

In the matter between:-

Charon Febe Harris Applicant

And

J Harris 1st Respondent

HL Harris 2nd Respondent

CJ Harris 3rd Respondent

MS Harris 4th Respondent

The Mattie Harris Trust 5th Respondent

Coram: Kganyago M.F

Decision handed down on the 27th November 2013

DECISION

INTRODUCTION

[1] The applicant is bringing an application against the five respondents seeking the following orders:-

- a. Trading shares between shareholders not according MOI of the company.
- b. 2012/2011 and 2011/2012 AFS not true reflection of company's status.
- c. False valuation documents (Prospectus) regarding value of property.

d. Erecting buildings on property not complying to Local Authority/Dept of Agriculture's regulations (Reckless).

e. Breach of directors fiduciary duties.

f. Breach of confidence in Director.

[2] The respondents are opposing the applicant's application and have raised five points *in limine*.

BACKGROUND

[3] All the parties are shareholders of Plot Rockbottom Bethlehem (referred to as "RB").

[4] Counsel for both parties have agreed to deal with the respondents points *in limine* first. The respondents points *in limine* read as follows:-

"4.1. The applicant failed to properly complete form CTR 142 by failing, inter alia, to state the specific relief sought by the Applicant from the Tribunal. It is further submitted that the applicant's aforesaid failure renders the application without any cause or causes of action and constitute a vague and embarrassing document to such an extent that I am unable to answer with clarity and particularly to any specific relief sought by the Applicant.

4.2. In addition, it is submitted that the Applicant failed to comply with Regulation 142 (1)(b) of the Companies Regulations in that all the relevant facts pertaining to the matter, were not set out in an affidavit. To the contrary, it has been set out in the form of a letter which was not attested to by a Commissioner of Oaths, thus rendering the facts contained in the letter or so called "statement of circumstances" superfluous, irrelevant and not part of this application. It is submitted that the Tribunal cannot judicially take notice of the facts contained in the Applicant's letter or "statement of circumstances."

4.3. *It is also submitted that Applicant failed to comply with the provisions of Regulation 142(2) in that she failed to serve form CTR 142 on me within five (5) business days after filing the same at the Companies Tribunal. From the stamp of the Companies Tribunal, it is clear that CTR 142 was served on the Companies Tribunal on the 11th June 2013 but the same was only served on me by the Sheriff on 25th June 2013, being eleven (11) business days after the date of service and/or lodgment.*

4.4. *The Applicant failed to comply with the provisions of Regulation 142(3) (a) and (d) in that she failed to disclose the basis of the Application by stating the section of the Act or the Regulations in terms of which the Application is made, thereby omitting the cause of action to which I am now called upon to reply or answer.*

4.5. *It is submitted that this Tribunal does not have jurisdiction or powers to grant the purported relief sought by the Applicant. It is evident from paragraph 6 and 7 of the applicant's affidavit that she in fact request the tribunal to determine a purchase price for her shares, which request and/or relief does not fall within the powers or jurisdiction of this Tribunal."*

APPLICABLE LAW

[5] Regulation 142 of the Companies Regulations 2011 reads as follows:-

"(1) Any person may apply to the Tribunal for an order in respect of any matter contemplated by the Act, or these Regulations, by completing and filing with the Tribunal's recording officer-

(a) an Application in form CTR 142;

b) a supporting affidavit setting out the facts on which the application is based.

(2) The applicant must serve a copy of the application and affidavit on each respondent named in the application, within 5 business days after filing it.

(3) An application in terms of this regulation must:-

(a) indicate the basis of the application, stating the section of the Act or these Regulations in terms of which the Application is made; and

(b) depending on the context-

(i) set out the Commission's decision that is being appealed or reviewed;

(ii) set out the decision of the Tribunal that the applicant seeks to have varied or rescinded;

(iii) set out the regulation in respect of which the applicant seeks condonation; or

(c) indicate the order sought; and

(d) state the name and address of each person in respect of whom an order is sought."

EVALUATION

[6] The respondents have raised five points *in limine*. I will treat point *in limine* 4.1, 4.2, 4.4 and 5.5 as one as they basically deal with one issue, which the respondents elected to split into different headings.

[7] Regulation 142 (1) (a) and (b) is clear, the applicant had to complete form CTR 142, which had to be supported by an affidavit setting out the facts on which the application is based.

[8] The applicant has completed form CTR 142 which is supported by an affidavit. However, the affidavit is not detailed. The applicant's application is also supported by a statement of circumstances. That statement of circumstances is separate from the affidavit and not an annexure to the affidavit. Regulation 142(1) (b) requires a supporting affidavit which must be attached to form CTR 142. The applicant's statement of circumstance is not an affidavit. It therefore

does not comply with the requirements of regulation 142(1)(b). If the statement of circumstances was an annexure to the affidavit, it would have complied.

- [9] I take note that when the applicant initiated her application, she did so on her own as a lay person. Her application lacks clarity, on form CTR 142, it does not state clearly what the relief she seeking. She has abbreviated the relief she is seeking in the following manner:-

“ Shares; AFS’S, Valuation (Prospectus), Building erected.”

- [10] In my view, the order which the applicant is seeking will not enable the Respondents to properly answer to the applicant’s founding affidavit. Some of the relief the applicant is seeking are not within the jurisdiction of the Tribunal. If the buildings erected on the property does not comply with the Local Authority or Department of Agriculture’s regulations, it is not an issue which should be referred to the Tribunal to deal with.

- [11] In the case of **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another (66/2007) [2008] ZASCA 6** at paragraph 13, Judge Hefer JA said the following:-

“A litigant may not necessarily recognize or understand the nuances of a bare denial or general denial against a real attempt to grabble with all the relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its content, inadequate as they may be, and will in actual exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his client dispute and to reflect such dispute fully and accurately in the answering affidavit. If that does not happen, it should not come as a surprise that the court takes a robust view of the matter”.

- [12] Applying the Wightman judgment to the present case, the applicant must set out fully and accurately the basis of her dispute in her founding affidavit. In the present case, the applicant has failed to do so. If that was not a requirement by

the regulation, and was a civil matter, the applicants claim would have been expiable, and dealt with by way of an exception. In this case it is a requirement which the regulations have prescribed, and should be complied with. Therefore in my view, there is merit in the points *in limine* raised by the respondents.

[13] With regard to the third point *in limine* raised by the respondent, it is clear that the applicant has failed to comply with regulation 142(2). The said regulation is peremptory. The applicant was supposed to have applied for condonation in terms of regulation 147(1), but has failed to do so. Therefore, in my view there is merit in the point *in limine* raised by the respondent.

FINDINGS

[14] Therefore, under the circumstances, in my view, the respondent were justified in raising the points *in limine*. However, I will take into consideration that the applicant has referred her dispute on her own as a lay person.

ORDER

[15] In the result, I make the following order:-

1. The respondents points *in limine* is upheld.
2. The applicant, if she still wish to pursue her application, is ordered to serve the respondent and file with the Tribunal a detailed and accurate application within one month of this order, and thereafter the respondents to serve and file their answering affidavit within 20 days of receipt of the applicant's application. The applicant if the wish to reply, to do so within 5 days of receipt of the respondents answering affidavit.

[16] Each party to pay his/her costs.

M.F KGANYAGO

MEMBER OF THE COMPANIES TRIBUNAL