

Is a report prepared in terms of S 165(4) of the Companies Act privileged?

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This aforesaid is an issue that recently enjoyed the attention of the Supreme Court of Appeal in the decision of *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited*.

Novus is a company involved in the printing and publication of books, magazines, newspapers, and related activities. Caxton is a competitor of Novus. It is also a minority shareholder in Novus.

In brief, the following gave rise to the dispute: Novus had previously concluded a commission agreement with Lebone Litho Printers (Pty) Ltd ("**Lebone**"). In terms of the commission agreement, Novus undertook to pay commissions to Lebone in relation to a public procurement contract between Novus and the Department of Education for the printing, packaging, and distribution of school workbooks throughout South Africa. Caxton served a demand on Novus in terms of section 165(2) of the Companies Act 71 of 2008 ("**the Act**") requiring that Novus institute legal proceedings against Lebone to declare the commission agreement illegal and void.

Companies Act 71 of 2008 – section 165(4)

In response, Novus invoked section 165(4) of the Act, which allows a company served with a demand in terms of section 165(2) of the Act to appoint an independent and impartial person or committee to investigate the merits of a demand. Novus appointed Retired Deputy President of the Supreme Court of Appeal, Justice Louis Harms as the independent and impartial person to investigate Caxton's demand. Retired Justice Harms duly prepared the report and made same available to Novus. Based on the contents of the report Novus refused Caxton's demand to institute legal proceedings against Lebone to set aside the commission agreement.

Caxton thereafter (on 10 July 2020) instituted an application against Novus in terms of which it sought leave to bring the envisaged proceedings (to set aside the commission agreement) in Novus' name and on Novus' behalf. In the course of the application brought by Caxton, Caxton sought production, in terms of rule 35(12) of the Uniform Rules of Court, of the report prepared by Retired Justice Harms. Novus refused to make the report available and contended that it was privileged because it was prepared for the purpose of litigation.

This prompted Caxton to bring an application to compel Novus to produce the report. This application was also opposed by Novus.

The purpose of section 165(4) of the Act

The court rejected Novus' contention that the report was privileged and ordered that Novus make the report available to Caxton. The court found that the purpose of section 165(4) of the Act is to enable a company faced with a demand in terms of section 165(2) of the Act to obtain an objective assessment by an independent and impartial person after investigating the demand.

The fact that the board of directors might also have intended to submit the report to Novus' legal advisers for legal advice does not change the essential character and key purpose of the report.

This decision is therefore authority for the proposition that a report prepared by an independent and impartial person in terms of section 165(4) of the Act is not privileged.



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