IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

25577/12

Case Number: ~~2557/~~2012

In the matter between

14/8/2014

MOBOREKI TRADING CC — Applicant

Registration No 2006/12440/23.

and

TONKIN CLACEY ATTORNEYS — First Respondent

ANTON MURRAY THERON — Second Respondent

BROOKS HOMEOWNERS ASSOCIATION — Third Respondent

JUDGMENT

BAM J

1. The applicant is a security company. The first respondent is a firm of attorneys. The second respondent is an attorney practising as such at the said firm. The third respondent was cited as an interested party but no order is sought against it save for a costs order in the event of it opposing the application.

2. The applicant seeks an order compelling the first and second respondents to provide the applicant's attorney with a variety of documents relevant to the applicant's security business. The application is opposed.

3. In the founding affidavit the applicant alleged that on 31 March 2007 it and the first respondent, represented by the second respondent, entered into an oral agreement, which was ratified on 4 February 2008 by a written agreement, in terms of which the second respondent would collect payment for security services rendered by the applicant from members of the third respondent, and subsequently account to the applicant in that regard . The required documents included documents relating to contributions amounting to R365 686.00 collected by the first and/or second respondents from members of the third respondent during the period February 2008 and February 2009 as well as documents relating to an alleged payment of R134 946.08 made by the first and/or second respondents on behalf of the applicant.

4. The applicant's case is based on the allegation that the first respondent collected several amounts, including the aforementioned amount of R365 686.00, for the period February 2008 – February 2009, which were never accounted to the applicant.

5. The applicant contended that it is by right entitled to the full account of the monies collected on its behalf, that the refusing to furnish the documents is an injury committed against it, and that it has no other remedy but to approach this court for appropriate relief.

6. The document reflecting the agreement between the parties, Annexure DM2 to the founding affidavit, specifies that the relationship between the parties is an association and not a partnership. In the document, Annexure DM4 to the founding affidavit, apparently drafted by the applicant, under the logo of the applicant, and signed on behalf of both parties, it is reflected, amongst others, that in the year February 2008–

February 2009, the first respondent collected all the contributions from the members of the third respondent on behalf of the applicant in the amount of R365 686.00 and that it attended to all the administrative functions on behalf of the applicant. It further reflected that the first respondent has paid the shortfall in respect of other expenses amounting to R134 946.08.

7. From the correspondence between the parties, attached to the applicant's founding affidavit, starting with a letter dated 10 January 2011 from applicant's attorneys addressed to the first respondent, referring to the partnership agreement between the parties and demanding *"detailed financial statements starting from 2007 to date including bank statements, copies of cheques received and/or drawn in favour of the cc, list of creditors and debtors, copies of tax returns to SARS, name of the auditors/bookkeeper, lists of assets and liabilities of the cc."*

   On 11 January 2011 this demand was however met by the first respondent's bold denial that *"there was ever a partnership agreement as alleged or at all."* It was further suggested that the parties meet to discuss the matter.

   This was followed by the applicant's attorneys on the same day now conceding that no partnership existed, but instead, a *"business arrangement"*. The applicant however still demanded the requested *"financial and administrative documents"*

   In the letter dated 12 January 2011 the first respondent denied that it had in its possession any of the documents sought by the applicant but conceded that it *"merely collected levies"* from the third respondent *"in order to pay the salaries of the guards employed"* by the applicant *"and financially assisted it to ensure delivery of security service"* to the third respondent.

In the letter of 13 January 2011 the applicant's attorneys persisted with their demand that the first respondent should furnish them with the required documents as well as other relevant *"information"*. On 14 January 2011 the first respondent enquired on what basis the applicant believed that it was entitled to call for the invoices/vouchers of payments collected from the third respondent. In the same letter the first respondent referred to a complaint against the applicant and further stated that they were *"forced to withdraw"* their daily support in respect of the supervision of the guards. Reference was also made to general problems experienced by the first respondent in respect of the security services.

In the letter of 15 January 2011 the applicant's attorneys pointed out that they need the documents *"having a bearing"* on the applicant and not between the first respondent and the third respondent.

On 25 January 2011 the first respondent recorded that it disagreed that the applicant was entitled to the books and accounts of the third respondent. In this letter the first respondent also referred to a notice by the Registrar of Companies, forwarded to the first respondent by the applicant, in which Notice the applicant was informed of the Registrar's intention to deregister the applicant due to the applicant's failure to lodge annual returns in terms of the provisions of the Close Corporation Act.

On 27 January 2011 the first respondent followed up on the letter of 25 January enquiring from the applicant's attorneys whether they should continue with the payments of the salaries of the guards or whether they should pay the money to the applicant to effect payment of the salaries.

On 28 January 2011, following up on the letters of the 25th and 27th,the first respondent forwarded to the applicants attorneys the list of payments to be made to the guards, enquiring how they should deal with the issue.

On 31 January 2011 the applicant's attorneys conveyed to the first respondent that it should proceed with the paying of the guards

On 7 February 2011 the first respondent informed the applicant's attorneys of problems experienced by the third respondent's members in respect of the security. It was further added that all documents of SARS, UIF and Workmen's compensation Commissioner were sent to the applicant's postal address and not to the first or third respondents.

8. The first and second respondents in their opposing affidavit, deposed to by the second respondent, took several points *in limine*.
The first point was that the deponent to the founding affidavit lacked *locus standi* in that at the time the resolution, DM1 to the founding affidavit, was signed, the applicant was deregistered.
The second point is that the documents sought by the applicant are privileged, as between the first respondent and its client the third respondent.

9. Further points taken by the two respondents are that the second respondent's citation was a misjoinder and that the agreements upon which the applicant relied were validly cancelled.

10. It was further contended by the two respondents that it is not the applicant's case that it was not properly remunerated. If that was so it should have instituted action against the respondents and then follow the procedure provided for by the Rules pertaining to discovery of documents.

11. From Annexures AM1 and AM2 to the respondent's opposing affidavit it appears that the applicant was in fact de-registered on 24 February 2011. According to a certificate issued by the Commissioner of Companies, Annexure AM5, the de-registration process already started on 19 October 2010 but was apparently only finalised on the date stated above. The de-registration process was subsequently cancelled on 5 June 2012.

12. Accordingly, on 5 January 2011, the day the questioned resolution was signed, the applicant's de-registration was still in progress and not finalized. What the said *"progress"* entailed and what effect it had on the applicant's legal status do not appear from the papers. There was no evidence or any proof that the applicant had no *locus standi* at the time.

13. It was further pointed out by Mr de Beer, appearing on behalf of the respondents, that the applicant's founding affidavit was in fact signed on 4 May 2012 and the application issued and served on 12 May 2012, before the cancellation of the applicant's de-registration. The application was apparently served on the respondents on 6 May 2012. From the papers it appears that the respondent's attorneys were (again) served with papers on 10 July 2012. The answering affidavit was served and filed on 7 July 2012. The replying affidavit was served on the respondents, about two years later, on 6 May 2014.

14. Mr Ledwaba, appearing for the applicant, submitted that the applicant, in terms of the provisions of the Promotion of Access to Information Act, No. 2 of 2000, *"PAIA"*, is entitled to the records *"in order to make an informed decision and exercise its rights to demand any monies due to it. . ."*

15. The respondent's argument that the resolution authorising the deponent to lodge the application was null and void due to a lack of *locus standi* is clearly unfounded. As remarked above there was no indication of what effect the *"process of de-registration"* had on the *locus standi* of the applicant. The argument that the application should in any event fail due to the fact that it was served at the time the applicant was de-registered, should be considered taking into account that the applicant's de-registration was subsequently cancelled, and what effect it had on the applicant's right to enforce its rights, if any. Although it may be correct in law that the applicant had no *locus standi* between its de-registration on 24 November 2011 and the cancellation thereof on 5 June 2012, it does not follow that any rights it had before were extinguished at the time of de-registration.

16. The respondent's contention that the information and documents sought by the applicant are privileged in that it actually concerns the third respondent's business, is equally without merit. In the request for the information addressed to the respondent it was clearly stated by the applicant's attorneys that the information required concerned the affairs of the applicant dealt with by the first respondent.

17. What remains to be considered is whether the applicant has made out a case on the papers to be entitled to the information sought. As remarked above, the applicant relies on the provisions of PAIA. The problem arising is that the applicant did not in its founding affidavit or its requests, as required by section 53(2)(d) of that Act, identify the right it was seeking to exercise or protect, nor did it provide an explanation why the requested records were required for the protection of any such right.

18. Although it is common cause that the respondent collected monies on behalf of the applicant, as reflected in Annexure DM4, alluded to above, the contents of the said document do not refer to any money collected by the respondent that was not paid to the applicant. Instead it refers to the fact that first respondent collected the amount of R365 686.00 *"and attended to all administrative functions"* on behalf of the applicant. It then went further and stated that the first respondent *"have paid the short fall not covered by the amounts collected from"* the third respondent. The amount in respect of this issue was stated to be R134 946.08. No reference was made to any amount owing or outstanding or not calculated by the respondents. In this regard it must be kept in mind that the applicant filed its replication about two years after the answering affidavit of the respondent had been filed.

19. In order to succeed with the application, the applicant was obliged to show that the respondent committed an injury. In this regard the applicant vaguely stated that it has liabilities to meet and that the non-disclosure and the non-payment lead the applicant not being able to meet its liabilities. The applicant did not even state in its founding affidavit that it was suspected that the respondent failed to pay any money due to it.

20. The applicant's remedy is clearly founded in the Rules. If it is of the opinion that any amount is still due and payable it can institute action against the respondent and follow the Rules pertaining to discovery.

21. Whether the applicant was really interested in obtaining the information it allegedly required is in any event somewhat doubtful in view of the fact that the applicant filed its replying affidavit about two

years after the answering papers of the respondents were served and filed.

22. It follows that the application stands to be dismissed.

23. The second respondent's aggrievedness of having been joined as a respondent is without substance. The second respondent was personally involved, although mainly apparently representing the first respondent. There is in any event no reason to award penalty costs against the applicant as insisted on by Mr de Beer.

ORDER

The application is dismissed with costs.

A J BAM JUDGE OF THE HIGH COURT

11 August 2014