REPUBLIC OF SOUTH AFRICA

IN THE HGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/3306

DELETE WHICHEVER ONE IS NOT APPLICABLE:	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED	
_____	_____
DATE	SIGNATURE

In the matter between:

MONIQUE INVESTMENTS (PTY) LTD	**APPLICANT**
And	
167 BREE STREET NEWTOWN (PTY) LTD	**FIRST RESPONDENT**
STAND 128 NEWTWON (PTY)	**SECOND RESPONDENT**
HURWUTZ, BARNEY	**THIRD RESPONDENT**

JUDGMENT

VAN NIEKERK J:

[1] The applicant seeks an order in terms of s 78(2)(d)(i) read with s 82(b) of the Promotion of Access to Information Act, 2000 (PAIA), compelling the respondents to furnish copies of various documents said to be relevant to the management of the affairs of the first and second respondents. The first and second respondents are private bodies for the purposes of PAIA; the third respondent is a director of both entities. It is not disputed that the third respondent is in control of the day to day running of the affairs of the first and second respondents.

[2] The information that the applicant seeks to have disclosed includes, *inter alia*, the memoranda of incorporation, rules, records, financial statements, notices and minutes, and the securities registers. All of these documents are the subject of a specific disclosure regime established by s 26 (1) of the Companies Act, 71 of 2008, in terms of which any person who holds or has a beneficial interest in any securities issued by a profit company or who is a member of a profit company, may inspect and copy the relevant records. The applicant relies on s 26 as the foundation for its right of access to these documents. The applicant further seeks access to lists of all related-party transactions conducted by the first and second respondents since incorporation, and documents proving authorisation of those transactions. The founding affidavit does not articulate any specific right on which the applicant's request for information is founded; the papers suggest that the applicant requires this information for the purpose of valuing its shareholding in the first and second respondents respectively, and that the conduct of the third respondent in relation to the management of the first and second respondents has caused it concern.

[3] The application is brought in a context where the relationship between the applicant and the respondents has deteriorated over a period of years. The applicant, represented by one of its directors, Pamensky, has sought since 2004 to obtain access to the records and books of the first and second respondents. For more than ten years, Pamensky has expressed his dissatisfaction with the third respondent's management of the first and second

respondents. Indeed, in March 2012, an application was filed in this court for the winding up of the second respondent on the basis that the relationship between the third respondent and Pamensky had broken down irretrievably. The threat to bring the present application was made as far back as 2006, but the applicant took no steps to act on this threat until 2013.

[4] In view of the conclusion to which I have come, it is not necessary for me to canvass this history in any detail. For present purposes, it is not disputed that the applicant submitted two requests, prepared in terms of sections 50 and 53(1) of PAIA, which were delivered in early December 2013. The respondents elected not to accede to the requests, with the consequence that thirty days after submission, the respondents were deemed to have refused the requests. The respondents do not dispute that the applicant's compliance with the procedural requirements established by PAIA.

[5] The respondents resist the relief sought by the applicant on the basis that they have previously provided the applicant with all of the records under their possession and/or in their control and which exist as recorded information, and that they have given the applicant's representatives opportunities to conduct an inspection of the books and accounts of the first and second respondents. The respondents also contend that the applicant has no right to the relief sought since it is not a holder of nor does it have a beneficial interest in any of the securities issued by the first and second respondents, with the consequence that it has no *locus standi* to obtain the relief that it seeks. Finally, the respondents contend that the applicant has not made out a case for the relief sought since it has not demonstrated that the records to which it seeks access are reasonably required for the exercise and protection of rights. (See *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) at 491 J to 492A, in which the court held that the record sought must be reasonably required in the sense that it would provide a substantial advantage to the exercise of any right, or where there is a need on the part of the requester for the record in the exercise or protection of any of its rights.)

[6] I deal first with the respondents' contention that the applicant lacks *locus standi* to bring the present application. As I have indicated, the applicant relies

on s 26 (1) of the Companies Act to justify its access to those records not concerned with the related-party transactions with which it is concerned. It does so on the basis that at the time the requests were sent, it was the registered owner of 25 percent of the issued share capital of the first and second respondents respectively, and that it has since become the registered owner of 50 percent of the issued share capital of the second respondent.

[7] The respondents deny these averments. They aver that the applicant was never the owner of 50% of the share capital in the second respondent, and that in any event, during 2012, after the filing of the application for liquidation and in the course of a meeting and subsequent correspondence between the parties' legal representatives, an agreement was reached in terms of which the third respondent would acquire Pamensky's shareholding in both the first and second respondents (and those of certain entities that he represented) for a total amount of R900 000, on the basis that the third respondent would not proceed with the application for liquidation. The respondents aver that for the agreement to be implemented, it was necessary for certain of the entities that held shares in the first respondent to be reinstated after their de-registration, so as to allow the relevant resolutions to be passed.

[8] It is not disputed that the parties agreed that the respondents' attorney would draft the relevant agreement and instruct the auditors to transfer the shares against payment of the purchase price. For reasons that are not fully apparent, those agreements were never signed. It is also not disputed that during September 2012, and on the basis that agreement had been reached regarding the acquisition by the third respondent of the shares held by the applicant in the first and second respondents, the third respondent instructed the auditors to transfer the shares held by the applicant to him, and that the auditors carried out this instruction. An extract from the securities register of both the first and second respondents is annexed to the answering affidavit, and reflects the third respondent as the sole shareholder of both entities as at 3 September 2012. The applicant avers that the third respondent had no authority to instruct the auditors to transfer the shares of the first and second respondent into his own name, and that to the extent that the securities registers were amended to reflect the third respondent as the sole

shareholder, they fail accurately to reflect the actual shareholding in the first and second respondents and fall to be rectified.

[9] But for any settlement agreements in terms of which the third respondents would acquire all of the applicant's shares in the first and second respondents (and those of other entities over which Pamensky had control), it is not disputed that the applicant was a shareholder in both the second and third respondents. The respondents contend that there was agreement on the *merx* and the price, and that in the absence of any condition to the effect that there would be no agreement unless and until all of the terms were reduced to writing, there is a binding agreement between the parties. They aver that by virtue of the settlement agreements concluded between the parties, albeit not implemented, the applicant disposed of its shareholding in the first and second applicant and that given the subsequent transfer of shares to the third respondent, the applicant is no longer a party in respect of which s 26 of the Companies Act confers rights of access to information or any right to make a request made in terms of s 50 (1) of PAIA.

[10] The applicant, in short, contends that the settlement agreements remain inchoate and that it remains a shareholder of the first and second respondents. As I have indicated, the applicant consequently seeks to have the transfer of the shares to the third respondent set aside and the securities register rectified.

[11] I am not in a position, on the papers before me, to determine what amounts to a factual dispute as to the nature and content of the discussions between the parties and their respective legal representatives and whether they had the result of a valid and binding agreement in terms of which the applicant would dispose of its shareholding in the first and second respondents. What I have before me is the securities registers of both the first and second respondents, which indicate that prior to the request in terms of PAIA served by the applicant and prior to the filing of this application, the third respondent was the sole shareholder of both the first and second respondents. Section 50(4) of the Companies Act provides that a securities register maintained in accordance with the Act is sufficient proof of the facts recorded in it, in the

absence of evidence to the contrary. The securities registers, for present purposes at least, are deemed to be presumptively valid and *prima facie* proof of the facts contained therein, unless and until rectification of the securities registers is ordered. To the extent that the applicant contends that the third respondent had no authority to instruct the auditors to transfer the shares into his name and that the securities shares stand to be rectified, this is not a matter that falls within the scope of the relief sought by the applicant in the present proceedings. It is in any event not a matter that is fully canvassed in the papers, certainly not to the extent that any proper factual findings might be made. The applicant's contention that the securities register stands to be rectified on the basis of a lack of authority is the subject of a terse averment to this effect made in the replying affidavit – there is simply no evidence to the effect that when the third respondent instructed the auditors to record the transfer of the shares in the securities register, that he had no authority to do so. Until such time as the applicant files a substantive application to rescind or otherwise set aside the transfer of the shares and secure the rectification of the securities registers, it seems to me that the applicant cannot be considered to be the holder of any securities in the first and second respondents or the holder of any beneficial interest in them. The applicant is accordingly not entitled to rely, as it does, on s 26(1) of the Companies Act to secure an order in terms of s 82(b) of PAIA for access to the documents listed in paragraphs 1.1 to 1.9 and 2.1 to 2.9 of the notice of motion.

[12] Turning next to those documents that are not specifically the subject of access under s 26 (1) of the Companies Act (i.e. those referred to in paragraphs 1.10, 1.11. 2.10 and 2.11 and which refer to lists sought of related-party transactions conducted by the first and second respondents respectively and supporting authorisations), it is incumbent on the applicant to identify the right or rights to be exercised or protected, for which purpose the record is required. In this regard, the applicant records in the founding affidavit that it has 'for some time' been concerned about the management of the affairs of the first and second respondents and in particular, that the first and second respondents had related-party dealings with a number of companies in which the third applicant had an interest. These are recorded as the

'substantial basis of concern about the manner in which the affairs of the second and third respondent have been conducted'. The basis on which access to the records concerned is sought amounts to the applicant's wish to determine whether the affairs of the first and second respondents have been conducted in accordance with the applicable regulatory provisions.

[13] It follows from the findings above that the dispute between the parties as to the sale and transfer of shares in the second and third respondents is not a matter that the court is entitled or ought appropriately to resolve in the present circumstances, and that the securities registers must be held for present purposes at least to be presumptively valid, that for present purposes at least, the applicant no longer has any rights in relation to the management of the affairs of the first and second respondents that it may seek to advance. Unless and until any transfer of the shares from the applicant to the third respondent is set aside and the securities registers rectified, there can be no cogent foundation to the applicant's request for information relating to any related-party transactions whether for the purpose of valuing the shares the applicant claims to hold in the first and second respondents or in relation to the consequences of what it contends to be mismanagement by the third respondent of the affairs of the first and second respondents. Section 50 (1) contemplates the existence of a right which the requester seeks to advance or protect, and which is causally connected to the records sought. In the absence of the right that an applicant seeks to assert, there can be no entitlement to any record that the applicant contends is required to exercise or protect that right. At the time that the applicant filed its request for access to the records it seeks, it was for present purposes no longer a shareholder in either the first or the second respondent, and thus not the holder of any rights *qua* shareholder in respect of either of those entities, nor did it acquire or continue to hold any rights arising from the management of their affairs.

[14] Given the conclusion to which I have come on the applicant's standing in relation to the substantive relief that it seeks, it is not necessary for me to decide whether there is any basis for the applicant's access to that category of information falling outside of s 26 of the Companies Act, or whether the prior access to information that the respondents contend that they have

granted to the applicant constitutes a valid ground for their refusal to comply with the applicant's request made under s 50(1) of PAIA.

I make the following order:

1. The application is dismissed, with costs, including the costs of two counsel where so employed.

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VAN NIEKERK J

ACTING JUDGE OF THE GAUTENG LOCAL DIVISION

JOHANNESBURG

Attorney for the applicant: Stan Fanaroff & Associates

Counsel for the applicant: Adv J Meiring

Attorney for the respondents: Fluxmans Attorneys
Counsel for the respondents: Adv A Subel SC

Date of Hearing: 5 March 2015

Date of Judgment: 10 April 2015