IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. : 3590/2014

In the matter between:-

MAKALIMENG BELINAH MAKANDA	1st Applicant
PITSO FAIRBRIDGE MOGOREGI	2nd Applicant
MPATI GRACE ERICA KALANE	3rd Applicant
MOSOEUNYANE SHADRACK RAMATHE	4th Applicant

and

AFRINNAI HEALTH (PTY) LTD	1st Respondent
LEHLOHONOLO MOSOTHO	2nd Respondent

CORAM: NAIDOO, J

JUDGMENT BY: NAIDOO, J

HEARD ON: 20 NOVEMBER 2014

DELIVERED ON: 5 FEBRUARY 2015

NAIDOO J

[1] The applicants seek an order against the respondents in the following terms:

> "1. That the first respondent be ordered to make available the documents set out hereunder, within 14 days of the date of this order, by delivery of copies thereof to the applicants'

attorneys of record, care of JH Conradie, Roussouws Attorneys, 119 Pres Reitz Avenue, Westdene, Bloemfontein, to wit:

1.1 The first respondent's memorandum of Incorporation and any amendments to it, and any rules made by the company as envisaged by the provisions of section 24(3)(a) of the Companies Act 71 of 2008 [**the Act**];

1.2 The records in respect of the first respondent's directors as envisaged by the provisions of section 24(3)(c)(i);

1.3 The reports to annual meetings and annual financial statements since inception of the first respondent to date of this order as envisaged by the provisions of section 24(3)(c)(i) and (ii) of the Act;

1.4 The notices and minutes of annual meetings and communications of the first respondent as envisaged by the provisions of section 24(3)(d) and (e) of the Act;

1.5 The securities register of the first respondent as envisaged by the provisions of section24(4) of the Act;

1.6 Accounting records, including bank statements of all accounts operated by the first respondent with any bank, from date of the first respondent's inception to date of the order;

2. The first and second respondent pay the cost of the application on the scale as between attorney and client, alternatively, party and party scale, jointly and severally, the one paying the other to be absolved;

3. Such further and or alternative relief as the court deems meet."

[2] Mr N Snellenburg appeared for the applicants and Mr MDJ Steenkamp appeared for the respondents. The applicants are shareholders in the first respondent and together hold 74 shares. The applicants' case is that they have repeatedly, for a period of about one year, requested the first respondent to make available to them the documents, financial statements and books of account, which would assist them gain insight into the manner in which the first respondent was being run and to assess the financial standing of the company in order to ascertain the state of their investment in the company.

[3] There is no dispute that the first respondent is required by law to keep all of the documents requested by the applicants, and that the latter are entitled to have access to and copies thereof. The respondents' case is that the first respondent is an investment company whose sole asset is approximately a 20% shareholding in a Lesotho–based company called Tsepong. The latter company appears to have taken a loan of R20 million and some of its shareholders are currently locked in a court case in Lesotho to obtain a forensic audit of the running of Tsepong. As a result, no dividend was paid to Tsepong's shareholders, which in turn resulted in the first respondent itself not being able to declare a dividend or pay its shareholders.

[4] The relevant sections of the Companies Act 71of 2008 (the Act) make extensive provisions for the keeping of company records, and the manner and form in which such records

must be kept, as well as for the furnishing of information to persons entitled thereto. The court is indebted to Mr Snellenburg for a detailed and useful exposition of the statutory framework in his Heads of Argument. In summary,

- **Section 24** of the Act provides comprehensively for the types of documents, and the manner, form and period that documents, accounts, books, records and other information are to be kept by the company. Such records include annual financial statements, accounting records and a full and complete record of the details of its directors.

- **Section 25** provides that such records and documents must be accessible from the company's registered address or other locations, in which case the Registrar must be informed if the documents are kept at such other locations.

- **Section 26** makes extensive provisions for access to company records by, amongst others, "A person who holds or has a beneficial interest in any securities issued by a profit company…has a right to inspect and copy, without any charge for any such inspection or upon payment of no more than the prescribed maximum charge for any such copy…". The information that such a person is entitled to includes that contained in the Memorandum of Incorporation, records relating to the company's directors, reports to annual meetings, annual financial statements, notices and minutes of annual meetings, notices and minutes relating to shareholders' meetings and communications sent out by the company generally to holders of securities. Section 26 (5) and (6) compel the company to respond to requests for information within 14 business days and to ensure that the register of members and register of directors is open for inspection by any member, free of charge, during business hours, respectively

- **Section 26(9)** makes it an offence for a company to refuse to accommodate a reasonable request for access or to unreasonably refuse access to any record to which a person is entitled, or to impede frustrate or interfere with the reasonable exercise by any person of rights set out in section 26 or section 31 of the Act

- **Section 163** provides for a shareholder or a director of a company to approach the court for relief against conduct of the company which is oppressive or unfairly prejudicial to the interests of the applicant. Section 163(2) lists a variety of orders that a court may make, including an order restraining the conduct complained of, and an order requiring the company, within a time specified by the court, to produce financial statements as directed by the court or to account in any manner stipulated by the court.

The application before me rests on the provisions of the sections of the Act I have listed above, as well as on the provisions of sections 27-29 and section 163.

[5] With regard to the first respondent's affairs, the second respondent, who deposed to the Opposing Affidavit on behalf

of the first respondent, indicated that the first respondent has no official premises, employees or infrastructure. It is run from the living rooms of the four non-executive directors and does not earn an income. It is dependent on the return of its investment in Tsepong to generate income to enable it to pay its expenses, including the fees of the auditors. Its inability to pay the latter has resulted in the auditors not performing many of the tasks in compliance with the first respondent's statutory obligations.

[6] It also emerges from the Opposing Affidavit that a number of documents were furnished to the applicants, and that the first, second and fourth applicants attended at least one annual meeting of the first respondent, in August 2012. This was not disclosed in the Founding Affidavit, nor was the fact that certain documents were in fact furnished by the first respondent to the applicants under cover of a letter dated 11 October 2013. Having said that, however, I must point out that although the fourth applicant's name appears on the attendance list, which is relevant to the meeting on 17 August 2012, there is no signature against his name. The applicants allege that the fourth applicant resigned from the Board of the first respondent in May 2010 and has not been involved in the affairs of the first respondent since then. It is also useful to record what documents were allegedly furnished to the applicants (page 115/6 of the papers). These were:

6.1 Afrinnai Health (Pty) Ltd Resolution – Change of Address;

6.2 Afrinnai Health (Pty) Ltd Resolution – Appointment of MRB & Partners as Auditors;

6.3 Special Power of Attorney for Change of Directors dated 27 February 2012.

6.4 Special resolution dated 14 June 2013;

6.5 Special Resolution dated 25 July 2013;

6.6 Notice of Annual General meeting held on 17 August 2013 at Garden Court Hotel;

6.7 A Resolution dated 12 February 2009;

6.8 Minutes of a meeting by the board of Directors of Afrinnai Health dated 5 November 2008;

6.9 Minutes of a meeting held on 17 December 2008;

6.10 Minutes of a meeting held on 22 April 2009;

6.11 Minutes of a meeting held on 31 August 2010;

6.12 Articles of Association of a company known as Silver Meadow Trading193 (Pty) Ltd, registration number 2007/010157/07;

6.13 Copy of the Memorandum of Association of Silver Meadow Trading;

6.14 A copy of a Certificate of Incorporation of Silver Meadow;

6.15 A copy of a Certificate of change of name of company from Silver Meadow Trading (Pty) Ltd to Afrinnai Health;

6.16 Articles of Incorporation of Afrinnai Health (Pty) Ltd;

6.17 A copy of a letter dated 26 July 2013 from Afrinnai Health addressed to Rossouws Attorneys;

6.18 A copy of an e-mail dated 1 October 2013 from Rupert Bester addressed to Dr L Mosotho.

In addition, it is not disputed that the first and /or the second respondent furnished the applicants' attorneys with a list of shareholders with an indication of their shareholdings (paragraph 8.5 of the Opposing Affidavit). Remarkably, though, the respondents allege that this is equivalent to a share register as there is no share register in existence. The provisions of the Act are clear, and a list of shareholders, albeit one that reflects their respective shareholding, cannot be regarded as a share register.

[7] The letter under cover of which the abovementioned documents were furnished refers to the Annual General Meeting held on 17 August 2013. An examination of the document, as well as the relevant attendance register shows that the meeting was held on 17 August 2012. The contents of this "notice" appear to be a recording of what was decided and resolved at such a meeting. With the exception of this notice, which purports to be a notice of an annual general meeting held on 17 August 2012, the only other notices and minutes furnished to the applicants are notices and minutes of meetings of the directors of the first respondent. The applicants seek notices and minutes of shareholders' meetings. The Articles of Incorporation furnished to the applicants does not appear to be a complete document. In any event, the applicant's the first respondent's Memorandum of Incorporation, together with any amendments made thereto and any rules made by the first respondent in terms of section 15 of the Act. The applicants

are not in possession of such a document and are clearly entitled thereto.

[8] The applicant's point out a number of discrepancies in different documents regarding the number of issued shares in the first respondent, for example the Company and Intellectual Property Commission (CIPC) report indicates that 1000 shares were authorised but only 100 were issued. The applicants in this matter together hold 74 shares, hence 74% of the issued shares. The second respondent deposed to the Answering affidavit in which he alleges that 1000 shares were issued. The applicants point out in reply that a list of shareholders provided for the meeting on 17 August 2012 (which does not form part of the papers in this matter), which I have referred to above, reflects a shareholding1032 shares. I agree with the submission of the applicants in this regard, which in essence is that the discrepancies create a sense of unease which raises a number of, hitherto unanswered, questions. I also agree with the submissions of the applicants that the contents of the answering affidavit in this matter are a clear indication that the first respondent and/or the second respondent have not complied with the statutory obligations placed on the first respondent with regard to the keeping of records and books of account.

[9] The contentions of the first respondent in the Opposing Affidavit have understandably created, unease, suspicion and a sense of disquiet in the minds of the applicant, leading to a strong suspicion that there is either mismanagement of

the affairs of the first respondent or that there has been a deliberate attempt to mislead the court regarding the financial standing of the first respondent. Two examples can be cited, firstly the alleged loan of R20 million that Tsepong obtained from the Development Bank of South Africa (DBSA). From the correspondence put up by the first respondent in the Opposing Affidavit, it is indeed clear that the loan was taken by Tsepong, although the second respondent claimed in a letter (also an annexure to the Opposing Affidavit) that the loan was taken by the first respondent. When the second respondent attempted to obtain a "letter of proof" that the first respondent was the recipient of the loan from DBSA, it was made clear to him that Tsepong and not the first respondent was in fact the recipient of the loan or loans. What is not clear is how this has prevented the first respondent from fulfilling its statutory obligations, especially with regard to the keeping of proper records and accounts, and from finalising its financial statements. The failure of the first respondent, therefore, to finalise its financial statements for several consecutive years, is concerning. Another example is that the Notice of Annual General Meeting purportedly held on 17 August 2012 (which I have referred to above) indicates that there was agreement that the second respondent and the other directors of the first respondent should receive remuneration totalling some R350 000.00 per annum for their directorship in the first respondent, which belies the allegation that the first respondent is without funds. There is no explanation in the Opposing Affidavit of the financial difficulties faced by the first respondent, or what its activities are while it awaits the dividend from Tsepong, more specifically, what the directors of the first respondent are doing to justify the remuneration that they receive.

[10] It is common cause that the applicants have attempted for approximately one year to obtain the documents that are the subject matter of the order they seek in this application. I am also of the view that such of the documents that the first and/or second respondent have furnished to the applicants, although required by law to be kept, are unhelpful in determining the financial position of the first respondent. The reluctance of the first respondent and/or its directors to furnish the applicants with the banking records (including bank statements) of the first respondent, especially in the absence of proper financial statements, is concerning. The applicants are justifiably anxious to enquire into the affairs of the first respondent in order to protect their respective investments in the first respondent, and are entitled and empowered by the Act to do so.

[11] With regard to the issue of citing the second respondent as a party to these proceedings, it does indeed appear from the papers and other documentation attached thereto, that the second respondent directed all the actions of the first respondent, which in any event can only act through a natural person. The first respondent’s failure to fulfil its statutory obligations is the result of the second respondent’s actions. I do not agree that joining him was a misjoinder or that not joining the other directors was a no-joinder. The

second respondent's residential address is in fact cited as the registered address of the first respondent. It is also noteworthy that the grounds set out in the founding affidavit for the joinder of the second respondent have not been refuted by him, other than to allege that he is not the managing director. The applicant's will indeed be affected by a costs order against the first respondent and joined the second respondent in order to ensure that he is held accountable for his actions.

[12] In the circumstances, I make the following order:

12.1. That the first respondent is ordered to make available the documents set out hereunder, within 14 days of the date of this order, by delivery of copies thereof to the applicants' attorneys of record, care of J H Conradie, Roussouws Attorneys, 119 Pres Reitz Avenue, Westdene, Bloemfontein, to wit:

12.1.1 The first respondent's Memorandum of Incorporation and any amendments to it, and any rules made by the company as envisaged by the provisions of section 24(3)(a) of the Companies Act 71 of 2008 [**the Act**];

12.1.2 The records in respect of the first respondent's directors as envisaged by the provisions of section 24(3)(c)(i) of the Act;

12.1.3 The reports to annual meetings and annual financial statements since inception of the first respondent to date of this order as envisaged by the provisions of section 24(3)(c)(i) and (ii) of the Act;

12.1.4 The notices and minutes of annual meetings and communications of the first respondent as envisaged by the provisions of section 24(3)(d) and (e) of the Act;

12.1.5 The securities register of the first respondent as envisaged by the provisions of section24(4) of the Act;

12.1.6 Accounting records, including bank statements of all accounts operated by the first respondent with any bank, from date of the first respondent's inception to date of the order;

12.1.7 The first and second respondent pay the costs of the application on the party and party scale, jointly and severally, the one paying the other to be absolved.

S. NAIDOO, J

On behalf of the 1st – 4th Applicants: Adv, N. Snellenburg
Instructed by:
J H Conradie
c/o Roussouws Attorneys
Bloemfontein
(KAL 17/0001(JHC/KJ)

On behalf of the Respondents: Mr MDJ Steenkamp
Instructed by:
BLOEMFONTEIN
(Arno Horn/tm/GC2543)