

# INSPECTORS REPORT



Companies and Intellectual  
Property Commission

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## INSPECTORS REPORT ON

**MDALI GROUP CONSORTIUM (PTY) LTD (2013 /103925 / 07)**

**AND**

**MDALI GROUP (PTY) LTD (2010 /023246 /07)**

**CASE NO: G131 (2015)**

**PREPARED BY**

**PUMLA MAVUMA AND LANA VAN ZYL**

**DATE: 19 JULY 2017**

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### DEFINITION OF TERMS

<b>Commission</b>	: Companies and Intellectual Property Commission
<b>Act</b>	: Companies Act No. 71 of 2008 (as amended)
<b>Inspectors</b>	: Ms Pumla Mavuma and Ms Lana van Zyl
<b>The Companies</b>	: Mdali Group (Pty) Ltd and Mdali Consortium (Pty) Ltd
<b>Mdali Consortium</b>	: Mdali Consortium (Pty) Ltd (2013/103925/07) and
<b>Mdali Group</b>	: Mdali Group (Pty) Ltd (2010/02346 /07)
<b>Complainant</b>	: Mail and Guardian Centre for Investigative Journalism NPC represented by Ms Karabo Rajuili
<b>Directors</b>	: Ms Zukiswa Mazibuko (Ms Mazibuko) and Dr Tembalikayise John Lupepe (Dr Lupepe) (Directors in Mdali Consortium (Pty) Ltd and Dr Tembalikayise John Lupepe Director in Mdali Group (Pty) Ltd
<b>Attorneys</b>	: Peyper Attorneys

### ANNEXURES

### NUMBER

1. Forms CoR 137.1 (Notices to investigate)	A
2. Letter to the directors dated 6 November 2015	B
3. Acknowledgement of receipt by Joyce Nel dated 12 January 2016	C
4. Letter to Mdali Consortium dated 12 April 2016	D
5. Letter to Mdali Group dated 12 April 2016	E
6. Correspondence between the complainant and the companies	F
7. Compliance notices	G

## 1. BACKGROUND

- 1.1 A complaint was lodged with the Commission by the Complainant on 6 October 2015 against the Companies for the failure to comply with the provisions of Section 26 (2) of the Act.
- 1.2 The Complainant alleged that on 18 August 2015 they made a request in terms of Section 26(2) of the Act. They requested access to the securities register of the Companies. The official 14 business days statutory period expired and no response was received from the Companies. Earlier a request was made and delivered to Dr Lupepe, a director in both the Companies through his assistant. The director's assistant received the request through an email and she confirmed that she will lodge the documents with Dr Lupepe. The Complainant subsequently liaised directly with Dr Lupepe who advised the Complainant that the matter will be referred to and dealt with by his lawyer Mr Hannes Peyper of Peyper Attorneys for finalization and compliance. The Complainant had on several occasions contacted the Companies and the Attorneys but there was no response received from either of them.

## 2. MANDATE

In terms of Section 168(1) (b) of the Act, any person may file a complaint in writing with the Commission in respect of any provision of the Act. To effectively deal with the complaint, Ms Pumla Mavuma was on Form CoR 137.1 dated 2 November 2015 directed to investigate Mdali Group and on 7 April 2016 appointed to investigate Mdali Consortium. Ms Lana van Zyl was per Forms CoR 137.1 dated 7 April 2016 directed to investigate the complaint against Mdali Group and Mdali Consortium in terms of Section 169 (1) (c), attached as **Annexure A**.

## 3. LEGISLATIVE FRAMEWORK

- 3.1 The following sections are relevant to the complaint.

### 3.1.1 Section 24: Form and standards for company records

*(1) – (3).....*

*(4) In addition to the requirements of subsection (3), every company must maintain*

*(a) a securities register or its equivalent, as required by section 50, in the case of a profit company, or a member's register in the case of a non-profit company that has members; and*

*(b) the records required in terms of section 85, if that section applies to the company.*

### 3.1.2 Section 26: Access to company records

*(1) A person who holds or has a beneficial interest in any securities issued by a profit company, or who is a member of a non-profit company, has a right to inspect and copy, without any charge for any such inspection or upon payment of no more than the prescribed maximum charge for any such copy, the information contained in the following records of the company:*

*(a) – (d) .....*

*(e) the securities register of a profit company, or the members register of a non-profit company that has members, as mentioned in section 24 (4).*

*(2) A person not contemplated in subsection (1) has a right to inspect the securities register of a profit company, or the members register of a non-profit company that has members, or the register of directors of a company, upon payment of an amount not exceeding the prescribed maximum fee for any such inspection.*

*In addition to the information rights set out in subsection (1) and (2), the Memorandum of Incorporation of a company may establish additional information rights of any person, with respect to any information pertaining to the company, but no such right may negate or diminish any mandatory protection of any record, required by or in terms of Part 3 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).*

*(4) A person may exercise the rights set out in subsection (1) or (2), or contemplated in subsection (3)—*

*(a) for a reasonable period during business hours;*

*(b) by direct request made to a company in the prescribed manner, either in person or through an attorney or other personal representative designated in writing; or*

*(c) in accordance with the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).*

*(5) Where a company receives a request in terms of subsection (4) (b) it must within 14 business days comply with the request by providing the opportunity to inspect or copy the register concerned to the person making such request.*

*(5) - (8) .....*

*(9) It is an offence for a company to—*

*(a) fail to accommodate any reasonable request for access, or to unreasonably refuse access to any record that a person has a right to inspect or copy in terms of this section or section 31; or*

*(b) to otherwise impede, interfere with, or attempt to frustrate, the reasonable exercise by any person of the rights set out in this section or section 31.*

### **3.1.3 Regulation 24 - Access to company information**

*(1) Any right of access of any person to any information contemplated in section 26 or in this regulation may be exercised only in accordance with-*

*(a) the Promotion of Access to Information Act, 2000 (Act No.2 of 2000); or*

*(b) the provisions of section 26; and*

*(c) sub- regulations (3) to (4).*

*(2) A person claiming a right of access to any record held by a company may not exercise that right until-*

*(a) a request to exercise that right has been made to the company in terms of sub-regulation (3) or*

*(b) to the extent applicable, the person's right of access to the information has been confirmed in accordance with the Promotion of Access to Information Act, 2000.*

*(3) A person claiming a right of access to any record held by a company must make a written request, as contemplated in section 26 (4), by delivering to the company-*

*(a) a completed Request for Access to Information in Form CoR 24; or*

*(b) to the extent applicable any further documents or other material required in terms of the Promotion of Access to Information Act, 2000.*

*(4) A company, that receives a request in terms of subsection 3(a) must, within 14 business days, accede to the request.*

### **3.1.4 Section 212 - Confidential information**

*(1) When submitting information to the Commission, the Panel, the Companies Tribunal, the Council, or an inspector or investigator appointed in terms of this Act, a person may claim that all or part of that information is confidential.*

*(2) Any claim contemplated in subsection (1) must be supported by a written statement explaining why the information is confidential.*

*(3) The Commission, Panel, Companies Tribunal, Council, inspector or investigator, as the case may be, must—*

*(a) consider a claim made in terms of subsection (1); and*

*(b) as soon as practicable, make a decision on the confidentiality of the information and access to that information, and provide written reasons for that decision.*

*(4) Section 172, read with the changes required by the context, applies to a decision in terms of subsection (3).*

*(5) When making any ruling, decision or order in terms of this Act, the Commission, the Panel, the Companies Tribunal or the Council may take confidential information into account.*

*(6) If any reasons for a decision in terms of this Act would reveal any confidential information, the Commission, the Panel, the Companies Tribunal or the Council, as the case may be, must provide a copy of the proposed reasons to the party claiming confidentiality at least 10 business days before publishing those reasons.*

*(7) Within five business days after receiving a copy of proposed reasons in terms of subsection (6), a party may apply to a court for an appropriate order to protect the confidentiality of the relevant information.*

#### **4. CONSIDERATION**

4.1 Ms Mazibuko and Dr Lupepe have been listed as the Directors in Mdali Consortium. Dr Lupepe has been listed as the only director in Mdali Group. On 6 November 2015 Inspector Ms Mavuma wrote a letter attached herein as **Annexure B** that was sent to the following email addresses [mnaidoo@mdali.co.za](mailto:mnaidoo@mdali.co.za) and [tlupepe@mdali.co.za](mailto:tlupepe@mdali.co.za) for the attention of the Directors of Mdali Consortium. The letter informed the Directors about the complaint which had been filed with the Commission against Mdali Consortium by the Complainant and set out the provisions of Section 26 of the Act which afford the Complainant the right to access to company records. It was made clear to the Directors that the Complainant requested the share register of Mdali Consortium but despite the request as per the requirement of the Act, Mdali Consortium refused to grant the Complainant access to the information requested.

4.2 In the abovementioned letter the Directors were requested to provide a written response, giving full details of the events which may have led to the above mentioned allegation and any steps taken by the company to avoid any possible non-compliance with Section 26 of the Act. The Directors were also requested to provide the Commission with a copy of the share register. It was furthermore brought to the attention of the Directors that should they view the requested information as confidential, Section 212 of the Act quoted in paragraph 3.1.4 above must be noted. The Company still had to submit the information to the Commission even if they viewed it as confidential as the Commission will have to make a determination as to the confidentiality of the information.

4.3 As the requested information should be readily available, the Directors were requested to provide the information within 5 business days from receipt of the letter. The Directors of the company did not forward any response nor any explanation for their failure to respond. On the

24<sup>th</sup> of November 2015 an email was again forwarded to Mdali Consortium asking them to respond but the company did not respond.

4.4 The Complainant had indicated that at some point there was communication with the attorneys representing Mdali Consortium on this matter. Peyper Attorneys were subsequently contacted. The letter which had been sent to the Directors of Mdali Consortium was also sent through to the email addresses [joyce@peyperattorneys.co.za](mailto:joyce@peyperattorneys.co.za) and [hannes@peyperattorneys.co.za](mailto:hannes@peyperattorneys.co.za) on 26 November 2015. On 12 January 2016 Ms Joyce Nel from Peyper Attorneys acknowledged receipt of the letters and indicated that they will respond to the request, copy attached as **Annexure C**. Despite numerous phone calls and email reminders by the Inspectors to Mdali Consortium and Hannes Peyper Attorneys, no response was received from the attorneys nor the Directors of Mdali Consortium.

4.5 On 12 April 2016, letters addressed to the Directors of Mdali Consortium and Mdali Group, copies attached as **Annexure D and E** were sent per email to Hannes Peyper Attorneys. These letters contained the same information as the letter forwarded on 6 November 2015 to Mdali Consortium. No reply was received from Hannes Peyper Attorneys. However, it transpired that Mdali Consortium was not in business as it reflects "AR Final deregistration" on the Commission's Disclosure database. In essence it means that the company is not on the Commission's Register as a registered company. It must be noted that at the stage that the Complainant made a request in terms of Section 26(2) of the Act, Mdali Consortium ought to have been in a position to provide the requested share register.

4.6 The fact that Dr Lupepe has been a director in both Mdali Consortium and Mdali Group means that he ought to be in a position to provide the Complainant with the information on both the share registers of the Mdali Consortium and Mdali Group. Even though Mdali Consortium is no longer on the Commission's register, he ought to know who the shareholders in Mdali Consortium were as he was a director in that company. The possibility is that the shareholding in both companies might be the same.

## 5 CONCLUSION

5.1 It is evident from the information above that the Complainant exercised its rights in line with Section 26 (4) of the Act by a direct request made in the prescribed manner to Mdali Consortium and Mdali Group. The Act is also very clear that where a company receives a request in terms of Subsection 26(2)(b) of the Act it must within 14 business days comply with the request by providing the opportunity to inspect or copy the register concerned to the person making such request.

- 5.2 The fact that the Complainant filed a complaint with the Commission, substantiated with evidence of correspondence between the Companies attached as **Annexure F** is an indication that Mdali Consortium and Mdali Group have indeed not complied with the Complainant's rightful request to have access to the complete security share register of the Companies .
- 5.3 The request by the Complainant was reasonable and done in accordance with the provisions of the Act. The Directors were given sufficient opportunities to provide the requested information to the Complainant and to give reasons to the Commission for their failure to give the information to the Complainant, but failed to respond.
- 5.4 It is an offence in terms of Section 26(9) of the Act for a company to fail to accommodate any reasonable request for access, or to unreasonably refuse access. Section 76 (3) of the Act inter alia states that a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director in good faith and for a proper purpose, in the best interests of the company, with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the functions of a director. Section 162 (3) of the Act provides for a director of a company to be held responsible for his/ her actions through an application declaring him delinquent or under probation. Such director can be held liable if s/he is a director of that company or, was a director of that company within 24 months immediately preceding the application.
- 5.5 The inspectors conclude that Dr Lupepe and Ms Mazibuko as directors of Mdali Group and Dr Lupepe as the director of Mdali Consortium have not complied with the requirements of Section 26(5) of the Act.

## **6 RECOMMENDATIONS**

- 6.1 Based on the above discussion the Inspectors recommend that the CIPC provide Dr Lupepe and Ms Mazibuko as directors of the Companies a final opportunity to comply with the request of the Complainant.
- 6.2 It is therefore recommended that compliance notices be issued which within 20 business days of the date of the Compliance Notices will require that :
- 6.2.1 Dr Lupepe and Ms Mazibuko of Mdali Group submit a copy certified as true copy of the original complete security/share register of Mdali Group (Pty) Ltd (2010/02346 /07) on the basis required by Section 26(5) of Act to Ms Karabo Rajuili of the Mail and Guardian Centre for Investigative Journalism NPC; and

6.2.2 Dr Lupepe of Mdali Consortium (Pty) Ltd (2013/103925/07) submit a copy certified as a true copy of the original complete security/share register of Mdali Consortium on the basis required by Section 26(5) of the Act to Ms Karabo Rajuili of the Mail and Guardian Centre for Investigative Journalism NPC.

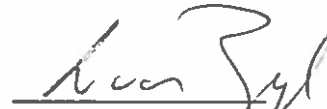
6.3 Ms Karabo Rajuili of the Mail and Guardian Centre for Investigative Journalism NPC as well as the Directors of Mdali Group Consortium and Mdali Group be given a copy of this report as provided for in Section 170(2) (b) of the Act.

Ms Pumla Mavuma  
Appointed Inspector



Date: 19/07/2017

Ms Lana Van Zyl  
Appointed Inspector



Date: 19/07/2017