

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: 23477/2013

DELETE WHICHEVER IS NOT APPLICABLE(1) REPORTABLE: ~~YES~~/ NO.(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/ NO.

(3) REVISED.

8/11/13
DATE

SIGNATURE

In the matter between:

MANDG CENTRE FOR INVESTIGATIVE**JOURNALISM NPC****MCKUNE, CRAIG**

First Applicant

Second Applicant

And

CSR-E LOCO SUPPLY (PTY) LTD

First Respondent

BASADI DIRANG DEVELOPMENT SYSTEMS

Second Respondent

MATSETSE INDUSTRIAL SERVICES (PTY) LTD

Third Respondent

JUDGMENT

NICHOLLS, J

- [1] The applicants seek an order declaring that they are entitled to access to the security registers of the respondent in terms of section 26 of the Companies Act 71 of 2008 (“the act”) and that the respondent’s refusal to grant them access to the requested records is unlawful in terms of section 26(9) of the act. Every profit company is obliged in terms of section 50 of the act to keep a register containing a list of all securities, including shares, debentures and other instruments, issued by the company.
- [2] Section 26 of the act deals with access to company records. Section 26(1) provides that a person who holds a beneficial interest in a company has a right to inspect certain records. Section 26(2) affords a person who has no beneficial interest the “*right to copy or inspect the securities register*” of a company upon payment of the prescribed fee. The applicants hold no beneficial interest and therefore section 26(2) is applicable. It is common cause that the applicants’ request was properly made in terms of section 26(2). What the respondents dispute is that section 26 confers an absolute right of access to the securities register. Instead the respondents contend that in certain circumstances a reasonable refusal is permissible.
- [3] The respondents state that their refusal is merely a temporary one based on their right to privacy. They have submitted a bid for the implementation of the Transnet 95 Locomotive supply contract. A major consideration in the evaluation of the bid, especially with State Owned Entities such as Transnet, will be the issue of BBBEE. How the respondents have structured their BBBEE component will give them a competitive edge over their opponents. Thus, so it is contended, the securities register is a trade secret tantamount to a pricing formula. If the identity of their shareholders, as reflected in the share register, is

revealed to their competitors before the evaluation is concluded the respondents say that they will suffer irreparable harm. This overrides the right to access contained in section 26.

- [4] The bid for project 599 closed on 29 April 2013. The respondents submitted their tender documents more than six months ago. Once the outcome of the tender has become known, the respondents are willing to provide the applicants access to their securities register. It was submitted from the bar by respondent's counsel that at very least the temporary refusal should remain in place for another month or two to make allowance for this.
- [5] The crux of the respondents' argument is that section 26 of the act must be considered in the light of the Constitution and the Promotion of Access to Information Act 2 of 2000 ("PAIA"), both of which recognise the right of refusal. Their reasoning is that the right to information in terms of the Constitution is subject to a limitation clause while PAIA grants a right of refusal to access to records if they contain trade secrets of a private body. Therefore, the facts set out above warrant a temporary refusal. Importantly, so it is argued, the reference in section 26(9) to a "reasonable request" is a clear indication that the legislature intended to provide for refusal of access in certain circumstances. According to the respondents the only absolute right conferred by section 26 is the right to request information, not necessarily to receive it.
- [6] In considering whether section 26 is a free-standing right, one should have regard to the relevant subsections. Sections 26(3), 26(4), 26(5), 26(7), 26(8) and 26(9) provide:

“26. Access to company records.—

(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 No. 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 No. 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.

(9) It is an offence for a company to—

- (a) fail to accommodate any reasonable request for access, or to unreasonably refuse access, to any record that a person has a right to inspect or copy in terms of this section or*
- (b) to otherwise impede, interfere with, or attempt to frustrate, the reasonable exercise by any person of the rights set out in this section or section 31.*

- [7] The request was a direct request to the company made in terms of section 26(4)(b). Therefore in terms of section 26(5) the company is obliged to comply within 14 days. Failure to comply is, in terms of section 26(9), a criminal offence.
- [8] The wording of the statute is clear. Section 26(7) read with regulation 24 states that that the rights set out in section 26 are in addition to, and not in substitution for, any rights set out in the Constitution or PAIA. Regulation 24 provides:
- (1) Any right of access of any person to any information contemplated in section 26 or in this regulation may be exercised only in accordance with -*
 - (a) the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000); or*
 - (b) the provisions of section 26; and*
 - (c) sub-regulations (3) to (4).*
- [9] It is evident from the use of the word 'or' in the regulation read together with section 26(7) above that what the legislature had in mind was that a party could get access to the securities register either in accordance with section 26 or PAIA. This means that additional rights are conferred by PAIA and the Constitution. However, this does not detract from the

fact that section 26 is a self-standing right. It is always open to the legislature to confer additional rights over and above the Bill of Rights.

[10] I agree with counsel for the applicant that the right to the information referred to in section 26(2), namely access to the share registers, is narrow and restricted, and it was for this reason that the statute was introduced to provide a quick and effective means of access. Insofar as the wording of section 26(9) makes reference to the words “reasonable” and “unreasonable” with regard to access, this is in the context of strict liability in the criminal sense. It is noteworthy that section 26(3) refers to information rights additional to right of access to the securities register provided for in section 26(1) and 26(2). These may be established in the Memorandum of Incorporation of a company but cannot negate any mandatory protection of access rights provided by PAIA. Presumably there could be circumstances where this additional information could be reasonably withheld. However, this is not the case with a request for the securities register in terms of section 26(1) or (2) which in my view confers an absolute right.

[11] In *La Lucia Sands Share Block v Barkhan*¹ the Supreme Court of Appeal considered section 113 of the old Companies Act 71 of 1971, which is substantially similar to section 26. The court referred to the English appeal court case of *Pelling v Families Need Fathers Ltd*², also dealing with a similar provision in English company law, where it was held that generally a court will make a mandatory order to give effect to the legal right. The court’s discretion to refuse the production of a members’ register is limited to exceptional circumstances where, for example, the order is sought for some unlawful purpose.

¹ 2010 (6) SA 421 (SCA)

² [2002] 2 All ER 440 (CA)

[12] The Supreme Court of Appeal went on to say:

“In a constitutional State in which freedom of association and access to information are valued, courts should be slow to make orders that have a limiting effect. It bears repeating that in terms of s113(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.”

[13] Even if I am incorrect that section 26(1) and (2) confer an absolute right and the courts have a discretion to refuse access, the applicants must succeed. Their request is legitimate. There is nothing on the facts of this case to indicate exceptional circumstances to justify the respondents' refusal to produce the securities register. The conduct of the respondents in doing so amounts to unlawful conduct in terms of section 26(9) of the act.

[14] In view of the above finding, it is unnecessary to deal with the respondents' further submissions. However, insofar as the respondents argue that section 26 is subject to PAIA and the Constitution, no case has been made out in this respect. There is no constitutional challenge to the legislation. Therefore any reliance on the limitations clause is misplaced. In terms of PAIA the respondent has to show that the securities register is a commercial secret, the disclosure of which would cause the respondent commercial harm³. It is inconceivable that in this case, disclosure of the securities register could possibly disadvantage the respondents. The tender process has already closed. None of the competing bidders would at this stage be able to amend their bids using

³ *BHP Billiton PLC Inc and Another v De Lange and Others* 2013 (3) SA 571 (SCA)

any information contained in the respondents' share register. To reveal the respondents' "ingenuity" in their BBBEE structure can cause them no commercial harm.

[15] The applicants seek a punitive costs order on the basis that the respondent's conduct in this matter amounts to nothing more than an attempt to delay compliance with the law in disregard of their statutory obligations. The first request was made on 12 December 2012. The email response to this was that the information amounted to "trade secrets". On 13 February 2013 the applicants' attorneys addressed a letter to the respondents again requesting the information and pointing out that not to provide it was a criminal offence. The respondents' attorneys replied on 21 February 2013 that they would respond "soon". This application was launched on 22 April 2013. To date the information has not been forthcoming.

[16] It does indeed appear that the respondents have merely sought to delay and obfuscate and that they have no defence to the clear wording of the act. In these circumstances a punitive costs order is warranted.

I make the following order:

1. The applicants are entitled to access the requested records in terms of Section 26(2) of the Companies Act 71 of 2008 ("the Act").
2. The respondents are to provide the applicants with copies of the requested records within 14 days of the grant of this order.

3. The respondents are to pay the costs of this application on the attorney and client scale



C.H. NICHOLLS
JUDGE OF THE HIGH COURT

Appearances:

Council for the Appellant :	Adv. S. Budlender
Applicant's Attorneys :	Webber Wentzel Attorneys
Council for the Respondent:	Adv. R. Mansingh
Respondent's Attorneys :	Tshisevhe Gwina Tatshimbilani Inc.
Date of hearing:	31 October 2013
Date of Judgement :	8 November 2013