Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 17199/2016

Before: The Hon. Mr Justice Binns-Ward
Hearing: 27 February 2017
Judgment: 1 March 2017

In the matter between:

LEWIS GROUP LIMITED Applicant

and

DAVID FARRING WOOLLAM First Respondent
JOHAN ENSLIN Second Respondent
LESLIE ALAN DAVIES Third Respondent
DAVID MORRIS NUREK Fourth Respondent
HILTON SAVEN Fifth Respondent

(This judgment should be cited as *Lewis Group Limited v Woollam and Others* (3) to distinguish it from the judgments in *Lewis Group Limited v Woollam and Others* [2016] ZAWCHC 130 (11 October 2016 and *Lewis Group Limited v Woollam and Others* [2016] ZAWCHC 162 (15 November 2016.))

JUDGMENT

BINNS-WARD J:

[1] The applicant company applied in terms of s 165(3) of the Companies Act, 71 of 2008, to set aside a demand served on it by the first respondent in terms of s 165(2) of the Act. The first respondent sought a direction that discovery be made by the applicant of certain documentation before he delivered his answering papers. His application to that end was unsuccessful. The circumstances in which the demand was made and the context of the institution by the applicant of the litigation to have it

set aside, as well as the aforementioned application by the first respondent for discovery, are apparent from the reported judgments in *Lewis Group Ltd v Woollam and others* (1) [2016] ZAWCHC 130, [2017] 1 All SA 192 (WCC) (especially at para. 94) and *Lewis Group Ltd v Woollam and others (2)* [2016] ZAWCHC 162, [2017] 1 All SA 231 (WCC). The demand that is in issue in the current proceedings is that which the first respondent sought to advance in the fourth set of affidavits that the court in large part refused to admit in *Woolam (1)*. The import of the demand was described in general terms in *Woollam (2)*. There is no need to rehearse the history.

[2] After the first respondent failed to obtain a direction that the applicant should make discovery (see *Woollam (2)*), he purported to respond to the applicant's founding papers by means of a notice in rule 6(5)(d)(iii), in which he recorded that he had withdrawn his demand and tendered to pay the applicant's wasted costs. The applicant gave notice in terms of rule 30 that it considered the aforementioned notice to be irregular. As the notice was not withdrawn, arrangements were made for the hearing, on 27 February 2017, of an application for it to be set aside. The parties thereafter eventually agreed that the question to be determined at the hearing on 27 February was whether the first respondent was legally able to withdraw his demand without the applicant's consent, or the leave of the court. It seemed to follow from that agreement that should the court find that the demand could not be withdrawn that the application to have it set aside should be determined on its merits and that if, on the other hand, it were held that the demand could be withdrawn, only costs would fall for determination.

[3] The applicant does not consent to the withdrawal of the demand. It is keen to have its application to set aside the demand determined on its merits. It considers that such a determination would assist in addressing the harm that it says that it has suffered as a consequence of the adverse publicity engendered by the demand. It is also concerned that the withdrawal of the demand is just a tactical move by the first respondent. It suspects that the first respondent's intention is to reissue the demand after he has obtained additional information to support it. It contends that the first respondent is not permitted to withdraw the demand, thereby putting an end to the proceedings in terms of s 165(3) (save as to costs).

[4] Section 165 provides that a person qualified in terms of subsection (2) '*may serve a demand upon a company to commence or continue legal proceedings, or take*

related steps, to protect the legal interests of the company'. The service of a demand is directed at requiring the company to procure an independent investigation into the issue raised by the demand and, after receipt of the resultant report, to consider instituting the proceedings that the demander alleges should be commenced or continued to protect the company's legal interests. If the company fails to procure the independent investigation contemplated by s 165(4), or, having considered the investigator's report, it informs the demander that it refuses to comply with the demand, the demander may apply to court in terms of s 165(5) for leave to proceed derivatively with the contemplated proceedings in the company's name. Serving a demand in terms of s 165(2) is therefore the first step that anyone contemplating pursuing proceedings derivatively on the company's behalf is required to take in order to qualify to do so.

[5] The legislature was obviously mindful of the potentially adverse effect on a company of the cost of funding investigations in terms of s 165(4) and thereafter possibly becoming involved in opposed proceedings in terms of s 165(5). Depending on the issues involved, these could quite conceivably be considerable. Provision was therefore made in s 165(3) for companies that are the recipients of demands that are frivolous, vexatious or without merit to apply to court for them to be set aside. The setting aside of a demand in terms of s 165(3) obviates the need for the company to procure the independent investigation. It also puts an end to the demander's aspirations to litigate derivatively because (unless he is able to make out an exceptional case within the meaning of s 165(6)) it deprives him of the basis to bring an application for the court's leave to do so.

[6] The remedy of setting aside a demand has to be seen in the context of s 165 as a whole, which is directed at the comprehensive statutory regulation of derivative actions and doing away in that respect with the previously applicable common law. An incidental effect of successfully setting aside a demand might well be that any adverse publicity that might have attended the demand could be redressed. But that is not the purpose of the provision, which is directed only at putting an early and summary end to contemplated derivative proceedings in a confined category of cases in which it is clearly appropriate to do so.

[7] Section 165 does not provide in terms that a demander may withdraw his demand. But, equally, it does not prescribe that he may not. The Act, as seems to

have become common in recent years, contains provisions enjoining how it must be interpreted. Section 5(1) prescribes that it '*must be interpreted and applied in a manner that gives effect to the purposes set out in section 7*'. Section 7 sets out the purposes of the Act in very general terms. Those purposes include '*encouraging transparency and high standards of corporate governance as appropriate*', [1] '*balanc*[ing] *the rights and obligations of shareholders and directors within companies*' [2] and '*encourag*[ing] *the efficient and responsible management of companies*'.[3] These are all purposes to which s 165 is recognisably directed to a greater or lesser degree and its provisions must accordingly be interpreted in a manner that gives effect to them. Section 7, however, contains nothing that I can identify as being particularly instructive on the manner in which the question in the current matter should be answered. The answer to the question of whether a demander may withdraw his demand must therefore be sought in the conventional way; that is upon a contextual consideration of the role of a demand in terms of the provision having regard to its place in the regulatory scheme concerning derivative actions that is the manifest purpose of the section read as a whole.

[8] A demand is the first of a series of requirements that must be satisfied before a person may institute derivative proceedings in the company's name. The purpose of setting up the requirements is to try to ensure that derivative proceedings will be permitted only when demonstrably justifiable in the company's interests. Any person wishing to proceed derivatively must obtain the court's leave to do so. That was not a requirement under the common law. If a person who has made a demand in terms of s 165(2) concludes that he no longer wishes to seek to proceed derivatively, or that his prospects of obtaining leave to do so are so weak as to render his having triggered the procedural process in terms of the section purposeless, there does not appear to be anything in the provisions of s 165 to indicate that he should not be allowed to abort the process by withdrawing the demand. All the practical considerations point in favour of the conclusion that a demand should be capable of withdrawal.

[9] The withdrawal of a demand would have the effect of rendering the institution or continuance of proceedings in terms of s 165(3) unnecessary with resultant costs

[1] Section 7(b)(iii).

[2] Section 7(i).

[3] Section 7(j).

savings for the company. To similar effect, it would render the procurement or continuance of an independent investigation in terms of s 165(4) unnecessary. If, however, the demand raised questions that the directors considered should be investigated, the withdrawal of the demand would not affect the company's ability to proceed with an investigation regardless, or even institute the contemplated proceedings directly, without an investigation. Another factor weighing against the notion that it is not competent to withdraw a demand is that there is nothing in the Act that compels a person who has made a demand to proceed with an application for leave to proceed derivatively even if the investigation report rendered in terms of s 165(4) indicates that the institution of proceedings would be in the best interests of the company and the board nevertheless refrains from acting in accordance with the recommendation. The position is sharply distinguishable from that which obtains after a person who has obtained leave from the court to proceed derivatively wishes to discontinue, settle or withdraw such proceedings. In the latter case permission must be obtained from the court in terms of s 165(15). A basis for the distinction is understandable. By the time a court grants leave to proceed derivatively it has necessarily engaged with the merits of the idea that proceedings are merited and in a sense placed its imprimatur on their institution. Once a court has engaged in the matter to that extent, it is not difficult to appreciate that it should have a say on any subsequent proposal not to take the proceedings that it has authorised to final judgment.

[10] The ability of a demander to withdraw his demand would not thwart or frustrate any of the purposes to which s 165 is particularly directed, or the broader statutory purposes set out in s 7 which the provision serves.

[11] In the circumstances it seems to me that a demander may withdraw his demand if he elects to do so.

[12] If the demand is withdrawn in the face of a pending application in terms of s 165(3) to have it set aside, the effect is to render those proceedings moot, apart from the question of costs. I find no reason to distinguish the position from that which obtains in comparable situations; for example, where a company faced with an application for winding-up on account of an alleged inability to pay its debts settles the applicant's claim, or when a respondent faced with an application to perform some or other act renders performance before the matter comes to hearing. A court will not

deal with the substantive issues in such cases because they have become moot. So, in *President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC), at para. 15, it was noted that the Constitutional Court is not bound to confirm a High Court order declaring a statutory provision unconstitutional when the provision has in the meantime been repealed, and will do so only if it is persuaded that a confirmatory order would be germane to the determination of underlying live issues remaining between the parties.

[13] When a demand is withdrawn, nothing remains to be set aside. The notion that the company should nevertheless still be entitled in the pending proceedings in terms of s 165(3) to a declaration that the demand had been vexatious, frivolous or without merit falls to be considered on the basis of the generally applicable principles in respect of declaratory relief. If a case no longer presents an existing or live controversy, it is moot and no longer justiciable. Declaring how it should have been decided raises the prospect of the court giving an advisory opinion on a matter that has become abstract; something it should generally avoid, cf. *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17, 2000 (2) SA 1 (CC), 2000 (1) BCLR 39, at para. 21, footnote 18. I am not persuaded that the prospect that the first respondent might serve a fresh amplified demand affords any reason in the circumstances to engage with the merits of the now redundant application in terms of s 165(3) for the purpose of being able to declare that the demand he has withdrawn was frivolous, vexatious or without merit. Any fresh demand that may ensue will have to be considered on its own terms; firstly, by the applicant, and subsequently, only if the applicant seeks to have it set aside, by a court.

[14] The applicant's counsel conceded that rule 41(1)[4] is not applicable because the application in terms of s 165(3) had not yet been set down for hearing when the demand was withdrawn, and the service of a demand in terms of s 165(2) in any event does not constitute the institution of proceedings within the meaning of the rule. But Mr *Hodes* SC nevertheless sought support for his argument that the demand could not be withdrawn other than by consent or with the leave of the court in the judgment in

[4] Rule 41(1)(a) provides:

'*A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party*'.

Karoo Meat Exchange Ltd v Mtwazi 1967 (3) SA 356 (C). The judgment is not on point in my view. It dealt with a situation in which a plaintiff purported, without the defendant's consent or the court's leave, to withdraw proceedings that had been set down for hearing. The court found that that was not permissible because of the effect of the relevant rules of the Magistrates' Court and the position under the common law once there was *litis contestatio*. None of those considerations is applicable in the current case, either directly or by analogy. In any event, as subsequently pointed out by Kumleben JA in *Levy v Levy* 1991 (3) SA 614 (A), a matter in which the court of first instance's refusal of leave to withdraw an action was overturned on appeal:

> It is after all not ordinarily the function of the Court to force a person to institute or proceed with an action against his or her will or to investigate the reasons for abandoning or wishing to abandon one. An exception, though one difficult to visualise, would no doubt be where the withdrawal of an action amounts to an abuse of the Court's process. In *Hudson v Hudson and Another* 1927 AD 259 De Villiers JA held at 268 that:
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> > 'Where... the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the duty of the Court to prevent such abuse. But it is a power to be exercised with great caution, and only in a clear case.'

Cf. also *Berman & Fialkov v Lumb* 2003 (2) SA 674 (C), at para 10.

[15] The appropriate remedy for any damage to the reputation of the applicant or the second to fifth respondents[5] that may have been caused unlawfully as a result of the demand (as to which I express no view) falls to be sought in proceedings in delict. Section 165(3) is not there to serve that purpose. The applicant's concern that the first respondent might resubmit the demand at a later stage also does not afford a sufficient basis for the court to make a declaratory order. If a demand were to be resubmitted by the first respondent in the same form as that which has been withdrawn, that might, depending on the context, afford grounds by itself, for the demand to be characterised as vexatious. But that would be a question to be addressed if and when the eventuality occurred, not now.

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[5] The second to fourth respondents, who did not play an active role in the current matter, are directors of the applicant company. The demand by the first respondent called upon the applicant to institute proceedings in terms of s 162 of the Companies Act, 2008, to have them declared delinquent. It has already been held (in *Woollam (1)*) that a shareholder who seeks to have a director declared delinquent would ordinarily not have standing to seek to proceed for such relief derivatively because he is able to do so directly.

[16] Turning now to consider the question of the costs of the application in terms of s 165(3). The applicant contends that it is entitled to its costs up to and including the hearing on 27 February 2017, with the fees of two counsel where such were engaged. The first respondent, on the other hand, argues that he should be liable for the applicant's costs only up to 24 November 2016 and that the applicant should pay his costs in the matter incurred after that date, including the costs of two counsel where such were engaged.

[17] Notice of the withdrawal of the demand was given on 24 November 2016 by way of a letter addressed by the first respondent's attorneys to those of the applicant. The relevant sentence advised '*Accordingly, our client hereby withdraws his demand in terms of Section 165 of the Companies Act served on your client on 22 August 2016, and tenders your client's wasted costs on a party and party scale*'. The notice elicited the following response: '*...bearing in mind that it is impermissible to withdraw a demand made in terms of section 165(2) of the Companies Act ..., at least at a stage when section 165(3) proceedings are pending in relation thereto, our client will enroll* (sic) *its application in terms of section 165(3) for hearing ... on the basis that it is unopposed, as envisaged in paragraph 2 of the order* [in *Woollam (2)*] *dated 15 November 2016*'. The abovementioned notice purportedly in terms of rule 6(5)(iii) followed on 29 November 2016.

[18] The applicant's counsel argued that even were it to be held, as it has been, that the first respondent was permitted to withdraw the demand, the tender of wasted costs incorporated in the notice given on 24 November 2016 was inadequate and that the applicant had been entitled to come to court on 27 February 2017, if only to get its costs. Mr *Hodes* submitted that an arguably adequate tender was made for the first time in the first respondent's counsel's heads of argument, dated 21 February 2017, in which it was stated that '*an appropriate costs order consequent upon the withdrawal of the demand would be costs on a party and party scale (including the costs of two counsel where employed) only up and until the date of the Notice of Withdrawal*'. Mr *Hodes* emphasised that by that stage most of the costs in respect of the hearing on 27 February had already been incurred, as counsel had been reserved for the day and had filed heads of argument. Mr *De Wet* for the first respondent countered, however, that the first respondent had been entitled to come to court, if only to resist the claim for a punitive costs order that the applicant's attorney had indicated would be sought.

In this respect it should be mentioned that in the applicant's counsel's heads of argument, dated 20 February 2017, it was indicated that costs were sought on the ordinary party and party scale.

[19] Mr *Hodes* was correct that the tender was technically inadequate. In the circumstances of the matter, in which at least two counsel had been engaged by each side from the outset and in which orders had been made allowing the costs of two counsel at every stage of the proceedings since the judgment in *Woollam (1)*, the tender of costs should have incorporated the costs of two counsel. The use of the expression 'wasted costs' in the tender was also inappropriate; cf. *Mbekeni v Jika* 1995 (1) SA 423 (Tk GD), where Pickering J explained (at 424F) that '*Wasted costs are additional costs incurred by a party through the fault of his opponent or costs previously incurred which have become useless by reason of his opponent's fault*'. I am of the view, however, that the inadequacies in the first respondent's tender were matters that could readily have been resolved had the applicant's attorney made it clear that the tender was required to cover the costs of two counsel and that the applicant required payment of its costs (not just its wasted costs) in the application up to the date of an adequate tender. In my view this matter proceeded beyond 1 December 2016, not because of the inadequacy of the tender, but principally because of the position adopted by the applicant that the demand could not be withdrawn and its pursuit of the object that the application in terms of s 165(3) should be determined on its merits notwithstanding the withdrawal of the demand. The conduct of the matter was complicated by the misdirected filing by the first respondent of a notice in terms of rule 6(5)(d)(iii) and the applicant's response thereto in terms of rule 30. Reliance on rule 30 was dropped on 30 January 2017 after the parties had reached the agreement mentioned in paragraph [2] above and when, on the basis of such agreement, the applicant delivered an affidavit by its attorney setting out the case advanced by it at the hearing on 27 February 2017. The first respondent could also have assisted his position if he had clarified the content of his costs tender before the filing of his counsel's heads of argument on 21 February.

[20] In all the circumstances I consider that it would be fair if the first respondent were directed to pay the applicant's costs in the application in terms of s 165(3) up to 30 January 2017 (excluding the costs attendant on drafting the affidavit of Kaanit Abarder, *jurat* 30 January 2017), and if the applicant were directed to pay one half of

the first respondent's costs of suit of suit incurred from that date (including the costs of the perusal and consideration of the aforementioned affidavit of Mr Abarder).

[21] The following order is made:

1. The withdrawal by the first respondent of his demand in terms of s 165(2) of the Companies Act 71 of 2008 that was served on the applicant on 22 August 2016 is noted.
2. The first respondent shall be liable for the applicant's costs of suit in the application to have the demand set aside in terms of s 165(3) of the Companies Act incurred up to 30 January 2017 (excluding the costs attendant on drafting the affidavit of Kaanit Abarder, *jurat* 30 January 2017), such costs to include the fees of two counsel where such were engaged.
3. The applicant shall be liable for one half of the first respondent's costs of suit incurred from 30 January 2017 (including the costs of perusing and considering the aforementioned affidavit of Kaanit Abarder) up to and including the hearing on 27 February 2017, such costs to include the fees of two counsel where such were engaged.

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

APPEARANCES

Applicant's counsel:	**P.B. Hodes SC**
Applicant's attorneys:	**Edward Nathan Sonnenbergs** **Cape Town**
First Respondent's counsel:	**H.N. De Wet**
First Respondent's attorneys:	**Marcusse Law Firm** **Observatory** **Cape Town**

(Applicant's heads of argument were drafted by P.B. Hodes SC, assisted by D. Goldberg.
First respondent's heads of argument were drafted by H.N. De Wet, assisted by D.M. Lubbe.)