HELEN SUZMAN FOUNDATION

Submission in response to the Companies Amendment Bill, 2018

1. Introduction

1.1. The Helen Suzman Foundation (**HSF**) welcomes the opportunity to make submissions on the Companies Amendment Bill published in Gazette No 41913 on 21 September 2018 (**the Bill**). Should the opportunity arise, the HSF wishes to make oral presentations to the Department of Trade and Industry (**Department**).

1.2. The HSF is a non-governmental organisation whose mandate is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability.

1.3. The HSF commends the Department's initiative in streamlining the provisions of the Companies Act 71 of 2008 (**the Act**) to increase legal certainty and reduce unnecessary barriers to conducting business in South Africa. The HSF believes that the amendment process provides an opportunity to introduce measures that benefit the public interest at large and align the Companies Act with other South African legislation.

1.4. In the main part of this submission, the HSF details a proposed further amendment to the Act to enhance ease of access to information about the beneficial ownership of shares. The reasoning behind this proposition will be discussed with reference to South African case law and comparative law.

1.5. The second part of this submission will highlight some typographical and language concerns in the Bill.

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2. Transparency in relation to beneficial ownership

2.1. *The need for readily-available access to share registers*

2.1.1. This submission relates to the amendment of sections 25 and 26 of the Act, as contained in sections 3 and 4 of the Bill.

2.1.2. The HSF takes no issue with the amendment contained in section 3 of the Bill, which provides that the Companies and Intellectual Property Commission (**CIPC**) must publish the notice setting out the location of records of the company. In theory, this will enhance transparency in that it allows third parties to know where information about the company is stored, which facilitates access where it is permitted. Practically, in the absence of regulations prescribing how and when such notices will be published, it is not possible at this stage to gauge whether or to what extent transparency will be promoted.

2.1.3. The HSF submits, however, that this amendment to section 25 is an incremental step towards transparency when, in fact, a giant leap is needed. This means reducing the number of steps involved in acquiring information relating to shareholders of private companies. The HSF's view is that one way to do this is for the share registers of companies to be made available electronically via request to the CIPC, in much the same way as information concerning directors is made available currently.

2.1.4. The reason that this change is needed is apparent from how the current regime operates in practice. Currently, section 26(4) of the Act provides that the share register of a company can be accessed in three ways:

2.1.4.1. by inspecting the records directly;
2.1.4.2. by request to the company in the prescribed form; or
2.1.4.3. via use of procedures prescribed in the Promotion of Access to Information Act 2 of 2000 (**PAIA**).

2.1.5. The Act does contain what appears to be strong protections of the right to access information regarding beneficial ownership, such as prescribing a time period within which to provide information requested in writing. Commendably, this time period has been reduced in the Bill from 14 business

days to five. Further, non-compliance with reasonable requests for information is an offence.

2.1.6. Nevertheless, this does not guarantee that reasonable requests are accommodated. The case of *Nova Property Group Ltd and Others v Cobbett and Another*[1] (***Nova Property***) illustrates this in an acute way. It highlights how companies can refuse to provide information – contrary to the law - and use legal process to obfuscate their shareholding, against the public interest. Further, it provides important guidance on the proper approach to transparency in relation to company information.

2.1.7. Briefly, the facts concern the attempts of a financial journalist who specialises in investigating illegal investment schemes to obtain share registers of companies for the purposes of an investigation. Despite making requests to the relevant companies in terms of the Act, he was refused. The publication that had commissioned the investigation was forced to launch a court application to obtain the share register, resulting in protracted litigation including interlocutory applications. The matter was only resolved by the order of the Supreme Court of Appeal, some two years later, with that court vindicating the right of the journalist to access the share registers of the company[2].

2.1.8. The Court made several important statements regarding the right of access to information contained in section 26(2), including the following:

2.1.8.1. Timely access to securities registers is essential for journalists[3];

2.1.8.2. There is nothing in sections 26(2) and 26(5) that qualifies the right of access to securities registers, nor is there any reference in these sections to the reasonableness of either the request or the response[4];

[1] 2016 (4) SA 317 (SCA).
[2] Following the judgment allowing access to the share register, serious allegations against the directors of the Nova Property Group Holdings (Pty) Ltd were revealed by the journalist who had originally made the information request – including that the directors had awarded themselves the majority of the shares in the company for almost nothing. This was at the expense of some 33 000 other individuals, many of them pensioners. See J Cobbett "Nova bosses take pensioners' R1bn" *Mail & Guardian* accessed at https://mg.co.za/article/2016-11-25-00-nova-bosses-take-pensioners-r1bn on 22 November 2018.
[3] *Nova Property Group* at paragraph 24.
[4] Ibid para 26.

2.1.8.3. A reasonable request would be one made in accordance with the provisions of section 26(4)(a) and (c) of the Act;[5]

2.1.8.4. The 'motive' with which a person seeks access to obtain access to share registers is irrelevant – the right of the public and media to access this information is unqualified[6];

2.1.8.5. In enacting section 26(2), the legislature demonstrated a clear intention to provide that this section can be exercised independently of PAIA;[7]

2.1.8.6. The exercise of the right to freedom of expression entails a duty on the media to report accurately, which means that journalists must be able to have speedy access to information such as the securities registers;[8]

2.1.8.7. Preventing the press from reporting fully and accurately does not only violate the rights of the journalist, but also violates the rights of all the people who rely on the media to provide them with 'information and ideas'; and[9]

2.1.8.8. **An unqualified right of access to a company's security register is, therefore, essential for effective journalism and an informed citizenry.**[10]

2.1.9. The HSF agrees with the Court's reasoning. It submits, however, that while the right to access a company's security register is unqualified legally, it is qualified by practical constraints. The intention of the existing legislation is therefore not given full effect under the current legislative regime.

2.1.10. These practical constraints are illustrated by the *Nova Property Group* case. The most egregious of these is that a company that does not wish to share its information can refuse a request and use the court system to delay investigations. This can put the requestor under financial duress to abandon the request. Therefore, the potential for a chilling effect on the investigation of financial crime exists.

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[5] Ibid para 26.
[6] Ibid paras 28, 33, 36, and 48.
[7] Ibid para 32.
[8] Ibid Para 37.
[9] Ibid para 37.
[10] Ibid para 38.

2.1.11. Other constraints lie in the practicability of the existing provisions. It is not always possible for requestors to go to the physical location of the record (and where they do, they may be met with hostility, which is a deterrent). Written requests create a delay between the time of the request and the response. In journalism, timeliness is key. Even the making of a request can alert companies to an investigation and create an opportunity for the destruction or concealment of vital evidence. This in itself is a strong justification for enabling access to the share register without necessarily involving the company.

2.1.12. No further mention need be made of using PAIA to access the information as provided for in section 26(4)(c) beyond that the court expressly stated in *Nova Property* that "PAIA will not provide journalists prompt access to securities registers – for whom timely access is essential".[11]

2.1.13. Further, there is nothing to show that the offence created in section 26(9) of the Act actually has a deterrent effect in relation to refusing requests. The offence sanctions only the company and not individual directors or prescribed officers of the company and therefore does not allow for individual accountability. There are no statistics available as to whether this crime is reported or prosecuted. It is submitted that there should not be a need for this offence to burden the criminal justice system when the unqualified right of access can be given effect to by allowing access to share registers via the CIPC.

2.1.14. If the right to access this information is unqualified, there is no reason why it should not be made readily available to requestors without having to approach the companies directly. Crucially, the infrastructure to facilitate this already exists, in the form of the electronic information repository administered by CIPC.

2.2. *Financial Intelligence Centre Act 38 of 2001 (**FICA**)*

2.2.1. FICA was enacted with the aim of combating money laundering activities and the financing of terrorist and related activities. In order to achieve these aims, FICA places a number of obligations on "accountable institutions" as defined in FICA, which includes banks, attorneys, estate agents, and the like.

[11] Ibid para 24.

2.2.2. Making share registers available through CIPC will allow accountable institutions easy access to information regarding the ownership and control structure of the client (section 21B(1)(b)) and be able to establish the identity of the beneficial owners of the client (section 21B(2)(a) and (b)). It will therefore make compliance easier and more effective, furthering the aims of that Act.

2.3. *Other countries*

2.3.1. A number of countries presently allow for electronic access to share registers, including the following:

2.3.1.1. In **Singapore** shareholder information is stored in the Electronic Register of Members (**EROM**) which is administered by the Accounting and Corporate Regulatory Authority. Members of the public can access the EROM online after the payment of a fee. This system was implemented in January 2016 following amendments to the Companies Act.

2.3.1.2. The **New Zealand** Companies Office administers an online companies register where information relating to companies is readily available. No fee is payable – all that is required is to enter identifying information such as the company name or registration number into the search function. Certain historical data can also be accessed online.

2.3.1.3. **India**'s Ministry of Corporate Affairs provides online access to share registers in much the same way as has been proposed in this submission. Companies are required to file an annual return within 60 days of an annual general meeting. It is required that a list of shareholders is attached to Form MGT 7, which forms part of the return. This information is available to the public upon payment of a fee.

2.3.1.4. In the **United Kingdom**, companies can elect to keep their register of members on the public register, which is administered by the Companies House (the UK equivalent of the CIPC). Once such an election is made, the public is able to access the share register online. Notably, if a company chooses not to keep its register of members on the public register, it is obliged to hold it at its premises, where it can be viewed by the public upon request.

2.3.2. There is therefore a growing recognition of the value of transparency in relation to share registers in various international jurisdictions.

2.4. *South African context*

2.4.1. While guidance can be drawn from other countries, this cannot be determinative of South African policy. South Africa's unique constitutional framework and circumstances necessitate strong protections for transparency. Openness is a foundational value listed in the Constitution. It operates against secrecy, which permits the concealment of illegal and immoral acts. Where money is involved, secrecy must be treated with circumspection.

2.4.2. South Africa – and the African continent generally – is suffering the ill effects of illicit financial flows (**IFFs**).[12] A dedicated effort to reforming laws and policies to combat IFFs effectively is required. Various IFFs are facilitated by the movement of funds between various companies at different levels of ownership. Some of these entities are merely postbox companies, incorporated with the purpose of obscuring beneficial ownership.

2.4.3. The task of "following the money" where IFFs are suspected is made easier by readily-available access to share registers. This type of exercise is not just for the authorities. It must not be forgotten that the public can also play a role in uncovering and reporting IFFs – but only if they are enabled to do so. Making the share registers of companies publicly available is a first step.

2.4.4. Enforcing the obligation on companies to make their share registers available will also act as a deterrent to companies from engaging in illegal activities in various areas.

2.5. *Practical considerations*

2.5.1. In light of the above, the HSF submits that access to share registers via the CIPC be specifically provided for in the Act by way of amendment to section 26(4) as follows:

"(4) A person may exercise the rights set out in –

[12] "Track it! Stop it! Get it! Illicit Financial Flows" Report on the High Level Panel on Illicit Financial Flows from Africa, accessed at https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf.

(a) subsection (1) ~~or (2),~~ or contemplated in subsection (3) –

(i) for a reasonable period during business hours;

(ii) 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; or

(iii) in accordance with the Promotion of Access to Information Act, 2000 (Act 2 of 2000);

(b) subsection (2) –

(i) for a reasonable period during business hours;

(ii) 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;

(iii) in accordance with the Promotion of Access to Information Act, 2000 (Act 2 of 2000); or

(iv) by request to the Commission in the prescribed manner and upon the payment of the prescribed fee."

2.5.2. It can be expected that including shareholder registers in the CIPC's database and creating means for requestors to access that information would require some financial outlay and IT infrastructure development. Nevertheless, this would involve the development of an existing system and should not be overly burdensome.

2.5.3. Practically, it would involve amendment to the CoR 30.1 form to include a section relating to beneficial ownership. At the very least, the following information would be required:

2.5.3.1. Identity of shareholders, including their names and identity numbers. Other identifying information, such as addresses, should be considered for inclusion; and

2.5.3.2. Number and class of shares held by each shareholder.

2.5.4. The CIPC would then be required to hold this information in its records following the filing of each annual return and provide it upon request. In this way, any person would be able to quickly and cheaply access share registers that are accurate up to the date of the last return submitted. A nominal fee may be charged before the information is provided.

2.5.5. Should historical information be required (or information regarding changes made after the date of the return), this can be obtained from the company directly by inspection or request.

2.5.6. The HSF submits that this amendment will give practical effect to the intention of section 26(4) of the Act, which is to provide unqualified access to information concerning beneficial ownership of shares.

3. Typographical comments

3.1. The purpose of this section is to highlight certain typographical concerns in the Bill that the HSF has identified.

3.2. *Section 10 of the Bill*

The word "trust" at the end of the section appears to be used in error, as the sub-paragraph refers to a stakeholder agreement and not a "trust agreement". It is proposed that subparagraph (ii) read as follows once amended:

> "(ii) cause the issued shares to be transferred to a third party, to be held by the third party as a stakeholder in terms of a stakeholder agreement but not as agent for either the company or the subscribing party, and later transferred to the subscribing party in accordance with the **stakeholder** agreement."

3.3. *Section 15 of the Bill*

Section 15 of the Bill refers to the amendment of section 72 of the Act. In reading subsection (5), the use of the peremptory "must" and the conjunctive "and" creates an obligation upon companies falling within the category of companies that are required to appoint a social and ethics committee to apply for an exemption from the requirement. This cannot be the intention of the provision. It is suggested that this be amended to make the option to apply for an exemption permissive, rather than peremptory.

3.4. *Section 22*

3.4.1. Section 22 of the Bill amends section 166 of the Act by providing that persons entitled to apply for relief to a court can make an application or lodge a complaint to only the Companies Tribunal (**Tribunal**), as opposed to having the option of choosing between the Tribunal, accredited entities, or any other persons. The range of options for alternative dispute resolution (**ADR**) is thus restricted to the Tribunal.

3.4.2. The legislative rationale for this change is unclear and was not explained in the explanatory memorandum accompanying the publication of the Bill. There is some concern that this limitation is not aligned with the spirit of ADR, which is to allow the disputing parties a wide degree of choice in how their matters are conducted and avoid excessive formality. It is possible that restricting ADR to the Tribunal will result in that institution taking on a quasi-judicial character which may not accord with what the disputing parties intended in selecting ADR instead of the courts.

3.4.3. A further comment of a typographical nature would be to delete the references to “conciliation” and “arbitration” in the amended subsection (2) of section 166. This is for the purposes of consistency.

4. Conclusion

The HSF thanks the Department for its consideration of its comments. Any enquiries relating to this submission can be directed to Cherese Thakur at cherese@hsf.org.za.

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