
SOUTH AFRICA / JUDGMENT

Morwane v Absa Limited and Others (M499/2016) [2017] ZANWHC 48 (6 April 2017) [2017] ZANWHC 48

COURT

North West High Court, Mafikeng

BEFORE

A M Kgoele

CASE / FILE NUMBER

M499/2016

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IN THE NORTH WEST HIGH COURT

MAHIKENG

M499/2016

In the matter between:

SIMON SIMI MORWANE

Applicant

and

ABSA LIMTED

1st Respondent

WALTER LOWRENS KINNEAR

2nd Respondent

SITONA MINING AND CONSULTANTS (PTY) LTD 3rd Respondent

THAKADU HOLDINS (PTY) LTD

4thRespondent

LOCAL MUNICIPALITY

CIVIL MATTER

DATE OF HEARING : 6 APRIL 2017

DATE OF JUDGMENT : 6 APRIL 2017

DATE OF REASONS : 6 JULY 2017

FOR THE APPLICANT : Adv Morwane(Self)

FOR THE RESPONDENT : Adv Swanepoel

REASONS

FOR JUDGMENT

KGOELE J:

1. This is an application wherein the applicant seeks delivery of certain documents and information pertaining to the third and fourth respondents (the Companies), as well as payment of substantial amounts of money and certain declaratory reliefs. The reliefs sought are many and comprises of a long list of not less than 18 prayers.
2. At the commencement of the hearing of the submissions, the applicant, who is legally qualified as an Advocate, and was representing himself, requested the Court to keep prayers 10-17 in abeyance. These are the prayers that relates to the payment of amounts of money and certain declaratory reliefs that were sought. He conceded to the fact that the Court cannot grant these prayers before prayer 1-9 have been finalised. The issues that were argued before me therefore related only to prayer 1-9 which mainly dealt with the furnishing of certain documents and information.
3. The application was opposed by the second to the third respondents (the respondents). After hearing arguments from both parties on the 6th of April 2017, this Court dismissed the application with costs. The applicant requested reasons for the said order as per letter dated 15th May 2017 and the reasons follows hereunder.
4. The background facts which are common between the parties are that the third and fourth respondents, who are Companies registered in terms of the law of the Republic of SA, were established in May 2005 by the second respondent. On or about July 2005 the second respondent approached the applicant to join as a partner in order to comply with the BEE legislation. From the papers it appears that the applicant resigned as the director of both the third and fourth respondent on the 28th of August 2013, per a written agreement which was concluded by the parties on the 27th of August 2013. It also appears from this agreement which only came to the fore through the answering affidavit of the second respondent

that the terms thereof were that he(the second respondent) purchased and re-acquired the applicant's entire shareholding in the third and fourth respondent at an aggregate purchase consideration of R2, 2 million. It is also not in dispute that the agreement was fully executed, the shares transferred to the second respondent and the purchase consideration duly paid to the applicant. The second respondent thereafter changed the names of the Companies, the third respondent to Sitona Mining (Pty) Ltd on the 7th of May 2015 and the fourth respondent to Sitona

Plant (Pty) Ltd on the 8th of May 2015. It therefore becomes clear that the applicant cited the third and fourth respondents by their names prior to the change.

5. The applicant's case is that the respondents should provide him with the detailed bank statements of the third and fourth respondents, the assets register, list and details including the values of the respective contracts secured, the value of the third and fourth respondents, audited financial statements, proof of payment of dividends, loan accounts to directors and proof of payments thereof including enabling resolutions, BEE certificates and lastly, minutes of meetings of board of directors and shareholders. All these information required is for the period of the 28th of February 2008 to the 31st of October 2014.
6. The applicant submitted that the application is actually for access of information he was entitled to both as a director and shareholder of the third and fourth respondent during his term in the office. According to him the information sought is not privileged but a right in the law and the first to the fourth respondents has persistently refused to accede to the demand and request thereof.
7. He maintained that the respondents by doing so disregard the provision of section 163 of the Companies Act 71 of 2008 (the Act). Further that, the agreement the respondents rely on does not exonerate them from refusing the applicant's right to information. He emphasized the fact that the information sought will amongst others assist in establishing the true nature of the agreement as it needs to be interrogated by the Court. The bank statements required will also serve to confirm that the third and fourth respondents were not ran in terms of the Act.
8. Advocate Swanepoel acting on behalf of the second to the fourth respondents submitted that the applicant disingenuously neglected to disclose to the Court that he resigned and further that an agreement was concluded between the parties for the buying of his shares. He further did not disclose the fact that he has already been interdicted by the Court from interfering in the affairs of the respondents and from holding himself out as a director of these companies. According to him the averment in his founding affidavit to wit "I have been a director and a shareholder since 2005" amounts to a breach of the Court orders.
9. Adv Swanepoel submitted further that the applicant is not entitled to the requested information because he is precluded by section 26 of the Act from obtaining such information. He argued that sec 26 (1) (a)-(e) prescribes what information one can seek and none appears in the list of the applicant. Further that, sec 26 of the Act also prescribes who can request such information. It says one has to be a current company director or have a beneficial interest.
10. According to Adv. Swanepoel the applicant's remedy may lie in the Promotion of Access to Information Act 2 of 2002 (PAIA). The applicant did not do this because he relies on the Companies Act for his reliefs sought. The relief sought is unprecedented as there is no law that imposes upon the respondents to provide the information requested by the applicant. In addition, he argued, the applicant has no locus standi to request these information.

11. The issue for determination which this Court had to grapple with is whether the applicant disclosed a cause of action that entitles him to any relief sought by him in prayer 1-9.
12. It is common cause between the parties that they concluded a parting agreement. The applicant comes back a couple of years demanding information of when he was still a director. I fully agree with Advocate Swanepoel that the applicant does not approach this Court in clean hands. He failed to disclose the parting agreement, he still referred to himself as a director of the third and fourth respondents in his founding affidavit. It was only in his replying affidavit that he conceded to the fact that he is no longer a director of the two companies. But this does not end here. In his papers he does not disclose at all that his shareholding was repurchased by the second respondent, he still maintains that his shares became depleted. It is trite law that the applicant is required in law to stand and fall by his case which is made in the founding affidavit.
13. Section 26 of the Act provides:

“ Access to the 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 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) (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.
 - (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).”
14. I fully agree with Advocate Swanepoel that the application by the applicant is without merit. A thorough analysis of Section 26 of the Act makes it clear that the applicant is not entitled to any of the information he requested. There is simply no legal basis for his request in terms of the Act. The fact that the applicant is no longer the director or a shareholder of either of the two companies is fatal to the application he made. The applicant no longer has any rights vis-a-vis the respondents and his statement that he requires the information sought to exercise any alleged rights are therefore baseless in law and totally void of substance. It also appears from the agreement made that there are no remaining loan account claims whatsoever

against the two companies that may affect him as all the loan account claims were according to the parting agreement ceded to the second respondent.

15. In addition, the information requested by him does not form part of the information that has been described as “Company records” that one can have access to in terms of Section 26. The applicant insist that he is still entitled to have access to the records of these two Companies when he was a director and shareholder without providing any basis or authority to that effect. Even under the PAIA, the request of information required by a person is not a given thing, an applicant still has to provide a basis for his request and further comply with certain requirements.
16. The above sums up the reasons why this Court concluded that the applicant had not disclosed a cause of action for the relief sought in prayers 1-9 of his notice of motion and dismissed his application with costs.

A M KGOELE

JUDGE OF THE HIGH COURT

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