McINTYRE VAN DER POST
LAW FIRM

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NUMBER 20815/2014

In the matter between:

NOVA PROPERTY GROUP HOLDINGS LIMITED	**First Appellant**
FRONTIER ASSET MANAGEMENT & INVESTMENTS (PTY) LTD	**Second Appellant**
CENTRO PROPERTY GROUP (PTY) LIMITED	**Third Appellant**
and	
JULIUS PETER COBBETT	**First Respondent**
MONEYWEB (PTY) LIMITED	**Second Respondent**
MANDG CENTRE FOR INVESTIGATIVE JOURNALISM NPC	***Amicus Curiae***

FILING SHEET

APPELLANTS' PRACTICE NOTE APPLICABLE TO ITS CASE AND HEADS OF ARGUMENT IN RESPONSE TO THE *AMICUS CURIAE'S* LEGAL SUBMISSIONS

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AND TO: **HONEY ATTORNEYS**
ATTORNEYS FOR RESPONDENTS
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KENNETH KAUNDA ROAD
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Two copies hereof received on this
_____day of February 2016.

_____
HONEY ATTORNEYS

AND TO: **WEBBERS ATTORNEYS**
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9 day of February 2016.

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9.27

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CENTRO PROPERTY GROUP (PTY) LIMITED	**Third Appellant**

and

JULIUS PETER COBBETT	**First Respondent**
MONEYWEB (PTY) LIMITED	**Second Respondent**
MANDG CENTRE FOR INVESTIGATIVE JOURNALISM NPC	***Amicus Curiae***

APPELLANTS' PRACTICE NOTE APPLICABLE TO ITS CASE AND HEADS OF ARGUMENT IN RESPONSE TO THE *AMICUS CURIAE*'S LEGAL SUBMISSIONS

SUPREME COURT OF APPEAL
(REPUBLIC OF SOUTH AFRICA)

Case No: 20815/2014

In the matter between:

NOVA PROPERTY GROUP HOLDINGS LTD	First Appellant
FRONTIER ASSET MANAGEMENT & INVESTMENTS (PTY) LTD	Second Appellant
CENTRO PROPERTY GROUP (PTY) LTD	Third Appellant
and	
JULIUS PETER COBBETT	First Respondent
MONEYWEB (PTY) LTD	Second Respondent
and	
MANDG CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Amicus Curiae

THE APPELLANTS' PRACTICE NOTE APPLICABLE TO ITS CASE RESPONDING TO THE AMICUS CURIAE'S SUBMISSIONS

The appellants' original practice note was delivered together with its heads of argument and Rule 10 and 10A certificate on 11 May 2015. This practice note is *not* intended to substitute the original one, but is simply filed as an accompaniment to the appellants' heads of argument filed in response to the submissions made by the amicus curiae.

The issues raised by the amicus

The appellants agree with the manner in which the amicus has defined the constitutional issue (in para 3 of its practice note). The appellants also agree with the manner in which the amicus has defined the issues on appeal (in para 4 of its practice note).

Duration of the argument

We agree that 3-4 hours is required, in total, for the hearing of the appeal. The amicus has requested 30 minutes for oral argument. The appellants would request the same amount of time, namely 30 minutes, to address the issues raised by the amicus curiae in its submissions.

Summary of the appellants' responsive argument

In response to the submissions made by the amicus, the appellants submit that:

1. The companies main submissions on how section 26(2) ought to be interpreted are contained in the main heads of argument prepared on the company's behalf by Advocates Jose Brett SC and Don Mahon.

2. The companies main submission is that section 26(2), interpreted within the broader context of section 26 as a whole, makes it clear that a person's right of access is qualified by certain considerations.

3. To the extent that any ambiguity *may* exist as postulated by the amicus, we say that such ambiguity must be interpreted in favour of a qualified right (because an unqualified right will unreasonably and unjustifiably limit the constitutionally protected right to privacy held by companies and their shareholders).

4. In order to save section 26(2) from unconstitutionality, the section must be interpreted to mean that the right of access is qualified rather than unqualified.

5. We find support for our argument that a qualified right of access is to be preferred in –

   - Section 14 of our own Bill of Rights and the jurisprudence emanating from it;

   - specific legislation – PoPI – designed to ensure that personal information is only disseminated in a manner consistent with a proper application of section 14 in the Bill of Rights; and

- The comparative law emanating from liberal democracies, such as the United Kingdom, where, for policy reasons, it is accepted that an unqualified right is untenable.

Details of counsel

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SUPREME COURT OF APPEAL
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THE APPELLANTS' HEADS OF ARGUMENT PREPARED IN RESPONSE TO THE AMICUS CURIAE'S LEGAL SUBMISSIONS

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INTRODUCTION

1. In paras 1 and 2 of its heads of argument, the amicus curiae correctly points out that the appellants (who, to retain the language used in the papers thus far, are referred to as "the companies") and the respondents ("Moneyweb") stand juxtaposed in their views on how section 26(2) of the Companies Act of 2008 ought to be interpreted. Moneyweb contends that section 26(2) confers an *unqualified* right on any person to obtain access to a private company's securities register (irrespective of why they want it – see para 29.4 of Moneyweb's heads of argument) whereas the companies contend that the right is *qualified.*

2. The companies *agree* with the formulation of the "true issue" as it has been identified by the amicus in para 4 of its practice note, namely that the appeal concerns "the interpretation of section 26(2)" and "whether section 26(2) confers an unqualified right of access to the securities register of a private company". We also agree with the manner in which the amicus has formulated the constitutional issue in para 3 of its practice note, namely that "this case involves the proper interpretation of section 26(2) of the Companies Act in light of section 39(2) of the Constitution." Indeed, these responsive heads of argument focus on how the companies submit that section 26(2) ought to be interpreted in light of the constitutional instruction given

to courts in section 39(2) to always "promote the spirit, purport and objects of the Bill of Rights" when "interpreting any legislation".

3. In summary, the companies contend that when interpreting section 26(2) of the Companies Act a court *must*, in promoting the spirit, purport and objects of the Bill of Rights, have regard to section 14 in the Bill of Rights – the right to privacy – which we say usefully informs the proper interpretation of section 26(2). It is important to appreciate, however, that the companies do *not* contend that the public should be precluded from accessing the securities register of a private company; instead we accept that as a general rule access must be granted but that *sometimes* there may be a good reason for denying it. It is the existence of a "good reason" justifying the denial of access that qualifies the right. Whereas Moneyweb say that a person's reason or purpose for wanting the share register is irrelevant; the companies say that the reason or purpose is certainly relevant. Our submissions is that the private information contained in the securities register cannot be accessed for *unlawful* or *improper* purpose.

4. Thus, section 39(2) of the Constitution requires that *all* legislation must be interpreted in accordance with the spirit, purport and objects of the Bill of Rights irrespective of how or why those provisions came to be. And, as the Constitutional Court explained in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) at paras 21-24, any interpretation of legislation that falls within constitutional

bounds must always be preferred over an interpretation that does not. Our main submission, therefore, in response to the amicus, is that an unqualified right of access in the context of section 26(2) produces a meaning that falls outside constitutional bounds whereas a qualified right of access, which takes section 14 of the Bill of Rights into account, is better because it is in kilter with the spirit, purport and objects of the Bill of Rights. A *qualified* right ought therefore to be preferred and a company ought to be permitted to refuse a request for access to a company's securities register where the requestor intends using the information for an unlawful or improper purpose.

THE ROLE OF PRIVACY IN GIVING MEANING TO 26(2)

5. Our case is that an unqualified right of access is inconsistent with the spirit, purport and objects of the Bill of Rights as informed, most notably, by the constitutional right that people have to privacy. The constitutional rights to privacy is contained in section 14 of the Bill of Rights:

> Everyone has the right to privacy, which shall include 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.

6. From the textual wording of section 14 it is clear that the right to privacy comes in two parts. The first is contained in the first phrase

of the first sentence of section 14 and provides a general right to privacy. The second part protects people against specific kinds of infringements of their privacy, namely certain types of searches and seizures or the interception of private communications. This appeal does not deal with any of the specific breaches of privacy but is concerned only with the general right to privacy which everyone enjoys under the Constitution.

7. The right to privacy - a fundamental human right – is vitally important for the proper functioning of any liberal democracy. Courts all around the world frequently quote the following dictum of Justice Brandeis in the US Supreme Court in *Olmstead v United States* 277 US 438 at 478 in recognition of the importance of the right to privacy in a constitutional liberal democracy:

> The makers of our Constitution... recognised the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be left alone – the most comprehensive of rights and the most valued by civilized men.

8. The most thorough judgment from the South African courts dealing with "privacy" is *Bernstein v Bester* 1996 (2) SA 751 (CC). Ackermann J, writing for the majority of the Constitutional Court, carefully considered the constitutional privacy jurisprudence in the United States, Canada and Germany during the course of writing his judgment. Ultimately he concludes that "it seems to be a sensible

approach to say that the scope of a person's privacy extends a fortiori only to those aspects in regard to which a legitimate expectation of privacy can be harboured". This conclusion is central to the determination of any "privacy" case analysis.

9. In *Bernstein v Bester* (supra), Ackermann J speaks about what has come to be known as the "continuum of privacy interests" in para 67:

> The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his or her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.

10. In *Bernstein v Bester* (supra) the applicant challenged certain provisions in the old Companies Act that required him to appear as a witness in an insolvency enquiry. He claimed that the right to privacy will be infringed if he is forced to disclose (to complete strangers) the financial records, books and documents of a private company. It is in response to this that Ackermann J, in para 85 of the judgment, held that:

> The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilisation of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute will have concomitant responsibilities. These include, amongst others, the statutory obligations of proper discloser and accountability to shareholders. It is clear that any information pertaining to participation in such a public space cannot rightly be held to be inhering in the person, and it cannot consequently be said that in relation to such information a reasonable expectation of privacy exists. Nor would such an expectation be recognised by society as objectively reasonable.

11. Paragraphs 67 and 85 in *Bernstein v Bester* (supra) suggest that the constitutional right to privacy can be legitimately claimed where the person claiming it subjectively expected that the information he is required to reveal would be kept confidential *and* where his subjective expectation is objectively reasonable. Although para 85 of the judgment suggests that statutory obligations on companies to disclose to its shareholders can never reasonably give rise to an expectation of privacy, we are not concerned with those kinds of disclosures in *this* appeal. This appeal concerns a disclosure of a shareholder's personal information to a complete stranger. It is easy to understand why a company cannot reasonably expect that its confidential information be kept private from its own shareholders since they are the owners of the company; but it is equally easy to understand why a company can reasonably expect that the same confidential information be kept private from a complete stranger who has nothing at all to do with the company.

Companies' expectations of privacy

12. A central issue in *this* appeal, which as we pointed out arises in every privacy case, is whether a *subjective* expectation is harboured (by companies) that the required information (details of their shareholders) will be kept confidential and whether this expectation can be said to be *objectively* reasonable.

13. There are many reasons why a company and its board of directors may not wish to have the identity of its shareholders disclosed. A company's reputation or brand could be negatively impacted depending who holds its shares and depending on the public's perception of a particular shareholder. Consider a hypothetical sports company which enjoys the loyal support of the general athletics-loving public. The public do not know who the company's shareholders are. Suppose that they one day learn that one of its shareholders is a notorious public enemy figure, perhaps a fallen hero who incurred the ire of the people after murdering his model girlfriend. A large segment of the general public, some of whom may have been happy customers of that company, could quite conceivably wish to dissociate themselves from the company after the disgraced murderer is disclosed as being a part-owner. The company would, in a case like that, suffer a loss through no fault of its own and for a reason entirely unconnected with the company itself.

14. For the most part, the legal fiction of "separate corporate identity" between a company and its members should make the identity of a company's shareholders entirely irrelevant.

Shareholders' expectations of privacy

15. Shareholders, too, may harbour a subjective expectation that their identity will be kept private. This expectation may also be objectively reasonable.

16. There are many reasons why a person may not wish to have his or her identity as a shareholder in a particular company disclosed. One of these may be the unavoidable association between one's shareholding and one's wealth. For the most part, people subjectively expect that details of their financial affairs and wealth will remain private. A person's wealth, what they can afford, and their credit-worthiness are all deeply personal aspects of a person's private life. They may impact on a person's good name and reputation and how other people perceive them. Reputation and dignity live closely with privacy in the family of personality rights that receive protection from unwarranted public scrutiny. Thus, a person's credit-worthiness in the context of blacklisting by a credit bureau, as an example, implicates both dignity and privacy. Just as money in the bank is an indication of a person's wealth, so too is the number of shares that a person has in a company or the number of companies that a person has shares in. Most people do not want their

wealth to be known and they have an expectation that their assets will not become the subject of public knowledge and scrutiny.

17. According to Ackermann J in para 65 of *Bernstein v Bester* (supra) "the right to privacy is not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity". In other words, a person can legitimately claim a right to privacy if, in doing so, such person is asserting his or her right to "own autonomous identity". This idea of a person's "own autonomous identity" featured *Hyundai* (supra) where the issue was whether certain search and seizure powers impermissibly infringed upon the privacy of people whose homes were being searched. Para 18 of that judgment had the following to say:

> As we have seen, privacy is a right which becomes more intense the closer it moves to the intermit personal sphere of the life of human beings, and less intense as it moves away from that core. This understanding of the right flows, as was said in *Bernstein v Bester*, from the value placed on human dignity by the Constitution. Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy. Exclusion of juristic persons would lead to the possibility of grave violations of privacy in our society, with serious implication for the conduct of affairs. The State might, for instance, have a free licence to search and seize material from any non-profit organization or corporate entity at will. This would obviously lead to grave disruptions and would undermine the very fabric of our democratic state. Juristic persons therefore do enjoy the right to privacy, although not to the same extent as natural persons. The level of justification for any particular limitation of the right will have to be judged in the light of the circumstances of each case. Relevant circumstances would include whether the subject of the

> limitation is a natural person or a juristic person as well as the nature and effect of the invasion of privacy.

18. *Hyundai* (supra) is an important case in the development of our privacy law because it confirms the value of a person's "own autonomous identity". It also reinforces the notion that a person can reasonably claim a right to privacy where his or her own autonomous identity is under threat or the subject of unwarranted scrutiny. Again, there are reasons why a shareholder may wish to retain his own autonomous identity. For example, some people may not want to have certain associations made publically known because disclosure may, rightly or wrongly, create a perception about their religious, political, or moral beliefs. There are people who do want to invite public scrutiny of deeply personal and private aspects of their lives or beliefs. This idea has been captured by Kent Greenawalt & Eli Noam *Confidentiality Claims of Business Organisations* (Columbia University Conference Volume) where they put it like this:

> Individuals need to be able to keep private some facts about themselves if they are to develop individual view points and lifestyles in a society in which everything is exposed... Relationships of love and friendship depend largely on selective disclosure of information; unless much about our thoughts and feelings that is communicated to loved ones and friends can be withheld from a more general public, genuinely intimate relationships would be difficult or impossible. Individuals may function more effectively at work and in other social activities if they enjoy a degree of privacy. Privacy may be important for emotional stability and may contribute to effective work performance. A person would be less likely to think and work creatively if he could not choose when to discuss matters with colleagues and when to disclose his thoughts to his superiors. The arguments for individual privacy are complex, and not only because privacy itself is a

> complex and amorphous concept. Some of the arguments rest on the premise that privacy is essential for the kinds of individuals and personal relationships that are valued in a liberal democratic society. Other arguments rest on the premise that privacy contributes to the effective functioning of economic and political institutions.

19. The information contained in a private company's securities register is information of a personal nature. It will contain the names and identities of individual people. It will tell those who read it where those people live and how they can be contacted. It may give the reader a sense of who the person affiliates with on a business level and whether the person is affluent. Depending on the nature of the company, it may even tell the general public what kinds of political, moral or religious views the person holding the shares probably has. The details in a private company's securities register unquestionably contains information that may be sensitive to some people and reveal deeply private matters about their personal lives.

20. Companies need to take the privacy rights enjoyed by their shareholders seriously. Where people have a genuine claim to privacy then companies have a corresponding obligation not to disclose their personal information in a way that infringes upon that right.

Informational privacy

21. Another very important point to emerge from the Constitutional Court's judgment in *Hyundai* (supra) para 16 is that the right to

privacy is implicated when a person ordinarily has the ability to decide what he or she wishes to disclose to the public together with the concomitant expectation that such decision will be respected. This aspect of the general right to privacy has become known as "informational privacy" which is a right capable of protecting the kind of data that information technology geeks call "informational self-determination" which embraces all the interests that people have in restricting the collection, use and dissemination of personal information.

22. Informational privacy and informational self-determination are issues that are now regulated by a separate piece of legislation called the Protection of Personal Information Act of 2013 which requires that the processing of personal information be *fair* and *lawful*. To that end the new legislation ("PoPI") specifies a set of general principles for the fair and lawful processing of personal information. Whilst the dispute animating *this* appeal does not fall to be determined under this new piece of legislation, its contents are instructive in at least one sense, namely that it contributes to our understanding of when a person can legitimately claim an infringement of privacy in the context of his or her own personal information. Consider the following aspects of PoPI:

22.1. Section 2(*a*) of PoPI describes its purpose as being *inter alia* to "give effect to the constitutional right to privacy by safeguarding personal information when processed by a responsible party subject to justifiable limitations that are

aimed at balancing the right to privacy against other rights, particularly the right of access to information and protecting important interests including the free flow of information within the Republic and across international borders."

22.2. PoPI is therefore concerned with *personal information* as protected by the constitutional right to privacy. The phrase "personal information" is defined in section 1 of PoPI to mean "information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person including but not limited to (*a*) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person; as well as (*c*) any identifying number, symbol, email address, physical address, location information, online identifier or other assignment particular to the person...".

22.3. Section 3(1) of PoPI makes it plain that the statute "applies to the processing of personal information entered into a record". A "record" has been defined in section 1 of PoPI to mean "any recorded information regardless of form or medium, including... information produced, recorded or stored by means of a tape-recorder, computer equipment, whether hardware or software or both, and any material

subsequently derived from information so produced, recorded or stored... regardless of when it came into existence."

22.4. Very importantly, PoPI applies, according to section 3(2)(*a*) to the exclusion of any other provision of any other legislation that requires the processing of personal information that is materially inconsistent with the object, or a specific provision, of PoPI". According to section 3(2)(*b*) "if any other legislation provides for conditions for the processing of personal information that are more extensive than those set out in chapter 3 of PoPI then the more extensive conditions prevail." What this means, we submit, is that the protection of private information offered by PoPI when personal information is processed will prevail over the manner in which personal information is processed under any statute including the provisions of section 26(2) of the Companies Act.

22.5. According to section 5 of PoPI, a person has the right to have his or her personal information processed in a manner that affords him or her an opportunity to "object, on reasonable grounds, to the processing of his or her personal information" subject to the exclusions contained in section 6 of PoPI which permit personal information to be disclosed in circumstances involving the protection of national security including activities that are aimed at assisting in the

identification of the financing of terrorist activities or for the purpose of preventing unlawful activities associated with money laundering and the like.

22.6. Chapter 3 of PoPI sets out various conditions that need to be met before the processing of personal information will be regarded as lawful. Condition 3 is reflected in section 13 which provides that "personal information must be collected for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party…". Section 15 of PoPI then goes on to say that this collected information about a person can only be "processed" in a manner that is "compatible with the purpose for which it was collected." The word "processing" in the context of personal information includes the dissemination of personal information and making it available to the general public.

23. The point that we wish to make in this portion of our heads of argument is simply this: The dissemination of personal information – the kind of information contained in the securities register of a private company – can only be disseminated to the general public under conditions that protect the privacy of the data subjects (namely the company and its shareholders). That is not to say that such personal information can *never* be disseminated to the general public but only to say that when it is disseminated, it must be disseminated in a manner that gives adequate protection to the constitutional privacy rights of those whose personal information is being

disclosed. An *unqualified* right of access to personal information can never be consistent with the aims and objectives behind PoPI. Moreover, the aims and objectives behind PoPI can only be realised if a normative enquiry is permissible, such to include an enquiry into the purpose for which a person wants to see the securities register and upon evaluating whether such purpose is *lawful* and *proper*. The enactment of PoPI in 2013, we submit, favours an interpretation that recognises a *qualified* right under section 26(2) of the Companies Act rather than an unqualified one.

OTHER POINTS RAISED BY THE AMICUS

The legislative history

24. In para 8.1 of its practice note the amicus foreshadows an issue dealt with in paras 6-18 and 26-43 of its heads of argument, namely that the legislative history behind the enacting of section 26(2) apparently makes it plain that the provision in its present formulation must have been intended to confer an unqualified right.

25. Whilst there are limits to when a court can competently have regard to the legislative history behind the making of a legislative provision, we do not seriously challenge *this* Court's competence to do so in the context of section 26(2) and in the manner suggested by the amicus in *these* proceedings. What we do challenge, however, is the relevance of doing it. In our view an exercise into the legislative

history is a redundant excurses because it does not matter *why* the legislature *may* have adopted the final wording employed in section 26(2) of the Companies Act. What matters is that there are two opposite and competing interpretations advanced in this appeal and that only one of them can feasibly be constitutionally "acceptable". This holds true irrespective of the history behind the drafting of the impugned provision.

26. Thus, section 39(2) of the Constitution requires that *all* legislation must be interpreted in accordance with the spirit, purport and objects of the Bill of Rights - irrespective of how or why those provisions came to be. And, as the Constitutional Court explained in *Hyundai* (supra) paras 21-24, any statute capable of more than one meaning should be given the meaning that is most consistent with the Constitution. Our main submission in response to the amicus is that an unqualified right of access in the context of section 26(2) of the Companies Act produces a meaning that is less constitutionally "acceptable" than a qualified right because a qualified right will take section 14 of the Bill of Rights into account.

International Law

27. The amicus refers to three international treaties to which South Africa is a signatory, namely the UN Convention Against Corruption, the AU Convention on Preventing and Combatting Corruption, and the SADC Protocol Against Corruption. However,

the amicus has not explained the relevance of these three treaties. We assume that they received mention to demonstrate that South Africa has a general obligation to the international community to fight corruption by creating greater measures for ensuring transparency in the private sector – which the amicus may argue is a legitimate governmental purpose consistent also with the purpose behind the enactment of section 26(2).

28. Be that as it may, whatever the intention of the amicus may have been, none of the three international treaties provide any useful assistance to the task identified by the amicus as the "true issue" (in para 4 of its practice note). That is so because, whilst we readily accept that governments are under increasing pressure to combat transnational crimes like money laundering, corruption and terrorism, we do *not* accept that the treaties make it obligatory for private companies to provide the public with *unqualified* access to their securities registers, nor do any of the treaties referred to by the amicus expect this.

29. Article 12(2)(*c*) of the UN Convention Against Corruption obliges South Africa to "promote transparency among private entities, including *where appropriate*, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities." This laudable objective can admittedly be achieved by a provision like section 26(2) of the Companies Act – but the use of the phrase "where appropriate" does not nail down the debate on whether this means that transparency

requires either unqualified access to the share register or whether it permits a more reasoned right of qualified access. A qualified right of access seems more "appropriate" given, for example, the dictates of section 14 in the South African Bill of Rights. The UN Convention recognizes this approach in Article 12.1 which states that the treaty only obliges signatory States to take those measures that are "in accordance with the fundamental principles of its own domestic law." So if South African domestic law, courtesy of section 14 in the Bill Rights, requires no more than qualified access, then reliance on the UN Convention takes the amici's point no further.

30. Both the AU Convention on Preventing and Combatting Corruption and the SADC Protocol Against Corruption contain similar "claw back clauses" which are unhelpful in contributing to the qualified versus unqualified access debate. The AU Convention manifestly allows signatory States to tackle corruption with transparency but within the permissible confines of "other relevant human rights instruments" (Article 3.2). Section 14 of the South African Bill of Rights clearly falls within the contemplated scope of Article 3.2 because our Bill of Rights is "a relevant human rights instrument". The SADC Protocol similarly obliges State parties to act within legislated "and other measures" introduced into their own domestic legal orders (Article 4.2). To the extent that section 26(2) of the Companies Act ought to be understood as an "other measure" introduced by South Africa, it was obviously introduced within the broader constitutional framework. That constitutional framework recognizes the constitutional right to privacy.

31. Our point is that nothing in either of these three international treaties requires that South Africa enforce an absolute or unqualified right of access to a private company's securities register. Quite the opposite holds true we submit: South African law needs to ensure that the share registers of private companies are accessed *only* within the permissible confines of our own constitutional law.

32. Finally, we submit that selective referencing to some international law treaties is unhelpful. There are other international law treaties that require the protection of personal information and in fact oblige State parties to protect privacy. For example, the right to privacy is explicitly guaranteed in Article 12 in the Universal Declaration of Human Rights (a treaty to which South Africa is signatory State), in Article 17 in the International Covenant on Civil and Political Rights (an international treaty to which South Africa is also a State party), in Article 8 of the European Convention on Human Rights and Article 11 of the American Convention on Human Rights (South Africa is obviously not a party to either the European Convention nor the American Convention). Our point, quite simply, is that there is a wealth of international law favouring a qualified interpretation to section 26(2).

Foreign law

33. The amicus alludes superficially to the position in the United Kingdom and Australia. The purpose of doing so, it says, is to show

"that where the right of access in provisions analogous to section 26 is qualified then the qualification is contained in an express statutory provision". The point being made by the amicus is that if the text does *not* contain an express qualification then no qualification can be implied. The amicus then says that *our* Act contains no such express qualification. The position in the United Kingdom, with the greatest of respect to the amicus, is more subtle than this.

34. The United Kingdom does *not* confer an unqualified right on members of the general public to access the security registers of private companies because of self-stated policy reasons recognized by liberal democracies the world over. Moneyweb, in its heads of arguments (para 29) get the position entirely wrong when it contends that old UK Companies Act of 1985 qualified the right but that new UK Companies Act of 2006 deliberately "opted not to enact a provision" that would qualify the right of access because the new company law opted instead to "strengthen the access provision by making clear that it conferred a *right* of access" (para 29.3 of Moneyweb's heads of argument). We do not agree. The legal position in the United Kingdom is as follows:

34.1. The historical position in the UK was governed by the old Companies Act ("the 1985 Act"). Section 356(6) of the 1985 Act entitled a member of the public to access the securities register of a private company. Section 356(3) provided that "any member of the company or any other person *may* require a copy of the register, or any part of it,

on payment of such fee as may be prescribed; and the company *shall* cause a copy so required by a person to be sent to him within 10 days... on which the requirement is received by the company." Section 356(5) further provided that "if the requirement is refused or a copy so required is not sent within the proper period, the company and every officer of it who is in default is liable in respect of each offence to a fine." And finally section 356(6) provided that "in the case of a refusal or default, the court *may* by order compel an immediate inspection of the register or direct that the copies required be sent to the persons requiring them."

34.2. The UK Appeal Court in *Pelling v Families Need Fathers Ltd* 2002 (2) All ER 440 (CA) was concerned with whether or not the access was qualified or unqualified. Dr Michael Pelling wrote to the Registrar requiring copies of a company's register. The Registrar wrote back saying that he had a discretion under section 356(6) of the 1985 Act and deems "this case not to be appropriate to require disclosure of the register". He accordingly refused Dr Pelling access to it. Dr Pelling argued that the Registrar had no discretion to refuse his request. He took a stance, identical to the one taken by Moneyweb in our case, that "the reasons for accessing the register were irrelevant" and that the "Registrar had no option but to make the order sought in his application" and further that "the Registrar had erred in law in holding that he had a discretion" (para 15 of the

judgment). The Appeal Court was concerned with whether the Registrar did in fact have a discretion under section 356(6) of the 1985 Act. Ultimately the court held that the inclusion of the word "may" in section 356(6) does confer a discretion on the Registrar. That discretion, held the Appeal Court, must be exercised judicially in accordance with established legal principles and having regard only to relevant considerations. The Appeal Court concluded that it agrees with Dr Pelling that "as a general rule the court will make a mandatory order to give effect to a legal right" but that "it is not a matter of unqualified right" and that "there may be something special in the circumstances of the case which leads the court to refuse to make the usual order".

34.3. The 1985 Act was replaced in the UK with a new Companies Act ("the 2006 Act"). Section 356 in the 1985 Act was replaced with sections 116 to 120 in the 2006 Act. The final formulation of sections 116 to 120 in the 2006 Act provides the following legislative scheme: It recognises that members of the public may have a legitimate interest in accessing the information in the company's register; a member of the public may need the information in order to investigate whether the board has issued shares improperly, for example by issuing them to their associates, etc; under section 356 of the 1985 Act anyone could obtain access to the register and copy it but there was clear evidence that some people were abusing this right and harassing members

of companies; after 2006 it became clear, for policy reasons, that the right of access would have to be qualified; the best way to achieve the policy objectives was to allow members of the public to request access which the company was obliged to provide *unless* the company felt that the purpose was improper in which case the company would have to apply to court for an order relieving it of any obligation to comply with the request.

34.4. The Appeal Court had to consider the meaning of these new provisions in *In Re: Burry & Knight Ltd* [2014] 1 WLR 4046. Section 117(3) of the 2006 Act contained what has become known as "the no-access provision" (a point recognised by the amicus in para 49 of its heads of argument). The Appeal Court had to consider a request for access that had been made by Dr Martin Knight in circumstances where the Registrar had determined that his reasons for wanting to access the register "contained a mixture of both proper and improper purposes". For the sake of completeness, section 117(1) of the 2006 Act provides that "where a company receives a request under section 116 (to inspect the company's register of members) it *must* within 5 working days either comply with the request or apply to court." And then section 117(3) provides that if a request is refused and an application is made to court then "if the court is satisfied that the inspection or copy is not sought for a proper purpose it shall direct the

company not to comply with the request." Dr Knight's request was refused for reasons discussed in para 118 of the judgment, namely that he was embroiled "in a family vendetta" and sought access to the company register because he wanted to "vindicate his own integrity" and also "to make mischief". The Appeal Court held that it was open to the Registrar to reach the conclusion that he did, namely that Dr Knight's obsession with his own personal dispute gave rise to a reasonable apprehension that he wanted to access the securities register for a purpose that was improper. The Appeal Court was not willing to interfere with the Registrar's discretion in arriving at that determination.

34.5. What is important from the *Burry and Knight* case (supra) is the court's discussion on the policy reasons behind these kinds of legislative provisions and why they cannot confer an *unqualified* right. In paras 15-17 the Appeal Court recognised that requests to inspect a company's share register were open to abuse and that they *were* often abused by, for instance, bounty hunters or people who sought to use the names and addresses of shareholders for advertising purposes. For this reason the right of access should always be qualified.

35. In the final analysis, whilst the amicus seeks to use the position in the United Kingdom to demonstrate that the courts in the UK are

only entitled to consider the purpose or motive behind the request *because* the statute expressly says they can, and that South African courts ought not to be able to do this because our statute does *not* expressly say that we can – we submit that the true value of the comparative law lies in the fact that other liberal democracies have recognised that an *unqualified* right of access to a private company's securities register, for policy reasons, is untenable. The comparative law hammers home the point that there will, in certain circumstances, be a good reason for not allowing a member of the public to access the information sought and that where a good reason exists the law should allow the company a right to refuse access. In short, the comparative law endorses our submission that no right of access should ever be unqualified.

CONCLUSION

36. In conclusion, in response to the submissions made by the amicus, we submit the following:

36.1. The company's main submissions on how section 26(2) ought to be interpreted are contained in the main heads of argument prepared on the company's behalf by Advocates Jose Brett SC and Don Mahon;

36.2. The company's main submission is that section 26(2) interpreted within the broader context of section 26 itself,

makes it clear that a person's right of access is qualified by certain considerations;

36.3. To the extent that any ambiguity *may* exist as postulated by the amicus, we say that the ambiguity must be interpreted in favour of a *qualified* right (because an unqualified right will unreasonably and unjustifiably limit the constitutionally protected right to privacy held by companies and their shareholders);

36.4. In order to save section 26(2) from unconstitutionality, the section must be interpreted to mean that the right of access is qualified rather than unqualified;

36.5. We find support for our argument that a *qualified* right of access is to be preferred in –

36.5.1. section 14 of our own Bill of Rights and the jurisprudence emanating from it;

36.5.2. specific legislation – PoPI – designed to ensure that personal information is only disseminated in a manner consistent with a proper application of section 14 in the Bill of Rights; and

36.5.3. the comparative law emanating from liberal democracies such as the United Kingdom, where,

for policy reasons, it is accepted that an unqualified right is untenable.

Jose Brett SC
Don Mahon
Kevin Hopkins

All Members of the Johannesburg Bar
8 February 2016