



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited (Case no 219/2021) [2022] ZASCA 24 (10 March 2022)

The Supreme Court of Appeal (SCA) today upheld an appeal brought by Caxton and CTP Publishers and Printers Limited (Caxton) against the decision of the Western Cape Division of the High Court of South Africa, Cape Town (Baartman J, sitting as court of first instance). The appeal was upheld with costs, including the costs of two counsel. The order of the high court was set aside and substituted with the order of the SCA in terms of which the respondent, Novus Holdings Ltd (Novus) was directed to produce all of the documents required by Caxton pursuant to the latter's notice under rule 35(12).

The facts may be summarised as follows. On 7 April 2020, and pursuant to s 165(2) of the Companies Act 71 of 2008 (the Companies Act), Caxton served a demand upon Novus, in terms of which it demanded that Novus institute legal proceedings against Lebone Litho Printers Proprietary Limited (Lebone). According to Caxton, the envisaged legal proceedings would seek to have a commission agreement (and any related agreements) concluded between Novus and Lebone declared invalid and unenforceable. In terms of the impugned agreement, Novus undertook to pay commission to Lebone in relation to a public procurement contract between Novus, on the one hand, and the Department of Basic Education (DBE) on the other for the printing, packaging and distribution of school workbooks throughout the country.

Invoking s 165(4) of the Companies Act, Novus appointed a retired Judge as an independent and impartial person (independent and impartial person) to investigate the demand, and thereafter to report to its board of directors on the matters set out in s 165(4). Upon receipt of the independent and impartial person's report, Novus advised Caxton that the latter's demand to institute legal proceedings against Lebone was declined. Undaunted, Caxton instituted the main application against Novus, in which leave was sought to bring the envisaged action in the latter's name and on its behalf. Novus resisted the relief sought in the main application by Caxton. In its answering affidavit in the main application, Novus made reference to several documents, one of which was the s 165(4) report, in terms of which it sought to demonstrate that the proposed action lacked any prospect of success or was simply devoid of merit.

Novus' multiple references to a number of documents in its answering affidavit prompted Caxton to ask for the production of the documents concerned by invoking rule 35(12) of the Uniform Rules of Court. This, too, was resisted by Novus, who refused to make any of the documents sought available to Caxton for the latter's inspection and, if deemed necessary, copying. Constrained by Novus' unwavering stance, Caxton then brought the interlocutory application in the Western Cape Division of the High Court, Cape Town (the high court), in terms of rule 30A of the Uniform Rules, to compel the production for inspection and copying of the documents sought. Caxton's interlocutory application took centre stage in this appeal.

Caxton's application to compel the production of the documents sought came before Baartman J, who dismissed it with costs. In dismissing the application, the learned Judge held, in essence, that all of the documents required by Caxton were irrelevant. Insofar as the report of the independent and impartial person was concerned, the high court held that it was, by its very nature and the circumstances attendant upon its production, privileged. And, further, that Novus had not, by quoting parts of the report, waived the privilege attaching to the report. In elaboration, the high court concluded that the fact that the report 'was commissioned in circumstances where litigation was contemplated' was reinforced by the undisputed and long litigation history between the parties, who were business arch-rivals. The high court granted Caxton leave to appeal against the judgment to the SCA.

The central issue in this appeal was whether the documents sought by Caxton in terms of its rule 35(12) notice delivered on 11 August 2020, all of which were referred to in Novus' answering affidavit in the main application, were relevant and therefore ought to have been produced for inspection and copying. A related issue was whether one of these documents, namely the report of the independent and impartial person appointed by Novus pursuant to s 165(4) of the Companies Act to investigate the demand, was privileged and thus protected against disclosure by virtue of its privileged status. If the report was found to be privileged, an allied issue would have arisen, namely whether in quoting virtually the entire conclusion of the report in its answering affidavit Novus had, as a result, waived the privilege attaching to the report.

The SCA found that the upshot of the relevant principles was that as a general rule, a document to which reference has been made in an adversary's pleadings or affidavits was susceptible to production. The SCA nevertheless noted that a court would refuse to order production of a document that was not in the possession or under the control of the other party or which was privileged or irrelevant. By relevance, the SCA explained, was meant that the document or tape recording in question 'might have evidentiary value' or 'might assist' the party seeking production in relation to any 'aspects or issues that might arise' in light of the facts stated in the pleadings or affidavits. Furthermore, it was necessary to emphasise that a court considering an application to compel production of the documents or tape recordings which are the subject of a rule 35(12) notice exercised a narrowly circumscribed discretion.

With regard to the issue of whether the documents sought were referred to in Novus' affidavits, the SCA found that the decisive touchstone for production of documents or tape recordings

pursuant to rule 35(12) was whether any ‘reference’ to the documents or tape recordings in question has been made in the other party’s pleadings or affidavits. In this matter Novus had, in resisting the relief claimed in the main application, made extensive references to a host of documents to demonstrate that Caxton’s application was unmeritorious. In addition, Novus asserted that Caxton’s invocation of s 165 of the Companies Act was a ruse employed in order to harass Novus, who was Caxton’s commercial arch-competitor. Insofar as the report of the independent and impartial person was concerned, Novus contended that it was protected against production by virtue of the litigation privilege attaching to it. Thus, the SCA held that barring the issue of privilege the requirements of rule 35(12) were satisfied.

With regard to the issue of whether the documents required were relevant to the issues between the parties, the SCA found that it was well to bear in mind that it was not for the SCA in this matter to make definitive findings that Caxton had satisfied the requirements of s 165(5)(b) of the Companies Act. That would be a matter for the court that would be seized with the main application in due course to determine those questions. For the SCA’s purposes, it sufficed to state that all what Caxton needed to establish was that the documents bore relevance to the issues raised in the main application. This could be demonstrated with reference to the fact that the documents were called in aid and heavily relied upon by Novus in opposing the relief sought by Caxton.

The SCA considered the individual categories of documents whose production Caxton sought to compel in this matter. This aspect of the case raised the question as to whether on an objective evaluation of the issues raised in the main application the documents sought were relevant. An allied question was whether one of the documents, namely the report, was privileged.

The SCA found that the key object of the report of the independent and impartial person was to advise the board of directors on the matters specified in s 165(4)(a) of the Companies Act. Put differently, the purpose sought to be achieved under s 165(4) was to determine whether or not the demand had substance. This was therefore the overriding consideration in determining the status of the report. Further, the SCA agreed with counsel for Caxton that a determination of the kind envisaged in s 165(5)(a)(iii) could realistically be made only after the report had been placed before the court, and if the parties themselves had had the opportunity to assess whether such report satisfied the requirements of s 165(5)(a)(iii), namely if it was adequate, rational or reasonable in its conclusions. In the final result, the SCA accordingly held that the report was not privileged. Thus, Novus was under an obligation to produce the report pursuant to Caxton’s demand therefor in terms of rule 35(12). This conclusion rendered it unnecessary to consider Caxton’s alternative argument, namely whether Novus, by quoting the conclusion of the report extensively in its answering affidavit thereby waived any privilege that might otherwise have attached to the report.

The SCA thereafter considered the individual items (of the various documents) and, briefly, the ground(s) upon which their production was sought. As to the relevance of the documents in issue, the SCA found that it was persuaded that a case had been made out to compel their production. Insofar as the other bases upon which counsel for Novus relied to object to the

production of the documents, the SCA considered that they all represented matters that were either not in the SCA's remit or could properly be ventilated during the hearing of the main application. For the foregoing reasons, therefore, the SCA was prepared to order the production of the documents in issue for inspection and copying by Caxton subject to a confidentiality regime. This was necessary because Novus, in resisting the interlocutory application asserted that the documents required contained sensitive commercial information that should not be disclosed, especially to a business rival and competitor like Caxton. In countering Novus' contention, Caxton submitted that the inspection of confidential documents may be circumscribed to protect the commercial interests of the party asserting confidentiality. The SCA found that the disclosure of sensitive commercial information by way of discovery was not novel. Permitting the production of confidential documents subject to appropriate limits was now firmly established in our law. Accordingly, the SCA held that the documents in issue were to be produced subject to the prescribed confidentiality regime.

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