# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

**Reportable**
Case No: 20815/2014

In the matter between:

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| **NOVA PROPERTY GROUP HOLDINGS LTD** | **FIRST APPELLANT** |
| **FRONTIER ASSET MANAGEMENT & INVESTMENTS** | **SECOND APPELLANT** |
| **CENTRO PROPERTY GROUP (PTY) LTD** | **THIRD RESPONDENT** |

**and**

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| **JULIUS PETER COBBETT** | **FIRST RESPONDENT** |
| **MONEYWEB (PTY) LTD** | **SECOND RESPONDENT** |

**and**

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| **MANDG CENTRE FOR INVESTIGATIVE JOURNALISM NPC** | **AMICUS CURIAE** |

**Neutral citation:** *Nova Property Group Holdings v Cobbett* (20815/2014) [2016] ZASCA 63 (12 May 2016)

**Coram:** Maya AP, Majiedt, Mbha JJA, Plasket and Kathree-Setiloane AJJA

**Heard:** 1 March 2016

**Delivered:** 12 May 2016

**Summary:** Appealability – interlocutory application – appealable under s 17(1) of the Superior Courts Act 10 of 2013.
Company law – interpretation of s 26(2) of the Companies Act 71 of 2008 – provides an unqualified right of access to a company's securities register – person's motive for access not relevant – right of access not subject to the provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA).
Rule 35 (14) – appellants failed to demonstrate that the documents sought are relevant to a reasonably anticipated issue in the main application.

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**ORDER**

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**On appeal from**: Gauteng Division of the High Court, Pretoria (Tuchten J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

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**JUDGMENT**

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**Kathree-Setiloane AJA (Maya AP, Majiedt and Mbha JJA and Plasket AJA concurring):**

[1] This appeal arises from the attempts of Moneyweb (Pty) Ltd (Moneyweb) and Mr JP Cobbett (Cobbett) to exercise their statutory right in terms of s 26 of the Companies Act 71 of 2008 (the Companies Act) to access the securities registers of the appellants, Nova Property Group Holdings Limited (Nova), Frontier Asset Management & Investments (Pty) Limited (Frontier), and Centro Property Group (Pty) Limited (Centro). The appellants will be referred to collectively as 'the Companies'.

[2] Cobbett is a financial journalist who specialises in the investigation of illegal investment schemes. Moneyweb is a publisher of business, financial and investment news. As part of its on-going investigation into, and coverage of Sharemax Group of Companies' controversial property syndication investment scheme (Sharemax syndication scheme), Moneyweb commissioned Cobbett to investigate the shareholding structures of the Companies, which are purportedly linked (directly or indirectly) to the Sharemax syndication scheme, and to write articles on his findings for publication by Moneyweb.

[3] On 24 July 2013, Cobbett sent requests to the Companies for access to their securities registers and to make copies thereof, in terms of s 26(2) of the Companies Act. He delivered a request for access to information in the form required by the Companies Regulations, 2011, for this purpose.[1] Section 26(2) entitles a person who does not hold a beneficial interest in any securities issued by a profit company, or who is not a member of a non-profit company, to inspect or copy 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. When Cobbett's requests were met with refusals, Moneyweb launched an application, in the Gauteng Division of the High Court, Pretoria (the court a quo), to compel the Companies to provide access to it for inspection and making copies of the securities registers within five days of the date of the order (the main application).

[4] Almost two years after the requests were made, Moneyweb has still been unable to access the securities registers. Nor is it even close to doing so, as the Companies have not filed an answering affidavit to the main application. Instead, the Companies issued notices, in terms of rule 35(12) and rules 35(11) to (14) of the Uniform Rules of Court, in which they sought documents referred to in Moneyweb's founding affidavit and copies of different sets of documents from Moneyweb. Dissatisfied with Moneyweb's responses to their rule 35(12) and rules 35(11) to (14) notices, the Companies launched an application to compel compliance therewith (the interlocutory application). The interlocutory application reveals that the Companies ostensibly sought these documents for purposes of interrogating the 'real motives' of Moneyweb, as they believed that Moneyweb was acting in furtherance of a 'sinister agenda' directed against Nova and its subsidiaries, including certain members of its executive, and that Moneyweb had embarked upon a vendetta for the sole purpose of discrediting the Companies and undermining their integrity. The Companies contend that the documents sought will

[1] Regulation 24 of the Companies Regulations, 2011 (Published under GN R351, *GG* 34239, 26 April 2011 as amended by GN R619, *GG* 36759, 20 August 2013 and GN R82, *GG* 37299, 5 February 2014) requires a person claiming a right of access to a record held by a company to make a request in writing by delivering to the company a completed request for access to information form (Form CoR24).

enable them to prove that Moneyweb intends publishing articles in the media not for any journalistic motive, but rather in furtherance of the 'sinister agenda' referred to above. They assert, in this regard, that the documents sought are relevant to the anticipated issues in the main application, as they will provide them with a defence to that application.

[5] In the court a quo, Tuchten J granted the Companies' rule 35(12) application to compel discovery of documents referred to in Moneyweb's founding affidavit, but dismissed their rule 35(14) application to compel and made the following order:

'1 The [appellants] are directed within 20 days of the date of this order to produce, in hardcopy format, the documents listed in paragraphs 1 to 10 of the respondents' notice in terms of rule 35(12) dated 15 November 2013 for their inspection and to permit them to make copies or transcriptions thereof.

2 For the rest, the application is dismissed.

3 The costs of this application will be costs in the cause of the main application to which these proceedings are interlocutory.'

[6] Although the court a quo had not decided the main application, it nevertheless pronounced on the proper interpretation of s 26(2) of the Companies Act, in deciding whether to grant the interlocutory relief to the Companies. It considered two of its conflicting decisions[2] on the subject, and concluded that s 26(2) did not confer an absolute right to inspection of the documents contemplated in the subsection, but that the court retained a discretion to refuse to order inspection. In arriving at this conclusion, the court below reasoned as follows:

'I think that the construction advanced on behalf of [Moneyweb] gives rise both to a potential for injustice and absurdities. Counsel for [Moneyweb] submitted, in answer to questions from the bench, that even if the evidence proved that the purpose of the request was to identify the home of one of the persons whose particulars were on the register so that an assassin would know where to find and murder that person, the court was bound to order disclosure. That outcome would, I think, be unjust. Section 26(9) makes it an offence to fail to accommodate any reasonable request for access, or unreasonably to refuse access to a register. If [Moneyweb's]

[2] *Bayoglu v Manngwe Mining (Pty) Ltd* 2012 JDR 1902 (GNP) and *M&G Centre for Investigative Journalism NPC v CSR-E Loco Supply (Pty) Ltd* case number 23477/2013 (8 November 2013).

construction is correct, a respondent who reasonably refused access but was nevertheless ordered to provide access would be liable to punishment for contempt of court for a failure to comply with the order even though he would be acquitted of the criminal offence of failing to provide access created by s 26(9). That outcome would, I think, be absurd.

In my view, a construction which confers a discretion on the court would more effectively promote the objects and spirit of the Constitution. The rights which the parties assert and seek to protect are . . . constitutional rights . . . rights to information on the one hand and privacy and dignity on the other. No constitutional right is absolute. In the process of determining which of the competing constitutional rights should prevail, each such right must be weighed against other relevant constitutional rights. A construction which would disable a court from weighing and giving effect to other constitutional rights would be subversive of the principle of fairness underlying the constitution.'

The Companies appeal against paragraphs 2 and 3 of the order set out above. The appeal is with leave of the court a quo.

[7] The issues in this appeal are two-fold. In view of the interlocutory nature of the order of the court a quo, the first issue that arises for determination is whether it is appealable. If found to be so, then the second issue which arises is whether the documents sought by the Companies in terms of rule 35(14) are relevant to a reasonably anticipated issue in the main application. This issue concerns the proper interpretation of s 26(2) of the Companies Act and, in particular, whether it confers an unqualified right of access to the securities register of a company contemplated in the section.

**Is the order appealable?**

[8] On the test articulated by this court in *Zweni v Minister of Law and Order,*[3] the dismissal of an application to compel discovery, such as by the court a quo, is not appealable as it is (a) not final in effect and is open to alteration by the court below; (b) not definitive of the rights of the parties; and (c) does not have the effect of disposing of a substantial portion of the relief claimed. However, three years later in *Moch v*

[3] *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532J-533A.

*Nedtravel (Pty) Ltd t/a American Express Travel Service,*[4] this court held that the requirements for appealability laid down in *Zweni* '. . .[d]o not purport to be exhaustive or to cast the relevant principles in stone'. Almost a decade later, in *Philani-Ma-Afrika v Mailula,*[5] this court considered whether an execution order (which put an eviction order into operation pending an appeal) was appealable. It held the execution order to be appealable, by adapting 'the general principles on the appealability of interim orders . . . to accord with the equitable and more context-sensitive standard of the interests of justice favoured by our Constitution'.[6] In so doing, it found the 'interests of justice' to be a paramount consideration in deciding whether a judgment is appealable.[7]

[9] It is well established that in deciding what is in the interests of justice, each case has to be considered in light of its own facts.[8] The considerations that serve the interests of justice, such as that the appeal will traverse matters of significant importance which pit the rights of privacy and dignity on the one hand, against those of access to information and freedom of expression on the other hand, certainly loom large before us. However, the most compelling, in my view, is that a consideration of the merits of the appeal will necessarily involve a resolution of the seemingly conflicting decisions in *La Lucia Sands Share Block Ltd & others v Barkhan & others*[9] and *Bayoglu*[10] on the one hand, and *Basson v On-Point Engineers (Pty) Ltd*[11] and *M & G Centre for Investigative Journalism NPC v CSR-E Loco Supply*[12] on the other.

[10] Section 17(1) of the Superior Courts Act 10 of 2013 (the Superior Courts Act),

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[4] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (A) at 10E-G.
[5] *Philani-Ma-Afrika & others v Mailula & others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA). See also *S v Western Areas Ltd & others* [2005] ZASCA 31; 2005 (5) SA 214 (SCA) paras 25-26; *Khumalo & others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) para 8.
[6] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC) para 53.
[7] *Philani-Ma-Afrika* para 20.
[8] *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & others* [1998] ZACC 9;1998 (4) SA 1157 (CC) para 32.
[9] *La Lucia Sands Share Block Ltd & others v Barkhan & others* [2010] ZASCA 132; 2010 (6) SA 421 (SCA).
[10] Footnote 2 above.
[11] *Basson v On-Point Engineers (Pty) Ltd & others* (64107/11) [2012] ZAGPPHC 251 (7 November 2012); 2012 JDR 2126 (GNP).
[12] Footnote 2 above.

which provides for the circumstances in which a judge may grant leave to appeal, gives express recognition to this consideration. It provides:

'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(*a*) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(*b*) the decision sought on appeal does not fall within the ambit of section 16(2)*(a)*; and

(*c*) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

The provisions of s 17(1) of the Superior Courts Act are tailor-made for this appeal principally for two reasons. First, as already alluded to, there are at least four conflicting judgments, including that of the court a quo, on the proper interpretation of s 26(2) of the Companies Act. Second, the appeal would lead to a just and prompt resolution of the real issues between the parties for the reasons set out below.

[11] Rule 35(14) provides that a party may, for purposes of pleading, require any other party to make available for inspection, within five days, a clearly specified document or tape-recording in his possession 'which is relevant to a reasonably anticipated issue in the action', and to allow a copy or transcription to be made of it. In the context of this appeal, the Companies are required to demonstrate that the documents are relevant to a tenable ground of opposition to the main application. Since the Companies seek to compel discovery for the purpose of interrogating the 'real motives' of Moneyweb for requesting access to their securities registers, in terms of s 26 of the Companies Act, the question of the 'relevance' of the documents sought would be integral to the interpretation of s 26(2) of the Companies Act. It is important to bear in mind, in this respect, that although the court a quo did not decide the main application, it did pronounce on the proper interpretation of s 26(2) of the Companies Act in deciding whether to grant the interlocutory relief sought by the Companies. Before us, therefore, the parties in essence accepted that if the court construes s 26(2) of the Companies Act to confer an unqualified right of access to the securities register of a company, then Moneyweb's 'motives' for requesting access to the registers would be irrelevant to the

main application, and it would be entitled to an order compelling compliance with s 26(2) of the Companies Act, thereby resolving the 'real issue' in the main application, as envisaged in s17(1)*(c)* of the Superior Courts Act. On this basis, therefore, Moneyweb was constrained to concede that the judgment of the court below, although not appealable under the traditional *Zweni* test for interlocutory applications to compel discovery, would be appealable under s 17(1) of the Superior Courts Act.

**Application to adduce evidence**

[12] Before I proceed to deal with the real issue, being the interpretation of s 26(2) of the Companies Act, I shall briefly deal with the application by the Mail & Guardian Centre for Investigative Journalism NPC (better known as amaBhungane) for leave to adduce evidence on appeal. AmaBhungane's application to be admitted as amicus curiae in this appeal, in terms of rule 16(4) of the rules of this court, was granted by the President of this court. AmaBhungane is affiliated to the Mail & Guardian newspaper, which is the primary publisher of its work. It is dedicated to uncovering, analyzing and reporting on information that the public has a right to know, such as evidence of corruption and abuse of power in both the public and private sectors. Timely access to the securities registers of companies, which are implicated in such matters of public interest, is essential to its task. Pursuant to this objective, amaBhungane made application, at the hearing of the appeal, for leave to adduce evidence on: (a) its experience with the Promotion of Access to Information Act 2 of 2000 (PAIA) and the significance of access to securities registers for the work of investigative journalists, and (b) the legislative history of s 26(2) of the Companies Act for the purposes of demonstrating that the present formulation of s 26(2) is intended to confer an unqualified right of access to securities registers of companies. The application was not opposed and the court granted amaBhungane leave to adduce evidence in the terms sought. Since the rules of this court do not expressly empower it to receive evidence from an amicus curiae, I deal below with the basis on which leave was granted to amaBhungane to adduce evidence on appeal.

[13] This court is empowered under s 19*(b)* of the Superior Courts Act to receive

further evidence. However, rule 16(8) of the rules of this court provides that 'a[n] amicus curiae shall be limited to the record on appeal and may not add thereto and, unless otherwise ordered by the Court, shall not present oral argument'. This position is, however, not invariable as the court's power to regulate its own process in terms of s 173 of the Constitution may be invoked to allow an amicus to adduce further evidence, if to do so would promote the interests of justice. Significantly, in this regard, in *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp & others*,[13] the Constitutional Court held as follows (in relation to rule 16A of the Uniform rules):

'. . . . In public interest matters, like the present case, allowing an amicus to adduce evidence best promotes the spirit, purport and objects of the Bill of Rights. Therefore, the correct interpretation of Rule 16A must be one that allows courts to consider evidence from amici where to do so would promote the interests of justice.'

The Constitutional Court went on to hold that an amicus must, in appropriate cases, be permitted to adduce evidence in the High Court for at least two reasons namely: (a) that rule 31 of the Constitutional Court rules which permits it to admit evidence adduced by an amicus curiae, supports the proposition that courts of first instance must also be permitted to adduce evidence, because it is generally not in the interests of justice for the Constitutional Court to sit as a court of first and final instance in relation to new issues and factual material;[14] and (b) that the persuasive comment of an amicus will often draw on broader considerations, and thus be premised on facts and evidence not before the court, including statistics and research. It would make little sense to allow the presentation of bare submissions unsupported by facts.[15]

[14] The same rationale should, in my view, apply to this court as it would be anomalous if an amicus could introduce evidence in the High Court and Constitutional Court, but not in this court. It follows, therefore, that this court may, in appropriate circumstances, permit an amicus to adduce evidence, provided the requirements of s 19(b) of the Superior Courts Act are met, namely that: (a) a sufficient explanation is provided for why the evidence was not introduced before the court a quo; (b) there is a

[13] *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp & others* [2012] ZACC 25; 2013 (2) SA 620 (CC) para 27.
[14] *Children's Institute* para 30.
[15] *Children's Institute* para 31.

prima facie likelihood that the evidence is true; and (c) the evidence is materially relevant to the outcome.[16] These requirements have been met in this appeal for the following reasons:

(a) AmaBhungane could not adduce the evidence in the court a quo because it was not party to those proceedings. It was, furthermore, not apparent that the court a quo would, in the interlocutory proceedings consider, let alone pronounce on the proper interpretation of s 26(2) of the Companies Act, which arises for determination in the main application.

(b) The evidence which amaBhungane wishes to adduce on appeal is true and not disputed by the parties. It is first-hand evidence of amaBhungane's experience regarding the importance of securities registers as a reliable tool in a journalist's artillery. Additionally, the evidence relating to the prior versions of the Companies Amendment Bill, 2010 (the Amendment Bill) is plainly incontrovertible as these documents are official in nature.

(c) The evidence of amaBhungane's experience with PAIA, and the significance of access to securities registers for the work of the media are plainly relevant, and is precisely the kind of evidence that the Constitutional Court has held may be introduced by an amicus curiae.[17] The practical impact of a particular construction of legislation, in this case s 26(2) of the Companies Act, is a relevant question which generally would need to be assessed from the evidence. Moreover, the evidence of the evolving formulation of the Amendment Bill in the parliamentary process is an aid to interpretation and sheds light on the intention of the legislature, thus demonstrating why the construction posited by the Companies could not have been intended by the legislature. Thus, the evidence is clearly relevant.

**Interpretation of s 26(2) of the Companies Act**

[15] I now turn to the question of the proper interpretation of s 26(2) of the Companies Act and, in particular, whether it confers an unqualified right of access to the securities

[16] D E van Loggerenberg et al (eds) Erasmus Superior Court Practice (November 2013 - Service Issue 43) at A1-56. See also *Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others* [2016] ZASCA 17 (15 March 2016) para 30.

[17] *Children's Institute* paras 31 and 34.

register of a company. The Companies contend that s 26(2) confers a qualified right as access may be refused, on the grounds set out in PAIA and on the grounds of the 'motive' of the requester. On the contrary, Moneyweb contends that an unqualified right is conferred on any person who meets the procedural requirements of s 26(2) of the Companies Act. AmaBhungane, in turn, contends that if access to securities registers is subject to the grounds of refusal which apply to a request under PAIA or to a refusal based on the alleged motive of the requester, then this will have a significant negative impact on investigative journalists and the public's right to know.

[16] The role that companies play in our society and their obligations of disclosure that arise from the right of access to information in s 32 of the Constitution, is central to the interpretation of s 26(2) of the Companies Act. Both this court and the Constitutional Court have recognised that the manner in which companies operate and conduct their affairs is not a private matter. In *Bernstein & others v Bester NO & others,*[18] the Constitutional Court made the position plain. The Court said:

'The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilisation of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute will have concomitant responsibilities. These include, amongst others, the statutory obligations of proper disclosure and accountability to shareholders. It is clear that any information pertaining to participation in such a public sphere cannot rightly be held to be inhering in the person, and it cannot consequently be said that in relation to such information a reasonable expectation of privacy exist. Nor would such an expectation be recognised by society as objectively reasonable. This applies also to the auditors and debtors of the company. . . .'

[17] This approach has been repeatedly endorsed. This passage in *Bernstein* was cited by this court in *La Lucia Sands*, in dealing with s 113 of the Companies Act 61 of 1973 (the old Companies Act), the predecessor to s 26 of the Companies Act.[19]

[18] *Bernstein & others v Bester NO & others* [1996] ZACC 2; 1996 (2) SA 751 (CC) para 85.
[19] *La Lucia Sands* para 21.

Similarly, in his separate concurring judgment in S v *Coetzee,*[20] Kentridge AJ emphasised that 'those who choose to carry on their activities through the medium of an artificial legal persona must accept the burdens as well as the privileges which go with their choice.' Most recently, in *Company Secretary of Arcelormittal South Africa & another v Vaal Environmental Justice Alliance*[21], this court emphasized that 'citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of government and in relation to corporations' and that Parliament, driven by Constitutional imperatives, had rightly seen fit to cater for this in its legislation.

[18] The Companies Act gives specific recognition to a culture of openness and transparency in s 7 which lists the core objectives of the Act. Section 7*(b)*(iii), in particular, provides that a purpose of the Act is to:

'. . . [encourage] transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation.'

Section 26 of the Companies Act is enacted with precisely these objectives in mind. It recognizes that the establishment of a company is not purely a private matter and may impact the public in several ways. It therefore seeks to impose strong rights of access in respect of very specific but ultimately limited types of information held by companies. Section 26 must, therefore, be interpreted in accordance with this purpose. Section 26(1) confers a right of access to information in respect of various kinds of information to a person who holds a beneficial interest in any securities issued by a profit company, or who is a member of a non-profit company. Section 26(2) then confers a narrower and more specific right of access to all others persons. It provides:

'A person not contemplated in subsection (1) has a right to inspect or copy 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.'

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[20] *S v Coetzee & others* [1997] ZACC 2; 1997 (3) SA 527 (CC) para 98.

[21] *Company Secretary of Arcelormittal South Africa & another v Vaal Environmental Justice Alliance* [2014] ZASCA 184; 2015 (1) SA 515 (SCA) para 1.

***Interaction between s 26(2) and PAIA***

[19] There are two aspects of s 26 that require particular emphasis: the first concerns the interaction between s 26(2) and the provisions of PAIA and the second concerns the nature of the right conferred by s 26(2). In relation to the former, s 26 makes clear that the right conferred by s 26(2) is additional to the rights conferred by PAIA and does not need to be exercised in accordance with PAIA. In this regard, s 26(7) provides:

'The rights of access to information set out in this section are in addition to, and not in substitution for, any rights a person may have to access information in terms of –

*(a)* section 32 of the Constitution;

*(b)* the Promotion of Access to Information Act, 2000 (Act 2 of 2000); or

*(c)* any other public regulation.'

Markedly, the approach of Parliament in conferring the right of access to information in s 26(2) of the Companies Act in addition to the rights conferred by PAIA is consistent with s 39(3) of the Constitution which provides that:

'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

[20] In respect of the process to be followed in exercising the rights, s 26(4) provides:

'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 2 of 2000).' (own emphasis.)

What is clear from s 26(4)*(c)* is that procedurally PAIA is an alternative to requesting access to a company's share register in terms of the provisions of s 26 of the Companies Act.

[21] The approach of Parliament, in this regard, was eminently sensible. PAIA is a general statute. It regulates access to innumerable types of information held by a wide range of bodies, with various different types of interests at stake. Parliament, therefore, had to lay down general rules to balance the competing interests at stake by means of threshold requirements, grounds of refusal and public interest overrides. By contrast, s 26(2) confers a specific right in respect of one type of information only − securities registers and directors registers. Parliament justifiably took the view that, in respect of this narrow category of information, it was unnecessary to build in the PAIA balances and counter balances with all the complexity and delay that might entail. Instead, it conferred an unqualified right that is capable of prompt vindication.

[22] Notwithstanding this, and the clear wording of s 26(4) and s 26(7) of the Companies Act, the Companies place considerable reliance on PAIA contending that they are entitled to argue, in the main application, that the refusal of access to Moneyweb 'is justified on the basis of the provisions of s 68(1) of PAIA.' In terms of s 68(1) of PAIA, access to a record of a company may be refused if the record:

*(a)* contains trade secrets of the company;

*(b)* contains financial, commercial, scientific or technical information, other than trade secrets, of the company, the disclosure of which would be likely to cause harm to the commercial or financial interests of the company;

*(c)* contains information, the disclosure of which could reasonably be expected; will put the company at a disadvantage in contractual and other negotiations; or will prejudice the company in commercial competition.

Securities registers quite clearly do not contain information of the nature contemplated in s 68(1) of PAIA, and access cannot possibly be refused by the Companies on that basis. Furthermore, the Companies contend that the right of access in s 26(2) must be qualified by, and subject to, the provisions of PAIA, and that the person requesting the information must demonstrate that the information is required for the purpose of exercising or protecting a right. It is not clear how this requirement can be imported into s 26(2) without doing violence to a right which is expressly intended by the legislature to be unqualified. Moreover, the Companies fail to explain how this reliance on PAIA can

be sustained in light of the clear language of subsecs 26(4) and 26(7). Accordingly, the Companies' reliance on PAIA is unsustainable as it certainly does not render the documents sought in the rule 35(14) interlocutory application relevant to the main application.

[23] In choosing to confer an unqualified right capable of prompt and easy vindication in s 26(2) of the Companies Act, Parliament would have been alive to the fact that the procedures of PAIA can readily be used as an instrument to frustrate and delay access to records. One of the threshold requirements for a requester to obtain access to information held by a private entity under s 50(1)(*a)* of PAIA is that the requester must prove that that information requested is necessary for the 'exercise or protection of any rights'. Even if this test is overcome, there is potential for a ground of refusal to be claimed by the company concerned. For instance, in terms of s 71(1) of PAIA, the private body 'must', if the record requested might contain certain information concerning a third party, take all reasonable steps to inform the third party of the request. The private body may take up to 21 days to give this notice and the third party may take a further 21 days to make representations, before the private body decides whether to grant or refuse access to the requester. If access is granted, the third party may approach a court to prevent disclosure. If refused, the requester would have to make application to court to compel disclosure. Given the potentially hundreds of holders of securities, a decision by a company to invoke the third party procedure in PAIA will effectively put the securities registers out of the reach of the requester indefinitely, and certainly far beyond the natural life cycle of a relevant journalistic investigation.

[24] The point is illustrated by *President of the Republic of South Africa v M & G Media Ltd*.[22] Even without any proper basis for withholding access to the record, access was delayed for six years. This was also amaBhungane's experience in *CSR-E Loco*.[23] The present proceedings speak for themselves – some three years later Moneyweb is

[22] *President of the Republic of South Africa & others v M & G Media Ltd* [2014] ZASCA 124; 2015 (1) SA 92 (SCA). See also generally *MEC for Roads and Public Works, Eastern Cape & another v Intertrade Two (Pty) Ltd* [2006] ZASCA 33; 2006 (5) SA 1 (SCA) para 20.
[23] See footnote 2 above.

still nowhere near accessing the Companies' securities registers. This demonstrates that PAIA will not provide journalists prompt access to securities registers − for whom timely access is essential. Thus, if the PAIA limitations apply to s 26(2) requests, the inconvenience and cost of an application to court to challenge a refusal on those grounds will greatly inhibit access to securities registers. Given the significant expenses involved in the court process, it will in most cases lead to important investigations being aborted rather than an application to court being pursued.[24] One wonders why subsecs 26(4)*(a)* and *(b)* were enacted if they are capable of being impliedly trumped by PAIA.

[25] What remains then is to set right the unfortunate obiter dictum of this court in *La Lucia Sands* vis-a-vis the application of PAIA to a request for access under s 26 of the Companies Act:[25]

'[17] For completeness, I record that the New Companies Act 71 of 2008 has been assented to but has not yet come into operation. Section 113 of the Act has not been repeated in the new legislation. Section 26 of the new Act is entitled ''Access to company records''. Section 26(3) provides that ''any member'' and "any other person'' are entitled to inspect the register of members during business hours. Section 26(4) provides:

"The rights of access to information set out in this section are in addition to, and not in substitution for, any rights a person may have to access information in terms of –

*(a)* section 32 of the Constitution

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

*(c)* any other public regulation.

[18] *It appears that in future the provisions of the Promotion of Access to Information Act 2 of 2000 will have to be employed by non-members seeking access to the register of members. The rationale set out above for obtaining information contained in the register of members will probably continue to apply, notwithstanding that the request for information will now have to be made in terms of the Act.* Happily, it is not an issue we need to address comprehensively or at all. Section 113 applies to the present matter.' (own emphasis.)

This obiter dictum is regrettable, as s 26(7) of the Companies Act expressly states that the right conferred by s 26(2) is additional to the rights conferred by PAIA. There is, in addition, no requirement in s 26 of the Companies Act that a request for access to a

[24] See *City of Cape Town v South African National Roads Authority Limited & others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA) para 43.

[25] *La Lucia Sands* paras 17-18.

company's securities register must only be exercised in accordance with PAIA. The obiter dictum of this court in *La Lucia Sands* is, therefore, clearly wrong, and the Companies' reliance on it is simply misplaced.

***The nature of the right***

[26] The second aspect of s 26(2) of the Companies Act that requires emphasis is the nature of the right conferred by it in the context of s 26 as a whole. Unlike its predecessor, s 113 of the old Companies Act, s 26(2) expressly confers a right of access in respect of the securities registers. Section 26(5) then goes further and provides expressly, and in unqualified terms, that where a company receives a request in the prescribed form, the company 'must within 14 business days comply with the request'. There is nothing in subsecs 26(2) and 26(5) which, in any way, qualifies this right. Nor is there any reference in these sections to the reasonableness of either the request or the response. The only sub-section which mentions reasonableness is s 26(9), which creates the criminal prohibition. It provides:

'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.'

A reasonable request in my view, would be one which is made in accordance with the provisions of s 26(4)*(a)* and *(b)* of the Companies Act.

[27] The decision to include the reasonableness defence in s 26(9) is perfectly understandable, as the legislature was presumably anxious to avoid creating a strict liability offence, possibly because of the constitutional difficulties that this might have raised. However, what the Companies seek to do is import the s 26(9) reasonableness qualification back into s 26(2) to limit the right it confers. There is no warrant for this. If Parliament had wanted to limit the s 26(2) right, it would have done so expressly. Instead, it enacted an unqualified right in s 26(2) read with s 26(4) and introduced a reasonableness qualification only in respect of the criminal offence created by s 26(9).

[28] The failure to introduce an equivalent qualification of reasonableness in s 26(2) and 26(4) makes clear that outside of the criminal offence created, there is no similar restriction. Section 26(2) clearly confers an unqualified right on members of the public and the media to obtain access to share registers. This means that the 'motive' with which the person seeks access to the information concerned is irrelevant. This construction of s 26(2) is completely consistent with its legislative history, as revealed by the different versions of the Amendment Bill. The versions of the Amendment Bill prior to the adoption of the Companies Act in its amended form show a deliberate journey from a formulation of s 26(2) in which the PAIA limitations were arguably applicable, to a formulation which makes it clear that the PAIA limitations are not applicable, and that the right of access is not qualified.

[29] Notably, s 113 of the old Companies Act provided an unqualified right for any person to access a company's share register that was subject to a court's discretion to refuse access. When the Minister of Trade and Industry tabled the Companies Bill, 2008, in the National Assembly there was no express access provisions for non-shareholders. The proposed subsecs 26(2) and (5) appeared to anticipate the possibility that non-shareholders might gain access by means of PAIA and that, given PAIA's exemptions, there might be reasonable grounds to deny access. AmaBhungane was concerned about the erosion of the unqualified right in s 113 of the old Companies Act and made submissions to the Portfolio Committee. When the Companies Act was finally enacted in 2008, it included s 26(2) which gives any person the right of access, and it introduced a peremptory element: *must . . . be open to inspection'* in s 26(6). The Companies Act made it clear that this right was in addition to any rights under PAIA.

[30] The Companies Act contained errors, and the Minister therefore introduced the Amendment Bill before the Act came into force. The original version of the Amendment Bill B40–2010 appeared to make the right to access subject to PAIA, by using the conjunctive 'and'. It also omitted the peremptory wording 'must' that had been included in the Companies Act. It stated:

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; *and*

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

Whilst that version appears to suggest that the s 26 right would have been qualified along the lines proposed by the Companies, after receiving public submissions (including amaBhungane's), the Portfolio Committee produced the revised version B40A−2010 of the Amendment Bill. In Bill B40A−2010 the conjunctive *'*and*'* in subsection (4) was replaced with the disjunctive *'*or'. The effect was to make it plain that PAIA would be an alternative mode of obtaining access to company records. In addition, the Portfolio Committee inserted a new sub-clause which made clear the peremptory nature of the obligation imposed on the company. It read:

'(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.' (own emphasis.)

These two alterations, which made it clear that the right is unqualified, were retained in the version of the Bill that ultimately became the Amendment Act.

[31] The Companies Regulations demonstrate a similar evolution. Regulation 24(2) of the Draft Companies Regulations, published for comment on 29 November 2010,[26] provided that a person claiming a right of access to any record held by a company may not exercise that right until *'[the person's] right of access to the information has been confirmed in accordance with [PAIA]'.*[27] Draft Regulation 24(4) provided that a person claiming access to any record held by a company had to make a written request by delivering to the company a completed prescribed form as well as 'any further documents or other material required in terms of' PAIA. The final regulations[28] are, however, consistent with the current formulation in the Companies Act as amended by

[26] Companies Regulations, GN R1664, *GG* 32832, 22 December 2009.
[27] Clause 24(3)(b) of the draft Regulations.
[28] Companies Regulations, GN R351, *GG* 34239, 26 April 2011.

the Amendment Act in 2011. They too now use the disjunctive *'*or*'* to distinguish between rights under PAIA and the additional access rights created by s 26, and they too use the peremptory form 'must . . . accede to the request'.

[32] The legislative history squarely contradicts the construction of s 26(2) which is contended for by the Companies. It demonstrates a clear intention on the part of the legislature to provide that the right under s 26(2) can be exercised independently of PAIA, and that a company cannot require disclosure of the reason for the request to access the securities register of a company − as the right is unqualified.

[33] Essentially, this means that the 'motive' with which a requester seeks access to a company's share register is irrelevant. In *La Lucia Sands* this court made clear that, under s 113 of the old Companies Act, a company could not require disclosure of the reason for the request to access the shares registers. It said:[29]

'Section 113 of the Act does not oblige a person requesting information to provide motivation for doing so. It has been held that a person who seeks to inspect the register need not give reasons for doing so. (See *Holland v Dickson* (1888) 37 Ch.D. 669 at 671-672 and *Labatt Brewing Co Ltd v Trilon Holdings Inc* 41 O.R. (3d) 384 para 6. Meskin et al *Henochberg on the Companies Act* (above), with reference to *Dickson*, state the following:

"But in any event the company cannot require the disclosure of the reason for the inspection as a condition precedent to allowing it . . ."

[34] Having said that, the court in *La Lucia Sands* went on to hold that, under s 113 of the old Companies Act, a court had a discretion to decline to make an order requiring access where it is shown that the information is sought for some unlawful purpose. In reaching this conclusion, it relied on the decision of the English court of appeal in *Pelling v Families Need Fathers Ltd,*[30] where its reasoning was based almost exclusively on the fact that the old English Companies Act 1985 provided that the

[29] *La Lucia Sands* at para 10.
[30] *Pelling v Families Need Fathers Ltd* [2002] 2 All ER 440 (CA).

Registrar hearing the matter "*may"* make an order compelling access. The court explained it as follows:[31]

'On the true construction of s 356(6) the registrar had a discretion to refuse the order. In its ordinary and natural meaning the word "may" is apt to confer a discretion or power . . . The use of "may" in subsection (6) is in striking contrast to the mandatory force of "shall" in other parts of the same section, such as sub-s (3). . . .

"[w]hether the power will be exercised must depend upon the proper discretionary considerations affecting the power in the light of the facts as are found by the court."[32]

We agree. For those reasons we reject the absolutist construction proposed by Dr Pelling.'

[35] Section 113(4) of the old Companies Act was in very similar terms to the old English Companies Act 1985. It provided that 'in the case of any such refusal or default the court may, on application, by order compel an immediate inspection of the register'. It is, therefore, not surprising that this court in *La Lucia Sands* took the same approach as the court in *Pelling*. However, s 26 of the Companies Act is different. Unlike s 113 of the old Companies Act, it does not contain a provision dealing specifically with an application to court to compel compliance and, in particular, contains no provision rendering the decision of the court discretionary on this basis. Parliament, which is presumed to know the law,[33] chose not to enact a provision equivalent to s 113(4), and instead strengthened the access provision by making clear in s 26(2) that it conferred a 'right' of access, without qualification and not subject to a discretionary override.

[36] This means that when a company fails or refuses to provide access, that person is entitled, as of right, to an order compelling access. The question of the motive or purpose is simply irrelevant. The Companies have, therefore, failed to demonstrate that the documents sought in the rule 35(14) notice 'are relevant to a reasonably anticipated issue in the main application.' The Companies' belief in relation to what they will purportedly achieve through access to those documents, does not give rise to a defence

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[31] *Pelling* para 23.
[32] *O'Brien v Sporting Shooters Association of Australia (Victoria)* [1999] 3 VR 251; [1999] VSC 313 (20 August 1999) para 21.
[33] *Road Accident Fund v Monjane* [2007] ZASCA 57; 2010 (3) SA 641 (SCA) para 12.

to the main application as Moneyweb's 'motive' for seeking access to the Companies' securities registers is simply irrelevant.

[37] The Companies' construction of s 26(2) would have a negative impact on openness and transparency, and would directly undermine the work of Moneyweb, amaBhungane and other investigative journalists, as it limits the right to freedom of expression. The Constitutional Court has emphasised in *Brümmer v Minister for Social Development & others*[34] that media have a duty to report accurately, as '[t]he consequence of inaccurate reporting would be devastating.*'* This then means that the journalists must be able to have speedy access to information such as the securities registers: 'Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.'[35] Interference with the ability to access information impedes the freedom of the press. The right to freedom of expression is not limited to the right to speak, but includes the right to receive information and ideas.[36] Preventing the press from reporting fully and accurately, does not only violate the rights of the journalist, but it also violates the rights of all the people who rely on the media to provide them with *'information and ideas.'*

[38] An unqualified right of access to a company's securities register is, therefore, essential for effective journalism and an informed citizenry. AmaBhungane has provided the court with examples of investigations and news reports, where access to share register information was central to its investigation. One such news report relates to a tender award by a parastatal,[37] where immediate access to share registers enabled journalists to uncover an apparent conflict of interests in relation to the head of a tender committee. Investigations like this, would likely not have been possible if journalists did not have an unqualified right of access to securities registers of companies under s 26(2) of the Companies Act.

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[34] *Brümmer v Minister for Social Development & others* [2009] ZACC 21; 2009 (6) SA 323 (CC) para 63.
[35] *Brümmer* para 63.
[36] Section 16(1)*(b)* of the Constitution.
[37] 'Transnet tender boss's R50 billion double game', Mail & Guardian, 4 July 2014.

[39] In a final attempt at salvaging its case, the Companies contend that an unqualified right of access to a company's securities register would constitute a violation of a shareholder's right to privacy in terms of s 14 of the Constitution, and that the rights of access to information and freedom of expression must be weighed against this right − as no right is absolute. The Companies contend that information contained in a private company's securities register is information of a personal nature as it will contain names and identities of individuals; their home and work addresses. In addition, they contend that depending on the nature of the company, it may also expose their business affiliations, how wealthy they are and what their political, moral and religious leanings are. The contention thus advanced is that a company's securities register contains information of a sensitive nature that may reveal deeply private matters about shareholders in a particular company which, in the hands of the wrong people, may be open to abuse.

[40] I disagree. First, because the Companies do not challenge the constitutionality of s 26(2) of the Companies Act on the grounds of a violation of the right to privacy, and secondly, because the privacy and dignity rights of shareholders are minimally implicated in the right of access conferred by s 26(2). It is a narrow right of access that is limited to securities registers and directors registers of companies contemplated in the section. Regulation 32 (2) of the Companies Regulations provides that:

'In addition to the information otherwise required, the company's securities register must also include in respect of each person to whom the company has issued securities, or to whom securities of the company have been transferred-

(a) the person's—

(i) name and business, residential or postal address, as required by section 50(2)(b)(i); and

(ii) the person's email address if available, unless the person has declined to provide an email address;

(b) an identifying number that is unique to that person.'

Regulation 32(6), in turn, provides that:

'In so far as the identity number and e-mail address of a person may be entered into a register kept under this regulation, such information may, at the instance of the company, Central Securities Depository or relevant Participant as the case may be, be regarded as confidential.'

[41] A shareholder in a company is, therefore, only required to provide his or her name, business, residential or postal address, an e-mail address if he or she elects to do so, and an identifying number that is unique to that person. Where the shareholder's identity number and e-mail address are entered into a securities register, it may be regarded as confidential at the instance of the company or the shareholder. Thus, in view of the limited nature of the personal information of a shareholder that must be included in a securities register, and the regulatory safeguards aimed at ensuring confidentiality and non-disclosure of such information, there can be no room for abuse. It is against this backdrop that a potential violation of the privacy rights of shareholders and companies should be considered.

[42] In conferring an unqualified 'right' of access to a company's securities register in s 26(2) of the Companies Act, the legislature has chosen to prioritize the right of access to information over the privacy rights of shareholders and companies. In the absence of an express limitation of that right by the legislature, it is not for the court to limit it because of some nebulous spectre of abuse, particularly where as in this context, there are built-in safeguards against the disclosure of confidential information − and the constitutionality of the provision is not challenged. The scope of the right to privacy of shareholders must, therefore, be viewed in its proper context. In *Gaertner & others v Minister of Finance & others*, the Constitutional Court held:[38]

'Privacy, like other rights, is not absolute. As a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks. This diminished personal space does not mean that, once people are involved in social interactions or business, they no longer have a right to privacy. What it means is that the right is attenuated, not obliterated. And the attenuation is more or less, depending on how far and into what one has strayed from the inner sanctum of the home.'

Accordingly, the court a quo erred in its obiter finding quoted in paragraph 6 above.

**Prior Restraint**

[43] In light of the irrelevance of Moneyweb's 'motive' in seeking access to the Companies' securities registers, the case of the Companies on appeal amounts to little

[38] *Gaertner & others v Minister of Finance & others* [2013] ZACC 38; 2014 (1) SA 442 (CC) para 49.

more than that they are deeply aggrieved about the manner in which Moneyweb has reported on them. The Companies fear that Moneyweb will use access to the securities registers for further 'negative reporting' and this will cause them harm. The Companies are, in this respect, little different from any person or entity who is subject to negative press coverage. They are unhappy about it and wish to curtail, impede and prevent it. But, whatever other remedies are open to the Companies, these concerns cannot provide a basis for limiting Moneyweb's exercise of its s 26(2) statutory rights in respect of the securities registers concerned. The media cannot be precluded from accessing information because the subject of the likely reportage considers that the reportage will be unfavourable and unfair. Indeed, such a proposition is inconsistent with two well established principles laid down by this court. The first is the principle established in *City of Cape Town v South African National Roads Authority Limited*, that access to accurate information is critical for the right to freedom of expression, which this court expressed as follows:

'The right to freedom of expression lies at the heart of democracy, and is one of a "web of mutually supporting rights" that hold up the fabric of the constitutional order. Section 32(1) of the Constitution guarantees everyone the "right of access to information held by the state". Citizens and public interest groupings rely on this right to uncover wrongdoing on the part of public officials or for accessing information to report on matters of public importance. The Constitutional Court has noted that the media has a duty to report accurately, because the "consequences of inaccurate reporting may be devastating." It goes without saying that to report accurately the media must have access to information. Access to information is "crucial to accurate reporting and thus to imparting information to the public." While s 32 of the Constitution guarantees the right of persons to access relevant information, s 16 entitles them to distribute that information to others.'[39] (footnotes omitted.)

[44] The approach urged by the Companies would, to my mind, preclude such accurate reporting. It would require Moneyweb to attempt to report on the shareholding of the Companies without having access to the information that definitively and accurately sets out those details. Quite apart from the potential negative effect that this

[39] *City of Cape Town v South African National Roads Authority Limited & others* above, para 20.

would have on the Companies, this would undermine the right of the public to receive accurate information via the media. There is simply no basis for this approach.

[45] The second principle is that courts will only rarely make orders which amount to prior restraints on expression. This principle was established in *Midi Television (Pty) Ltd t/a E-TV v DPP (WC),*[40] where this court held:

'In summary, a publication will be unlawful, thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interest of every person in having access to information. Applying the ordinary principles that come into play when a final interdict is sought, if a risk of that kind is clearly established, and it cannot be prevented from occurring by other means, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.

Those principles would seem to me to be applicable whenever a court is asked to restrict the exercise of press freedom for the protection of the administration of justice, whether by a ban on publication or otherwise. They would also seem to me to apply, with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right. . . .'

[46] Although the interlocutory application does not involve the granting of an interdict against the media, the effect is much the same. The deponent to the Companies' founding affidavit makes plain that they are, in fact, seeking to prevent Moneyweb from reporting on these issues at all. They seek to do this by precluding Moneyweb and Cobbett from ever having access to their securities registers for purposes of their reporting. In other words, rather than interdict the Moneyweb publication, the Companies seek to stop it at the investigation stage. There is simply no basis for such

[40] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56; 2007 (5) SA 540 (SCA) paras 19-20.

an order. If publication occurs and if it is unlawful, the Companies will be entitled to sue for damages, which will 'usually [be] capable of vindicating the right to reputation.'[41] The Companies cannot, however, in advance enlist the assistance of the court to prevent Moneyweb from engaging in the investigations concerned as this will undoubtedly amount to prior restraint.

[47] To sum up, s 26(2) of the Companies Act provides an unqualified right of access to securities registers. If Parliament is of the view that the right should be qualified in some way, because of concerns relating to abuse of the right of access, it can legislate accordingly – but it has chosen not to do so. For instance, under the old English Companies Act, 1985, anyone could obtain access to a company's share register. However, there was evidence that some people were abusing this right and seeking information in order to harass shareholders. So, since 2006, these rights have been qualified in the English Companies Act, 2006, as the English Parliament sought to provide some protection for members against improper requests by enabling the company to obtain a court order preventing access to the registers if the requester fails the proper purpose test. Accordingly, in terms of s 116(4)(*c*) and (*d*) of the English Companies Act, 2006, a person who requests access to the register of members is required to submit a formal request setting out certain information that includes, inter alia, the purpose for which the information is to be used and whether the information will be disclosed to another person. Once the request has been submitted to the company, it must, within five working days, either comply with the request or apply to court for an order that it need not comply with the request.[42] The court may grant an order if it is satisfied that the inspection or copy is not sought for a 'proper purpose.'[43] Notably, our Parliament has chosen not to follow this route.

[48] As things stand, Moneyweb's 'motive' for seeking access to the Companies' securities registers is simply irrelevant. They have, therefore, failed to demonstrate that

[41] *Midi Television* para 20.
[42] Section 117(1)(a) and (b).
[43] *In re Burry & Knight Ltd* [2014] 1 WLR 4046.

the documents sought in the rule 35(14) notice 'are relevant to a reasonably anticipated issue in the main application'. For these reasons, the appeal must be dismissed.

**Costs**

[49] Moneyweb urges the court to direct the Companies to pay Moneyweb's costs on a punitive scale as their application to compel discovery in terms of rule 35(14) was and remains untenable, and the conduct of the Companies, in that regard, has had the effect of considerably delaying Moneyweb proceeding with the main application and obtaining access to the securities registers. In addition, they urge the court to make clear that conduct that delays or frustrates the exercise of statutory and constitutional rights is not acceptable.

[50] Sight must not be lost of the fact that the Companies had obtained partial relief in the court below. Curiously, the Judge in the court below found that although there was 'a compelling case for discovery':

'I have decided in the exercise of my discretion not to grant a discovery order at this stage. My reasons for this decision are purely practical. If a discovery order is granted, the affidavit would become completely unwieldy.'

He furthermore pronounced upon the interpretation of s 26(2) of the Companies Act in a manner favourable to the Companies – yet he failed to grant their application to compel discovery in terms of rule 35(14). The Companies were, in my view, justified in appealing the judgment of the court below. Accordingly, I incline against granting costs against the Companies on a punitive scale.

[51] The following order is made:

The appeal is dismissed with costs including the costs of two counsel.

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F Kathree-Setiloane
Acting Judge of Appeal

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|---|---|
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