

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 23/39002

(1) REPORTABLE: No

(2) OF INTEREST TO OTHER JUDGES: No

(3) REVISED: No

DATE: 05/01/2024

SIGNATURE

In the matter between:

NAVASEN MOODLEY

Applicant

and

CRAZY PLASTICS HOLDINGS (PTY) LTD

First Respondent

BLACKTIP REEF SHARK INVESTMENTS (PTY) LTD

Second Respondent

t/a CRAZY PLASTICS LA LUCIA

JUDGMENT

YACOOB J:

INTRODUCTION

1. Mr Moodley, the applicant, is a former employee of the first respondent, which ought to have been cited as “Crazy Group Holdings (Pty) Ltd”. I refer to the first respondent as “Crazy”. The second respondent (“Blacktip”) is a subsidiary of Crazy, in which Crazy owns the majority of shares.
2. It is common cause that Mr Moodley was given a 25% shareholding in Blacktip when it was registered, and that he was an executive director of Blacktip, either

until he resigned on 8 September 2021 or he was removed as director on 6 May 2022. He did not sign a shareholders' agreement. Mr Moodley left the employ of Crazy and was removed from his directorship of Blacktip when the relationship between him and Mr Teixeira, who is the director of both respondents and whom Mr Moodley describes as the "owner" of Crazy, deteriorated.

3. The parties have been unable to agree on a value of the shares, to enable the first respondent to purchase the shares from him. Mr Moodley has not accepted a valuation provided by Blacktip, nor does he accept the unaudited and unreviewed financial statements of Blacktip which have been provided to him.
4. There has been other litigation between the parties, which Mr Moodley describes as not relevant to this litigation. The relief sought in that litigation dealt with the determination of the value of Mr Moodley's shareholding. He was mulcted in costs, which remain unpaid.
5. On 31 January 2023 Mr Moodley's attorneys stated in a letter to the respondents' attorneys that they have received financial statements (it is not clear for what period) and submitted them to their auditors for review, and requesting the financial statements for 2022.
6. Mr Moodley now seeks in this application an order that both respondents release independently audited financial statements for the period 2020 – 2022, or, alternatively, that the respondents pay for an independent auditor to audit the financial statements.
7. The respondents raise various points in *limine*, and, as regards the merits, simply state that Mr Moodley is not entitled to audited financial statements. They decline to disclose whether audited statements exist.

THE POINTS IN *LIMINE*

8. The respondents raise three points in *limine* in their answering affidavit, but have abandoned the third point which relied on the unpaid costs of the previous litigation.

9. The first point in *limine* is that Mr Moodley has no cause of action against Crazy. It is contended that Mr Moodley seeks the financial statements of both Crazy and Blacktip.
10. Although the notice of motion is not a model of clarity, it is clear from the founding affidavit that Mr Moodley only seeks the statements of Blacktip. He confirms this in reply. It seems to me that Crazy has deliberately misconstrued the relief sought simply for purposes of taking the point.
11. Crazy also complains that costs are sought against it. This is clearly also only something that will be awarded if the court deems it necessary. Had Crazy not opposed the relief sought, which on its own version has nothing to do with it, no costs would have been considered against it.
12. It is true that Mr Moodley seeks in his alternative relief that independent auditors be appointed at the expense of both Crazy and Blacktip. But on a conspectus of the papers it is clear that Crazy is only joined for its interest in Blacktip, and the substantive relief sought is against Blacktip.
13. I consider that the conduct of the respondents' legal representative in persisting with this point in the heads of argument after it was explicitly clarified in reply that relief was not sought against Crazy is not appropriate. It is however consistent with the manner in which this matter has been handled, which is to avoid dealing with the substance of Mr Moodley's complaints, and to take a highly technical approach to his requests.
14. The second point in *limine* is that Mr Moodley has no cause of action against Blacktip. The point is that Mr Moodley is not entitled to be provided with independently audited financial statements. Again, Blacktip declines to disclose whether independently audited financial statements exist. It simply contends that Mr Moodley is not entitled to them.

15. This is a defence to the merits of Mr Moodley's claim and I deal with it below in dealing with the merits of the application.

THE MERITS

16. Mr Moodley has pleaded that Blacktip has declined to give him audited financial statements. He has pleaded that he needs these so that he can properly value his shareholding, so that he can sell the shares. He has complained the Blacktip has not paid attention to his requests and that he was not properly advised of his rights by Blacktip. In the heads of argument, it was argued that Mr Moodley relies on both section 26 and section 163 of the Companies Act, 71 of 2008. Mr Moodley also complains that he was not informed by Blacktip of his rights to access documentation in terms of section 26 of the Companies Act.

17. Blacktip takes the position that Mr Moodley is not entitled to audited financial statements, and that it does not have any obligation to advise Mr Moodley of his rights. Blacktip has provided Mr Moodley with statements that comply with the provisions of the Companies Act. It does not choose to disclose whether there are, in fact, audited financial statements, because it maintains that Mr Moodley is not entitled to audited financial statements. In its written submissions and at the hearing, Blacktip also relied on the fact that section 29 of the Companies Act does not require it to have its financial statements audited, as long as any existing financial statements indicates clearly on the first page that they are not audited or independently reviewed.

18. It is clear that Blacktip has treated Mr Moodley and his requests with a measure of disregard, by not engaging with him substantively and by taking a technical approach.

19. Mr Moodley's real issue is that he is not happy with the manner in which Blacktip has calculated the value of his shares. He complains that the valuation was purportedly done in accordance with a shareholders' agreement, when he has not signed any shareholders' agreement. He appears to have a suspicion that, because the financial statements are not audited, there may be something amiss, which leads to the undervaluing of his shares.

20. The two issues are separate. Mr Moodley does not, in this application, seek to obtain a different method of valuing shares. He seeks only either access to existing audited financial statements, or, if they do not exist, an order that the financial statements be audited. Due to Blacktip's approach to this litigation, Mr Moodley has to still seek relief in the alternative, as he does not know if audited financial statements exist.

21. In the written submissions and at the hearing, it was also submitted for Mr Moodley that, as a minority shareholder, he has been subjected to unfair or oppressive conduct, that the allegations in his affidavits support that conclusion, and that the court should assist him as a result. He relies on the judgment in *Bester and Others v Lebra Developments (Pty) Ltd and Others*¹ ("Bester") for this submission.

22. Blacktip's response is simply that there is no allegation of the conclusion that Blacktip's conduct towards Mr Moodley has been unfair or oppressive, and therefore that he cannot now rely on such submissions. A submission is also made that, since Mr Moodley is not seeking an order that Crazy buy him out, it is fallacious for him to invoke s163 of the Companies Act.

THE APPLICABLE LAW AND HOW IT APPLIES TO THE ISSUES

23. Section 26 read with section 24 of the Companies Act allows a shareholder to inspect and copy information including the annual financial statements which the company is obliged to keep in terms of the Act. Section 29 prescribes the form of financial statements which are provided to any person for any reason. Section 30 prescribes the form of annual financial statements which the company is obliged to keep.

24. If the company is a private, profit company, which does not fall into the category of companies obliged to be audited, like Blacktip, it must either be audited if the Memorandum of Incorporation, a shareholder's resolution or the Board requires

¹ (88160/19) [2022 SAGPPHC 211 (24 March 2022)]

it, or it must be independently reviewed. If all the shareholders are also directors, the company is exempt from these requirements.

25. Certainly then, for the time period after Mr Moodley ceased to be a director, the company is obliged to have its statements independently reviewed, in accordance with section 30(2)(b)(ii)(bb) read with section 30(2A) of the Companies Act.

26. As far as the preceding period is concerned, it is true that the Companies Act does not require the company to have financial statements reviewed or audited, and section 26(1) read with section 24 only entitles Mr Moodley to have access to the statements in the form the company is obliged to keep. It does of course also entitle Mr Moodley to the source documents from which the financial statements are produced.

27. Section 26(7) provides that the rights of access to information set out in section 26 are in addition to other rights of access to information people have, in terms of section 32 of the Constitution,² or the Promotion of Access to Information Act,³ which gives effect to the section 32 right.

28. In my view, even though Mr Moodley has not made a request in terms of the Promotion of Access to Information Act, it is clear that, if audited financial statements do exist for the period while he was still a director, he is entitled in to them in order to properly exercise his rights as a shareholder. He is also entitled to know whether they exist.

29. If the audited financial statements do not exist, Mr Moodley is entitled to the documents which will enable him to procure audited financial statements. The question then arises who must pay for this.

² The right to access information which is required for the exercise or protection of rights.

³ Act 2 of 2000

30. Mr Moodley submits that Blacktip should pay because he is being treated unfairly. Blacktip submits that Mr Moodley should pay because it is he who wants them.

31. I think it is clear that Blacktip has not been playing fair with Mr Moodley. It has been taking every opportunity to be obstructive and to take advantage of his unsophisticated approach. On the other hand, Mr Moodley is the one who takes issue with the existing financial statements and valuations, and must bear some responsibility for the production of audited financial statements.

32. In my view it is appropriate that Blacktip and Mr Moodley share the cost of the production of audited financial statements.

CONCLUSION

33. As far as costs are concerned, in my view Mr Moodley has been substantively successful. In addition the respondents have not elected to be forthcoming in their approach to the litigation. It is therefore appropriate that they bear the costs of the application.

34. I therefore make the following order:

1. The second respondent is to provide the applicant with independently reviewed financial statements for the financial year ending February 2023, to be produced within one month of the date of this order.
2. The second respondent is to provide the applicant with independently reviewed financial statements for the financial year ending February 2024, within two months of 29 February 2024.
3. The second respondent is to inform the applicant, within ten days of the date of this order, whether audited financial statements exist for the financial years preceding that ending in February 2023, and, if they do exist shall simultaneously provide them to the applicant.

4. If no financial statements exist for the financial years preceding the year ending February 2023:
 - a. the second respondent is to provide the applicant's nominated auditor with all source documents required to produce audited financial statements, within one month of being informed by the applicant of the identity of the auditor, and is to co-operate with the auditor in the production of the audited financial statements, and
 - b. the applicant and the second respondent are to share the cost of the production of the audited financial statements for that period.
5. The second respondent is to pay the costs of the application.

S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

For the applicant:	D Kela
Instructed by:	Mkhize Attorneys
For the respondents:	H P West
Instructed by:	Robert Sousa Attorney
Date of hearing:	03 October 2023
Date of judgment:	05 January 2024