



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

Case no: 1057/2013

In the matter between:

JOHANNES JACOBUS PRETORIUS

First Applicant

WILLEM HENDRIK PRETORIUS

Second Applicant

and

PB MEAT (PTY) LTD

First Respondent

STEVEN EDWARD TIMCKE

Second Respondent

Court: Judge J I Cloete

Heard: 8 and 9 May 2013, supplementary heads of argument filed on 22 and 27 May 2013

Delivered: 14 June 2013

JUDGMENT

CLOETE J:

- [1] This application centres on the extent of the particularity required to be furnished by a board of a company to a director who faces possible removal on

the ground, *inter alia*, that he or she has been derelict in the performance of his or her functions as director. In particular, the application relates to what is envisaged by the words '*a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit [a] director to prepare and present a response*' as they appear in s 71(4)(a) of the Companies Act 71 of 2008 (*'the Act'*).

- [2] The parties have approached the matter on the basis that the applicants are still directors of the first respondent (*'the company'*). The second respondent (*'Timcke'*) is one of two remaining directors of the company (there is a dispute about whether a further director has in fact been appointed).

- [3] On 21 November 2012 Timcke caused letters to be served upon the applicants on behalf of the company to attend a board meeting convened to consider a proposed resolution to remove them as directors on the basis that they had been derelict in the performance of their functions as such. Both applicants had previously resigned as employees of the company with effect from 30 September 2012 and by choice have not been involved in the management of the company since at least that date. Despite repeated requests since July 2012 the applicants have refused to resign as directors notwithstanding a clause contained in their respective service agreements to the contrary. They initially failed to provide any reason for their refusal. On the day after this application was launched they alleged, for the first time, that the relevant clause (requiring them to resign on request of the company upon termination of their

employment) had been included in their respective service agreements as a result of a common mistake. This is denied by the company.

- [4] Attached to the proposed resolution was a '*statement of reasons*'. The same reasons were supplied in respect of each applicant and I will quote in full from the '*statement of reasons*' pertaining to the first applicant:

'STATEMENT OF REASONS FOR PROPOSED RESOLUTION TO REMOVE JOHANNES JACOBUS PRETORIUS AS A DIRECTOR OF PB MEAT (PROPRIETARY) LIMITED ("THE COMPANY")

The following allegations made by Steven Edward Timcke form the grounds for the proposed resolution to remove Johannes Jacobus Pretorius as a director of the Company:

- 1. That Johannes Jacobus Pretorius in conjunction with Willem Hendrik Pretorius unlawfully removed equipment owned by the Company (namely two Handtman meat grinders depicted on Annexure A hereto) from the Company's premises and installed such equipment at premises controlled by he and Willem Hendrik Pretorius for the purposes of unlawfully utilising such equipment for his and Willem Hendrik Pretorius' own purposes.*
- 2. That Johannes Jacobus Pretorius in conjunction with Willem Hendrik Pretorius unlawfully disposed of equipment owned by the Company (namely a Weiler meat grinder) in or about August 2010 to Mountain Meat Traders and unlawfully retained the proceeds of such disposal which ought to have been paid to the Company.*
- 3. That Johannes Jacobus Pretorius in conjunction with Willem Hendrik Pretorius disposed of equipment owned by the Company (namely a Vemag sausage filler) to a third party and unlawfully retained the proceeds of such disposal which ought to have been paid to the Company.*

4. *That Johannes Jacobus Pretorius, in conjunction with Willem Hendrik Pretorius, acquiesced in Jacques Pretorius' unlawful appropriation of product belonging to the Company in circumstances where his duties as a director of the Company required of him to act against Jacques Pretorius' aforementioned conduct.*
5. *That Johannes Jacobus Pretorius, in conjunction with Willem Hendrik Pretorius, acquiesced in Jacques Pretorius' unlawful appropriation of cash belonging to the Company in circumstances where his duties as a director of the Company required of him to act against Jacques Pretorius' aforementioned conduct.*
6. *That on 24 November 2011 Johannes Jacobus Pretorius in conjunction with Willem Hendrik Pretorius and Jacques Pretorius arranged for Henry Badenhorst of Witvlei Meats (a supplier to the Company) to sell directly to Coleridge Meats a container of frozen meat products which would otherwise have been sold to the Company and then sold by the Company to customers including Coleridge Meats resulting in the parties thereto unlawfully making a secret profit from such transaction amounting to R166, 000.00; which profit ought to have accrued to the Company.'*

[5] Jacques Pretorius, who is referred to in the statement of reasons, is the son of the second applicant. He was employed in the company's fresh and frozen meat products trading section as head of logistics (including bulk buying and selling of product). He resigned with effect from 31 December 2011.

[6] The procedure upon which the company relies to have the applicants removed as directors is set out in s 71 of the Act. Subsections (3) and (4) provide as follows:

'(3) If a company has more than two directors, and a shareholder or director has alleged that a director of the company ---

(a) *has become ---*

- (i) *ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69 (8) (a); or*
- (ii) *incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or*
- (b) *has neglected, or been derelict in the performance of, the functions of a director,*

the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.

(4) Before the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given ---

- (a) *notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and*
- (b) *a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.'*

[emphasis supplied]

- [7] After receipt by them of the proposed resolution and statement of reasons the applicants' attorney delivered a '*request for further particulars and specificity in terms of section 71(4)*' of the Act. It is in the form of a request for further particulars for trial and runs to eight typed pages. The company duly furnished a written response. Some of the particulars requested were furnished by way of factual averments contained in the response itself and supported by invoices and delivery notes. In response to other particulars requested the applicants were referred to various affidavits and annexures thereto which had been filed

in support of an earlier application launched by the company against the applicants on 14 November 2012 (*'the earlier application'*) to prevent them from dealing with the two Handtman meat grinders pending the finalisation of a vindicatory action to be instituted by the company. That application was settled on the basis that the applicants undertook that they would neither dispose of nor deal with the two grinders pending the outcome of the vindicatory action. The applicants did not deliver opposing affidavits, so it is not possible, in respect of that application, to establish what their responses were to the allegations made by the company against them. It is common cause that the applicants did not avail themselves of the provisions of rule 35(12) and (13) of the uniform rules of court with reference to the documents and tape recordings referred to in the founding papers in that application; but I do not believe that any inference should be drawn from their failure to do so given that no opposing affidavits were filed and the application was settled. It was in any event not suggested by the company's counsel that any such inference should be drawn; and it is common cause that the applicants deny all of the allegations of wrongdoing against them.

- [8] The applicants formed the view that the further particulars supplied by the company *'fell short of reasonably enabling the applicants to prepare a response for presentation at the board meeting'*. Their attorney thus delivered a "Request for Access to Record of Private Body" in accordance with s 53(1) of the Promotion of Access to Information Act 2 of 2000 (*'PAIA'*). The record of the company that was requested was the following (the undated letter, annexure

'A1', referred to therein was the letter containing further particularity provided by the company):

1. *All the original telephone recordings between "Willem and Jacques", referred to in paragraph 2.3 of the undated letter by PB Meat (Pty) Ltd attached hereto as annexure "A1".*
2. *All the original "telephone recordings between Jacques Pretorius, J J Pretorius and Hendry Badenhorst" referred to in paragraph 6.7 of annexure "A1".*
3. *All the original telephone recordings and tape recordings referred to in paragraphs 21,22 and 40.2 of the affidavit dated 14 November 2012 by Mr Timcke, which forms part of the notice of motion in case number 21817/2012 ("the Timcke affidavit").*
4. *The "transactional documentation" referred to in paragraph 13 of the Timcke affidavit.*
5. *All source documents of PB Meat (Pty) Ltd reflecting the "sales generated by the Applicant's major lines", referred to in paragraph 19 of the Timcke affidavit.*
6. *All the source documents of PB Meat (Pty) Ltd reflecting the "marked increase in the amount of stock which was missing and unaccounted for" as referred to in paragraph 21 of the Timcke affidavit.*
7. *All the source documents and accounting documents of first entry including VAT invoices of PB Meat (Pty) Ltd reflecting the alleged "marked decline and the income derived from the trade of fresh and frozen meat products, which was an area of the business controlled by PB Meats and Jacques Pretorius" as referred to in paragraph 21 of the Timcke affidavit.*

8. *All the source documents (including VAT invoices) of PB Meat (Pty) Ltd in substantiation of the contention in paragraph 21 of the Timcke affidavit that there was an unlawful “diverting business away from the Applicant”.*
9. *All the source documents and stock sheets of PB Meat (Pty) Ltd referred to in paragraph 21 of the Timcke affidavit to the effect that there were “stock losses”.*
10. *All the monthly management account statements of PB Meat (Pty) Ltd for the period commencing 1 September 2010 to date hereof.*
11. *The source documents of PB Meat (Pty) Ltd containing the financial records of PB Meat (Pty) Ltd supporting the allegation in paragraph 27 of the Timcke affidavit regarding the Applicant’s “current financial performance”.*
12. *The financial statements of PB Meat (Pty) Ltd for the periods ending 28 February 2010, 28 February 2011 and 28 February 2012.*
13. *The “proceedings against Mountain Meat Traders” referred to in paragraph 40.1 of the Timcke affidavit.*
14. *The documents relating to the “forensic investigation” referred to in paragraph 40.2 of the Timcke affidavit.*
15. *The “undertaking given by Mountain Meat Traders”, referred to in paragraph 40.1 of the Timcke affidavit.”.*

[9] The issue to be decided is whether the tape recordings and documents referred to above must be produced by the company in order to meet the ‘*sufficient specificity*’ requirement in s 71(4)(a) of the Act. There is no similar requirement in the comparable provision, i.e. s 220(2) of the old Companies Act 61 of 1973. There also appears to be no authority on the meaning of the ‘*sufficient specificity*’ requirement. The closest that I have been able to come to obtaining

guidance in both local and foreign jurisdictions with comparable company law jurisprudence is an article written by Caroline B Ncube, who is a senior lecturer in the Faculty of Law at the University of Cape Town, in the 2011 South African Law Journal at p33 titled *'You're fired! The removal of directors under the Companies Act 71 of 2008'* where the author writes:

'Section 71(4) provides that a director whose removal is in issue must be given notice of the meeting, plus a copy of the relevant resolution accompanied by a statement of reasons for resolution which is detailed enough to enable him to formulate a response. Whilst the English and Australian companies legislation make provision for notice to be given to directors they do not go as far as stating that sufficiently detailed reasons must accompany the notice. In requiring this, the 2008 Act protects directors by ensuring that they are in a position to mount a response to the case for their removal. Where the director concerned is also an employee, these provisions ensure the fairness of a hearing that may lead to a dismissal. In that sense, the legislation also protects companies by requiring them to ensure fair hearings.'

[emphasis supplied]

- [10] The learned author's formulation of *'sufficient specificity'* as *'sufficiently detailed reasons to mount a response'* is a useful guide to employ. Inherent in this formulation is that each case will ultimately depend upon its own particular facts. I intend to adopt this approach for purposes of determining this matter; and to also take guidance, for comparative purposes, from the decision in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration & Others* (2006) 27 ILJ 1644 (LC) where the court, in dealing with the content of the concept of procedural fairness in the Labour Relations Act 66 of 1995, held as follows at p1652:

'The signal of a move to an informal approach to procedural fairness is clearly presaged by the explanatory memorandum that accompanied the draft Labour Relations Bill. The memorandum stated the following:

"The draft Bill requires a fair, but brief, pre-dismissal procedure... [It] opts for this more flexible, less onerous, approach to procedural fairness for various reasons: small employers, of whom there are a very large number, are often not able to follow elaborate pre-dismissal procedures; and not all procedural defects result in substantial prejudice to the employee."

On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex "charge-sheets", requests for particulars, the application of the rules of evidence, legal arguments, and the like.'

[11] The company was informed that the right that each applicant wished to exercise or protect (as set out in s 50(1)(a) as read with s 53(1)(d) of PAIA) was as follows:

- '1. The requester is a director of PB Meat (Pty) Ltd.*
- 2. Mr S E Timcke has convened a board meeting of PB Meat (Pty) Ltd at which meeting he will propose a resolution that the requester be removed as director of PB Meat (Pty) Ltd, due to a dereliction in the performance of his functions as a director.*
- 3. The requester has the right to defend the allegations.*
- 4. The requester also has the right to make representations at the forthcoming board meeting of PB Meat (Pty) Ltd in terms of section 71(4) of the Companies Act No 71 of 2008;*
 - 4.1 that the allegations are incorrect;*
 - 4.2 that the requester was not derelict in his duties;*

4.3 *that the requester should not be removed as director.*

5. *The requester has the right to protect himself from being removed as a director of PB Meat (Pty) Ltd.'*

[12] The applicants advised the company that the reasons why the record was required (in accordance with s 53(1)(d) of PAIA) were that: (a) they needed to listen to the tape recordings; and (b) they needed to peruse all of the documents in order to prepare a response and to make a presentation at the board meeting. It was contended that if they were denied this opportunity they would be '*seriously prejudiced*' in their preparation.

[13] Certain telephone recordings (seven in all) have subsequently been provided by the company. Four were provided before the application was launched and three were provided thereafter. Timcke had alleged in the earlier application that he had installed call loggers on the company's telephone system in November 2011; and that when listening to the recordings it had rapidly become apparent that the applicants, together with Jacques Pretorius, had been '*working with suppliers/competitors... to divert business*' away from the company. The applicants suggest that the first four recordings provided do not support the company's allegations. Timcke states that the compact disk initially supplied to the applicants contained, to the best of his knowledge, six recordings, but tendered the missing recordings which, as I understand it, have now been provided.

- [14] What issignificant is that Timcke stated that *'these are the recordings which formed the basis for reasons 2 and 6 in the statement of reasons together with the transcription of the recording attached as an annexure to the [earlier] application'* and similarly tendered the recording relating to that transcription. If, as the applicants suggest, the first four recordings provided do not support Timcke's allegations, one has to wonder why it is necessary for the applicants to demand any further recordings. That leaves the other three recordings which the applicants, in their replying affidavit, stated that they still needed to listen to as these had only been provided by the company on 17 April 2013. The applicants did not seek leave to file a supplementary affidavit dealing with the content of these three recordings. In addition the applicants have not claimed that, to the extent that the remaining three recordings might support allegations of wrongdoing, there would be other recordings pertaining to them of an exculpatory nature. It is not as if the recordings were relied upon by the company *in vacuo* – they have been referred to within the context of specific allegations made against the applicants. The applicants nonetheless contend that:

'The respondents did not furnish all the relevant telephone recordings. The respondents contend that they only have to furnish the telephone recordings upon which they rely. That contention is incorrect. The applicants are also entitled to rely on other telephone conversations in support of their defence..... All the telephone recordings are highly relevant in order to prepare the applicant's defence and the telephone recordings have to be considered and used conjunctively to gainsay the allegations of wrongful conduct. The telephone recordings are also highly relevant and necessary in order to consult with witnesses, such as, inter alia, Mr Jacques Pretorius, Mr H Badenhorst, the relevant witnesses at Coleridge Meat, and representatives of the relevant transport contractor, and Mr Erich Kuhn (ACT Logistics).'

[15] Nowhere in the aforementioned passage (which was proffered in reply) have the applicants stated that, for example, telephone conversations with other individuals will show that the company has taken the recordings upon which it relies out of context. The company does not rely on any recordings other than the seven recordings that have now been provided to the applicants; and accordingly the company will have to stand or fall by the contents thereof, taken together with any other evidence to substantiate its allegations against the applicants when the proposed resolution is considered at the board meeting. The applicants have the recordings relied upon and there appears to be no good reason why they should be permitted to trawl through every recording of every telephone conversation logged by the company during the entire period from November 2011 until September 2012. It would have been a simple matter for them to direct the company's attention to any telephone calls that might have been made in support of their denial of wrongdoing. They were both previously actively engaged in the business of the company and they would have known if any such telephone conversations had taken place since they were the individuals who would have been party to them. This, coupled with their suggestion that the four recordings that they have listened to do not support the company's allegations, leads me to conclude that in respect of the telephone recordings the applicants have been provided with sufficient specificity to reasonably permit them to prepare and present a response.

[16] The company refused to provide the applicants with any of the documents requested by them on the following grounds. First, it was contended that the documents were not necessary in order to protect the applicants' rights and the

refusal to provide them would not result in any prejudice to the applicants. Second, it was contended that the documents either constitute sensitive commercial information as envisaged in s 68 of PAIA; or that, given that they had been requested for the purpose of civil proceedings, they were not required to be produced in accordance with s 7(1)(b) of PAIA. The company's reliance on s 7(1)(b) of PAIA was not pursued during argument, correctly in my view, and this ground for refusal requires no further comment.

[17] S 68 of PAIA is contained in chapter 4 thereof and reads as follows:

'68 Commercial information of private body

- (1) *Subject to subsection (2), the head of a private body may refuse a request for access to a record of the body if the record ---*
 - (a) *contains trade secrets of the private body;*
 - (b) *contains financial, commercial, scientific or technical information, other than trade secrets, of the private body, the disclosure of which would be likely to cause harm to the commercial or financial interests of the body;*
 - (c) *contains information, the disclosure of which could reasonably be expected ---*
 - (i) *to put the private body at a disadvantage in contractual or other negotiations; or*
 - (ii) *to prejudice the body in commercial competition; or*
 - (d) *is a computer program, as defined in section 1(1) of the Copyright Act, 1978 (Act 98 of 1978), owned by the private body, except insofar as it is required to give access to a record to which access is granted in terms of this Act.*
- (2) *A record may not be refused in terms of subsection (1) insofar as it consists of information about the results of any product or environmental testing or other investigation supplied by the private body or the results of any such testing or investigation carried out by or on behalf of the private*

body and its disclosure would reveal a serious public safety or environmental risk.

- (3) *For the purposes of subsection (2), the results of any product or environmental testing or other investigation do not include the results of preliminary testing or other investigation conducted for the purpose of developing methods of testing or other investigation.'*

[emphasis supplied]

[18] After receipt of the company's refusal the applicants demanded that in any event the documents should be made available to them in their capacities as directors of the company. This demand was similarly refused.

[19] The present application is brought on two grounds, namely that the applicants are entitled to the documents in their capacities as directors of the company; and that they are entitled to the documents in terms of s 50(1) of PAIA, which provides as follows:

'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.'*

[20] The documents initially sought by the applicants in their notice of motion were identical to those contained in their request delivered to the company in terms of s 53(1) of PAIA. During argument the request was revised and clarified and became restricted to the following:

- 18.1 The '*transactional documentation*' concluded between the applicants and the company relating to the previous sale of the applicants' partnership business to the company;
- 18.2 all the stock sheets, purchase invoices, VAT invoices and monthly management accounts of the company for the period 1 September 2010 to 14 November 2012;
- 18.3 the financial statements of the company for the periods ending 28 February 2010, 28 February 2011 and 28 February 2012;
- 18.4 the documents relating to the '*forensic investigation*' referred to at paragraph 40.2 of the affidavit of Timcke filed in support of the earlier application; and
- 18.5 the undertaking given by Mountain Meat Traders to the company.

[21] The revised relief sought by the applicants in relation to the documents requested was accompanied by an open tender that the documents be placed in the possession of counsel for the company or a third party of its choice, and that the applicants and their legal representatives be entitled to view the documents for the purpose of preparing for the forthcoming board meeting. The applicants also consented to an order directing that they would only be permitted to use the documents for purposes of the board meeting and for no other purpose whatsoever.

- [22] Insofar as their entitlement to the documents in their capacities as directors is concerned, the applicants' argument is essentially that, given that they each have a statutory obligation as directors to manage the business and affairs of the company in terms of s 66(1) of the Act, they will effectively be precluded from fulfilling those obligations if they are refused access to the documents. In a supplementary note filed by counsel for the applicants it was stated that *in casu, the applicants seek certain documents only in order to preserve their management functions as directors of [the company]. Insofar as the applicants' conduct [sic] is aimed at preserving their managerial functions as directors, a court should not prevent them in the exercise of those rights'.*
- [23] The difficulty with this argument is that the applicants, on their own version, do not require the documents in order to manage the business and affairs of the company. They wish to have sight of the documents, and to consider them, in order to prepare and present a response to the allegations made against them. They have not attempted to manage the business and affairs of the company and thus execute their functions as directors since they resigned from their employment with effect from 30 September 2012. This does not mean that as *'non-executive'* directors their duties became any less onerous: see *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (AD) at 678A-D. It is simply that the applicants do not wish to be provided with the documents for any purpose other than safeguarding themselves from possible removal.
- [24] The question which then arises is whether a director's right of access to company records is absolute. Blackman in Commentary on the Companies Act

Vol 2 at p8-26 writes that *'Because a director's right to inspect the books of account of his company is not a statutory right, the court has a discretion whether or not to order inspection'*. S 76(2) and (3) of the Act deal with the standard of conduct required of a director and provide as follows:

'(2) 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; and

(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director---

(i) reasonably believes that the information is---

(aa) immaterial to the company; or

(bb) generally available to the public, or known to the other directors; or

(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.

(3) 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 that director; and

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

[emphasis supplied]

[25] In Henochsberg on The Companies Act 71 of 2008 it is stated at p248 that:

'The significance of the power to manage [the] business and affairs in terms of section 66 are two-fold. In the first instance this power (and obligation) is now original and not delegated (from the shareholders through the Memorandum of Incorporation) as it was under the 1973 Act (through the articles). Secondly the ultimate power in the company is now with the board of directors, and not with the shareholders...'

[26] Directors' powers and duties are now partially codified in the Act (see Henochsberg at p287). The directors of a company are obliged, in terms of s 76(3)(a) and (b) of the Act, to exercise their powers as directors *bona fide* and in the best interests of the company. *'A director of a company must not use the position of director, or any information obtained while acting in the capacity of a director, to gain an advantage for the director, or for another person other than the company, or knowingly cause harm to the company. "Knowingly" means that the person either had actual knowledge of that matter or was in a position in which the person reasonably ought to have had actual knowledge or reasonably ought to have investigated the matter to an extent that would have provided the person with actual knowledge, or reasonably ought to have taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter'* : Henochsberg at p288.

[27] The allegations levelled at the applicants are essentially that they have not acted *bona fide* and in the best interests of the company. The request for documentation is not for the purpose of exercising their powers, and to perform

their functions, in the best interests of the company; nor for seeking to ensure that the other directors have done so. On the applicants' own version it is for the purpose of defending allegations which go to the root of their s 76 obligations. Put differently, the applicants do not seek to protect the company, but to protect themselves as individual directors. The applicants thus wish to exercise their powers, not for the benefit of the company, but for the benefit of themselves. It is my view that in these circumstances the applicants' access to the company records must be fettered by the purpose for which such access is sought.

- [28] The applicants also rely on *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W), cited with approval in *Apco Africa (Pty) Ltd v Apco Worldwide Inc* 2008 (5) SA 615 (SCA). In my view the *Erasmus* case is distinguishable. First, it involved an application for the winding-up of a company on the ground that it would be just and equitable to do so, and different considerations thus applied. Second, the court found that it was apparent that the relationship between the warring directors was more than a purely commercial one, which is not the case in the present matter. Third, the court found that the applicant director's complaint was not only directed at dissatisfaction with the way in which the affairs of the respondent company were being conducted, but also that the notice to remove him as a director, constituting as it did an attempt to exclude him from participating in the management of the company, was a repudiation of the special relationship already referred to. None of those considerations apply in the present matter. The *Apco* case is also

distinguishable. It is therefore my view that the applicants, in their capacities as directors, are not entitled to the documents as of right.

- [29] The applicants contend that they are entitled to the documents sought in terms of PAIA on the basis that they are relevant ‘to *disprove*’ the allegations against them. They point out that the company has not alleged that the documents do not exist. The defences are that, although the documents exist: (a) the production thereof is ‘*unnecessary*’; (b) that the company’s refusal to grant access to the documents will in no manner prejudice the applicants in their preparation for the board meeting; and (c) that all the relevant information is already at the applicants’ disposal. The applicants also argue that the production of the documents would provide them with a substantial advantage. In *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) at paragraph [9] the Supreme Court of Appeal explained the ‘*substantial advantage*’ principle as follows:

[9] The next question is whether access to the record sought is “required” for the protection of the right. In Clutchco in para [13] (followed in Unitasin para [17]), this Court said:

“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.”

The substantial advantage in this matter consists in the fact that the contents of the record would be decisive. (Unitas in para [54]), ie they would bring a short sharp end to the dispute (Van Niekerk v Pretoria City Council 1997 (3) SA 839 (T) ([1997] 1 All SA 305) in para [103]).) They would either confirm the appellant’s contentions, in which event SAA would apparently have no defence, or they would support the latter’s case, in which event the appellant would

obviously, as his counsel said in argument, not proceed with the proposed litigation. SAA's reluctance to produce the document in these circumstances is inexplicable.'

[30] In an application of this nature an applicant is not required to establish a clear right worthy of protection. All that is required of an applicant is to *'put up facts which prima facie, though open to some doubt, establish that he has a right which access to the record is required to exercise or protect:'* see *Claase* at paragraph [8]. The applicants contend that they have established facts which *prima facie* show that the documents are reasonably required to protect their rights. It is not in dispute that the applicants have shown that they have a *prima facie* right worthy of protection; but I do not understand *Claase* to mean that therefore all that the applicants are required to show is that, *prima facie*, the documents are reasonably required to protect their rights. I say this because of the authorities referred to below.

[31] Rule 3(4)(c) of the procedural rules of PAIA makes it incumbent upon an applicant in an application of this nature to explain the relevance of each document upon which he or she intends to rely. It is thus necessary to have regard to the content given by our courts to the concept of *'required for the protection of any rights'* in s 50 of PAIA. In *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA) at paragraphs [6] and [16] to [18] the Supreme Court of Appeal held as follows:

- 31.1 Generally speaking, the question whether a particular record is *'required'* for the exercise or protection of a particular right is inextricably bound up with the facts of that matter;
- 31.2 Our courts have been reluctant to make any positive statements as to what the expression *'require'* means. The inclination is rather to define the expression in terms of what it does not mean. *'So, for example, it is said that it does not mean the subjective attitude of "want" or "desire" on the part of the requester; that, at the one end of the scale, "useful" or "relevant" for the exercise or protection of a right is not enough, but that, at the other end of the scale, the requester does not have to establish that the information is "essential" or "necessary" for the stated purpose';*
- 31.3 Although the threshold requirement is that of *'assistance'*, if the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied;
- 31.4 *'Reasonably required'* connotes *'a substantial advantage or an element of need'*.

[32] In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) at paragraph [28] the Supreme Court of Appeal formulated the test as follows:

'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 a 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.

[emphasis supplied]

[33] The applicants have set out the rights that they wish to exercise or protect, namely to safeguard their removal as directors of the company. They have also set out the information that is required. It is the third leg, namely, how that information will assist them in exercising or protecting that right, which requires scrutiny, i.e. the element of need. Also to be considered is whether the provision of the documentation now sought will provide the applicants with a substantial advantage in the sense that it will bring a *'short, sharp end'* to the dispute as set out in the *Claase* case.

[34] The applicants claim that the documents that they require are crucial to enable them to prepare and present a response. They contend that the company's incorporation by reference in the further particulars provided of the papers in the earlier application have *'significantly enlarged the scope of the allegations contained in the statement of reasons'*. The difficulty however is that instead of dealing fully with these averments the applicants focused on the reasons advanced by the company in support of the refusal to furnish the record. I intend to quote the relevant part of the founding affidavit in full:

'The documents are unnecessary

44. *The documents are necessary in order to prepare our response, and to prepare for the board meeting. By way of example, I refer to the charge that Jacques Pretorius appropriated product by PB Meat, and that the*

Applicants acquiesced therein. All the documents called for are relevant. Amongst others, the VAT invoices of PB Meat, the stock sheets, the monthly management account statements, the financial records relating to the current financial performance and the financial statements of PB Meat, are inter alia vital to disprove the foregoing charges.

The refusal will not prejudice the requesters

45. *The Respondents are clearly in possession of the documents. They will suffer no prejudice if the Applicants are afforded access to the documents. If the Respondents are allowed to keep the documents secret, the Applicants will be prejudiced in preparing a proper response to refute Timcke's charges. The documents are clearly relevant to the charges made against the Applicants.*

All relevant information is already at the disposal of the Applicants

46. *I dispute the contention that all the relevant information is already at the disposal of the Applicants. The Applicants do not have all the required documents. The documents called for, are in the possession of the Respondents. I fail to understand why the Applicants are not allowed to have sight of those documents.*
47. *Upon a proper interpretation of the third and fourth paragraphs of the letter dated 14 January 2013 by Keller Snyman Schelhase, it is clear that the Respondents refuse to give the documents to the Applicants that were required in paragraphs 3 to 15 of annexure "A" to the Request for Access to Record of Private Body. That means, properly construed, that the Applicants are not in possession of the documents.*
48. *The objective effect of the Respondents' refusal, is to prejudice the Applicants.*
49. *I invite the Respondents to show how and when the Applicants came into possession of the required documents.*

The record constitutes commercial information

50. *The record is not commercial information as meant in PAIA. In the alternative and in any event, I submit that the Applicants in their capacity as directors of PB Meat have the right of access to all documents and information of PB Meat. Timcke has no right to determine unilaterally that the Applicants, as co-directors, are denied access to certain records of PB Meat.'*

[35] Insofar as the relevance of the documents sought is concerned, the only averments made by the applicants are that:

'THE RELEVANCE OF THE DOCUMENTS THAT THE APPLICANTS REQUIRE

57. *All the documents are relevant with regard to the charges which Timcke has made in support of his attempt to have the Applicants removed as directors. The Applicants require those documents, as explained above, to prepare a response and to present the response at the proposed board meeting.'*

[36] In the concluding paragraphs of the affidavit the applicants allege that:

'69. *This application had to be prepared on an urgent basis under severe time constraints. Given the uncompromising attitude of the Respondents the Applicants have not enjoyed 30 days within which to prepare this application. In the premises the Applicants reserve the right to seek leave to supplement these papers, should the need arise.'*

[37] It is common cause that the applicants did not seek leave to supplement their founding papers and were thus presumably of the view that there was no need to do so. It was only in reply that specific reasons were advanced by the

applicants for why they consider the documents to be '*crucial*' to enable them to prepare and present a response.

- [38] In summary, the reasons advanced by the applicants were as follows (I will deal only with the restricted version of the documents now sought):

The '*transactional documentation*' concluded between the applicants and the company relating to the sale of the applicants' partnership business to the company

38.1 The documentation sought will show that the company did not acquire ownership of either the two Handtman meat grinders or the Weiler meat grinder. It will also show that there is no asset register in existence to prove that the company is the owner of the grinders concerned. (These documents relate to charges 1 and 2 in the statement of reasons.)

All the stock sheets, purchase invoices, VAT invoices and monthly management accounts of the company for the period 1 September 2010 to 14 November 2012

38.2 These documents will show that there was no stock shortage and/or appropriation of product and/or cash belonging to the company as alleged. They will also show that there was no decline in the business of the company (within the context of the allegations), and that therefore no business was diverted by the applicants to third parties. '*When the applicants are placed in possession of the source documents of [the company] the necessary graphs and statistics will be prepared by our expert and we will then be in a position to show that no business was*

diverted by us. (These documents relate to charges 4, 5 and 6 in the statement of reasons.)

The financial statements of the company for the periods ending 28 February 2010, 28 February 2011 and 28 February 2012

38.3 The financial statements *'will probably show* that there was no decline in income (within the context of the allegations), and consequently no lost business as alleged. They will also deal with the alleged stock losses and alleged theft. *'It is important to see what has been reported by the directors, in keeping with their obligation of corporate governance relating to risk management... the financial statements should contain details of the assets of [the company], and depreciation that has been claimed in respect of those assets. It would be important to see whether the financial statements list the... grinders... as assets of [the company].'*

The documents relating to the 'forensic investigation' referred to in the affidavit of Timcke in the earlier application

38.4 These documents are required in relation *inter alia* to the telephone recordings and the alleged fraudulent scheme pertaining to the sale of a machine to Mountain Meat Traders. (These documents relate to charge 3 in the statement of reasons.)

The undertaking given by Mountain Meat Traders to the company

38.5 This document is similarly required for the purpose set out in the immediately preceding paragraph.

[39] Although this was valiantly pursued by the applicants' counsel during argument, I am not satisfied that the company's incorporation by reference of the papers in the earlier application when providing the further particulars sought has widened the ambit of the allegations made. But even if this were the case the point is that the company is nonetheless bound by the allegations contained in the statement of reasons initially provided by it in terms of s 71(4)(a) of the Act. It is in relation to those allegations that the applicants' request for documentation must be assessed.

[40] Although there is merit in the company's complaint that the applicants have bolstered their case in reply, I must also consider that the company did not deem it necessary to apply to strike out the offending paragraphs; nor did it seek leave to file a further affidavit dealing with the explanations provided by the applicants. It is indeed so that the company pertinently raised the issue during argument and sought an order that the application be dismissed on that ground alone; but in my view it cannot be said that the applicants had failed to make out any case at all in their founding papers, particularly if regard is had to the history of the matter as set out therein. Taking these factors into account it seems to me that it would not serve the interests of justice to adopt what might well be considered to be an overly technical approach. In any event, during argument on the merits, the debate centred on the requirement of sufficient specificity and not whether the explanations provided by the applicants constituted new matter in themselves.

[41] The company's stance is as follows. The nature of the conduct complained of is such that, even should the applicants succeed in showing that the grinders were not reflected on its asset register; that there are no records of stock shortages; and that there was no decline in income recorded in the company's financial statements, the applicant will still not have answered the allegations levelled against them, as the substantiation of the allegations is not dependent on the documents requested. The applicants' contention that the company relies on the existence of documents other than those provided is therefore misplaced. In addition, the documentation can only constitute sensitive commercial information which, in light of the allegations made, would enable the applicants to cause significant commercial and financial harm to the company should they be provided with the information. It is nothing short of ludicrous to demand that – as initially sought by the applicants and still persisted with in various respects – virtually every source document utilised in the business must be disclosed to them in order to enable them to prepare and present a response to the statement of reasons.

[42] Annexed to the applicants' founding affidavit is the set of papers filed by the company in support of the earlier application. These papers contain the following:

42.1 The allegation that the applicants caused the two Handtman meat grinders to be removed from the company's premises after the company took control of the business. Two employees of the company have deposed to affidavits in support of this allegation;

- 42.2 The allegation that the applicants disposed of the Weiler meat grinder which had been on the company's premises, albeit briefly, after the company took control of the business; and sold it to an entity known as Mountain Meat Traders, keeping the proceeds of the sale for themselves. The company has produced an affidavit by an employee to this effect and has also provided the applicants with a telephone recording as well as the transcription thereof;
- 42.3 The allegation that the undertaking provided by Mountain Meat Traders related to a dispute concerning unlawful passing off and it thus has no relevance to the complaints levelled at the applicants. It was referred to solely in the context of Timcke's allegation that it was at a meeting at the premises of Mountain Meat Traders to resolve the unlawful passing off dispute that Timcke saw the Weiler meat grinder; and
- 42.4 The allegation that Jacques Pretorius had on more than one occasion misappropriated both product and cash from the company's cash register. An employee has deposed to an affidavit confirming that she personally witnessed this and that she reported it to the second applicant who failed to take any action. Misappropriation of cash by Jacques Pretorius was also reported to the company by another employee, and the details thereof were similarly contained in an affidavit by the employee concerned.

[43] In the further particulars supplied by the company it was alleged that the applicants disposed of a Vermag sausage filler to Striker Meat for a purchase

consideration of R35 000 but only paid over R10 000 of this amount to the company. This had been confirmed by both the company's bookkeeper and the manager of Striker Meat. The allegations relating to the diversion of the company's business to Coleridge Meats are said to be supported by certain of the telephone recordings. The quantification of the secret profit alleged is supported by documents already supplied to the applicants relating to market related prices as well as prices achieved for similar products.

[44] If one scrutinises the statement of reasons dispassionately and objectively, the allegations made are in fact simple. When regard is had to the further particulars provided by the company it is evident that the information and documentation produced in substantiation of the allegations are equally uncomplicated, and largely comprise of eyewitness testimony. There is no suggestion by the company that the applicants are guilty of complex commercial fraud. Had that been the case the position might well have been different. However, having regard to the foregoing I am not persuaded that the production of the financial and commercial records of the company as sought by the applicants will assist them in any meaningful way in admitting or denying the allegations levelled against them. In other words, the documents sought will not assist them in exercising or protecting their rights.

[45] What the applicants seek, in effect, is to embark on a full-scale forensic audit of the company, and to employ the services of an expert to prepare '*graphs and statistics*' and the like. It is difficult to envisage how, in these circumstances, the production of the record sought will bring a '*short sharp end*' to the dispute and

thus provide the applicants with a substantial advantage in the sense that it will be decisive of the matter. If anything, it is likely to rather escalate it into a full-blown, costly, elaborate and lengthy exercise. This is not what is envisaged by s 71(4)(a) of the Act in the circumstances of this matter.

[46] I am thus persuaded that the applicants have already been provided with sufficiently detailed reasons to mount a response to the allegations levelled against them. It is accordingly not necessary to consider the company's defence of sensitive commercial information (in accordance with s 68 of PAIA).

[47] Two further aspects require mention. First, the applicants also claimed that in their capacities as shareholders of the company they are entitled to copies of its annual financial statements in accordance with s 26 and s 31 of the Act. The company denies that they are shareholders, and avers that the applicants are the holders of a 25% stake in the holding company, PB Meat Holdings (Pty) Ltd, which in turn holds 72% of the share capital in the company. This averment was met with a bare denial in reply; and whether, in these circumstances, the applicants hold a beneficial interest in the securities issued by the company was not pursued with any vigour by their counsel during argument. In any event this was not advanced as a ground for the relief sought; and it is thus not necessary to consider it any further.

[48] Second, as pointed out by counsel for the company, should the applicants for whatever reason be dissatisfied with the determination of the board, they can avail themselves of the provisions of s 71(5) of the Act which affords them a

remedy in the form of an absolute right to have a court review the board's determination.

[49] **In the result I make the following order:**

The application is dismissed with costs, including all reserved costs orders.

J I CLOETE