

**IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE No. 968/2010

DATE: 13/10/2010

In the matter between:

ELEMENTONE LIMITED

Applicant

and

MODERN MEDIA PROMOTIONS

(PTY) LIMITED

First Respondent

AFMED (PTY) LTD

Second Respondent

CAXTON LIMITED

Third Respondent

CAXTON AND CTP PUBLISHERS

AND PRINTERS LIMITED

Fourth Respondent

TERRENCE DESMOND MOOLMAN

Fifth Respondent

JUDGMENT

WILLIS J:

[1] The applicant seeks access to certain documents in terms of the Promotion of Access to Information Act, No. 2 of 2000 (“PAIA”). There are two reasons upon which the applicant relies in seeking this information. The first is that the applicant wishes to sell shares it holds in the second, third and fourth respondent. The second is that the applicant wishes to know the basis upon which the fifth respondent receives certain remuneration.

[2] The first, second, third and fourth respondents all form part of what is generally known as “the Caxton Group”. The Caxton Group is one of the leading commercial printers and publishers of newspapers, magazines and other paper-based materials in the country. Its market capitalisation is about R6,5 billion. It employs over 5 000 people. Its turnover is of the order of R4 billion per annum. Last year, its after tax profits were just short of R500 million. The Caxton Group is controlled by the fifth respondent, Mr Terrence Moolman. The applicant used to known as Argus Printing and Publishing Company Limited. I think I may fairly take cognisance of the fact that “The Argus Group” was, for decades, a household name in South Africa. In effect, Mr *Trengove*, who appeared for the respondents, invited me to take such judicial notice. Indeed, among my journalist friends the Argus Group was known as “Granny Argus”. Although the applicant is a public company, it has been suspended from the Johannesburg Securities Exchange and is expected to be delisted. The applicant holds a minority stake in the Caxton Group, excluding the first respondent. The applicant has close links with Allan Gray Limited, a well-known investment company.

[2] A diagram annexed to the respondents’ answering affidavit indicates that the fifth respondent, Mr Moolman and his business partner, Mr Noel Coburn, through their partnership known as Moolman Coburn Partnership & Associates hold the majority and

controlling interest in all of the respondents. They own 100% of the shares in the first respondent which, in turn holds just over 50% of the shares in the second respondent. The second respondent holds 68,77% of the shares in the third respondent. The third respondent holds 39.16 % of the shares in the fourth respondent. Nevertheless, through a combination of its control of the first respondent and, via that, of the second respondent and, via that, of the third respondent, Moolman Coburn Partnership & Associates, together with its direct shareholding in the fourth respondent and a further indirect holding through a company known as Caxton Share Investments (Pty) Ltd controls the fourth respondent.

[4] The applicant owns just under 50% of the shares in the second respondent, 12,77% of the shares in the third respondent and 17,18% of the shares in the fourth respondent. The applicant's Achilles' heel is that it holds a sliver under 50% of the shares in the second respondent. On the other hand, the share structure set out in paragraph [3] above obviously gives Mr Moolman massive leverage throughout the Caxton Group such that he ultimately controls it through the one-thousandth of a percent majority which the first respondent has in the second respondent. The first respondent is, in turn, owned 100% by Moolman Coburn & Associates.

[5] When the applicant mooted the possibility of disposing of its minority stake in the Caxton Group, it was told by various persons acted on behalf of that group that "You can't do so". When the applicant asked why it could not do so, it was told "Because the matter is governed by certain agreements". When the applicant asked to be shown these documents the Caxton Group replied, "We won't".

[6] Relations between Mr Van der Merwe, the chairperson of the applicant and Mr Moolman, the fifth respondent, have soured considerably.

[7] The applicant claims that, underlying the first reason for bringing the application is the fact that, without access to the documents in question, it has no way of knowing what its rights and obligations are and therefore cannot enter into serious negotiations with any one in order to dispose of its interests. It is not disputed that the applicant may wish to dispose of its interests in the Caxton Group. Mr Moolman, on behalf of the Caxton Group, says, however, that the applicant is bringing the application for an ulterior purpose and that the real reason for the application is to “break up the Caxton Group” and to wrest control thereof from the fifth respondent. As this allegation appears in the answering affidavit, the court cannot go behind this by reason of the *Plascon Evans* rules.¹ I cannot, in all the circumstances of this case, go so far as to find that the Caxton Group’s version raises fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that I should be justified in rejecting it on the papers before me. Mr *Trengove*, who appeared on behalf of the respondents, also argued that the application was an attempt to harass and intimidate the Caxton Group and that it was a mere “fishing expedition”. In this regard, he relied heavily on decision of the Supreme Court of Appeal (“the SCA”) in *Unitas Hospital v Van Wyk*.²

¹ Insofar as disputes of fact are concerned, the time-honoured rules set out in *Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235 E-G and as qualified in *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C are to be followed. These are that where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants’ founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent’s version are bald or uncreditworthy, or the respondent’s version raises fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected. These rules have been re-affirmed in innumerable cases. A recent example of some prominence was the case of *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).

² 2006 (4) SA 436 (SCA) at paragraph [21].

[8] Insofar as the second reason for the applicant's bringing of the application is concerned, Mr *Harris*, who appeared for the applicant, argued that it would appear from certain documentation that is indeed to hand that certain payments to the fifth respondent by the fourth respondent have been made and will continue to be made to the fifth respondent without there being an underlying *causa*. The difficulty for the applicant is that this was not the case which the applicant made out in its founding affidavit. Moreover, Mr *Trengove* relied strongly on the SCA decision in *Clutchco (Pty) Ltd v Davis*³ to argue that the provisions of PAIA should not be used to obtain information which could be obtained by using the machinery of the Companies Act and the common law to protect shareholders. Mr *Trengove* submitted that these kinds of queries could be raised at an Annual General Meeting. He also submitted that in this regard the applicant was definitely engaging in a "fishing expedition". In all the circumstances, the case of the applicant is far too "thin" for it to succeed on this basis of the application.

[9] Mr *Trengove* furthermore argued that the applicant was, in any event, time-barred in bringing the application by reason of the order in *Brümmer v Minister for Social Development*.⁴ It is common cause that if the application had to be brought within 30 days of a request for information having been refused the applicant has been out of time but that if the relevant period is 180 days it is not. In *Brümmer's* case the Constitutional Court held that the 30-day period in section 78 (2) of PAIA was unconstitutional. In (g) of the order of the Constitutional Court it stipulated that pending amending legislation by Parliament or for a period of 18 months from 13 August 2009, which occurs first a period of 180 days was to be "read into" section 78 (2) in lieu of 30 days. Mr *Trengove* submitted, however, that in (f) of the order of the Constitutional Court it suspended the declaration of invalidity of the

³ 2005 (3) SA 486 (SCA) at paragraphs [17] and [18]

⁴ 2009 (6) SA 623 (CC) at paragraph

30-day provision for a period of 18 months. Accordingly, so the argument went, the 30 day period remained of force and effect. In (j) of the Constitutional Court's order, however, it stipulates that:

"The declaration of invalidity will apply to and govern all future requests for information and to all pending applications launched under section 78 (1) of the Promotion of Access to Information Act 2 of 2000 which, at the time of this order, have not yet been finally determined by judgment delivered at first instance or on appeal or by settlement duly concluded".

I am satisfied that, whatever else the Constitutional Court intended by (f), it could not have intended that a 30 day period rather than a 180 day period remained applicable for 18 months after the date of its order. My finding is that the applicant is therefore not time-barred. Be this as it may, the provisions of PAIA do not apply to the relief which I propose to grant.

[10] It is clear to me, however, that the applicant has an understandable, legitimate and unjustifiable grievance: it is intolerable that a shareholder in a company who wishes to dispose of its shares therein is to be told that it cannot do so by reason of provisions contained in a document but the person seeking to prevent that disposition is not prepared to disclose that document (or, at very least, the relevant provisions of thereof). A public company may, but a private company must, restrict the right to transfer its shares.⁵ Besides, it is my understanding that the very rationale for holding shares in a public company, apart from receiving dividends, is to have the right to sell those shares to whomsoever one wants at the best possible price. I put it to counsel for both sides that surely it would make sense for me to order under "alternative relief" that, other than as may be provided for in the articles of association of companies falling within the Caxton group, the applicant may dispose of its shares to whomsoever it pleases. Counsel for the parties had an

⁵ See *Henochsberg on the Companies Act* Vol 1, Issue 27, page 38

interesting response: they said that although they would not agree to this, their respective clients “could live with that”. I asked the parties to consider a settlement along these lines but they were unsuccessful. Against the background of events, I consider it right and proper and within my powers to make such an order.

[11] As the contending parties have been neither wholly unsuccessful nor without vindication, it seems appropriate not to take any order as to costs in this matter.

[12] The following order is made:

- (i) Subject to such restrictions as may, at the present time, exist in the Articles of Association of any of the second, third and fourth respondents, the applicant may dispose of its interests therein (i.e. the second, third and fourth respondents) to whomsoever the applicant may agree thereto;
- (ii) None of the respondents may unreasonably withhold their consent to any such disposition as provided for in paragraph (i) of this order;
- (iii) The fifth respondent may, in respect of any such disposition, exercise a right of first refusal, which right shall include the right to do so on behalf of whomsoever may agree with him accordingly;
- (iv) The right of first refusal aforesaid must be exercised within 30 calendar days of the fifth respondent being given notice of any such intended disposition.

DATED AT JOHANNESBURG THIS 13th DAY OF OCTOBER, 2010.

N.P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Applicant: *L..N. Harris SC* (with him, *R.M. Pearse*)

Counsel for the Respondents: *W. Trenove SC* (with him, *J. Wilson*)

Attorneys for the Applicant: Mervyn Taback Incorporated

Attorneys for the Respondents: Fluxmans

Date of hearing: 15 September, 2010

Date of judgment: 13 October, 2010