

SOUTH AFRICA / JUDGMENT

Loest v Gendac (Pty) Ltd and Another (17699/2016) [2017] ZAGPPHC 73; 2017 (4) SA 187 (GP) (3 March 2017) [2017] ZAGPPHC 73

COURT

North Gauteng High Court, Pretoria

BEFORE

K La M Manamela

CASE / FILE NUMBER

17699/2016

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE NO: 17699/2016

3/3/2017

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

HEIN

CILLIERS

LOEST Applicant

and

GENDAC

(PTY)

LTD First

Respondent

SEFEKO

(PTY)

LTD Second

Respondent

JUDGMENT

MANAMELA, AJ

Introduction

[1] The applicant seeks an order compelling the first and second respondents (the respondents) to allow the applicant access to

information in the form of copies of bank statements; management account statements and contracts entered into by the respondents with third parties.[1] The applicant relies, in this regard, on the provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA) and submits that access to the required information is for exercise or protection of his rights in terms of section 164 of the Companies Act 71 of 2008 (the Companies Act).[2]

[2] Section 164 of the Companies Act provides for what is referred to as the "dissenting shareholders appraisal rights".[3] It is submitted that the applicant, as a shareholder of the respondents should be allowed access to the respondents' bank statements and management accounts for the period January 2013 to December 2015, and contracts entered into by the respondents with third parties from 26 August 2014 to date, for purposes of determination of the fair value of his shares in the respondents.

[3] The application is opposed by respondents on various grounds, but in the main, on the grounds that the applicant does not require the information for protection of his rights, and that the appraisal rights procedure provided by section 164 represents an alternative remedy to access to information in terms of PAIA. The applicant submits that the 30-day period contemplated in the provisions of PAIA, had elapsed since he sent his request for the information in terms of section 53(1),[4] also of PAIA, without any reaction by the respondents. Therefore, the respondents ought to be deemed to have refused his request to access the impugned information, hence this application.

[4] For the sake of completeness, it ought to be mentioned that, the respondents delivered a striking-out application on the basis that the material in the applicant's replying affidavit constitutes new matters and new evidence that should have been included in the founding affidavit.[5] There was no follow-through of the striking application at the hearing of this matter on 07 December 2016. But, I consider this abandonment to have been proper and commendable under the circumstances of this matter, as the material contained in the applicant's replying affidavit was, in my view, justified by what was raised in the opposing affidavit and also the absence of a response to the applicant's request for information in terms of PAIA. There was no way the applicant could fathom the respondents' grounds for refusal of his request after it was met with radio silence. Therefore, there is no need of further detention by this issue, save in respect of costs, which I shall deal with in the order to be made.

Brief factual

background

[5] From what is stated in the introduction above, it is clear that determination of the issues in this application would primarily

require interpretation of statutory provisions. However, some factual background to the matter is warranted, even if it is to set the scene, so to speak. This ought to be brief.

[6] The respondents are private profit companies, conducting business in software development and guard monitoring services, respectively, and with registered office addresses at Persequor Techno Park, Pretoria. The companies appear to be related and share premises. The applicant was a director of both until his removal by special resolution of shareholders on 26 August 2014.[6] He appears to be still challenging his removal as a director,[7] but this is not part of the determination required here.

[7] The applicant is or was a shareholder of the respondents at all material times. There is some denial on the part of the respondents[8] that the applicant is currently a shareholder, but his status as a shareholder at the time when the section 164 procedure was triggered is common cause. However, although I hold the view that the respondents' contentions are of no consequence for current purposes, I briefly deal with this issue further below.

[8] In his capacity as shareholder of the respondents, the applicant received during August 2015, notices informing him of general meetings of shareholders to be held on 27 August 2015.[9] The notices stated, among others, that the respondents' ordinary share capital would be converted from shares with par value of R1.00 per share to shares of no par value; that the ordinary share capital of the respondents would be increased; that the respondents would be authorised to issue such number of further ordinary shares from their authorised ordinary share capital which would exceed 30% of the voting power of the then issued ordinary share capital, and that the memoranda of incorporation of the respondents would be amended to achieve the aforementioned intentions.[10]

[9] The applicant delivered to the respondents in the morning of 27 August 2015 prior to commencement of the meetings notices objecting

to proposed resolutions.[11] However, the resolutions were nevertheless adopted by a majority of 71.4% of the voting rights exercised,[12] with the applicant being the only dissenting shareholder. [13]

[10] The applicant asserted his rights in terms of section 164 of the Companies Act. He also approached BDO Corporate Finance (BDO) in September 2015 to assist him in the determination of the value of his shareholding in the respondents. BDO placed the values as R 1.8 million and R4.2 million on his shareholdings in the first and second respondents, respectively. He had previously been offered an amount of R250 000.00 by the respondents on the basis of the valuation of the respondents' auditor prepared a year earlier, in

September 2014. The applicant sent requests to the respondents in terms of PAIA for access to specified financial information on 21 January 2016^[14] and followed up with letters by his attorneys of record in early February 2016, but in vain.^[15]

[11] The applicant wants out of the respondents as he considers the resolutions adopted to have adverse effect on his rights and

interests as a shareholder. According to him, the provisions of PAIA ought to assist him to access the necessary financial material for the determination of the fair value of his shares, as contemplated in terms of sections 164 of the Companies Act.

The dispute, submissions and legal principles (an analysis)

[12] To recap, the dispute between the contending parties is essentially whether the applicant is entitled to the information sought in terms of the provisions of PAIA in order to exercise or protect his rights in terms of section 164 of the Companies Act. However, as I mentioned above, the dispute is elongated or stretched by other peripheral points. Some of these serve as pivots to the dispute, but others are mere detours and will be disposed of as soon as they arise in the facts below. However, I will employ subheadings to facilitate a discussion of all the issues. But the subheadings may not necessarily offer an accurate description of what appears thereunder or distinguish one part from the other. So, all this ought to be considered jointly.

Is the applicant a shareholder?

[13] As indicated above, the respondents challenge the status of the applicant as a shareholder and therefore his standing in this

application. They say the applicant holds no shares by virtue of the provisions of section 35(5)^[16] and 164(9)^[17] of the Companies Act. The applicant denies that these statutory provisions are correctly interpreted or applied. He asserts that he did not lose his shares through the exercise of his rights in terms of section

164. I agree. The applicant is still a shareholder for purposes of receiving fair value for his shares. ^[18] Section 164 doesn't deprive him of his status as a shareholder, but merely removes other trappings or privileges associated with this status, whilst the applicant as a dissenting shareholder pursues the remedy in terms of this statutory provision.

The status of the applicant's objection vis-a-vis other provisions of (section 164 of the Companies Act

[15] The two positions articulated above are, in my view, contradictory or even irreconcilable. It is conceivable that all these may be problems of interpretation of the provisions of section 164. But, I do not deem it warranted to determine whether or not the applicant's pursuit of a remedy based on section 164 is still valid. Therefore, any determination of the issues to follow will be predicated on the assumption that the applicant can still validly enforce his appraisal rights in terms of section 164, subsequent to his objection.

Request for information and PA/A, and section 164 of the Companies Act

General

[16] The applicant's request for access to the respondent's information is based on section 50 of PAIA, which reads in the material part:

"50 Right of access to records of private bodies

- (1) A requester must be given access to any record of a private body if-
 - (a) that record is required for the exercise or protection of any rights;
 - (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
 - (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
- (2) ...
- (3) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester or the person on whose behalf the request is made."

[underlining added for emphasis]

[17] There was no response from the respondents[20] and the applicant submits he had to approach this Court for an order in terms of the provisions of PAIA. The applicant submits he requires access to the impugned documents or records for the exercise or protection of his rights in terms of section 164.

[18] Section 164 of the Companies Act provides that a dissenting shareholder may demand the company to pay him the fair value of his shares upon occurrence of certain events. It reads in the material part:

"(1) ...

- (2) If a company has given notice to shareholders of a meeting to consider adopting a resolution to-

- (a) amend its Memorandum of Incorporation by altering the preferences, rights, limitations or other terms of any class of its shares in any manner materially adverse to the rights or interests of holders of that class of shares, as contemplated in section 37(8)
- ...
- (3) At any time before a resolution referred to in subsection (2) is to be voted on, a dissenting shareholder may give the company a written notice objecting to the resolution.
- (4) Within 10 business days after a company has adopted a resolution contemplated in this section, the company must send a notice that the resolution has been adopted to each shareholder who-
 - (a) gave the company a written notice of objection in terms of subsection (3); and
 - (b) has neither –
 - (i) withdrawn that notice; or
 - (ii) voted in support of the resolution.
- (5) A shareholder may demand that the company pay the shareholder the fair value for all of the shares of the company held by that person if-
 - (a) the shareholder-
 - (i) sent the company a notice of objection, subject to subsection (6); and
 - (ii) in the case of an amendment to the company's Memorandum of Incorporation, holds shares of a class that is materially and adversely affected by the amendment;
 - (b) the company has adopted the resolution contemplated in subsection (2); and
 - (c) the shareholder-
 - (i) voted against that resolution; and
 - (ii) has complied with all of the procedural requirements of this section.
- (6) The requirement of subsection (S)(a)(i) does not apply if the company failed to give notice of the meeting, or failed to include in that notice a statement of the shareholders rights under this section.
- (7) A shareholder who satisfies the requirements of subsection (5) may make a demand contemplated in that subsection by delivering a written notice to the company within-
 - (a) 20 business days after receiving a notice under subsection (4); or
 - (b) if the shareholder does not receive a notice under subsection (4), within 20 business days after learning that the resolution has been adopted.

-
- (8) A demand delivered in terms of subsections (5) to (7) must also be delivered to the Panel, and must state -
- (a) the shareholder's name and address;
 - (b) the number and class of shares in respect of which the shareholder seeks payment; and
 - (c) a demand for payment of the fair value of those shares.
- (9) A shareholder who has sent a demand in terms of subsections (5) to (8) has no further rights in respect of those shares, other than to be paid their fair value, unless -
- (a) the shareholder withdraws that demand before the company makes an offer under subsection (11), or allows an offer made by the company to lapse, as contemplated in subsection (12)(b);
 - (b) the company fails to make an offer in accordance with subsection (11) and the shareholder withdraws the demand; or
 - (c) the company, by a subsequent special resolution, revokes the adopted resolution that gave rise to the shareholder's rights under this section.
- (10) If any of the events contemplated in subsection (9) occur, all of the shareholder's rights in respect of the shares are reinstated without interruption.
- (11) Within five business days after the later of-
- (a) the day on which the action approved by the resolution is effective;
 - (b) the last day for the receipt of demands in terms of subsection (7)(a); or
 - (c) the day the company received a demand as contemplated in subsection (7)(b), if applicable, the company must send to each shareholder who has sent such a demand a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares, subject to subsection (16), accompanied by a statement showing how that value was determined.
- (12) Every offer made under subsection (11)-
- (a) in respect of shares of the same class or series must be on the same terms; and
 - (b) lapses if it has not been accepted within 30 business days after it was made.
- (13) If a shareholder accepts an offer made under subsection (12)-
- (a) the shareholder must either in the case of-
 - (i) shares evidenced by certificates, tender the relevant share certificates to the company or the company's transfer agent; or

- (ii) uncertificated shares, take the steps required in terms of section 53 to direct the transfer of those shares to the company or the company's transfer agent; and
 - (b) the company must pay that shareholder the agreed amount within 10 business days after the shareholder accepted the offer and-
 - (i) tendered the share certificates; or
 - (ii) directed the transfer to the company of uncertificated shares.
- (14) A shareholder who has made a demand in terms of subsections (5) to (8) may apply to a court to determine a fair value in respect of the shares that were the subject of that demand, and an order requiring the company to pay the shareholder the fair value so determined, if the company has-
- (a) failed to make an offer under subsection (11); or
 - (b) made an offer that the shareholder considers to be inadequate, and that offer has not lapsed.
- (15) On an application to the court under subsection (14)-
- (a) ...
 - (b)
 - (c) the court-
 - (i)
 - (ii) must determine a fair value in respect of the shares of all dissenting shareholders, subject to subsection (16);
 - (iii) in its discretion may-
 - (aa) appoint one or more appraisers to assist it in determining the fair value in respect of the shares; or
 - (bb) allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective, until the date of payment;
 - (iv) may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the court; and
 - (v) must make an order requiring-
 - (aa) the dissenting shareholders to either withdraw their respective demands or to comply with subsection (13)(a); and
 - (bb) the company to pay the fair value in respect of their shares to each dissenting shareholder who complies with subsection (13)(a), subject to any conditions the court considers necessary to ensure that the company fulfils its obligations under this section ... "

Section 164 of the Companies Act

[20] Generally stated, section 164 created the right for a shareholder, dissatisfied with proposed resolutions, to object and thereafter exit the company with receipt of fair value for his or her shares. But, there is no need to go into minute details in the analysis of this provision for current purposes, save to remark that the procedural requirements of section 164 appear at quick glance, with respect, to be cumbersome.

[21] The current occupation of the Court by the provisions of section 164 follows the applicant's submission that he needs to exercise or protect his rights in terms thereof. But, not all provisions of

section 164 are material. The nub of the applicant's contentions is with regard to the determination of fair value for the applicant shares. This is the limited basis on which the analysis of this provision will continue.

[22] There is no provision for a dissenting shareholder to approach the Court for access to information for purposes of determining fair value. What is allowed in terms of section 165(14) is for a dissenting shareholder to approach the Court, on application, for determination of the fair value of the shares. This relief is available where no offer is made by the company in respect of the dissenting shareholder's shares or the dissenting shareholder

considers the offer made to him in respect of his shares inadequate (before such an offer lapsed).

[22]

[23] The Court hearing an application to determine the fair value of the shares may appoint one or more appraisers to assist the Court in this regard.[23] This is logical, since the Court would not necessarily have the relevant technical expertise to determine the fair value of the shares. The Court is therefore given access to these skills by appointing appraisers to assist, more like experts envisaged in rule 36(9) of the Uniform Rules of this Court. The role that may be played by the appointed appraiser or appraisers, in my view, may, for example, include collation of relevant information where the Court deems available information insufficient or unreliable for purposes of determining fair value or even where there is no information at all. Therefore, in my view, there will be no room for the company or controlling shareholders to refuse disclosure or access by the Court or the appointed appraiser to information necessary for determination of the fair value of the shares of the dissenting shareholder. This, in my view, equally applies for both instances where the offer made is considered inadequate or where there is no offer.

- [24] Although not specifically stated in section 164, it is conceivable that the adjudicating Court, would have powers to summon the parties or the company to make available to the Court or the appraisers or both, whatever information or documents necessary for determination of fair value. Also, the Court would be entitled to apply its normal rules and practices, including those relating to procurement of documents or information, when hearing an application in terms of section 164.
- [25] Therefore, it appears that section 164 has in-built mechanisms for a dissenting shareholder to protect his rights to receive fair value for his shareholding when exiting a company whose resolution(s) he finds objectionable. This is the background I will use to analyse the submissions by the parties, which follow after the general analysis of the relevant provisions of PAIA.

Section 50 of PAIA

- [26] The respondents contend that the applicant's request does not meet the requirements of section 50 of PAIA. They say in this regard that the impugned information is not "required" by the applicant for the exercise or protection of his asserted rights.
- [27] Our Courts have already made attempts at attaching precise meaning to the word "required" contained in section 50(1)(a) of PAIA. There were also attempts to define similar words in other similar or comparable legislation, as in the Supreme Court of Appeal decision of *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*.^[24] In the decision of *Clutchco (Pty) Ltd v Davis*^[25] the Supreme Court of Appeal borrowed from its earlier decision in *Cape Metropolitan Council* decision and stated the following regarding the meaning of "required":

"It seems to me that Streicher JA's choice of the words 'assistance' and 'assist' in the above passage indicates that 'required' does not mean necessity, let alone dire necessity. I think that 'reasonably required' in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need. It appears to me, with respect, that this interpretation correctly reflects the intention of the Legislature in s 50(1)(a)."^[26]

- [28] The Supreme Court of Appeal had another opportunity to ascribe a meaning to "required" in the matter of *Unitas Hospital v Van Wyk and Another*.^[27] Although the majority ruling was arrived at through individual judgments by the Supreme Court of Appeal,^[28] the following is instructive from this decision:

"Closest to a positive formulation is the one articulated as follows by Streicher JA in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) in para [28]:

'Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information ... an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.'

[17] The threshold requirement of 'assistance' has thus been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self-evidently, however, mere compliance with the threshold requirement of 'assistance' will not be enough. The acceptance of any

notion to the contrary will, after all, be in conflict with the postulate that mere usefulness to the requester will not suffice. In *Clutchco* this Court was reluctant to go any further than to confirm this threshold requirement. That appears from the following statement by Comrie AJA immediately after he had referred to the above- quoted dictum from Cape Metropolitan Council (in para [13]):

'I think that "reasonably required" in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need. It appears to me, with respect, that this interpretation correctly reflects the intention of the Legislature ins 50(1)(a).'

[18] I respectfully share the reluctance of Comrie AJA to venture a formulation of a positive, generally applicable definition of what 'require' means. The reason is obvious. Potential applications of s 50 are countless. Any redefinition of the term 'require' with the purpose of restricting its flexible meaning will do more harm than good. To repeat the sentiment that I expressed earlier: The question whether the information sought in a particular case can be said to be 'required' for the purpose of protecting or exercising the right concerned, can be answered only with reference to the facts of that case, having regard to the broad parameters laid down in the judgments of our courts, albeit, for the most part, in a negative form." [29]

[29] Academic writers have also weighed in, so to speak with respect, on what section 50(1)(a) entails. I find the discussion by Cassim [30] regarding the right to inspect the books and records of a company in terms of PAIA illuminating, although this was in different context.

Submissions

made (specifically on provisions of PAJA and section 164)

[30] Mr TP Kruger SC, appearing on behalf of the applicant with Mr A Politis, confirmed, at the very beginning of the hearing, that the application is in terms of section 164 of the Companies Act. This was very important to establish in the light of what I have stated above regarding the current status of the section 164 procedure. [31]

- [31] Mr Kruger further submitted that the applicant had accepted that he is entitled to be paid the fair value of all his shares in the respondents,[32] which is indicative of his intention to make a clean break with the respondents. He pointed out that the applicant does not agree with the valuation methodology employed by the respondents' auditor in calculation of the offer made by the respondents to the applicant. This is the reason why the applicant approached an independent auditor. The auditor wants the information to determine the fair value of his shares, even though the auditor had already furnished a valuation report.
- [32] Without the impugned information the applicant submits that he will not be able to exercise his rights in terms of section 164. Mr Kruger further submitted that the information sought by his client is "reasonably required" as envisaged in the Clutchco decision.[33] Therefore, the applicant was entitled to come to Court for access to the information in terms of PAIA.
- [33] It is submitted that the provisions of PAIA are not excluded by the application of section 164, including section 164(14). Emphasis is placed on the inclusion of the word "may" in section 164(14) as indication of the applicant's choice to approach the Court in this regard. I do not agree with this interpretation, but nothing

really turns on this.

- [34] Mr OM Leathern SC, appearing for the respondents together with Mr J Eastes, submitted that it was incorrect to say that the applicant's auditor requires the information for his valuation. The auditor has produced a report and nowhere in the report, is it stated that the information stated in the applicant's notice of motion is required. The auditor already has what he required and the difference of opinion with the respondents' auditor is one of the methodologies applied. Therefore, the current application is clearly a fishing expedition and the applicant has an effective alternative remedy in terms of sections 164(14) and 164(15) of the Companies Act, it is submitted. It is not the auditor who requires the information, but the applicant. But, even if it is the auditor who requires the information for valuation purposes, it is of no consequence as the Court is the appropriate body to determine the value of the shares in terms of section 164.
- [35] Mr Leathern submitted that the information is not "reasonably required" as defined in the Clutchco decision. The applicant failed to show any "element of need" or a "substantial advantage" and to lay a basis why the information is reasonably required.[34] Besides, section 164(14) doesn't require an applicant to have any information before approaching the Court to get fair value. The procedures in terms of section 164, particularly at sections 164(14) and (15), clearly provide for what is to happen for a dissenting shareholder exercising his appraisal rights. Therefore, the current

application is ill-conceived as the applicant is not entitled to some pre-action discovery.

- [36] The respondents also say they are entitled to exclude commercial information in terms of section 68 of PAIA, as the applicant is employed by a competitor of the respondents. The applicant says the Court should avail itself of its wide and extensive powers on application,

[35] to order that the information be released only to the applicant's auditor and not to competitors. Also, there could be omission of the confidential parts. The respondents reject both suggestions and submit that the applicant should have known that the information is confidential.

[37] In my view, the submissions made on behalf of the parties, could be analysed along the following rubrics: first, can an applicant

exercising rights in terms of section 164 access information in terms of PAIA, and second, if so has the applicant made out a case for access in terms of PAIA? I use these questions for purposes of the

analysis.

Can an applicant exercising rights in terms of section 164 access information in terms of PAIA?

[38] It is clear that a shareholder is only entitled to invoke appraisal remedy in terms of section 164, when triggered by action of the company, in the form of proposed resolutions, as contemplated in section 164(2).[36] However, once the shareholder has noted his or her objection to the proposed resolution, can he or she still access remedies or procedures outside of section 164, albeit for the exercise of the appraisal rights? This is one leg of the determination required in this matter. Put differently: do the provisions of section 164 preclude the dissenting shareholder from exercising rights in terms of the provisions of PAIA?

[39] A superficial reading of the provisions of section 164, does not justify a conclusion that the dissenting shareholder is precluded from exercising or accessing other legal remedies outside of this statutory provision.

[40] However, I have indicated above that this provision appears to have in-built mechanisms for dissenting shareholders to protect their rights to receive fair value for their shareholding, when exiting companies whose proposed resolutions they find objectionable.[37] These mechanisms include launching an application to court for determination of the fair value of shares. I have already indicated

above as to how the adjudicating court would be able to access the requested information for purposes of determination of fair value. I do not intend revisiting the issues here. But, to avoid doubt, in my mind there is no impediment within section 164 for exercising rights of access to information contemplated by PAIA.

Has the applicant made out a case for access to the information in terms of PAIA?

[41] Without any impediment within section 164, then the second leg of the determination is necessary. Did the applicant make out a case that he requires the impugned information for the exercise of his appraisal rights?

- [42] From the discussion of the legal authorities above it is clear what is meant by the word "require". I do not intend repeating that part of the discussion.
- [43] On the basis of the above authorities, I hold the view that the applicant does not require access to the requisite information simply because of existence of the right and the information, but whether the information is reasonably required for the exercise of the right. Put differently, the mere existence of the right does not entitle the requester to "require" the information. It would very much depend on what entails the protection or exercise of the particular rights.
- [44] In this matter the right or rights are in the form of appraisal rights of dissenting shareholders in terms of section 164. These are commercial rights aimed at protecting minority shareholders from escaping the effects of majority rule and to remove their investment when some specified objectionable events occur. Therefore, the exercise of this right or the protection thereof has to be considered within the four comers of this provision.
- [45] In my view the applicant has not established or laid a basis why the information is reasonably required for the exercise of his rights of appraisal. To determine whether the information is required for the exercise of the appraisal rights the Court which is not sitting as the adjudicator Court for purposes of determining the fair value of the shares in terms of section 164, has to be enabled to determine whether or not access is required to be granted to this or the other information or records for the exercise of the right in terms of section 164, unless access is to be granted for the asking. This, in my view, would also unnecessarily add parallel processes to the process in terms of section 164 and with that unnecessary costs and burdens on the company, including those relating to maintenance of confidentiality. There is also potential for abuse as forewarned in the Clutchco decision.[38]
- [46] I agree with the views contained in the dicta by Comrie AJA in the Clutchco decision that the Companies Act ought to be "viewed holistically" as it is replete with provisions designed to protect the interests of shareholders.[39] Therefore, the applicant is despite the findings herein, not without possible relief.

Conclusion and Costs

- [47] Both sides have contended that costs granted should include costs consequent to the appointment of two counsel. It was submitted that this is actually an important matter to justify employment of two counsel on both sides. I agree and will make an order on this basis.

Order

- [48] In the premises, I make the following order:
- (a) the application is dismissed; and

- (b) the applicant is directed to pay costs of the application, including costs consequent upon the employment of two counsel, save for costs relating to the striking-out application which are to be borne by the first and second respondents, jointly and severally.

.....

K. La M. Manamela

Acting Judge of the High Court

DATE OF HEARING: 07 DECEMBER 2016

DATE OF JUDGMENT: 03 MARCH 2017

Appearances:

For the Applicant: Adv TP Kruger SC

Adv A Politis

Instructed by: Molenaar & Griffiths Inc, Pretoria

For the Respondent: Adv OM Leathern SC

Adv J Eastes

Instructed by: Mame Coetzee Attorneys, Pretoria

- [1] See the notice of motion at indexed pp 1-2.
- [2] See par 18 below for a reading of section 164 of the Companies Act 71 of 2008 (the Companies Act).
- [4] See par 53 below for a reading of section 53 of the Promotion of Access to Information Act 2 of 2000 (PAIA).
- [5] See indexed pp 560-564.
- [6] See pars 5.1-52 of the founding affidavit on indexed p 9; annexures "HL6" and "HL7" to the founding affidavit on indexed pp 114-115 and 116-117, respectively.
- [7] See par 5.1 of the founding affidavit on indexed p 9.
- [8] The respondents deny that the applicant is currently a shareholder. See, among others, pars 5-6 of the opposing affidavit on indexed pp 442-443.
- [9] See par 6.1 of the founding affidavit on indexed p 9.
- [10] See par 6.3 of the founding affidavit on indexed pp 10-11; annexures "HL12" and "HL13" to the founding affidavit on indexed pp 145-152 and 153-160, respectively.
- [11] See annexures "HL10", "HL10A", "HL11" and "HL11A" to the founding affidavit on indexed pp 133-135, 136-138, 139-141 and 142-144, respectively.

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- [12] See annexures "HL8" and "HL9" to the founding affidavit on indexed pp 118-130 and 131-132, respectively.
- [13] See annexures "HL14" and "HL15" to the founding affidavit on indexed pp 161 and 162, respectively.
- [14] See annexures "HL18" and "HL19" to the founding affidavit on indexed pp 175-178 and 179-182, respectively.
- [15] See par 9 of the founding affidavit on indexed pp 14-18.
- [16] Section 35(5) reads as follows: "(5) Shares of a company that have been issued and subsequently (a) acquired by that company, as contemplated in section 48; or (b) surrendered to that company in the exercise of appraisal rights in terms of section 164, have the same status as shares that have been authorised but not issued."
- [17] See par 18 below for a reading of section 164(9) of the Companies Act.
- [19] See sections 164(9) and 164(10).
- [20] See section 56(3) of PAIA.
- [21] However, according to Delport P and Vorster Q Henochsberg on the Companies Act 71 of 2008 (LexisNexis October 2016) at 577 section 164 has a comparable provision in section 390 of the Companies Act 61 of 1973.
- [22] See section 164(14).
- [23] See section 165(15).
- [24] 2001 (3) SA 1013 (SCA).
- [25] 2005 (3) SA 486.
- [26] See Clutchco at par [13] (pp 491I-492B).
- [27] 2006 (4) SA 436.
- [28] Brand JA penned what could be considered the main judgment to which Cameron JA dissented, but Cloete and Conradie JJA concurred with Brand JA, and Harms JA who didn't write anything concurred with Conradie and Cloete JJA.
- [29] See Unitas at pars 16-18 (pp 4448-I) per Brand JA.
- [30] See Cassim R Contesting the removal of a director by the board of directors under the Companies Act 2016 SALJ 133.
- [31] See par 15 above.
- [32] See par 8 of the founding affidavit on indexed p 14.
- [33] Clutchco at pars 13 and 14 (pp 491J-492F).

[34] See Clutchco at par 12 (p 491H-I).

[35] Note: See footnote 33 of the applicant's HOA.

[36] See Beukes HGJ An introduction to the appraisal remedy in the Companies Act 2008: the Standing and the appraisal procedure (20 I

0) 22 SAMLJ 176.

[37] See section 25 above.

[38] See Clutchco at par 17 (page 499C-D).

[39] See Clutchco at par [15] (p 492F-G).

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Prepared on 13 October 2026 · Esheria