

# DISPUTE RESOLUTION ALERT

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This question was raised and decided in the case of *Fisher v Natal Rubber Compounders (Pty) Ltd* (20640/14) [2016] ZASCA 33.

### BEWARE OF THE PUBLIC'S UNQUALIFIED RIGHT OF ACCESS TO A COMPANY'S RECORDS

The Supreme Court of Appeal (SCA) in the matter of *Nova Property Group Holdings v Cobbett* (20815/2014) [2016] ZASCA 63 provided welcome clarity on the interpretation and qualifications of the public's rights to have unrestricted access to companies' records as conferred upon by s26(2) of the Companies Act, No 71 of 2008 (Act).

# CAN THE SUBSTITUTION OF A PLAINTIFF IN A COURT CASE CREATE A DEFENCE OF PRESCRIPTION?

*Y raised the defence that the claim was extinguished by prescription in terms of s15(2) and s15(6) of the Prescription Act, No 68 of 1969.*

*Central to the court's rejection of Y's argument that the claim had prescribed was the finding that there was an essential continuity in pursuing the claim.*

**This question was raised and decided in the case of *Fisher v Natal Rubber Compounders (Pty) Ltd* (20640/14) [2016] ZASCA 33.**

Briefly, X sued Y within the three year prescription period after X's claim arose. After close of pleadings, X ceded to Z its right to recover the debt and Z was substituted as the plaintiff.

By the time Z was substituted as plaintiff, more than three years had elapsed since the claim arose. Accordingly, Y raised the defence that the claim was extinguished by prescription in terms of s15(2) and s15(6) of the Prescription Act, No 68 of 1969 (Act). Y's argument was as follows: the substitution of the plaintiff meant that X's interruption of prescription lapsed and the claim was extinguished. Y also argued that the substitution amounted to a "process whereby legal proceedings are commenced" and by this time more than three years had elapsed since the claim arose. The claim had, according to Y's reasoning, prescribed.

Central to the court's rejection of Y's argument that the claim had prescribed was the finding that there was an essential continuity in pursuing the claim. Essential continuity requires a creditor to prosecute the same claim under the same process to final judgment. In the event that the same claim is pursued under the same process, the substitution would not be considered the commencement of new proceedings.

This means that, upon substitution, X and Z would have to be considered one and the same creditor and there must not have been a break in the legal process from the time X sued Y until Z was substituted.

It was held that there are two requirements for essential continuity:

- the substitution must not amount to a document or "process whereby legal proceedings are commenced" (otherwise this will cause a break in the legal process); and
- the claim must relate to the same debt.

On the facts of this case, the court held that there was essential continuity in the legal process. Underlying the court's reasoning was the fact that a valid cession had taken place, causing the substitution not to cause the commencement of new proceedings. Z simply stepped into the shoes of X.

Notably, the court held that upon cession of the rights, the debt remained the same because the cession caused only the identity of the plaintiff to change. Z was therefore pursuing the same claim. A defence of prescription was therefore not created and Z was able to pursue its claim.

# CAN THE SUBSTITUTION OF A PLAINTIFF IN A COURT CASE CREATE A DEFENCE OF PRESCRIPTION?

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*The court found that by substituting C as the plaintiff, A ceased to pursue the claim - there was no continuity because there was no valid cession.*



The case of *Silhouette Investments Ltd v Virgin Hotels Group Ltd* 2009 (4) SA 617 (SCA), had similar facts to the *Fisher* case. Here, A sued B and A then attempted to cede its rights to the claim to C, amending the particulars of claim to reflect the change in plaintiff. However, the contract between A and B precluded such cession. Trying to rectify this, A amended the particulars of claim, substituting itself as plaintiff again. The court found that by substituting C as the plaintiff, A ceased to

pursue the claim - there was no continuity because there was no valid cession. By the time A commenced proceedings for a second time, the claim had prescribed.

It is therefore essential, on the substitution of a plaintiff, to ensure that the requirements for essential continuity have been met in order to avoid a defence of prescription.

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# BEWARE OF THE PUBLIC'S UNQUALIFIED RIGHT OF ACCESS TO A COMPANY'S RECORDS

*Until now it has also been disputed whether s26 of the Act confers an unqualified right of access to the securities register of a company.*

*The crux of the matter revolves around the correct interpretation of s26 of the Act in light of the Companies' argument that the right of access to the securities register is a qualified or limited right.*



**The Supreme Court of Appeal (SCA) in the matter of *Nova Property Group Holdings v Cobbett* (20815/2014) [2016] ZASCA 63 provided welcome clarity on the interpretation and qualifications of the public's rights to have unrestricted access to companies' records as conferred upon by s26(2) of the Companies Act, No 71 of 2008 (Act).**

Section 8 of the Act reads that a person who holds no beneficial interest 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. Section 26(5) gives a company 14 business days to comply with any request submitted in accordance with the Act. In addition s26(9) also makes it an offence for a company to fail to accommodate a reasonable request for access, or to unreasonably refuse access, to any record to which a person has a right to inspect. It is also an offence (s26(9)) to impede or interfere with any attempt at the reasonable exercise of these rights.

Until now it has also been disputed whether s26 of the Act confers an unqualified right of access to the securities register of a company. This has been put to bed in the Nova case in which a certain Mr Cobbett, an independent investigative journalist for Moneyweb, requested access to the security registers of Nova Property Group Holdings Limited, Frontier Asset Management & Investments Proprietary Limited, and Centro Property Group Proprietary Limited (Companies).

The crux of the matter revolves around the correct interpretation of s26 of the Act in light of the Companies' argument that the right of access to the securities register is a qualified or limited right. The Companies argued for a discretion as to whether or not to permit access to its securities register, submitting that such access would constitute a breach of the listed members' constitutional rights to privacy and dignity.

The court noted the significance of the disjunctive 'or', rather than the conjunctive 'and' used between s26(4)(b) which provides for the mechanism to gain access to a securities register in terms of the Act, and s24(4)(c) which permits access to a company's register in terms of the provision of the Promotion of Access to Information Act, No 2 of 2000 (PAIA). The use of 'and' between the provisions would indicate that the methods can both be used, which further implies that one of the methods may not be sufficient on its own. While the use of 'or' clearly shows that it is one or the other, which patently implies that each method, in and of itself is sufficient to achieve the aim of accessing a company's register.

# BEWARE OF THE PUBLIC'S UNQUALIFIED RIGHT OF ACCESS TO A COMPANY'S RECORDS

CONTINUED

*The court held that the unqualified right of access to a company's register is an essential component of effective journalism and an informed citizenry.*



The court also applied the trite legal axiom that the legislature is deemed to know the law, and in light of this must be accepted to have expressly altered the wording of the provision to indicate the unqualified right of access to the securities register. If the legislature intended for the right to be qualified, it would have drafted such accordingly.

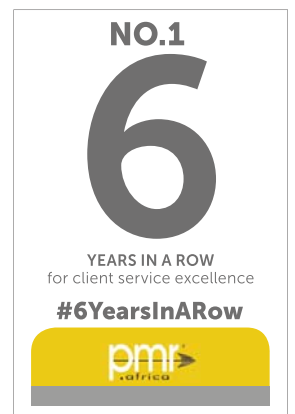
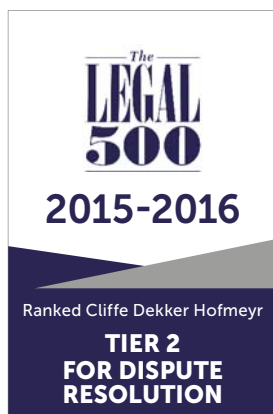
The court dismissed the Companies' constitutional argument that the right to privacy and dignity of the shareholders would be violated by an unqualified right to access of their securities register. An interference with the ability to access such information impedes the freedom of the press and the concomitant freedom of expression which is not limited to the right to speak but includes the right to receive information and ideas. The court held that the unqualified right of access

to a company's register is an essential component of effective journalism and an informed citizenry.

The court further stated that access to accurate information is crucial for the right to freedom of expression, and that the courts will not make an order which would amount to prior restraint on expression unless a very stringent list of criteria is met.

The meaning now ascribed and confirmed to s26(2) of the Act is that any member of the public may access the securities register and records listed in s26(2) of any company on application and payment of a fee, following which the company has 14 days to comply or else face the repercussions of contravening the provisions of the Companies Act.

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