IN THE CONSTITUTIONAL COURT

(REPUBLIC OF SOUTH AFRICA)

CCT Case No.

SCA Case No: 20815/2014

In the matter between:

NOVA PROPERTY GROUP HOLDINGS LTD First Applicant

FRONTIER ASSET MANAGEMENT & INVESTMENTS (PTY) LTD Second Applicant

CENTRO PROPERTY GROUP (PTY) LTD Third Applicant

and

JULIUS PETER COBBETT First Respondent

MONEYWEB (PTY) LTD Second Respondent

and

MANDG CENTRE FOR INVESTIGATIVE

JOURNALISM NPC Amicus Curiae

COVER SHEET

PAGES: 79

VOLUME: 1 of 1

Dated at Johannesburg on this the 30th day of May 2016.

Faber Goertz Ellis Austin Inc
Applicant's Attorney
First Floor, Block D
Saint Andrews Office Park
Meadowbrooke Lane
Epsom Downs, Bryanston
Tel: (010) 590-3378
Email: diaan@fgea.co.za

TO: **The Registrar of the Constitutional Court**

Braamfontein, Johannesburg

AND TO: **Willem De Klerk Attorneys**

Respondents Attorney

Le Val Office Park, North Block

45 Jan Smuts Avenue

Cnr the Valley Road

Westcliff, Johannesburg

Tel: (011) 486-0242

Email: infor@wdklaw.co.za

Agnes 13:03

WILLEM DE KLERK
ATTORNEY
PO BOX 84162
GREENSIDE 2034

AND TO: **Webber Wentzel**

Attorneys for the Amicus Curiae

90 Rivonia Road

Sandton

Ref: D G Roberts / B Strydom

WEBBER WENTZEL

TIME: 12:30

DATE: 30 MAY 2016

SIGNATURE:

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FRONTIER ASSET MANAGEMENT & INVESTMENTS (PTY)	Second Applicant
CENTRO PROPERTY GROUP (PTY) LTD	Third Applicant

And

JULIUS PETER COBBETT	First Respondent
MONEYWEB (PTY) LTD	Second Respondent

And

MANDG CENTRE FOR INVESTIGATIVE JOURNALISM NPC Amicus Curiae

NOTICE OF MOTION

TAKE NOTICE that the applicants hereby apply to the Constitutional Court for an Order in the following terms:

1. The applicants are granted leave to appeal against the Judgment and Order made by the Supreme Court of Appeal on 12 May 2016.

2. The appeal is upheld.

3. Paragraphs 2 and 3 of the order of the court of first instance are set aside and substituted with the following:

> *"2. The respondents (applicants in the main application) are*

directed to comply with the applicants' notice in terms of Uniform Rule 35(11), (12), (13) and (14) and make the documents listed therein available for inspection and copying by the applicants, within a period of 10 (ten) days;

3. *The respondents shall pay the costs of the application, jointly and severally, the one paying, the other to be absolved."*

4. The applicants are awarded costs, such to include those consequent upon the employment of two counsel.

TAKE NOTICE that the accompanying affidavit of Dominique Haese is used in support of this application.

TAKE NOTICE FURTHER that within 10 days from the date upon which this application is lodged, the respondents may respond in writing indicating whether or not they oppose the application for leave to appeal and, if so, the grounds for such

opposition. They must, in that event, appoint a correspondent within the area of the Constitutional Court to accept service of all documents in this matter.

Dated at Johannesburg on 24 May 2016.

Faber Goertz Ellis Austin Inc
Applicant's Attorney
First Floor, Block D
Saint Andrews Office Park
Meadowbrooke Lane
Epsom Downs, Bryanston
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6

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CCT Case No. .....

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In the matter between:

NOVA PROPERTY GROUP HOLDINGS LTD	First Applicant
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CENTRO PROPERTY GROUP (PTY) LTD	Third Applicant

and

JULIUS PETER COBBETT	First Respondent
MONEYWEB (PTY) LTD	Second Respondent

and

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MANDG CENTRE FOR INVESTIGATIVE JOURNALISM NPC

Amicus Curiae

FOUNDING AFFIDAVIT IN SUPPORT OF THE APPLICATION BROUGHT UNDER RULE 19

I, the undersigned,

DOMINIQUE HAESE

do hereby state under oath as follows:

1. I am an adult female businesswoman and a director of the first applicant. I deposed to both the founding and replying affidavits in certain proceedings that were interlocutory the main application that was initially instituted by the respondents in the High Court. I was authorized to launch the interlocutory application in the High Court on behalf of all three applicants and am similarly authorized to launch *this* application for leave to appeal on their behalf as well.

2. The facts contained herein are, unless the context indicates otherwise, within my personal knowledge and belief, and are both true and correct.

3. This is an application for leave to appeal, brought under Constitutional Court Rule 19, against the Judgment and Order made by the Supreme Court of Appeal ("SCA") on 12 May 2016 and reported as *Nova Property Group Holdings v Cobbett* [2016] ZASCA 63. A copy is attached as "**A**". For the sake of completeness, I also attach as "**B**" the judgment of the North Gauteng High Court which was reported as *Cobbett & Another v Nova Property Group Holdings Ltd & Others* [2014] ZAGPPHC 836.

INTRODUCTION

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4. The issue raised in this application for leave to appeal is an extremely narrow one. It concerns the proper interpretation of section 26(2) of the Companies Act No. 71 of 2008 (the "Companies Act") which provides as follows:

> A person... 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.

5. The SCA's judgment made two very important findings in relation to the interpretation of section 26(2). The first was that a person's right of access to a company's securities register is always *unqualified* meaning that a company can never permissibly refuse access to it. And secondly, the *motive* for wanting to inspect the securities register is always entirely irrelevant. The error that belies the judgment, we say, is that the SCA interpreted the statute without any regard to section 39(2) of the Constitution which mandated it to promote the spirit, purport and objects of the Bill of Rights when doing so.

6. It is trite that when interpreting section 26(2) of the Companies Act a court *must* promote the spirit, purport and objects of the Bill of Rights. We say that

this means that it *must* inter alia have regard to a shareholder's and/or a company's constitutional right to privacy when doing so. We accept that, as a general rule, access to a company's securities register *must* be granted in the spirit of openness and transparency. However, we submit that *sometimes* there may be a good reason for denying a member of the general public access to it. Thus, whereas the SCA held that the right is entirely unqualified, we submit that it must be capable of qualification. And, whereas the SCA held that the motive for requiring access to the share register is entirely irrelevant, we say that the motive *may* be relevant because nobody should have access to a securities register if they want to use the information in it for an unlawful or improper purpose.

7. This application for leave to appeal therefore brings the proper interpretation of section 26(2) of the Companies Act into focus. Does it confer, as the SCA has now held, an unqualified right on everybody to access every share register of any company at any time? Or should the right be qualified in certain necessary albeit limited circumstances? We submit that an unqualified right is

too rigid to withstand constitutional muster. The right needs to be flexible enough to accommodate those circumstances where access can and should reasonably be refused.

JURISDICTIONAL MATTERS

8. I have been advised to address three jurisdictional matters, namely (*a*) the constitutional issue implicated in this application for leave to appeal; (*b*) the arguable point of law of general public importance; and (*c*) those considerations which, in the interests of justice, favour the granting of leave to appeal.

The constitutional issue

9. Last month this Court in *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13 at paras 87 to 91 reconfirmed the proper constitutional approach to statutory interpretation. The Court made clear that section 39(2) of the Constitution

"fashions a mandatory constitutional cannon of statutory interpretation" which introduces into our law "a new rule in terms of which statutes must be considered". This new rule "demands the promotion of the spirit, purport and objects of the Bill of Rights". In our view an unqualified right of access to a company's share register neither *promotes* nor *protects* the privacy of people who may, in specific circumstances, require that protection. An unqualified right is therefore out of kilter with the spirit, purport and objects of the Bill of Rights. Thus, the proper interpretation of section 26(2) of the Companies Act raises a constitutional issue. The right to privacy is also a constitutional issue ala *Bernstein v Bester* 1996 (2) SA 751 (CC) and *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC). That a constitutional issue exists was recognised in both of the earlier judgments from the High Court and SCA in *this* matter. This court therefore has jurisdiction by virtue of section 167(3)(*b*)(i) of the Superior Courts Act which provides that it "may decide constitutional matters and issues connected with decisions on constitutional matters".

Arguable point of law of general public importance

10. The new Companies Act is an extremely important statute and section 26 is an extremely important part of it. So too is the issue of whether section 26(2) confers a qualified or unqualified right of access to the information in a securities register. It cannot be gainsaid that the proper interpretation of such an important statutory provision is a matter of great public importance. In the circumstances, we respectfully submit that this Court also has jurisdiction by virtue of section 167(3)(*b*)(i) of the Superior Courts Act which provides that it "may decide any other matter… that raises an arguable point of law of general public importance". 10

Interests of justice

11. We understand that the central issue that *this* Court engages when deciding leave to appeal applications is whether it is in the interests of justice that leave

be granted. We submit that there are three broad reasons why it is in the interests of justice to grant leave in *this* case.

11.1. The first is the importance of the issue. Indeed, the "importance of the issue" has previously been recognised by this Court as being a major factor in persuading it to grant leave to appeal in many cases ala *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC) at para 3 and *Competition Commission v Loungefoam (Pty) Ltd* 2012 (9) BCLR 907 (CC) at paras 25 and 26 to name but two. I have already addressed the importance of the issue in earlier parts of this affidavit.

11.2. Secondly, as was identified by the SCA in paras 9 and 10 of its judgment in *this* case, there have been a number of conflicting judgments produced by the High Court – at least four of them – about the proper interpretation of section 26(2), namely *La Lucia Sands Shareblock Ltd & Others v Barkhan & Others* 2010 (6) SA 421 (SCA), *Bayoglu v Manngwe Mining (Pty) Ltd* 2012 JDR 1902 (GNP), *Basson v*

On-Point Engineers (Pty) Ltd 2012 JDR 2126 (GNP) and *M&G Centre for Investigative Journalism v CSR-E Loco Supply (Pty) Ltd* (unreported). Section 17(1) of the Superior Courts Act renders it desirable to have an appeal court dispositively pronounce on the matter where more than one interpretation of a statute exists. Indeed, we submit that it is in the interest of justice that *this* Court and not the SCA has the final word on the meaning of this very important statutory provision given that its meaning is informed by constitutional considerations.

11.3. Thirdly, there are reasonable prospects of success, a relevant factor to be considered in the basket of items that inform the interests of justice. The "prospects of success" in an appeal has played a role in previous decisions to grant leave ala *Loungefoam* (supra) at paras 25 and 26, *De Reuck* (supra) at para 3, *National Union of Metalworkers of South Africa v Bader-Bop (Pty) Ltd* 2003 (3) SA 513 (CC) at para 17,

National Education Health & Allied Workers Union v University of Cape Town 2003 (3) SA 1 (CC) at para 25 and many others.

THE MERITS OF THE APPEAL

12. The first respondent ("Mr Cobbett") is a financial journalist who regularly writes for the second respondent ("Moneyweb"). Mr Cobbett has, since July 2013, being investigating the shareholding structures of the three applicant companies. And so, on 24 July 2013, he sent a written request to each of them asking for access to their securities registers. The companies, suspicious of Mr Cobbett's motives, and having previously been on the receiving end of less than objective journalistic reporting by him, expressed their fears that he wanted access to their share registers for an unlawful and/or improper purpose. And so his request was refused. On 20 September 2013, Mr Cobbett launched an application to the North Gauteng High Court seeking an order to compel the companies to produce their securities registers. Instead of delivering an opposing affidavit to Mr Cobbett's application, we requested

documents from him, using the discovery provisions in Uniform Rule 35, given that we had reason to believe that the documents would demonstrate, upon their production, that Mr Cobbett and Moneyweb's motive for requesting access to the securities registers was unlawful and/or improper.

13. Mr Cobbett and Moneyweb refused, telling us that their purpose for wanting to see the securities registers is irrelevant. We had little option but to launch an interlocutory application to compel the production of those documents because we believed that a request for access to a securities register animated by an unlawful or improper purpose justifies a refusal to access the register. In opposing our interlocutory application, Mr Cobbett and Moneyweb persisted with the view that section 26(2) of the Companies Act conferred upon them an unqualified right of access to the companies' securities registers and that their purpose for requiring access is irrelevant.

14. The judgment of the SCA is a judgment granted in *that* interlocutory application (in other words in our application for access to the documents that

will establish Mr Cobbett's true purpose). The SCA agreed with Mr Cobbett and Moneyweb that the right of access to a company's securities register is an absolute and *unqualified* one and that the requestor's purpose for requiring access is *irrelevant*. We respectfully disagree with the SCA's finding. Therein lies the reason for this appeal.

15. Our case is that an unqualified right of access is inconsistent with the spirit, purport and objects of the Bill of Rights as informed, most notably, by the constitutional right that people have to privacy. Courts around the world frequently quote Justice Brandeis in the US Supreme Court in *Olmstead v United States* 277 US 438 at 478 when emphasizing the importance of the right to privacy in a constitutional liberal democracy that seeks to "protect peoples beliefs, thoughts and emotions". Justice Brandeis is also quoted as saying that "the right to be left alone is the most comprehensive of rights and the most valued by civilized men".

16. The most thorough judgment from the South African courts dealing with "privacy" is *Bernstein v Bester* 1996 (2) SA 751 (CC) in which *this* Court held that "the scope of a person's privacy extends to those aspects in regard to which a legitimate expectation of privacy can be harboured". A central issue in *this* appeal is therefore whether a *subjective* expectation is harboured (by companies) that the required information (details of their shareholders) will be kept confidential and whether this expectation can be said to be *objectively* reasonable. There are many reasons why a company and its board of directors may not wish to have the identity of its shareholders disclosed. A company's reputation or brand could be negatively impacted depending who holds its shares and depending on the public's perception of a particular shareholder. Consider a hypothetical sports company which enjoys the loyal support of the general athletics-loving public. The public do not know who the company's shareholders are. Suppose that they one day learn that one of its shareholders is a notorious public enemy figure, perhaps a fallen hero who incurred the ire of the people after murdering his model girlfriend. A large segment of the general public, some of whom may have been happy customers of that

company, could quite conceivably wish to dissociate themselves from the company after the disgraced murderer is disclosed as being a part-owner. The company would, in a case like that, suffer a loss through no fault of its own and for a reason entirely unconnected with the company itself.

17. Shareholders, too, may harbour a subjective expectation that their identities will be kept private. This expectation may also be objectively reasonable. Indeed, there are many reasons why a person may not wish to have his or her identity as a shareholder in a particular company disclosed. One of these may be the unavoidable association between one's shareholding and one's wealth. For the most part, people subjectively expect that details of their financial affairs and wealth will remain private. A person's wealth, what they can afford, and their credit-worthiness are all deeply personal aspects of a person's private life. They may impact on a person's good name and reputation and how other people perceive them.

18. Reputation and dignity live closely with privacy in the family of personality rights that receive protection from unwarranted public scrutiny. Thus, a person's credit-worthiness in the context of blacklisting by a credit bureau, as an example, implicates both dignity and privacy. Just as money in the bank is an indication of a person's wealth, so too is the number of shares that a person has in a company or the number of companies that a person has shares in.

19. Most people do not want their wealth to be known and they have an expectation that their assets will not become the subject of public knowledge and scrutiny. But there is another reason as well. In *Bernstein v Bester* (supra) at para 65 this Court held that "the right to privacy is based on the notion of what is necessary to have one's own autonomous identity". Again, there are reasons why a shareholder may wish to retain his own autonomous identity. Some people may not want to have certain associations made publically known because disclosure may, rightly or wrongly, create a perception about their religious, political, or moral beliefs.

20. The information contained in a company's securities register is information of a personal nature. It contains the names and identities of individual people and will tell those who read it where they live and how they can be contacted. It may give the reader a sense of who the person affiliates with on a business level and may even tell the general public what kinds of political, moral or religious views the person holding the shares probably has. These are deeply private matters.

21. Companies need to take the privacy of their shareholders seriously. Where people have a genuine claim to privacy then companies have a corresponding obligation not to disclose their *personal information* or to be careful when doing so. The right to privacy embraces all of the interests that people have in restricting the collection, use and dissemination of their personal information. Informational privacy is to be regulated by the Protection of Personal Information Act of 2013 ("PoPI") which, although not yet fully in force, will require that the processing of personal information be *fair* and *lawful*. PoPI is the product of careful consideration – not only of what our domestic

constitutional order requires, but indeed what international law requires of us as a State.

22. The contents of PoPI contribute to our understanding of when a person can legitimately claim an infringement of privacy in the context of his or her own personal information. Section 2(*a*) describes PoPI's purpose as being *inter alia* to "give effect to the constitutional right to privacy by safeguarding personal information... and balancing the right to privacy against other rights, particularly the right of access to information and protecting important interests including the free flow of information."

23. The phrase "personal information" is defined in section 1 to mean "information relating to race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person... as well as any identifying number, symbol, email

address, physical address, location information, online identifier or other assignment particular to the person".

24. According to section 3(2)(*b*) "if any other legislation provides for conditions for the processing of personal information that are more extensive than those set out in chapter 3 of PoPI then the more extensive conditions prevail." What this means, we submit, is that the protection of personal information offered by PoPI will prevail over the manner in which personal information is processed under any other statute, including the provisions of section 26(2) of the Companies Act. Most significantly, PoPI affords a person an opportunity to "object, on reasonable grounds, to the processing of his or her personal information" subject to the exclusions contained in section 6 which permit disclosure necessary to protect national security or to prevent the financing of terrorist activities and/or money laundering.

25. Thus, the dissemination of personal information – like the kind of information contained in the securities register of a company – in order to pass

constitutional muster needs to respect, protect and promote *privacy* in appropriate cases. That is not to say that personal information can *never* be disseminated to the general public but only that when it is disseminated, it must be disseminated in a manner that gives adequate protection to the constitutional right. An *unqualified* right of access to personal information is not consistent with the aims and objectives behind PoPI. Those aims and objectives can only be realised if a normative enquiry is permissible, such to include an enquiry into the purpose for which a person wants to see the securities register and upon evaluating whether such purpose is *lawful* and *proper*. The enactment of PoPI is therefore, like section 14 in the Bill of Rights, relevant when interpreting the permissible bounds of section 26(2) of the Companies Act.

EVALUATING THE SCA JUDGMENT

26. The SCA judgment starts from the premise that the right of access to information in section 32 of the Constitution is more important than the right

to privacy in section 14 when it comes to interpreting section 26(2) of the Companies Act. Although we do not discount the importance of the right access to information in a liberal democracy, we say that the right to privacy is also important in a liberal democracy. A court interpreting section 26(2) of the Companies Act must take *both* of these two competing rights into account. In our respectful submission, the SCA did not do this. Instead it elevated the right of access to information and subverted the right to privacy. This Court has often explained the need to balance competing constitutional rights against one another. Fundamental to *this* case is the notion that if one accepts that the right of access to information (in section 32 of the Bill of Rights) needs to be balanced against the right to privacy (in section 14 of the Bill of Rights) then considerations of privacy manifestly play a part; and if that is so then the right of access to a company's securities register under section 26(2) of the Companies Act cannot be an unqualified right. It must *ipso facto* be qualified by privacy considerations.

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27. A central feature of the SCA judgment is its reliance on the intention of the legislature when drafting section 26(2). The judgment is populated with references to the Legislature and/or Parliament intending the right to be unqualified. This is especially evident in paras 26 to 38 of the judgment. It is here, with respect, that the SCA loses sight of the fact that, in a constitutional democracy such as ours, the Judiciary is specifically charged with the express task of protecting constitutional rights no matter what Parliament may have intended. We no longer have a system of parliamentary sovereignty. That this short coming permeates the entire SCA judgment is most apparent from para 47, which we quote in full, because it makes the point so strongly. This is how the SCA concluded its judgment: 10

> To sum up, section 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

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old English Companies Act 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 *new* English Companies Act, 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 register if the requestor fails the 'proper purpose' test. Accordingly, in terms of section 116(4)(*c*) and (*d*) of the *new* English Companies Act, 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 5 working days, either comply with the request or apply to court for an order that it need not comply with the request. The court may grant an order if it is

satisfied that the inspection or copy is not sought for a proper purpose. Notably, our Parliament has chosen not to follow this route.

28. Our criticism of para 47, the conclusion to the SCA judgment, is threefold. Firstly, unlike the English legal order, South Africa's Parliament is no longer sovereign and may no longer legislate as it chooses. It can now, under our post-1994 system of Constitutional Supremacy, only enact laws that are constitutionally compliant. The SCA therefore put too much emphasis on Parliament's intention and not enough on constitutional compliance.

29. Secondly, unlike the position in England, South African courts do not have to accept as valid the laws enacted by Parliament. In fact, unlike English courts, South African courts are mandated to ensure that every law is compliant with the Constitution and, if found not to be, then they are constitutionally bound to declare such law invalid to the extent of its inconsistency. This duty

extends to section 26(2) of the Companies Act as well, irrespective of what Parliament.

30. Thirdly, perhaps more subtly, the English company law experience shows us that other developed legal systems readily accept that the right of access to a company's share register should not be unqualified. Thus, as the quoted extract makes clear, the new company law in England expressly recognised the need to qualify the right of access. We respectfully submit that the need for a qualified right also exists in our company law.

CONCLUSION

31. In conclusion, we respectfully submit that, when viewed through a constitutional prism, section 26(2) of the Companies Act cannot permissibly confer an unqualified right on the general public to access a private company's share register. The right must be capable of limitation in certain circumstances albeit exceptional ones. We therefore accept that, generally, a

company must produce its securities register; but we also recognise that there *may* be times when it is entirely reasonable for it to refuse to do so. The right of access to a share register, like any other right in our law, cannot be an absolute one. If it is, then, as the High Court observed, injustices or absurdities may arise.

32. If this Court is with us and decides that the right of access in section 26(2) of the Companies Act is indeed a qualified one and that the requestor's purpose *is* relevant then our appeal must succeed. The practical effect of that will be a return to Mr Cobbett's application launched on 20 September 2013 in which he sought to compel the companies to provide him with access to their securities registers. We have not yet filed an opposing affidavit in *that* application. We have not done so because Mr Cobbett has not yet furnished us with the documents that will shed light on his true purpose. It is only one we have seen those documents that we can either accede to his request or else to oppose it. In other words, if we are successful with this appeal then Mr

Cobbett and Moneyweb will be required to discover the documents that we need in order to take an informed decision.

33. In all of the circumstances referred to above, we respectfully request that leave to appeal be granted and that, if it is, we be afforded an opportunity to argue that the SCA's judgment was wrong and that our appeal should be upheld.

DOMINIQUE HAESE

Thus signed and sworn to before me at on this day of May 2016, the deponent having acknowledged that she knows and understands the contents of this affidavit, that she has no objection to taking the prescribed oath and that she considers the oath as binding on her conscience.

COMMISSIONER OF OATHS
Full names:
Business address:
Designation:
Area/office:

JOSEPH MURRAY KOTZÉ
COMMISSIONER OF OATHS
PRACTISING ATTORNEY (RSA)
VENN & MULLER ATTORNEYS
VENN & MULLER SUITE
105 CLUB AVENUE
WATERKLOOF HEIGHTS
PRETORIA. 0181

A33

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 20815/2014

In the matter between:

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

and

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

and

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.

ORDER

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.

JUDGMENT

Kathree-Setiloane AJA (Maya DP, 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),

[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.