IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 48920/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) *REVISED*: Yes

25 January 2022

DATE SIGNATURE

In the matter between:

KEITH OPPERMAN **APPLICANT**

And

SHERYL DE KLERK N.O **FIRST RESPONDENT**

ANTON OPPERMAN **SECOND RESPONDENT**

RONSOE (PTY) LTD **THIRD RESPONDENT**

EILEEN OPPERMAN **FOURTH RESPONDENT**

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 25 January 2022

JUDGMENT

MATSHITSE AJ

[1]. In this matter the applicant is seeking an order in terms of section 163, read with section 165[1] to be granted leave to act on behalf of the third respondent (the company), and to be appointed the director of the company, in order to institute action(s) to recover damages, allegedly suffered by the company, from the deceased estate of his late father ("the Late Mr Opperman) as well as from the fourth respondent, his step-mother (his late father's second wife).

[2]. The second respondent is opposing the applicant's application on her capacity as the executrix in the deceased estate of the Late Mr Opperman, and the fourth respondent is also opposing the application on her personal capacity.

[3]. It is worth noting that at the beginning the applicant did not cite the fourth respondent in this application, and it is clear that she has a direct and substantial interest in this matter. However after the intervention of the fourth respondent's attorney, the applicant amended his Notice of Motion in order to include the fourth respondent.

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[1] Companies Act, Act 71 of 2008

[4]. Both the second and fourth respondents are opposing the application on the basis that the relief sought by the applicant cannot be granted under section 163, and on the merits that the company did not suffer any damages.

[5]. The second respondent brought a counter application seeking an order that the deceased estate of the Late Mr Opperman reimburse her for the costs incurred in her personal capacity while defending this matter. The applicant is opposing the said counter application.

[6]. The fourth respondent is also opposing the applicant's application on the basis that the debt the applicant wishes to bring on behalf of the third respondent has already prescribed.

Common Cause Facts

[7]. The Late Mr Opperman and his two sons at one stage, that is, the applicant and the second respondent, were shareholders in the third respondent. The late Mr Opperman, held 50% of the allocated shares of the third respondent whereas the two son each one of them held 25% of the allocated shares of the third respondent and the Late Mr Opperman was the only director of the third respondent.

[8]. The third respondent was the owner of two properties being a Sectional title holder of Section number 25 in the scheme known as Martinmead situated at Nortmead Ekurhuleni Metropolitant Municipality and Portion 124 (a portion of portion 5) of the Farm Driefontein 85 (Driefontein property). During 2006 the third respondent sold Driefontein property for an amount of R5 793 862,00 and during 08 May 2008 he bought Section number 25 for R850 000,00 (Six Hundred and Two Thousand Rand) from the third respondent and during 08 May 2014 he sold the same property for an amount R620 000,00.

[9]. During 07 June 2006 the Late Mr Opperman then took a contract of assurance, a Multiple-Access Investment Plan (Endowment)[2] policy number 0013214257, with Liberty Life in the amount of R5 000 000,00, and retained the rest of the balance

[2] See annexure R10 attached to the applicant's founding affidavit

of the purchase prices of the sold properties. He nominated the fourth respondent as the beneficiary on the said policy.

[10]. The third respondent was deregistered during 19 March 2012. The late Mr Opperman then passed on the 18 June 2017 and on the 10 July 2012 Liberty Life paid the fourth respondent as a beneficiary mentioned in the policy.

[11]. During 2019 the applicant brought an application of reinstatement[3] of the third respondent before this court, of which the court granted an order under section 83(4) that CIPC to restore the third respondent's name on the register of Companies.

[12]. The applicant had instituted proceedings, which are pending in the Gauteng Local Division High Court, against the first respondent as executrix of his late father's estate (the late Mr Opperman) and also seeking a declaration that his late fathers will(s) are invalid based on the fact that at the time that he drafted those will(s) he was already suffering from Alzheimer. Therefore, this court is of the view that any disputes regarding whether first respondent acted in contravention of the Administrations Act and/or his late father's (the Late Mr Opperman's will(s)) will(s) is or are valid or not, it is not for this court to determine about them.

[13]. The facts and the parties in this application are the same, (with the exception of CIPC, The Ministers of Finance and Trade and Industry who are mot cited in this application) as in the case of the application of reinstatement of the third respondent. It was therefore vital that upon writing this judgement I should also take note of the judgement of that matter. And I have referred extensively to the said judgment. The pertinent difference between the two applications is that in this application the applicant is seeking an order to act on behalf of the company to institute proceedings against estate of the Late Mr Opperman and the fourth respondent, whereas in the reinstatement application he was seeking reregistration of the third respondent.

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[3]Keith Opperman vs The Companies and Intellectual Property Commission of South Africa and 5 others Case Number 54506/2019)

[14]. The first respondents counter application, that this court should order that the estate should pay her costs, is a matter that has to be taken up with the court that ordered that the funds of the estate be frozen, currently first respondent is cited in this proceeding not in her personal capacity but as an executrix of the estate of the Late Mr Opperman, as such she is at liberty to can approach the appropriate court to request the court to release funds in order to pay for the proceedings that involve the estate. As such this court will not make any ruling in that regard.

[15]. Therefore the only question that this court has to determine is whether the applicant has made up a case in terms of the provisions of Sections 163 and 165 to be granted permission (an order) to be appointed as a director of the third respondent and to institute proceedings on behalf the third respondent against the estate of his late father (Estate of the Late Mr Opperman) and the fourth respondent.

[16]. In order for the applicant to succeed with his application he must have *locus standi* (comply with section 163) right from the beginning he must have complied with the provisions of the section 165 (2) or 165(6), he must also show that he is acting in good faith, in bringing the application, the derivative proceedings launched by him or her must be in the company's best interest, and it must relate to a serious question of material consequence to the company[4].

LOCUS STANDI OF THE APPLICANT (SECTION 163)

[17]. It is not in dispute that the applicant did convene the meeting[5], which was held by means Zoom on 29 June 2020, the aim being to pass a resolution to institute proceedings by the third respondent (company) against the Late Mr Opperma's estate and the fourth respondent, and the said resolution, motion was not carried forward.

[18]. As a result the applicant then brought this application based in terms of section 163 read with section 165 of the Companies Act. Which, section 163, provides

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[4]. See page 25 Contemporary Company Law, 2nd Edition Juta by Farouk HI Cassim (Managing Editor) et al

[5] See Annexure RO 11 minutes of the meeting of Shareholders of Ransoe (Pty) Ltd

among others, that a shareholder can approach the court to grant him/her permission to institute proceedings on behalf the company.

[19]. Is the applicant a shareholder of the third respondent, does he have *locus standi* to can bring any application on behalf of the third respondent?

[20]. *Locus standi* is given to a registered shareholders a 'shareholder' is defined in section 1 of the Act as the 'the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be'. The definition appears to relate to registered shareholders as well as 'persons entitled to be registered as shareholders[6]'.

[21]. In her answering affidavit[7] the fourth respondent had stated that "The only two shareholders mentioned herein above was my late husband and the second respondent. The basis for this was the applicant renounced his shares within the third respondent on 12 March 2007 as per security transfer form marked AA5"

[22]. The applicant has stated[8] that "As for the reliance by the fourth respondent on the document signed by me on the 12 of March 2007, this has already been dealt with in the restoration application. He went further to explain the reason why he signed annexure AA5 by stating that "...because I was advised by Mr Van der Laan that my late father had committed a reportable irregularity and I was of the view that if my brother and I relinquished our shareholding in the company, my father's misappropriation of the proceeds would be somehow become regularised".

[23]. In reply to the above statement Malunaga AJ at paragraph 18[9] stated that "the applicant had stated as follows in his affidavit '10.3 As a result, I took an in-principle decision to transfer my shares in the company to my father. I did so because I formed the view that if my brother and I both transferred our shareholding to my father, his unlawful conduct would effectively become regularised. I *therefore on the 12 March 2007* signed the annexure attached as "EO1" to the affidavit by Eillen Opperman"

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[6] See page 779 of Contemporary Company Law, 2nd Edition Juta by Farouk HI Cassim (Managing Editor) et al
[7] At paragraph 29.2
[8] *at paragraph 38.7 (See replying affidavit)*
[9] See Keith Opperman vs CIPC and 5 others,

[24]. Paragraph 2 of the letter from DNL to the Late Mr Opperman dated 18 November 2008[10] stated that "Wat betref Anton (the second respondent) toon die state dat daar R1 757 941 aan hom vesrkuldig is, synde 25% van dividend reeds deur di maatkappy betaal. Reellings moeet met hom ge maak word oor die terugbetalling daarvan, Op die omblik too die stae dat u dit persoonlik ontrek het".

[25]. Paragraph 3 of the same letter stated that: "Na betaling van belastings en die opstel van reellings insake die bedrag versuldig aan Anton, kan met goedkeuring van die beide die maatskappy gederegistreer word"

[26]. I believe the above question was answered by the Late Mr Opperman by his letter dated 1 December 2008, as it was quoted at paragraph 38 by Malungana AJ when he stated among others that:- "with reference to your letter regarding the deregistration of Rensoe (Pty) Ltd (the third respondent herein), you are instructed to proceed to deregister the company as "Mr A Opperman understand that his shares are to be paid out on the death of both myself and Eileen Opperman. A note can be made that the value of 25% as calculated by DNL is to be paid across to him on the death of both parties and will not form part of any will and testament"

[27]. From the above one can observe that nothing is said about the applicant's shares in the company at the time of contemplating deregistering of the third respondent which means therefore that one can come to the conclusion that the applicant was no longer a shareholder of the third respondent.

[28]. I wish to pause here and observe from the judgement of the case of Keith Opperman vs CIPC when it came to issues raised on the affidavits during the said application, including annexure AA5 herein (EO5 in the said judgement), the court stated at paragraph 22 that "I have merely to consider whether the intervening party has made out a case sufficiently strong to conclude that she has 'direct and substantial interest' in the subject matter of the litigation. In view of the fact that some issues raised in the papers would come to court at some stage, when the court which tries the case will have to make a final decision, I will restrict myself to the issues relevant to disputes set out in the current application". At paragraph [44]

[10] See annexure AA 4 attached to the fourth respondent answering affidavit

the court went further to conclude that "As stated above, any dispute of facts or points of law raised will be dealt with by the court that tries the matter" Therefore I do not agree with the applicant when he stated in his replying affidavit[11] that AA5 was resolved during the reinstatement application.

[29]. There is nowhere in the papers were the applicant has stated that the shares that he had signed over (given) to the late Mr Opperman, was signed back to him. He does not even mention or state that the said AA5 was ever withdrawn. Accordingly he was no longer a shareholder of the third respondent. He did not have any *locus standi* on the affairs of the third respondent from 02 March 2007. He could not attend any meetings or even take part on the resolutions involving the third respondent affairs, as a shareholder.

[30]. In terms of annexure RO5[12], which apparently does not have a date, all the shareholders (including the applicant and the fourth respondent) held a meeting wherein they allegedly rectified the actions of, the late Mr Opperman, whereupon the late Mr Opperman and Mr Van der Laan wrote a letter to Liberty Life, informing them among others that the policy belongs to the company, third respondent. However, the late Mr Opperman allegedly wrote a letter to Liberty Life revoking his previous letter that he had co-signed and written with Mr Van der Laan.

[31]. According to annexure RO8[13] which is dated 07 September 2007, Mr Van der Laan informed the late Mr Opperman that "by informing/ instructing Liberty Life[14], to leave the policy contract as it was, that is, Liberty Life should ignore the instructions which were given to them"[15], it was a "reportable irregularity" the same annexure was cc (send) to the applicant and the second respondent. The applicant was made aware, to be precise, since the 07 September 2007, that his father (the late Mr Opperman) had rejected their rescue solution (rectification) of his unlawful actions/misappropriations of the funds.

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[11] See footnote 8 above
[12] Attached on the applicants founding affidavit
[13] *Attached on the applicants founding* affidavit
[14] See annexure RO7 attached on the applicants founding affidavit
[15] See annexure RO6 attached on the applicants founding affidavit

[32]. Thereafter everything was left as it is, that is, neither the applicant nor any shareholder nor Mr Van der Laan decided to bring any action against the late Mr Opperman for his unlawful actions or misappropriations of the company's funds, up until a resolution was taken to deregister the third respondent. The applicant does not deal with the issue of the resolution of deregistering the third respondent.

[33]. The fourth respondent had stated[16] "As a further testimony that the applicant was aware of the sale of the properties was that he participated in the winding down of the affairs of the third respondent. The applicant participated in signing of the resolution to the winding up of the third respondent". The court in the case of Keith Opperman vs CIPC and others[17], referred to the said resolution and the court came to the following conclusion that "...There can also, I think, be no doubt that the applicant signed the document reference annexure "EO9", as a shareholder of Ransoe (Pty) Ltd. I find it difficult to accept the parties' explanation about the purpose of the said document. On examination of the document it becomes apparent that it was contemplated by the shareholders to deregister the company in pursuance to section 82(3(b)".

[34]. It is clear from above that the applicant was well aware of what was happening in the affairs of the third respondent. Mr Van der Laan was also keeping him updated Therefore by stating that he was under the impression that everything was correct and he only became aware, during 2017, after the passing of his father and Liberty Life having paid the fourth respondent the said R5million is not truthful and it is rejected by court.

[35]. It is worth noting that the applicant gives the impression that the second respondent has been or is supporting him in this application, "My brother (second respondent) and I are of the position that I am to be appointed as director and that the company is to institute legal action against the first respondent and Eileen Opperman to recover the Liberty Funds"[18] and further that that the second respondent is in full support of this application"[19], however there is no confirmatory affidavit to that

[16] See paragraph 30 of the Fourth respondent's answering affidavit
[17] See paragraphs 40 and 42 of the judgement
[18] See paragraph 55.1 of the applicant's founding affidavit
[19] See paragraph 50 of the applicants' replying affidavit

effect, nor anything from the second respondent that he will abide by the courts decision.

[36]. Therefore I have come to the conclusion that since 02 March 2007 the applicant had relinquished his shares to his father and he was no longer a shareholder on the third respondent as such he does not have any *locus standi* in terms of the provisions of section 163 to can act or bring any application on behalf of the third respondent, and such the application stand to be dismissed on lack of *lous standi.*

DERIVATIVE ACTION SECTION 165(2) AND (6)

[37]. The applicant application still stands to fail under section 165(2) and (6) as stated below.

[38]. A director, who has for an example committed some wrong against the company or is otherwise in breach of his or her fiduciary duty to the company, could well face a derivative action instituted (in terms of section 165) against him or her by a minority shareholder, a director to protect the interests of the company.

[39]. Section 165 requires a person to apply to the court for leave to bring or continue proceedings in the name and on behalf of the company, and the court has the discretion to grant or refuse leave, on the basis of guiding criteria stated in the section.

[40]. In exceptional circumstances, a person may apply to the Court for leave to bring proceedings in the name and on behalf of the company without making the prior demand, or without affording the company time to respond to the demand. This may be the case where there are only two directors and shareholders and due to the fact that the company is unable to take a resolution to commence proceedings against one of the directors because he does not attend meetings where such a resolution is proposed, the Court can grant the other director leave to bring the

action in the name of the company and that sub-s (6) (*b*) and (*c*) were complied with[20].

[41]. The Court may grant leave only if it is satisfied that the delay required for the required procedures may result in irreparable harm (not merely "harm") to the company, or substantial prejudice (not merely "prejudice") to the interests of the applicant or another person (any other person). The concepts "irreparable harm" and "substantial prejudice" and "interests of the applicant" are not defined and are open to interpretation by the courts. There is a reasonable probability that the company may not act to prevent that harm or prejudice, or act to protect the company's interests that the applicant seeks to protect, and that the requirements under the Court's discretion in terms of sub-s (5) (*b*) are satisfied (sub-s (6))[21].

[42]. In *Kukama v Lobelo*[22] at para 27 the court stated that "granted leave to institute legal proceedings [in terms if s 162]. . . without making the demand contemplated in section 165 of Act 71 of 2008 in the name and on behalf of the company". This implies that s 165 must/should be used before a shareholder can bring the application. It is, with respect, not the situation as sub-s (2) gives the *locus standi* to the shareholder or director to bring the application. It was therefore also not necessary to ascertain whether the company authorised the application by a single director (at para 25)"

[43]. The applicant has submitted that the reason he failed to comply with the provisions of section 165(2) or 165(6) is that there was no director nor employee and the first respondent refusing to appoint a director "the inevitable result will be that the company (third respondent) not be able to make a decision, as envisaged by the Act, to respond to the demand". The court is of the view that since the third response was reinstated (reregistered) the status quo was brought back, that is, among others the Late Mr Opperman, was the director and was duly represented by the first respondent, as such, he was required to send his demand to the executrix, in her capacity as the director of the third respondent, notwithstanding

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[20] *Hacker v Hartmann and Others* (1415/2017) [2019] ZAECPEHC 22 (10 April 2019) para 45

[21] *Hacker v Hartmann and Others*

[22] [2013] ZAGPJHC 72 (31 May 2013)

the fact that during the "shareholders" meeting of the third respondent on the 29 June 2020[23] the shareholders voted against his resolutions.

[44]. The applicant failed to show, that the reason he did not give the company notice is, that it would have caused an irreparable harm (not merely "harm") to the company, or substantial prejudice (not merely "prejudice") to the his interests or any other person. He stated that the second respondent refused to appoint him as a director or to institute legal proceedings against the estate of his late father and the fourth respondent. On his papers applicant has submitted that third respondent did not have any board of directors. The question is why did he approach the first respondent to accede to his request, except if he had regarded her as "director" and shareholder of the company, acting in her capacity as representative (Executrix) in the estate of his late father.

[45]. There is a risk of applicants bringing frivolous or vexatious proceedings or of using the section for 'strike suits' or 'greenmail' in order to extract personal benefits for themselves as opposed to the company. The main control measure or safeguard is that the leave of the court is required to commence or continue derivative proceedings. Control for vexatious claims or frivolous claims include the requirement that a demand must be served on the company, the good faith test, the test of the best interest of the company, the possibility of the company having the demand set aside, and the scope for security for costs[24].

[46]. Frivolous" would mean a lack of seriousness because it is manifestly insufficient[25], while frivolous or vexatious would mean that the action is so unfounded that it could not possibly be sustained.[26] "Vexatious" would mean that the action is obviously unsustainable as a matter of certainty[27].

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[23] See Annexure RO11attached to the applicant's founding affidavit

[24] See Foot note 97 page 777 Contemporary Company Law)

[25] *S v Cooper and Others* 1977 (3) SA 475 (T)

[26] *Argus Printing & Publishing Co Ltd v Anastassiades* 1954 (1) SA 72 (W).

[27] *Bisset and Others v Boland Bank Ltd and Others* 1991 (4) SA 603 (D); *L D v Technology Corporate Management (Pty) Ltd and Others; S D v L D* (40036/16; 35926/16) [2018] ZAGPJHC 69 (23 February 2018) para 29

[47]. "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 v Pratt*. The first being whether the applicant honestly believes that a good cause of action exists and that it has a reasonable prospect of success. The second is whether the applicant is seeking to bring the derivative action for a collateral purpose, so as to amount to an abuse of process[28].

[48]. The onus to establish good faith, on a balance of probabilities, remains on the applicant and there is no evidentiary burden on the respondent to establish the absence of *bona fides*, let alone an onus: It would not be a matter of mere assertion by an applicant that he possesses the requirement of good faith because 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: Absence of reasonable grounds for belief (in the truth of what is stated) may provide cogent evidence that there is no such belief (*R v Myers* 1948 (1) SA 375 (A) 383) or that a belief that is not well-founded may point to the absence of an honest belief[29].

[49]. As I have indicated, that in this matter there are emotions and animosity between the parties, the fourth respondent stated among others that[30] 'the error herein by the applicant is clear indication that he had no real relationship with his father as his demise did not leave any cemented date of his passing in the mind of the applicant" and the applicant stated that[31] " I repeat what I said about personal relationship between the first and fourth respondent, and their mutually beneficial collusive relationship, ...My father was a wealthy man at the time of his death, and as a result of her deceit she is also now wealthy".

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[28] *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2016 (5) SA 414 (GJ) *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA) para 11 ([*Swansson v RA Pratt Properties Pty Ltd* (2002) 42 ACSR 313; 20 ACLC 1549; [2002] NSWSC 583)

[29] *Mbethe* (*a quo*) case *supra* para 174 *Mbethe* (SCA) case *supra* para 20

[30] for example at paragraphs 59 of the fourth respondent's answering affidavit

[31] at paragraphs 26 and 27 of his replying affidavit he

[50]. The parties in this application are somehow related, by blood to each other or had some long encounter amongst themselves. The court cannot ignore this issue of emotions and animosity between the parties because the question is, is the applicant genuine in this application, does he satisfy the requirements that in bringing this application he was acting in good faith and it is to the best interest of the company or he has an ulterior motive like to make sure that the fourth respondent does not inherit from the estate of his late father or if she inherit she should inherit as little as possible.

[51]. "An action sought to be instituted by a former shareholder or current shareholder with a history of grievances against the current majority of shareholders or the current board may be easier to characterise 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. Also, no personal (self) interest of an applicant, ie no shareholding or no financial benefit, may also be an objective element indicative of bad faith[32]". As I have already determine that since 2007 the applicant was not a shareholder of third respondent. As a result the court is of the view that the person who at least should have brought this application is the second respondent, as much as the applicant has stated that second respondent is supporting him, he is not cited as a second applicant or at least filed a confirmatory affidavit from him but instate he is cited in this application as a respondent.

[52]. The "interests of the company" under the equivalent provision in Australia has been interpreted to mean the company's "separate and independent welfare"[33] and elements and circumstances that will be considered by the Court in determining whether granting leave would be in the best interests of the company include the character of the company; the business of the company so that the effects of the proposed litigation on the conduct of the business of the company may be appreciated; whether there are any other means of obtaining the same redress so that the company does not have to be brought into litigation against its will the

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[32] *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA)

[33] (*Charlton v Baber* (2003) 47 ACSR 31; [2003] NSWSC 859 para 44)

ability of the defendant to meet at least a substantial part of any judgment in favour of the company, in order to assess whether the action would be of any practical benefit to the company[34]. This requirement can overlap with that of good faith, as an action driven by an ulterior motive may not be in the best interests of the company, although "best interests of the company" is purely objective. It therefore differs from the *bona fide* (belief) that it is in the best interest of the company, which is said, based on s 76 (4), to have a subjective and objective element.[35]"

[53]. At the time of application for reinstatement of the third respondent the applicant had indicated that "I am not aware of any other assets, real or immaterial, that belonged to the company at the time of deregistration. I am not aware of any assets that were transferred to the state's ownership as a result of the deregistration", except the money, from the sale of Driefontein Property, allegedly misappropriated by his father from the company. The original business of the company (the third respondent) was to "deal in properties" therefore after the sale of the last property it was no longer in business for quite some time up until it was deregistered as it was said in Mbethe vs United Manganese of Kalahari ". . . Court has 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"[36]. Therefore I find that it will not be in its best interest that an action be instituted on behalf the third respondent.

[54]. The applicant had indicated that the shareholders called a meeting[37] wherein a resolution was taken to rectify the actions of his father, which resolution was carried out by writing to Liberty Life to indicate to them that that money belonged to the company[38]. This meant that the shareholders rectified the actions of the late Mr Opperman, and as such agreed, if not directly, that the company did not suffer any losses or damages as a result of the late Mr Opperman actions. I believe that the applicant has an ulterior motive as to why he wants to be granted permission to

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[34] See *Mbethe v United Manganese of Kalahari* (SCA) at para 33

[35] *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 (5) SA 179 (WCC) para 74 and Piet Delport 2017 *THRHR* 657–666.

[36] *Mbethe v United Manganese of Kalahari*

[37] See annexure R05

[38] See annexure R06

bring an action against the estate of his late father and the fourth respondent, and also he has failed to show that he is acting in good faith in bringing this application

[55]. According to the said shareholders[39] resolution of rectifying the actions of the late Mr Opperman it was resolved that the people who were to be insured was the late Mr Opperman and the fourth respondent, they did not state that in the event of passing of the "insured" who will be the beneficiary (ies), the letter and resolution only indicated that "no other beneficiary should be indicated". Condition 9 of the Multi Access Endowment[40] contract stated "the owner may at any time appoint any beneficiary to receive any benefits payable on death of the Life Assured (subject to the rights of any cessionary) or remove such beneficiary. The appointment or removal of a beneficiary will not be binding on Liberty Life unless it is recorded by Liberty Life". The resolution or letter where not clear as to whether the fourth respondent was removed from being a beneficiary or not, the policy required that there be a beneficiary and as such the only person left to be the beneficiary would have been fourth respondent as the letter did not replace her with any other beneficiary.

[56]. Should Liberty Life had complied with the shareholders request, then in the event of the passing of the fourth respondent her estate was going to be the beneficiary. Yes the company (third respondent) would have been the owner of the money that insured the parties (the Late Mr Opperman and the fourth respondent), the condition of the policy required that a beneficiary be nominated, of which as I have indicated above the shareholders did not nominate any beneficiary. As a result I am of the view that it would not be of any practical benefit to the third respondent, to institute any legal against any person since the money would still have stayed with Liberty Life after the passing of the Late Mr Opperman, up until the demise of the fourth respondent.

[57]. As a result the applicant has failed to satisfy the requirements of section 165 and as such his application also stand to be dismissed on that basis.

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[39] See annexure R 05 (above)

[40] See annexure R10 attached to the applicant's founding affidavit

CONCLUSIONS

[58]. The fourth respondent has raised other defence in her answering papers, like prescription and four preliminary aspects, in view of the conclusion that I have reached I find it not necessary to can deal with those aspects and defence raised.

[59]. Therefore I have come to the conclusion that the applicant has failed to satisfy the requirements as stated in section 163 and 165 in order to be granted a directive order

[60]. In the result I make the following order:

Applicant's application is dismissed with costs

[redacted]

MATSHITSE AJ

Counsel for the Applicant:	ADV RUDOLF MASTENBROEK
Attorney for the Applicant:	EUGENE MARITZ PROKURER
Counsel for 1st Respondents:	ADV HEIN VAN DER MERWE
Attorney for the 1st Respondent:	LINDEQUE VAN HEERDEN ATTORNEYS
Counsel for 4th Respondents:	ADV I L POSTHUMUS
Attorney for the 4th respondents:	MERVYN TABAK INC T.A. ANDERSEN
Date of Hearing:	26 OCTOBER 2021
Date of Judgment:	25 JANUARY 2022