REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

APPEAL CASE NO: A5038/2018
COURT A QUO CASE NO: 07995/2015 & 4280/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

29 September 2021 .....
DATE SIGNATURE

In the matter between:

VALENCIA HOLDINGS 13 (PTY) LTD	1ST Appellant
MDS INTERNATIONAL SKILLS (PTY) LTD	2ND Appellant
MDS NDT CONSULTANTS (PTY) LTD	3RD Appellant
SHAUN MICHAEL GREEN	4th Appellant
MARK DOUGLAS SMITH	5th Appellant
RONALD JAMES HOY	6th Appellant
DEREK NORMAN STANBRIDGE	7th Appellant
ALEXANDER ELIAS RODITIS	8TH Apppellant
and	
MICHELLE ARMITAGE N.O.	Respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 29 September 2021.)

JUDGMENT

MIA, J

[1] This matter concerns two appeals that are to be considered. The first appeal includes a cross-appeal against the judgment of Modiba J dated 10 February 2017 and related to two applications in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA"), heard together by Modiba J. I shall refer to them as the "PAIA appeal". The second appeal is against the decision of Van der Westhuizen AJ dated 6 September 2017. The judgment related to the appellant's refusal to comply with the order of Modiba J and will be referred to as the "contempt appeal". Modiba J granted the appellants leave to appeal in the PAIA appeal, whilst Van der Westhuizen AJ refused leave to appeal in the contempt appeal. The SCA granted the appellants leave to appeal against the judgment of Van der Westhuizen AJ in the contempt appeal and directed that the PAIA appeal and the contempt appeal be heard together.

BACKGROUND FACTS

[2] The first appellant, Valencia Holdings 13 (Pty) Ltd ("Valencia"), is the holding company of the second and third appellants, who are MDS International Skills (Pty) Ltd ("MDS International") and MDS NDT Consultants (Pty) Ltd ("MDS NDT"). The fourth to seventh appellants, that are, Shaun Michael Green (Green), Mark Douglas Smith (Smith), Ronald James Hoy (Hoy) and Derek Norman Stanbridge (Stanbridge), are shareholders and directors of Valencia. The eighth appellant, Alexander Elias Roditis (Roditis), is a director of MDS International and MDS NDT. He is the financial manager of Valencia. The respondent, Michelle Armitage, sued the appellants in her official capacity as the executor of the deceased estate of her late husband, Alan Joshua Armitage (Mr Armitage). Mr Armitage was a director and holder of 7.5% issued shares in Valencia, before he died on 12 December 2013. After his demise, Mrs Armitage brought the applications in her representative capacity as executrix of the deceased estate. She needed to access documents related to her late husband's shareholding in Valencia to determine their value in order to sell the shares. The Court considered

that in requesting the documents, (1) the applicant had to demonstrate that she required the records to protect her rights or interest, (2) she complied with the procedural requirements under PAIA and (3) requested access to the requisite documents

[3] Mrs Armitage commenced negotiations regarding the sale of her late husband's (the deceased) shares, following his death. Initially, Valencia claimed the Mr Armitage's shareholder account had a credit balance of R994 980.55. Mrs Armitage's attorney, Ms Fung, queried this amount as Valencia's audited financial statements for the year 28 February 2013 reflected a balance of R594 245.00 in respect of the deceased's loan account in Valencia. She requested Valencia's management accounts and audited financial statements for the year ending 28 February 2014. This information was not furnished to her. A dispute arose between the parties regarding the proposed sale of the Mr Armitage's shares. The remaining shareholders in Valencia terminated negotiations on 30 April 2014, pertaining to the sale of the shares.

[4] On 5 September 2015, Mrs Armitage instructed her current attorneys to request Valencia's audited financial statements for the year ending 28 February 2014 and other information related to the deceased's shareholding account. A meeting took place on 8 October 2014 and Mrs Armitage's financial adviser, Mr Wayne Danheisser (Danheisser) was afforded insight into some of the deceased's loan ledger accounts. Mrs Armitage was informed that the information she sought was with the subsidiaries and she should seek the relevant records from the subsidiaries. Danheisser met with Mr Roditis again on 21 October 2014 to discuss the buying and selling policy and related matters. It was reiterated that Mrs Armitage should request the information she sought from the subsidiaries.

[5] Mrs Armitage was not satisfied with the information furnished. On 11 December 2014 she requested the following documents in terms of section 53(1) of PAIA:

5.1 Valencia's audited 2014 financial statements. If not approved, the latest draft,

5.2 the deceased's loan account ledger and supporting documents and documents justifying debit and credit entries on this account,

5.3 the loan account ledger for each of the other shareholders and supporting documents or documents justifying debit and credit entries on each account.

[6] The respondents were required to comply by 23 February 2015. The respondents requested an extension, however, the applicant did not respond to the request for an extension but rather launched the first PAIA application on 2 March 2015. The respondents provided Mrs Armitage's attorneys with:

6.1 Valencia's audited statements for 2014 which were signed by its directors on 17 November 2014 and its auditors on 18 November 2015. The statements were still to be reviewed by the auditors. The auditors only approved them on 27 February 2015.

6.2 A detailed loan ledger of every shareholder in Valencia.

APPELLANTS' SUBMISSIONS

[7] Counsel for the appellant, submitted that the Court *a quo* erred in granting the application. He further submitted that the first PAIA application should have been dismissed by the Court *a quo* because by the 7 October 2014, the respondent was in possession of every document that she needed to determine why the late Mr Armitage's loan account had moved from a credit balance of R594 245 at the end of February 2013 to a debit balance of R990 221 at the end of February 2014.It followed that the respondent did not have a legitimate "right" to exercise or to protect when she launched the application. He submitted furthermore that the respondent did not make out a case establishing how these documents would assist her in exercising or

protecting her "right" to determine the loan account of Mr Armitage for the purposes of resolving the disputes between the parties on that issue of the sale of shares.

[8] Counsel submitted further that the Court *a quo* erred in finding that Valencia "is in control of supporting documents for transactions reflected in its books of account as well as the books of account of its subsidiaries in respect of transactions that appear in its shareholders' loan accounts,". This was so, he argued, as it was common cause that the documents supporting all the debits and credits in the respective shareholders' loan accounts in Valencia were in the possession of either MDS International or MDS NDT, depending on which entity made the payment. He argued, that Mr Danheisser's opinion was that Valencia must have joint possession or control of documents "relevant to the bank account" of each subsidiary, not that it did. Mr Danheisser did not specify or explain exactly what these documents are. This clearly raised a dispute of fact on the papers.

[9] He continued that even though the respondents asserted, by way of an opinion, that Valencia ought to have the documents relevant to each subsidiary's bank account in its possession or under its control despite, it was common cause, that Valencia does not trade and does not have a bank account. Any payments that were made to its shareholders or any payments made to third parties on behalf of its shareholders were paid out of the bank accounts of MDS International and/or MDS NDT, through the cash book and general ledger of either MDS International and MDS NDT (depending on which entity made the payment). The documents that support the aforementioned payments were generated, stored and in the possession of MDS International and/or MDS NDT. He clarified that at the end of each financial year, the balance of the loan accounts on MDS International and MDS NDT's trial balance was raised in Valencia's books of account. This was done via a single journal entry. There are no further records or details of this transaction to be recorded. Valencia's AFS are not audited.Its accounting records

are reviewed annually in accordance with the International Standard on Review Engagements (ISRE) 2400; and the AFS of MDS International and MDS NDT are audited and the audited AFS's of MDS International and MDS NDT are unqualified.

[10] Counsel submitted moreover that the payments made by MDS International and MDS NDT through their respective bank accounts to the shareholders, were thus audited in these two entities. He submitted that Danheisser does not explain what statutory obligation Valencia breaches in circumstances where the transactions that take place occur in the books and records of MDS International and MDS NDT and not in Valencia. Counsel argued that Mr Danheisser's opinion was bald, unsubstantiated and meaningless. Thus he argued that it should be rejected[1].

[11] Furthermore, in motion proceedings, he reiterated that the appellants' version must be accepted in accordance with the principles applicable to motion matters summarised by Harms JA in the case of *President of the Republic of South Africa and Others v M&G Media Limited*.[2] The appellants' version cannot be rejected, he argued, as it could not be said to comprise bald or uncreditworthy denials nor was it palpably implausible, far-fetched or so clearly untenable. It was a version that even the respondent accepted.

[12] In addition, counsel argued that the Court *a quo* erred in granting the declaratory order that Valencia "is in control of supporting documents for transactions reflected in its books of account as well as the books of account of its subsidiaries in respect of transactions that appear in its shareholders' loan accounts". This was so, he argued, because the Court did not find that Valencia was in possession of the documents and also because there were no transactions recorded in Valencia's

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[1] *Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others* 1999 (2) SA 279 (T) at 324 – 325; see also *President of the Republic of South Africa and Others v M&G Media Limited* 2011 (2) SA 1 (SCA) para 15 –18.

[2] *Supra*.

books of account. Counsel submitted that a shareholder right to "control" access to documents is determined by sections 26 and 31 of the Companies Act 71 of 2008 (Companies Act). Valencia had no greater right to access the documents of MDS International and MDS NDT than that which is provided for in sections 26 and 31 of the Companies Act. MDS International and MDS NDT are separate and distinct juristic persons. The only relationship Valencia has with these entities is one based on its shareholding in these entities.

[13] He pointed out that the Court *a quo* acknowledged, in its reasons for granting leave to appeal, its error in the following terms:

> *"In paragraph 1b, I declared that Valencia is in control of supporting documents for transactions reflected in its books of account as well as the books of account of its subsidiaries in respect of accounts that appear in its shareholders' loan accounts. It is common cause that there were no transactions reflected in Valencia's books of account. Only composite entries in respect of directors' loan account transactions reflected in the books of its subsidiaries are reflected in Valencia's books. As argued by counsel for the respondent, as a shareholder in its subsidiaries, Valencia is only entitled, in terms of section 26 of the Companies Act to documents listed in this section. These exclude source documents. Therefore it is probable that another court would find that Valencia is not in control of the relevant documents and that Mrs Armitage is not entitled to these documents, particularly in light of the authority in Clutchco (Pty) Ltd v Davis. In Clutchco, the Supreme Court of Appeal found that the legislature could not have intended the Promotion of Access to Information Act (PAIA) to trump the limitations imposed by the Companies Act in respect of information shareholders are entitled to, especially in light of other safeguards for shareholders in the Companies Act and the common law and in circumstances where a substantial foundation for any irregularities in the company's financial statements has not been laid."*

[14] He further submitted that the Court *a quo* also erred in finding that Valencia had handed over the documents in respect of the late Mr Armitage's records. This was not so. He continued that it was common cause that the documents provided to the respondent in support of the late Mr Armitage's loan account were provided with the specific permission and authority of the directors of MDS International and MDS NDT. It was MDS International and MDS NDT and not Valencia who met this demand. The respondent was informed on at least four occasions that the documents were in the possession of MDS International and MDS NDT. In requesting the same documents through the second PAIA application from MDS International and MDS NDT, the respondent accepted that the records were not in the possession or under the control of Valencia. There was then no need to persist with the first PAIA application against Valencia, rendering it academic.

[15] Counsel submitted that the first PAIA application should accordingly have been dismissed. This was so, he argued, because the application was academic in view of the fact that the identical relief was sought in the second PAIA application against MDS International and MDS NDT and in the circumstances, the Court *a quo* erred in making the declaratory order in 1b of its order and the consequential order in 2a in respect of the first PAIA application. He submitted that the order in paragraph 1a of the Court *a quo*'s judgment was not necessary. Valencia's attorneys had already, on 15 June 2015, informed the respondent that it would not be proceeding in argument with their point *in limine* and there was thus no reason why the respondent had to apply to amend her Notice of Motion to seek declaratory relief in the terms of paragraph 1a of the Court *a quo*'s order. The amendment was superfluous, he argued, and if Valencia had persisted with the *in limine* point, the Court would simply have dismissed the point if it was a bad point.

[16] He continued that the Court *a quo* had already confirmed in its reasons for granting leave to appeal, that 2b of the order should not have been granted. He submitted that it was necessary to correct the factual finding that the Court *a quo* made in respect of the 2014 AFS that was incorrect. This, he indicated, occurred in paragraph [20] of the judgment, where the Court *a quo* found:

> *"On the respondent's version, the 2014 draft financial statements were signed by 2 of the directors and auditors in November 2014, yet its auditors were yet to review them. It is implausible that auditors would append their signature to financial statements they were yet to approve. Valencia is very conservative in its explanation as to why it took until 2 March 2015 to make the financial statements available to Mrs Armitage, particularly because Mrs Armitage's request included draft financial statements if the approved financial statements were not available. It failed to take this court into its confidence regarding the nature of the review that the auditors had to undertake after signing the financial statements."*

He continued that the finding in paragraph [20] above was incorrect. This was so because it was correct that the 2014 AFS, whilst dated 17 November 2014, were issued as final on 27 February 2015. The respondent did not dispute this and in fact relied on the fact that the 2014 AFS were only issued on 27 February 2015, "almost a year after the end of the financial year." in support of her contention that Valencia failed to prepare its AFS within the statutory period.

[17] In the second PAIA application, counsel took issue with the respondent's reasons for the request for information, the late request as well as the request for condonation appearing in the replying affidavit. Counsel noted that no case was made out, nor was there an attempt to advance a case to demonstrate that it was in the interests of justice that the Court condone the non-compliance. The respondent did not advance any facts or submissions to persuade the Court to condone the second PAIA application. No case was made out why it would be in the interests of justice and be just and equitable. The Court

a quo granted condonation and in its reasons granting leave to appeal, noted that the respondent did not make out a case that it was in the interests of justice that condonation be granted.[3] The Court noted that an appeal Court may find that it erred in doing so.

[18] He argued that the very reasons furnished by the respondent for why they did not proceed earlier, such as disposing of the first application, saving costs and reconsidering lodging the second PAIA application, demonstrated that it is was not in the interests of justice that condonation be granted. There was no case made out, he submitted, which enabled the Court *a quo* to grant the relief sought in prayer 1 of the amended Notice of Motion because no case was made out that it was in the interests of justice that condonation be granted. This, he reiterated, was confirmed by the Court *a quo* in its reasons for granting leave to appeal.

[19] The issue of joinder was also submitted as a factor which reflected on the respondents conduct. Counsel submitted that it was indicative of the respondent's abusive conduct that she did not deny that her conduct in joining the fourth to eighth appellants was calculated to embarrass and terrorise. He argued that this was the real reason for their joinder and confirms the fact that these appellants should not have been joined in the first place. He submitted that the Court *a quo* should have dismissed the second PAIA application on the grounds of either misjoinder or non-joinder. He pointed out that the Court *a quo*, did not consider the issue of joinder at all.

[20] He submitted that the Court erred in ordering MDS International and MDS NDT to provide the respondent with "copies of all documents supporting and/or justifying the credits raised against the shareholders' loan account ledger of Valencia and non-personal expenses paid in

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[3] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) at 365A-366 B; *Van Wyk v Unitas Hospital & Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) para 22.

respect of benefits for the shareholders" for the years 2012, 2013 and 2014. This is so, he submitted, because these documents have nothing to do with her alleged right "to enforce payment of any loan account owed to the "estate" by Valencia". The respondent was already in possession of a copy of the deceased's loan account as well as every document that supported the quantification of the late Mr Armitage's loan account. Furthermore, the respondent failed to demonstrate how any of the records she has demanded would assist her in exercising or protecting this "right". He argued, on that basis alone, the second application should have been dismissed.

[21] Counsel contended that the respondent stated that she required the records to "determine the true value of the company's shares for the purpose of proceeding under section 163 of the Companies Act and she required the records to protect or exercise the right to defend "any claim on loan account" made by Valencia against the "estate". He argued that this was not a valid reason as she has no legal right to launch a section 163 application against MDS International and MDS NDT and especially when offers had been made by the appellants to purchase the late Mr Armitage's shares. He continued that it was impermissible to utilise the machinery of PAIA to protect a right which had not even materialised or presented itself.

[22] He noted that the respondents' affidavits were filled with a myriad of allegations of theft, falsification, fraud, misconduct, irregularities and wrongdoings. The respondent alleges impropriety and misconduct on the part of the appellants to deliberately taint the reader's perception of the appellants. He argues however the when the allegations are considered with the application of common sense, the allegations are exposed as the ambiguous and deliberately misleading assertions that they are. Regarding the irregularity of the dividend issue, he submitted that this was a non-issue. This was so, he argued, because the respondent's expert, Mr Danheisser, accepted the recalculation of the

dividend on gross dividends which was admitted in paragraph 29.19 of her reply[4]. where she states:

> *"It is correct that there was an interchange between Danheisser and Cambanis regarding the recalculation of the dividend on a correct basis and that Danheisser was satisfied with the correctness of that recalculation."*

[23] Counsel submitted that the respondent's conduct in reporting Cambanis to the IRBA was unwarranted. This was unwarranted, he argued, in the context of the explanation proffered by Mr Fichardt from Webber Wentzel. This complaint resulted in the delay in the finalisation of Valencia's 2015 AFS. Mr Cambanis initially refused to complete the outstanding work required on the audit and review of Valencia, MDS International and MDS NDT, because of this complaint. He continued that whilst it was correct that Valencia's 2015 AFS were not prepared within the statutory period provided in the Companies Act, there was a justifiable reason for this. He pointed out that there was no fictitious entry of a dividend in Valencia's 2015 AFS. The resolution to pay the R12.650 million dividend was passed on 1 April 2015. As the dividend was declared before the completion of the 2015 AFS the declaration was reflected in the 2015 AFS. The payment of dividends was made within three months of the date of declaration. The respondent thus only received payment of the dividend at the end of June 2016.

[24] He noted that the respondent has unnecessarily made defamatory and insulting allegations about the appellants, the attorneys and the auditors and asserted that she is permitted to do this without having to prove these allegations and without justification. She persisted with the second PAIA application despite the fact that the first PAIA application, was not first resolved. She joined parties to the second PAIA application when there was no legally justifiable reason to do so. She did not apply for condonation and assumed condonation was there for the taking and only made out a case for condonation in reply. In view of

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[4] Volume 9, PAIA Appeal, RA, p 830 par 29.19.

the aforementioned, he submitted that both PAIA applications were abusive and put the appellants to an inordinate amount of time and money to deal with. He therefore sought costs on a punitive scale in view of the defamatory and insulting assertions made about them which are, to the respondent's knowledge, untrue.

[25] He noted that the respondent's cross-appeal was restricted to the costs order granted by the Court *a quo* wherein she sought an order that the costs be paid by all the appellants jointly and severally as opposed to just Valencia, MDS International and MDS NDT and Roditis. He argued that there was no merit in the cross-appeal. There was no evidence in the papers that supported what the respondent set out as the grounds of her appeal.

[26] Regarding the contempt appeal, counsel argued that it was a matter of common sense, bearing in mind the nature of the relief granted in Modiba J's orders, namely, to hand over documentation to the respondent, that to comply with the orders whilst intending to appeal them would have simply defeated an appeal. This was so because the appeal, in view of compliance with the orders, would have no practical effect or result. The court ought to have dismissed the contempt application on this ground alone. He continued however that attorneys, as a matter of practice, exercise a measure of professional collegiality to each other in situations such as this. They generally afford the losing party the opportunity to consider the merits of an appeal when this indulgence is requested. Steps are usually only taken to enforce compliance with an order after the fifteen-day period provided for in Rule 49(1)(b) of the Uniform Rules of Court, had passed, alternatively, when informed that there will be no application for leave to appeal. This request for an indulgence was ignored in the present matter.

[27] Counsel continued that if the appellants had immediately complied with Modiba J's orders, it would have resulted in a future appeal having no practical effect or result. Moreover, he submitted, the appellants would

have been exposed to an argument of peremption. He pointed out pertinently that Mr Kahn, who deposed to the founding and replying affidavits on the respondent's behalf, did not deny the facts in the appellants answering affidavit. Thus in applying the test formulated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[5], the appellants' version should have been accepted. He argued that the appellants' conduct in requesting an indulgence to consider Modiba J's orders to decide on their course of action, did not constitute a deliberate and *mala fide* intention to defy the orders. They cannot be held to be guilty of contempt or breach of the orders. He argued that it was not the appellants' case that Rule 49(1)(b) afforded them with a *spatium deliberandi*. They merely sought an indulgence from Mr Kahn to consider Modiba J's orders and in response to this request Mr Kahn agreed and stated that the appellants were entitled to take full advantage of the time frames provided for in the Rules of Court within which they may - if they so wish - apply for leave to appeal.

[28] He submitted that the Court *a quo* erred in not dismissing the respondent's application because the respondent sought declaratory orders without consequential relief and Courts do not have the power, under common law, to grant declaratory orders without consequential relief.[6] The respondent merely required the Court to pronounce on the status *quo* of past events. This alone, he argued, was sufficient basis for the Court *a quo* to dismiss the application. The Court *a quo* erred in this reasoning where it held at paragraph [30] of its judgment, that a declaratory order can be granted where there is an infringement of the right that is the subject of the declaratory order. This is so, he contented, because the respondent's right to enforce the order was not infringed. The very contempt application the respondent launched was the exertion of the respondent's right to enforce the order. Insofar as

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[5] 1984 (3) SA 623 (A) at 634E-635C

[6] *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 439 – 41; *Softex Mattress (Pty) Ltd v Transvaal Mattress and Furnishing Co Ltd* 1979 (1) SA 755 (D) at 757D; *Preston v Vredendal Co-operative Winery Ltd* 2001 (1) SA 244 (E) at 247H – I.

any infringement existed, this came to an end on 2 March 2017 when the appellants filed their application for leave to appeal.

[29] He continued that the declaratory relief sought was academic or moot since the appellant delivered their Notice of Application for leave to appeal Modiba J's orders on 2 March 2017. In terms of section 18(1) of the Superior Court Act,[7] the operation and execution of a Court order which is the subject of an application for leave to appeal or appeal is suspended pending the decision of the application or appeal. The operation of Modiba J's orders was thus suspended on 2 March 2017. He submitted that the declaratory relief the respondent sought was hypothetical and academic[8] and a waste of the Court's time as the declaratory orders did not relate to an interest in an existing, future or contingent right or obligation because there was no actual dispute between the parties.[9] Furthermore he argued, there was no case in the founding affidavit on 27 February 2017, to support the declaratory relief to prove contempt of Modiba J's orders or breach thereof. This onus to prove a breach lay with the respondent to establish the requirements

on a balance of probabilities when declaratory relief is sought. The respondent failed to do so, he contended.

[30] Moreover, he argued, the respondents founding and replying affidavit do not demonstrate, on a balance of probabilities, that the appellants deliberately and intentionally violated the Court's dignity, repute or authority. An objective analysis of the facts does not establish that the appellants' conduct was contemptuous or in breach of the order he submitted and whilst the Court *a quo* at paragraph [27] found that the appellants,

> *"refusal to comply with the order, or an indication when they would comply, at least until the application for leave to appeal was filed,*

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[7] Act 10 of 2013.

[8] *SA Mutual Life Assurance Society v Anglo-Transvaal Collieries Ltd* 1977 (3) SA 642 (A) at 658H.

[9] *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA) at 541A – B.

constitutes in my view wilfulness and mala fides on the part of the respondents",

the appellants did not refuse to comply with Modiba J's orders. He reasoned that the appellants first requested an indulgence to consider whether to appeal the orders. As soon as the decision was made to appeal Modiba J's orders, the appellants communicated this decision to the respondent's attorney on 20 February 2017. They could not reasonably be expected to comply with a court order they had decided to appeal. Had the appellants complied with Modiba J's orders, their appeal would have no practical effect or result.

[31] Counsel argued that the Court *a quo* at paragraph [5] found that "*No time periods for compliance with the orders were stipulated. It is that lacuna that is the subject matter of the declaratory orders sought.*". If this were so, he submitted, this favoured the appellant's position in not having complied with the orders immediately or within 7 days. Therefore, he continued, the Court *a quo* ought not to have declared that the appellants had breached the orders because they had not complied with them on 27 February 2017. In as much as the respondent sought to amend or vary Modiba J's orders so as to clarify the time period within which compliance was to occur, she was required to do so by utilising Rule 42. This is also the very reason why the Court *a quo* could not order that the appellants must comply with Modiba J's orders within 7 days of the date on which the application for leave to appeal is refused, alternatively, and in the event that leave to appeal is granted, from the date upon which the appeal is dismissed. He submitted, there was no application before the Court *a quo* in terms of Rule 42 and no was argument advanced on the respondent's behalf for such relief. Thus, he submitted, the appeal should succeed with costs on a punitive scale.

RESPONDENT'S SUBMISSIONS

[32] Counsel for the respondent submitted that the respondent, represented by Brian Kahn Inc. BKI, lodged, with Valencia, a request for access to

records under PAIA under cover of a letter dated 11 December 2014. The respondent required:

32.1 the loan account ledger of Valencia for Armitage for the year ended 28 February 2014, including all entries reflecting debits and credits on such account;

32.2 copies of documents supporting and/or justifying the credits and debits raised against the account referred to in paragraph 37.1 hereof;

32.3 the loan account ledger of the company for each of the shareholders, other than Armitage, reflecting the details of credits and debits for the year ended February 2014;

32.4 copies of all documents supporting and/or justifying the debits and credits raised in the accounts referred to in paragraph 32.3 hereof;

32.4 the audited financial statements of Valencia for the year ended 28 February 2014 or, if not approved, the latest draft financial statements for such period.

32.5 Valencia and its directors would have known that the annual financial statements had been approved and reviewed by the time that it received this demand.

[33] Valencia was obliged to advise the respondent whether or not it would provide the above documents by 11 January 2015. It did not, instead it apologised for the delay and stated that Valencia's response to the request would be due on Monday, 23 February 2015. When Valencia failed to meet the deadline, the respondent, as applicant, commenced the first PAIA application. The documents were provided, more than two and a half months after the PAIA demand, and were less than what was requested and comprised:

33.1 the annual financial statements which had been approved and reviewed by 18 November 2014;

33.2 a single page document recording the opening and closing balances for the loan accounts of Armitage,

Green, Smith, Hoy and Stanbridge for the year ended 28 February 2014;

33.3 a single page document reflecting the trial balance for Valencia for the year ended 28 February 2014 with less than 25 lines of entries.

This was accompanied by an apology and an indication that it comprised "... all the documents (pertaining to your client PAJA request) that is (sic) in the possession of Valencia."

[34] Counsel submitted that the first PAIA application was issued prior to the receipt by BKI of the documents and the accompanying excuse for the failure or refusal to deliver all of the documents requested. It was for this reason that the founding affidavit did not address this issue. Accordingly, the respondent delivered a supplementary affidavit deposed to by an attorney at BKI, Steffenini, with a confirming affidavit by an accounting expert, Danheisser. The founding affidavit, he continued, specifically recorded that the respondent, as executrix, required access to details concerning the loan account of the other shareholders to determine whether the debits that had been raised against Mr Armitage's loan account were correct and in this regard, whether there was "like treatment" by Valencia of the other shareholders in respect of similar expenditure that took place. The affidavit specifies, by way of illustration, and refers to the fact that the debits of premiums on the insurance policies should not have been raised against the individual loan accounts, for purposes of tax efficiency, but paid by Valencia.

[35] He continued that the affidavit of Steffenini addressed the issues such as: -

35.1 the need on the part of Valencia to have advised the respondent, as requested, under section 55 of PAIA, if the documents sought could not be found or did not exist; and

35.2 why, if Valencia sought to contend that it was excused from producing the documents because certain of the documents were under the control or in the possession of one or other of the subsidiaries, such contention was unfounded.

The respondent required the explanation after noting the changes in the loan accounts of each of the remaining shareholders and the improbability that could have occurred other than by way of transactions that involved the creation of documents; and the opinion of Danheisser as an expert in the accounting field that, where expenditure was incurred by a holding company, such as Valencia, and documents evidencing that expenditure are generated within one of its subsidiaries, those documents are required to be retained and available to Valencia.

[36] Valencia opposed the first application on the basis that the respondent was not entitled to the records sought for the reasons indicated above. Counsel for the respondent argued that by the time that the answering affidavit had been delivered, Valencia had complied with most of its obligations, but not all of the documents relating to the loan accounts of the other shareholders were furnished. Counsel submitted that the reason furnished that Valencia does not have control over the documents, is not supported when regard is had to the factual basis, which is not disputed. This, he argued, was that Valencia does not have its own bank account, and any payments made directly to shareholders of Valencia or any payments made to third parties on the shareholders' behalf, are paid out of the bank account of a subsidiary company. Consequently, they form "part of that subsidiary company's cashbook and general ledger"; and in the circumstances, the documents supporting the debits and credits recorded in the loan accounts of the shareholders do not belong, nor are they in the

possession or under the control of Valencia, but in the possession of the subsidiary company.

[37] He pointed out the consequences that follow from this set of facts that are material, namely: the subsidiary making the payment to the shareholder or on behalf of the shareholder for the holding company, Valencia will be acting as an agent for Valencia and, as agent, be obliged to provide the documents to Valencia. If there was a dispute between one of the shareholders and Valencia as to a payment, how would Valencia be able to resolve that dispute without having unrestricted access to the document which would be either in the physical possession of the subsidiary held on behalf of Valencia or, at worst, held by the subsidiary jointly with Valencia; and how would a review, let alone an audit, of Valencia's affairs be able to take place if the auditor or reviewer was not entitled to have unrestricted access to the documents in question. This submission was reinforced by his argument that an auditor or reviewer must have unrestricted access to the records concerning the payments of all the shareholders' loan accounts. The aforesaid, he continued, was reinforced by Valencia's own challenge to the respondent to access to the information referring to the loan accounts of the remaining shareholders as she has the right to be given annual financial statements, where it is expressly stated that: -

"The financial statements of Valencia are reviewed at the end of every financial year by an independent auditor." and "Valencia's financial statements have never been qualified in any respect. "The appellants meet these facts and the opinion of the expert, Danheisser, a bald denial, where an explanation was required".

[38] Counsel maintained that the financial statements revealed, that the debit loan account as at February 2013 to February 2014 had increased for Smith from approximately R5.8 million to R8.9 million; and Hoy from approximately R5.6 million to R8.6 million. The respondent considered this course of action, which was persisted with

as conduct as contemplated by section 163 which was oppressive, prejudicial or contrary to the interests of the respondent as reflected in the second PAIA application. Furthermore, he argued, it amounted to a breach by the shareholders/directors of their duties as directors; as the respondent's legal representatives saw it. It appeared that the shareholders/directors were carrying out their functions as directors of Valencia to advantage themselves, contrary to the interests of Valencia and in all probability (if they were advised properly) , in bad faith, to avoid disclosure of the details of their misconduct. Still, he submitted, Valencia and the subsidiaries did not provide the documents requested under the second PAIA request. In this second application, their conduct was aided by and they were under the control of Roditis.

[39] He disputed that the delivery of the second PAIA notices had rendered the first PAIA application "academic". Furthermore, he submitted that it was not appropriate for the respondent, as applicant, to withdraw the first PAIA application and tender Valencia's costs as recorded by the appellants. He contended that the applications would not have been necessary had Valencia and the subsidiaries provided the records sought which were the subject matter of the first PAIA application. This would have rendered the first PAIA application academic, except for the issue of costs; and if there were further proceedings, the declaratory relief. The Court would not have heard the matter if it would have no practical result. This in itself indicated that the matter was not moot.

[40] Counsel referred to further conduct by the appellants to obstruct the respondent from obtaining the relevant information regarding Valencia. He referred, in particular, to the irregularities identified by Danheisser regarding the annual financial statements for Valencia for the year ended 28 February 2015, which should have been prepared and reviewed by 31 August 2015, but had not occurred. He submitted that the respondent's attorney referred the appellants to a dividend irregularity and specifically demanded the shareholders/directors the

annual financial statements for the year ended 28 February 2015, which should then already have been prepared and reviewed, alternately to provide the latest draft thereof, whether approved or unapproved by the directors. The attorney also referred to other matters that called for explanations. He argued that the "dividend irregularity" arose in regard to the financial statements for the year ended 28 February 2013 which reflected, a discrepancy of R4 554 330 between the amount of the dividends supposedly declared by the subsidiaries and that received by Valencia. The response received was that Valencia was currently in the process of preparing financial statements for the year ended 28 February 2015 and estimated that they would be finalised by 30 November 2015, they offered to ensure that copies thereof would be received by the respondent when they were complete. They still stated that they "remain
desirous" of purchasing the respondent's late husband's shares at a commercial value and looked to the respondent for a suggestion as to how that should be achieved. What followed was a withdrawal of negotiations. The appellants were aware at this stage that the respondent, in order to negotiate on the issue of a share price, required financial information concerning Valencia. The first PAIA application was opposed and was yet to be heard. Furthermore, no information or records pursuant to the second PAIA requests had been furnished. The respondent was in possession of statements that were more than 18 months old.

[41] Counsel argued that if the shareholders/directors genuinely intended to negotiate with the respondent to acquire the estate's shares in Valencia, they would have co-operated and approved the provision of the information requested before the launch of the PAIA applications as it would have served their interests as directors/shareholders and was not contrary to the interests of Valencia. The attorneys were aware of the benefits. He argued moreover that the information available to Cambanis which he had promised, should have been given which would have rendered the first PAIA application academic and the

second PAIA application or this appeal as well as the contempt /declaratory application would not have commenced. He submitted that the respondent, as applicant, specifically relied, in the second PAIA application, upon the refusal by Cambanis to give information in accordance with the undertaking and referred to the undertaking in her founding affidavit referring to the letter and citing the very words appearing in the letter from Webber Wentzel. The respondent noted in her affidavit that the refusal to give this information was as a result of instructions given by Anderson of Bowmans. She consequently questioned Cambanis' independence as an auditor and his integrity in light of the fact that he had undertaken to give the information and thereafter had simply followed the instructions of Anderson on behalf of the shareholders/directors of Valencia. She also, under advice, questioned the conduct of the directors and their refusing access to this information, and concluded that it called into question their integrity.

[42] Counsel submitted that there were discrepancies surrounding the financial statements and what emerged was that there were two further versions of these financial statements that (differed in material respects):

42.1 Valencia had made an operating loss during that financial year and had an accumulated loss of R56 602.00 as at the end of the year (the effect of which was that it was insolvent); and

42.2 yet, the interest free loans of the shareholders/directors had increased and, in particular, those of Smith from R8.9 million to 10 million and Hoy from R8.6 million to R 11.2 million.

[43] In the second PAIA application, the respondent sought further documents from Valencia as well as from the subsidiaries, MDS and MDS NDT. An extension was requested by the appellants attorneys so that "consultations amongst divisions of our clients as well as between our respective clients are necessary and desirable in order to decide

upon the various requests ". Valencia and the subsidiaries waited for almost a further month before responding to the request on 7 July 2016 and then informed the respondent that: -

"172.1 the consolidated financial statements for Valencia for the financial years ended 28 February 2012, 28 February 2013 and 28 February 2014;

172.2 the draft financial statements or management accounts reflecting the financial position of Valencia for the year ended 28 February 2015 or any portion thereof;

172.8 and all directors' valuations, calculations and other documents evidencing or referring to the value of Valencia's shares in the subsidiaries for the periods referred to in paragraphs 172.1 and 172.2.1 (and the equivalent documents for the subsidiaries) do not exist or are not in their possession"

Counsel argued that it was evident that those in control of Valencia, namely the shareholders/directors (and possibly the three BEE directors) and Roditis, took a period of more than two months to decide on the two defences that had already been raised in the first PAIA application, namely that no case had been made out for the ledgers and supporting documents for the loan accounts and that such documents were not in the possession of Valencia. Furthermore, that the disclosure of both the ledgers and the supporting documents would be an unreasonable disclosure of personal information and a breach of a duty of confidence owed to the relevant shareholders. A further claim that it had no value and if it did, was in possession of the auditors which they could not pursue in two months.

[44] He submitted that in the face of such evasive responses, the respondent was entitled to prevent further misuse of Valencia and its subsidiaries (in which Valencia had a proper legal and commercial interest) for obstructing her in litigation. She sought loan account ledgers of the other shareholders (including the shareholders/directors) and the supporting documents were sought. This was to enforce a

claim under section 163 of the Companies Act; to establish that in framing the loan accounts, there was "like treatment" of Mr Armitage when compared with the other shareholders, in particular the shareholders/directors; the invalidity of the payment of amounts to shareholders who are also directors; and the unreliability of the financial statements of Valencia (and possibly the subsidiaries).

[45] He submitted that the appellants offered no explanation why the ledger accounts reflecting each payment made to or on behalf of each of the shareholders (other than Mr Armitage), which would involve the disclosure of anything of a personal nature, could not be redacted so as not to cause embarrassment to the shareholder in question. And assuming that by choosing to have the relevant company pay the debt, the shareholder has not waived the right to privacy, it may be arguable that a particular debit should not be disclosed. He argued that making the bald claim that there is an unreasonable disclosure, the factual substantiation therefor is not presented.

[46] He conceded that the respondent did not ask for condonation for failing to bring the second PAIA application within 180 days of the notices. This was addressed by the respondent in her replying affidavit where she set out the basis for that application, and invited the appellants, as respondents in the application, to address it. The appellants responded by way of a supplementary affidavit. She explained that as a date for the hearing of the first application had been assigned to the matter, it was determined that the respondent should await the outcome of the first PAIA application. In that application, certain matters of principle relevant to the second PAIA application could be decided which would avoid the need for the second application. The second application was partially argued and postponed (as a result of the appellants' conduct) and, ultimately, in January 2016, the acting Judge hearing the matter chose to recuse herself. He submitted that the facts show that the respondent acted reasonably and properly in withholding the commencement of the second PAIA application. The Court *a quo*

exercised its discretion correctly in granting the application as it was clearly in the interests of justice to grant condonation.

[47] Regarding the question of costs, the respondent, as a shareholder of Valencia, suggests a substantial order of costs against Valencia would diminish the value of her shares not only by the order of costs against Valencia, but also by the fact that Valencia (and its subsidiaries) would have incurred costs in opposing the application. The respondent contended it had a proper basis, thus for asking for costs to be paid by the shareholders/directors.

ANALYSIS

[48] In considering the submissions of both counsel, it is apparent that when the first PAIA application was lodged, the documents requested from Valencia were overdue at law[10], and had not been provided in accordance with their undertaking. The annual financial statements for February 2014 and two further documents had not been provided, and Valencia refused to provide further documents on the basis that they were not in its possession or control. Furthermore, in view of the dividend irregularity and the unsatisfactory explanation in relation thereto as well as the lack of disclosure of information regarding the interests of shareholders and directors, I am of the view that the Court *a quo* exercised its discretion properly to grant condonation in relation to the second PAIA application. In addition, the Court *a quo* was correct in ordering that the documents relating to the loan accounts of the other shareholders be provided, albeit that the respondent contended (as she still does) that the appellants were not entitled to withhold the documents allegedly containing personal information[11].

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[10] S 50 of PAIA requires that "(1) 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 rights; (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part."

[11] The respondent's view was that personal expenses need to be assessed for relevance when they are being paid by the company

Whilst certain documents were furnished, there were documents that were required and which the respondent as the executrix and shareholder was entitled to. There was no plausible reason to withhold such information from her. Moreover, that certain documents may already have been furnished is of no consequence when she was directed to MDS and MDS NDT, the subsidiaries. It cannot be said that the second PAIA application was unwarranted when this information was withheld from her and she was directed to MDS and MDS NDT to obtain the information.

[49] In granting the condonation, it is correct that the application ought to have been made in the founding affidavit. Having regard to the conduct of the shareholders and directors who withheld information and purported to be interested in purchasing the shares, the issue the respondent wished to take up regarding the interest free loans to shareholders/ directors where the entity was insolvent, it is plausible to see why the Court *a quo* would have granted condonation to enable the respondent to address the issues she raised which included the personal expenses which were being covered. This is especially where the respondent sought to resolve issues with the first application and explains this. It is certainly in the interests of justice that she be permitted to pursue the matter.

[50] The appellants laboured under the erroneous assumption that the respondent was not entitled to information from the subsidiaries. I agree with counsel for the respondent on this aspect. Where the subsidiaries are in possession of documents that are relevant for the exercise or protection by the respondent of her rights under section 163 of the Companies Act against Valencia, she is entitled to those documents from the subsidiaries. They had repeatedly referred her to the subsidiaries to obtain the information and could not complain when she eventually approached the subsidiaries in the second application. When regard is had to the dictum relied upon in the *Clutchco* case, it is evident that it is simply caution: -" that one must guard against forcing

corporates to throw open their books on claims of alleged minor errors or irregularities. "[12] This is simply not the case in the present matter. Moreover, having regard to the Companies Act, a shareholder is entitled, as of right and with proving nothing further, to annual financial statements of a company. The respondent, as the executrix (shareholder) is entitled to the documents and under PAIA is entitled to further documents once she meets the requirements. There was no suggestion that she did not meet the requirements of PAIA. I was referred to no contrary authority to indicate that the provisions of PAIA do not permit of access beyond the limitations under the Companies Act.

[60] Given the manner in which the appellants acted in response to the demands for compliance with the order, the respondent was compelled to approach the Court to seek further relief; to obtain a declaratory order. The respondent's application was not for contempt but for declaratory orders. Section 18 of the Superior Courts Act states that on lodging of an application for leave to appeal, the operation of an order is suspended pending the decision on the application for leave to appeal or the appeal. A litigant, against whom a judgment has been granted, is not entitled to a stay thereof to consider whether or not it wishes to appeal. The appellants appeared to labour under the view that they were entitled to consider the matter and not required to perform the obligations under the orders. It is clear from the communications that until receipt of the e-mail, the appellants, through their attorneys, insisted on an entitlement and did not seek any indulgence as they suggest. They continued to disregard the orders of Court, without filing any application for leave to appeal until the respondent brought the declaratory application. At the time that the application was brought, no application for leave to appeal was filed. The application was only delivered on 2 March 2017. For this reason, the application was necessary. The order, once granted, was

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[12] *Company Secretary, Arcelormittal South Africa Ltd & another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) para 80.

immediately enforceable and would only be stayed and be unenforceable if a notice of Application for leave to Appeal was delivered. The appellant had the option of either delivering a Notice of Application for leave to Appeal immediately and, if successful, could at a later stage elect not to pursue the appeal or withdraw it. Alternatively, the appellants could request an indulgence from the respondents not to enforce the order immediately or indicate when they would comply.

[61] I have had regard to the judgment of Modiba J where she conceded that the order in 2b may not be necessary. Having regard to the submissions of counsel and the draft order that was furnished, counsel conceded that the orders in 2b in case 7995/2015 were not necessary as it was not relief requested. Furthermore, the relief in 3a, 3b, 5 and 6 of case 4280/2016 were similarly not necessary. The usual costs order follows upon the relief granted.

ORDER

[62] For the reasons above, I propose the following order:

1 The appeals are upheld in respect of

1.1 Paragraph 2b of the Court *a quo*'s order in case no. 07995/2015; and

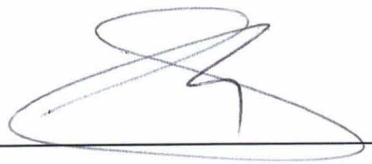
1.2 Paragraphs 3a, 3b, 5 and 6 of the Court *a quo*'s order in case no. 04280/2016.

2 The orders of the Court *a quo* are amended by the deletion of:

2.1 Paragraph 2b of the Court *a quo*'s order in case no. 07995/2015; and

2.2 Paragraphs 3a, 3b, 5 and 6 of the Court *a quo*'s order in case no. 04280/2016.

3 The appeals are dismissed with costs in respect of the remaining relief granted by the Court *a quo*.



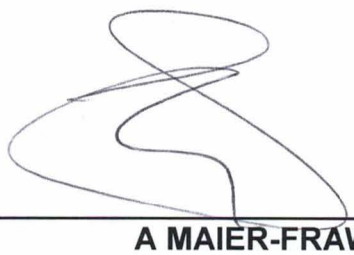
S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

I agree/~~disagree~~

PP

C LAMONT
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

I agree/~~disagree~~



PP

A MAIER-FRAWLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Appearances:

On behalf of the appellant	: Adv JC Blou SC & P Cirone
Instructed by	: Knowles Hussain Lindsey
On behalf of the respondents	: Adv AC Botha SC
Instructed by	: Brian Kahn Inc
Date of hearing	: 24 August 2021
Date of judgment	: 29 September 2021