IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 8509/2020

In the matter between:

ANTHONY JAMES HYDE	Applicant
and	
PETER ALLAN HYDE	First Respondent
JONKERBERG FARM CC	Second Respondent
SPENCE AND ASSOCIATES	Third Respondent

Coram: Justice J I Cloete

Heard: 23 November 2020

Delivered electronically: 3 February 2021

JUDGMENT

CLOETE J:

[1] This is an application in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA") in which the applicant seeks to compel the respondents to provide him with the annual financial statements of the second respondent for

the years ending 2014 to 2020 inclusive ("the record"). The applicant claims costs only against the first respondent.

[2] The first and second respondents oppose the relief sought whereas the third respondent abides the Court's decision.

[3] The applicant and first respondent are brothers who have been involved in a series of commercial partnerships for many years. The first respondent is the sole member of the second respondent. The third respondent is the second respondent's firm of auditors and as such is responsible for the preparation of its annual financial statements.

[4] On 10 December 2019 the applicant, through his attorney, despatched written requests for the record to the second and third respondents in terms of s 53 of PAIA. On 11 December 2019 the third respondent replied that the record would only be provided upon receipt of an order compelling it to do so. On 17 December 2019 the second respondent's attorney advised that he was taking instructions and would revert in due course.

[5] This was followed by a further s 53 request from the applicant to the first respondent on 5 May 2020 to which the first and second respondents' attorney replied that he would revert in due course. Other than this, no response was received to the applicant's requests, resulting in the present application.

[6] There is no dispute that the first and second respondents' failure to give a decision on the applicant's request for access constitutes a deemed refusal in terms of s 58 of PAIA. Nor is there any dispute that the third respondent's refusal on 11 December 2019 falls foul of the requirements contained in s 56 thereof, and more particularly s 56(3).

[7] In addition the applicant and first and second respondents are *ad idem* that the request for access pertains to what the applicant refers to as the "fifth partnership" between himself and the first respondent, being their last commercial partnership. Their point of departure is whether the second respondent forms part of the fifth partnership (which has not yet been liquidated, wound up or had its profits, if any, distributed). The applicant maintains that it does whereas the first respondent denies this.

[8] The applicant's case in the founding affidavit is based on s 50(1) of PAIA which reads as follows:

> *'50* Right of access to records of private bodies
> *(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…'*

[9] The first and second respondents accept that the requirements of s 50(1)(b) and (c) have been met, and that the application turns on a finding by the Court in respect of s 50(1)(a), i.e. whether the record is required for the exercise or

protection of any rights. There is no dispute that the onus lies upon the applicant to show that he has met the s 50 threshold.

[10] Two defences were raised in the answering affidavit. The first was that the applicant is precluded from obtaining the record since s 7(1)(a) of PAIA provides that the Act does not apply to a record requested for the purpose of criminal or civil proceedings. However this point was abandoned in heads of argument filed on their behalf since no legal proceedings have been instituted by the applicant.

[11] The second defence, which was raised in respect of both the abandoned s 7(1)(a) point as well as the applicant's claim in terms of s 50(1)(a), was that the information required by the applicant *'…is dependent upon a judicial finding in civil proceedings that the second respondent was in fact (and in law) part of the fifth partnership'.*

[12] The first respondent asserted that there is a material dispute of fact between the brothers in this regard, and that until such time as a finding is made in the applicant's favour, he has no duty to make disclosure in respect of the second respondent.

[13] However in the same breath the first respondent declined to deal with the applicant's allegations pertaining to the fifth partnership – in fact he went so far as to state that he deliberately did not answer them – purportedly on the ground that they are wholly unnecessary and irrelevant. Having adopted this

approach the sum total of his “challenge” to the applicant’s averments was that his failure to deal therewith should not be construed as an admission thereof.

[14] The first respondent further asserted that the applicant had requested the record for the purpose of civil proceedings against him (and the second respondent, should the applicant so deem fit). This assertion appears to have flowed from the first respondent’s view that the applicant’s remedy lies in the *actio pro socio*, and that during the course of that litigation (should the applicant institute it), he is at liberty to obtain the record by way of discovery and/or subpoena *duces tecum.*

[15] In his founding affidavit the applicant set out the history of the various commercial partnerships between himself and the first respondent, which commenced during 1991. At times, they were joined by another brother, Mr Robert Hyde, whose involvement finally ceased in 2001. The applicant alleged that the fifth partnership commenced in January 2002. At all material times the applicant has been the sole member of Hyde Construction CC, which as far as can be gleaned from his affidavit, was regarded as a partnership asset and utilised as such. The partnerships focused on building and development projects, eventually branching out into farming. The applicant set out in painstaking detail how the various projects and the farming enterprise evolved, with Hyde Construction CC playing an integral role in the financing thereof.

[16] After commencement of the fifth partnership, the first respondent suggested that they should purchase the farm Uitsig (being remainder portion 2 of the farm Jonkershoek no 220, in the Mossel Bay area). They agreed to sell a portion of another farm acquired by the fifth partnership and to purchase Uitsig if the owners were willing to sell. The proceeds of that sold portion of R1 440 135.85 were paid into the call account of Hyde Construction CC on 23 November 2002.

[17] On 1 June 2003 the first respondent, representing the fifth partnership, made an offer to purchase Uitsig for R2 million which was accepted on 6 June 2003. According to the applicant, he and the first respondent agreed that Uitsig would be registered in a close corporation of which the first respondent would be the sole member. The second respondent was duly registered on 3 July 2003 and Uitsig was transferred into the name of the second respondent on 15 October 2003.

[18] The applicant alleges that, although a mortgage bond was registered over Uitsig in favour of Nedbank to secure an approved loan of R1 million, all payments in respect of the purchase of Uitsig were made by Hyde Construction CC, namely the deposit of R200 000 on 11 June 2003, the balance of the purchase price of R1.8 million on 16 October 2003 and agent's commission of R102 600 on 17 October 2003. He annexed documentary evidence in support of these averments.

[19] In addition, according to the applicant, between 1 November 2003 and 2 May 2013 Hyde Construction CC paid to Nedbank R1 525 941.14 on account of the loan, a *'loan settlement amount'* of R78 089.97, and a total of R64 204.28 during November 2012 to May 2013 for a centre pivot on the farm. He also avers that Hyde Construction CC continued to finance the second respondent's farming operation by purchasing livestock and implements and funding its day to day running costs. His founding affidavit is replete with examples (including full details) thereof and in general the amounts expended are substantial.

[20] The applicant asserted that the second respondent owed its entire existence to the fifth partnership and Hyde Construction CC in particular. The latter was also responsible for the second respondent's administration, including the filing of VAT returns and the preparation of its management accounts.

[21] In 2013, as a result of its financial position, Hyde Construction CC ceased to operate and the administrative functions of the second respondent were undertaken by the applicant personally. He maintains that the second respondent's co-operation (in the person of the first respondent) in furnishing him with the necessary information to perform these functions thereafter diminished until the only information available to him was its bank statements. Sometime towards the end of 2018 the first respondent cancelled the applicant's access to the second respondent's banking profile and instructed the bank not to provide the applicant with information. At that point he was no longer able to calculate the VAT and file the VAT returns. The last VAT return

that he filed for the second respondent was on 29 November 2018 (in respect of October 2018).

[22] The applicant alleges that, unbeknown to him, the first respondent sold Uitsig on 20 December 2018 for R30 million, and the farm was transferred to the purchaser concerned on 24 June 2019. He attached the relevant deed of transfer to his affidavit. However, he does not know, so he alleges, whether the livestock and/or implements have also been sold, nor has the first respondent accounted to him at all regarding the sale of any of the assets acquired in the fifth partnership (including Uitsig).

[23] He avers that from a reading of those bank statements which he has been able to obtain, between December 2018 and approximately July 2019, payments were made into the second respondent's bank account totalling R672 377.77, in addition to which an amount of R14.25 million has flowed into and out of the account along with various interest payments. The relevant pages of these bank statements were also annexed to his affidavit.

[24] On 20 November 2019 the applicant met with representatives of the bank (Nedbank Business, George) where he requested bank statements and an explanation of the movement concerning the sum of R14.25 million as well as the interest payments. The representatives left the interview room and, when they returned, informed the applicant that they had been instructed not to provide him with any information. An informal request to the third respondent on 26 November 2019 for the second respondent's annual financial

statements was met with the response that it had been instructed not to release them to him. Attempts to resolve the impasse with the first respondent came to nought. However the applicant, quite properly, disclosed what he understood to be the first respondent's attitude in respect of the assets of the fifth partnership and in particular Uitsig, and responded in detail to each of the contentions allegedly made by the first respondent.

[25] In particular, the applicant alleged that at all material times he and the first respondent were in agreement that, irrespective of who would be a sole member of a close corporation in such partnership, the properties held in such close corporations would nonetheless constitute partnership property. The same applied to those registered in individual's names. Similarly, equipment obtained for projects, farming implements and livestock would also be partnership property.

[26] The applicant asserted that the record is required *'…to exercise my right to disclosure to be informed of how Jonkerberg has performed and, amongst others, to be informed how Hyde Construction's loan account has been dealt with and, if necessary, to protect the partnership assets and/or to share in the profits of Jonkerberg that, to my knowledge has stopped trading… apart from Mr Peter Hyde's duty as partner to render accurate accounts concerning Jonkerberg (which lies under his control) he is also obliged to disclose to me all information affecting the partnership. The sale of Uitsig has yielded a substantial profit and I have been advised further that I have a right to be informed thereon, and should be allowed to consider what attitude I take with*

regard to the profit that was made on the sale of Jonkerberg and the broader picture of the Jonkerberg venture… It is submitted that the [record] will inform me on how the partnership property is used, and if necessary, I will be able to take action to protect the partnership property… it is consequently submitted that the information contained in the [record] will assist me to make a judgement on the question whether I should take action to protect the partnership assets…'.

[27] Against the common cause fact of the existence of a fifth partnership and the level of detail provided by the applicant in support of his averment that the second respondent is one of its assets, it is quite extraordinary that the first respondent, acting personally and on behalf of the second respondent, adopted the stance which he did in the answering affidavit.

[28] Clearly, the matters raised by the applicant fall squarely within the first respondent's knowledge and he is probably the only individual who could meaningfully have dealt with them. Not only that, but he had a duty to do so if he wished to have any prospect of this Court being in a position to evaluate whether or not there is indeed a material dispute of fact.

[29] It is settled law that in motion proceedings a real, genuine and bona fide dispute of fact can only exist where the Court is satisfied, in circumstances such as the present, that the party who purports to raise the dispute *'…has in his affidavit seriously and unambiguously addressed the fact said to be*

disputed… If that does not happen it should come as no surprise that the Court takes a robust view of the matter'.[1]

[30] In his replying affidavit the applicant admitted the averment that the respondents' duty to furnish the record is dependent upon him "establishing" that the second respondent forms part of the fifth partnership.

[31] In this regard the parties have misunderstood the legal position. In *Claase v Information Officer, South African Airways (Pty) Ltd*[2] it was held that the test is not one of proof on a balance of probabilities. All that an applicant in a s 50 application is required to do is put up facts which *prima facie* (though maybe open to some doubt) establish that he has a right, which in the present case is a partnership right pertaining to the second respondent. In other words, the test is the same as in applications for interim interdictory relief.

[32] Not only have the first and second respondents not even attempted to raise a material dispute of fact, but the applicant has clearly met the *Claase* threshold. For present purposes only (and without making any definitive finding) I can thus accept that the second respondent is one of the assets in the fifth partnership. I can also accept that the record sought is under the control of the first and third respondents. (During argument I was informed by counsel for the first and second respondents that the record exists).

---

1 *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para [13].

2 2007 (5) SA 469 (SCA) para [8].

[33] It is one of the fiduciary duties of a partner to his other partner(s) to make full disclosure, including the rendering of accurate accounts concerning all partnership affairs under his control, and to disclose all information to which he is privy which affects the partnership.

[34] The question which now arises is whether the applicant requires the record for the exercise or protection of his right as partner on the grounds contained in the founding affidavit.

[35] In *Unitas Hospital v Van Wyk and Another*[3] it was held that the meaning of "required" within the context of s 50(1)(a) cannot be determined in the abstract, and that, generally speaking *'…the question whether a particular record is "required" for the exercise or protection of a particular right is inextricably bound up with the facts of that matter…'.*

[36] The first and second respondents submit that if the applicant is permitted access to the record, this would have the effect of pre-litigation discovery which, in matters such as the present, is not permissible.

[37] This submission must immediately be qualified by what was stated in *Unitas*:

> *'[22] I hasten to add that I am not suggesting that reliance on s 50 is automatically precluded merely because the information sought would eventually become accessible under the rules of discovery, after proceedings have been launched. What I do say is that pre-action discovery under s 50 must remain the exception rather than the rule; that it must be available only*

[3] 2006 (4) SA 436 (SCA) para [6].

> *to a requester who has shown the "element of need" or "substantial advantage of access to the requested information… at the pre-action stage.'*

[38] The Court also approved the following formulation articulated in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*[4]:

> *'Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information… an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required, and how that information would assist him in exercising or protecting that right.'*

[39] In the present case the applicant has satisfied the first two elements. It is the third element which requires scrutiny.

[40] As stated, the applicant contends that the record would assist him in exercising his right as partner in the fifth partnership to be informed how the second respondent has performed; how Hyde Construction CC's loan account has been dealt with; and <u>if necessary</u> (my emphasis) to take steps to protect the partnership assets and/or share in the profits of the second respondent.

[41] Although the applicant speaks of Hyde Construction's loan account in the second respondent (which gives the impression that it might be a creditor of the second respondent) there is nothing untoward in this, given the history of the inter-entity loans detailed in the founding affidavit. Put differently there is

---

4 2001 (3) SA 1013 (SCA) para [28] at *Unitas* para [16].

no reason in principle why one partnership asset cannot loan funds to another. Moreover the first and second respondents have not taken issue with the applicant's averments about the existence of such a loan account.

[42] The primary purpose of the applicant's request for access to the record is thus based squarely on his legal entitlements as partner in the fifth partnership to access information concerning one of its assets, the second respondent. The applicant's version that he has been blocked at every turn in his attempts to obtain this information by other means is undisputed. It is difficult to conceive of a more appropriate manner to obtain the information to which he is entitled than by being provided with the second respondent's annual financial statements. The applicant has thus met the threshold of "element of need" and/or "assistance".

[43] That litigation may follow once the record is received and considered by the applicant is secondary to the primary purpose. The applicant therefore does not say that he only requires the record to evaluate whether or not he should institute legal proceedings. This would render the request impermissible.[5]

[44] This is borne out by the contents of the s 53 requests themselves. Those addressed to the second and third respondents are identical in this respect and section G thereof reads as follows:

[5] *Mahaeeane v AngloGold Ashanti* 2017 (6) SA 382 (SCA) para [17].

'1. ***Indicate which right is to be exercised or protected:***

A commercial partnership exists between the requester and Mr Peter Allan Hyde (the sole member of Jonkerberg Farm CC). Any proceeds emanating from the membership interest and property of Jonkerberg Farm CC is subject to a 50/50 partnership claim of the requester. Jonkerberg Farm CC, during the course of 2018 – 2019 apparently sold all its assets without accounting to the partnership as aforementioned. The requester needs to protect his right as partner to receive his profit emanating from the sale of Jonkerberg Farm CC's assets and any declaration of dividends to the member of Jonkerberg Farm CC.

2. ***Explain why the record requested is required for the exercise or protection of the aforementioned right:***

See above under G1.'

[45] The s 53 request subsequently addressed to the first respondent is also identical, save for the addition of the following sentence:

> *'The requester as a partner has a right of access to the records of accounting, including financial statements, of the partnership against his co-partner Mr Peter Allan Hyde.'*

[46] In any event, given the stance of the first and second respondents that the applicant's access to the record is dependent upon a judicial finding that the second respondent is part of the fifth partnership, they implicitly concede that in the event of such a "finding" (which, as stated, is in the sense set out in *Claase*) the applicant is entitled to the record. Indeed the first respondent himself stated that *'…Until such time that such a finding is made in the applicant's favour, I have no such duty towards him (in respect of the second respondent)'.*

[47] The first respondent alleges that the second respondent is dormant, since the farm which was its only asset (according to him) has been sold. He has not taken the applicant, or the Court, into his confidence about what happened to the proceeds of the sale. He has not even suggested that the loan account of Hyde Construction CC has been repaid. Clearly the applicant is entitled to this information as a partner, and such information must surely be contained in the record sought.

[48] **The following Order is made:**

1. **It is declared that the failure by the first and second respondents to respond at all to the applicant's request for access to the annual financial statements of the second respondent for the years ending 2014 to 2020 ("the record") in terms of section 53 of the Promotion of Access to Information Act 2 of 2000 ("PAIA") is a deemed refusal in terms of section 58 thereof;**
2. **The deemed refusal referred to in paragraph 1 above is reviewed and set aside;**
3. **The third respondent's refusal to furnish the applicant with the record pursuant to his section 53 request is reviewed and set aside;**
4. **The respondents are directed to furnish the applicant with the record, or certified copies thereof, within 15 (fifteen) days from date of this Order; and**
5. **The first respondent (in his personal capacity) shall pay the costs of this application on the scale as between party and party as taxed or agreed, including the costs of one senior junior counsel as well as**

the reasonable travel and accommodation costs of the applicant's counsel for his attendance at the hearing.

_____

J I CLOETE