IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 61219/2013

In the matter between: 24/10/2014

JULIUS PETER COBBETT First Applicant

MONEYWEBB (PTY) LIMITED Second Applicant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

23/10/14
DATE

SIGNATURE

NOVA PROPERTY GROUP HOLDINGS LIMITED First Respondent

FRONTIER ASSET MANAGEMENT & INVESTMENTS (PTY) LIMITED Second Respondent

CENTRO PROPERTY GROUP (PTY) LIMITED Third Respondent

JUDGMENT

Tuchten J:

1 The applicants are financial journalists. They believe that the respondents are implicated in financial improprieties. They have sources who supply them with information which may be truthful, partially truthful or untruthful. They have published and want to

continue publishing articles in the media about the respondents and those who control them and direct their businesses. On the papers it is unlikely that the applicants will have much to say about the respondents and those behind them (in the sense I have mentioned) that is complimentary. The respondents deny the allegations of financial impropriety. To further their journalistic endeavours, the applicants have requested the respondents, under s 26(2) of the Companies Act, 71 of 2008 ("the new Companies Act"), to give them access to the respondents' securities registers. Under s 50(2) of the new Companies Act, the securities register must contain, amongst other things, the names and addresses of its shareholders to whom certificates of their shareholdings have been issued.

2 The respondents refused the request for access. The applicants applied to this court for orders directing the respondents to provide them with access. The respondents have not yet delivered answering affidavits. Instead, by notices dated 15 November 2013 and 25 November 2013 respectively for the production of documents by the applicants.

3 The first notice, in terms of rule 35(12), called for the production of certain documents mentioned in the applicants' founding papers. The response of the applicants was to direct the respondents' attention to certain websites on the internet where, it was said, the respondents could access the documents.

4 The second notice, although claiming in its heading to have been framed under rules 35(11) to (14), is no less than a request for full discovery relative to a ground of opposition to the request for disclosure, which I shall describe below. The applicants' response was that the documents sought are irrelevant and calculated simply to run up costs and that some of them, at least, are available on the internet.

5 Although no answering papers have yet been put up, the respondents' ground for refusing to provide the applicants with access appears from the papers. The ground is that the applicants are not engaged in any legitimate journalistic endeavour, but in a sustained vendetta against the respondents and those who control or are perceived to control them, in which the applicants have defamed and vilified the targets of their attacks. In short, the respondents say, the applicants seek access to their registers to continue their unlawful campaign.

6 The respondents are dissatisfied with the applicants' responses to their notices and have moved for compelling orders. What is before me is not the main application, for access to the registers, but the interlocutory applications to compel compliance with the two notices.

7 The fate of the notice in terms of rule 35(12) may be swiftly resolved. The relevance of the documents called for is not in dispute. Nor is it in dispute that electronic stores of information are hit by the subrule. It was similarly not suggested that the court does not have the power to direct compliance with the subrule. The issue is whether by directing the respondents to websites from which they can download the relevant documents, the applicants have complied with their obligation under the rule. Rule 35(12) reads:

> Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.

8 So the issue, at this level, is whether the applicants have "produced" the documents. In my view, they have not. In *Copalcor Manufacturing (Pty) Ltd and Another v GDC Hauliers (Pty) Ltd (formerly GDC Hauliers CC)* 2000 3 SA 181 W para 27 the court held:

> Is it sufficient for a party in custody of a large volume of documentation to point to a storeroom and give access thereto to his adversary with an invitation to inspect and copy to his heart's content? There is no specific injunction in Rule 35(3) covering this particular situation but it seems obvious to me that Rule 35(3), read in conjunction with subrules (1), (2), (4) and (6), would require of a party in custody of a large volume of documentation, to comply, at the very least, with the provision set out in Rule 35(2)(c). It would be incumbent upon a party in custody of the documents to arrange in proper chronological order and thereafter duly initial and consecutively number them. Sufficient identificatory details of each document should be given to enable (i) the other party to call for it; and (ii) the Court to know whether or not the document in question has been produced. ... The party who had issued a Rule 35(3) notice will only be able to call for inspection of documents contained in a large volume of documents if the party in custody thereof acting in response to the Rule 35(3) notice, had properly specified and identified the additional documents in its custody. In fact, subrule (6) contemplates the party who had issued the Rule 35(3) notice to be in the position to select which of the additionally discovered documents it wishes to call for, for purposes of inspection and copying. Such a party would not be able to do so if it is merely directed to a storeroom full of documents and invited to rummage through the papers to its heart's

> content. In my view, the underlying philosophy of discovery of documents is that a party in possession or custody of documents is supposed to know the nature thereof and thus carries the duty to put those documents in proper order both for the benefit of his adversary and the Court in anticipation of the trial action.

9 Although *Copalcor* dealt with a notice under rule 35(3), I think the views expressed by the learned judge, with which I respectfully agree, apply equally in principle to a notice under rule 35(12). The invitation to search the web is equivalent to an invitation to search a warehouse. I hold that the response to the respondents' notice in terms of rule 35(12) was inadequate. A compelling order must therefore issue.

10 The second notice raises questions which are more complex. Counsel advanced different interpretations of s 26(2) of the new Companies Act, which reads:

> (1) 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, has a right to inspect and copy, without any charge for any such inspection or upon payment of no more than the prescribed maximum charge for any such copy, the information contained in the following records of the company:

(a) The company's Memorandum of Incorporation and any amendments to it, and any rules made by the company, as mentioned in section 24 (3) (a);

(b) the records in respect of the company's directors, as mentioned in section 24 (3) (b);

(c) the reports to annual meetings, and annual financial statements, as mentioned in section 24 (3) (c) (i) and (ii);

(d) the notices and minutes of annual meetings, and communications mentioned in section 24 (3) (d) and (e), but the reference in section 24 (3) (d) to shareholders meetings, and the reference in section 24 (3) (e) to communications sent to holders of a company's securities, must be regarded in the case of a non-profit company as referring to a meeting of members, or communication to members, respectively; and

(e) the securities register of a profit company, or the members register of a non-profit company that has members, as mentioned in section 24 (4).

(2) 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.

(3) In addition to the information rights set out in subsections (1) and (2), the Memorandum of Incorporation of a company may establish additional information rights of any person, with respect to any information pertaining to the company, but no such right may negate or diminish any mandatory protection of any record required by or in terms of

Part 3 of the Promotion of Access to Information Act, 2000 (Act 2 of 2000).

(4) 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).

(5) Where a company receives a request in terms of subsection (4) (b) it must within 14 business days comply with the request by providing the opportunity to inspect or copy the register concerned to the person making such request.

(6) The register of members and register of directors of a company, must, during business hours for reasonable periods be open to inspection by any member, free of charge and by any other person, upon payment for each inspection of an amount not more than R100,00.

(7) 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.

(8) The Minister may make regulations respecting the exercise of the rights set out in this section.

(9) 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.

11 The Companies Act, 61 of 1973 ("the old Companies Act"), contained a provision equivalent to s 26(2) of the new Companies Act. Section 113 of the old Companies Act provided, at the date of its repeal, *sv* inspection of register of members:

(1) The register of members of a company shall, except when closed under the provisions of this Act, during business hours (subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to inspection by any member or his duly authorized agent free of charge and by any other person upon payment for each inspection of an amount of R10 or such lesser amount as the company may determine.

(2) Any person may apply to a company for a copy of or extract from the register of members and the company shall either furnish such copy or extract on payment by the applicant of an amount of R10 or such lesser amount as the company may determine for every page of the required copy or extract, or

afford such person adequate facilities for making such copy or extract.

(3) If access to the register of members for the purpose of making any such inspection or any such copy or extract or facilities for making any such copy or extract be refused or not granted or furnished within fourteen days after a written request to that effect has been delivered to the company, the company, and every director or officer of the company who knowingly is a party to the refusal or default, shall be guilty of an offence.

(4) In the case of any such refusal or default the Court may, on application, by order compel an immediate inspection of the register and index or direct that the copy or extract required shall be sent to the applicant requiring it and may direct that any costs of or incidental to the application shall be borne by the company or by any director or officer of the company responsible for the refusal or default.

(5) The provisions of this section shall mutatis mutandis apply also in respect of any register of transfers kept by a company.

12 For present purposes, the most significant difference between the two measures, in my view, is that s 113(4) in the old Companies Act explicitly provides remedies in the case of default or refusal of a request for disclosure while s 26 in the new Companies Act does not. Section 113 has been authoritatively interpreted as affording the court which hears an application to compel disclosure a judicial discretion

to refuse to order disclosure where, eg, it is shown that the information is sought for some unlawful purpose.[1] In coming to this conclusion, the SCA referred with approval to *Pelling v Families Need Fathers Limited* [2002] 2 All ER 440 CA, in which the Court of Appeal held, at 447*d* that

> ... as a general rule, the court will make a mandatory order to give effect to a legal right. But, as stated ... in *Armstrong v Sheppard & Short* [1959] 2 All ER 651 at 656, ... '[i]t is not a matter of unqualified right'. There may be something special in the circumstances of the case which leads the court to refuse to make the usual order. The scope of the residual discretion to refuse such an order may be narrow ... .

13 Counsel for the applicants pointed to the absence in s 26 of the new Companies Act of any express power conferring a discretion on the court to refuse to order disclosure and submitted that the absence of such a provision demonstrates a change of legislative intent. Section 26(2), submitted counsel, confers an absolute right on any person who meets the procedural requirements of the measure to obtain disclosure.

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1 *La Lucia Sands Share Block Ltd and Another v Barkhan and Others* 2010 6 SA 421 SCA para 11.

14 Section 26(2) has been the subject of conflicting decisions in this Division. In *Bayoglu v Manngwe Mining (Pty) Ltd* 2012 JDR 1902 GNP, the court held, at para 7, that the court retained a discretion under the new Companies Act to refuse to order inspection.[2] But in *MANDG Centre for Investigative Journalism NPC*, a case decided in this court on 8 November 2013 under case no. 23477/2013, the court held, at para 10, that a request under ss 26(1) or (2) conferred an absolute right.

15 As these proceedings are interlocutory to the main application, in which the proper interpretation of s 26(2) and the proper course to follow on the facts will arise for decision, I do not think that I should pronounce finally on the interpretation of the subsection. But I am bound to say that I incline towards the conclusion in *MANDG*. My brief reasons follow.

16 In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 6 SA 520 SCA para 16, the modern approach to the interpretation of documents, whether contractual or statutory or otherwise was articulated:

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2 The discretion was described in para 12 as "narrow". Counsel in *Bayoglu* were agreed that a discretion existed and the conclusion in this regard was arrived at without the benefit of argument to the contrary.

> *Chartered Accountants (SA) v Securefin Ltd and Another* and *Natal Joint Municipal Pension Fund v Endumeni Municipality* ... make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset. [Footnotes omitted]

See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA paras 17-26

17 I think that the construction advanced on behalf of the applicants[3] gives rise both to a potential for injustice and to absurdities. Counsel for the applicants 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 was 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 the applicants' construction is correct,

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3 Described in *Pelling* 447*d* as "absolutist".

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.

18 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 the constitutional rights; notably rights to information on the one hand and to privacy and dignity on the other. No constitutional right is absolute. In the process of determining which of 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.

19 In these circumstances I should be hesitant to find that s 26(2) has created an absolute right. I therefore find that the respondents' contention that the court has a discretion in relation to the enforcement of the right created by s 26(2) cannot be rejected. That

contention thus legitimately constitutes a matter in question to be determined in the main application.

20 Had the main application been a trial action and had the respondents translated their contention that they are the victims of an unlawful campaign into a pleaded defence, the respondents would, upon the closure of pleadings, have been entitled to discovery as of right under rule 35(1):

> Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within twenty days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring discovery and the party required to make discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings.

21 If the main application had been a trial action, then, the respondents would, as correctly conceded by counsel for the applicants, have been entitled to discovery of nearly all the material called for in the second notice.[4] But the applicants came by way of motion, a course which was not criticised by counsel for the respondents. In motion

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[4] With the possible exception, in whole or in part, of material which disclosed the applicants' sources.

proceedings, the affidavits perform the functions of both pleadings and evidence.

22 In these circumstances, counsel for the respondents submit that the respondents cannot properly prepare answering affidavits until they are aware, from documents in the possession or under the control of the applicants, of the full extent of the applicants' dealings in relation to their investigations (to use a neutral term) of the respondents and those who control them. As I see it, there is substance in that submission. This is an exceptional case because the determination of the allegations made by the respondents will probably depend largely on inferences to be drawn from the documentary material in respect of which they seek discovery and the evidence of, amongst others, the authors of the documents..

23 Although there is in my view a compelling case for discovery, I have decided in the exercise of my discretion not to grant a discovery order at this stage. My reasons for this decision are purely practical. If a discovery order is granted, the affidavits would become completely unwieldy. The case for the respondents would require the assertion in the answering affidavits of inferences favourable to the respondents' case. These allegations would probably be denied by

the applicants. Looking ahead, the likelihood is that the matter will probably have to go to trial.

24 I raised this with counsel during argument and suggested that the parties agree forthwith to go to trial. My suggestion was declined by the applicants.

25 A similar situation arose in *Advanced Business Technologies & Engineering Company (Pty) Limited (In Business Rescue) v Aeronautique Et Technologies Embarquées SAS*, a case I decided in this court under case no. 72522/11 on 23 February 2012. In that case too, I found that justice required that full discovery be made but that the form in which the proceedings were then cast, ie motion proceedings, militated against a discovery order at that stage.

26 As to costs: both parties have had some success. I think that costs should be costs in the main application. That was the costs order I made in *Advanced Business Technologies*, *supra*.

27 I make the following order:

1 The applicants 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.

NB Tuchten
Judge of the High Court
23 October 2014

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