

Corporate transparency and the right to information

Whether s26(2) of the Companies Act (71 of 2008) confers an absolute and unqualified right on the public to access any profit company's securities register and, accordingly, shareholders' personal information, has been the subject of much debate since the Act first came into force on 1 May 2011. This issue, which has a material impact on aspects such as corporate transparency and freedom of the press, has now, at least for the time being, been resolved by the Supreme Court of Appeal (the SCA) in *Nova Property Group Holdings Ltd v Cobbett* (20815/2014) [2016] ZASCA 63 (12 May 2016) (*the Nova Appeal*).



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In summary, the SCA found that s26(2) of the Act confers an unqualified right on a person, despite not having a beneficial interest in any securities issued by a profit company, to inspect and copy such a company's securities register. In other words, the reasons or motives of the person seeking access to the securities registers are wholly irrelevant and the court does not have a discretion to refuse such a person access. In terms of s26(2), the same right to access applies to member registers of non-profit companies and directors' registers of profit and non-profit companies.

In addition, and hand-in-hand with this, the SCA made a finding on a further well debated issue – whether the right to access as provided for in s26(2) is subject to the provisions and limitations as set out in the Promotion of Access to Information Act (20/2000) (PAIA). In response to this question, the SCA found that, in contrast to the *obiter dictum* in *La Lucia Sands Share Block Ltd & Others v Barkhan & Others* 2010 (6) SA 421 (SCA), s26(2) functions independently from PAIA and the limitations and grounds for refusing access as provided therein do not apply to s26(2). In other words, PAIA is an alternative mechanism for requesting access to a company's securities register.

The *Nova Appeal* was an appeal to a judgement handed down in an unreported interlocutory application to compel (the

"Interlocutory Application") brought by Nova Property Group Holdings Ltd and two other private entities against two financial journalists, Moneyweb (Pty) Ltd and Julius Corbett. The companies sought to compel the journalists to provide them with certain documents, requested in terms of Rule 35(14) of the Uniform Rules of Court, which the companies claimed to be relevant to the issues in dispute in a pending application before the High Court, Gauteng Division, Pretoria (the "Main Application"). According to the companies, the documents would provide them with a defence to the Main Application. The Main Application was brought by the journalists to compel compliance by the companies with a request to inspect and copy the companies' securities registers, in terms of s26(2). The companies refused to provide the journalists access on the basis that they were allegedly not engaged in any legitimate journalistic endeavours but rather in a sustained vendetta against the companies and those who control them, with the sole aim of discrediting them. In other words, the companies alleged that the journalists sought access to their respective security registers for an unlawful purpose and wished to expose these motives through the documents requested in terms of Rule 35(14).

The journalists argued that their motives were irrelevant for purposes of the relief sought in the Main Application and, in other words, for gaining access to the securities registers. The court *a quo* dismissed the portion of the Interlocutory Application which sought compliance with the companies' request in terms of Rule 35(14), without making any final findings in relation to the interpretation of s26(2), as according to the court this aspect was to be dealt with in the Main Application. The court *a quo* noted, however, that it would be hesitant to find that s26(2) has created an absolute right in favour of the public, and was of the view that the court should have a discretion to refuse access. It proceeded to dismiss the order for *"purely practical grounds"*. The companies accordingly took this judgement on appeal to the SCA.

The SCA found that in order to determine whether the documents requested by the companies in terms of Rule 35(14) were relevant to the issues in dispute in the Main Application, it first had to determine whether the reasons the journalists sought access to the companies' securities registers were relevant and, accordingly, whether s26(2) confers an unqualified right on the public.

Uncertainty first arose in respect of s26(2) as a result of two conflicting high court judgements: *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* (23477/2013) (8 November 2013). The SCA, in the *Nova Appeal*, agreed with the *M&G Centre* case and found that, unlike s113 of the old Companies Act (61 of 1973), there is no provision in s26 that makes a court's decision to compel compliance with the section discretionary, regardless of whether a request for access is considered *"reasonable"*. It was further held that the legislature expressly selected not to enact a provision equivalent to Old Companies Act s113(4), instead it strengthened the access provision by making clear in s26(2) that it conferred a *"right"* of access, without qualification and not subject to a discretionary override.

In making its decision, the SCA emphasised the importance of freedom of information and expression, and the fact that an unqualified right of access to companies' securities registers is essential for effective journalism and informed citizenry. It held that preventing the press from reporting fully and accurately not only violates the rights of the journalist, but also violates the rights of people who rely on the media to provide them with *"information and ideas"*.

In addition to this, corporate transparency played a fundamental role in the SCA's decision. The court held that the Act gives specific recognition to a culture of openness and transparency in s7. In particular, it provides that one of the purposes 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 Act is enacted with precisely these objectives in mind. It recognises that the establishment of a company is not purely a private matter, and may impact the public in several ways. The Act 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.

The SCA's decision did, however, leave the door open for s 26(2) to be challenged on a constitutional level for potentially contravening the right to privacy and dignity of persons' whose names appear on documents being accessed. Notwithstanding this, the SCA expressed its disagreement with an argument of this nature, and held that the privacy and dignity rights of shareholders are minimally implicated in the right of access conferred by s26(2). It was further held that the Regulations (in particular 32 (2) and (6)) contain sufficient protection for shareholders' rights and personal information on the basis of confidentiality, including their identity numbers and email addresses, and that accordingly there is very little room for abuse. What was not considered, however, was the effect that the Protection of Personal Information Act (4/2013) (POPI) will have on the public's right to access under s26, once it becomes fully operational.

The *Nova Appeal* is significant as it has brought about some form of clarity and certainty on two much debated issues. Firstly, in placing fundamental importance on corporate transparency, the right to information and freedom of the press, it has entrenched the principle that s26 confers an absolute and unqualified right on the public to access a company's securities register, and accordingly, the personal information of shareholders. In addition, the *Nova Appeal* set the record straight by finding that s26 is not subject to the provisions and limitations of PAIA. The right to information (as well as the rights accompanying it) and the right to privacy are both constitutionally entrenched rights which, much like s26, have

also been the subject of controversy and debate. It is, however, unlikely that the *Nova Appeal* will remain perpetually unchallenged under the Constitution or even perhaps a fully operational POPI.

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