CAMPAIGN FOR FREE EXPRESSION

SUBMISSIONS ON THE COMPANIES AMENDMENT BILL

INTRODUCTION

1. Campaign for Free Expression ("**CFE**") hereby responds to the call for submissions by the Minister of Trade, Industry and Competition on the Companies Amendment Bill, 2021 ("**the Bill**").

2. CFE's submissions focus on the proposed amendments to section 26 of the Companies Act, 2008 ("**the Act**"), which proposes to expand the right of public access to information held by companies, including securities registers and, importantly, the new registers of beneficial ownership. CFE also makes brief submissions on the remuneration policy and remuneration report in what is proposed to become section 30A of the Act.

3. CFE enthusiastically supports the proposed amendments to section 26. But CFE submits that public access can be enhanced even further, without impinging on the constitutional rights or overburdening the administrative capabilities of companies, by ensuring that share registers and beneficial share registers be published by companies on their websites. Moreover, CFE proposes that the remuneration policy and remuneration report of public companies, state owned companies and larger private companies should be (i) accessible by members of the public and (ii) also published on the companies' websites. These proposals will at once enhance transparency and accountability while not unjustifiably restricting any privacy or confidentiality rights of the companies concerned.

ABOUT US

4. CFE is a non-profit organisation dedicated to protecting and expanding the right to free expression for all, and enabling everyone to exercise this right to the full, whether it be by speaking out, by protesting, by revealing information, by blowing the whistle on wrong-doing, by arguing, debating, writing, painting, composing or just by shouting out your opinion.

5. CFE's aims are to:

5.1. monitor the free flow of ideas and information and report on relevant events and developments;

5.2. inject an informed, principled, consistent, and fact-based freedom of expression position into the national discourse;

5.3. encourage awareness of and support for freedom of expression across all elements of society, in particular ensuring it is not just a media concern but one for all citizens and civil society;

5.4. promote transparency and access to information in all sectors of society;

5.5. facilitate a broad alliance of those who care about this issue and partnerships with like-minded organizations;

5.6. undertake strategic and precedent-setting legal action to promote and defend free expression; and

5.7. act as a think-tank on policy, particularly around the complex issues being thrown up by digital media, disinformation, and regulation.

6. It is therefore important to CFE that the public be able to access, directly and through the media and civil society, accurate information that is essential to the fight against inequality and wage disparity in the workplace, and corruption and other financial crimes that threaten democracy.

SECTION 26: REASONS FOR OPEN ACCESS TO COMPANY REGISTERS

7. In ***ArcelorMittal v Vaal Environmental Justice Alliance***, the Supreme Court of Appeal remarked that "citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect of government and in relation to corporations".[1]

8. It is becoming internationally accepted that transparency in the beneficial ownership of companies is vital for investigative journalists and civil society actors to assist the public and private sectors with the fight against corruption, tax evasion, money laundering and terrorist financing. This is obviously because those committing such crimes can and do attempt to hide money flows behind various front and shelf companies across borders, as has been demonstrated by the explosive disclosures of the Panama Papers, the Pandora Papers, and – closer to home – the Gupta Leaks.

9. The Panama Papers (2016) and the Pandora Papers (2021) were journalistic exposés that revealed the extensive and complicated networks of off-shore companies and trusts used by the wealthy and powerful to hide their assets and sometimes to launder money and avoid tax.[2] The International Consortium of Investigative Journalists (ICIJ), which

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[1] *Company Secretary of ArcelorMittal South Africa & another v Vaal Environmental Justice Alliance* [2014] ZASCA 184; 2015 (1) SA 515 (SCA), para 1.

[2] See www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore/

coordinated hundreds of journalists in scores of countries to produce these exposés, say that the amounts hidden in off-shore companies and accounts is somewhere between $5-trillion and $32-trillion. The higher end would represent a third of global GDP.

10. The *New York Times* reported that these stories exposed "a thriving sector of the financial services industry [which] specializes in helping affluent clients obscure their assets and legally minimize the taxes they would otherwise owe.[3] These advantages are achieved through a couple of basic methods, built around the principles of disguised ownership and low regulation."

11. The Independent Commission for the Reform of International Corporate Taxation said: "The Pandora Papers reveal the inner workings of what is a shadow financial world, providing a window into the hidden operations of a global offshore economy … [this] enables some of the world's richest people and multinationals to hide their wealth and in some cases pay little or no tax."[4]

12. In short, these papers revealed the extent of this covert movement of money and assets, and how it depends on hidden or disguised ownership and a lack of regulation. This amendment seeks precisely to tackle this, as we explain below.

13. Disclosure of beneficial ownership enables the state to fight financial crimes, and aids the public in assisting with that fight.

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[3] See www.nytimes.com/2021/10/04/world/pandora-papers.html

[4] Id.

14. This is not only good for the public – it is also good for business. Corruption impairs the economic performance, competitiveness and investment climate of a country. This is not conducive to an enabling business environment. Access to beneficial ownership information also facilitates fair competition and due diligence, both of which are good for business.

15. Providing for disclosure of beneficial ownership is not only emerging best practice, but long-standing binding international law. The 2003 United Nations Convention Against Corruption ("**UNCAC**"), which South Africa has ratified, and which our Constitution "takes into its very heart", according to the Constitutional Court in ***Glenister***.[5]

15.1. Article 12 provides that State Parties must "take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector", and may do so inter alia by "promoting 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".

15.2. Article 13(1)(b) in turn provides as follows:

> Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as … ensuring that the public has effective access to information.

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[5] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC), para 178.

16. These obligations are reinforced by the right of access to information (enshrined in section 32 of the Constitution) and the right to freedom of expression, which includes receive and impart information and ideas (enshrined in section 16 of the Constitution).

17. We submit that, under international and constitutional law, South Africa is entitled and indeed obliged to provide for effective access to information for journalists, civil society actors and the wider public to assist in the fight against corruption and other financial crimes.

18. In ***Nova v Cobbett***,[6] the Supreme Court of Appeal found that the current section 26 of the Act provides the public with an unqualified right of access to companies' securities registers. The Court reasoned inter alia as follows:[7]

> The Constitutional Court has emphasised in ***Brümmer v Minister for Social Development & others*** that media have a duty to report accurately, as '[t]he consequence of inaccurate reporting would be devastating.' This then means that the journalists must be able to have speedy access to information such as the securities registers: 'Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.' Interference with the ability to access information impedes the freedom of the press. The right to freedom of expression is not limited to the right to speak, but includes the right to receive information and ideas. Preventing the press from reporting fully and accurately, does not only violate the rights of the journalist, but it also violates the rights of all the people who rely on the media to provide them with 'information and ideas.'

19. But securities registers tell only a limited story, and where concerted efforts have been made to conceal ownership and control structures by interposing nominees and front companies, securities registers are effectively meaningless.

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6 *Nova Property Group Holdings v Cobbett* [2016] ZASCA 63; [2016] 3 All SA 32 (SCA); 2016 (4) SA 317 (SCA).

7 Id, para 37 (emphasis added).

20. It follows, only logically, that if the public have a constitutional right to access securities registers, then they also have a right to access beneficial interests registers (once the Bill becomes law and ensures that these are created).

21. CFE thus welcomes the proposed amendments to section 26 of the Act, which will grant the public an unqualified right of access to beneficial interests registers.

22. However, the requirements of making a request and paying a prescribed fee constitute self-evident limitations on the rights to freedom of expression and access to information. We submit that these limitations are unnecessary and thus unjustifiable. We say so for the following reasons:

22.1. First, time is often of the essence when exposing and reporting on corruption and other financial crimes. As the Court held in ***Nova v Cobbett***, "journalists must be able to have speedy access to information".[8] The Court also recognised a case where "immediate access to share registers enabled journalists to uncover an apparent conflict of interests in relation to the head of a tender committee".[9] The delay occasioned by making a request and waiting for a response may undermine the obligation under the UNCAC to provide the public with "effective" access to information.

22.2. Second, companies will in any event be required to lodge their beneficial interests registers periodically with the State. The work of compiling the register is already done. It will cost the company next to nothing to upload the register (duly redacted,

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[8] Id.

[9] Id, para 38.

to the extent necessary to protect personal information, such as addresses) onto its website. This will relieve the company of the administrative burden of having to find and redact the register every time it receives a request. And it will give the public the critical advantage of having information immediately available in a manner that is now widely regarded as the most efficient in the digital age.

23. Thus, the UNCAC Coalition argues as follows:[10]

> Crucially, beneficial ownership registries need to be freely accessible to the public online. This allows international law enforcement bodies to easily access the information without having to go through mutual lengthy legal assistance procedures. Public access also benefits businesses by reducing transaction and due diligence costs: Nine out of ten senior private sector executives say it is important to know the ultimate beneficial ownership of the entities with which they do business. Public access also allows the media, civil society organisations and the general public to monitor who benefits from public funds, for example through public procurement contracts or grants awarded to companies in response to the COVID-19 crisis.

24. CFE supports the Open Ownership Principles, one of which is Public Access, articulated as follows:

> Sufficient data should be freely accessible to the public
> - The public should have access to BO [beneficial ownership] data, at a minimum to a subset that is sufficient for users to understand and use the data.
> - This data should be available free of charge.
> - This data should be available as open data: published under a specified licence which allows anyone to access, use, and share it without barriers such as identification, registration requirements, or the collection of data about users.
> - This data should be available in bulk and searchable by both company and beneficial owner.
> - A legal basis for the publication of data should be established, in line with privacy and data protection legislation, and potential negative effects of the publication of data should be understood and mitigated for.

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[10] See https://uncaccoalition.org/learn-more/beneficial-ownership-transparency/.

- A broad purpose for publishing the data based on accountability and the public interest should be specified in law.
- Where information about certain classes of persons (e.g. minors) is exempt from publication, the exemption should be clearly defined, justified, and narrowly interpreted.
- Where a disclosure system permits anonymity in published data on a case-by-case basis in a protection regime (for example, to mitigate personal safety risk), the grounds for granting anonymity should be clearly defined, proportionate, and fairly applied.
- Where data has been exempted from publication, the publicly available data should note that BO information is held by authorities but has been exempt from publication.

25. We attach, marked "A", a copy of Open Ownership's explanation of this Principle, which inter alia explains as follows:

> Having a public BO [beneficial ownership] register means that law enforcement, businesses, journalists, and citizens from around the world can easily access information on the BO of companies. Having widespread third party use of data can drive up data quality, and can increase impact by expanding the user base beyond authorities. For instance, publicly available BO data can reduce the cost and complexity of due diligence and risk management for the private sector, thereby levelling the playing field and increasing competitiveness. Evidence shows that data in a public register is used much more widely when it is available without use of barriers such as registration, payment, or identification. This can be particularly important for enabling international users to access the data (for example, when tracing transnational links between companies).

26. As explained above, free and instant public access to beneficial ownership information is not only good for the public – it is also good for business. It should thus not be seen as hampering but in fact enhancing the ease of doing business in South Africa.

27. We are unable to conceive of any principled or practical reason why both securities and beneficial interests registers should not be freely accessible on the Internet on the websites of companies.

28. We accordingly submit that section 26 of the Act should be amended further to place an obligation on companies to upload their securities and beneficial interests registers

onto their websites within twenty days of having lodged them with the authorities. Of course, the securities and beneficial interests registers should also remain accessible at the companies' registered office, in addition to access on the companies' websites.

29. CFE also welcomes the fact that section 26(2) of the Act is to be amended to entitle members of the public to access the company's memorandum of incorporation, records of the company's directors and the company's annual financial statements. It is critical that the public are able to access this important information: the memorandum of incorporation "sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company"; the register of directors tells the public who manages the company at board level, and annual financial statements set out the financial position of the company. These company records are all critical for the public to access – to ensure commercial efficacy of business transactions as much as facilitating investigations by the media and civil society.

30. These additional categories of company information should also be accessible on a company's website.

31. CFE also wishes to point out that there appears to be a drafting error in section 26(2) – the categories of company information in section 26(1)*(c)* – reports to annual meetings – and 26(1)*(d)* – notices and minutes of annual meetings and certain communications - are excluded from section 26(2). Section 26(2A) carves out exceptions to the right of access to those categories of company information (for private companies, non-profit companies or personal liability companies where annual financial statements are prepared internally or independently and where the company has a public interest score of less than a certain number).

32. While this carve-out may be reasonable, the point we make is that where companies do not fall within these exceptions, members of the public should have access also (and online) to reports to annual meetings and notices and minutes of annual meetings.

33. Finally, because we advocate for the access through disclosure of company documents on their websites, there is no longer any need for sections 26(4), (5) and (6) – which regulate the process by which members of the public request company information, which companies must comply with within 14 (now 10) days. This is all unnecessary. All that is required is that companies have a legal obligation to make the documents available on their websites, and at their registered office (the latter for inspection during business hours on notice to the company).

COUNTERVAILING CONCERNS RELATING TO BENEFICIAL OWNERSHIP DISCLOSURE

34. It is imaginable that some companies may be apprehensive about the changes. As in ***Nova v Cobbett***:

> The Companies contend that information contained in a private company's securities register is information of a personal nature as it will contain names and identities of individuals; their home and work addresses. In addition, they contend that depending on the nature of the company, it may also expose their business affiliations, how wealthy they are and what their political, moral and religious leanings are. The contention thus advanced is that a company's securities register contains information of a sensitive nature that may reveal deeply private matters about shareholders in a particular company which, in the hands of the wrong people, may be open to abuse.

35. Some companies may say that the Promotion of Access to Information Act, 2000, may be used to access beneficial interests registers. But the reasoning in ***Nova v Cobbett***

dispenses with this. The Court recognised that "the procedures of PAIA can readily be used as an instrument to frustrate and delay access to records".[11]

36. Some companies may also claim that expanding section 26 of the Act may impinge on the privacy rights of the company or the holders of beneficial interests. This too is not correct. In ***Bernstein v Bester***,[12] the Constitutional Court held as follows:

> 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 disclosure and accountability to shareholders. It is clear that any information pertaining to participation in such a public sphere 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 exist. Nor would such an expectation be recognised by society as objectively reasonable.

37. Similarly, in ***S v Coetzee***, Kentridge AJ emphasised that "those who choose to carry on their activities through the medium of an artificial legal persona must accept the burdens as well as the privileges which go with their choice."[13]

38. Any concerns about sensitive information can be dealt with by appropriate redaction of personal information not required by members of the public to identify owners of securities (such as addresses and identity numbers).

39. There is thus no reason why expanding the right in section 26 of the Act should impinge on any legitimate interests of businesses.

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[11] Id, para 23.

[12] *Bernstein & others v Bester NO & others* [1996] ZACC 2; 1996 (2) SA 751 (CC), para 85.

[13] *S v Coetzee & others* [1997] ZACC 2; 1997 (3) SA 527 (CC), para 98.

REMUNERATION OF DIRECTORS; REMUNERATION POLICY AND REPORT

40. CFE also welcomes the new requirement that the annual financial statements of companies whose statements are required to be audited must not only include the remuneration and benefits received by each director but also name the director concerned (section 30(4)(a)). In particular, CFE notes that these annual financial statements will be accessible to the public under section 26(2) of the Act (as it is to be amended).

41. CFE is also encouraged by the detailed new section 30A which requires public companies and state-owned companies to prepare and present a remuneration policy and report to shareholders. CFE notes that such a report will contain a disclosure of the total remuneration of the employee of the company with the highest total remuneration, the total remuneration of the employee with the lowest total remuneration in the company, and the average remuneration of all employees, median remuneration of all employees and the remuneration gap between the top 5% and lowest 5% paid employees of the company. The rationale for such disclosure set out in the explanatory memorandum to the Bill are laudable.

42. But all this critical information – critical for all the important reasons set out in the explanatory memorandum (not least that South Africa is one of the most unequal societies in the world) is only proposed to be made accessible to shareholders. The public remains in the dark. The remuneration report does not form part of the annual financial statements of a company under section 30 of the Companies Act – and is hence not accessible to members of the public under the enhanced section 26(2).

43. One of the stated objectives of the detailed disclosures to be made in the remuneration report, such as the remuneration gap, is that it may "induce [ ] the boards of companies

and senior executives to refrain from awarding and receiving excessive remuneration for fear of the adverse reputational consequence". CFE agrees. But this objective is best achieved by publicising the remuneration report which includes metrics such as the remuneration gap and the remuneration of the lowest paid employee. It is after all the public who will exert the reputational pressure that the objective speaks of.

44. CFE also takes the view that, with regard to the appropriate metric, there can be no sensible argument to exclude the individuals' bonuses from the calculation. It is well known that, in certain sectors, the bonus can in fact be larger than the basic salary. In any event, a provision excluding any remuneration beyond the basic salary invites companies to hide the true remuneration of its senior staff in other aspects of their remuneration packages, and so undermine the mischief this provision seeks to address.

45. In our view, there can be no constitutional or legal impediment to requiring the remuneration report to be available to the public. The Constitutional Court recognises that there is a "continuum of privacy interests", only some of which can reasonably be considered to be private. It is only the "inner sanctum of a person, such as his/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…". Accordingly, "privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as <u>business and social interaction</u>, the scope of the personal space shrinks accordingly."[14]

[14] *Bernstein & others v Bester NO & others* [1996] ZACC 2; 1996 (2) SA 751 (CC), para 67.

46. The remuneration reports of public companies is not part of the “truly personal realm”. On the contrary, the public has a right to know what leaders of business earn and the extent of the gap between the best and worst paid in any public company. The wage gap impacts on public life; it is one of the causes of social and political instability in South Africa and globally, and accordingly there is an overwhelming public interest in its disclosure.

47. CFE thus contends that either the remuneration report of public companies and state-owned companies should be specifically referred to in section 26(2) of the Act – and published on the website of the company concerned – or it should form part of the annual financial statements of a company, and hence be publicised in that fashion.

PRIVATE COMPANIES

48. Finally, CFE submits that the objectives of the bill will not be fully realised unless large private companies are also hit by the disclosure provisions. There are significant private companies that have a similar impact to public companies. In our view, private companies that meet a certain threshold, for example, annual turnover and staff complement beyond a certain size, should have the same disclosure requirements as public companies.

CONCLUSION

49. CFE in general welcomes the provisions of the Companies Bill in so far as they enhance public access to important company information.

50. This important development in the right direction should be taken to its logical conclusion: share registers, beneficial ownership registers, memoranda of

incorporation, registers of directors, annual financial statements, reports and minutes of annual meetings, and the remuneration report, should all be not only public documents but published on the website of the company.

51. This would alleviate the burden on the company to respond to requests for access to company information and also achieve practical and speedy transparency. After all, if in principle the documents are to be made public, why request a fee be paid and a form be completed? Why put companies to the administrative burden of responding to these requests and arranging such access? True transparency – and accountability – means providing the public with easy and effective access: not placing procedural obstacles in their way.