IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 5125/2017

In the matter between:

TSIETSI BENJAMIN LETANTA Applicant

and

STANDARD BANK (PTY) LTD 1st Respondent

MOHKAT (PTY) LTD 2nd Respondent

JANE PEDZISAI 3rd Respondent

HERBERT NEMATO 4th Respondent

CORAM: **MHLAMBI J,**

HEARD ON: 17 MAY 2018

DELIVERED ON: 07 JUNE 2018

MHLAMBI, J

[1] The applicant, as director and shareholder of the second respondent, approached this court on application seeking the following relief:

"1. That the First Respondent be ordered to provide Applicant with the bank statements in respect of the following bank account statements in the name of the Second Respondent;

a) [....]

b) [....]

2. The Third Respondent to provide the books of accounting in respect of all liabilities; expenses and profit in respect of the Second Respondent from inception to date of judgment herein.

3. The Third Respondent to provide the lease agreement for the premises shared by the Second Respondent and the Third Respondent's law firm, that which the Applicant was contributing half of regarding rental fee.

4. The Third Respondent to provide the mandates, either to sell or lease, granted to the Second Respondent in respect of properties listed in annexure 5 attached to this application.

5. The Third Respondent to provide a list of properties leased and sold by the Second Respondent, from inception to date of judgment herein.

6. Costs against the Third Respondent and, any other party opposing this application, jointly and severally, one pays others to be absolved.

7. Further and/or alternative relief."

[2] The applicant, third and fourth respondents are shareholders and directors of the second respondent, which conducted or whose line of business would be the establishment of an estate agency. The third respondent was mandated by way of a resolution dated 9 April 2014 to open a bank account on behalf of the second respondent which mandate was duly discharged.

[3] The applicant and the third respondent agreed that the premises of her law firm would be used to house the second respondent and the applicant would pay half of the office space rental. Both parties would share the costs of salaries of the individual who would solely attend to the activities of the second respondent. The applicant's contributions were deposited into the third respondent's bank account by the applicant.

[4] During February 2016 matters came to a head as the applicant alleged that the third respondent channelled the second respondent's funds through her firm's trust account without his consent. The applicant accused the third respondent of either failing to account or accounting "erratically" in the form of spreadsheets which lacked sufficient detail. *"The Third respondent appears to have been creative and/or dishonest in her accounting and this is to the detriment of the Applicant and Second respondent."* [1]

[1] Founding Affidavit paragraph 24 page 11

[5] On 30 July 2017, the applicant was provided with bank statements by the first respondent in respect of one bank account and advised that all three bank accounts held with the first respondent were closed. A letter was addressed to the third respondent by the applicant's attorneys on 16 may 2017 demanding to be furnished with financial records of the company from the date of the opening of the account to date on or before 31 May 2017. Attached to the letter was a copy of the resolution of 9 April 2014. The third respondent responded in writing as per the letter dated 17 May 2017 and advised *that:*

"We do not have any financials as we never appointed any accountant to do that.

Since your client does not want to speak to me, may you convey this message to him. I think the best thing to do is for him to resign as director of Mohkat. I will be able to assist him with the forms and will request the accountant who assisted us with the registration of the company to attend to the matter. Kindly inform if your client agrees." [2]

[6] The third respondent opposed the application and stated that, as both shareholder and director, the applicant was not entitled to the relief sought as he should have called a directors' meeting and requested the documents. Upon termination of the business relationship, she had called him for a meeting to address the second respondent's business affairs, clarify all issues and close shop; but the applicant failed to attend. Besides, the applicant was at liberty to request the documents from the second respondent's

[2] Page 155 of the Bundle

employees. It was clear from the founding affidavit that the respondent was already in possession of the second respondent's records and bank statements.

[7] The third respondent admitted to having been mandated to open a banking account but such mandate did not extend to the management of the affairs of corporate entity nor conferred on her the functions, powers and rights to administer the said entity. As there was no start-up capital available, the administrative and support staff were employed and financed by the applicant and herself on a 50/50 basis. Expenses and other responsibilities were shared on the same basis.

[8] It transpired that the company did not comply with the prescripts of the estate agency board and could therefore not conduct the business of an estate agent as planned. In order to avoid that the business should stagnate, it was agreed by both parties that she should use her fidelity fund certificate issued by the Law Society and her professional company, Pedzisai Pion Incorporated Attorneys. This would facilitate the receipt of funds from clients which would be deposited into the said firm's trust account. The applicant misconstrued the deposits as constituting returns on investments and that she was accountable to him for such funds. This attitude led to the proposition by her that they should part ways.

[10] In both written and oral arguments, it was argued on behalf of the applicant that the third respondent effectively hijacked the applicant's investments to further her own business venture while

pretending to further their joint venture. Relying on **Makanda and others v Afrinnai Health (Pty) Ltd & others**[3] and Section 24, 25, 26 and 163 of the Companies Act 71 of 2008 (the Act), it was submitted that the applicant was, as director, shareholder and investor, entitled to the documents sought in prayers 1-5 of the Notice of Motion as they related to the financial records of the second respondent.

[11] In the supplementary heads of argument, it was argued on behalf of the third respondent that the applicant, in his reply, rehashed the contents of his founding papers and left a myriad of issues unexplained. The focus of the supplementation was that the statutory element and the reference to the remedy relied on in the Companies Act, was raised for the first time in the heads of argument. As a shareholder, it was submitted that the applicant had a right of access to the company records and to enquire into the financial affairs of the second respondent. However, this right could only be given credence and effect only if the company itself complied with its statutory duty to keep proper books and records as required by the relevant legislation. Except for the opening of the bank account, no mandate was expressly given to any director to perform any of the company's juristic acts.

[12] It was contended further that there was no evidence adduced demonstrative of a mandate to any natural person to keep financial records and cause that financial statements be produced. It stood uncontroverted that the company did not hold directors meetings,

[3] [2015] ZAFSHC 6

kept records, appointed any person to take care of the statutory duties, caused the audit of the financial records etc. Therefore, it begged the question why the applicant asserted the right of access of company records against the third respondent? Even more, why did the applicant try to access company records that he knew did not exist?

[13] The following paragraph was quoted from **S v Coetzee**[4] that "*those who choose to carry on their activities though the medium of an artificial persona must accept the burdens as well as the privileges which go with the choice."* It was submitted that applicant, just as any other of his co-directors and/or co-shareholders was equally culpable in that they abdicated their statutory obligation and could not seek to pontificate by deflecting such obligation onto the third respondent.

[14] It remained the weakest point of the applicant's case that he failed to refer to the company's constitutive document such as the Memorandum of Incorporation and that the rights of the members of a company vis-à-vis each other are to be found in the constitutive document. It was argued that, in the circumstances, such document was indispensable in the determination of the issues as it bound the company and its members inter se.

[15] It was submitted that the applicant had not formulated its application in terms of section 163 of the Companies Act which provided for a shareholder or a director of company to approach the court for relief against conduct of a company which was oppressive or unfairly prejudicial to the interests of such a

[4] 1977 (3) SA 527 (CC) at 98

shareholder or director. This remedy was not available to the applicant in the present case.

[16] I agree with the submissions made on behalf of the third respondent. Reliance on **Makanda**, *supra,* by the applicant was misplaced. Section 163 of the Act refers to the relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of the company. The applicant failed to show in his papers that the conduct he complained of did resort under section 163(1) of the Act in order to qualify for the so-called oppression remedy or that it attracted the orders the court could make in terms of section 163 (2). Furthermore, the **Makanda** case was squarely based on the provisions of the Act, unlike the present case.

[17] It is evident that no relief is sought against both second and fourth respondents. The applicant, despite maintaining that he is a director in the second respondent, failed to execute his duties as a director as required by the Act. It would seem that he disregarded the legal personality of the second respondent and pursued a partnership relationship with the third respondent. In my view, this application should never have served before the court and stands to be dismissed for lack of substance.

[18] In the result, the costs should follow the event.

[18] I therefore make the following order:

Order

The application is dismissed with costs.

MHLAMBI, J

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