IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

REPORTABLE

CASE NO.: 1658/09

In the matter between:

MOSES FORTUIN **Applicant**

and

COBRA PROMOTIONS CC **Respondent**

JUDGMENT

GROGAN AJ:

[1] The applicant seeks an order in terms of section 78 of the Promotion of Access to Information Act 2 of 2000 ("the Information Act") directing the respondent to furnish him with copies *inter alia* of its balance sheet, financial statements, asset register, VAT returns, lists of debtors and creditors and current management accounts.

[2] In support of his claim to entitlement to this information, the applicant says he is a member of the respondent, a closed corporation that conducts business

as a building contractor, holding a 50% member's interest which he acquired from the other member, Mr F G Cuthbertson in terms of an agreement dated 20 February 2006 ("the agreement"), a copy of which is annexed to the founding affidavit. The applicant also claims that Mr Cuthbertson reneged on the agreement to transfer the member's interest to himself. In consequence of the alleged breach of the agreement, the applicant says he is now considering invoking section 36 of the Close Corporations Act 69 of 1984, seeking an order directing the respondent to transfer his member's interest to himself and thereafter the transfer thereof to Mr Cuthbertson against payment of an appropriate purchase price.

[3] After an exchange of correspondence, the respondent through its attorneys disclosed certain information, which the applicant says, correctly, he could in any event have obtained from the Register of Close Corporations. Unhappy with this response, the applicant has instituted the present application.

[4] Mr Cuthbertson claims that he is and has always been the respondent's sole member. While he admits that a draft agreement was prepared in terms of which the applicant would have obtained a 50% member's interest, he claims that he subsequently learned that because of the applicant's "parlous" credit record certain suppliers would cease advancing credit to the respondent if he became a member. Mr Cuthbertson claims further that after discussing the situation with the applicant, they agreed that the agreement would be

cancelled and that they would instead enter into a partnership to trade “on an equal basis” as a building contractor.

[5] Insofar as it may be relevant to the present application, it appears common cause that the relationship between the applicant and Mr Cuthbertson did not prosper after the agreement was concluded. The applicant claims that Mr Cuthbertson “marginalised” him by treating him as a “mere employee” and finally purported to dismiss him. Mr Cuthbertson claims in turn that the applicant’s work was of unacceptable quality, which led to difficulties with clients, and which in turn caused Mr Cuthbertson to accuse the applicant of breaching the partnership agreement and to give notice of its termination. Mr Cuthbertson alleges that, notwithstanding these developments, he had agreed to retain the applicant as a foreman until that relationship was finally terminated because of the applicant’s poor work. A year after his alleged dismissal, the applicant through his attorneys began pressing the claim that he was a member of the respondent, and as such entitled to information concerning the close corporation.

[6] The respondent now seeks to resist disclosure on two bases. It alleges, first, that the applicant failed to comply with the procedural requirements stipulated in the Act; second, that the record is not required for the exercise or protection of any of the applicant’s rights. I deal with each of these grounds in turn.

[7] With regard to the former point, Mr Cuthbertson contends that he is neither willing nor obliged to comply with the applicant's request for information because the notice in which it was conveyed was deficient in the following respects: (i) the applicant's attorney, who completed the request form, failed to state his capacity; (ii) the form does not specify whether or how the requester required the response to be sent to him; (iii) the particulars of the right to be exercised or protected and the purposes for which the information is required is left blank. Mr Cuthbertson contends that, in the face of these deficiencies alone, he was entitled to ignore the applicant's request, and that he remains under no legal obligation to satisfy it.

[8] The Information Act requires both public bodies and private persons to disclose information in specified circumstances. Section 50(1), which deals with the right of access to records of private bodies, reads:

> "A requester must be given access to any record of a private body if—
> (a) that record is required for the exercise or protection of any rights;
>
> (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
>
> (c) access to the record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part."

[9] Section 53(1) reads:

> "A request for access to a record of a private body <u>must</u> be made in the prescribed form to the private body concerned at its address, fax number or electronic mail address." (Underlining supplied.)

[10] The information the requester is required to provide is set out in section 53(2). This reads:

> "The form for a request for access prescribed for the purposes of subsection (1) <u>must</u> at least require the requester concerned—
>
> *(a)* To provide sufficient particulars to enable the head of the private body concerned to identify—
>
> (i) the record of records requested; and
>
> (ii) the requester;
>
> *(b)* to indicate which form of access is required;
>
> *(c)* to specify a postal address or fax number of the requester in the Republic;
>
> *(d)* to identify the right the requester is seeking to exercise or protect and provide an explanation of why the requested record is required for the exercise or protection of that right;
>
> *(e)* if, in addition to a written reply, the requester wishes to be informed of the decision on the request in any other manner, to state that manner and the necessary particulars to be so informed; and

(f) if the request is made on behalf of a person, to submit proof of the capacity in which the requester is making the request, to the reasonable satisfaction of the head.” (Underlining supplied again.)

[11] Certain parts of the form completed by the applicant’s attorney have not been filled in. These include Parts A (which requires the requester to declare the capacity in which the request is made where, as in this case, it is made on behalf of another person), G (which requires the requester to indicate the right to be exercised or protected and an explanation for why the record requested is required for the exercise or protection of the “aforementioned right”) and H (which requires the requester to indicate how he/she would “prefer to be informed of the decision regarding your request for access to the record”).

[12] The applicant contends that there has been at least substantial compliance with the requirements of the Act and that, in any event, the form must be read in relation to the correspondence that preceded the transmission of the form.

[13] The objection that the applicant’s attorney failed to state his capacity seems excessively technical. The designation “Michael Randell Attorneys” under the heading “Particulars of person requesting access to the record” (Part A of form C) leaves no room for doubt that the “requester” is representing “the person on whose behalf request is made” (Part B). In any event, the earlier correspondence had clearly alerted the respondent to Mr Randell’s role.

[14] The same can be said of the failure to specify the manner in which the requester required the “necessary particulars” to be provided (Part H). The respondent did in fact fax such information as it was prepared to disclose to the applicant’s attorney. These objections accordingly smack of opportunism.

[15] The applicant’s failure to provide any detail at all in Part G is another matter. The Information Act affords subjects an extraordinary remedy, which could be open to abuse. This is why the Legislature states in clear terms that persons to whom requests are addressed should be appraised, not only of why the requester seeks the information, but should also be given an explanation for the request. Without this information, the person to whom the request is addressed cannot evaluate whether the requirements of section 50(1), which obliges disclosure, have been met. Like that provision, both subsections of section 53 are cast in peremptory terms. Failure to specify the right the requester seeks to exercise or protect and to provide an explanation for why the information is required will generally be fatal to a request.

[16] I say “generally” because, in my view, it is arguable, as the applicant argues, that strict compliance with section 53 may not be required where, as in this case, the formal notice succeeds an exchange of correspondence in which the details specified in the form have been made plain. The question is whether a requester is entitled to omit that information from the form because

it is in any event known to the respondent — or, to put the same issue in other words, whether, as the applicant contends, a failure to state facts in the request of which the person to which it is addressed is well aware constitutes substantial compliance with section 53.

[17] I can find no authority on this issue. However, I think it appropriate to interpret the procedural provisions of the Information Act in accordance with the settled law relating to non-compliance with the provisions of statutes cast in linguistically peremptory terms (see *Nkisimane v Santam Insurance* 1978 (2) SA 430 (A) at 433-434). I am prepared to accept in the applicant's favour that, in circumstances where it has been made obvious in previous correspondence why the information is required, and for what purpose, a requester need not restate the reasons in the pro forma request notice. While the applicable provisions are cast in peremptory form, I do not think it was the intention of the lawmaker that a "requester" should be non-suited merely because the form is not completed. The question is whether, in the circumstances of the present case, it can be said that the respondent was aware, or ought reasonably to have been aware, of the reasons for the request. This answer requires a sketch of the developments preceding the lodging of the formal section 53 request.

[18] The request was preceded by an exchange of correspondence between, in the first instance, the parties' former attorneys, and then their current attorneys of record. The first letter, dated 9 March 2007, advised the

respondent that it had failed to comply with clause 3 of the agreement relating to the sale of a 50% share of the membership interest to the applicant, drew the respondent's attention to sections 42, 46 and 49 of the Close Corporations Act, and requested *inter alia* an income and expenditure statement for the period 1 March 2006 to 28 February 2007. In their lengthy reply to that letter, the respondent's then attorneys claimed that the agreement had been superseded by a partnership agreement, and tendered to make available the relevant financial and bank statements and "all other documentation relevant to its activities *qua* partner" on reasonable notice. Notice was also given of the termination of the alleged partnership.

[19] More than a year later, on 28 May 2008, the applicant's current attorney of record entered the fray with a threat to launch liquidation proceedings against the respondent if the matter was not resolved amicably. A month after receiving a letter dated 29 May 2008 reserving the respondent's rights pending further instructions, the applicant's attorney wrote a further letter adverting to an arrangement between the parties' legal representatives that the respondent "would be furnishing an accounting of the current financial circumstances of the Close Corporation so that consideration can be given to whether our client will approach the court for a winding up order".

[20] Four days later, on 4 July 2008, the applicant's attorney wrote again, this time stating that in the event of the respondent failing to settle the matter, he held instructions "to approach the court by way of appropriate relief either by way

of liquidation proceedings or alternatively, by way of proceedings in terms of Section 36 of the Close Corporations Act compelling your client to firstly transfer the relevant member's interest to our client and thereafter acquiring our member's interest against payment by your client of an appropriate purchase price". In the same letter, the applicant's attorney indicated that he was "awaiting receipt of accounting from your client", including copies of all financial statements and bank statements in respect of the corporation's business affairs from inception to date hereof". This letter drew a terse response from the respondent's attorney *inter alia* denying that the applicant is a member of the CC "in any form or fashion".

[21] Nine months later, the applicant delivered his formal request for information in terms of the Information Act. On 26 March 2009, the respondent, under a cover of a letter denying yet again that the applicant was a member of the CC, delivered a number of documents "in accordance with the provisions of the Promotion of Access to Information Act". These were said to be "public documents". They were indeed. The documents delivered were copies of the CC's certificates of incorporation and of member's interest, and the founding statement. The final riposte of the applicant's attorney before launching this application was to point out that these documents were unhelpful, that the Information Act did not restrict requesters to public documents, and that the financial records were required.

[22] Can it be said that against the above background the failure to complete the sections of form C requiring the requester to identify the right the applicant seeks to protect and the reasons for which the information is required constitutes a defect sufficiently material to entitle the respondent to ignore the request? In my view, it is apparent from the correspondence that the respondent was at the very least aware that the applicant required the financial statements for the purpose of debating and fixing the amount owed to him by the respondent as the member's interest transferred to him by virtue of the agreement dated 20 February 2006. So much is apparent from the respondent's vigorous denial that the applicant was in fact a member of the CC, and from the current submission that the applicant is merely seeking the information to launch an application to wind up the CC. The merits of these claims are for present purposes beside the point. Subject to what is said below, a court determining an application in terms of section 78 of the Information Act is not required to determine the ultimate dispute between the parties. For present purposes, the sole issue is whether the respondent knew why the applicant was seeking the information listed in the request for information, and which right he sought to protect.

[23] In my view, the correspondence outlined above makes it abundantly clear that the right the applicant is seeking to enforce is that emanating from the agreement of 20 February 2006. This agreement entitles the applicant on payment of R1000.00 to "50% of all income and expenditure and makes him 50% off [*sic*] responsibilities pertaining to the above cc". The correspondence also explains why the applicant needs the information ultimately requested to

enforce his rights under this agreement. The mere fact that the applicant kept open the options of applying for the winding up of the respondent and an action in terms of section 36 of the Closed Corporations Act is not in my view material. I accordingly find that the respondent was not entitled to rely on the applicant's failure to fill in parts of the request form to escape the obligation imposed by section 50(1) of the Information Act.

[24] Mr *Dyke*, who appears for the respondent, submits that this application should fail for a further reason. This is that the common law, company law and the Insolvency Act all provide procedures for the winding up of close corporations, and that the present application is nothing more than an abuse of the process provided by the Information Act, and a mere "fishing expedition". That submission is too broadly stated. The Information Act serves a purpose different from the common law and company legislation. Its object is to assist persons to obtain information which they might otherwise be unable to acquire. Requesters do not have to establish the rights they seek to exercise or protect; they need do no more than satisfy the court that the information requested is for the exercise or protection of the right claimed.

[25] But that is not the end of the inquiry. The information must indeed be "required". The meaning to be attributed to the word "required" has received judicial consideration. In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & others* 2001 (3) SA 1013 (SCA) Streicher JA observed at para. [28] that '[i]information can only be required for the exercise

of a right if it will be of *assistance* [my emphasis] in the exercise or protection of the right". In *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) the court accepted this observation, but refined the notion of "assistance" in these terms at para. [13]:

> "It seems to me that Streicher JA's choice of the words 'assistance' and 'assist' in the above passage indicates that 'required' does not mean necessity, let alone dire necessity. I think 'reasonably required' in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need. It appears to me ... that this interpretation correctly reflects the intention of the legislature in s 50(1)(a)."

[26] The *Clutchco* judgment makes it clear that where other legislation (in that case the Companies Act 61 of 1973) does not afford a party a right to information sought, that party may invoke Part 3 of the Information Act, but only "where the circumstances warrant such a course" (see at 492E-F). The court noted that the Companies Act is replete with the provisions designed to protect the interests of shareholders, and concludes (at para.17):

> "The machinery established by legislation and the common law for the protection of shareholders is ... not lightly to be disregarded. In enacting the PAIA, Parliament could not have intended that the books of a company, great or small, should be thrown open to members on a whiff of impropriety or on the ground that relatively minor errors or irregularities have occurred. A far more substantial foundation would be required."

[27] Two implications can be drawn from this passage. The first is that the existence of alternative remedies under the common law or legislation is a factor to be taken into account in assessing whether access to the information required by a party invoking the Information Act is required for the exercise or protection of any of that party's rights. The second is that the requester must lay a cogent foundation for the request.

[28] In this case, the right sought to be exercised or protected is that flowing from the agreement of 20 February 2006, as read with the applicable legislation. If proved, that right will entitle the applicant to claim a half share of the members' interest of the respondent and to invoke the provisions of section 36 of the Close Corporations Act or seek its winding up. The applicant indicated that it is his intention to approach the Court for one or other of these forms of relief. The issue is whether the information requested is reasonably required for those purposes. In my view, it is. As Mr *Niekerk* contends on the applicant's behalf, the applicant is unable to calculate the value of his 50% interest without access to the CC's financial records. Such information would enable him to assess which remedy to use, or whether to let the matter rest.

[29] Apart from a general allegation that the information requested is irrelevant for the applicant's purposes, the respondent has not stated why it resists disclosing the information, or whether it will suffer prejudice by disclosure. I also note that at one stage the respondent was prepared to tender for inspection copies of the CC's financial and bank statements, a tender

withdrawn only after the respondent changed its attorneys. In the circumstances, I am unable to discern what prejudice disclosure would cause the respondent, since the applicant could in any event ultimately obtain the information by means of the normal procedure of discovery after action is instituted, if indeed action is instituted. If it is not, disclosure might encourage a process of debatement and possible settlement.

[30] In my judgment, therefore, the respondent has failed to demonstrate why it is entitled to ignore the applicant's request to disclose the requested information.

[31] The Information Act confers on the Court the discretion to make "any order that is just and equitable" (section 82). I deem it just and equitable to make the following order:

1. The respondent is directed to make available for inspection by the applicant or his legal representative copies of the following documents:

1.1 its balance sheet from inception of its activities to date;

1.2 its income and expenditure statements from inception to date;

1.3 its asset register as of the date of registration, including all amendments thereto to date;

1.4 all VAT returns submitted to the SA Revenue Services from inception to date;

1.5 its creditors' list to date;

1.6 its debtors list to date;

1.7 its latest management accounts.

2. The above documents shall be made available within six weeks of the date of this order.

3. The respondent is to pay the costs of this application.

J G GROGAN

ACTING JUDGE OF THE HIGH COURT