**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 14867/20**

In the matter between:

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| **VUMACAM PROPRIETARY LIMITED** | Applicant |
| and | |
| **JOHANNESBURG ROADS AGENCY** | First Respondent |
| **CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY** | Second Respondent |
| and | |
| **THE RIGHT2KNOW CAMPAIGN** | First Applicant for Admission as an amicus curiae |
| **GAVIN DENNIS BORRAGEIRO** | Second Applicant for Admission as an amicus curiae |

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**APPLICANT'S HEADS OF ARGUMENT**

**IN RESPONSE TO THE PROSPECTIVE AMICI**

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## INTRODUCTION

1 This matter concerns a narrow and urgent legal issue: May the Johannesburg Roads Agency ("**JRA**") lawfully refuse to even consider and decide wayleave applications, in circumstances in which the applicable bylaws provide that the JRA must do so?

2 In our main heads of argument, we explained 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 on this score. Yet, that is precisely what the JRA has done – for an indefinite period.

3 We stand by the submissions contained in our main heads of argument on this score.

4 However, after our main heads of argument were filed, the Right2Know Campaign and Mr Borrageiro sought admission as amici curiae ("**the prospective amici**"). The prospective amici contend that the matter raises concerns regarding the right to privacy and associated constitutional rights. They say that they seek to participate because of their interest in these areas.

5 As we explain in what follows, the prospective amici's stance is unsustainable. This matter does not turn on these issues.

5.1 The prospective amici would have the court stray beyond the pleadings, to decide issues that have no bearing on the relief actually sought in this matter.

5.2 Their admission to these proceedings will serve only to derail what ought to be a crisp and urgent legal debate about what the JRA's powers and duties are in relation to wayleaves.

5.3 In any event, as we demonstrate in what follows, the contentions of the prospective amici are legally unsustainable.

6 Accordingly, in these heads of argument, we respond to the arguments made by the prospective amici by addressing the following issues in turn:

6.1 The contentions the prospective amici raise are irrelevant to this matter;

6.2 The contentions that the prospective amici raise are precluded by the principle of constitutional subsidiarity;

6.3 The contended duty to review past wayleaves; and

6.4 The contended need for an enabling legal framework.

**THE ISSUES THE PROSPECTIVE AMICI RAISE DO NOT ARISE IN THIS MATTER**

7 The submissions the prospective amici seek to make primarily concern whether Vumacam may lawfully conduct CCTV surveillance, and the impact such surveillance may have on constitutional rights.

8 These are simply not issues that arise for determination in this matter.

9 First, no relief has been sought against Vumacam in this matter.

9.1 No order is sought by anyone to the effect that Vumacam has committed some constitutional breach or unlawful act. Nor has any declaration of unconstitutionality been sought.

9.2 There is accordingly no need for this Court to decide whether Vumacam's CCTV cameras infringe rights (though they plainly do not) or are otherwise lawful (though they plainly are).

10 Second, the question that is raised for determination – whether the JRA may suspend CCTV wayleaves – does not require this Court to decide whether CCTV surveillance infringes constitutional rights or is otherwise lawful.

10.1 The court is asked only whether the JRA may lawfully suspend CCTV wayleaves.

10.2 The answer to that question does not turn on whether CCTV surveillance infringes constitutional rights. It turns on the JRA's powers and duties under the bylaws.

10.3 The bylaws are clear. They provide expressly that once the requirements in the bylaws are met, the JRA is obliged to consider and issue a wayleave.[1] The question of whether the JRA thinks that

[1] Clauses 1.1.3 and 3.1.3 of the bylaws, Annexure FA3 (caselines 001-61). See also Vumacam's main heads of argument at paras 28-33.

the wayleave applicant may later infringe privacy or other rights is not relevant to, and is not a requirement for, a wayleave provided for in the bylaws.

10.4 The JRA is not empowered to suspend CCTV wayleaves at all, and certainly not on the basis of privacy concerns.

10.5 To be perfectly clear: even if the respondents and prospective amici were correct that Vumacam's CCTV cameras infringe individuals' rights to privacy (which they are not), this would not give the JRA the power to suspend CCTV wayleave applications. The JRA would remain obliged to grant wayleaves, provided the requirements in the bylaws were met.

10.6 If the City of Johannesburg wishes to enact a bylaw dealing with privacy concerns and if it has the competence to do so (which is most doubtful), it should do so. But the JRA cannot enact a bylaw via the back-door and use a wayleave process to deal with these concerns.

11 Therefore, this Court is neither directly nor indirectly tasked with determining whether CCTV infringes privacy or any other rights in this matter. Submissions on this issue are irrelevant.

12 Whatever concerns the prospective amici may have about CCTV surveillance, their remedy is not to raise them now, in a matter concerning the lawfulness of the JRA's suspension. Each of the prospective amici have been aware of Vumacam's camera network and operations since, at the

latest, February 2019 and have made public statements criticising Vumacam on this score.[2] Yet they have not brought any application concerning the issue until now.

13 We submit that it would be inappropriate for this Court to pronounce on the matters raised by the prospective amici.

13.1 If a court is to pronounce on whether, and to what extent, CCTV surveillance is lawful and constitutional, this should be done in a matter where the facts raise these issues squarely for determination – not, as in this case, where they are issues peripheral to the issues before the court, and which have been raised by prospective amici at the eleventh hour.

13.2 The court is tasked only with deciding the narrow legal point of whether CCTV wayleaves may lawfully be suspended. It should, we submit, reject the attempt by the prospective amici to stray beyond these issues.[3]

14 In the words of the Constitutional Court in *De Lange,* the main thrust of the prospective amici's submissions "*is off the beam and will thus be of no help to the court's task of resolving the present dispute*."[4] Therefore, the application of the prospective amici should be dismissed.

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2 AA to prospective amicus application (caselines 049-37) para 25.

3 *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC) ("*Molusi*") at para 28; *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) ("*Fischer*") at para 13; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) ("*Zuma*") at paras 15 to 19.

4 *De Lange v Methodist Church and Another* 2016 (2) SA 1 (CC) ("*De Lange*") at para 28.

**THE CONTENTIONS THAT THE PROSPECTIVE AMICI RAISE ARE PRECLUDED BY THE CONSTITUTIONAL PRINCIPLE OF SUBSIDIARITY**

15 The main argument the prospective amici advance is that the suspension of CCTV wayleaves is justifiable because CCTV surveillance infringes the right to privacy.[5]

16 This argument faces a fatal difficulty: the principle of constitutional subsidiarity precludes the prospective amici from relying directly on the constitutional right to privacy.

17 This is because Parliament has enacted legislation specifically to give effect to the constitutional right to privacy. That legislation is the Protection of Personal Information Act 4 of 2013 ("**POPIA**").

18 POPIA's preamble is instructive. It provides:

> *"RECOGNISING THAT-*
>
> - *section 14 of the Constitution of the Republic of South Africa, 1996, provides that everyone has the right to privacy;*
> - *the right to privacy includes a right to protection against the unlawful collection, retention, dissemination and use of personal information;*
> - *the State must respect, protect, promote and fulfil the rights in the Bill of Rights;*
>
> *AND BEARING IN MIND THAT-*
>
> - *consonant with the constitutional values of democracy and openness, the need for economic and social progress, within the framework of the information society, requires the removal of unnecessary impediments to the free flow of information, including personal information;*
>
> *AND IN ORDER TO-*

[5] Prospective amici HOA para 23.

- *regulate, in harmony with international standards, the processing of personal information by public and private bodies in a manner that gives effect to the right to privacy subject to justifiable limitations that are aimed at protecting other rights and important interests,*

*PARLIAMENT of the Republic of South Africa therefore enacts, as follows…" (our emphasis)*

19 Though the prospective amici are dismissive of POPIA's effect on privacy protection,[6] the preamble makes it clear: this is legislation that has been specifically enacted in order to give effect to the right to privacy, and to regulate the processing of personal information in a manner that protects this right.

20 But once this is so, this means that the prospective amici (and indeed the JRA) are precluded from side-stepping POPIA and relying directly on the section 14 right to privacy. They either had to rely on POPIA itself or, if they contend that POPIA is constitutionally deficient, challenge it. This the effect of the principle of constitutional subsidiarity, which has repeatedly been applied by the Constitutional Court.

21 For example, in *My Vote Counts*, the Constitutional Court noted that the principle of subsidiarity was "*a well-established doctrine within this court's jurisprudence*."[7]

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6 See prospective amici HOA, para 48, where the prospective amici argue that compliance with POPIA is irrelevant, as POPIA does not authorise surveillance; and para 56, where they argue that compliance with POPIA does not safeguard the right to privacy.

7 My Vote Counts NPC v Speaker of the National Assembly and Others 2016 (1) SA 132 (CC) ("*My Vote Counts*") at para 161.

21.1 The Constitutional Court held that the essence of this principle is that –

> *"where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution."*[8]

21.2 The Constitutional Court held that, if the complaint is that legislation suffers from shortcomings, the principle of subsidiarity requires a party to challenge that legislation as falling short of the Constitutional standard. [9]

21.3 The Constitutional Court accordingly held that it was not open to My Vote Counts to found a cause of action directly on section 32 of the Constitution. It had to found its cause of action on the Promotion of Access to Information Act 2 of 2000 ("**PAIA**") or challenge PAIA's constitutionality.[10]

22 The same holds true for this case.

22.1 Parliament has, in POPIA, enacted legislation specifically to give effect to the constitutional right to privacy.

22.2 To the extent that the prospective amici are concerned that CCTV surveillance violates the right to privacy, they had only two options: base their attack in POPIA, or, if POPIA does not found such an attack, challenge POPIA's constitutionality.

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8 *My Vote Counts* at para 161.

9 *My Vote Counts* at paras 163-164.

10 *My Vote Counts* at paras 181 and 193.

22.3 The first option was to seek to show that Vumacam is non-compliant with POPIA. Neither the prospective amici nor the respondents have even alleged – let alone proved – that Vumacam's CCTV surveillance does not comply with POPIA.[11]

22.4 If the prospective amici took the view that POPIA is inadequate, and does not sufficiently protect the right to privacy, their only recourse was to challenge POPIA's constitutional validity on the basis that it does not give proper effect to section 14. If, for instance, the prospective amici take issue with POPIA's one-year compliance grace period,[12] they ought to have challenged the constitutionality of that provision. If they considered POPIA to be deficient in protecting privacy in the CCTV context in particular, their recourse was to bring a constitutional challenge to that effect.

22.5 But what the prospective amici may not do, is what they seek to do in this case: to attack the operation of Vumacam's CCTV network directly under section 14 of the Constitution in breach of the principle of subsidiarity.

23 A related difficulty scuppers the JRA's case.

23.1 Where Parliament – which is the sphere of government tasked with legislating to fulfil the right to privacy – has enacted legislation

[11] RA (caselines 010-24 – 010-27 ) paras 54-58. The respondents' AA does not mention POPIA compliance at all; the prospective amici consider it to be "irrelevant" whether Vumacam complies (see prospective amici HOA para 48).

[12] Prospective amici HOA, para 56.1.

specifically to safeguard that right, it is not for local government to take it upon itself to impose requirements over and above those imposed in the legislation. Even less is it permissible for a local government agency, such as the JRA, to do so itself, outside any legislative process.

23.2 Indeed, it is doubtful that the City of Johannesburg even has the legal competence to enact a bylaw on this issue:

23.2.1 Section 156(3) of the Constitution provides that a bylaw that conflicts with national legislation is invalid. This means that the City cannot enact bylaws in relation to CCTV that conflict with POPIA. (Still less may the JRA seek to impose requirements, outside the bylaws, in excess of those imposed under POPIA.)

23.2.2 Moreover, the different levels of government have different areas of competence, set out in the Constitution. A municipality, such as the City, may only legislate within its constitutionally ordained areas of competence.[13] The City's areas of competence do not extend to legislating privacy protection through bylaws.

23.3 If the City of Johannesburg wishes to enact a bylaw dealing with privacy concerns and believes it can do so lawfully, it should seek to do so. But the JRA cannot enact a bylaw via the back-door by using

[13] Section 156 of the Constitution, read with Part B of Schedule 4 and Part B of Schedule 5.

a wayleave process to deal with these concerns in a manner that breaches the existing bylaws.

24 Therefore, we submit that the prospective amici's submissions to the effect that CCTV surveillance infringes the constitutional right to privacy cannot succeed. In terms of the principle of subsidiarity, the prospective amici were required to bring their attack within the ambit of POPIA, or to challenge POPIA's constitutionality. They have done neither.

25 In the circumstances, their argument that CCTV surveillance infringes the right to privacy cannot be upheld.

**THE CONTENDED DUTY TO REVIEW PAST WAYLEAVES**

26 The prospective amici argue that the respondents ought to have taken steps to have previous wayleaves for CCTV purposes set aside.[14]

27 This submission is novel, but irrelevant.[15]

27.1 No party in these proceedings seeks an order reviewing and setting aside wayleaves granted in the past. Nor do the prospective amici.

27.2 In addition, the question whether the JRA ought to have reviewed previous wayleaves has no bearing on the question whether its

[14] Prospective amici HOA paras 24ff.

[15] The prospective amici HOA say at para 3.1 that Vumacam concedes that this submission is relevant. This is incorrect, as is clear from AA (caselines 049-39) para 32.

decision to suspend CCTV wayleaves was lawful. That is the only matter at issue in these proceedings.

27.3 The question whether the respondents ought to have reviewed their previous wayleaves is therefore entirely irrelevant to this matter.

28 The prospective amici contend that it would be somehow "appropriate" and "just and equitable" for this Court to make a pronouncement on whether the respondents ought to have reviewed their previous wayleaves.[16]

29 It would not. On the contrary, it would be manifestly inappropriate for this Court to pronounce on this issue. This would require the Court to stray beyond the pleadings and the matters they raise for determination. This is impermissible.[17] It is also acutely prejudicial to the parties, who have had not had a proper opportunity to explain why this relief is unfounded.

30 The submission is also entirely unsustainable.

30.1 The prospective amici argue that the respondents have a duty to review past wayleaves because the respondents themselves consider these to have been granted unlawfully.[18] However, there is no basis for this anywhere in the papers. The respondents do not state, anywhere in their answering affidavit, that they consider the previous wayleaves to have been granted unlawfully.

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16 Prospective amici HOA, para 30.

17 *Molusi* at para 28; *Fischer* at para 13; *Zuma* at paras 15 to 19.

18 Prospective amici HOA, para 26.

30.2 The prospective amici do not explain on what possible basis a decision to grant a wayleave – where the application for the wayleave complied with all the requirements in the bylaws – can be regarded as unlawful and should be set aside.

**THE CONTENDED NEED FOR "AN ENABLING FRAMEWORK"**

31 Like the respondents, the prospective amici seem to be under the impression that, in the absence of a law positively authorising conduct, that conduct is prohibited. It is on that basis that they consider Vumacam to require some sort of "approval" to operate a CCTV network.

31.1 This is not correct.

31.2 The correct position is the opposite: in the absence of a law prohibiting Vumacam's activities, it is perfectly entitled to conduct its business.

31.3 There is no law or regulation in place prohibiting Vumacam from doing what it seeks to do, or requiring Vumacam to obtain some sort of approval to provide the services it does.

32 In any event, the present application is a debate about wayleaves. Under the current legal position, Vumacam requires a wayleave so that it may construct poles. The JRA is obliged to grant Vumacam's wayleaves if the requirements in the bylaws are met. Vumacam neither seeks, nor does it require, the JRA's "approval" of its business operations.

33 The prospective amici seek to raise two points to support the need for an "enabling legal framework":

33.1 First, they argue that the decision of the Pretoria High Court in *Amabhungane*[19] is authority for the proposition that Vumacam requires some sort of "authority" in law to conduct its activities.[20]

33.2 Second, even if this is not the case, they argue that CCTV surveillance limits constitutional rights, and, in terms of section 36 of the Constitution, can only do so if there is "law of general application" authorising this.[21]

34 Neither argument is sustainable. We address each in turn.

35 Before we do so, we reiterate that these submissions have no relevance to the issues to be determined in this matter. Even if even if the respondents and prospective amici were correct that Vumacam's CCTV cameras requires enabling law (which they plainly do not), this would not give the JRA the power to suspend CCTV wayleave applications. The JRA would remain obliged to grant wayleaves, provided the requirements in the bylaws were met.

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[19] *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Others* 2020 (1) SA 90 (GP) ("*Amabhungane*").

[20] Prospective amici HOA paras 44 and 46-47.

[21] Prospective amici HOA paras 44-45.

36 The submissions made by the prospective amici are therefore irrelevant to this application. However, they are also unfounded in fact and law. For the sake of completeness, we explain why below.

**RELIANCE ON THE *AMABHUNGANE* DECISION IS MISPLACED**

37 The prospective amici argue that the decision of the Pretoria High Court in *Amabhungane* is authority for the proposition that Vumacam requires some sort of "authority" in law to conduct its activities.

38 However, this is plainly based on a misreading of *Amabhungane*.

38.1 The paragraphs of the judgment to which the prospective amici refer deal with a constitutional challenge to a practice of the State in conducting "bulk interceptions" of telecommunications traffic. In other words, the State was engaging in a process of searching emails, whatsapps and so on for certain keywords – thus they were intercepting the content of private communications.

38.2 That challenge was brought on the basis that there was no lawful authority for the state to conduct such bulk interceptions.[22]

38.3 The court in that matter held that there was no lawful authority for the state to conduct bulk surveillance of that nature.[23]

[22] *Amabhungane* at paras 3 and 143-166.

[23] *Amabhungane* at para 165.

39 However, this is in no way relevant to the present case – indeed it is miles away from it. Vumacam's position is completely different to that of the state in *Amabhungane*.

40 First, *Amabhungane* was not concerned with "surveillance" in general. It concerned a specific type of surveillance, which entailed the interception of the content of private communications.[24]

40.1 Vumacam's CCTV cameras record only image data. Conversations are not recorded. [25]

40.2 Whereas intercepting private conversations has obvious privacy implications, recording a person's image, while they are in a public place, is completely different.

40.3 The prospective amici make no attempt to explain why they consider the court's reasoning regarding the interception of private communications to be applicable here.

40.4 Therefore, there is no basis to extrapolate the reasoning of the court in *Amabhungane* to the present case.

41 Second, *Amabhungane* was concerned with the activities of state actors.

41.1 It is trite that any exercise of public power must be rooted in law, and an organ of state may exercise no power beyond those conferred on

[24] *Amabhungane* at paras 143 to 145

[25] AA to prospective amicus application (caselines 049-46) para 54.6.

it by law.[26] It is for that reason that, for bulk surveillance to be lawful, the state needed to point to the legal basis for that surveillance: the source of its powers, or empowering provisions. In the absence of such a lawful basis, the exercise of public power was of course unlawful. This is uncontroversial.

41.2 Vumacam, by contrast, is not a state actor. When it conducts its business, it does not exercise public power. It is accordingly not limited by the same principles that limit the exercise of power by state organs. There is no requirement that the activities of a private party be empowered by law. On the contrary, private actors are generally able to act freely, unless the law imposes a constraint on them.

42 The prospective amici contend that, in providing CCTV services, Vumacam actually performs a public function in terms of the Constitution. According to the prospective amici, Vumacam's CCTV network aims to assist the SAPS in their constitutional function of providing security to the public. Therefore, they say, Vumacam's activities are required to be authorised by law.[27]

43 This argument is unsustainable:

43.1 If this proposition were correct, then every private security guard and security service provider in the country would be performing a "public function" whenever they discharge their functions, and would be

[26] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 49; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58.

[27] Prospective amici HOA, para 44.

constrained by the principle of legality in doing so. This seems most unlikely.

43.2 But even if it were correct, there is already legislation dealing with the provision of security services by private entities. The Private Security Industry Regulation Act 56 of 2001 ("**PSIRA Act**") regulates the provision of security services by private actors in South Africa. It therefore regulates the very aspect of Vumacam's services that the prospective amici consider to be "public" in nature.

43.3 Vumacam is registered as a security services provider under the PSIRA Act, and is fully PSIRA-compliant.[28]

43.4 Therefore, even if the security aspects of Vumacam's services amount to the exercise of public power (which they do not), Vumacam is duly authorised to perform those security functions by virtue of its PSIRA registration. It cannot require additional authorisation purely because the specific nature of the security services it provides is CCTV surveillance.

44 Vumacam's activities are thus entirely distinguishable from those of the state that were under consideration in *Amabhungane*.

45 Therefore, we submit that, in the absence of law prohibiting Vumacam from constructing and operating its CCTV network, it is perfectly entitled to do so.

[28] AA to prospective amicus application (caselines 049-43) para 49.3.

There is no need for positive law specifically authorising Vumacam to operate a CCTV network.

**NO LIMITATION OF RIGHTS**

46 The prospective amici then argue that an "enabling legal framework" is required because CCTV surveillance limits constitutional rights, and, in terms of section 36 of the Constitution, Vumacam can only do so if there is "law of general application" authorising this.

47 This argument rests on the assumption that the installation and operation of Vumacam's CCTV cameras infringes constitutional rights.

48 However, on the facts before the court, no case has been made out that any constitutional right has been infringed. The "limitation" that the prospective amici contend gives rise to the need for enabling law has therefore not been shown, on the facts, to arise.[29]

49 The prospective amici invoke various constitutional rights in support of their argument.[30] They primarily rely on the right to privacy. In what follows, we first explain why no limitation of the right to privacy has been shown, on the facts, to arise, before turning to the other constitutional rights the prospective amici allege are implicated.[31]

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[29] AA to prospective amicus application (caselines 049-41, 049-41, 049-42 and 049-50) paras 39, 44, 47 and 59.

[30] Prospective amici HOA paras 31-43.

[31] Prospective amici HOA paras 37-43.

***No limitation of the right to privacy***

50 The prospective amici and respondents contend that Vumacam's CCTV cameras infringe the rights of members of the public to privacy. As a result, they maintain, a law of general application is required in order for the CCTV network to be lawful.

51 However, no limitation of the right to privacy has been shown, on the papers, to arise. The full extent of the respondents' case on this issue is a series of bald assertions to the effect that the right to privacy is violated, without any factual allegations underpinning this conclusion.

52 By contrast, the facts that Vumacam has put up show that there can be no question of a privacy limitation.

52.1 First, Vumacam is compliant with POPIA – the legislation that gives effect to the right to privacy.[32] Significantly, neither the respondents nor the prospective amici have questioned Vumacam's POPIA compliance.

52.2 Second, even if POPIA compliance were not enough (which it plainly must be), there is no basis, on the facts before the court, to conclude that a limitation of the constitutional right to privacy has been proved.

[32] AA to prospective amicus application (caselines 049-46) para 56; RA (caselines 010-24 – 010-27 ) paras 54-58.

Vumacam is POPIA-compliant

53 Vumacam is fully compliant with the legislation that Parliament has enacted specifically to give effect to the right to privacy: POPIA.

54 POPIA regulates the "processing" of "personal information". "Personal information" is broadly defined as "information relating to an identifiable, living, natural person".[33] "Processing" includes, among other things, the collection, receipt, recording, organisation, collation, use, and dissemination of information.[34]

55 Because Vumacam's system collects image data, it may be that Vumacam's activities amount to the "processing" personal information within the meaning of POPIA. Therefore, taking a cautious approach, and sensitive to potential privacy concerns, Vumacam has sought to ensure that it complies with the provisions of POPIA.

56 This means that, to the extent that Vumacam processes personal information, it must (in terms of POPIA), comply with the conditions for the lawful processing of personal information, set out in section 4(1) of POPIA. Section 4(1) provides:

> *"The conditions for the lawful processing of personal information by or for a responsible party are the following:*
> *(a) 'Accountability', as referred to in section 8;*
> *(b) 'Processing limitation', as referred to in sections 9 to 12;*

[33] Definition of "personal information" in section 1 of POPIA.

[34] Definition of "processing" in section 1 of POPIA.

*(c) 'Purpose specification', as referred to in sections 13 and 14;*
*(d) 'Further processing limitation', as referred to in section 15;*
*(e) 'Information quality', as referred to in section 16;*
*(f) 'Openness', as referred to in sections 17 and 18;*
*(g) 'Security safeguards', as referred to in sections 19 to 22; and*
*(h) 'Data subject participation', as referred to in sections 23 to 25."*

57 Vumacam has published a POPIA Policy, which explains how Vumacam processes personal information.[35] That policy deals with each of the eight conditions for the lawful processing of personal information, and explains how Vumacam complies with them.

58 In this matter, Vumacam was not called on to defend itself against an allegation that it is engaged in the violation of the provisions of POPIA.

58.1 Neither the respondents nor the prospective amici have even alleged (still less shown) that Vumacam does not comply with POPIA.

58.2 Accordingly, we do not deal in detail with the myriad steps Vumacam has taken to ensure that it is POPIA-compliant. We simply set out a few illustrative examples below, to illustrate the types of steps Vumacam has taken to ensure POPIA-compliance.

59 Regarding the "purpose specification" condition: [36]

59.1 This condition requires that personal information must be collected for a "specific, explicitly defined and lawful purpose related to a function

[35] AA to prospective amicus application (caselines 049-47) para 57.1; Annexure AA1 p159, (caselines 009-68).

[36] Section 4(1)(c) of POPIA, read with sections 13 and 14.

or activity of the responsible party."[37] Steps must be taken to ensure that the data subject is aware of the purpose for which the information is collected.[38]

59.2 The primary purpose of Vumacam's CCTV surveillance is to detect, deter and prevent crime. The purposes of the network are asset out in Vumacam's POPIA Policy.[39] Members of the public are informed of this purpose by prominent signs placed on each Vumacam camera. On each camera, there is a notice informing the public of the purpose of the camera and how to access information on processing, storage and data use if required.[40]

59.3 This condition also requires that records of personal information not be retained any longer than necessary for achieving the purpose for which that information was collected or processed.[41] Vumacam's POPIA Policy provides for data to be stored 30 days, in order to achieve the purpose for which it was collected,[42] or longer if this is required for further investigation.[43]

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[37] Section 13(1) of POPIA.

[38] Section 13(2) of POPIA.

[39] AA to prospective amicus application (caselines 049-48) paras 57.3-57.4; Annexure AA1, p160 (caselines 009-69), clause 3.2.

[40] AA to prospective amicus application (caselines 049-48) para 57.4. See the photographs at annexure RA4 (caselines 010-126 – 010-129).

[41] Section 14(1) of POPIA.

[42] AA to prospective amicus application (caselines 049-47) para 57.5; Annexure AA1, pp161 and 163 (caselines 009-70 and 009-72), clauses 6.7 and 8.1.

[43] AA to prospective amicus application (caselines 049-47) para 57.5; Annexure AA1, pp162 and 163 (caselines 009-71 and 009-72), clauses 6.8 and 8.1.

60 Regarding the openness condition:[44]

60.1 This condition requires that a responsible party must publish a POPIA policy, and "take reasonably practicable steps" to ensure that the data subject is aware that their personal information is being collected.[45]

60.2 Vumacam cameras are installed in such a manner as to be clearly visible and identifiable to all members of the public.[46] Each pole with a live Vumacam camera has a clear notice informing the public of the purpose of the camera and how to access information on data use, processing and storage.[47]

60.3 Vumacam has also published its POPIA Policy.[48] This document explains how Vumacam processes personal information.

61 Regarding the security safeguards condition:[49]

61.1 This condition requires a responsible party to take certain steps to secure the integrity and confidentiality of personal information.[50] The overarching requirement is that "appropriate, reasonable technical and organisational measures" must be taken to prevent unlawful access to, or processing of, personal information.[51]

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44 Section 4(1)(f) of POPIA, read with sections 17 and 18.

45 Sections 17 and 18 of POPIA.

46 AA to prospective amicus application (caselines 049-45) para 54.3; Annexure AA1, p162 (caselines 009-71), clause 6.11.

47 See the photographs at annexure RA4 (caselines 010-126 – 010-129).

48 Annexure AA1, p159 (caselines 009-68).

49 Section 4(1)(g) of POPIA, read with sections 19-22.

50 Section 19 of POPIA.

51 Section 19(1)(b) of POPIA.

61.2 In compliance with this condition, all data is hosted on secure servers.[52] The processing of data collected by Vumacam cameras is first and foremost handled by a VMS called Milestone.[53] Milestone is one of the first VMS systems to be certified GDPR-compliant under the General Data Protection Regulation applicable under European Union law.[54]

62 Regarding the data subject participation condition:[55]

62.1 This condition requires that a data subject be given the right to request a responsible party to provide it with a record that the responsible party has about that person.[56] This is clearly provided for in Vumacam's POPIA Policy, which provides for individuals to request access to data.[57]

63 Regarding the processing limitation condition:[58]

63.1 In terms of section 11 of POPIA, personal information may only be processed if the data subject consents, or another ground of justification in section 11(1) of POPIA is present. For instance, in terms of section 11(1)(d), personal information may be processed if

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[52] AA to prospective amicus application (caselines 049-49) para 57.6; Annexure AA1, p163 (caselines 009-72), clause 8.3.

[53] AA to prospective amicus application (caselines 049-49) para 57.6.

[54] AA to prospective amicus application (caselines 049-49) para 57.6.

[55] Section 4(1)(h) of POPIA, read with sections 23-25.

[56] Section 23 of POPIA.

[57] AA to prospective amicus application (caselines 049-49) para 57.7; Annexure AA1, p165 (caselines 009-74), clause 10.

[58] Section 4(1)(b) of POPIA, read with sections 9-12.

this is “necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied”.

63.2 Vumacam processes personal information only to the extent that this is necessary for crime prevention, which it considers to be a “legitimate interest” of members of the public, within the meaning of the Act.

64 Therefore, we submit that, to the extent that it processes personal information, Vumacam complies with all of the conditions for lawful processing set out in POPIA.

65 Once that is the case, a submission that Vumacam impermissibly limits the right to privacy is plainly unsustainable.

The attempt to rely on the constitutional right to privacy

66 As we have explained above, it is not permissible for the respondents or prospective amici to go behind POPIA – the legislation specifically enacted to give effect to the right to privacy – and seek to rely directly on the constitutional right to privacy. As long as Vumacam is POPIA compliant (and there is no allegation or showing that it is not) there can be no limitation of the right to privacy.

67 However, for the sake of completeness, in this section we explain why, even if direct reliance on the right to privacy were permissible, no limitation of that right – let alone a violation – has been established.

68 The right to privacy is protected in section 14 of the Constitution, which provides:

> *"Everyone has the right to privacy, which includes the right not to have-*
> *(a) their person or home searched;*
> *(b) their property searched;*
> *(c) their possessions seized; or*
> *(d) the privacy of their communications infringed."*

69 In assessing whether a person's right to privacy has been infringed, the question is whether that person had a legitimate expectation of privacy in the circumstances. A person who claims that his or her right to privacy has been infringed must establish –

69.1 first, that he or she has a subjective expectation of privacy; and second

69.2 that society has recognised such a subjective expectation as objectively reasonable.[59]

[59] *Bernstein and others v Bester and Others NNO* 1996 (2) SA 751 (CC) ("*Bernstein*") at para 75. The "legitimate expectation of privacy" test was recently applied by the Constitutional Court in *Centre for Child Law and Others v Media 24 Ltd* 2020 (3) BCLR 245 (CC) ("*Centre for Child Law*") at para 48.

70 The scope of a person's privacy (that is, the content of the right) extends only to those aspects in regard to which a legitimate expectation of privacy can be harboured.[60]

71 According to the Constitutional Court, the right to privacy is best viewed as a continuum of protection.[61]

71.1 Protection is at its greatest for an intimate core of personal matters and spaces, where limitations of privacy can be justified only exceptionally.[62]

71.2 The more a person moves into the public sphere, the less reasonable their expectation of privacy.[63] In other words, "*the more a person inter-relates with the world, the more the right to privacy becomes attenuated*."[64] As Langa J pointed out *Hyundai* –

> *"[P]rivacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core".*[65]

71.3 This is because, as a person moves out of the personal sphere, the reasonableness of their expectation of privacy gradually erodes. In the intimate personal sphere – in one's home or relationships, for instance – the expectation of privacy is at its greatest. As one moves

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60 *Bernstein* at para 75.

61 *Bernstein* at para 67.

62 *Bernstein* at para 77.

63 *Bernstein* at para 67.

64 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd, In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) ("*Hyundai*") at para 15.

65 *Hyundai* at para 18.

out of this sphere, the reasonableness of an expectation of privacy reduces.

72 On the papers, no case has been made out that any individual who is recorded via Vumacam's CCTV cameras either had (a) a subjective expectation of privacy, or (b) that that expectation was reasonable in the circumstances.

73 In fact, the opposite is true. An individual whose image is recorded by Vumacam's CCTV cameras on public roads and in public areas does not have an expectation of privacy in relation to being seen. This is for the following reasons:

73.1 Vumacam's CCTV surveillance network employs fixed cameras, designed and deployed to record images of individuals, as well as vehicle and vehicle registration plates, on public roads and in public spaces.

73.2 This means that, any person whose image is captured by these cameras is in a public space, visible to any person in the street.

73.3 As we have explained above, as an individual moves beyond the intimate personal sphere, their expectation of privacy erodes.

73.4 We submit that, in respect of the sort of information Vumacam's CCTV cameras collect, there can be no reasonable expectation of privacy at all.

73.5 All Vumacam's cameras see is image data: for instance, whether a person is walking or driving down a public road at a particular time. This is information that is readily publicly available to anyone who happens to be in the street at the same time, or looking out their window. Vumacam's CCTV network does not intercept or record any communications, such as conversations.[66]

73.6 In *Hyundai*, the Constitutional Court held that the right to privacy will come into play "[*w]herever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable*." When a person walks down a public road, he has chosen to be in public. Having done so, he does not have the capacity to "decide" whether to disclose this. He has already disclosed his presence publicly.

73.7 There is self-evidently no violation of the right to privacy where one is seen by another person walking down a public street. This is precisely because an expectation of privacy would, in the circumstances, be unreasonable. A person walking in public cannot reasonably expect that the information that he or she was walking in public must be kept private. But this is fatal for the argument of the prospective amici, because there is no showing that there is any difference where it is a CCTV camera, rather than another member of the public, who "sees" a person walking in a public place.

[66] AA to prospective amicus application (caselines 049-46) para 54.6.

73.8 There is also no showing that anyone who is recorded by Vumacam's CCTV cameras in fact has a subjective expectation of privacy. Vumacam cameras are installed in such a manner as to be clearly visible and identifiable to all members of the public, with clear signposting.[67] They are not hidden or obscured, and are not placed in such a fashion as to be able to record activity in any area not considered to be "public".[68] Anyone who walks past one does so in the full knowledge that they are being recorded.

73.9 In addition, it is not the case that the footage seen by the cameras is extensively viewed. In fact, only a very limited portion is ever viewed.[69] The Vumacam system is based on alerts generated by sophisticated artificial intelligence ("**AI**"). This means that individuals are generally anonymous on the system. It is typically only after an alert is generated that someone examines that particular video feed to assess whether further action is required in respect of the alert. The system is thus designed to limit the viewing of extensive footage by using AI.

74 On the papers, no factual allegations are made to the effect that individuals recorded by Vumacam's CCTV cameras have an expectation of privacy, or why this is the case. The respondents' answering affidavit makes no factual allegations as to when and how the alleged privacy limitation occurs, or why

[67] AA to prospective amicus application (caselines 049-45 and 049-48) paras 54.3 and 57.4. See the photographs at annexure RA4 (caselines 010-126 – 010-129).

[68] AA to prospective amicus application (caselines 049-45) para 54.3.

[69] AA to prospective amicus application (caselines 049-46) para 54.5.

the respondents consider there to be a limitation. Nor does the application filed by the prospective amici.

74.1 The Constitutional Court has repeatedly held that constitutional attacks must be pleaded explicitly and with specificity to enable the state to know what case to meet and to adduce the evidence necessary to do so.[70] As the court held in *Phillips*, "*[a]ccuracy in pleadings in matters where parties place reliance on the Constitution in asserting their rights is of the utmost importance*."[71]

74.2 And, in *PSA* –

> *"Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet."*[72]

74.3 The respondents have failed to adduce any facts to support their assertion that Vumacam's activities infringe the right to privacy. We submit that there is therefore no basis on which this Court may conclude that such a limitation in fact arises.

75 Belatedly, in heads of argument, the prospective amici seek to make out a case in this regard. They argue that the limitation of the right occurs "*from the moment of collection about a person, and continues through all phases of the*

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[70] *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC) at para 22.

[71] *Phillips and others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) ("*Phillips*") at paras 39 to 43.

[72] *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and others* 2018 (2) SA 365 (CC) ("*PSA*") at para 50.

*process of that personal information*".[73] The argument seems to be that, because POPIA regulates these activities, this must mean that they constitute an infringement of the right.

75.1 This does not solve the lack of factual basis to found a conclusion that the right is indeed limited. It is simply another assertion that a limitation arises, without any factual underpinning.

75.2 In any event, this approach ignores the fact that POPIA has been enacted to give effect to the right to privacy. The very reason it imposes conditions for the lawful processing of personal information is to ensure that the right to privacy is <u>not</u> infringed. Where one complies – as Vumacam does – with those conditions for lawful processing, there can be no question that an infringement of the right to privacy occurs.

76 We submit that no proper case has been made out that the right to privacy is limited by Vumacam's CCTV cameras. The prospective amici's argument that the limitation of this right means that Vumacam requires an enabling legislative framework to provide CCTV services, is unsustainable.

<u>The attempt to rely on the international instruments</u>

77 The prospective amici also refer to various international instruments to support the assertion that CCTV surveillance limits rights. However, the

[73] Prospective amici HOA, para 19.

prospective amici have misconstrued the import of at least three of the documents on which they rely.

78 First, the prospective amici rely on UN General Assembly Resolutions, to the effect that unlawful or arbitrary surveillance are highly intrusive acts that interfere with human rights.[74] The prospective amici extrapolate from this that CCTV interferes with rights.

78.1 However, the prospective amici ignore the words "unlawful or arbitrary" surveillance. Vumacam's CCTV cameras are neither. These resolutions are therefore no authority for a conclusion that Vumacam's activities interfere with human rights.

79 Second, the prospective amici rely on a report by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression.

79.1 They refer to this report as authority for the submissions that –

79.1.1 CCTV gives rise to an interference with the right to privacy;[75]

79.1.2 the role of private surveillance companies has been "a persistent cause for concern";[76] and

[74] Prospective amici HOA, para 22.

[75] Prospective amici HOA, para 20.

[76] Prospective amici HOA, para 21.

79.1.3 the Special Rapporteur has recommended a moratorium on the development and use of "privately developed surveillance tools."[77]

79.2 However, the Special Rapporteur report referred to does not actually make these conclusions in respect of CCTV surveillance. Tellingly, it does not refer to CCTV or video surveillance at all. The report is actually concerned with technology that enables surreptitious access to various information – primarily private communications.

79.3 Under the heading "types of surveillance considered in the present report", the report lists "computer interference", "mobile device hacking", "social engineering", "network surveillance", "stringray" and "deep packet inspection".[78]

79.4 These are all highly invasive surveillance methods. They are far more invasive than simply CCTV video surveillance. It is therefore not surprising that the report reaches the conclusions it does, <u>in respect of the invasive types of surveillance it considers</u>.

79.5 However, these conclusions cannot conceivably be extrapolated to CCTV video surveillance, of the limited type Vumacam is engaged in. The report therefore cannot be considered as authority for any of the submissions the prospective amici make.

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[77] Prospective amici HOA, para 22.

[78] United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 'Report to the Human Rights Council: Surveillance and human rights', 28 May 2019, A/HRC/41/35, paras 7-14.

80 Third, the prospective amici refer to the concluding observations of the Human Rights Committee on the initial report of South Africa in 2016.

80.1 They refer to a paragraph where the Committee says that "*the state party*" should take necessary measures to ensure that any interference with the right to privacy complies with the principles of legality, necessity and proportionality.[79]

80.2 What the prospective amici fail to point out is that the section of the report in which the Committee makes this remark is headed "right to privacy and interception of private communications". The Committee is plainly referring to state interference with private communications. There is no basis on which to extrapolate from this statement some sort of duty on the state to regulate private CCTV providers.

81 Therefore, the international instruments relied on are in no way authority for the proposition that Vumacam, or indeed CCTV in general, infringes the right to privacy.

***No limitation of other constitutional rights***

82 The prospective amici also contend that Vumacam's CCTV cameras implicate other constitutional rights: freedom of movement,[80] freedom of

[79] Prospective amici HOA, para 35.

[80] Prospective amici HOA para 39.

association;[81] children's rights;[82] equality and dignity.[83] As a result, law of general application is required in order for the CCTV network to be lawful.

83 Regarding the right to freedom of movement:

83.1 Though the respondents plead that Vumacam's CCTV cameras infringe this right, they do so baldly, and without alleging any facts in support of this conclusion.

83.2 Therefore, on the facts, no case whatsoever has been made out that CCTV surveillance limits the right to freedom of movement. The prospective amici accordingly cannot rely on an assumed "intrusion" into this right to argue that Vumacam requires an enabling legislative framework to provide CCTV services.

84 Regarding the right to freedom of association:

84.1 The respondents do not plead a limitation of this right at all. Nor do the prospective amici. They say simply that the right is "implicated".[84]

84.2 It is impermissible for a party to rely on a constitutional complaint that was not pleaded.[85]

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[81] Prospective amici HOA para 38.

[82] Prospective amici HOA para 40.

[83] Prospective amici HOA para 41.

[84] Prospective amici HOA para 38.

[85] *Fischer* at para 13.

84.3 Therefore, on the facts, there is no basis on which to conclude that this right has been limited.

85 Regarding the rights of children and the rights to equality and dignity:

85.1 Neither the respondents nor the prospective amici pleaded violations of these rights at all. They appear for the first time in the prospective amici's heads of argument. Even there, the prospective amici do not allege that these rights are violated or even limited. They say merely that the rights are "implicated".[86] As reliance on these rights was never pleaded, the prospective amici cannot rely on them.

85.2 Therefore, on the facts, there is no basis on which to conclude that these rights have been limited.

86 Therefore, we submit that no proper case has been made out that any constitutional right is limited by Vumacam's CCTV cameras. The prospective amici's argument that an "intrusion" into these rights means that Vumacam requires an enabling legislative framework to provide CCTV services, is unsustainable.

**CONCLUSION**

87 For the reasons set out above, we submit that –

[86] Prospective amici HOA para 41.

87.1 The issues the prospective amici seek to raise do not arise in this matter. They will serve only to derail what should be a crisp legal debate on a limited issue.

87.2 It is not open to the prospective amici to place direct reliance on the constitutional right to privacy, where Parliament has enacted national legislation specifically to give effect to this right. In terms of the principle of subsidiarity, the prospective amici were required to bring their attack within the ambit of POPIA, or to challenge POPIA's constitutionality. They have done neither. In the circumstances, their argument that CCTV surveillance infringes the right to privacy is misplaced, and cannot be upheld.

87.3 This Court should ignore the prospective amici's invitation to pronounce on whether the respondents ought to have reviewed prior wayleave decisions. This issue simply does not arise on the papers, and its determination would require the court to stray beyond the papers.

87.4 Vumacam does not require an "enabling legal framework" in order to operate its CCTV network. It is not an organ of state that requires empowering legislation in order to act. Further, there is no showing on the papers that Vumacam's activities give rise to the limitation of constitutional rights.

87.5 Even Vumacam did require enabling legislation in order to conduct CCTV surveillance, this would not give the JRA the right to suspend wayleave applications. The JRA would remain obliged to grant

wayleaves, provided the requirements in the bylaws were met. The debate about whether Vumacam's activities are lawful is accordingly irrelevant.

88 For all of these reasons, and for the reasons set out in our main heads of argument, we submit that the relief sought by Vumacam in the main application ought to be granted.

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Chambers, Sandton
27 July 2020

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