

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2014/4017

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
.....	
DATE	SIGNATURE

MODISANE AL

First Applicant

MODISANE NGWENYA NS

Second Applicant

and

PRIME PORTFOLIO INVESTMENTS A (PTY) LIMITED

Respondent

JUDGMENT

[1] The Applicants seek an order compelling the Respondent to supply all or some of certain documents alternatively to make the documents available for inspection by the Applicants and/or their appointed agent

[2] The documents generally relate to corporate and financial records of the Respondent.

- [3] The Applicants further seek an order that a forensic audit should be performed on the Respondent for the period 2003 – 2006 and 2001 – 2014 by an independent auditor appointed by the Chairman of the South African Institute of Chartered Accountants (“SAICA”).
- [4] The Applicants further seek an order for costs on the scale as between attorney and own client.
- [5] The Applicants had initially sought certain interim relief that no dividends be paid by the Respondent to any shareholder, and that no assets be disposed of by the Respondent to any party pending determination of this matter. I was informed during argument that this part of the relief sought is no longer relevant as it is not proceeded with by the Applicants.
- [6] The issue for determination is whether or not the Applicant is entitled to the main relief for access to documentation and that a forensic audit be performed on the Respondent.
- [7] The relevant facts in this matter are largely common cause. The Applicants are shareholders in the Respondent. The Applicants own 5% and 7% respectively of the shares in the Respondent. The balance of the shares are held by other shareholders in the proportion of between 10 and 18% each.
- [8] The Respondent started off as a “stokvel” (informal savings club) of the current shareholders of the Respondent. It was later converted into a

company but its business was still conducted as a partnership and not strictly as a company.

[9] Until the annual general meeting of April 2014, no annual general meetings were held and no financial statements were approved by the directors. It appears that the affairs of the Respondent were not conducted strictly according to the requirements of the Companies Act 71 of 2008 ("the Act"). In particular the annual financial statements were not performed as and when strictly required by the Act.

[10] Directors of the Respondent have recently attempted to comply with the requirements of the Act by preparing annual financial statements which stretch back to the time when the company was incorporated. Financial statements have been approved by the shareholders and this is where the genesis of the dispute arises.

[11] Applicants are dissatisfied with certain aspects of the financial statements and affairs of the Respondent. They complain that they were unlawfully removed as directors and as such they have had no access to the inner workings of the Respondent and its financial affairs.

[12] The Respondent, which is represented in these proceedings by most of the remainder of the shareholders, contends that the Applicants were removed as directors because they were not actively involved in the affairs of the Respondent.

- [13] Although nominally it appears that the Respondent is the company, on a closer analysis of the facts the dispute in essence involves on the one hand the Applicants and on the other their co-shareholders. The Respondent is a proxy through which the shareholders do battle in this matter.
- [14] The Respondent holds substantial assets valued at approximately R68 819 145.00 as at 1 March 2010. The Respondent is a special purpose vehicle in that it does not actively trade but holds equity interest in other established companies.
- [15] After the financial statements of the Respondent were updated and given to the shareholders, the Applicants suspected that certain irregularities were committed by the shareholders who are in charge of the business of the Respondent. The suspected irregularities relate to dividend distribution and disposal or intended disposal of certain assets of the Respondent.
- [16] The Respondent has engaged in certain transactions and earned dividends. The dividends are due for distribution. A dispute has arisen between the Applicants and the other shareholders regarding the distribution or disposal of the assets. The Applicants are of the view that they are entitled to a bigger share of the dividends than what is proposed. They also suspect that in the past other distributions were made and they were excluded. They have queried certain specific items in the financial statements and demand more documentation to substantiate those transactions. In addition they want to subject the Respondent to a forensic audit.

[17] The Applicants allege that they have attempted on many occasions to gain access to the information concerned but the Respondent has refused them that information.

[18] On the other hand the Respondent's stance is that it has either provided the information demanded by the Applicants or it does not have it and can thus not produce it.

[19] After listening to the Applicants' arguments it became clear that the extent of the scope of the documents demanded and which is outstanding is fairly limited.

[20] The information which the Applicants contend is still outstanding is more fully set out in paragraph 27.5 of the founding affidavit and is the following:

20.1. Copies of any written communications sent generally by the Respondent to all shareholders of any class of the Respondent's securities. The Respondent alleges that it does not have this information in its possession.

20.2. All management accounts of the Respondent for the period 2007 to 2014. The Applicants contend that this information must be available, taking into account certain entries in the financial statements. I was referred to certain journal entries which form part of the notes to the financial statements and on the basis of these journal entries the Applicants contend that the documents must be available irrespective

of the allegations by the Respondents to the contrary. Respondent asserts that it does not have this information.

20.3. All offers made by any party for the purchase of any of the Respondent's assets during the period 2007 – 2014. The Respondent asserts that this information is not available to it. Applicants contend otherwise.

20.4. All correspondence with regard to offers during the period 2007 – 2014. Respondent contends that this information is not in its possession and as such cannot be provided.

20.5. All valuations performed on any of the assets of the Respondent during the period 2007 – 2014. The Applicants contend that the balance sheet of the Respondent records other financial assets held in listed companies, and that the assets are recorded at a fair value. According to the Applicants this means that the shares were valued and a report should be available. In response the Respondent submits that the very same financial statements record that the fair values of listed or quoted investments are based on the quoted market price at reporting period and that the unlisted investments are carried at cost. Accordingly Respondent contends that there is no separate valuation report of the assets.

20.6. All ledgers, including the general ledger of the Respondent for the period 2007 – 2014. Respondent contends that it does not have this information while the Applicants contend that based on a reading of the financial statements I must conclude that there are ledgers including the general ledger as demanded and that I should order the Respondent to make that available.

20.7. The salary / wage book of the Respondent for the period 2007 – 2014. Similarly the Applicants contend that based on an entry in the financial statements recording that wages/salaries were paid, that this information should be available.

[21] During argument the Applicants' counsel conceded that the Applicants will accept the word of the Respondent that the documents in paragraphs 20.1 - 20.5 in fact are not available and as such I cannot order their delivery. The remaining documents which the Applicants insist on are the valuation reports, ledgers as well as the salaries / wage books.

HAS THE APPLICANT MADE OUT A CASE ?

[22] The parties have concluded a shareholders agreement. A shareholders agreement, as the name suggests is an agreement among shareholders. In terms of section 15(7) of the Act the shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with the Act and the company's memorandum of incorporation.

[23] The sanctity of contracts must prevail and the parties must be held to the shareholders agreement.¹ The shareholders agreement must be interpreted in terms of the ordinary rules of interpretation.

[24] The purpose of the shareholders agreement is to govern the relationship of the shareholders. The parties concluded shareholders agreement concluded in 2007 is binding on them. Whatever rights and obligations the shareholders enjoy must therefore be determined with reference to the shareholders agreement.

[25] Clause 6 of the shareholders agreement governs the shareholders' right to information. In essence this application is an assertion of the Applicants to their right to information.

[26] Cause 6.2 provides as follows:

"6.2 In addition to the provisions of clause 6.1, each shareholder shall be entitled at its expense to appoint its own auditors to review the company's annual audited financial statements for each financial year and for that purpose to have access to all the company's books of account and records and to all the working papers of auditors."

[27] Prayer 2 of the Notice of Motion is an order that a forensic audit be performed on the Respondent by an independent auditor appointed by the Chairman of

¹ Theron v Phoenix Marketing (Pty) Ltd (Heyman Intervening) pp295J-296A

the SAICA. There is no provision in the shareholders agreement, particularly in clause 6.2 for a type of audit called a forensic audit. All that clause 6.2 provides is that any shareholder may appoint an auditor at their own cost. After the appointment of that auditor, it follows as a matter of logic that the appointed auditor may approach the auditors of the Respondent and request the financial statements as well as source documents underlying the financial statements.

[28] In order to exercise the right enshrined in this clause 6.2, a shareholder does not require the consent or permission of the Respondent. Nor does section 6.2 envisage that a forensic audit would be performed by an independent auditor appointed by an outside body such as SAICA.

[29] In my view therefore prayer 2 falls outside the ambit of the shareholders agreement.

[30] In addition it should be noted that a shareholders meeting was convened at which the Applicants sought a resolution to be adopted by the Respondent authorising the appointment of a forensic auditor.

[31] The resolution was not adopted as the majority rejected it. It is trite law that the decisions of a company, especially those of the shareholders are taken through a majority vote². The principle of the supremacy of the majority is

² Henochsberg on the Companies Act 71 of 2008 p585

essential to the proper functioning of companies.³ The minority cannot complain if the majority exercise their vote to defeat a minority driven resolution, provided that the laid down procedure of the company, the terms of the shareholders agreement and the general principles of company law are followed.

[32] It is not the contention of the Applicant that the meeting at which the resolution refusing the appointment of the forensic auditor was adopted was improperly convened or conducted. They have not sought to challenge that decision in these proceedings. Neither have the Applicants relied on section 163 of the Act which offers minority shareholders relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company.

[33] The conduct of the majority shareholders should, however always be judged in the light also of the principle that by becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions of the prescribed majority of shareholders, if these decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights as a shareholder.⁴ Thus, loss of confidence in the manner in which the company's affairs are conducted or resentment at being outvoted will not of themselves constitute prejudice.⁵

[34] The dispute in this matter revolves around accounting matters. The Applicants have deposed to the founding affidavit in their own names and have not

³ Garden Province Investment v Aleph (Pty) Limited 1989 2 SA 525 D at 534 quoting from Sammel and Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A)

⁴ Henochsberg on the Companies Act 71 of 2008 p. 574; Garden Province Investment v Aleph (Pty) Limited 1989 2 SA 525 D at 534-535

⁵ Garden Province case supra at 535

sought the support of an accounting expert. The court is therefore placed in a difficult position in that it cannot interpret the financial statements in order to conclude whether or not the documents which the Respondent says are not available to it are in fact available. The court is therefore unable to second guess the Respondent when it says that the documents are not available.

[35] I am unable to find that the documents in fact exist. As regards the valuation reports I accept the Respondent's version that the financial statements make it clear that the listed assets are valued at their publicly listed prices. There can therefore be no valuation report available.

[36] Accordingly I am of the view that the Applicant has not established a case for relief sought. There is no basis in the shareholders agreement for a forensic audit. As regards the documents which the Respondent says that it in fact does not have those documents, there is a dispute between the parties whether the documents sought in fact exist. Their dispute cannot be resolved on the papers.

[37] Both parties have argued that the costs should follow the suit.

[38] Accordingly the following order is made:

38.1. The application is dismissed.

38.2. The Applicants are to pay the costs.

Nalane, AJ

Acting Judge of the High Court of South Africa

Appearances:

For the applicant: Adv N Riley

Instructed by: Michael Saltz Attorneys

For the respondent: Adv R Du Plessis SC

Instructed by: Cliffe Dekker Hofmey Inc

Date of hearing: 05 October 2015

Date of judgment: 12 November 2015