral purpose.

‘. . . 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.’

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.

[21] The appellant states that he has acted in good faith in order to protect the interests of the respondent. The respondent denies this and alleges that the appellant lacks an honest purpose in seeking leave to institute a derivative action in the name and on behalf of, the respondent. The dispute is whether the appellant has misrepresented his state of mind. In *R v Myers* 1948 (1) SA 375 (A) at 383 it was held that absence of reasonable grounds for belief in the truth of what is stated, may provide cogent evidence that there is in fact no such belief. In *Hamman v Moolman* 1968 (4) SA 340 (A) at 347A, the following was stated:

‘The fact that a belief is held to be not well-founded may, of course, point to the absence of an honest belief, but this fact must be weighed with all the relevant evidence in order to determine the existence or absence of an honest belief.’

[22] The enquiry is whether the evidence reveals reasonable (and therefore objective) grounds for the appellant's statement that he acts in good faith. If it is found that none, or insufficient, reasonable grounds are present to support his statement, this may establish an absence of good faith on his part. In addition, if the evidence establishes the presence of a collateral or ulterior purpose on the part of the appellant, the pursuit of which does not involve the trial of a serious question of material consequence to the company, or which is not in the best interests of the company, this may also constitute cogent evidence of the absence of good faith on the part of the appellant.

[23] Because the issue of whether the appellant discharged the onus of proving on a balance of probabilities that he acted in good faith was not referred for the

hearing of oral evidence, any factual disputes must be resolved in accordance with the dicta in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C. Any dispute of fact has to be resolved based on the facts relied upon by the respondent, together with any facts relied upon by the appellant which are admitted by the respondent. As held in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 SCA para 56 the version of the respondent can be rejected:

'. . . only if it is "fictitious" or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.'

[24] The termination of the Zastrospace contract, being an integral part of the statutory demand, is central to a determination of whether the appellant has discharged the onus of proving on a balance of probabilities that he acts in good faith. The court a quo concluded that an analysis of the demands against the factual matrix demonstrated that:

'. . . although dressed up in the noble cause of promoting good corporate governance and the upliftment of the Kuruman community, it is essentially all about the retention of the Zastrospace contract. It was only after the purported termination of this contract by way of committee that such committees have become the subject of complaint by the applicant in the interests of good corporate governance.'

[25] Before us, counsel for the appellant conceded that the fifth demand that the respondent take steps to reinstate the Zastrospace contract had been rendered moot by the passage of time, even at the stage when the matter was heard by the court a quo. The conduct of the appellant in advancing this demand however remains of significance in deciding whether the application is brought in good faith.

[26] The importance to the appellant of the termination of the Zastrospace contract as a ground for launching the application, is evident from his replying affidavit in which he states:

'The Zastrospace issue forms an integral part of the statutory demand. . . .'

It is therefore necessary to examine the evidence to determine whether reasonable grounds exist to support the appellant's statement that he has acted in good faith.

[27] The appellant maintained in his founding affidavit that:

(a) A reinstatement of the Zastrospace contract was necessary to protect the mining right of the respondent. This was because Zastrospace represented 27 local communities and its appointment was in compliance with the terms and conditions of the respondent's mining right, which permitted the continued exploration of the mineral resource.

(b) Notices served by the Department of Mineral Resources on the respondent, were of relevance to the respondent in retaining its mining right. The department notified the respondent on 12 November 2014 that it required an audit and compliance inspection in respect of the mining right to take place on 2 December 2014. The inspection had as its stated purpose procurement and mine community development requirements. This was preceded by a compliance notice dated 28 October 2014 to obtain, inter alia, details of contracts relating to selling arrangements in relation to minerals, as well as details of outsourced mining activities.

(c) A reinstatement of the contract was also necessary to ensure employment for members of the local community. He also brought the application in his capacity as a duly authorised representative of the Kuruman Community Trust (the Trust). According to the appellant, the Trust was formed by him with the specific purpose of representing the [BEE] requirement, which enabled the respondent to obtain its prospecting right and later its mining right.

[28] In response to these allegations the respondent stated that:

(a) As pointed out above, the need for the mobile crushing and screening service offered by Zastrospace was dictated by a high global demand for manganese ore, with associated high prices. In order to take advantage of the favourable market conditions, it was necessary to increase the respondent's production in excess of the capacity of its fixed crushing and screening plant. It was always clear that this service would only be required on an interim basis, for as long as the high global demand for manganese ore continued.

(b) Although the rates charged by Zastrospace were broadly in line with similar charges by other contractors, the principal motivating factor for the conclusion of the

Zastrospace contract, was the appellant's assurance and insistence that this would provide substantial financial benefits to the local community.

(c) No formal or long-term agreement was concluded with Zastrospace because of the unpredictability of future market conditions and because it had no experience or track record in the business.

(d) A financial rate per ton of manganese rock was agreed. Purchase orders were thereafter issued by the respondent for Zastrospace to process certain specified quantities of rock, which was the common practice in the industry. The quantities requested depended entirely on the respondent's own commercial requirements.

(e) During the period from May 2013 to May 2014 the respondent paid R32.5 million to Zastrospace. During this period, and in order to confirm the empowerment and local benefits claims advanced by the appellant, the respondents made enquiries concerning the affairs of Zastrospace. It transpired that a company Cytopix (Pty) Ltd received 30 per cent of all payments made to Zastrospace as a 'management fee'. Mr P Roelofse, who was the CEO and controlled the financial affairs of Zastrospace, was also the sole director of Cytopix. Mr Lourens representing the respondent, requested details of the management services allegedly provided to Zastrospace by Cytopix as well as access to the Cytopix bank statements. This request was refused. During the period from August 2013 to June 2014, payments from Zastrospace to Cytopix totalled R5.6 million. It was estimated that by the time the contract was terminated, these payments should have exceeded R7 million.

(f) According to Mr Lourens the payment by Zastrospace of 30 per cent of its total turnover to Cytopix as a 'management fee' would mean that it would spend less than 70 per cent of its total turnover on operational expenses, which was highly unusual for this type of business. In his view it was highly unlikely that it would make any profit, or acquire any retained earnings with which to benefit the local community. When regard was had to proper provision being made for statutory payments such as PAYE and VAT it would probably have operated at a loss, after payment of the 'management fee'.

(g) At the height of its operations Zastrospace employed approximately 12 to 13 persons based upon its payroll records. This number varied depending upon the

level of services provided from time to time. The payroll records reflected the employees as coming from the Kuruman communities. According to the respondent, employment of 12 to 13 individuals on an ad hoc basis provided minimal, if any benefit to the local community. The respondent submits that the continued employment of Zastrospace would only be to the benefit of Cytopix and not the local community.

(h) As regards the relationship between the appellant and Mr Roelofse, the respondent stated that the appellant had very close links to a range of companies bearing the 'ukupha' name. These included Ukupha Properties, Ukupha Technologies and Ukupha Holdings. Mr Roelofse and his assistant Ms Erasmus, frequently made use of an email address linked to a domain name 'ukupha' or 'ukuphagroup'. The Ukupha group was a private investment vehicle of the appellant, of which he was the main beneficiary and exercised management control. On those occasions when business opportunities with 'Ukupha' were discussed, the appellant always spoke on its behalf.

(i) As pointed out above, the Zastrospace contract was cancelled because the respondent's need for mobile crushing and screening services disappeared because the demand for manganese ore deteriorated rapidly. When the appellant learned that the management of the respondent believed that the relationship with Zastrospace should be terminated and referred to the Social Investment Committee for an independent decision, he threatened management and instructed KPMG, the respondent's company secretary, to cease all committee meetings. The appellant however, did not attend the meeting of this committee to argue for the retention of the Zastrospace contract, nor did he discuss this issue with the board of the respondent.

(j) Although the appellant stated that he was a duly authorised representative of the Trust, it had failed to produce up-to-date financial statements. These would have indicated its spending or funding, in pursuance of its [BEE] objectives, to show how it had benefited the local community.

(k) The notices from the Department of Mineral Resources simply referred to routine regulatory inspections. The respondent co-operated with the department in these inspections and no issue of importance or relevance, remained outstanding.

The very good relationship between the respondent and its statutory regulator continued as before.

[29] In response to these allegations the appellant in reply stated that:

(a) Zastrospace was employed on the basis of a 12 month trial period whereafter a term contract was envisaged by the parties as it would provide employment to the local community. For this reason its services should have been retained, or appropriate measures taken to retain some, or all of its services. It was accordingly misleading to categorise the Zastrospace contract with the other mobile crushing and screening contractors.

(b) He denied that he had any financial interest in Zastrospace and stated that he did not receive any economic benefit from it.

(c) Cytopix was a company owned by Mr Roelofse which managed Zastrospace and employed 12 individuals. The 30 per cent management fee was required to pay for the management expenses of Cytopix. Zastrospace commenced crushing manganese ore in June 2013 and continued to do so until its services were terminated in September 2014. During this time its turnover was approximately R1.7 million per month, excluding VAT. Unskilled labourers of the Kuruman community were employed by it and there was nothing sinister or untoward in its financial affairs. The respondent had no right to investigate the affairs of Cytopix and Mr Roelofse was under no obligation to assist in any enquiry.

(d) Ms Erasmus, the personal assistant to Mr Roelofse, made use of the Ukupha Group email address for an intermittent period prior to Zastrospace acquiring its own email address. He had known Mr Roelofse for many years and there was nothing untoward in their relationship.

(e) It was not denied that the respondent's requirement for mobile crushing and screening services declined to virtually nothing.

[30] Bearing in mind the dictum in *Plascon-Evans*, the following conclusions may be drawn from the evidence:

(a) The respondent was legally entitled to terminate the contract with Zastrospace when it did. Indeed, it would have been financially irresponsible to

continue with the contract, regard being had to the decline in demand for manganese ore at that time.

(b) Regard being had to the undisputed reasons why the services of a mobile crushing and screening contractor were initially required, there can be no basis for the appellant's contention that after a 12 month trial period, it was envisaged that a term contract would be concluded with Zastrospace. This is particularly so when the unpredictability of the future demand for manganese ore is considered.

(c) Regard being had to the fact that Zastrospace employed only 12 individuals from the local community, as well as the absence of any evidence to indicate how the local community benefited from the Zastrospace contract, it is clear that very little if any benefit accrued to them as a result of the contract. It appears that the main beneficiary of the Zastrospace contract was Mr Roelofse in his capacity as the CEO of Zastrospace, as well as the sole director of Cytopix, which was richly rewarded for the ‘management services’ provided to Zastrospace.

(d) Although there was no obligation on Mr Roelofse to furnish any information on the functions Cytopix performed to justify payment of 30 per cent of the total turnover of Zastrospace to it, as well as the manner in which the local community benefited from the contract, it should have been a simple matter for him to do so. That no affidavit was forthcoming from him, or indeed from members of the community, speaks volumes.

(e) There is no basis for the appellant's contention that the notices from the Department of Mineral Resources had any relevance to the cancellation of the contract with Zastrospace, nor that they had serious implications for the retention by the respondent of its mining right.

[31] Accordingly, the objective facts revealed by the evidence do not disclose any reasonable grounds to support the statement by the appellant, that he acted in good faith in seeking to have the contract with Zastrospace reinstated. The absence of reasonable grounds for belief in the truth of this statement, provides cogent evidence that he did not hold such a belief. The absence of any evidence to justify the reinstatement of this contract, particularly for the reasons and on the grounds advanced by the appellant, points inexorably to the presence of a collateral ulterior purpose on the part of the appellant, in order to explain his conduct. It is

unnecessary to speculate as to what this purpose was, it being sufficient to conclude that as a result, the appellant failed to discharge the onus of proving on a balance of probabilities that the proposed proceedings involved the trial of a serious question of material consequence to the respondent. In addition, he failed to discharge the onus of showing that he held the honest belief that the respondent possessed a good cause of action with reasonable prospects of success, to have the Zastrospace contract reinstated.

[32] As regards the remaining demands, it was only after the appellant became aware that the Zastrospace contract was likely to be terminated by a committee of the respondent, that the conduct of the committees of the respondent became the subject of complaint by the appellant, ostensibly in the interests of good corporate governance. The absence of good faith on the part of the appellant permeates all of these demands, which have as their origin his unjustified dissatisfaction with the termination of the Zastrospace contract.

[33] In addition s 165(5)*(b)*(iii) of the Act requires that it be '. . . in the best interests of the company that the applicant be granted leave to commence the proposed proceedings . . .'. If there are alternative means to obtain the same relief which do not involve the company being compelled to litigate against its wishes, this would be an important consideration in determining whether to grant leave to an applicant (*Swansson* supra para 60). The provisions of ss 20(4) and 163 of the Act provide an alternative avenue for the relief sought in demands 1 to 4.

[34] Section 20(4) of the Act provides that:

'One or more shareholders, directors or prescribed officers of a company, or a trade union representing employees of the company, may apply to the High Court for an appropriate order to restrain the company from doing anything inconsistent with this Act.'

The first demand alleges that the shareholders' agreement of the respondent is in conflict with the provisions of the Act in relation to the activities, authority and quorate decision making process of the board committees. The demand is made that the respondent take all necessary steps to have the holding of all board committee meetings interdicted and suspended, pending the removal of the inconsistencies

between the terms of reference of the board committees in the shareholders' agreement and the Act. The respondent denies these allegations and states that there is no inconsistency between s 72(2) of the Act and the shareholders' agreement, in particular schedule 13, being the approval framework. However, the appellant as a director would be entitled to apply to the high court for an order in terms of s 20(4), to restrain the company from doing anything inconsistent with the Act. In other words, the respondent could be interdicted from allowing board committee meetings to be held in terms of the shareholders agreement, contrary to the provisions of the Act.

[35] Section 163(1) of the Act provides that:

'(1) A shareholder or a director of a company may apply to a court for relief if –

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or

(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.'

In terms of s 163(2) of the Act, the court is entitled to make any interim or final order it considers fit, including an order restraining the conduct in question.

[36] The relief sought in terms of the second demand is an interdict to prevent Mr Kriek and Mr Ramaite from convening and holding board committee meetings of the respondent, on the grounds that the appellant as a director and chairman of the respondent, suspended the holding of all such meetings. The respondent disputes that the appellant possesses an absolute executive authority to unilaterally suspend meetings and determine whether any actions of the respondent and/or its executives are authorised. When regard is had to the fact that the appellant is only one of four directors of the respondent, it is apparent that the relief sought by the appellant is comprehended by either subsec (1)*(b)* or *(c)* of s 163 of the Act.

[37] The third demand is that the necessary legal steps be taken to interdict and restrain Mr Ramaite from acting as a member of all the committees on which he serves, as he is allegedly not a director of the company. It is alleged that in doing so he acted contrary to the express instructions of the appellant, colluded to reconvene meetings of the committees in breach of his duty of good faith and fiduciary duties to the respondent and in breach of clause 12.4 of the shareholders agreement. Again, the relief sought by the appellant is comprehended by either subsec (1)*(b)* or *(c)* of s 163 of the Act.

[38] The fourth demand is that the requisite legal steps be taken to interdict Mr Ramaite from purporting to act as the deputy CEO of the respondent and that Mr Letshalo be declared to be the duly appointed deputy CEO of the respondent. The appellant alleges that Mr Ramaite refused to relinquish his position as deputy CEO and purported to act as such on behalf of the respondent, which conduct was unlawful, unauthorised and to the prejudice of the respondent. The respondent stated that neither of these individuals have ever expressed any concern or problem with the appointment of two separate deputy CEO's. Again, the relief sought by the appellant is comprehended by either subsec (1)*(b)* or *(c)* of s 163 of the Act.

[39] The appellant therefore failed to prove on a balance of probabilities in terms of s 165(5)*(b)*(iii) of the Act that it was in the best interests of the respondent that he be granted leave to commence the proposed proceedings on behalf of the respondent.

[40] The following order is made:

The appeal is dismissed with costs, such costs to include the costs of two counsel.

K G B Swain

Judge of Appeal

Appearances:

For the Appellant:	J G Nel
	Instructed by:
	Natalie Lubbe & Associates Inc, Northriding
	EG Cooper Majiedt Inc, Bloemfontein
For the Respondent:	A E Bham SC (with J A Babamia)
	Instructed by:
	Mervyn Taback Inc, Parktown
	Webbers, Bloemfontein