



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 52790/2021

- (1) Reportable: No
- (2) Of interest to other Judges: No
- (3) Revised: No

10/5/2022

Date

Signature

In the matter of

MOGALADI PETUNIA LETSOBANA

APPLICANT

And

AFRICABIN BUILDING SYSTEMS PROPRIETARY LIMITED

RESPONDENT

Registration number : 2010/014974/07

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

INTRODUCTION

[1] This is an opposed motion where in the applicant seeks an order to exercise her rights in terms of section 26 of the Companies Act (“**the Act**”)¹.

[2] The applicant seeks the following order;

1. That the respondent to comply with the applicant's notice in terms of Section 26 of the Companies Act 71 of 2008 dated 21 September 2021 and Form CoR 24 of the Companies Act 71 of 2008 dated 11 October 2021 by providing the following particulars to the applicant, within a period of five (5) days of the order:-

1.1. The reports of annual meetings and annual financial statements as mentioned in section 24(3)(c)(i) and (ii).

1.2. The notices and minutes of annual meetings and communications contemplated by Section 24(3)(d)and (e) from date of incorporation to date.

1.3. The banking statements of the company.

1.4. Shares certificates for Mathibela John Mogaladi (100 shares), Julia Lerato Mogaladi (200 shares), Petunia Letsobana Mogaladi (100 shares), Lucia Tebogo Mogaladi (100 shares) and Kabelo Gift Mogaladi (400 shares) which were all signed and acquired on 08 July 2010 as part of the 1000 ordinary issued by the company in its Memorandum of Association;

¹ Act 71 of 2008.

1.5. Notices of Pre-emptive rights and sale of shares notices to the shareholders for the shares sale of Mathibela John Mogaladi and Lucia Tebogo Mogaladi in the company;

1.6. Proof of payment for the purchase of Lucia Tebogo Mogaladi's shares by Kabelo Gift Mogaladi, and the shareholder's meeting minutes or resolution sanctioning the acquisition of Mathibela John Mogaladi and Lucia Tebogo Mogaladi shares in the company.

1.7. Memorandum of Incorporation and the amended Memorandum of Incorporation of the company.

1.8. Shareholders agreements and the amended shareholders agreement, shareholders resolutions for the amendment of the shareholders agreements and notices for the meeting shareholders' meeting to amend the shareholders' agreement as well as the agenda for such meeting.

1.9. Board of Directors authorisation for loans and financial assistance of the company to any of Sepomo Transport Services, Classic Tops, Mathote Contracting, Winnerspark Football Club, Randzanani Trading Enterprises, Springs Industrial Business Park, Komsese Construction and Civils, Best Enough Trading and Projects 217, Kgapa Ya Dikgapa Investment, African Concord Capital Trade, Joint Venture Abacus Modular Mathote Contracting, Mathote Modular Building Systems, Mathote Investment Holdings, Striving Mind Trading 522, Asiziwelele, Kygofor and Bakone Ditau Mineral Resources.

1.10. The company's annual returns filed with South African Revenue Service ("SARS") and Companies and Intellectual Property Commission ("CIPC") from the date of incorporation to date.

1.11. Loan agreements, and any other agreements between the company with either of the companies Sepomo Transport Services, Classic Tops, Mathote Contracting, Winnerspark Football Club, Randzanani Trading Enterprises, Springs Industrial

Business Park, Komsese Construction and Civils, Best Enough Trading and Projects 217, Kgapa Ya Dikgapa Investment, African Concord Capital Trade, Joint Venture Abacus Modular Mathote Contracting, Mathote Modular Building Systems, Mathote Investment Holdings, Striving Mind Trading 522, Asiziwelele, Kygofofor and Bakone Ditau Mineral Resources.

1.12. Declaration of the company's dividends and proof of distribution thereof, from date of incorporation to present.

1.13. The minutes of the annual meeting following the audit of financial statements from date of incorporation to date.

1.14. The credit and debt book of the company, the disposal agreements and asset register of the company from date of incorporation to date.

2. Ordering the respondent to pay the costs of this application on scale of attorney and own client's scale.

3. Further or alternative relief.

PARTIES

[3] The applicant a major female, a shareholder, director and employee of the respondent.

[4] The Respondent is African Building Systems Proprietary Limited, a private company registered as such with the Companies and Intellectual Property Commission.

BACKGROUND OF RELEVANT FACTS

[5] The respondent was formed in 2010, by John Mogaladi (“**John**”). John is the uncle of the applicant and the deponent. The respondent was formed based on family dynamics.

[6] The respondent was funded by John with him providing seed capital at inception, as well as him undertaking to provide additional loans. He also offered to sign surety on behalf of the respondent as and when required.

[7] The nature of the business of the respondent is to manufacture prefabricated/temporary buildings such as site offices and mobile classrooms.

[8] On 15 July 2010 the applicant was appointed as director of the respondent, alongside Mogaladi Kabelo Gift (“**Kabelo**”) and Ntswane Julia Lerato (“**Lerato**”). Kabelo being John’s son and Lerato the niece to the applicant and Kabelo.

[9] The applicant was employed by the respondent as sales and marketing manager. There was no issues with the applicant's performance at work and she complied with all instructions given to her.

[10] Lerato was appointed as a Managing Director of the respondent and as such she reported to the Board.

[11] During September 2021 issues related to the applicant’s performance at work came into question as the applicant stayed away from work and failed to carry out lawful instructions given to her.

[12] In this regard the applicant was charged with insubordination and absenteeism and she was summoned to a disciplinary enquiry on 27 September 2021.

[13] Following the outcome of the CMMA referral, an agreement was reached at the CCMA. In terms of the settlement agreement, the applicant was to “*at all costs be*

collegial and harmonious in her relationship with the respondent and John and also strive at all times to better their relationship”.

[14] Notwithstanding the settlement agreement reached at the CCMA, the applicant, on 31 October 2021 proceeded to approach the media and publically defame the respondent and John by making certain allegations against them.

[15] As a result of the applicant’s conduct disciplinary action was instituted against the applicant and the applicant was charged with the following charges:

Charge 1: Bringing the Company into disrepute;

Charge 2: Failure to comply with the provisions of a CCMA settlement agreement; and Charge 3: Misrepresentation/dishonesty.

[16] On 2 November 2021 following the disciplinary hearing the applicant was suspended an dismissed from work.

[17] On 23 September 2021, the applicant’s attorneys sent a section 26 notice to the respondent, which read as follows:-

1. In terms of section 26(4)(b) the applicant demanded to be furnished, within a period of 14 business days of despatch of the notice, with the following documents:—

a) The reports of annual meetings and annual financial statements as mentioned in section 24(3)(c)(i) and (ii).

b) The notices and minutes of annual meetings and communications contemplated by section 24(3)(d) and (e) from date of incorporation to date,

c) The banking statements of the company.

d) Shares certificates for Mathibela John Mogaladi (100 shares), Julia Lerato Mogaladi (200 shares), Petunia Letsobana Mogaladi (100 shares), Lucia Tebogo Mogaladi (100 shares) and Kabelo Gift Mogaladi (400 shares) which were all signed and acquired on 08 July 2010 as part of the 1000 ordinary issued by the company in its Memorandum of Association;

e) Notices of Pre-emptive rights and sale of shares notices to the shareholders for the shares sale of Mathibela John Mogaladi and Lucia Tebogo Mogaladi. Proof of

payment for the purchase of Lucia Tebogo Mogaladi's shares by Kabelo Gift Mogaladi, and the shareholder's meeting minutes or resolution sanctioning the acquisition of Mathibela John Mogaladi and Lucia Tebogo Mogaladi shares in the company.

g) Memorandum of Incorporation and the amended Memorandum of Incorporation of the company;

h) Shareholders agreements and the amended shareholders agreement, shareholders resolutions for the amendment of the shareholders agreements and notices for the meeting shareholders' meeting to amend the shareholders' agreement as well as the agenda for such meeting.

i) Board of Directors authorisation for loans and financial assistance of various companies.

j) The company's annual returns filed with SARS and Companies and CIPC from the date of incorporation to date.

k) Loan agreements, and any other agreements between the company with various other companies if any.

l) Declaration of the company's dividends and proof of distribution thereof, from date of incorporation to present;

m) The minutes of the annual meeting following the audit of financial statements from date of incorporation to date.

n) The credit and debt book of the company, the disposal agreements and asset register of the company from date of incorporation to date.

[18] Following the notice said out above a meeting was arranged between all relevant parties. The meeting took place on 7 October 2021. The meeting was attended by the applicant, Kabelo, Lerato and a certain Shantala Maharaj of Ramathe Chartered Accountants being the respondent's auditing company who was caused to advise the board in respect of Section 26 notice issued by the applicant.

[19] The fourteen days allocated to the respondent to respond to section 26 notice letter expired on 7 October 2021. The respondent did not reply to the said notice.

[20] The applicant issued a further notice to the respondent, encompassing the prescribed CoR 24 form in terms of Regulation 24(3) of Companies Regulations 2011. The respondent also did not reply to the Cor 24 notice.

[21] The applicant thereafter launched this application.

[22] The respondent opposed the application.

SUBMISSIONS BY THE APPLICANT

[23] The applicant argued that by virtue of being a shareholder and director of the respondent she has a right to access the records of the respondent.

[24] Counsel for the applicant contended that the said right for access to records pertaining to the respondent is provided for in section 26 (1) of the Act. Furthermore it was asserted by counsel that the applicant also has a right to access to the respondent's records in terms of section 50(1)(a) of the Promotion of Access to Information Act (“**PAJA**”)²

[25] The applicant stated that she requires access to the respondent's records to exercise her pre-emption rights as a shareholder. It was stated by the applicant in her founding affidavit that she requires access to the said records because she intends to sell her shares to the other shareholders of the respondent. She further stated that when provided with the records, she will only then be in a position to determine the value of her shares in the respondent.

[26] It was submitted by the applicant that she has made out a proper case and the order prayed for should be granted.

² Act 2 of 2000.

SUBMISSIONS BY THE RESPONDENT

[27] Counsel for the respondent argued that the relief sought by the applicant in the Notice of Motion is only in terms of the Act, and as such the applicant cannot rely on PAJA in the alternative.

[28] The respondent contended that the application in terms of PAJA is premature, because no PAJA application was made to the respondent. The applicant has not complied with section 53(2)(e) and (f) of PAJA and as such the argument must fail.

[29] The respondent informed the court that on the day prior to the hearing, the parties were in consultation and during the consultation the respondent agreed to provide the records prayed for in paragraphs 1.1 (the reports of annual meetings and financial statements as mentioned in section 24(3)(c)(i) and (ii) of the Act, 1.2 (the notices and minutes of the annual meetings and communications contemplated by section 24(3)(d) and (e) of the Act, and 1.7 (the memorandum of Incorporation and the amended Memorandum of Incorporation of the company.

[30] The respondent asserts that the records requested in paragraphs 1.3-6, and 1.8-14 are not provided for in terms of section 26 of the Act, therefore the respondent requested that the prayers relating to the said paragraphs should be dismissed.

ISSUE FOR DETERMINATION

[31] The only issue that this court has to determine is, whether the applicant is entitled to the requested records pertaining to the respondent.

CASE LAW AND EVALUATION

[32] Section 26 of the Companies Act provides the following:

“26 Access to company records

(1) A person who holds or has a beneficial interest in any securities issued by a profit company, or who is a member of a non-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 contained in the following records of the company:

(a) The company's Memorandum of Incorporation and any amendments to it, and any rules made by the company, as mentioned in section 24 (3) (a);

(b) the records in respect of the company's directors, as mentioned in section 24(3) (b); (c) the reports to annual meetings, and annual financial statements, as mentioned in section 24 (3) (c) (i) and (ii);

(d) the notices and minutes of the annual meetings, and communications mentioned in section 24 (3)(d) and (e), but the reference in section 24 (3)(d) to shareholders meetings, and the reference in section 24 (3) (e) to communications sent to holders of a company's securities, must be regarded in the case of a non-profit company as referring to a meeting of members, or communication to members, respectively; and

(e) the securities register of a profit company, or the members register of a non-profit company that has members, as mentioned in section 24 (4).

(2) 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.

(3) In addition to the information rights set out in subsections (1) and (2), the Memorandum of Incorporation of a company may establish additional information rights of any person, with respect to any information pertaining to the company, but

no such right may negate or diminish any mandatory protection of any record required by or in terms of Part 3 of the Promotion of Access to Information Act 2000 (Act 2 of 2000).

(4) A person may exercise the rights set out in subsection (1) or (2), or contemplated in subsection (3)-

(a) for a reasonable period during business hours;

(b) by direct request made to a company in the prescribed manner, either in person or through an attorney or other personal representative designated in writing; or

(c) in accordance with the Promotion of Access to Information Act, 2000 (Act 2 of 2000).

(5) Where a company receives a request in terms of subsection (4) (b) it must within 14 business days comply with the request by providing the opportunity to inspect or copy the register concerned to the person making such request.

(6) 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 other person, upon payment for each inspection of an amount not more than R100,00.

(7) The rights of access to information set out in this section are in addition to, and not in substitution for, any rights a person may have to access information in terms of-

(a) Section 32 of the Constitution;

(b) The Promotion of Access to Information Act, 2000 (Act 2 of 2000); or

(c) Any other public regulation.

(8) The Minister may make regulations respecting the exercise of the rights set out in this section.

(9) It is an offence for a company to-

(a) Fail to accommodate any reasonable request for access, or to unreasonably refuse access, to any record that a person has a right to inspect or copy in terms of this section or section 31; or

(b) To otherwise impede, interfere with, or attempt to frustrate, the reasonable exercise by any person of the rights set out in this section or section 31.”

[33] Section 32 of the Constitution, 1996, provides:

“32(1)Everyone has the right of access to-

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”

[34] Section 50 of the Promotion of Access to Information Act provides:

“50 Right of access to records of private bodies

(1) 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.

(2) In addition to the requirements referred to in subsection (1), when a public body, referred to in paragraph (a) or (b)(i) of the definition of “public body” in section 1, requests access to a record of a private body for the exercise or protection of any rights, other than its rights, it must be acting in the public interest.

(3) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester or the person on whose behalf the request is made.”

[35] The applicant holds 15% shareholding in the respondent, a family business. Unfortunately, conflicts arose between the applicant, John and the remaining shareholders, which lead to a fall-out. The details of the disagreements between the parties are contemptuous and are of no relevance in the application before me. The applicant was dismissed as employee of the respondent, but she remained a director and shareholder of the company and on this basis she seeks in sight into various records of the respondent in order to value her shareholding.

[36] It is therefore clear that the applicant has a beneficial interest in the respondent.

[37] In the case of *Nova Property Group Holdings Ltd and Others v Cobbett and Another*³ the court dealt with the interaction between section 26(2) of the Act and PAJA. The following was said at paragraph [20]:

“What is clear from section 26(4)(c) is that procedurally PAJA is an alternative to requesting access to a company’s share register in terms of the provisions of section 26 of the Companies Act.”

[38] In *Clutchco (Pty) LTD v Andrew Christopher Davies*⁴ the Supreme Court of Appeal said the following:

“The machinery established by legislation and the common law for the protection of shareholders is in my opinion not lightly to be disregarded. In enacting PAJA Parliament could not have been intended that books of a company, great and small, should be thrown open to members on a whiff of impropriety or on the ground that

³ 2016 (4) SA 317 (SCA).

⁴ [2005] ZASCA 16 at paragraph [17].

relatively minor errors or irregularities have occurred. A far more substantial foundation would be required.”

[39] In her founding affidavit the applicant stated that her reliance on PAJA is contained in a letter sent to the respondent on 11 October 2021. The subject contained in the letter is titled:

“PETUNIA LETSOBANA MOGALED // AFRICABIN BUILDING SYSTEMS PROPRIETARY LIMITED- NOTICE IN TERMS OF SECTION 26 OF THE COMPANIES ACT 71 OF 2008” (my emphasis)

[40] The CoR 24 form attached to the said letter referred to the Companies Act regulations, and as such had no relevance on PAJA.

[41] Furthermore, section 53 of PAJA set out the requirements for information as the following;

“53(2)(e) if, in addition to a written reply, the requester wishes to be informed of the decision on the request in any other manner, to state that manner and the necessary particulars to be so informed; and

53(2)(f) if the request is made on behalf of a person, to submit proof of the capacity in which the requester is making the request, to the reasonable satisfaction of the head.”

[42] It is clear that the applicant did not comply with the requirements in terms of PAJA, and therefore did not apply for the said records in terms of PAJA.

[43] I will now turn to the question of the interpretation of section 26(2) of the Act.

[44] In *Bernstein & others v Bester NO & others*,⁵ the Constitutional Court made the position in the manner in which companies operate and their conduct plain. The court said:

⁵ 1996 (2) SA 751 (CC)

“The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilisation of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute will have concomitant responsibilities. These include, amongst others, the statutory obligations of proper disclosure and accountability to shareholders. It is clear that any information pertaining to participation in such a public sphere cannot rightly be held to be inhering in the person, and it cannot consequently be said that in relation to such information a reasonable expectation of privacy exist. Nor would such an expectation be recognised by society as objectively reasonable. This applies also to the auditors and debtors of the company. . . .”

[45] Most recently, in the case of *Company Secretary of Arcelormittal South Africa & another v Vaal Environmental Justice Alliance*⁶, it was again emphasized that “citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of government and in relation to corporations” and that Parliament, driven by Constitutional imperatives, had rightly seen fit to cater for this in its legislation.

[46] Therefore, with the objective of openness and transparency, section 26(1) of the Act confers a right of access to information in respect of various kinds of information to a person who holds a beneficial interest in any securities issued by a profit company, or who is a member of a non-profit company.

[47] Section 26(2) confers a narrower and more specific right of access to all others persons. It provides:

“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

⁶ [2014] ZASCA 184; 2015 (1) SA 515 (SCA) at paragraph 1.

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.”

[48] In the *Nova case supra* at paragraph [47] the court stated that;

“To sum up, s 26(2) of the Companies Act provides an unqualified right of access to securities registers. If Parliament is of the view that the right should be qualified in some way, because of concerns relating to abuse of the right of access, it can legislate accordingly – but it has chosen not to do so.”

[49] Therefore, the applicant has a right to access records referred to in section 26 of the Act and the respondent cannot refuse compliance with the request to access the said information set out in the section.

[50] However, it is important to note that in terms of section 26 (1) access to information contained in the in the following records are allowed;

- a) the company’s Memorandum of Incorporation and any amendments to it, and any rules made by the company, as mentioned in terms of section 23 (3) (a),
- b) The records in respect of the company’s directors, as mentioned in section 24 (3) (b),
- c) the reports to annual meetings, and annual financial statements, as mentioned in section 24 (3) (c) (i) and (ii)
- d) the notices and minutes of annual meetings, and communications mentioned in section 24 (3) (d) and (e)....,
- e) the securities register of a profit company, or the members register of a non-profit company that has members, as mentioned in section 24 (4).

[51] I am therefore of the view that the applicant is only entitled to access records as set out in section 26 of the Act.

COSTS

[52] It is an accepted legal principle that costs ordinarily follow the result and a successful party is therefore entitled to his or her costs. The general rule is that costs follow the event, which is a starting point.

[53] The guiding principle is that “...costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation, as the case may be. Owing to the unnecessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.”⁷

[54] It is also an accepted legal principle that cost is in the discretion of the court.⁸

[55] The basic rules were stated as follows by the Constitutional Court in *Ferreira v Levin NO and Others*⁹:

“The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy,

⁷ Cilliers AC “Law of Costs” Butterworths page 1-4; *Agriculture Research Council v SA Stud Book and Animal Improvement Association and Others*; *In re: Anton Piller and Interdict Proceedings* [2016] JOL 34325 (FB) par 1 and 2; *Thusi v Minister of Home Affairs and 71 Other Cases* (2011) (2) SA 561 (KZP) 605-611.

⁸ *Fusion Hotel and Entertainment Centre CC v eThekweni Municipality and Another* [2015] JOL 32690 (KZD) “[12] It is common cause that in this matter the issues at hand remained undecided and the merits were not considered. When the issues are left undecided, the court has a discretion whether to direct each party to pay its own costs or make a specific order as to costs. A decision on costs can on its own, in my view, be made irrespective of the non-consideration of the merits. I am stating this on the basis that an award for costs is to indemnify the successful litigant for the expense to which he was put through to challenge or defend the case, as the case may be...”

⁹ [1996] ZACC 27; 1996 (2) SA 621 (CC) at 624B—C (par [3]).

depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.”

[56] In this matter I considered the facts before me and are of the view that it would be fair and reasonable under the circumstances that each party should pay their own costs.

ORDER

[57] In the premises of the above the following order is made;

1. The respondent is ordered to comply with the applicant's notice in terms of section 26 of the Companies Act 71 of 2008 dated 21 September 2021 and Form CoR 24 of the Companies Act 71 of 2008 dated 11 October 2021 by providing the following particulars to the applicant, subject to seven (7) years, within a period of five (5) days of the order:-

1.1. The reports of annual meetings and annual financial statements as mentioned in section 24(3)(c)(i) and (ii),

1.2 The notices and minutes of annual meetings and communications contemplated by Section 24(3)(d) and (e) from date of incorporation to date.

1.3 The Memorandum of Incorporation and the amended Memorandum of Incorporation of the company.

2. Each party to pay their own costs.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT**

APPEARANCES

For the applicant: Adv. Makhubele
Instructed by Mohlokwane Attorneys

For the respondent Adv. Deeplal
Instructed by Maharaj Attorneys

DATE OF HEARING: 29 April 2022

DATE JUDGMENT DELIVERED: 10 May 2022