IN THE SUPREME COURT OF APPEAL

Appeal case number: 20815/2014

High Court case number: 61219/2013

In the appeal between:

NOVA PROPERTY GROUP HOLDINGS LIMITED	First Appellant
FRONTIER ASSET MANAGEMENT & INVESTMENTS (PTY) LIMITED	Second Appellant
CENTRO PROPERTY GROUP (PTY) LIMITED	Third Appellant

and

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

RESPONDENTS' HEADS OF ARGUMENT

INTRODUCTION

1 This appeal arises from the attempts of the respondents (Cobbett and Moneyweb) to exercise their statutory right to access the securities registers of the three appellants (the Companies).

2 Cobbett is a financial journalist who specialises in the investigation of illegal investment schemes.[1] Moneyweb is a publisher of business, financial and investment news.[2] Cobbett was commissioned by Moneyweb to investigate the shareholding structure of the Companies and to write articles in this regard.[3]

3 On 24 July 2013, Cobbett sent requests to the Companies for access to their share registers.[4] He did so in terms of section 26(2) of the Companies Act 71 of 2008. When these requests were met with spurious refusals,[5] Moneyweb launched an application in the High Court to compel the Companies to provide access. We refer to this as 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. Instead, it has

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1 FA, v 1 p 6 para 4

2 FA, v 1 p 7 para 7

3 FA, v 1 p 8 para 14

4 FA, v 1 p 8 para 15

5 Annexures JC1 to JC3, v 1 p 51 - 55

been caught up in a series of delaying tactics adopted by the Companies in an effort to frustrate Moneyweb's exercise of its statutory rights.

4.1 The Companies did not file an answering affidavit to the main application. Instead, they proceeded to issue notices in terms of Rules 35(12) and Rules 35(11)-(14) in which they sought copies of twenty different sets of documents.

4.2 The Companies ostensibly sought these documents for purpose of interrogating the "*real motives*" of Moneyweb and Cobbett and demonstrating that they are engaged through "*negative reporting*" in a "*vendetta for the sole purpose of discrediting [the companies] and undermining [their] integrity*". It was said that this would provide a defence to the main application.[6]

4.3 The High Court duly ordered compliance with the Companies' Rule 35(12) notice. However, it dismissed the Companies' compelling application in respect of their notice in terms of Rule 35(11)-(14).[7]

4.4 The Companies were not content to proceed on the basis of the documents obtained pursuant to their partial victory. Instead, they insisted on appealing the High Court's dismissal of their compelling application to this Court.

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[6] FA in compelling application, v 1 p 63-64 paras 6-9; p 85-86 para 70

[7] Judgment, v 3 p 271x§-288

5 In what follows, these heads of argument address the following two main submissions.

5.1 First, the order of the High Court refusing to grant the compelling order sought by the Companies is not appealable.

5.2 Second, and in any event, the contentions of the Companies in relation to the compelling order are unsustainable. There was no basis for the compelling order to be granted. In particular:

5.2.1 The Companies' notice is far too broad and vague to comply with the requirement in Rule 35(14) that it seek a "*clearly specified document*".

5.2.2 In any event, on a proper interpretation of section 26(2) of the Companies Act, the documents sought by the Companies are simply irrelevant to the main application. Section 26(2) of the Companies Act does not permit a company to refuse access on the basis of the motive of the requester. Yet, that is precisely the purpose for which the Companies say that they require the documents concerned.

5.2.3 Moreover, the high-watermark of the companies' ostensible concerns is that Moneyweb will engage in "*negative reporting*" on the basis of the share registers. The Companies may have various remedies available to them if this occurs – but they cannot use this

fear as a basis to prevent Moneyweb accessing the share registers at all as they now seek to do.

THE ORDER OF THE HIGH COURT IS NOT APPEALABLE

6 In the High Court, the Companies sought to compel the production of various documents.

6.1 First, they sought to compel production of the documents mentioned in their notice in terms of Rule 35(12). The High Court granted this order and this issue forms no part of the present appeal.

6.2 Second, they sought to compel production of the documents mentioned their its notice in terms of Rules 35(11)-(14). The High Court dismissed this part of the application and it is this which forms the subject-matter of this appeal.

7 The first question then is whether the dismissal of an application to compel production of certain documents is appealable at all.

8 That is dealt with squarely by the judgment of the Appellate Division in *Zweni.*[8] In that case, similar to this one, the appeal arose from the dismissal of an application to compel production of a discovered document.

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[8] Zweni v Minister of Law and Order 1993 (1) SA 523 (A)

9 In the context of a trial for assault by the police, the plaintiff had sought to compel production of a police docket. The court a quo had dismissed the application to compel. The Appellate Division held that this was not appealable in terms of section 20 of the Supreme Court Act 59 of 1959.

9.1 In its judgment, the Court held that an appealable order, as a general principle, had three attributes:

> *"first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings … The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief".*[9]

9.2 The Court emphasised that whether the order at issue placed the party at a disadvantage in the ongoing proceedings was irrelevant to the question of appealability:

> *"The fact that a decision may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability … To illustrate: the exclusion of certain evidence may hamper a party in proving his case. That party may notionally be able to prove it by adducing other evidence. In that event an incorrect exclusion would not necessarily have an effect on the final result. In deciding upon the admissibility of evidence a court is not called upon to speculate upon or divine (with or without the assistance of the parties) the ultimate effect of its decision on the course of the litigation."*[10]

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[9] At 532J - 533B

[10] At 533C-F

9.3 The Court then concluded that the dismissal of the compelling application was not appealable – it did not meet any of the three requirements for appealability.[11]

10 The decision in *Zweni* therefore makes quite clear that an order dismissing an application to compel production of a document is not appealable. Yet that is precisely the nature of the present appeal.

11 The present appeal also does not meet the requirement for appealability set out in the recently enacted Superior Courts Act 10 of 2013.

11.1 Section 17(1)(c) of that Act provides:

> *"Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*
>
> *….*
>
> *(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."*

11.2 The present appeal does not dispose of all of these issues in the main application. It also does not lead to a just and prompt resolution of the real issue between the parties – that is whether the securities registers should be made available to Moneyweb.

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[11] At 536B-C

THE COMPELLING APPLICATION IS WITHOUT MERIT

12 The appeal must also fail on its merits. The compelling application is not sustainable in a series of respects.

Failure to request "clearly specified documents"

13 The Companies now appear to accept that the compelling applications must be brought within Rules 35(13) and (14).[12] The Companies must therefore establish:

13.1 First, exceptional circumstances justifying the discovery proceedings being applicable, despite the proceedings being an application. In this regard, our courts have repeatedly stressed that discovery in application proceedings is "*a very, very rare and unusual procedure to be used … only in exceptional circumstances*".[13]

13.2 Second, that the requirements of Rule 35(14) are met. 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*".

14 Our courts have repeatedly emphasised the limits of Rule 35(14).

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[12] See, for example the Companies' heads of argument at paras 16-18. The original notice also referred to Rules 35(11) and (12), but it appears that reliance is no longer placed on these sections.

[13] Moulded Components & Rotomoulding SA (Pty) Ltd v Coucourakis 1979 (2) SA 457 (W) at 470.

14.1 In *Cullinan Holdings,* the Court held:

> *"Myns insiens skep Reel 35(14) nie 'n metode waardeur 'n gedingsparty deur gebruikmaking van generiese omskrywings 'n net kan knoop waarmee vir halfbekende dokumente gevis kan word nie. Dit is 'n remedie wat vir besondere omstandighede geskep is. Dit vereis die oproep van 'n spesifieke dokument waarvan die applikant kennis dra en wat hy presies kan omskryf. Slegs dan kan hy deur gebruikmaking van Reel 35(14) die normale blootlegging van Reel 35(1) vooruitloop."*[14]

14.2 This approach was subsequently endorsed in both *Quayside Fish Supplies*[15] and *MV Urgup.* In the latter case, the Court emphasised that Rule 35(14) does not "*afford a litigant a licence to fish in the hope of catching something useful"*.[16]

14.3 A mere reading of the Companies' notice[17] makes clear that they have not complied with these requirements. The notice consists of eight separate categories of documents, all described in extremely broad and non-specific terms. For example:

> *"All letters, emails and correspondence generally sent by any of the Applicants to and/or received by any of the Applicants from any person practicing or having practiced in or associated with the insolvency related practitioning fraternity in South Africa, relating to any of the affairs of the Sharemax Group and/or any company having formed part of the said Sharemax Group, and/or Sharemax Investments, and/or any director or functionary of any of the companies referred to in this paragraph 5 (including emalls In regard to any of the above and any matter referred to in this*

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[14] Cullinan Holdings Ltd v Mamelodi Stadsraad 1992 (1) SA 645 (T) at 648F-G.

[15] Quayside Fish Supplies CC v Irvin & Johnson Ltd 2000 (2) SA 529 (C) at 533H–534G

[16] MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd 1999 (3) SA 500 (C) at 515C-H

[17] Annexure DH4, v 1 p 101-105

paragraph 5, which the Applicants were copied in on, emanating from any third party).”[18]

and

“*Each and every news article or other publication published by way of whatever medium (including the Internet) of and concerning the affairs of-*

8.1 the Sharemax Group and/or any company having formed part of the said Sharemax Group, and/or Sharemax Investments, and/or any director or functionary of any of the companies referred to in this paragraph 8.1; and

8.2. any of the Respondents and/or any company forming part of the group of companies controlled by the First Respondent, and/or any director or functionary of any of the companies referred to in this paragraph including, specifically, Ms Dominique Haese and Mr Connie Myburgh;

whether such article or publication emanates from the Applicants or from a media house that has relied on the Applicants as a source of information.”[19]

15 On this basis alone, the compelling application cannot succeed.

The effect of section 26(2) of Companies Act

16 There is a further and more fundamental reason why the compelling application cannot succeed. Rule 35(14) requires the companies to demonstrate that the documents sought are “*relevant to a reasonably anticipated issue*” in the main application. In the context of this matter, that means that the Companies must demonstrate that the documents are relevant to a tenable ground of opposition to the main application.

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[18] Annexure DH4, v 1 p 103-104 para 5

[19] Annexure DH4, v 1 p 103-104 para 8

17 In this case, the Companies seek to compel discovery of these documents for the purpose of interrogating the "*real motives*" of Moneyweb and Cobbett.[20] But as we demonstrate in what follows, the motives of Moneyweb and Cobbett are simply irrelevant to the main application. Moneyweb and Cobbett are entitled to an order compelling compliance with section 26(2) – whatever their motives. The documents are therefore not relevant to a reasonably anticipated issue in the main application.

18 Before turning to the language of section 26, it is necessary to bear in mind what our courts have said about the role of companies in our society and the obligations of disclosure that arise from the Constitution in this regard.

19 This Court and the Constitutional Court have recognised that the manner in which companies operate and conduct their affairs is not a private matter.

19.1 In *Bernstein*,[21] the Constitutional Court made the position plain:

> *"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 mobilization 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 exists. Nor would such an expectation be*

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[20] FA in compelling application, v 1 p 63-64 paras 6-8; p 85-86 para 70

[21] Bernstein and Others v Bester NO and Others 1996 (2) SA 751 (CC) at para 85

recognised by society as objectively reasonable. This applies also to the auditors and the debtors of the company."

19.2 This approach has been repeatedly endorsed. This Court, for example, cited this passage in *La Lucia Sands*[22] in dealing with section 113 of the Companies Act 61 of 1973, the predecessor to section 26 of the current Companies Act.

19.3 Similarly, in his separate concurring judgment in *Coetzee*, 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*".[23]

19.4 Most recently, in the *Arcelor Mittal* case,[24] 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 governments and in relation to corporations*" and that Parliament, driven by Constitutional imperatives, had rightly seen fit to cater for this in its legislation.

20 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 numerous ways. It therefore seeks to impose

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[22] La Lucia Sands Share Block Ltd and Others v Barkhan and Others 2010 (6) SA 421 (SCA) at para 21

[23] S v Coetzee and Others 1997 (3) SA 527 (CC) at para 98

[24] Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance 2015 (1) SA 515 (SCA) at para 1

strong rights of access in respect of very specific types of information held by companies. The section must be interpreted in accordance with this purpose.

21 Section 26(1) confers a right of access to information in respect of various kinds of information to a person who holds or has a beneficial interest in any securities issued by a profit company, or who is a member of a non-profit company. It is not relevant to these proceedings.

22 Section 26(2) then confers a narrower and more specific right of access on all other 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."*
>
> (emphasis added)

23 There are two aspects of section 26 that require particular emphasis.

24 The first concerns the interaction between section 26(2) and the provisions of PAIA.

24.1 Section 26 makes expressly clear that the right conferred by section 26(2) is additional to the rights conferred by PAIA and does not need to be exercised in accordance with PAIA.[25]

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[25] The tentative obiter dictum by this Court in La Lucia Sands Share Block Ltd and Others v Barkhan and Others 2010 (6) SA 421 (SCA) at para 18 to the opposite effect is incorrect.

24.2 Section 26(7) is quite plain. It 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."*
>
> (emphasis added)

24.3 Similarly, in respect of the process to be followed, section 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)."*
>
> (emphasis added)

24.4 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. It therefore had to lay down general rules to balance the competing interests at stake by means of threshold requirements,[26] grounds of refusal[27] and public interest overrides.[28]

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[26] For example, section 50 of PAIA

[27] For example, sections 63 to 69 of PAIA

[28] For example, section 70 of PAIA

24.5 By contrast, section 26(2) confers a specific right in respect of one type of information only – securities registers and directors registers. Parliament understandably 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 this might entail. Instead, as we demonstrate below, it conferred an unqualified right of access in this regard and intended that this right be capable of prompt vindication.

24.6 Notwithstanding this and the clear wording of sections 26(4) and 26(7) of the Companies Act, the Companies place considerable reliance on PAIA.

24.6.1 They first did so in their initial response to Cobbett's requests. The Companies each sought to contend that the right asserted by Cobbett was "*qualified by and subject to the provisions of*" PAIA and that the person requesting the information had to "*demonstrate that the information is required for the purpose of exercising or protecting a right*".[29]

24.6.2 They continue to do so in their heads of argument in this Court. They devote four pages to PAIA and contend that they are entitled to argue at the main application that the refusal of access to Moneyweb "*is justified on the basis of the provisions of section 68 of PAIA*".[30]

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[29] Annexure JC 21, v 1 p 50 para 3; Annexure JC22, v 1 p 52 para 3; Annexure JC23, v 1 p 54 para 3

[30] Companies' heads of argument at paras 23 – 33, especially 33

24.7 Yet the Companies fail to explain how this reliance on PAIA can be sustainable in light of the clear language of sections 26(4) and 26(7). It does not mention these sections at all.

24.8 The Companies' reliance on PAIA must therefore be rejected. It certainly cannot render the documents sought in the Rule 35(14) notice relevant to the main application.

25 The second aspect of section 26(2) that requires attention is the nature of the right conferred by it and the rest of section 26.

25.1 Unlike its predecessor, section 113 of the 1973 Companies Act, section 26(2) expressly confers a "*right*" of access in respect of the share registers.

25.2 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*".

25.3 There is nothing in sections 26(2) to 26(8) 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.

25.4 The only sub-section which mentions reasonableness is section 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."*

25.5 The decision to include a reasonableness defence in this sub-section is perfectly understandable. Parliament was presumably anxious to avoid creating a strict liability offence,[31] possibly because of the constitutional difficulties that this might have raised.[32]

25.6 However, what the Companies seek to do is import the section 26(9) reasonableness qualification back into section 26(2) to limit the right it confers.[33] There is no warrant for this. If Parliament had wanted to limit the section 26(2) right, it would have done so. Instead, it enacted an unqualified right in section 26(2) read with 26(4) and introduced a reasonableness qualification only in respect of the criminal offence created by section 26(9).

25.7 The failure to include an equivalent qualification of reasonableness in sections 26(2) and 26(4) makes clear that that, outside of the criminal offence created, there is no similar restriction.

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[31] M & G Centre for Investigative Journalism v CSR-E Loco Supply (Pty) Ltd NGHC case number 23477/2013 (v 2 p 177-185) at para 10

[32] See, for example: S v Coetzee and Others 1997 (3) SA 527 (CC) at paras 95 and 162

[33] Companies' heads of argument, paras 35 - 36

26 We therefore submit that section 26(2) confers an unqualified right on members of the public and the media to obtain access to share registers.[34]

27 This means that the "*motive*" with which the requester seeks access to the information concerned is irrelevant. Indeed, in *La Lucia Sands* this Court made clear that under section 113 of the previous Companies Act a company could not require disclosure of the reason for the request to access the share registers:

> *"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 ChD 669 at 671 - 672 and Labatt Brewing Co Ltd v Trilon Holdings Inc 41 OR (3rd) 384 para 6. Meskin et al Henochsberg on the Companies Act (above), with reference to Dickson, state the following:*
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> > *'But in any event the company cannot require the disclosure of the reason for the inspection as a condition precedent to allowing it…."*[35]

28 The High Court took the same approach to section 26 in the *Basson* matter.[36]

29 What remains then is this Court's apparent acceptance in *La Lucia Sands* that, under section 113 of the 1973 Companies Act, a court had a discretion to decline to make an order requiring access where the information were sought for an unlawful purpose.

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[34] M & G Centre for Investigative Journalism v CSR-E Loco Supply (Pty) Ltd NGHC case number 23477/2013 (v 2 p 177-185) at para 10

[35] La Lucia Sands Share Block v Barkhan 2010 (6) SA 421 (SCA) at para 10

[36] Basson v On-Point Engineers (Pty) Ltd (64107/11) [2012] ZAGPPHC 251 (7 November 2012) at para 10.1.

29.1 In reaching that conclusion, this Court relied on the decision of the Court of Appeal in *Pelling.*[37] In that case, the Court of Appeal's reasoning was based almost exclusively on the fact that the English statute provided that the Registrar hearing the matter "*may*" make an order compelling access. The Court explained it as follows:

> *"On the true construction of Section 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 subsection (3). … "Whether the power will be exercised must depend upon the proper discretionary considerations affecting the power in the light of the facts found by the court." We agree. For those reasons we reject the absolutist construction proposed by Dr Pelling."*[38]

29.2 Section 113(4) of the 1973 Companies Act was in very similar terms to the English statute. 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*" (emphasis added). It is therefore unsurprising that this Court took the same approach as the *Pelling* court.

29.3 However, section 26 of the current Companies Act is different. It no longer contains any provision dealing specifically with the application to Court to compel compliance and, in particular, contains no provision rendering the decision of the Court discretionary on this score. Parliament, which is

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[37] Pelling v Families Need Fathers Ltd [2001] EWCA Civ 1280; [2002] 2 All ER 440 (CA)

[38] At para 6.

presumed to know the law,[39] opted not to enact a provision equivalent to section 113(4) and instead strengthened the access provision by making clear that it conferred a "right" of access.

29.4 We therefore submit that section 26 means that when a company fails or refuses to provide access, the requester is entitled as of right to an order compelling access. The question of the motive or purpose is simply irrelevant.

30 The Companies have therefore failed to demonstrate that the documents sought in Rule 35(14) notice are relevant to a reasonably anticipated issue in the main application. The Companies' theory on what it will achieve via those documents does not give rise to a defence to the main application.

In any event, the Companies' position is untenable

31 In the previous section, we explained that section 26(2) confers an unqualified right of access and that the discretion apparently accepted by this Court in *La Lucia Sands* under section 113 no longer applies.

32 For the sake of completeness, however, we emphasis that even if the discretion previously accepted by this Court did apply to section 26, this would still not assist the Companies.

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[39] Road Accident Fund v Monjane 2010 (3) SA 641 (SCA) at para 12.

32.1 In *La Lucia Sands*, this Court emphasised the very narrow circumstances in which it would refuse access in the exercise of its discretion. It began by citing and endorsing the approach of the English Court of Appeal on this score. That Court had explained that there would have to "'*be something special in the circumstances of the case which leads the court to refuse to make the usual order*" and that the scope of this discretion was "*narrow*".[40]

32.2 This Court went on to add its own further caution, related to our constitutional scheme: "*In a constitutional state in which freedom of association and access to information is valued courts should be slow to make orders that have a limiting effect.*"[41]

33 It is therefore clear that if any discretion to refuse access exists at all, it is exceedingly narrow.

34 In the present case, even if the Companies' purported concerns were accepted as stated, this would not be sufficient to deny Moneyweb access to the securities registers.

35 The Companies explain that they seek to compel discovery of the documents in the notice in order to deal with Moneyweb's "*motives*" for seeking access to the share registers. Thus, the Companies state:

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[40] La Lucia Sands Share Block v Barkhan 2010 (6) SA 421 (SCA) at para 11

[41] At para 13

> *"… I deny, in particular that the Applicants seek access to the Respondents' share registers for the benign reason that the contents of such share registers is "newsworthy and of public interest".*
>
> *The Respondents believe that the Applicants have a far more sinister agenda and it in fact appears that the Applicants, and in particular, Cobbett, have an axe to grind with the First Respondent and its subsidiaries ("the Nova Property Group"), myself and the Nova Property Group's executive chairman, Mr Cornelius (Connie) Myburgh and have embarked upon a vendetta for the sole purpose of discrediting us and undermining our integrity.*
>
> *The Applicants have made a number of defamatory remarks of and Mr Myburgh and we reserve our rights in this regard.*
>
> *As far as the main application is concerned, we will, in due course, traverse in some depth the extent of the Applicants' real motives for seeking access to the Respondents' share registers; however we are presently unable to do so properly given the Applicant's outstanding discovery obligations which form the subject matter of this affidavit and the relief sought herein.*
>
> *As I will demonstrate, the main application is a disguised and manufactured attempt at extracting information from the Respondents in order to serve the Applicants' own interests in what has been a continued mud slinging exercise in relation to the Nova Property Group and its directors. The relief sought by the Applicants is opposed, inter alia, for this reason."*[42]
>
> and
>
> *"The Respondents (and the Nova Property Group) have reason to believe that such correspondence will, once discovered, substantiate their belief that that the Applicants have engaged and continue to engage in a personal vendetta against the Respondents (and the Nova Property Group) and that their purpose is, though negative reporting, to discredit the Respondents (and the Nova Property Group) and their directors and to cause us harm."*[43]

36 Shorn of the emotive language, the case of the Companies amounts to little more than the following:

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[42] FA in compelling application, v 1 p 63-64 para 6 – 9 (emphasis added)

[43] FA in compelling application, v 1 p 85-86 para 70 (emphasis added)

36.1 The Companies are deeply aggrieved about the manner in which Moneyweb has reported on them.

36.2 The Companies fear that Moneyweb will use access to the share registers for further "negative reporting" and that this will cause them harm.

37 The Companies are in this regard 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 refusing to allow Moneyweb to exercise its section 26(2) statutory rights in respect of the share registers concerned.

38 We are unaware of any authority suggesting that the media can 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 would fly in the face of two well established principles laid down by this Court.

39 The first is that access to accurate information is critical for the right to freedom of expression.

39.1 This Court recently made clear the position in this regard:

> *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 be able to access information. Access to information is 'crucial to accurate reporting and thus to imparting information to the public.' Whilst s 32 of the Constitution guarantees the right of persons to access relevant information, s 16 entitles them to distribute that information to others."*[44]

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

40 The second is that Courts will only extremely rarely make orders which amount to prior restraints on expression.

40.1 This Court laid down that position in *Midi Televsion.*[45]

> *"In summary, a publication will be unlawful, and 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*

[44] City of Cape Town v South African National Roads Authority Limited and Others 2015 (3) SA 386 (SCA) at para 20

[45] Midi Television (Pty) Ltd t/a E-TV v DPP (WC) 2007 (5) SA 540 (SCA) at paras 19 – 20 (emphasis added)

> *account but, more important, the interests 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."*

40.2 The main application, of course, does not involve the granting of an interdict against the media. But the effect is much the same. The Companies' affidavit makes plain that they are in fact seeking to prevent Moneyweb from reporting on these issues at all. They seek to do so by precluding Moneyweb and Cobbett from even having access to the securities registers for purposes of their reporting. In other words, rather than interdict the Moneyweb publication, the Companies seek to stop it at an earlier stage – the investigation stage.

40.3 There is no basis for such an order. If a publication happens 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*".[46] The Companies cannot, in advance, enlist the assistance of the Courts to prevent Moneyweb from engaging in the investigations concerned.

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[46] Midi Television (Pty) Ltd t/a E-TV v DPP (WC) 2007 (5) SA 540 (SCA) at para 20

CONCLUSION AND COSTS

41 We therefore submit that the appeal falls to be struck from the roll or dismissed.

42 In either event, the Companies should be directed to pay Moneyweb's costs on an attorney-client scale.

42.1 The reliance on the Rule 35(14) notice was and remains untenable, as does the present appeal. Moreover, the conduct of the Companies in this regard has had the effect of considerably delaying Moneyweb proceeding with the main application and obtaining access to the securities registers.

42.2 This Court should make clear that such conduct which delays or frustrate the exercise of statutory and constitutional rights is not acceptable.

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11 June 2015

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