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

7/11/2012

Case Number: 64107/11

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
7/11/2012.	
DATE	SIGNATURE

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 JUDGE'S SECRETARY
2012 -11- 07
REGTERS KLERK PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

In the matter between:

ADRIAAN JURGENS BASSON

1ST APPLICANT

MEDIA 24 LIMITED

2ND APPLICANT

and

ON-POINT ENGINEERS (PTY) LTD

1ST RESPONDENT

SL ENGINEERING (PTY) LTD

2ND RESPONDENT

GWAMA PROPERTIES

3RD RESPONDENT

JUDGMENT

Delivered on: 07 November 2012

POTTERILL J,

1 On 15 June 2012 Bertelsmann J made the following order:

"1.First, second and third respondents are called upon to show cause on 05 July 2012 at 10h00 am in this court (Bertelsmann, J) why they should not be directed to allow applicants or their duly authorized representatives to inspect

and make copies of the original security register of each of the three respondents within 5 days from date of this order.

- 2 This flows from the applicants applying for an order directing the respondents to allow the applicants to inspect and make copies of the original register of members of each of the respondents within five days of the order. The applicants also pray that the respondents be directed to pay the costs jointly and severally on an attorney and client scale.

- 3.1 The first applicant is employed by the second applicant as the Assistant Editor at the City Press newspaper. In the application he averred that he is: "*duly authorized to depose to this affidavit on behalf of the second respondent.*"[par1] The respondent in the opposing affidavit answered thereto in par 3.1 as follows: "*The deponent to the founding affidavit in support of the application has not provided any proof that he has been authorized to institute proceedings on behalf of the second applicant. There is no resolution of the Second Respondent in this regard.*"

In the replying affidavit the first applicant attached "RA1" a copy of a resolution of the second respondent wherein the first applicant's authority to act on behalf of the second respondent is confirmed.

- 3.2 On behalf of the respondents it was argued that the first applicant did not have authority to act on behalf of the second applicant and that this as a point *in limine* should end the matter there. The argument was that the authorization was obtained on 30 January 2012 whereas the application was already filed on

9 November 2011 clearly indicating that at the time of launching the application the applicant lacked the necessary authority to act on behalf of the second applicant.

- 3.3 The applicant's counsel pointed out that paragraph 2 of the authorization ratified all steps "*in the initiation and prosecution of the application which predates this authority*". Accordingly this point *in limine* is to be dismissed as even a defective authority at the time of launching an application can be ratified *ex post facto*; **National CO-op Dairies Ltd v Smith** 1996(2) SA 717 (N) on p719 at D.

- 3.4 On the papers before me the first applicant can in any event act on behalf of himself. As for him acting on behalf of the second applicant his authorization was ratified *ex post facto* and the first applicant was thus authorized to act on behalf of the second applicant.

There was a further argument on behalf of the respondents that the first applicant deliberately misled the Court by averring in the founding affidavit that he was authorized to act on behalf of the second applicant when he was not authorised to do so. The court should frown upon such an untruth and disregard the affidavit in support of the notice of motion resulting in the dismissal of the application.

There is no basis set out in the opposing affidavit that the first applicant without knowledge or authorization of the second applicant proceeded to initiate the proceedings. There is no evidence to suggest that the second applicant did not know of the application.

From the wording of the authorization the second applicant knew that affidavits were to be filed by the first applicant on behalf of the second applicant and all steps taken in the application which predated the authority were to be ratified. This written ratification is in essence a decision by the second applicant to proceed with the application from which the only inference to be made is that the second applicant wanted to ratify whatever action was taken – **Smith v Kwanonqubela Town Council** [1999] 4 ALL SA SCA 331 on 334 [9].

This point *in limine* is thus dismissed.

- 4.1 The second point *in limine* raised at the hearing for the first time was that the affidavits in support of the notice of motion did not comply with the provisions of “section” 4(1) of the Justices of the Peace and Commissioners of Oaths Act, Act 16 of 1963, in that the full names of the Commissioner of Oaths was not printed, did not state the designation, did not provide a business address and did not indicate the area for which the commissioner held office. I was referred to **NDPP v Hlongwe: In Re NDPP v Nkosi** [2006] 2 ALL SA 486 (T) on 501 at [36] as support for the proposition that the application must be dismissed because there is no affidavit before the court.
- 4.2 The applicant argued that as this point *in limine* was not raised on the two previous occasions at court or in the opposing affidavit the applicant had no opportunity to seek condonation of the defect; [**Swart v Swart** 1950(1) SA 263 (O)]. It was further submitted that this point must be dismissed because Regulation 4 was held to be directory and there was substantial compliance with the regulation- **Dawood v Mohamed** 1979(2) 361 [D and CLD].

4.3 The full bench of this division in **S v Msibi** 1974(4) SA 821 (T) found that the compliance with regulation 4 is directory and a court can exercise its discretion in admitting such affidavit if there is substantial compliance with the regulation. The Commissioner did not provide a business address and the area the Commissioner held office and his/her designation. This is in fact a requirement of Regulation 4(2) and not 4(1) as complained of. The stamp of the Commissioner clearly indicated that the Commissioner was in the South African Police Services at the Management Information Centre Rosebank. I can not express myself better than in the words of Page AJ in the Dawood-matter supra at p367C-E:

"In deciding whether the non-compliance is of such a nature that the Court should refuse to entertain the affidavit it is clearly relevant to have regard to the nature and purpose of the requirement with which there has been failure to comply. In the present case it seems to me that the reason for the requirement that the commissioner should furnish his business address is to facilitate the task of anyone who might thereafter wish to locate him for any purpose connected with the affidavit and its execution. In the present case the information supplied is sufficient to enable anyone of ordinary intelligence to deduce that the business address of the commissioner of oaths is".. at the offices of the SAPS Rosebank Management Information Centre. The commissioner is thus at minimum designated for the area of Rosebank ex officio. On this paltry defect I cannot refuse to accept the affidavit into evidence. The replying affidavit was commissioned at the SAPS Client Service Centre Rosebank.

The full names of the Commissioner on both the applicants' affidavit are not printed. On the replying affidavit the force number of the Commissioner is printed and the Commissioner can be easily traced from this. The purpose of the requirement of the full names of the Commissioner can once again only be to identify the Commissioner for any enquiry pertaining to the attestation. I am certain that with little trouble the Commissioner of the founding affidavit will be located through visiting the Rosebank Management Information Centre of the SAPS and enquiring whose signature is on the document.

The matter *in casu* is wholly distinguishable from the NDPP v Hlongwe-matter quoted *supra*. In the Hlongwe-matter the supporting affidavits were required by section 28(6) of Act 32 of 1998 to be affirmed or attested to by the Investigating Director; this was not done. Furthermore there was nothing before that court indicating that the affidavits were deposed to before a commissioner as required in regulation 4(1). Before me there is a clear indication that the document was **sworn** to and signed and "*the regulations contained in Government Notice R1258 dated 21 July 1972 as amended by Government Notice R1648 dated 19 August 1977, having been complied with.*"

To add insult to injury in the Hlongwe-matter there was also not compliance with regulation 4(1). There was thus not at all substantial compliance with the regulations whereas in *casu* there was substantial compliance with the regulations.

This point *in limine* is dismissed.

5 The following facts are common cause:

- 5.1 On 5 September 2011 the applicants in writing requested all three the respondents' access and copies of the register of members of each of the respondents. The request was made in terms of section 26 of the Companies Act, No 71 of 2008["the Act"]read with Regulation 24 of the Companies Regulations, 2011["regulations"]. The requests were sent by registered mail to each of the respondents registered addresses as well as to their respective auditors. The requests were also hand delivered.
- 5.2 The applicants completed a "Request for Access to Company Information, Form CoR24 dated 1 September 2011. On this form the following was requested;" *The Register of Members referred to in section 26(3) of the Companies Act 71 of 2008.*"
- 5.2 By 23 September 2011 Mr Ledwaba of Mponya Ledwaba confirmed that he acted on behalf of all three respondents. He also indicated that the applicants were to pay an access fee of R100.00 for access to each of the requested records. Mr Ledwaba also requested an extension of 7 days within which to comply with the applicants' request. In terms of regulation 24(4) a company is afforded a period of 14 business days from the receipt of the request to accede to such request.
- 5.3 The applicants agreed to an extension until noon on 29 September 2011.
- 5.4 On 26 September 2011 the applicants electronically transferred the amount of R300.00 to the banking account of Mponya Ledwaba.

- 5.5 On 29 September 2011 the applicants request was not complied with. The attorney on behalf of the applicants phoned Mr Ledwaba whom informed him that the records were posted. A written letter followed confirmed that during this telephone conversation the applicants' attorneys demanded access to the records by no later than 9:00 on 30 September 2011. On the same day Mr Ledwaba faxed documents to the attorneys of the applicants. These documents were the Certificate of Confirmation of each of the three respondents.
- 5.6 The applicants attorneys immediately informed Mr Ledwaba that the documents were not the documents requested. In response thereto they were informed that the applicants were only entitled to the record of the directors and no other information.
- 5.7 On 14 October 2011 the applicants' attorney wrote a letter to respondents' attorney with the relevant paragraph reading as follows:
- "It has come to our knowledge that the Companies Act was amended in April 2011, inter alia, by re-numbering the former s26(3) as s26(6). Our client's requests were therefor in fact based on section 26(6) of the amended Act. The essence of our client's requests, namely for access to the registers of members of the aforesaid companies, however remains unaltered.*
- Insofar as the reference to s26 (3) in the requests may have caused confusion, we hereby afford your clients the opportunity to reconsider their refusal to allow our clients access to the registers of members."*
- No response was received to this letter despite a further written request dated 21 October 2012.

5.8 The respondents are profit companies.

5.9 This application was then launched on 9 November 2011.

6.1 The argument on behalf of the applicants was that as a third party they were entitled to the securities register/register of members under this Act. From the first letter sent requesting access it was clear to the respondents what information the applicants required access to. The court order of Bertelsmann J explicitly expressed the intention of the applicants in ordering the respondents to show cause why the applicants should not be entitled to access to the **securities registers**.

6.2 There is no definition of the "register of members" in the Act and it was argued that this Act and specifically section 26(6) used the term "register of members" as a neutral term for non-profit and profit companies; this is so because in section 26(6) no distinction is drawn between a non-profit and profit company whereas section 26(4) draws this distinction. There is no definition of a "register of members" whereas "securities register" is defined as "*means the register required to be established by a profit company in terms of section 50(1).*" Regulation 32 of the Companies regulations sets out the prescribed content of a securities register which is the information the applicants require access to.

6.3 It was further argued that upon analysis of sections 105 and 113 of the old Companies Act with sections 24(4) and 50(1) of the new Act the access provisions have substantially been replicated from the old Act to the new

Companies Act. Under the old Act access of a members register was granted to any person, provided the prescribed fee was paid. In the new Act the only change is a name change in that a profit company must have a securities register which was the members register under the old Act.

6.4 It was also submitted that section 26 of the Act advances the constitutional right of access to information which is entrenched in section 32 of the Constitution. In *casu* the applicants are members of the media who indicated that they seek access to the respondents' registers of members in order to establish the shareholding of each of the respondents so that they can further establish who benefitted from the state tenders which have been awarded to the respondents. If there is any doubt as to whether the applicants are in terms of section 26(6) entitled to the securities registers of the applicants then I must adopt an interpretation of this section which best promotes the spirit, purport and objects of the Bill of Rights as set out in section 39(2) of the Constitution.

7.1 The respondent argued that the applicant did not on the papers make out the relief now claimed in the replying affidavit. A "securities register" is not the "register of members" the applicants sought and the court cannot grant relief not claimed in the notice of motion. The applicants built their case as they went on and still in the replying affidavit is requesting copies of the members register. The applicants in the CoR24 Form also only sought access to the "register of members".

7.2 On behalf of the respondents it was argued that the respondents as profit companies do not have members because as defined in the act, members only relate to non-profit companies. The respondents have directors. This distinction is very important because the request to access was in terms of section 26(6) entitling the applicants only to inspection and not the copying of the register of directors. The applicants' application must be dismissed because they seek an order that did not derive from section 26(6). Henochsberg is of the opinion that section 26(6) only affords *"The inspection hours and payment of the fee however, only apply to the register of members and register of directors of a company, thereby excluding the register of security holders."*

7.3 The Court was further urged to take the necessary precautions in balancing the rights of third parties and Companies and to protect Companies against unwarranted invasion.

8 It is clear that the applicants as third parties are requesting access to information that would be contained in a "securities register" and not a "members register." The respondent's argument is correct that the applicants have used the terms interchangeably which initially might have led the respondents to correctly providing access to the "incorrect" information sought. The application was further incorrect in that the applicants requested the information in terms of section 26(3), later in terms of section 26(6) instead of section 26(2).

I am however satisfied that the nature of the sought after information, and what type of access was requested, was very clear to the respondents when

Bertelsmann J ordered the respondents to show cause why they should not be directed to allow the applicants to **"inspect and make copies of the original securities register of each of the three respondents.."**[my emphasis] It is not only opportunistic, but in contempt of a court order for the respondents not to show cause why the applicants would not be entitled to inspect and make copies of the security registers of the respondents.

9.1 There is a difference between the old Act and the new Act in that under the new Act a profit company has shareholders, not members and a non-profit company can either have members or not; i.e. members and shareholders are no more the same and "members" and "shareholders" cannot be used interchangeably in reference to a profit company.

9.2 However the new Act just like its predecessor provides for access to company records. In section 26(1) access to company records is set out for a person with a beneficial interest in any **"securities in a profit company or who is a member of a non-profit company.** Herein the distinction between "members" of a non-profit company and "shareholders" of a profit company is enunciated. Section 26(1)(e) grants a person with a beneficial interest access to ***"the securities register of a profit company, or the members register of non-profit company that has members.."*** [my emphasis] again reiterating access to a profit company of their securities register.

9.3 Section 26(2) reads as follows:

*A person not contemplated in subsection (1) **has a right to inspect or copy the securities register of a profit company**, or the members register of a non-profit company that has members, or the register of directors of a company upon payment of an amount not exceeding the prescribed maximum fee for any such inspection.* [my emphasis]

In terms of this section a person who does not hold a beneficial interest in a profit company may inspect or copy the securities register or the register of directors upon payment of the fee. A person who is not a member of a non-profit company may inspect or copy the register of members of the non-profit company upon payment of a fee.

9.4 As to what a "securities register" entails Section 24(4) reads as follows:

In addition to the requirements of subsection (3), every company must maintain-

- (a) *A securities register or its equivalent, as required by section 50, in the case of a profit company, or a member's register in the case of a non-profit company that has members; and*
- (b) *....."*

Regulation 32 sets out what a securities register must contain. In essence it requires of a company to set out every class of authorised securities, the numbers, availability and dates issued. The company must also in this register set out to whom the company has issued securities or to whom securities of the company was transferred. The name of the person to whom securities were issued as well as the business, residential or postal address of that person

must be recorded in the securities register. The e-mail address and identity number of a person in this register may be regarded as confidential. Securities are defined as *"means any shares debentures or other instruments, irrespective of their form or tile, issued or authorised to be issued by a profit company."*[s 1]

9.5 The applicants would thus be entitled to inspect or copy the securities register and directors register upon payment of the prescribed fee. The applicants were however only requesting the securities registers of the respondents.

9.6 In the old Act section 113 provided for access to the information required to be kept by a company in terms of section 105. Section 105 read very similar to the new regulation 32. Pertaining to access of non-members in terms of these sections the court in **La Lucia Sands Share Block v Barkhan** 2010 (6) SA 421 (SCA) found the following:

"[9] The original object of giving non-members a statutory right of inspection, as contained in s113 of the Act, was to enable them to ascertain the identities of the shareholders and the extent of capital not paid up. See Pathescope (Union) of South Africa Ltd v Mallinick 1927 AD at 301 and Meskin et al Henochsberg on the Companies Act vol 1 at 218. ..."

In Henochsberg on the Companies Act, 71 of 2008 in vol 1 p113 he submits the following:

"The existence of this right [of giving non-members a right of inspection] is valuable since a non-member may require knowledge of the identities of the members for a variety of reasons, eg to organise an arrangement under s 114 or a takeover under the relevant provisions under Chapter 5, to establish

whether the company is a subsidiary of another company, to canvass support for a particular proposed resolution."

This right is so strong that it has been held that a company may not require the disclosure of the reason for the inspection as a condition precedent to allowing it. This right of a person to inspect the information that must be kept in a securities register is confirmed in the La Lucia-matter supra. This right is entrenched in the new Act.

- 9.7 The respondent argued that in terms of section 26(6) the respondents would only be entitled to inspect the directors register. The applicant would be entitled to inspect or copy the securities register and the directors register in terms of section 26(2). In Henochsberg quoted supra on p111 he aptly described the difference between sections 26(2) and 26(6) as follows:

"Inspection of the securities register or members' register is open to the above persons, or to third parties, but in the latter instance subject to the payment of a fee of not more than R100 (sub-s (6)). The inspection hours and payment of fee however, only apply to "the register of members and register of directors of a company thereby excluding the register of securities holders."

Section 26(6) reads as follows:

"The register of members and register of directors of a company, must, during business hours for reasonable periods be open to inspection by any member, free of charge and by any person, upon payment for each inspection of an amount not more than R100.00."

Section 26(2) thus regulates requests for access to inspect or copy the register of members or register of securities and directors whereas section 26(6)

regulates inspection of the register of members and register of directors at the business during business hours for reasonable periods.

9.8 In the La Lucia-matter quoted above the Court found:

"[10] Section 113 of the Act does not oblige a person requesting information to provide motivation for doing so. It has been held that a person who seeks to inspect the register need not give reasons for doing so....

[11] The parties were agreed that a court called upon to act in terms of s113(4) may, in appropriate circumstances, decline to make an order in favour of the person requesting the information, for example where it is shown that the information is sought for some unlawful purpose. "

In the matter at hand we know the reason for the request for information as set out in paragraph 13 of the applicants' replying affidavit of which the crux is the following:

"As members of the media, the applicants seek access to the respondents' register of members in order to exercise their right to freedom of expression and to inform the public on matters of public interest. It is public knowledge that the first and second respondents have benefitted from lucrative state tenders in the Limpopo province....

City press wishes to establish exactly who the shareholders of the three respondents are in order to establish who benefitted from state tenders given to the respondents."

It was not argued on behalf of the respondent that the request for access is for unlawful purposes.

In the La Lucia-matter quoted supra in par[13] p 426 the following was found:

"In a constitutional State in which freedom of association and access to information are valued, courts should be slow to make orders that have a limiting effect. It bears repeating that in terms of s113(3) of the Act a failure to comply with a legitimate request for access to the register of embers renders a company, and every director or officer who knowingly is a party to the refusal guilty of a criminal offence."

Similarly Section 26(9) makes it an offence not to accommodate any reasonable request for access to any record in terms of section 26 or section 31.

All three the respondents must thus provide copies of the securities register or inspection thereof. The respondents have set out no reasons why the applicants would not be entitled to inspect or copy the securities register as they were ordered to do by Bertelsmann J.

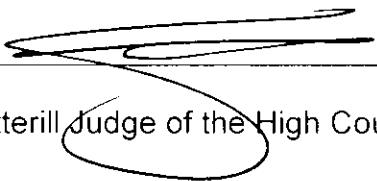
10.1 On behalf of the applicants a strong argument was rendered that the respondents were to be ordered to pay costs on a punitive scale because they refused to grant the applicants access since September 2011. The refusal of the respondents is in itself criminal conduct. The respondents were given a second bite at the cherry with the postponement, yet a year later they still have put no reasons forward why the applicants would not be entitled to the securities registers. It would be an appropriate cost order so as not to leave the applicants out of pocket.

10.2 The respondents argued that the application be dismissed with costs.

10.3 I am not persuaded that in this case the respondents must pay punitive costs. The applicants initially requested access to the "register of members", incorrectly so. This was corrected with the order of Bertelsmann J and the respondents cannot hide behind the initial incorrect request. The applicants however still used the phrases "members register" and "securities register" interchangeably in the replying affidavit. On that basis the applicants themselves did not act with the prudence required of them.

11 I accordingly make the following order:

- 11.1 The first, second and third respondents are ordered to allow the applicants or their duly authorised representatives to inspect or make copies of the securities registers of each of the respondents within five(5) days of the date of this order;
- 11.2 The respondents are ordered to pay the costs of the application jointly and severally.



S. Potterill Judge of the High Court

Matter heard on: 23 October 2012

Delivered on: 07 November 2012

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