REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 52753/12

15/8/2013

(1) REPORTABLE:NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

15 AUGUST 2013 **FHD VAN OOSTEN**

In the matter between:

JOHANNES CORNELIUS NICOLAAS DAVEL **APPLICANT**

and

UKWANDISA HOLDINGS (PTY) LIMITED
(REG NO: 2002/011944/07) **FIRST RESPONDENT**

MANKO MICHAEL MAFE **SECOND RESPONDENT**

JUDGMENT

VAN OOSTEN J:

[1] The applicant and the second respondent are the registered holders respectively of 13% and 62% shareholding in the first respondent (the company), which conducts a lucrative broiler farming business, *inter alia* being a supplier of chickens to Early Bird

Farm (Pty) Ltd. In this application the applicant seeks an order that certain documents concerning the company (notices and minutes of annual general meetings; records in respect of its directors, the securities register and annual financial statements from 2007 until 2012) be made available to him, that the company or the second respondent be ordered to convene a meeting of shareholders as provided for in s 61 of the Companies Act 71 of 2008 ("the Act") and for the award of punitive costs against the respondents. The respondents oppose the application essentially on the basis of a challenge to the applicant's title as shareholder or right to be a holder of shares in the company.

[2] It is necessary at the outset to refer to the salient background facts. The applicant became a 13% shareholder in the company (then known as Desert Charm Trading 21 (Pty) Ltd) in terms of a sales of shares agreement (the agreement), concluded on 10 May 2004, between the second respondent, as seller, and the applicant and one Botha as purchasers, of the second respondent's 44% shareholding in the company for the purchase price of R1 250 000m payable in full on or before 30 March 2007. The agreement further provides for the applicant and Botha becoming entitled upon signature of the agreement, to transfer of 13% each of the second respondent's shareholding and to give effect hereto they agreed to negative loan accounts being created for the purchase price of that portion of the shareholding. Of relevance for present purposes are four suspensive conditions enumerated in clause 5 of the agreement. The agreement provides that upon the fulfilment of the suspensive conditions the applicant and Botha would become entitled to the balance of the second respondent's shares, then being 9% each. The respondents boldly contend that the suspensive conditions were not fulfilled and that the agreement therefore did not come into existence resulting in the share certificate issued to and held by the applicant being of no force and effect. On the same date a shareholders agreement was concluded between the second respondent, the applicant and Botha. In terms of this agreement the share capital of the company was allocated as follows: 62% to the second respondent, 13% to the applicant, 13% to Botha and 12% to a Worker's Trust which was to be established. The applicant's 13% shareholding was subsequently transferred to him and a share certificate issued. It is common cause that the remaining 9% of the shares has not been transferred to the applicant.

[3] The applicant's right to the applicant's shareholding is attacked by the respondents on the grounds, firstly that that the suspensive conditions of the agreement have not been fulfilled, and, secondly, that the applicant has not alleged full payment of the purchase price of the shares on or before or on due date. Counsel for the applicant with reliance on *Watt v Sea Plant Products Ltd & others* 1999 (4) SA 443 (C) and *Bank Windhoek Bpk v Rajie en 'n ander* 1994 (1) SA 115 (A) 141C-E, submitted that it was not open to the respondents to challenge the applicant's share certificate in respect of the 13% shareholding as those shares had duly been transferred. According to the provisions of s 94 of the previous Companies Act 61 of 1973, a certificate signed by two directors of a company specifying any shares of that company held by any member, shall be *prima facie* evidence of the title of the member to such shares. The applicant, albeit in the replying affidavit, has gone to great lengths to show that the suspensive conditions except for one which on the respondent's own version had fallen away were fulfilled. I am satisfied that the applicant has at least *prima facie* shown that he is a 13% shareholder in the company. That being so, and primarily based on the issued share certificate the applicant, I hold, is entitled to the documents required in terms of the relevant subsections of s 26 (1) of the Act. It follows that the applicant is entitled to relief he seeks.

[4] It remains to deal with the costs of this application. Counsel for the applicant asked for a punitive costs order. As justification for such an order counsel referred to the earlier refusals by the respondents to comply with requests by the applicant to deliver the documents to him. Counsel further pointed to the second respondent's bald denial of fulfilment of the suspensive conditions in the answering affidavit which was effectively controverted by the applicant in his replying affidavit for the submission that the second respondent in fact was *mala fide*. This aspect indeed caused me concern. I have however decided to adopt a holistic approach to the matter which brings the following factors to the fore: The applicant for reasons unexplained did not refer to or attach the sale of shares agreement to the founding papers. The second respondent did so and as I have mentioned, baldly denied fulfilment of the suspensive conditions which in turn was refuted by the applicant. This of course occurred in the replying affidavit with the

normal ensuing restriction of filing a reply thereto. But, another disturbing aspect needs to be mentioned: the applicant indeed, as stated by the respondents, has not made any mention of payment in respect of the remaining shares on or before due date, or at all. The applicant has moreover not asked for a declarator concerning his shareholding. Counsel for the respondents, not surprisingly, informed me that this is not the end of the matter: the second respondent intends in further litigation to challenge the applicant's right and title to shareholding in the company. From all this it appears that not all the facts of this matter are before me. I am accordingly not inclined to order costs without the advantage of a consideration of all the facts. I have therefore decided to order costs to be costs in the proposed litigation failing such that the second respondent pays the costs.

[5] In the result I make the following order:

1. The first and/or second respondents are ordered within 15 days of the date of this order to provide the applicant with the following documents of the first respondent:

1.1 The notices and minutes of annual meetings; and

1.2 The records in respect of the first respondent's directors as referred to in section 24(3)(b) of the Companies Act, Nr 71 of 2008 ('the Act"); and

1.3 The securities register of the first respondent; and

1.4 The annual financial statements of the first respondent for each financial year from 2007 until 2012, as required by the Act.

2. The first and/or second respondent are ordered to convene a meeting of shareholders as provided for in section 61(1) of the Act, within 15 days of the date of this order.

3. The costs of this application shall be costs in the proposed action to be instituted by the second respondent within 30 days of the date of this order, failing which the second respondent shall pay such costs.

F.H.D. VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	*ADV MMW VAN ZYL SC*
APPLICANT'S ATTORNEYS	*DAWIE BEYERS ATTORNEYS INC*
COUNSEL FOR RESPONDENTS	*ADV PI OOSTHUIZEN*
RESPONDENTS' ATTORNEYS	*S ROUX INC*
DATE OF HEARING	*6 AUGUST 2013*
DATE OF JUDGMENT	*15 AUGUST 2013*