THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 35/04
REPORTABLE

In the matter between

CLUTCHCO (PTY) LTD **APPELLANT**

and

ANDREW CHRISTOPHER DAVIS **RESPONDENT**

Before: Mpati DP, Streicher, Nugent, van Heerden JJA and Comrie AJA

Heard: 4 March 2005

Delivered: 24 March 2005

Summary: Information – access to – s 32 of Constitution – Promotion of Access to Information Act 2 of 2000, Part 3 – private company – accounting records of first entry – whether shareholder required access thereto for exercise or protection of right.

JUDGMENT

COMRIE AJA

[1] Section 32 of the Constitution 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.’

The national legislation contemplated by s 32(2) is the Promotion of Access to Information Act 2 of 2000 (PAIA). Part 3 of that statute regulates the rights of access to the records of private bodies. The appellant, a private company, is such a body.

[2] The appellant is a small private company that houses a family business. Seventy percent of the shares are held by the Davis Family Trust which appears to be controlled by Frederick Davis-Armitage. He is the sole director of the company. He has two sons: Gordon Davis, and Andrew Davis, who is the present respondent. Gordon Davis was appointed general manager and he attends to the administration of the company and its business. In 1999 the respondent joined the company. He purchased 30% of the shareholding from his father (or

the trust) for R100 000; he was made a director; and he was appointed workshop manager.

[3] Unfortunately, there was a family fall-out. In the result the respondent was removed as a director and removed from his post as workshop manager. However, he retains his 30% shareholding. There were some oral negotiations for the acquisition of those shares, by the other shareholder, but agreement was not reached. The respondent began to ask for information relating to the appellant's finances. He was furnished with audited financial statements. He continued to press for more information, in particular for access to the company's books of first accounting entry such as cash books, ledgers, journals and invoice books. This was denied. Eventually, in January 2003, the respondent submitted a formal request in terms of s 53(1) of PAIA for access to the following company records:

'1.1 Volledige kasboeke vanaf Maart 1999 tot 21 Januarie 2003

1.2 Gedetaileerde algemene grootboek vanaf Maart 1999 tot 21 Januarie 2003

1.3 Gedetaileerde debiteure grootboek vanaf Maart 1999 tot 21 Januarie 2003

1.4 Gedetaileerde krediteure grootboek vanaf Maart 1999 tot 21 Januarie 2003

1.5 Volledige joernale ten opsigte van aandeelhousers se leningsrekening'

[4] Part G of the request reads as follows:

'**G. Besonderhede van reg wat uitgeoefen of beskerm word**

1. Dui aan watter reg uitgeoefen of beskerm word: DIE REG OM DIE WERKLIKE FINANSIËLE POSISIE VAN DIE MAATSKAPPY (CLUTCHCO) VAS TE STEL.

2. Verduidelik waarom die rekord wat versoek word, benodig word om voormelde reg uit te oefen of te beskerm: DIT SAL MY IN STAAT STEL OM DIE FINANSIËLE REKORDS TE REKONSTRUEER EN DAN DIE WAARDE VAN MY 30% AANDELE TE BEPAAL.'

[5] On 29 January 2003 the company's attorneys responded:

'Regarding your client's request for certain records and information from my client, it is my instructions that, in view of the fact that the other shareholder in the Company is no longer interested in purchasing your client's shares in the Company, the question regarding the value thereof is no longer relevant, and the information and records which are requested is therefore denied.'

[6] In late February 2003 the respondent launched an application in the Cape High Court for an order compelling the company to furnish copies of the accounting records which I have listed in para 3 above. The application was opposed. The matter was heard by Meer J who, subject to certain riders, granted the order as prayed with costs. The judgment is reported at 2004 (1) SA 75 (C). The

learned Judge refused leave to appeal, but such leave was granted on petition to this court. The appeal is unopposed.

[7] As appears from the reported judgment, both parties in their affidavits adumbrated their respective reasons for request and refusal. The respondent claimed that as a shareholder he was entitled to access to the records in question, especially as he suspected (for reasons given) that not all the company's transactions were reflected in the financial statements. He claimed further that he wished to reconstruct the financial records in order to determine the company's real income. This would enable him to determine the real value of his 30% shareholding, which he proposed to sell.

[8] In his answering affidavit Mr Davis-Armitage stated that he endeavoured to buy his son's shares. In terms of clause 7.7.3 of the articles of association the company's auditors were asked to value the shares. The auditors' valuation was R100 065 for the company's entire shareholding. The deponent nonetheless offered to buy his son out for R100 000 (being the initial investment) but the respondent was not amenable thereto. Mr Davis-Armitage stated that the respondent was out to destroy him personally. He admitted that in early 2002 there had been problems with the company's credit facilities, but stated that they were neither permanent nor insurmountable. The

company was properly managed. He claimed that the respondent had no entitlement in law to the financial records in question, and that as regards the value of the shareholding, the respondent's rights were circumscribed by clause 7 of the articles. He added, in reference to s 68 of PAIA, that:

'the financial records sought by the Applicant are highly relevant to the Respondent's financial viability, would enable the Applicant to have detailed insight into the Respondent's margins, customer lists, financial planning and profit margins. Disclosure of this information would therefore be likely to cause harm to the commercial and financial interests of the Respondent, more particularly because the Applicant may use that information to set himself up in a business in competition with the Respondent.'

[9] In reply the respondent pointed out that he had not given notice in writing of his intention to sell his shares, as required by clause 7.7.1 of the articles. In such a notice he would be obliged to 'state the price he requires for his shares'. It would seem to follow – and counsel for the appellant appeared to accept – that the auditor's valuation is not binding upon him, and that he is presently not restricted by articles 7.7.1 to 7.7.4 in the price which he may ask for such shares. He stated that in order to determine the value of his shareholding (and therefore, I assume, his asking price), he needed the information which he sought. He advanced criticisms of the

financial statements and of the auditors' valuation and he added that, in the light of what his father told him in 1999, his shareholding should be worth considerably more than R300 000. Finally, he dealt with the s 68 allegations in a manner which I need not set out because that aspect is not advanced on appeal.

[10] In extending the fundamental right of access to information to records held by private bodies, the Constitution and the statute have taken a step unmatched in human rights jurisprudence. We listened to argument about the meaning of the words 'any rights' in s 32(1)(*b*) of the Constitution and in s 50(1)(*a*), read with s 9 ('objects'), of the statute, and on whether the underlying right asserted by the respondent fell within the ambit of that phrase. In the view which I take of the matter, however, it is unnecessary to express any views on those questions, and it would be wiser not to do so without the benefit of opposing argument.

[11] The underlying right which the respondent asserts is his right, as a shareholder, to value his shareholding in order to fix an appropriate selling price. I shall assume, without deciding, that that is a right within the compass of Part 3 of the statute. Section 50(1)(*a*) provides that a 'requester' must be given access to any 'record' of a private body if –

‘(*a*) that record is required for the exercise or protection of any right.’

Such right of access is far from untrammelled, as appears from the rest of Part 3. The expression ‘required for the exercise or protection of any . . . rights’ is also to be found in item 23(2)(*a*) of Schedule 6 to the Constitution, being the transitional arrangements in relation to the right to information. It has been judicially considered. In *Shabalala v Attorney-General, Transvaal, and another; Gumede and others v Attorney-General, Transvaal* 1995 (1) SA 608 (T) Cloete J said at 624C:

‘In addition, s 23 postulates that the information must be “required”. The word “required” is capable of a number of meanings ranging from “desired” through “necessary” to “indispensable” (see *Khala v Minister of Safety and Security* (*supra* [1994 (3) SA 218 (W) and 1994 (2) SACR 361 (W)] at 224G-225E (SA) and 367d-368a (SACR)) where Myburgh J discusses the meaning of the word “required” and the context in which it should be interpreted in the Constitution). To my mind, “required” in s 23 conveys an element of need: the information does not have to be essential, but it certainly has to be more than “useful” (the meaning given by Marnewick AJ in *Sefadi’s* case *supra* [*S v Sefadi* 1995 (2) SA SACR 667 (D)] at 671d) or “relevant” (the test postulated by Myburgh J in *Khala’s* case *supra* at 238D-F (SA) and 381h-382a (SACR)) or simply “desired”.’

[12] In *Nortje and another v Attorney-General, Cape* 1995 (2) SA 460 (C), a full bench decision, at 474G, Marais J held that ‘required’

meant not ‘needs’, but ‘reasonably required’ in the particular circumstances. That view appears to have been shared by Cameron J in *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 848G. The same learned judge in *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T) emphasised the need for an applicant for information to ‘lay a proper foundation for why that document is reasonably “required” for the exercise or protection of his or her rights’ (the quotation is from the English headnote). In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (3) SA 1013 (SCA) the appellant purported to cancel a contract on the ground that the first respondent had committed a material breach by submitting fraudulent commission claims. It sought disclosure of specified documents appertaining to the claims in question. Streicher JA said at paras 28 and 29:

’[28] Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of s 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.

[29] Although the first respondent did not expressly say so, it is clear that the information required is the particulars of allegations that it claimed and received

commissions to which it was not entitled. All the documents referred to would probably contain such information. The right which the first respondent wishes to protect is its right to a good name and reputation. It denies that it submitted fraudulent claims. In order to protect its good name and reputation it obviously has to have particulars of the specific allegations made against it. It follows that the Court *a quo* correctly ordered that the first respondent be given access to the aforesaid documents.'

[13] It seems to me that Streicher JA's choice of the words 'assistance' and 'assist' in the above passage indicates that 'required' does not mean necessity, let alone dire necessity. I think that reasonably required in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need. It appears to me, with respect, that this interpretation correctly reflects the intention of the legislature in s 50(1)(*a*).

[14] I turn to the provisions of the Companies Act 61 of 1973. First, a spyglass look reveals that a member is entitled to receive copies of the company's annual financial statements (ss 286, 302, 309), and to obtain copies of the minutes of the company's general meetings (ss 204, 206). A shareholder is not entitled to sight of the minutes of directors' and managers' meetings maintained in terms of s 242 (*Janit v Motor Industry Fund Administrators (Pty) Ltd* 1995 (4) SA 293 (A) at

303B-F). Nor, unless the articles of association otherwise provide, is he or she entitled to inspect the accounting records of first entry maintained by the company in terms of s 284. That right is reserved to the directors (see s 284(3); *Jacobs v Old Apostolic Church of Africa* 1992 (4) SA 172 (Tk) at 175B-C; *Henochsberg on the Companies Act* (ed Meskin) Volume 1 at p 544). The appellant's articles of association (more particularly article 24) make no contrary provision. Arguably – I express no views – there may be special instances where a court could order some form of access in terms of s 252 (member's remedy in case of oppressive or unfairly prejudicial conduct), but that section is not applicable here. The position is, therefore, that the Companies Act does not afford the respondent the right of inspection or right to information which he seeks. On the assumption made above in para 11, second sentence, it follows that the respondent can invoke Part 3 of PAIA provided that the circumstances warrant such a course.

[15] The Companies Act should, however, be viewed holistically. It is replete with provisions designed to protect the interests of shareholders. Of particular significance in this context are the stringent duties placed on the directors in relation to the company's accounting records and financial statements. It is ultimately the

responsibility of the directors to take reasonable steps to secure proper compliance with s 284, that is that a proper set of books be kept (s 284(4)). By s 286 it is the duty of the directors to cause the financial statements to be made out. They must conform to generally accepted accounting practice and 'fairly present the state of affairs of the company and its business as at the end of the financial year concerned' including the profit or loss for that year (s 286(3)). Failure to comply is potentially an offence (ss 286(4); 287). See too regarding falsifications, ss 249-251. Certain matters such as directors' loans and emoluments have to be disclosed in the annual financial statements (ss 295-7). The statements must be approved by the directors and signed on their behalf (s 298). They must be accompanied by the directors' report (s 299) and the independent auditor's report (s 286(2)(*d*)).

[16] An entire chapter of the Companies Act (chap X) is devoted to auditors. By s 281 the auditor has the right of access at all times to the company's accounting records, and the right to be heard at general meetings. The auditor is 'entitled to require from the directors or officers of the company such information and explanations as he thinks necessary for the performance of his duties' (ibid). The auditor reports to the members (s 282), and in respect of the annual financial

statements the report is either with or without qualification (s 301). An auditor's duties are extensive and onerous. See the commentary *ad* s 282 in *Henochsberg*, supra. With regard to the audit of the annual financial statements, these duties are set out in some detail in s 300. Failure by an auditor properly to discharge these and other duties may attract liability. See, most recently, *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) and cf ss 247, 248.

[17] 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 PAIA Parliament could not have intended that the books of a company, great or small, should be thrown open to members on a whiff of impropriety or on the ground that relatively minor errors or irregularities have occurred. A far more substantial foundation would be required.

[18] In my view the respondent failed to lay such a foundation. His complaints were not of a serious nature and no detailed criticism of the auditors was advanced. In addition the respondent's proposed modus operandi was lacking in specificity. He claimed that access to the books of first entry would enable him to 'reconstruct' them and that the reconstructed version would enable him to place a proper

value on his shares. These broad and general assertions were not supported by, for example, an affidavit by an experienced accountant and auditor. I conclude that the respondent failed to show that the access which he sought was required for the exercise or protection of the rights which he asserted. The court *a quo* should accordingly have dismissed the application with costs.

[19] As to the costs on appeal, I agree with Mr Manca that the appeal raised, at least potentially, issues of novelty, difficulty and fundamental import. In these circumstances I consider that the costs of employing two counsel on appeal should be allowed.

[20] The appeal succeeds with costs, including the costs of two counsel. The order granted by the court *a quo* is set aside, and replaced by an order dismissing the application with costs.

_____

R G COMRIE AJA

CONCUR:

MPATI DP
STREICHER JA
NUGENT JA
VAN HEERDEN JA