

IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2020/14867

In the application for admission as *amici curiae* of:

**THE RIGHT2KNOW CAMPAIGN**

First Applicant for Admission  
as an *amicus curiae*

and

**GAVIN DENNIS BORRAGEIRO**

Second Applicant for Admission  
as an *amicus curiae*

In the matter between:

**VUMACAM (PTY) LTD**

Applicant

and

**JOHANNESBURG ROADS AGENCY**

First Respondent

**CITY OF JOHANNESBURG  
METROPOLITAN MUNICIPALITY**

Second Respondent

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**NOTICE OF APPLICATION FOR ADMISSION AS *AMICI CURIAE* IN TERMS OF  
RULE 16A**

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**KINDLY TAKE NOTICE THAT** the First and Second Applicants for Admission as *amici curiae* ("**Applicants for Admission**") intend to apply to this Court on urgency for an order in the following terms:

1. The rules, time limits, forms, procedures and service provided for in the Uniform Rules of Court are dispensed with in terms of Rule 6(12)(a) and Rule 16A(9), to the extent necessary, and that this application be heard as a matter of urgency.

2. Admitting the Applicants for Admission as *amici curiae* in the Main Application.
3. Granting the Applicants for Admission—
  - 3.1. the right to file written heads of argument in the Main Application; and
  - 3.2. to the extent the Court requires, granting the Applicants for Admission the right to present oral argument at the hearing of the Main Application,  
  
provided that such argument does not repeat matters detailed in the arguments of the parties and raises new contentions which may be useful to the Court.
4. Directing that the costs of this application be paid by any party that opposes any of the relief sought in this application.
5. Further and/or alternative relief.

**TAKE FURTHER NOTICE** that the affidavit of **FLOYD NKOSI** and the confirmatory affidavit of **GAVIN DENNIS BORRAGEIRO** will be used in support of this Application.

**TAKE FURTHER NOTICE** that the Applicants have appointed the address of its attorneys, Power Singh Inc. at 20 Baker Street, Rosebank, as the address at which it will accept notice and service of all process in these proceedings. The Applicant's attorneys will also accept electronic service at the following email addresses: michael@powersingh.africa, avani@powersingh.africa, tina@powersingh.africa and tara@powersingh.africa.

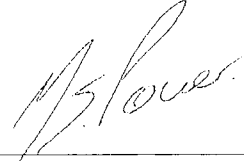
**TAKE FURTHER NOTICE** that if you wish to oppose this application you are required to:

1. Notify the Applicants for Admission's attorneys by email of your intention to oppose on or before **10h00 on Tuesday, 21 July 2020**.
2. Appoint an address that complies with the requirements of Uniform Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

3. File your answering affidavit, if any, by **17h00 on Wednesday, 22 July 2020.**

**KINDLY** set the matter down for hearing accordingly.

DATED AT JOHANNESBURG ON THIS THE 20<sup>th</sup> DAY OF JULY 2020.



**POWER SINGH INC.**

**Per: Michael Power**

Attorneys for the Applicants for

Admission as *amici curiae*

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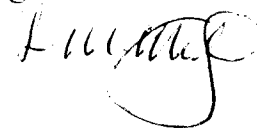
tina@powersingh.africa

tara@powersingh.africa

Ref.: PSIR2- 202003

**TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT  
JOHANNESBURG**

**AND TO: SCHINDLERS ATTORNEYS**  
Attorneys for the Applicant in the Main Application  
2<sup>nd</sup> Floor, 3 Melrose Arch  
Melrose Boulevard  
Johannesburg  
Tel: 011 448 9600  
Fax: 011 448 9620  
Email: green@schindlers.co.za  
Ref.: Mr Green/VR/G17103  
*Served electronically*

240 DC 107/2020  


**AND TO: MADHLOPA & THENGA INCORPORATED**

Attorneys for the First and Second Respondent

54 Seventh Avenue

Parktown North

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PO BOX 2710, Parklands, 2121

Docex: 534 JHB

Tel: 011 442 9045

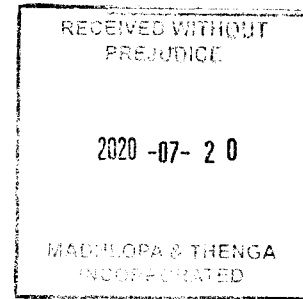
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Ref: MT/st/CO101542/20

*Served electronically*



*[Handwritten signature]*  
14-15



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Second Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**FLOYD NKOSI**

hereby make oath and state:

**INTRODUCTION**

1. I represent the First Applicant in this matter. I am an adult male, and the Countering Repression Organizer of the Right2Know Campaign (“**R2K**”), a voluntary association

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registered as a non-profit organisation, registration number NPO 132-307, with its national office located at 107 Community House, 41 Salt River Road, Salt River, Cape Town.

2. I am duly authorised to bring this application and to depose to this affidavit on behalf of R2K.
3. The Second Applicant is Gavin Dennis Borrageiro (“**Mr Borrageiro**”), an adult male with identity number 7408145122089, and who resides at 5 Buchner Crescent, Lonehill, Johannesburg. Mr Borrageiro is a privacy activist and member of the R2K and acts herein in his personal capacity.
4. The facts to which I depose are true and correct and are within my personal knowledge, except where it is apparent from the context that they are not. Where I make submissions of law, I do so on the advice of R2K’s legal representatives.
5. This is an urgent application in terms of Rule 16A(5) of the Uniform Rules of Court (“**Rules**”), in terms of which R2K and Mr Borrageiro (“**Applicants for Admission**”) seek leave to be admitted as *amici curiae* in this matter.
6. The Applicant alleges that the issue in this matter simply concerns whether the Johannesburg Roads Agency (“**JRA**”) may lawfully refuse to consider wayleave applications. The Respondents contend that the matter raises concomitant constitutional issues regarding the infringement of the right to privacy and freedom of movement.
7. The Applicants for Admission are firmly of the view that the installation of CCTV cameras in public spaces, or any process which leads to their installation, for the purposes of video surveillance implicates, among others, the rights to privacy, freedom of movement and freedom of association. Additionally, the application concerns the constitutional right to just administrative action. Accordingly, this matter clearly raises constitutional issues<sup>1</sup> and therefore invokes Rule 16A. The Applicants for Admission

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<sup>1</sup> *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) at para 27.

seek to make submissions on both the question of privacy and related constitutional rights, and just administrative action.

8. In line with the particular areas of interest and expertise of the Applicants for Admission, and cognisant not to repeat any of the submissions that have already been canvassed by the parties, the proposed submissions of the Applicants for Admission are narrowly-tailored to three key issues of relevance to the present matter:

8.1. **First**, the proper process in this matter dictates that the Respondents should have set aside the approvals of previous wayleave applications by way of formal counter-application. Upon the realisation that the previous decisions to grant wayleaves were unlawful, the Respondents should have sought to set those decisions aside and there is a duty on the Respondents to do so. This process has not been followed in this matter.

8.2. **Second**, the intrusive nature of video surveillance in public spaces requires the existence of an enabling legal framework which includes appropriate safeguards to protect, among others, the rights to privacy, freedom of movement and freedom of association. This framework does not currently exist and the sole reliance on the Protection of Personal Information Act 4 of 2013 (“**POPIA**”) by the Applicant is insufficient. It is accordingly not in the interest of justice for this Court to grant the relief sought by the Applicants in relation to the present wayleave applications, at this stage.

8.3. **Third**, a dichotomy need not exist between privacy and security and an appropriate balance should be struck between these competing interests. International and foreign law instruments and case law provide useful guidance on the ways to appropriately strike this balance, and on broader considerations relating to privacy, security, and video-surveillance which are relevant to this matter.

9. In line with these proposed submissions and Rule 16A(6) of the Rules, this affidavit is structured as follows:

9.1. **First**, the interests of the Applicants for Admission in this matter are detailed.

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- 9.2. **Second**, the submissions that the Applicants for Admission propose to advance, including their relevance, novelty, and utility to the Court, and how they differ from the submissions already advanced in the present matter are succinctly outlined.
- 9.3. **Third**, the Applicants for Admission's compliance with the relevant procedural aspects of the Rules is detailed.
- 9.4. **Fourth**, the timeframes for the filing of written submissions in these proceedings is proposed.
- 9.5. **Fifth**, urgency is addressed.
10. Each aspect is dealt with in turn below.

## **I. RELEVANT INTEREST IN THIS MATTER**

### **Right 2 Know Campaign**

11. R2K is a non-profit organisation that operates in the public interest to promote and advocate for communication and privacy rights, protest rights and participatory democracy in South Africa. In the last nine years, R2K's work has consistently related to key human rights issues, always with the objective of promoting access to information, informed public participation, the protection of privacy and greater transparency and accountability.
12. R2K is an active member within the South African civil society space and works alongside an array of civil society organisations ("CSOs") to promote a culture of human rights. Specifically, R2K engages in a variety of activities relating to the triad of information rights, which include the rights to privacy, freedom of expression and access to information. In this regard, R2K has dealt with issues pertaining to the Protection of State Information Bill, net neutrality, data protection, bulk communications and surveillance, and digital rights.

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13. R2K has consistently worked to safeguard the right to privacy and actively works to challenge unlawful surveillance. Some of R2K's work in this regard has included the following activities:
- 13.1. In 2015, R2K made submissions to the Civil Aviation Regulations Committee regarding proposed amendments to civil aviation regulations which would legalise the use of drones. Their submission raised concerns regarding the need to protect the public's right to privacy in light of the potential use of drones in surveillance activities.
- 13.2. In 2016, R2K, together with Privacy International and the Association of Progressive Communicators, submitted a joint report to the United Nations Human Rights Committee. The report focused on concerns regarding the Regulation of Interception of Communications and Provision of Communication Related Information Act,<sup>2</sup> mass surveillance, and the threats to internet freedom, privacy, and freedom of expression posed by the draft Cybercrimes and Cybersecurity Bill.
- 13.3. In 2019, R2K participated as an *amicus curiae* in the matter of *amaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Corrections and Others*,<sup>3</sup> a matter which concerned, among other things, bulk communications surveillance.
14. Despite the Applicant's averments to the contrary, the decision to authorise the installation of a network of video surveillance CCTV cameras in public spaces in Johannesburg raises important questions related to privacy and public participation, and the chilling effect that video surveillance has on the rights to, among others, privacy, freedom of movement, and freedom of association. It also relates to just administrative action and the transparency of such processes. A matter in which R2K has an interest.
15. Accordingly, the nature of the matter falls within R2K's particular areas of interest and

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<sup>2</sup> Act 70 of 2002.

<sup>3</sup> *amaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Corrections and Others* [2019] ZAGPPHC 384; [2019] 4 All SA 343 (GP); 2020 (1) SA 90 (GP) 2020 (1) SACR 139 (GP).

the work that it pursues. R2K has a clear interest in this matter, and is well-placed to be of assistance to this Court. The submissions which R2K intends to make have not been raised by the other parties and are important considerations in the full ventilation of this matter.

**Mr Borrageiro**

- 16. Mr Borrageiro is a member of the R2K and has accordingly contributed to the work detailed above. In addition to his work with R2K, Mr Borrageiro has consistently engaged in individual activism around the roll-out of CCTV video surveillance in public spaces in Johannesburg. In so doing, he has focused on the infringement of the rights to privacy, freedom of movement and freedom of association posed by video surveillance.
- 17. Mr Borrageiro is referred to in this matter on multiple occasions with regards to a complaint which he raised with the City of Johannesburg Ombudsman. The correspondence concerning his complaint have been included in the Master Bundle at pages 010-59 to 010-99.
- 18. Mr Borrageiro is a concerned subject of video surveillance. In addition, his activism around the infringement of rights posed by video surveillance is evidence of his clear interest in this matter.
- 19. Accordingly, the nature of the matter falls within Mr Borrageiro’s particular areas of interest and the work that he pursues in his personal capacity, and with R2K. He has a clear interest in this matter, and is well-placed to be of assistance to this Court. The submissions which he intends to make have not been raised by the other parties and are important considerations in the full ventilation of this matter.

**II. OUTLINE OF THE PROPOSED SUBMISSIONS**

**The duty on the Respondents to review previous unlawful conduct**

- 20. The first submission that the Applicants for Admission seek to advance relates to the duty on the Respondents to review previous unlawful conduct. It is common cause that the

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JRA has issued previous wayleave applications submitted by the Applicant. The JRA now contends that due to the infringement of privacy rights posed by the installation of CCTV cameras, they are not empowered to approve the current wayleave applications which form the subject-matter of this urgent application.

21. The Applicants for Admission will submit that upon the realisation that the JRA is not empowered to authorise wayleave applications of this nature, the Respondents had a duty to set those previous unlawful decisions aside.<sup>4</sup> This duty on the state to tread respectfully when dealing with constitutional rights and “do right” still exists.<sup>5</sup> The Constitutional Court has confirmed that state respondents must apply to set aside decisions by way of counter-application.<sup>6</sup> This has not happened in this matter.
22. Notwithstanding the incorrect process followed by the Respondents regarding the authorisation of the previous wayleave applications, the Applicants for Admission submit that the current wayleave applications cannot be granted in light of the countervailing constitutional issues, as discussed below.

**There is no law authorising bulk and indiscriminate CCTV video surveillance**

23. The second aspect of the Applicants for Admission’s proposed submission relates to the lawful exercise of public power and the interplay between bulk video surveillance and bulk communications surveillance. In this regard, the Applicants for Admission intend to argue that the reasoning of the Gauteng Division of the High Court, Pretoria in *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others*,<sup>7</sup> pertaining to the need for lawful authority to trespass on privacy and associated rights in relation to communications surveillance,<sup>8</sup> is apposite to this matter and CCTV video surveillance in and around Johannesburg.
24. In particular, the Applicants for Admission intend to argue that the intrusive nature of

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<sup>4</sup> *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) at 82.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *amaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Corrections and Others* [2019] ZAGPPHC 384; [2019] 4 All SA 343 (GP); 2020 (1) SA 90 (GP) 2020 (1) SACR 139 (GP).

<sup>8</sup> *Id.* at paras 143-66.

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video surveillance in public spaces requires the existence of an enabling legal framework, with appropriate safeguards to protect, among others, the right to privacy, freedom of movement, and freedom of association. Presently, there is no such legal framework and the Applicant’s reliance on the Protection of Personal Information Act 4 of 2013 (“**POPIA**”) alone is insufficient. For these reasons, the Applicants intend to present submissions as to why it is not in the interests of justice for the Court to grant the relief sought by the Applicants in relation to the present wayleaves, at this stage.

- 25. The Applicant seeks to dissuade this Court from considering the constitutional issues which this matter raises. However, the Applicants for Admission submit that this matter clearly raises constitutional issues, particularly in relation to the right to privacy and associated rights which warrant consideration by the Court. In this regard, the proposed arguments by the Applicants for Admission concerning bulk communications surveillance and its interplay with bulk video surveillance and the lack of an enabling legal framework authorising video surveillance are relevant and will be useful to this Court in its determination of this matter.

**Striking an appropriate balance between privacy and security**

- 26. The third aspect of the Applicants for Admission’s proposed submission relates to finding an appropriate balance between privacy and security, and the appropriate threshold for a reasonable expectation of privacy in public spaces. The Applicant alleges that the operation of CCTV video surveillance in public spaces has assisted residents in combatting and deterring crime.<sup>9</sup> The Respondents deny this averment and note the lack of evidence submitted to the Court by the Applicant in this regard.<sup>10</sup>
- 27. The Applicants for Admission do not intend to make a submission regarding the effectiveness, or otherwise, of CCTV video surveillance in the combatting of crime. The Applicants for Admission are advised that this evidence falls on the Applicant to adduce. Instead, the Applicants for Admission seek to submit that a dichotomy need not exist between privacy and security, and that an appropriate balance must be struck between

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<sup>9</sup> Master Bundle, 001-10, para 12.  
<sup>10</sup> Master Bundle, 009-46, paras 10.13-10.15.

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these two competing interests. In this regard, the Applicant’s for Admission intend to present submissions on various international and foreign law instruments and case law which considers privacy, security, and video surveillance, and what constitutes a reasonable expectation of privacy in public spaces.<sup>11</sup> In addition, the Applicants intend to bring this Court’s attention to a recent call by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression for a moratorium on the use of surveillance equipment.<sup>12</sup>

28. The Applicants for Admission submit that these instruments are relevant and of use to this Court in its determination of this matter as they will assist the Court to properly determine the privacy concerns occasioned by CCTV video surveillance in public spaces. Importantly, they emphasise the need to strike an appropriate balance between security and privacy and they complement the arguments which the Applicants for Admission propose to advance in relation to the need for an enabling legal framework authorising video surveillance before any process enabling increased surveillance can be authorised.

**III. COMPLIANCE WITH THE RELEVANT PROCEDURAL ASPECTS OF THE RULES**

29. The Applicants for Admission have considered the papers filed in the Main Application and are of the view that they have a substantial interest in the proceedings and can make a valuable and relevant contribution to the determination of the issues before this Court.

30. To facilitate their involvement in this matter, and in line with Rule 16A(2) of the Rules, on Saturday, 18 July 2020 the attorneys of record for the Applicants for Admission addressed a letter to the attorneys for the Applicant and the Respondents seeking their written consent for the Applicants for Admission to be admitted *as amici curiae* in the Main Application. A copy of this letter is attached hereto and marked as annexure “TN1”.

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<sup>11</sup> For example, the 2007 Opinion on Video Surveillance in Public Places by Public Authorities and the Protection of Human Rights prepared by the Venice Commission CDI.-AD (2007) 014-e (Venice, 16-17 March 2007).

<sup>12</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/HRC/41/35 (28 May 2019).

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31. At the time of filing this application, the Applicants for Admission have received a letter from the Attorneys for the Applicant conveying that they do not consent to the request for admission as *amici curiae*. A copy of this letter is attached hereto and marked as annexure "**TN2**". The Applicants for Admissions have not, as yet, received a response from the Attorneys for the Respondents but should same be received, it will be filed with this Court.
  32. In its correspondence, the Applicant argues that constitutional issues around privacy and associated rights are irrelevant to this matter. This is simply not the case and has been dealt with earlier in this affidavit. Additionally, the Applicant fails to note that the Applicants for Admission also seek to present submissions on the duty on the Respondents to review and set aside the previous wayleave applications, should they determine that the granting of the previous wayleave applications was unlawful. This proposed submission directly implicates the constitutional right to just administrative action and the subject-matter of this dispute.
  33. As a result of the inability to receive consent to intervene from the Applicant, which the Applicants for Admission submit has been unreasonably withheld, the Applicants for Admission have considered it prudent to file this application, at this stage, to afford the Court an opportunity to consider the application and to determine appropriate timeframes in the light of the urgency of this matter.

#### **IV. PROPOSED TIMEFRAMES FOR THE FILING OF HEADS OF ARGUMENT**

34. In order to ensure that the matters which the Applicants for Admission seek to advance are fully ventilated, and in accordance with the letter from the Applicant, the Applicants for Admission are willing to accede to the timeframes proposed by the Attorneys for the Applicant in their attached letter marked "**TN2**". Resultantly:
  - 34.1. The Applicant, and Respondents should they wish to do so, should file answering affidavits by Wednesday, **22 July 2020**;
  - 34.2. The Applicants for Admission will file heads of argument by **12h00 on Friday, 24 July 2020**; and

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34.3. To the extent that any of the parties wish to file heads of argument in response to the heads of argument of the Applicants for Admission, such written submissions should be filed by **12h00 on Sunday, 26 July 2020.**

## V. URGENCY

35. Rule 16A of the Rules serves to facilitate the admission of *amici curiae* by providing courts with guidelines on how this should happen. It is the “entry point for non-parties into public interest matters with constitutional ramifications”.<sup>13</sup> Simply, Rule 16A(1)(a) requires any person “raising a constitutional issue in an application or action” to give notice, which is to be made public and placed on a notice board. (Own emphasis.) The importance of the notice cannot be gainsaid: it notifies interested parties of public interest matters and invites them to seek consent to enter proceedings and play a role in the development of South Africa’s constitutional jurisprudence.
36. The notice of motion in this matter was filed on 29 June 2020, and despite the matter raising genuine constitutional issues from the outset, a rule 16A notice was only filed, by the Respondents, on Friday 17 July 2020. The Applicants for Admission filed their letter seeking written consent to intervene one-day later on Saturday, 18 July 2020. This is certainly not “very belated timing” as alleged by the Applicant. Notably, the Applicant has not filed a Rule 16A notice in contravention of the Rules. As a result, the urgency of this application is directly aligned to the conduct of the Applicant and the need for this matter to be heard alongside the hearing of the Main Application. The Applicants for Admission submit that no prejudice will result from the filing of heads of argument and the hearing of this matter on expedited timeframes.
37. In its Responding Affidavit, the Applicant does not make out a case as to why it has failed to file a notice and its reliance on Rule 16A(9) is misplaced.<sup>14</sup> The urgent application that has been filed runs to 93 pages in length. To have filed a one-page notice alongside

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<sup>13</sup> *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* [2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC) at 60.

<sup>14</sup> Master Bundle, 010-33, para 76.

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the application was not too much to ask, particularly as this matter clearly raises constitutional issues relating to privacy and just administrative action.<sup>15</sup>

38. It is, in the view of the Applicants for Admission, not in the interests of justice for this matter to proceed without a reasonable opportunity for *amici curiae* to apply for admission given the constitutional issues that are raised, even if such an opportunity is on reduced timeframes. This opportunity should not only apply to the present Applicants for Admission but to any interested parties wishing to join this matter.
39. Despite the prejudice suffered as a result of the failure of the Applicant to file a notice, the Applicants for Admission have taken all reasonable steps to ensure compliance with Rule 16A and any non-compliance therewith should be condoned, where necessary. These steps include the filing of a letter seeking written consent to intervene and the filing of this application, which is compliant with Rule 16A(5) and (6), on an urgent basis.
40. This matter clearly raises constitutional issues and it is arguable that the failure by the Applicant to file a notice has shut the door on other potential *amici* who may have wished to enrich this constitutional debate. The Applicant's conduct should not also shut the door on the Applicants for Admission. It is in the interests of justice that this application be heard on reduced timeframes, and alongside the Main Application.

## CONCLUSION

41. The Applicants for Admission reiterate that the proposed submissions are relevant, novel and of utility to this Court. Additionally, the issues that they propose to raise have not been canvassed by any of the parties to the proceedings, and should be considered by the Court in making an appropriate determination in this matter.
42. In the light of the submissions above, the Applicants for Admission request that this Court grant their application for intervention as *amici curiae* in the present matter on the terms expressed in the notice of motion to which this affidavit is attached, including to

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<sup>15</sup> See note 1 above.

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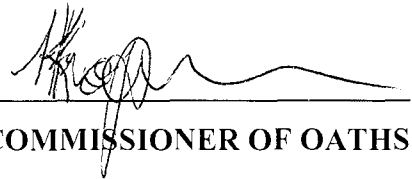
present written heads of argument and to present oral argument at the hearing of this matter.



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**FLOYD NKOSI**

I hereby certify that the deponent stated that he knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at **ROSEBANK** on this the **20<sup>th</sup>** day of **July 2020**. The Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.



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**COMMISSIONER OF OATHS**

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**KELLY KROPMAN**  
Commissioner of Oaths  
Practising Attorney  
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Rosebank, Johannesburg  
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Mr. Green/KR/G17103/



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**Date: 18 July 2020**

Your ref: Mr Green/KR/G17103/  
MT/C1010542

Our ref: PSIR2-202003

**TO: SCHINDLERS ATTORNEYS**  
**Attorneys for the Applicant**  
**c/o Craig Green**  
E-mail: green@schindlers.co.za

**AND TO: MADHLOPA & THENGA INC**  
**Attorneys for the Respondents**  
**c/o Renita Naicker**  
Email: renita@madhlopathenga.co.za / commercial@madhlopathenga.co.za /  
mashudu@madhlopathenga.co.za

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Dear Mr Green and Ms Naicker,

**VUMACAM (PTY) LTD V JOHANNESBURG ROADS AGENCY AND CITY OF JOHANNESBURG  
(2020/14867): REQUEST FOR CONSENT TO BE ADMITTED AS AMICI CURIAE**

1. We act for the Right2Know Campaign (“R2K”) and Mr Gavin Borrageiro (“our clients”).

// Directors: A Singh B.Comm., LL.B. (UP), MJ Power B.A., LL.B., LL.M. (Wits) | Associates: T Power B.A., LL.B., LL.M. (Wits),  
T Davis B.A. (RU), LL.B. (UCT) | Office Manager: J Rashid | Technology Officer: K Nwana. Power Singh Incorporated is a law firm registered  
with the Legal Practice Council (F18433) and a personal liability company registered in the Republic of South Africa (2018/071686/21).

2. R2K is a voluntary association registered as a non-profit organisation that operates to promote and advocate for communication and privacy rights, protest rights and participatory democracy. The defence and promotion of fundamental human rights is core to R2K's mandate, prompting their engagement in various legislative and litigious processes, including their recent participation as an *amicus curiae* in the matter of *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Corrections and Others*,<sup>1</sup> a matter concerning, among other things, bulk communications surveillance. Mr Borrageiro is a privacy activist, Lonehill resident and member of R2K. He engages in activism around privacy and the roll-out of CCTV video surveillance in Johannesburg. He is referred to in this matter on multiple occasions and seeks to intervene in his personal capacity. Our clients are both clearly interested parties in this matter as a result of the privacy questions which it raises, and which are dealt with extensively by both parties to the application.
3. Our clients are of the view that this matter raises genuine concerns regarding the rights to privacy, freedom of movement and freedom of association, and the relationship between privacy and security. In line with our clients' areas of interest and the work that they pursue, they seek to participate in this matter as *amici curiae*, as contemplated in terms of Rule 16A of the Uniform Rules of Court ("**Rules**"). Accordingly, we hereby request your client's written consent that our clients be admitted as *amici curiae* with the opportunity to present written submissions, as well as to present oral argument should it be deemed necessary to do so.
4. Our clients do not intend to repeat any matter outlined in the argument of the other parties and seek only to raise new contentions which may be useful to the Court. In so doing, our clients intend to canvass the following issues, which they submit will assist the Court in its determination of this matter and which are different from those of the other parties to the litigation:
  - 4.1. ***The duty on the Respondents to review previous unlawful conduct***

- 4.1.1. The first aspect of our clients' proposed submission relates to the proper process which should have been followed by the Respondents in this matter. The Constitutional Court has confirmed that state respondents may apply to set aside approvals by way of formal counter-applications.<sup>2</sup> This has not been done in this case. Resultantly, while the Respondents argue that the law does not empower them to authorise the installation and use of surveillance equipment, our clients propose to submit that upon the realisation that the decisions to grant the previous wayleave applications to the Applicant are unlawful, there is a duty on the Respondents to seek to set those decisions aside.

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<sup>1</sup> [2019] ZAGPPHC 384; [2019] 4 All SA 343 (GP); 2020 (1) SA 90 (GP) 2020 (1) SACR 139 (GP).

<sup>2</sup> See, for example, *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6.

4.2. ***There is no law authorising bulk and indiscriminate CCTV video surveillance***

4.2.1. The second aspect of our clients' proposed submission relates to the lawful exercise of public power and the interplay between bulk video surveillance and bulk communications surveillance. In this regard, our clients intend to argue that the reasoning of the Gauteng Division of the High Court, Pretoria in *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others*,<sup>3</sup> pertaining to the need for lawful authority to trespass on privacy rights in relation to communications surveillance,<sup>4</sup> is apposite to this matter.

4.2.2. In particular, our clients intend to argue that the intrusive nature of video surveillance in public spaces requires the existence of an enabling legal framework, with appropriate safeguards to protect the right to privacy. Presently, no such legal framework exists and the Applicant's reliance on the Protection of Personal Information Act 4 of 2013 alone is insufficient. For these reasons, the Applicants intend to present submissions as to why it is not in the interests of justice for the Court to grant the relief sought by the Applicants in relation to the present wayleaves, at this stage.

4.3. ***Striking an appropriate balance between privacy and security***

4.3.1. The third aspect of our clients' proposed submission concerns the appropriate balance between privacy and security. In this regard, our clients intend to present submissions on various international and foreign law instruments which consider privacy, security and video surveillance, including the trifecta of legal instruments which authorise video surveillance in the United Kingdom and the establishment of the Office of the Surveillance Camera Commissioner; the 2007 Opinion on Video Surveillance in Public Places by Public Authorities and the Protection of Human Rights released by the Venice Commission, the recent moratorium on surveillance technologies proposed by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and jurisprudence on reasonable expectations of privacy in public spaces.

5. Based on the foregoing, our clients submit that the installation of CCTV video surveillance cameras, or any process which authorises their installation, raises important constitutional concerns which must be fully ventilated. Additionally, we note that these matters have not been dealt with, in the terms detailed above, in the submissions of other parties.

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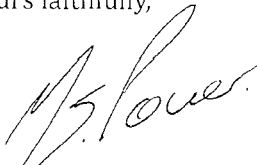
<sup>3</sup> Note 1 above at paras 143-66. It bears reference that a confirmation application has been heard by the Constitutional Court in this matter and judgment has been reserved.

<sup>4</sup> Id at para 165.

AK  
FN

6. We note that, despite this application being filed on 29 June 2020, a Rule 16A Notice was only filed on 17 July 2020 by the Respondents. Thereafter, our clients only had sight of the full set of papers during the afternoon of 17 July 2020, and, at this stage, have not yet had sight of the Respondents' heads of argument. We note that this situation could have been averted by the Applicant who, in our clients' view, should have filed a Rule 16A notice as the application of the Promotion of Administrative Justice Act 3 of 2000 clearly raises a constitutional issue.<sup>5</sup>
7. Despite these complications, should your client provide written consent for our clients' admission as *amici curiae*, we undertake to file an application for admission by **13h00 on Monday, 20 July 2020** and our clients' written submissions by **17h00 on Monday, 20 July 2020**. In order to avoid further prejudice created by these short timeframes, we request your consent to serve all papers electronically.
8. In order to enable our clients to properly prepare an application in terms of Rule 16A(5), should our clients need to do so, we request that you advise, in writing, whether your client consents to our clients' intervention as *amici curiae* and to the proposed timeframes for the filing of written submissions by no later than **11h00 on Monday, 20 July 2020**.
9. We look forward to hearing from you.

Yours faithfully,



**POWER SINGH INC.**

Per: Michael Power

E-mail: [michael@powersingh.africa](mailto:michael@powersingh.africa); [tara@powersingh.africa](mailto:tara@powersingh.africa)

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<sup>5</sup> Note 2 above at para 27.

attorneys and notaries

POWER SINGH INC.

Your Ref: PSIR2-202003

Our Ref: CG/kr/G17103

Date: 20 July 2020

By Email: [michael@powersingh.africa](mailto:michael@powersingh.africa); [tara@powersingh.africa](mailto:tara@powersingh.africa)

Copy To: [renita@madhlopathenga.co.za](mailto:renita@madhlopathenga.co.za); [mashudu@madhlopathenga.co.za](mailto:mashudu@madhlopathenga.co.za);  
[commercial@madhlopathenga.co.za](mailto:commercial@madhlopathenga.co.za)

\*\*\*PER EMAIL\*\*\*

\*\*\*ATTENTION: M POWER\*\*\*

Dear Sir,


**RE: VUMACAM (PTY) LTD V JOHANNESBURG ROADS AGENCY AND CITY OF JOHANNESBURG (2020/14867): REQUEST FOR CONSENT TO BE ADMITTED AS AMICI CURIAE**

1 We act for the applicant in this matter ("our client").

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We now have a virtual reception open between 08h30 to 17h00. Please feel free to enter via Zoom and have your queries addressed by one of our professionals – enter on: <https://zoom.us/j/8114489600>  
Please also take note our Pro Bono initiative to assist businesses in distress <http://www.cobra.org.za>

<b>Address:</b>	Second Floor 3 Melrose Boulevard Melrose Arch 2076	<b>Docex:</b>	10 Hyde Park
		<b>Postal address:</b>	P O Box 10909 Johannesburg, 2000
<b>Tel number:</b>	<b>ZOOM ID – 811-448-9600 – TELKOM (PRESENTLY UNAVAILABLE)</b> (+27) (11) 448-9600 / <b>Emergency/Bail:</b> 083 631 2023	<b>E-mail address:</b>	<a href="mailto:info@schindlers.co.za">info@schindlers.co.za</a>
<b>Fax number:</b>	(+27) 86 608 9600	<b>Web site:</b>	<a href="http://www.schindlers.co.za">www.schindlers.co.za</a>
		<b>Vat number:</b>	4870283290
<b>Partners:</b>	Hilton Schindler BProc (Wits) · Maurice Crespi BA LLB (Rhodes) HDip Co Law (Wits) · David Hepburn BComm LLB (Rhodes) · Lisa Sher BComm (Unisa) LLB (Wits) · Marius van Rensburg BA LLB (Rhodes) (Conveyancer) · Sarah Thackwell BComm LLB (Rhodes) · Chantelle Gladwin-Wood BA LLB (Rhodes) LLM (Unisa) (Notary Public) (Conveyancer) · Lee Binneman BA (RAU) LLB (UJ) · Dean Wright BA LLB (UJ) · Craig Green BComm LLB (Wits) · Christopher Tucker BComm LLB (Rhodes) · Keane Robertson LLB (UCT) · Paul-Michael Keichel BA LLB (Rhodes) · Pierre van der Merwe BComm LLB HDip Tax LLM (UJ) (Notary Public) · Lisa-Marie Bowes BComm (SU) LLB (UCT) · Daniella Brocco BA LLB (Wits) · Alec Veitch BComm LLB (UJ) · Justin Sloane BComm LLB MComm (Tax) (Rhodes) · Nicola Nieuwoudt BComm LLB (SU) · Vicky Revelas BComm LLB (Wits) · Maïke Gohl LLB (UP) · Caitlin Wilde BA LLB (Wits)		
<b>Senior Associates:</b>	Anja van Wijk LLB (UP) · Dominique Lloyd BComm LLB (UJ) · Gary Boruchowitz BA Journ (RAU) LLB (Unisa) · Musa Mathebula LLB (Wits) · Shaun Piveteau BA Law LLB LLM (UP) · Kerry Theunissen BComm LLB (Wits) · Charlotte Clarke BA LLB (Wits) (Solicitor of England and Wales)		
<b>Associates:</b>	Omphile Boikanyo BComm LLB (UJ) · Lisa Schmidt LLB (Wits) · Dingumuzi Ndhlovu BComm (Rhodes) LLB (UP) · Jeannique Booyens BComm LLB (SU) · Simone Jansen Van Rensburg BComm (Marketing) LLB (Notary Public) (UP) · Andrew Lawrie BComm LLB (Rhodes) · Jayna Hira BComm Law LLB (UP) · Saul Mayers BCom LLB (Wits) LLM International Business Law (QMUL) · Stefan Bezuidenhout LLB (NWU) · Khotso Mmatli LLB (UFS) · John Mackechnie BComm Accounting (UJ) · Hons Investment Management (UJ) LLB. LLM (UCT) · Divina Naidoo BA Law, LLB Cum Laude, LLM Mining and Energy Law (Wits) · Wesley Pons BCom LLB (Rhodes) · Mohau Ledwaba BCom(UNISA) LLB (UP)		
<b>Head of Finance:</b>	Carien van Zyl (CA) (SA) · <b>Office Manager:</b> Melanie Hanreck		

  
FN

- 2 We refer to your letter of Saturday 18 July 2020, requesting that our client consent to your clients being admitted as amici curiae with an opportunity to present written submissions and oral argument.
- 3 Our client does not consent to your clients' admission as amici curiae in this matter and will oppose any application for such admission. This is on various bases, including particularly that the submissions your clients seek to make are wholly irrelevant to the matters that fall to be determined in this urgent application.
  - 3.1 Your letter refers to this matter as raising concerns regarding the right to privacy, freedom of movement and freedom of association. Your clients seek to participate because of their interest in these areas.
  - 3.2 In fact, no such issues are raised in this matter at all.
  - 3.3 This matter concerns a narrow and crisp legal issue: May the JRA lawfully refuse to even consider and decide these wayleave applications, in circumstances in which the applicable bylaws provide that the JRA must do so? Vumacam's submission is that, on trite legal principles, the answer is clear. The JRA may not do so. It is required by law to consider and decide wayleave applications. It cannot unilaterally suspend decisions. Questions relating to privacy, freedom of movement and freedom of association have no relevance to the determination of that crisp legal question.
- 4 Moreover, we have noted the three specific submissions your clients seek to make and take the view that, even if they were relevant, they are unfounded on the facts and the law. This will be addressed in our client's answering affidavit in response to your client's application.
- 5 We are extremely concerned by the very belated timing of your clients' attempt to seek admission as an amicus curiae. Your attempt to lay any complaint on this score at our client's door is plainly without merit.
- 6 But wherever the blame lies, it is plain that the matter can no longer proceed this week as:
  - 6.1 Your clients still need to file their application;



- 6.2 Our client will then need to file its answering affidavit to your clients' application;
  - 6.3 Your client will need to file their heads of argument dealing with the new issues raised, including the foreign and international law issues; and
  - 6.4 Our client will need to file its heads of argument in response, including on the foreign and international law issues.
- 7 Our client would therefore be substantially prejudiced were the hearing to proceed this week.
  - 8 In the circumstances, and purely in an effort to give your clients a chance to formally apply for admission as amici curiae and for our client to respond, we suggest the following process:
    - 8.1 The matter is removed from the urgent roll for this week;
    - 8.2 Your clients must file their application for admission today, 20 July 2020;
    - 8.3 Our client will file its answering affidavit to your clients' application by Wednesday, 22 July 2020;
    - 8.4 Your clients file their heads of argument by 12:00 on Friday, 24 July 2020; and
    - 8.5 Our client files its heads of argument by 12:00 on Sunday, 26 July 2020.
  - 9 Given that this proposal cannot conceivably cause any prejudice to yourselves or the respondents, we trust that it will be in order.
  - 10 We look forward to your urgent confirmation in this regard. This letter is written with prejudice and will be placed before the court should the need arise.

Yours faithfully,

**SCHINDLERS**

Sent electronically and therefore unsigned.

F N JK

**IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: **2020/14867**

In the application for admission as *amici curiae* of:

**THE RIGHT2KNOW CAMPAIGN**

First Applicant for Admission  
as an *amicus curiae*

and

**GAVIN DENNIS BORRAGEIRO**

Second Applicant for Admission  
as an *amicus curiae*

In the matter between:

**VUMACAM (PTY) LTD**

Applicant

and

**JOHANNESBURG ROADS AGENCY**

First Respondent

**CITY OF JOHANNESBURG  
METROPOLITAN MUNICIPALITY**

Second Respondent

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**CONFIRMATORY AFFIDAVIT**

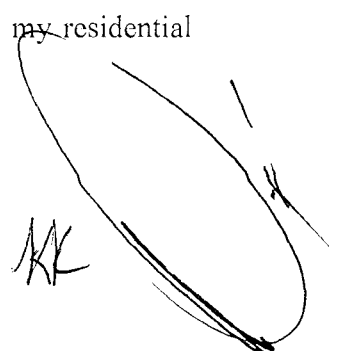
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I, the undersigned,

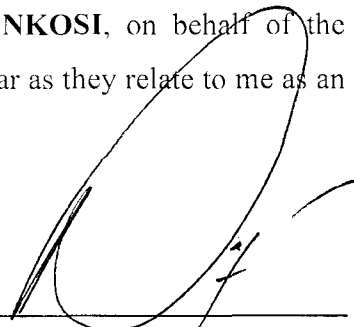
**GAVIN DENNIS BORRAGEIRO**

hereby make oath and state:

1. I am an adult major male with identity number 7408145122089, and with my residential address being at 5 Buchner Crescent, Lonehill, Johannesburg.

A handwritten signature in black ink, appearing to be 'GDB', is written over a large, hand-drawn oval scribble.


2. The facts contained herein are within my personal knowledge and are both true and correct unless the contrary is stated or as clearly appears from the context.
  
3. I have read the founding affidavit deposed to by **FLOYD NKOSI**, on behalf of the Right2Know Campaign, and confirm the contents thereof insofar as they relate to me as an Applicant for Admission.



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**GAVIN DENNIS BORRAGEIRO**

I hereby certify that the deponent stated that he knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at **ROSEBANK** on this the **20<sup>th</sup>** day of **July 2020**. The Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.



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**COMMISSIONER OF OATHS**

**KELLY KROPMAN**  
Commissioner of Oaths  
Practising Attorney  
20 Baker Street,  
Rosebank, Johannesburg  
(011) 485 0352