

In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 533/2012

In the matter between :

Sky's the Limit Investments CC

Applicant

and

Gerrit van der Merwe

Respondent

Judgment

Lopes J.

[1] The applicant in this matter is a limited liability company which carries on business as a property investor. Pursuant to an agreement which it concluded with Empangeni Cold Storage CC ('the corporation') it instituted action against the corporation on the 5th August 2009 for arrear rental and damages. The action was initially defended by the corporation, but at the last moment it desisted with its opposition, and the applicant was granted judgment against the corporation for payment of the sum of R196 962,60 in respect of arrear rental, and damages in the sum of R204 491,52 together with interest on those amounts and costs.

[2] Pursuant to the judgment which it obtained the applicant caused three trucks which it believed belonged to the corporation to be attached. On the 22nd March 2012 the Sheriff of the High Court issued an interpleader notice informing the applicant that a third party, Briekdraai Beleggings (Edms) Bpk which traded as Pongola Cold Storage, had claimed ownership of the attached trucks. Shortly thereafter and on the 29th March 2012 the corporation was placed under voluntary liquidation.

[3] The applicant avers that the respondent in this application, one Gerrit van der Merwe, in his capacity as the managing member of the corporation, caused or was party to causing, the assets of the corporation to be transferred to a third party which in turn transferred it to Briekdraai Beleggings, in order to frustrate the claims of creditors against the corporation. The applicant was accordingly advised that it should institute action against the respondent based on the provisions of s 64 and s 65 of the Close Corporations Act, 1984. It was also originally advised to pursue matters in terms of s 34 of the Insolvency Act, 1936, but that avenue of recovery was abandoned by the applicant.

[4] In order to prosecute its claim against the respondent the applicant then submitted to the respondent a request for access to information in terms of sub-s 53(1) of the Promotion of Access to Information Act, 2000 ('the Act') This was done by way of a letter addressed to the respondent on the 28th March 2012

together with a request contained in Form C of the regulations promulgated pursuant to the provisions of the Act. The details of the information and documents required by the applicant, were contained in an annexure to Form C.

[5] The respondents' attorneys replied to the applicant's request for information, stating that they believed that in the light of the liquidation of the corporation, the person to whom the request should have been addressed was the liquidator, at that stage one Mr J Z H Müller.

[6] The applicant's attorney replied almost immediately demanding that the respondent comply with the request, and expressing the view that the liquidation of the corporation was irrelevant and that the information was in the possession of the respondent. When a third demand was made and not responded to positively the applicant brought this application.

[7] The preamble to the Act recognises that our system of government before 1994 resulted in a secret and unresponsive culture in both public and private bodies which often led to an abuse of power and human rights violations. In terms of s 32(1)(b) of the Constitution provision is made for the horizontal application of the right of access to information held by another person, to everyone when that information is required for the exercise or protection of any rights. It was pursuant to that recognition and the establishment of the right of access that the Act was promulgated.

[8] In his answering affidavit the respondent raised, inter alia, the following :

- (a) the applicant's alleged lack of jurisdiction – this was dealt with in reply and abandoned by Mr *Ryneveld* who appeared for the respondent;
- (b) that the application was made when there was pending litigation between the parties. In this regard reference was made to the interpleader proceedings.

S 7 of the Act provides :

- '(1) This Act does not apply to a record of ... a private body if –
 - (a) that record is requested for the purpose of criminal or civil proceedings;
 - (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and
 - (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.
- (2) Any record obtained in a manner that contravenes subsection (1) is not admissible as evidence in the criminal or civil proceedings referred to in that subsection unless the exclusion of such record by the court in question would, in its opinion, be detrimental to the interests of justice.'

In my view the section does not preclude the provision of the record on the basis of the existence of the interpleader proceedings. Those proceedings are between different parties and the respondent was not a party to those proceedings;

- (c) that the information sought by the applicant was not 'required' in order for it to protect its rights.

[9] S 50(1) of the Act provides :

'A requestor must be given access to any record of a private body if –

- (a) that record is required for the exercise or protection of any rights;
- (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
- (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.'

[10] What has been the subject of considerable judicial discussion and opinion is the meaning of the work 'required' in ss 50(1)(a)

[11] This was dealt with in *Unitas Hospital v van Wyk and Another* 2006 (4) SA 436 (SCA) where the court considered the meaning of the word 'required'. In that case the plaintiff's husband had died whilst a patient in the Unitas Hospital. She sought access to a copy of a report prepared by a doctor at the hospital dealing with nursing conditions at the time her husband was a patient. The court held that in view of the fact that the plaintiff did not require the doctor's report to formulate her claim for the purposes of instituting action, and that in the course of litigation the hospital would be obliged to provide it in terms of the discovery rules, the real issue in the case was whether s 50 of the Act afforded the plaintiff a right to what would amount to pre-action discovery.

[12] The court a quo had taken the view that the avoidance of speculative litigation and the early determination of the dispute between the parties would entitle a requestor to information under s 50 of the Act. This would be on the basis that such information could possibly be of assistance in establishing the merits of the case to be instituted. The court a quo had held that that should be the case because those underlying considerations 'would accord with the "philosophical approach to dispute resolution in an open and democratic society."' "

[13] In argument, Mr *Omar* for the applicant referred me to the minority judgment of Cameron JA in *Unitas* as support for the grant of the order sought. However I am bound by the majority judgment of Brand JA.

[14] At page 445, paragraphs 21 - 22 Brand JA referred to the view of the court a quo and stated :

'[21] I find myself in respectful disagreement with these sentiments. I do not believe that open and democratic societies would encourage what is commonly referred to as 'fishing expeditions', which could well arise if s 50 is used to facilitate pre-action discovery as a general practice. Nor do I believe that such a society would require a potential defendant, as a general rule, to disclose his or her whole case before any action is launched. The deference shown by s 7 to the rules of discovery is, in my view, not without reason. These rules have served us well for many years. They have their own built-in measures of control to promote fairness and to avoid abuse. Documents are discoverable only if they are relevant to the litigation, while relevance is determined by the issues on the pleadings. The deference shown to discovery rules is a clear

indication, I think, that the Legislature had no intention to allow prospective litigants to avoid these measures of control by compelling pre-action discovery under s 50 as a matter of course.

[22] I hasten to add that I am not suggesting that reliance on s 50 is automatically precluded merely because the information sought would eventually become accessible under the rules of discovery, after proceedings have been launched. What I do say is that pre-action discovery under s 50 must remain the exception rather than the rule; that it must be available only to a requester who has shown the 'element of need' or 'substantial advantage' of access to the requested information, referred to in *Clutchco*, at the pre-action stage.'

[15] In the present matter the plaintiff seeks to recover damages based upon the provisions of s 64 and s 65 of the Close Corporations Act, 1984. In my view the founding affidavit of the applicant in this matter discloses sufficient information for it to have instituted such an action without having to obtain the information sought by it in the notice of request for a record in terms of the Act.

See : Amler's Precedents of Pleadings, 7th ed by L T C Harms at pages 92 - 97

[16] Mr *Omar* submitted that the documents vest in the respondent directly and not in the liquidator. In this regard he refers to the judgment of Combrink J in *Schoerie NO v Syfrets Bank Ltd and others* 1997 (1) SA 764 (D&CLD) at page 778 G – I. Although the provisions of s 361(1) of the Companies Act, 1973 do not vest the assets of the corporation in the Master or liquidator, the assets are deemed to be in the custody and under the control of the Master until the appointment of the liquidator. If the documents vest in the respondent as suggested by Mr *Omar* then he will be obliged to reveal them in discovery. If the documents are in the possession of the liquidator they can be subpoenaed.

Either way the applicant is covered by the court procedures which will apply in the action.

[17] Mr *Omar* also submitted that the provisions of s 5 of the Act are overriding in that they apply to the exclusion of any provision of other legislation that prohibits or restricts disclosure of a record, or is otherwise materially inconsistent with an object or specific provision of the Act. The provision of laws relating to discovery and the serving of a subpoena do not restrict the disclosure of a record, but rather facilitate it. In interpreting the Act in any event, a court is required to look at the entire Act and in this regard the provisions of s 7 cannot simply be ignored.

[18] Mr *Omar* submitted that because the respondent previously deposed to a discovery affidavit in the interpleader proceedings he had possession of the information sought.

[19] The respondent is one of three members of the corporation. The fact that documents may once have been under his custody and control does not mean that they remain so. In his answering affidavit he records that 'All the paperwork generated in the furtherance of the corporation's business was kept at its administrative offices in Richards Bay. None of those documents are stored or in my possession in Barberton, or for that matter at White River where by (sic) administrative office is located.' I understood the word 'by' to be intended to have been typed as 'my'.

[20] In dealing with this denial I am bound by the dicta in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) where Corbett JA stated :

‘It is correct that, where in proceedings on notice of motion disputes of facts have arisen on the affidavits, a final order ... may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.’

[21] The denial of possession by the respondent is not one which I am inclined to regard as so far-fetched or clearly untenable that I would be justified in rejecting them merely on the papers. In these circumstances a final order cannot be granted. In my view a referral to oral evidence is unlikely to disturb the probabilities as they emerge from the papers, and I decline to so refer the matter.

[22] In the premises the application must fail and I make the following order :
The application is dismissed with costs.

Date of hearing : 21st November 2012

Date of judgment : 6th December 2012

For the Applicant : M Omar of M S Omar & Associates)

For the Respondent : P van Ryneveld (instructed by du Toit-Smuts Mathews

Phosa c/o Johan Jooste)