

SOUTH AFRICA / JUDGMENT

Daxmollie Bae (Pty) Ltd v Mimarkits Company (Pty) Ltd (1730/24P) [2024]

ZAKZPHC 120 (8 November 2024)

[2024] ZAKZPHC 120

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Van Rooyen AJ

CASE / FILE NUMBER

1730/24P

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IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULU-NATAL
DIVISION, PIETERMARITZBURG
CASE NO: 1730/24P

In the matter between: DAXMOLLIE BAE (PTY)
LTD
Applicant
and
MIMARKITS COMPANY
(PTY) LTD
Respondent

JUDGMENT

VAN ROOYEN AJ

- [1] The applicant applies for final relief on motion based on the provisions of Section 163 of the Companies Act, 71 of 2008 (“the Act”). Applicant’s counsel correctly accepts that the PLASCON-EVANS rule finds application. The applicant can only succeed “in those exceptional circumstances where the respondents’ version of the disputed facts can safely be rejected out of hand as far-fetched or untenable.”[1]
- [2] In applications of this nature this court is not required to resolve every factual dispute[2] and the matter is essentially to be decided on the respondent’s version.[3]

[3] In summary, the applicant moves this court for the following orders: -

3.1 Directing the respondent to provide financial statements for the years ending 2022 and 2023, independently reviewed by an agreed upon or court appointed auditor in accordance with Generally Accepted Accounting Principles, within one month of the order;

3.2 Independently reviewed financial statements for the year ending February 2024;

3.3 Inform the applicant whether audited financial statements exist for the period preceding February 2024 and, if they do, to provide them to the applicant;

3.4 Furnish the applicant, upon request within 30 days of the receipt of the financial statements, with invoices, bank statements, vouchers and other source documents required to verify the financial statements;

3.5 Provide the applicant's "nominated appointed auditor" (sic) with all source documents required to produce audited financial statements within one month of being notified of whom the appointed auditor is and to co-operate in the production of audited financial statements;

3.6 Tender the cost of production of the audited financial statements;

3.7 Provide the minutes of the respondent's AGM of 10 August 2023, within 5 days of the order;

3.8 Provide the name and details of the respondent's company secretary; and

3.9 To pay the costs of the application "in the event of the (respondent) opposing the relief."

[4] During argument, Mr. Oosthuizen, who appeared with Mr. Pillay, abandoned the relief sought in paragraphs 3.6 to 3.8 above, in my view correctly so.

[5] The applicant announces in paragraph 5 of the founding affidavit that the application is made in terms of Section 163(1) of the Companies Act 71 of 2008 by it as a minority shareholder of the respondent, holding 33 fully paid ordinary shares issued on 10 February 2023.

[6] The respondent asserts factually that, during 2020, a shareholder extricated itself from the respondent and that a director, Mr. Platt, engaged in the market to find a replacement investor which resulted in the shares being owned by four entities, including the applicant.

[7] The respondent describes the applicant as a "management shareholder", to which description the applicant takes umbrage. I understand the description to suggest that the applicant would have, through a director or more, a managerial function in the business of the respondent and be entitled to participate in the conduct of the business.

[8] The respondent could rightfully be described as a company "where the shareholders enter into the venture on the basis of an informal or tacit understanding or arrangement that each will contribute

something by way of capital or labour and each will play a role in the running of the company, usually as a director but sometimes as an employee...”[4]

- [9] The respondent asserts that Mr. Michael Wade, the director of the respondent representing the applicant’s interests, resigned – a fact denied by the applicant baldly.
- [10] As a result of the resignation, the applicant’s relationship with the respondent terminated and this has led to arbitration proceedings concerning provisions in the shareholder’s agreement relating to disposal of the applicant’s shares under the circumstances. The respondent contends that the applicant’s rights as a “management shareholder” terminated and that the applicant lacks locus standi to pursue the relief sought.
- [11] Nothing turns on the dispute and I am obliged to accept the respondent’s version that Mr. Wade resigned as director and that there can be no suggestion that there has been an unfairly prejudicial exclusion of the applicant’s representative from the business affairs of the respondent.
- [12] I am equally obliged to accept that the applicant remains a de facto shareholder of the respondent.
- [13] The further contention by the respondent is that, notwithstanding the disputes, the applicant’s representatives were permitted to attend, and did in fact attend, the respondent’s AGM’s. The respondent appointed Finovo Accountants, in the stead of Mr. Wade, to attend to the accounting and tax aspects of the respondent’s business, an issue admitted by the applicant.
- [14] The respondent’s annual financial statements were prepared by Finovo, “internally reviewed by the firm (by a different partner), approved at the AGM’s, signed and submitted to SARS.” The applicant admits that it approved the financial statements for March 2022 to July 2023 and that it is in possession of statements, approved by it, preceding that period.
- [15] The applicant asserts that it was represented, by proxy, at the respondent’s AGM on 10 August 2023 and that pursuant thereto, on 18 August 2023, it requested a recording of what transpired at the meeting and the respondent’s bank statements for 1 March 2022 to July 2023.
- [16] No response was allegedly received and a repeat request was made in writing on 7 September 2023, which included a request for the provision of details regarding the company secretary.
- [17] The applicant was told that Finovo performs the function of company secretary at the 2021 AGM, another fact I am bound to accept.
- [18] In reply, the applicant admits receiving the recording on 11 August 2023. It failed to disclose this fact in the founding affidavit.

- [19] It baldly denies the respondent's assertion that it is not entitled to the bank statements for the period March 2022 to July 2023 as it had approved the financials covering that period.
- [20] What then is the applicant's complaint?
- [21] The claim that the respondent has failed to provide the minutes of the aforesaid AGM is devoid of substance. The applicant had the recording of the meeting which undoubtedly recorded resolutions, if any were taken.
- [22] The respondent ignored the request for the provision of bank statements, and thereby tacitly refused the request.
- [23] In terms of Section 26(1)(c) of the Act, a shareholder, qua a person holding a beneficial interest in any securities issued by a profit company, has a right to inspect and copy, amongst others not relevant to this application, the annual financial statements, as mentioned in Section 24(3)(c)(i) and (ii) of the Act.
- [24] Sections 24(3)(c)(i) and (ii) refer to reports presented to an AGM and annual financial statements, retained for a period of seven years.
- [25] Notably excluded from Section 26(1)(c) are the accounting records of the company, retained for the required period.
- [26] This statutory restriction of access by shareholders to the accounting records accords with the interpretation of the Companies Act, 1973, considered by the Supreme Court of Appeal in *Clutchco*[5], where a shareholder applied for accounting records.
- [27] It was held that "unless the articles of association otherwise provide, he is not entitled to inspect the books of first entry...That right is reserved for the directors."
- [28] There are no articles of association before me.
- [29] The court did not, however, exclude that there may be a right to access the information in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA") or under Section 252 of the Companies Act, 1973.[6]
- [30] "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 of relatively minor errors or irregularities having occurred. A far more substantial foundation would be required." [7]
- [31] The applicant makes no case for relief under PAIA but squares its relief on the successor to Section 252, being Section 163 of the Act.

- [32] Mr. Oosthuizen submitted, relying on Crazy Plastics[8] at paragraph [28], that, notwithstanding the fact that no request for information in terms of PAIA has been made, the applicant is entitled to the documents sought in this application as Section 26(7) of the Act makes the remedy to be in addition to any PAIA remedy.
- [33] The submission loses sight of the fact that a shareholder is entitled to access financial statements, and if there are audited statements, it is entitled to those. The applicant knows there are no audited financial statements.
- [34] This does not address the restriction regarding accounting records. The view expressed in the judgement that Moodley is entitled to the source documents, used to compile the financials, does not take Clutchco into consideration.
- [35] Of greater significance is that Crazy Plastics is authority for the proposition that, for the period preceding Moodley's resignation or removal as a director, he was only entitled to have access to the statements in the form the company is obliged to keep.[9] He appears to have been excluded from the company's affairs from that date, a feature which distinguishes him from the applicant's position, which was to continue to attend AGM's and approve annual financial statements.
- [36] The reason given for the need for the information is for the applicant to "have a proper understanding of Respondent's income and expenditure...of the valuation of its shares, and further, to properly exercise its rights as a shareholder." The applicant further asserts its alleged right to know whether audited financial statements for the respondent exist.
- [37] The applicant does not suggest that the respondent was required to have audited financial statements in terms of Section 30(2) of the Act, read with Regulation 28. The financial statements, as they are, were reviewed by Finovo and approved by the applicant.
- [38] The same process would have been applied for the 2024 financial statements, which would be placed before the AGM held between May and August 2024, discussed and approved. There is no supplementary evidence showing that this did not transpire.
- [39] Where the applicant has approved financial statements, it cannot, through the mechanism of this application, call them into question. It has accepted that they state the respondent's financial position accurately and are available to it to understand the respondent's "income and expenditure." By approving them, it accepts that all underlying transactions were properly captured and dependably reported.[10]
- [40] Section 163 of the Act permits a shareholder or director of a company to approach a court for relief where any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or unfairly disregards the interests of, the applicant; the business of the company, or a related person, is being or has been carried on

or conducted in a manner which has similar effect; or the powers of a director or prescribed officer, or a person related to the company, are being or have been exercised in a manner which has similar effect.

[41] The Section must be construed to advance the remedy, rather than to limit it^[11] and that the power of a court to grant relief is wide and not restricted to the relief formulated by the applicant.^[12]

[42] The court's jurisdiction to make an order does not arise until the statutory criteria have been satisfied.^[13]

[43] The principles for the application of Section 163, set out hereunder, are extracted from the SCA judgement in De Sousa^[14] which is, no doubt, the final word spoken on the application of Section 252 of the Companies Act, 1973.

[44] It is trite that regard may be had to authorities dealing with Section 252 in interpreting and applying Section 163 of the Act.^[15]

[45] The relationship between a company and its members, and the members inter se, is contractual, and based primarily on the memorandum of incorporation or other agreements concluded amongst shareholders. The minority

subjects itself to the lawful exercise of the will of the majority, exercised in the interests of the company.

[46] By statute the courts have been vested with powers to override the majority's exercise of their contractual powers, in order to remedy oppression and unfair prejudice suffered by the minority.

[47] A claim under Section 252 required proof of the manner in which the affairs of the company were being conducted and an identifiable and discernible course of conduct, that was unfairly prejudicial to the member. The Section concerned itself with the effect of the course of conduct, not the motives of those responsible for it. Prejudice is commercial and not merely emotional.

[48] The word "unfairly" is emphasised. The remedy is only available if the member is unfairly prejudiced. The applicant must establish a lack of probity or fair dealing or violation of conditions of fair play.^[16]

[49] The breadth of the powers vested in a court are not an invitation for courts to intervene in the affairs of a company at the behest of a disgruntled member. Dissatisfaction and disagreement with, or disapproval of, the conduct of the business does not of itself mean that the member has suffered unfair prejudice. The fact that there are irreconcilable differences between shareholders may in some circumstances justify an order for winding up the company, but it is not, without more, unfair prejudice.

- [50] Conduct is oppressive, unfairly prejudicial or unfairly disregards the interests of a shareholder, if objectively viewed, it has that effect.
- [51] “Oppressive conduct” has been accepted to include unjust or harsh or tyrannical conduct; burdensome, harsh or wrongful conduct; or conduct which involves at least an element of lack of probity or fair dealing.[17]
- [52] The onus of proving the conduct has the effect envisaged by the Section, falls on the applicant. “A high degree of specificity is required... The threshold is an extremely onerous threshold to achieve in motion proceedings...” [18]
- [53] The applicant has failed to even emerge from the starting blocks in discharging the onus of establishing that the effect of conduct by the company or directors is prejudicial, let alone unfair.
- [54] Its director resigned as director of the respondent. It cannot therefor be said that it was excluded from the business and affairs of the respondent, other than on its own volition.
- [55] It was permitted to and in fact attended annual general meetings, through a proxy, and participated in the approval of the annual financial statements. On request, it received a transcript of the proceedings at the 2023 AGM.
- [56] The vast majority of these facts, now admitted, are not disclosed in the founding affidavit.
- [57] It raises no material objection to the content of annual financial statements approved by it, nor how the provision of bank statements, will result in further clarity and understanding of the respondent’s financial position – a position confirmed by it in approving the annual financial statements.
- [58] It makes no case for suggesting that the financial statements provided to it, which were, incidentally, independently reviewed, did not comply with the standard of accounting imposed on the respondent by the Act. The complaint that the reviewer is not independent is opportunistic and unrelated to the fact that the applicant independently approved the financials.
- [59] It does not explain the need for audited financial statements when the financials were approved in their current form. The relief sought in paragraph 3 of the notice of motion, requiring the respondent to be directed to disclose whether audited financial statements exist is disingenuous, when the respondent represented its financial affairs to shareholders and SARS through approved unaudited statements.
- [60] The respondent, in applying for the aforesaid order, unjustifiably latches on to the finding in Bester[19] to the effect that, in that case, the value of shares could only be determined through a forensic audit. It lays no foundation for the need for an audit.

- [61] Section 163 provides an equitable remedy. No facts were placed before me in order to determine what the impact of the cost of an audit, on the respondent, would be.[20] Fortunately this relief was abandoned.
- [62] It is common cause that the parties are engaged in arbitration proceedings involving the applicant as shareholder of the respondent. Such proceedings appear to involve a determination of the basis for the applicant's exit as shareholder of the respondent. The process will, of necessity, involve the mutual discovery of documents and records relevant to the enquiry.
- [63] The applicant has a clear alternative remedy.
- [64] Should I exercise an equitable jurisdiction to override the lawfully exercised contractual powers of the majority on the basis that it has been established with "a high degree of specificity" that the business of the respondent has been conducted in a manner that, objectively, has the effect of lacking probity, fair dealing, violating conditions of fair play or unfairly disregarding the interests of fairplay?
- [65] To do so on the facts before me would be to improperly intervene in the affairs of the respondent "at the behest of a disgruntled member." A far more substantial factual foundation is required.
- [66] The view I take is that this application was ill-advised and completely bereft of any facts which from which it could objectively be concluded that the conduct complained of, falls within the ambit of Section 163. The paucity of information provided in the founding affidavit, together with material facts omitted therefrom (and subsequently admitted in reply) calls into stark question the applicant's bona fides and motives for making the application.
- [67] There is nothing in the respondent's version that is to be rejected as far-fetched and untenable. In fact, many of the facts which could have been contentious, were admitted by the applicant.
- [68] Where a court is satisfied that the purpose behind an application is other than that sought to be achieved by the statutory remedy, a punitive costs order is appropriate. The purpose of this application is distinctly unclear, where the material information regarding the respondent's financial affairs was available to the respondent, and in fact, approved by it.
- [69] The applicant has put the respondent to needless expense and persisted to an opposed hearing on the strength of a founding affidavit devoid of facts sufficient to sustain the applicant's cause. This is a factor which weighs in determining an appropriate costs order.
- [67] In conclusion the following order is made:
1. The application is refused.
 2. The applicant is ordered to pay the respondent's costs on an attorney and client scale.

Date reserved:

4 November 2024

Date delivered:

8 November 2024

For Applicant:

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[1] Prinsloo NO v Goldex 15 (Pty) Ltd 2014

(5) SA 297 (SCA) at para [17], with reference to Plascon at 634E to 635C

[2] Bester v Lebra Developments (Pty) Ltd (2022) ZAGPPC 211 at para 34

[3] Business Doctor Consortium Ltd v Old Mutual Finance (RF) (Pty) Ltd 2022 JDR 2891 (WCC)

[4] De Sousa v Technology Corporate Management (Pty) Ltd 2017

(5) SA 577 (GJ) at para [47]

[5] Clutchco (Pty) Ltd v Davis 2004

(3) SA 486 (SCA)

[6] Clutchco at paras [11] and [14]

[7] Clutchco at para [17]

- [8] Moodley v Crazy Plastics 2024 JDR 0058 (GJ)
- [9] Crazy Plastics at para [26]
- [10] Pakade NO v Lukhandji Leisure (Pty) Ltd ZAECGHC 21 (2 March 2017)
- [11] Grancy (Pty) Ltd v Manala 2015
- (3) SA 313 (SCA) at para [26]
- [12] Freedom Stationery v Hassam 2019
- (4) SA 459 (SCA) at para [27] to [28]
- [13] De Sousa at para [38]
- [14] De Sousa v Technology Corporate Management (Pty) Ltd 2015
- (5) SA 57 (SCA)
- [15] Grancy Property Ltd v Manala 2015
- (3) SA 313 (SCA) at para [22]
- [16] De Sousa (a quo) at para [39] to [44]
- [17] Grancy at para [22] and [23]
- [18] Business Doctor at para [57] and [58]
- [19] At para [59]
- [20] De Sousa (SCA) at para [258] and [259] – in the context of a court ordered buy-out where no enquiry was conducted into the financial effect of such an order on the company. “The purpose of a buy-out order was not to bring a company to its knees.”

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