Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 4212/2017

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 8 September and 28 November 2022

Date of judgment: 12 April 2023

In the matter between:

NEBAVEST 1 (PTY) LTD t/a MINSTER CONSULTING Applicant

and

CENTRAL PLAZA INVESTMENTS 202 (PTY) LTD First Respondent

EDUARD WILLEM STRYDOM Second Respondent

LOUBSER RENE BESTER Third Respondent

JUDGMENT

BINNS-WARD J:

[1] This is an application brought in terms of s 165(5) of the Companies Act 71 of 2008 ('the Act') for leave to bring derivative proceedings in the name of the first respondent and on its behalf. The applicant (Nebavest 1 (Pty) Ltd t/a Minster Consulting) owns fifty percent of the shares in the first respondent company (Central Plaza Investments 202 (Pty) Ltd). The other shareholder is Salt Invest Holdings (Pty) Ltd ('Salt'). The second respondent is Eduard Strydom. He is the sole director of Central Plaza and also a director of Salt. Lourens René Bester, a co-director of

and shareholder in Salt, was cited as the third respondent. He was a director of Central Plaza for a short period in 2008-2009. The third respondent, who is also a director of African Unity Insurance Ltd, did not participate in the proceedings. The applicant gave notice of the withdrawal of its application against Bester in February 2018, without a tender to pay his costs. The withdrawal of the proceedings against Bester was effected after he brought an application against the applicant for security for his costs.

[2] It is not in dispute that the applicant served a demand on Central Plaza in terms of s 165(2)(a) of the Act prior to the institution of the application. It is also not in issue that Central Plaza, which has been dormant for a number of years and - according to the Windeed company report attached to the founding affidavit, appears to be in the course of deregistration for failure to lodge its annual returns - did not apply, in terms of s 165(3), to have the demand set aside or take any of the steps provided for in s 165(4) for the institution of an independent investigation into the subject matter of the demand. It follows that the requirements of s 165(5)(a) have been satisfied, and that what remains for determination in these proceedings is whether the requirements of s 165(5)(b) have been met.

[3] Section 165(5)(b) of the Act provides that –

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

(a) ...

(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.'

(iv)

It was pointed out in *Mbethe v United Manganese of Kalahari (Pty) Limited* [2017] ZASCA 67 (30 May 2017); 2017 (6) SA 409 (SCA), para 18, that even if the requirements of s 165(5) are met, the court is not compelled to grant the application.

[4] The hearing of argument in the application commenced on 8 September 2022. After a postponement agreed to by counsel in mid-argument, proceedings resumed on 28 November. At the resumed hearing, the applicant's counsel, without objection from his counterpart for the first and second respondents, handed up a document entitled 'draft order'. That document is an attenuated version of the notice of motion and, as I understand the position, sets out the relief that the applicant persists in asking for. It is convenient in the circumstances to use it, rather than the notice of motion, to describe the relief that is sought.[1]

[1] As pointed out in the first and second respondents' answering affidavit, the relief sought in terms of the notice of motion was very wide ranging. It contemplated derivative proceedings against the second and third respondents as well as the trustees of the Eduard Strydom Trust, Salt Invest Holdings (Pty) Ltd ('Salt'), African Unity Insurance Ltd, the Road Freight and Logistics Provident Fund, the Bargaining Council for the Road Freight Logistics Industry, BOO Spencer, Herman Lombaard

[5] The 'draft order' reads as follows:

1. The Applicant is authorised, in terms of section 165(5) of the Companies Act 71 of 2008, to bring proceedings in the name of and on behalf of the First Respondent against those person (*sic*) liable (including but not limited to the Second Respondent, Third Respondent, African Unity Insurance Ltd and Salt Holdings (Pty) Ltd) for the accounting for and/or repayment of all commissions and benefits paid by African Unity Insurance Ltd, directly or indirectly, to persons other than the First Respondent (including but not limited to payments made to Salt Investment Holdings (Pty) Ltd and/or the Eduard Strydom Trust) in respect of or arising from medical aid cover and other business conducted with the National Road Freight Industry Fund since 2010 to date hereof.

2. The Applicant's director, Mr Trevern Haasbroek ("Haasbroek"), is appointed and authorised to represent and act on behalf of the First Respondent in bringing the derivative action and to negotiate and/or settle all issues relating to the relief claimed by the First Respondent.

(African Unity's operations director) and Joe Letswalo. It was contemplated that the proceedings would be for a statement and debatement of account from and with the second and third respondents, the trustees, Salt and African Unity. The statement of account was to be in respect of all transactions 'directly and/or indirectly concluded by one or more of them in a personal or representative capacity during the period from January 2009 to date of judgment related directly and/or indirectly to the commission paid by African Unity in respect of both the funeral cover and medical aid cover business derived from the Road Freight and Logistics Provident Fund and/or the Bargaining Council for the Road Freight Logistics Industry. The contemplated proceedings would also include (i) a claim for damages against the second and third respondents for loss caused by the breach of their fiduciary duty to the first respondent, (ii) a delictual claim or claims against any other person who had caused the first respondent to suffer a loss, including Herman Lombard and Joe Letswalo and (iii) a damages claim against BOO Spencer for breach of its contract to provide auditing services to the first respondent.

3. The Applicant undertakes to pay the remuneration, legal fees and expenses due to and/or reasonably incurred by Haasbroek in respect of or in connection with bringing the derivative action. It is ordered that the Applicant shall be reimbursed for all such expenses as a first charge against the proceeds derived from the said derivative action.

4. Haasbroek is entitled, in terms of section 165(9)(e) of the Companies Act, to inspect any books and records of the First Respondent for any purpose connected with the legal proceedings.

5. The First Respondent and Second Respondent shall pay the costs of this application, jointly and severally, the one paying the other to be absolved.'

[6] One, Trevern Haasbroek was the deponent to the principal founding affidavit. He is a director of the applicant. Strydom deposed to the principal answering affidavit on behalf of both Central Plaza and himself as second respondent. He alleged that the applicant and Central Plaza are dormant companies.

[7] It is obvious, having regard to the structure of s 165 of the Act, that the nature of any proceedings in respect of which leave might later be sought in terms of subsection (5) to proceed derivatively must be foreshadowed in the demand that, in terms of subsection (2), has to precede any application for leave. A person cannot

demand in terms of subsection (2) the institution by company of claim *x* and later, in an application in terms of subsection (5), seek leave to proceed derivatively in the company's name with claim *y*.

[8] In its demand in terms of s 165(2) of the Act, the applicant relied on the alleged breach of two agreements. The basis for the complaint was said to be the non-payment by African Unity Insurance Ltd ('African Unity') of '*the full amount of the commission due to Central Plaza*'.

[9] According to the applicant, the two agreements were (i) an undated 'Non-Circumvention / Non-Disclosure Agreement' ('the NCNDA') concluded between Central Plaza (as 'the Discloser') and African Unity (as 'the Recipient') and (ii) an alleged oral agreement concluded during 2009 between the applicant (represented by Haasbroek), Salt (represented by Strydom and Bester) and African Unity (represented by Bester). The common cause facts suggest that the NCNDA must also have been executed in or about 2009.

[10] Clauses 3 - 5 of the NCNDA (which is far from a model of draftmanship) provided:

> '**3 Commission**
>
> 3.1 On successfully negotiating the closure of [?the] assistance business that will be underwritten by African Unity Insurance, African Unity Insurance will pay the Discloser a monthly commission fee of 10% (ten)

for as long as the underwritten agreement is in place with African Unity or any affiliate of African Unity Insurance.

3.2 This commission will be paid into a bank account that the Discloser will nominate.

3.3 The commission will be paid free of any deductions.

3.4 Each transaction will be viewed separate (*sic*) and commission will be paid accordingly.

4 Duration of this Agreement

This agreement is an evergreen contract. It applies to all transactions now and in the future between the parties, including subsequent renewals, extensions, renegotiations, additions, rollovers, or any parallel third party agreement of the same (*sic*), including transactions with parent/subsidiary and/or other persons, companies or entities. It is valid and enforceable regardless of the success or failure of the initial transaction or the success or failure of any project.

5 Default

5.1 Should any Party ("Defaulting Party") commit a breach of any of the provisions of this Agreement then the other Party (the "Aggrieved Party") shall (without prejudice to the Aggrieved Party's rights to claim damages and/or specific performance in terms of this Agreement or in law):-

5.1.1 be entitled to claim from the Defaulting Party any commission or other remuneration that the Defaulting Party receives either directly or indirectly, as a result of the breach;

5.1.2 be entitled to claim from the Defaulting Party any commission that the Aggrieved Party would have earned had there not been a breach.'

(Underlining supplied for highlighting purposes.)

[11] Clause 6 of the NCNDA provided as follows in so far as relevant:

'**6 General**

...

6.4 The expiry or termination of this agreement shall not affect such provisions of this agreement as expressly provided that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.

...

6.9 This agreement constitutes the sole record of the agreement between the parties with regard to the subject matter hereof. No party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein.'

[12] Therefore, according to its tenor, the NCNDA provided for the monthly payment by African Unity to Central Plaza of commission at ten percent in respect of African Unity's earnings on the assistance business to be underwritten by African Unity pursuant to the acquisition of such business by African Unity that was apparently under negotiation when the NCNDA was concluded. In the founding affidavit in this application, Haasbroek averred that the alleged oral agreement was concluded between (i) the applicant, of which he was the managing director, (ii) Salt, represented by Strydom and Bester and (iii) African Unity, represented by Bester.

The agreement was to the effect that Central Plaza 'would receive 10% commission on all business introduced to African Unity by the Applicant, represented by [him]self'. (I have underlined '*all business*' to highlight the distinction in the language with the use of the term '*assistance business*' in clause 3.1 of the NCNDA; see para [10] above.)

[13] The statutory demand alleged that the parties to the orally concluded contract agreed that Central Plaza '*would receive 10% commission on all business introduced to African Unity by* [the applicant], *represented by Haasbroek*'. It proceeded to state that the applicant, represented by Haasbroek, had introduced one Gabriel Cillie of RF Administrators (Pty) Ltd (subsequently renamed Silver Crest Risk Administrators (Pty) Ltd) to African Unity and Salt. RF Administrators was then the manager or administrator of the Road Freight and Logistics Industry Pension Fund ('the RFLIPF'). It alleged that the business underwritten by African Unity consequent upon the introduction included '*both funeral cover and medical aid cover*' relating to various road freight entities, including the National Bargaining Council for the Road Freight and Logistics Industry ('the NBC'). It complained that African Unity had paid commission only in respect of the funeral cover and only for a period of two years. It stated that no commission had been paid in relation to the medical aid cover business. It alleged that African Unity had paid '*a large amount of commission into the bank account of the Eduard Strydom Trust*'. The demand asserted that African Unity was under an obligation to account to Central Plaza '*in detail regarding all commissions paid in respect of both the funeral cover and medical aid cover business derived from the Road Freight entities*'.

[14] The demand went on to allege that Strydom and Bester had been in breach of their fiduciary duties to Central Plaza by being '*instrumental in ousting Silver Crest as the administrator and manager of the RFLIPF and replacing it with Salt, which is owned and controlled by them*'. (The 'ouster', about which more later, occurred in 2011, two years after Bester had ceased to be a director of Central Plaza.) That, it was alleged, had resulted in the termination of the commission income enjoyed by Central Plaza from African Unity. It alleged that Strydom and Bester had thereby, using information obtained while acting as directors of Central Plaza, caused harm to the latter in contravention of their duty, in terms of s 76(2)(a) of the Act, not to do so.[2] It also alleged that Strydom and Bester had acted at odds with the duty imposed on them in terms of s 76(3)(a) and (b) of the Act.[3] The demand pointed out that, on the basis of the aforegoing allegations, Strydom and/or Bester were, in terms of s 77(2)(a) of the Act, '*liable – (a) in accordance with the principles of the common law relating to breach of fiduciary duty, for any loss, damages or costs sustained by* [Central Plaza]'.

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[2] Section 76(2)(a) provides: '*A director of a company must-*

(a) not use the position of director, or any information obtained while acting in the capacity of a director-

(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company ; or

(ii) to knowingly cause harm to the company or a subsidiary of the company'.

[3] Section 76(3) provides: '*Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director –*

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person –

(i) carrying out the same functions in relation to the company as those carried out by the director; and

(ii) *having the general knowledge, skill and experience of that director*'.

[15] The demand proceeded to list a number of respects in which the directors of Central Plaza were alleged to have been remiss in their duties in respect of a number of obligations imposed on the company in terms of the Act and 'the various revenue statutes'. As the forementioned 'draft order' makes no provision for any derivative proceedings in relation to any of those matters, it is unnecessary to detail them.

[16] Insofar as remains relevant for current purposes, Central Plaza was called on by the demand in terms of s 165(2) of the Act to –

1. demand of African Unity that it (i) account to the company for '*all premium income received from the Road Freight entities in respect of funeral policies and medical aid cover*' and '*the commission payable to* [the company] *in respect of such premium income*' (ii) debate the account rendered and (iii) pay to the company '*the full amount of unpaid commissions due in respect of the aforesaid premium income*' and to institute proceedings to obtain such accounting and payment if African Unity failed to comply; and also '*if necessary*' request African Unity to agree to the rectification of the NCNDA '*by deleting the word "assistance" in clause 5.1.1* [an evidently intended reference to clause 3.1] *in order to avoid any uncertainty as to how clause 5.1.1* (sic) *should be interpreted*' and to institute legal proceedings to obtain an order for rectification of the agreement if African Unity refused the request.

2. demand of its directors (Strydom and apparently also Bester) (i) a full and proper account of all payments and benefits received, directly and/or indirectly from (a) the company itself, (b) African Unity and (c) Salt, and (ii) '*a full and proper disclosure of all interests they have directly or indirectly had in third parties, including Salt, that were instrumental in misappropriating opportunities available to* [the company]'. It was not expressly stated, but might fairly be implied, I think, that the statutory demand required of Central Plaza to institute proceedings against the directors for corresponding relief if they did not comply with what the company was required to demand of them.

[17] The allegations made in the statutory demand letter were essentially repeated, without much amplification, in the founding affidavit subsequently deposed to by Haasbroek on behalf of the applicant. Extracts from the bank statements of the Eduard (or Eddie) Strydom Trust were attached to the founding affidavit. These reflected substantial payments into the bank account, which Haasbroek, purporting to rely on information obtained from Strydom's ex-wife, alleged were commission payments by African Unity in respect of the medical aid cover business. They also reflected the appropriation by the trustees of those amounts for substantial payments to various parties, including Bester, Lombard and Johannes ('Joe') Letswalo. Letswalo was the principal officer of the RFLIPF and, until mid-2012, also the national secretary of the NBC.

[18] The founding affidavit drew no discernible distinction between the subject matter of the NCNDA and the alleged oral agreement. It did not in any way address the effect of the sole memorial provision in clause 6.9 of the NCNDA. The failure to

do so strikes me as significant in the context of the rectification of the NCNDA contended for in the s 165(2) demand letter (but not mentioned in the 'draft order' handed up by the applicant's counsel). If the rectification were effected, it would be difficult to discern any basis for a material distinction between the written and the alleged oral agreement. The applicant's reliance on the alleged oral agreement seems to me necessarily to imply an apparent acceptance by it that the parties to NCNDA clause 4 of the NCNDA was not wide enough to include the subject matter of the oral agreement; for it is clear that if it were, there would be no need or reason for the alleged oral agreement.

[19] It was also not explained in the founding affidavit how the word '*assistance*' came to be employed in clause 3.1 of the NCNDA. No interpretation of the term '*assistance business*' was offered, and no explanation was given of the character or subject matter of the negotiations evidently in progress when the agreement was concluded. There is also no detail in the founding papers as to the relative timing of the conclusion of the alleged agreements. In my view, one would have expected some particularity in that regard in the context of the other features that I just identified. It is also noteworthy that the founding affidavit gives no explanation why Salt should have been a party to the alleged oral agreement.

[20] Absent any explanation, the alleged conclusion of two agreements implies that the oral agreement was intended to provide for the payment of commission on business underwritten by African Unity that did not fall within the ambit of the '*assistance business*' referred to in the NCNDA. Objectively, it suggests that the

introduction of some other type of business must have been the rationale for the conclusion of the alleged oral agreement. It is common cause on the papers that Central Plaza has received commission from African Unity on only one category of underwriting business, namely, funeral cover. African Unity did pay Salt commission on medical aid policies underwritten by it, but that business commenced two years after the conclusion of the alleged oral agreement.

[21] In the first and second respondents' answering affidavit, Strydom explained, with reference to the definition of '*assistance policy*' in s 1(1) of the Long-Term Insurance Act 52 of 1998, that the term '*assistance business*' in clause 3.1 of the NCNDA related to the funeral cover policies to be underwritten by African Unity. Strydom asserted that the medical cover business was introduced to African Unity in quite discrete circumstances, which I shall describe later in this judgment.

[22] The Long-Term Insurance Act currently defines '*assistance policy*' as follows:

> '***"assistance policy"***' *means a life policy in respect of which the aggregate of –*
>
> *(a) the value of the policy benefits, other than an annuity, to be provided (not taking into account any bonuses to be determined in the discretion of the long-term insurer); and*
>
> *(b) the amount of the premium in return for which an annuity is to be provided,*
>
> *does not exceed R30 000, or another amount prescribed by the Minister; and includes a reinsurance policy in respect of such a policy.*'

Having regard to the definition of '*life policy*',[4] it is evident that a funeral cover policy would, subject to the value of the cover provided thereby being within the limit stated in the definition, fall within the defined meaning of '*assistance policy*'. (It would appear from the answering affidavit that at the relevant time the limit of the value of the policy benefits for an assistance policy was R10 000.) Indeed, s 75(c) of the Long-Term Insurance Act confirms that a reference in a law in force immediately before the commencement of that Act to '*funeral business*' shall be construed as a reference to the business of proving policy benefits under assistance policies.[5] (A medical aid insurance policy would be a '*health policy*', as defined in the Long-Term Insurance Act.)

[23] The distinction that the applicant makes between the two agreements is that the written agreement gave Central Plaza the right to commission on business introduced to African Unity by itself, whereas the oral agreement provided for the payment of commission to Central Plaza in respect business that the applicant (Nebavest, represented by Haasbroek) introduced to African Unity. That Central Plaza should be the recipient of commission from African Unity consequent upon the introduction of business to it by another company (Nebavest) appears odd on the face of matters. The companies are related, but why should the other shareholder(s)

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[4] '*Life policy*' is defined to mean '*a contract in terms of which a person, in return for a premium, undertakes to-*

(a) provide policy benefits upon, and exclusively as a result of, a life event; or

(b) pay an annuity for a period;

and includes a reinsurance policy in respect of such a contract;'.

[5] Such legislation includes the Avbob Mutual Assurance Society Incorporation (Private) Act 7 of 1951 (s 11), the Insurance Act 27 of 1943 (s 1, prior to repeal by Act 52 of 1998), and the Railways and Harbours Pensions Amendment Act 26 of 1941 (s 1, prior to amendment by Act 67 of 1980).

in Central Plaza (who have no interest in Nebavest) obtain a benefit from Nebavest's endeavours? I would have expected some explanation. The applicant's case does not provide one. Haasbroek did aver that the applicant received payments from Central Plaza for two years from commission paid on funeral cover, but he did not describe the basis upon which or the amount in which such payments were made, whether by declared dividend or contractual arrangement.

[24] Haasbroek estimated the monthly commissions paid by African Unity on the medical aid business to have been R2,9 million per month over a period of five years. He alleged that African Unity had paid '*a large amount of commission into the bank account of the Eduard Strydom Trust*', whereas Central Plaza had in fact been '*entitled to such commissions in terms of the aforesaid agreements*'.

[25] In the respondents' answering affidavit, Strydom stressed the vagueness and superficiality with which Haasbroek's founding affidavit sought to support the diffuse relief applied for in the notice of motion. He referred to Haasbroek's evidence as '*a cryptic exposition*'. It should be clear from my observations about the founding affidavit in the preceding paragraphs that I consider that his criticism of it was not without justification.

[26] Strydom referred to previous proceedings in this court under case no. 16559/2014, in which African Unity, Salt, Herman Lombard (operations director of African Unity), Bester and himself had sought an interdict against the applicant, Haasbroek, Cillie and one Frans Schoeman restraining them from publishing

defamatory matter concerning the commission payment issues that have now become the subject of the current proceedings. The papers in case no. 16559/14 were incorporated by reference in the current proceedings.

[27] The evidence in the earlier case was to the effect that Central Plaza had been established as the vehicle for a joint venture between the applicant and Salt to earn commission through the introduction of '*new business*' to African Unity. The applicants in the earlier case alleged that it was in furtherance of that object that a written agreement was concluded between African Unity and Central Plaza in respect of '*assistance business*'.

[28] Strydom denied the existence of the oral agreement relied on by the applicant in the current application. He contended that it would be 'nonsensical' for the parties to have reduced only part of their supposed contractual relationship to writing leaving the rest 'open to an informal oral agreement with no fixed or certain terms'. In this regard, understandably, he emphasised the sole memorial clause in the NCNDA.

[29] Strydom confirmed that, as contemplated in terms of the NCNDA, African Unity had underwritten the funeral business for the RFLIP Fund until October 2011 (i.e. for approximately two years), when its mandate was terminated and a concern called Guard Risk was appointed to take over the underwriting of the funeral policies. Strydom attached a copy of the letter of cancellation, dated 21 April 2011, addressed by the principal officer of the RFLIPF, Joe Letswalo, to Bester at African Unity. Strydom's averment that African Unity has since not underwritten any assistance

policies for the RFLIP Fund since October 2011 was supported in a confirmatory affidavit by Herman Lombard, African Unity's operations director. The applicant has not adduced any evidence to suggest that it is able to controvert the veracity of the evidence concerning the termination of African Unity's assistance policy business with the RFLIP Fund and that Central Plaza was paid all of the commission due to it in respect of that business.

[30] It is evident that Haasbroek was aware that Central Plaza had ceased to receive commission from African Unity in 2011, approximately five and a half years before the institution of the current application in March 2017. It is clear to me that the current litigation arises out of the discovery by Haasbroek, apparently in 2013 or 2014, that African Unity had underwritten medical aid cover for employees in the road freight logistics industry in terms of an agreement with the NBC and that Salt, with which, it will be recalled, both Strydom and Bester are involved, was in receipt of commission in relation thereto. It is apparent from the evidence in the aforementioned interdict application in case no. 16559/14 that Haasbroek convened a meeting with Strydom and Bester in August 2014 at which he sought to bring pressure on them to account to Nebavest for its share of the commission that he contended should, in terms of the NCNDA, have accrued to Central Plaza for that business.

[31] Haasbroek and the aforementioned Frans Schoeman, reportedly then Haasbroek's co-director of the applicant, indicated at the August 2014 meeting that they believed that Bester and Strydom had circumvented by the NCNDA by

engineering the termination of Silver Crest's appointment as manager of the RFLIP Fund and procuring the appointment of Salt in its place thereby allegedly creating an environment in which commission on the medical aid cover business could be diverted for the benefit of Strydom, Bester, Salt and Letswalo. An allusion was made at the meeting that Haasbroek and Schoeman had insight into Strydom's banking records, and threats were made that complaints would be laid with National Prosecuting Authority and the Financial Services Board. The reference at the meeting to Strydom's banking records plainly foreshadowed the subsequent use, mentioned earlier, of extracts from the bank statements of the Eduard Strydom Trust in the founding papers in the current application. Complaints were indeed subsequently laid with the Financial Services Board and the law enforcement authorities, which generated adverse publicity for the applicants in the interdict application, but nothing came of them.

[32] Strydom gave the following explanation in regard to the medical aid business referred to by Haasbroek in the founding affidavit. In March 2010, African Unity, in response to an invitation from the NBC to develop and tender for a 'wellness program' for its members, had submitted a proposal. A copy of the proposal was attached to the answering affidavit. The contract was, however, not awarded to African Unity.

[33] In response to a further invitation to tender, African Unity thereafter submitted 'a more comprehensive proposal' in June 2011. A copy of the second proposal was also attached to the answering affidavit. It appears from the documents that both

proposals were prepared by Bester. (It will be recalled that Bester was at the time a director of African Unity and also of Salt. He was not a director of Central Plaza.) It is apparent from a letter, dated 28 June 2011, written by Lombard of African Unity to Ngoako Bopape of the NBC that negotiations between the respective bodies followed after the submission of the more comprehensive proposal. The letter deals in detail with African Unity's response to a number of issues of detail raised by the NBC in relation to a draft contract that appears to have been discussed at meetings with the NBC and its attorneys on 23 and 27 June 2011. An agreement in respect of an insurance policy conferring medical aid benefits on eligible employees of employers operating in the Road Freight Industry 'within the registered scope' of the NBC was concluded between African Unity and the NBC on 30 June 2011. A copy of the agreement was attached to the answering affidavit. The contract period was two years from 1 July 2011 plus 'any renewal period/s, as the case may be'.

[34] It is convenient to interpolate at this point that in his answering affidavit in the interdict application Haasbroek alleged that Central Plaza, represented by Bester and Strydom had introduced '*a low cost medical product to* [African Unity], *which was underwritten by* [African Unity] *and which resulted in commissions becoming due and payable to Central Plaza*'. The documentation annexed to Strydom's answering affidavit in the current proceedings goes against the import of Haasbroek's allegation. It is not consistent with either Central Plaza or Haasbroek having had anything to do with the generation of the medical aid business.

[35] The agreement between African Unity and the NBC was renegotiated during 2013, and a replacement contract, commencing on 1 July 2013 and terminating (unless renewed) on 28 February 2016, was concluded between the parties on 28 June 2013.

[36] In March 2014, African Unity responded positively to an invitation by the NBC to express interest in submitting a proposal to render services for the NBCRFLI Health Plan. According to Strydom, African Unity was awarded a contract to render services for the Health Plan for a period ending on 31 December 2016.

[37] Strydom concluded his evidence concerning the medical aid business as follows, in para 42-43 of the answering affidavit:

> '42. To summarise in regard to the medical aid products underwritten by African Unity, and specifically that concluded with [the NBC]:
>
> 42.1 That business was not the result of an introduction by Cilliers (*sic*) and/or Haasbroek;
>
> 42.2 No commissions were paid to or became due to [Central Plaza];
>
> 42.3 Neither (*sic*) Haasbroek, Cilliers (*sic*), I nor [Central Plaza]:-
>
> (a) had anything to do with these contracts being awarded to African Unity; and

(b) as those contracts, in any event were not assistance business as regulated by the non disclosure agreement.

43. For purpose of (*sic*) being afforded these tenders African Unity developed its own medical aid products, and properly tendered therefor. No third party can ever claim entitlement to the proceeds or reap dividends and/or rewards for this business conducted by African Unity with [the NBC] in respect of these medical aid policies.'

[38] The papers in the 2014 interdict application gave a full explanation of (i) the circumstances in which Silver Creek's appointment as administrator of the RFLIP Fund had been terminated, (ii) the payments into the Eduard Strydom Trust bank account, and (iii) the payments from the Trust's account to Bester, Lombard and Letswalo. It will be recalled that Haasbroek and the applicant company were respondents in that application. I would have expected of Haasbroek to have meaningfully addressed that evidence in the founding papers in the current application. Significantly, he did not.

[39] As to the termination of Silver Creek's appointment, it was explained that that had occurred consequent upon reports made by two firms of auditors, Mazars and Deloittes suggesting 'maladministration' by Silver Creek. Concerns about Silver Creek's administration had also been raised by the Financial Services Board. The subsequent award of the administration contract to Salt Employee Benefits (Pty) Ltd, of which Salt is, indirectly, the majority shareholder and Strydom is an employee, was effected pursuant to a decision made by the board of trustees of the RFLIP Fund (in respect of which Letswalo had no say) after a public tender process managed by auditors KPMG in which several other fund administrators competed.

The RFLIP Fund was subsequently awarded more than R85 million in damages against Silver Creek in arbitration proceedings before Adv. Craig Watt-Pringle SC.

[40] It was denied that African Unity had made any payments to the Eduard Strydom Trust '*whether by way of commission, fees or otherwise*'. The payments into the Trust's account alleged by Haasbroek to have been made by African Unity were in fact payments from Ambledown Financial Services (Pty) Ltd, a medical insurance underwriter, in respect of business entirely unrelated to the medical aid cover provided by African Unity for employees represented by the NBC. The payments from the Trust's account allegedly to Lombard and Bester were for shares purchased from the latter's family trusts in a company called African Unity Insurance Administrator (Pty) Ltd, a minority shareholder in African Unity. The payments were to the respective vendor-trusts, not to Lombard and Bester personally.

[41] The payments alleged to have been made to Letswalo were loans to Moloko Manufacturing (Pty) Ltd, previously known as African Dune Investments 172 (Pty) Ltd, in which company Strydom and Letswalo were shareholders (in a 40% / 60% ratio) and of which Letswalo was the sole director. This was vouched by the attachment to the replying papers of copies of Moloko's bank statements. The company's business, which was not insurance related, failed and it went into voluntary liquidation and was deregistered in April 2013. Letswalo also attached copies of his personal bank account statements to his supporting replying in the interdict application to prove that the payments did not reflect there. He also testified that he had disclosed his interest in Moloko to the trustees of the RFLIP Fund, and

supported his evidence by attaching to his affidavit a copy of the relevant financial disclosure form, dated 28 February 2012, signed by him and countersigned by the chairman of the board.

[42] Other large payments from the Eduard Strydom Trust account were identified as having been to the PEO Family Trust in relation to a business venture entirely unrelated to any of the other protagonists in the litigation and to Nulane Investments CC, with which Strydom was in a joint venture and to which Salt Employee Benefits would be supplying insurance products required by a trade union. It was pointed out that African Unity did not hold any interest in Nulane. In his replying affidavit in the interdict application, Lombard testified that he had attempted to obtain the relevant bank statements of the PEO Family Trust. That trust no longer conducted business, but at the time Lombard made the affidavit he was given to understand that the former trustees, identified as Messrs Samuel Lemekoane and Norman Sedumeni, were trying to obtain the bank statements.

[43] In answer to a supplementary affidavit by Haasbroek, dated 1 March 2022, which was admitted without opposition at the hearing on 8 September 2022, Strydom explained, in an affidavit deposed to on 19 August 2022, that the commission paid by African Unity to Salt in respect of the medical aid business was because Salt had been instrumental in developing the product. Strydom described it as a '*complex, first-of its-kind product in South Africa*'. He testified that Salt had developed the product with the assistance of Professor George Marx, an actuary who was head of the Council of Medical Schemes. He enumerated four allegedly unprecedented

'*components/benefits*' of the policies. He testified that Salt was paid one per cent commission on the policies, which he said was the maximum permitted in terms of the regulations made under the Long-Term Insurance Act. In a further supplementary affidavit made by Strydom in response to a submission by the applicant's counsel at the hearing on 8 September 2022, Strydom testified that African Unity's underwriting of the medical insurance product was terminated on 31 December 2014. He also gave particulars of the commission earned by Salt in respect of the medical insurance product in the years 2013, 2014 and 2015 financial years. He was unable to find any documentation that gave the commission earned in the preceding two years.

[44] It is in the context of all of the evidence I have summarised that a determination must be made whether the applicant has satisfied the requirements of s 165(5)(b) of the Act. It is established law that each of the stipulated requirements has to be met before leave can be granted, but also that the considerations in clauses (i) to (iii) of the provision fall to be considered holistically, rather than compartmentally.[6] Thus, for example, the prospects of success or apparent viability of the proposed derivative action(s) is a consideration that may have a bearing in respect all three of the stipulated requirements.

[45] However, before I turn to consider whether the requirements in s 165(5)(b) have been met in the current matter, it is appropriate to deal shortly with a contention by the respondents that any claim against Strydom as director of Central Plaza for

[6] See *Mbethe v United Manganese of Kalahari* (SCA) supra, para 19.

breach of his duties as such is time barred in terms of s 77(7). For reasons to be stated presently, I consider that the contentions on both sides in this regard were something of a red herring. I deal with the point only to do justice to the submissions addressed on it and lest, if the matter is taken further, some other court attaches a significance to it that has escaped me on the view that I have taken of the applicant's case.

[46] The applicant's counsel submitted that s 77(7) of the Act (which provides '*Proceedings to recover any loss, damages or costs for which a person who is or may be held liable in terms of this section may not be commenced more than three years after the act that gave rise to that liability*') was not inconsistent with the Prescription Act 68 of 1969, and that accordingly, in terms of s 16(1) of the latter Act, the enforceability of the claims that the applicant seeks to pursue derivatively is governed by s 13(1)(e) of that Act. In support of the argument the applicant's counsel relied especially on the judgments of the appeal court in *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Share Block Limited and Others* [2016] ZASCA 62 (25 April 2016); [2016] 2 All SA 704 (SCA); 2016 (6) SA 181 (SCA) and *Premier of the Western Cape Provincial Government NO v Lakay* [2011] ZASCA 224 (30 November 2011); 2012 (2) SA 1 (SCA); [2012] 1 All SA 465 (SCA).

[47] In *Off-Beat Holiday Club* (SCA), the court held, in respect of proceedings on behalf of a company initiated by a member in terms of s 266 of the Companies Act 61 of 1973 to recoup damages or loss suffered through a wrong committed by any director or officer of the company, that as the creditor was the company, not the

shareholder, extinctive prescription against the delinquent director commenced to run only when the court appointed a curator *ad litem* because it was only at that stage, so the majority judgment (per Maya ADP) held, that the debt first arose.[7] The separate concurring judgments given by Cachalia and Leach JJA refrained from endorsing that proposition. See the judgment of Leach JA at para 62, and that of Cachalia JA at para 50-51, where the learned judge appears to suggest, with reference to the effect of s 13(1)(e) read with s 13(1)(i) of the Prescription Act, that it was rather a question of the completion of prescription against the delinquent director being delayed until the appointment in terms of s 266 of a curator *ad litem* than the claim first arising at that stage.

[48] The appeal court's decision in *Off-Beat Holiday Club* was reversed on appeal to the Constitutional Court, but the judgments in the latter court,[8] which focussed on the issue whether a claim for redress in terms of s 252 of the 1973 Companies Act involved a 'debt' within the meaning of the Prescription Act, did not address Maya ADP's finding on the effect of s 266. As it was founded on the construction of a quite different statutory provision and the issue of whether a '*vervaltermyn*' was involved did not arise in the matter, the appeal court's judgment in *Off-Beat Holiday Club* in any event does not appear to me to bear relevantly on the import of s 77(7) of Act 71 of 2008.

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[7] See *Offbeat Holiday Club* (SCA) at para 41.

[8] *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others* [2017] ZACC 15 (23 May 2017); 2017 (7) BCLR 916 (CC); 2017 (5) SA 9 (CC).

[49] In *Lakay*, the appeal court held that the provisions of s 2(1)(c) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970, which read '*Subject to the provisions of this Act, no legal proceedings in respect of any debt shall be instituted against an administration, local authority or officer (herein after referred to as the debtor) —*

(a) . . .

(b) . . .

(c) after the lapse of a period of twenty-four months as from the day on which the debt became due'

was a period of prescription, not a '*vervaltermyn*'. The reason given for that finding was that the provision was not inconsistent with s 16(1) of the Prescription Act, which provides '*Subject to the provisions of subsection (2)(b), the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.*'

[50] In the context of the facts in *Lakay*, which concerned a claim in respect of damages sustained by a minor, the significance of the finding that the provision in the Limitation of Actions Act was a prescription provision was that prescription was delayed by virtue of the operation of s 13(1)(a) of the Prescription Act. That was a consideration relevant only for the purpose of determining whether condonation for

non-compliance with the notice provisions in s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 could be granted or not. The court would have been unable to condone non-compliance if the debt in issue had been extinguished by prescription.

[51] The judgment in *Lakay* expressly followed the judgment to the same effect in respect of s 2(1)(c) of Act 94 of 1970 in *Meintjies NO v Administrasieraad van Sentraal-Transvaal* 1980 (1) SA 283 (T). Indeed it is necessary to read *Lakay* with the contextual analysis of the relevant provisions of Act 94 of 1970 in *Meintjies* to appreciate the reasoning that underlies what otherwise would appear to be a baldly stated conclusion in the appeal court's judgment. It is plain, when one has regard to *Meintjies*, that the determining factor in the court's conclusion that s 2(1)(c) of Act 94 of 1970 was a prescription provision, not a '*vervaltermyn*', was the correspondence between the provisions of s 2 of that Act and those of s 12 of the Prescription Act. That, held the court, made it impossible to find that the provision in Act 94 of 1970 was inconsistent with the Prescription Act. The applicant's counsel did not undertake a similar analysis of the 2008 Companies Act that might have supported their reliance on the judgment of *Lakay* for the purposes of the current case. I think that any attempt to have done so would have demonstrated that the two matters are quite distinguishable.

[52] In *Meintjies*, Le Roux J gave the following exposition of the distinction between a prescription provision and a '*vervaltermyn*': '*na my mening, lê die verskil in beginsel daarin dat 'n "verjaringstermyn" die onafdwingbaarwording van die skuld*

beskou uit die oogpunt van die skuldeiser en enige persoonlike faktore wat op sy posisie van toepassing is en wat sy nalatigheid, as 'n mens dit so kan stel, om sy skuld betyds af te dwing verskoon of verlig, in aanmerking neem, in teenstelling tot die ware vervaltermyn wat doodeenvoudig, sonder inagneming van enige persoonlike faktore of verskoningsgronde, loop vanaf die oomblik dat die skuld in teorie ontstaan totdat die termyn verstryk het. Dit is 'n termyn wat bloot uit die oogpunt van die skuldenaar bekyk word.'[9]

[53] In *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A) Williamson JA quoted the following extract from De Wet and Yeats, *Kontraktereg en Handelsreg* 2 ed at p.203 to explain the distinction between a '*vervaltermyn*' and extinctive prescription: '*Die reg kan onder omstandighede voorskryf dat 'n skuldeiser sy reg binne 'n vasgestelde tyd moet laat geld onder bedreiging van verval. Mens tref dit veral aan waar die skuldenaar die Staat is. In ons reg het ons 'n goeie voorbeeld van 'n vervaltermyn in art. 64 van Wet 22 van 1916, in verband met aksies teen die administrasie van Spoorweë en Hawens. Op so 'n vervaltermyn is die gewone beginsels betreffende verjaring nie van toepassing nie, bv. die vervaltermyn loop selfs teen 'n minderjarige. Of mens in 'n bepaalde geval met verjaring dan wel met 'n vervaltermyn te doen het, is 'n vraag van wetsuitleg, en welke reëls van verjaring*

[9] At p. 293D-E. 'In my opinion the difference in principle is that a "prescription period" bears on the unenforceability of the debt viewed from the position of the creditor and any personal factors that are applicable to his position and which excuse or mitigate his negligence, if one can put it that way, in (? not) enforcing his claim in time, in contrast with the true "expiry period" which, simply, without account of any personal factors or grounds for excuse, runs from the moment that the debt in theory arises to the expiry of the period. It is a period which is looked at only from the viewpoint of the debtor.' (My translation.)

op 'n bepaalde vervaltermyn toepaslik is en welke nie, is eweneens 'n vraag van uitleg.'[10]

[54] The respondents' counsel argued that s 77(7) of the Act is a so-called expiry provision or '*vervaltermyn*'; as to which see, for example, *Hartman v Minister van Polisie* 1983 (2) SA 489 (A). *Hartman* concerned the effect of s 32(1) of the Police Act 7 of 1958, which provided '*Any civil action against the State or any person in respect of anything done in pursuance of this Act, shall be commenced within six months after the cause of action arose, and notice in writing of any civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof*.' The court in *Hartman* rejected an argument that the provision was not inconsistent with the provisions of the Prescription Act. At p. 496F-G, Rabie CJ stated '*Wanneer daar in art 32 (1) gesê word dat enige aksie binne ses maade ná die ontstaan van die skuldoorsaak ingestel moet word, hou dit in dat geen aksie ná die verstryking van daardie tydperk ingestel kon word nie: die verbod is dus dieselfde as wanneer gesê sou word dat geen aksie ingestel mag word nie tensy dit binne die genoemde tydperk gedoen word'*.[11]

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[10] 'The law can in certain circumstances prescribe that a creditor must exercise his right within a determined period under penalty of expiry. One encounters this especially where the debtor is the State. In our law a good example of an expiry period is to be found in s 64 of Act 22 of 1916 in relation to actions against the Railways and Harbours administration. The ordinary principles concerning prescription are not applicable to such an expiry period, e.g. the expiry period even operates against a minor. Whether one is infact dealing with an expiry period is a question of statutory interpretation, and which rules of prescription might apply and which not, is equally a question of construction.' (My translation.)

[11] 'Where it is provided in s 32(1) that any action must be instituted within six months after the cause of action arose, that implies that no action can be instituted after the expiry of that period; the prohibition is accordingly the same as if it had been said that no action may be instituted unless it is done within the stipulated period.' (My translation.)

[55] And at 499C-E of *Hartman*, the learned chief justice concluded:

> '*Die Polisiewet is 'n "Parlementswet" wat 'n tydperk voorskryf waarin 'n eis of 'n aksie ten opsigte van 'n skuld ingestel moet word, en die vraag is dus of die bepalings van hoofstuk III van die Verjaringswet onbestaanbaar is met dié van die Polisiewet. My mening is, soos reeds hierbo aangedui, dat daar wel so 'n onbestaanbaarheid is. Hierdie onbestaanbaarheid lê nie daarin dat art 32 (1) 'n ander tydperk bepaal as wat in hoofstuk III van die Verjaringswet genoem word nie, want laasgenoemde Wet voorsien dat ander Wette ander tydperke waarin aksie ingestel moet word, kan bepaal, maar in die oorweging (soos hierbo genoem) dat die Wetgewer in art 32 (1) gebruik maak van taal wat toon dat enige aksie op straf van verval binne ses maande ná die ontstaan van die betrokke skuldoorsaak ingestel moet word, en ook in die verdere oorweging dat art 32 (1) beoog om (soos hierbo gesê) die Staat en persone ten opsigte van enigiets wat ingevolge die bepalings van die Polisiewet gedoen is, teen die láát instel van aksies te beskerm, welke oogmerk verydel sou kon word indien die bepaalde tydperk verleng sou kon word*'.[12]

[56] In my judgment, the wording of s 77(7) of the Act, which provides '*Proceedings to recover any loss, damages or costs for which a person is or may be held liable in terms of this section may not be commenced more than three years after the act or omission that gave rise to that liability*' creates an absolute time bar against the institution of such proceedings outside the stipulated three-year period.

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[12] 'The Police Act is an "Act of Parliament" which prescribes a period within which a claim or action in respect of a debt must be instituted and the question is thus whether the provisions of chapter III of the Prescription Act are inconsistent with those of the Police Act. As already indicated above, my view is that there is indeed such an inconsistency. The inconsistency lies not in the fact that s 32(1) determines a different period from that provided in chapter III of the Prescription Act because the latter statute allows that other statutes can determine different periods within which an action must be instituted, but rather in the consideration (identified above) that the Legislature has employed language in s 32(1) that indicates that any action must, on pain of expiry, be instituted within six months of the cause of action arising and also the further consideration that s 32(1) (as noted above) contemplates that the State and persons responsible for anything done under the Police Act should be protected against the delayed institution of actions, an object that would be frustrated if the stipulated period could be extended.' (My translation.)

The provision is cast in prohibitory language; it prohibits the commencement of such proceedings outside the stipulated period irrespective of factors, such as reasonable lack of knowledge by the creditor of the relevant facts or the creditor's temporary legal disability, that were chapter III of the Prescription Act applicable, might have allowed an extension of the period within which proceedings could be commenced. The provision is therefore inconsistent with the provisions of chapter III of the Prescription Act. To borrow from the language of Le Roux J in *Meintjies* supra, the time limitation in s 77(7) '*is 'n termyn wat bloot uit die oogpunt van die skuldenaar bekyk word*'.

[57] The conclusion I have reached as to the import of s 77(7) affects only the claims that the applicant alleges Central Plaza could advance against Strydom and Bester for being in breach of s 76(2)(a) and s 76(3)(a) and (b) of the Act while they were directors of Central Plaza. There is no evidence to support any such claim against Bester in respect of the short period during 2008-2009 that he was a director. The alleged diversion of the medical aid business commission to Salt occurred in 2011, and thus any claim against Strydom in terms of the aforesaid provisions of the Act in that regard was time barred in terms of s 77(7) before the institution of the current proceedings, and *a fortiori* before any proceedings to be instituted pursuant to leave granted in terms of s 165(5) could commence.

[58] The applicant's counsel contended, however, that s 77(7) of the Act does not apply to any common law claims for theft of corporate opportunities or disgorgement of secret profits that Central Plaza may have. It is evident from s 77(2) that s 77(7)

applies to claims for which a director could be liable, in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company arising from a breach by a director of the duties contemplated in ss 75, 76(2) or 76(3)(a) or (b) and, in accordance the principles of the common law relating to delict, in respect of a breach of the duty contemplated in s 76(3)(c).[13] As mentioned earlier, in its demand the applicant alleged breaches by the directors of their duties in terms of s 76(2)(a) and s 76(3)(a) and (b). In my view, it is arguable that theft of corporate opportunities by a director qualifies as a breach of the duty contemplated in s 76(2)(a). The applicant's counsel's argument that a claim for disgorgement of secret profits is not a claim to which s 77(7) applies is correct in my opinion.

[59] The arguments on these issues appear to me to be academic, however, because the relief sought in terms of para 1 of the 'draft order' does not concern derivative proceedings for damages for the theft of corporate opportunities or the disgorgement of secret profits. It concerns derivative proceedings '*for the accounting for and/or repayment of all commissions and benefits paid by African Unity Insurance Ltd, directly or indirectly, to persons other than the First Respondent (including but not limited to payments made to Salt Investment Holdings (Pty) Ltd and/or the Eduard Strydom Trust) in respect of or arising from medical aid cover and other business conducted with the National Road Freight Industry Fund since 2010 to date hereof*'.

[13] See notes 2 and 3 in para [14] above for the text of these provisions.

[60] Reverting then to whether the requirements of s 165(5) of the Act have been met.

[61] As to the 'good faith' requirement in s 165(5)(b)(i), this is not satisfied if it is apparent that the applicant does not honestly believe that a good cause of action exists and that it has a reasonable prospect of success. In *Mbethe v United Manganese of Kalahari* (SCA) supra, at para 20, the court observed '*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.*' At para 21, Swain JA referred to the statement in *Hamman v Moolman* 1968 (4) SA 340 (A) at 347A that '[t]*he 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*'.

[62] I referred earlier (at para [25]) to the superficiality of the applicant's allegations in support of the claims it seeks to prosecute derivatively. I also indicated (at para [38]) that I considered the failure by the applicant in its founding affidavits to confront and squarely address the evidence adduced by the applicants in the interdict application to be significant. It was significant because unless it could be shown that the applicant in the current matter was able to adduce cogent evidence to controvert it, it would be difficult for this court to accept that the applicant represented by the deponent (Haasbroek) had a bona fide belief that Central Plaza enjoyed a

viable claim against any of the non-exclusive list of persons identified as potential defendants in the contemplated, albeit ill-defined, derivative proceedings. In a supplementary affidavit, Haasbroek testified that the applicant's counsel in the current matter decided that it was necessary to read the papers in the interdict application only at a late stage in the exchange of papers in the current application. That might be so, but there was no suggestion that Haasbroek had not himself done so. It is most improbable that he would not have read the papers as he was a respondent in the interdict application and had entered the lists to oppose it. His own failure to deal in the founding papers with the evidence given by Lombard and Strydom in the interdict application that weighed against the existence of a viable claim by Central Plaza for unpaid or misappropriated commission has gone unexplained. He did not need a lawyer's advice to appreciate its materiality. It is a failure that has left me unsatisfied that in bringing this application the applicant is acting in good faith.

[63] A factor that also weighed materially with me in regard to the good faith requirement is the unexplained delay by the applicant in bringing the application. It is apparent that Haasbroek started making the allegations on which the current application is premised in mid-2014. He must have been aware, probably by no later than early 2012, that Central Plaza's commission income had dried up much earlier than that. The delay until March 2017 in instituting the current application cried out for explanation, especially in the context of the ventilation of the relevant facts that had occurred in the interdict application proceedings during 2014.

[64] As noted earlier, it seems clear that Haasbroek's interest was excited by his discovery in 2013 or 2014 that a company in which Strydom and Bester were involved (Salt) that held an interest in Central Plaza was earning commission from African Unity on a medical aid insurance product for certain employees in the road freight logistics industry. He plainly considered that, through Central Plaza, he should be sharing in the proceeds of that transaction. There is no suggestion in the evidence that Haasbroek raised any concerns about the cessation of commission income from Central Plaza's assistance policy related business in the interval between African Unity's termination in 2011 of its relationship with Central Plaza in that regard and the time that he learned of the medical aid related commission income being paid by African Unity, according to his belief, to Strydom and Bester. In the circumstances it is probable that he must have been aware and accepting of the fact that the assistance business had been cancelled.

[65] It also evident that Haasbroek was fully astute to the significance of the reference to '*assistance business*' in the NCNDA, and that the medical aid policies did not qualify as assistance business. He could not pretend otherwise because the transcript he produced in the interdict proceedings of the meeting he and Frans Schoeman had with Strydom and Bester in August 2014 showed that that had been an aspect that was debated there. It is clear that Haasbroek must have appreciated that to suit his purpose he needed either a rectification of the NCNDA – a way forward that he appears to have abandoned – or another agreement. It was only subsequent to the August 2014 meeting that Haasbroek first alleged the existence of the oral agreement on which the applicant relies strongly in the current proceedings. For this and all the other reasons advanced by the respondents, described earlier in

this judgment, it is improbable that there was an oral agreement. Haasbroek's reliance on it redounds adversely against his credibility. A poor impression of Haasbroek's credibility on such a critical issue materially undermines the applicant's ability to establish that it is acting in good faith in bringing the current application.

[66] I have come to the conclusion that the good faith requirement in s 165(5)(b)(i) has not been met approaching the issue on the basis set forth in *Madinda v Minister of Safety and Security, Republic of South Africa* [2008] ZASCA 34 (28 March 2008); [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) at para 8. There, in respect of provisions involving the phrase '*if the court is satisfied*' or other words to similar effect, Heher JA noted '*The phrase "if [the court] is satisfied" in s 3(4)(b)* [of Act 40 of 2002] *has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties. See eg Die Afrikaanse Pers Beperk v Neser 1948 (2) SA 295 (C) at 297. I see no reason to place a stricter construction on it in the present context*.' (*Neser*'s case addressed the effect of the word '*satisfy*' in the old Cape rule of court regulating applications for summary judgment; it has been followed in various other contexts, see e.g. *S v Makoula* 1978 (4) SA 763 (SWA), in relation to s 286(1) of the Criminal Procedure Act 51 of 1986, and *Sand Grove Opportunities Master Fund Ltd and Others v Distell Group Holdings Ltd and Others* [2022] ZAWCHC 46 (13 April 2022); [2022] 2 All SA 855 (WCC); 2022 (5) SA 277 (WCC) at para 97, in regard to s 115(6) of the Companies Act, 2008.)

[67] In *Mbethe v United Manganese of Kalahari* (SCA) supra, at para 23, however, the court, without reference to the jurisprudence in *Afrikaanse Pers v Neser, Madinda* and similar cases, approached s 165(5)(b)(i) on the basis that there was a true onus on an applicant for leave to institute a derivative action to prove on a balance of probabilities that it was acting in good faith. It held, accordingly, that, in the absence of oral evidence, disputes of fact on the papers fell to be resolved by the application of the rule in *Plascon-Evans*.[14] It may well be that when the opportunity presents, the appeal court may reconsider that approach, but until and unless it does this Court is bound to apply it. On that approach, the conclusion that the applicant is not acting in good faith is impelled even more strongly.

[68] The conclusion to which I have come on the good faith question means that the application must fail, and that it is unnecessary to consider whether the requirements in s 165(5)(b)(ii) and (iii) have been satisfied. There is, however, a consideration that seems to me to overlap all three elements in s s 165(5)(b) that does bear mention. It is this: the applicant does not appear to have a clear idea as to the character of the proceedings that it contemplates pursuing derivatively or as to precisely against whom such proceedings will be brought. One sees that in the notice of motion[15] and in paragraph 1 of the 'draft order'.[16] It is difficult to conceive how a court could be satisfied that the proposed proceedings '*involve a the trial of a serious question of material consequence to the company*' or that it would be '*in the best interests of the company that the applicant be granted leave to commence the*

[14] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51 (21 May 1984); 1984 (3) SA 623 (A) at 634E-635C.

[15] See note 1 in para [4] above.

[16] See para [5] above.

proposed proceedings' if the applicant is not able to give a clear and unambiguous indication what the contemplated proceedings will be.

[69] The applicant's papers suggest that a reason for its vagueness about the way forward is that it needs a statement of account and the debatement thereof from various parties to find out where it stands. As already discussed, it adopted that position notwithstanding its failure to deal upfront with the pertinent information already provided to Haasbroek in the course of the interdict proceedings. The short point is that absent proof of the alleged oral agreement with African Unity or an appropriate rectification of the NCNDA, Central Plaza has no basis to demand an account from African Unity (cf. *Absa Bank Bpk v Janse van Rensburg* [2002] ZASCA 7 (14 March 2002); 2002 (3) SA 701 (SCA), para 15) in respect of commission on the medical aid business, nor an accounting from Strydom or Bester in respect of any 'profits' they derived from the commission arrangement between African Unity and Salt in respect of the medical aid business. The factors that suggest the improbability of the existence of such an agreement have been identified earlier in this judgment.

[70] An order will consequently issue in the following terms:

The application is dismissed with costs, including the fees of two counsel.

A.G. BINNS-WARD
Judge of the High Court

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