

**THE UNQUALIFIED RIGHT OF ACCESS TO
COMPANY RECORDS BY NON-HOLDERS OF
THE COMPANY'S SECURITIES UNDER SOUTH
AFRICAN COMPANY LAW¹**

***Nova Property Group Holdings Ltd v Cobbett
(MandG Centre for Investigative Journalism NPC
as amicus curiae) 2016 (4) SA 317 (SCA)***

1 Introduction

Section 26(2) of the Companies Act 71 of 2008 gives a person who holds no beneficial interest in the securities issued by a profit company, or who is not a member of a non-profit company, the 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. Such person must pay a fee for the inspection. The person may exercise the right of access to such company records for a reasonable period during office hours (s 26(4)(a)), by making a direct request to a company either in person or through an attorney or other personal representative (s 26(4)(b)), or in accordance with the Promotion of Access to Information Act 2 of 2000 (PAIA) (s 26(4)(c)). A failure by a company to accommodate a reasonable request for access (or an unreasonable refusal of access by the company) to the company's records constitutes an offence (s 26(9)(a)). It is also an offence to impede, interfere with, or attempt to frustrate the reasonable exercise by any person of the right to access (s 26(9)(a)).

Notably, section 26(2) is in addition to the information that is accessible to the public from the Companies and Intellectual Property Commission (the CIPC) (see s 187(4)(c) of the Companies Act 71 of 2008), which includes a company's Memorandum of Incorporation (Davis, Geach, Mongalo, Butler, Loubser, Coetzee, and Burdette *Companies and Other Business Structures in South Africa* 3ed (2013) 159). Furthermore, section 26(7) makes it clear that the rights of access to information in section 26 are "in addition to, and not in substitution for" the rights of access to information under section 32 of the Constitution of the Republic of South Africa (the Constitution), PAIA or any other public regulation.

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An important issue that arises in the context of the right of access to company records by non-holders of the company's securities relates to the proper interpretation of section 26(2) of the Companies Act – that is, the nature and ambit of the right that this section confers. There have been conflicting decisions by the High Court on the correct interpretation of this provision, particularly on the question of whether the right enshrined in section 26(2) is qualified or unqualified. This issue was considered by the Supreme Court of Appeal (SCA) in *Nova Property Group Holdings Ltd v Cobbett (MandG Centre for Investigative Journalism NPC as amicus curiae)* 2016 (4) SA 317 (SCA) (*Nova*) in view of the appellants' argument that section 26(2) did not confer an absolute right to inspection of a company's securities register, and that the court had a discretion to permit or refuse access to a company's securities register.

This note, therefore, discusses the *Nova* case with a focus on the approach of the court regarding the proper interpretation and the ambit of the right of access to a company's records by any person as conferred by section 26(2) of the Companies Act 71 of 2008. It provides some critical comments on the main issues that this judgment raises, including the impact of the Constitution in this area of South African company law, the interpretation of section 26(2) in light of the role and impact of companies in society, the interpretation of section 26(2) in light of the purposes of the Companies Act 71 of 2008, the interface between section 26(2) and PAIA as well as the potential for abuse of the right of access to company records enshrined in section 26(2). This is followed by some concluding remarks.

2 Factual background

2.1 Facts

The appellants in this case were Nova Property Group Holdings Limited, Frontier Asset Management and Investments (Pty) Limited, and Centro Property Group (Pty) Limited (the Companies). The respondents were Julius Peter Cobbett (a financial journalist who specialises in the investigation of illegal investment schemes) and Moneyweb (Pty) Ltd (a company that publishes business, financial and investment news) (Moneyweb). The MandG Centre for Investigative Journalism NPC was admitted as an *amicus curiae*.

The respondents requested the Companies, in terms of section 26(2) of the Companies Act 71 of 2008, to give them access to inspect and make copies of their securities registers. Moneyweb had commissioned Mr Cobbett to investigate the Companies' shareholding structures as the Companies were purportedly linked to a controversial property syndication investment scheme. Mr Cobbett was then to write articles on his findings for publication by Moneyweb. The Companies, however, refused to grant the request to access their securities registers. Consequently, Mr Cobbett and Moneyweb applied to the Gauteng Division of the High Court, Pretoria (court *a quo*) for orders compelling the Companies to provide them with access to inspect and copy their securities registers within five days of the date of the orders.

The Companies did not file any answering affidavits to Mr Cobbett and Moneyweb's application. In a bid to establish that Moneyweb's real motive in publishing the articles in the media was sinister and directed at discrediting them, the Companies issued notices (in terms rules 35(12) and 35(11)–(14) of the Uniform Rules of Court) seeking discovery of documents referred to in Moneyweb's founding affidavit and copies of various other documents from Moneyweb. The Companies were not satisfied with Moneyweb's responses to their notices. They, therefore, brought an interlocutory application to compel Moneyweb to comply with their notices.

2.2 *The court a quo*

The court *a quo* upheld the Companies' rule 35(12) application to compel discovery of documents referred to in Moneyweb's founding affidavit, but dismissed the rest of the application. In its adjudication of the interlocutory application launched by the Companies, the court *a quo* made a pronouncement on the proper interpretation of section 26(2) of the Companies Act 71 of 2008. After considering two of its conflicting decisions on this issue (*Bayoglu v Manngwe Mining (Pty) Ltd* 2012 JDR 1902 (GNP) (*Bayoglu*) and *MandG Centre for Investigative Journalism NPC v CSR–E Loco Supply (Pty) Ltd* 23477/2013 (8 November 2013) (*M & G*)), the court *a quo* held that section 26(2) does not confer an absolute right to inspect the documents set out in the subsection, but the court has a discretion not to grant an order for such inspection. In reaching this conclusion, the court *a quo* considered that the construction that confers on a non-holder of securities an absolute right of inspection regardless of that person's motive would give rise to a potential for unjust and absurd outcomes. On the contrary, the court *a quo* reasoned that a construction that gave the court a discretion would enable the court to weigh and balance the competing constitutional rights in this regard – that is, the right to information and the rights to privacy and dignity – as opposed to giving the constitutional right to information absolute eminence (par 6).

The Companies then appealed, with leave of court, to the SCA against the dismissal of the rest of their interlocutory application by the court *a quo*.

3 Issues before the Supreme Court of Appeal

There were two issues that the SCA had to decide. The first issue was procedural in nature. It related to the appealability of an interlocutory order of the court *a quo* under section 17(1) of the Superior Courts Act 10 of 2013 (par 7). The second issue related to the proper interpretation of section 26(2) of the Companies Act 71 of 2008 – namely, whether this section confers an unqualified right of access to the securities register of a company (par 7). It is the second issue that is key for the purposes of this note. The first issue will only be discussed briefly in this note for the sake of completeness.

4 Judgment

4.1 Appealability of an interlocutory order

After looking at the requirements of section 17(1) of the Superior Courts Act 10 of 2013 regarding the circumstances in which leave to appeal may be granted, the court concluded that the interlocutory order in this case was appealable (par 10). In arriving at this conclusion, the court reasoned that the requirements of section 17(1) were satisfied in this case as there were conflicting judgments on the proper interpretation of section 26(2) of the Companies Act 71 of 2008 (see s 17(1)(a)(ii) of the Superior Courts Act 10 of 2013, which provides that leave may only be granted where the judge is of the opinion that there is some compelling reason for the appeal to be heard, “including conflicting judgments on the matter under consideration”). The court further considered that the appeal would lead to “a just and prompt resolution of the real [issue] between the parties” in the main application – namely, whether Moneyweb was entitled to an order compelling compliance with section 26(2) of the Companies Act 71 of 2008 (par 10 and 11).

4.2 Whether section 26(2) confers a qualified or unqualified right of access to the securities register of a company

With regard to the question of whether the right conferred by section 26(2) of the Companies Act 71 of 2008 is qualified or unqualified, the court held that there is nothing in section 26(2) and (5) that in any way qualifies this right (par 26). It found that these subsections are also silent on the reasonableness of either the request for access or the response. Furthermore, the court found that the intention or motive of the person seeking to obtain access to a company’s securities register is irrelevant (par 28). The court, therefore, concluded that section 26(2) clearly provides an unqualified right to any member of the public and the media to access a company’s securities register. The reasoning that the court followed in arriving at its decision is analysed further in paragraph 6 of this case note.

5 The court order

The court found that the Companies failed to show that the documents sought in their rule 35(14) notice were “relevant to a reasonably anticipated issue in the main application” (par 51). It, therefore, dismissed the appeal with costs.

6 Analysis

The judgment in the *Nova* case raises a number of pertinent issues regarding the interpretation of section 26(2) of the Companies Act 71 of 2008 that merit further analysis. These issues include the uncertainty and conflicting judgments on the proper interpretation of section 26 of the Companies Act 71 of 2008, the impact that the Constitution has on the

interpretation of section 26, the interface between section 26 and PAIA, the interpretation of section 26 in light of section 7 of the Companies Act 71 of 2008 and the role and impact of companies in society, as well as the potential for abuse of the right enshrined in section 26(2) if it is unqualified.

6.1 *Unqualified right of access*

Until the *Nova* case, there had been uncertainty as to whether section 26(2) of the Companies Act 71 of 2008 provides an unqualified right of access to a company's records contemplated in this subsection or whether the court has a discretion not to grant such access on the grounds provided for under PAIA and on the ground of the "motive" of the person seeking to inspect the records (the aspects relating to PAIA are discussed separately under heading 6.3 below). This was particularly the case in view of the conflicting judgments on this issue in *Bayoglu (supra)* (on the one hand) and in *M & G (supra)* and *Basson v On-Point Engineers (Pty) Ltd* 2012 JDR 2126 (GNP) (*Basson*) (on the other). In *Nova (supra)*, the court upheld the approach in *M & G (supra)* and *Basson (supra)* and held that the right of access to company records enshrined in section 26(2) is unqualified. The court considered this issue in the context of section 26 as a whole and found that there is nothing in section 26(2) and (5) that qualifies this right (par 26).

The court rejected the Companies' contention that a request for access in terms of section 26(2) may be declined where it is reasonable to do so – for example, where the information is sought for an unlawful purpose. (See *La Lucia Sands Share Block Ltd v Barkhan* 2010 (6) SA 421 (SCA) (*La Lucia Sands*), which dealt with section 113 of the Companies Act 61 of 1973. In reaching its conclusion, the court in *La Lucia Sands (supra)* had relied on the English case of *Pelling v Families Need Fathers Ltd* [2002] 2 All ER 440 (CA), which was based on the similarly worded provisions of section 356 of the UK Companies Act 1985).

In contrast, the court in *Nova (supra)* held that the reasonableness of the request for access is irrelevant when interpreting section 26(2) of the Companies Act 71 of 2008. It noted that reasonableness is only mentioned in section 26(9) as a defence to the criminal offence provided in this subsection. This reasonableness defence is appropriate in order to avoid creating an offence of strict liability that could give rise to constitutional challenges (par 27). There is no basis, according to the court, for importing this reasonableness defence into section 26(2) in order to limit the right enshrined in this subsection (par 27).

The court further held that if Parliament had wanted to limit the right in section 26(2), it would have done so expressly. It noted that Parliament chose not to enact a provision equivalent to section 113(4) of the Companies Act 61 of 1973 which gave the court discretionary powers, upon application, to compel an immediate inspection of a company's register where there has been refusal to grant access or default. Instead, Parliament has made it clear in section 26(2) of the Companies Act 71 of 2008 that the right of access in this provision is conferred "without qualification and not subject to a discretionary override" (par 35).

The significance of the court's finding, in this regard, is that it has resolved the controversy over whether section 26(2) of the Companies Act 71 of 2008 confers an unqualified right of access to a company's records by any member of the public. It has upheld the line of reasoning in *M & G (supra)* and *Basson (supra)* that this right is absolute and that the motive of the requestor or the purpose for which information is sought is completely irrelevant. This has brought clarity to this area. The practical effect of the ruling is that if any member of the public seeks access to the records mentioned in section 26(2), the company must allow such person to inspect or copy such records within the prescribed 14 business days. In the case of failure or refusal by a company to grant a request for access, the requestor is entitled "as of right" to a court order compelling the company to provide such (par 36).

6.2 *Impact of the Constitution*

In South Africa, the right of access to information and the right to privacy are both constitutionally protected. It is therefore essential to consider the impact that the Constitution has on the right of access to company records that section 26(2) of the Companies Act 71 of 2008 confers on any person. This is particularly pertinent in view of the Companies' contentions that an unqualified right of access to a company's securities register would violate the shareholders' constitutional right to privacy (see s 14 of the Constitution), and that the right to information (see s 32 of the Constitution) must be weighed against the right to privacy, since no right is absolute.

The court dismissed the Companies' argument as they had not challenged the constitutionality of section 26(2) of the Companies Act 71 of 2008 on the grounds of a violation of the right to privacy (par 40). The court further considered that section 26(2) conferred a narrow right involving access to personal information of a limited nature and that regulation 32 of the Companies Regulations, 2011 already provides appropriate safeguards to ensure confidentiality and to prevent abuse (par 40–41).

In regard to the right of access to information, the court referred to *Brümmer v Minister for Social Development* 2009 (6) SA 323 (CC) par 63 and held that an interference with the ability to access information such as a company's securities register limits freedom of expression, impedes the freedom of the press and prevents the press from reporting fully and accurately. The court stressed that freedom of expression includes the right to speak as well as the public's right to receive information and ideas (par 37; see also par 43–44). Therefore, an unqualified right of access to a company's securities register is vital for "effective journalism and an informed citizenry" (par 38). Referring to *City of Cape Town v South African National Roads Authority Limited* 2015 (3) SA 386 (SCA) par 20, the court further held that access to accurate information constitutes a vital element of the right to freedom of expression (par 43). Moreover, South African courts are reluctant to make orders that effectively impose a prior restraint on expression (see par 45 and *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) referred to there).

In essence, the court in *Nova (supra)* upheld what it considered to be Parliament's approach to the public's access to company records in terms of section 26(2) of the Companies Act 71 of 2008 – that is, that the public's right of access to information trumps the shareholders', directors' and companies' rights to privacy.

However, the court did indicate the possibility of a constitutional challenge to section 26(2) of the Companies Act 71 of 2008 on the ground that it may violate company shareholders' privacy as their personal information is disclosed in the company records contemplated in the provision. The same argument can be advanced in relation to company directors. The court in *Nova (supra)*, however, remarked that such a constitutional challenge is unlikely to succeed in view of the limited nature of personal information of shareholders that is required to be disclosed in the securities register.

It is submitted that the court's remarks on the constitutionality of section 26(2) of the Companies Act 71 of 2008 should be regarded as *obiter*. They do not constitute an authoritative resolution of the tension between the constitutional right to access information on the one hand and the right to privacy on the other. Should section 26(2) be challenged under the Constitution, then the courts will have an opportunity to analyse the constitutionality of the provision in much more depth (compared to the remarks in *Nova (supra)*) and to make an authoritative judgment on this issue.

6.3 *The interaction between section 26 and the provisions of PAIA*

It was relevant for the court to consider the interface between section 26(2) of the Companies Act of 2008 and PAIA in view of the Companies' argument that a request for access to a company's securities register must only be exercised in terms of the provisions and limitations of PAIA. The Companies had further contended that they were entitled to argue, in the main application, that their refusal to grant the respondents access to their share registers was justified on the basis of the provisions of section 68(1) of PAIA. The Companies had relied, in this regard, on the *dictum* of the SCA in *La Lucia Sands (supra)* that the request for access to a company's records under section 26 is subject to PAIA (see *La Lucia Sands (supra)* par 17–18).

Notably, section 68(1) of PAIA provides that a request for access to a company's records may be refused if the record:

- contains trade secrets of the company;
- 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;
- contains information, the disclosure of which could reasonably be expected to put the company at a disadvantage in contractual or other negotiations, or to prejudice the company in commercial competition.

However, the court in *Nova (supra)* dismissed the Companies' argument that a refusal to grant access to a company's share register is justified on the

basis of the provisions of section 68 of PAIA. Instead, the court held that a company's securities register "quite clearly" does not contain the kind of information contemplated in section 68(1) of PAIA (par 22).

The court also rejected the Companies' arguments that the right of access provided for in section 26(2) of the Companies Act 71 of 2008 must be exercised only in accordance with the procedure in terms of PAIA and that the person seeking access to the records must prove that the information is required for the exercise or protection of a right (see s 50(1)(a) of PAIA). It held that it is clear from the wording of section 26 that the right provided in section 26(2) is additional to the rights provided by PAIA and that the right in section 26(2) does not need to be exercised in accordance with the procedure set out in PAIA (par 19).

After examining the legislative history of section 26(2), the court emphasised the significance of replacing the conjunctive "and" with the disjunctive "or" to distinguish between section 26(4)(b) of the Companies Act 71 of 2008 (which provides for the procedure through which access to company records may be exercised under the Companies Act 71 of 2008), and section 26(4)(c) (which allows access to company records to be exercised in accordance with PAIA). It found that the use of "or" between these paragraphs indicates Parliament's clear intention that the procedure under PAIA must be an alternative to requesting access to a company's share register in accordance with the provisions of section 26 of the Companies Act 71 of 2008 (par 20 and par 28–32). These two methods of requesting access to company records may, therefore, be exercised independently of each other. This means that the restrictions and the restrictive procedure under PAIA are not applicable to section 26(2) of the Companies Act 71 of 2008 since the right in section 26(2) is unqualified. Accordingly, a person seeking access to company records need not prove that the information is required for the exercise or protection of a right since motive or intention is irrelevant under section 26(2).

That section 26(2) of the Companies Act 71 of 2008 confers an unqualified right of access to company records that cannot be trumped by the provisions of PAIA is confirmed by the peremptory wording of section 26(5). In terms of section 26(5), if a company receives a request for access to its records (see s 26(4)(b)) it "*must*" comply with the request within 14 business days. If a company fails or refuses to provide access, the requestor has the right to a court order compelling access (par 36).

Parliament's provision that section 26(2) of the Companies Act 71 of 2008 must not be subject to the provisions and limitations of PAIA is justified on the ground that the latter is a general statute that regulates access to various types of information held by various types of bodies, with diverse interests at stake, whereas the Companies Act 71 of 2008 provides a specific right in relation to a narrow category of information (par 21). In addition, the procedure in PAIA is complex and compliance with such procedure may cause undue delays and costs in the context of requesting access to company records (par 22–24). In contrast, the procedure provided in section 26(2) of the Companies Act 71 of 2008 is simple and is designed to ensure timeous access to company records (par 24).

The significance of the court's findings on the interaction between section 26(2) of the Companies Act 71 of 2008 and the provisions of PAIA is that they have clarified the controversy over whether the former is subject to the provisions and limitations of the latter. The court emphatically stated that the *dictum* in *La Lucia Sands (supra)* is wrong and must not be relied upon (par 25). Section 26(2) may be exercised independently of, and in addition to, PAIA.

6 4 *Interpretation of section 26 in light of section 7 of the Companies Act 71 of 2008 and the impact of companies in society*

It is interesting to note that the court in *Nova* also relied on the purposes of the Companies Act 71 of 2008 (see s 7). It referred in particular to section 7(b)(iii) in concluding that a proper interpretation of section 26(2) prioritises the right of access to information. It emphasised that the purposes of the Companies Act 71 of 2008 (as set out in s 7) support a culture of openness and transparency. In terms of section 7(b)(iii), one of the purposes of the Companies Act 71 of 2008 is to promote the development of the South African economy by *inter alia* "encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation". The court held that section 26 of the Companies Act 71 of 2008 was enacted precisely to give effect to the objectives of promoting transparency and high standards of corporate governance (par 18).

Furthermore, the court held that the significant role of companies in society and the disclosure obligations emanating from the right of access to information in section 32 of the Constitution are key to the interpretation of section 26(2) of the Companies Act 71 of 2008 (par 16). It stated that section 26 seeks to confer strong rights of access to very specific but limited types of information in recognition of the fact that companies perform an important role in society and that the manner in which companies conduct their businesses may affect the public in a number of ways (par 18). Referring to previous judgments by the SCA and the Constitutional Court, the court held that the manner in which companies operate is not a private matter (par 16). (See *La Lucia Sands (supra)* par 21; *Bernstein v Bester NO* [1996 (2) SA 751 (CC) par 85; *S v Coetzee* 1997 (3) SA 527 (CC) par 98; and *Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) par 1).

Parliament had, accordingly, enacted section 26 in order to promote corporate transparency and prevent the harmful consequences that corporate secrecy may have on society. This is in line with constitutional principles as discussed under heading 6.2 above. Therefore, a purposive approach – one that seeks to reinforce transparency and high standards of governance in view of the role of companies in society as envisaged in section 7 of the Companies Act 71 of 2008 – must be followed when interpreting section 26 of the Companies Act 71 of 2008 (par 18).

6.5 *Potential abuse of section 26(2)*

An absolute right of access to company records contemplated in section 26(2) of the Companies Act 71 of 2008 may raise difficulties. Whilst third parties (non-holders of securities issued by the company) may require access to a company's records contemplated in section 26(2) for a number of valid reasons, there is a possibility that some third parties might abuse this right if it is unqualified. For instance, third parties may seek access to company records in order to harass shareholders and directors, or to commit serious crimes, or for other improper purposes.

Seeking access for improper purposes has already occurred in the United Kingdom (UK) where there was evidence of abuse of the public's rights to inspect and obtain copies of a company's register of members under the UK Companies Act 1985 (par 47). The developments prompted the legislature in that jurisdiction to limit such rights of access to the register of a company's members in section 116(4) of the current UK Companies Act 2006 (par 47). This section provides that the request for such access must contain the name and address of the requestor (in the case of an individual). If the requestor is an organisation, the request must contain the name and address of an individual responsible for making the request on behalf of the organisation. Importantly, the request must specify the purpose for which the information is to be used as well as whether the information will be disclosed to any other person. Where the information will be disclosed to another person, the identity of that other person and the purpose for which the information is to be used by him or her must be specified in the request. Where a company receives a request to inspect and obtain a copy of its member's register, it must within five working days either grant the request, or apply to the court for an order directing that the company must not comply with the request (see s 117(1) and (3) of the UK Companies Act 2006). The court is obliged to direct the company not to comply with the request if the court is "satisfied that the inspection or copy is not sought for a proper purpose" (s 117(3)(a) of the UK Companies Act 2006).

Even though the court in *Nova (supra)* held that Parliament appears to have deliberately chosen not to impose any limitation on the right in section 26(2) of the Companies Act 71 of 2008 (par 35 and par 47–48), it is submitted that Parliament should consider giving a company the option to apply to court, within a short period after receiving the request, to decline a request for access in exceptional circumstances where the request is sought for an improper purpose, as is the case in the UK. Improper purpose could, in this context, be limited to an unlawful purpose. The availability of such option would protect companies, shareholders and directors against improper requests. However, to protect the access to information rights underpinned by section 26(2) and to prevent companies from abusing the leeway suggested above, appropriate safeguards could be incorporated in the provision. Such safeguards could include a rebuttable presumption that the request is not being sought for an improper purpose. The company would then have to rebut such presumption by adducing acceptable evidence to prove on a balance of probabilities that the request is for an improper purpose. The courts, in considering an application by the company, would have to exercise care so as to ensure that the public's right of access

to a company's records is only refused in exceptional circumstances. Furthermore, the court could be empowered to order a company to pay the costs incurred by a requestor of access to information (or the respondent on the application) in order to prevent companies from bringing frivolous and vexatious applications.

It is further submitted that section 26 of the Companies Act of 2008 should be amended to prescribe the specific form of the request for access to the information. In order to increase transparency (not only the transparency of companies, but of requestors as well), the requestor should be required to disclose his or her name and address as well the purpose for which the information is to be used. Where the information will be disclosed to any other specific person, the name and address of such other person should be disclosed together with the purpose for which that person will use the information. The provisions of sections 116 and 117 of the UK Companies Act 2006 would be instructive in this regard.

It is submitted that the suggested approach would still promote transparency and high standards of corporate governance (see s 7(b)(iii) of the Companies Act 71 of 2008) whilst also extending adequate protection to shareholders, directors and companies. The suggested approach would also strike a better balance between the constitutional rights to information and privacy respectively (see also s 7(a) of the Companies Act 71 of 2008, which lists the promotion of compliance with the Bill of Rights in the application of company law as one of the core purposes of the Companies Act 71 of 2008).

7 Conclusion

This note has discussed the judgment of the SCA in *Nova (supra)* regarding the interpretation of section 26(2) of the Companies Act 71 of 2008 – specifically, the nature and ambit of the public's right to access a company's records that this section confers. This provision had been subject to controversy due to conflicting decisions by the High Court on the correct interpretation of the provision, particularly on the question of whether the right enshrined in section 26(2) is qualified or unqualified. The note has further considered some pertinent issues raised by the judgment, including the impact of the Constitution in this area of South African company law, a purposive interpretation of section 26(2) of the Companies Act 71 of 2008, the interface between section 26(2) and PAIA, and also the potential for abuse of the right of access to company records enshrined in section 26(2).

It is submitted that the significance of the SCA's decision in *Nova (supra)* is that it has resolved the controversy over whether section 26(2) of the Companies Act 71 of 2008 confers an unqualified right of access to a company's records by any member of the public. The court held that the right of access to company records enshrined in section 26(2) is unqualified and that the court does not have discretion to refuse to grant such access. The reasonableness of the request or the motive of the requestor is completely irrelevant.

Furthermore, the SCA's judgment in *Nova (supra)* has brought clarity to yet another issue that had been controversial – namely, whether the request

for access to a company's records under section 26 of the Companies Act 71 of 2008 is subject to the provisions and restrictions in PAIA. The court held that section 26(2) may be exercised independently of, and in addition to, PAIA. The legal position is therefore now clear that any person may inspect or copy a company's securities register or company records listed in section 26(2) of the Companies Act 71 of 2008 by making a direct request to the company and upon payment of a fee. Should the company fail or refuse to grant a request for access, the requestor is entitled "as of right" to a court order compelling the company to provide the access. It is submitted that the court's interpretation (that the public's right of access to a company's records in terms of section 26(2) of the Companies Act 71 of 2008 is unqualified and that the exercise of this right is not subject to the provisions of PAIA) is correct.

A further significance of the SCA's decision in *Nova (supra)* is that it brings to the fore the tension – when interpreting section 26(2) of the Companies Act 71 of 2008 – between the constitutionally entrenched right of access to information on the one hand, and the right to privacy on the other, as well as the potential for abuse of the right of access enshrined in the provision. Whilst accepting that section 26(2) of the Companies Act 71 of 2008 may be challenged under the Constitution for potentially violating the right to privacy, the SCA in *Nova (supra)* remarked that such a challenge would be unlikely to succeed since shareholders' privacy rights are marginally implicated in the right of access to company records under section 26(2) and there are also adequate protections under regulation 32 of the Companies Regulations, 2011 for the rights and personal information of shareholders. It is submitted that the court's remarks in relation to the constitutionality of section 26(2) of the Companies Act 71 of 2008 should be regarded as an *obiter dictum*. They do not constitute an authoritative resolution of the tension between the constitutional rights to information and privacy respectively. In the event that section 26(2) is challenged under the Constitution in future, which remains a possibility, then the courts will have an opportunity to analyse the constitutionality of this provision in much greater depth and to make an authoritative judgment on its constitutionality.

Finally, this note has identified two possible amendments to section 26(2) of the Companies Act 71 of 2008. The first suggestion is that section 26(2) be amended to give a company the option, in exceptional circumstances, to apply to court to decline an access request where the request is sought for an improper purpose. Care should, however, be exercised to ensure that the public's right of access to a company's records is only refused in exceptional circumstances. The second suggestion is that section 26 of the Companies Act 71 of 2008 be amended to prescribe the specific form of the request for access to company records contemplated in section 26(2) so as to increase the transparency of requests, as has been done in the UK under section 116(4) of the UK Companies Act 2006. It is submitted that the suggested amendments would protect companies, shareholders and directors against improper requests. They would contribute to striking an appropriate balance between the right of access to information and the right to privacy.

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