

SOUTH AFRICA / JUDGMENT

Tiso Blackstar Group (Pty) Ltd and Others v Steinhoff International Holdings N.V (18706/2019) [2022] ZAWCHC 265; 2023 (1) SA 283 (WCC) (10 May 2022) [2022] ZAWCHC 265

COURT

Western Cape High Court, Cape Town

BEFORE

L.G. Nuku

CASE / FILE NUMBER

18706/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: 18706/2019

In

the matter between: TISO
BLACKSTAR GROUP (PTY) LTD
FIRST APPLICANT
ROB
ROSE
SECOND
APPLICANT
THE
AMABHUNGANE CENTRE FOR INVESTIGATIVE
JOURNALISM
THIRD APPLICANT
KARABO
MPHO LETTA RAJUILI
FOURTH APPLICANT
and
STEINHOFF
INTERNATIONAL HOLDINGS N.V
RESPONDENT
Date

of hearing: 31 January 2022
Date

of Judgment: Delivered electronically on 10 May 2022

JUDGMENT

NUKU, J

- [1] This is an application for access to a report held by the respondent, Steinhoff International Holdings N.V (“Steinhoff”) brought in terms of the provisions of the Promotion to Access to Information Act 2 of 2000 (“PAIA”).
- [2] The first applicant is Tiso Blackstar Group (Pty) Ltd (“Tiso Blackstar”) which has its registered business address at H[...] on E[...], 1[...] E[...] Road, Corner H[...] Street and E[...] Road, Parktown, Johannesburg. Tiso Blackstar is the owner of various media assets which include the Sunday Times, the Sowetan, the Herald, the Daily Dispatch, the Business Day and the Financial Mail. The second applicant is Robert Rose (“Rose”), an adult male employed by Tiso Blackstar as the editor of its publication, Financial Mail.
- [3] The third applicant The amaBhungane Centre for Investigative Journalism NPC (“amaBhungane”), a non-profit company duly incorporated in terms of the Companies Act 71 of 2008 with its registered address at C[...] H[...], 4[...] S[...] R[...] Road, S[...] R[...], Western Cape. The fourth respondent is Karabo Mpho Letta Rajuili (“Rajuili”), an adult female employed by amaBhungane as its advocacy co-ordinator. Tiso Blackstar, Rose, amaBhungane and Rajuili are collectively referred to as the applicants.

- [4] The respondent is Steinhoff, a public company incorporated in the Netherlands. Steinhoff has its primary listing on the Frankfurt Stock Exchange (“FSE”) and it has a secondary listing in South Africa on the Johannesburg Stock Exchange (“JSE”).

Its principal place of business is situated within the jurisdiction of this Court at B[...], V[...] O[...] Park, Corner A[...] T[...] and D[...] V[...] Roads, Stellenbosch. Steinhoff is a global retailer with over 12 000

stores in more than 30 countries. It also owns various retail assets which includes Ackermans, Pep, BuCo, Unitrans, Poundland, Pep & Co and Pepco.

- [5] During early December 2017, it became public knowledge that Steinhoff’s external auditors, Deloitte Accountants BV of the Netherlands (“Deloitte”) had refused to sign off on Steinhoff’s annual financial statements because of some alleged

accounting financial statements for the financial year end 30 September 2017 within the prescribed time limits of the JSE and FSE.

- [6] On 5 December 2017, Steinhoff’s Chief Executive Officer, Mr Markus Johannes Jooste (“Mr Jooste”) tendered his resignation. On 6 December 2017, Steinhoff released a SENS announcement on the JSE advising, among others, that it had accepted Mr Jooste’s resignation and the JSE advising, among others, that it had accepted Mr Jooste’s resignation and that it had appointed PricewaterhouseCoopers Advisory Services Proprietary Limited (“PwC”) to perform an independent investigation into the alleged accounting irregularities. Although not stated in the SENS announcement, the papers in this matter reveal that in fact what happened was that Werksmans Incorporated Attorneys (“Werksmans”) was instructed by Steinhoff was instructed by Steinhoff with instructions that Werksmans appoints PwC to perform the said independent investigations into the alleged accounting irregularities.
- [7] The above events precipitated a sharp decline in Steinhoff’s share price which was estimated at some point in time to have lost in the region of about 98% of its values resulting in investors losing approximately in excess of R200 billion of their investment.
- [8] The loss of value to Steinhoff’s share price resulted in some of Steinhoff’s investors and shareholders threatening legal action. The first of such demands came from the Dutch Investors’ Association (Vereniging van Effectenbezitters (“VEB”) dated 8 December 2017.
- [9] PwC concluded the investigation during February 2019 and handed the report (“the PWC report”) to Steinhoff and Werksmans, simultaneously, during March 2019. On 15 March 2019, Steinhoff published what it termed the “the overview of the Forensic Investigation” (“the overview”).

- [10] On 28 March 2019, Tiso Blackstar requested access to the PwC report, in terms of section 53 (1) of PAIA (“the first PAIA request”). Tiso Blackstar motivated its request on the grounds that it is a member of the media that investigates and exposes corporate scandals, and is thus responsible for providing the public with accurate information regarding issues that lie within the public interest.
- [11] On 26 April 2019, Steinhoff refused the first PAIA request on the grounds that the PwC report is legally privileged as contemplated in section 67 of PAIA.
- [12] On 2 September 2019, amaBhungane also requested access to the PwC report in terms of section 53 (1) of PAIA (“the second PAIA request”). The second PAIA request was also motivated on similar grounds as the first PAIA request.
- [13] On 30 September 2019, Steinhoff also refused the second PAIA request on the grounds that the PwC report is legally privileged as contemplated in section 67 of PAIA.

The letter refusing the first and second PAIA requests came from Werksmans who stated, among other, that the PwC report:

“...was commissioned by our offices on the instructions of our client on the basis, directly, of providing legal advice to our client in contemplation of litigation on behalf of our client against a number of individuals both juristic and natural as well as to defend threatened claims against our client...has been specifically and intentionally prepared for use in contemplated litigation

proceedings...”

- [14] The applicants now approach this court, in terms of section 78 of PAIA, for the following relief in terms of section 82 of PAIA:

14.1 an order that Steinhoff’s decisions refusing the first and second PAIA request be set aside, and

14.2 an order directing Steinhoff, within ten days of the order, to supply Tiso Blackstar and amaBhungane with a copy of the PwC report.

- [15] The applicants contend that the access to the PwC report cannot be refused on the ground of privilege because:

- (a) the PwC report was never subject to legal privilege, and
- (b) Steinhoff has waived any privilege, if any privilege applied.

- [16] The applicants also rely on the provisions of section 70

- (b) of PAIA, which provides that a request made in terms of PAIA must be granted if the public interest in the disclosure of the record outweighs the harm contemplated in the provisions in question.

[17] In the alternative, and in the event that the PwC report is subject to legal privilege which has not been waived and the public interest override does not apply, the applicants contend that the PwC report is severable and that those sections which are not

privileged should be disclosed to them. In the further alternative, the applicants request for a judicial peek of the PwC report by this Court in the exercise of its discretion.

[18] Steinhoff opposes the application on the grounds that;

- (a) the PwC report is privileged for the purposes of the exemption contemplated in section 67 of PAIA
- (b) it has not waived such privilege;
- (c) the public interest override contemplated in section 70 (b) of PAIA does not apply;
- (d) the PwC report is not severable; and
- (e) the applicants have not made out a case for a “judicial peek”

at the PwC report.

[19] In addition to the issues referred to above, Steinhoff applied, in terms of Rule 6 (15) of the Uniform Rules of Court, for the striking out of paragraphs 31 to 36 of the founding affidavit on the basis that the averments contained therein constitute inadmissible hearsay evidence as they had not been confirmed on oath by way of confirmatory affidavits. It is necessary to set out the statutory framework before considering these issues.

[20] The right of access to information can be traced back to section 32 of the Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”), which in subsection 32

- (1) (b) deals with the right to have access to information held by any person other than the State and provides that:

“Everyone has the right to have access to any information that is held by another person that is required for the exercise or protection of any right.”

In order to give effect to this right to have access to information, Section 32 (2) of the Constitution goes on to provide that:

“National legislation must be enacted to give effect to this right, and may provide for reasonable measure to alleviate the administrative and financial burden on the State.”

[21] PAIA is the national legislation that was enacted to give effect to the right to have access to information and Part 3 thereof deals with the right to have access to information held by private bodies. In relation to this information, PAIA uses the term “record”

which is defined in section 1 to mean any recorded information regardless of form or medium in the possession or under control of that public or private body and whether or not it was created by that public or private body. The further sections of PAIA that are relevant for the purposes this application are sections 50, 53, 59, 67, 70, 78, 81 and 82.

[22] Section 50 deals with the right of access to records of private bodies and subsection (1) provides:

“(1) A requester must be given access to any record of a private body if-

- (a) that record is required for the exercise or protection of any rights;
- (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and
- (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.”

[23] Section 53 prescribes the form of the request and subsection (2) (d) (2) provides:

“(2) The form for a request for access prescribed for the purposes of subsection

- (1) must at least require the requester concerned-

...

- (d) to identify the right the requester is seeking to exercise or protect and provide an explanation of why the requester record is required for the exercise or protection of that right.”

[24] Section 59 deals with severability of the record and subsection (1) (a) and (b) provides:

“(1) If a request for access is made to a record of a private body containing information which may or must be refused in terms of any

provision of Chapter 4 of this Part, every part of the record which-

- (a) does not contain; and
- (b) can reasonably be served from any part that contains,

any such information must, despite any other provision of this Act, be disclosed.”

[25] In refusing to provide the record to Tiso Blackstar and amaBhungane, Steinhoff relied on the provisions of section 67 which provide:

“The head of a private body must refuse a request for access to a record of the body if the record is privileged from production in legal proceedings unless the person entitled to the privilege has waived the privilege.”

[26] Section 70 deals with the public interest override and provides:

“Despite any other provisions of this Chapter, the head of a private body must grant a request for access to a record of the body contemplated in section 63 (1), 64 (1), 65, 66 (a) or (b), 67, 68 (1) or 69 (1) or

(2) if-

(a) the disclosure of the record would reveal evidence of-

(i) a substantial contravention of, or failure to comply with, the law, or

(ii) imminent and serious public safety or environmental risk, and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.”

[27] Section 78 deals with the right to approach a court by a person aggrieved by the decision to refuse access to the record and subsection

(2) (d) (1) provides that a requester aggrieved by a decision of the head of a private body to refuse a request for access may by way of an application, within 180 days, apply to Court for the appropriate relief in terms of section 82.

[28] Section 81 deals, among others, with the burden of proof. In proceedings contemplated in section 78, and subsection (3) (a) thereof provides that:

“The burden of establishing that the refusal of a request for access complies with the provisions of this Act rests on the party claiming that it so complies.”

[29] Lastly, section 82 deals with remedies that a court hearing an application brought in terms of section 78 may grant. It provides that a court may grant any order which is just and equitable, including orders confirming, amending or setting aside the decision which is the subject of the application concerned as well as orders as to costs.

[30] The parties are in agreement that the PwC report is the record as defined in section 1 of PAIA. It is also common cause that Steinhoff is a private body as defined in section 1 of PAIA. That being the case section 53 (2) (a) requires Tiso Blackstar and amaBhungane to identify the right they seek to exercise or protect and provide an explanation of why the requested record is required for the exercise or protection of such right.

[31] Both Tiso Blackstar and amaBhungane have identified the right they seek to exercise or protect in seeking the PwC report as the right to freedom of expression enshrined in section 16 of the Constitution which right includes the freedom of the press and other

media as well as the freedom to receive or impart information or ideas.

[32] Tiso Blackstar and amaBhungane support their argument that they are entitled to have access to the PwC report with reference to the judgment of the Constitutional Court in *Brummer*[1] where the Court explained that:

“Access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. As the present case illustrates, Mr Brummer, a journalist, requires information in order to report accurately on the story that he is writing. The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.”

[33] Steinhoff, on the other hand, submitted that the Constitutional Court in *Brummer* was concerned with a PAIA request made to a public body, the Department of Social Development and that it has been unable to find any reported judgments dealing directly with the right to freedom of expression in the context of private bodies.

[34] I did not, however, understand Steinhoff's argument to be that whereas the right to freedom of expression may be good enough to entitle a requester to a record held by a public body, it may not be good enough to entitle a requester to a record held by a private

body. In any event such argument would be missing the point because the requirement for a requester to identify a right sought to be exercised or protected applies only in respect of a record held by a private body and not to a record held by a public body. A requester does not have to identify a right sought to be exercised or protected in respect of a record held by a public body and It is only in respect of a record held by a private body that a requester is required to identify a right he or she seeks to exercise or protect.

[35] There is no doubt in my mind that the right to freedom of expression is among the rights which would entitle a requester to a record held by a private body because PAIA does not distinguish between the rights which would entitle a requester to have access to a record held by a private body.

[36] In any event, the applicants have referred this Court to the decision of the High Court of South Africa, South Gauteng Division, Johannesburg in *M&G Media Ltd*[2] where Morrison AJ came to the conclusion that the right to freedom of expression applies in respect of private bodies. Steinhoff did not make any submission that *M&G Media Ltd* was wrongly decided and I can certainly find no rational basis for holding that the right to freedom of expression would not entitle a requester to access to a record held by a private body. All that section 50 requires is that the record held by a private body must be required “for the exercise or protection of any rights”. In my view, the right to freedom of expression is one of these rights contemplated in section 50 of the PAIA.

[37] There is also another tangential issue that requires attention before dealing with the main issues as set out above. It is that in its answering papers, Steinhoff sought to argue that the applicants' freedom of expression is not limited by the refusal to provide the PwC report. This, Steinhoff submitted, is because Rose has already published a number of articles as

well as a book on the so called Steinhoff saga. Steinhoff further submitted that the fact that the other media houses as well have been able to publish articles on the so called Steinhoff saga is indicative that the refusal to provide the PwC report does not limit the applicants'

right to freedom of expression.

[38] The applicants, correctly in my view, point out that this argument is untenable because the information available in the public domain is incomplete. The applicants further submitted that the fact that there is information in the public domain cannot be a basis of refusal of access to information under PAIA.

[39] I have some difficulty in following Steinhoff's argument that its refusal to provide the PwC report does not limit the applicants' right to freedom of expression. As the Constitutional Court stated in *Brummer*, access to information is crucial to accurate reporting and thus to imparting accurate information to the public. Accurate reporting and imparting accurate information to the public are at the core of the right to freedom. The refusal to provide the PwC report limits the applicants' right to freedom of expression and the relevant enquiry is whether such limitation is justified in terms of section 67 of PAIA.

[40] In any event, when Steinhoff communicated its decision to refuse Tiso Blackstar and amaBhungane access to the PwC report, it made no mention of the fact that its refusal does not, or would not impede their asserted right to freedom of expression. This is understandable

because, under PAIA, that would not be one of the recognised exemptions to disclosure of a record held by a private body. It can

thus not avail Steinhoff to argue that its refusal to disclose the PwC report does not impede the applicants' right to freedom of expression. As the authors of *The South African Law of Evidence* state, this is one of those cases where the Court is called upon to consider the collision between privilege and the right that every person has of access to information held either by the public or private body[3]

[41] The parties are in agreement that the burden of establishing that the refusal of access to information is justified under PAIA rests on the party refusing the record and in this instance the burden rests on Steinhoff. In this regard Steinhoff is required to adduce sufficient evidence that the PwC report falls within the description of the statutory exemption relied on, in this instance the privilege as contemplated in section 67 of PAIA, and the proper approach is for the Court to ask whether, on the probabilities, the information withheld falls within the exemption[4].

[42] In proceedings under PAIA, a court decides the claim of exemption from disclosure afresh, engaging in a *de novo* reconsideration of the merits.[5]

[43] As already stated, Steinhoff claimed that litigation privilege as the basis of its refusal to provide Tiso Blackstar and amaBhungane with the PwC report. This was because, according to Steinhoff, the PwC report was prepared for the “express” purpose of obtaining legal advice and in respect of actual or contemplated litigation.

[44] Cachalia JA in *Competition Commission v Arcelormittal South Africa and Others*[6] discusses the requirements for litigation privilege and states:

“Litigation privilege has two established requirements: The first is that the document must have been obtained or brought into existence for the purpose of a litigant's submission to a legal advisor for legal advice; and second that litigation was pending or contemplated as likely at the time.”

This requires of Steinhoff to establish that the PwC report was obtained or brought into existence for the purpose of submitting it to Werksmans for legal advice in respect of litigation which was either pending or contemplated as likely at the time.

[45] Steinhoff does not claim that the PwC report was brought into existence for the purpose of submitting it to Werksmans for legal advice in respect of litigation which was pending at the time. Its case is that the PwC report was brought into existence for the

purpose of submitting it to Werksmans for legal advice in respect of litigation which was contemplated at the time. This is apparent from the affidavit deposed to by Mr Nicholas James Lewis (“Lewis”) wherein he states:

“The approach to PwC by Werksmans was for the purpose of a forensic investigation being conducted into the Steinhoff saga and for the purpose of Werksmans legally advising Steinhoff group of companies in regard to what was (reliably as matters have turned out) contemplated litigation.”[7]

[46] Lewis further sets out the circumstances under which Steinhoff sought the assistance Werksmans as follows:

“39. As a result, Werksmans was immediately retained, with the appointment of PwC as a priority. Werksmans was acutely aware of the potential for massive legal claims against the Steinhoff Group and advised SIHNV of this fact.

42. ...It was plain to the Steinhoff Group and Werksmans, even at the very stage after the allegations accounting irregularities has surfaced, that legal action against the Steinhoff Group in general, and SIHNV, in particular, would almost certainly eventuate.

43. The claims, and threats of claims, following the events of early December 2017, were of a legal nature and required legal advice. The claims that were made on SIHNV were directly related to the loss of value in Steinhoff’s share price as a result of the alleged accounting irregularities. SIHNV was therefore required to itself, in the face of various legal threats, to defend its position and ascertain, with as much legal accuracy as possible, the existence of the alleged accounting irregularities and the effects that such alleged account irregularities could have on SIHNV from a governance perspective, as well as on its share price.

44. For the same reasons and in the same context, SIHNV needed to ready itself to recover any damages which it might have suffered as a consequence of the alleged accounting irregularities.”

[47] In addition, Lewis deals with some of the events leading up to the appointment of PwC as well as some of the events subsequent to the said appointment. The events leading up to the appointment of PwC are essentially what is contained in the SENS announcement that published on 6 April 2017, as well as the fact that Steinhoff’s share price plummeted as a result. Some of the events subsequent to the appointment of PwC included meetings between the representatives of Steinhoff, PwC, Werksmans and Deloitte.

[48] It was submitted on behalf of Steinhoff that the purpose of a document in respect of which privilege is claimed is not to be ascertained by reference to its author, but rather by reference to the person or authority under whose direction, whether particular or general, it was produced or brought into existence, and that it is the intention of the person who procured the document, and not that of the author, that is relevant for determining the document’s purpose.[8] In this regard Lewis explains that:

“... while it is correct that the PwC report was required, inter alia, for purposes of dealing with issues that had arisen in regard to the audited financial statements of Steinhoff, this was not the primary or dominant purpose for which the report was commissioned. Rather, it was commissioned to assist Steinhoff in assessing its legal position, both in respect of threats received of legal action, as well as legal action to be taken by Steinhoff against those parties ultimately identified as bearing legal responsibility for the alleged accounting irregularities and any damages suffered by the Steinhoff Group as a consequence thereof.”

[49] Lewis goes on to say that attorneys Driman and Hertz of Werksmans were approached by Du Toit during early December 2017, on explicit basis that Werksmans was instructed to brief PwC in contemplation and in anticipation of the litigation that has since ensued, and he states that there was already litigation in play at the time that amaBhungane made its request, as appears from Werksmans’ response thereto.

[50] Were this not Steinhoff’s intention, says Lewis, then there would have been no purpose in interposing a law firm in briefing PwC. Lewis refers to the letter of engagement which was prepared by PwC and which is marked “privileged in contemplation of litigation” in support of his suggestion that even at that stage it was contemplated that the report produced by PwC would

attract privilege on the basis that it would be used to defend claims and to assert claims by Steinhoff against third parties.

[51] Lewis further makes the point that, at the outset, Werksmans was engaged by Steinhoff and was instrumental in the appointment of PwC and also that Werksmans is a signatory to the final letter of engagement; the appointment of PwC was on the basis that the work performed would be privileged and in direct contemplation of litigation; the PwC Report

was thus obtained and/or created for the purpose of a litigant's submission to a legal advisor; and, litigation was pending or contemplated, is likely or probable, at the time that the PwC report was commissioned, as is evident from the heading to the final letter of engagement.

- [52] It was submitted that the attempt by both Tiso Blackstar and amaBhungane to chip away at Steinhoff's claim to privilege, *ex post facto* (sic), is unsustainable as they were not party to PwC's engagement and so cannot reasonably dispute the version put up by Steinhoff, which is, in any event, supported by the objective facts.
- [53] It was further submitted that the fact that the dominant purpose of the PwC Report was not made public in earlier communications does not mean that legal advice or litigation privilege does not apply as Steinhoff has always been consistent in this regard and it has not made any statements in the media that the part PwC Report would not be used for the purposes of litigation the contemplated and which has now eventuated.
- [54] On the other hand, the applicants contend that Steinhoff has failed to put forward sufficient evidence to establish that its refusal complies with the provisions of PAIA for the following reasons: firstly, that Steinhoff's mere *ipse dixit* in its affidavit is not sufficient to show that the record falls within the exemption as its affidavit must provide sufficient information to bring the record within the exemption, and secondly, the only two documents that Steinhoff has provided do not support its assertion that litigation was contemplated as likely at the time of the commissioning of PwC.
- [55] The first document referred to by the applicants is the SENS announcement Steinhoff published on 6 December 2017, and the criticism in this regard is that Lewis suggested that the SENS announcement stated that the approach to PwC was done through Werksmans whereas the SENS announcement makes no mention of the approach to PwC having been done through Werksmans.
- [56] The second document referred to by the applicants is the letter of engagement prepared by PwC and headed "privileged in contemplation of litigation" and which was signed by Steinhoff, PwC and Werksmans. The criticism in this regard is that the mere fact that a law firm has been interposed between PwC and Steinhoff is not enough to establish privilege. Nor is the mere inclusion of a "privileged" header. This is because in order for the report to be privileged, the purpose for which it was commissioned must have been the preparation and defence of litigation – regardless of whether the formal engagement was done by Werksmans, or what the header on the letter of engagement says. The submission goes further that to focus on the header and the signatories to the engagement letter and concluded that the report is privileged, is to elevate form over substance.
- [57] The applicants further submitted that the reading of the engagement letter in its entirety makes it clear that the purpose for which the investigation was commissioned, was to investigate the financial irregularities with a view to finalising Steinhoff's audited financial statements.

[58] The applicants point out that beyond the SENS announcement and the engagement letter prepared by PwC, all that is left in support of Steinhoff's claim of litigation privilege is the say so of Steinhoff's deponent, Lewis, that the report was procured for

the express purpose of obtaining legal advice and in respect of actual and contemplated litigation. The applicants submitted that

Steinhoff has therefore not put up any evidence of substance on which to base the conclusion that its claim of litigation privilege is a real one and that its evidence is insufficient to discharge its burden.

[59] The applicants further point out that the evidence Steinhoff put forward is particularly insufficient in the light of the documents published at the time the report was commissioned as these documents demonstrate that the report was not prepared for the dominant purpose of obtaining legal advice from a lawyer regarding litigation that was pending or contemplated as likely. The applicants

also refer to the fact that at no stage prior to the responses to the PAIA requests does there appear to have been any public reference by Steinhoff to the report having been produced solely, mainly or even partially in view of contemplated litigation. Instead, Steinhoff has publicly referred to other purposes for which the report was commissioned: principally, to assist in the production of its

financial statements.

[60] It was further submitted on behalf of the applicants that the fact that Steinhoff would appoint PwC for the purpose of enabling it to finalize its financial statements makes perfect sense. This is because, at the time PwC was appointed to conduct its investigation,

Steinhoff was under considerable pressure to report its financial results and to comply with its reporting obligations in terms of the JSE listing requirements and the Companies Act 71 of 2008 ("the Companies Act"). It therefore makes perfect sense that the report would have been commissioned in order to enable Steinhoff to comply with these obligations and report its financial results.

[61] Finally, it was submitted on behalf of the applicants that the claim that the PwC report was commissioned with litigation as its

dominant purpose is far-fetched. It is even more far-fetched when one has regard to the copious documentary evidence that contradicts

Steinhoff's efforts to assert privilege.

[62] As already stated, it is common cause that there was no pending litigation at the time when Werksmans was instructed with a brief to appoint PwC to conduct an independent investigation into the alleged accounting irregularities and so the enquiry here is limited

to whether Steinhoff has put up sufficient evidence to establish that litigation was contemplated as likely at the time of the appointment of PwC.

- (a) Steinhoff's say so;
- (b) the SENS announcement; and
- (c) the engagement letter prepared by PwC.

[63] It is perhaps convenient to deal first with the engagement letter prepared by PwC. One of the submissions made on behalf of Steinhoff

was that it is not the intention of the author of the document that it is relevant for the purposes of determining whether the document is privileged, but that it is the intention of party under whose authority or direction that document was produced. As the engagement letter was prepared by PwC and it must have been the authors of the engagement letter who, by inserting the header "privileged in contemplation of litigation" Intended to claim litigation privilege, their Intention is not relevant for the purposes of determining whether the PWC report is subject to litigation privilege. This is because the engagement letter does not evidence Steinhoff's intention but PwC's. This then leaves the SENS announcement and Steinhoff's say so. I deal next with the SENS announcement.

[64] The SENS announcement published by Steinhoff on 6 December 2017 makes no mention of the appointment of PWC having been done through

Werksmans. That the SENS announcement makes mention of the appointment of PwC having been done through Werksmans was Lewis' addition which is not contained in the SENS announcement. This then leaves us with Steinhoff's say so that the PWC report was brought into existence at the time when litigation was contemplated as likely, to which I now turn.

[65] What Lewis has done in substantiating Steinhoff's claim to litigation privilege is to restate the requirements for privilege without providing the underlying facts on the basis of which this Court can assess the said claim. Whether litigation is contemplated at a particular point in time is a conclusion to be drawn from a certain state of facts and it is this state of facts that is required

to be placed before the Court.

[66] The litigation that Steinhoff claims to have been in contemplation at the time of the appointment of Steinhoff has been stated in the vaguest terms. There is no indication of the precise nature of the litigation which was in contemplation, the person or persons against whom such litigation was contemplated, and the facts on the basis of which formed the opinion of the prospect of litigation as likely.

[67] In *Schwikkard and Van der Merwe*[9] the authors discuss the matter of *General Accident, Fire and Life Assurance Corporation Ltd v Goldberg*[10] where an insured made a claim upon a policy of fire insurance and an assessor was appointed by the insurance company to

investigate and advise whether the claimant should be paid out. The company, in claiming privilege in respect of the assessor's report, alleged that it was required for the purpose of submitting it "if necessary" to the company's attorneys. The court refused to uphold the privilege on the basis that neither of the above-mentioned

requirements had been fulfilled.

[68] The authors proceed to quoted what Mason J stated with reference to the requirement that litigation must be contemplated, namely that:

"With reference to the first point, whether the report was made in contemplation of litigation, I do not think that the circumstances in this case, as alleged by the affidavit on behalf of the company, show that litigation was contemplated. It is not a question whether a man is very nervous or suspicious that there may be litigation, and that if he is so nervous and suspicious he is not protected. There must be really some contemplated litigation, some fact to indicate that litigation is likely or probable. It must not be a mere possibility which there is nothing to lead one to believe would be converted into reality according to the facts of the case."

[69] It may well be that Steinhoff became nervous on learning of the alleged accounting irregularities and decided to appoint Werksmans

for the purpose of advising them in respect of any fallout from the PwC report but this would not be sufficient to justify the claim that the PwC report is privileged. As Mason J stated, there must be some fact to indicate that litigation is likely. In this matter, apart from seeking to rely on litigation which has since ensued, there are no facts which have been placed before the court to support the assertion that litigation was in contemplation at the time of the appointment of PwC.

[70] Litigation privilege is primarily to protect communication exchanged in preparation for litigation. This is not controversial in

respect documents brought into existence in preparation of litigation which has already commenced. The law however appreciates the fact that preparation litigation does not commence only when litigation has commenced hence it extends the litigation privilege to documents brought into existence in preparation for litigation when such litigation is contemplated as likely. A party relying on the extension of the litigation privilege has to at least set out objective facts on the basis of which the court can assess whether it can be said that objectively, litigation was in contemplation. This, in my view, Steinhoff has failed to do and accordingly its decision refusing access to the PwC report fail to be set aside.

[71] In light of the above finding it is not necessary to consider the applicant's alternative claims that:

- (a) Steinhoff had waived privilege when it published the overview;
- (b) the PwC report should be disclosed in the public interest;
- (c) that the PwC report is severable; and

(d) the Court should consider a "judicial peek" of the PwC report.

It remains for the Court to consider Steinhoff's application to strike out.

[72] The application to strike out relates to paragraphs 31 to 36 of the founding affidavit on the basis that they constitute inadmissible

hearsay evidence. The applicants, in denying that the paragraphs complained of contain inadmissible hearsay evidence, sought to argue that what is contained in these paragraphs was drawn from publicly available information and/ or logical inferences drawn from the publicly available information published by credible sources with first-hand knowledge of the information.

[73] The applicants' justification is unsustainable and it, in fact, confirms that the paragraphs that are the subject of the strike out

application contain hearsay evidence. The fact that Rose, who deposed to the founding affidavit, obtained the information from publicly available information cannot and does not change the fact that what he has stated in these paragraphs is hearsay evidence and is accordingly inadmissible. As an aside, the issues contained in paragraphs were not germane to the application. The application to strike out paragraphs 31 to 36 of the founding affidavit has merit.

[74] On the issue of costs, the applicants have been successful in respect of the main application and, in my view, the cost should follow the results. I am also of the view that the employment of two counsel was warranted.

[75] Steinhoff has also been successful in respect of the application to strike out and I am of the view that the cost should likewise

follow the result including the costs occasioned by the employment of two counsel.

[76] In results the following order is made:

76.1 The decision of Steinhoff refusing Tiso Blackstar's PAIA request (dated 28 March 2019) and amaBhungane's PAIA request

(dated 2 September 2019) in terms of section 53 (1) of PAIA are set aside.

76.2 Steinhoff is directed to supply Tiso Blackstar and amaBhungane, each with a copy of the PwC report within ten days of this order.

76.3 Steinhoff is to pay costs suit, excluding the cost referred to in subparagraph 76.4 below, and such costs to include costs of two counsel, where employed.

76.4 The applicants are ordered to pay the costs in relation to Steinhoff's application for striking out and such costs to

include costs of two counsel, where employed.

JUDGE L.G. NUKU

APPEARANCES:

For the Applicants: Advocate S. Budlender, SC

Advocate I. Cloete

Instructed by: Webber Wentzel

(Ref: Mr. D. Milo)

For the Respondent: Advocate A. Smalberger, SC

Advocate R. Fitzgerald

Instructed by: Werksmans Attorneys

(Ref: Mr. R. Driman)

[1] Brummer v Minister of Social Development & Others 2009 (6) SA 323 (CC) at para 63

[2] M&G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd and Another 2011 (S) SA 163 (GSJ) at para 163

[3] Zeffert and Paizes, The South African Law of Evidence, 2nd ed, at p648

[4] President of the Republic of South Africa and Others v M & G Media Ltd 2012 (2) RSA 50 (CC) at para 23

[5] President of the Republic of South Africa and Others v M & G Media Ltd at para 14

[6] Competition Commission v Arcelormittal South Africa Ltd and Others 2013 (5) SA 538 (SCA) at para 21

[7] AA pa256 para 38

[8] Zeffert and Paizes, The South African Law of Evidence, 3rd ed at 742

[9] Schwikkard and Van Der Merwe, Principles of Evidence, 3rd ed at p149

[10] General Accident, Fire and Life Assurance Corporation Ltd v Goldberg 1912 TPD 494

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