IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 20815/2014

In the matter between:

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

and

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

and

MANDG CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Amicus Curiae

SUBMISSIONS ON BEHALF OF THE AMICUS CURIAE

INTRODUCTION

1. The High Court was of the view, and the Appellants (**the Companies**) contend, that section 26(2) of the Companies Act, 2008 (**the Act**) confers a qualified right to inspect the share register of a company. The Companies contend that access may be refused on the grounds which apply to a request in terms of the Promotion of Access to Information Act 2 of 2000 (**PAIA**), and on the grounds of the motive of the requester.

2. The Respondents (**Moneyweb**) contends that section 26(2) confers an unqualified right on any person who complies with the procedure set out in section 26(2) and (4).

3. If access to securities registers is subject to the grounds of refusal which apply to a request under PAIA or to refusal based on the alleged motive of the requester, this will have a significant negative impact on journalists and the public. MandG Centre for Investigative Journalism NPC (**amaBhungane**) has intervened as an amicus curiae in order to address this issue.

4. The amicus submits that the construction that the section 26(2) right is unqualified, is supported by the following:

4.1 the legislative history of section 26 of the Act;

4.2 the Constitutional right of freedom of expression and of the media, and to the Constitititional right to receive information;

4.3 international law; and

4.4 comparative law.

5. These submissions are structured as follows:

5.1 We address the admission of new evidence by an amicus curiae;

5.2 We set out the legislative history of the section;

5.3 We address the impact of the Companies' interpretation on the constitutional rights which are affected; and

5.4 We set out the position in two foreign jurisdictions;

5.5 We then submit that if this Court finds that the High Court's judgment is not appealable, because it is interlocutory in nature, it should nevertheless pronounce on the correct interpretation of section 26.

AN AMICUS CURIAE MAY BE PERMITTED TO ADDUCE NEW EVIDENCE

6. This Court has the power under section 19(b) of the Superior Courts Act 10 of 2013 to "*receive further evidence*".

7. It is so that Rule 16(8) of this Court provides that "*[a]n amicus curiae shall be limited to the record on appeal and may not add thereto and, unless otherwise ordered by the Court, shall not present oral argument*" (emphasis added). However, we submit that this position is not invariable. While an amicus plainly has no right to introduce evidence, the Rule does not preclude this Court from receiving evidence, for the following reasons:

7.1 The Rules of Court cannot validly preclude the Court from exercising a power which is conferred upon it by (later) statute.

7.2 Rule 16(8) must be read with Rule 11(1). Rule 11(1) provides that the President of this Court or the Court may of their own accord, or upon request or on application:

> *(a) … condone non-compliance with these rules; or*
> *(b) give such directions in matters of practice, procedure and the disposal of any appeal, application or interlocutory matters as the President or the Court may consider just and expedient*.

We submit that this empowers the Court to admit evidence tendered by an amicus. The phrase "*just and expedient*" should be interpreted in this context as akin to the "*interests of justice*" test applied by the Constitutional Court in the *Children's Institute* case.[1]

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[1] *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (2) SA 620 (CC) (***Children's Institute***) para 32.

7.3 The adduction of evidence falls under the ambit of a court's power to regulate its own process in terms of section 173 of the Constitution. Thus, even if the rules do not provide for an amicus to adduce evidence, section 173 can appropriately be invoked by the Court to allow an amicus to do so.[2]

8. As has often been observed, the rules exist for the court, not the court for the rules.[3]

9. Further, section 39(2) of the Constitution requires that, when interpreting any legislation, a court must promote the spirit, purport and objects of the Bill of Rights. This duty is one in respect of which "*no court has a discretion*" and which must "*always be borne in mind*" by the courts.[4] This requires more than the avoidance of an interpretation which renders a statutory provision unconstitutional.[5] It requires also the adoption of an interpretation which "*better*" promotes the spirit, purport and objects of the Bill of Rights, provided that the provision is reasonably capable of such an interpretation.[6]

10. In *Children's Institute*, the Constitutional Court held as follows:

> *In public interest matters, like the present case, allowing an amicus to adduce evidence best promotes the spirit, purport and objects of the Bill of Rights. Therefore, the correct interpretation of Rule 16A must be one that allows courts to consider evidence from amici where to do so would promote the interests of justice.*[7] (Emphasis added.)

11. The Constitutional Court has recognised that amici curiae can play a critical role in dealing with constitutional issues:

> *Amici curiae have made and continue to make an invaluable contribution to this court's jurisprudence. Most, if not all, constitutional matters present issues, the resolution of which will invariably have an impact beyond the parties directly litigating before the*

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[2] *Children's Institute* para 38.

[3] *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) 783A–B

[4] *Phumelela Gaming and Leisure Limited v Grundlingh and Others* 2007 (6) 350 (CC) paras 26 – 27

[5] *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC) para 47

[6] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) paras 46, 84 and 107.

[7] *Children's Institute* para 27 (concerning Rule 16A of the Uniform Rules of Court).

> *court. Constitutional litigation by its very nature requires the determination of issues squarely in the public interest, and insofar as amici introduce additional, new and relevant perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged.*[8]

12. The Constitutional Court held that an amicus must, in appropriate cases, be permitted to adduce evidence in the High Court for at least two key reasons:

12.1 The fact that the Constitutional Court is permitted to admit evidence adduced by amici curiae supports the proposition that courts of first instance must be permitted to adduce evidence, because it is generally not in the interests of justice for the Constitutional Court to sit as a court of first and final instance in relation to new issues and factual material.[9] We submit that it would be anomalous if an amicus could introduce evidence in the High Court and the Constitutional Court, but not this Court.

12.2 The persuasive comment of an amicus will often draw on broader considerations, and thus be premised on facts and evidence not before the court, including statistics and research. It would make little sense to allow the presentation of bare submissions unsupported by any facts.[10]

13. We submit that this Court may in appropriate instances permit an amicus to adduce evidence.

THE REQUIREMENTS FOR THE ADMISSION OF NEW EVIDENCE

14. The import of the new evidence is: (a) to demonstrate the impact of the construction adopted by the High Court and the Companies; and (b) to demonstrate that the legislative history of section 26(2) of the Act makes it plain that the present formulation of section 26(2) is intended to confer an unqualified right.

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[8] *Koyabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) para 80.

[9] *Children's Institute* para 30.

[10] *Children's Institute* para 31.

15. This Court has established the following requirements for receiving new evidence: (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 is materially relevant.[11]

16. These requirements are satisfied in this case:

16.1 The explanation of why the evidence was not introduced in the court *a quo* is twofold. First, amaBhungane was not party to the proceedings in the High Court. Second, it was not apparent that the court *a quo* would in those interlocutory proceedings consider, let alone pronounce on, the proper interpretation of section 26(2) of the Act, which arises for decision in the main application.

16.2 The evidence is true. It is not disputed by any of the parties. It is first-hand evidence of amaBhungane's experience regarding the importance of share registers as a reliable tool in a journalist's artillery; and the evidence in relation to the prior versions of the Companies Amendment Bill, 2010 (**the Amendment Bill**) plainly cannot be controverted: those documents are official in nature.

16.3 The evidence is relevant:

16.3.1 The evidence of amaBhungane's experience with PAIA and the significance of access to securities registers for the work of the media is plainly relevant, and is precisely the kind of evidence that the Constitutional Court has held may be introduced by an amicus curiae.[12] The consequences of a particular construction of legislation can generally only be established by evidence. We submit that the practical impact is relevant to the questions before the Court.

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

[12] *Children's Institute* para 31 (see also para 34).

16.3.2 The evidence of the evolving formulations of the Amendment Bill in the Parliamentary process throws light on the intention of the legislature.

17. We submit that the evidence sought to be introduced demonstrates why the construction posited by the Companies was not and could not have been intended. None of the parties has disputed the correctness of the evidence, or opposed the application for admission of the evidence.

18. Accordingly, we submit that the evidence should be admitted.

THE IMPORTANCE OF UNQUALIFIED ACCESS TO SECURITIES REGISTERS

19. An unqualified right of access to companies' securities registers is essential for effective journalism. In the founding affidavit, three examples are given of investigations and news reports where access to share register information was central to amaBhungane's investigations.[13] Many other reports by amaBhungane and other members of the media relied on timely access to share registers. These investigations would likely not have been possible if journalists could not easily access the securities registers.[14]

20. The procedures of PAIA are readily used as an instrument to frustrate and delay access to records.[15] The point is illustrated by *President of the Republic of South Africa v M & G Media Ltd.*[16] Even without any proper basis for withholding access to the record, access was delayed for six years.

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[13] Para 47 of amaBhungane's founding affidavit.
[14] Para 48 of amaBhungane's founding affidavit.
[15] Paras 40 to 43 of amaBhungane's founding affidavit.
[16] 2015 (1) SA 92 (SCA).

21. This was also amaBhungane's experience in *CSR-E Loco.*[17] It demonstrates that PAIA will not provide prompt access to securities registers. The present proceedings speak for themselves in this regard.

22. If the PAIA grounds apply to a section 26(2) request, the inconvenience and cost of an application to court to challenge a refusal on those grounds will greatly inhibit access to securities registers. Given the significant expense of the court process, it will in most cases lead to important investigations ceasing rather than an application to court being pursued.[18]

23. The Companies' construction of section 26(2) would have a negative impact on openness and transparency, and would directly undermine the work of amaBhungane and other journalists.

24. The Companies' construction thus limits the right to freedom of expression. The Constitutional Court has noted that the media have a duty to report accurately, as "*[t]he consequences of inaccurate reporting may be devastating.*"[19] But that means that journalists must be able to access information such as the securities registers: "*Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.*"[20] Interference with the ability to access information impedes the freedom of the press.

25. The right to freedom of expression is not limited to the right to speak, but includes the right to receive information and ideas.[21] When the press is prevented from reporting fully and accurately, that not only violates the rights of the journalists, it also violates the right of all the people who rely on the media to provide them with "*information and ideas*".

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[17] *M&G Centre for Investigative Journalism NPC v CSR-E Loco Supply (Pty) Limited*, Case Number 23477/2013 (8 November 2013) (***CSR-E Loco***).

[18] Para 43 of amaBhungane's founding affidavit. See also *City of Cape Town v South African National Roads Authority Limited and Others* 2015 (3) SA 386 (SCA) para 43.

[19] *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) ("***Brümmer***) para 63.

[20] *Brümmer* paras 62 to 63.

[21] Section 16(1)(b) of the Constitution.

THE LEGISLATIVE HISTORY

26. We submit that, just as a court will have regard to how a statute has been amended in order to interpret the intention of those amendments, so the Court ought to have regard to the changes to the Amendment Bill during the parliamentary process which culminated in the Companies Amendment Act 3 of 2011 (**the Amendment Act**), and thus the present formulation of section 26(2) of the Act.

27. The Constitutional Court has held that the preamble and legislative history can be helpful in an analysis of the subject-matter of the legislation.[22] In *Makwanyane* Chaskalson P considered whether background material was admissible for the purpose of interpreting the Constitution and noted that "*[o]ur Courts have held that it is permissible in interpreting a statute to have regard to the purpose and background of the legislation in question*."[23]

28. In *Minister of Health v New Clicks South Africa (Pty) Ltd*,[24] the pharmacies referred to the explanatory memorandum which accompanied the Medicines and Related Substances Control Amendment Bill 72 of 1997 when it was introduced into Parliament. Chaskalson CJ referred to the finding in *Makwanyane* and held that "*it is applicable to ascertaining 'the mischief' that a statute is aimed at where that would be relevant to its interpretation*."

29. We submit that, if an explanatory memorandum (which is simply the Minister's explanation of the need for the legislation) is admissible in order to ascertain the mischief targeted by a particular provision, the different versions of a Bill must *a fortiori* also be admissible. They show the evolving intent of Parliament itself.

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[22] *Mashavha v President of the Republic of South Africa and Others* 2005 (2) SA 476 (CC) paras 41 & 42.
[23] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 13.
[24] 2006 (2) SA 311 (CC) para 199.

30. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[25] the Court examined a proposed construction of regulations which governed pension funds and a provident fund. That construction initially seemed plausible; but when it was examined in the light of the history of the definition of "*actuary*" in the regulations, it was found to be implausible. The Court held:

> *The history shows that the definition in the regulations originally referred to the 'Administrator' and not the 'Minister' and was amended to its present form when the definition of 'Minister' was introduced after the new provincial governmental structures came into effect with the transition to democracy. The reference to 'Administrator' cannot possibly have been taken to refer to the Minister of Finance and equally the amendment can only refer to the MEC.*[26]

The evolving versions of the Amendment Bill show that the legislature intended an unqualified right of access to securities registers

31. The versions of the Amendment Bill prior to the adoption of the Amendment Act show a deliberate journey from a formulation of section 26(2) in which PAIA was arguably applicable, to a formulation which makes it clear that PAIA is not applicable and that the right of access is not qualified.

32. Section 113 of the previous Companies Act 61 of 1973 (**the 1973 Act**) provided an unqualified right for any person to access a company's share register.

33. When the Minister of Trade and Industry tabled the Companies Bill, 2008 in the National Assembly there was no express access provision for non-shareholders.[27] The proposed sections 26(3) and (5) appeared to anticipate the possibility that non-shareholders might gain

[25] 2012 (4) SA 593 (SCA) para 39.
[26] Id.
[27] Para 50 of amaBhungane's founding affidavit.

access via PAIA and that, given PAIA's exemptions, there might be reasonable grounds to deny access.[28]

34. Members of amaBhungane were concerned about the erosion of the unqualified right in section 113 of the 1973 Act and made submissions to the Portfolio Committee.[29]

35. When the Act was finally enacted in 2008 it included section 26(3), which gives any person the right of access and introduced a peremptory element ("*must ... be open to inspection*").[30] The Act made it clear that this right was in addition to any right under PAIA.

36. The Act contained errors, and the Minister therefore introduced the Amendment Bill before the Act came into force. The original version of the Amendment Bill[31] appeared to make the right of access subject to PAIA, by using the conjunctive "*and*". It also omitted the peremptory wording ("*must*") that had been included in the Act. It stated (with our emphasis):

> *(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; and*
>
> *(c) in accordance with the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).*

[28] Para 51 of amaBhungane's founding affidavit.

[29] Para 52 of amaBhungane's founding affidavit.

[30] Para 53 of amaBhungane's founding affidavit.

[31] Attached to amaBhungane's founding affidavit as "SCB11".

37. This would appear to suggest that the section 26 right is qualified along the lines proposed by the Companies. After receiving public submissions (including amaBhungane's), the Portfolio Committee produced the revised version B40A—2010 of the Amendment Bill.[32]

38. In Bill B40A—2010 the conjunctive word "*and*" in subsection (4) was replaced with the disjunctive "*or*".[33] The effect was to make it plain that PAIA would be an alternative mode of obtaining access to company records.

39. In addition, the Portfolio Committee inserted a new sub-clause which made clear the peremptory nature of the obligation imposed on the company.

> *(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.*

40. These two adjustments, which made it clear that the right is unqualified, were retained in the version of the Bill that ultimately became the Amendment Act.[34]

41. The Regulations demonstrate a similar evolution.[35] Regulation 24(2) of the Draft Companies Regulations, published for comment on 29 November 2010,[36] provided that a person claiming a right of access to any record held by a company may not exercise that right until "*the person's right of access to the information has been confirmed in accordance with PAIA*".[37] Draft Regulation 24(3) provided that a person claiming access to any record held by a

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[32] Attached to amaBhungane's founding affidavit as "SCB12".

[33] *Vhembe District Municipality v Stewarts and Lloyds Trading (Booysens) (Pty) Limited and Another* [2014] 3 All SA 675 (SCA) para 11.

[34] B40B—2010 (attached to amaBhungane's founding affidavit as "SCB13"), which was adopted by Parliament and assented to by the President, thereupon becoming the Amendment Act.

[35] We of course recognise that an Act cannot be interpreted by reference to Regulations, but submit that the similar evolution is revealing.

[36] Attached as "SCB14.1" to amaBhungane's founding affidavit.

[37] See also regulation 26(3)(b) of annex "SCB14.2" to amaBhungane's founding affidavit.

company had to make a written request by delivering to the company a completed prescribed form as well as "*any further documents or other material required in terms of*" PAIA.[38]

42. The final regulations are however consistent with the current formulation in the Act as amended by the Amendment Act in 2011. They too now use the disjunctive "*or*" to distinguish between rights under PAIA and the additional access rights created by section 26, and they too use the peremptory form ("*must ... accede to the request*").

43. We submit that this legislative history squarely contradicts the construction proffered by the Companies. It demonstrates a clear intention on the part of the legislature to provide that the right under section 26(2) can be exercised independently of PAIA.

INTERNATIONAL AND COMPARATIVE LAW

44. There is a growing international awareness that company transparency is key to anti-corruption and anti-tax avoidance efforts.[39]

INTERNATIONAL LAW

45. This is recognised in three international treaties to which South Africa is a party:

45.1 The United Nations Convention Against Corruption (**the UN Convention**)[40] obliges South Africa to take measures to prevent corruption involving the private sector,[41] *inter alia* by "*[p]romoting transparency among private entities, including, where*

[38] See also regulation 26(4)(b) of annex "SCB14.2" to amaBhungane's founding affidavit.

[39] See for example the Report of the High Level Panel on Illicit Financial Flows from Africa, which was commissioned by the African Union Commission and the United Nations Economic Commission for Africa ("**the Report of the High Level Panel**") annexed as "SCB14" to amaBhungane's founding affidavit.

[40] Ratified by Parliament on 22 November 2004.

[41] Article 12.1 of the UN Convention.

appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities";[42]

45.2 The African Union Convention on Preventing and Combating Corruption (**the AU Convention**)[43] obliges South Africa to:

45.2.1 *"adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences"*;[44]

45.2.2 "*[a]dopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector*";[45]

45.2.3 "*[c]reate an enabling environment that will enable civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs*";[46]

45.2.4 "*[e]nsure that the media is given access to information in cases of corruption and related offences on condition that the dissemination of such information does not adversely affect the investigation process and the right to a fair trial*".[47]

45.3 The Southern African Development Community Protocol Against Corruption (**the SADC Protocol**)[48] obliges South Africa to adopt measures to "*prevent and combat acts*

[42] Article 12(2)(c) of the UN Convention.
[43] Ratified by Parliament on 11 November 2005.
[44] Article 9 of the AU Convention (emphasis added).
[45] Article 11(1) of the AU Convention (emphasis added).
[46] Article 12(2) of the AU Convention (emphasis added).
[47] Article 12(4) of the AU Convention (emphasis added).
[48] Ratified by Parliament on 15 May 2003.

of corruption committed in and by private sector entities",[49] as well as to "*create, maintain and strengthen*" mechanisms to:

45.3.1 "*promote access to information to facilitate eradication and elimination of opportunities for corruption*";[50]

45.3.2 "*ensure that publicly held companies and other types of associations maintain books and records which, in reasonable details, accurately reflect the acquisition and disposition of assets*";[51]

45.3.3 "*encourage participation by the media, civil society and non-governmental organizations in efforts to prevent corruption*".[52]

46. The Report of the High Level Panel[53] (chaired by former President Mbeki) identified transparency as a key mechanism to deter money laundering and other corrupt activities:

> *Another key transparency issue relates to the declaration of beneficial ownership in companies. The operation of shell companies and allowing the identity of owners to remain secret enable those who wish to hide illicit wealth or launder money to do so without hindrance. To combat these problems, the Panel feels strongly that public registry of beneficial ownership is important. It welcomes the passage by the European Parliament of a resolution calling for beneficial owners of companies, foundations and trusts to be listed in public registers and looks forward to the final EU legislation to serve as a model for other jurisdictions.*[54]

47. Its recommendations include:

> *Transparency of ownership and control of companies, partnerships, trusts and other legal entities that can hold assets and open bank accounts is critical to the ability to determine where illicit funds are moving and who is moving them. African countries should require that beneficial ownership information is provided when companies are*

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[49] Article 4(2) of the SADC Protocol.
[50] Article 4(1)(d) of the SADC Protocol.
[51] Article 4(1)(h) of the SADC Protocol.
[52] Article 4(1)(i) of the SADC Protocol.
[53] See footnote 39.
[54] At page 46 of the Report of the High Level Panel.

incorporated or trusts registered; such information is updated regularly; and such information is placed on the public record. Beneficial ownership declarations should also be required of all parties entering into government contracts. False declarations should result in robust penalties.[55]

COMPARATIVE LAW

48. Comparative law shows that where the right of access in provisions analogous to section 26 of the Act is qualified, the qualification is contained in an express statutory provision. There is no such provision in our Act. This is demonstrated by the law in the United Kingdom and in Australia.

49. **United Kingdom**

49.1 Company law in the United Kingdom is governed by the Companies Act, 2006.

49.2 A person who requests access to the register of members is required to submit a formal request setting out certain information that includes *inter alia* the purpose for which the information is to be used and whether the information will be disclosed to another person.[56]

49.3 Once the request has been submitted to the company it must, within five working days, either comply with the request or apply to court for an order that it need not comply with the request.[57] The court may grant such an order if it is satisfied that the inspection or copy is not sought for a "*proper purpose*" (**the no-access provision**).[58]

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[55] At page 81 of the Report of the High Level Panel.

[56] Sections 116(4)(c) and 116(4)(d).

[57] Sections 117(1)(a) and 117(1)(b).

[58] The same provisions apply to the register of debentures, if such securities are issued by the company (see sections 743 – 47 of the UK Companies Act).

50. **Australian law**

50.1 In Australia the Corporations Act, 2001 governs public access to shareholder information. The applicant must make application in a prescribed form, and must set out in it each of the purposes for which he or she seeks access.[59] None of the purposes must be a prohibited purpose. The prohibited purposes are set out explicitly and exhaustively, and include such matters as requesting a donation from a member.

51. The South African Act contains no such provisions.

APPEALABILITY

52. Moneyweb contends that the order of the High Court is not appealable.[60] The amicus curiae does not wish to make any submissions in this regard.

53. The amicus curiae submits, however, that if the Court were to hold that the order of the High Court is not appealable, it should nevertheless pronounce on the correct interpretation of section 26(2).

54. This Court took that approach in *Competition Commission v Computicket*.[61] Brand JA held that this Court did not have jurisdiction to hear the appeal. He then proceeded: "*... since I hold a firm view that, in any event, the proposed appeal is devoid of merit, I shall state the reasons that led me to that conclusion.*"[62] Having stated his reasons, he concluded "*I believe that were this court to have had jurisdiction to enter into the merits of the appeal, the matter is devoid of substance and the appeal ought on that score as well to have failed.*"[63]

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[59] Section 173(3A).
[60] Moneyweb's heads of argument at pages 4 to 7.
[61] *Competition Commission v Computicket* [2014] ZASCA 185.
[62] Para 18.
[63] Para 22.

55. We submit that this is a case in which this Court should take a similar approach, if the judgment of the High Court is held not to be appealable.

56. There are now conflicting judgments of the High Court. It is likely to be some time before this Court is again faced with this question. In the interim, companies which wish to frustrate or prevent access to this information will be able to do so on the basis of the judgment of court *a quo*, knowing that journalists will be unlikely to undertake the risk and expense of uncertain litigation. Journalists and members of the public will not have clear guidance as to whether their access is qualified by PAIA or in some other manner.

57. We submit that this is an issue which ought to be regulated in a uniform manner across the country. It would be most unfortunate, and would conduce to an arbitrariness which is inimical to the principle of legality, if companies based in different parts of the country were able to take different approaches, depending solely on the area in which their registered office is located.[64]

COSTS

58. As regards costs: amaBhungane makes these submissions in order to advance the public interest which it promotes and in order to assist the Court in coming to a decision on the proper meaning of section 26(2) of the Companies Act. It has not repeated the submissions of the parties.

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[64] In *Mkontwana v Nelson Mandela Metropolitan Municipality and another; Bissett and others v Buffalo City Municipality and others; Transfer Rights Action Campaign and others v MEC, Local Government and Housing, Gauteng, and others; (KwaZulu-Natal Law Society and Msunduzi Municipality as amici curiae)* 2005 (1) SA 530 (CC) an appeal was before the Constitutional Court. Another party sought direct access for a case which addressed the same section of the Act in question, but went beyond the matter before the Court. Ordinarily the Court would not have granted direct access. However, the fact that there were conflicting judgments on the matter was a factor leading the Court to decide to grant direct access: see paras 11 and 12.

59. In accordance with the ordinary practice that costs are not ordered for or against an amicus, amaBhungane does not seek an order for costs. We submit that if amaBhungane's submissions are not upheld, it should similarly not be held liable for costs.

CONCLUSION

60. We submit that for all of the reasons advanced, section 26(2) contains an unqualified right of access to securities registers. If Parliament is of the view that the right should be qualified in some way, it can legislate accordingly. It has chosen not to do so.

61. The amicus curiae requests leave to present brief oral argument at the hearing of this matter in terms of Rule 16(8) of this Court's Rules. If the amicus curiae is permitted to do so, it will not repeat the arguments of the parties, and will keep to the 30-minute time limit.[65]

G M BUDLENDER SC

Counsel for the *Amicus Curiae*

Chambers, Cape Town

21 August 2015

[65] Set out in Rule 16(8) of this Court's Rules and in paragraph 6 of the Order of 5 August 2015.