IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 8835/2015

In the matter between:

REMGRO LIMITED **1ST APPLICANT**

ROBERTSONS HOLDINGS (PTY) LIMITED **2ND APPLICANT**

and

UNILEVER SOUTH AFRICA HOLDINGS (PTY) LIMITED **RESPONDENT**

J U D G M E N T

Delivered on : 23rd November, 2015

OLSEN J

[1] Two applicants bring this urgent application, Remgro Limited ("Remgro") and Robertsons Holdings (Pty) Limited ("Robertsons"). The sole respondent, Unilever South Africa Holdings (Pty) Limited (which I will refer to as "the respondent") has raised the issue that Remgro is misjoined. There is merit in this objection, but the point need not be decided. Remgro's participation has no measureable impact on the costs of the proceedings; but nevertheless puts it at risk for an order of costs against it in the event of the application being unsuccessful.

[2] Robertsons owns 25.75% of the shares in the respondent. The remaining shares in the respondent are owned by two foreign companies, Unilever Best Foods Robertsons (Holdings) LLC (as to 44.68%) and Unilever Overseas Holdings BV (as to 29.57%). I will refer to these two companies as

the “Unilever Shareholders”. Acting jointly, as they do, they are in effect a majority shareholder.

[3] Broadly stated, the business of the respondent is the manufacture, sale, marketing and distribution of Unilever products in South Africa, Lesotho, Swaziland, Botswana and Namibia.

[4] The respondent is the beneficiary of certain corporate services which are provided on a centralised basis by Unilever PLC, a United Kingdom based company. These services are made available also to other companies in the Unilever stable which operate elsewhere in the world. The services comprise such matters as secretarial, treasury and legal services, strategic research, and advice from specialists in the departments of Unilever PLC dealing with production, technology, financial, legal, tax and accounting matters. On 11 October 2007 the respondent and Unilever PLC concluded a written agreement entitled “Know-How, Corporate Services and Intellectual Property Licence Agreement” (which I shall refer to as the “CSA”) to govern their relationship with regard to these services. In terms of clause 4.1 of the CSA the respondent undertook to pay annual fees to Unilever PLC for the provision of its services in terms of the CSA. The agreed fees were 3% of the repondent’s turnover in one category of goods and 5% of turnover for the rest. A proposal has been made by Unilever PLC and the Unilever shareholders that the CSA should be amended by increasing these two rates of remuneration to 8% and 9% respectively. That proposal is the genesis of these proceedings. It will have a significant effect on the profits earned by the respondent. The personal complaint of Robertsons is that it will have a significant effect on the dividends it receives and on the value of its investment in the respondent. (Remgro makes a similar complaint upon the basis that it is the beneficial holder of all the shares in Robertsons, and adds its concern that it is likely to suffer reputational damage as well, if the CSA is amended as proposed.)

[5] In April 2013 Robertsons, the Unilever shareholders and the respondent concluded a shareholders agreement. It records in its introduction

that there had been earlier such agreements, but that things like subsequent corporate reorganisations and the need for the respondent to adopt a memorandum of incorporation in terms of the Companies Act, 2008 (which was also done in April 2013) rendered it necessary to amend in some respects, and otherwise to restate what had been agreed before. This was in effect a new shareholders agreement. It is not contended that there is any conflict between the shareholders agreement and the memorandum of incorporation insofar as the provisions of these instruments are relevant to the determination of the present application.

[6] The shareholders agreement provided for two matters which are relevant to the present application. Firstly, each of Robertsons and the Unilever shareholders was given the right to nominate directors for appointment to the Board. Secondly, some measure of protection against the majority power of the Unilever shareholders was afforded to Robertsons. Ignoring matters of detail, this protection was achieved by identifying a number of so-called "fundamental issues", and providing that the respondent would not undertake any action in connection with them without the matter first having been "discussed" by the Board, and without having obtained the prior approval of Robertsons. The "fundamental issue" at stake in this litigation is Item 11 in Part 1 of the list of fundamental issues set out in Schedule 3 to the shareholders agreement. It reads as follows.

> "Termination or amendment (including, for the avoidance of doubt, amendment pursuant to the provisions of clause 4.9 of the Corporate Services Agreement) of the Corporate Services Agreement ...."

[7] The proposal made to amend the CSA to increase the fees payable by the respondent is accordingly one over which Robertsons has, initially, a veto power. I say "initially" because the shareholders agreement contains a deadlock-breaking mechanism. Clause 7.8 of the shareholders agreement is to the effect that if a proposal affecting a fundamental issue is made, is discussed by the Board, and does not secure the approval of Robertsons, and this occurs twice within six months, then the Unilever shareholders are

> "entitled (but not obliged) within 30 business days after that proposal not being approved a second time to serve notice (a "Deadlock Resolution Notice") on the Robertsons shareholder implementing (or, as the case may be, commencing the implementation of) the proposal on that matter without any further vote (except where some further affirmative vote is required, in which case the Robertsons shareholder hereby irrevocably undertakes to give its approval to that proposal)."

[8] According to clause 7.7 the approval that is required from Robertsons must be reflected in a vote in favour of the proposal at a shareholders meeting, or at a Board meeting; or in an expression of willingness to sign a written resolution supporting the proposal.

[9] Before proceeding further I should dispose of an issue relating to clause 4.9 of the CSA. It reads as follows.

> "The parties acknowledge that if after the Effective Date, Unilever [PLC] and/or any other Group of Companies provide services to the [respondent] in addition to those set out in Part 1 of Schedule B, the parties shall, acting in good faith, review that increase in the services provided in order to ascertain whether the level of the annual fees set out in clause 4.1 should be increased as a result of the provision of such additional services."

In the correspondence between the parties in the run-up to the launch of this application, and in the applicants' affidavits, the applicants make the argument that the only circumstance in which there can be an increase in the fees payable by the respondent to Unilever PLC is that contemplated by clause 4.9; i.e. the circumstance that further or new services are now provided. It is argued that the current proposal does not qualify as it is made on the basis that the income generated by the current fee scale is insufficient to cover the cost to Unilever PLC of providing the existing services to the respondent.

[10] In my view there is no merit in the argument. It amounts to a contention that upon a proper construction of the agreements no consensus

between the parties on new fee scales for existing services would be enforceable. There is no provision of the CSA or the shareholders agreement to that effect, nor any which prohibits a proposal being made for the amendment of the fee scales. Clause 4.9 of the CSA says nothing about amendments to the tariff which are not occasioned by the provision of additional services. The plain purpose of the special mention of clause 4.9 of the CSA in item 11 of the schedule to the shareholders agreement is to clarify the fact that an amendment to fees generated by the application of clause 4.9 would also constitute a fundamental issue, in respect of which Robertsons would enjoy the benefit of protection. Mr Burger SC (who appeared for Robertsons) accepted in argument that the shareholders had not by their agreement brought about that the respondent had lost its inherent power to agree to any amendment at all of the CSA. One simply adds that the shareholders agreement therefore regulates the manner in which, and the process through which, the respondent will agree (or withhold its consent) to any amendment of the CSA which is proposed, including new fee scales.

[11] The proposal for the increase in the fees payable by the respondent to Unilever PLC was first made in June 2013, and was thereafter discussed and repeated through 2014 and into 2015. The attitude of Robertsons was that the proposal held no advantage for the respondent, that it was in fact severely prejudicial to the respondent, and that, given those circumstances, no director of the respondent could vote in favour of a resolution supporting such an amendment without being in breach of his fiduciary duties. The attitude of Robertsons was uncompromising. (There is no need, and it is not possible on the papers before me, to make a determination on the question as to whether there is a sound, businesslike and rational basis for the acceptance by the respondent of the proposal to increase the fees.)

[12] In March 2015 a Mr Todd (a director nominated by the Unilever shareholders) conveyed to Robertsons that there was a firm intention to amend the CSA in line with the proposals that had been made, and that “we are prepared to follow the due process of our agreement”.

[13] Notice was then given of a meeting of the directors of the respondent to be held on 9 June 2015. The notice itself was not altogether clear on the question as to what was to be done there, but the matter of the proposed increase in fees was on the agenda. As to what was proposed to be done one can have regard to a notice given on behalf of the Unilever shareholders to Robertsons on the subject of the proposed increase in fees. This was done by letter dated 29 May 2015. It was stated that the Board meeting had been convened for 9 June 2015 "to consider and vote on this matter as a separate and specific Board resolution." Robertsons' vote in support of the proposed resolution was requested. It was made clear that this meeting was being called in furtherance of the objective of the Unilever shareholders, which was to bring about that the conditions for the lawful delivery of a Deadlock Resolution Notice became satisfied. This was to be the first of the two Board meetings which had to take place, without securing the approval of Robertsons, before a right to deliver such a notice would accrue.

[14] In my view the persons responsible for setting up the meeting of 9 June 2015 paid insufficient attention to the care with which the relevant provisions of the shareholders agreement (and the memorandum of incorporation) had been drafted. In terms of s75 (5) of the Companies Act, 2008, in a situation of conflict a director is not only to withhold his or her vote, but may not take part in the consideration of the matter in question. (This provision is replicated in the respondent's memorandum of incorporation). The draftsperson of the shareholders agreement presumably realised that if a proposal arose on a fundamental issue which held considerable advantages for the Unilever interests with which the Unilever directors were aligned, they would not be entitled to take part in the consideration of the issue. It was nevertheless intended that a debate should take place at Board level whenever it became necessary to secure the assent of Robertsons to a proposed course with regard to a fundamental issue; presumably to ensure that views could be exchanged and commented upon to the advantage of all shareholders. It seems to me that it is for this reason that the shareholders agreement provides that the matter shall be "discussed by the Board" and not that it should be "considered", or "considered and voted upon" by the Board.

[15] A full account of what happened at the meeting of 9 June 2015 is not available on the papers in this application. What is available suggests that there was no or insignificant "discussion" about the proposal itself, but rather relatively unseemly squabbling about conflicts of interest, which resulted in the Unilever directors recusing themselves and the Robertsons directors abstaining. It is plain from the papers before me that the respondent (directed in effect in this litigation by Unilever interests) regarded and continues to regard the meeting of 9 June 2015 as the first of the two which have to be held in order to overcome the veto power given to Robertsons with respect to the proposed amendment of the CSA. For its part Robertsons is concerned that the meeting of 9 June 2015 may indeed be regarded as the first of the two necessary meetings, and has launched this application to prevent any second meeting being held within six months of the first, for fear that it will result in the Unilever shareholders breaking the deadlock by issuing the requisite notice. In the view I have taken of this matter it proves unnecessary to decide the question as to whether the meeting of 9 June 2015 qualified as the first of those necessary to generate a right on the part of the Unilever shareholders to break the deadlock.

[16] This application was first launched on 7 July 2015. It was said to be urgent then because the annual meeting of shareholders of the respondent was due to take place on 29 July 2015, and Robertsons was concerned that the Unilever shareholders would seek to table their proposal at that meeting. As it turns out an undertaking was given to Robertsons that no meeting involving the disputed proposal to increase fees would be held without an acceptable period of notice being given, as a result of which it was unnecessary for the matter to be heard as urgently as originally anticipated. Subsequently notice of a meeting to be held on Tuesday, 24 November 2015 was given to Robertsons. In the result this matter was set down for urgent hearing on Friday, 20 November 2015, the original papers now being accompanied by supplementary founding, answering and replying affidavits.

[17] With that somewhat lengthy statement of the background against which the application was launched, I turn to the question of the relief which is sought by Robertsons.

[18] Robertsons seeks an interdict. There is no need to record the precise formulation of the interdict set out in the notice of motion. It is sufficient to state that, if granted, the interdict would prevent the respondent from holding any directors or shareholders meeting for the discussion or consideration of the proposal to amend the CSA by increasing fees. Further orders were sought in the notice of motion as follows.

> "3. Directing that the aforesaid interdict shall remain in place pending the following:
>
> 3.1 the service of a demand by the second applicant on the respondent in terms of s165 (2) of the Companies Act 71 of 2008 ("the Act") to commence legal proceedings or to take related steps to protect the legal interests of the respondent in regard to the following:
>
> (a) the breach of the fiduciary duties by the directors appointed to the board of the respondent by the Unilever shareholders by *inter alia* their failure to take steps to prevent an increase in the annual fees payable by the respondent to Unilever PLC in terms of the corporate services agreement, [annexed to the founding affidavit];
>
> (b) the meaning of the corporate services agreement and the circumstances under which the agreement may be amended to increase the fees payable by the respondent to Unilever PLC;
>
> 3.2 the completion of the process under s165 of the Act;
>
> 3.3 the final determination of an action or application to be instituted by [Robertsons] against the respondent and the Unilever shareholders for declaratory and related relief in regard to the terms of the shareholders agreement, [annexed to] the founding affidavit;

4. Directing [Robertsons] to serve such demand and to institute such action or application by no later than sixty (60) days from the date of this order".

[19] A decision as to whether this application can be granted must commence with a consideration of the cause of action. Whether my views on that determine the outcome of the case depends on whether my views on a point of non-joinder raised by the respondent are correct; because if they are, no decision on the validity of the cause of action can determine the outcome of the application without hearing the parties who are not before the court. Finally I must deal with the implications of s165 of the Companies Act for this application.

THE CAUSE OF ACTION

[20] The case sought to be made in the founding papers went along the following lines.

(a) The meeting of directors which took place on 9 June 2015 was a charade.

(b) This was of no consequence to the Unilever directors, because holding the meeting was merely a stratagem devised by the Unilever shareholders to take the first step in a process which would result in the Unilever shareholders breaking the deadlock between shareholders.

(c) Because the proposed increase in fees holds no advantage, and only disadvantage, for the respondent, the Unilever directors were bound by their fiduciary duty to do everything necessary to avoid the outcome that the amendment to the CSA eventuates.

(d) In discharge of that duty the Unilever directors were and remain bound to ensure that the proposed amendment is not even tabled before a board meeting for discussion, as the ultimate outcome (after that has happened twice in six months) will be that the Unilever shareholders will break the deadlock, resulting in the increase in fees.

The directors must discharge that duty for the benefit of the respondent.

(e) Furthermore, if the directors fail in their duty, Robertsons will then unlawfully have been put in a position where it must either live with the reduced profits the respondent will earn, or sell its shares in the respondent to the Unilever shareholders at an exit price determined in terms of the shareholders agreement, being one which Robertsons claims to be less than the true value of those shares.

[21] The interdict was sought originally to protect Robertsons and, it is claimed, the respondent, against what Robertsons contended to be the unlawful implementation of the provisions of the shareholders agreement dealing with deadlock. Those provisions are also contained in the respondent's memorandum of incorporation. The directors are bound at least by the memorandum of incorporation, as are the shareholders. The implications of the applicants' argument as to the duties of the directors is that the privilege accorded to Robertsons as a minority shareholder in connection with all "fundamental issues" is absolute whenever the directors are of the view that a proposal concerning such an issue is contrary to the interests of the respondent; because, holding that view, the directors must not allow such a proposal to be discussed by the board. In the absence of such a discussion, the refusal of Robertsons to approve a proposal will never generate a right on the part of the Unilever shareholders to break the deadlock. That right vested in the directors to block a proposal must flow from a proper construction of the memorandum of incorporation. The Interpretation of the provisions must be undertaken in accordance with the usual rules, as set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para [18].

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into

> existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[22] Following this process, the following becomes apparent.

(a) The veto right which is set out in Article 28.7 of the memorandum of incorporation is expressly stated to be conferred "subject to the provisions of article 28.9". That article permits the Unilever shareholders to break the deadlock in the circumstances already discussed. The language conveys that the veto privilege is only given subject to that important qualification.

(b) No language is employed which conveys that the directors have any decision to make for so long as the veto power of Robertsons subsists.

(c) The language of the provision conveys clearly, and in the interests of Robertsons, that for so long as Robertsons withholds its consent to action on a fundamental issue, the only role of the board is that of a forum for discussion.

(d) On the construction given to the provision by Robertsons, the directors have an unexpressed power to support Robertsons in a

dispute between shareholders over a fundamental issue, and override the majority status of the Unilever shareholders, whenever the board considers a proposal supported by the Unilever shareholders not to be in the interests of the respondent. No language used in the provision conveys that or supports that contention. No language supports the contention that the board may refuse to discuss the disputed proposal.

(e) Subject only to the constraints of law, the default position within companies is that the majority prevails. It is indisputable that the concession made by the Unilever shareholders regarding this principle was subject to its right to break deadlocks in certain circumstances. The clear purpose of a deadlock breaking mechanism in this case is the restoration of the default position. Nowhere is it said that the default position can only be restored if the board agrees, which is in effect what Robertsons is saying.

(f) Considering the provisions as a whole, and given that the board is bound by the provisions of the memorandum of incorporation, it must be implied that the board is duty bound to discuss any proposal concerning a fundamental issue. The board's views on the quality of the proposal determine nothing until and unless it is called upon eventually to decide the issue, whether that occurs because the deadlock has been broken or because Robertsons voluntarily relents and approves the proposal.

[23] In my view Robertsons has not established a case for the relief it seeks. Whatever may be said about the meeting of 9 June, the notice of the meeting due to take place tomorrow is in precise compliance with the requirement of the shareholders agreement that the proposal to amend the scale of fees should be "discussed by the Board". The notice to directors does not place a proposed resolution on the agenda and does not convey that a resolution will be "considered" in the sense that that word is used in s75 of the Companies Act. The directors are bound to discuss the matter as required by the memorandum of incorporation (and the shareholders agreement) by which they are bound. They have no right to obstruct the agreed process for overcoming what the Unilever shareholders may regard as

the inappropriate use by Robertsons of its veto power with regard to any fundamental issue. Any dispute as to the lawfulness of anything which follows (after tomorrow's meeting, or perhaps after a further meeting of directors to discuss the fee issue) is a matter for adjudication once it occurs.

NON-JOINDER

[24] In its answering papers the respondent took the point that the relief sought by Robertsons is incompetent because it materially affects the interests and rights of the Unilever shareholders, and they have not been joined in these proceedings. Whether for that reason or for some other undisclosed one, in its first replying affidavit Robertsons stated that it would not seek the interdict pending the institution and final determination of a claim for declaratory relief made on its own behalf, but reserved its right to initiate such proceedings if the respondent did not do so following the process under s165 of the Companies Act. Consistent with this, in the heads of argument delivered on behalf of Robertsons it was indicated that the interdict would be sought pending only the matters referred to in paragraphs 3.1 and 3.2 of the notice of motion (reproduced above). (Counsel for Robertsons accepted in argument that some reformulation of the relief would be necessary as the service of a demand by Robertsons in terms of s165 (2) of the Companies Act, which is the cornerstone of the condition in paragraph 3.1 of the prayer, had already taken place by the time the first replying affidavit was delivered.)

[25] Counsel for Robertsons rightly conceded in argument that Robertsons could not in this application seek an interdict for the protection of any rights which it holds under the shareholders agreement because it had failed to join the Unilever shareholders in this application. (As will be seen, in my view this concession as to the merits of the respondent's point of non-joinder does not go far enough). It is argued that the right which Robertsons does have, and which can be protected without the joinder of the Unilever shareholders, is the right to the integrity of the process initiated by Robertsons in terms of the s165 (2) of the Companies Act.

[26] Reproducing all the provisions of s165 of the Companies Act will not contribute to clarity in this judgment. I prefer where possible to furnish a précis of the provisions of the section which govern or will govern the process upon which Robertsons has embarked by serving a notice on the respondent in terms of s165 (2) of the Act. However the context within which those provisions apply cannot be appreciated without considering s165 (1) which should be quoted in full.

> "(1) Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right."

The section does away with the common law derivative action.

[27] Section 165 (2) is to the effect that a shareholder of a company may serve a demand upon that company to commence legal proceedings to protect the legal interests of the company. Section 165 (3) allows the company to apply to court within 15 business days to set aside the demand on the basis that it is frivolous, vexatious or without merit. This has not been done in this case.

[28] Section 165 (4) (a) requires a company which has not secured an order setting aside the demand to appoint an independent and impartial person or committee to investigate the demand and report to the Board on a number of issues, the primary one being the question as to whether it is in the best interests of the company to pursue the action which is the subject of the notice in terms of s165 (2). A senior advocate has in fact being appointed to perform that function in this instance. The performance of the function cannot be delayed because, in terms of s165 (4) (b), unless it obtains an extension of time from the court, the company must within 60 days of service of the demand either initiate the proposed action, or serve a notice on the shareholder who made the demand, refusing to do so. If the latter happens then the shareholder who made the demand may in terms of s165 (5) apply to

court for leave to institute proceedings in the name and on behalf of the company. In terms of s165 (5) (b) the court cannot grant such an order unless it is satisfied, *inter alia*, that

(i) the applicant is acting in good faith;
(ii) the proposed 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 such leave be granted.

[29] In that statutory context the demand served by Robertsons on the respondent requires it to institute legal proceedings for the following orders.

> "1. Declaring that anything done by the Unilever shareholders in seeking to achieve an increase in the fees payable to Unilever PLC as proposed is contrary to the provisions of the shareholders agreement.
>
> 2. Declaring in particular that the [respondent's) Board meeting of 9 June 2015 did not take place in accordance with the provisions of the shareholders agreement and does not constitute a meeting as envisaged by, and for the purposes of, clause 7.6 of the shareholders agreement, with the result that that meeting cannot serve as the basis on which a second proposal concerning the same "fundamental issue" can be made as contemplated by clause 7.8 of the shareholders agreement.
>
> 3. Interdicting the Unilever shareholders from making a second proposal as contemplated by clause 7.8 of the shareholders agreement."

[30] It will be seen immediately that all of the relief that Robertsons has called upon the respondent to enforce involves the denial of rights claimed by the Unilever shareholders in terms of the shareholders agreement. The issue in the proposed litigation is not the quantum of the fees payable by the

respondent to Unilever PLC, an issue which would obviously be one for the respondent if it was, for instance, being charged more than it had agreed to pay. The issue is the process which is being and will be followed in order to achieve a change in the fee structure, the validity and lawfulness of which process is asserted by the Unilever shareholders and denied by Robertsons. Given that, I can see no basis upon which a court presented with an application by Robertsons in terms of s165 (5) of the Companies Act would consider the issues as to whether Robertsons is acting in good faith, and as to whether it is in the best interests of the company that relief in the form demanded by Robertsons be pursued on behalf of the company, without the Unilever shareholders being joined in that application. The rights in issue in the proposed litigation would be those of the shareholders. The respondent's *locus standi* in the proposed proceedings would be nominal only, in the sense that as a party to the shareholders agreement, it is entitled to demand that the rights of the shareholders given in the shareholders agreement (and repeated in the memorandum of incorporation to which the company is bound in terms of s15 (6) of the Companies Act) are lawfully exercised.

[31] In this application the applicant seeks an order having precisely the same effect (in the interim) as would the successful prosecution by or on behalf of the respondent of the action which Robertsons has demanded of the respondent that it should institute against the Unilever shareholders. The respondent's complaint of non-joinder of the Unilever shareholders is justified not only because those shareholders have "a direct and substantial interest" in this application (*Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659), but because it is the rights of the Unilever shareholders that are in fact the subject of this application. Whether the application is regarded as one for the protection of a right held by Robertsons, or one for the protection of the respondent, it remains indisputable that the proposed interdict nullifies the rights the Unilever shareholders assert. For that reason, and given the circumstances that

(a) Robertsons has taken no steps to join its co-shareholders despite being long forewarned of the point of non-joinder; and

(b) the meeting (or at least the first meeting) sought to be interdicted is to take place tomorrow, leaving no time to join the Unilever shareholders

I would dismiss this application on the basis of non-joinder alone.

SECTION 165 OF THE COMPANIES ACT

[32] Putting aside the question of non-joinder, as mentioned earlier, counsel for Robertsons has argued that the right Robertsons is entitled to protect through the interdict it seeks is its right to pursue the process it has initiated in terms of s165 of the Companies Act. But there is of course nothing done by the respondent to obstruct the exercise of the right Robertsons has to pursue the process it has initiated under s165 of the Companies Act. Robertsons seeks no interdict with regard to the process which it has initiated. The present application therefore has nothing to do with the applicant's rights under s165 of the Companies Act.

[33] Given the concession made by Robertsons in argument, that it cannot assert any other of its own rights in its own name because they emanate from the shareholders agreement, and would require the joinder of its co-shareholders, and given the nature and import of the interdict which Robertsons seeks in this application, it becomes apparent that at best for Robertsons it might contend that it seeks the interdict for the protection of the right of the respondent to require that, for its own benefit, its shareholders and directors should be compelled to exercise their rights and duties lawfully. That, it seems to me, is the best slant that can be put on this application, which means that it is itself a "derivative action". The difficulties which might have been occasioned in urgent matters by the abolition of common law rights to prosecute legal proceedings on behalf of a company were not overlooked in the Companies Act. Section 165 (6) of the Act reads as follows.

> "(6) In exceptional circumstances, a person contemplated in sub-section (2) may apply to a court for leave to bring proceedings in the name and on behalf of the company without making a demand as contemplated in that sub-section, or without

affording the company time to respond to the demand in accordance with sub-section (4), and the court may grant leave only if the court is satisfied that –

(a) the delay required for the procedures contemplated in sub-sections (3) to (5) to be completed may result in –
    (i) irreparable harm to the company; or
    (ii) substantial prejudice to the interests of the applicant or another person;
(b) there is a reasonable probability that the company may not act to prevent that harm or prejudice, or act to protect the company's interest that the applicant seeks to protect; and
(c) that the requirements of sub-section (5) (b) are satisfied."

The requirements of sub-section (5) (b) are that the court must be satisfied that the applicant acts in good faith, that what is proposed involves the trial of a serious question of material consequence the company, and that the grant of the application is in the best interests of the company.

[34] In my view, questions of non-joinder aside, this application cannot be saved by regarding it as one made for the protection of the interests of the respondent. If that was its intention, then there was time enough to frame the application in accordance with s165 (6) of the Companies Act, even if that application would have had to be brought on an urgent basis. This application does not raise the question as to whether there may be circumstances where the need for judicial intervention is so urgent that, without satisfying the requirements of s165 (6) of the Companies Act, relief may be granted at the instance of an applicant who lacks *locus standi* to be heard otherwise than for and on behalf of a company that is incapacitated.

CONCLUSION

[35] If, as appears likely, Robertsons does not agree to the proposed amendment to the CSA after tomorrow's meeting, the Unilever shareholders may choose to issue a Deadlock Resolution Notice. If for whatever reason Robertsons takes the view that the right to issue such a notice has not

accrued, or finds reason to object to the process which may subsequently be followed by the respondent to reach consensus with Unilever PLC on increased fees, Robertsons may then take such action as it may be advised to take, whether for the protection of its own rights or those of the respondent, in proper form. In my view the remedy of stopping a lawful meeting (or meetings) for fear that unlawful conduct will follow is not available.

[36] For all these reasons this application must fail.

I make the following order.

1. The application is dismissed.

2. The costs of the application, including the costs of two counsel, shall be paid by the applicants, their liability being joint and several.

OLSEN J

Date of Hearing:	FRIDAY, 20 NOVEMBER 2015
Date of Judgment: :	MONDAY, 23 NOVEMBER 2015
For the Applicants :	MR SF BURGER SC with MR AJ DICKSON SC and MR D WEST
Instructed by:	CLIFFE DEKKER HOFMEYR INC. APPLICANTS' ATTORNEYS 1 PROTEA PLACE SANDTON (TEL : 011 – 562 1071) (REF.: P J Conradie/JLatsky/20132277) **c/o BOTHA & OLIVIER INC** 239 PETER KERCHHOFF STREET PIETERMARITZBURG KWAZULU-NATAL (TEL.: 033 – 342 7190) (REF.: S Hariparsad)
For the Respondent :	MR LN HARRIS SC with MR JA BABAMIA
Instructed by:	EDWARD NATHAN SONNENBERGS RESPONDENT'S ATTORNEYS 140 WEST STREET SANDTON (TEL.: 011 – 269 7600 (REF.: D Lambert/H Meiring/0397272 **c/o VENNS ATTORNEYS** 281 PIETERMARITZ STREET PIETERMARITZBURG KWAZULU-NATAL (TEL.: 033 – 355 3100) (REF.: Mr Robert Stuart-Hill)