

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED NO
	1 Sept 2023
.....
SIGNATURE	DATE

CASE NO: 21545/2022

In the matter between:

KAREL PETRUS MOUTON, ANDRE MOUTON and

PETRUS CORNELIUS NORVAL

and

Applicants

8 MILE INVESTMENTS 503(PTY)LTD &

ATTENTUS ACCOUNTING AND TAX SOLUTIONS CC

Respondents

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 1st of September 2023.

BADENHORST AJ

- [1] The applicants seek an order allowing inspection of the “signed annual audited financial statements relating to 2019-2020 together with the bank statements and issued invoices for 2019 and 2020” and various other financial records of the first respondent company, 8 Mile Investments 503 (Pty) Limited (“the company”).
- [2] The applicants rely on Section 26 of the Companies Act, 71 of 2008 (“the Act”) as well as an agreement between the shareholders of the company.
- [3] The applicants are the trustees of the Kapem Trust (“the trust”) which holds 5% of the shares in the company, having acquired them from a third party in 2009.
- [4] The application is opposed and accordingly raises the question whether the company is under a legal duty (statutory and/or contractual) to produce the requested financial records for inspection by the trust.
- [5] Section 26 (in relevant part) provides as follows:

“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 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)....*
- (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....*
- (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.” [underlined]*

[6] Section 30 (3)(c) of the Act provides (in relevant part) that:

“30 The annual financial statements of a company must-...

- (c) be approved by the board and signed by an authorised director;... [underlined].

[7] The respondents deny that the shareholders agreement (relied on by the trust) “was ever finally accepted and concluded by all intended parties” (paragraph 7.1 of the answering affidavit). No replying affidavit was filed and respondent's version prevails in any event under the *Plascon Evans Rule*. It follows that any reliance placed on the shareholders' agreement is doomed to fail.

[8] In its heads of argument, the trust abandoned large sections of the relief claimed in the notice of motion and, instead, attempted *in its heads of argument* to advance a new claim for the following:

“8.1. The first respondent is ordered to comply with the applicant's notice in terms of section 26 of the Companies Act 71 of 2008 dated 2 March 2021 by providing or making available to copy, the following particulars to the applicant, within a period of five (5) days of the order:-

8.2. The first respondent's signed financial statements to the applicants as is required by Sections 24 and 26 the Act for the period 2019-2021;

8.3. Each party to pay its own costs, alternatively, in the event that the first respondent persists with its opposition, that the first respondent pay the cost of the application.

In addition, should this Honourable Court be so inclined:

8.4. That the first respondent provides or make available to copy, the accounting records for 2022 and the current financial year to which it is entitled in terms of Section 24 (3) (c) (ii),

In the alternative to 8.3 above, should this Honourable Court be so inclined:

8.5. The first respondent allows the applicants to inspect the books of the first respondent in terms of clause 25 of the first respondent's shareholder agreement, subject to the reasonable restrictions as to the time and manner of inspecting or copying same that may be imposed by the first respondent for the past seven (7) years as mentioned in Section 24 (3) (c) (i), (ii) and (iii) of the Act;

8.6. The notices and minutes of annual meetings, communications and resolutions for the past seven (7) years as mentioned in Section 24 (3) (d), (e) and (f) of the Act.”

[9] The applicant's extraordinary attempt to effect substantial amendments to the relief claimed *in its heads of argument* is obviously not countenanced by the rules and practice of this Court. To entertain such a blatantly irregular procedure would be to invite chaos in the civil procedure of the courts which has been developed over many years and for sound reasons.

[10] At no stage was a notice of amendment delivered as required by the rules and practice of this Court and I am not prepared to entertain the irregular process proposed by the applicant. There is moreover no foundation pleaded in the papers to sustain the proposed (irregular) amendment which is, accordingly futile and without consequence.

[11] At the hearing, the applicant reduced its claim to only the following:

- a. Production of tThe signed financial statements (of the first respondent) for the 2021 financial year; and
- b. Costs.

[12] Counsel for the respondent directed my attention to a letter which his attorney addressed to applicant's former attorney on 19 October 2022 to which the signed financial statements for the 2021 financial year were attached. There is no evidence of any complaint raised to the effect that what was attached to that letter was unsatisfactory (for example because the signature was not made at the appropriate place in the statement or otherwise).

[13] On this basis, it appears that the only remaining document still demanded, was already sent to the applicant's former attorney in October 2022.

[14] There is a further problem confronting the applicant: as appears from the (as yet unamended) notice of motion, the relief claimed in this matter remains for the "signed annual audited financial statements" [underlined] to be made available for inspection. Respondent has convincingly demonstrated that it is not required to produce *audited financial statements*, a fact which counsel for the applicant – correctly – accepts.

[15] Counsel for the applicant contended that the reduced claim (for signed statements) is included in the prayer in the notice of motion, *i.e.* that is a lesser claim. But this is not so – there is a significant difference between financial statements that are signed and ones that are signed *and* audited.

[16] The result is that the application is ill conceived and cannot succeed.

[17] I accordingly make the following order:

The application is dismissed with costs.

C H J BADENHORST
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING:	28 August 2023
DATE OF JUDGMENT:	1 September 2023
APPLICANTS' COUNSEL:	Adv. J. Hartman
INSTRUCTED BY:	Pagel Schulenburg Inc Attorneys
RESPONDENT'S COUNSEL :	Adv J Lubbe
INSTRUCTED BY:	Van der Merwe Greyling Attorneys