# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

# JUDGMENT

**Case no: 37/2010**

In the matter between:

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| **LA LUCIA SANDS SHARE BLOCK LIMITED** | **First Appellant** |
| **LENTZ, JOHAN PAUL GERARD** | **Second Appellant** |
| **WOLFE, GEORGE** | **Third Appellant** |
| **PARKER, JEANNE** | **Fourth Appellant** |
| **COLLINS, PATRICK MICHAEL** | **Fifth Appellant** |

and

| | |
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| **BARKHAN, HOWARD LESLIE** | **First Respondent** |
| **GLASSER, ERROL MAXWELL** | **Second Respondent** |
| **MINISTER OF TRADE AND INDUSTRY** | **Third Respondent** |

**Neutral citation:** LA LUCIA SANDS SHARE BLOCK LTD v BARKHAN (37/10) [2010] ZASCA 132 (1 October 2010)

**Coram:** NAVSA, MAYA, BOSIELO, SHONGWE JJA and K PILLAY AJA

**Heard:** **2 SEPTEMBER 2010**

**Delivered:** **1 October 2010**

**SUMMARY: Company law ─ power of court in terms of s 113 of the Companies Act 61 of 1973 to allow access to a register of members – rationale for provision discussed ─ general rule is to make information available ─ access rightly granted ─ delay in delivery of judgment discussed.**

## ORDER

**On appeal from**: KwaZulu-Natal High Court (Durban) (Van Zyl J sitting as court of first instance).

The following order is made:

The appeal is dismissed with costs and the first appellant is ordered to pay respondents' costs.

## JUDGMENT

SHONGWE JA (NAVSA, MAYA, BOSIELO JJA and K PILLAY AJA concurring):

[1] This is an appeal against a judgment of the KwaZulu-Natal High Court, Durban, (Van Zyl J) ordering the first appellant, La Lucia Sands Share Block Limited (La Lucia Sands), to provide photocopies of all the pages constituting its register of members to the first and second respondents, Messrs Howard Barkhan and Errol Glasser, alternatively to make its register of members available for inspection by the respondents. La Lucia Sands was ordered to pay the costs of the application, including the costs of two counsel in respect of the Minister of Trade and Industry. The latter order is one about which more will be said later in this judgment. The appeal is with the leave of the court below. I shall refer to Messrs Barkhan and Glasser as B and G, respectively.

[2] The question in this appeal is whether the court below, acting in terms of s 113(4) of the Companies Act 61 of 1973 (the Act), correctly made the order referred to in the preceding paragraph.

[3] The dispute between the parties culminating in the present appeal started in 2006 when B and G instructed their attorney to obtain a copy of the register of members of La Lucia Sands, as they intended addressing letters to them offering to purchase their shareholding. La Lucia Sands is a share block company. It appears, however, that antagonism had developed between the parties much earlier and that there is prior litigation in which they are involved that includes other parties. La Lucia Sands also accused B and G of being involved with an entity called Flexi Holiday Club in an attempt to engineer a 'hostile takeover' of La Lucia Sands.

[4] The first letter on behalf of B and G requesting copies of La Lucia Sands' register of members was sent to the latter in May 2006. It was replied to by Mr George Wolfe, an attorney and director of La Lucia Sands who is also the second appellant. He stated that La Lucia Sands and its members did not want to have their addresses and 'other pertinent private information' divulged. During June 2006 the members of La Lucia Sands in a general meeting passed a resolution to that effect. Even though there appears to have been later abortive attempts to provide at least some information, what remained constant was La Lucia Sands' refusal to provide members' addresses and 'other pertinent private information'. Communications and interaction between the parties remained tense. Predictably, the information sought was ultimately not provided, leading to an application by B and G in the Durban High Court and the order referred to in para 1 above. It is necessary to record that although initially B and G intended to approach members directly concerning their members' interest, without any regard to the board of La Lucia Sands that position had changed by the time the replying affidavit had been filed by them in the court below. At the time of the hearing in the Durban High Court it was abundantly clear that they intended to approach both the members and the board simultaneously.

[5] The Minister of Trade and Industry was joined as a respondent in the proceedings in the court below. Initially it appeared that the Minister was not intent on being a contesting party. An affidavit was filed on his behalf to be of assistance to the court. However, during the hearing in the court below, the Minister was represented and submissions were made on his behalf. Before us, La Lucia Sands sought to reverse the costs order granted against it, in the court below, even if it lost the appeal, on the basis that an important constitutional issue had been raised in the

court below. It is necessary to record that in the court below the constitutionality of s 113 had been challenged on the basis that it offended against the right of privacy of company members enshrined in s 14 of the Constitution. The challenge was abandoned before us. That notwithstanding, the appellants sought to reverse the costs order on appeal on the basis that granting a costs order against unsuccessful parties in constitutional matters would have a chilling effect on potential future litigation involving important rights issues.

[6] The court below considered the provisions of s 113 of the Act and held that accessibility to the register of members of a company served an important public purpose. Van Zyl J concluded that the provisions of s 113 of the Act entitled B and G to the information sought and consequently made the order referred to above.

[7] I turn to a consideration of the relevant statutory provisions. Section 105 of the Act reads as follows:

'**Register of Members**

(1) Every company shall keep in one of the official languages of the Republic a register of its members, and shall forthwith enter therein –

(a) the names and addresses of the members and, in the case of a company having a share capital, a statement of the shares issued to each member, distinguishing each share by its number, if any, and by its class or kind, and of the amount paid or agreed to be considered as paid on the shares of each member; and

(b) in respect of each member –

(i) the date on which his name was entered in the register as a member; and

(ii) the date on which he ceased to be a member.'

[8] The relevant parts of s 113 of the Act provide:

'**Inspection of register of members**

(1) The register of members of a company shall, except when closed under the provisions of this Act, during business hours (subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to inspection by any member or his duly authorized agent free of charge and by any other person

upon payment for each inspection of an amount of R10 or such lesser amount as the company may determine.

(2) Any person may apply to a company for a copy of or extract from the register of members and the company shall either furnish such copy or extract on payment by the applicant of an amount of R10 or such lesser amount as the company may determine for every page of the required copy or extract, or afford such person adequate facilities for making such copy or extract.

(3) If access to the register of members for the purpose of making any such inspection or any such copy or extract or facilities for making any such copy or extract be refused or not granted or furnished within fourteen days after a written request to that effect has been delivered to the company, the company, and every director or officer of the company who knowingly is a party to the refusal or default, shall be guilty of an offence.

(4) In the case of any such refusal or default the Court may, on application, by order compel an immediate inspection of the register and index or direct that the copy or extract required shall be sent to the applicant requiring it and may direct that any costs of or incidental to the application shall be borne by the company or by any director or officer of the company responsible for the refusal or default.'

[9] The original object of giving non-members a statutory right of inspection, as contained in s 113 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 292 at 301 and Meskin, J A Kunst, Professor P Delport and Q Vorster *Henochsberg on the Companies Act* Vol 1 p 218.[1] The following comment by Meskin et al *Henochsberg on the Companies Act* on s 113 at p 218 is important:

'The continued existence of this right is valuable, however, notwithstanding that shares cannot be issued as partly paid up (s 92(1)) since a non-member may require knowledge of the identities of the members for a variety of purposes, eg to organise an arrangement under s 311 or a takeover . . . to

[1]In *Oakes v Turquand* (1867) L.R. 2 H.L. 325 at 366-367 (cited with approval in *Pathescope*) Lord Cranworth said:
'But when the Legislature enabled shareholders to limit their liability, not merely to the amount of their shares, but to so much of that amount as should remain unpaid, it is obvious that no creditor could safely trust the company without having the means of ascertaining, first, who the shareholders might be, and, secondly, to what extent they would be liable. This is obviously the reason why the new statute opened the register to the inspection of all the world . . . The legislature took care to provide the register as the means of enabling persons dealing with the company to know to whom and to what they had to trust'.

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

[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. See *Holland v Dickson* (1888) 37 Ch. D. 669 at 671-672 and *Labatt Brewing Co Ltd v Trilon Holdings Inc*, 41 O. R. (3d) 384 para 6). Meskin et al *Henochsberg on the Companies Act* (above), with reference to *Dickson*, state the following:

'But in any event the company cannot require the disclosure of the reason for the inspection as a condition precedent to allowing it . . .'

[11] The parties were agreed that a court called upon to act in terms of s 113(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 *Pelling v Families Need Fathers Ltd* [2002] 2 All ER 440 (CA) the Court of Appeal, dealing with a similar provision in the English Companies Act, said the following concerning a court's discretion to order the production of information in a register of members (para 23):

'The statutory discretion must be exercised judicially in accordance with established legal principles and having regard only to relevant considerations. We agree with Dr Pelling that, as a general rule, the court will make a mandatory order to give effect to a legal right. But, as stated by Lord Evershed MR in *Armstrong v Sheppard & Short Ltd* [1959] 2 All ER 651 at 656, [1959] 2 QB 384 at 396 "[i]t is not a matter of unqualified rights". There may be something special in the circumstances of the case which leads the court to refuse to make the usual order. The scope of the residual discretion to refuse such an order may be narrow, but Dr Pelling is, in our view, wrong in his assertion that it is non-existent.'

This dictum is instructive.

[12] In the present case, we know the motivation for the request for information ─ to make an offer to purchase the shareholding of members. B and G dispute any alliance or conspiracy with Flexi Holiday Club. That is a dispute that cannot be resolved on the papers but, in any event, even if they were involved commercially

with Flexi Holiday Club to any extent, I fail to see how that could preclude them from being afforded access to the information sought. It appears that Mr Wolfe and other directors and members of La Lucia Sands are of the view that B and G and their cohorts should not be permitted to exert influence on members of La Lucia Sands. It was submitted on behalf of La Lucia Sands that members of share block schemes should be protected from 'predatory practices'. Mr Wolfe and others are not precluded from persuading members of La Lucia Sands to the contrary. Section 3(2) of the Share Blocks Control Act 59 of 1980 provides that the provisions of the Act 'shall apply to a share block company in so far as those provisions are not in conflict with the provisions of this Act'. Counsel for La Lucia Sands failed to persuade me that because share block schemes are set up in a specific manner their members are entitled to greater protection against disclosure of members' information in the register of members of other types of companies.

[13] Section 32(1)(b) of the Constitution provides that everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights. Section 32(2) obliges the State to enact national legislation to give effect to this right. That legislation is the Promotion of Access to Information Act 2 of 2000. In a constitutional state in which freedom of association and access to information is valued courts should be slow to make orders that have a limiting effect. It bears repeating that in terms of s 113(3) of the Act a failure to comply with a legitimate request for access to the register of members renders a company and every director or officer who knowingly is a party to the refusal guilty of a criminal offence.

[14] It is necessary to deal briefly with the submission on behalf of La Lucia Sands, that the request for information by B and G for the purpose of a direct approach to members as part of a takeover scheme, was in contravention of statutory rules regulating takeovers, and that consequently the court below had erred in granting the order referred to in para 1 above. Section 440A of the Act defines an 'affected transaction', inter alia, as follows:

'[A] . . . transaction . . . or scheme, whatever form it may take, which –

*(a)* taking into account any securities held before such transaction or scheme, has or will have the effect of ─

(i) vesting control of any company (excluding a close corporation) in any person, or two or more persons acting in concert, in whom control did not vest prior to such transaction or scheme; or

(ii) any person, or two or more persons acting in concert, acquiring, or becoming the sole holder or holders of, all the securities, or all the securities of a particular class, of any company (excluding a close corporation); . . .'

[15] Section 440L of the Act provides:

'Subject to any exemption by the panel, no person shall enter into or propose an affected transaction, except in accordance with the rules.'

The rules referred to are the rules promulgated by the Securities Regulation Panel, established under the provisions of s 440B of the Act. The rules established a code regulating takeovers and mergers. Rule 1*(a)*, under section D of the rules, provides that when a takeover offer is made it should be put to the board of the offeree company or to its authorised advisors. Rule 1*(c)* stipulates that a board so approached is entitled to be satisfied on reasonable grounds that the offeror is, or will be, in a position to implement the offer in full.

[16] As stated in para 4 above, as matters stood in the court below and before us, B and G have disavowed any intention to bypass the board. The request referred to above can therefore not be said to be in contravention of the rules which have statutory force. I interpose to State that the other litigation involving the parties is for present purposes wholly irrelevant.

[17] For completeness, I record that a new Companies Act 71 of 2008 has been assented to but has not yet come into operation. Section 113 of the Act has not been repeated in the new legislation. Section 26 of the new Act is entitled 'Access to company records'. Section 26(3) provides that 'any member' and 'any other person' is entitled to inspect the register of members during business hours. Section 26(4) provides:

'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 No. 2 of 2000); or

(c) any other public regulation.'

[18] It appears that in future the provisions of the Promotion of Access to Information Act 2 of 2000 will have to be employed by non-members seeking access to the register of members. The rationale set out above for obtaining information contained in the register of members will probably continue to apply, notwithstanding that the request for information will now have to be made in terms of that Act. Happily, it is not an issue we need to address comprehensively or at all. Section 113 applies to the present matter.

[19] Before turning to the question of costs it is necessary to deal with the fact that it took so long for judgment to be delivered in the court below. Almost two years had passed from the time that the matter had been argued. This is in itself an undesirable state of affairs. Courts should strive to promote swift and efficient justice. In the present case one of the consequences of the delay in delivering the judgment was that the costs order in the court below incorrectly recorded that the Minister of Trade and Industry was entitled to the costs of two counsel. The judgment referred to a junior counsel who was not present during the hearing. Before us the parties were agreed that in the court below the Minister had been represented by only one counsel. I have no doubt that the Minister will not seek to recover more than the costs of one counsel.

[20] Before us the Minister was represented by counsel who informed us that his presence in court was confined to dealing with the costs order in favour of the Minister, which La Lucia Sands sought to have reversed. When important constitutional issues are raised courts have, in appropriate circumstances, not awarded costs against unsuccessful litigants. In this regard see *Chirwa v Transnet Ltd* 2008 (4) 367 (CC) para 78. In the present case, Mr Wolfe, on behalf of La Lucia Sands, adopted and promoted an inflexible and hostile attitude from the outset. The other directors, the second, fourth and fifth appellants supported him.

[21] The constitutional point was rightly abandoned in the court below. More than 14 years ago the Constitutional Court in *Bernstein v Bester* 1996 (2) SA 751 (CC) stated clearly that the establishment of a company as a vehicle for conducting business is not a private matter and that there was a statutory obligation of proper disclosure and accountability to shareholders. It said the following (para 85):

'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 exists. Nor would such an expectation be recognised by society as objectively reasonable. This applies also to the auditors and the debtors of the company. On the facts of this case the conclusion seems to be unavoidable that no threat to or infringement of any of the applicants' right to privacy as protected by s 13 of the Constitution has been established.'

The importance of the constitutional point was more illusory than real.

[22] Furthermore, courts would be particularly slow to visit a costs order on litigants who were struggling financially and whose personal circumstances are precarious. In the present case there is every indication that La Lucia Sands is financially viable and that it authorised litigation fully aware of the costs implications and that it maintained its inflexible attitude throughout, notwithstanding that threat.

[23] I have difficulty in understanding the submission on behalf of La Lucia Sands that the Minister did not assist the court below as fully as he should have and that the affidavit filed on his behalf was vague. It was submitted that this failure to fulfil a 'constitutional mandate' in itself was an issue that called for a reversal of the costs order. To my mind the affidavit filed on behalf of the Minister was lucid. It set out in broad outline the rationale for statutory provisions such as s 113 of the Act. The gist of the affidavit is in line with what is set out above.

[24] For all the reasons set out above, the appeal must fail, both in respect of the merits and the costs order. The following order is made:

The appeal is dismissed with costs and the first appellant is ordered to pay respondents' costs.

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**J SHONGWE**
**JUDGE OF APPEAL**

APPEARANCES:

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| For Appellants: | N Tee |
| | Instructed by: |
| | George Wolfe Attorney<br>ORCHARDS |
| | Matsepe Inc<br>BLOEMFONTEIN |
| For 1st and 2nd Respondents: | G B Rome |
| Instructed by: | Eversheds<br>SANDTON |
| | Lovius Block<br>BLOEMFONTEIN |
| For 3rd Respondent: | F Boda |
| Instructed by: | The State Attorney<br>PRETORIA |
| | The State Attorney<br>BLOEMFONTEIN |