THE SUPREME COURT OF APPEAL

Case 20786/2014

In the matter between:

CITY OF CAPE TOWN Appellant

and

SANRAL AND OTHERS Respondents

and

RIGHT2KNOW CAMPAIGN AND OTHERS *Amici Curiae*

AMICI'S SUBMISSIONS

TABLE OF CONTENTS

I INTRODUCTION ... 3

II ADMISSION OF NEW EVIDENCE ... 4

The new evidence ... 4

Impact of the High Court judgment ... 4

Past and current practice ... 5

The new evidence should be admitted ... 6

III THE RELEVANT CONSTITUTIONAL RIGHTS ... 7

Constitutional Rights ... 7

The limitations are insufficient ... 13

IV RULE 53 AND THE ULTERIOR PURPOSE RULE ... 15

The purpose of Rule 53 ... 15

The ulterior purpose rule does not apply to the Rule 53 record ... 16

The Constitution and PAIA ... 16

The rationales for the rule do not apply ... 20

Public entities have no privacy interest ... 21

No need to incentivise disclosure ... 23

The rule does not prohibit disclosure of the record in court papers ... 24

V RULE 62(7) ... 25

The proper approach to interpretation ... 25

The regulatory context ... 27

Plausible interpretations ... 28

Choosing the right interpretation ... 31

VII CONCLUSION ... 32

I INTRODUCTION

1. The judgment of the High Court substantially reduces current access to records of the High Court, threatens the freedom of the media, curtails the work of public interest organisations and undermines the independence of the judiciary.

2. The *Amici Curiae* have intervened for two reasons. First, to demonstrate the (perhaps unintended) negative consequences of the High Court's findings. Second, to submit that:

   2.1. there is no legal basis for the application of the ulterior purpose rule to administrative records of decision filed in terms of Rule 53; and

   2.2. Rule 62(7) can and must be interpreted to allow free access to all High Court records, absent a court order to the contrary.

3. The animating principle that underlies the *Amici*'s submissions is that all court records are, by default, public documents that are open to public scrutiny at all times. While there may be situations justifying a departure from that default position – the interests of children, state security or even commercial confidentiality – any departure is an exception and must be justified. The High Court's judgment is inconsistent with that basic principle with regard to both the ulterior purpose rule and Rule 62(7).

4. These submissions are structured as follows:

   4.1. Part II briefly addresses the admission of the new evidence.

   4.2. Part III expands on the constitutional rights at stake and why the High Court judgment interferes with them.

   4.3. Part IV explains why:

      4.3.1. the ulterior purpose rule cannot apply to Rule 53 records; *alternatively*

      4.3.2. the ulterior purpose rule does not prohibit the use of a Rule 53 record in subsequent documents in the same case.

4.4. Part V argues that Rule 62(7) should – consistent with uniform and longstanding practice – be interpreted to permit any person to access High Court records at any stage of the proceedings.

II ADMISSION OF NEW EVIDENCE

The new evidence

5. The import of the new evidence is: (a) to demonstrate the impact of the High Court judgment; and (b) to deal with the past and current practice in the High Court.

Impact of the High Court judgment

6. The *Amici* identify the following negative impacts of the High Court judgment:

6.1. It will make it more difficult for parties, particularly public interest organisations, to intervene as *amici curiae* or as intervening parties.[1] This not only negatively affects access to justice, it is a detriment for courts who will be deprived of the advantage of the submissions that *amici curiae* make.

6.2. It will make it more difficult for journalists to report accurately and fairly on court proceedings.[2] It will not prevent reporting on court cases of public interest, but it will make that reporting less accurate because reporters will not have had prior access to the underlying documents. This does not only affect journalists; it affects the public who will be denied accurate reporting on matters of public interest.

6.3. It will prevent or delay the discovery and exposure of public or private wrongdoing.[3] The evidence of both the MGCIJ and Corruption Watch explain how court documents can often be used – together with other documents – to reveal corruption, maladministration or other forms of wrongdoing.

---

[1] Amici Founding Affidavit at paras 105-106.

[2] Amici Founding Affidavit at paras 111-113.

[3] Amici Founding Affidavit at para 114.

6.4. It will make it harder for public interest law organisations to publicise their work, mobilise communities, raise funds and act strategically.[4]

6.5. It will threaten the ability of the DGRU – through SAFLII – and SAHA to make court documents freely and openly available.[5]

Past and current practice

7. The *Amici*, based on their experience, allege that the past practice in both the Western Cape High Court and other High Courts was for the Registrar to provide access to anybody who requested court documents.[6] That practice was seriously altered by the High Court judgment. It ended the practice of open access in the Western Cape High Court.[7] It appears to have had mixed effects in other jurisdictions.[8]

8. Lastly, prior to the High Court judgment it was the common practice of lawyers to provide court documents to interested parties, including the record in Rule 53 proceedings.[9] It was also frequent practice for journalists to obtain court documents from lawyers, rather than from the court.[10] The High Court judgment has reversed that practice. Lawyers will no longer provide the documents, and journalists have found that lawyers are no longer willing to provide them with court documents.[11]

---

[4] Amici Founding Affidavit at paras 115-118.

[5] Amici Founding Affidavit at para 120.

[6] Amici Founding Affidavit at paras 97-100.

[7] Amici Founding Affidavit at para 102.

[8] Amici Founding Affidavit at paras 103-104

[9] Amici Founding Affidavit at para 92.

[10] Amici Founding Affidavit at paras 93.

[11] Amici Founding Affidavit at paras 94-95.

The new evidence should be admitted

9. This court has the power under s 19(a) of the Superior Courts Act 10 of 2013 to "*receive further evidence*".[12] It includes the power to receive evidence from *amici curiae*.[13]

10. The ordinary requirements this court has established to receive evidence under s 19 are: (a) a sufficient explanation for why the evidence was not introduced before the court *a quo*; (b) a *prima facie* likelihood that the evidence is true; and (c) the evidence must be materially relevant.[14]

11. These requirements are met in this case:

    11.1. The *Amici* were not parties before the High Court. In addition, the record was not publicly available, the proceedings were held *in camera*, and the issues on which the *Amici* now wish to intervene were not pleaded by the parties. For all these reasons it was not possible for the *Amici* to attempt to submit the new evidence at that stage.

    11.2. The evidence is of a general or legislative character. It relates to the proper application of the ulterior purpose rule and Rule 62(7). It relates to the operations of the *Amici* and the manner in which they rely on accessing and distributing court records. There is no reason to believe it is not true.

    11.3. The issues before this court are not, primarily, about factual disputes between the parties. They are issues of law that will affect many people beyond the confines of this case. The evidence is relevant for determining whether it is appropriate to

---

[12] Section 19(a) replaced s 22 of the Supreme Court Act 59 of 1959.

[13] Neither the rules nor the Superior Courts Act expressly deal with whether *amici curiae* can introduce new evidence. This Court has not directly addressed the issue. However, academic opinion (see G Budlender 'Amicus Curiae' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS 2006) at 8.13) and Constitutional Court precedent on comparable provisions in the High Court (*Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* [2012] ZACC 25 at para 29) both suggest that there is no obstacle to receiving new evidence from *amici curiae*.

[14] D Van Loggerenberg & P Farlam *Superior Court Practice* (Service 37, 2011) at A1-56.

prevent the distribution of Rule 53 records or to limit the Registrar's existing ability to make all court records publicly available.

12. Accordingly, the new evidence should be admitted.

III THE RELEVANT CONSTITUTIONAL RIGHTS

Constitutional Rights

13. The High Court judgment threatens the exercise of the following constitutional rights:

13.1. The rights of litigants to a public trial in both civil and criminal matters.

13.2. The right of the public to open justice.

13.3. The right of everyone to access to information.

13.4. The City's right to freedom of expression.

13.5. The media's right to report on court proceedings.

14. These rights are overlapping and inter-related. They reflect the multiple interests involved, and are different aspects of the same underlying principle: a system where court proceedings and court documents are, by default, open to the public.

15. First, the right to a public hearing in section 34,[15] and the right to a public trial in s 35(3)(c).[16] This right is afforded, first, to litigants in civil matters, and to accused persons in criminal matters. The publicity of the trial guarantees that the case will be determined fairly, independently, and impartially. The glare of public scrutiny makes it far less likely that courts will act unfairly or unprofessionally towards those who appear before them.

16. In *S v Shinga*, the Constitutional Court considered the constitutionality of a law that allowed criminal appeals to be determined in chambers. It expressed alarm at the idea that court proceedings could, by default, be held in secret:

---

[15] Constitution s 34 reads: "*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*"

[16] Constitution s 35(3)(c) reads: "*Every accused person has a right to a fair trial, which includes the right to a public trial before an ordinary court*".

> "*The section makes dangerous inroads into our system of justice which ordinarily requires court proceedings that affect the rights of parties to be heard in public. It provides that an appeal can be determined by a judge behind closed doors. No member of the public will know what transpired; nobody can be present at the hearing. Far from having any merit, the provision is inimical to the rule of law, to the constitutional mandate of transparency and to justice itself. And the danger must not be underestimated. Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based.*"[17]

17. Litigants are – as a general rule – prejudiced when their proceedings in court are not held in public. It may be that litigants may sometimes wish to keep their litigation private. And there may be situations where a court will justifiably depart from the default rue that court proceedings are public. But it would be dangerous for all litigants – in both civil and criminal matters – for court documents to be generally inaccessible, and unpublishable.

18. Second, the right to public courts does not belong only to litigants, but also to the public at large. The idea that South African civil courts should be open to the public goes back to 1813.[18] The principle of open courtrooms is now constitutionally entrenched. In *Independent Newspapers*, the Constitutional Court held:

> *"There exists a cluster or, if you will, umbrella of related constitutional rights which include, in particular, freedom of expression and the right to a public trial, and which may be termed the right to open justice.*"[19]

---

[17] *Shinga v The State and Another (Society of Advocates, Pietermaritzburg Bar as* Amicus Curiae*); O'Connell and Others v The State* [2007] ZACC 3; 2007 (4) SA 611 (CC) at para 25.

[18] Marais J explained that history in *Financial Mail (Pty) Ltd v Registrar of Insurance and Others* 1966 (2) SA 219 (W) at 220F-G: "*Until 1813, in consonance with the then universal practice in Holland … whilst judgments and orders of the Cape courts had to be pronounced in public, evidence and argument in trial cases were heard in camera, with only the parties and their lawyers in attendance. The British Governor of the Cape, in 1813, issued a proclamation requiring all judicial proceedings in future to be carried on with open doors as a matter of 'essential utility, as well as the dignity of the administration of justice'; it would imprint on the minds of the inhabitants of the Colony the confidence that equal justice was administered to all in the most certain, most speedy and least burdensome manner.*"

[19] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC) at para 39.

19. In addition to the rights we discuss in this section, open justice is also supported by the Constitution's general endorsement of openness and transparency in all public affairs,[20] and the requirement of judicial independence. Open justice is, moreover, required by s 32 of the Superior Courts Act 10 of 2013: "*Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court.*"

20. Open justice does not exist to satisfy the prurient interests of those who wish to examine the private details of others as revealed in court papers. Courts are open in order to protect those who use the institution and to secure the legitimacy of the judiciary. The best expression of this principle appears in *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others*: "*The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness.*"[21]

21. Open justice operates for the benefit of litigants, the general public, and for the benefit of the judiciary as an institution. Without openness, the judiciary loses the legitimacy and independence it requires in order to perform its function.

22. The importance of open justice to the judiciary and the rule of law explains why "*the default position is one of openness*".[22] Court proceedings are open, unless a court orders otherwise. Departures are permissible, but only when the dangers of openness outweigh the benefits.

---

[20] Constitution s 1(d) reads: "*The Republic of South Africa is one, sovereign, democratic state founded on the following values: … (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.*" See also *Independent Newspapers* at para 40.

[21] [2006] ZACC 15; 2007 (1) SA 523 (CC) at para 32. See also *Shinga* at para 26 ("*Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal appeals to be dealt with behind closed doors, faith in the criminal justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy.*")

[22] *Independent Newspapers* at para 43.

23. Importantly for this case, the right of open justice is not limited to attending court hearings. It includes "*the right to have access to papers and written arguments which are an integral part of court proceedings*".[23] This is obvious. The public would not be able to assess the legitimacy or fairness of court proceedings if they could observe the proceedings in a courtroom, but were denied access to the documents that provide the basis for the court's decision. The issue at stake in *Independent Newspapers* concerned only access to the record – all the court proceedings were held in public. Yet the court still emphasised the importance of openness and ordered that, despite claims of national security, the vast majority of the record should be made publicly available. Where it is necessary to limit access to court records or court proceedings, the limitation must be as small as necessary to achieve the purpose.[24]

24. Obviously, the High Court judgment interferes with this principle. Its interpretation of Rule 62(7) creates a default rule of secrecy for all court records. In addition, its application of the ulterior purpose rule to administrative records limits the ability of litigants to ensure publicity when they challenge the actions of the state. It means that court challenges to government action will be less open than they currently are, and less open than other ordinary application proceedings where there is no mandatory disclosure process. Where openness is needed most – the consideration of government conduct – the High Court judgment limits openness the most. The blanket of secrecy it throws over previously open proceedings undermines the legitimacy and effectiveness of the courts.

---

[23] *Independent Newspapers* at para 41.

[24] *Independent Newspapers* at para 45. See also ibid at para 181 (Van der Westhuizen J, dissenting) "*Even if it is shown that national security requires non-disclosure, it must be shown that the non-disclosure that is specifically being sought is the least restrictive method to achieve the purpose. A court will look favourably upon alternatives to full disclosure, or absolute non-disclosure, for example redaction of highly sensitive materials, or summaries of documents that allow the public to understand the substance if not the specifics of the material.*" See also *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC) at para 42.

25. Third, s 32(1) guarantees everyone the "*right of access to any information held by the state*". In *Brümmer*, Ngcobo J (as he then was), explained that in order to give effect to the values of accountability, responsiveness and openness, "*the public must have access to information held by the state.*"[25] The right affects both access to documents from the registrar, and the application of the ulterior purpose rule to administrative records. The court is part of the state, and the documents it holds is "*information held by the state*". And Rule 53 records consist, by definition, of public documents which any member of the public would be entitled to access through the provisions of the Promotion of Access to Information Act 2 of 2000 ("**PAIA**") which gives effect to s 32.

26. In the context of this case, several groups rely on this right. The public interest organisations rely on it to do their work. The DGRU and SAHA rely on it to compile their databases of court documents. Corruption Watch relies on it to uncover wrongdoing by public officials. And the media *amici* rely on accessing state information to report on important public events. The Constitutional Court has noted that the media has a duty to report accurately, as "*[t]he consequences of inaccurate reporting may be devastating.*"[26] But that means that journalists must be able to access information: "*Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.*"[27] Rules that interfere with the ability to access information also interfere with the freedom of the press.

27. Fourth, the media's right to freedom of expression. The right to expression is the flip side of the right of access to information. Section 32 guarantees that people can access relevant information, and s 16 entitles them to distribute that information to others. The media are "*a key facilitator and guarantor*"[28] of the right to freedom of expression:

---

[25] *Brümmer v Minister for Social Development and Others* [2009] ZACC 21; 2009 (6) SA 323 (CC) at para 62.

[26] Ibid at para 63.

[27] Ibid.

[28] *Mail and Guardian Media Ltd and Others v Chipu N.O. and Others* [2013] ZACC 32; 2013 (6) SA 367 (CC) at para 52.

> "*In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility.*"[29]

28. Importantly, the right to freedom of expression is not limited to the right to speak, but also the right to receive information and ideas.[30] When the government prevents the press from reporting fully and accurately, it does not only violate the rights of the journalists who want to publish those ideas, it violates the right of all the people who rely on the media to provide them with "*information and ideas*".

29. The High Court judgment, again, seriously interferes with the right to express and receive ideas. It prevents the media from publishing accurately on court proceedings because it denies them access to court records. As the MGCIJ has explained, it is both the interpretation of Rule 62(7) and the application of the ulterior purpose rule that has this effect: journalists have, in the past, obtained court documents either from the registrar, or from lawyers involved in the case. As a result, the Judgment also denies the public the right to receive the information and ideas that the media would publish.

30. Fifth, this case also engages litigants' right to freedom of expression. The ulterior purpose rule prevents a litigant in the position of the City from distributing its supplementary affidavit and the contents of the court record. That is a serious difficulty for public interest organisations like the LRC, SERI and Section27. For them, the right to inform people about what their clients are doing in litigation is vital to ensuring community mobilisation, advocating and mobilising for law reform, and raising funds.

---

[29] *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) at para 24.

[30] Constitution s 16(1)(b): "Everyone has the right to freedom of expression, which includes – (b) freedom to receive or impart information or ideas". See also *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC) at para 49.

The limitations are insufficient

31. The High Court adopted certain limiting principles which reduce the degree of violation, namely:

    31.1. Both prohibitions operate only until the case is called in open court.

    31.2. Anybody is entitled to approach a court to seek a departure from rule 62(7), and a litigant is entitled to request a departure from the ulterior purpose rule.[31]

32. Neither of these additions to the rule meaningfully addresses the limitation of the rights at stake. The two limitations are related, and rest on the basic assumption that there is some basis for secrecy before a matter is called in court. They are not a sufficient safeguard for the following reasons.

33. First, it does not assist those who wish to intervene – as *amici* or intervenors – to obtain the papers after the hearing.[32] They need the papers before the hearing in order to assess whether they wish to intervene or not.

34. Second, the *Amici* – and the public generally – have a legitimate interest in cases that never get heard in open court, because they are settled or withdrawn.[33] Parties have still chosen to engage the court proceedings if a matter settles. They must also be subject to the requirement of openness. Especially where litigation involves public entities, the public will have a real interest in evaluating the court papers to determine whether the decision to settle or withdraw was justified.

35. Third, it is not possible for the media to report accurately on court proceedings if they can only access the documents once the case is called. It is vital that the public be able to have access to court records prior to the hearing so that they can follow the proceedings in open

---

[31] High Court judgment at para 53.

[32] Amici Founding Affidavit at para 123.

[33] Amici Founding Affidavit at paras 124-127.

court. Without prior access to the papers, the proceedings will be meaningless.[34] Moreover, having access to papers in advance allows journalists to prioritise reporting on matters of public interest.[35]

36. Fourth, there is no legitimate expectation of parties who submit documents in court that those documents will remain private. As the *Amici* have pointed out, the widespread and longstanding practice in the High Court has been that court records are freely available at any stage. Parties who choose to use the courts get the benefit of an open court process, but they also incur the costs. As Van der Westhuizen J explained in *Prinsloo v RCP Media Ltd t/a Rapport*:

> "*Intimate personal details are often disclosed in court rooms in front of members of the public and the media. This is unfortunate for the individuals involved, but their privacy is in such cases outweighed by values such that courts in a democratic country function with transparency, so that any member of the public can see that justice is being done*".[36]

That principle applies equally to intimate or embarrassing details disclosed in court papers. Put bluntly, if there is some interest in keeping court records private, it is difficult to see how that interest lapses when the matter is called.

37. Fifth, cases that are settled can still provide vital evidence that reveals wrongdoing. Settlement may still be news, and the wisdom of the settlement is a legitimate issue for public debate, particularly if the litigation involves organs of state. The public are entitled to know whether a case was properly settled, or whether the settlement was influenced by some improper motive. That can only be determined by access to the papers.

38. Sixth, an application for access to papers is an additional cost in time and money. In many cases, people who otherwise have an interest in the matter will determine that they cannot afford to bring an application for access. While the High Court attempts to paint this

---

[34] Amici Founding Affidavit at para 128.

[35] Amici Founding Affidavit at para 129.

[36] 2003 (4) SA 456 (T) at 462.

option as enhancing access, in reality, it will provide an insuperable barrier to many, particularly litigants with limited funds for High Court litigation.[37] That includes both many media organisations and public interest organisations.

IV RULE 53 AND THE ULTERIOR PURPOSE RULE

The purpose of Rule 53

39. Rule 53 exists to facilitate applications for judicial review. The rule is "*an important tool in determining, on equal footing … the lawfulness and fairness of any administrative action which is mostly taken, so to speak, behind closed doors.*"[38] It recognises that those seeking to review public decisions often have "*no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision.*"[39] Without the protection afforded by Rule 53, the applicant "*would be obliged to launch review proceedings in the dark*".[40]

40. To overcome this almost inevitable information deficit, Rule 53 compels the public authority to provide the record of proceedings and then entitles the applicant to amend its notice of motion and supplement its founding affidavit. In essence, the applicant is given a fresh chance to state its case after having sight of all relevant documents. As the Appellate Division put it in *SA Jockey Club*: "*The Rule thus confers the benefit that all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the Court have identical papers before them when the matter comes to Court.*"[41]

41. The provision is therefore very different in operation and purpose from discovery in ordinary civil proceedings. Under Rule 35, discovery is only undertaken after the pleadings have closed. There is not generally a right to compel discovery in order to allow the party

---

[37] Amici Founding Affidavit at para 131.

[38] *Lawyers for Human Rights v Rules Board for Courts of Law and Another* [2012] ZAGPPHC 54; [2012] 3 All SA 153 (GNP); 2012 (7) BCLR 754 (GNP) at para 23.

[39] *Jockey Club of SA v Forbes* 1993 (1) SA 649 (A) at 660D.

[40] Ibid.

[41] Ibid.

to state its case. Rather, discovery facilitates the exchange of evidence in order to allow the parties to prove their cases, after their contours have already been determined. Rule 53 assists in exposing evidence, but it also allows an applicant to determine whether they have a case at all, and if so what the basis of that case may be.

42. Therefore, when an applicant in Rule 53 proceedings files its supplementary affidavit, it is, in effect, fully stating its case for the first time.

The ulterior purpose rule does not apply to the Rule 53 record

43. The ulterior purpose rule imposes a default rule of secrecy because it requires discovered information to be kept secret unless the party who discovered the information, or the court, consents to its disclosure. The alternative is a default rule of openness with provision for a party who is obliged to discover confidential information to approach the court for protection of that information.

44. The debate in this matter is a very narrow one. The High Court, the City and SANRAL accept – as do the *Amici* – that a party who discovers confidential information is entitled to protection of the confidentiality of its information. The dispute is whether the default rule should be secrecy or openness for documents over which no party claims confidentiality.

45. We submit that the Constitution requires that the default rule must be openness, at least for documents held by the state. We will advance two lines of argument in support of that proposition. First, the Constitution prohibits the application of the rule. Second, the rationales for the rule do not apply to Rule 53 proceedings.

The Constitution and PAIA

46. The constitutional principle of open justice prevents the application of the ulterior purpose rule to Rule 53 proceedings. The rights to freedom of expression, access to information

and access to courts all favour easy access to court documents. Indeed, openness and publicity are the very price of going to court. The state provides a machinery for the resolution of disputes, but one of the essential conditions for using that machinery is – absent special circumstances – to have your dispute determined in public.

47. Section 32(1)(a) of the Constitution affords everyone "*the right of access to any information held by the state*". Section 32(2) goes on to say that "*[n]ational legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.*"

48. PAIA is the national legislation enacted to give effect to the right of access to information in terms of section 32.[42] It unambiguously establishes a default rule of openness in relation to documents held by the state. Section 11(1) states that a requester "*must be given access to a record of a public body*" as long as it complies with the procedural requirements, and there is no valid ground of refusal.[43] Section 11(3) goes on to make it clear that the reasons or purpose why the requester seeks access are irrelevant.

49. This default rule of openness is then qualified by sections 34 to 45 which entitle the state to deny access to its information in exceptional circumstances where secrecy is justified. The important point, however, is that the default rule is one of openness. In accordance with section 32 of the Constitution, PAIA establishes a default rule of openness and allows secrecy only by exception if the particular circumstances justify it. That rule is emphasized by s 46 of PAIA which provides a public interest override for

---

[42] The long title of PAIA reads: "*To give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith.*"

[43] The section reads in full:

"*(1) A requester must be given access to a record of a public body if-*

(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part."

access to documents where the public authority could otherwise refuse access. PAIA therefore reflects the rule with regard to court proceedings generally: they are, by default, open unless there is a reason for excluding access that cannot be outweighed by public interest concerns.

50. Once a record is obtained under PAIA, there are no restrictions on how that information may be used. PAIA does not prevent those who obtain documents from further distributing those documents to whomever they wish. The documents are public documents and can be made publicly available.

51. Section 7(1) of PAIA excludes from its operation any access to information requested for the purpose of pending judicial proceedings.[44] Its rationale is that it is left to the rules of court to regulate discovery.[45] In other words, in the context of litigation in the High Court, the rules of court constitute the national legislation required by section 32(2) of the Constitution to give effect to the right of access to information. Rule 53 is the rule that provides for access to the public documents that are required to prosecute an administrative review.

52. The rules of court must therefore establish a principle or default rule of unqualified openness, just as the Constitution requires and PAIA does. They may provide for secrecy by way of exception when it is justified by the circumstances of any particular case but their default rule must be one of openness. They must give effect to the unqualified

---

[44] PAIA s 7(1) reads:

> *"(1) This Act does not apply to a record of a public body or a private body if-*
>
> *(a) that record is requested for the purpose of criminal or civil proceedings;*
>
> *(b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and*
>
> *(c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.*"

[45] *Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI) and Others* 2012 (2) SA 269 (SCA) at para 9; *PFE International and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at para 21.

constitutional right of access to any information held by the state. They may limit it only in accordance with section 36(1) of the Constitution.

53. It is consequently not open to the court to adopt the ulterior purpose rule in relation to documents held by the state. The rule is incompatible with section 32(1) of the Constitution because it departs from the rule of default, unqualified access to public documents. It imposes an obligation of confidentiality on parties who obtain documents which they would not be under if they had obtained the documents under PAIA. That is not only irrational, it is perverse. For the reasons highlighted above, court proceedings must be as open as possible. The ulterior purpose rule makes documents harder to obtain and use than they would be outside of court proceedings.

54. If the High Court were correct in its approach, it would create the following anomaly. Section 7(1) means that a litigant can no longer rely on the presumptive right of access to state information guaranteed in s 32(1)(a) and 11(1) of PAIA. Once the City decides to take SANRAL to court, its access to SANRAL's record is regulated by the rules of court that govern discovery.

55. But the public and the media do not seek access to the record "*for the purpose of criminal or civil proceedings*". Their access is accordingly not excluded by s 7 and remains governed by s 11 of PAIA. Section 5 of PAIA moreover provides that PAIA trumps other legislation inconsistent with it.[46] The rights of the media and the public, in terms of PAIA, to access to SANRAL's record of decision and indeed to all other court records, accordingly override the restrictions imposed by the common-law ulterior-purpose rule. Indeed, as we discuss in more detail below, it must also overrule Rule 62(7) of the rules of court.

---

[46] Section 5 reads:

"*This Act applies to the exclusion of any provision of other legislation that-*

(a) prohibits or restricts the disclosure of a record of a public body or private body; and
(b) is materially inconsistent with an object, or a specific provision, of this Act."

56. Lastly: If the City and the *Amici* are correct about Rule 62(7), then the entire rationale for the ulterior purpose rule also falls away. If any person can access the contents of the Rule 53 record from the Registrar, then nothing is achieved by preventing parties from distributing those documents. That, of course, does not mean that the ulterior purpose rule does not apply to documents provided under the ordinary rules of discovery. The documents provided under Rule 35 are not part of the court papers, they are merely exchanged between the parties. They will, therefore, not be available from the registrar, and preventing their distribution by the parties still serves a practical purpose.

The rationales for the rule do not apply

57. The rationale for the ulterior purpose rule is twofold:

    57.1. Discovery impinges upon the rights of privacy of the party required to make discovery. Lord Denning MR put the point as follows: "*Compulsion is an invasion of a private right to keep one's documents to oneself.*"[47] It is important to stress that it is the privacy of the person making disclosure that needs to be protected.

    57.2. But while there is an interest in protecting privacy, there is also a "*public interest of discovering the truth, ie in making full discovery.*"[48] A rule that simply allowed parties to refuse to discover documents would be incompatible with that interest. The second rationale, therefore, is to encourage litigants to make full discovery by assuring them that their information would only be used for purposes of the litigation for which the discovery is made, and not for any other purpose.

58. Neither rationale – the protection of privacy or the need to ensure full disclosure – applies in the context of documents disclosed by a public body in Rule 53 proceedings.

---

[47] *Riddick v Thames Board Mills Ltd* [1977] 3 All ER 677 (CA) at 687 (quoted by the High Court at para 42).

[48] *Riddick* at 678.

Public entities have no privacy interest

59. Rule 53 will only ever require the disclosure of documents by public bodies. The question is whether those public bodies have any privacy interest in the documents they hold. There are two reasons that public bodies have no privacy interest – the nature of the institution and the nature of the documents.

60. First, not all entities are bearers of constitutional rights. Ordinarily, constitutional rights apply only to natural persons. Section 8(4) affords rights to juristic persons only "*to the extent required by the nature of the rights and the nature of that juristic person.*"

61. The right to privacy to the extent it applies to public bodies at all, does not include protection of documents relied on to make decisions.

    61.1. Privacy is closely linked to human dignity. Public bodies, like juristic persons, "*are not the bearers of human dignity.*"[49]

    61.2. Public bodies are subject to the default rules that all information they hold must be publicly available. In such a regime, they can have no expectation that the privacy of documents will be protected merely because they are provided through the effect of Rule 53, rather than a request under PAIA.

62. Accordingly, public bodies are not the bearers of a right to the privacy of the information they hold. That does not mean that public bodies never have a claim to keep their documents confidential. But any claim for confidentiality arises from a different interest – national security, the privacy rights of people mentioned in the documents – not from the public entity's right to privacy.

---

[49] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* [2000] ZACC 12; 2001 (1) SA 545 (CC) at para 18.

63. Second, the nature of the documents requested in Rule 53 proceedings will, as a general rule, not be private documents. In *Mistry v Interim National Medical and Dental Council*, the Constitutional Court explained that the extent of protection afforded by s 14 of the Constitution[50] depends on the nature of the activity being protected:

> "*The more public the undertaking and the more closely regulated, the more attenuated would the right to privacy be and the less intense any possible invasion. [There is] a continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life and ending in a public realm where privacy would only remotely be implicated.*"[51]

64. As this court's rules explain, "*[d]ocuments filed for Court purposes are public documents*."[52] Moreover, the documents that will form part of a Rule 53 record are documents that informed the exercise of public power. They are as far from the core of private interests as it is possible to go. There is simply no reason why those documents should be presumptively private.

65. Where, for particular reasons, some of the documents are indeed confidential – because they reveal private, internal deliberations,[53] or personal information of private people – the correct approach is for the public entity to seek permission for those documents to remain confidential. The confidentiality claim arises from the nature of the documents, not the fact that they were provided under compulsion.

---

[50] Section 14 reads:

> "*Everyone has the right to privacy, which includes the right not to have -*
> *(a) their person or home searched;*
> *(b) their property searched;*
> *(c) their possessions seized; or*
> *(d) the privacy of their communications infringed.*"

[51] [1998] ZACC 10; 1998 (4) SA 1127 (CC) at para 27.

[52] Supreme Court of Appeal Rule 4(3)(a).

[53] See, for example, *Helen Suzman Foundation v Judicial Service Commission and Others* [2014] ZAWCHC 136 (confidentiality of internal deliberations of Judicial Service Commission's proceedings sought as part of Rule 53 record).

No need to incentivise disclosure

66. The second justification for the ulterior purpose rule – encouraging full discovery – is inapplicable when it comes to the production of administrative records by public bodies under Rule 53. Indeed, relying on it in the context of a requirement that public bodies provide relevant documents to court would be perverse.

67. First, it is simply not necessary to coax the state to make the disclosure required by law. Private persons have no general legal obligation to actively assist in court proceedings. They are required only to comply with the rules in place. Public bodies, by contrast, are bound by the Constitution to "*ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.*"[54] In the words of Justice Sachs: "*the Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open.*"[55] Given this obligation, it is not necessary to incentivise the state to disclose relevant documents by promising confidentiality.

68. Indeed, in English law, there is normally no discovery process equivalent to Rule 53 because of the "*duty of candour*" on public bodies. Public authorities owe what is known as a "*duty of candour*"[56] to lay "*all the cards face upwards on the table*", since "*the vast majority of the cards will start in the authority's hands*".[57] As one judge put it: "*It is expected, and the expectation is almost always met, that the public authority defendant will explain in an open and full manner how it reached the decision impugned, exhibiting the relevant supporting documents, without need for any general or specific order.*"[58]

---

[54] Constitution s 165(4).

[55] *Matatiele Municipality and Others v President of the Republic of South Africa and Others (1)* [2006] ZACC 2; 2006 (5) SA 47 (CC) at para 107.

[56] SA De Smith et al, *De Smith's Judicial Review* (7 ed, 2013) at para 16-027.

[57] R *v Lancashire CC, ex p Huddleston* [1986] 2 All ER 941 (CA) at 945.

[58] *British Union for the Abolition of Vivisection (BUAV) v Secretary of State for the Home Department* [2014] EWHC 43 (Admin) at para 55.

69. Second, all the records provided as part of a Rule 53 record would, in any event, be available in terms of PAIA. It would be perverse to confer a rule of secrecy on the selfsame documents once they are subject to litigation. To the extent that the documents would be subject to an exception under PAIA, it will be open to the public entity to seek a departure from the default position of openness.

The rule does not prohibit disclosure of the record in court papers

70. If the City and the *Amici* are wrong, and the ulterior purpose rule prohibits the disclosure of the Rule 53 record itself, it cannot be relied on to prohibit an applicant from disclosing its own further affidavits or heads of argument that refer to the contents of that record. In this case, the rule cannot be relied on to prevent the City from disclosing its supplementary affidavit to the public.

71. The ulterior purpose rule does not prescribe the manner in which litigation may be conducted. Its purpose is also not, in the first place, to preserve the confidentiality of discovered documents. Its purpose is to ensure that discovered documents are only used for purposes of the litigation in which they are discovered. It says only that discovered documents may not be used for ulterior purposes. As a result, the rule is not breached by any disclosure of discovered documents. It is breached only by use of the documents for an ulterior purpose, whether or not that use results in the disclosure of the documents to third parties.

72. The City's use of parts of the administrative record in its supplementary founding affidavit constitutes a legitimate use of the record in compliance with the ulterior purpose rule. The question is whether the City may publicly release its supplementary founding affidavit. If a litigant may normally do so, that is, if it is a normal incident of application proceedings that a litigant may publicly release its affidavits, then it cannot be said that the City's release

of its supplementary founding affidavit constitutes the use of the administrative record for purposes other than the litigation.

73. There is no general rule that prevents parties from releasing their affidavits to the public prior to the hearing of a matter. Nor – outside its broad interpretation of the ulterior purpose rule – does the High Court suggest that such a prohibition exists. But if there is no such rule, then there can be no objection to the City releasing its supplementary founding affidavit to the public, whether or not it contains references to the contents of the Rule 53 record.

74. That is not to say that there can never be a prohibition on the public release of court documents: If there is a genuine confidentiality interest, the court may order that affidavits should not be disclosed. But, again, the default rule remains one of openness. Secrecy is the exception and must be imposed by the court; ordinarily on application by one of the parties.

V RULE 62(7)

75. Rule 62(7) reads: "*Any party to a cause, and any person having a personal interest therein, with leave of the registrar on good cause shown, may at his office, examine and make copies of all documents in such cause.*" The question for this court is how that rule should properly be interpreted. In answering that question we deal with the following issues:

75.1. The proper approach to interpretation.

75.2. The historical meaning.

75.3. The grammatically available meanings.

75.4. The constitutionally compatible meaning.

The proper approach to interpretation

76. There are a number of guides to how Rule 62(7) should be interpreted.

77. First, s 39(2) of the Constitution reads: "*When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*" As this court held in *Arse v Minister of Home Affairs and Others*, s 39(2) requires courts when interpreting a statute or a rule of court to "*avoid an interpretation that would render the statute unconstitutional*"; and "*adopt the interpretation that would better promote the spirit, purport and objects of the Bill of Rights, even if neither interpretation would render the statute unconstitutional.*"[59]

78. Second, courts must have regard to text, context and purpose. As Wallis JA explained in *Natal Joint Municipal Pension Fund*:

> *"consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.*"[60]

79. As the court went on to explain, "*[m]ost words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise.*"[61] Courts will not adopt interpretations that lead to "*impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation … under consideration.*"[62]

80. In the context of the interpretation of Rule 62(7), this court must consider the various grammatical meanings it can bear. It must investigate how those possible meanings fit the

---

[59] [2010] ZASCA 9; 2012 (4) SA 544 (SCA), citing *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* [2000] ZACC 12; 2001 (1) SA 545 (CC) paras 22-6; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12; 2009 (1) SA 337 (CC) paras 46, 84 and 107; *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC) para 47.

[60] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 18.

[61] Ibid at para 25.

[62] Ibid at para 18.

context of the rules as a whole, as well as the broader regulatory framework of which the Uniform Rules form a part. And it must ask which interpretation better serves the purpose of those rules. Lastly it must ensure its interpretation is constitutional.

The regulatory context

81. The purpose of the rules as a whole "*is to secure the inexpensive and expeditious completion of litigation before the courts: they are not an end in themselves.*"[63] Or, as Rumpff JA said "*the rules exist for the court, not the court for the rules.*"[64] An interpretation of the rules that better serves the interests of the court as an institution, should be preferred.

82. Rule 62(7) must be understood as part of the whole of Rule 62. The rule deals with technical and procedural matters concerning the "*Filing, Preparation and Inspection of Documents*". It requires additional copies to be filed if there is more than one judge, specifies the type of ink and paper that must be used, deals with the numbering and indexing of papers, and affords the Registrar the power to refuse to accept documents that do not comply with the rule.[65] It is questionable whether, if the drafters meant to drastically restrict access to court documents, it would have done so in a rule addressing such technical matters. In the context of Rule 62 as a whole, the rule is better read as simply indicating that copies and examinations must happen with the Registrar's leave, and at her office, rather than as a substantive prohibition on access.

---

[63] D Van Loggerenberg *Erasmus Superior Court Practice* (RS 45, 2014) B1-p5.

[64] *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783A–B ("*die Hof nie vir die Reëls bestaan maar die Reëls vir die Hof*").

[65] Rules 62(1)-(6).

Plausible interpretations

83. The *amici* submit that there are three[66] grammatically plausible interpretations of Rule 62(7).

84. The "**High Court's Interpretation**": The High Court interpreted the rule to mean that the Registrar may only provide access to the record to: (a) parties; and (b) those with a direct legal interest in the case.[67] Apart from the substantive flaws in this approach that we have already identified, it poses a real administrative difficulty. It requires the Registrar to make a determination of whether or not a party has a direct and substantial interest in the matter, without any evidence from the intervening party. It is entirely unclear how the High Court envisioned that the Registrar would make this determination.

85. The "**Broad Interpretation**" asserts that "*any person*" who wishes to access documents from the Registrar has the requisite "*personal interest*". The Applicants submit that, considered in its proper context, this is the most plausible interpretation of the Rule. Rule 62(7) does not refer to the phrase "*direct and substantial interest*"; it uses the phrase "*personal interest*". The High Court – based only on academic commentary[68] – assumed that is the appropriate interpretation. But the qualifier "*personal*" in Rule 62(7) can equally well be read to mean "*any person*" who is personally interested in the matter. There are several pointers that this is not only a plausible, but also a preferable interpretation of the rule.

---

[66] The *Amici* no longer advance the interpretation that "*personal interest*" could include applicants for intervention as *amici curiae*.

[67] High Court judgment at para 35.

[68] Loggerenberg (n 55) at B1-405. The author states merely: "*It is submitted that, on the analogy of the principles pertaining to intervention and joinder, a person has a 'personal interest' in a cause if he has a legal interest in the subject-matter of the cause which would be prejudicially affected by the judgment of the court.*" Given that the phrase "*personal interest*" is not used in rules or statutes regulating intervention, and that the purpose of Rule 62(7) has nothing to do with intervention, there is no meaningful analogy.

86. First, the rules of this court,[69] the Constitutional Court,[70] the Land Claims Court,[71] the Labour Court,[72] and the Magistrates' Court,[73] all state that "*any person*" may make copies of all court documents in the presence of the Registrar (or clerk). The Uniform Rules are the only rules to qualify the phrase "*any person*" with the words "*having a personal interest therein*". Yet there is nothing different about proceedings in the High Court that would suggest that the difference in wording requires a different approach in practice. The phrase "*any person having a personal interest therein*" is clearly capable of referring simply to "*any person*". The ambiguity in the meaning should be resolved by adopting the meaning that is consistent with the unambiguous intent of every other rule in South African courts on the issue.

87. Second, that is how the rule has in fact been interpreted in practice. Prior to the High Court judgment, that was the practice in the Western Cape Division of the High Court. With a few exceptions, it remains the default practice of all or most other divisions that any person may obtain access to court documents. That demonstrates that the Broad Interpretation is indeed the most natural interpretation of the rule.

88. Third, the Broad Interpretation coheres with how the phrase is used elsewhere in the Uniform Rules. The only other place the phrase "*personal interest*" appears is in Rule 57. That rule requires an application for the appointment of a curator *ad litem* to be

---

[69] Supreme Court of Appeal Rule 4(3)(a) reads: "*Documents filed for Court purposes are public documents and may be inspected by any person in the presence of the registrar.*"

[70] Constitutional Court Rule 4(6) reads, in relevant part: "*Copies of a record may be made by any person in the presence of the Registrar."*

[71] Land Claims Court Rule 4(4) reads: "*All documents forming part of the records in a case may be perused by any person in the presence of the Registrar or any person designated by him or her.*"

[72] Labour Court Rule 28(4) reads: "*Any person may make copies of any document filed in a particular matter, on payment of the fee prescribed from time to time, and in the presence of the registrar, unless a judge otherwise directs.*"

[73] Magistrates' Court Rule 3(5) reads: "*Copies of the documents referred to in rule 3(4) may be made by any person in the presence of the registrar or clerk of the court.*" Rule 3(4) refers to all documents filed with the court. Magistrates' Court Rule 63(6) reads: "*Any person, with leave of the registrar or clerk of the court and on good cause shown, may examine and make copies of all documents in a court file at the office of the registrar or clerk of the court.*"

accompanied by an affidavit of a person who knows the patient, and two medical practitioners. If the person "*has any personal interest in the terms of any order sought*" the affidavit must disclose the "*full details of such relationship or interest*". In addition, the medical practitioners should be people "*without personal interest in the terms of the order sought.*" It is plainly not a reference to a direct and substantial legal interest. It is meant to capture those people who have an intimate or financial relationship with the patient. That use demonstrates that "*direct and substantial interest*" is not the necessary, let alone the most obvious, meaning of "*personal interest*" when the phrase is used in the Uniform Rules.

89. Fourth, where this court was required to interpret a similar phrase – "*person with an interest*" – it did so on the assumption that it referred to a legal interest.[74] But it described that as "*the narrow meaning*" of the phrase.[75] Clearly, there is nothing inherent in the use of the word "*interest*" that requires it to be interpreted to mean "*direct and substantial*" interest.

90. The third possible interpretation is the "**No Prohibition Interpretation**". Rule 62(7) contains no express prohibition on access; it merely states that parties and those with a "*personal interest*" may make copies of documents. It is silent on what the Registrar should do when a person not mentioned in Rule 62(7) requests access to court documents.

91. The answer is that the Registrar – as a public official bound by the Bill of Rights[76] – must exercise her power to promote the rights of access to information and access to courts. She must therefore provide access to any person seeking access to court records, absent a legitimate reason to refuse (such as an order that the record be kept confidential). Rule 62(7) tells the Registrar only that the reasons that may justify refusing access to interested individuals, do not entitle refusing access to the parties and those with a direct legal interest.

---

[74] *Minister of Environmental Affairs and Tourism and Others v Atlantic Fishing Enterprises (Pty) Ltd and Others* 2004 (3) SA 176 (SCA) at para 14.

[75] Ibid.

[76] In terms of s 8(1) of the Constitution, the Bill of Rights binds "*the legislature, the executive, the judiciary and all organs of state*".

92. This interpretation is attractive because it coheres with the Constitution and the position in all other comparable courts in the Republic, but still assigns some meaning to the slightly different wording of Rule 62(7). It provides access to all, but slightly better access to those with a more direct interest in proceedings.

Choosing the right interpretation

93. Applying the principles of interpretation to the four available interpretations, the Broad Interpretation should be adopted. Textually, it is the most plausible. It does not seek to give the term "*personal interest*" a stretched or unnatural meaning. It adopts the ordinary meaning that: (a) is consistent with the constitutional right to open justice; (b) is compatible with the position in all other comparable courts as expressed in the rules and as given effect to in practice; and (c) fits with the other uses of "*personal interest*" in the Uniform Rules. Indeed, the Broad Interpretation is the interpretation that best promotes constitutional rights. It is, therefore, the interpretation that this court must adopt.

94. Alternatively, the No Prohibition Interpretation also complies with constitutional precepts. It allows "*any person*" to obtain access to court documents, although it draws a distinction between two groups: parties/interested persons and all other requestors. While it, too, is a plausible textual interpretation it relies on the twisting of the phrase "*personal interest*" to be limited to intervenors (and possibly *amici curiae*). There are no good textual, contextual or purposive reasons to adopt that interpretation. The No Prohibition Interpretation is preferable to the High Court's Interpretation solely for the substantive reason that it promotes open justice. It should only be adopted over the Broad Interpretation if, contrary to the position we have advanced, the court finds that it is a better textual, contextual or purposive interpretation.

95. The High Court's Interpretation is inconsistent with the Constitution. It severely limits the basic principle of open justice, and the rights to public hearings, freedom of expression and access to information for the reasons described earlier. And it relies on a contrived textual interpretation. It makes the High Court an outlier, with far more restrictive rules of access than any other superior court. It should be rejected for all those reasons.

96. Lastly, we noted above that s 5 of PAIA provides that it prevails over other legislation. That includes prevailing over the rules of court. The High Court's approach creates an anomaly where Rule 62(7) prohibits public access to court documents, whereas s 11 of PAIA (read with s 5) demands it. The public is entitled to all the documents that form part of the Rule 53 record merely by requesting them from SANRAL in terms of PAIA. Yet it cannot obtain the same documents because they have been used in litigation by another party. There is no justification for that contradiction.

VII CONCLUSION

97. The High Court adopted new procedural rules that threaten the venerable and constitutionally required rule of open justice and access to public documents. It threatens to do serious harm to the media, the fight against corruption, public interest organisations, and public knowledge of matters of public import. It threatens public trust of the courts and therefore their independence and legitimacy.

98. This court should reverse the High Court's findings with regard to both the ulterior purpose rule and Rule 62(7). It should formalise the position that has always been adopted in practice: absent some substantive claim of confidentiality, court documents are public.

Wim Trengove SC

Chambers, Sandton

Michael Bishop

Legal Resources Centre, Cape Town

Counsel for the *Amici Curiae*

20 February 2015