**IN THE HIGH COURT OF SOUTH AFRICA**

**WESTERN CAPE DIVISION, CAPE TOWN**

**REPORTABLE**

**Case No: 22058/2019**

In the matter between:

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| **MARIB HOLDINGS (PTY) LTD** | **APPLICANT** |
| and | |
| **PATRICK ALBERT PARRING N.O.** | **FIRST RESPONDENT** |
| **ANDRE PEPLER N.O.** | **SECOND RESPONDENT** |
| **ELIZABETH CATHARINA PARRING N.O.** | **THIRD RESPONDENT** |
| **ROBERT GLEN PARRING N.O.** | **FOURTH RESPONDENT** |
| **MARLON CLINTON PARRING N.O.** | **FIFTH RESPONDENT** |

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**JUDGMENT DELIVERED ON-LINE ON 7 AUGUST 2020**

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**FRANCIS, AJ**

**INTRODUCTION**

[1] Marib Holdings (Pty) Ltd ("the applicant") operates as an investment holding company and has applied in terms of section 165 (3) of the Companies Act, 71 of 2008 ("the Act") to set aside the demand served on it by Patrick Albert Parring N.O. ("the first respondent"), Andre Pepler N.O. ("the second respondent"), Elizabeth Catharina Parring N.O. ("the third respondent"), Robert Glen Parring N.O. ("the fourth respondent"), and Marlon Clinton Parring N.O. ("the fifth respondent"), who are all cited in their capacity as trustees for the time being of The Parring Family Trust ("the Trust"). For the purposes of this judgement, depending on the context, the first respondent is referred to as "Parring" and the respondents are collectively referred to as the "Trust" or the "respondents".

[2] This application is brought pursuant to a demand served by the Trust in terms of section 165 (2) of the Act on the applicant on 18 November 2019 ("the demand"). The relevant portion of the demand reads as follows:

> "*We have instructions to demand, as we hereby do, that the (applicant) commence legal proceedings against its directors, viz Blum Khan, Brian Figaji and Lionel Louw, to recover all directors remuneration paid to them to date, which remuneration was paid contrary to the provisions of s66 (9) of the Act, in order to protect the legal interests of the (applicant).*"

[3] The applicant has considered the demand, and its board of directors – who also constitute the majority of its shareholders – resolved to bring this application on the grounds that the demand is frivolous, vexatious, and without merit.

[4] The respondents have opposed the application and have persisted with their assertion that the payments made to the directors were *ultra vires* the powers of the applicant.

[5] The applicant was represented by Mr AM Smallberger SC and Mr T Crookes represented the respondents.

**RELEVANT FACTUAL BACKGROUND AND SUMMARY OF SUBMISSIONS**

It is common cause that:

[6] In the beginning of 2003, the applicant, together with various other parties, entered into a series of agreements with Entilini Concession (Pty) Limited ("ConcessionCo") and Entilini Operations (Pty) Limited ("OpsCo") (referred to collectively as "the Entillini entities").

[7] The so-called Entilini project was conceived for the purpose of operating a tollgate on the Chapmans Peak Drive in Cape Town. The applicant, together with the construction firm, Murray & Roberts and the engineering firm, Haw & Inglis,

held shares in ConcessionCo and OpsCo from the inception of the Entilini project until about 2016. The applicant remains involved in the Entilini project.

[8] The applicant's current directors, Lionel Louw ("Louw"), Brian Figaji ("Figaji"), and Blumerious Loudewyk Ezra Khan ("Khan"), together with Parring were all directors of the applicant when it became involved in the Entilini project. Parring was the applicant's sole representative on the board of directors of ConcessionCo and OpsCo from the inception of the Entilino project until March 2014 when he was removed both from the board of the applicant and as the applicant's representative on the boards of the Entilini entities.

[9] The departure of Parring from the boards of the applicant and the Entillini entities was precipitated by allegations by the applicant that Parring had contracted through a company with which he was associated, Exel Project Management Services (Pty) Ltd ("Exel"), to provide certain services to ConcessionCo. The applicant alleges that Parring never disclosed the existence to it of these services and the payments being made to Exel. The applicant also alleges that Parring had communicated directly with Murray & Roberts and sought to buy the latter's shareholding in the consortium without informing the applicant. The applicant considered these actions by Parring to constitute a breach of his fiduciary duties to the applicant. The applicant subsequently instituted legal proceedings against both Exel and Parring for the recovery of the sum R3 812 468, being the amount

paid to Exel. Parring has denied the allegations levelled against him and Exel and both have defended the legal proceedings instituted against them.

[10] Subsequent to Parring leaving the board of directors of the applicant, various payments were made to the applicant's remaining directors - Louw, Figaji, and Khan - in the amount of R2 078 030. These directors constitute the entire current board of directors of the applicant, and are the holders of 65.17% of the issued shares in the applicant. When the payments were made to the directors concerned, the shareholders had not adopted any special resolution in terms of section 66(9) of the Act. In this regard, sections 66(8) and (9) of the Act provides that:

> "*(8) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to subsection (9).*
>
> *(9) Remuneration contemplated in subsection (8) may be paid only in accordance with a special resolution approved by the shareholders within the previous two years.*"

It is these payments which form the basis of the demand served on the applicant and which forms the subject matter of the current application before this court.

**SUBMISSIONS BY THE APPLICANT**

[11] In its founding affidavit, the applicant does not dispute that directors' fees were paid to Louw, Figaji, and Khan. Nor does it dispute that such payments were not made in compliance with section 66(9) of the Act in that no special resolution by shareholders was passed to make these payments to the directors concerned. Instead, the main thrust of the applicant's submissions was directed at discrediting Parring (and the Trust) and questioning the motive behind the issuing of the demand.

[12] The following paragraphs from the applicant's founding affidavit, deposed to by Khan, illustrates the approach adopted by the applicant:

> "*61.1 The demand must be seen in the context of the background facts to which I have alluded above, the fact of the litigation I have described above, and the obvious fact that there is no love lost between the present directors of the (applicant) and Parring. It is plain that Parring seeks to kick up as much dust as possible in*

*regard to the directors of the (applicant) in order to advance his (and the Trust's) personal agenda.*

*61.2 The demand is not aimed at advancing the interests of the (applicant). As I have mentioned, at the time that Parring was a director of the (applicant) he did not insist that a special resolution was passed in regard to the directors' remuneration. His objection now, via the Trust, is not one bona fide advanced to protect the legal interests of the (applicant). It is also telling, as I have mentioned above, that the demand references events that occurred more than two years ago as a basis for the demand.*

*61.3 Parring is well aware of the work that has been performed by the directors. He – and the Trust – have also never complained as to the level of directors' fees. Rather, the Trust has stubbornly refused to cooperate, and has tactically employed its shareholding in the (applicant) to ensure that no special resolution can ever be passed. Having done so, it now seeks to deploy the demand for purposes wholly unrelated to protecting the legal interests of the (applicant).*

*61.4 The demand, in short, is a spiteful attempt by Parring – and the Trust – to get back at the directors of the (applicant). It has nothing whatsoever to do with protecting the legal interests of the*

*(applicant). Rather, it is aimed at promoting the interests of Parring (and the Trust), which is not something which I am advised is sanctioned by relevant section of the Act."*

[13] In its replying affidavit, the applicant changed tack somewhat by adding a new string to its bow. It alleged for the first time in reply that the amounts that were paid to the directors (and in respect of which the demand was made) were not paid as directors' fees by the applicant. The applicant opines that it was merely a conduit for payments from ConcessionCo and OpsCo to the directors of the applicant for the services that they performed, not for the applicant, but for both ConcessionCo and OpsCo. Thus, according to the applicant, the fact that ConcessionCo and OpsCo made these payments to the applicant does not mean that the funds the applicant received constitutes part of the applicant's profits, or could ever have done so, given that these funds were always paid to the applicant for a very specific purpose and were always intended to be paid over to the respective directors for their work at ConcessionCo and OpsCo.

[14] The applicant avers that Parring (and the Trust) knew about the conduit function performed by the applicant. This was made clear in a document[1] that was circulated to the shareholders of the applicant (including the Trust) prior to a shareholder meeting held in November 2017, which states *inter alia* as follows:

[1] Attached as "BK5" to the applicant's affidavit.

*"In order to bring (the fees payable by ConcessionCo and OpsCo) in line with the prescripts of the company's act of 2008 we brought the proposal to the AGM but it was rejected by one large shareholder. We are now listing the functions that were and are being performed by the Applicant's directors on behalf of the Applicant as a justification for the Directors fees that are made available by Entilini Concession and Operations. The Entities could have paid it directly to us but we agreed that it could be paid to the Applicant and we would distribute it from there as was done in the past."*

[15] The applicant concedes that the payments received from the Entilini entities are reflected in the applicant's financial statements as a "management fee" but avers that the description of the payments are "unfortunate" and "confusing" since these payments were not management fees but fees that had to be legitimately passed on to the directors who had performed services to the respective Entilini entities.

[16] In summary, then, it is the applicant's contention that the payments made to the directors concerned were not paid as a consequence of any legal obligation on the applicant's part to do so. Accordingly, it was not incumbent on the applicant to "regularise" such payments by obtaining a special resolution in terms of section 66(9) of the Act. The applicant was merely acting as a conduit for

payments received from OpsCo (on behalf of both OpsCo and ConcessionCo). Because no special resolution was required in the circumstances, the demand of the respondents was thus frivolous, vexatious, and without merit. There was no "legal interest" to be protected by the demand given that the payments in question were not paid from the applicant's funds, and the payments did not financially prejudice the applicant in any way.

**Application to strike out**

[17] As indicated, the applicant introduced a new "defence" to the demand in its reply. The applicant explained that the new matter was dealt with for the first time in its replying affidavit as it had to bring the application within 15 days[2] after the demand had been served and it was unable to place all the relevant factual issues before its legal representatives at the time. However, during the preparation of its replying affidavit, and during the course of consulting with its legal representatives, it became clear to the applicant that the directors' fees in question were not fees paid by the applicant. This issue was, accordingly, raised in the replying affidavit for the first time. The respondents were invited to file a further affidavit dealing with this new issue.

[18] Not surprisingly, the respondents objected to the raising of new matter in the reply. The respondents did not take up the invitation to file a further affidavit but

[2] s165(3) of the Act.

instead filed an application to strike out all those paragraphs dealing with the new matter in reply.

[19] An application to strike out any matter from an affidavit is regulated by Rule 6(15) of the Uniform Rules of Court, which reads as follows:

> "*The court may on application order to be struck out from the affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted."*

[20] An applicant for the striking out of any matter from an affidavit has to satisfy two requirements: firstly, that the matter to be struck out is scandalous, vexatious or irrelevant; and, secondly, the applicant must satisfy the court that he or she will be prejudiced if the matter is not struck out[3].

[21] At the hearing, Mr Crookes appeared to accept that the application was not vexatious or scandalous but argued that the new matter was irrelevant as, seen in the overall context of the case, the new facts would not render the Trust's demand "without merit". The respondents did not address the issue of what prejudice, if any, they would suffer if the new matter was not struck out. Indeed, given the respondents' submission that the new matter would, in a sense, make

[3] See, ***Beinash v Wixley*** 1997(3) SA 721 (SCA) at 733A-B.

no difference, the respondents cannot reasonably argue that they would be prejudiced by this new matter. In the circumstances, I dismissed the application to strike out. However, it is difficult to understand why the new matter was raised for the first time in reply since the basis of this new submission was "BK5" which was annexed to the applicant's founding affidavit. In addition, as Mr Crookes pointed out in argument, the applicant had sufficient time between the filing of the founding affidavit (on or about 9 December 2019) and the filing of the answering affidavit (on or about 24 January 2020) to take proper instructions and file a supplementary affidavit. These factors have a bearing on the issue of costs in relation to the application to strike out, which I will deal with below.

**RESPONDENTS' SUBMISSIONS**

[22] The respondents' answering affidavit was deposed to by Parring. His explanation with regard to the payment of directors' fees is set out as follows in the answering affidavit:

> *"115. Since the beginning of the concession period, directors serving on the board of ConcessionCo were paid a directors' fee through the relevant shareholding entity (initially, the applicant, or Thebe, or H&I).*

116. *The directors' duties in respect of the boards of OpsCo and the applicant, however always stood on a different footing. From inception in 2003 through until I was removed from those boards, the directors were never paid for the performance of their directors' duties to those two companies.*

117. *As the representatives of the applicant on the board of ConcessionCo, Brian Figaji and I were paid directors' fees only for those functions – in other words, all the directors' fees paid to me and to Brian Figaji were from the ConcessionCo board of directors. Despite their role as directors of the applicant, and their involvement in the Chapmans Peak Community Trust (for which Lionel Louw has always been largely responsible), neither Blum Khan nor Lionel Louw was paid any fee.*

118. *This was the case whilst we were all (me through the Trust) shareholders in the applicant and directors (me to safeguard the interest of the Trust) of the applicant.*

119. *The effect is that the benefits accruing to the applicant by virtue of the efforts of its directors fed the investment company's bottom line, and were available for distribution to the shareholders as dividends (save only for the ConcessionCo fees)."*

[23] The respondents aver that once Parring was removed as a director, the situation relating to the payment of directors' fees changed from one where the management fees that the applicant earned from the services rendered by its directors to the Entillini entities were retained as earnings (resulting in dividends to the shareholders) to one where those fees were disbursed as directors' fees to the directors concerned. The respondents illustrate these changes with reference to the applicant's financial statements. For example, in the year ending February 2013, directors' fees were paid to Parring in the amount of R40 351 and directors' fees were paid to Figaji in the sum of R48 420. In the year ending February 2014, director's fees were paid to Figaji in the sum of R48 904. However, after Parring's removal in March 2014, directors' fees increased significantly: R488 000 for the year ending 2015, R528 420 for the year ending 2016, R533 190 for the year ending 2017, and R528 420 for the year ending 2018. Given the diversion of directors' fees to the directors themselves, no dividend was paid in 2015, 2016, or 2017. According to the respondents, before Parring's removal, a dividend of R1 300 000 was paid to shareholders in 2014 and in the year before that a dividend of R700 000 was paid to shareholders.

[24] According to the respondents, on becoming aware of the practice of the current directors to divert the revenue due to the applicant, the Trust registered an objection by way of a letter written to Louw on 14 August 2017. In this letter, the Trust called for all payments made to directors to be reversed and for the correct

process in terms of the Act to be followed. A reply was received from the applicant in which the Trust was informed *inter alia* that a shareholders' meeting would be convened in November 2017 to discuss the issue of directors' fees. A shareholders meeting was indeed subsequently held on 18 November 2017. According to the respondents, the issue of directors' fees was discussed at the meeting within the context of non-compliance with the Act and Parring, representing the Trust, registered his objection against the payment of directors' fees. The respondent, thus, denied that the demand was vexatious, frivolous, or without merit.

[25] The applicant further addressed the delay in furnishing the demand, explaining that they only became aware of the requirement of a special resolution before the shareholders meeting in July 2017. Parring also explained that part of the delay in furnishing the demand was due to attempts to settle the litigation on the basis that if the Trust's shares had been bought out by the applicant, the Trust would have no further interest in the applicant pursuing its interest, and if the Trust became the sole shareholder, no derivative claim would be necessary for the litigation to commence.

**ANALYSIS AND EVALAUTION**

[26] Section 165 of the Act revokes the common-law derivative action of a person other than the company to bring legal proceedings on behalf of the company and replaces the common law with the statutory provisions contained in section 165.

[27] Section 165(2) of the Act provides that a range of persons and entities, including a shareholder, 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. In terms of section 165(3) of the Act, a company that is served with a demand 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.

[28] A demand under section 165(2) of the Act is a procedural precursor to the possible institution, by the person serving the demand, of a derivative action in the name and on behalf of a company. The "action" in question is the commencement or continuation of legal proceedings, or taking related steps, to protect the legal interests of the company. The Act does not define the term "legal interests" but it would not be out of place to define this term widely in view of the stipulation in the Act that its provisions must be interpreted and applied in a manner that gives effect to the purposes of the statute[4]. The purpose of the Act are set out in section 7 and includes encouraging high standards of corporate governance[5], balancing the rights and obligations of shareholders and directors

[4] Section 5 of the Act.
[5] Section 7(b)(iii) of the Act.

within companies[6], and encouraging the efficient and responsible management of companies[7].

[29] If the demand is not set aside by the court, the company is obliged in terms of section 165(4) of the Act to appoint an independent and impartial person or committee to investigate the demand and report to the board *inter alia* on facts and circumstances that may give rise to a cause of action contemplated in the demand, and whether it appears to be in the best interests of the company to pursue any such cause of action. If the company does not take these steps, or declines to comply with the demand, the person making the demand may then seek the court's leave to bring or continue proceedings in the name and on behalf of the company[8].

[30] A company may request the court to set aside a demand if the company can show that the demand is frivolous, vexatious or without merit; these are the only grounds on which a court may close the door on a demander. The courts have over time had cause to reflect on the meaning of "frivolous" and "vexatious" in a legal sense. "Frivolous" usually refers to the contemptuous attitude adopted by a litigant and the use of intemperate language during proceedings[9] or gross impertinence[10]. "Vexatious" may refer to proceedings instituted by a litigant which

[6] Section 7(i) of the Act.
[7] Section 7(j) of the Act.
[8] s165(5) of the Act.
[9] ***Caluza v Minister of Justice 1969 1 SA 251 (N)***.
[10] ***Van Eck Bros v Van der Merwe 1940 CPD 357***.

is designed to frustrate and harass a defendant[11] or proceedings instituted to cause annoyance to a defendant[12]. In ***LF Boshoff Investments v Cape Town Municipality***[13] Corbett J (as he then was) described proceedings which are frivolous and/ or vexatious as proceedings which are "*obviously unsustainable and this must appear as a matter of certainty and not merely on a preponderance of probabilities*", a sentiment echoed by Holmes JA in ***African Farms and Townships Ltd v Cape Town Municipality***[14].

[31] In the case of ***Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd***[15], GS Myburgh AJ had occasion to consider the yard stick that one is to use to determine whether a demand in terms of section 165(3) of the Act falls to be regarded as "frivolous, vexatious or without merit". After surveying the relevant case law dealing with the meaning of these words (including some of the cases referred to in paragraph [30] above), the learned judge concluded that:

> "*Given the meanings which our courts have attributed to the words 'frivolous' and 'vexatious', I think that to seek to draw any distinction may well amount to an exercise in splitting hairs. In my view, the words should be given their ordinary meaning. The result, as I see it, is that an applicant for relief in terms of section 165(3) is entitled to succeed if he is able to*

[11] **Hyman v Clulee 1935 TPD 176**.
[12] ***Fisheries Development Corporation of SA Ltd v Jorgensen and Another 1979 3 SA 1331 (W)***.
[13] 1969 (2) SA 256 (C) at 275C.
[14] 1963 (2) SA 555 (A) at 565D-E.
[15] 2014 (5) SA 532 (GJ).

*demonstrate that the demand is without merit in the sense that it cannot succeed".*[16]

The learned judge goes on to state as follows:

*"It seems to me that the correct approach is to consider the gravamen and thrust of the demand and to ask whether, on the available evidence, a company might conceivably succeed in their envisaged action/s. I specifically say "might conceivably" for it seems to me that issues of probability cannot properly be taken into account at this stage. The threshold which a complainant has to cross is a low one. Conversely, the onus and burden of persuasion which an applicant for relief in terms of section 165(3) bears is a rather heavy one".*[17]

[32] In ***Lewis Group Ltd v Woollam***[18], Binns-Ward J expressed some reservation with regard to the view expressed by GS Myburgh AJ in ***Amdocs*** that the onus on the company is a "heavy" one and instead remarked that the nature of the onus is that which ordinarily applies in civil litigation: the company must prove on a balance of probabilities that the demand is frivolous, vexatious, or without merit. According to Binns-Ward J[19],

[16] ***Amdocs SA Joint Enterprise (Pty) Ltd***, at para [14].
[17] Para [17].
[18] 2017 (2) SA 547 (WCC).
[19] **Lewis Group Ltd**, at para [55].

"(*h*)*eaviness does not enter the equation: there is no presumption in favour of the complainant that its demand is not frivolous, vexatious, or without merit, anymore than there is one in favour of the company that it is*. *The statutory provisions do not give rise to any inherent probabilities one way or the other*".

With respect, while it is correct that the nature of the onus is that which ordinarily applies in civil litigation, it cannot be doubted that the evidentiary burden placed on a company is not an easy one to discharge given the narrow basis on which a demand may be challenged.

[33] Whilst section 65 of the Act does not expressly prescribe the requirements the demand must meet, the person making the demand must make out the basis of a cognisable claim[20]. What is apparent from the wording of section 165(3) of the Act is that the company bears the onus to show on a balance of probabilities that the demand is completely lacking in merit, contemplating an action that cannot succeed. To this extent, the court's function is a limited one and it is certainly not called upon to adjudicate the merits of the demand but merely to ascertain whether there is a serious issue that merits investigation.

[34] In this matter, it is common cause that the current directors received payments in the form of directors' fees and that no special resolution was passed to sanction these payments. The main area of dispute between the parties is the source of

[20] See, ***Lewis Group Ltd,*** at para [56].

these payments and how these payments ought to be characterised. According to the applicant, these payments were for services rendered by its directors to entities other than the applicant and the applicant was merely a conduit for the payments to be made to the directors concerned. As such, the payment made to the directors ought not to be characterised as revenue accruing to the applicant. On the other hand, the respondent has averred that the payments to the directors were in fact management fees which the applicant earned from the services performed by the directors to the Entilini entities and that the revenue earned ought to be retained by the applicant either as earnings and/or disbursed as dividends.

[35] On the evidence available, and having considered the arguments of counsel, I am of the view that the applicant has not proved on a balance of probabilities that the demand is frivolous, vexatious, or without merit. I say so for the following reasons:

[35.1] Even if Parring's motive was improper and he had an axe to grind with the applicant due to the litigation instituted by the applicant against him, it cannot be legitimately concluded that the demand *per se* is vexatious, frivolous, or improper. As Ndlovu J remarked in ***Mouritzen v Greystone Enterprises (Pty) Ltd and another***[21], "*there is no requirement in law that the directors of a company need to be friends or even to be (on) talking terms.*" In any event, all the complaints levelled against Parring are

[21] [2012] 3 All SA 343 (KZD) at para [60].

directed against him in his personal capacity and not in his representative capacity as a trustee of the Trust. Indeed, the Trust is not a party to the litigation initiated by the applicant against Parring. In the applicant's founding affidavit, the Trust appears to have been tagged on as an incidental adjunct to Parring without any explanation.

[35.2] The directors of the applicant appeared to have been alive to the fact that the fees they were being paid fell to be classified as remuneration paid to them by the applicant. This certainly was the position of the applicant in its founding affidavit. The issue of directors' fees was also the subject of a vote at a shareholders meeting held in July 2017 where the Trust voted against the resolution. Again, in November 2017, the issue of directors' fees was placed on the agenda and was discussed at length at the shareholders meeting. Although there is some dispute between the parties on exactly what transpired at the November 2017 meeting, it is not disputed that the issue of directors' fees was discussed within the context of non-compliance with section 66(8) of the Act. Indeed, repeated reference was made during this meeting to the Act and the need for a resolution to regularise the payment of directors' fees. If the fees paid to the directors did not fall under the definition of "directors' remuneration" for the purposes of section 66 of the Act, why was it considered necessary to regularise the payment of these fees?

[35.3] During this hearing, counsel for the applicant was asked why the applicant was being used as a conduit to pay the fees earned by directors in the Entilini entities and why these entities did not simply pay the directors directly. The answer provided was that although this arrangement was not ideal, this is the way that it was done historically. The same answer was provided in response to a query relating to the terms of the contractual relationship between the Entillini companies and the applicant which obliged the applicant to be used as a conduit. Unfortunately for the applicant, this type of response does not engender much confidence in its case. This is particularly so given the fact that in all the annual financial statements for the relevant years, it is recorded that the applicant received "revenue in respect of the rendering of services" or "service revenue" and "management fees", and also records the payment of "employee costs" or "directors remuneration". No explanation could be furnished by the applicant why all the financial statements referred to the payment of directors' remuneration and why the payments received from the Entilini entities were recorded as "revenue". Certainly, on the face of it, it appears from the annual financial statements that the applicant earned a fee from the Entilini entities, and that this fee is reflected as revenue and not as funds received on behalf of some other persons. All these annual financial statements were signed by the current directors of the applicant.

[35.4] In an e-mail from Figaji to the directors dated 23 September 2014, he makes reference to “services to be delivered by (the applicant)” and then states that the remuneration for these services must be split between Figaji, Louw and Khan and that the applicant must remunerate these members accordingly. Again, the indication is that it is the applicant who was providing the services (*albeit* through its directors) and was being paid therefor by the Entilini entities.

[35.5] In December 2014, an instruction was given by Louw, as the applicant’s Secretary, to the accountants of the applicant to pay the directors directly and to pay over the tax (PAYE) to SARS. If the Entilini entities were the source of the payments to be made directly to the directors, surely these entities, and not the applicant, would have been obliged to withhold PAYE and pay it over to SARS?

[36] The Applicant raised a further contention in its heads of argument that was not apparent from the papers. Essentially, the applicant argued that the demand would be vexatious if the Trust had an alternative remedy that vested in it directly. This contention was not advanced by any of the applicant’s deponents and the applicant’s heads of argument does not identify the alternative remedy that would be available to the respondents, either jointly or severally. The applicant sought to rely on ***Mbethe v United***

***Manganese of Kalahari (Pty) Limited***[22], a case in which a demander made an application for leave to sue in terms of section 165(5) of the Act. The appeal court found that there were alternative remedies available to the demander in terms of sections 20 and 163 of the Act and held that it would be contrary to the best interests of the company for the company to be forced to take steps when those self-same steps could be taken by the demander *eo nomine*[23]. As Mr Crookes argued, in the matter at hand, the nature of the Trust's demand is such that the claim is not one that the Trust can pursue *eo nominee*. In the circumstances, there are no alternative means for the respondents to obtain the same relief, as was the case in ***Mbethe***.

[37] In light of the foregoing, it certainly appears to me that the respondents have a cognisable claim; there is a serious question to be answered and it cannot be said that the demand is without substance or is meritless. Remuneration paid to directors without the requisite special resolution would be *ultra vires* the powers of the applicant. The fact that payments may have been made unlawfully is, in my view, within the ambit of what may be considered to be a "legal interest" of the applicant. After all, the applicant has a duty to observe high standards of corporate governance and complying with the Act is one of the interests the applicant would be obliged to protect. Indeed, the directors of the applicant have

[22] 2017 (6) SA 409 (SCA).
[23] ***Mbethe,*** at para [33].

a fiduciary duty to ensure that the applicant complies with its statutory obligations.

[38] In the circumstances, I am of the view that the applicant has failed to discharge the onus of proving that the demand is frivolous, vexatious, or without merit.

**COSTS**

[39] There are two issues of costs that have arisen in this matter. Firstly, the costs of the application to strike out and, secondly, the costs in respect of the application brought by the applicant to set aside the demand ("the main application").

[40] In relation to the application to strike out, I found in favour of the applicant and dismissed the application. This application was argued by both counsel within the context of their submissions in respect of the main application, and comparatively little time was devoted to argument in respect of the application to strike out. In addition, although the new matter introduced by the applicant in its replying affidavit was relevant and not prejudicial to the respondent, it appears that the factual basis for the new matter was in the possession of the applicant when it drafted its founding affidavit. Given the limited time spent on the application and the circumstances surrounding the introduction of the new matter in the replying affidavit, I am of the view that it would be just and equitable if each party bear its own costs with regard to the application to strike out.

[41] In so far as the costs of the main application are concerned, the applicant expressed the view that if it was unsuccessful, it would be premature for the court to make a costs order at this stage of the proceedings and that the costs should be reserved pending the outcome of the report of the investigator. If proceedings were instituted for recovery of the directors' fees, the court hearing that matter could determine the costs of this application as well. If a claim is not instituted, either party could approach the court for an order in relation to the costs of the main application.

[42] I disagree with the argument advanced by the applicant. In my view, the main application is a discrete application and, as Mr Crookes correctly pointed out, there might not be any further litigation on the claim reflected in the demand. The investigation might uncover new facts that show the applicant has no claim, or the applicant might sue, without compulsion, to recover the directors' fees following the investigation, or the directors might reach a settlement with the applicant. The question of the costs in this matter should, therefore, not be dictated by the future conduct of the parties or by the result of any subsequent legal action; this court is perhaps in the best position to determine the issue of the costs of this application.

**ORDER**

[43] In the circumstances, I make the following order:

[43.1] The application to strike out is dismissed, with each party to bear their own costs.

[43.2] The application to set aside the demand served on the applicant on 18 November 2019 in terms of section 165(2) of the Companies Act 71 of 2008, is dismissed and the applicant is directed to pay the costs of the application.

**FRANCIS, AJ**